

Dispossession: An American Property Law Tradition

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ABSTRACT

Universities and law schools have begun to purge the symbols of conquest and slavery from their crests and campuses, but they have yet to come to terms with their role in reproducing the material and ideological conditions of settler colonialism and racial capitalism. This Article considers the role the property law tradition has played in shaping and legitimizing regimes of racialized dispossession past and present. It intervenes in the traditional presentation of property law by arguing that dispossession describes an ongoing but disavowed function of property law. As a counter-narrative and critique of property, dispossession is a useful concept for challenging existing property arrangements, often rationalized within liberal and legal discourse.

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INTRODUCTION

[W]hat could have been the intellectual history of any discipline if it had not insisted upon, or been forced into, the waste of time and life that rationalizations for and representations of dominance required—lethal discourses of exclusion blocking access to cognition for both the excluder and the excluded.

—Toni Morrison¹

The protests in Ferguson, the resistance at Standing Rock, the election of a president swept into office on a tide of white grievance²—these events have precipitated a momentous shift in political consciousness. White Americans who, a decade earlier, celebrated the arrival of a post-racial era have been forced to confront the durability of structural racism. A global pandemic has revealed our basic incapacity to meet collective needs, exposing millions to death, hunger, and homelessness. After the killings of Ahmaud Arbery, George Floyd, and Breonna Taylor, lockdown gave way to mass uprising, as Americans called not only for an

1. Toni Morrison, Nobel Lecture (Dec. 7, 1993) (transcript available at <https://www.nobelprize.org/prizes/literature/1993/morrison/lecture/> [<https://perma.cc/492F-MBM8>]).

2. German Lopez, *The Past Year of Research Has Made It Very Clear: Trump Won Because of Racial Resentment*, VOX (Dec. 15, 2017, 2:40 PM), <https://www.vox.com/identities/2017/12/15/16781222/trump-racism-economic-anxiety-study>.

end to police violence but for a radical reimagining of the institutions and ideas that govern collective life.

As protests spill onto college campuses, students have demanded that their institutions acknowledge their own relation to racist pasts. Statues have been removed and building names have changed, but much remains the same. Academic conferences now open with formal ceremonies acknowledging the Indigenous peoples on whose stolen land we convene, but these gestures of “land acknowledgement” come at a moment when Indigenous peoples themselves demand “land back.”³ The celebrated beneficiaries of reparations groan, “not enough.”⁴ As colleges and law schools tout their diversity, debt-burdened graduates suspect predatory inclusion.⁵ Institutions of higher learning, in other words, have not only failed to come to terms with their historic entanglement with colonialism and slavery, they have yet to acknowledge their role in perpetuating the ideological and material conditions of racial capitalism.

As mounting crises give way to an unprecedented willingness to confront the legacies of colonialism and slavery, what role does legal education have to play in reimagining our collective institutions and social arrangements? What would it mean to decolonize—not diversify—legal education and thought? This Article seeks to engage those questions by considering the role that property law has played in perpetuating forms of racialized dispossession.

The United States was, of course, founded in conquest and slavery, both forms of racialized dispossession. Property law allowed settlers to turn the earth into real estate and to establish markets in people. The prospect of ownership turned free white people into the agents of colonial expansion and racial exclusion. Property law gave structure and legitimacy to these processes and was, in turn, transformed by them. Though this much may be obvious by now, it is hardly acknowledged within legal education. Instead, the traditional property law curriculum—with its narrow focus on formal doctrine and technical rules—tends to reify existing property arrangements, offering techniques for the management of routine controversies rather than stimulating normative question or critique.

3. See *LANDBACK Manifesto*, LANDBACK, <https://landback.org/manifesto/> [<https://perma.cc/BH3P-N8EW>] (last visited Mar. 4, 2022). See generally Robert Lee, Tristan Ahtone, Margaret Pearce, Kalen Goodluck, Geoff McGhee, Cody Leff, Katherine Lanpher & Taryn Salinas, *Land-Grab Universities: A High Country News Investigation*, HIGH COUNTRY NEWS, <https://www.landgrabu.org> [<https://perma.cc/A2BR-MR79>] (last visited Mar. 4, 2022).

4. See DaVita Robinson, Valerie White & Maxine Crump, *Our Ancestors Were Sold to Save Georgetown. '\$400,000 Is Not Going to Do It.'*, N.Y. TIMES (Feb. 6, 2020), <https://www.nytimes.com/2020/02/06/opinion/georgetown-reparations.html>.

5. See DEBT COLLECTIVE, <https://debtcollective.org> [<https://perma.cc/4TFR-JU9L>] (last visited Mar. 4, 2022); Louise Seamster & Raphaël Charron-Chénier, *Predatory Inclusion and Education Debt: Rethinking the Racial Wealth Gap*, 4 SOC. CURRENTS 199, 199 (2017). See generally RIAZ TEJANI, LAW MART: JUSTICE, ACCESS, AND FOR-PROFIT LAW SCHOOLS (2017).

The normative justifications for property themselves have not changed much in a century. Casebooks and treatises often devote a few opening pages to exploring the foundational justifications for property law—Locke’s labor theory of private property, Jeffersonian ideas associating property with freedom from tyranny, Bentham’s principle of wealth maximization, Hegel’s association of private property with personal development.⁶ These are generally rooted in the ideals of enlightenment liberalism, a political and philosophical tradition which, not coincidentally, was itself shaped by the experience and imperatives of settler colonialism and transatlantic slavery. In the property law canon, these ideas are often presented—as within political liberalism—as timeless revelations, obscuring their material relation to the histories of colonization and slavery that have shaped American law.

Perhaps more than other areas of study, property *does* evoke a sense of history, but it is a deceptively curated history, one that situates the origins of our tradition in the English pasture rather than the American plantation.⁷ Organic metaphors of bundled sticks tend to naturalize the most brutal innovations of the American property law traditions—innovations that would reduce sovereign nations to tenants and splinter persons into property. Casebooks illustrate the first-in-time principle with cases involving fox hunts and fishermen, lending property law an air of earthy common sense, while offering only the most cursory response to the question that nags at most students: weren’t Indians here first?⁸

Students instead learn to puzzle through the rule against perpetuities, as though this hazing ritual were the most difficult part of the legacy they inherit. Judging by the material included and not included in most casebooks, students are likely to spend more time on fugacious elements, oil and gas, than fugitive slaves—to say nothing of the freedom suggested by their flight.⁹ Much of what is covered on the bar exam concerns the intergenerational transfer of wealth, though Black and Brown families have relatively little to pass on.¹⁰ Homelessness is almost never mentioned, though half a million Americans are unhoused and a quarter of Americans face housing insecurity.¹¹ This is because property law, as students

6. See, e.g., JOHN G. SPRANKLING & RAYMOND R. COLETTA, *PROPERTY: A CONTEMPORARY APPROACH* 1–8 (3d ed. 2015).

7. See James Grimmelmann, *Raze and Rebuild the Property Course*, L. & POL. ECON. PROJECT (Nov. 2, 2018), <https://lpeproject.org/blog/raze-and-rebuild-the-property-course/> [<https://perma.cc/92VP-Y4X4>]; Michelle Wilde Anderson, *The Racial Wealth Gap and the Question of Time Zero*, L. & POL. ECON. PROJECT (Feb. 7, 2019), <https://lpeproject.org/blog/the-racial-wealth-gap-and-the-question-of-time-zero/> [<https://perma.cc/6TPS-YMP5>]; K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 *YALE L.J.* 1062, 1062–63 (2022).

8. See generally STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (2005) (describing how white settlers transformed the legal institutions in the United States to acquire Native American land).

9. See, e.g., ROBIN D. G. KELLEY, *FREEDOM DREAMS: THE BLACK RADICAL IMAGINATION* (2002); STEFANO HARNEY & FRED MOTEN, *THE UNDERCOMMONS: FUGITIVE PLANNING & BLACK STUDY* (2013); Saidiya Hartman, *The Plot of Her Undoing*, 2 *NOTES ON FEMINISMS* 1, 2 (2019).

10. See Michele Lerner, *One Home, a Lifetime of Impact*, *WASH. POST* (July 23, 2020), <https://www.washingtonpost.com/business/2020/07/23/black-homeownership-gap/>.

11. See *State of Homelessness: 2021 Edition*, NAT’L ALL. TO END HOMELESSNESS, <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-2021/> [<https://>

discover, remains firmly rooted in the interests of owners rather than the provision of shelter.

Why do we continue to tell these same stories? For whom are they written? And what other stories do we have to tell instead? This Article attempts to disrupt the story that property law tells about itself by offering *dispossession* as a counter-narrative and by providing a critical framework through which we might reevaluate the role that property has played in shaping American life. As a counter-narrative, dispossession underscores the constitutive role that colonialism and slavery have played in shaping contemporary forms of racial capitalism and liberal democracy. Racialized dispossession describes what has long been the normative object of American property law: to secure the conditions of self-sufficiency considered necessary for the exercise of freedom, equality, and self-government for a racially exclusive “citizen race” through processes of economic expansion that rely on the expropriation and exploitation of racialized others—Indigenous, Black, and immigrant.

As a framework of analysis, dispossession offers a corrective to the abstracting and ahistorical tendencies of political liberalism, which gain authority and defend their legitimacy by disavowing the conditions of their articulation, including but not limited to colonialism, slavery, racial capitalism, and patriarchy. Dispossession restores to the formalism of property law doctrine the complexities of history and context, the social and spatial dimensions of property, and the ways in which it produces and differentiates us as subjects. As a tool of critical analysis, dispossession foregrounds the relational character of private property. Where a traditional focus on rights and duties perhaps tends toward a static construction of the world governed by property, dispossession emphasizes the dynamic and dialectical relation between accumulation and deprivation, private ownership and social abandonment, white possession and racialized expropriation. Where private law generally suffers from a methodological individualism, taking for granted the possessive individual as the subject of property rights, dispossession emphasizes the historical, structural, and intergenerational character of property relations. We are not, with every generation, born anew.

Insofar as the account of dispossession developed here emphasizes the relational character of property, it is sympathetic to the work of progressive property scholars.¹² But where “The Statement of Progressive Property” cautiously avoids any mention of race, I maintain that it is impossible to understand what property law is, has been, or should be in the United States without an earnest engagement with histories of racialization, settler colonialism, and racial capitalism. And where progressive property scholars offer a redemptive vision of property,

perma.cc/3QVC-EWAD]; Jane Callen, *Weekly Census Bureau Survey Provides Timely Info on Households During COVID-19 Pandemic*, U.S. CENSUS BUREAU (May 20, 2020), <https://www.census.gov/library/stories/2020/05/new-household-pulse-survey-shows-concern-over-food-security-loss-of-income.html> [https://perma.cc/83DU-WS5N].

12. See generally Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009).

hopeful that it might be reoriented toward “human flourishing,” the critique of property advanced here is far more pessimistic.¹³ Particularly as we confront the ecological disaster hastened by colonial capitalism, we have no choice but to imagine radical alternatives.

This Article is not the first to revisit histories of colonialism and slavery in the context of American property law.¹⁴ I am indebted to the work of legal historians and critical race scholars working across disciplines.¹⁵ But my aim here is to offer a critical conceptualization and counter-narrative of property that speaks to the urgencies of our historic moment. It is to complicate our understanding of property law by critically reevaluating its past and perhaps reimagining its future. In recent years, the term “dispossession” has erupted into public and academic discourse to challenge economic relations generally rationalized within liberal discourse. In Part I, I offer a brief survey of this emergent discourse and argue that dispossession may be useful to legal analysis, among other reasons, because it confronts us with the material inequality reproduced by property but often obscured by liberal discourse and neoliberal rationality.

Part II offers a resituating of *Johnson v. M'Intosh* within the property law canon.¹⁶ The case, often read in the first days of law school, has come to perform the work of a land acknowledgement ceremony. We ceremonially acknowledge the wrong but then carry on with the routine business of property law. As such, Chief Justice Marshall's opinion in the case models a posture of judicious resignation, while rehearsing narratives and reasoning that have allowed white Americans to reconcile themselves to practices of racialized dispossession—from homesteading to redevelopment. *Johnson v. M'Intosh* also set in motion a history of federal land distribution that is often elided from the study of property, though that history demonstrates, among other things, how property law recruited prospective white owners to become the agents of Indigenous dispossession, colonial expansion, and racial exclusion and expulsion.

Part III traces the afterlife of slavery in contemporary property regimes. Within the property law canon, the legacy of slavery is often reduced to a commodification of human bodies, for instance, in controversies involving the property

13. See *id.* at 743.

14. For recent illustrations of legal scholarship engaging U.S. histories of Indigenous dispossession and settler colonialism, see the work of Amna Akbar, Bethany Berger, Maggie Blackhawk, Kristen Carpenter, Seth Davis, K-Sue Park, Jed Purdy, Aziz Rana, Angela Riley, Ezra Rosser, Natsu Taylor Saito, Joseph Singer, and Leti Volpp.

15. For recent illustrations of legal scholarship on race and property, see the work of Bernadette Atuahene, Steven Bender, Alfred Brophy, Eleanor Brown, Sheryll Cashin, Anthony Farley, Sheila Foster, Cheryl Harris, Sonia Katyal, Robin Lenhardt, Alberto Lopez, Audrey McFarlane, Thomas Mitchell, Kali Murray, K-Sue Park, Eduardo Peñalver, Aziz Rana, Madhavi Sunder, Patricia Williams, and Lua Yuille. For a few examples of legal historical scholarship on property engaged with histories of settler colonialism, slavery, and racial capitalism, see BANNER, *supra* note 8; K-Sue Park, *Money, Mortgages, and the Conquest of America*, 41 L. & SOC. INQUIRY 1006 (2016); Park, *supra* note 7; AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* (2010); and Daniel J. Sharfstein, *Atrocity, Entitlement, and Personhood in Property*, 98 VA. L. REV. 635 (2012).

16. 21 U.S. (8 Wheat.) 543 (1823).

interests in human embryos, organs, and tissue.¹⁷ But this construction both misunderstands the institution of slavery and obscures the ways in which its legacy continues to haunt nearly every aspect of life. Since the killing of Michael Brown, scholars and activists have drawn a line of continuity between slavery, racial policing, and mass incarceration.¹⁸

Here, I attempt to bring into focus a less appreciated line of continuity—in property. The law of slavery continues to shape the ways in which we are differently constituted as persons—as propertied citizens or expropriable subjects—and the ways in which landscapes of police encounters have been shaped by the imperatives of racial capital.

Whiteness is property, Cheryl Harris argued, because it confers racial status.¹⁹ In Part IV, I extend Harris’s insight to argue that property also creates racialized subjects. Whiteness is not only a form of value, but a form of license, agency, or personhood, cultivated by law to recruit and reward white participation in regimes of racial capitalism. In that sense, the claim that whiteness is dispossession shifts our focus from legal form to social formation, from racial status to racialized subjectivity. In this Part, I also revisit Margaret Jane Radin’s influential “personhood theory” of property to explore the historical relation between possessive personhood and racial embodiment, often ignored within legal discourse.²⁰

There is no doctrinal solution to the problems created by colonial capitalism. Instead, addressing the crises of capitalism will require of us the political will to abandon ideas and practices that we recognize to be morally indefensible and practically unsustainable. For this reason, this Article is primarily committed to a project of critique and historical recovery: understanding the ways in which property law is complicit in reproducing regimes of racialized dispossession is a necessary first step to imagining alternatives. But I conclude by suggesting that, rather than confine ourselves to the instruments of law, we might fashion alternatives to the present by studying practices that have flourished under, alongside, and against colonial capitalism, especially those growing out of Indigenous and Black liberation movements.

I. DISPOSSESSION: A USEFUL CONCEPT FOR LEGAL ANALYSIS

In the past decade, the language of dispossession has powerfully erupted into public discourse, giving name to historic and ongoing injuries that have long

17. See, e.g., JOSEPH WILLIAM SINGER, BETHANY R. BERGER, NESTOR M. DAVIDSON & EDUARDO MOISÉS PEÑALVER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 247–77 (7th ed. 2017); MARGARET JANE RADIN, *CONTESTED COMMODITIES* 50–52 (1996); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1926–27 (1987).

18. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 1–19 (2010); 13TH (Ava DuVernay & Kandoo Films 2016); Loïc Wacquant, *The New ‘Peculiar Institution’: On the Prison as Surrogate Ghetto*, 4 THEORETICAL CRIMINOLOGY 377, 383–85 (2000).

19. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1709 (1993).

20. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

been denied recognition and redress. Renewed calls for reparations, the return of stolen lands, canceling debt, and ending eviction signal the exhaustion of a liberalism that has extended to dispossessed communities only the most threadbare commitments to equality. The language of dispossession in this emergent discourse represents a shift from the symbolic to the material, from rights to repair. But dispossession, a critique of property, also has a longer tradition in political liberalism, used by philosophers and social critics seeking to challenge existing property arrangements sanctioned by law. This critical tradition arises within political liberalism but has been taken up more recently by scholars of postcolonial, Black radical, and critical Indigenous thought to underscore the racial and predatory character of modern capitalism, from its emergence in sixteenth-century Europe through its contemporary expression in neoliberalism. In this Part, I offer a quick survey of this tradition to consider how a term like dispossession might be useful to the critical analysis of property law.

A. THE USE OF LEGAL ANALYSIS

But first, what is a useful concept? What is the purpose of legal analysis? More than two decades ago, in his book, *What Should Legal Analysis Become?*, Roberto Unger expressed concern that legal analysis had largely abandoned what he described as its primary role in a democratic society: to enable us, as citizens, to participate in deliberation over the institutionalization of our shared ideals.²¹ Unger worried that legal analysis had been reduced to “rationalizing” the law, representing it as a closed and nearly perfect system, orderly and coherent, logical and apolitical.²² Legal education, Unger suggested, had become similarly reduced to preparing students for professional administration of the status quo, while devaluing critique and discrediting radical alternatives as “romantic illusions.”²³ This form of legal analysis, he suggested, preserves its authority by focusing narrowly on what the law is, while cultivating a professional indifference toward what the law *could* have been or what it *should* become.

Unger’s book was written in the 1990s, at the supposed end of history, when some declared that there “is not an alternative” to global capitalism.²⁴ Unger was writing as neoliberalism had begun to transform political discourse and public sensibility. In law school, law and economics had begun to dominate legal thought, undermining other, quaintly egalitarian, approaches to social questions. As we now confront the failures of neoliberalism and search for alternatives, Unger’s call to reinvigorate legal analysis sounds all the more urgent. How do we develop an understanding of contemporary legal institutions “in a manner that acknowledges its transformative possibilities”?²⁵

21. See ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 1 (1996).

22. *Id.* at 2; see generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

23. UNGER, *supra* note 21.

24. *Id.* at 22.

25. *Id.* at 1.

Returning to property law, then, the task is to tell a new story about property, one that refuses the mystifications of liberalism, exposes its contingencies and contradictions, but, as Unger suggested, one that remains useful in that it gives us the “power to make the future.”²⁶ A term like dispossession may be a useful concept for legal analysis in that it enables us to challenge the false pieties, suppressed conflicts, and constitutive exclusions that sustain the authority of a tradition or discipline.²⁷ It is also useful in the sense that it is responsive to the

26. *Id.*

27. See Joan W. Scott, *Gender: A Useful Category of Historical Analysis*, 91 AM. HIST. REV. 1053, 1054 (1986). This may be an appropriate place to interject a note on usage. Gender, Scott argued, is not a fixed category through which feminists should read history; instead, the task of the feminist historian is to explore how gender itself is constituted and reconstituted as a category of knowledge and regulation. There is a similar claim to be made about race, or racialized difference.

In this Article, I have adopted the practice, recently adopted by this Journal and many others, to capitalize Indigenous, Black, and Brown. Among the most compelling reasons to do so is to acknowledge the self-identification of powerfully politicized communities. But when talking about the past, as this Article does, I worry that that capitalization gives the impression that these racialized constructions are more fixed, unified, and stable over time than they actually are. “Black” in the writing of a contemporary activist means something quite different than in the writing of a colonial legislator. If I were to come across a capitalized “Black” in a nineteenth-century text, I would wonder whether the writer was engaging in a form of racial essentialism. Often, when we use terms like “Black” and “Indigenous,” what we are referring to are groupings and ascriptions *imposed* on a diverse group of people, often by a society intent on controlling, among other things, others’ capacity for self-authorship.

Race is often experienced as misrecognition. Black, capitalized or lowercase, is an extraordinarily complicated term, meaning radically different things to different people at different times, the subject of powerful literary exploration and critical writing. It is not obvious to me that, to a casual white reader, “Black” confers dignity to the groups designated, or whether it tends to naturalize a certain way of thinking about difference (rendering Indigenous, Black, Asian, Irish, or Italian vaguely equivalent). Nor is it clear to me that “Indigenous” confers respect when the term is used to elide the identity of nations and tribes that have their own names for themselves. In other writing, drawing on the writing of others, I have embraced “indigeneity”—to identify indigenous persistence with resistance to settler liberalism—over the more ethnographic sounding “Indigenous.” “Brown,” a relatively new construction, holds the promise of coalition building but also risks incoherence and instability. I say all of this as a brown person (though others might not recognize me as such) who bristles at “South Asian” (not a term my parents would ever use to describe themselves) and “Asian Americans” (which is more reflective of U.S. geopolitical anxieties than commonality among the designated), and has always longed to identify instead with something like the British “Black” (which draws into collectivity those identified with former colonies, migrancy, racialization.).

At present at least, the convention is not to capitalize white. For some, the argument is that capitalizing Black is a way of affirming Blackness in the face of white racism, and for that reason, white should remain lowercase. See Anne Price, *Spell It with a Capital “B,”* INSIGHT CTR. FOR CMTY. & ECON. DEV. (Oct. 1, 2019), <https://insightcced.medium.com/spell-it-with-a-capital-b-9eab112d759a> [<https://perma.cc/5894-R566>]. But the asymmetric treatment of Black and white, to this reader at least, risks preserving the supposed transparency of whiteness. Others are particularized and grouped; white people are unmarked individuals. To disrupt this racial ontology, Nell Irvin Painter suggests that White should be capitalized, too, precisely to unmask and to “challenge[] that freedom.” Nell Irvin Painter, Opinion, *Why ‘White’ Should Be Capitalized, Too*, WASH. POST (July 22, 2020), <https://www.washingtonpost.com/opinions/2020/07/22/why-white-should-be-capitalized/>. I tend to agree with her—and with Anthony Appiah, who suggests that capitalizing both Black and White restores to both terms the dialectical co-production of each. See Kwame Anthony Appiah, *The Case for Capitalizing the B in Black*, ATLANTIC (June 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackand-white/613159/>.

Ultimately, my aim in this Article is to explore the way in which racialized categories are continually being constructed and reconstructed in particular historical moments, often in the service

overlapping crises that define our moment—as well as the possibility suggested by those crises.²⁸ Legal analysis, Unger asserted, should place itself “in the service of democratic experimentalism.”²⁹

As a concept, dispossession throws into question the normative foundations and usual justification for the appropriation and accumulation of property. Grounded in historical materialism, dispossession offers a critical corrective to the abstracting and ahistorical conventions through which political liberalism and legal discourse preserve their authority. It confronts liberalism with its historical record and complicates the tidy formalism of law with the social complexities that condition its operation.

I use the term dispossession both to designate an object of study and to rehearse a mode of inquiry. As an object of study, dispossession refers to property’s record in the United States, the pattern of involuntary transfer—usurpation, expropriation, deprivation, and devaluation—that has propelled American expansion since the time of conquest to the “insatiable predatory relation” that continues to structure racial capitalism.³⁰ Dispossession describes the disavowed purpose and effects of property law. As a mode of inquiry, a practice of reading property law “against the grain,” dispossession roughens the surface of property’s form, unsettling long settled questions, reopening concepts and histories to make visible the social forces that have shaped current crises, and produces fresh injury.

Dispossession, as counter-narrative and critique, is less concerned with property rules than with property as a “social formation.” Louis Althusser and Étienne Balibar use the phrase “social formation” to summon the economic, political, and ideological “practices” that constitute a dynamic and “complex whole” at any given time and place.³¹ Their emphasis on “practices” directs our attention to the dialectic between social structures and individual agency, the repertoire of habits, behaviors, and exchanges through which individuals articulate their relation to their surroundings. To understand property as a social formation, we might extend this configuration to embrace the historical consciousness, legal

of settler imperialism and capitalist expansion. I worry that capitalization of Indigenous, Black, and Brown may render us less alert to the contingencies of those categories. I worry that symbolic change often forestalls other forms of material redress, that it’s easier to capitalize racial designations than to redress racial capitalism. Though I remain ambivalent about capitalization, I am careful to use the language of “racialization” (which captures contingency) instead of “race” (which tends to imply fixity and stability). I also feel very strongly about describing people as “enslaved” rather than as “slaves,” and generally find it productive to think about “criminalization” rather than “crime.” Like others who have recently embraced changing usage conventions, I maintain a certain faith that through language, its creative usage, and lively interpretation, we can transform our shared experience of the world. And it is to preserve this powerful potential in language that I think it is important to explain why we use the words we use as we do.

28. See *Introduction* to *POLITICAL CONCEPTS: A CRITICAL LEXICON* 1, 1–4 (J. M. Bernstein et al. eds., 2018).

29. UNGER, *supra* note 21, at 23.

30. Jodi A. Byrd, Alyosha Goldstein, Jodi Melamed & Chandan Reddy, *Predatory Value: Economies of Dispossession and Disturbed Relationalities*, 36 *SOC. TEXT* 1, 2 (2018).

31. LOUIS ALTHUSSER, ÉTIENNE BALIBAR, ROGER ESTABLET, PIERRE MACHEREY & JACQUES RANCIÈRE, *READING CAPITAL* 313 (Ben Brewster & David Fernbach trans., complete ed. 2015).

rationalities, cultural logics, and spatial sensibilities that allow individuals to reconcile themselves to the contradictions and disappointments of racial capitalism. What are the epistemic frames, intellectual conventions, and affective dispositions that have allowed, for instance, generations of law professors and students to largely ignore the legacies of slavery and colonization and the racial dimensions of ownership?

Law and legal discourse, of course, play an active role in these processes. Property law is implicated not only as a set of rules but as an economic rationality imbricated in racial logic. Black land loss, for instance, has been facilitated not only by legal doctrine—rules governing title registration, adverse possession, mortgage foreclosure—but also by a governing rationality that allows claims of “improvement” to justify the usurpation of current possessors.³² At work in this example are also racial logics that explicitly or implicitly assign value or a sense of propriety to certain owners, uses, places, and relations—but not others.

Regimes of racialized dispossession are also maintained by practices of historical erasure. The property law canon is full of forgetting. In the past decade, for instance, the plantation has emerged as a focus of interdisciplinary study. While these scholars examine the way plantation economies and logics continue to govern the lives of Black, Indigenous, and colonized peoples, the plantation is never named in property law casebooks.³³ Legal discourse and education remain deeply invested in an uplifting narrative of national progress and racial redemption.³⁴ Within the property law context, this narrative is often punctuated by monumental cases and legislation of the Civil Rights Era—*Shelley v. Kraemer* and the Fair Housing Act, in particular.³⁵ But the implicit narrative of racial progress leaves unexamined, and often obscures, the constancies of colonial capitalism.

B. DISPOSSESSION AND THE NEW SOCIAL MOVEMENTS

A usage tracker suggests that the word “dispossession” has been circulating with increasing frequency over the last forty years, a period marked by the end of the Civil Rights Era and ascendance of neoliberalism.³⁶ Neoliberalism is, of course, a highly contested term, but I use it here to refer primarily to a set of political, economic, and ideological practices that promote market interests over and against countervailing interests like social equality, sustainability, and mutual

32. See *infra* Part II.

33. See, e.g., Tiffany Lethabo King, *The Labor of (Re)reading Plantation Landscapes Fungible(ly)*, 48 *ANTIPODE* 1022, 1023 (2016); Katherine McKittrick, *Plantation Futures*, 17 *SMALL AXE* 1, 2–3 (2013); see also Ann Laura Stoler & Carole McGranahan, *Introduction to IMPERIAL FORMATIONS* 1, 23 (Ann Laura Stoler et al. eds., 2007).

34. See generally JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011). See also Ariela Gross, *The Constitution of History and Memory, in LAW AND THE HUMANITIES: AN INTRODUCTION* 416–52 (Austin Sarat et al. eds., 2010); Seth Davis, *American Colonialism and Constitutional Redemption*, 105 *CALIF. L. REV.* 1751, 1751 (2017).

35. 334 U.S. 1 (1948); 24 U.S.C. §§ 3601–19.

36. Search String Frequency Tracker for “Dispossession,” GOOGLE BOOKS NGRAM VIEWER, <https://books.google.com/ngrams> [<https://perma.cc/7M4U-2UVF>] (search “dispossession”).

concern.³⁷ As a governing rationality, it has steadily eroded the gains of the Civil Rights Era by dismantling the welfare state, trade liberalization, union busting, and financial deregulation.

In *The New Imperialism*, published in 2005, David Harvey argued that the new imperialism of the late twentieth century resembles the old imperialism of the sixteenth century in that the primary means of wealth accumulation is not production but “dispossession.”³⁸ By the 1970s, advanced capitalist societies, no longer able to sustain the expansion of the postwar years, had come to rely on new forms of enclosure and expropriation to accumulate value. These new practices included the privatization of natural resources, the expansion of extractive industries, and the innovation of novel financial instruments to facilitate transfers of value and wealth, such as subprime lending and foreclosure.³⁹ These newer forms of “accumulation by dispossession” were not simply the working of free markets, as we are often told, but the result of state power.⁴⁰ Dispossession relies on governments to make Indigenous lands across the world available for resource extraction—and on legal systems to stabilize credit markets and enforce judgments.

The diffusion of the term dispossession within activist and academic communities has coincided with the financial crisis of 2008. The crisis left millions of Americans without jobs and homes but was particularly devastating to Black and Brown communities rendered especially vulnerable by decades of discrimination, divestment, and predation.⁴¹ As the federal government rushed to rescue the banks whose reckless greed had precipitated the crisis, many Americans began to recognize the foreclosure crisis—and the corresponding upward contraction of wealth—as part of a continuous history of racialized dispossession and predatory capitalism. The crisis reawakened a class consciousness among broad swaths of Americans—“the 99 percent”—but it also exposed a relative indifference toward the chronic vulnerability of Black, Indigenous, and immigrant communities.⁴² Many were critical of the Occupy Movement, for instance, for its failure to develop a *racial* analysis of economic inequality.⁴³ To critics, it seemed as though

37. See, e.g., WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION 17, 20–45 (2015); David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 1 (2014); Michael Omi & Howard Winant, *How Colorblindness Co-Evolved with Free-Market Thinking*, POL. RSCH. ASSOCS. (Oct. 8, 2014), <https://politicalresearch.org/2014/10/08/how-colorblindness-co-evolved-free-market-thinking> [<https://perma.cc/D5S6-L2BH>].

38. DAVID HARVEY, *THE NEW IMPERIALISM* 144 (2003).

39. See *id.* at 145; Sandro Mezzadra & Brett Neilson, *On the Multiple Frontiers of Extraction: Excavating Contemporary Capitalism*, 31 CULTURAL STUD. 185, 188 (2017); SASKIA SASSEN, *EXPULSIONS: BRUTALITY AND COMPLEXITY IN THE GLOBAL ECONOMY* 12–15 (2014). See generally MACARENA GÓMEZ-BARRIS, *THE EXTRACTIVE ZONE: SOCIAL ECOLOGIES AND DECOLONIAL PERSPECTIVES* (2017).

40. HARVEY, *supra* note 38, at 144–45.

41. See generally Special Issue, *Race, Empire, and the Crisis of the Subprime*, 64 AM. Q. 361 (2012).

42. See generally *Economies of Dispossession: Indigeneity, Race, Capitalism*, SOC. TEXT, June 2018, at 1.

43. See Davey D., *To Occupy or Decolonize? That is the Question . . . Is There an Easy Answer?*, UNSETTLING AM. (Dec. 8, 2011), <https://unsettlingamerica.wordpress.com/2011/12/08/to-occupy-or-decolonize-that-is-the-question-is-there-an-easy-answer/> [<https://perma.cc/X7AT-HTSH>]; Adam J.

capitalism had been working well enough for white Americans when it burdened only Black and Brown communities.

A few years later, Ta-Nehisi Coates wielded the language of “theft” and “plunder” to effectively make his “Case for Reparations.”⁴⁴ Coates’s intervention into the perennial debate over reparations succeeded in shifting the focus of the debate from the original sin of slavery to the continuous history of racial dispossession. Remarkably, his case for reparations is argued primarily in the domain of property law, focusing on the succession of property crimes committed against Black Americans—from outright theft to redlining to contract leasing—*after* the abolition of slavery, compounding the original debt.

Then came protests in Ferguson and Standing Rock. The young protestors leading these demonstrations, unlike a previous generation of activists, seemed less motivated by the promise of equality and inclusion than by their own exhaustion with predatory accumulation. The protests in Ferguson were ignited by the murder of Michael Brown, but they were fueled by decades of resentment, simmering among Black residents of St. Louis County who were tired of over-policing—and paying absurd fees and fines to prop up underfunded municipalities.⁴⁵ These protests galvanized Black Lives Matter and brought into focus the relation between violent policing and other forms of economic predation.⁴⁶

Encouraged by the protests in Ferguson, Indigenous activists staged a months-long resistance to the imposition of a pipeline on the ancestral lands of the Standing Rock Sioux. Many young activists began to recognize that, though Black and Indigenous movements have distinct histories and motivations, “our struggles are connected.”⁴⁷ Activists in Standing Rock also identified their

Barker, *Already Occupied: Indigenous Peoples, Settler Colonialism and the Occupy Movements in North America*, 11 SOC. MOVEMENT STUD. 327, 327 (2012); Joanne Barker, *Territory as Analytic: The Dispossession of Lenapehoking and the Subprime Crisis*, 36 SOC. TEXT 19, 20 (2018); Stacey Patton, Opinion, *Why Blacks Aren't Embracing Occupy Wall Street*, WASH. POST (Nov. 25, 2011), https://www.washingtonpost.com/opinions/why-blacks-arent-embracing-occupy-wall-street/2011/11/16/gIQAwc3FwN_story.html.

44. Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC, June 2014, <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

45. See DOJ, C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/8UUE-TWS8>]; Note, *Policing and Profit*, 128 HARV. L. REV. 1723, 1723 (2015); Radley Balko, Opinion, *How Municipalities in St. Louis County, Mo., Profit from Poverty*, WASH. POST (Sept. 3, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/09/03/how-st-louis-county-missouri-profits-from-poverty/>.

46. See Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018). Critics such as Robin D.G. Kelley, Walter Johnson, and Richard Rothstein played an important role in publicly framing the events in Ferguson in terms of racial capitalism, structural racism, and racial segregation. See *infra* Section III.C.

47. Ashoka Jegroo, *Why Black Lives Matter is Fighting Alongside Dakota Access Pipeline Protesters*, SPLINTER (Sept. 13, 2016, 8:00 AM), <https://splinternews.com/why-black-lives-matter-is-fighting-alongside-dakota-acc-1793861838> [<https://perma.cc/5V28-XQ34>]; see Kim TallBear, *Badass (Indigenous) Women Caretake Relations: #NoDAPL, #IdleNoMore, #BlackLivesMatter*, SOC'Y FOR CULTURAL ANTHROPOLOGY (Dec. 22, 2016), <https://culanth.org/fieldsights/badass-indigenous-women-caretake-relations-no-dapl-idle-no-more-black-lives-matter> [<https://perma.cc/49X9-GVFB>].

opposition to oil extraction as part of a centuries-long struggle against colonial capitalism in the Americas, drawing connections between their own resistance, that of their ancestors, and that of Indigenous peoples in other parts of the colonized world. Extractive capitalism, which has only intensified since the financial collapse, disproportionately affects Indigenous peoples, who until now have protected what remains of the world's natural wealth and biodiversity.⁴⁸ Black and Indigenous activists have also embraced the solidarity of environmentalists and socialists, whose causes they recognize to be interwoven with their own.

This mobilization, which has only gained momentum, marks an important shift in political consciousness, signaling the exhaustion of a liberalism that has been more focused on rights and recognition than redress and redistribution, a loss of faith in free markets and a neoliberal rationality that has reigned unrivaled for more than four decades, and an unprecedented willingness to imagine radical alternatives to the present, including an unprecedented willingness to question capitalism itself. These movements have also been shaped by a deep historical consciousness, which, in turn, has focused collective attention on the deep structures that continue to reproduce violence and vulnerability. Resisting the minoritizing effects of identity politics and rights discourse, the swell of social movements of the past decade—led by Black, Indigenous, immigrant, queer youth—have been strengthened and energized by the recognition of a shared struggle and a common grievance, rooted in the political economy of colonialism and slavery.

C. ON THE ORIGINS OF DISPOSSESSION

As a concept, dispossession is hardly foreign to legal discourse. Within the property law tradition, it appears as “takings.” The Fifth Amendment Takings Clause delimits the state's power to take, seize, or confiscate private property from its subjects.⁴⁹ The construction of the Takings Clause, which delimits rather than enumerates a federal power, betrays something of the contradictory character of property. The Takings Clause limits the government's power to interfere with private property, though private property is a function of government recognition. Juridical questions about takings raise more fundamental questions about the political relationship between private property and the state. Which comes first? Is private property a natural or pre-political right, or is it a matter of state dispensation?

Locke's answers to these questions have proven to be most influential within American political and legal thought. In his *Two Treatises of Government*,

48. See GOMEZ-BARRIS, *supra* note 39; SASSEN, *supra* note 39. Indigenous people comprise less than five percent of the world's population but protect eighty percent of the world's biodiversity. Jim Robbins, *Native Knowledge: What Ecologists Are Learning from Indigenous People*, YALE ENV'T 360 (Apr. 26, 2018), <https://e360.yale.edu/features/native-knowledge-what-ecologists-are-learning-from-indigenous-people> [<https://perma.cc/BQ33-9STL>].

49. See U.S. CONST. amend. V.

published in 1690, Locke argued that property, unequivocally, comes first.⁵⁰ The right to property is a natural right, one that inheres in the right to one's own body and the results of one's labor. "[E]very Man has a *Property* in his own *Person*," Locke argued.⁵¹ When a person mixes their labor with something, removing it from "the common state [that] Nature . . . [left] it in," they acquire a property interest in that thing.⁵² This act of appropriation is unilateral. It does not require the consent of others, nor does it derive its legitimacy from the government. Instead, Locke argues, individuals form a government primarily to protect their property. The purpose of government is accordingly limited: "the preservation of Property being the end of Government," the government cannot take an individual's property without his consent.⁵³

Locke's theory of a natural right to private property remains powerful within the American imaginary because it provides moral justification for the accumulation of wealth. Accumulation is justified, in Locke's account, because it is earned. It is the natural result of labor, effort, or merit. The great achievement of Locke's theory of property is that, as it unfolds, what begins as an unassailable right to one's labor (and sustenance) is ultimately transformed into a right of practically limitless accumulation.⁵⁴ As later critics would argue, although labor and effort lent moral legitimacy to ownership, by the time Locke was writing, his theory would become instrumental to justifying forms of ownership and accumulation that had become entirely severed from the owner's labor and effort.

But Locke's writing on property has also spawned generations of critics. Writing in the mid-eighteenth century, Jean Jacques Rousseau offered a different view on the origins of property. Rousseau argued that there was nothing natural about property. Instead, he characterized the invention of property as a massive fraud perpetrated by feudal aristocracy to "disguise their usurpations" of a common form of subsistence.⁵⁵ Thomas Paine issued a similar challenge to feudal property arrangements. He argued that there was no such thing as property in the natural world. "[P]roperty commenced with cultivation," precisely to allow owners of land to appropriate the value of cultivation created by those who worked on the land.⁵⁶ Property had allowed the aristocracy to "dispossess[] more than half the inhabitants of every nation of their natural inheritance," consigning them to "a species of poverty and wretchedness that did not exist before."⁵⁷ Nineteenth-

50. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1690).

51. *Id.* § 27, at 305.

52. *Id.* § 27, at 306.

53. *Id.* § 138, at 378.

54. Though Locke himself recognized that accumulation was limited by waste and others' want, he begins to loosen those constraints in his own account of the development of money. And part of the claim here is that Locke's labor theory circulates in American political culture to justify wealth accumulation relatively unconstrained by concerns about waste and want. See C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE 194–222* (1962).

55. JEAN-JACQUES ROUSSEAU, *Second Part*, in *A DISSERTATION ON THE ORIGIN AND FOUNDATION OF THE INEQUALITY OF MANKIND AND IS IT AUTHORISED BY NATURAL LAW?* (G. D. H. Cole trans., 1754).

56. THOMAS PAINE, *AGRARIAN JUSTICE* 13 (3d ed. 1797).

57. *Id.* at 15 (updating original script).

century critics of industrial capitalism reprised these origin stories to condemn industrial labor relations. Karl Marx traced modern industrial relations to the enclosure of the commons. Enclosure enabled land owners to accumulate a surplus of capital, while consigning the dispossessed to conditions of dependency and wage labor.⁵⁸

For these critics, the language of appropriation, usurpation, and dispossession inverts Locke's moral theory of earned ownership. "Property is theft," Pierre-Joseph Proudhon asserted, because it allowed the owners of land and capital to appropriate wealth that was generated collectively and therefore belonged to everyone in common.⁵⁹ In stark contrast to Locke's scene of unilateral appropriation, Proudhon argued that value is never generated by an individual in isolation. "All human labor being the result of collective force," Proudhon argued, "all property becomes, in consequence, collective and unitary."⁶⁰ Instead, an individual's capacity for production "lies in association, and in the intelligent combination of universal effort."⁶¹ Different people make different contributions to this "universal effort," Proudhon acknowledged, but these differences did not justify the unequal distribution of wealth. Recognizing the essentially collective and interdependent character of capitalist production, Marx similarly sought to disrupt liberalism's moral theory of just deserts—we each have what we deserve—by proposing an alternative formula for distributing wealth: "[f]rom each according to his ability, to each according to his needs!"⁶²

In addition to challenging the assumed equivalence between ownership and effort, this critical tradition is useful because it offers a powerful corrective to the abstracting and ahistorical tendencies of liberal discourse. Marx's intervention into debates about the origins of private property remains relevant to our study of American property, among other reasons, because he shifted the terrain of political theory, from liberalism's fabled "state of nature" to the realm of material history. The "state of nature," Marx demonstrated, was little more than a screen for the industrial labor market: "There alone rule Freedom, Equality, Property . . . Freedom, because both buyer and seller of . . . labour-power, are constrained only by their own free will. . . Equality, because each enters into relation with the other . . . and they exchange equivalent for equivalent. Property, because each

58. See I KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* 513–14 (Samuel Moore & Edward Aveling trans., Frederick Engels ed., Progress Publishers 1954) (1867) (ebook), <https://www.marxists.org/archive/marx/works/download/pdf/Capital-Volume-I.pdf> [<https://perma.cc/GL3B-9YUP>]; see generally PETER LINEBAUGH, *STOP, THIEF!: THE COMMONS, ENCLOSURES, AND RESISTANCE* (2014) (tracing the communist tradition).

59. See PIERRE-JOSEPH PROUDHON, *WHAT IS PROPERTY?: AN INQUIRY INTO THE PRINCIPLE OF RIGHT AND OF GOVERNMENT* 21 (Benj. R. Tucker trans., Dover 1970) (1840) (ebook), <https://theanarchistlibrary.org/library/pierre-joseph-proudhon-what-is-property-an-inquiry-into-the-principle-of-right-and-of-governmen> [<https://perma.cc/F3VD-4HUN>]; see also LINEBAUGH, *supra* note 58.

60. PROUDHON, *supra* note 59, at 132.

61. See *id.* at 77.

62. KARL MARX, *Critique of the Gotha Programme*, in 3 MARX/ENGELS SELECTED WORKS 6 (Progress Publishers 1970) (1875) (ebook), <https://www.marxists.org/archive/marx/works/1875/gotha/ch01.htm> [<https://perma.cc/VXA2-QBD7>].

disposes only of what is his own.”⁶³ In other words, liberal abstractions of freedom, equality, and property conceal their opposing realities.

More recently, scholars of postcolonial, Indigenous, and Black studies have focused attention on the constitutive but disavowed relationship between liberalism and empire.⁶⁴ Locke’s state of nature was not only a projection of the London market, as Marx suggested, but a representation of the New World. “[I]n the beginning all the World was *America*.”⁶⁵ Locke was intimately familiar with colonial capitalism—he participated in the establishment of the Carolina colony and was an investor in the transatlantic slave trade.⁶⁶ His theory of property, as plenty have shown, was both informed by and provided justification for the colonial appropriation of Indigenous lands.⁶⁷

Locke’s labor theory of property remains nonetheless influential within American thought. But its authority, like the authority of many founding texts, rests on a sanctioned indifference toward the colonial histories that have shaped and been shaped by liberalism’s abstractions. Charles Mills has argued that political liberalism and philosophy, as disciplines, remain structured in “white ignorance,” a willful blindness to the material histories of race and empire that continue to underwrite liberal formulations of freedom, equality, the social contract, and so on.⁶⁸ This ignorance is not a passive ignorance, but an “active refusal” to confront histories that would force us to develop alternative frameworks for understanding our institutions and intellectual traditions.⁶⁹

Scholars and activists writing in the radical Black and critical Indigenous tradition have also revisited Marxist critiques of modern capitalism to underscore its relation to processes of racialization.⁷⁰ These critics retain from Marxism its emphasis on material history and dialectical methods, but they also depart from it in

63. See MARX, *supra* note 58, at 123. In Marx’s account, liberal formulations of freedom, equality, and property conceal opposing realities: the supposed “freedom” of laborers dignifies their exploitation; employers and employees enjoy “equality” only in the formalism of contract law; and to have a “property” in one’s labor is to become the agent of one’s own dispossession and exploitation. See *id.*

64. For recent examples of legal scholarship engaged with the history of settler colonialism in the United States, see the work of Greg Ablavsky, Bethany Berger, Seth Davis, Paul Frymer, K-Sue Park, Kunal Parker, Aziz Rana, and Natsu Taylor Saito.

65. LOCKE, *supra* note 50, § 49 at 319.

66. See generally David Armitage, *John Locke, Carolina, and the Two Treatises of Government*, 32 POL. THEORY 602 (2004) (providing evidence that Locke helped revise the Fundamental Constitutions of Carolina while composing chapter five of the Second Treatise); Wayne Glasser, *Three Approaches to Locke and the Slave Trade*, 51 J. HIST. IDEAS 199, 199 (1990).

67. See JAMES TULLY, AN APPROACH TO POLITICAL PHILOSOPHY: LOCKE IN CONTEXTS 137–38 (1993).

68. See Charles W. Mills, *White Ignorance*, in RACE AND EPISTEMOLOGIES OF IGNORANCE 13, 15 (Shannon Sullivan & Nancy Tuana eds., 2007); CHARLES W. MILLS, THE RACIAL CONTRACT 1–7 (1997).

69. ADAM DAHL, EMPIRE OF THE PEOPLE: SETTLER COLONIALISM AND THE FOUNDATIONS OF MODERN DEMOCRATIC THOUGHT 4 (2018).

70. See, e.g., Robin D.G. Kelley, *What Did Cedric Robinson Mean by Racial Capitalism?*, BOS. REV. (Jan. 12, 2017), <https://bostonreview.net/race/robin-d-g-kelley-what-did-cedric-robinson-mean-racial-capitalism> [<https://perma.cc/MW4R-MKTD>].

at least a few important ways.⁷¹ First, where Marx identified labor exploitation as the primary means of capital exploitation, contemporary critics have returned focus to processes of expropriation, extraction, taking, and theft. Second, although Marx and a generation of Marxist thinkers recognized forms of expropriation to be foundational to capitalism, “original” or “primitive” events, located in a feudal past or in distant colonies, more recent scholars insist that dispossession is ongoing—as the foreclosures on predatory debts and the events at Standing Rock demonstrate. Third, these scholars insist that our understanding of class capitalism cannot be disentangled from processes of colonization and racialization.⁷² Racialization, these critics argue, is not only the legal construction of racial difference or status, but a “differential devaluation of racialized groups.”⁷³

As Cheryl Harris so powerfully demonstrated, these processes of racialization are inextricably bound with property as a social formation.⁷⁴ More recently, Nancy Fraser has argued that capitalism reproduces inequality not only through labor exploitation but old and new forms of *expropriation*.⁷⁵ Expropriation, in Fraser’s account, embraces the violent practices “associated with capitalism’s early history but still ongoing, such as territorial conquest, land annexation, [and] enslavement,” as well as contemporary forms of expropriation like debt foreclosure and prison labor.⁷⁶ This shift in focus from exploitation to expropriation, again, underscores the critical role that the state plays in producing “expropriable subjects” by casting others “outside” the sphere of legal protection—as criminals, foreigners, or “illegal aliens”—and thus rendering them vulnerable to exploitation and theft.⁷⁷

D. DISPOSSESSION AND ITS DISCONTENTS

As dispossession, as a critical analytic, is taken up to describe varieties of expropriation and deprivation under colonial capitalism, scholars and activists have had to confront a conceptual dilemma: does the charge of dispossession concede the naturalness or universality of a right to possession?⁷⁸ Do we mean to say that those who have been dispossessed were prior “owners” of their lands or themselves? By using the language of property to name an injury caused by the imposition of the very property regime we seek to challenge, do we further inscribe the language that law has imposed on the relations we seek to reimagine?

71. See Michael Ralph & Maya Singhal, *Racial Capitalism*, 48 *THEORY & SOC’Y* 851, 854–56 (2019); ROBERT NICHOLS, *THEFT IS PROPERTY!: DISPOSSESSION AND CRITICAL THEORY* 28 (2020).

72. See Byrd et al., *supra* note 30, at 2.

73. *Id.* at 3 (quoting LISA MARIE CACHO, *SOCIAL DEATH: RACIALIZED RIGHTLESSNESS AND THE CRIMINALIZATION OF THE UNPROTECTED* 17 (2012)).

74. See Harris, *supra* note 19, at 1716; see also SANDRO MEZZADRA & BRETT NEILSON, *BORDER AS METHOD, OR, THE MULTIPLICATION OF LABOR* (2013) (using “the border” to reassess concepts such as citizenship and sovereignty).

75. See Nancy Fraser, *Expropriation and Exploitation in Racialized Capitalism: A Reply to Michael Dawson*, 3 *CRITICAL HIST. STUD.* 163, 163 (2016).

76. *Id.* at 167.

77. *Id.* at 171–72.

78. See NICHOLS, *supra* note 71, at 8.

Do we end up presupposing the inevitability of a system we recognize to be contingent and contested? Ultimately, these questions should prompt us to consider whether redressing racialized dispossession requires us to imagine radically different forms of coexistence, ones that are not overwhelmed by property's logic of self-interest, development, expropriation, and exhaustion.

Among Indigenous activists and scholars of settler colonialism, the language of dispossession has been particularly useful for bringing into focus the particularity of Indigenous grievance, a particularity that is often effaced within liberal frameworks of equality and inclusion.⁷⁹ The problem is not only that Indigenous people face employment discrimination or have been denied educational opportunities. Instead, the problem is that Indigenous people have been dispossessed of their lands and forced to accommodate themselves to colonial arrangements. They have been denied self-determination and the ability to preserve their own lifeways—particularly those that are incommensurable with private property—and forced to assimilate, notoriously, as the federal government snatched children from their parents and sent them to boarding schools.⁸⁰ In other words, Indigenous peoples have been injured not only by practices of racial discrimination, but also by colonization and genocide; redress requires, far beyond civil rights, “land back” and sovereignty.⁸¹

Recourse to the language and logic of possession risks obscuring or even deforming what settler colonialism has taken from Indigenous peoples—not an already-objectified property interest in land, but a relationship to the land that is not reducible to commodification or ownership. For instance, Mohawk legal scholar Patricia Monture-Angus has explained that, although Indigenous people “maintain a close relationship with the land,” their assertion of sovereignty over stolen lands “is not about control of land”; instead, the “request to have our sovereignty respected is really a request to be *responsible*.”⁸² Similarly, Michi Saagiig Nishnaabeg scholar Leanne Betasamosake Simpson has described the natural world as a “compassionate web of interdependent relationships” that teaches by

79. See generally JODI A. BYRD, *THE TRANSIT OF EMPIRE: INDIGENOUS CRITIQUES OF COLONIALISM* (2011) (arguing colonization is the starting point for reimagining a future inclusive of Indigenous loss and agency); Bonita Lawrence & Enakshi Dua, *Decolonizing Antiracism*, 32 SOC. JUST. 120 (2005) (critiquing the exclusion of Aboriginal people and perspectives in antiracism contexts).

80. See Melissa Mejia, *The U.S. History of Native American Boarding Schools*, INDIGENOUS FOUND., <https://www.theIndigenousfoundation.org/articles/us-residential-schools> (last visited Apr. 11, 2022); *History and Culture: Boarding Schools*, AM. INDIAN RELIEF COUNCIL, http://www.nativepartnership.org/site/PageServer?pagename=airc_hist_boardingschools (last visited Apr. 11, 2022); *US Indian Boarding School History*, NAT'L NATIVE AM. BOARDING SCH. HEALING COAL. <https://boardingschoolhealing.org/education/us-indian-boarding-school-history/> (last visited Apr. 11, 2022).

81. See Joanne Barker, *For Whom Sovereignty Matters*, in *SOVEREIGNTY MATTERS: LOCATIONS OF CONTESTATION AND POSSIBILITY IN INDIGENOUS STRUGGLES FOR SELF-DETERMINATION* 1, 13–14 (Joanne Barker ed., 2005); *LANDBACK Manifesto*, *supra* note 3.

82. See NICHOLS, *supra* note 71, at 29 (emphasis added) (quoting Patricia Monture-Angus); see also Glen Coulthard, *Place Against Empire: Understanding Indigenous Anti-Colonialism*, 4 AFFINITIES: J. RADICAL THEORY, CULTURE & ACTION 79, 82 (2010).

modeling interdependence and reciprocity.⁸³ The Indigenous charge of dispossession, in this sense, is intended to do far more than reassert ownership of stolen land, or possession, as it is understood within the American property law tradition. Instead, it signals the loss of a set of relations, a way of living in the world, that is ultimately incommensurable with that tradition.

Robert Nichols has shown that, by working through this conceptual dilemma, Indigenous thinkers and critics of settler colonialism have come to identify dispossession as a unique historical process, one in which the property form is used to appropriate land through a retroactive recognition of ownership or possession. Nichols, in his own insightful intervention, describes this as the recursive logic of legal dispossession.⁸⁴ Dispossession, in his account, “combines two processes typically thought distinct: it transforms nonproprietary relations into proprietary ones while, at the same time, systematically transferring control and title of this (newly formed) property.”⁸⁵ Thus, dispossession is “not (only) about the *transfer of property* but the *transformation into property*.”⁸⁶ The recursive logic of dispossession often forces those who object to cultural appropriation into a double bind: without invoking the language of property, how do the Navajo convey that they have been injured when Urban Outfitters desecrates their sacred culture by draining symbols of their history and meaning and copying them onto underwear?⁸⁷

The language of dispossession has also been used to underscore the material and economic character of slavery and its afterlives in the United States. Those pressing for reparations identify the acknowledgement of dispossession as the starting point for the accounting of “what is owed,” in Nikole Hannah-Jones’s formulation.⁸⁸ But as within the Indigenous context, the charge of dispossession introduces a dilemma. Stephen Best and Saidiya Hartman, for instance, have asked whether material reparations are adequate to redress the enormity of the crime of slavery, which involved not just theft of wages, but captivity and torture, loss of personhood and autonomy, natal alienation and ungendering.⁸⁹ Slavery leaves in its wake both the structures and stigmata of race. Best and Hartman acknowledged both “the necessity of legal remedy and the impossibility of

83. Leanne Betasamosake Simpson, *Land as Pedagogy: Nishnaabeg Intelligence and Rebellious Transformation*, 3 *DECOLONIZATION: INDIGENEITY, EDUC. & SOC’Y* 1, 11 (2014).

84. NICHOLS, *supra* note 71, at 8.

85. *Id.* at 30–31.

86. *Id.* at 31.

87. *See Navajo Nation v. Urban Outfitters, Inc.*, 212 F. Supp. 3d 1098, 1103 (D.N.M. 2016) (invoking trademark law); DJ Pangburn, *A Navajo Artist Breaks Down His Tribe’s Urban Outfitters Lawsuit*, VICE (Aug. 3, 2016, 10:30 AM), <https://www.vice.com/en/article/8qvjpb/navajo-artist-urban-outfitters-lawsuit> [<https://perma.cc/K92N-32D6>].

88. Nikole Hannah-Jones, *What Is Owed*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/interactive/2020/06/24/magazine/reparations-slavery.html>.

89. *See* Stephen Best & Saidiya Hartman, *Fugitive Justice: The Appeal of the Slave*, 92 *REPRESENTATIONS* 1, 5–7 (2005); *see also* Hortense J. Spillers, *Mama’s Baby, Papa’s Maybe: An American Grammar Book*, 17 *DIACRITICS* 65, 67, 71 (1987); ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH* 172–208 (1982).

redress.”⁹⁰ Their concern was not primarily about the inadequacy of the compensation offered, but whether monetary reparations reproduced the essential violence of slavery—of confusing personhood with property, of making commensurable the incommensurable. Within this tradition, as within critical Indigenous studies, the language of dispossession has come to index a loss that defies accounting and originates with the logic of property.

II. PROPERTY’S EMPIRE

Johnson v. M’Intosh holds a privileged, if ambivalent, place within the property law canon.⁹¹ The case appears at the beginning of most property law casebooks, burdened with the contradictory task of introducing concepts foundational to the study of property law while memorializing the historic wrong of colonial dispossession.⁹² *Johnson* is plainly of enormous historical significance, but its contemporary relevance is sometimes obscured by its appearance in the property law canon as a ceremonial acknowledgement of past wrong. The wrong is not past. Decided at the start of the nineteenth century, *Johnson* laid the legal and ideological groundwork for continuous expansion. With the closing of the frontier, it gained new relevance, as the Supreme Court incorporated its legacy into the emerging plenary power doctrine, according to which Congress asserts unilateral authority over Indians, immigrants, and the inhabitants of overseas territories.⁹³ It has been invoked in other parts of the settler world to justify Indigenous dispossession.⁹⁴ That *Johnson* is now established within the canon of property law, rather than constitutional law or international law—Indian affairs are international affairs—is itself a testament to its great achievement: the privatization of conquest and the domestication of empire.⁹⁵

In what follows, I offer a rereading of *Johnson*, underscoring the ways in which Chief Justice Marshall acknowledges the wrong of colonial dispossession only to

90. Best & Hartman, *supra* note 89, at 3.

91. See, e.g., T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 99 (2002); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1818 (2019); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 385 (1993); Jedediah Purdy, *Property and Empire: The Law of Imperialism in Johnson v. M’Intosh*, 75 GEO. WASH. L. REV. 329, 330 (2007); Ezra Rosser, *Essay, Assumptions Regarding Indians and Judicial Humility: Thoughts from a Property-Law Lens*, 45 CT. REV. 40, 40 (2008–2009); NATSU TAYLOR SAITO, *SETTLER COLONIALISM, RACE, AND THE LAW: WHY STRUCTURAL RACISM PERSISTS* 30–34 (2020); Joseph William Singer, *Well-Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 489 (1994).

92. See, e.g., SINGER ET AL., *supra* note 17 at 3, 88; SPRANKLING & COLETTA, *supra* note 6, at 29; JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER & MICHAEL H. SCHILL, *PROPERTY* 3–16 (6th ed. 2006).

93. See ALEINIKOFF, *supra* note 91; DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 63–90 (2007); see generally SAITO, *supra* note 91.

94. See Blake A. Watson, *The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand*, 34 SEATTLE U. L. REV. 507, 508–09 (2011).

95. Indigenous critics have long argued that what are generally referred to as “Indian affairs” are really matters of international relations. See, e.g., Barker, *supra* note 81, at 19.

place it beyond the scope of justiciability or legal redress.⁹⁶ I then trace the legacy of *Johnson* through the nineteenth century, focusing on the role that federal land policy played in churning Indian land into private property for white Americans. Federal preemption and homesteading policies, for instance, used the lure of private property to turn prospective owners into agents of dispossession. At the same time, by blurring the line between government and individual action, these policies propped up the myth of the self-made American by transferring the wealth of the continent from Indigenous peoples to white settlers. Finally, I demonstrate how a Lockean theory of labor and improvement, embraced by Chief Justice Marshall in *Johnson*, extends the legacy of that case by providing a rationale for the continuing dispossession of Black, Mexican, and Asian peoples.

A. *JOHNSON V. M'INTOSH*, A STUDY IN RESIGNATION

Historians trace the tangled roots of the property dispute in *Johnson v. M'Intosh* to the chaos of the revolutionary period.⁹⁷ Settler rebellion and the lure of cheap and abundant land created a “vacuum” into which “speculation and greed became the driving forces for the . . . founders of our nation.”⁹⁸ Nearly every member of the revolutionary elite participated in land speculation, and speculation, in turn, shaped revolutionary ideals.

Before the American Revolution, land speculation and settler expansion had been constrained only by war and imperial regulation. During the French-Indian War, hostility with France and its Indian allies prevented British colonists from expanding westward. After the war, colonists were constrained by the King of England. After France surrendered its vast territory to Britain, in 1763, colonists assumed that they would be allowed to claim the territory for themselves.⁹⁹ But King George III, eager to avoid another war on the continent, issued a Proclamation prohibiting colonists from claiming lands in the ceded territory without permission from the Crown.¹⁰⁰ The Proclamation of 1763 drew a line of partition over the crest of the Allegheny Mountains. Lands west of the Proclamation Line were reserved for Indian use; colonists were barred from purchasing, surveying, or granting title to the lands and those already settled on the land were ordered “forthwith to remove themselves.”¹⁰¹

96. See generally Sherally Munshi, “*The Courts of the Conqueror*”: Colonialism, the Constitution, and the Time of Redemption, in *LAW’S INFAMY: UNDERSTANDING THE CANON OF BAD LAW* 50 (Austin Sarat et al. eds., 2021). My reading of *Johnson* in this Section draws closely from that essay.

97. See LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* 5 (2005).

98. William D. Wallace, Book Review, 29 *AM. INDIAN L. REV.* 447, 447 (2005) (reviewing ROBERTSON, *supra* note 97).

99. GREG GRANDIN, *THE END OF THE MYTH: FROM THE FRONTIER TO THE BORDER WALL IN THE MIND OF AMERICA* 17 (2019).

100. *Id.* at 17–20.

101. King George III, Royal Proclamation of 1763 (Oct. 7, 1763).

But rather than constrain settlers, the Proclamation spurred them to revolt. Settler militias moved forward in defiance of the Proclamation, often terrorizing the Indians from whom they seized land.¹⁰² More elite speculators, like George Washington, viewed the Proclamation as little more than a “temporary expedient to quiet the minds of the Indians,” bound to be revoked sooner or later.¹⁰³ Benjamin Franklin similarly thought colonial expansion to be a foregone conclusion. As he wrote, “[n]either royal nor provincial proclamations, nor the dread and horrors of a savage war . . . [would] prevent the settlement of the lands over the mountains.”¹⁰⁴

Inspired by the writings of Locke, Thomas Jefferson advanced the case for settler revolt, arguing that the British government had no right to restrain colonial expansion. Adam Dahl has described Jefferson’s argument as a “labor theory of empire,” according to which the New World belonged to individuals who colonized it, rather than the government.¹⁰⁵ “America was conquered,” Jefferson wrote, “at the expense of individuals, and not the British public. Their own blood was spilt . . . their own fortunes expended . . . for themselves they fought, for themselves they conquered, and for themselves alone they have right to hold.”¹⁰⁶ These ideas laid the groundwork for the Declaration of Independence—which Jefferson drafted two years later—and the development of a distinctly new form of government: a settler democracy, within which the guarantees of freedom, equality, and self-government were secured by a fundamental right to ownership and expansion.¹⁰⁷

The Proclamation prohibited the purchase of Indian lands without permission from the Crown, but speculators sought to purchase lands from Indians anyway, anticipating that their purchases would eventually gain legal recognition, transforming their lawless ventures into enormous windfalls.¹⁰⁸ *Johnson v. M’Intosh* involved such purchases. The plaintiffs, land speculators organized as the United Illinois and Wabash Land Companies, purchased several large tracts of land, first from the Illinois in 1773 and, later, from the Piankeshaw in 1775.¹⁰⁹ Both purchases were made a decade after the Proclamation and in clear violation of it. To convince British officials of the legality of their purchase, the Companies produced forged documents, suggesting that the Proclamation had been superseded.¹¹⁰ When they were found out, the Companies appealed to various governments—the colony of Virginia, the Continental Congress, the United States Congress—before finally manufacturing a suit before a district court in

102. GRANDIN, *supra* note 99, at 21.

103. *Id.* at 23.

104. *Id.* at 20.

105. DAHL, *supra* note 69, at 32.

106. *Id.* at 34; see THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (1774), https://avalon.law.yale.edu/18th_century/jeffsumm.asp [<https://perma.cc/8CEP-5DTB>].

107. See DAHL, *supra* note 69, at 34–37; see generally RANA, *supra* note 15.

108. See BANNER, *supra* note 8, at 98–104.

109. See ROBERTSON, *supra* note 97, at 7–23.

110. *Id.*

Illinois.¹¹¹ William M'Intosh, the defendant in the suit, was himself a speculator and had been sought out by the Companies' lawyers. M'Intosh had agreed entirely to the Companies' statement of the facts, raised no counterarguments, and limited the question to whether the Companies' land purchases would be legally recognized, though they had been made in violation of the Proclamation of 1763.¹¹² In a brief opinion, the district court answered unequivocally, no.¹¹³

When *Johnson v. M'Intosh* reached the Supreme Court in 1821, it was essentially a title dispute, one that could have easily been put to rest in a few short paragraphs or by affirming the lower court's decision. Instead, in the hands of Chief Justice Marshall, a feigned controversy would yield a doctrine with catastrophic effect for Indigenous Americans, dispossessing millions of their ancestral lands. A case that otherwise might have disappeared into obscurity remains foundational to the Nation because Chief Justice Marshall dramatically reframed the question before the Court. The real question, as Marshall put it, was whether Indians had "the power . . . to give . . . a title which can be sustained in the Courts of this country."¹¹⁴

Having so dramatically reframed the question, Marshall opened his answer by reviewing the history of European colonization in the Americas. Upon "discovery" of the continent, he explained, European powers were so eager to appropriate for themselves as much land as they could, that, to "avoid conflicting settlements, and consequent war," they needed to devise a principle to determine who owned what.¹¹⁵ This principle is known as the doctrine of discovery: "discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments."¹¹⁶

But the discovery doctrine defines rights and duties among conquering powers, not the relationship between conquerors and the conquered. The discovery doctrine itself, in other words, does not necessarily divest conquered peoples of their right to land. To the contrary, as Marshall acknowledged, under existing "international" law recognized by European imperial powers, conquered peoples generally retained such rights. "[U]sually, they are incorporated with the victorious nation, and become subjects" of the conquering power.¹¹⁷ Where "this incorporation is practicable," Marshall acknowledged, "humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired."¹¹⁸

But in the Americas, Marshall claimed, European nations departed from this custom to establish a new practice: "all of the nations of Europe, who have

111. See *id.* at 14–23, 26; Eric Kades, *History and Interpretation of the Great Case of Johnson v. M'Intosh*, 19 L. & HIST. REV. 67, 85–87, 100 (2001).

112. See Kades, *supra* note 111, at 98–99.

113. See ROBERTSON, *supra* note 97, at 58.

114. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572 (1823).

115. *Id.* at 572–73.

116. *Id.* at 573.

117. *Id.* at 589.

118. *Id.*

acquired territory on this continent, have asserted in themselves, and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians.”¹¹⁹ But here, Marshall engaged in a sleight of hand, attributing to Europe a history of Indian erasure that is of his *own* invention. The actual history of European engagement with Indians in North America was far more varied, nuanced, and contested than Marshall’s lament would suggest; his representation of European custom was belied by centuries of treaty-making—a history with which Marshall was familiar and which evidenced European recognition of both Indian sovereignty and dominion over their land.¹²⁰

But having defined Indigenous dispossession as customary practice in the Americas, Marshall considered whether the United States had “rejected or adopted” the practice.¹²¹ Though *Johnson* has become notorious for embracing the discovery doctrine, the more astonishing turn in the decision is Marshall’s assertion both that the United States has unilateral authority to extinguish Indian title *and* that it has no choice in the matter. After the United States declared its independence from England, a reluctant successor in conquest, the new nation had no choice but to “hold, and assert in themselves, the title by which [the land] was acquired.”¹²² The “royal prerogative” to extinguish Indian title simply “passed” to the United States.¹²³ Throughout his opinion, Marshall attempts to distance the revolutionary nation from its imperial past. He is critical, for instance, of the “pretensions” and “pompous claims” of the “potentates of the old world.”¹²⁴ But rather than break with imperial tradition, with his decision, he inaugurated a new one.

All but acknowledging that the power to extinguish Indian title is morally indefensible, Marshall maintained that the Court was powerless to unsettle the nation’s colonial foundations:

However extravagant the pretensions of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; . . . it becomes the law of the land, and cannot be questioned. . . . However . . . opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled . . . [it] certainly cannot be rejected by Courts of justice.¹²⁵

Among the achievements for which Marshall is most celebrated is his bold articulation of the principle of judicial review, the authority of the Supreme Court to declare acts of Congress and the President unconstitutional. In his most

119. *Id.* at 584; see Frickey, *supra* note 91, at 387.

120. Barker, *supra* note 81, at 5, 7–9.

121. *Johnson*, 21 U.S. (8 Wheat.) at 584.

122. *Id.* at 584, 587.

123. *Id.* at 584, 595.

124. *Id.* at 573, 590–91.

125. *Id.* at 591–92.

celebrated decision, *Marbury v. Madison*, decided two decades earlier, Marshall announced that the Constitution established “the fundamental and paramount law of the nation” and that the Supreme Court had the power “to say what the law is.”¹²⁶ But in *Johnson v. M’Intosh*, stunningly, Marshall maintained that the Court is powerless to constrain the federal government. “Conquest gives a title which the Courts of the conqueror cannot deny.”¹²⁷

Marshall’s opinion in *Johnson*, as Philip Frickey has argued, is organized around a sharp distinction between colonialism and constitutionalism. “Colonialism,” in Frickey’s reading of the case, “raises almost exclusively non-justiciable, normative questions beyond judicial authority and competence.”¹²⁸ Though the colonization of North America was intensifying at the time of Marshall’s writing, in his account, colonialism appears as a thing of the distant past, “prior to, and the antithesis of, constitutionalism,” as Frickey writes.¹²⁹ In this way, Marshall’s opinion places the violence of colonialism beyond the scope of constitutional review or legal redress.

Marshall’s opinion also participates in shaping a national narrative of colonialism, according to which, settler expansion and Indigenous elimination is made to appear natural, inevitable, unavoidable:

What was the *inevitable* consequence of this state of things? . . . Frequent and bloody wars, in which the whites were not always the aggressors, *unavoidably* ensued. European policy, numbers, and skill, prevailed. As the white population advanced, that of the Indians *necessarily* receded. . . . The game fled into thicker and more unbroken forests, and the Indians followed. . . . That law [of assimilation] which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application The resort to some new and different rule . . . was *unavoidable*.¹³⁰

Here too, Marshall unfurled what has become a familiar script, one in which settlers “advance” and Indians “necessarily recede,” as if by some unforgiving natural process rather than a matter of concerted national policy.¹³¹ Colonial expansion and Indian dispossession become a history without agents.

Marshall’s opinion makes for dramatic reading in the first year of law school, in part, because of the way in which it surfaces moral outrage. *Johnson v. M’Intosh* reads almost as though it were written for contemporary readers, consumed as we are by questions about remembrance and responsibility, eager to understand how the Court itself answers for this historic wrong. Marshall’s

126. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

127. 21 U.S. (8 Wheat.) at 588.

128. Frickey, *supra* note 91, at 389 (emphasis omitted).

129. *Id.*

130. *Johnson*, 21 U.S. (8 Wheat.) at 590–91 (emphasis added).

131. *Id.*; see, e.g., JEAN O’BRIEN, *FIRSTING AND LASTING: WRITING INDIANS OUT OF EXISTENCE IN NEW ENGLAND* xi (2010); KEVIN BRUYNEEL, *THE THIRD SPACE OF SOVEREIGNTY: THE POSTCOLONIAL POLITICS OF U.S.-INDIGENOUS RELATIONS* 1–2 (2007); MARK RIFKIN, *BEYOND SETTLER TIME: TEMPORAL SOVEREIGNTY AND INDIGENOUS SELF-DETERMINATION* 6 (2017).

performance of moral conflict is compelling, but it is ultimately a lesson in legal restraint and containment. However reassuring his tone of indignation, the overall effect of his opinion—and its presentation in the standard curriculum—is not to raise a fundamental challenge to the legitimacy of a nation built on stolen land, but to foreclose further challenge. His retrospective condemnation affirms the essential goodness of the nation and its institutions, the promise of perfectibility in our constitutional norms—even as he places the history of conquest beyond question or judgment. Not unlike the land acknowledgement ceremonies now performed at the beginning of academic conferences and university events, the effect is to defend existing arrangements rather than to reimagine them.¹³² The ritual of remembrance absolves us of responsibility, dissipating the urgency of redress.

B. THE DOMESTICATION OF EMPIRE

In the property law curriculum, *Johnson v. M'Intosh* appears as a sort of prehistory to the nation, removed from the ordinary business of property—wills, deeds, estates. But the extraordinary power recognized by the Court in *Johnson*—the power to extinguish Indian title, referred to as a right of “preemption”—played a critical role in establishing the territorial, demographic, and ideological contours of the contemporary United States. After *Johnson v. M'Intosh*, the federal right of preemption became the primary mechanism through which the continent was parceled out as private property and the dream of ownership came to underwrite American expansion.

As it shifted meaning over the course of the nineteenth century, the federal right of preemption devolved and delegated the imperial prerogative to land speculators and squatters, investing property rights with imperial purpose. The strange development of preemption is generally elided from the property law curriculum, but it illuminates how we got from there to here: from conquest to real estate, from the epic to the ordinary. More importantly, the continuous innovation of preemption, as a legal form, demonstrates how the United States used the prospect of property ownership to turn white Americans into agents of Indian dispossession. The formal indeterminacy of the doctrine would allow the federal government to disavow its own role in advancing the frontier while incentivizing and encouraging squatting and speculation, blurring the boundaries between legal and illegal, public and private.

In the first decades after declaring its independence from Britain, the United States adopted a policy of federal “preemption” that closely resembled the royal prerogative.¹³³ By claiming for itself the exclusive authority to deal with Indians,

132. See Alex Small, Opinion, *Land Acknowledgments Accomplish Little*, INSIDE HIGHER ED (Jan. 9, 2020), <https://www.insidehighered.com/views/2020/01/09/why-land-acknowledgments-arent-worth-much-opinion> [https://perma.cc/4956-V9VF].

133. The Intercourse Act of 1790 declared that “no sale of lands made by any Indians, or any nation or tribe of Indians” would be valid unless “made and duly executed at some public treaty, held under the authority of the United States.” Indian Trade and Intercourse Act, ch. 33, § 4, 1 Stat. 138 (1790) (codified as amended in 25 U.S.C. § 177).

the federal government was able to control the pace of expansion, limiting exposure to frontier violence and overextension of a weak federal government.¹³⁴ It also allowed the government, burdened by the costs of constant war, to raise revenue by selling lands.¹³⁵ Federal preemption was essential then not just to the building of a new state, but one explicitly designed for colonial expansion. As Greg Ablavsky has shown, constitutional design and federal Indian policy were developed to transform a relatively weak revolutionary government into a powerful “fiscal-military state,” by using land to raise revenues and become a war machine, capable of continuously extending its frontier either by force or by instilling fear.¹³⁶

Federal preemption also served a set of ideological functions, allowing the United States to preserve a self-image—a democratic republic, founded in the rule of law—while disavowing its own role in the dispossession of Indians. For instance, when asked by a British official whether the United States planned “to exterminate the Indians and take the lands,” Thomas Jefferson explained, “[o]n the contrary, [o]ur system was to protect them, even against our own citizens.”¹³⁷ The temporal construction of preemption allowed the federal government to assume the posture of a benevolent sovereign, “generous in its restraint,” willing to wait until Indians were ready to part with their lands.¹³⁸ But the policy also announced its clear expectancy that Indian lands would eventually pass into the hands of white owners, presumably as a matter of choice rather than coercion.¹³⁹ Because preemption signaled that the prohibition against the private acquisition of Indian lands was only temporary, it promised great rewards to those who engaged in unauthorized speculation and settlement. Thus, while purporting to control expansion, the federal policy of preemption also encouraged it.

In the early years of the republic, officials believed that preemption would give some assurances to Indians threatened by settler encroachment and that Indians would be willing to negotiate with a restrained government.¹⁴⁰ Instead, as Michael Blaakman demonstrates, Indigenous leaders saw through this legal artifice. As one Indian representative wrote in his correspondence with the federal government,

You have talked . . . a great deal about pre-emption, and your exclusive right to purchase Indian lands, as ceded to you by the King We never made any

134. See PAUL FRYMER, *BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION* 35–36 (2017).

135. See Michael A. Blaakman, *Speculation Nation: Land Mania in the Revolutionary American Republic* 7–11 (2017) (unpublished manuscript) (on file with author); Sean Gailmard & Jeffrey A. Jenkins, *Distributive Politics and Congressional Voting: Public Lands Reform in the Jacksonian Era*, 175 *PUB. CHOICE* 259, 261 (2018).

136. GREGORY ABLAVSKY, *FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES* 170 (2021).

137. Blaakman, *supra* note 135, at 239.

138. *Id.* at 255.

139. *Id.*

140. *Id.* at 253.

agreement with the King, nor with any other nation . . . and we declare to you, that we consider ourselves free to make any bargain or cession of lands, whenever and to whomsoever we please.¹⁴¹

When it became clear that Indians would not submit to its intentions, the federal government began to redefine its preemption policy.

As early as the 1790s, preemption took on new meaning as the federal government, hungry for revenue, began to *sell* its exclusive right to purchase Indian lands, effectively subcontracting the work of colonial expansion to speculators, deputizing others to do the work of dispossessing Indians. As Blaakman observes, by selling its right of preemption to lands that had not yet been ceded, the government transformed what had originally been conceived as a power of sovereignty into a form of private property, one that would eventually convert into full title once Indian rights to the land had been “extinguished.”¹⁴² The right of preemption, in this second meaning, would allow the federal government to commodify lands it did not yet control, while extending to private actors a financial stake in the eventual dispossession of Indians.

Thus, by the early nineteenth century, preemption allowed the federal government to pursue conflicting policies at once. By restricting land purchases, the federal government was able to control the price of land, raise needed revenue, and reduce violence. By allowing the government to control the pace and pattern of settlement, federal land policy played an essential role in advancing the frontier: rather than directly forcing Indians to remove, the government coordinated settlement to slowly but steadily “crowd” them out.¹⁴³ But while purporting to constrain speculators and squatters, the federal government implicitly and explicitly encouraged both, effectively *deputizing* private actors to do the rough work of advancing the frontier, promising, in return, eventual title to Indian lands. However contradictory, preemption took the form of both restriction and license, advancing the same end—dispossessing Indians.

Preemption thus set in motion a speculative frenzy. As Nichols writes, “[o]nce set into motion, the dispossessive logic of settler colonization proved difficult to control.”¹⁴⁴ As speculators and squatters continued to overrun jurisdictional limits, preemption came to assume another form: the retrospective conferral of legal ownership to illegal squatters. With the ascendance of Jacksonian populism, in 1839, the federal government abandoned the early policy of controlled settlement and favored expanding access to land ownership to a broader swath of Americans. Rather than relying on land sales to raise revenue, the government realized it had more to gain by opening the frontier to rapid settlement.¹⁴⁵

141. *Id.*

142. *Id.* at 256.

143. See FRYMER, *supra* note 134, at 34–35, 137.

144. NICHOLS, *supra* note 71, at 37.

145. See Gailmard & Jenkins, *supra* note 135, at 263.

Preemption allowed the federal government to catch up to squatters and speculators, effectively regularizing unauthorized settlements.

Over the course of the decade, Congress had enacted five special preemption acts, each conferring legal title to individuals and families who had illegally settled upon public land.¹⁴⁶ The Preemption Act would allow squatters to purchase up to 160 acres of land they had possessed and cultivated, at the rate of \$1.25 per acre (roughly \$35 today) if they filed their claim within a year. Two years later, in 1832, Congress passed another Preemption Act, allowing squatters to purchase smaller parcels of land, effectively extending the benefits of the first Act to smaller farmers. Two years after that, in 1834, the original Preemption Act was reenacted, allowing squatters to purchase public lands they had possessed and cultivated *after* the original Act was passed.¹⁴⁷

As a series, they represent a shift in federal policy. Preemption could no longer be credibly described as a form of temporary relief granted to those who had already broken the law; instead, it had become a standing policy, establishing law-breaking as a new form of acquiring legal title.¹⁴⁸ For this reason, preemption appears, in Robert Nichols's analysis, as an exemplary form of "theft as property," illuminating the recursive logic of American property law, according to which the law confers legitimacy upon acts of appropriation that are plainly illegal at the time they are performed.¹⁴⁹

Preemption soon gave way to homesteading as the primary strategy for both settler expansion and Indian displacement, as proposals to expand land ownership gained in popularity.¹⁵⁰ In 1840, Senator Thomas Hart Benton of Missouri introduced a bill that would give land to individuals willing to settle in Florida. The recruitment of "armed cultivators" was proposed as a cheaper alternative to fighting the Seminoles, who had long resisted removal. The Florida Armed Occupation Act, as it was called, would recruit private actors to do the work of expansion and removal, concealing the hand of the state behind the figure of the rugged "cultivator."¹⁵¹ Within a year of enactment, more than 1,300 permits were issued to armed cultivators for the 200,000 acres made available. The Act did not seem to attract a particularly militant group, but as an army general at the time reflected, the point was not to kill the Indian but to "crowd" him out, so that "they will not only consent to remove, but will desire it as the greatest benefit the nation can confer upon them."¹⁵²

146. *Id.*

147. *See id.* at 264.

148. *See* NICHOLS, *supra* note 71, at 37–38.

149. *See id.*; *supra* Section I.D.

150. FRYMER, *supra* note 134, at 136–37.

151. Armed Occupation Act, Pub. L. No. 27-122, 5 Stat. 502, 502 (1842).

152. FRYMER, *supra* note 134, at 137 (citing Letter from The Quartermaster Gen., to Thomas H. Benton, Chairman, Mil. Comm. of the Senate (January 19, 1839), in 25 TERRITORIAL PAPERS U.S. 563, 565 (1960)); *see also* James W. Covington, *The Armed Occupation Act of 1842*, 40 FLA. HIST. Q. 41, 42 (1961).

The success of the Florida Armed Occupation Act led to calls to extend such policies to other parts of the frontier. In 1850, Congress passed legislation to encourage white settlers to “join the army of occupation” in Oregon Territory, an area over which the United States, Great Britain, and Indians vied for control.¹⁵³ The Oregon Land Donation Act conferred legal title to existing squatters, and it offered land to “every white settler” willing to live on the land and cultivate it for four years. Citizenship was not a requirement for land donation—occupation and cultivation were considered the “real pledge of fidelity to the country.”¹⁵⁴ By the time the law expired in 1855, more than seven thousand land patents had been issued, distributing nearly three million acres of land, tripling the population in five years.¹⁵⁵ As the number of white settlers began to overwhelm the native population in the region, the federal government concluded its negotiations with Indian tribes, who “consented” to give up title.

Through most of the nineteenth century, Congress regulated its affairs with Indian tribes by treaty. But after the Civil War, as the rush to expand westward gained new intensity, Congress abruptly ended its treaty practice. Having seized most of their land and confined them to reservations, Indian tribes were no longer recognized as sovereign nations. Instead, the United States would deal with tribes as “local dependent communities.”¹⁵⁶ In 1886, in *United States v. Kagama*, the Supreme Court affirmed that the federal government had plenary authority over Indian affairs.¹⁵⁷ In 1887, under the terms of the Allotment Act, Congress began to seize and distribute tribal lands—which until then had been held communally—to individual Indians as private property owners.¹⁵⁸

Under the Act, Congress extended citizenship to Indians, but on the condition that they had “voluntarily taken up . . . residence separate and apart from any tribe of Indians” and “adopted the habits of civilized life.”¹⁵⁹ For Henry Dawes, the congressman who sponsored the Act, to be civilized was to “wear civilized clothes . . . cultivate the ground, live in houses, ride in Studebaker wagons, send children to school, drink whiskey”—and above all—“own property.”¹⁶⁰ “Surplus” land was sold to white settlers; funds raised by the sale were used to establish Indian Schools, to which Indian children were sent, usually against the will of their parents, to be “Americanized” and prepared for industrial work and

153. FRYMER, *supra* note 134, at 138 (emphasis removed).

154. *Id.* at 138–39 (citing CONG. GLOBE, 26th Cong., 2d Sess. 22–25 (1841)).

155. *Id.* at 140.

156. *See United States v. Kagama*, 118 U.S. 375, 382 (1886).

157. *Id.* at 381.

158. *See Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations* (“General Allotment Act (Dawes) Act of 1887”), Pub. L. No. 49–105, ch. 119, 24 Stat. 388, 388 (1887).

159. *Id.* at 390.

160. *The Dawes Act February 8, 1887*, WEST: PUB. BROAD. SERV., <https://www.pbs.org/kenburns/the-west/the-dawes-act> [<https://perma.cc/H4ES-T6V9>] (last visited Mar. 7, 2022).

domestic labor.¹⁶¹ Despite resistance, tribes lost nearly ninety million acres of tribal territory during allotment, roughly sixty percent of their reserved lands.¹⁶²

C. IMPROVE, REMOVE, AND REPEAT

1. Black Land Loss

Colonial invasion, Patrick Wolfe asserted, is “a structure not an event.”¹⁶³ Rather than an unfortunate episode that we can neatly consign to a remote past, colonization continues to ramify, not only with the establishment of rules and institutions, but with the proliferation of narratives and rationalities, construction of spaces, and reproduction of subjects. Beyond the breathtaking assertion that the United States has the power to extinguish Indian title, the legacy of *Johnson v. M’Intosh* includes the construction of a national narrative, one in which Indigenous dispossession and colonial expansion are rendered agentless and inevitable—cast beyond the scope of history and redress. We can add to this legacy what Brenna Bhandar has called an “ideology of improvement” and a corresponding division of the world into “waste” places and “white spaces.”¹⁶⁴

Among the justifications that Marshall offers for the dispossession of Indians is their failure to make adequate use of the land. “To leave them in possession of their country,” Chief Justice Marshall wrote, “was to leave the country a wilderness.”¹⁶⁵ His reasoning resembles that of Locke, who argued that individuals transform the natural world, wilderness, into private property by mixing their labor with it. It is the addition of value that justifies unilateral appropriation.

As Locke’s discussion of “America” makes plain, his theory of improvement would justify the appropriation not only of unoccupied or unclaimed lands but *unimproved*, or otherwise uncultivated, lands. As he wrote, “[I]and that is left wholly to Nature, that hath no improvement . . . is called, as indeed it is, *waste*.”¹⁶⁶ Improvement or cultivation transforms the wastelands of nature into something of value, and it is value that gives rise to property rights. Locke justifies the colonial appropriation of Indian lands by contrasting the cultivated fields of Devonshire with the “uncultivated waste” of America.¹⁶⁷ Locke acknowledges “the wild *Indian*” who occupies the land but denies his ownership.¹⁶⁸ Because the land remains unenclosed and uncultivated, because it gives rise to neither commerce nor currency, the Indian cannot claim any exclusive right to it.

161. See sources cited *supra* note 80.

162. See Susan Bibler Coutin, Justin Richland & Véronique Fortin, *Routine Exceptionality: The Plenary Power Doctrine, Immigrants, and the Indigenous Under U.S. Law*, 4 U.C. IRVINE L. REV. 97, 102 (2014).

163. Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 388 (2006).

164. See BRENNA BHANDAR, COLONIAL LIVES OF PROPERTY: LAW, LAND, AND RACIAL REGIMES OF OWNERSHIP 115–148 (2018); Elijah Anderson, “*The White Space*,” 1 SOCIO. RACE & ETHNICITY 10, 11 (2015).

165. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 590 (1823).

166. LOCKE, *supra* note 50, at 315 (updating original script).

167. *Id.* at 312 (updating original script).

168. *Id.* at 305.

Students of property law learn to recognize the extraordinary power of this ideology of improvement because it appears and reappears in the common law to justify the transfer of possession from idle owners to industrious users, or to reward development over conservation, wealth maximization over personal attachment.¹⁶⁹ A settler theory of just appropriation is the through line that connects Indian removal to more recent forms of racialized dispossession. Activists recognize as much when they argue that “urban renewal . . . means negro removal” or “gentrification is colonization.”¹⁷⁰ An implicit logic of improvement justifies the dispossession of others because it devalues those others and the places they inhabit. For instance, then-New York City Mayor Bill de Blasio described the precious green spaces—the tiny parks and gardens—enjoyed by the residents of public housing projects as “underutilized land” before leasing them to private developers.¹⁷¹ Black enjoyment of green spaces is not a good enough use. Writing about the redevelopment of New Orleans after Hurricane Katrina, Bench Ansfield observes that if a Black neighborhood targeted for improvement is not already uninhabited, public officials and urban developers designate it “uninhabitable” to justify the planned removal.¹⁷²

Through the twentieth century, the entire arsenal of property law has been used to dispossess Black Americans of their land—adverse possession, partition sales, tax sales, title recording, mortgage foreclosure.¹⁷³ Often, these practices are underwritten by an implicit theory of just appropriation—but not always. During the Jim Crow Era, southern Black farmers lost hard-earned land to outright violence and theft. They abandoned lands in terror. Lynching, Black intellectuals remind us, was never about flirting.¹⁷⁴ “[W]hites wanted their land,” Ray Winbush explains, “if you’re looking for stolen Black land, just follow the lynching trail.”¹⁷⁵

169. See, e.g., *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922); *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 877 (N.Y. 1970); *Kelo v. City of New London*, 545 U.S. 469, 469 (2005).

170. *A Conversation with James Baldwin*, AM. ARCHIVE OF PUB. BROAD., https://americanarchive.org/catalog/cpb-aacip_15-0v89g5gf5r [<https://perma.cc/TK8R-MX8R>] (last visited Mar. 7, 2022); Bill Healy, *StoryCorps Chicago: ‘Gentrification is Colonization,’* WBEZ CHI. (Feb. 1, 2019, 4:00 PM), <https://www.wbez.org/stories/storycorps-chicago-gentrification-is-colonization/f78f1b79-3782-4057-a42d-c495a1ad01a3> [<https://perma.cc/83PH-JNVX>].

171. Sally Goldenberg, *City Quietly Pauses Plans for Private Development at Brooklyn NYCHA Site*, POLITICO (May 6, 2019, 5:02 AM), <https://www.politico.com/states/new-york/city-hall/story/2019/05/05/city-quietly-pauses-plans-for-private-development-at-brooklyn-nycha-site-1007308> [<https://perma.cc/EG72-67JL>].

172. Bench Ansfield, *Still Submerged: The Uninhabitability of Urban Redevelopment*, in SYLVIA WYNTER: ON BEING HUMAN AS PRAXIS, 126–27 (Katherine McKittrick ed., 2015).

173. See Lizzie Presser, *Their Family Bought Land One Generation After Slavery. The Reels Brothers Spent Eight Years in Jail for Refusing to Leave It*, PROPUBLICA (July 15, 2019), <https://features.propublica.org/black-land-loss/heirs-property-rights-why-black-families-lose-land-south/> [<https://perma.cc/9CEJ-AWQB>].

174. See generally Ida B. Wells, *Speech Given in Chicago, Illinois: Lynch Law in America* (Jan. 1, 1900) (exposing the epidemic of lynching in the United States) (transcript available at http://www.sojust.net/speeches/ida_wells_lynch_law.html) [<https://perma.cc/BK58-2CZW>].

175. Presser, *supra* note 173; see also Megan Ming Francis, *Ida B. Wells and the Economics of Racial Violence*, ITEMS (Jan. 24, 2017), <https://items.ssrc.org/reading-racial-conflict/ida-b-wells-and-the-economics-of-racial-violence/> [<https://perma.cc/6HKR-BTZV>]; Dolores Barclay, Todd Lewan &

Since the start of the twentieth century, the federal government has played a critical role in dispossessing Black farmers by transferring Black lands to white owners under the banner of “modernization.”¹⁷⁶ Though they had been denied reparations and excluded from homesteading policies, after the Civil War, Black freedmen steadily acquired land, overcoming the resistance of white counterparts who would consign them to “exploitive sharecropping,” tenant farming, and debt arrangements.¹⁷⁷ By the start of the twentieth century, Black farmers owned fifteen million acres of land in the South, roughly fourteen percent of all farmland owned in the United States.¹⁷⁸ But today, Black farmers own roughly two million acres of rural land, roughly one percent of farmland owned in the United States.¹⁷⁹

Much of that land loss has been attributed to federal agricultural policies. As part of the New Deal, the U.S. Department of Agriculture (USDA) poured investment into research and innovation, machinery and chemicals, and the development of a financial infrastructure that would support farmers in pursuing capital-intensive farming.¹⁸⁰ But these investments overwhelmingly benefitted white and wealthier landowners.¹⁸¹ New land-grant universities—which were themselves funded by Indigenous dispossession—were racially segregated. Excluded from these new centers of agricultural science, Black farmers acquired skill and knowledge by working. But that skill and knowledge was aggressively devalued by an ascending class of experts, entrepreneurs, and policymakers now invested in large-scale agriculture.¹⁸²

By the 1960s, when the Civil Rights Era brought new scrutiny to discriminatory federal policies, the business of farming itself had been radically transformed. As Pete Daniel has shown, federal officials collaborated with industrial farmers to replace small-scale, labor-intensive farming with large-scale capital-intensive farming, richly subsidizing wealthy white farmers while raising barriers to poor, overwhelmingly Black farmers. As Daniel writes,

Federal agricultural policy and laborsaving science and technology became weapons that ruthlessly eliminated sharecroppers, tenants, and small farmers. The human dislocation caused by this transformation was masked by the USDA’s upbeat and sterile bureaucratic vocabulary, which focused on the

Allen G. Breed, *Prosperity Made Blacks a Target for Land Grabs*, L.A. TIMES (Dec. 9, 2001, 12 A.M.), <https://www.latimes.com/archives/la-xpm-2001-dec-09-mn-13043-story.html>.

176. PETE DANIEL, *DISPOSSESSION: DISCRIMINATION AGAINST AFRICAN AMERICAN FARMERS IN THE AGE OF CIVIL RIGHTS* xi–xii, 8, 14 (2013).

177. *Id.* at 14.

178. Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 507, 527 (2001).

179. *See id.* at 527.

180. DANIEL, *supra* note 176, at 12.

181. *See id.* at 12–13.

182. *See* DANIEL, *supra* note 176, at 13–15; Mitchell, *supra* note 178, at 528–29.

tools of modern agriculture and justified USDA policies by denigrating those who resisted them as hopeless and backward obstructionists.¹⁸³

In other words, USDA officials often chalked up Black land loss to the inevitability of progress and development. Echoing Marshall's lament, it announced, "[a]s the white population [of settlers] advanced . . . Indians necessarily receded."¹⁸⁴ In fact, the federal government played a critical role in supporting the industrialization of agriculture while ignoring cries of racial discrimination. In *Pigford v. Glickman*, the largest class action lawsuit settled by the federal government, Black farmers demonstrated that they were routinely denied access to federal loans and assistance—forms of credit which had become essential to modern agriculture.¹⁸⁵ Black farmers were routinely given smaller loans, distributed later in the season, subject to more burdensome restrictions than their white counterparts.¹⁸⁶ Set up to fail, Black farmers struggled to keep up with payments. Eventually, many of them lost their land, often held in the family for generations, to foreclosure.¹⁸⁷

All the while, federal officials, local banks, and neighboring farm owners told themselves that Black farmers fell behind because they were ignorant, incompetent, or lazy.¹⁸⁸ Alexander Pires, the lead plaintiffs' attorney in *Pigford*, observed wryly that, under slavery, Black farmers were "qualified to farm millions of acres . . . and make white America rich, but when he wants to do it on his own, he's not competent."¹⁸⁹ He asked: "Who do you think picks cotton? White people?"¹⁹⁰

More recently, the dispossession of Black landowners has been instigated by real estate developers eager to turn Black-owned land into luxury condos and resorts.¹⁹¹ The Gullah Geechee, who have lived on the coastlands stretching from northern Florida to North Carolina since slavery, have lost considerable land to partition sales initiated by developers.¹⁹² Around the time of the Civil War, Black communities acquired, by gift and by purchase, lands that had been abandoned

183. DANIEL, *supra* note 176, at 12.

184. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 590 (1823).

185. 206 F.3d 1212, 1214–15 (D.C. Cir. 2000).

186. *Id.* at 1225–27.

187. *Id.* at 1227.

188. See DANIEL, *supra* note 176, at 14; Nikole Hannah-Jones, *Episode 5: The Land of Our Fathers, Part 1*, N.Y. TIMES: 1619 (Oct. 4, 2019), <https://www.nytimes.com/2019/10/04/podcasts/1619-slavery-sugar-farm-land.html>.

189. 1619, *Episode 5: The Land of Our Fathers, Part 2*, N.Y. TIMES: 1619 (Oct. 11, 2019), <https://www.nytimes.com/2019/10/11/podcasts/1619-slavery-farm-loan-discrimination.html>.

190. *Id.*

191. Vann R. Newkirk II, *The Great Land Robbery*, ATLANTIC (Sept. 29, 2019, 2:15 PM), <https://www.theatlantic.com/magazine/archive/2019/09/this-land-was-our-land/594742/>; see Mitchell, *supra* note 178, at 508; Presser, *supra* note 173; MORGAN JERKINS, *WANDERING IN STRANGE LANDS: A DAUGHTER OF THE GREAT MIGRATION RECLAIMS HER ROOTS* (2020) (describing development trends in lowcountry, Georgia and South Carolina).

192. VICE News, *A Vanishing History: Gullah Geechee Nation*, YOUTUBE (Jan. 6, 2016), <https://www.youtube.com/watch?v=SqDTJogdWmA&t=770s> (interviewing Marquetta Goodwine, Willie Heyward, Adolph Brown, and Lawrence Palmer).

by white owners because they were considered undesirable—snake-ridden marshes ill-suited to farming. Now, the same coastal areas have become attractive to speculators and developers, eager to build condos and luxury resorts. Hilton Head, for instance, once home to three hundred Gullah families, is now the site of sprawling golf courses and plantation-themed gated communities.¹⁹³

Black land loss in places like these is the combined effect of rules governing intestacy and partition.¹⁹⁴ After an owner dies without a will, intestacy laws transfer interest in a property from the original owner to a class of heirs. After several generations of such transfer, the original interest may be divided among hundreds or thousands of heirs, each of whom holds a fractional share of the property as a whole. Because the owners of “heirs property” are often land-rich and cash-poor, or far removed from the land itself, developers are able to turn relatives against one another by offering the smallest inducement to force others from their homes.¹⁹⁵

For instance, after discovering that he co-owned a share of desirable property in South Carolina, Adolph Brown left New York to become a real estate broker in Hilton Head. He has encouraged his poorer relatives to embrace development, arguing they may have no other choice: if they do not sell their land, they may lose their land anyway—through partition sales and eminent domain—to developers and municipalities all too eager to turn existing trailer parks into luxury hotels.¹⁹⁶ He warns of the inevitability of loss: “The world changes . . . I give [the] analogy of the American Indians that were [on] downtown Wall Street. They had the teepees there, they had their little communities. Could you imagine today . . . twenty acres [of] Indian reserves in Wall Street? It can’t happen.”¹⁹⁷

2. Race, Removal, and Settling a White Nation

The record of dispossession in the United States also includes instances of removal *without* improvement. In the second half of the nineteenth century, after the closing of the frontier, when the United States stretched its borders to achieve its current outline, racialized “foreigners” would become the targets of dispossession and displacement. Campaigns to “drive out” the Chinese or “repatriate” Mexicans were animated not by a logic of improvement but white nationalism, an avowed policy of establishing a white nation.¹⁹⁸ The removal of racialized foreigners was often initiated by the imposition of restrictions on property ownership—laws intended to frustrate the settlement and survival of racialized

193. *Id.*

194. See Mitchell, *supra* note 178.

195. VICE NEWS, *supra* note 192.

196. Dahleen Glanton, *Ex-slaves' Land Heirs Feel Island Shift*, CHI. TRIB. (July 11, 2006), <https://www.chicagotribune.com/news/ct-xpm-2006-07-11-0607110145-story.html>.

197. VICE NEWS, *supra* note 192.

198. See JEAN PFAELZER, DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS 208 (2008); FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S 52–53 (rev. ed. 2006).

communities. These policies often set the stage for the violence through which removal was finally achieved.

After the Mexican-American War, a war of aggression that has also been described as “land grab,” the United States resolved to take as much land as possible with as few inhabitants as possible.¹⁹⁹ Then-Congressman Abraham Lincoln drew the line at the Rio Grande, annexing what he called “the unsettled half,” the largely uninhabited territories into which the United States could “introduce an American population.”²⁰⁰ During treaty negotiations with Mexico, the United States promised to respect the property rights of Mexicans living in the annexed territory, but it struck those guarantees before ratification, rendering landowners in the annexed territory vulnerable to dispossession.²⁰¹

As Mexican officials feared, within a few decades, Mexican landowners in the annexed territory lost most of the land that had been granted to them by the Spanish or Mexican government.²⁰² Among the primary tools used to divest Mexican landowners of their property was an onerous legal process established by the U.S. Congress that required existing landowners to confirm existing title.²⁰³ This process was heavily stacked against Mexican landowners who were forced to defend titles granted under a now foreign legal system. For instance, U.S. courts routinely invalidated community land grants, though community land grants were the primary form of land distribution used by Spanish and Mexican authorities.²⁰⁴ Even Mexican landowners with perfect titles were forced to endure the long and uncertain process of confirming ownership. Spanish-speaking owners were dependent on English-speaking lawyers and often lacked the resources to pay for assistance. Lawyers offered to receive payment in the form of an interest in property, which they then used to force partition sales.²⁰⁵ The uncertainties—or potential for dispossession—introduced by the confirmation procedure encouraged lawyers, among others, to participate in speculation and corruption.²⁰⁶

Government practices emboldened individuals and corporations who took advantage of language barriers and legal formalities to defraud Mexicans of their

199. Christopher David Ruiz Cameron, *One Hundred Fifty Years of Solitude: Reflections on the End of the History Academy's Dominance of Scholarship on the Treaty of Guadalupe Hidalgo*, 25 BILINGUAL REV./LA REVISTA BILINGÜE 1, 1 (2000).

200. FRYMER, *supra* note 134, at 196 (quoting Abraham Lincoln); see MARTHA MENCHACA, NATURALIZING MEXICAN IMMIGRANTS: A TEXAS HISTORY 17 (2011) (describing congressional decision to acquire least populated territories).

201. See Ruiz Cameron, *supra* note 199, at 4; STEVEN W. BENDER, TIERRA Y LIBERTAD: LAND, LIBERTY, AND LATINO HOUSING 18–19 (2010).

202. BENDER, *supra* note 201, at 17.

203. See *id.* at 19.

204. See *id.* at 20.

205. *Id.* at 21; ARMANDO C. ALONZO, TEJANO LEGACY: RANCHEROS AND SETTLERS IN SOUTH TEXAS, 1734–1900, at 265–66 (1998).

206. See David Correia, *Making Destiny Manifest: United States Territorial Expansion and the Dispossession of Two Mexican Property Claims in New Mexico, 1824–1899*, 35 J. HIST. GEOGRAPHY 87, 93 (2009).

land.²⁰⁷ In the first decades of the twentieth century, Mexicans were subject to breathtaking violence, often at the hands of their own neighbors. As “thousands fled to Mexico and decapitated bodies floated down the Rio Grande,” write the creators of a website memorializing the atrocity, a Texas newspaper described Mexicans as “a serious surplus population that needs eliminating.”²⁰⁸ Dispossession was not simply a matter of legal indeterminacy, nor was the violence a spontaneous eruption of racial animus. Instead, it was continuous with the colonial project of settling a white nation.²⁰⁹ During the Great Depression, more than a million Mexicans, previously recruited to work in farms and factories in places as far flung as Los Angeles and Detroit, were rounded up by local officials and “repatriated”—or deported—to Mexico.²¹⁰ The deported included the sick and elderly, orphaned children, and American citizens.

Asian immigrants have also been the targets of expulsion. In the late 1880s, Chinese immigrants across the Pacific Northwest were the targets of coordinated “driving out” campaigns. In 1885, a mob of white coal miners in Rock Springs, Wyoming descended upon the housing encampment of Chinese miners, set fire to their homes, and chased them into the hills.²¹¹ Chinese miners were burned alive, scalped and branded, mutilated and displayed. The violence left twenty-eight dead, fifteen wounded, and drove hundreds from the territory.²¹² The “success” of the massacre encouraged organized mobs in cities across the Pacific Northwest.²¹³ Two decades later in Bellingham, Washington, white mobs burned the homes of Indian immigrants, stole their possessions, and marched them to the city jail where they were held in “protective” custody before being put on trains and sent to Canada.²¹⁴ Newspapers cheered that Indian immigrants had finally been “wiped off the map.”²¹⁵

Japanese internment is often remembered as the wrongful imprisonment of people on the basis of racial identity. But it was also the culmination of a decades-long effort to displace, dispossess, and remove the Japanese immigrants and Japanese-Americans who established themselves as successful farmers in the

207. See GLORIA ANZALDÚA, *BORDERLANDS/LA FRONTERA: THE NEW MESTIZA* 30–31 (1st ed. 1987).

208. *The History of Racial Violence on the Mexico-Texas Border*, REFUSING TO FORGET, <https://refusingtoforget.org/the-history/> [<https://perma.cc/SG67-SX35>] (last visited Mar. 8, 2022).

209. See generally LAURA E. GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* (2d ed. 2018) (exploring the racial constructions of Mexicans as related to the American racial order).

210. See BALDERRAMA & RODRIGUEZ, *supra* note 198, at 50–53.

211. BETH LEW-WILLIAMS, *THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA* 116–17 (2018).

212. *Id.* at 117.

213. See generally PFAELZER, *supra* note 198.

214. Sherally Munshi, *Immigration, Imperialism, and the Legacies of Indian Exclusion*, 28 *YALE J.L. & HUMANS* 51, 62 (2016).

215. *Id.*

West.²¹⁶ Since Japanese immigrants began settling in the West, journalists stoked white fears of Japanese “colonization” and “replacement” and urged the government to prevent Japanese from establishing permanence in the United States.²¹⁷ Through the nineteenth century, white immigrants were guaranteed the same property rights as citizens, as inducement to settle. But as Chinese and Japanese immigrants began settling in the West, the western states began enacting laws restricting ownership.²¹⁸ Alien land laws were passed, first in California in 1913, then throughout the country, to prevent “aliens ineligible to citizenship”—Asian immigrants—from owning property.²¹⁹ Between 1920 to 1925, Japanese immigrants had lost a third of their land.²²⁰ California tightened its restrictions on alien land ownership in 1920 and again in 1943, during the period of internment.²²¹

As Japanese-Americans were rounded up and “relocated” to fairgrounds and stables, their assets were frozen. White neighbors bought up their possessions in hurried sales. One survivor of internment recalls that her mother was so revolted by the predations of her white neighbors that she smashed her plates instead of selling them.²²² White neighbors sometimes moved into abandoned homes and took over their farms. Internees were gradually removed from local relocation centers to remote concentration camps—often Indian reservations. As skilled farmers, Japanese-Americans posed a threat to white landowning neighbors. But on concentration camps, those same skills were exploited by government officials to cultivate the “waste land” to which Indians had been removed.²²³ Officials at the Office of Indian Affairs thought that Japanese-American farmers might prepare the reservations for Indians who had, until then, refused to relocate or to cultivate.²²⁴

216. See Rose Cuisson Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979, 992–99 (2010); Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 937–38 (2004).

217. See V. S. McCLATCHY, JAPANESE IMMIGRATION AND COLONIZATION, 67TH CONG., S. DOC. NO. 55, at 32–34, 65, 135 (1st Sess. 1921).

218. When rewriting its constitution in 1879, California limited land ownership to aliens of the “white race or of African descent,” the same words used to exclude Asians from naturalization under the Naturalization Act of 1870. CAL. CONST. OF 1879, art. I, § 17 (1879); Naturalization Act of 1870, Pub. L. No. 41-254, § 7, 16 Stat. 254, 256.

219. GRACE KYUNGWON HONG, *THE RUPTURES OF AMERICAN CAPITAL: WOMEN OF COLOR FEMINISM AND THE CULTURE OF IMMIGRANT LABOR* 41–42 (2006).

220. *Id.* at 41.

221. See Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CALIF. L. REV. 61, 70–73 (1947).

222. See Order 9066, *Chapter 2: The Order*, APM REPORTS, (Feb. 19, 2018), <https://www.apmreports.org/episode/2018/03/05/order-9066-e02-the-order> [<https://perma.cc/YLV2-9B9M>].

223. Ruth Y. Okimoto, *Sharing a Desert Home: Life on the Colorado River Indian Reservation, Poston, Arizona, 1942-1945*, NEWS FROM NATIVE CAL., at 8 (citing Letter from William Zimmerman, Assistant Comm’r, Off. of Indian Affs., to House of Representatives (Apr. 11, 1942)).

224. See *id.* at 7.

III. PROPERTY AND POLICING

What is the relevance of slavery to contemporary life, to the study of property law? The question has been returned to public focus in recent years by renewed calls for reparations, the rhetoric of new abolitionists, and the memory work taking shape in newsrooms and college campuses. The question itself provokes discomfort for many Americans, as evidenced by laws protecting Confederate monuments, historians' quarrels with The 1619 Project, and state bans on critical race theory.²²⁵ Saidiya Hartman has explained:

If slavery persists as an issue in the political life of black America, it is not because of an antiquarian obsession with bygone days or the burden of a too-long memory, but because black lives are still imperiled and devalued by a racial calculus and a political arithmetic that were entrenched centuries ago. This is the afterlife of slavery—skewed life chances, limited access to health and education, premature death, incarceration, and impoverishment.²²⁶

In public discourse, the afterlife of slavery is most readily recognized in its carceral form. In other words, the line of continuity that connects slavery to Jim Crow to mass incarceration is often drawn in terms of social control and spatial confinement. But in this Part, I attempt to bring another line of continuity into focus: property. The afterlife of slavery consists in the relation between property and policing, the confluence of carceral and proprietary logics that allow for the criminalization of the dispossessed and the dispossession of the criminalized.

A. THE AFTERLIVES OF SLAVERY

Most property law casebooks devote at least a few pages to exploring the origins of the modern estate system in feudal England. But they hardly mention the four-hundred-year history of chattel slavery in the United States. When it is mentioned at all, slavery itself is reduced to something like the metamorphosis of persons into property; the contemporary relevance of slavery is reduced to a line of cases concerning the commodification of human corporeality. For instance, one of the few leading casebooks to devote sustained attention to slavery includes an excerpt from *Dred Scott v. Sandford*, but then devotes the remainder of the chapter, entitled “Human Beings and Human Bodies,” to cases involving surrogacy contracts, organ sales, and the harvesting of human tissue.²²⁷

But this construction of slavery—as the transformation of persons into property—does not begin to capture either the enormous complexity of slavery as a social institution or its continuing relevance. Like colonization, slavery conditioned the aspirations of the nation's founders. It stimulated all sorts of innovations in property law, capitalism, and finance, which in turn transformed a settler

225. See, e.g., Park, *supra* note 7, at 1065 nn.3–4.

226. SAIDIYA HARTMAN, *LOSE YOUR MOTHER: A JOURNEY ALONG THE ATLANTIC SLAVE ROUTE* 6 (2007).

227. SINGER ET AL., *supra* note 17, at 247–84.

colony into a global empire.²²⁸ As Justice Taney frankly acknowledged in *Dred Scott*, slavery was integral to the establishment of a “citizen race,” the rights of which were violated by the Missouri Compromise.²²⁹ Thus, to reduce slavery to the commodification of bodies or sale of organs obscures the ways in which slavery haunts our political, economic, and social institutions, shaping us as citizens and subjects, animating our desires and fears, distributing life and death across racialized landscapes.

This construction of slavery in property law—as the thingification of bodies—is consistent with constructions of slavery in public discourse, in which the essential wrong of slavery, violent policing, and mass incarceration is often described as “dehumanization.”²³⁰ “Hundreds of years ago, our nation put those it considered *less than human* in shackles,” Michelle Alexander has written, “today we put them in cages.”²³¹ Brené Brown has described Black Lives Matter as “a movement to rehumanize black citizens,” explaining that “for slavery to work, in order to buy, sell, beat, and trade people like animals, Americans had to completely dehumanize slaves All lives matter, but not all lives need to be pulled back into moral inclusion.”²³² “The opposite of criminalization,” Van Jones insists, “is humanization.”²³³

These tropes of dehumanization and rehumanization fundamentally misapprehend the institution of slavery and its aftermath. These narratives miniaturize slavery in national memory, transforming a ruthlessly rational and economic institution into a personal lack of compassion. As Walter Johnson writes, slavery was economically profitable because it allowed enslavers to exhaust and exploit *every* human capacity.²³⁴ Enslaved people were valuable because they were intelligent and acquired skills; they were pliable because they had needs and desires; they could be controlled because they dreaded pain and felt

228. See generally EDWARD E. BAPTIST, *THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM* (2014) (discussing how slavery shaped America’s economy and politics); see also WALTER JOHNSON, *RIVER OF DARK DREAMS: SLAVERY AND EMPIRE IN THE COTTON KINGDOM* (2013) (recounting slavery’s role in U.S. expansionism and global capitalism); SVEN BECKETT, *EMPIRE OF COTTON: A GLOBAL HISTORY* (2014).

229. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 420, 423 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; RANA, *supra* note 15, at 169.

230. See Jeannine Marie DeLombard, *Dehumanizing Slave Personhood*, 91 AM. LIT. 491, 494 (2019).

231. *Id.* at 491 (citing ALEXANDER, *supra* note 18, at 141 (emphasis added)); see also David Remnick, *Ten Years After “The New Jim Crow,”* NEW YORKER (Jan. 17, 2020), <https://www.newyorker.com/news/the-new-yorker-interview/ten-years-after-the-new-jim-crow>.

232. BRENÉ BROWN, *BRAVING THE WILDERNESS: THE QUEST FOR TRUE BELONGING AND THE COURAGE TO STAND ALONE* 77 (2017); see also Alicia Garza, *A Herstory of the #BlackLivesMatter Movement* by Alicia Garza, FEMINIST WIRE (Oct. 7, 2014), <https://thefeministwire.com/2014/10/blacklivesmatter-2/> [<https://perma.cc/SU6L-H4AU>].

233. Television Interview with Van Jones, CEO, Reform Alliance, on *Anderson Cooper 360°* (June 17, 2020) (transcript available at <https://transcripts.cnn.com/show/acd/date/2020-06-17/segment/01/perma.cc/KHZ5-48HW>).

234. Walter Johnson, *To Remake the World: Slavery, Racial Capitalism, and Justice*, BOS. REV. (Feb. 20, 2018), <https://bostonreview.net/forum/walter-johnson-to-remake-the-world> [<https://perma.cc/U6H9-7N7Y>].

terror.²³⁵ Slavery did not reduce enslaved people to inert objects, drained of sentience or will, but the rhetoric of dehumanization performs the very violence it purports to challenge, throwing into question the humanity of those it seeks to humanize.²³⁶ Moreover, liberal rhetoric of humanization enshrines a particular and problematic construction of “the human.”²³⁷ In the standard historical narrative, the human awaiting emancipation is the subject of liberal rights, cut in the image of a property-owning white man, shaped by the experience and imperatives of conquest, slavery, and racial capitalism. Emancipation is inclusion within the project of racial capitalism, rather than its abolition.

Liberalism did not merely cast Indians and Africans from the sphere of humanity, or “moral inclusion” as Brené Brown suggests. Instead, liberalism reconciled its supposed egalitarianism with colonialism and slavery by differentiating humanity, in part, by assigning moral worth.²³⁸ John Locke, for instance, did not deny that Indians were humans or had a right to own property. Instead, he recognized that Indians also enjoyed a natural right to own property, but he justified their usurpation by demonstrating that they had failed to “improve” their lands.²³⁹ Because European settlers were able to put the same land to more productive use, they were justified in taking it from Indians. The colonial dispossession of Indians was not a matter of dehumanization but devaluation of their relation to land. The recognition of prior possession—as failed possession—perversely renders them responsible for their own dispossession.

Locke justifies slavery in similar terms. He acknowledges the problem that slavery poses to his theory of property: if “every Man has a *Property* in his own Person,” then how can anyone else claim to own another as property?²⁴⁰ Locke answers this question by posing another. Tellingly, the question is no longer how can one person own another, but how can a person “*enslave himself*” to another.²⁴¹ Individuals do not have a natural right to take their own lives or to surrender themselves “by Compact[] or . . . Consent” to any other.²⁴² But if “by his fault” an individual has “forfeited his own Life, by some Act that deserves Death; he, to whom he has forfeited it, may . . . make use of him to his own Service.”²⁴³ Slavery, then, is justified not by denying humanity, but by recognizing *fault* and *forfeiture*.²⁴⁴ War was the origin of “fault” in Locke’s discussion of slavery, but

235. *Id.*

236. See Patricia J. Williams, *On Being the Object of Property*, 14 SIGNS 5, 7–9 (1988).

237. See KATHERINE MCKITTRICK, *DEMONIC GROUNDS: BLACK WOMEN AND THE CARTOGRAPHIES OF STRUGGLE* 125–27 (2006).

238. See Williams, *supra* note 236. See generally UDAY SINGH MEHTA, *LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT* (1999); HOMI K. BHABHA, *THE LOCATION OF CULTURE* (1994).

239. LOCKE, *supra* note 50, at 307, 312; see David Kazanjian, *Dispossession, Reimagined from the 1690s*, in *A TIME FOR CRITIQUE* 210, 214–15 (Didier Fassin & Bernard E. Harcourt eds., 2019).

240. LOCKE, *supra* note 50, at 100.

241. *Id.* at 302.

242. *Id.* (updating original script).

243. *Id.* (updating original script).

244. See Kazanjian, *supra* note 239, at 214.

in his reasoning, we can recognize the way constructions of fault and forfeiture—criminalization—would provide the mechanism for differentiating and dispossessing the enslaved.

Appeals to common humanity fail us, then, because they obscure the way liberal humanism participates in differentiating humans by distributing worth (“improvement”) and blame (“fault”). They also fail to address the racial logic woven through these same patterns of differentiation, devaluation, and dispossession. For this reason, Jeannine DeLombard argues that we ought to shift our critical focus from questions about Black humanity to examining the legal construction of Black *personhood*.²⁴⁵ “A human being is a particular bundle of fluids and tissues,” she writes, “legal persons, by contrast, are varying bundles of rights and duties, powers and obligations.”²⁴⁶ Slavery did not simply turn people into property; instead, it proliferated new categories of legal persons. Anyone could own a Black person, for instance, but a Black person could not trade in white servants; a Black bondsman could be whipped, but not a white servant; Black bondswomen could give birth to enslaved children, but not white servants; and so on.²⁴⁷ Shifting our focus from the category of the human to racialized constructions of legal persons illuminates the role that property law played in *producing* racial difference. By attaching itself to the raw processes of human life and death, the law naturalized modern constructions of raced personhood.

Legal persons are never identical to their natural bodies. Legal personhood entails a doubling. Every legal person—the king, the citizen, the enslaved, the stateless—has “two bodies,” one natural and one juridical.²⁴⁸ But slavery in the United States gave birth to an entirely new legal person. As the object of *property*, the enslaved was denied basic rights and protections enjoyed by ordinary persons; but as a *person*, she was nonetheless bound by legal duties.²⁴⁹ An enslaved woman could be raped with impunity—her violation would give rise to no legal injury—but if she were to steal a piece of mail, she would be criminally liable.²⁵⁰ DeLombard writes of a case involving such a theft, in which Justice Taney rejected the argument that an enslaved woman, because she was property rather than a “person,” as defined by the relevant statute, was shielded from criminal liability.²⁵¹ Justice Taney insisted that “we must not lose sight of the twofold character which belongs to the slave. He [*sic*] is a person, and also property. As property, the rights of the owner are entitled to the protection of the law. As a

245. See DeLombard, *supra* note 230, at 493.

246. *Id.* at 495.

247. See An Act Concerning Servants and Slaves, ch. XLIX, §§ VII, XI, XXXIV, XXXVI (1705), in 3 HENING’S STATUTES AT LARGE 448, 449–50, 459, 460.

248. See STEPHEN M. BEST, THE FUGITIVE’S PROPERTIES: LAW AND THE POETICS OF POSSESSION 12 (2004); Edward Mussawir & Connal Parsley, *The Law of Persons Today: At the Margins of Jurisprudence*, 11 L. & HUMANS. 44, 49 (2017).

249. See Best, *supra* note 248.

250. See HARTMAN, *supra* note 226, at 80–83; *United States v. Amy*, 24 F. Cas. 792, 810 (C.C.D. Va. 1859) (No. 14,445).

251. DeLombard, *supra* note 230, at 496–97, 506–07.

person, he is bound to obey the law, and may, like any other person, be punished if he offends against it.”²⁵² The law recognized the enslaved to be a “person” but only in her capacity to commit a crime.

This two-sided construction of Black personhood—expropriable property and criminal person—would persist even after the abolition of slavery, or what Saidiya Hartman refers to as the “nonevent of emancipation.”²⁵³ She calls emancipation a “nonevent” because the conferral of rights without resources would condemn Black freedmen to live under the same conditions of poverty, dependency, and exploitation as before. But now, as “free” and “equal” to their former enslavers, the formerly enslaved had only themselves to blame. Emancipation was no straightforward restoration of rights or rehumanization, Hartman argues. Instead, emancipation delivered Black Americans into what she calls a “double bind of freedom.”²⁵⁴ Black Americans were “freed from slavery and free of resources, emancipated and subordinated, self-possessed and indebted, equal and inferior, liberated and encumbered, sovereign and dominated, citizen and subject.”²⁵⁵ Rather than eliminate the relations of domination and exploitation, upon which the plantation economy thrived, the conferral of rights effaced the character of those relations, turning domination into equality, deprivation into freedom, and coercion into contract.

Within an unreconstructed plantation economy, the formerly enslaved would continue to labor for their former masters, but now as “free” labor or debt peons, as contractors or criminals. New laws criminalizing vagrancy and unemployment would deliver freedmen back into the hands of former masters, now as leased convicts rather than chattel slaves. These Black codes were enforced not only to remand the formerly enslaved to labor under conditions often worse than slavery, but to regulate and restrict nearly every aspect of Black life—from selling things to preaching, congregating after sunset or drinking, intermarrying. Black Americans were individually free, in that they were individually responsible for their own uplift, but nonetheless bound to racial grouping, stigmatization, and control.²⁵⁶

Thus, while the abolition of slavery did little to transform the material conditions of Black life, the emancipatory rhetoric of freedom and the empty formalism of equality would recast what had previously been recognized as coercive relations into relations created by contracts or criminality. At the same time, as Hartman demonstrates, “[t]he ascribed responsibility of the liberal individual”—the Black freedman—“served to displace the nation’s responsibility for providing and ensuring the rights and privileges conferred by the Reconstruction

252. *Amy*, 24 F. Cas. at 810.

253. SAIDIYA V. HARTMAN, *SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA* 116 (1997).

254. *Id.* at 115.

255. *Id.* at 117.

256. See HARTMAN, *supra* note 253, at 119–20.

Amendments”²⁵⁷ In the wake of emancipation, subject to new forms of debt, deprivation, and criminalization, the freedman would become the source of his own subordination.

B. THE BLACK BURDENS OF WHITE POSSESSION

This legal construction of Black personhood—“a debilitating mixture of civil death and criminal culpability,” in DeLombard’s synthesis—remains remarkably constant over a long arc of American history as an afterlife of slavery.²⁵⁸ It survives the Reconstruction Era, as Hartman demonstrates, and it underscores the continuities between the slave economy and the rise of what Bernard Harcourt calls “neoliberal penalty,” a contemporary form of rationality that promotes market interests by dismantling forms of social protection and managing crises through policing and punishment.²⁵⁹ These strategies have been buttressed by ideological shifts, reassigning certain forms of social responsibility from government to individuals.²⁶⁰ As Angela Davis, Ruth Gilmore, Loïc Wacquant, and others have argued, the intensification of policing and punishment has less to do with rising crime than with managing the economic and social displacements produced by neoliberal restructuring.²⁶¹ These contradictory forces have been felt most acutely in post-industrial cities, to which Black Americans migrated in the early twentieth century, fleeing the humiliations of the Jim Crow South only to find themselves confined to ghettos and subject to over-policing.²⁶² Many of these same cities have become sites of protest in the wake of police killings—Ferguson, Baltimore, and Cincinnati, to name a few.²⁶³

Scholars have written meticulous histories demonstrating that violent encounters between police officers and Black Americans have been at least a century in the making. Colin Gordon, Walter Johnson, and Richard Rothstein have all demonstrated, for instance, that the killing of Michael Brown in Ferguson has been shaped by a continuous history of public and private segregation, exclusionary zoning, financial redlining and reverse redlining, urban redevelopment, and predatory policing.²⁶⁴ While some of these accounts may be familiar to students of

257. *Id.* at 118.

258. DeLombard, *supra* note 230, at 491.

259. Bernard E. Harcourt, *Neoliberal Penalty: A Brief Genealogy*, 14 THEORETICAL CRIMINOLOGY 74, 77 (2010); *see generally* HARTMAN, *supra* note 253.

260. *See* Jamie Peck, *Austerity Urbanism: American Cities Under Extreme Economy*, 16 CITY 626, 650 (2012).

261. *See generally* ANGELA Y. DAVIS, ABOLITION DEMOCRACY: BEYOND PRISONS, TORTURE, AND EMPIRE 19–48 (2005); RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 87–127 (2007); Wacquant, *supra* note 18, at 1; Harcourt, *supra* note 259, at 74–77; STUART HALL, CHAS CRITCHER, TONY JEFFERSON, JOHN CLARKE & BRIAN ROBERTS, POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER 29–52 (1978); BRETT STORY, PRISON LAND: MAPPING CARCERAL POWER ACROSS NEOLIBERAL AMERICA (2019).

262. *See generally* ISABEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA’S GREAT MIGRATION (2010).

263. *See* Monica C. Bell, *Anti-Segregation Policing*, 95 NYU L. REV. 650, 651, 730–31 (2020).

264. *See* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 48–50 (2017) [hereinafter ROTHSTEIN, COLOR OF LAW]; RICHARD

property law, I revisit them here to emphasize that property law is implicated in structuring not just racial segregation but racialized dispossession. Beyond separating white from non-white Americans, policies and practices governing the use of property maintain a political economic system that has allowed white Americans to accumulate wealth and opportunities in zones of relative comfort and security, while depriving their non-white counterparts of the same wealth and opportunities, consigning them to zones of immiseration and insecurity, “waste” places eventually targeted for destruction and “renewal.” This dialectical relation between white ownership and Black deprivation is often obscured by the ahistorical and decontextualized presentation of the property form in legal discourse but is sustained by a cultural logic that ascribes value and risk, welfare and blight to racialized bodies, spaces, and practices.

What Hartman describes as the “burdened individuality” of Black freedom, we can trace in the life and death of Michael Brown.²⁶⁵ Long before his life was cut short by a police officer’s bullets, Brown was born into the chokehold of racial capitalism, burdened by histories of exclusion and deprivation, his future foreclosed by underfunded and predatory schooling, whose exercise of freedom was bound to criminalization by a municipality that built no sidewalks for him but outlawed his “manner of walking in roadway.”²⁶⁶ The burdened individuality of Brown is mirrored in the possessive individualism of white Americans who, since the turn of the twentieth century, have been the beneficiaries of federal and local policies intended to promote access to home ownership and wealth accumulation. While a moral culture of individual responsibility renders members of the dispossessed and abandoned class responsible for their material deprivation, it has also convinced many white Americans that they have earned the advantages they enjoy, obscuring the role that the government has played in distributing advantage, while elevating the pursuit of property interests to a civic virtue. And by the same token, it renders Black Americans responsible for poverty and policing.

ROTHSTEIN, *THE MAKING OF FERGUSON: PUBLIC POLICIES AT THE ROOT OF ITS TROUBLES* 1–2 (2014), <https://files.epi.org/2014/making-of-ferguson-final.pdf> [<https://perma.cc/LAN9-LZA7>] [hereinafter ROTHSTEIN, FERGUSON]; WALTER JOHNSON, *THE BROKEN HEART OF AMERICA: ST. LOUIS AND THE VIOLENT HISTORY OF THE UNITED STATES* 388 (2020); Walter Johnson, *Ferguson’s Fortune 500 Company*, ATLANTIC (Apr. 26, 2015), <https://www.theatlantic.com/politics/archive/2015/04/fergusons-fortune-500-company/390492/>; COLIN GORDON, *CITIZEN BROWN: RACE, DEMOCRACY, AND INEQUALITY IN THE ST. LOUIS SUBURBS* 120–144 (2019); Colin Gordon & Clarissa Rile Hayward, *The Murder of Michael Brown*, JACOBIN (Aug. 9, 2016), <https://www.jacobinmag.com/2016/08/michael-brown-ferguson-darren-wilson-policing/> [<https://perma.cc/6TBN-XJ3B>].

265. HARTMAN, *supra* note 253, at 115–17.

266. DOJ, C.R. Div., *supra* note 45, at 67 (capitalization omitted). Having just graduated from an underfunded school, which had just lost its accreditation, Brown was planning to attend a local for-profit college known to Congress for preying upon “vulnerab[le]” students. Nikole Hannah-Jones, *School Segregation, the Continuing Tragedy of Ferguson*, PROPUBLICA (Dec. 19, 2014), <https://www.propublica.org/article/ferguson-school-segregation> [<https://perma.cc/36F4-RJAQ>]; S. COMM. ON HEALTH, EDUC., LAB. & PENSIONS, *FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS*, S. Doc. No. 112-37 (2d Sess. 2012).

1. Exclusionary Zoning and Restrictive Covenants

Modern city planning in the United States begins with the Great Migration. As Black Americans, fleeing the terror and humiliation of living in the Jim Crow South, began to make their way to the manufacturing centers of the North and Midwest, white Americans began to carve up their cities.²⁶⁷ In 1916, St. Louis became the first city in the United States to enact a segregation ordinance by voter referendum.²⁶⁸ It was approved by a two-thirds majority.²⁶⁹ The ordinance was effectively struck down the following year, when the Supreme Court in *Buchanan v. Warley* held a similar ordinance unconstitutional, but, by then, the city had already established the blueprint for segregation that would be maintained by exclusionary zoning and racially restrictive covenants, among other forms of intimidation and violence.²⁷⁰

St. Louis adopted its first comprehensive zoning ordinance in 1919.²⁷¹ Though race neutral on its face, the goal of the plan, according to the city's planning engineer, was to preserve existing patterns of segregation, to prevent "colored people" from moving into the "finer residential districts."²⁷² White neighborhoods that had adopted racially restrictive covenants were zoned for the most restrictive use—single-family residential.²⁷³ Lands adjacent to Black neighborhoods were zoned for the most permissive use—vice and industry.²⁷⁴

The St. Louis plan not only segregated Black and white communities, but it also established a regime of racial capital, a self-replicating structure within which wealth would accrue to white residents who defended their neighborhoods against Black "encroachment."²⁷⁵ Observing that where property "values have depreciated, homes are either vacant or occupied by colored people," city planners all but fixed a relationship between the value of property and the race of its occupants, marking Black bodies, in turn, with the threat of containment and loss.²⁷⁶ Local and federal policies played a critical role in establishing this regime, but, to work, it had to be maintained by its white beneficiaries. Government policies guaranteed white homeowners the value of their investments by enlisting them in the work of policing racial boundaries. They were rewarded for racial vigilance.

Black residents of St. Louis, in turn, were not just denied the same privileges and resources that flowed to white Americans living in "finer residential

267. JOHNSON, *supra* note 264, at 251–52.

268. Jeannette Cooperman, *The Story of Segregation in St. Louis*, ST. LOUIS (Oct. 17, 2014, 9:47 AM), <https://www.stlmag.com/news/the-color-line-race-in-st.-louis/> [<https://perma.cc/7T89-RUDY>].

269. *Id.*

270. *See Buchanan v. Warley*, 245 U.S. 60 (1917).

271. *See* ROTHSTEIN, FERGUSON, *supra* note 264, at 8.

272. *Id.* at 7.

273. *Id.*

274. *Id.* at 9.

275. *Id.* at 8. *See also* JOHNSON, *supra* note 264, at 252 (citing language used by neighborhood associations that campaigned for residential segregation).

276. *See* ROTHSTEIN, FERGUSON, *supra* note 264, at 7.

districts”—better schools, services, and the appreciation of property values—they were consigned to live in crowded neighborhoods where they were bound to overpay for substandard housing—the effect of an artificial scarcity created by zoning and restrictive covenants, among other formal and informal means of exclusion.²⁷⁷ Because zoning regulations allowed landlords to subdivide properties, Black renters found themselves squeezed into crowded and dilapidated housing. Because Black renters had nowhere else to go, landlords were able to extract exorbitant rents from them.²⁷⁸ Segregation was profitable.²⁷⁹

Exclusionary zoning was intended not only to extract wealth from Black communities but to prepare for their eventual expulsion.²⁸⁰ As Yale Rabin observes, zoning patterns established in the early twentieth century were intended not only to exclude Black people from white neighborhoods but “to permit—even promote—the *intrusion* into black neighborhoods” of noxious uses.²⁸¹ These included not just polluting industries but liquor stores and brothels, perceived sources of social contamination and contagion, banished from other parts of the city.²⁸² Rabin describes this practice as “expulsive zoning” because it plainly anticipated the displacement of Black residents, who would eventually leave one way or another.²⁸³ In 1936, the St. Louis planning commission recognized that the existing land use pattern, confining too many to the inner city, amounted to a “deliberate creation of slums” which would inevitably “reduce our total population [by thirty-seven percent].”²⁸⁴ By the 1950s, the deterioration of housing conditions, the introduction of polluting industries, and other harm would qualify Black neighborhoods for urban renewal, or as one St. Louis activist put it, “black removal with white approval.”²⁸⁵

In this sense, expulsive zoning in the early twentieth century replicated practices used to displace Indigenous Americans through the nineteenth century. As the federal government opened Indian lands to white settlement, it did so in a manner that would “crowd” Indians, encouraging them to “consent” to leave.²⁸⁶ And just as earlier philosophers and judges justified their appropriation by characterizing Indian land as uncultivated “waste,” city planners would justify their appropriation of Black neighborhoods, having turned them into waste places, overwhelmed by noxious uses considered incompatible with the standards of white middle-class respectability.²⁸⁷

277. JOHNSON, *supra* note 264, at 255.

278. *Id.*

279. See generally N.D.B. CONNOLLY, *A WORLD MORE CONCRETE: REAL ESTATE AND THE REMAKING OF JIM CROW SOUTH FLORIDA* (2014).

280. See Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in *ZONING AND THE AMERICAN DREAM* 101, 101 (Charles M. Haar & Jerold S. Kayden, eds., 1989).

281. *Id.* (emphasis added).

282. *Id.* at 108; ROTHSTEIN, FERGUSON, *supra* note 264, at 9.

283. Rabin, *supra* note 280, at 108.

284. *Id.*

285. Johnson, *supra* note 264.

286. See *supra* note 152 and accompanying text.

287. See *supra* notes 164–67 and accompanying text.

In 1926, in *Village of Euclid v. Ambler Realty Co.*, the Supreme Court considered whether a zoning ordinance like the one adopted in St. Louis violated the rights of property owners by limiting their property's use and value.²⁸⁸ At the time, it was hardly obvious that the *Lochner* Court would uphold such a sweeping ordinance. The Court had taken a consistently narrow view of state police powers and a correspondingly expansive view of private property and contractual rights, routinely striking down laws intended to protect health, safety, and welfare. The district court struck down Euclid's zoning ordinance for precisely this reason, explaining that the ordinance bound "all the property in an undeveloped area . . . in a strait-jacket."²⁸⁹ Its overwhelming purpose was "to regulate the mode of living of persons who may hereafter inhabit it" to "classify the population and segregate them" even before they arrived.²⁹⁰

Justice Sutherland, writing for the majority of the Supreme Court, made no mention of the segregation of populations but instead recognized the wisdom of segregating certain "uses."²⁹¹ Zoning away potential nuisance—the sort of nuisance that a new factory might introduce to residential neighborhood—Justice Sutherland explained, was well within the state's police powers. But his analysis went further. The regulation of anticipated nuisance not only justified the separation of industrial from residential uses, it also justified the segregation of apartment buildings from single-family homes. Justice Sutherland wrote of the "parasit[ic]" character of apartment buildings, which "take advantage of the open spaces and attractive surroundings," "monopolizing the rays of the sun," while introducing "disturbing noises" and traffic, "depriving children of the privilege of quiet and open spaces for play."²⁹² Justice Sutherland says nothing about race in *Euclid*, but his racial meaning is clear, for instance, when he explains that "[a] nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard."²⁹³

The lasting significance of *Euclid* is not only that it granted local governments broad discretion to segregate "uses," but it also gave them a race-neutral rhetoric and rationale with which they could defend and deny their racial designs. *Euclid* offered a durable model for translating the crude racism of segregation into the more discreet language of bourgeois white liberalism, with its emphasis on residential character, quiet and enjoyment, low traffic and low density, and the safety of children—some children, at least. Moreover, *Euclid* recognized that state police powers—conventionally limited to promoting the health, safety, and welfare of the community—extended unequivocally to protecting property values. Thus, *Euclid* would allow members of the propertied class to advance their

288. 272 U.S. 365, 379–85 (1926).

289. *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924), *rev'd* 272 U.S. 365 (1926).

290. *Id.*

291. *Euclid*, 272 U.S. at 396–97.

292. *Id.* at 394–95.

293. *Id.* at 388.

material interests over and against the well-being of others by conflating their private interests with the public good.

The racial asymmetries established by restrictive covenants and exclusionary zoning in the 1920s were further amplified by New Deal Era policies intended to promote white homeownership during a period of suburban expansion. The Federal Housing Administration (FHA), established in 1934, guaranteed loans to applicants buying homes in white neighborhoods, but not in Black neighborhoods, equating property value and stability to white exclusivity. The FHA considered neighborhoods that were covered by “zoning regulations and appropriate deed restrictions”—racially restrictive covenants—to be safer investments than those left vulnerable to “infiltration of inharmonious racial or nationality groups.”²⁹⁴ The FHA’s first underwriting manual, distributed to appraisers in 1935, advised underwriters that for a neighborhood to “retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes.”²⁹⁵ A few years later, to simplify underwriting decisions, the federal Home Owners Loan Corporation promulgated its notorious color-coded maps of American cities, “redlining” neighborhoods considered high-risk or “hazardous,” ensuring that they would be starved of the same resources extended to white neighborhoods.²⁹⁶

The FHA encouraged white flight not only by insuring the mortgages of individual home buyers but by subsidizing highway construction and insuring the construction of entire subdivisions. Richard Rothstein illustrates this phenomenon by contrasting the development of two subdivisions in St. Louis County: St. Ann and De Porres. In 1943, Charles Vatterott, a relatively progressive builder, obtained FHA guarantees to create St. Ann, a subdivision of single-family homes for working-class Americans.²⁹⁷ But to obtain FHA funding, he was required to restrict ownership to white families. Still committed to offering a comparable opportunity to potential Black buyers, he built another subdivision for Black residents, called De Porres. Vatterott intended to sell De Porres homes to Black families with income comparable to white families in St. Ann, but because he could not obtain FHA funding for the project, homes in De Porres were not as nice as those in St. Ann. De Porres had none of the same parks and playgrounds. Because potential buyers themselves were denied FHA-guaranteed loans, Black residents of De Porres tended to rent rather than own their homes.²⁹⁸

Exclusionary zoning practices adopted in urban centers established a pattern that would radiate outward into the suburbs. After *Euclid* established that local governments had broad authority to regulate land use, the federal government promulgated model zoning legislation which was quickly adopted by cities and suburbs across the United States. In the St. Louis area, even tiny white

294. ROTHSTEIN, *COLOR OF LAW*, *supra* note 264, at 83 (citation omitted).

295. JOHNSON, *supra* note 264, at 316.

296. *Id.*

297. ROTHSTEIN, *FERGUSON*, *supra* note 264, at 15, 18, 30.

298. *Id.*

subdivisions like St. Ann incorporated themselves into what Colin Gordon has called “postage-stamp municipalities.”²⁹⁹ Between 1930 and 1970, more than seventy new municipalities were carved out of St. Louis County. Some, like Champ, were home to only a dozen people; others, like Ladue, required absurdly large lot sizes.³⁰⁰

Often, the first order of business in these tiny enclaves was to enact a zoning ordinance to limit all future development to single-family residential housing, preventing the construction of public or affordable housing.³⁰¹ Municipal boundary lines would harden emerging patterns of racial and economic segregation, blocking the flow of resources and tax revenues from one municipality to the next, allowing white suburbanites to engage in what Charles Tilly has called “opportunity hoarding.”³⁰² Some municipal boundaries, like the one dividing all-white Ferguson from mostly-Black Kinloch, had been fortified with chains and barricades.³⁰³ A sundown town for the first half of the twentieth century, Ferguson allowed Black nannies and gardeners from neighboring Kinloch to work in the homes of white families but expected them to leave by nightfall. In the 1930s, as white families began moving into neighborhoods surrounding Kinloch, they cleaved themselves into the town of Berkeley, supporting better schools with a higher tax base, as Kinloch became a “dilapidated ghetto.”³⁰⁴

Colin Gordon explains that “[b]y the early 1970s, Ferguson occupied a precarious spot in St[.] Louis’s spatial hierarchy.”³⁰⁵ One of few municipalities incorporated in the late-nineteenth century, before the era of exclusionary zoning, Ferguson allowed for the construction of apartment buildings. For that reason, it was accessible to white working-class families fleeing the city. Like many inner-ring suburbs, through the 1960s, Ferguson defended its racial exclusivity with restrictive covenants, steering practices, and intimidation. But after *Shelley v.*

299. COLIN GORDON, *MAPPING DECLINE: ST. LOUIS AND THE FATE OF THE AMERICAN CITY* 45 (2008). Jodi Rios and Walter Johnson suggest that this fragmentation also reflects a deep investment in local autonomy in the St. Louis region dating back to the first half of the nineteenth century, when the region was governed by French, then Spanish, then American law. Concerned with protecting their existing interests in land, trade, and slavery, powerful individuals and families sought local control over laws governing, above all, property. Responding to the demands of powerful individuals and families in St. Louis, Missouri was the first state to adopt home rule in its constitution. JODI RIOS, *BLACK LIVES AND SPATIAL MATTERS: POLICING BLACKNESS AND PRACTICING FREEDOM IN SUBURBAN ST. LOUIS* 61 (2020); JOHNSON, *supra* note 264, at 141–42.

300. See JOHNSON, *supra* note 264, at 322; Gordon, *supra*, note 264. The St. Louis suburb of Ladue has made a recent entry into the property law canon for testing the First Amendment with its conformist zoning restrictions. See *City of Ladue v. Gilleo*, 512 U.S. 43, 45 (1994); cf. *Missouri ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305, 308 (Mo. 1970) (considering the authority of Ladue’s architectural board to create zoning ordinances under the Missouri Constitution).

301. See Balko, *supra* note 45; GORDON, *supra* note 299, at 129–36; Johnson, *supra* note 264.

302. See CHARLES TILLY, *DURABLE INEQUALITY* 91 (1998); Gordon & Hayward, *supra* note 264.

303. See Richard Rothstein, *The Making of Ferguson: How Decades of Hostile Policy Created a Powder Keg*, AM. PROSPECT (OCT. 13, 2014), <https://prospect.org/civil-rights/making-ferguson-decades-hostile-policy-created-powder-keg/> [<https://perma.cc/6NAC-7DFT>].

304. *Id.*

305. Gordon & Hayward, *supra* note 264.

Kraemer, as Black families began moving in, white families began moving out.³⁰⁶

2. After *Shelley*: Divestment and Predation

In the property law canon as in the public imaginary, *Shelley v. Kraemer* marks a high point in the evolution of American property law. In *Shelley*, the Supreme Court held that judicial enforcement of racially restrictive covenants was unconstitutional.³⁰⁷ As such, it is often represented as one of the achievements of the Civil Rights Era. But by the time *Shelley* was decided, in 1948, Black communities across the country had already been shut out of huge swaths of suburban development. Exclusionary zoning and restrictive covenants had left a permanent mark on the American landscape, carving it up into zones of white privilege and Black deprivation, ascribing value to certain bodies, family arrangements, and aesthetic preferences while ascribing risk to other non-conforming bodies, families, and tastes.³⁰⁸ While the crude racism of restrictive covenants could not survive the kind of scrutiny brought to racist expression during the Civil Rights Era, the more discreet, colorblind racism of exclusionary zoning—sanctioned by the Court in *Euclid*—had become entirely commonplace, saturating the culture of real estate investment and consumption.

The achievements of the Civil Rights Era also precipitated a shift in political culture. In Heather McGhee's summary of the phenomenon, "racism drained the pool."³⁰⁹ "In the 1920s," she writes, "towns and cities tried to outdo one another by building the most elaborate pools; in the 1930s, the Works Progress Administration put people to work building hundreds more."³¹⁰ Municipal pools, schools, libraries, bridges, and highways had come to symbolize what government could do for people. But by the 1950s, rather than integrate what were now considered essential public goods and services, white Americans began to withdraw their material and ideological investment from "big government" and reinvest in private rights.³¹¹

In other words, the achievements of the Civil Rights Era were undermined by neoliberal policies of the 1970s, which, among other things, cut public spending, lowered property taxes, and criminalized the dispossessed. Critical to the study of property law, this meant restricting the flow of government resources that, until then, had subsidized white ownership—for instance, by seizing and redistributing Indian lands through the nineteenth century and by underwriting the creation of

306. *See id.*

307. 334 U.S. 1, 20 (1948).

308. *See, e.g.,* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding zoning ordinance that restricted one-family dwellings to not more than two persons unrelated by blood, adoption, or marriage); Ames Rental Prop. Ass'n v. City of Ames, 736 N.W.2d 255, 257 (Iowa 2007) (upholding zoning ordinance that restricted single-family dwellings to no more than three unrelated persons), *cert. denied*, 552 U.S. 1099 (2008).

309. HEATHER MCGHEE, THE SUM OF US: WHAT RACISM COSTS EVERYONE AND HOW WE CAN PROSPER TOGETHER 17 (2021) (capitalization omitted).

310. *Id.* at 23.

311. *See id.*

segregated suburbs in the 1930s. We cannot understand the failed promise of a civil rights victory like *Shelley* without also understanding the backlash it generated—the counterrevolution of property it instigated.³¹²

Desegregation in the 1960s was followed by disinvestment in the 1970s. During the New Deal Era, federal and state resources flowed generously to white suburbanites, who were given access to quality housing, public education, and the opportunity to accumulate wealth. But the 1970s ushered in a new era of fiscal austerity, which plunged inner-ring suburbs like Ferguson into crisis.³¹³ In the more affluent post-war suburbs of St. Louis, where property values were high and the cost of services relatively low, revenue from property taxes was sufficient to cover the cost of providing services. But in older suburbs like Ferguson, things were falling apart. Population and property values were declining, while the cost of maintaining aging infrastructure and addressing social need was increasing. No longer able to rely on federal and state subsidy, declining municipalities were forced to search for alternative sources of revenue.

In Ferguson, and throughout Missouri, local officials were further constrained in their ability to raise tax revenue because, in 1980, the Missouri legislature amended the state constitution to require voter approval for most tax increases.³¹⁴ The primary effect of the amendment was to prevent municipalities like Ferguson from taxing property owners to pay for needed services.³¹⁵ Ferguson cut spending on schools, infrastructure, and social services. Unable to raise property taxes, Ferguson had come to rely on the revenue generated by regressive sales and use taxes, which, as Walter Johnson explains, allowed the city to extract more revenue from Black renters heating their homes and paying phone bills than from their landlords.³¹⁶ Meanwhile, “[t]he vast wealth of the city, scarcely taxed at all, is locked up in property that African Americans were prevented from buying for most of its history.”³¹⁷

Deprived of government subsidy and unable to raise property taxes, places like Ferguson are forced to compete with one another to attract new sources of revenue, compounding inequalities and inefficiencies produced by hyper-fragmentation. In St. Louis County, white suburbs have cannibalized Black neighborhoods, annexing communities with promises of integration and sharing resources, only to force annexed residents out through tax foreclosures and redevelopment

312. For a more in-depth discussion of this, see *infra* Part IV.

313. See *infra* Part IV; Peck, *supra* note 260, at 643, 645.

314. Gordon & Hayward, *supra* note 264; Kimberly Hubbard, Note, *There Must Be a Better Way: The Unintended Consequences of Missouri's Hancock Amendment: Zweig v. Metropolitan St. Louis Sewer District*, 412 S.W.3d 233 (Mo. 2013) (*en banc*), 80 MO. L. REV. 275, 275–76 (2015).

315. See sources cited *supra* note 314. Before he was killed, Michael Brown had just graduated from a badly underfunded school, almost all Black, which had lost its accreditation in 2012. He was preparing to enroll in a nearby for-profit college which had been investigated for preying on “vulnerab[le]” students. Hannah-Jones, *supra* note 266.

316. Johnson, *supra* note 264.

317. *Id.*

schemes a few years later.³¹⁸ Neighboring municipalities have waged annexation battles over parcels of land with the vague hope that new development will generate revenue and increase property values.³¹⁹ Places like Ferguson can compete with more affluent municipalities only by offering massive tax breaks to prospective investors or by going into debt, selling municipal bonds, to pay for the sorts of amenities that would attract new businesses.³²⁰ Ferguson has done both, spending millions—at the expense of local residents—to attract big-box stores and billion-dollar corporations, and forgoing millions more in the form of low property assessments and tax abatements.³²¹

In 1997, Ferguson managed to lure new development to West Florissant Avenue, the site of protest two decades later, by offering what is known as tax incremental financing (TIF).³²² TIFs allow municipalities to subsidize private development by deferring the payment of property taxes on the development. In theory, TIF projects pay for themselves: the increase in property values and taxes generated by new development is supposed to cover the costs of the initial improvements. But if they do not, then local residents are often forced to pay for foregone revenue as well as the debt incurred by selling municipal bonds.³²³

TIFs often fail, but a TIF used to revitalize part of Ferguson's downtown has succeeded in attracting new restaurants and shops. That success, however, has not been shared. The redevelopment project was designed to lure business from other, more affluent parts of St. Louis, while excluding the local residents of Ferguson. There was no easy road, for instance, for Michael Brown to travel from Canfield Drive, where his body lay for hours, to Ferguson's downtown redevelopment. If he had a car, he would have had to drive along an undeveloped stretch of Ferguson Avenue and make a U-turn. Because the city built no sidewalks along the way, he would have to walk along the shoulder, hazarding a stop or citation for "manner of walking in the roadway."³²⁴ Since Brown's death, numerous corporations have made commitments to invest in the rebuilding of Ferguson, but almost all of this new development has been concentrated in the whiter, more affluent parts of Ferguson, bypassing the neighborhoods that went up in flames,

318. ROTHSTEIN, *FERGUSON*, *supra* note 264, at 22–23; JOHNSON, *supra* note 264, at 389–91.

319. *See* Gordon & Hayward, *supra* note 264.

320. *See* Johnson, *supra* note 264.

321. *See* Gordon & Hayward, *supra* note 264; Johnson, *supra* note 264.

322. *See* Johnson, *supra* note 264; *see also* Anthony Flint, *The Hidden Costs of TIF: Reconsidering a Vaunted Economic Development Tool*, LAND LINES, Oct. 2018, at 9, <https://www.lincolnst.edu/publications/articles/hidden-costs-tif> [<https://perma.cc/VZK3-VMLR>].

323. In Missouri, although the Hancock Amendment prevents municipalities from raising property taxes without a voter referendum, it allows municipalities to impose *sales* taxes. This sales tax paid by the residents of Ferguson is used to repay the banks and investors that now hold the city's debt, while banks and investors themselves assume little risk. Municipal bonds are safe investments, among other reasons because municipalities are obligated to pay their debts before, for instance, paying for new schools or roads. *See* Johnson, *supra* note 264.

324. *Id.* *See also* DOJ, C.R. DIV., *supra* note 45, at 67.

exacerbating inequality.³²⁵

Contrast the way in which the law assigns criminality to Brown's "manner of walking" but not the century of opportunity hoarding that left Brown with nowhere to go. Police officials and others have insistently argued that Brown was somehow responsible for his own killing—because he allegedly shoplifted a bag of cigarillos.³²⁶ But those who have benefited from a local regime of racial confinement, expropriation, and over-policing remain blameless.³²⁷ Breonna Taylor's dating history brought her within the scope of police surveillance and collective scrutiny, while Louisville's aggressive redevelopment plan, which contemplated the destruction of her ex-boyfriend's neighborhood, largely escapes judgment—or is celebrated as "renewal."³²⁸ Behind the killing of Eric Garner, Freddie Gray, and others, there are similar stories to tell about the relation between property and policing, and a white investment in real estate that overwhelms concern for Black life.³²⁹

In a recent op-ed, Betsy Hodges, the former mayor of Minneapolis, observes that white liberals have finally joined Black Americans in protesting violent policing, but they continue to resist systemic change.³³⁰ Many of the cities in which Black Americans have been subject to high-profile killing—Chicago, Baltimore, Minneapolis—have been led by Democrats for decades but are as segregated as they were a generation ago.³³¹ Rather than redress racial inequality by adopting

325. See Tracy Jan, *The Forgotten Ferguson*, WASH. POST (June 21, 2018), <https://www.washingtonpost.com/graphics/2018/business/is-racial-discrimination-influencing-corporate-investment-in-ferguson/>.

326. See, e.g., Beverly Hallberg & Shelby Steele, *Shelby Steele Discusses His New Doc "What Killed Michael Brown?"*, INDEP. WOMEN'S F. (Nov. 20, 2020), <https://www.iwf.org/2020/11/20/shelby-steele-discusses-his-new-doc-what-killed-michael-brown/> [<https://perma.cc/74EY-YVZ8>].

327. See Ezra Klein, *The Police Are the Issue in Ferguson, Not Michael Brown's Character*, VOX (Aug. 15, 2014, 3:40 PM), <https://www.vox.com/2014/8/15/6005861/michael-brown-darren-wilson-ferguson-shooting> [<https://perma.cc/8EUG-NAK9>].

328. See Rukmini Callimachi, *Breonna Taylor's Life Was Changing. Then the Police Came to Her Door*, N.Y. TIMES (Aug. 30, 2020), <https://www.nytimes.com/2020/08/30/us/breonna-taylor-police-killing.html>; Richard A. Oppel Jr., Derrick Bryson Taylor, & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (April 26, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html>; Brenden Beck, *The Role of Police in Gentrification*, APPEAL (Aug. 4, 2020), <https://theappeal.org/the-role-of-police-igentrification-breonna-taylor/> [<https://perma.cc/3LJ5-FRJH>].

329. See Brenden Beck & Adam Goldstein, *Governing Through Police? Housing Market Reliance, Welfare Retrenchment, and Police Budgeting in an Era of Declining Crime*, 96 SOC. FORCES 1183, 1187–89 (2018); Emily Badger, *The Long, Painful and Repetitive History of How Baltimore Became Baltimore*, WASH. POST (Apr. 29, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/04/29/the-long-painful-and-repetitive-history-of-how-baltimore-became-baltimore/>; Abdallah Fayyad, *The Criminalization of Gentrifying Neighborhoods*, ATLANTIC (Dec. 20, 2017), <https://www.theatlantic.com/policies/archive/2017/12/the-criminalization-of-gentrifying-neighborhoods/548837/>.

330. Betsy Hodges, *As Mayor of Minneapolis, I Saw How White Liberals Block Change*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/opinion/minneapolis-hodges-racism.html>.

331. See Benjamin Wallace-Wells, *The Intolerable Tensions Between American Cities and Their Police Forces*, NEW YORKER (May 29, 2020), <https://www.newyorker.com/news/our-columnists/the-intolerable-tensions-between-american-cities-and-their-police-forces>; Steven Malanga, *Why Can't Big-City Democrats Reform the Police?*, CITY J. (June 12, 2020), <https://www.city-journal.org/democrats-police-reform> [<https://perma.cc/4Z39-SD7Z>].

policies that would redistribute public resources, integrate public schools, and promote affordable housing, Hodges writes, white liberals refuse to share resources and instead settle for “*illusions of change*,” embracing modest programs that “make us feel better about racism, but fundamentally change little for the communities of color whose disadvantages often come from the hoarding of advantage by mostly white neighborhoods.”³³² Police departments are asked to do the “dirty work” of white liberals—to preserve white comfort and white property by aggressively policing Black communities. A “sustainable transformation of policing,” she writes, “will require that white people of means disinvest in the comfort of our status quo.”³³³

3. Propriety and Policing

In her first novel, *The Bluest Eye*, set in her hometown of Lorain, Ohio in 1940, Toni Morrison writes of how Black owners tended their homes.

Propertied black people spent all their energies, all their love, on their nests. Like frenzied, desperate birds, they overdecorated everything; fussed and fidgeted over their hard-won homes; . . . they painted, picked, and poked at every corner of their houses. And these houses loomed like hothouse sunflowers among the rows of weeds that were the rented houses. Renting blacks cast furtive glances at these owned yards and porches In the meantime, they saved, and scratched, and piled away what they could in the rented hovels, looking forward to the day of property.³³⁴

Their longing for the security and self-possession guaranteed by homeownership was animated by a dread of being “put outdoors”—the threat of eviction, shadowed by memories of slavery and anticipation of the prison, the threat of losing status, of being exposed to trespass or violence, without protection.

There is a difference between being put *out* and being put *outdoors*. If you are put out, you go somewhere else; if you are outdoors, there is no place to go Outdoors was the end of something, an irrevocable, physical fact, defining and complementing our metaphysical condition. Being a minority in both caste and class, we moved about anyway on the hem of life, struggling to consolidate our weaknesses and hang on, or to creep singly up into the major folds of the garment. Our peripheral existence . . . was something we had learned to deal with—probably because it was abstract. But the concreteness of being outdoors was another matter—like the difference between the concept of death and being, in fact, dead. Dead doesn’t change, and outdoors is here to stay.³³⁵

In Morrison’s telling, Black owners “fuss and fidget” over their homes, not out of pride, but because Blackness itself imperils possession. Ownership offers little

332. Hodges, *supra* note 330 (emphasis added).

333. *Id.*

334. TONI MORRISON, *THE BLUEST EYE* 18 (1970).

335. *Id.* at 17–18.

repose because the threat of dispossession always looms. “Outdoors is here to stay.” In St. Louis County, a Black family might lose its grip on ownership because the back door is unpainted, the curtains mismatched, or the grass too tall.³³⁶

In the archives of the Missouri Historical Society, a handwritten document entitled “Normandy’s Black History” recounts that, in the 1960s, as Black families began moving into the inner-ring suburbs of St. Louis, “nearly every house and yard improved in appearance.”³³⁷ But as things inevitably worsened—the result of exploitive real estate practices and white flight, among other economic and political transformations—Black residents were blamed for the decline. In her critical ethnography of St. Louis suburbs, Jodi Rios reports that she routinely heard municipal leaders assert that Black people “don’t know how to behave in the suburbs,” attributing the manufactured decline of inner-ring suburbs to Black pathology.³³⁸

After *Shelley v. Kraemer* and the Fair Housing Act of 1968 began to open white suburbs to Black residents, across the country, real estate agents engaged in blockbusting—stoking panic among white homeowners, encouraging them to sell fast and low, only to turn around and resell those same homes to Black buyers at higher rates. Because these properties were turned around quickly, often without repair, or had been subdivided without proper permits, their new owners were immediately burdened with unexpected expense and liability.³³⁹ In St. Louis County and urban centers around the country, suburban Black communities were also disproportionately affected by deindustrialization, deregulation, and the defunding of social services through the 1970s and 1980s.³⁴⁰ As populations and property values began to decline, local officials passed a slew of housing ordinances intended to defend and protect respectable suburbs against the decline associated with Black invasion. These housing ordinances, redolent of earlier Black codes, regulated, among other things, front yard barbeques, the number of people who could spend the night, where children could leave their toys, and the security of “trash can lid[s].”³⁴¹

In property law casebooks, the problem with “aesthetic zoning” is often introduced with a pair of cases involving peace activists placing signs of protest in their second-floor windows or the imposition of modernist architecture among uniform Tudors—cases involving the rebellious suburbanites asserting their First Amendment freedoms against the repressive conformity of their neighbors.³⁴²

336. RIOS, *supra* note 299, at 2, 100; DOJ, C.R. Div., *supra* note 45, at 7.

337. RIOS, *supra* note 299, at 70.

338. *Id.* at 91.

339. *Id.* at 71.

340. See GILMORE, *supra* note 261, at 5–29; Michael C. Dawson & Megan Ming Francis, Essay, *Black Politics and the Neoliberal Racial Order*, 28 PUB. CULTURE 23, 27 (2016).

341. RIOS, *supra* note 299, at 2; see Balko, *supra* note 45; THE PRISON IN TWELVE LANDSCAPES (Oh Ratface Films 2016).

342. SPRANKLING & COLETTA, *supra* note 6, at 821–33; DUKEMINIER ET AL., *supra* note 92, at 821–940; SINGER ET AL., *supra* note 17, at 423–512.

Those two cases also happen to arise in the elegant suburbs of St. Louis. But since the 1980s—the era of broken-windows and order-maintenance policing—the problem with aesthetic zoning, especially for the abandoned classes, is that, by conflating the protection of property value with public safety and welfare, it has allowed municipalities to aggressively police and punish the “non-conforming” expressions of Blackness and poverty.

Ferguson’s solution to its financial problems are well-known. By the 1990s, Ferguson had come to rely on revenues generated by extracting fees and fines from its residents, who were aggressively policed for minor traffic and housing code violations.³⁴³ The practice intensified after the financial collapse of 2007, after which Ferguson drew as much as twenty percent of its total revenue from fees and fines.³⁴⁴ By 2013, Ferguson was processing warrants at a rate of three per household.³⁴⁵ In nearby Jennings, the rate was two per household in 2014.³⁴⁶ In 2016, Jennings settled a major class action lawsuit for imprisoning 2,000 residents for small unpaid fees and fines.³⁴⁷ Jodi Rios observes with irony that, in a county so troubled by fragmentation, one of very few acts of collaboration has yielded a shared database of outstanding warrants. After “sitting out” time in jail for unpaid fines in one jurisdiction, an individual might be taken to a courthouse in the next jurisdiction, as Rios writes, creating a “leapfrogging jail population” across the county.³⁴⁸ In St. Louis County, municipalities are so finely cut that a person driving a four-mile stretch of a single road might be ticketed by as many as eight police departments.³⁴⁹ As Black residents report, “[t]he only way you know you’re entering a different city is a different police officer stops you.”³⁵⁰ The shared database ensures that everyone gets “they cut.”³⁵¹

In her recent documentary on carceral landscapes, Brett Story features a woman in St. Louis County who was jailed for failing to pay a \$175 fine for “failing to secure a trashcan lid.”³⁵² In her own telling, when she learned of the warrant for the citation, the woman was incredulous. She had never seen or signed the citation, which itself included inconsistencies. Fed up with constant harassment and extraction, she refused to pay. “I had the money, but I work too hard for

343. DOJ, C.R. Div., *supra* note 45, at 7, 13–14.

344. Some neighboring municipalities drew twice as much from fees and fines. See Gordon & Hayward, *supra* note 264.

345. DOJ, C.R. Div., *supra* note 45, at 3; Emily Thomas, *Ferguson Averages 3 Warrants per Household, New Report Shows*, HUFFPOST (Aug. 22, 2014, 3:53 PM), https://www.huffpost.com/entry/ferguson-warrants-per-household_n_5698454.

346. Complaint at 3, *Jenkins v. City of Jennings*, No. 4:15-cv-00252-CEJ (E.D. Mo. Feb. 8, 2015); see Edwin Rios, *A St. Louis Suburb Jailed Nearly 2,000 People for Not Paying Fines*, MOTHER JONES (Dec. 16, 2016), <https://www.motherjones.com/politics/2016/12/st-louis-jennings-ferguson-debtors-prison-lawsuit/>.

347. See Rios, *supra* note 346.

348. RIOS, *supra* note 299, at 86.

349. STORY, *supra* note 261.

350. RIOS, *supra* note 299, at 99.

351. *Id.*; THE PRISON IN TWELVE LANDSCAPES, *supra* note 341.

352. THE PRISON IN TWELVE LANDSCAPES, *supra* note 341.

my money to give it to you over a freakin' trash can lid."³⁵³ She would not let a friend pay either. After taking herself to the police station, she was fingerprinted and stripped. Choking up while recounting her ordeal, the woman explained that she was treated "like a common criminal."³⁵⁴ The only people who showed compassion in the prison were the Black women working there, "because it was wrong." The cell was filthy. There was "blood on the wall, feces on the wall," no towels or soap. She refused to eat. After three days, feeling weak, she finally asked officers if she could "buy herself out." They said no, she would have to stay another twelve days.³⁵⁵

Her story brings into relief the essential impropriety of property itself. The quiet grace of the "favored quarter" is indeed sustained by "tyranny," as Sheryll Cashin finely put it—and by terror, by taking everything from those who have nothing and who, in turn, live in fear of being put outdoors or behind bars, with blood on the walls.³⁵⁶

C. CRIMINALIZATION AS FRONTIER

America needs a frontier. American democracy was "born of free land," Frederick Jackson Turner argued; "its continuous recession, and the advance of American settlement" were the condition for individual freedom and political equality.³⁵⁷ By the time Turner articulated this in his influential thesis in 1921, at the height of Jim Crow, industrialization, and overseas expansion, the term "frontier" had become freed from its territorial pinning to suggest that the American project was conditioned on continuous expansion—new wilderness to tame, new resources to claim, markets to manifest.

In the last forty years, deindustrialization has made frontiers out of urban "waste" spaces and a commons out of a criminalized class. Post-industrial cities, burdened by populations rendered redundant by the offshoring of manufacturing and denied federal and state funding, have sought to rehabilitate themselves by investing in real estate capitalism, by turning themselves into pleasure grounds, replete with new waterfronts and bike lanes for the young professionals they hope to attract, developers and investors behind them.³⁵⁸ Of course, the neighborhoods most ripe for redevelopment are precisely those to which Black and working class communities were confined a century earlier, the same communities disproportionately affected by deregulation and divestment, the same

353. *Id.*

354. *Id.*

355. *Id.*

356. Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1987 (2000); see RIOS, *supra* note 299, at 85; THE PRISON IN TWELVE LANDSCAPES, *supra* note 341.

357. Frederick Jackson Turner, Paper Read at the Meeting of the American Historical Association in Chicago: The Significance of the Frontier in American History (July 12, 1893), <http://nationalhumanitiescenter.org/pds/gilded/empire/text1/turner.pdf> [<https://perma.cc/6Y3Z-JVY3>].

358. See SAMUEL STEIN, CAPITAL CITY: GENTRIFICATION AND THE REAL ESTATE STATE 49–92 (2019).

communities from which police and municipalities extract a steady stream of fees and fines.

This transformation often precipitates—is sometimes preceded by—more policing.³⁵⁹ As municipalities seek to rehabilitate themselves, not by investing in roads, schools, or safety but by reorienting their practices toward raising property values, policing becomes part of a broader redevelopment strategy. Brenden Beck writes that municipalities often intensify “quality-of-life” or “order maintenance” policing in gentrifying neighborhoods to “clean [them] up,” to make them more attractive to newcomers and developers.³⁶⁰ Eric Garner’s numerous encounters with the police for selling loose cigarettes on a “transitional” block in Staten Island were precipitated by complaints about loitering and “disorder” from landlords and business owners.³⁶¹ He did not represent a threat to public safety, but he stood in the way of neighborhood improvement. The family of Breonna Taylor alleges that the botched raid that led to Taylor’s death, in her home in the middle of the night, was part of a plan to clear the street for real estate development.³⁶²

Calls to redress over-policing and mass incarceration require more than “rehumanization” or recognition of Black life. They require a more thoroughgoing transformation of the relation between property and policing, white investment in property, and the criminalization of poverty. Without a reconstruction of expropriable personhood in the American imaginary, criminalization remains a frontier of racial capital, a site of continuous extraction, a renewable source of revenue. The expansion of the private prison industry alongside the criminalization of migration; the sale of prison labor to private companies and the Defense Department; California’s reliance on inmates to fight wildfires—these are by now familiar examples of the United States’ deep investment in the extraction of value from the criminalized dispossessed.³⁶³

Efforts to redress abusive policing have largely focused on police reform rather than the economic interests preserved and promoted by abusive policing. The Justice Department concluded its otherwise remarkable report on predatory

359. See Beck & Goldstein, *supra* note 329, at 1201–04.

360. Brenden Beck, *Policing Gentrification: Stops and Low-Level Arrests During Demographic Change and Real Estate Reinvestment*, 19 CITY & CMTY. 245, 254, 267 (2020).

361. See Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html>.

362. Igor Derysh, *Was Breonna Taylor Killing Driven by Gentrification? Studies Suggest It’s Possible*, SALON (July 23, 2020, 6:00 AM), <https://www.salon.com/2020/07/23/was-breonna-taylor-killing-driven-by-gentrification-studies-suggest-its-possible/> [<https://perma.cc/K983-879V>].

363. See CORECIVIC, 2019 ANNUAL REPORT 2, 7, 10 (2019), <http://ir.corecivic.com/static-files/fc9bf96b-56dc-4b8f-b631-431c1f717e31> [<https://perma.cc/LY3X-5E3A>]; Laura Carlsen, *How Private Prisons Profit from the Criminalization of Immigrants*, COUNTERPUNCH (Dec. 12, 2012), <https://www.counterpunch.org/2012/12/12/how-private-prisons-profit-from-the-criminalization-of-immigrants/> [<https://perma.cc/RB36-234LJ>]; Whitney Bennis, *American Slavery, Reinvented*, ATLANTIC (Sept. 21, 2015), <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/>; Maanvi Singh, *Pandemic Sidelines More than 1,000 Incarcerated Wildfire Fighters in California*, GUARDIAN (July 10, 2020, 4:35 PM), <https://www.theguardian.com/us-news/2020/jul/10/california-wildfire-coronavirus-prison-incarcerated-firefighters> [<https://perma.cc/KQ9F-MAZ5>].

policing in Ferguson with a fairly modest set of recommendations. The report recommended that the police department improve training and oversight policies while diversifying personnel.³⁶⁴ But it did not address the broader political economy shaped by municipal decisions—decisions to hoard resources, avoid raising taxes on property owners and corporate residents, and, instead, mine the most vulnerable for fees and fines.³⁶⁵ After the uprising in Ferguson, the state of Missouri enacted legislation to limit municipal court abuses by capping the amount of revenue generated from traffic fines.³⁶⁶ But as long as cities in Missouri remain starved for revenue, the limits on traffic fines might encourage municipalities to raise revenue through more aggressive enforcement of property violations.

In the meantime, entrepreneurs have found ways to profit from the heightened cost of police brutality, often through schemes that shift that cost from municipalities back to overpoliced communities. The proliferation of “police brutality bonds” is illustrative.³⁶⁷ In the last decade, twelve cities paid roughly \$880 million for police related judgments and settlements.³⁶⁸ Lawyers often assume that huge financial penalties will deter future misconduct, but many cities have simply incorporated the cost of misconduct into their budgets. Cities that cannot afford the cost of their own misconduct issue bonds to raise funds to pay settlements and damages.³⁶⁹ Banks and investors collect fees and interest on the bonds while shifting the cost of police misconduct to taxpayers, often members of communities that are most vulnerable to over-policing.³⁷⁰ In other words, police brutality bonds effectively transfer wealth from communities that are already subject to over-policing to banks and wealthy investors.

Ingrid Eagly and Joanna Schwartz write of the emergence of “privatized police policymaking.”³⁷¹ One private company, Lexipol, has written police policies and training manuals for roughly 3,000 police agencies. The company holds itself out as a cost-saving alternative to more democratic forms of policymaking, not only because adopting its manuals saves time, but because the policies themselves limit police departments’ exposure to liability.³⁷² It does this, in part, by drafting

364. See DOJ, C.R. DIV., *supra* note 45, at 90–96.

365. See *id.*

366. *Missouri SB 5: Modifies Distribution of Traffic Fines and Court Costs Collected by Municipal Courts*, FINES & FEES JUST. CTR. (Dec. 1, 2014), <https://finesandfeesjusticecenter.org/articles/missouri-sb-5-fines-fees-municipal-courts/> [<https://perma.cc/6K4H-5SHD>].

367. ALYXANDRA GOODWIN, WHITNEY SHEPARD & CARRIE SLOAN, POLICE BRUTALITY BONDS: HOW WALL STREET PROFITS FROM POLICE VIOLENCE 3–4 (2018), https://acrecampaigns.org/wp-content/uploads/2020/06/ACRE_PBB_2020_2.pdf [<https://perma.cc/6TFK-QT7S>].

368. *Id.* at 4.

369. See Brooke Sweeney, *Wall Street Is Making Millions Off Police Brutality*, VICE NEWS (June 24, 2020, 12:29 PM), <https://www.vice.com/en/article/akzke/how-wall-street-profits-from-police-brutality> [<https://perma.cc/38YL-756W>].

370. See *id.*

371. Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol: The Privatization of Police Policymaking*, 96 TEX. L. REV. 891, 891 (2018).

372. *Id.* at 895, 915–22. Lexipol claims that agencies that have adopted its policies are subject to fewer claims and pay less in judgements and settlements than those that have not. *Id.* at 917.

policies and manuals that permit a *maximal* use of force, in some cases, beyond what is legal.³⁷³ Rather than embrace even modest and uncontroversial changes to policing practices, Lexipol promotes the avoidance of litigation costs over and above the avoidance of police killing.³⁷⁴

Calls to reduce mass incarceration and defund the police have been answered by libertarians who advocate the privatization of policing and punishment.³⁷⁵ Websites such as Nextdoor.com profit by homeowner anxieties about their property investment, providing a platform through which gentrifiers can surveil and monitor their neighbors.³⁷⁶ Maya Schenwar and Victoria Law observe that efforts to reduce mass incarceration have resulted in, among other things, the massive expansion of house arrest. With the expansion of electronic monitoring, private companies have found ways to profit from turning the home itself into a prison.³⁷⁷

Individuals sentenced to house arrest often end up in prison because they are unable to keep up with the cost of electronic monitoring.³⁷⁸ Human Rights Watch reported the case of Thomas Barrett who was arrested in Georgia for stealing a \$2 can of beer and sentenced to a \$200 fine and a year of probation.³⁷⁹ His probation term required that he wear an alcohol-monitoring bracelet, which cost him a \$50 startup fee, a \$39 monthly service fee, and \$12 daily fee. To keep up with the cost of paying roughly \$400 per month, Barrett sold his blood plasma twice a week. When he started skipping meals, his protein levels rendered him ineligible for blood donation. When he fell behind on paying Sentinel Offender Services, which provided him his ankle monitor, Barrett was finally sentenced to prison for failing to pay his debt.³⁸⁰

What Karl Marx suggested of industrial capitalism might be said of carceral capitalism. Like a vampire, it lives by consuming the life of others. But where industrial capitalism “only lives by sucking living labour,” carceral capitalism has found ways to suck value even from those no longer valued for their labor.³⁸¹

373. *Id.* at 925–27.

374. See Scott Morris, *Police Policy for Sale*, APPEAL (Feb. 13, 2019), <https://theappeal.org/lexipol-police-policy-company/> [<https://perma.cc/XJ96-DN37>].

375. See Allegra M. McLeod, Essay, *Beyond the Carceral State*, 95 TEX. L. REV. 651, 667 & n.75 (2017) (reviewing MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2015)); see Ira Stoll, *Professionalizing Police Hasn't Worked. Try Privatizing Instead.*, REASON (June 8, 2020, 4:10 PM), <https://reason.com/2020/06/08/professionalizing-policing-hasnt-worked-privatize-it-instead/> [<https://perma.cc/XNK7-LFE3>].

376. See generally NEXTDOOR, <https://nextdoor.com/> [<https://perma.cc/L3Q8-8Z78>] (last visited Mar. 14, 2022).

377. See MAYA SCHENWAR & VICTORIA LAW, *PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS* 29–30 (2020).

378. See *id.*

379. HUMAN RIGHTS WATCH, *PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY* 34–35 (2014), https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf [<https://perma.cc/Q7SU-LGZK>]; see also JACKIE WANG, *CARCERAL CAPITALISM* 155–56 (2018); *Policing and Profit*, *supra* note 45, at 1726.

380. See sources cited *supra* note 379.

381. Mark Steven, *Reading Marx on Halloween*, JACOBIN (Oct. 31, 2018), <https://jacobinmag.com/2018/10/marx-gothic-halloween-horror-capitalism-zombies-vampires-frankenstein> [<https://perma.cc/FMM2-6W4Z>];

IV. WHITENESS AS DISPOSSESSION

Whiteness is property, Cheryl Harris argued, because it confers status and value. Here, I argue that whiteness is also a form of personhood and agency, cultivated by law to advance the project of settler colonialism and racial capitalism. It is the right to advance one's own interest by taking from others. Chief Justice Taney recognized the correlation between white possession and racialized dispossession when he acknowledged that, although Black Americans routinely exercised the rights of citizens, Black Americans "had no rights which the white man was bound to respect."³⁸² In this sense, the claim that whiteness is dispossession recapitulates earlier arguments: by dangling the prospect of ownership, federal land policy recruited white settlers to participate in the dispossession and removal of Indians. Similarly, exclusionary New Deal policies rewarded white homeowners, landlords, real estate agents, and so on, for their racial vigilance.

In this part, I continue to explore the relation between possessive personhood and racial capitalism, first, by recovering the racial dimensions of Margaret Jane Radin's "personhood theory of property." W.E.B. Du Bois, among others, has offered a powerful account of the role that personal investment in white possession, white innocence, and white ignorance have played in maintaining regimes in racialized dispossession. Drawing on the work of Du Bois, I consider the ways in which racial progress in the United States has been continuously undermined by what he identified as the "counter-revolution of property."³⁸³

A. ON PERSONHOOD AND PROPERTY

Published in 1982, Margaret Jane Radin's *Property and Personhood* offered a powerful corrective to the economism that had come to overwhelm property law scholarship.³⁸⁴ She challenged the liberal foundations of American property law, laid by Locke and Bentham, by offering an alternative justification for property rights. Property rights were justified, in her account, not because they rewarded improvement or promoted wealth maximization but because they were essential to the development of personhood. Radin argued that "to achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment. The necessary assurances of control take the form of property rights."³⁸⁵ A person, in her account, is not the same as an individual. The individual, the subject of liberalism and law, is isolated and independent in her self-possession. But a *person* is born into the world of things and others, always already entangled in a world of relation and interdependence.

see, e.g., Wacquant, *supra* note 18, at 384–85 (comparing the current carceral system's impact on Black Americans to ghettos of the mid-twentieth century); WANG, *supra* note 379.

382. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; see MARTHA S. JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* 128–45 (2018).

383. W. E. B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA 1860–1880*, at 580 (Free Press 1998) (1935) (capitalization omitted).

384. Radin, *supra* note 20.

385. *Id.* at 957.

Radin's theory was itself derived from Hegel's assertion that property rights were essential to personal freedom and development. Freedom, for Hegel, was not the negative freedom of freedom from others but the realization of a capacity for self-determination *in relation* to things, others, and institutions.³⁸⁶ As Radin observes, "Hegel makes object relations the first step on his road from abstract autonomy to full development of the individual in the context of the family and the state."³⁸⁷ Abstract autonomy is realized through the assertion of control over matter; possession is the materialization of personal will. In Hegel's formulation, the primary role that property plays in securing personal development justifies "mankind's absolute right of appropriation over all things. . . . [P]roperty is the first embodiment of freedom and so is in itself a substantive end."³⁸⁸

Since it was introduced, Radin's personhood theory of property has enjoyed tremendous influence. It now appears in casebooks and treatises as a foundational justification for private property alongside Lockean and utilitarian approaches.³⁸⁹ It has been taken up with especially compelling force by progressive property scholars.³⁹⁰ It has also been credited with restoring to legal analysis a recognition of subjectivity and embodiment, generally sloughed away by economic approaches—we do not move through the world as disembodied cost-benefit calculators, she reminds us. Given her attention to subjectivity and embodiment, Radin's work has been identified as a model of feminist jurisprudence.³⁹¹

But despite her sensitivity to the worldly dimensions of ownership, her personhood theory of property fails to engage the ways in which *racialized* embodiment informs—or undermines—ownership, self-possession, and self-determination. Radin's *Property and Personhood* has surprisingly little to say about the terrifying legacy of slavery—the derangement of the distinction between persons and property. Nor does Radin's theory of possessive personhood countenance the historical conditions of its emergence, namely colonial conquest, racial slavery, and capitalist expansion.³⁹² For these reasons, Radin's personhood theory of property does little to reconstruct or reimagine the figure that remains entrenched as the subject of liberal legalism, the possessive individual. My interest here is not to single out Radin, but to call attention to the conventions of liberalism and legal thought that have allowed us to construct theories and justifications for property without confronting the tradition's deep entanglement with histories of racial

386. See generally MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004).

387. Radin, *supra* note 20, at 972.

388. *Id.* at 973 (citing GEORG WILHELM FRIEDRICH HEGEL, *HEGEL'S PHILOSOPHY OF RIGHT* §§ 44–45R (T. M. Knox trans., Clarendon Press 1952) (1820)).

389. See, e.g., SPRANKLING & COLETTA, *supra* note 6, at 7; JOSEPH WILLIAM SINGER, *PROPERTY* 20, 160–61 (4th ed. 2014).

390. See, e.g., Alexander et al., *supra* note 12, at 743–44.

391. See, e.g., Jeanne Lorraine Schroeder, *Virgin Territory: Margaret Radin's Imagery of Personal Property as the Inviolable Feminine Body*, 79 MINN. L. REV. 55, 58 (1994).

392. For a powerful exception to this general oversight, see Daniel J. Sharfstein, *Atrocity, Entitlement, and Personhood in Property*, 98 VA. L. REV. 635, 641 (2012).

dispossession and exclusion. The danger, as Cheryl Harris has powerfully demonstrated, is reproducing the essential whiteness of property.³⁹³

Remarkably, Radin refers to her personhood theory as an “intuitive view,” universalizing the experience of an unmarked subject, obscuring the ways in which rights to property and personhood are predicated on difference.³⁹⁴ But as Hegel himself acknowledged, liberal conceptions of personhood have, from the beginning, been rendered unstable by the contradictions of enlightenment, within which freedom was conditioned and defined by its antithesis—slavery. Slavery appears in perhaps the most famous passage of Hegel’s writing, his master-slave dialectic, which provides the key to his theory of personal development and world history.³⁹⁵ In the allegory, a master and slave are locked in a struggle for recognition by the other. At first, the master appears independent—he lives for himself—while the slave is dependent—he lives for his master. But as the dialectic unfolds, the master comes to realize that he is, in fact, dependent on the slave, and therefore unfree, trapped in the realm of abstraction, out of touch with the material world. Only the slave has actual knowledge of the world because he comes into resistance with it.³⁹⁶ Here is the lesson contained in Hegel’s allegory: personal development and historical progress are impossible under such conditions of asymmetry.

Susan Buck-Morss has argued that Hegel may have elaborated his famous allegory with the Haitian Revolution in mind.³⁹⁷ Evidently, news of the slave rebellion appeared in the newspapers Hegel read.³⁹⁸ How might such an event have disrupted Hegel’s understanding of world history? Buck-Morss suggests that perhaps the events in Haiti signaled to Hegel the essential untenability of a liberal modernity conditioned on slavery.³⁹⁹ Perhaps it revealed to Hegel the essential unreliability of western knowledge, conditioned as it was on an obliviousness to its own dependence on slavery—not unlike the master in his allegory.

However appealing this reading of Hegel’s dialectic, as Buck-Morss acknowledges, it is undermined by Hegel’s later writing on Africa and Africans.⁴⁰⁰ Africa, Hegel wrote, “is no historical part of the World . . . it has no movement or development to exhibit.”⁴⁰¹ Africans themselves are incapable of personal development, he asserted, because they lacked the self-consciousness necessary for personal development.⁴⁰² This incapacity, in Hegel’s view, owed something to

393. See Harris, *supra* note 19, at 1709.

394. See Radin, *supra* note 20, at 959, 961.

395. G. W. F. HEGEL, PHENOMENOLOGY OF SPIRIT 111–19 (A.V. Miller trans., Oxford Univ. Press 1977) (1807).

396. See *id.*

397. Susan Buck-Morss, *Hegel and Haiti*, 26 CRITICAL INQUIRY 821, 847–49 (2000).

398. *Id.* at 843–44.

399. See *id.* at 849.

400. See *id.* at 858–59.

401. GEORG WILHELM FRIEDRICH HEGEL, THE PHILOSOPHY OF HISTORY 99 (J. Sibree trans., Dover Publ’ns, Inc. 1956) (1837).

402. GEORG WILHELM FRIEDRICH HEGEL, LECTURES ON THE PHILOSOPHY OF WORLD HISTORY: INTRODUCTION: REASON IN HISTORY 172 (H. B. Nisbet trans., Cambridge Univ. Press 1975) (1837).

the veil of black skin. White skin is “the most perfect,” Hegel explained, because it allows “the inner feelings [to] make a sign of their presence”—as through blushing.⁴⁰³ The African, by contrast, is opaque. Because his skin allows no expression of inner feeling to pass through it, he remains inscrutable—to Europeans, at least—and is thus prevented from externalizing his will or intentions and from participating in the development of either himself or the world.⁴⁰⁴

Radin’s engagement with Hegel’s personhood theory does not address either its dialectical method or its racist dimension. But the contradictions between his theory of personal development and his construction of Blackness have been powerfully mined by writers of the African diaspora.⁴⁰⁵ In *Black Skins, White Masks*, Frantz Fanon returns to the problem of Black embodiment—what Hegel identified as the condition of enclosure and immobility—but from the inside, exploring the impossibility of self-determination as a Black person living in an anti-Black world.⁴⁰⁶

In a chapter entitled “The Lived Experience of the Black Man,” Fanon initiates what Radin described as “the first step” to personal development, through which an individual comes to know himself as distinct from other things in the world.⁴⁰⁷ Fanon describes stretching out his arms, reaching for his things, a table, a cigarette—property, for Radin. But this narrated experience of the self in the world is interrupted by his recollection of a white child who points his finger and says, “Look, a Negro!”⁴⁰⁸ The original relation between the self and body, “my body and the world,” collapses and gives way to what Fanon calls an “epidermal racial schema.”⁴⁰⁹ Shattered by the encounter, the Black subject recomposes itself from without:

My body was returned to me spread-eagled, disjointed, redone, draped in mourning on this white winter’s day. The Negro is an animal, the Negro is bad, the Negro is wicked, the Negro is ugly; look, a Negro; the Negro is

403. GEORG WILHELM FRIEDRICH HEGEL, LECTURES ON THE PHILOSOPHY OF SPIRIT 1827–8, at 88–89 (Robert R. Williams trans., Oxford Univ. Press 2007) (1994).

404. A similar claim about Black opacity appears in Thomas Jefferson’s *Notes on the State of Virginia* to justify slavery. Among the physical characteristics that disqualify Black Americans from freedom or self-government, Jefferson includes that “immoveable veil” of Black skin, which he contrasts with the blushing candor of white skin. See TAVIA NYONG’O, THE AMALGAMATION WALTZ: RACE, PERFORMANCE, AND THE RUSES OF MEMORY 86–88 (2009).

405. See, e.g., W. E. BURGHARDT DU BOIS, DARKWATER: VOICES FROM WITHIN THE VEIL 29–55 (1920); ZORA NEALE HURSTON, *How it Feels to Be Colored Me*, in ZORA NEALE HURSTON: FOLKLORE, MEMOIRS AND OTHER WRITINGS 826, 826–29 (Cheryl A. Wall ed., 1995) (1928); AIMÉ CÉSAIRE, DISCOURSE ON COLONIALISM 29–78 (Joan Pinkham trans., 2000) (1950); James Baldwin, *A Letter to My Nephew*, PROGRESSIVE MAG. (Dec. 1, 1962, 7:02 PM), <https://progressive.org/magazine/letter-nephew/> [<https://perma.cc/8FHL-QNEJ>]; Williams, *supra* note 236, at 5.

406. FRANTZ FANON, BLACK SKIN, WHITE MASKS 91 (Richard Philcox trans., Grove Press 2008) (1952).

407. See *id.* at 89–119; Radin, *supra* note 20, at 972.

408. FANON, *supra* note 406, at 90–91.

409. *Id.* at 91–92.

trembling, the Negro is trembling because he's cold, the small boy is trembling because he's afraid of the Negro⁴¹⁰

Inverting Hegel's theory of personal development, as an opening of the self into the world, Fanon demonstrates that "[i]n the white world, the man of color encounters difficulties in elaborating his body schema. The image of one's body is solely negating."⁴¹¹ The "body schema," or the relation between self and embodiment that anchors Radin's personhood theory of property, in Fanon's experience, is continuously interrupted by a racial schema, or white racist perception that does not recognize itself to be such. As he writes, "I am overdetermined from the outside. I am a slave . . . to my appearance."⁴¹²

Underscoring the dialectical relation between white personhood and Black being, Fanon asserts that the philosophical tradition of ontology—to which Hegel's and Radin's investigations of personhood belong—"does not allow us to understand the being of the black man."⁴¹³ A Black person among other Black people, Fanon writes, "will have no occasion, except in minor internal conflicts, to experience his being through others"; but among white people, a Black person is always turned into something else—"tom-toms, cannibalism, intellectual deficiency, feti[s]hism, racial defects, slave-ships, and above all else . . . : 'Sho' good eatin'."⁴¹⁴ Fanon writes, "not only must the black man be black; he must be black in relation to the white man. . . . The black man has no ontological resistance in the eyes of the white man."⁴¹⁵

The assumed mastery of white people, and the casual usurpation of Black autonomy, has been on full display in recent years, with the circulation of viral videos capturing white Americans policing, regulating, and interdicting the ordinary being of Black Americans, for instance, grilling in a park, sitting in a Starbucks, and napping in a dorm.⁴¹⁶ In many of these videos, Black Americans are questioned about conduct on their own property.⁴¹⁷ In a recent video, a white woman in a graceful New Jersey suburb approached a Black couple, both law professors, asking whether they had permits to construct a patio in their own

410. *Id.* at 93.

411. *Id.* at 90.

412. *Id.* at 95.

413. *Id.* at 90.

414. Frantz Fanon, *The Fact of Blackness*, in THEORIES OF RACE AND RACISM: A READER 257, 257, 259 (Les Back & John Solomos eds., Charles Lam Markmann trans., Routledge 2d ed. 2009) (1952).

415. FANON, *supra* note 406, at 90.

416. See Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness as Nuisance*, 69 AM. UNIV. L. REV. 863, 865–66, 873–75, 882–83 (2020); Apryl Williams, *Black Memes Matter: #LivingWhileBlack with Becky and Karen*, SOC. MEDIA + SOC'Y Oct.–Dec. 2020, at 1, 1–2.

417. See Christian Spencer, *Tennessee 'Karen' Who Blocked Black Women from Residential Pool Is on Disciplinary Leave*, THEGRIO (June 13, 2020), <https://thegrio.com/2020/06/13/karen-blocks-pool/> [<https://perma.cc/TH3F-GSMU>]; Alejandro Serrano, *SF Man Who Stenciled 'Black Lives Matter' on Home Speaks Out After Video Goes Viral*, S.F. CHRON. (June 16, 2020, 11:15 AM), <https://sfchronicle.com/bayarea/article/SF-man-who-stenciled-Black-Lives-Matter-on-15341503.php>.

backyard.⁴¹⁸ They explained, not for the first time, that they did.

Fanon concludes *Black Skins, White Masks* with a final prayer: “O my body, always make me a man who questions!”⁴¹⁹ Ronald A. T. Judy has interpreted those words to affirm the radical potential of Black experience and Black consciousness.⁴²⁰ Judith Butler has taken them to mean that by affirming one’s body, by refusing the enclosures of white racist perception, the embodied questioner begins not only to disrupt racial epistemologies but racial ontologies.⁴²¹ In other words, the questioner opens himself to reimagining what it means to be a person, human—beyond the terms given by colonial enlightenment or racial capitalism. For us, the prayer is an invitation to question liberalism’s often unquestioned relation between personhood and property. Can we imagine a form of personhood that is not secured by possession or ownership? A home that is structured not in sovereignty but in hospitality? A self that is constituted not through exclusion but in relation, not through accumulation but generous dissipation?

B. UNBURDENING THE WHITE MIND

Writing around the start of the First World War, W.E.B. Du Bois observed a new race consciousness sweeping across the globe. “[T]he world in a sudden, emotional conversion has discovered that it is white and by that token, wonderful!”⁴²² This “discovery of personal whiteness,” which he described as “a very modern thing,” was shaped by the imperatives of European colonialism but asserted with renewed intensity in the early twentieth century as anti-imperial, anti-racist, and anti-capitalist movements gained momentum across Asia, Africa, and the United States.⁴²³ “But what on earth is whiteness that one should so desire it?” Du Bois asked. “[W]hiteness is ownership of the earth forever and ever, Amen!”⁴²⁴

Whiteness, in Du Bois’s account, is not simply a claim to racial status or superiority, as it is sometimes represented within liberal or anti-racist discourse. Instead, in his writing, whiteness appears, first and foremost, as a form of property and sense of entitlement: “ownership of the earth forever” and “title to the universe.”⁴²⁵ Du Bois’s account of whiteness remains powerful because it synthesizes historical and material accounts of racial capitalism with a penetrating ontological and “psychological” account of whiteness. Structural racism reproduces

418. They did have permits. See ‘Permit Karen’ Calls Cops on Black Neighbors on Their Own Property, N.J. 101.5 (July 1, 2020), <https://nj1015.com/permit-karen-calls-cops-on-black-neighbors-on-their-own-property/> [<https://perma.cc/42M5-TGXZ>].

419. FANON, *supra* note 406, at 206.

420. See Ronald A. T. Judy, *Fanon’s Body of Black Experience*, in FANON: A CRITICAL READER 53, 71 (Lewis R. Gordon et al. eds., 1996).

421. See Judith Butler, *Violence, Non-Violence: Sartre on Fanon*, 27 GRADUATE FAC. PHIL. J. 3, 5–7 (2006).

422. W. E. BURGHARDT DU BOIS, *The Souls of White Folk*, in DARKWATER: VOICES FROM WITHIN THE VEIL 29 (1920), reprinted in W.E.B. DU BOIS: WRITINGS 923, 923 (Nathan Huggins ed., 1986).

423. *Id.*

424. *Id.* at 924.

425. *Id.*

itself, but it is also animated by the ideological and affective investment in whiteness.

“Now what is the effect on a man or a nation when it comes passionately to believe such an extraordinary dictum as this,” Du Bois asked, that whiteness is “ownership of the earth”?⁴²⁶ The effect, as Du Bois and others argue, is confusion, alienation, a distorted sense of one’s place in the world. Colonization, Aimé Césaire argued, begins with Europeans’ misidentification of the colonized. In the mind of the colonizer, the native is reduced to a false image, savage and unequal.⁴²⁷ In this sense, colonization deforms not just the colonized but the colonizer. In Césaire’s formulation, “colonization works to *decivilize* the colonizer, to *brutalize* him.”⁴²⁸

Because few beneficiaries of colonialism are willing to identify themselves as colonizers or colonists, Albert Memmi observed, the colonizer lives in a realm of anxious denial, attempting to distance himself from what he recognizes to be wrong about colonialism while continuing to enjoy all of its advantages.⁴²⁹ “It is not easy to escape mentally from a concrete situation, to refuse its ideology while continuing to live with its actual relationships.”⁴³⁰ The colonizer “lives his life under the sign of a contradiction which looms at every step, depriving him of all coherence and all tranquility.”⁴³¹

Throughout his career, James Baldwin similarly insisted that white Americans were afflicted by a profound sense of confusion about their place in the world, clinging to a claim of innocence, which itself was only maintained by willful ignorance.⁴³² In an essay addressed to his nephew, Baldwin explained that, though white Americans have convinced themselves that they have to “accept” Black Americans, in fact, it is Black Americans who carry the burden of accepting white Americans:

You must accept them and accept them with love, for these innocent people have no other hope. They are in effect still trapped in a history which they do not understand and until they understand it, they cannot be released from it. They have had to believe for many years, and for innumerable reasons, that black men are inferior to white men.⁴³³

Shedding the illusion, Baldwin explained, is difficult for white Americans because it risks the loss of identity. Baldwin writes,

426. *Id.*

427. CÉSaire, *supra* note 405, at 36–37.

428. *Id.* at 35.

429. See generally ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* 45–88 (Howard Greenfeld trans., Earthscan Publ’ns Ltd. 2003) (1957).

430. *Id.* at 64.

431. *Id.*

432. See Baldwin, *supra* note 405.

433. *Id.*

Try to imagine how you would feel if you woke up one morning to find the sun shivering and all the stars aflame. You would be frightened because it is out of the order of nature. . . . Well, the black man has functioned in the white man's world as a fixed star, as an immovable pillar, and as he moves out of his place, heaven and earth are shaken to their foundations.⁴³⁴

For many white Americans, to acknowledge that one's position in the world has been secured by racialized dispossession is profoundly unsettling. The violent resistance to race-conscious teaching in public schools is illustrative of Baldwin's proposition.

As Du Bois demonstrated, property and amnesia have worked hand in hand to preserve white possession, to clear the white conscience of any nagging sense of unearned advantage, historic guilt, or moral responsibility. Writing about the aftermath of slavery, Du Bois attributed the "splendid failure" of Reconstruction not to a crude reassertion of white supremacy, but what he called "the counter-revolution of property."⁴³⁵ He used that phrase to refer, among other things, to the haste with which liberal abolitionists were eager to put the sin of slavery behind the nation by sooner making amends with former enslavers than insisting upon reparations for the formerly enslaved. "What liberalism did not understand," Du Bois wrote, was that abolition was an "economic and involved force."⁴³⁶ It required not just the extension of formal equality or civil rights but "to change the basis of property and redistribute income."⁴³⁷ Without a radical transformation of the property relations, Du Bois observed, the promises of abolition and Reconstruction were undermined by "a dictatorship of property," through which a class of elites continued to wield political and economic power by stoking racial division among the working class.⁴³⁸

Legal realists, writing at the same time as Du Bois, recognized a similar counter-revolution occurring in legal discourse, where the reassertion of propertied interests was articulated in the language of classical liberalism—rights to property and freedom of contract. Legal realists argued that the supposed neutrality and rationality of law was used to mask and to justify its relation to arrangements of power and domination.⁴³⁹ What Du Bois' social history adds to the legal realists' critique is an understanding of the relation between the elevation of private rights and the erosion of Black freedom and social equality. The promises of freedom and racial equality boldly announced in the Thirteenth and Fourteenth Amendments were soon hollowed by a jurisprudence that, among other things,

434. *Id.*

435. DU BOIS, *supra* note 383, at 580–633, 708.

436. *Id.* at 591.

437. *Id.*

438. See CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* 185–204 (1983).

439. See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 *CORNELL L.Q.* 8, 29 (1927). See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* (1992).

invested corporations with constitutional rights and elevated private rights of property and contract to constitutional inviolability. White supremacy, in other words, was restored soon after Reconstruction, in the guise of free markets, the language of rights, property, and contract.

If the Civil Rights Era has been described as the Second Reconstruction, then neoliberalism might represent a second counter-revolution of property. Like the first, this second counter-revolution uses the neutral-sounding language of rights and responsibility, markets and competition to steadily erode and undermine formal commitments to racial equality and redress. The promises of freedom and equality reissued in the Civil Rights Acts of the 1960s, however limited, have been steadily undermined by the political mobilization of racial resentment and by neoliberal policies. Since the 1970s, for instance, conservatives have succeeded in mobilizing white resentment to dismantle welfare protections intended to benefit the most vulnerable—read, Black—while embracing policies that advance the interests of wealthy individuals and corporations.

Neoliberal policies, like cutting taxes and social services, have been accompanied by an insistent faith that the free market is the best arbiter of everything and by a corresponding disparagement of government.⁴⁴⁰ As it rewards the pursuit of self-interest, it abandons the vulnerable to extreme precariousness. As an economic agenda, neoliberalism transforms the conditions of collective life; as a governing rationality, per Wendy Brown, it reduces complex moral subjects to economic animals, thoroughly reconstituting us as market actors, wealth maximizers, and entrepreneurs.⁴⁴¹ The defunding of education, the deregulation of political speech, and the withdrawal of any assurance of freedom from hunger, homelessness, or illness have turned us into ruthlessly self-regarding creatures, reducing life to a “project of capital enhancement” for some, mere survival for others.⁴⁴² As it “responsibilizes” and criminalizes the dispossessed and abandoned classes, neoliberalism ennobles white possession. Greed is good; self-interest is a virtue.

Old liberal repertoires that confer value or worth upon the agents of colonial capitalism while devaluing or denying the worth of its racialized casualties are amplified within a contemporary neoliberal ethos, in which freedom includes “the right to be unencumbered by concern for the well-being of others,” as Jodi Melamed and Chandan Reddy write.⁴⁴³ Liberal discourse has a long tradition of constructing persons as unencumbered individuals, perfectly free and independent of social entanglement or

440. See, e.g., Ronald Reagan, Inaugural Address (Jan. 20, 1981) (transcript available at <https://www.reaganfoundation.org/media/128614/inaguration.pdf> [<https://perma.cc/C2UH-PE2W>]) (“[G]overnment is not the solution to our problem; government is the problem.”).

441. See BROWN, *supra* note 37, at 30–32.

442. *Id.* at 22.

443. See Jodi Melamed & Chandan Reddy, *Using Liberal Rights to Enforce Racial Capitalism*, SOC. SCI. RSCH. COUNCIL: ITEMS (July 30, 2019), <https://items.ssrc.org/race-capitalism/using-liberal-rights-to-enforce-racial-capitalism/> [<https://perma.cc/RSL6-LBZN>].

obligation.⁴⁴⁴ Melamed and Reddy argue that the “unencumbered” subject of liberalism is not merely a discursive construction; the subject has in fact become unencumbered in that he is rewarded for his indifference.⁴⁴⁵ Individual freedom is the freedom from social obligation. Property law participates in the unencumbering of white possession both by establishing a property regime that, for generations, has allowed white families to accumulate wealth without even having to think too hard about it. Moreover, they have been allowed to believe that they deserve what they have, that their advantages have been earned, that their achievements are their own.

Historical ignorance and amnesia play a significant role in unencumbering white possession of its debts. Du Bois observed that, after Reconstruction, Black Americans were represented by historians as brutes who could not be helped, despite the goodwill of decent Americans. He concludes his *Black Reconstruction* with a chapter entitled “the Propaganda of History,” in which we can recognize a set of tropes which would reemerge a hundred years later—that of the “lazy, dishonest and extravagant” freedman, wasting government money—each time to unburden the national conscience of a sense of ethical obligation toward those who are owed so much.⁴⁴⁶

Recent attempts to ban “critical race theory” represent an attachment to the propaganda and to sheltering possessive whiteness from the demands of history. A recently enacted Texas law, which has become a model for state legislation across the country, elevates the “founding documents” within the public-school curriculum, while prohibiting teachers from introducing materials that complicate historical narratives by foregrounding “race or sex.”⁴⁴⁷

Terry Stoops, an educational policy expert at the conservative John Locke Foundation, explained that parents who support the bans on critical race theory do not object to teaching “the truth of slavery or racism.”⁴⁴⁸ Parents “want their children to learn about the mistakes of the past,” but they “don’t want their children to be told that they are responsible for the mistakes of their ancestors.”⁴⁴⁹ The Texas law also prohibits teachers from suggesting that “meritocracy or traits such as a hard work ethic are racist or sexist.”⁴⁵⁰ The intention here is not only to

444. Feminists and scholars of race and empire have long taken issue with this construction. See generally CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988); MILLS, *supra* note 68; MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000); FINEMAN, *supra* note 386; FRANÇOISE VERGÈS, *A DECOLONIAL FEMINISM* (Ashley J. Bohrer, trans., Pluto Press 2021) (2019).

445. See Melamed & Reddy, *supra* note 443.

446. DU BOIS, *supra* note 383, at 711–12.

447. H.R. 3979, 87th Leg., Reg. Sess. (Tex. 2021) (codified at TEX. EDUC. CODE ANN. § 28.002 (West 2021)).

448. Benjamin Wallace-Wells, *What Do Conservatives Fear About Critical Race Theory?*, NEW YORKER (June 10, 2021) (quoting Stoops), <https://www.newyorker.com/news/annals-of-inquiry/what-do-conservatives-fear-about-critical-race-theory> [<https://perma.cc/8L6Y-U3AX>].

449. *Id.*

450. H.R. 3979, 87th Leg., Reg. Sess. (Tex. 2021) (codified at TEX. EDUC. CODE ANN. § 28.002 (West 2021)).

relieve white children of a sense of moral responsibility but to assure them that their own advantages are entirely the result of individual effort rather than the generational effects of racism.

CONCLUSION

Drawing on the work of scholars and activists engaged in postcolonial, Indigenous, and Black radical traditions, this Article has offered a critical counter-narrative of the American property law tradition. If we want to reorient property law to better serve our collective needs and aspirations, we have to disabuse ourselves of the expectation that legal analysis as usual might lead us toward a solution to our problems. As I have tried to demonstrate here, property law has largely avoided confronting its entanglements with colonization and slavery, perhaps because such a confrontation would require a radical reconsideration of the way in which property law is studied and practiced. Legal analysis has been part of the problem.

Insofar as the property law tradition has been sustained by colonial disavowal and racial amnesia, it will require a break from the established conventions of that tradition. We have to begin to imagine an alternative to the kinds of inequality that structure our present.⁴⁵¹ As Lisa Marie Cacho suggests, “[i]f we suspend the need to be practical, we might be able [to] see what is possible”⁴⁵²

Decolonization cannot originate within the epistemological framework of colonial capitalism.⁴⁵³ An ongoing process of epistemic and ethical reorientation, decolonization requires that we look to and learn from practices that have flourished not before or outside colonial capitalism, but *alongside* it, in spite of it.⁴⁵⁴ “Decoloniality,” Walter D. Mignolo’s preferred formulation, is not a reversal of colonialism or its transcendence but an available alternative or “option.”⁴⁵⁵ To recognize that we have options means that we do not have to wait for a revolution, nor do we have to consent to perpetuate what we recognize to be unequal and unsustainable arrangements and practices. As Mignolo writes, “decolonial options start from the principle that the regeneration of life shall prevail over primacy of the production and reproduction of goods at the cost of life.”⁴⁵⁶ In terms of property law, it means that in our individual and professional capacities, we

451. See CACHO, *supra* note 73, at 32.

452. *Id.* at 31.

453. See Walter D. Mignolo, *The Conceptual Triad: Modernity/Coloniality/Decoloniality*, in ON DECOLONIALITY: CONCEPTS, ANALYTICS, PRAXIS 135, 135–52 (2018); Sindre Bangstad & Torbjørn Tumyr Nilsen, *Thoughts on the Planetary: An Interview with Achille Mbembe*, NEW FRAME (Sept. 5, 2019), <https://www.newframe.com/thoughts-on-the-planetary-an-interview-with-achille-mbembe/> [<https://perma.cc/5CW3-U59L>].

454. See, e.g., STEFANO HARNEY & FRED MOTEN, *THE UNDERCOMMONS: FUGITIVE PLANNING & BLACK STUDY* 17–18 (2013).

455. Walter D. Mignolo, *Epistemic Disobedience, Independent Thought and Decolonial Freedom*, 26 THEORY, CULTURE & SOC’Y 159, 161–62 (2009).

456. *Id.* at 161 (emphasis omitted).

can choose policies, practices, and pedagogies that advance collective well-being over self-interest, reciprocity over expropriation, sustainability over exhaustion.

To recognize that we have options requires reevaluating and revaluing disavowed forms of knowledge and practice. Consider, for instance, the recent interest in Indigenous knowledge after another deadly season of wildfires in California. Officials in California have appealed to Indigenous leaders to learn how traditional practices of controlled burning might be used to manage a crisis created by overdevelopment, worsened by climate change, and now contained primarily by imprisoned fire fighters.⁴⁵⁷ Indigenous scholars and activists have gone further to insist that an essential strategy for redressing climate change is returning Indigenous land.⁴⁵⁸ Insofar as the study of property law remains ignorant of and indifferent to Indigenous practices of land stewardship or the radical imaginary of fugitives, it perpetuates its founding violence and forecloses alternative futures.

To imagine our way beyond the enclosures of colonial capitalism and the exhaustion of colorblind liberalism, we can look to and learn from the resurgent practices of racialized communities that have been historically devalued and dispossessed. Since the uprisings in Ferguson and at Standing Rock, for instance, Black, Indigenous, and allied activists have begun to develop blueprints for an alternative future, as they respond to a cascade of crises now convulsing American life—mass incarceration, racial policing, gendered inequity, extreme precarity, environmental disaster, and endless war.

The Movement for Black Lives has broadly called for a divestment from policing and imprisonment and a reinvestment in “long-term safety” secured through public education, protected employment, a livable income, and access to housing, health care, and child and elder care.⁴⁵⁹ The group has called for a divestment from extractive industries, which displace Indigenous peoples and perpetuate environmental racism, and a reinvestment in “community-based sustainable energy solutions.”⁴⁶⁰ It also promotes participatory budgeting and democratic control over economic development in its own neighborhoods as well as support for community-led experiments in the creation of affordable housing and de-commodification of land, namely through community land trusts and cooperatives.⁴⁶¹

457. See *id.*; Ray Levy Uyeda, *The Violent Contradiction of California's Reliance on Incarcerated Firefighters*, NEW REPUBLIC (Aug. 31, 2020), <https://newrepublic.com/article/159164/violent-contradiction-californias-reliance-incarcerated-firefighters>.

458. See, e.g., #LandBack is Climate Justice, LAKOTA PEOPLE'S L. PROJECT (Aug. 14, 2020), <https://lakotalaw.org/news/2020-08-14/land-back-climate-justice> [<https://perma.cc/8GFX-DQFJ>].

459. See *Invest-Divest*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/invest-divest/> [<https://perma.cc/HD93-WS5A>] (last visited Mar. 18, 2022); *Economic Justice*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/economic-justice/> [<https://perma.cc/ZA24-W8E2>] (last visited Mar. 18, 2022).

460. *Invest-Divest*, *supra* note 459.

461. See *Economic Justice*, *supra* note 459; *Community Control*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/community-control/> [<https://perma.cc/TA84-HGMH>] (last visited Mar. 18, 2022); see also James J. Kelly, Jr., *Land Trusts That Conserve Communities*, 59 DEPAUL L. REV. 69, 70 (2009).

In solidarity with these initiatives, Indigenous feminists set forth a vision for a “regenerative economy,” one that advances the cause of environmental repair and sustainability while centering “Indigenous sovereignty and black liberation.”⁴⁶² A regenerative economy, according to the Indigenous Environmental Network, is “based on ecological restoration, community protection, equitable partnerships, justice, and full and fair participatory processes.”⁴⁶³ Apart from ensuring clean air, water, and food to everyone, the regenerative economy the group envisions is oriented toward recognizing the value of reproductive labor and caretaking and practices that are life-affirming and community-building. The Red Nation, a collective of Indigenous feminists, in uncompromising terms calls for an end to colonial capitalism, recognizing that it is premised on and perpetuates violence and inequality: “We do not seek a milder form of capitalism or colonialism—we demand an entirely new system premised on peace, cooperation, and justice.”⁴⁶⁴

In Oakland, California, where there are enough vacant homes to house the unhoused, one organization, Moms for Housing, has staged an occupation of foreclosed homes, “stolen from the Black community in the subprime mortgage crisis.”⁴⁶⁵ The occupation demonstrates, as one advocate put it, that “[t]ogether we can take Oakland back from the big banks and real estate speculators. We need a new paradigm in thinking about private property. . . . [T]his is the first step.”⁴⁶⁶ In response to the occupation, California passed a bill preventing large investors from purchasing foreclosed homes in volume,⁴⁶⁷ and one corporate owner offered to sell its portfolio to the Oakland Community Land Trust.⁴⁶⁸ After the killing of George Floyd in Minneapolis and mass protest in the midst of a pandemic, activist volunteers turned an empty hotel into an emergency shelter for 300 unhoused people, disrupting a common sense about who owes who what, and rehearsing forms of mutual aid, care, and repair.⁴⁶⁹

462. *Introduction*, INDIGENOUS ENV'T NETWORK, [https://perma.cc/XM2R-3EBM] (last visited Mar. 18, 2022); UNITED FRONTLINE TABLE, A PEOPLE'S ORIENTATION TO A REGENERATIVE ECONOMY: PROTECT, REPAIR, INVEST, AND TRANSFORM, https://climatejusticealliance.org/wp-content/uploads/2020/06/ProtectRepairInvestTransformdoc24s.pdf [https://perma.cc/58KN-SZQE].

463. UNITED FRONTLINE TABLE, *supra* note 462, at 6.

464. THE RED NATION, THE RED DEAL: INDIGENOUS ACTION TO SAVE OUR EARTH PART ONE: END THE OCCUPATION 1 (2020), http://therednation.org/wp-content/uploads/2020/04/Red-Deal_Part-I_End-The-Occupation-1.pdf [https://perma.cc/E5LY-2WKH].

465. Jeffrey Martin, *Activist Group 'Moms for Housing' Occupies Vacant Home in Oakland to Protest City's Homeless Crisis*, NEWSWEEK (Nov. 18, 2019, 7:23 PM) (quoting group member Dominique Walker), https://www.newsweek.com/activist-group-moms-housing-occupies-vacant-home-oakland-protest-citys-homeless-crisis-1472535 [https://perma.cc/K5EA-C3U9].

466. *Id.* (quoting civil rights attorney Walter Riley).

467. S. 1079, 2019–2020 Leg., Reg. Sess., 2020 Cal. Stat. 3108 (codified at CAL. CIV. CODE §§ 2924, 2929.3 (West 2021)).

468. Marisa Kendall, *Oakland: Moms 4 Housing Home Sells for \$587,500, Will Become Homeless Housing*, MERCURY NEWS (Oct. 11, 2020, 4:56 AM), https://www.mercurynews.com/2020/10/09/oakland-moms-4-housing-home-sells-for-587500-will-become-homeless-housing/.

469. See Charmaine Chua, *Abolition Is a Constant Struggle: Five Lessons from Minneapolis*, 23 THEORY & EVENT S-127, S-128 (2020).

These various platforms and projects are not always consistent with one another, but they have in common a commitment to collective flourishing without reproducing the constitutive divisions of settler colonialism and racial capitalism. These experiments, however imperfect, represent both a longing and a capacity to reorient our institutions, away from individualism and accumulation, toward mutual care and collective responsibility.

Finally, as we confront climate disaster, itself an effect of colonial capitalism, we have to reclaim from property law the question posed by colonizers: to whom does the Earth belong? It can no longer be that it belongs to those who use it most intensely, exhaustively, or to the exclusion of all others. “The political in our time,” Achille Mbembe argues, “must start from the imperative to reconstruct the world in common.”⁴⁷⁰ For many of us, the beneficiaries of colonial capitalism, to rehearse commonality and to enter collectivity will require us to reimagine who we are, and to give something up—our attachment to possessive personhood at the very least.

470. Bangstad & Nilsen, *supra* note 453.