DISMANTLING THE HOUSE OF PLESSY: A PRIVATE LAW STUDY OF RACE IN CULTURAL AND LEGAL HISTORY WITH CONTEMPORARY RESONANCES☆

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ABSTRACT

In this article Professor Perry argues that Plessy v. Ferguson *and the de jure segregation it heralded has overdetermined the discourse on Jim Crow. She demonstrates through a historical analysis of activist movements, popular literature, and case law that private law, specifically property and contract, were significant aspects of Jim Crow law and culture. The failure to understand the significance of private law has limited the breadth of juridical analyses of how to respond to racial divisions and injustices. Perry therefore contends that a paradigmatic shift is necessary in scholarly analyses of the Jim Crow era, to include private law, and*

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moreover that this shift will enrich our understandings of both historic and current inequalities.

INTRODUCTION

The claim that African Americans merit reparations for enslavement and Jim Crow elicits a wide array of responses, ranging from astonishment, to appall, to enthusiasm. Many reparations activists have argued that regardless of whether or not reparations litigation is successful, it is important that the cases bring about a public conversation about the history of exclusion experienced by African Americans. Further, it is argued that the discourse about reparations leads to a greater understanding of current gaps between African Americans and white Americans in wealth, income, and education.

The litigation and public conversation about reparations also leads us into relatively under-explored territory in thinking about race and law. Reparations discourse is, in part, about the law of property, tort and contract. The litigation has led us to consider how private actors, governed by private law rules, might be liable for racist practices, and how profit-bearing enterprises, as governed by private law, should be treated when the profit was garnered through systematic racist practices.[1] Furthermore, reparations discourse aids us in considering how the law of race exists in both public and private realms, and in the messy interstices between public and private law.

Reparations discourse is alarming to some precisely because it is such a dramatic departure from the traditional civil rights model of thinking about race and law, in which public law is conceived of as the sole appropriate realm in which to respond to deliberate and conscious practices of racism, either at the hands of legislators or private citizens. Reparations discourse pushes us to broaden, and to think about profit, ownership, and impoverishment in our considerations of race and the law. However, the reality is that a thorough legal-historical examination of the law of Jim Crow demonstrates clearly that the shift in thought proposed by Reparations activists should not be so alarming. Rather, a private law analysis of Jim Crow and its legacy is demanded by any thorough interpretation of race in American legal history. When I refer to Jim Crow here, I mean the broad legal infrastructure created in the final days of Reconstruction and the terrifying period called "Redemption." I do not simply mean the law of segregation as signified by *Plessy v. Ferguson* (1896). Rather I positively assert that *Plessy* just isn't enough to understand Jim Crow![2]

Plessy v. Ferguson has overdetermined[3] the discourse about race, and in particular, Jim Crow in the 20th century. I use the term overdetermined in two senses. First, Plessy has been over-used as both a shorthand for the practice of

legal segregation, and the practice of legal segregation has been used as a cultural synecdoche for the range of practices that excluded African Americans from full participation in the body politic in the late 19th through the first half of the twentieth century. This, despite the fact that *Plessy* as a case represents a small fraction of the practices of exclusion, and its status as cultural synecdoche has obscured the range of de jure practices that were integral to Jim Crow.

Second, Homer Plessy's case has become the signature symbol of Jim Crow such that we fail to understand that the practice of legal segregation had meaning largely as a result of is existence within a larger coherent network of de jure and cultural practices consistent with an ideology of white supremacy.

In this article I want to take up both the challenge of the overdetermination of Plessy, and the challenge of private law as race law put forth by the reparations debate. In so doing I am proposing here a methodological shift in how race is analyzed in late 19th and 20th century law. I argue that we should decentralize legal segregation in considering Jim Crow, and engage in a series of reconsiderations of other racialized legal practices. In centering other areas of race law I believe the critical race theoretical problematic of moving outside of the "color conscious" vs. "color blind" dichotomy is facilitated. This is an important undertaking as the body of critical race theoretical scholarship has shown us, and should be done so with a historical awareness.

The shift this article proposes is one of theory in practice. This article is not simply suggesting a paradigm shift motivated by a rejection of the overdetermination of *Plessy*, but is actually an attempt to engage in the kind of work that results from that shift. It is a culturo-historical inquiry of the private law of Jim Crow. The period of examination is post-emancipation and pre World War I. Specifically I am treating the law of property and contract as experienced by the majority of black workers, primarily agricultural, during this period. The law of property and contract in this period were used to re-establish white supremacy after slavery ended, and after Reconstruction was dismantled. The white supremacist execution of private law during this era served to exclude African Americans from the full practice and experience of citizenship.

This historical analysis is engaged in through an observation of legislation, case law, and literature written about the subject. In demonstrating that private law, and its relationship to African American citizenship, was of central concern to literary and other public figures of the time, I show that the paradigm shift I propose is not radical or novel, but rather suggested by intellectual as well as legal and cultural history.

Following the historical discussion, I will argue that the lens of Jim Crow offered by this history is illuminating and instructive for contemporary studies of race and law. In showing the contemporary significance of this history it is my

hope that this work is useful not only for scholars, but also for practitioners and judges considering these issues, and that is innovative in the area of race and the law. Practitioners frequently use history in arguing their cases, and judges use history in writing opinions. In looking at race in the law, the paradigm of historical understanding is incredibly important. *Plessy*, *Brown v Board of Education* (1954) and their related cases are heavily relied upon and yet frequently insufficient in the contemporary era as a lens through which to understand race and the law, despite the fact that in the American imagination they are the principle signifiers of the Jim Crow era, and of de jure racism period.[4]

Historical analysis serves to demonstrate how Jim Crow, interpreted thoroughly, led to current race problems with respect to law. Moreover, it is arguable that in our failure to fully treat the early racist practices of private law as "Jim Crow" during the Civil Rights legal revolution, we missed an enormous opportunity to dismantle the great apparatuses of Jim Crow. In fact, de jure segregation was arguably a relatively small part[5] of the greater picture of racist law-making, and in overdetermining it, we have failed to see the actual picture of how to address race, and racism in the law.

Private/Public Law Distinction

My argument for a private law analysis of Jim Crow rhetorically implies a clear cut distinction between private and public law. I recognize that, in reality, there is abundant overlap between the areas of private and public law. I use the terms in the formal legal academic sense, that the public law addresses the areas traditionally considered to govern the relationship between the individual and the state, and effectuates public interests, i.e. Constitutional and Criminal Law, whereas private law governs the enforcement of private rights, i.e. Contracts, Tort and Property. Despite growing scholarly attention to the vulnerability of the private/public law divide, I find using the term private law useful precisely because the historic struggle for African American rights has been understood primarily in terms of Constitutional Law as "public law," while relatively scant attention has been paid to the manner in which the laws of property, contract, and tort have been implicated in the history of race and the law.

PROPERTY: FROM EMANCIPATION TO "REDEMPTION"

From the earliest days of the Civil War, enslaved black Americans were escaping to freedom and national service behind Union lines. They served as laborers,

cooks, carpenters, nurses and more. In late 1862, the Union Army began to recruit Black soldiers. Captain C. B. Wilder of the Union army noted their vigorous interest in joining Union ranks, reporting, "some 10,000 have come under our control . . .."[6] Over 180,000 black troops served in the army, coming from the North, South and border states, 20,000 served in the Navy, and 37,000 gave their lives in service.[7] Despite early protestations that blacks were not made to be soldiers, or would degrade white service, black men served nobly throughout the Civil war, winning a large number of critical battles, and being the most effective spies.[8] They demonstrated in their military service that they were people, rather than chattel, regardless of how they had been legally and socially defined.

Lincoln's Emancipation Proclamation made those who escaped from slavery to fight free,[9] and as free men and women those in service consented to membership in the Union army, which was a symbolic representation of the Union itself. Raising arms on behalf of that army was a symbol of membership in the nation. As Charles Chesnutt, African American writer, lawyer and activist wrote, ". . . the colored people of the United States, by their conduct in the pursuits of peace and their bravery and courage upon the battlefield in every period of their country's need, have thrice earned their citizenship."[10]

This thrice-earned citizenship referred to African Americans who served in the American Revolution[11], the war of 1812 and finally the Civil War. What distinguished the Civil War amongst these three was that with it came freedom for all African Americans. In this war Blacks participated in greater numbers than ever before in an American war, and did in effect fight their way into the social contract.

One of the most dramatic gestures of African Americans during the Civil War was not however on the battlefield. Members of the fifty-fourth regiment, a colored regiment, protested the lesser pay received by black soldiers, and refused payment for 18 months until they were fairly remunerated.[12] This protest eventually led to a congressional act that equalized pay.[13] With that act the value of black soldiers to the nation was acknowledged as equal. Value would become a powerful metaphor. Following emancipation, The terms of the citizenship of African Americans would be debated for the next century, in courts, legislatures, streets and books. The debate could easily be described as a conflict over what the value of their citizenship would be. What rights, abilities and freedoms would it entail as compared with the white populace? The aspiration was equality, but the reality was otherwise. The term "Redemption" was used to refer to the period following Reconstruction, and it symbolized a return to white supremacy in the American South, enacted in large part through racist laws and law enforcement, much of which was related to property and property holding. Redemption entailed a devaluation of black citizenship rights.

Property was from the very beginning central to the meaning of freedom for African Americans. If citizenship can be described as a property interest in the nation, then African Americans most vigorously wanted to use that interest to have rights to obtain private property. However the class of whites who had formerly been their masters were hostile to the idea of African Americans as property holders. Many of them continued to smart from the belief that they had been deprived of their property rights when the men, women and children they had enslaved were freed.[14] It was difficult and even offensive for many whites to see those who had been chattel as property holding citizens.

On the one side African Americans sought to exercise property rights as citizens and on the other side they were thwarted by the work of white supremacy. In the midst of this struggle that played out in courts and legislatures, as well as in private interactions between individuals, one finds authors of poetry, prose, fiction and essays, who hoped that the persuasive power of their words might compel American people at large to rally in support of the rights of African Americans. Their work provides a compelling historical, political, and emotional record. In this article I will therefore also discuss literature in which the property rights of African Americans, and their struggles to maintain them, figure as central themes. What will become clear is that as the masses of African Americans struggled to maintain their belief that citizenship must fundamentally entail rights to property, there were writers and activists who reflected these struggles in their pages, and supported the efforts and interests of the African American community by appealing to both a reading public and governmental policy makers. This struggle preceded the struggle against legal segregation, persisted subsequent to the dismantling of legal segregation, and arguably continue to this day in current debates over race and policy. This was and is the struggle against Jim Crow.

THE LABOR DESERT OF THE FREED AND THE RESISTANCE OF THE DEFEATED

John Locke[15] explained the concept of property from the perspective of a working individual. He believed that an individual held ownership to his (or her) body and his (or her) work. He also believed that God had given the land of the earth to human beings in common. The addition of one's labor to that commonly held property led to a property interest in the products of that labor, and in the land itself as long as there remained enough land for others. This is the essence of his labor desert theory as it was applied to pre-political societies, and the foundation of U.S. conceptions of property-ownership. Enslaved African Americans had neither the ownership of their bodies nor their labor, nor did they own the crops they produced or the land on

which they spent their entire lives working. However, once free, they attempted to exercise each of these basic elements of property as elucidated by John Locke. In each area they found themselves thwarted largely because the idea of the African American as a property-holding citizen was anathema to the racial ideology that had developed in the South and throughout the U.S. over several hundred years of slavery. Even as free citizens, black Americans faced legislatures, courts and citizens who believed they were not meant to exercise property rights and who acted upon these beliefs.

As an extension of his basic theory of the origin of property, Locke addressed how we arrive at more modern systems of ordering and allocation. Locke described the development of more complex economies as giving rise to the need for government, and various systems of dispute resolution (courts and laws) over property. These more complex systems in the context of the American South were not objective institutions that would resolve conflicts in the most equitable fashion or interpret contracts over property fairly. Rather, they were institutions that to a great extent maintained existing structures of power and inequality, thereby perverting the concept of property as it applied to African American citizens.

Locke cautioned against the monarchy, believing that property could not best be protected in the hands of one. Instead he believed the balance of various governmental entities provided better security in a high trade, money exchange society. The examination of the experience of African Americans demonstrates that power held in the hands of one race or caste, a herrenvolk system as it were, even in a political system with a balance of powers, could provide little protection for the property rights of those who were not of that race or caste, even as it did protect the interests of the members of the ruling caste. It was at once a monarchy of caste and a Herrenvolk Lockean[16] society.

The theory of John Locke thus is instructive in a number of ways: as a means of analyzing property aspirations, contracts, and the relationship between property and citizenship. Political force would be exerted upon the properties, and aspirations to property of African Americans, but in contrast to Locke's descriptions, this would not be the terms of their inclusion in the social contract, but rather exclusion from the social contract.

African Americans after the Civil War demonstrated a labor desert theory which manifested in the desire to own the land upon which they would work and had worked as slaves, now as free people. As a black man from North Carolina wrote, "if the strict law of right and justice is to be observed, the country around about me, or the sunny South, is the entailed inheritance of the Americans of African descent, purchased by the invaluable labor of our ancestors, through a life of tears and groans, under the lash and the yoke of tyranny."[17] From the earliest moments of freedom African Americans hoped for the redistribution of lands,

so that they might become landowners in distinct contrast to recent classification as chattel. With the exception of the redistribution that occurred in the Sea Islands, congressional redistribution efforts, such as those planned through the Freedman's Bureau and the Southern Homestead act, were failures or never got beyond the planning stage.[18] However the fact that there were even plans indicates that Congress shared the sentiment of African Americans that property was an essential part of their citizenship. For instance, the Civil Rights Act of 1866, congress proclaimed:

> . . . citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right in every state and Territory in the United States, to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property.[19]

Congress was forced to make assertions of these property rights in order to protect freedmen from rapidly being sent back into a condition of near-slavery after the war. For example, Mississippi's Black code held a legislative ban on selling or leasing farmland to African Americans, In general, "Under the codes, black males who did not enter employment contracts could be charged as criminal vagrants."[20] So they were forced into work, but kept out of labor desert land ownership. Once Reconstruction began, the black codes enacted in every southern state, which had essentially stripped African Americans of virtually all civil and political rights, were dismantled, but the ideology that fostered them would continue. This was the case to some extent even in the policies of the Freedmen's Bureau, the agency formed in order to usher freedpeople into citizenship. Even though they planned redistribution, they were also concerned with disciplining black labor, which sometimes meant the loss of freedom. In Mississippi, the Bureau "required freedmen to sign labor contracts or be arrested for vagrancy. Bureau officials generally believed that the former slaves lacked the self reliance and stability to work in a system of freedom of contract."[21]

Even in the face of the failures of the most ambitious redistributive plans, huge numbers of African Americans struggled to buy land. Some of them used the money they earned as soldiers in the civil war to acquire land or buy tools for skilled labor that would earn them enough money to eventually purchase land.[22] Although most would assume that those African Americans who had been free before the war would be at a greater advantage in the struggle to become economically independent than those coming out of slavery with no education, money or resources, the passion of those who had recently been freed made them quickly the majority of African American landowners. Those African Americans who had been free before the war were disproportionately people who had been described as "mulattoes," many of them having been freed by a white father. In

1860, according to historian Loren Schweninger, 70% of the people of African descent who were listed as real estate owners in the lower South were listed in the census as mulatto. He notes that by 1870, in a total reversal, 76% of African American property owners in the lower South were listed in the census as black.[23]

This reversal is indicative that those who had been least advantaged in an overwhelmingly disadvantaged community, those who had been enslaved and field workers, were the most aggressive in obtaining property. Moreover, by the end of the nineteenth century, when there was a small group of wealthy black Americans, the majority of them were the children of field laborers, or had been field laborers themselves. As well, according to Schweninger the formerly enslaved these were exceptionally eager after emancipation to become the holders of real property.

He writes:

> These sentiments were shared almost universally by those who had spent their lives in bondage. When freedom came, they expressed again and again how they hoped to buy a 'little lot of land' 'What's de use of being free' an old man informed the journalist Whitelaw Reid in 1865 'if you don't own land enough to be buried in. Might just as well stay slave all yo days.'[24]

As historian Leon Litwack has noted, the ownership of land, "was the way to give substance to their freedom, to undergird their political rights with an esssential economic independence, and gain a more certain entrance into the mainstream of an agricultural society."[25]

The passion of African Americans to acquire land leads to a double sided story. On the one hand it is clear that their efforts to acquire land were largely thwarted. African American scholar and intellectual W. E. B. DuBois wrote in 1903 of the black belt of Georgia:

> Out of the hard economic conditions of this portion of the black belt, only 6% of the population have succeeded in emerging into peasant proprietorship; and these are not all firmly fixed, but grow and shrink in number with the wavering of the cotton market. Fully 94% have struggled for land and failed, and half of them sit in hopeless serfdom.[26]

This was the reality, and it was not simply due to poverty. There were also a number of whites who refused to sell to blacks, "thinking the possession of land a sort of patent nobility, to which blacks should not be admitted."[27] However, on the other hand, when one considers the incredible obstacles, political and economic, faced by African Americans the fact that African Americans were able to acquire fifteen million acres of land between 1865 and 1910, is extraordinary. Despite the best efforts of white supremacists, "in the agricultural sector, where the overwhelming number of black landowners were concentrated, black farm owners constituted 16.5% of all southern landowners by 1910."[28]

Within these difficult conditions a number of blacks did become prosperous in various industries and were in the practice of institution building in numerous businesses from undertaking to barbering to draymanry.[29]

The former slaves were at the vanguard of black economic development, despite common misconceptions otherwise. It was those who had shifted from being property and worked in field along with chattel who most vigorously advocated for their property rights and moved forward with them. Even amongst the poorest there were those who worked with some autonomy as entrepreneurs. They sold fruit, fried fish, nuts, flowers rags and other items easy to obtain at low cost, yet still saleable goods.[30] Poor blacks, from whom this entrepreneurial class was drawn, were likely to buy small things in order to have some personal property when they could not acquire the most coveted real property.

In the urban South as well, which offered more options for spending money than rural areas, the greatest desire amongst blacks was for property. As historian Loren Schweninger wrote:

> Prosperous urban blacks rarely invested heavily in 'liquid assets' – stocks, bonds, silver, gold, jewelry, cash, bank savings. Like their predecessors during the ante-bellum era, they invested the bulk of their profits in real estate. It seemed as if the assertion of one of the first Negro landholders in the South- "I know myne own ground" – remained as dominant in the minds of blacks in the late nineteenth and early twentieth centuries as it had been among those early colonists in Virginia.[31]

Significantly however, the property aspirations of black Americans was met with resistance that extended beyond isolated incidents of hostility, and in fact was part of a coherent logic of white supremacy that would be expressed legally, culturally and socially.

HERRENVOLK LOCKEANISM

Many historians have argued that racist labor and land practices that developed in the South were motivated by the desire to rebuild the economically devastated land at cheapest cost.[32] This argument, while somewhat compelling on an economic level, fails to consider fully the manner in which racial ideology impacted policy and law. Certainly productive black landowners did not, and if they had been allowed to flourish would not, threaten the economic development of the South. But those few individuals were consistently treated as threats.[33] Deflecting black land ownership, and the simultaneous exploitation of black labor together aided in the relatively cheap rebuilding of the south as both an economically productive region *and* as a location where the ideology of white supremacy would rule. The concept of the black individual as a property holder was anathema to Southern

racial ideology, and it was this ideology that motivated many of the decisions regarding property law and contract law in the New South. These actions were as deeply ideological as they were practical.

While the post-emancipation South required a new ordering of relationships as those who had been property were now citizens, that new order was put into place by people who had maintained racial ideologies from earlier times. The roots of the racial thought of the New South can be found in the antebellum period. Legal historian, William W Fisher III argues that there were two sorts of ideologies which supported slavery and white supremacy in the antebellum period. These were paternalist and racialist. Of the racialist arguments he writes, "the key to arguments of the second type was the proposition that it is morally permissible and even mandatory for Caucasians to dominate and exploit Africans."[34] And further:

> The developers of what (in retrospect) has been called the herrenvolk theory contended that there exists in all societies a laboring class, that it is natural that there exists in all societies a laboring class, that it is natural that the brutish and subhuman Negroes should fill this role, and that the incidental advantages of such an arrangement for whites includes democracy, solidarity and prosperity.[35]

In the New South the majority of African Americans were kept in that role and seen as members of an unruly and ignorant laboring class, standing outside of the social contract as defined by the property holding citizen, the Madisonian ideal. They were not simply laborers, they were laborers to be controlled with little concern for giving them a decent wage or for their desires as to when or for whom they would work. It is important that we understand this as more than emotional or individual racism, but rather as a holistic system that emerged from a pervasive cultural of white supremacy and racial ideology. In his article, "Herrenvolk Ethics," Charles Mills argues that in a herrenvolk system, an ethical order develops in accordance with that system which provides the citizens with a moral deficit in regard to the excluded members. As part of the article he discusses what he terms Herrenvolk Lockeanism, a concept useful for our purposes. With R1s being the members of the Herrenvolk, in the case of the Redemption south, whites, and R2s being the excluded, in this case blacks, Mills writes:

> R1s have intrinsic metaphysical property of R1ness, a property that is a prerequisite for the moral/political property of full self ownership, for the ownership of efficient nature-appropriating labor (and thus the normative ownership of possessions) and for full entitlement to ownership of rights. Correspondingly, R2s lack of property of R1ness negatively effects their entitlement to property in these senses- and ultimately their personhood, since the Lockean person is definitionally a self owning, nature-appropriating rights bearing being.[36]

The lingering conception of blacks as neither self owning nor self-defining facilitated the development of systems which excluded African Americans from

property-holding. Some of these systems which I shall discuss include laws that limited African American power with regard to labor contracts as well as laws that enabled landowners and business people to lease the labor of convicts who were overwhelmingly black. There was a culture of white supremacy which would support these laws, a Herrenvolk Lockeanism noted by the earliest northern visitors to the post Civil War South. Major General Carl Schurz wrote the following in a report to President Andrew Johnson on the condition of the South in the first year of the Freedmen's Bureau:

> There appears to be another popular notion prevalent in the south . . . that the negro exists for the special object of raising cotton, rice and sugar for the whites, and that it is illegitimate for him to indulge, like other people, in the pursuit of his own happiness in his own way. Although it is admitted that he has ceased to be the property of a master, it is not admitted that he has a right to become his own master.[37]

However, it is essential to understand that the Herrenvolk Lockeanism of the white South did not disuade African Americans from a belief in their property rights, quite the contrary. They as well had sensibilities about property that were born before the civil war and which they brought with them to freedom. Even in slavery black people tried to obtain property of some form or another. As one scholar has written:

> [A]ccording to the comments of slaveholders, [there were] increasing enactments to halt "pretended ownership," . . . [A] considerable number of slaves had become property owners. They possessed cattle, milk cows, horses, pigs, chickens, cotton, rice, tobacco, gold and silver coin, wagons, buggies, fancy clothing, and in rare instances even real estate.
>
> Furthermore, in the antebellum period, the incentive to acquire capital was particularly strong for those African Americans given the opportunity to purchase their freedom. Those fortunate enough to be freed spared no effort to become property owners.[38]

The effort to acquire property after emancipation was the logical extension of the seeds of such efforts during slavery. However after emancipation, this desire was tied to their sense of what freedom was. Additionally, it is likely that the freedpeople's ideas of freedom were derived from their experience amongst white people who comprised the overwhelming majority of the free people they encountered. Landownership was, of course, a central property right they saw possessed by their masters. (They also owned people, but understandably the freedpeople did not aspire to that kind of freedom.) The other kind of freedom they saw on the part of white men was that of the small farmer or tenant, who still had some degree of autonomy and control over the land they worked. In observing white women, they saw the control of houses, and household management.[39] And while the freedom of free blacks in the antebellum South was very limited, those who were enslaved during that time were probably aware of the efforts of free blacks to acquire land and were inspired by it. All in all, they were eager to own property long before

emancipation, and brought that desire to their sense of citizenship once they became citizens.

So what happened? The legal framework that developed with Redemption, the bloody backlash against Reconstruction, served the purposes of herrenvolk lockeanism, and excluded African Americans from many property rights, and from the position of possessor of rights under private law generally. The laws used to effect this exclusion were of various sorts, and were treated in the cultural world of activists on behalf of African Americans as some of the worst features of Jim Crow injustice.

TOURGEÉ'S *A FOOL'S ERRAND*

Southern Herrenvolk Lockeanism, and African Americans desires for land are both treated in the 1880 novel, *A Fool's Errand*, written by Albion Tourgee, the man who would later serve as counsel for Homer Plessy in *Plessy v. Ferguson*. Albion Tourgee, a white lawyer from Ohio, entered the Civil War in 1863. After the close of the war he decided to settle in North Carolina with his wife and daughter. There he aspired to participate in the rebuilding of the South as free soil with free labor. He served in Reconstruction governments as a congressman, and later as a judge who would be well-regarded by Republicans and Democrats alike, despite his controversial views in support of political equality for African Americans.[40] He was a northern man living in North Carolina who learned that his belief that the South could be reconstructed in a neat and efficient fashion was pure folly given the bitterness of the defeated confederates and the depth of their belief in white supremacy.

After the end of Reconstruction in North Carolina, Tourgee decided to leave the state and he wrote *A Fool's Errand* in the following year. It is a work of fiction overwhelmingly based on his experience in the South during Reconstruction. This novel describes the folly of Northern aspirations during Reconstruction, but was also written as an attempt to re-enlist northern support for African Americans who were beginning to be seen as a burden upon the minds and resources of the nation, the frequent cry having become "they should help themselves," or in legal language, that they could no longer be "the special favorite of the laws."

From the date of its publication critics understood that the book was more a social history than a novel, and they treated it as such. In the first year, Tourgee left his name off the book, which led to much sensational speculation as to who the author was. Even without a self-professed author, the sales were high. In its first six weeks of publication, the book sold 5,281 copies.[41] Historian John Hope Franklin wrote of its publication history:

> By the middle of 1880 it had sold more than 43,000 copies. During that summer the sales were so lively that the publishers made duplicate plates and printed the work simultaneously in New York and Boston. In early December the New York Tribune said, 'No book on the shop counter sells better and the fame of it has been carried on the wings of newspapers into every state if not county in the land.' By the end of the year approximately 90,000 copies had been sold.[42]

In the second year of its publication Tourgee acknowledged that he was the author of the book and with that acknowledgment he received both vociferous accolades and intense criticism. The prominence of the book inspired James A. Garfield to enlist Tourgee's assistance in his presidential campaign. It appeared that after he was elected, Tourgee was in line to assist in Garfield's administration.[43] Because Garfield was assasinated so early in his presidency, there is no fair way to know whether Tourgee could have positively affected policy with regard to African Americans, but that a novel could potentially lead the author to have such a great impact on policy is noteworthy.

In *A Fool's Errand*, Tourgee documents the deep seated hostility to property ownership for blacks and the injustice that resulted from the belief that African Americans were suited only to be servants and not full citizens. The hero of the novel is Colonel Servosse, who is a thinly veiled version of Tourgee himself. Colonel Servosse purchases an old estate named Warrington (he thinks the price is quite cheap, but given the depreciation with the war, he actually experiences price gouging at the hands of a former confederate). At one point his wife recounts his noble plans for his land in a letter she writes to friends up North. She writes that he has:

> decided to sell all of Warrington but a hundred acres. The rest lies along the creek and is very well fitted to cut up into little farms of ten and twenty acres for colored men, giving them upland to live on, with a little timber, and a piece of good bottom to cultivate. He is going to put little log houses on them, and sell them to colored people on six or ten years time. It will make quite a little town.[44]

This intention, along with his belief in Negro suffrage, raises the great ire of the white townspeople, who have not adjusted to the idea that blacks should be anything but a servant class, and have no intention of making such an adjustment. Servosse, despite the hostility he faces, is undeterred in his efforts.

> He found the colored men of the best character and thrifty habits anxious to buy lands, and no one else was willing to sell to them. He purchased some Confederate buildings which were sold by the government, tore them down, and, out of the materials, constructed a number of neat and substantial little houses on the lots which he sold. He also assisted many of them to buy horses, in some instances buying for them, and agreeing to take his pay in grain and forage out of the crops they were to raise . . . There was some fault found with the sales which he made to colored men on the ground that it had a tendency to promote "nigger equality" but he was so good natured and straight-forward in the matter that but little was said, and nothing done about

> it at that time, though he heard of organizations in some parts of the State instituted to prevent the colored people from buying land or owning horses.[45]

Tourgee presents Servosse as a model of the kind of commitment that the freed-people deserved from the Union, and particularly from the Radical Republicans in appreciation for their war efforts, but a commitment they failed to receive. Servosse is also a model of bravery, several times narrowly escaping the clutches of the newly formed Ku Klux Klan. Although the Klan is unable to capture Servosse, there are instances of the Klan torturing African Americans in this novel. The manner in which the Klan terrorizes blacks in the novel is always punishment for their exercise of property rights. The following passage is a good example of that:

> Little attention had been paid to the manner in which he had chosen to build houses and sell lands to the colored people,- it being perhaps regarded as merely a visionary idea of the Yankee abolitionist. When however, the crops were harvested, and some of these men became owners of horses and houses in their own right, it seemed all at once to awaken general attention. One night a gang of disguised ruffians burst upon the little settlement of colored men, beat and cruelly outraged some, took the horses of two, and cut and mangled those belonging to others.[46]

The property of African Americans was destroyed as a sign that they were unfit to be property holders in the eyes of those men who would become the "redeemers" of the South after Reconstruction.[47] In the letter to Servosse, attendant to this event, "The Regulators hez met and decided thet no nigger shant be allowed to own no hoss nor run no crop on his own account herearter. And no nigger worshippin Yankee spy shel live in the county."[48]

Servosse as narrator recounts other such threats to those who allowed blacks to crop on shares or who sold them horses. Servosse does not understand this disposition, but his friend and fellow former Union Army officer informs him of the significance of this breach of the social contract. He writes to Servosse of the Klan and their antics:

> [I]t is not at you as an individual that the blow is struck; but these people feel that you, by the very fact of Northern birth, and service in the federal army, represent a power which has deprived them of property, liberty, and a right to control their own, and that now, in sheer wantonness of insult, you are encouraging the colored people to do those two things which are more sacred than any other to the Southern mind; to wit, *to buy and hold land* and to *ride their own horses*.[49]

Throughout the novel, the recurrent theme is that the violent hostility of the South to the advancement of black folks and their exercise of rights is a form of retaliation against the nation that has subjugated them and which they believe deprived them of their property rights in slaves paired with a belief in black inferiority. Tourgee

describes the Klan terrorism and the North's slow awakening to their power, and finally, the Klan trials which quelled the power of the organization, but allowed for the pardon of murderers, arsonists, destroyers of property, and those who had criminally conspired against other citizens. In the end, Servosse is compelled to admire even the simplest efforts African Americans made to exercise their citizenship rights, knowing that they faced potential retribution at every farm bought or vote cast. He sees that Redemption will lead to law and policy that will not allow property to reside in the hands of black people.

PROPERTY IN LABOR AND THE FREEDOM OF CONTRACT

> The principle of freedom cannot require that one should be free not to be free (John Stuart Mill).

> I am doing tolerably well, my people can never do well and generally become landowners in the South. Our old masters will ever regard us as legal property stolen and forcibly taken away from them, and if they can't get our labor for nothing in one way, they will invent some other plan by which they can, for they make all the laws and own all the best lands.[50]
>
> – words of a Black Texan

Although following emancipation blacks were free laborers, many white southerners believed they still owned and should control black labor, as demonstrated by Tourgee's novels. Black people tried to acquire land and when they could not, tried to sell their labor at a fair rate of exchange for money or goods. They attempted thereby to exercise the property right they had in their own bodies and labor.

However the powerful entities in the new economic order made it difficult for them to do even that. John Stuart Mill argued that if one was free one could not sell herself into slavery. Such a contract would be void as it negated the very freedom one had to make the contract. But, in effect, the labor relations of the New South forced African Americans into virtual slave conditions.[51]

The herrenvolk ideology of the New South made it difficult for blacks to be anything but laborers in proscribed areas in proscribed fashion. If African Americans used their labor to acquire goods or land that would afford them more than a meager existence they had to be prepared for retaliation from white "redeemers" who believed they had stepped out of their place. In his book, *Trouble in Mind: Black Southerners in the Age of Jim Crow*, historian Leon Litwack describes the thoughts of Eunice Rivers, a black woman whose father had been beaten and intimidated by white men:

> The more she reflected over the attack, however the more she came to believe that by supplementing his farm work with paid labor at the sawmill, her father "was just living a little

> bit too well to be a Negro . . . A Negro's s'posed to be in a little cabin, and the white man tell him when to go and when to come." Her father however, had opted to own his own small home and be independent . . . The attacks persisted. Finally after night riders shot into their house one night, her father gave in and moved the family back into one of the rental cabins.[52]

Instead of being rewarded for his labor on a second job, Mr. Rivers was forced to give up the property he was able to acquire through his labor. Litwack also tells a story from the youth of Martin Luther King's father, "Daddy King."

> Martin Luther King Sr. born in 1899 spent his youth in rural Georgia, where he witnessed drunken white men beat a black man to death for being "sassy," a term commonly used by whites to identify troublemaking, "uppity," and "impudent" blacks. In this instance the victim's "sassiness" consisted of refusing the demand of the white men that he hand over his paycheck. He had been murdered not for violating the racial code but for being successful at his mill job and pocketing his pay.[53]

But he had violated the code of Herrenvolk Lockeanism in which the rights to property were not for blacks or at least were to be narrowly proscribed by white authority. It is not incidental that both men suffered for their work in mill jobs which paid relatively well and which also required some skill. Such work was often seen as the exclusive province of white workers. To take away pay or force someone out of his house was to demonstrate that a general white authority governed their labor, money and property, rather than just employers, their efforts and the laws of economics. These acts of retaliation against their property holding went unpunished by the criminal law, throughout the late 19th and 20th centuries. Legal inaction was a feature of the denial of citizenship.

In *A Fool's Errand*, Tourgee's hero Servosse hears first-hand from a man named Bob, a blacksmith, about this particular operation of Herrenvolk Lockeanism:

> "I refused ter du some work fer Michael Anson or his boy, 'cause they'd run up quite a score at de shop, and allers put me off when I wanted pay. I couldn't work jes fer de fun ob scorin' it down: so I quit. It made smart ob talk. Folks said I waz getting' too smart fer a nigger, an' sech like; but I kep right on; tole em I waz a free man, – not born free, but made free by a miracle, – an I didn't propose ter do any man's work fer noffin"'[54]

He also says of the Southern whites, "Dey don't mind 'bout our getting' on ef dey hev a martgage, so't de 'arnin's goes into ther pockets, nor 'bout our votin,' so long ez we votes ez dey tells us. Dats dere idea uv liberty fer a nigger."[55] Bob's refusal to continue to do work for customers who have not paid off a long tab is seen as unacceptable insolence for a Negro. For this insolence Bob is met with a threat and a night of terror from the Klan, he is beaten and whipped, his wife and oldest daughter raped.

As Reconstruction ended African Americans found even less freedom in the exercise of their property rights or right to contract as an extension of property

rights as an all encompassing system of control developed during the era referred to as Redemption.

> After the Compromise of 1877, federal authorities probably shared the views of their predecessors during Reconstruction that legal sanctions to force blacks to work and to stick to their obligations were necessary for economic and social stability.[56]

Therefore, the federal government was loath to intervene in the explosion of white supremacy and control of black people, property and labor.

Initially, African Americans seemed to be somewhat successful in some of their labor desert leanings as workers. Sharecropping developed as a result of African Americans refusing to work in gangs under a white overseer as they had during slavery. Instead, they elected a system where they would work a piece of land, and the profit from the crop on that land after the harvest would be shared by the worker and the landowner.

Even within the sharecropping system, however, croppers were at a disadvantage in comparison to tenant workers, who would eventually become disproportionately white, while croppers were mostly black.[57] Tenants owned their crop because they rented the land, whereas croppers had a right to a portion of the profits of the land alone, which meant that they had no control over choosing where to sell the crop, or any way of measuring whether they were getting what they were owed, or a just portion of the crop.

Sharecropping was a good arrangement for planters because they didn't have to pay their workers until the end of the season, in crop. In the aftermath of the war, with depressed economy, southern planters had to rebuild their lands. Because they no longer owned slaves who could be used as collateral, it was difficult for them to get loans. Within this context the crop lien system developed.[58] Landowners could get liens against their crop in exchange for money and goods. Of course this led to some conflicts over lien priority from various entities when there wasn't enough profit to pay everyone owed. An elaborate structure of lien law would develop to address this difficulty. Along with the banks and merchants, blacks would wait for the crop in order to get paid, and they would be paid last.

In some instances blacks tried to push the autonomy of the cropper job even further. They sometimes argued in court that they were not employees but partners of the landowners.[59] Courts would not recognize such assertions but the fact that the idea even emerged demonstrates how intensively African Americans continued to press to exercise the rights of property owners, even if they did not have legal title. Southern courts described croppers as a version of wage laborers.[60] In this framework as well black laborers tried to exercise property rights. They wanted daily wages, and if they got those wages, there was no

guarantee they would come to work every day. Instead, they might only work as much as they needed to live. They were choosing to exchange their labor for money when they wanted to rather than feeling compelled to work.

Most workers had to sign year-long work contracts, as described before, and would only get paid at the end of the year in a right to a portion of the crop. However, many blacks would use their property right in the future crop to gain personal property, Legal Historian Harold Woodman writes:

> The freedmen, with the support of local merchants, quickly discovered ways to take advantage of the lien laws in order to decrease their dependence upon their employers, a result completely unforseen by those who wrote the initial laws. If the workers would receive as their wages a portion of the crop at the end of the year, they would therefore have produced a crop on which they could, under the law, give a lien in order to get advances.[61]

As a consequence freedmen could get other things they wanted during the year.

> . . . the freedmen easily found merchants who were willing to grant them goods on credit in return for a lien on their share of the crop being grown, and many borrowed from them rather than from their employers- or, as often happened, from both.[62]

They were able to exercise a property interest in the land despite the fact that they were not landowners. But they did not have a powerful lien before the law. The cropper's liens came behind all others. A substantial problem developed, as well. Merchants charged exponentially higher prices for goods sold on credit rather than cash, "The tenant . . . paid twice for buying on credit at the local store, first in the vastly inflated prices, then in the exorbitant interest charged on the outstanding balance."[63] One contemporary described this phenomenon in detail:

> The Negro's necessities have developed an offensive race, called merchants by courtesy, who keep supply stores at the cross-roads and steamboat landings, and live upon extortion. These people would be called sharks, harpies, and vampires in any Northwestern agricultural community, and they would not survive more than one season. The country merchant advances the Negro tenant such supplies as the Negro wants up to a certain amount, previously fixed by contract, and charges the Negro at least double the value of every article sold to him.[64]

Some landowners required that their workers buy any items they needed from stores owned by the landowners, or from merchants of the landowners choosing. They would in addition to limiting their choice of who to buy goods from, which was another intrusion upon their right to contract in buying goods, also charge extremely high prices for goods. The result was that often the money the croppers earned from selling their portion of the crop would not be enough to cover the cost of the goods they had bought on credit during the year, leaving them in debt, and without having seen any cash payment after a years worth of work.

Alabama sharecropper Ned Cobb said,

> In my condition, and the way I see it for everybody, if you don't make enough to have some left you ain't done nothin, except given the other fellow your labor. That crop out there goin to prosper enough for him to get his and get what I owe him; he's making his profit but he ain't going to let me rise . . . You want some cash above your debts' if you don't get it you lost, because you gived that man your labor and you can't get it back . . .
>
> Now it's right for me to pay you for usin' what's yours- your land, stock, plow tools, fertilizer . . . You got a right to your part-rent; and I got a right to mine. But who's the man ought to decide how much? The one that owns the property or the one that works it?[65]

He asked an important question about labor contracts. If the working person doesn't have any say in the cost of his labor, how much of a property right is it? In *Souls of Black Folk*, his 1903 masterpiece of southern black life and longing, W. E. B. DuBois wrote of the devastating scenes that resulted from the debt many black workers were caught in:

> I have seen a black farmer fall in debt to a white storekeeper, and that storekeeper go to his farm and strip it of every single marketable article, – mules, ploughs, stored crops, tools, furniture, bedding, clocks, looking-glass, – and all this without a warrant, without process of law, without a sheriff or officer, in the face of the law for homestead exceptions, and without rendering to a single responsible person any account or reckoning.[66]

The lack of a responsible party overseeing the labor and credit relations in general made it very easy for debt to be fabricated by planters who had little interest in paying black workers a just wage and had a great interest in keeping them working on their plantations to pay off the debt they had incurred. While this system of economic exploitation through cycles of debt was not unique to African Americans, even in the United States, given similar phenomenon in the experiences of mine workers for example, there is something distinct about this situation. First, the efforts to exploit African American workers were tied to a larger racial ideology, demonstrated in the violent reaction to black property holding of any sort, and was not simply an exploitation of the working class. Second, the wider social landscape in which the convict labor system was overwhelmingly black (as a result of the disproportionate arrest and prosecution of blacks)[67] and the overwhelming penalty for resisting the systems of debt peonage, meant the choice they overwhelmingly was one kind of forced labor or another. Finally, given the proximity of slavery, and the ethos of redemption which manifested in segregation laws, tracts idealizing the old South, and a host of other legal and social practices, efforts to control the mobility and to keep blacks from earning money as laborers were clearly hearkening back to a slave condition.

IMMOBILIZED FREEDOM

Besides wanting to sharecrop rather than work in gangs, wanting to get daily pay, and wanting to use liens to obtain personal property, there was another especially potent manner in which blacks tried to exercise property rights in their labor and freedom of contract. That was mobility. African American workers were a mobile population, often leaving one labor contract in search of another more profitable or humane one. Despite the fact that often they had conferred a benefit on the planter, having performed labor without having received wages yet, African Americans were nevertheless interested in exercising their freedom by moving.

A number of prominent African American literary critics, most notably Robert Stepto, have noted that there is a long-standing literary trope in African American fiction in which mobility is tied to freedom.[68] Beginning with the *Narrative of the Life of Frederick Douglass*, written in the antebellum period, the source of this trope is, of course, that during slavery African Americans were unable to move freely about the world. For the African American sense of freedom then, mobility was important, and in the world of work this translated to the ability to move from one contract to the next. African Americans believed in the freedom of choosing for whom one worked, and choosing not to work as well. For African Americans who were working without being paid, and who could not be sure that they would be paid at the end of the year, being mobile was in effect an affirmation that this work without regular pay was not actually a slave condition because one didn't have to do the job.

Many historians have noted this tendency of black workers to move about and the angry response of white landowners and employers to this behavior. As Alex Lichenstein has written:

> . . . the most common complaint of planters and industrialists alike was the difficulty of recruiting and retaining adequate labor. How do we reconcile the presence of a low-wage labor market with fears of chronic labor scarcity? Despite the best efforts of whites to reinvent slavery, African-Americans insisted on their status as free laborers, and attempted to exercise the right to mobility. As they gained leverage, however, the spread of modern forms of labor negotiation merely fostered renewed coercive intervention into the labor market. In an ongoing struggle, landowners and merchants devised methods to keep blacks landless, impoverished and dependent.[69]

Lichenstein describes this phenomenon in another Southern enterprise:

> . . . contractors on the Atlantic and Gulf Railroad expressed dissatisfaction with free black labor, since the freedmen had a habit of leaving the company's employ before even a month was up, even foregoing their pay. Of course the fact that their compensation was mostly in the form of "rations" may have contributed to their capriciousness.[70]

The planter class prevented such behavior by developing what might best be described as a reliance model of contract upon the workers which would be legitimized through legislation. In contracts for agricultural labor, which generally were year long contracts, the fact that they relied upon a year of work, by either advancing the workers' money or supplies, became a criterion upon which they developed legislation to punish African Americans criminally, or other whites who employed African Americans who had abandoned a year long labor contract. On the other hand, African Americans who might work for close to a year in a context in which they had a lien on the harvest of the landowner for example, did not often hold out hope for payment, knowing from experience that they would not end up with any money at the end of the year. Therefore, they lost nothing by leaving. However, it is also true that for them the freedom of contract was about the right to exit a contract as well as enter one. When they moved around, they sought different contractual relationships than the ones they had previously been in, often because they felt they had been treated unjustly in them. Leaving bad conditions, unending debt, and hopes of acquiring land caused many blacks to leave their jobs but it is likely as well that in other instances they may have simply liked the freedom of movement, and felt they had a right to it as free people.

The planter class moved the legislatures to address this problem, arguing that it caused them economic hardship because they had to pay out new advances when they hired new workers, and had to go through the trouble of getting new workers. A more important reason for ending this mobility was the belief that black people should be disciplined and controlled. If the mobility were allowed to continue, the constant movement would probably lead to an increase in wages and benefits for laborers because planters would be forced to create incentives for workers to stay. Rather than allow a negotiation between labor and employers that might allow the laborers to push wages up because their labor was needed, the planter and industrialist classes preferred to use law and policy to keep black labor controlled and impoverished.

HERRENVOLK PENALTIES AT LAW

The laws that were enacted to control black labor and the mobility and bargaining power of black workers, were various. Vagrancy laws were, "so open-ended that any person without a job or means of support was fair game for arrest and conviction, [And] were a potent threat to black laborers who fled from contractual promises, real or claimed, or who dawdled before committing themselves to labor obligations."[71] The vagrancy laws allowed for the arrest of any (black) person

who wasn't working because they were very generally drawn, and they were disproportionately enforced during harvest time, so that landowners could hire prison labor when they were shorthanded.

Anti-enticement laws made it a criminal act to "entice" a laborer away from someone else who had a contract with the laborer. In *Hudgins v. State* (1906),[72] a Mr. Baker sued a Mr. Hudgins for enticing Frank Matthews away from his employment. In the opinion, the court describes the facts of the case, and then says:

> During the existence of slavery it was neither necessary nor important that the Negro should be instructed as to the binding obligation of a contract. When he emerged from this condition, and immediately, without any instruction on the subject, became clothed with full contractual powers, it is not surprising that he could be induced by unscrupulous white men to flagrantly violate the obligations of contracts into which he had entered.[73]

The language of the court shows a presumption that Matthews was not acting of his own presence of mind when he decided to enter another contract, nor was it considered that there might be legitimate reasons for his breach, but rather the assumption was that he had been seduced, being an unintelligent creature. This example reveals that not only were the motivations of enticement statutes unjust, but as well their application was occasion for courts to reveal racist presumptions and biases.

Other laws criminalized the breach of labor contract if the worker had been advanced money, thereby forcing people to stay working for one person or into forced labor as convicts if they left that job before the end of the season.

Undaunted by state laws against imprisonment for debt, which should have prevented the criminalization of blacks who left their jobs after they had received advances, legislatures found ways to get around them. In the early 1900s, Alabama, North Carolina, Georgia, Florida, Mississippi, Arkansas and South Carolina enacted laws that made a laborer's breach of a labor contract and failure to repay an advance prima facie evidence of an intent to defraud. That way, workers could be imprisoned for breach under the statute of frauds. Frequently, if a laborer were convicted under such a statute, the landlord who brought the suit would pay the worker's fines, add that to the debt owed him by the laborer, and put him back to work off the payment and to fulfill the contract.

In surety situations a laboring person might be brought to court for debt and have someone else willing to pay his fine. He or she would work for the person who paid the fine rather than go to prison. If sent to prison for fraudulent breach of contract, robbery or some other offense, black men and women were usually leased out to private corporations according to provisions of convict lease laws, and there they faced forced labor under brutal conditions.

The convict labor system was the ultimate system of forced labor and control. It was also a means of industrializing the South. The southern convict labor system was distinctly bad in comparison to those of other regions of the United States. As historian Alex Lichenstein writes:

> . . . nineteenth-century northern prisons had several systems of penal labor which often included contracting the prisoners' labor out to private entrepreneurs. Yet only in the South did the state entirely give up its control of the convict population to the contractor; and only in the South did the physical "penitentiary" become virtually synonymous with the various private enterprises in which convicts labored.[74]

High numbers of black people found themselves in convict labor camps for a number of reasons. They were poor, often hungry, and some believed in "stealing what had been previously theirs by customary right" which might have been food or goods from the employers which they both needed and thought they deserved.[75] The 1904 Atlanta University study of Negro crime revealed that half of black prisoners were convicted of crimes against property and another significant portion for breaking contracts and vagrancy.[76] With such oppressive laws it was easy for states to collect enough workers as convict lessors needed and states were able to collect revenue from such laborers by selling their labor in a system where it was very difficult for African Americans to fairly sell their labor themselves. In the years that the convict labor lease was prevalent in southern states, black people comprised over 90% of the prison population in most of the South.[77]

The legal structure was backed up by a social order that further limited African Americans in their freedom of contract and in their freedom to use the property in their labor. It seemed as though nearly everyone was complicit in keeping African Americans barely free. As a contemporary of the era said, African Americans had:

> to pay double the value of nearly everything they buy; that they are compelled to pay a rental of ten dollars a year for an acre of ground that will not bring thirty dollars under the hammer; that land-owners are in league to prevent land-owning by negroes; that when they work the land on shares, they barely make a living . . . the law is the refuge of crime rather than of innocence; . . . even the old slave-driver's whip has reappeared in the South, and the inhuman and disgusting spectacle of the chain-gang is beginning to be seen there; . . . the government of every Southern State is now in the hands of the old slave oligarchy, and . . . both departments of the National Government soon will be in the same hands; . . . they believe that when the Government, State and National, shall be in the control of the old masters of the South, they will find means for reducing the freedman to a condition analagous to slavery; that they despair of any change for the better.[78]

Thus began a cycle of debt peonage in which black laborers were bound by debt to work for the same person year in and year out. This, of course, increased the incentive to leave the plantation in order to find a job where they might be able

to make some money, which often led to their arrest and return to that plantation or another plantation or to prison, in every circumstance forced to work without making a decent wage or any financial gains that would allow them to acquire the property they aspired to, or even more than the most minimal personal property. Of course the threat of convict lease camps prevented many from breaching unjust contracts. Soon, African Americans would begin to feel trapped by this system, as is found in these words of a laborer:

> (I)f you make a crop and don't clear nothin' and you still wound up owin' on your sharecrop and on your furnish' and you try to move, well the police be after you then all right. But if you're clear well mostly, you can't go too far because of the money. If you move, or if you try to move they know if they like the way you work they make you pay somethin' just for holdin' the house up. If, after you pay that you want to move, well you cain't go too far because . . . you gonna need money to carry you on to the place where you can get work.[79]

TOURGEÉ'S *BRICKS WITHOUT STRAW*

Tourgee's second most popular novel, *Bricks Without Straw* was published in 1881. In this novel Tourgee depicts the experience of an African American man attempting to exercise his citizenship rights. For Tourgee it is clearly the case that resistance, legal and cultural, to black property rights, and property holding, were the greatest impediments to the full exercise of black citizenship. This is an incredibly important illumination to come from the man who was to be lawyer to Plessy. Moreover, Tourgee actually demonstrates the mechanism of the private law exclusions in an individual's life. Although the story is presented as a dramatic narrative, and therefore has a certain melodrama, this explication of law in practice reveals the manner in which laws that were/are facially color blind, might be very effectively racist and race conscious. In this novel, Tourgee presents the decline of one of the novel's heroes, an African American man named Nimbus. In *Bricks Without Straw* black characters have more central roles and are written with greater depth than in Tourgee's earlier novel, *A Fool's Errand*. Nevertheless this novel was also quite successful with an overwhelmingly white reading public. Nimbus runs away during the Civil War and goes to serve in the Union army. With the payment he received for service, he buys a piece of land from his former master, and "receives a bond for title to the tract of land, and full covenants of warranty and seizin."[80] The narrative voice of Tourgee spoke powerfully of Nimbus' moment of purchase as a transformative one.

> . . . the recent subject of transfer by deed was elevated to the dignity of being a party thereto. The very instrument of his bondage became thereby the sceptre of his power. It was only an incident of freedom, but the difference it measured was infinite.[81]

Nimbus' service in the Civil War, and his use of the benefit conferred for that service to buy land is a demonstration of the relationship between new citizenship and the movement from being property to being property-holder.

Colonel Desmit, Nimbus' former master and the man from whom he purchases his land, fails to tell Nimbus that he merely had a life estate[82] in the land, which would revert to the ownership of heirs in Indiana upon his death, and therefore he was legally unable to actually sell the land to Nimbus. Nimbus suffers from a lack of knowledge of property law and would eventually lose his land as a result. But for years, thinking he is the rightful owner, Nimbus builds a home and community on that land. At Red Wing, he lives with his wife and family, his best friend, Eliab, a crippled literate light-skinned preacher, and other Negroes who he hires when they are threatened with being fired by their white landowners for voting. A school, a church, a temperance regulation and profitable land all make Red Wing a prosperous community.

But it is only a matter of time before Nimbus' success is challenged by the white community which finds his accomplishments offensive rather than laudable. First, he is sued under an enticement statute for hiring his friend Berry Lawson. The sheriff comes to Nimbus, saying of Berry's former employer:

> "... He says you and 'Liab enticed away his servant – what's his name? that limber-jinted, whistlin' feller you've had working for you for a spell."
>
> "What Berry?"
>
> "That's it, Berry, Berry Lawson. That is the very chap. Well, old Granville says you coaxed him to leave his employ, and he's after you under the statute."
>
> "But it's a lie – every word on't! I nebber axed Berry ter leave him, an' hed no notion he was a gwine ter do it till Marse Sykes throwed him out in de big road."[83]

That he is accused of enticing someone who was fired for attempting to vote is an injustice that goes unrecognized. While in reality these statutes disproportionately affected white landowners, because most landowners were white, the specific description of Nimbus' terrorization is literarily symbolic of racial policies that flowed from the Herrenvolk Lockeanism of North Carolina. Nimbus was not seen as fit to be a landowner. The Ku Klux Klan threatens Nimbus. He ignores them, but they return to make good on their threats one night when he has left town on business. They destroy the church at Red Wing and attack Eliab's home and person, almost killing him. They injure Nimbus' wife, Lugena. Nimbus heroically returns in the midst of the episode to protect his home and family. In the process, he kills a white man and therefore is forced to run away to save his own life, leaving his infirmed friend Eliab to be hidden away and nursed to health by a sympathetic white man before he escapes. In this system, if the protector of one's own property is a Negro, he is not exercising a right but rather he is a violator of the social contract. To protect his life he must flee.

This shift from property to proprietor is unacceptable to the Ku Kluxers. Soon after Nimbus is forced to leave, his land ownership is attacked as well. The sheriff serves his wife Lugena with legal papers. The white school teacher explains that the "'ttachment" is an action for the recovery of real estate, seeking the land in exchange for a debt which a man named Peyton Winburn alleges that Nimbus has refused to pay. He further alleges that Nimbus' purpose for running away was to avoid paying it. Lugena announces that Nimbus has made clear to her that he owes no one, and figures that "It's all of a piece, – a Ku-Kluckin' by night, and a-suin by day. 'Tain't no use, t'ain't no use! Dey'll hab dere will fust er last, on way er anudder shore!"[84]

The sense that the legal maneuvering around property ownership and Klan violence were part of a coherent system is an accurate assessment on Lugena's part. The reality that their freedom did not mean the free exercise of rights or will, but rather simply submission to white authority and "Dere will," that collective white will to dispossess Negroes, diminishes Nimbus back to someone who owns nothing. On the run from Red Wing he is fortuitously reunited with his mother who was sold away from him during slavery. They cast their lots together and find work on a plantation. When Nimbus defends his mother against corporal punishment from the land owner he is imprisoned. His belief that a labor contract should not include whipping, and his protection of his mother leads to his being punished yet again and he is sent to prison. Like a slave, he is sold on the auction block to a company which leases convicts. But instead of a set price for his entire value, as in slavery, he is instead sold for a "wage" of twenty five cents a day, which he must work off over the course of four hundred days to pay the fine for the infraction of hitting the white man who abused his mother. Nimbus must pay two days for every day he loses due to illness, and frustrated by an increasing sentence due to illness, Nimbus tries to run away. Every time he runs he is caught, and by the time he is free, having finally completed his sentence, his mother has died. He loses her again in freedom as he had in slavery.

In *Bricks Without Straw* and Tourgee's earlier, *A Fool's Errand*, Tourgee constantly has his African American characters express the desire to have a "white man's chance" or half a white man's chance. This is always quite explicitly connected to an ability to get ahead in a sense of acquiring property or getting a decent labor contract, i.e. "a white man's chance" is the opportunity for economic advance. Because Tourgee is more of a social historian than an artist, it seems reasonable to assume that this was an expression he heard uttered by the blacks amongst whom he lived and worked while in North Carolina. Years later, in *Plessy v Ferguson*, Tourgee presented before the court a theory that there was a property value in whiteness that Plessy was being deprived of by being forced to sit in the segregated car. Tourgee's concept of there being property in whiteness in

part must have emerged from expressions such as "a white man's chance," which meant a freedom to exercise property rights and which reflected the frustrations and desires of freedpeople. Nimbus declines from his position as property holder because he never is given a white man's chance. The story of his declension, despite the novels happy ending, does fit into a 19th century literary tradition of representing decline. As a broader literary trope it was a reaction to the dangers of urbanity and industrial labor, but in this specific case was a response to the white supremacist culture confronted by black Southerners. Importantly, "property in whiteness"[85] is the private law reference in Plessy that has only recently been understood in legal scholarship as indicative of a larger spectrum of "Jim Crow justice." Property (and contract law about property) was, in fact a central means of de jure racism in the Jim Crow era and Tourgee knew it.

CHARLES CHESNUTT, ORAL PROPERTY, AND THE EXCHANGE VALUE OF LABOR

As was argued earlier in this article, property rights were a fundamental element of how the newly emancipated imagined their freedom, and one of the hardest aspects of freedom to realize. One of the most fundamental elements of property rights is the property in one's own labor, and the ability to exchange that labor for other forms of property. If we look to the work of another noteworthy author of that period, we find further illumination of property and contract as features of the law of Jim Crow, and the sense of dispossession experienced by black Americans through private law means.

Charles Chesnutt, one of the first celebrated African American authors of imaginative fiction wrote short stories treating African Americans' relationship to property and contract. In these short stories, he did not usually have the same level of realistic description of laws and policies as was found in Tourgee's fiction or that appeared in some of Chesnutt's other work. Instead, he presented extended analogies on the subject of property and contract in which black people articulated property desires and interpretations of contract in improvisational fashion, given a society with many limitations imposed upon black Americans.

Charles Chesnutt first became known for his "Conjure stories." He was initially inspired to become a writer by having read Tourgee's *A Fool's Errand*, but would far surpass Tourgee in literary skill. *The Conjure Tales*, so designated for their description of folk magic practices, are amongst his best crafted and most beautiful for their colorful representations of southern culture as well as sophisticated structure. Many of them appeared in the popular *Atlantic Monthly Magazine*. He first proposed to collect them as a book to be published by Houghton Mifflin,

the parent company to the *Atlantic Monthly Magazine*, years before they were to appear in book form. The sentiment of the desire to have them published was well expressed in his letter to the press. He wrote:

> These people have never been treated from a closely sympathetic standpoint. They have not had their day in court. Their friends have written of them, and their enemies; but this is, so far as I know, the first instance where a writer with any of their own blood has attempted a literary portrayal of them.[86]

For Chesnutt, the self-representation of African Americans was of the utmost importance. His stories would finally be published as a book in 1899, when Houghton Mifflin was under the editorship of Walter Hines Page, himself a Southern Republican and fiction writer. Chesnutt's representation of black thought and experience was profound, both because of his skill in doing so, and also because of his unique position as an African American writer.

In these early stories of his, the reader is brought into the agricultural South. At this moment in literary history, nostalgia for the Old South abounded and, therefore, dialect tales and tales in the folk genre which presented African Americans in an idyllic pastoral antebellum past were extremely popular, and appeared in the pages of the popular monthly magazines of the era. It was one region's version of the rage for "local color fiction." Chesnutt felt confined by this literary landscape. However he used it to his advantage. He wrote stories that took place in the current South although they referred back to a slave past. However, he subverted their power by analogically inserting complex analyses of social and political issues of the New South. Southern local color fiction was by and large racist and oppressive, but Chesnutt carved out a space of possibility within that genre.

Likewise, Chesnutt's central character in the Conjure Tales, an elderly black man called Uncle Julius, carves out a life for himself within the confines of a new South characterized by the widespread dispossession, disenfranchisement and poverty of African Americans. He does so in the realm of property, finding novel ways to possess property and exercise property rights despite the fact that he was not a "property owner" of real property or much personal property.

The stories are narrated by John, a white Northern man who has moved South with his wife. There he encounters Julius. Julius, having formerly been a slave on the land which John purchases, is now one of John's employees, serving as his coachman. However, he has another job as well. He tells instructive stories to John and Annie. The reader of Chesnutt's stories are privy both to the interaction between Julius and John and Annie, which provide frame narratives, and as well to the world of the slave plantation, which is the interior story shared in Julius' voice.

Julius' story-telling reveals two kinds of property rights. The first is that he uses the stories in exchange for goods, and therefore, he uses story-telling as labor

which has exchangeable value. The second is his stories are oral property. He owns them and he uses the knowledge that that ownership confers, which is substantial in the folk culture of African Americans. These two kinds of property are meaningful in different social realms. The first is important for Julius in his social and political condition as a black man in the South, the second, for use in a black spiritual and cultural world, the world of conjure, with its own rules and laws that must be followed.

The recognition of a property right in one's labor, and what one could get for that labor was a principle recognized in American courts in this period, although it was not frequently discussed in the context of black workers. It is referred to in both the opinion and the dissent of the Slaughterhouse cases 86 U.S. 36 (1873) and it was made doctrine in *Allegeyer v. Louisiana* 165 U.S. 578 (1897) often referred to as the case which established "liberty of contract." The Court also recognized liberty of contract as a property right in *Coppage v. Kansas* 236 U.S. 1 (1915). It is doubtful that any of this was lost on Chesnutt who was both an artist and a lawyer and who followed both politics and legal decisions intensively. Chesnutt, using the ideas of property as something of exchange value, crafts in Julius a character who uses the exchangeable value of his labor in a manner which is at once humorous and intelligent, given the confines in which this character lives his life.

In the first conjure tale of the collected book of 1899, "The Goophered Grapevine" the reader learns of how John and Julius meet. John is interested in a certain plot of land. He and his wife go to visit the land and there they find Julius, an elderly black man. He advises them against purchasing the land. He offers as explanation a plantation story from when he was a slave on that plantation. He tells John and Annie that the land was once owned by "Mars' Dugal" whose vineyard was plagued by slave and poor white grape thieves. The master turned to the free colored conjure woman, Aunt Peggy, to protect his land and she provides a spell, or "goopher" which guaranteed that "a'er nigger w'at eat dem grapes 'ud be sho ter die inside'n twel' mont's."[87] This is a just consequence for theft in the world of conjure, given that everyone has been made aware of the penalties for such action. However when a new slave, Henry, comes to the plantation and eats grapes without knowing about the rule. He is carried to Aunt Peggy who figures she can rescue him due to his "ig'nance er de conseq'ences." She gives him conjure medicine and tells him to come back in the spring. When the spring comes he takes her a ham as a gift, and she tells him to take sap from the blooming grapes and anoint his head with it. If he does this once a year he will be safe. (And because he has brought her the ham, she'll make it so that he can continue to eat as many grapes as he wants.)

A strange thing happens: In the Summer, Henry would grow like the grapes, young and spry, his hair thick as grapevines. And in the winter he becomes bald,

old and sickly like the seasonally withered vines. The master finds in this pattern a good opportunity to re-sell and re-buy Henry every year at a profit to unsuspecting summer purchasers. Henry becomes a constant commodity. In this story, the conjure woman's spell, while saving the slave's life, results in his further commodification. He dies when a Northern grape cultivator ruins the crops, digging up the ground and promising Mars Dugal greater profits with his faulty innovations. When the grape harvest dies, Henry goes with it. He, as a slave, is tied to the land unto death.

And so is Julius in the present tense frame story, having remained on this land where he once was a slave. He warns against John purchasing the land because the "goopher" or magic is still on some of the older grapes. According to Julius, he can eat them because he can tell the new crop from the old, but this newcomer might not be able to. In the internal world of African American folk culture, the knowledge about the grapes was transmitted through stories as a kind of oral property he possessed which allowed him to eat grapes safely.

The reader learns a great deal about Julius after reading the internal story of the Goophered Grapevine, and that information gives meaning to the story-telling. As it turns out, Julius had been living on this land alone for a long time. "The estate had been for years involved in litigation between disputing heirs during which period shiftless cultivation had well nigh exhausted the soil . . . the few scattered grapes they now were the undisputed prey of the first comer.[88] And Julius had a business selling the grames.

So, through a sort of functional although not legally realized adverse possession Julius became the owner of the land, having set up home in a cabin and made his livelihood there. He is unlettered in the rules of the law of property, but feels some sense of possession over the land upon which he has worked. He tries to protect his "property" by offering up the story. This effort fails, but he still winds up getting something in exchange for his efforts. He becomes coachman on the land and, therefore, he is able to keep his home.

John learns somewhat after this first interaction with Julius, that Julius had "derived a respectable revenue for the product of the neglected grapevines." So the reader learns that not only did Julius use his story-telling to try to keep ownership of "his" land, but in the products of it as well.

John is amused and imagines that his new income was "more than an equivalent for anything [Julius] lost by the sale of the vineyard."[89] So Julius has been able to use the work of storytelling to his advantage in more than one way. The symbolism of the story is instructive however in that we both get a sense of Julius's right to the grapes, despite his lack of title to the land, and a sense of the reality that black people who worked plots of land for years during slavery had not experienced the fruits of their labor as it were, and did not receive any of their redistributive due.

In another conjure tale, John's wife, the infirm Annie, is especially moved by the story of "Po' Sandy" which Julius shares with her one afternoon. Sandy was an exceptionally hard-working slave belonging to Master Maraboo McSwayne. (Perhaps the Swayne is a reference to the Justice who discussed the exchange value of labor in his decision in the Slaughterhouse cases, but perhaps it is a coincidence.) McSwayne constantly loans Sandy out to his adult children to assist on their plantations. While he's away on one of these loans, McSwayne sells Sandy's wife. Sandy is hurt, but soon finds another wife. She is a new slave on the plantation, Tenie. He loves Tenie, and is troubled by his continued life as "loaned out" goods, which forces him to be away from her. He tells Tenie:

> hits Sandy dis en Sandy dat en Sandy yer en Sandy dere, tel it 'pears ter me I ain' got no home ner no master ner no mistess ner no nuffin' . . . Tenie en I dunno whe'r I'm eber gwine ter see ag'in er no. I wisht I wuz a tree, er a stump, er a rock, er sump'n w'at could stay on de plantation fer a w'ile.[90]

Tenie reveals to Sandy that she is a conjure woman, and she grants his wish to be able to avoid the constant manipulations of slavery by turning him into a tree. Occasionally she turns him back to a person, because life as a tree is difficult, he can neither hear nor eat in that state. The master thinks Sandy has run away, and Sandy is free in some respect, although in his paralyzed tree state he has a strange sort of autonomy. Several abuses of Sandy in tree form take place. A woodpecker pecks him and someone cuts out a chunk of his leg for lumber. Each time something bad happens, Tenie provides some protections for Sandy in the future. She cannot ultimately protect him, however, when she is loaned out to her master's daughter-in-law, and that is when tragedy strikes.

While she is gone, Sandy the tree is chopped down to build a new kitchen for the master. When Tenie returns from being loaned out, she learns lumber is being cut for a new kitchen and she runs to Sandy to see if he is still standing. She finds him already cut down and being carried to the mill. She is in hysterics, and is tied down to prevent her flailing. As a result, she is unable to turn him back into a person one last time to tell him she hadn't forgotten about him. The wood squeaks and moans as it is sawed. These are the wails of Sandy, and listening to them, Tenie loses her mind. Once the kitchen is built, it is haunted by Sandy's spirit, and eventually, no one will go there at night except Tenie who goes to make amends to her lover. One night, Tenie dies there in the kitchen on the cold floor.

The occasion for Julius to tell this story is that Annie and John are planning to build a new kitchen, partly with the wood from the old kitchen, which had served as a schoolhouse for several interim years, and partly with new lumber. Annie, John and Julius are at the mill buying the new lumber when Julius tells them about

po' Sandy. Annie, identifying with the brokenhearted Tenie, decides that it would be better to use all new lumber for their kitchen despite her husband's irritation that she might be moved by such obvious fiction. Annie does not want the lumber with the blood of slavery upon it. But Julius does. She allows him to use the old school-house that was built with Sandy as a church for his splinter group from the Sandy Run Colored Baptist Church which has divided over the issue of Temperance. John asks Annie what Julius plans to do about the ghosts, trying to draw attention to the manner in which she has been manipulated by Julius. She responds, "Uncle Julius says that ghosts never disturb religious worship, but that if Sandy's spirit should happen to stray into meeting, no doubt the preaching would do it good."[91]

Julius obtains property in exchange for this story. But there is something more. He also recovers the bodies of a soul lost in slavery. He recovers his own symbolic heritage in the wood that was Sandy. The property value in the stories then, is also that owning them is owning an identity which is deeply connected to land in an often tortured fashion, a torture disappointingly continued in the post-emancipation South, as systems of debt peonage became the norm. The choice for Sandy to either be forced into moving from job to job as a loaned out slave, or to be frozen into one place where he is in some limited sense free, to a great degree parallels the choice that was presented to many African Americans in the post-Reconstruction era. Either they would stick to working in one particular location as free men, or they would leave, thereby breaching labor contracts and be threatened with the proposition of being hired out without any choice as to where he or she went, through the convict labor system or the surety system. It is an oblique analogy, and Chesnutt felt to some degree forced to keep it oblique, given the literary climate and Chesnutt's desire to be published. His more direct protest literature did not sell as well as this work, and did not get as good reviews. But at the very least, this work is an eerie description of paralyzed freedom, which is a metaphor for the kind of freedom African Americans experienced in this era.

In "Dave's Neckliss," Chesnutt is engaged in a psychologically charged, double layered discourse about slavery and post-slavery. Uncle Julius tells John a story about the psychological impact of slavery on the slave (or former slave). Dave was a slave who learned to read, despite the law of slavery. Because he is such a good slave however, the master permits him to use his skills to serve as a preacher. He is a popular man and has an attractive girlfriend named Dilsey. Another of Dilsey's suitors, Wiley, sets Dave up to be punished by planting a stolen ham in his cabin. When the master discovers the ham, he punishes Dave by chaining a ham to his neck, where it will remain for six months. From that point on Dave is shunned, even by Dilsey, and the ham takes on a huge role in his life.

> w'enever he went ter wuk, dat ham would be in de way. Ef he turn ober in his sleep dat ham would be tuggin at his neck. It wus de las' thing he seed at night, en de fus' thing in seed in de mawnin' W'enever he met a stranger de ham would be de fus' thing de stranger would see.[92]

The ham is symbolic of the biblical curse of Ham, which had been interpreted as the punitive sentence of the children of Africa. It also refers to the cross Christ bore. Like Christ, Dave is betrayed by one of his own, and is offered up for sacrifice. It is also a symbol of chattel slavery; Dave is reminded that he is nothing but a piece of meat. Dave begins to identify with the Ham. Even after his punishment is over he ties a string about his neck where he once carried the ham. He asks his friend, "Did yer knowed I was turnin' ter a ham, Julius?" In Dave's mind he is the ham, he is the cursed, he is the sacrificed, he is the chattel. Wiley makes a death bed confession, revealing that he framed Dave. The master wants to publicly absolve Dave, and so sends Julius to get him. Julius finds Dave in the smokehouse:

> Dere wuz a pile er bark burnin in de middle er de flo' en right ober de fier, hangin' fum one er de rafters, wuz Dave; dey wuz a rope roun' his neck, en I didn' haf ter look at his face mo' d'n once fer to see he wuz dead.[93]

This harrowing story about the psychology of degradation is also a warning. The injustice was repaired too late, Dave was already hung by the effects of slavery. In the frame story to this one, the narrator notes that Julius speaks of slavery's cruelty

> . . . with a furtive disapproval which suggested to us a doubt in his own mind as to whether he had a right to think or feel and presented to us the curious psychological spectacle of a a mind enslaved long after the shackles had been struck off from the limbs of its possessor.[94]

Julius, now free, is like Dave still caught in the psychology of the unfree. The ham about Dave's neck operates in the text as a symbol of both chattel slavery and "the curse of ham" thought to have been wreaked upon the sons and daughters of Africa and explanatory of their oppressed condition. In the politics of the New South, the ham takes on yet another symbol for the reader. It is an analogy to the "badges of servitude" which referred to the Thirteenth Amendment. The social alienation of Dave from his slave community due to the ham, even after it is removed, is certainly an analogy to the social and political alienation of African Americans as a group in the New South. They were no longer yoked with the categorization as slaves, but its effect lingered, particularly on the psyche of the one who had been enslaved by the ham. Notwithstanding that the evidence that had been presented against him was false, he carries the burden of it on to his death, which is a suicide. He smokes himself like a ham, in the smokehouse. This story then is both a metaphor for the wrongs that were experienced by African Americans condemned by false evidence, and is also a metaphor for the damage done to African Americans by the

conditions in the South, it is therefore, a psychological work which anticipates the development of more nuanced and psychologically provocative forms of fiction written by African Americans in the 1920s. Julius, in the frame story, is able to obtain an entire Ham from Annie, another exchange of a story for some property. Annie is so touched by the story that she cannot eat the ham. Julius can.

LITERATURE AND ACTIVISM FOR BLACK PROPERTY RIGHTS AND THE LEGAL RESPONSE

The two literary figures which this article has treated thus far, were activists as much as artists. Their concerns reflected the concerns of the black South, and their allies. They wrote about private law in ways that were more expansive and detailed than their treatments of the indignity of segregation, and even more than they did about suffrage rights. Attention to this literary tradition, and its relationship to larger activism, facilitates our understanding of what the law of Jim Crow actually was, and how much more it was than simply the law as it resulted from *Plessy*. It reflects the centrality of property and contract concerns in the minds of black citizens, and the reality of the importance of these private law areas to the exercise of citizenship. In this section I will discuss the activism, from authors and others, and the relationship between that activism and some legal developments with respect to race and law. While there was some modest success, I conclude that these successes did not facilitate future lawyers and judges in understanding private law as an element of Jim Crow, as it should have.

While in his fiction Chesnutt was not explicit and didactic about the system of peonage that developed, he certainly was in other areas of his public life, writing and speaking about it. And in his later fiction he weighed in on a number of political issues facing African Americans, including the convict lease laws. He saw himself as an activist, however, with respect to race and the law. He was not alone amongst African American authors who in their fiction tended to use property as part of a larger argument about the rights of African Americans. James Weldon Johnson and Paul Laurence Dunbar, two of his contemporaries, had property themes in their work as well.

But Chesnutt, Johnson and Dunbar, all great literary figures, and the former two great intellectuals and activists in other realms as well, together did not have a fraction of the power or influence of Booker T. Washington. Washington, president and founder of Tuskeegee Institute, a historically black college in Tuskeegee Alabama, was the most powerful black leader of his time. He was known for his accomodationist and gradualist philosophy when it came to black political rights, but he was the leading public advocate for the idea that African

Americans should focus the majority of their energy for racial uplift on the acquisition of land, property. He believed African Americans should not press for political rights, but rather wait until they had an economic foothold in this society. To that end he was a leading proponent of industrial education.[95]

Washington's advocacy for black property-holding emerged from his self-reliance philosophy. Through his education model he sought to make black people competitive agricultural engineers, skilled and semi-skilled laborers in order to make their location in the economic marketplace indispensible.[96] Although he was hesitant to claim this publicly, it seems that his motivation was impacted by the influx of immigrants into the U.S. as well as a native white skilled working class, two alternative sources of labor. Washington also wanted to increase the likelihood that black people would have the skill to rise to become property-holders. Other black leaders believed in industrial education for similar reasons, although few believed it should be the exclusive form of education to which black people were exposed. Alexander Crummell, the fiery minister who expatriated to Liberia for twenty years and who was extremely critical of Washington's accomodationist stance with regard to political rights (he was a friend of DuBois'), nevertheless shared his beliefs in the property-based purposes of industrial education. Crummell wrote:

> Some plan must be fallen upon by which the rising generation among us can be learned in handicraft. Some scheme must be projected by which our youth can, with success, be equipped for the trades.[97]

Crummell understood that developing labor skills that would increase their negotiating power would be critical to black people seeking to be self-possessed citizens. He also wrote:

> The general sentiment of this nation seems always to have been that the black man is fit for use. When he was first brought from Africa, 200 years ago, a slave, it was because he was fit for use. For generations he as been employed on board plantations, amassing wealth for the great proprietors in the South because he was fit for use.
>
> He has recently been emancipated, and still the idea is current in this country that he is still fit for use. He is thought fit for use by both political parties in the country. They wish to employ them for their own purposes; and all the time while using the black man, no idea has been entertained of his right to use himself; his own power and resources for his own benefit.[98]

This was, in effect, an argument for a property right in one's own labor. After making this argument in this essay, he then advocates a national scholarship fund for African Americans wishing to enter highly skilled trades. For him, however, the political life and economic life of African Americans were connected, as with most other black political leaders. In contrast, Washington believed the

development of property-owning and influence through industrial and agricultural education would lead to political rights. Washington agreed that, "Negroes must demand their constitutional rights," but "after all the Negro will have to depend upon the influence which he can bring to bear in his own immediate community for his ultimate defense and final rights," however, he added that, "It is very difficult for any law-making body to give an individual influence of power which he does not intrinsically possess."[99]

It was a plausible theory, given the idea held by many philosophers and political theorists that political rights developed from property ownerhship. Moreover, industrial education served a very pressing concern because African Americans were for the first time competing on a labor market. As historian Howard Rabinowitz writes:

> Industrial education is often seen as either a white plot to perpetuate Negro inferiority or as a program blacks reluctantly adopted at the very end of the century in response to the prodding of Booker T. Washington. In fact, whites often advocated industrial education for members of their own race. Editorials in the Southern press during the 1880s supported this type of schooling for both races, but often emphasized its value for whites.[100]

Despite the functional benefit to industrial education, there was a problem with Washington's theory. It failed to adequately consider the reality that black people were not deemed fit to be property-holders, and that they could not protect the property they did acquire against violence or their labor rights as skilled or unskilled laborers. In fact, while Washington was roundly criticized for being so quiet about the social ills of lynching, Ida B. Wells, the muckraking black woman journalist from Tennesee who exposed the crime of lynching in print, showed that often black men were lynched for the "crime" of holding too much property in the minds of the southern herrenvolk ideologues, or for becoming economically successful. She told the following story of men who were lynched as an example of such a punishment:

> On March 9th, 1892, there were lynched in this same city three of the best specimens of young since the war Afro-American manhood. They were peaceful, law abiding citizens and energetic business men. They believed the problem was to be solved by eschewing politics and putting money in the purse. They owned a flourishing grocery business in a thickly populated suburb of Memphis, and a white man named Barrett had one on the opposite corner. After a personal difficulty which Barrett sought by going into the "People's Grocery" drawing a pistol and was thrashed by Calvin McDonnell, he (Barrett) threatened to "clean them out." These men were a mile beyond the city limits and police protection; hearing that Barrett's crowd was coming to attack them Saturday night, they mustered forces and prepared to defend themselves against the attack.
>
> When Barrett came he led a posse of officers, twelve in number, who afterward claimed to be hunting a man for whom they had a warrant . . .

These black men accidentally fired into a group of plainclothes police officers while trying to defend themselves and their property. They are taken off to jail, and then:

> three of these men, the president, the manager and clerk of the grocery, 'the leaders of the conspiracy' were secretly taken from jail and lynched in a shockingly brutal manner. "The Negroes are getting too independent", they say, "we must teach them a lesson."
>
> What lesson? The lesson of subordination.[101]

Blacks were not to be self-defined, self-owning, property-owning people, but members of a subordinate labor class and they stepped out of line with the idea that they might have to pay for it with their lives according to the rules of the Redemption era South. Despite Washington's theory, property-holding was not the precursor to political membership for African Americans. It was along with political membership an affront to the white South. Washington's aspirations toward the development of a black skilled labor force, while notable in providing numerous opportunities for African Americans, would not change that.

Perhaps Washington became an activist in the area of debt peonage rather than any of the other areas in which blacks were subjugated because the system exposed the deepest flaw in his theory. He, along with a group of other activists, and with some federal assistance, were instrumental in bringing about the lawsuits which overthrew the laws which maintained the system of debt peonage.

Booker T. Washington had established himself as a national leader by the time peonage reform came into the public eye. President Theodore Roosevelt shared Washington's concerns about the issue. Washington recommended that he appoint Thomas Goode Jones to a federal district court judgship in Alabama.[102] In 1901, Roosevelt made the appointment and Jones would use his position to become one of the most important peonage reformers of his time. Washington used national press coverage to push for grand jury investigations and Department of Justice activity. As a Judge, Jones struck down two Alabama statutes which supported the system of peonage.[103] One was Alabama's enticement statute, and the other was the law which punished a laborer who had entered a written contract with an employer and abandoned that work before the completion of the contract and who took similar employment elsewhere without notifying his first employer. Jones was a southerner and was one of a number of southern judges who ruled against the series of laws that had cast blacks in the position of having limited freedom of labor. Some of them, like Jones, were sincerely committed to the issues. It is likely that others, mostly state court judges, were anticipating decisions from federal courts that would overturn their rulings and they pre-empted such decisions. That fear was probably motivated by the interest Roosevelt and later Taft had in dismantling debt peonage, and that their choices for southern federal judges and

attorneys general reflected this interest. Roosevelt was also the first president with a rapidly expanding size of adminstration and regulation, and these judges might have feared the extent to which he might go in regulating states.

Charles Chesnutt took notice of the efforts of Roosevelt and his appointees and was public in his appreciation. He wrote:

> President Roosevelt and his appointees in the Federal Courts have made a strong effort to break up the new slavery ere it became firmly established and in many other ways the President has endeavoured to stem the tide of prejudice, which sweeping up from the South has sought to overwhelm the Negro everywhere; and he has made it clear that he regards himself as the representative of all the people.[104]

Although Roosevelt (as well as Taft and Wilson) would not act on the numerous other ways in which African Americans were being oppressed in the South, Chesnutt was moved by Roosevelt's attention to this issue and what could be the results of that interest. He wrote:

> By the efforts of the Department of Justice, at the suggestion of Federal Judge Jones of Alabama, one of President Roosevelt's appointees, and at the personal instance of the President himself, it was ascertained and made known that this iniquitous system of involuntary servitude was flourishing widely and had been practiced for years in the "black belt" of Alabama and adjoining States, and was spreading to the upland counties. Convictions followed the indictments; many of the guilty were punished, and warning was given that the Federal Government would no longer tolerate the state of things.[105]

Unfortunately, Chesnutt found Roosevelt an unwilling ear in other areas. He wrote to him, hoping that he would read his novel based on the events of the 1901 Wilmington North Carolina race riots, *Marrow of Tradition*. He also asked Booker Washington to suggest that the President read the book: "He has shown himself very friendly, so far to our people, and I should like to help brace him up in this particular."[106] Roosevelt proved himself disinterested in protecting black citizens from abuse in southern states.[107] And even in the area of debt peonage, Chesnutt's celebrations nothwithstanding, prosecutions of those holding people as peons were difficult to obtain. In 1907 an investigator sent to the South by the Department of Justice "estimated in 1907 that some one-third of larger planters (operating from five to a hundred plows) in Alabama, Georgia and Mississippi were holding their black workers to 'a condition of peonage,' arranging for the arrest and forcible return of those who left their workplace before settling their indebtedness."[108] The problem was epidemic, and prosecutions were difficult because on the one hand many local whites who would act as witnesses or jurors were loathe to prosecute someone for a system they thought was just, and on the other many blacks were afraid of the personal consequences of their potential testimonies, having learned that violence was a central element in Herrenvolk Lockeanism. Nevertheless, throughout the first decades of the twentieth century, sometimes less

than ten years after one had been enacted, state statutes leading to debt peonage were struck down.

Judge Emory Speer of Georgia, an anti-peonage activist, expressed a strong cause of concern that many judges may have had about the peonage system. He asked: "What incentive to better effort or better life – if he, his wife, his daughters or his sons, may in a moment be snatched from his humble home and sold into peonage."[109] It was a system that degraded black labor in such a way that, in the end, southern economy might suffer.

In *Ex Parte Drayton*,[110] South Carolina district court judge William Brawley struck down the law that made breach of labor contract criminal if one had received an advance. Part of his argument was that a system of forced labor would be a deterrent to European immigrants who might otherwise seek to work in the South, a people about whom there was much excitement and speculation. He also cited the *Allegeyer*[111] decision and Justice Field's dissent in *the Slaughterhouse Cases*, both of which had referred the concepts of liberty of contract and the property rights in labor.

In 1908, the same statute Brawley struck down came up for consideration before the state supreme court of South Carolina, *Ex Parte Holman*.[112] And the decision in that case shows a concern both with Brawley's ruling and Judge Jones of Alabama's earlier decisions.

Jack Holman, a black man, applied to the court for release from prison under habeas corpus. He argued that the South Carolina statute under which he had been convicted was unconstitutional. The statute in question read as follows:

> Any laborer working on shares of crop or for wages in money or other valuable consideration under a verbal or written contract to labor on farm lands, who shall receive advances either in money or supplies and therafter willfully and without just cause fail to perform the reasonable service required of him by the terms of the said contract shall be liable to prosecution for a misdemeanor, and on conviction shall be punished by imprisonment for not less than twenty days nor more than thirty days or to be fined in the sum of not more than twenty five dollars nor more than one hundred dollars in the discretion of the court: Provided, the verbal contract herein referred to shall be witnessed by at least two disinterested witnesses.[113]

The decision of this court to overrule this statute, along with Brawley's earlier decision, was significant because it was the norm for African American farm laborers to need advances at the beginning of a season, this statute would therefore touch the majority of the agricultural laboring population of South Carolina in some way or another. It certainly must have become a consideration for any person who was considering leaving a labor contract, that they might face prison time for doing so. Fundamentally, it served to limit the possibility to exit contracts in the manner in which many African Americans had exercised contract rights in the post-emancipation South.

The court reaches a conclusion for Holman in this case on several bases. Significant among these was that South Carolina had a provision in the State Constitution that stated that a person could not be imprisoned for debt except in the case of fraud. There was nothing in the statute in question that required *evidence* that the worker had received the advance with the intention of defrauding the landowner; fraud was assumed, a legal fiction used to get around the state constitutional provision against imprisonment for debt.

The court notes that:

> It is strenuously argued, however, that the act does not provide for imprisonment for debt under civil process, and that the General Assembly may make an act criminal and punishable by imprisonment which is not fraudulent and recognized as morally wrong. The power of the General Assembly to make an act criminal, which was before innocent, is familiar. But the legislative power to make acts criminal and punishable by imprisonment cannot be extended to an invasion of the rights guaranteed the citizen of the Constitution.[114]

This statement by the court is in part a declaration of the unconstitutionality of the statute, but it also closes the door to the possibility that the South Carolina legislature might enact a statute which forced labor directly as payment for the advances made to the worker. Such a practice would fail to appreciate that the freedom to exit a contract was an essential part of the right to contract, something that was increasingly recognized by courts in other regions, and that return of the advanced good or monies would have to be an option for the obligation of one who breached a contract. This was particularly important given the thirteenth amendment and how recently the condition of slavery was a norm in Southern states. Freedom to move was tied to freedom of contract. The court mentions that in Louisiana, a statute was upheld which stated, "whoever violates a contract of labor, upon the faith of which money or goods have been advanced, shall be punished by fine in the sum of not less than ten or over two hundred dollars, or, in default of payment, ninety days or less imprisonment at the discretion of the district court."[115] However such a statute could not be upheld in South Carolina which had the constitutional provision that imprisonment for debt was illegal.

The court goes further though, and addresses the question of whether the statute enforces "involuntary servitude or peonage." Instead of simply allowing it to rest on the previous grounds, the court considers other legal questions. Perhaps it is pre-emptively anticipating the possibility that an amendment to the state constitution might allow for another similar statute to be enacted, which might appear again before the court under the grounds of debt peonage. In the alternative, it might be the case that the court was attempting to prevent recourse in future cases to the U.S. Supreme Court. The court states:

> A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for a breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of that service.[116]

Furthermore:

> It is important to observe our statute places no limit on the time for which a laborer may be bound under a contract to work, nor does it allow him to release himself from his burden to continue the service on pain of punishment as a criminal by repayment of the advances. The statute not only enforces the involuntary servitude of the laborer because he has contracted a debt with his employer, but it enforces his involuntary service because the debt once existed, though it be paid. Thus it falls within the prohibition of the peonage statute and goes beyond it.[117]

There is yet another pre-emptive move the court makes against the South Carolina legislature. The court states that even if the statute were revised to only punish for fraud, as it stands, it would still be unconstitutional. It is a violation of the fourteenth amendment to punish the laborer without having a similar penalty punishing the landowner for breach. The court recognizes equal protection rights for different social classes when they exist on either side of a binding contract. That the court is trying to prevent legislative manipulations in its ruling is an example of the way in which southern courts in the first two decades of the twentieth were in this respect complicit with executive efforts.

State v. Armstead[118] was decided by the Supreme Court of Missisippi 1913, and a number of the statements of the court are of the same tenor as those in Holman. In this case, Mose Armstead was working for one man and before the end of this contract, went to work for another. This was in violation of a Missisippi statute which stated:

> Any laborer, renter or sharecropper who has contracted with another person for a specified time in writing, not exceeding one year, who shall leave his employer or leased premises before the expiration of his contract without the consent of the employer or landlord, and makes a second contract with a second party without giving notice of the first contract to the second party, shall be guilty of a misdemeanor, and on conviction shall be fined not exceeding fifty dollars.[119]

Although the statute had been in effect for a number of years, and people had been convicted under it, this case was the first in which the constitutionality of the statute had been considered. This court finds the statute unconstitutional on several grounds. Additionally, the court responds to the contentions which must have been heard from the planter class that this statute was necessary to make labor effective by saying,

> In the course of government it may be necessary for citizens to be restricted in what they may deem to be their natural rights for the general good of the public. But the Constitution limits the extent to which their rights and privileges may be abridged.[120]

This, the court decides is too far an abridgment, citing a Missouri case, *State v. Julow*, in which the court there stated: "Here the law under review declares that to be a crime which consists alone in the exercises of a constitutional right, to wit, that of terminating a contract, one of the essential attributes of property – indeed property itself – under preceding definitions."

In this case, the situation was different from in Missouri, in that it wasn't just punishing the breach of a labor contract, but the entrance into another contract. But the court cites another case in Alabama in which a statute similar to their own was declared unconstitutional. This court sees that the statute in its effect forced people into involuntary servitude. It does so with a recognition that a court had to mediate practicality with constitutionally protected rights, herrenvolk philosophy notwithstanding, saying:

> The Legislature when enacting the law, doubtless believed that they were presenting a wise and necessary provision for the purpose of requiring the fickle laborers in our cotton country to reasonably observe their contracts. We are fully aware of the situation regarding the uncertainty of plantation croppers, tenants, and employees fulfilling their agreements. . . . However, over and against this is the more important question of protecting the liberties and rights of the citizen. . . . There is no necessity by reason of the general welfare of the public sufficient to require that the rights of the individual shall yield, in this case, to the rights of the public.[121]

The protection of the individual rights of African Americans was, of course, limited. Make no mistake, these cases did not herald a second Reconstruction. It is true that in a number of cases besides the ones discussed the court ruled against legislation that violated the rights of African Americans. The process of either declaring such statutes unconstitutional, or limiting the extent of their authority, was taking place throughout the South, but it was a South in which Convict Labor had become endemic, and most African Americans remained in the ranks of unskilled backbreaking labor, and with limited options for doing other work. By the time these statutes were overturned black people's impoverished economic condition was firmly codified. These cases simply took the edge off the exploitation and prevented the criminalization of the entire African American community simply for exercising the rights of citizens. It was a deeply conflicted political reality that the New South had shaped. African Americans still could not vote, and were on the whole impoverished, segregated legally and socially from whites, and lived under threat of violent white authority. However, the moves of the court in these cases was in part the product of a negotiation between Southern states and the federal government over how far the oppression of African Americans could go. The states understandably did not want a trend of the federal courts overruling their statutes, so they gave just enough. That activists who pushed the federal government to put pressure on the states in this regard recognized these were cases

worth struggling over suggested that the private law was a critical part of their struggle for citizenship.

APPELLATE FEDERAL PEONAGE CASES

The appellate federal peonage cases, like the state and district court cases might be seen as a clear victory for black workers in that they declared unconstitutional some of the laws which facilitated the process of peonage. However, I wish to posit that they might also be seen as a defeat from a historical perspective. Although they overruled certain laws, they allowed others with clear racist intent to persist. Moreover, in having a "color-blind" interpretation as to why they were unconstitutional, they did not set a precedent for understanding that property and contract were central means of violating the rights guaranteed to black Americans by the Civil War Amendments, and therefore created no path for understanding de jure racism through private law.

The threat of Federal cases probably motivated many of the state cases. The first significant Supreme Court case regarding peonage was *Clyatt v United States* (1905),[122] followed by *Bailey v. Alabama* (1911)[123] *and U.S. v. Reynolds* (1914).[124] "The Court pierced the gloom of racial and labor arrangements in the South largely as a result of executive initiative, and much of the practical impact of the Peonage Cases on Southern labor practices depended on executive enforcement."[125] In each of these three cases, the court addressed the problem of debt peonage from a different angle, although in none of the cases was the prevalent southern racism articulated as a factor in decision-making. As Benno Schmidt wrote in a history of the peonage cases, "It was in the name of property rights and an imaginative variant on freedom of contract that the Court gave constitutional support to the most wretched of the South's black agricultural laborers."[126]

Schmidt argued that in these cases the Court took a unique attitude towards liberty of contract and that:

> . . . The positive right approach of the peonage cases established a limited right to breach of contracts as a fundamental freedom, and in so doing revealed that the central principle of laissez faire constitutionalism, freedom of contract, embraced a free labor value that shielded workers from the harshest owner an unscrupulous employer could exercise: the power to force continued labor on pain of criminal punishment for quitting.[127]

Clyatt

In the *Clyatt* case, Mr. Clyatt was convicted under the federal peonage statute of 1867, which had been written to address the treatment of Mexican workers in the

West. He had forced a group of black men back to work in a sawmill in Georgia, acting as an agent of the man who had employed them and to whom they were in debt for advances. Attorney General Moody, an anti-peonage activist, argued the case against Clyatt. The attorney general of Georgia tried to implore him against his course, writing that unless they "were permitted to control their labor as they saw fit without any interference from the federal authorities, they would be unable to carry on the sawmill business."[128] But Moody was undeterred. Although the Court would not uphold Clyatt's conviction because the allegation brought against him was that he *returned* the men to peonage and no evidence had been presented that they had *previously* been in a condition of peonage. The peonage statute was unanimously upheld by the court. The statute reads as follows:

> The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the territory of New Mexico, or in any other territory or state of the United States; and all acts, laws, resolutions, orders, regulations, or usages of the territory of New Mexico, or of any other territory or state, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void.[129]

The court also said that peonage includes work that was initially entered to in a voluntary fashion but becomes compulsory service after the fact, which was the situation in much of the southern peonage.

Hodges v. U.S.,[130] decided by the Court the same year, demonstrates that the court was not striking against the system of white supremacy as a whole when they recognized the illegality of peonage. Rather, the court was simply asserting a liberty of contract and a liberty to exit contract. In *Hodges* the court set aside the convictions of three men who had terrorized a group of black men who were employed at a saw mill with the intention of driving them away from this (often coveted) job. Brewer wrote for the court, and in the opinion he stated:

> It is said, however, that one of the disabilities of slavery, one of the indicia of its existence, was a lack of power to make or perform contracts, and that when these defendants, by intimidation and force, compelled the colored men named in the indictment to desist from performing their contract, they, to that extent, reduced those parties to a condition of slavery – that is, of subjection to the will of defendants, and deprived them of a freeman's power to perform his contract. But every wrong done to an individual by another, acting singly or in concert with others, operates pro tanto to abridge some of the freedom to which the individual is entitled. A freeman has a right to be protected in his person from an assault and battery. He is entitled to hold his property safe from trespass or appropriation; but no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery . . .
>
> It is for us to accept the decision, which declined to constitute them wards of the nation or leave them in a condition of alienage where they would be subject to the jurisdiction of Congress, but gave them citizenship, doubtless believing that thereby in the long run their best

> interests would be served, they taking their chances with other citizens in the states where they should make their homes. . . . For these reasons we think that the United States court had no jurisdiction of the wrong charged in the indictment.[131]

The court neglects to protect them against the intimidation of southern whites. Indeed, such a decision would have opened the floodgates, given that the intimidation of black people had become such a norm of southern relations. To rule against it would have been to demand federal intervention. The court, ruling in this cases soon after Clyatt, distinguished against the exploitative contractual relationship and the extra-legal intimidation that supported the social order which could impede upon the freedom of contract of black workers. Harlan dissents in this case as he did in Clyatt, thinking Clyatt's conviction should have been upheld. Harlan describes this as a case of conspiracy or combination. But the Court as a whole, having retracted from the protection of blacks in the South in recent years, is only concerned with one specific area of contract rights and relationships.

Bailey

Alonzo Bailey, a black Alabaman, was held on a charge of having obtained money under a written contract with intent to defraud. Alabama law provided that breach of a labor contract, coupled with failure to repay an advance constituted prima facie evidence of an intent to defraud. Bailey's filed a writ of habeas corpus which first came before the Supreme Court of the U.S. in 1908.[132] Holmes wrote the opinion of the court in that case, asserting that it was not ripe because it was not yet clear that the prosecutors were proceeding under the statute at hand, nor, if it had been assumed that they would proceed under the statute, had evidence yet shown that the statutory provision at hand was unconstitutional. After the case had been tried in Alabama State court the Supreme Court confronted the statute again, in *Bailey v. State of Alabama* (1911).

In *Bailey v. Alabama*, the Court voided the Alabama statute which declared the failure to complete performance of a labor contract after the laborer had received an advance, prima facie evidence of fraud, and therefore, criminally punishable. Moreover, a local rule prevented the person accused under the statute from testifying about his motives in leaving his employment compounding its unconstitutionality. Hughes, however, writing for the court, asserted that this case was not about race, but instead about contract. He writes:

> The statute, on its face, makes no racial discrimination, and the record fails to show its existence in fact. No question of a sectional character is presented, and we may view the legislation in the same manner as if it had been enacted in New York or in Idaho . . .[133]

> A mere breach of a contract is not by the statute made a crime. The criminal feature of the transaction is wanting unless the accused entered into the contract with intent to injure or defraud his employer, and unless his refusal to perform was with like intent and without just cause. That there was an intent to injure or defraud the employer, both when the contract was entered into and when the accused refused performance, are facts which must be shown by the evidence . . .[134]
>
> The asserted difficulty of proving the intent to injure or defraud is thus made the occasion for dispensing with such proof, so far as the prima facie case is concerned. And the mere breach of a contract for personal service, coupled with the mere failure to pay a debt which was to be liquidated in the course of such service, is made sufficient to warrant a conviction.[135]

Despite the assertions of the court otherwise, the case was about race because Southern Herrenvolk Lockeanism led to the creation of such laws which impeded the freedom African Americans had to enter and exit labor contract as they wished. Although denying the case was about race, the court did consider the function of the statute amongst those disadvantaged by society:

> Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question . . . and it is apparent that it furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid; an instrument of compulsion peculiarly effective as against the poor and ignorant, its most likely victims. There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based.[136]

African Americans sought to find freedom through the exchange value of their labor. It was a well recognized principle of contract law that it was efficient to breach a contract where the cost of performance was greater than the value of performance. When African Americans worked in these labor contracts for a year in exchange for debt, rather than material gain, breach made perfect sense, but very few powerful parties considered the operation of basic contractual or property theory from the perspective of black workers. Finally, in this one of many areas of the social exclusion of African Americans, the highest court recognized this one important means of excluding them from citizenship rights.

Interestingly, one of the most important contractarians in American legal history, Oliver Wendell Holmes Jr., dissented from the decision in Bailey. Holmes had recognized a limit to the penalties for breach of contract and a freedom to exit contract in his legal theory. As Benno Schmidt notes, Holmes wrote in *The Common Law*:

> The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by and therefore free to break his contract if he chooses.[137]

Holmes, however, did not have a problem with forced labor for contractual liability as it appears in this context. In his dissent, he states:

> I shall begin, then, by assuming for the moment what I think is not true, and shall try to show not to be true, that this statute punishes the mere refusal to labor according to contract as a crime, and shall inquire whether there would be anything contrary to the 13th Amendment or the statute if it did, supposing it to have been enacted in the state of New York. I cannot believe it.[138]

He refuses to accept the idea that this decision is not made as a result of racial considerations. But Holmes' dissent perhaps suggests racial considerations itself. He seems to be more motivated by the belief that states should be able to compel these workers to stay in their labor contracts than with individual contract rights. He writes:

> If the mere imposition of such consequences as tend to make a man keep to his promise is the creation of peonage when the contract happens to be for labor, I do not see why the allowance of a civil action is not, as well as an indictment ending in fine. Peonage is service to a private master at which a man is kept by bodily compulsion against his will. But the creation of the ordinary legal motives for right conduct does not produce it.[139]

Holmes' belief in Eugenics theories might explain this hostility to the protection of black rights, and to the peonage statute period. Perhaps he did not consider these black workers in the South truly as rights bearing individuals before the law to be protected but as the less developed who must be allowed to fend for themselves, and who would likely fail. Additionally Holmes might have been taking the much discussed trauma of his experience in the Civil War out on the subjects of the conflict. According to his own earlier theory:

> If there is an excuse for breaking the contract, it will be found in external circumstances, and can be proved.[140]

However, it was impossible under local rules to refute the presumption of fraud and therefore external circumstances that would support the black workers were not admissable. Moreover, Holmes argues in this dissent from his objectivist theory while failing to considering the "real" operation of law to which he proclaimed he was committed. In applying his objectivist theory of contract to this case, Holmes refused to consider the social negotiation that was necessary in light of the numbers of freedpeople in the labor force. He looks merely to what appears to be an externally viable contract, and sees the punishment for that as legitimate, arguing that it would be a different question if there were an "external reason" for breaking the contract. The subjectivity of the experience of freedpeople who were locked effectively into systems of debt peonage did not weigh into his analysis of the legitimacy of either the contract or the punishment for violation of the contract. However, other members of the court were able to see the impossibility of the freedpeople's situation with regards to the most basic elements of a bargain theory to which Holmes himself owed the foundations of his contract theory.

Moreover, Holmes does not see any potential excuse in the fact of being forced either to labor against one's will according to a contract which will bear you no appreciable material advantage or to just work under forced labor in prison. He fails to consider the social context of the decision, although that failure was distinctly non-Holmesian according to his elaborated theory. It makes sense, however, when one considers the eugenicist leanings of Holmes and perhaps that he believed that blacks were fundamentally meant to be laborers, that the externally viable contract was an easy question because ultimately they were supposed to be obedient workers above all else, and if they were to rise above that condition they would be able to do so of their own accord.

Holmes also resists the argument that the statute criminalizes breach because the element of prima facie evidence of fraud is not the same as conclusive presumption. Conclusive presumption might, he admits, be said to make a change in substantive law. He argues that there is nothing wrong with a state purporting to punish a party who fraudulently obtains money by a false pretense of an intent to keep the written contract, in consideration of which the money is advanced. While the logic of that argument is clear, it fails to realistically consider the context in which such contracts would be entered.

Reynolds

In 1914, a third Alabama law was struck down for its role in leading to peonage. It allowed people who were convicted of a misdemeanor and, therefore, fined to accept a surety in the amount of the fine from some third party and then to reimburse that person by working for him on terms that were to be approved by the court. The Supreme Court, in the process of over-ruling this statute, pointed out that at times these surety arrangements led to longer work sentences than if they had worked off their fines as convicts. As Schmidt noted, the Court in *Reynolds* seemed somewhat cagey in making its ruling, but did assert that the cycle of debt, fear and work that resulted from these arrangements amounted to peonage. Day writes for the court:

> This labor is performed under the constant coercion and threat of another possible arrest and prosecution in case he violates the labor contract which he has made with the surety, and this form of coercion is as potent as it would have been had the law provided for the seizure and compulsory service of the convict. Compulsion of such service by the constant fear of imprisonment under the criminal laws renders the work compulsory, as much so as authority to arrest and hold his person would be if the law authorized that . . .
>
> Under this statute, the surety may cause the arrest of the convict for violation of his labor contract. He may be sentenced and punished for this new offense, and undertake to liquidate the penalty by a new contract of a similar nature, and, if again broken, may be again prosecuted,

> and the convict is thus kept chained to an ever-turning wheel of servitude to discharge the obligation which he has incurred to his surety, who has entered into an undertaking with the state, or paid money in his behalf.[141]

In this case Holmes concurred, surprisingly. With a bit of sarcasm he writes:

> There seems to me nothing in the 13th Amendment or the Revised Statutes that prevents a state from making a breach of contract, as well a reasonable contract for labor as for other matters, a crime and punishing it as such. But impulsive people with little intelligence or foresight may be expected to lay hold of anything that affords a relief from present pain, even though it will cause greater trouble by and by.[142]

He describes black laborers as lacking in intelligence and foresight. So he implicitly says although there is nothing legally wrong with the statute, they must be "protected" from their own stupidity. It is in some ways the flip side of his earlier argument in *Bailey*, still premised on the failures of the laborers. It again also neglects to consider them as those possessed of the intellectual capacities of citizens. It is suggestive of a eugenicist theory but without eugenicist policy, rather paternalist policy.

In Schmidt's illuminating article about debt peonage he considers the social effects of the *Reynolds* decision, and argues that from an economic perspective it imposed a cost in workers who might have wanted advances badly enough to lock them into labor contracts. He writes:

> . . . it embodies a paternalistic principle limiting the extent to which laborers can bargain away the freedom, guaranteed them under traditional contract law, to breach contracts without the legal system's intervening to compel them to perform.[143]

The problem with this aspect of Schmidt's interpretation of Bailey is that it is premised upon an idea of a marketplace in which people bargained freely. In the absence of advances with people so poor, no one could do the work, they would starve or freeze to death. It was not a tool of negotiation but rather a necessity. It was barely a bargaining tool. Moreover given the inflated cost of advances, provided often in food or clothes rather than cash, means that the loss suffered by landowners, which they asserted in the first place as a justification for these overruled statutes, in many cases might have been false, or at least exaggerated. This economic trap faced by many African Americans, in which they bore the responsibility of bargaining parties, but were in legal and extra-legal ways prevented from effective bargaining, was in large part a result of the failures of Reconstruction to provide any economic foundation for these people. The fact that people would choose surety over convict camp drives home this point. As Schmidt writes:

> The pinnacle of the system of servitude during Reconstruction and after was convict labor. The convicts were leased to private interests by the state, tolled on state or county chain gangs or were forced into criminal surety contracts under which a period of servitude for a private

> employer was exchanged for the wherewithal to pay a fine levied as a result of a criminal conviction often based on petty or trumped up charges.[144]

In convict labor camps forced labor took an even more disturbing turn. One essential difference between convict labor and slavery was the perceived value of the laborer. The work was temporary and therefore the life of the convict laborer had less value that what had been perceived for the enslaved laborer. Lichenstein writes for example, "Over four hundred convicts perished during the first twelve years of leasing in Georgia, four times the number of deaths recorded in the entire history of the state's ante-bellum penitentiary."[145] A noted convict lessor, in response to massive deaths in convict labor camp said, "casualties would have been fewer if the colored convicts were property, having a value to preserve."[146]

In his concurrence in *Reynolds*, Holmes did not consider the mental calculus facing black workers who had to choose between long surety agreements and work in the convict labor lease system. It was not that the workers were ignorant or impulsive, but they probably were balancing length of forced labor against the likely prospect of death and disease. They were forced to barter for their property right to live.

In *United States v. Broughton* 235 U.S. 133 (1914), another surety conviction case coming out of Alabama in the same year as Reynolds, the court ruled inline with Reynolds, that the statute was unconstitutional and employers under it subject to prosecution. In *Taylor v. Georgia*, 315 U.S. 25 (1942), the Court again dealt with a breach plus advance equals prima facie intent to defraud case, and again declared such a law unconstitutional, and in *United States v. Gaskin*, 320 U.S. 527 (1944), a creditor/employer was indicted for "arresting a debtor to peonage," and said indictment was upheld by the Supreme Court. Clearly, while the federal courts had taken a deliberate stand against laws that supported peonage, there was ongoing litigation and conflict over southern state laws that continued to reduce blacks to a state of peonage.

These federal peonage cases, while curbing the excesses of the exploitative system, did not abolish peonage throughout the South. Southern legislatures and courts continued to create laws and interpret laws in such a way that facilitated peonage, but just pursued them with greater sophistication. In 1943, Emanuel Pollock, a black man, was arrested. He had entered into a contract to perform labor for the J. V. O'Albora corporation, and had been advanced $5.00. He had left this employ and was brought before a county judge who issued a fine of $100.00, or if he could not pay that, 60 days in the county jail.

The statute under which he was convicted read as follows:

"Any person in this state who shall, with intent to injure and defraud, under and by reason of a contract or promise to perform labor or service, procure or obtain

money or other thing of value as a credit, or as advances, shall be guilty of a misdemeanor and upon convict thereof shall be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding six months . . .

In all prosecutions for a violation of the failure or refusal, without just cause, to perform such labor or service or to pay for the money or other thing of value so obtained or procured shall be prima facie evidence of the intent to injure and defraud."[147]

Notable was the fact that this statute was enacted subsequent to the courts decision in Bailey! The Florida legislature had distinguished this statute, (it being a revision of an earlier statute that was repealed in 1913, having been identical to the one in Alabama) from the unconstitutional Alabama statute by omitting the presumption of intent to defraud when there was a failure to perform the service or make restitution, but maintaining the prima facie evidence rule.

In 1919 the statute prior to this distinguishing revision, was held void by the Florida Supreme Court in light of Bailey. However, late the Supreme Court of Florida upheld a conviction under this statute because the question of presumption was not considered to have arisen due to the fact that the defendant pled guilty. This statute was re-enacted in 1941, with the presumption of intent to defraud omitted, and again in 1943, despite the fact that the Supreme Court had held a very similar statute unconstitutional in *Taylor v. Georgia* in 1942.

In this case, Pollock filed a writ of habeas corpus. And the Circuit Court, in light of the Supreme Court's decision in Bailey, held that the statute under which the case was prosecuted was unconstitutional, and they discharged the prisoner. The Supreme Court of Florida reversed this decision. That Court held that the decision in Bailey asserted that only the prima facie evidence rule was unconstitutional, hence a similar statute from which the prima facie evidence rule could be severed, would not be condemned with respect to the substantive part of the statute. Because the prisoner had pleaded guilty they argued, the presumption had not come into play.

The court rejected this argument, noting that the guilty plea might have been motivated by a desperate hope for leniency, and considering the context of the man being poor, ignorant and black before a Southern court. Moreover, no facts that the prisoner acted with the intent to defraud are part of the record of the case, nor do they appear on the warrant. The court concludes that "the presumption provision had a coercive effect in producing a guilty plea." Hence the guilty plea did not obviate the presumption provision.

The Court also responded to the State's argument that the prima facie clause was severable from the substance of the statute, by taking notice of the absence of a severability clause in the legislation. Moreover, the court expresses ire that Florida has repeatedly enacted laws that are deliberately in violation of

Supreme Court rulings, "No one questions that we clearly have held that such a presumption is prohibited by the Constitution and the federal statute. The Florida legislature has enacted and twice re-enacted it since we so held. We cannot assume it was doing an idle thing. Sinec the presumption was known to be unconstitutional and of no use in a contested case, the only explanation we can find for its persistent appearance in this statute is its extra-legal coercive effect in suppressing defenses."

The threat created by the presumption according to the Court, combined with the Legislature's clear intent that the provision be maintained in repeated enactments, lead the court to decide that whether or not the provision is severable under state law is immaterial. The court aggressively states that Florida ha apparently misunderstood the decisions on peonage that have come down before, and therefore they are "induced . . . to make more explicit the basis of constitutional invalidity of this type of statute."

The Court detailed its jurisprudence on the matter. In *Taylor v. Georgia*, it noted, both sections were struck down, despite Florida's assertion that this was simply a casual use of the plural. The Court also anticipated other efforts Florida might engage in to get around the force of the thirteenth amendment, arguing that it was of no consequence that the Alabama statute that was struck down prohibited the prisoners testimony as to his uncommunicated intent, or that the Georgia statute precluded the prisoner from being sworn. Absolutely clear, the court states that a state, "may not make failure to labor in discharge of a debt any part of a crime. It may not directly or indirectly command involuntary servitude, even if it was voluntarily contracted for."

That the court was forced to make such painstaking efforts to be clear in its prohibitions against laws supporting peonage is simply indicative of Southern state legislatures and courts continued practice of peonage, and continued efforts to maintain it. Clearly, even after these laws were struck down, black defendants were vulnerable, and likely often faced trumped up charges of larceny in the absence of such provisions criminalizing breach. I make this leap because of historical evidence showing that convict labor camps were suddenly full at planting and harvest times, and that the vast majority of convictions leading to the camps were crimes against property.

The victory of the peonage cases was thus tepid at best. The practice of private convict leasing of prisoners while formally dismantled by most states by the 1920s, continued on the county level into the 1960s,[148] and the exploitation of the labor of black prisoners combined with harsh corporal punishment reminiscent of enslavement, (chain gangs which were like slave coffles, whippings with leather straps) continued as well into the 1950s even in situations in which prisoners were not leased out. A wonderful historical treatment of such history is found in

David Oshinsky's *Worse Than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice*.

Moreover while black continued to be convicted for "crimes against property" and other illegal offenses, the crimes against the property of blacks went largely unpunished. Race riots in which black towns, businesses, homes, and personal items, were destroyed plagued the early twentieth century, and followed black migrants out of the South to Northern cities like Chicago, Okhlahoma, Milwaukee, and New York.

The Civil Rights Cases, Dicta and Private Law

The *Civil Rights Cases*, 109 U.S. 3 (1883) were ruled upon by the Supreme Court in 1883 The Court declared the provision of the Civil Rights Act of 1875 (*U.S. Statutes at Large*, Vol. 18, p. 335) that asserted that any person who violated the rights of all citizens to "equal enjoyment" of inns, public conveyances, entertainment and the like, would be subject to criminal prosecution, unconstitutional. They state, "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. It has a deeper and broader scope."[149] *The Civil Rights Cases*, while failing to protect blacks against segregation engaged in by private parties, before Plessy would determine that it was legitimate even as a state action as long as it was enacted on all citizens regardless of race, did include dicta which argued that Congress had the power to declare unconstitutional state laws which impeded contract and property holding as a violation of the fourteenth amendment. This dicta appears as an analogy to the distinction between negative power against state intrusion on constitutional rights, and a positive power to create laws governing how parties interact. The court states, "The constitution prohibited the states from passing any law impairing the obligation of contracts. This did not give Congress power to provide laws for the general enforcement of contracts, nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did however, give the power to provide remedies by which the impairment of contracts by state legislation might be counteracted and corrected . . ."[150]

The court essentially is arguing "render unto private law that which is private, unto the Constitution, that which is public." The denial of public accommodations was considered private action (in these cases) and therefore should not fall under the provisions of the fourteenth amendment. But of course the line of public and private is not so clear when racist ideology permeates both the general population,

legislature and judiciary to such an extent as to effectively rise to being an ideological custom, if not a specific practice.[151]

The problem of the behavior of private actors grew to enormous proportions, given the violence and brutality that continued throughout the Jim Crow era. The courts would not respond to racist intrusions upon private actors in private law contexts until the civil rights revolution of the 1960s. And even in the case of peonage, the Court stopped short of fully responding to state intrusions upon private law rights in violation of the intent of the fourteenth amendment. It is important to note that the federal peonage cases were decided on the basis of the thirteenth amendment rather than the fourteenth amendment, despite the fact that plaintiffs frequently brought cases under both amendments. Rather than treating the laws as impediments to equal protection of rights under common law, they treated them as leading to involuntary servitude which necessarily limited their applicability to other racialist private laws. Other intrusions onto property or contract rights such as racially restrictive covenants, or even the right to ride in the "ladies car" which was a first class car, as a right to enter into particular kind of contract.[152] Moreover it is indicative of a deeper blind spot with respect to the intrustions upon property and contract rights. The many incidences of destruction of black owned property were frequently engaged in with implicit sanction from the state, as law enforcement refused to protect the property of blacks, or intervene on their behalf during riots. Possible resort to Section 1983,[153] which did recognize that private individuals could be held in violation of the fourteenth amendment as a result of practices which amounted to state action because of custom, or effectively representing the state, was likely considered to have been cut off by the assertion in the Civil Rights Cases that the fourteenth amendment absolutely did not protect against the actions of private parties. White hostility to black people, and their power as a herrenvolk group amounted to a custom of the sort the manifestations of which should have been prohibited under Section 1983. Yet their brutality was afforded state sanction. Tellingly, Section 1983 was very narrowly interpreted until 1961,[154] in the midst of the Civil Rights Movement. Property law, specifically, failed to be considered as a source of breach of the civil war amendments, until the Court began to consider racially restrictive covenants[155] and poll taxes.[156]

While the peonage laws were dismantled, the narrow vision with respect to their underlying ideology led to the flourishing of alternative racist legal and social practices. The exclusion of black people from citizenship through the laws and practices of property and contract during this era were simply setting a trend for the greater part of the twentieth century, such that even as these older forms departed, other biased practices replaced them. What is dramatic, however, is how

these older practices have quite direct resonance to contemporary problems faced in law with respect to race.

CONTEMPORARY ISSUES AND THE PRIVATE LAW LEGACY

As suggested by the introduction to this article, the most obvious contemporary significance for this historical exposition is that it is pertinent to the debate over reparations. This private law history demonstrates a systematic and widespread practice of economic exploitation of agricultural laborers who were not paid market rates for their work and moreover, were denied citizenship rights to freely enter and exit contracts, and whose property rights were severely impeded by state power. Furthermore, the various crimes against property in the forms of burnings, and other forms of destruction, and the corporal punishment of laborers, convicts, and other black citizens at the hands of employers and law enforcement constitute a substantial history of unacknowledged tort.[157] So there are a number of bases in the post-slavery context for arguing for reparations both from private corporations that benefited from these practices, and from states or the federal government which legally supported this social and economic Jim Crow. Within the convict lease system in particular, not only was the labor of convicts unpaid, but they were victims of widespread violence, yet people who created wealth for private corporations.[158]

Another feature of interest here, is that the history of debt peonage and convict leasing, and the specific harms experienced by parties caught in the system, are much more easily traced than those in slavery to particular families and particular direct beneficiaries, due to more detailed record-keeping and a more recent history, and the fact that these practice took place within the southern period of industrialization rather than facilitated northern industry as in slavery, thus corporate entitites had a more direct relationship to the injury. Thus, one of the oft cited difficulties of reparations claims, how to establish a plaintiff class, or through an administrative lens, how to establish who should receive reparations, is largely obviated in arguments for reparations based upon Jim Crow era debt peonage or the convict labor system.

While reparations is an obvious arena in which private law concerns dovetail with the history of racial oppression, there are a number of other contemporary racial issues with which the law wrangles, that have deep historical ties to this history of private law Jim Crow. Understanding the history of race and private law thus might suggest an expansion in our interpretation of how current law should operate in dismantling historico-legal structures of racism.

The intersections between criminal law enforcement, wealth, political representation and freedom abound in contemporary considerations of race and the law. We might begin with the discrete issue of racial sentencing disparities. It has been well-documented that black defendants are sentenced more harshly that white defendants for the same crimes than white defendants.[159] As well, the crack-powder cocaine distinction has led to greater conviction rates and longer sentences for black defendants prosecuted on drug related offenses.[160] The sentencing disparities persist whether they are subject to jury, judge, legislative, or prosecutorial discretion.[161] While the Batson[162] opinion consciously attempted to address the vulnerability of black defendants before all-white juries (Powell, writing for the Court, held that racial discrimination in the selection of jurors deprived the accused of important rights during a trial and undermined "public confidence in the fairness of our system of justice,") Batson claims do not effectively protect against sentencing disparities.[163] The Batson court understood that exclusion from juries was a violation of the constitutional rights of African American citizens. The more amorphously discriminatory realm of sentencing disparities has not in contrast been understood as a violation of constitutional rights. However, the origin of sentencing disparities based upon race is found in the Jim Crow era with the convict leasing system. The modern prison emerged in early 19th century America.[164] In the antebellum era, as blacks were considered a form of property, most of their "crimes" were subject to the private authority of the master rather than the public authority of the state, for punishment. Hence prison populations were overwhelmingly white. Following emancipation, as the convict lease system took hold of the south, the Southern prison population became overwhelmingly black, and much harsher sentences were meted out to black defendants.[165] In particular, the fact that most southern state law did not recognize degrees of larceny at the turn of the century, allowed for widely divergent sentences to be given to black and white actors who had committed the same crime without restraint. Longer sentences were incentivized by state budgets dependence upon revenues from convict leasing. There was a financial interest in increasing the prison population and an ideological foundation for controlling black labor, keeping black labor unfree, and maintaining a private realm for punitive and coercive measures of the state, all rooted in slave society. Therefore, current trends towards increasing privatization of prisons should be treated with alarm. Incentivizing coercive state power with for profit incarceration has dangerous historical precedent in the contract laws that encouraged debt peonage and the convict lease system. As well, difficulties in determining Section 1983 violations for parties who are not clearly private, nor clearly acting as state representatives, are certain to flourish.[166] We should be cognizant of the dangers that violations of the constitutional rights of prisoners might increase in such ambiguous circumstances.

As in the Redemption era South, the entire United States now faces a crisis of black imprisonment with grossly disproportionate rates of incarceration, and a growing population of disenfranchised black people as a result of statutory felon disfranchisement. Analysts have determined that by the year 2010, fully one third of Alabama's black male population will be disenfranchised, and other states face similarly disturbing futures.[167] The disparate impact of felon disfranchisement upon black populations is of course tied to a number of factors including poverty, greater surveillance of black communities, and disparate sentencing. The laws and social practices of property and contract in the Redemption era are to some extent responsible for current economic conditions of black people, as well as the construction of images of black criminality and the perceived need to vigorously survey and control black communities and populations.[168] With a more expansive understanding of the extent of Jim Crow, popular notions of deserved suffering for black communities (see images of the "welfare queen," the neglectful black mother, absent black father, drug dealers, pimps and the like) to explain black poverty and higher rates of imprisonment, might be supplanted by a sincere historical understanding of the history of racism. At best, this history might broaden our understanding of Jim Crow such that we develop more expansive bases for causes of action under the Civil Rights Act, or the extent to which discriminatory intent might be inferred in cases of disparate impact with respect to sentencing.

The economic impact of private law and public culture in the Redemption era south, and the Jim Crow South (and North) has repercussions that extend beyond criminal law. Election law scholar, Spencer Overton, in his critiques of increasing the limits upon private contributions to campaigns, has noted that in an era in which money largely determines the outcomes of elections, black voters relative poverty leads to diminished suffrage.[169] Whereas in the pre-Civil Rights era poll taxes and all-white primaries quite explicitly and deliberately excluded black people from voting, the correlation between wealth and public office limits the voting power of black voters and candidates. In recent years an urban legend has circulated amongst the African American population that if the Voting Rights Act is not renewed in 2004 then black people will lose the right to vote.[170] The growth of this urban legend is perhaps indicative of the anxiety created by the very real power disparities, with historical roots, that impact black suffrage.

The economic impact of Jim Crow has further resonance in the realm of education. That *Plessy* was overturned with an education case, *Brown v. Board of Education* 347 U.S. 483 (1954) is profound. The integrationist model of racial theory understands the profundity of Brown residing in its recognition of the

deleterious effects of racial ideology upon children, and in its proclamation of the benefits of integrated settings. The diversity justification that the court in *Grutter v. Bollinger*[171] accepted as a basis for affirmative action has intellectual roots in militant integrationism. However, another profound dimension of *Brown* is that it was about disparate educational resources. The road to *Brown* was paved with education cases that demonstrated that there was no equal in "separate but equal" when comparable educational opportunities did not exist for black citizens.[172] Today, integration remains elusive, because of ongoing residential segregation and because resources continue to be imbalanced along racial lines as school systems are financed by local tax bases. At the level of college admissions, Lani Guinier has described how great a role wealth plays in academic achievement and in particular standardized test scores.[173] Hence, racial wealth disparities are replicated through unequal educational opportunities that have roots in socioeconomic disparities that developed and deepened in the Jim Crow era. More than that, they were facilitated by Jim Crow law and justice. Affirmative action then, could be understood not as a departure from merit, to be justified by notions of the importance of diversity, but a correction of a legal history which debilitated African American economic progress and geographic mobility.

Critical Race Theorists have, for the better part of twenty years, been engaged in a challenge to the notion of the color blind constitution as an obstruction of the manner in which race and racism are effected through law, often without explicit reference to race, and they have argued that redemptive efforts are thwarted if color consciousness is uniformly disallowed or rejected. One of the prime examples of the manner in which redemptive efforts in response to a legacy of racism have been challenged under the banner of color blindness is of course found Affirmative action, with is concomitant assaults experienced under the banner of "it's reverse racism." This argument gains strength through the overdetermination of *Plessy*. Our popular cultural narrative of the history of Jim Crow is almost exclusively about segregation, and to a lesser extent considers lynching. The message that results is that legally supported attention to race is what led to the marginalization and oppression of black people. *Plessy* becomes a shorthand for racism, an incomplete signifier, which fails to really consider the mechanics of the racism and dispossession experienced by African Americans. Moreover, the incorrect notion that segregation was the only or most damaging realm of de jure racism misleads legislators, legal thinkers and the citizenry. It suggest that the only jurisprudential realm for correction of racism is found in legal color-blindness, a system in which race-consciousness can only be justified in limited and temporary context such as the aspiration to diversity. If the law of property, contract, criminal law, and more, were seen as part of the legal history of Jim Crow, it would be a

much harder assumption to draw that color consciousness was itself the linch pin of Jim Crow. Rather it was racial stigma and domination. If we think of the history of Jim Crow as an economic legal history that has ongoing consequences for black people, a redemptive measure like affirmative action is modest compared to the systematic legally enforced economic marginalization of black people over multiple generations. Arguably, group poverty matters, as we want to achieve group parities in order to remedy the way groups have been treated.

I believe this article's deliberate articulation of herrenvolk lockeanism, and the explication of how it was integral to Jim Crow is instructive for analyses beyond those in this article. It suggests that when one finds a systemic framework of inequality, legal remedy must be responsive to the broader architecture of law with respect to inequality if it is to be truly efficacious, rather than simply addressing the facially discriminatory aspects of law. Moreover, the overdetermination of Plessy could have easily been the overdetermination of another element of Jim Crow injustice. It is not that it is Plessy that makes the overdetermination problematic, rather it is that one aspect of Jim Crow justice has been overdetermined and fueled the invisibility of other areas. The ongoing spectre of racial disparities should alert us that the practice of using cultural synedoches, or the practice of treating each racially unjust law or practice autonomously, fails to address the structural mechanisms of racism in such a way as to lead us to success in the path towards a racially fair and harmonious society. Hence, the idea here is not to argue for a categorical paradigm shift, but rather a methodological paradigm shift in which a series of arguments are made from a variety of disciplinary foci, a dialectic of jim crow studies as it were, that might lead us to a more productive race jurisprudence.

This article simply touches the surface of dismantling the overdetermination of Plessy. The goal of the work is not to argue that Plessy was irrelevant, but rather to show that once we depart from our fixation upon it as the primary symbol of Jim Crow with the greatest meaning,[174] we can begin to see the full history of Jim Crow, from a legal perspective, and reconstruct it both in the popular imagination and in law. Most of the issues we deal with now, such as those just treated, are discussed as though the interrogation of them begins in the 1960s, only after Brown and after the struggle against de jure segregation, as though that was the primary legal roadblock. This allows for these discussions to become ahistorical policy discourses rather than what they truly are, treatments of the unfinished business of Brown. But the activists of the 1880s, 1990s, and the turn of the century tell a story of legal struggle that was about property, contract, suffrage, and more. It is my hope that this article has begun to unveil their powerful testimony.

NOTES

1. See Robinson, Alfreda (2003, Winter). "Corporate Social Responsibility and African American Reparations: Jubilee." Rutgers Law Review.

2. A number of scholars who have written about reparations have begun to discuss practices such as debt peonage, convict leasing, race riots, destruction of black property and the like, as much a part of the reparations area as slavery. However, there are only a handful of thorough historical treatments of this subjects in legal scholarship.

3. Overdetermination is a term used in both Psychonanalytic theory (see Freud) and Marxist theory (see the work of Louis Althusser and Goran Therborn).

4. An unfortunate consequence of the overdetermination of Plessy has been that the overwhelming majority of racialist practices outside of legal segregation, have been termed de facto, when in fact, de jure racism appeared in numerous ways despite segregation. The terrible fallout is that racial remedies have been deemed "policy" since the 1960s, which if understood through the reality that de jure is far broader than simply segregation, might have instead been seen rather as "hard law."

5. I do not want to suggest here that I do not understand the great symbolic significance of de jure segregation, but rather than it was a symbol that operated as a signifier for the substance of racism that existed in a number of other areas, and that now it is treated not as the symbol but as the substance itself, often as the sum total of the substance.

6. Testimony of Capt. C. B. Wilder before the American Freedmen's Inquiry Commission, 9 May 1863, filed with O-328 1863, Letters Received, ser. 12, Record Group 94, Adjutant General's Office, National Archives.

7. See Glatthaar (2000). Forged in Battle: The Civil War Alliance of Black Soldiers and White Officers. Baton Rouge: Louisiana State University Press.

8. Donald E. Markle Spies and Spymasters of the Civil War.

9. The Emancipation Proclamation did not free the enslaved in all parts of the south, just in the following rebel locations: Arkansas, Texas, Louisiana (except the Parishes of St. Bernard, Plaquemines, Jefferson, St. Johns, St. Charles, St. James, Ascension, Assumption, Terrebone, Lafourche, St. Mary, St. Martin, and Orleans, including the City of New-Orleans), Mississippi, Alabama, Florida, Georgia, South-Carolina, North-Carolina, and Virginia (except the forty-eight counties designated as West Virginia, and also the counties of Berkley, Accomac, Northhampton, Elizabeth-City, York, Princess Ann, and Norfolk.

10. Chesnutt, Charles W. (1892, June 4). "Resolutions Concerning Recent Southern Outrages." In: "Fittingly Observed." Cleveland: The Gazette, p. 1.

11. See Wienick, Henry (2003). An Imperfect God: George Washington, His Slaves and the Creation of America. New York: Farrar Strauss and Giroux.

12. National Park Service, Boston African American National Historic Site, Robert Gould Shaw and 54th Regiment Memorial.

13. CHAP. CXXIV. – An Act making Appropriations for the Support of the Army for the Year ending the thirtieth June, eighteen hundred and sixty-five, and for other Purposes. U.S., Statutes at Large, Treaties, and Proclamations of the United States, Vol. 13 (Boston, 1866), pp. 126–130.

14. This perceived sense of "taking" was responded to in Section 4 of the fourteenth amendment which held, *But neither the United States nor any state shall assume or pay any*

debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void."

15. Locke, John (1698). Second Treatise of Government. New York: Liberal Arts Press, 1952.

16. Herrenvolk Lockeanism is a term I have coined to describe the class exclusive construct of labor desert theory found in the post emancipation American South.

17. McPherson, James (1991). The Negro's Civil War. New York: Ballantine, p. 298.

18. See Robert Westley (1998). Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations? Boston College Law Review, Vol. 40, pp. 429–476.

19. Civil Rights Act April 9, 1866.

20. Schmidt, Benno (1982, May). Principle and Prejudice: The Supreme Court and Race in the Progressive Era Part 2: The Peonage Cases. Columbia Law Review, p. 647.

21. Schmidt, Benno (1982, May). Principle and Prejudice: The Supreme Court and Race in the Progressive Era Part 2: The Peonage Cases. Columbia Law Review, p. 650.

22. Schweninger, Loren (1997). Black Property Owners in the South 1790–1915. Urbana: University of Illinois Press.

23. Schweninger, Loren (1997). Black Property Owners in the South 1790–1915. Urbana: University of Illinois Press, p. 145.

24. Schweninger, Loren (1997). Black Property Owners in the South 1790–1915. Urbana: University of Illinois Press, p. 145.

25. Litwack, Leon F. (1999). Trouble in Mind: Black Southerners in the Age of Jim Crow. New York: Vintage Books, p. 120.

26. DuBois, W. E. B. (1903). The Souls of Black Folk. New York: Bantam Books, 1989, p. 112.

27. Litwack, Leon F. (1999). Trouble in Mind: Black Southerners in the Age of Jim Crow. New York: Vintage Books, p. 121.

28. Ibid.

29. Schweininger, Loren (1992, October). "The Roots of Enterprise." The Virginia Magazine, Vol. 100, No. 4, p. 546.

30. See generally Walker, Juliet (1998). The History of Black Business in America: Capitalism, Race, Entrepreneurship, New York: Twayne. for discussions of early entrepreneurship and racist response.

31. Schweninger, Loren (1997). Black Property Owners in the South 1790–1915. Urbana: University of Illinois Press, p. 222.

32. For a recent work in this vein see: Richardson, Heather Cox (2001). The Death of Reconstruction: Race, Labor and Politics in the Post-Civil War North. Cambridge: Harvard University Press. Older proponents of this sort of explanation include, Ransom, Roger and Richard Sutch (1977). One Kind of Freedom: The Economic Consequences of Emancipation. New York: Cambridge University Press.

33. See Schweninger, Loren (1997). Black Property Owners in the South 1790–1915. Urbana: University of Illinois Press; also see Ida B. Wells, *A Red Record* (1895). Reprinted in Jacqueline Jones Royster (Ed.) (1997). *Southern Horrors and Other Writings: The Anti-Lynching Campaign of Ida B. Wells, 1892–1900*. Boston: Bedford Books, for record questioning reported justifications of lynching violence. A substantial number of the victims she cites were property holders or otherwise prosperous.

34. Fisher, William W. (1997). Ideology and Imagery in the Law of Slavery. In Slavery and the Law, edited by Paul Finkleman. Madison, WI: University of Wisconsin Press, p. 53.
35. Fisher, William W. (1997). Ideology and Imagery in the Law of Slavery. In: Paul Finkleman (Ed.), Slavery and the Law. Madison, WI: University of Wisconsin Press, p. 53.
36. Mills, Charles (1998). White Right: The Idea of Herrenvolk Ethics. In: Blackness Visible: Essays on Philosophy and Race. Ithaca: Cornell University, p. 154.
37. Hill, Herbert (1985). Black Labor and the American Legal System: Race, Work and the Law. Madison: University of Wisconsin Press, p. 66.
38. Hill, Herbert (1985). Black Labor and the American Legal System: Race, Work and the Law. Madison: University of Wisconsin Press, p. 66.
39. See *Within the Plantation Household: Black and White Women of the South* by Elizabeth Fox-Genovese. Chapel Hill and London: University of North Carolina Press, p. 198.
40. *Carpetbagger's Crusade: The Life Of Albion Winegar Tourgee* by Otto H. Olsen (1965). Baltimore, MD: Johns Hopkins Press, 395 pp.
41. Tourgée, Albion W. (1880). A Fool's Errand. Cambridge: Belknap Press of Harvard University Press, 1961, p. xx.
42. Tourgée, Albion W. (1880). A Fool's Errand. Cambridge: Belknap Press of Harvard University Press, 1961, p. xxi.
43. Tourgee was going to be in Garfield Administration.
44. Tourgée, Albion W. (1880). A Fool's Errand. Cambridge: Belknap Press of Harvard University Press, 1961, p. 55.
45. Tourgée, Albion W. (1880). A Fool's Errand. Cambridge: Belknap Press of Harvard University Press, 1961, p. 56.
46. Tourgée, Albion W. (1880). A Fool's Errand. Cambridge: Belknap Press of Harvard University Press, 1961, p. 98.
47. Leonard S. Rubinowitz & Imani Perry, *Crimes Without Punishment: White Neighbors' Resistance to Black Entry*, 92 J. Crim. L. & Criminology, pp. 335, 354–355, 388, 408–410, 419, 420, 421, 423 (Fall 2001 to Winter 2002) for a discussion of widespread criminal acts against African American who owned property throughout the twentieth century.
48. Tourgée, Albion W. (1880). A Fool's Errand. Cambridge: Belknap Press of Harvard University Press, 1961, p. 98.
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95. Washington's leading rival, W. E. B. DuBois, the first African American to receive a Ph.D. from Harvard and the most widely read African American author of his time, was an advocate for classical rather than industrial education, along with full political rights.

Chesnutt was critical of them both. He wrote with reference to DuBois: "Educate them all to a high degree and leave the same inequalities and as old Ben Tillman is so fond of

saying – he occasionally tells the truth by accident – you merely shift the ground of the problem, you do not alter its essential features." In a letter written to Washington he wrote, "There is no good reason why we should not acquire them (Education and Property) and exercise our constitutional rights at the same time, and acquire them all the more readily because of our equality of rights." (Chesnutt to Booker T. Washington, June 27, 1903, Charles Chesnutt Papers Fisk. University). Washington and Chesnutt had a long-standing correspondence about the question of suffrage, they were at the very least close associates if not friends, and Washington employed several of Chesnutt's children as professors at Tuskeegee. The difference between Chesnutt versus Washington or DuBois was that while he knew how important education was for black people, Chesnutt was not an apologist for black ignorance and never expressed any belief in the inadequacy of blacks for citizenship.

Regardless of how ignorant, Chesnutt believed that black people deserved full political rights. This was a greater conflict with Washington's philosophy, but DuBois as well tended to write about education as preparing black people for citizenship even as he pressed for full political rights, and he spoke during this period of a "talented tenth" that would be highly educated and lead the masses of black people. Chesnutt believed that if the ignorant European immigrant was prepared for suffrage, so was the ignorant former slave, and he thoroughly believed in democracy. He wrote: I do not at all agree with Mr. Carnegie or with Dr. Washington, whom he quotes in holding it "the wiser course" to practically throw up the ballot . . . Nothing in history goes to show that the rights of any class are safe in the hands of another . . . I am unable to see how any self-respecting man can, willingly and without protest, submit to the deprivations of so elementary and fundamental a right" (Chesnutt to Hugh M. Browne, November 21, 1907. Booker T. Washington Papers, Library of Congress).

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109. Schmidt, Benno (1982, May). Principle and Prejudice: The Supreme Court and Race in the Progressive Era Part 2: The Peonage Cases. Columbia Law Review, p. 658.

110. Ex Parte Drayton 153 F. 986 (D.S.C. 1907).

111. Allegeyer v. LA 165 U.S. 578, 589 (1897).

112. Ex Parte Holman 79 S.C. 9 (1908).

113. Ex Parte Holman 79 S.C. 9, 20 (1908).

114. Ex Parte Holman 79 S.C. 9, 22 (1908).

115. Ex Parte Holman 79 S.C. 9, 23 (1908).

116. Ex Parte Holman 79 S.C. 9, 24 (1908).

117. Ex Parte Holman 79 S.C. 9, 24 (1908).

118. State v. Armstead 103 Miss. 790 (1913).

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122. Clyatt v. United States, 197 U.S. 207 (1905).

123. Bailey v. Alabama, 219 U.S. 219 (1911).

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129. Sections 1990 and 5526, Rev Stat. (U.S. Comp. Stat. 1901, pp. 1266, 3715).

130. Hodges v. U.S. 203 U.S. 1, 17 (1906).

131. Clyatt v. United States, 197 U.S. 207, 208 (1905).

132. Bailey v. State of Alabama, 211 U.S. 452 (1908).

133. Bailey v. Alabama, 219 U.S. 219, 31 (1911).
134. Bailey v. Alabama, 219 U.S. 219, 232–233 (1911).
135. Bailey v. Alabama, 219 U.S. 219, 234 (1911).
136. Bailey v. Alabama, 219 U.S. 219, 244–245 (1911).
137. Schmidt, Benno (1982, May). Principle and Prejudice: The Supreme Court and Race in the Progressive Era Part 2: The Peonage Cases. Columbia Law Review, p. 686.
138. Bailey v. Alabama, 219 U.S. 219, 246 (1911).
139. Bailey v. Alabama, 219 U.S. 219, 246 (1911).
140. Bailey v. Alabama, 219 U.S. 219, 246 (1911).
141. U.S. v. Reynolds 235 U.S. 133, 146.
142. U.S. v. Reynolds 235 U.S. 133, 146–147.
143. Schmidt, Benno (1982, May). Principle and Prejudice: The Supreme Court and Race in the Progressive Era Part 2: The Peonage Cases. Columbia Law Review, p. 711.
144. Schmidt, Benno (1982, May). Principle and Prejudice: The Supreme Court and Race in the Progressive Era Part 2: The Peonage Cases. Columbia Law Review, p. 651.
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146. Lichenstein, Alex (1996). Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South. London: Verso, p. 61.
147. Chapter 7917 Acts of 1917, reenacted 1941 FSA sections 817.09, 817.10.
148. Myers, Martha A. (1998). *Race, Labor, and Punishment in the New South*, Dr. Martha A. Myers. Columbus: Ohio State University Press.
149. Civil Rights Cases 109 U.S. 3 (1883).
150. Ibid.
151. Racist practices were changing following emancipation so the term custom can't well be applied.
152. U.S. v Robinson, decided by the Civil Rights Cases concerned the removal of a black woman from the Ladies car of a train because she was presumed to be a prostitute. She effectively did not have the same rights of contract as a similarly suited white woman.
153. 42 Section 1983 states as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." It its origins in the Ku Klux Klan Act of 1871.
154. See Monroe v. Pape 365 U.S. 167 (1961).
155. See Shelley v. Kraemer. 334 U.S. 1 (1948), which declared racially restrictive convenants unconstitutional.
156. In Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), the Supreme Court held Virginia's poll tax to be unconstitutional under the 14th Amendment.

157. See Rubinowitz, Leonard S. and Imani Perry (Fall 2001 to Winter 2002). Crimes Without Punishment: White Neighbors' Resistance to Black Entry, 92 J. Crim. L. & Criminology.

158. See forthcoming work by the author: A Siberia to the South: The Rhetorical Activism Against the Convict Leasing System.

159. See Iontcheva, Jenia (2003, April). "Jury Sentencing as Democratic Practice." Virginia Law Review.

160. See Kennedy, Randall (1997). Race Crime and the Law. New York: Pantheon Books.

161. See Iontcheva, Jenia (2003, April), "Jury Sentencing as Democratic Practice." Virginia Law Review, p. 360.

162. Batson v. Kentucky, 476 U.S. 79 (1986) held that a prosecutor may not utilize peremptory challenges in order to exclude jurors solely on account of their race.

163. This is true for a number of reasons meriting scholarly treatment of its own, including judicial and prosecutorial bias, as well as apparently neutral means being engaged for striking black jurors, and the biases some black jurors have against black defendants.

164. See White, Ahmed A. (2001, Winter). "Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective." American Criminal Law Review, pp. 122–127.

165. Cable, George Washington (1909). The Convict Lease System in the United States. The Century Magazine, 27(4).

166. See DelFiandra, David (2000, Winter). " Comment: The Growth of Prison Privatization and the Threat Posed by 42 USC 1983, Duquesne Law Review. Duquesne Law David J. DelFiandra.

167. See Mondesire, J. (2001, Spring). "Felon Disenfranchisement: the Modern Day Poll Tax." 10 Temple Political and Civil Rights Law Review, pp. 435–441.

168. Kennedy, Randall (1997). Race Crime and the Law. New York: Pantheon Books.

169. See Overton, Spencer. "Mistaken Identity: Unveiling the Property Characteristics of Political Money," 53 Vand. L. Rev. 1235 (2000); and Overton, Spencer "Voices from the Past: Race, Privilege, and Campaign Finance," 79 N.C.L. Rev. 1541 (2001).

170. The urban legend warning that African Americans right to vote would expire in 2007, when the Voting Rights Act went out of effect, was frequently spread through email messages like the following: "We are quickly approaching the 21st Century and I was wondering if anyone out there knew what the significance of the year 2007 is to Black America? Did you know that our right to vote will expire in the year 2007?" Seriously! The Voters Rights Act signed in 1965 by Lyndon B. Johnson was just an ACT. It was not made a law. In 1982 Ronald Reagan amended the Voters Rights Act for only another 25 years. Which means that in the year 2007 we could lose the right to vote!

171. Grutter v. Bollinger (2003) in a 5–4 opinion delivered by Justice Sandra Day O'Connor, the Court held that the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.

172. See cases leading up to *Brown* ruling on higher education inequalities, lack of graduate programs for black students: Missouri ex rel. Gaines v. Canada, 305 U.S. 337; Sipuel v. Oklahoma, 332 U.S. 631; Sweatt v. Painter, 339 U.S. 629; McLaurin v. Oklahoma State Regents, 339 U.S. 637.

173. In Guinier, Lani "Comment: The Supreme Court 2002 Term, Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals" Harvard Law Review

November, 2003 at 131, Guinier. demonstrates how definitions of merit are tied to maintenance of elite status.

174. In a forthcoming work I will further complicate the definition of Plessy as a public law case, arguing that there is some ambiguity about how it should be classified in our legal understanding. Expanding Plessy to be understood as a matter with resonance for private law as well, will enrich our understanding of Jim Crow and its entire multi-faceted matrix.