

OPEN HUNTING SEASON: BLACK BODIES AS A THREATENED SPECIES

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“ . . . about one white person in two believes police provide very good protection . . . for Negroes, the figure is one in five.”¹

Abstract

Tracing the Endangered Species Act of 1973 provides striking parallels with the historical, legal, and cultural aspects of bondage mapped upon Black bodies. The United States Congress promulgated the Endangered Species Act to protect and conserve threatened and endangered wildlife species. However, this gives rise to a serious moral dilemma and cognitive dissonance in that nearly 1,500 wildlife species benefit from the Endangered Species Act’s protections. At the same time, Black bodies disproportionately suffer without similar federal protections. Congress has strengthened the Endangered Species Act’s force through four amendments since its inception, even while there have been mounting threats to Black existence. There remains an “open hunting season” on Black bodies, and the Buffalo massacre and the brutal and senseless murder of Tyre Nichols, a Black male, on January 10, 2023,

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¹ NAT’L ADVISORY COMM’N ON CIV. DISORDERS, THE KERNER REPORT 309 (Princeton Univ. Press ed. 2016) [hereinafter KERNER REPORT]. President Lyndon B. Johnson (1963-68), by Executive Order 11365, created the National Advisory Commission on Civil Disorders on July 29, 1967, to investigate the proliferation of violence, civil unrest, and outbreak of riots in American cities during the 1960s. *See generally id.* President Johnson, in seeking to “ensure that the commission produced a report favorable to the White House’s aims” and capitalize on the momentum created by the controversial 1965 Moynihan Report (“The Negro Family: The Case for National Action”) blaming societal conditions on the disintegration of the Black family, wanted answers to three basic questions: “What happened? Why did it happen? What can be done to prevent it from happening again and again?” *Id.* at xix. President Johnson appointed Otto Kerner, the former Illinois governor and “loyal member of the Illinois Democratic machine intent on protecting the president’s political interests.” *Id.* at xvii. Among The Kerner Commission’s primary findings was “that racism was literally embedded into American life.” *Id.* at xxvii. Dismayed and expecting a different result, the Johnson administration subsequently refused to formally receive or accept the commission’s findings. *See* CLAY RISEN, A NATION ON FIRE: AMERICA IN THE WAKE OF THE KING ASSASSINATION (2009).

at the hands of five Black Memphis police officers, represent only the latest still frames indelibly etched into the psychological reels of Black minds. Critical Race Theory scrutinizes how historical and legal events have created the inequalities so effortlessly reproduced today. This Article's central claim is that Black bodies are a threatened species and that, by comparing the Endangered Species Act's express, statutory language to Black peoples' experiential realities in the United States, it is evident that this country is criminally liable. In contrast, federal legislation aimed at improving how government actors protect and serve their citizens, such as the George Floyd Justice in Policing Act of 2021, which mandates stricter "police practices and law enforcement accountability," has virtually become extinct in the corridors of Congress. This legislation was introduced after the vile murder of George P. Floyd, Jr., a Black male, on May 25, 2020, by White Minneapolis police officer Derek Chauvin. When juxtaposing the protections, the Endangered Species Act currently offers vis-à-vis those George Floyd Justice in Policing Act seeks to provide, Critical Race Theory illuminates how the American legal system commits inchoate crimes of conspiracy in the threatened status of Black bodies.

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INTRODUCTION

Alabama beach mice, Carolina northern flying squirrels, Florida panthers, pygmy raccoons, jaguars, red wolves, kangaroo rats, grizzly bears, tigers, Canadian lynx, black-footed ferrets, whooping cranes, northern long-eared bats, giant sea bass, ridley sea turtles, and California condors all share one thing in common: they receive federal protection because of their threatened or endangered species status.² The United States Congress (“Congress”) promulgated the Endangered Species Act of 1973 (“ESA”) with the express purpose of protecting and conserving wildlife species in danger of, or near, extinction.³ Nearly 1,500 species benefit from the ESA’s protections today.⁴

Ta’Kiya Young, Tyre Nichols, Roberta A. Drury, Margus D. Morrison, Andre Mackneil, Aaron Salter, Geraldine Talley, Celestine Chaney, Heyward Patterson, Katherine Massey, Pearl Young, Ruth Whitfield, Eric Garner, Michael Brown, Tamir Rice, Trayvon Martin, Freddie Gray, Sandra Bland, Breonna Taylor, Atatiana Jefferson, Ahmaud Arbery, George Floyd, Jacob Blake, Jayland Walker, and so many others similarly share one thing in common: they represent a “catalogue of oppression” of *Homo sapiens* with Black bodies who *did not* receive similar federal protection.⁵ The protections afforded by the ESA offer a striking contrast with the historical, legal, and cultural experiences of Black bodies held in bondage and relegated to

² See *Listed Animals*, U.S. FISH & WILDLIFE SERV., <https://ecos.fws.gov/ecp0/reports/ad-hoc-species-report?kingdom=V&kingdom=I&status=E&status=T&status=EmE&status=EmT&status=EXPE&status=EXPN&status=SAE&status=SAE&mapstatus=3&ferithab=on&fstatus=on&fspecrule=on&finvpop=on&group=on&header=Listed+Animals> (last visited Feb. 29, 2024) [hereinafter *Listed Animals*].

³ See Endangered Species Act, S. 1983, 93rd Cong. (1973). The 93rd Congress (1973-74) voted 92-0 (roll call #322) in the Senate and 355-4 (roll call #714) in the House of Representatives, respectively, on bipartisan legislation (co-sponsored by five Democrats and three Republicans). S.1983 – 93rd Cong. (1973-1974): An Act to provide for the conservation of endangered and threatened species of fish, wildlife, and plants, and, for other purposes, S.1983, 93rd Cong. (1973), <https://www.congress.gov/bill/93rd-congress/senate-bill/1983>. President Richard M. Nixon signed Pub. L. No. 93-205 on December 28, 1973, after successfully running for re-election on a “law and order” platform that sought to stabilize the country and crack down on urban riots, crime, and violence sweeping across America in the late 1960s. The Republican President squarely blamed Democrats for being too soft on crime, which was an innuendo for greater government protection of White people, harsher penalties and punishment, and less protection for Black and other people of color. The lack of Republican support for legislation to protect and conserve Black bodies is revealed in its historical voting patterns. By implication, Republican voting patterns demonstrate the prioritization, protection, and conservation of White bodies. See JAMES BALDWIN, *I AM NOT YOUR NEGRO* 23, 79-82 (Raoul Peck ed., 2017).

⁴ *Listed Animals*, *supra* note 2.

⁵ BALDWIN, *supra* note 3, at 23. See FRANK B. WILDERSON III, *AFROPessimism* (2020). Wilderson’s basic premise is that anti-Black systems and structures did not end with slavery, and newer systems are intended to keep Black people enslaved and subjugated in American society. Moreover, the probability of more Black bodies being added to this growing list by the time this Article is published is high. Thus, the author leaves a blank _____.

subhuman status, a source of moral dissonance in American society to the present day.

As Congress has strengthened the ESA, offering further protection to endangered and threatened wildlife species, Black populations face mounting threats. There were nearly 2,300 shootings from 2022 to 2023 where law enforcement officers have injured or killed a suspect subject, and many of these have been perpetrated against marginalized communities.⁶ For many, it remains an “open hunting season” on Black bodies as these endemic horrors represent only the latest in a continuous sequence of still-frame images of racial violence indelibly etched onto the psychological reels of Black minds. When comparing the ESA’s statutory language to the daily realities of Black bodies, they are an unprotected, threatened species, a tragedy for which America is criminally liable.

While the ESA fails to extend protection to threatened members of the human species, other federal legislation has sought to fill this legal lacuna. The George Floyd Justice in Policing Act of 2021 (“GFA”), federal legislation aimed at improving how government actors protect and serve their citizens, is a prototype. The GFA, arguably a conservation act, *among other things*, “establishes a framework to prevent and remedy racial profiling by law enforcement at the federal, state, and local levels.”⁷ Regrettably, this

⁶ See *Past Summary Ledgers*, GUN VIOLENCE ARCHIVE, <https://www.gunviolencearchive.org/past-tolls> (last visited Jan. 13, 2024) [<https://perma.cc/LD9W-6M6V>]. Officer-involved shootings increased during the Trump administration (2,148 in 2017; 2,188 in 2018; 2,084 in 2019; and 2,227 in 2020) as did mass shootings (347 in 2017; 335 in 2018; 414 in 2019; and 610 in 2020). *Id.*; see also *Charts and Maps*, GUN VIOLENCE ARCHIVE, <https://www.gunviolencearchive.org/charts-and-maps> (last visited Dec. 2, 2023) [<https://perma.cc/9V4E-4D3K>]; see also Cheryl W. Thompson, *Fatal Police Shootings of Unarmed Black People Reveal Troubling Patterns*, NPR (Jan. 25, 2021, 5:00 AM), <https://www.npr.org/2021/01/25/956177021/fatal-police-shootings-of-unarmed-black-people-reveal-troubling-patterns>; Brita Belli, *Racial Disparity in Police Shootings Unchanged Over 5 Years*, YALENEWS (Oct. 27, 2020), <https://news.yale.edu/2020/10/27/racial-disparity-police-shootings-unchanged-over-5-years>; *Rate of Fatal Police Shootings in the United States from 2015 to January 2024, by Ethnicity*, STATISTA (Jan. 29, 2024), <https://www.statista.com/statistics/1123070/police-shootings-rate-ethnicity-us> [<https://perma.cc/9ZA2-NYZZ>].

⁷ See George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021) [hereinafter George Floyd Justice in Policing Act]. H.R. 1280, introduced by Representative Karen Bass (D-CA), a Black woman, on February 24, 2021, forty-nine days after the January 6 insurrection, barely passed the House of Representatives by a vote of 220-212. Phil Helsel, *House Passes Police Reform Act Named for George Floyd*, NBC NEWS, <https://www.nbcnews.com/politics/congress/house-passes-police-reform-act-named-george-floyd-n1259548> (last updated Mar. 3, 2021, 11:48 PM). One hundred percent of the 199 co-sponsors of this legislation were Democrats, and only one Republican voted in favor of the bill. See George Floyd Justice in Policing Act, *supra* note 7. H.R. 1913, Local Law Enforcement Hate Crimes Prevention Act of 2009 (“LLEHCPA”), has shared a similar fate with 112 Democrats and 8 Republicans supporting the bill. See Local Law Enforcement Hate Crimes Prevention Act, H.R. 1913, 111th Cong. (2009). LLEHCPA intended to provide federal assistance to states and local jurisdictions to prosecute hate crimes. See *id.* The LLEHCPA passed the House of Representatives by a vote of 249-175, with only eighteen Republican Ayes. *Timeline of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention*

legislation was introduced only in the aftermath of *another* watershed moment in American history: the heinous murder of George Perry Floyd, Jr., a Black male, by White Minneapolis police officer Derek Chauvin on May 25, 2020.⁸ To deconstruct racial binaries, these acts of violence are sometimes an inside job. This would be the case involving the senseless murder of Tyre Nichols, a Black male, on January 10, 2023, at the hands of five Black Memphis police officers.⁹ Viral images and videos of these killings, reminiscent of public lynchings in previous centuries, have sparked global outrage. Yet, this legislation is “in danger of or near extinction” in the U.S. Senate, where Democrats have slowly lost the majority since 2009 and currently are the minority.¹⁰

How does Congress almost unanimously pass the ESA yet completely stall on the GFA if life conservation is the common goal? The contrast between the ESA and the GFA offers a prime test case to elucidate the purpose and significance of Critical Race Theory (“CRT”). CRT provides a scholarly legal framework, tracing and analyzing ways race, racism, and racial inequality are facilitated and maintained. CRT also scrutinizes and interrogates how historical and contemporary events have perpetuated the inequalities so effortlessly today. Thus, this Article’s central claim is that, when juxtaposing the federal protections, the ESA *currently* offers wildlife species *vis-à-vis* those the GFA *seeks to* provide to Black *Homo sapiens*, CRT illuminates how the American legal system commits inchoate crimes of conspiracy to perpetuate the “threatened” status of Black bodies.

I. CAVEATS AND CONCESSIONS

It is critical at the outset to outline what this Article seeks to avoid and accomplish, necessitating certain caveats and concessions to set a foundational framework for what follows. First, despite contrariwise historical, cultural, and legal arguments, this Article does not propose that Black bodies are a separate or different “species.”¹¹ All human beings (*Homo*

Act, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/hate-crimes-timeline> (last visited Mar. 2, 2024).

⁸ See generally Evan Hill, Ainara Tiefenthäler, Christaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES, <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> (last updated Jan. 24, 2022).

⁹ Laura Testino, *What are the Charges Against 5 Former Memphis Police Officers Indicted in Tyre Nichols’ Death?*, COM. APPEAL, <https://www.commercialappeal.com/story/news/2023/01/26/tyre-nichols-death-what-charges-do-5-former-memphis-police-officers/69844940007> (last updated Jan. 27, 2023, 5:56 PM).

¹⁰ Endangered Species Act, 16 U.S.C. § 1531(a)(2); see also *Party Division*, UNITED STATES SENATE, <https://www.senate.gov/history/partydiv.htm> (last visited Feb. 28, 2024).

¹¹ For arguments challenging the status of Black people as an “endangered species,” see Paul D. Butler, *Black Male Exceptionalism? The Problems and Potential of Black Male-Focused Interventions*, 10 DU BOIS REV. 485 (2013).

sapiens) are members of a common species of primates. Second, this Article does not prescribe a Black universalism, which is rightly a matter of self-definition, self-determination, and self-amendment. However, the presentation of Black bodies has been one of legal and historical subjugation, objectification, and commodification. Third, this Article does not argue that Black bodies are “endangered” as defined within the purview of the legislation reviewed herein since their population numbers are in the tens of millions in America. Fourth, this Article does not suggest that *only* Black bodies are threatened; instead, it claims that Black bodies are disproportionately threatened *vis-à-vis* other bodies. Fifth, this Article concedes that the ESA was nonexistent during the four centuries of the North American slave trade. Thus, its analysis and application here are metaphoric and retroactive, considering Black bodies’ historical and existential realities while highlighting Congress’s lawmaking capacity and power. Finally, racial categories are inherently problematic and biologically indefensible. Race is a social and legal construction in which the courts have played a significant role.¹² “Black” and “White” will be used here with the understanding of the former being people of African descent and the latter being people of European descent living in the United States and beyond. These categories will be capitalized except for when in a direct source quote.

Positively, this Article endeavors to accomplish a few goals. First, it utilizes CRT as a tool to demonstrate, through federal legislation, the government’s complicity in the disparate treatment of Black bodies. Next, this Article seeks to show that Black bodies remain a “threatened population” despite their sacred value and worth. It affirms that, from a bibliocentric perspective, God declares creation to be “very good” after humanity is created. Before this moment, creation is “good.” Thus, all human beings reflect the *imago Dei* and are of sacred value and worth deserving of dignity and respect. Finally, it seeks to establish that “threatened population” might be the more appropriate designation for Black bodies since the word “population” alone fails to convey the truths that making symbolic connections to the ESA highlights.

¹² See *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (holding a free Black person is not a citizen of the United States and is part of an inferior class); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding “separate but equal” facilities did not violate the Equal Protection Clause against a man who had seven-eighths Caucasian and one-eighth African blood); *In re Ah Yup*, 1 F. Cas. 223 (C.C.D. Cal. 1878) (holding that a Chinese man of Mongolian race is not a “white person” within the meaning of the Act); *In re Najour*, 174 F. 735 (C.C.N.D. Ga. 1909) (holding that Syrians are part of the Caucasian or White race for purposes of the Act); *Ex parte Shahid*, 205 F. 812 (E.D.S.C. 1913) (holding that Syrians are *not* part of Caucasian or White race); *Takao Ozawa v. United States*, 260 U.S. 178 (1922) (the Court held Japanese is not part of Caucasian or White race); *United States v. Bhagat Singh Thind*, 261 U.S. 204, 213 (1923).

II. “IT IS UNLAWFUL”

The express intent and purpose of the ESA is to “provide a means whereby the ecosystems upon which endangered species and *threatened species depend may be conserved, to provide a program for the conservation* of such endangered species and *threatened species*, and to take such steps as may be appropriate to achieve the purposes[.]”¹³ Having found that “these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific *value to the Nation* and its people . . . the United States *has pledged itself* as a sovereign state in the international community to conserve to the extent practicable the various species . . . facing extinction[.]”¹⁴

Thus, section 1538(a)(1) of the ESA states:

[I]t is *unlawful* for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this Act.¹⁵

The ESA classifies wildlife species into two categories: endangered and threatened.¹⁶ The latter is the focus here. The ESA, as enforced by the U.S. Department of the Interior and interpreted by the Federal Register, defines a “threatened species” as one “likely” to become endangered in the “foreseeable future” throughout all or a significant portion of its range.¹⁷ The Federal Register construes “range” as the geographical area where a species is currently found, including all or part of a species’ expected life cycle and

¹³ See 16 U.S.C. § 1531(b) (emphasis added).

¹⁴ § 1531(a)(3)-(4) (emphasis added).

¹⁵ § 1538(a)(1)(A)-(G).

¹⁶ See § 1533.

¹⁷ See § 1532(6).

span.¹⁸ The final categorization ultimately depends on (1) the species' status and (2) *the degree of threats the species faces*.¹⁹

Black bodies face significant threats and are, therefore, a “threatened species” because they are “likely” to become endangered in the “foreseeable future” throughout all or a significant portion of their range.²⁰ Consider a brief comparison of the ESA to a non-exhaustive snapshot of Black bodies' historical realities, which shall be more closely analyzed below. White slaveowners and White supremacists (as persons “subject to the jurisdiction of the United States”)²¹ would have violated the ESA's express prohibitions. Having subjected Black bodies that had been shackled, chained, raped, maimed, murdered, and kidnapped from Africa against their wills “to the jurisdiction of the United States” after taking them “upon the high seas” (on the *Jesus*, *White Lion*, *Desire*, *Fortune*, *Prosperity*, *Success*, *Hope*, *Clotilda*, and other slave ships), White slaveowners and White supremacists “delivered, received, carried, transported, or shipped in interstate or foreign commerce” (at slave auctions, a “ritual of reference”)²² Black bodies and commodified slavery as “a commercial activity” (nearly 12.5 million enslaved Black bodies provided the free labor that undergirded the robust economy of the American South).²³ In doing so, White people set “regulations pertaining to” Black bodies in place (through Slave [Black] Codes and Jim Crow laws) “pursuant to authority” (a distorted view of God,

¹⁸ See Final Policy on Interpretation of the Phrase “Significant Portion of Its Range” in the Endangered Species Acts’ Definitions of “Endangered Species” and “Threatened Species,” 79 FR 37578-01.

¹⁹ Congress prioritized wildlife species by amending the ESA's strength, scope, and breadth four times: in 1978, 1982, 1988, and 2004. *History of the Endangered Species Act*, BALLOTPEdia, https://ballotpedia.org/History_of_the_Endangered_Species_Act#:~:text=Congress%20subsequently%20amended%20the%20Endangered,1978%2C%201982%2C%20and%201988 (last visited Mar. 2, 2024); See also *Listing a Species as Threatened or Endangered: Section 4 of the Endangered Species Act*, U.S. FISH & WILDLIFE SERVS. (2016), <https://www.fws.gov/sites/default/files/documents/ESA-Section-4-Listing.pdf> (italics added to demonstrate by analogy that Black bodies fit within federal descriptions of “threatened”).

²⁰ See § 1532(20).

²¹ § 1538(a)(1).

²² § 1538(a)(1)(E); see also ANTHONY B. PINN, *TERROR AND TRIUMPH: THE NATURE OF BLACK RELIGION* 49 (2003).

²³ § 1538(a)(1)(E); see also *Slave Ships*, NAT'L ARCHIVES, <https://www.nationalarchives.gov.uk/education/resources/georgian-britain-age-modernity/slave-ships> (last visited Mar. 2, 2024); *Slave Ships*, ENCYCLOPEDIA VA., VA. HUMANITIES, <https://encyclopediavirginia.org/entries/slave-ships-and-the-middle-passage> (last visited Feb. 28, 2024) [hereinafter *Slave Ships*]; Allison Keyes, *The ‘Clotilda,’ The Last Known Slave Ship to Arrive in the U.S., is Found*, SMITHSONIAN MAG. (May 22, 2019), <https://www.smithsonianmag.com/smithsonian-institution/clotilda-last-known-slave-ship-arrive-us-found-180972177>; see also *Jesus of Lübeck, The First Slave Ship to Arrive in Africa in 1562*, AFRICAN HIST. (July 3, 2020), <https://theafricanhistory.com/774>.

the Bible, and Christianity).²⁴ Black bodies were “taken in violation within the United States” (regularly sold across state lines). Taken singularly or collectively, this historic treatment of Black bodies clearly would have violated the ESA.

Violating the ESA carries a maximum criminal penalty of \$50,000, not more than a one-year imprisonment, or both, per offense.²⁵ The statute also provides for civil action and remedies.²⁶ It is impossible to account for each Black body involved in this analysis and arrive at the requisite violations for which the United States should be prosecuted. However, a conservative estimate of accrued fines exceeds \$650 billion on a single count for each of the nearly thirteen million Black bodies enslaved, not including children.²⁷ Why are there no federal laws in America enforced against the senseless killing of Black bodies if the federal government can promulgate penalties for threatening the health, safety, and welfare of wildlife species? Simply stated, local, state, and federal laws are satisfied with the “‘double standard’ of justice.”²⁸ The GFA, which seeks to provide uniform policing policies for those who swear an oath “to protect and to serve,” would offer a significant countermeasure.²⁹ Yet, it will likely fail for want of support or interest convergence.

III. “UPON THE HIGH SEAS”

Olaudah Equiano, also known as Gustavus Vassa, a captured slave, provides a compelling firsthand account of the horrors experienced by Black bodies upon the high seas. Equiano wrote:

The closeness of the place, and the heat of the climate, added to the number in the ship, which was so crowded that each had scarcely room to turn himself, almost suffocated us. This produced copious perspirations, so that

²⁴ See § 1538(a)(1)(G); see also MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* (1968) [hereinafter *WHERE DO WE GO FROM HERE*]. King argued, “The greatest blasphemy of the whole ugly process [White supremacy] was that the white man ended up making God his partner in the exploitation of the Negro.” *Id.* at 79.

²⁵ § 1540(b)(1).

²⁶ § 1540(a).

²⁷ *Slave Ships*, *supra* note 23.

²⁸ KEEANGA-YAMAHTTA TAYLOR, *FROM #BLACKLIVESMATTER TO BLACK LIBERATION* 116 (2014). The Court in *Dred Scott v. Sandford*, in holding Black people were not citizens whom the Framers contemplated as benefitting from the privileges and immunities afforded to people of the United States or citizens, also concluded:

[T]hey had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.

Dred Scott v. Sanford, 60 U.S. 393, 407 (1856).

²⁹ George Floyd Justice in Policing Act, *supra* note 7.

the air soon became unfit for respiration, from a variety of loathsome smells, and brought on a sickness among the slaves, of which many died, thus falling victims to the improvident avarice, as I may call it, of their purchasers. This wretched situation was again aggravated by the galling of the chains, now become insupportable; and the filth of the necessary tubs, into which children often fell, and were almost suffocated. The shrieks of the women, and the groans of the dying, rendered the whole a scene of horror almost inconceivable.³⁰

Equiano's experiences represent a simulacrum of life lived as a Black body. Though written in 1789, 170 years after the *White Lion*'s arrival with the first African slaves in North America, Equiano unmutes the muzzled voices of countless nameless Black bodies.³¹

On or about August 20, 1619, the *White Lion* arrived in America off the shores of Point Comfort in Virginia, possessing cargo bearing a single classification: chattel property.³² Unlike the Separatists or Pilgrims, who exercised agency fleeing to America seeking religious freedom from the oppressions of England and spending "sixty-six grueling days on the perilous Atlantic Ocean," slaves aboard the *White Lion* were kidnapped from their native lands of Africa against their wills to make a trip uncertain of their destination or destiny. The *White Lion* offloaded "momentous cargo" in the form of Black bodies.³³ The ship contained other cargo, like food and supplies, but the presence of Black bodies aboard was an anomaly. Although there is "no ship manifest," effectively erasing their very existence, it is known that "20 and odd Negroes" emerged from the barracoons, storage areas used to "control pigs and other animals,"³⁴ and disembarked into the realities of a whole new world created for them over the next four centuries without notice, forewarning, readiness, or preparation.³⁵ In one fell swoop, the *White Lion* landed its cargo of Black bodies and, concomitantly, inaugurated the tragic history of White supremacy on American soil.

Alfie Shaw states, "White lions have been regarded as sacred animals across Africa," but "there is a common misconception that they are

³⁰ OLAUDAH EQUIANO, *THE INTERESTING NARRATIVE OF THE LIFE OF OLAUDAH EQUIANO* 79 (ebook 2005) (available at: <https://www.gutenberg.org/files/15399/15399-h/15399-h.htm>).

³¹ *Id.*

³² *This Day in History: August 20: 1619: First Enslaved Africans Arrive in Jamestown, Setting the Stage for Slavery in North America*, HIST., <https://www.history.com/this-day-in-history/first-african-slave-ship-arrives-jamestown-colony> (last updated Aug. 15, 2023). I would also like to note here that Henry Louis Gates, Jr. has argued that enslaved Africans were in North America in the Spanish colony of Florida as early as 1526. See HENRY LOUIS GATES, JR., *THE BLACK CHURCH, THIS IS OUR STORY, THIS IS OUR SONG* 17 (2021).

³³ Nikole Hannah-Jones, *1619-1624: Arrival*, in *FOUR HUNDRED SOULS: A COMMUNITY HISTORY OF AFRICAN AMERICA, 1619-2019* 3-4 (Ibram X. Kendi & Keisha N. Blain eds., 2021).

³⁴ *Id.*

³⁵ PINN, *supra* note 22, at 30.

albinos.”³⁶ White lions are a separate subset of lions with a regressive mutation called Leucism, resulting in a reduced volume of melanin.³⁷ White lions have white coats and blue eyes, and there are ongoing efforts to protect them in South Africa.³⁸ White lions metaphorically represent the *White Lion*, a cargo ship that was among the first in a long line of vessels that plied the mid-Atlantic to bring slaves to American shores from the African coasts.³⁹ White males, likely with blue eyes, viewed slavery as their sacred right and “sense of Christian duty” and subsequently raped and ravaged the African land and people under the maximum protections of their imperial nations and with a warped sense of God’s providence.⁴⁰

One often hears lions identified as kings of the jungle who rule and dominate through raw strength and power in prides. This is a misnomer because jungles are not their natural habitat.⁴¹ However, the white lion’s sacredness, strength, and power are attributed to whiteness universally. As Robin DiAngelo notes, whiteness signifies “a set of locations that are . . . intrinsically linked dynamic relations of domination.”⁴² Thus, White people and whiteness are the perceived “kings” of the universe, who rule and dominate through the imposition of their strength and power upon “others” with pride and often in prides. One expression of their strength, power, and domination was taking possession of Black bodies upon the high seas and exchanging them through commercial activity as commodities.

IV. “A COMMERCIAL ACTIVITY”

White bodies’ introduction of Black bodies to America as commodities offers a striking point of comparison to the Act’s proscription against commercial activity.⁴³ White people took, imported, possessed, sold,

³⁶ Alfie Shaw, *The Lion King and Other Lion Myths*, BBC EARTH, <https://www.bbcearth.com/news/the-lion-king-and-other-lion-myths/> (last visited Nov. 29, 2023).

³⁷ *Id.*

³⁸ Kitson Jazyka, *Rare White Lions Survive in Protected Areas in South Africa*, WASH. POST (Mar. 22, 2014, 2:27 PM), https://www.washingtonpost.com/lifestyle/kidspost/rare-white-lions-survive-in-protected-areas-in-south-africa/2014/03/20/225689ee-a86d-11e3-b61e-8051b8b52d06_story.html; *About Us*, GLOBAL WHITE LION PROT. TRUST, <https://whitelions.org/about-us/#:~:text=After%20commercial%20lion%20trophy%20hunting,land%20of%20their%20origin%2C%20purchasing> (last visited Feb. 29, 2024).

³⁹ Crystal Ponti, *America’s History of Slavery Began Long Before Jamestown*, HIST., <https://www.history.com/news/american-slavery-before-jamestown-1619> (last updated Aug. 26, 2019).

⁴⁰ ANTHEA BUTLER, *WHITE EVANGELICAL RACISM: THE POLITICS OF MORALITY IN AMERICA* 31 (2021).

⁴¹ Janet F. Murray, *Lions are the King of the Beasts Because They Don’t Live in Jungles!*, WORLD ANIMAL FOUND. (Feb. 13, 2023), <https://worldanimalfoundation.org/advocate/wild-animals/params/post/1291221/lions>.

⁴² Robin DiAngelo, *White Fragility*, 3 INT’L J. CRITICAL PEDAGOGY 54, 56 (2011).

⁴³ “Commercial activity” means all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and

delivered, carried, transported, shipped, or received across the “territorial sea” (i.e., the mid-Atlantic) Black bodies from the sixteenth to nineteenth centuries, selling them upon the slave auction blocks.⁴⁴ Anthony B. Pinn calls these loci places of “peddling flesh.”⁴⁵ The auction blocks served as platforms for the official commodification of Black bodies, with the express purpose of the “negation of true humanity.”⁴⁶ Prospective slave owners descended upon the situs like shoppers at a flea market or a swap meets to select the best merchandise. Before making their purchases, slaves were routinely “stripped of clothing that got in the way.”⁴⁷ Frederick Bancroft describes the horrific scene:

Hands were opened and shut and looked at inside and out. Arms and legs were felt of as a means of deciding whether they were muscular and regular. Backs and buttocks were scrutinized for the welts that heavy blows with a whip usually left. Necks were rubbed or pinched to detect any soreness or lumps. Jaws were grasped, fingers were run into negroes’ mouths . . . so that all the teeth and gums could be seen . . . [i]f there was any suspicion that one eye might not be good, a strange hand was clapped over the other and the slave was asked what object was held before him. The hearing was likewise tested. All such inquiries were made with equal freedom whether the slave was man, woman, boy or girl.⁴⁸

Pinn calls such acts of dehumanization a “ritual of reference” because of their “repeated, systematic activity conducted in carefully selected locations that is intended to reinforce the enslaved’s status as object.”⁴⁹ Slave auctions and public lynchings are not only exemplars of Pinn’s “ritual of reference” but also fit Iris Marion Young’s five “faces” of oppression: exploitation, marginalization, powerlessness, cultural imperialism, and violence.⁵⁰

selling within the ESA. 16 U.S.C § 1532(2). One of the first exhibits at The National Civil Rights Museum at the Lorraine Motel in Memphis, featured life-sized depictions of the trans-Atlantic slave trade including a mother holding her infant child at the slave auction. Families of commodified Black men, women, and children were separated, sold, and often never reunited. THIS IS THE STORY OF A PEOPLE: A PICTORIAL OF NATIONAL CIVIL RIGHTS MUSEUM 4-11 (Faith Morris, Connie Dyson & Debbie Nutt eds., 2018) (souvenir book on file with author).

⁴⁴ Thomas Lewis, *Transatlantic Slave Trade*, BRITANNICA, <https://www.britannica.com/topic/transatlantic-slave-trade> (last updated Feb. 29, 2024).

⁴⁵ PINN, *supra* note 22, at 36.

⁴⁶ *Id.* at 43.

⁴⁷ *Id.* at 42.

⁴⁸ FREDERICK BANCROFT, *SLAVE TRADING IN THE OLD SOUTH* 106-07 (1959).

⁴⁹ PINN, *supra* note 22, at 49.

⁵⁰ See IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 39-65 (1990). Young argues that exploitation means “a steady process of the transfer of the results of the labor of one social group to benefit another.” *Id.* at 49. She defines “marginalization” as a situation wherein “[a] whole category of people is expelled from useful participation in social life and thus potentially subjected to severe material deprivation and even extermination.” *Id.* at 53. “Powerlessness” denotes the “lack of authority, status, and

Karl Marx defined “use-value” as the natural worth in the utility of a thing and the “exchange-value” as the value in exchange of commodities.⁵¹ The objectified, performative bodies of African slaves had both “use-value” and “exchange-value.” The business arrangement of exchanging bodies for services makes Black bodies the “subjects of property exchanges.”⁵² Black children were non-exempt. Thomas Jefferson, one of the Founding Framers, wrote, “I consider the labor of a breeding woman as no object, and that a child raised every 2 years is of more profit than the crop of the best laboring man.”⁵³ Though derived from purely selfish motives and greed, Jefferson’s reflection implicitly concedes that Black female bodies are particularly threatened. Jefferson understood that free slave labor would immediately cease without the production and reproduction of Black bodies. The “course of [this] commercial activity” provided America with more than twelve million Black bodies for free forced labor.⁵⁴ America would have been utterly incapable of building its infrastructure or economy without the foreign and interstate commerce and influx of free labor provided by Black bodies. However, America needed a systematic and sustainable scheme to regulate its new labor force.

V. “REGULATIONS PERTAINING TO SUCH SPECIES”

The nineteenth-century book *Extracts from the American Slave Code* provides further evidence of the threats against and entrenchment of the position of Black bodies. The preamble is revelatory: “The cardinal principle of slavery, that the slave is not to be ranked among *sentient beings*, but among *things*—is an article of property—a chattel personal, obtains as undoubted law in all the Slave States.”⁵⁵ This brief but powerful declaration had broader implications for both slaves and slaveholders. First, the slaves’ insentient status rendered them “an article of property.”⁵⁶ Second, the slaves’ lack of

sense of self that professionals tend to have.” *Id.* at 57. Cultural imperialism means the “universalization of a dominant group’s experiences and culture, and its establishment as the norm.” *Id.* at 59. Violence occurs when “[m]embers of some groups live with the knowledge that they must fear random, unprovoked attacks on their persons or property, which have no motive but to damage, humiliate, or destroy the person.” *Id.* at 61.

⁵¹ Karl Marx, *Critique of Capitalism*, in THE MARX-ENGELS READER 199, 204, 216, 224 (Robert C. Tucker ed., 1978).

⁵² PINN, *supra* note 22, at 15.

⁵³ KIMBERLÉ W. CRENSHAW, NEIL GOTANDA, GARY PELLER & KENDALL THOMAS, CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 279 (1995).

⁵⁴ *Slave Ships*, *supra* note 23.

⁵⁵ PHILADELPHIA FEMALE ANTI-SLAVERY SOCIETY, EXTRACTS FROM THE AMERICAN SLAVE CODE, (Philadelphia Female Anti-Slavery Society, 1880) (available at: <https://archive.org/details/extractsfromamer00phil/page/n6/mode/1up> [https://perma.cc/PF92-2MK7] [hereinafter EXTRACTS FROM THE AMERICAN SLAVE CODE]).

⁵⁶ *Id.*

perceptive and sensory abilities located them below animals. As James Baldwin argued, “[i]n order to justify the fact that men were treated as though they were animals, the white republic had to brainwash itself into believing that they were, indeed, animals and *deserved* to be treated like animals.”⁵⁷ Third, because of the first two implications, the exaction of cruel and unusual punishment by slaveholders was limitless. Finally, the “undoubted law” speaks to the incontrovertible, unchallengeable, not abrogable, and undeniable nature of these same.

Slaveholders were given carte blanche, unfettered rights to deal with their “articles of property” as they deemed fit. They literally and unflinchingly invoked a distorted eucharistic profession, “*Hoc est enim corpus meum* (This is my body).”⁵⁸ Below is a sample of how Southern slaveholding states legally effectuated the power of White owners over their “chattel personal”:

Louisiana. – A slave is one who is in the power of his master, to whom he belongs. The master may sell him, dispose of his person, his industry and his labor, he can do nothing, possess nothing, nor acquire anything but what must belong to his master. *Civil Code, Art. 35.*⁵⁹

Mississippi . . . Act of June 18, 1822, sec. 21. No negro or mulatto can be a witness in any case, except against negroes or mulattoes. **P. 749; New Code, 372.**⁶⁰

Alabama . . . Act of January 1, 1823, authorizes an agent to be appointed by the governor of the state, to *sell for the benefit of the state*, all persons of color brought into the United States, and within the jurisdiction of Alabama, *contrary to the laws of Congress prohibiting the slave trade.* **P. 643.**⁶¹

Georgia . . . Act of December 13, 1792, Any person who sees more than seven men slaves without any white person, in a high road, may whip each slave *twenty* lashes. **P. 454.**⁶²

⁵⁷ JAMES BALDWIN, *A Talk to Teachers*, in JAMES BALDWIN: COLLECTED ESSAYS 681 (1998) [hereinafter BALDWIN: COLLECTED ESSAYS].

⁵⁸ WILLIE JAMES JENNINGS, *THE CHRISTIAN IMAGINATION: THEOLOGY AND THE ORIGINS OF RACE* 39 (2010).

⁵⁹ THE NINETEENTH CENTURY: A QUARTERLY MISCELLANY, EDITOR’S DEPARTMENT: THE AMERICAN SLAVE CODE 194 (Philadelphia, G.B. Ziber & Co., 1848).

⁶⁰ *Id.* at 195.

⁶¹ *Id.* at 196.

⁶² *Id.*

South Carolina. – *Brevard's Digest*. Slaves shall be deemed sold, taken, reputed, and adjudged in law to be *chattels personal* in the hands of their owners, and possessors, and their executors, administrators and assigns, *to all intents, constructions and purposes whatever*. **Vol. ii., p. 229.**⁶³

North Carolina. – *Haywoods Manual . . . Act of 1799*. Any slave set free, except for meritorious service, to be adjudged of by the county court, may be seized by any free holder, committed to jail, *and sold to the highest bidder*. **P. 525.**⁶⁴

Tennessee. – . . . *Laws of 1813, chap. 35*. In trials of slaves, the sheriff chooses the court, which must consist of three justices and twelve *slaveholders* to serve as jurors.⁶⁵

Arkansas. – *Rev. Stat., sect. 4*. Requires the patrol to visit all places suspected of unlawful assemblages of slaves; and sect. 5 provides that any slave found at such assembly, or strolling about without a pass, *shall receive* any number of *lashes*, at the discretion of the patrol, not exceeding twenty. **P. 604.**⁶⁶

Missouri. – *Laws I*. Any master may commit to jail, there to remain, at *his pleasure*, any slave who refuses to obey him or his overseer. **P. 309.**⁶⁷

Kentucky. – *Dig. of Stat., act Feb. 8, 1798, sect. 5*. No colored person may *keep or carry*, gun, powder, shot, *club*, or *other weapon*, on penalty of *thirty-nine lashes*, and forfeiting the weapon, which any person is authorized to take.⁶⁸

Virginia. – . . . *Suppl. Rev. Code. . . .* By the Revised Code, *seventy-one* offences are punished with *Death*, when committed by slaves, and nothing more than imprisonment when by the white[] [people]. *Stroud's Sketch*, **p. 107.**⁶⁹

⁶³ *Id.*

⁶⁴ *Id.* at 197.

⁶⁵ *Id.*

⁶⁶ *Id.* at 197-98.

⁶⁷ *Id.* at 198.

⁶⁸ *Id.*

⁶⁹ *Id.*

[Virginia] – And if any women servant shall be delivered of a bastard child within the time of her service aforesaid, *Be it enacted, by the authority aforesaid, and it is hereby enacted*, That in recompense of the loss and trouble occasioned her master or mistress thereby, she shall for every such offence, serve her said master or owner one whole year after her time by indenture, custom, and former order of court, shall be expired; or pay her said master or owner, one thousand pounds of tobacco[.]⁷⁰

Maryland. – . . . *Act 1717, chap. 13, sec. 5. p.* Provides that any free coloured person marrying a slave, becomes a slave for life, except mulattoes born of white women.⁷¹

Delaware. – *Laws.* More than six men slaves, meeting together, not belonging to one master, unless on lawful business of their owners, may be whipped to the extent of twenty-one lashes each. **p. 104.**⁷²

District of Columbia. . . . The city of Washington grants a license, to *trade in slaves*, for profit, as an agent or otherwise, for 400 dollars. *City Laws*, **p. 249.**⁷³

This legal kaleidoscope of constrictions conflicts with the ESA's purpose of expanding the species' range by suffocating and compressing the movement of Black bodies while ensuring White supremacy across state lines. Expressly, Alabama even declared her state sovereignty over the U.S. Constitution's Supremacy Clause by completely disregarding a contravening federal law, a tactical strategy employed throughout the American South in the post-Reconstruction and Civil Rights Movement eras.⁷⁴ The combination

⁷⁰ WILLIAM WALTER HENING, *THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619* 3:452 (New York, R. & W. G. Bartow, 1823).

⁷¹ EXTRACTS FROM THE AMERICAN SLAVE CODE, *supra* note 55, at 4.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ The examples for Southern resistance to federal intervention on behalf of former slaves would require another historical volume beyond this Article's current scope. A few examples include *Schnell v. Davis*, 336 U.S. 933 (1949) (banning literacy tests as violative of voting rights); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (mandating integration of schools "with all deliberate speed"); *Browder v. Gayle*, 352 U.S. 903 (1956) (ruling Alabama statutes for segregated bus seating unconstitutional); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (holding poll taxes are illegal); *Cooper v. Aaron*, 358 U.S. 1 (1958) (holding states must obey Supreme Court decisions); *This Day in History: November 14: 1960: Ruby Bridges Desegregates Her School*, HIST. (Mar. 2, 2021), <https://www.history.com/this-day-in-history/ruby-bridges-desegregates-her-school>.

of the slave auctions, classification of Black children as “bastards,” and Slave Codes were a death knell to personhood and humanity for Black bodies. They rendered Black bodies as “nobodies” or “*no bodies*,” who were wholly severed from “community, liberty, and the power to shape history . . . [c]onfined to the cash value of flesh.”⁷⁵ Possessing no legal, marital, or property rights, being subjected to sale, disposition, and interstate and intrastate trade, enslaved Black bodies rightly would have fallen under the protections of the ESA had it been in force at the time. Since 1619, America has violated every provision of the ESA pursuant to the authority of a distorted theological construction.

VI. “PURSUANT TO AUTHORITY”

White people situated Black bodies within their theological framework. White slaveholders maintained that Christian scriptures morally and theologically endorsed chattel slavery. The Pentateuch unveils the first institution of systemic racism, slavery, and brutality. Exodus 1 chronicles:

Now there arose a new king over Egypt, who did not know Joseph. And he said to his people, “[L]ook, the people of the children of Israel *are* more and mightier than we; come, let us deal shrewdly with them, lest they multiply, and it happen, in the event of war, that they also join our enemies and fight against us, and *so* go up out of the land.” Therefore they set taskmasters over them to afflict them with their burdens. And they built for Pharaoh supply cities, Pithom and Raamses. But the more they afflicted them, the more they multiplied and grew. And they were in dread of the children of Israel. So the Egyptians made the children of Israel serve with rigor. And they made their lives bitter with hard bondage—in mortar, in brick, and in all manner of service in the field. All their service in which they made them serve *was* with rigor.⁷⁶

The justification for the enslavement of the children of Israel was born solely from fear. But what was the genesis of these unsubstantiated fears? They were based on losses of power and property, tied to whiteness in the United States.⁷⁷ Pharaoh said, “the children of Israel are more numerous and

⁷⁵ PINN, *supra* note 22, at 51.

⁷⁶ *Exodus* 1:8-14 (New King James).

⁷⁷ See JUAN F. PEREA, RICHARD DELGADO, ROSE CUISON-VILLAZOR, OSAMUDIA R. JAMES, JEAN STEFANCIC & STEPHANIE M. WILDMAN, *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 1 (4th ed. 2023) for a more in-depth discussion justifying White violence because of the “perceived threat posed by increasing number of persons of color.” *Id.* According to Perea, Delgado, Cuison-Villazor, James, Stefancic, and Wildman: “Together with the fear and intimidation wrought by violence against persons of color, our political system is under attack by persons who refuse to share power in an increasingly racially diverse society. A resolute, and increasingly desperate, minority of White[] [people] fight to maintain its control over society.” *Id.*; see also Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

more powerful than we.”⁷⁸ Pharaoh’s unjustifiable fears parallel, and are representative of, White peoples’ psychological fears that are still propagated and reappropriated today in the post-Civil War, post-Reconstruction, and so-called “post-racial” eras through conspiracy and replacement theories. Pinn explains, “[t]here is a preoccupation with the Black body as a marker of ‘something,’ as the storehouse for the fears, anxieties, stories, phobias, and desires of white[] [people].”⁷⁹ White peoples’ irrational fears and (mis)treatment of Black bodies eerily mimic Pharaoh’s handling of the children of Israel.

Being outnumbered by subjugated people weighs heavily upon and threatens the oppressor’s psyche, whose response is to “deal shrewdly with them.”⁸⁰ The shrewdness concretized itself in the form of bitter slavery, the birth of the first policing system, and capital punishment. Pharaoh committed inchoate crimes of solicitation and conspiracy to frame attempted murders as inside jobs, declaring the first edict over the Israelite babies, which, by analogy, was attributed to Black bodies.⁸¹ Pharaoh said, “[w]hen you do the duties of a midwife for the Hebrew women, and see *them* on the birthstools, **if it is a son, then you shall kill him[.]**”⁸² Black bodies, particularly Black males, inhale the threat and legacy of hatred and bigotry of this death sentence pronounced over their lives with their first breath. James Baldwin explained the origins and motive for this hate: “They [White people] really hate you—really hate you because in their eyes . . . you stand between them and life.”⁸³ If Baldwin was correct, then Black bodies remain under a perpetual threat, and many suffer as collateral damage of the violence that protects, upholds, and values whiteness.

The first Slave Codes enshrined “the extreme deprivations of liberty already existing in social practice.”⁸⁴ Slave Codes morphed into *de jure* and *de facto* segregation and Jim Crow laws. Each was enforced through terroristic forms of vigilante justice at the hands of groups like the Ku Klux Klan, White Citizens’ Council, the White League, and others to “keep [Black bodies] in their place” when, in their subjective judgment, they were out of place.⁸⁵ Thus, the law provided White people the legitimation for the

⁷⁸ *Exodus* 1:9 (NRSVUE).

⁷⁹ PINN, *supra* note 22, at 20.

⁸⁰ *Exodus* 1:10 (NRSVUE).

⁸¹ *Exodus* 1:16 (NRSVUE).

⁸² *Exodus* 1:16 (New King James) (bold added).

⁸³ BALDWIN: COLLECTED ESSAYS, *supra* note 57, at 681.

⁸⁴ CRENSHAW, GOTANDA, PELLER & THOMAS, *supra* note 53, at 278.

⁸⁵ *A Brief History of Jim Crow*, TEACH DEMOCRACY, <https://teachdemocracy.org/online-lessons/black-history-month/a-brief-history-of-jim-crow> (last visited Feb. 21, 2024). *See also* Eduardo Bonilla-Silva & Amanda Lewis, *The “New Racism”: Toward an Analysis of the U.S. Racial Structure*,

systemic creation of oppressive institutions and structures they desired. White people also boot-strapped this legal authorization with their warped biblical justifications. “Sanctified vengeance” became a form of “divine justice” enacted by White supremacists to reaffirm their societal positions against Black bodies out of their place.⁸⁶

White slaveholders utilized many Christian Bible verses to rationalize slavery. The Exodus narrative is one, but there are others. Anthea Butler noted, “Ephesians 6:5-7 offered slaveholders an even more compelling argument.”⁸⁷ It reads, “[b]ondservants, be obedient to those who are your masters according to the flesh, with fear and trembling, in sincerity of heart, as to Christ; not with eyeservice, as men-pleasers, but as bondservants of Christ, doing the will of God from the heart[.]”⁸⁸ White people believed obedience and docility were meted to Black bodies in fulfillment of God’s will for their lives. Calvinist theology of predestination offered White people an additional theological framework for the belief that God had divinely ordained certain groups of people to be slaves and other slaveholders.⁸⁹ Moreover, as David Chidester noted, Black bodies represented “savagery,” “ferocity,” and were “barbaric” and “grotesque in the extreme.”⁹⁰ Thus, White peoples’ normative gaze upon Black bodies paved the way for their employment of a dialectic approach to justifying slavery.

The prevailing rationale was, “slavery was a sin, but if a *Christian* owner held slaves, the Christian was not sinful, because God had ordained slavery in the Bible.”⁹¹ In other words, a slaveholder’s Christian status could whitewash slavery’s sinful stain. This dominant mentality produced cognitive dissonance within Christianity, which continues to this day. Describing slaveholding religion, Frederick Douglass asserted, “between the Christianity of this land, and the Christianity of Christ, I recognize the widest possible difference[.]”⁹² Yet, as Morris L. Davis observed, “[a]sking whether racist Christians were *really* Christian is like asking whether slaveholding Americans were *really* Americans.”⁹³ Sitting perched upon the moral mantle

1960s-1990s 24 (Ctr. Rsch. Soc. Org., Working Paper No. 536, 1996) (available at <https://deepblue.lib.umich.edu/bitstream/handle/2027.42/51300/536.pdf;sequence=1>).

⁸⁶ BUTLER, *supra* note 40, at 30-31.

⁸⁷ *Id.* at 18.

⁸⁸ *Ephesians* 6:5-7 (New King James).

⁸⁹ See REV. FRED A. ROSS, *SLAVERY ORDAINED OF GOD* (Philadelphia, J. B. Lippincott & Co., 1857); see also John Saillant, *Slavery and Divine Providence in New England Calvinism: The New Divinity and a Black Protest, 1775-1805*, 68 *NEW ENG. Q.* 584 (1995).

⁹⁰ DAVID CHIDESTER, *EMPIRE OF RELIGION: IMPERIALISM AND COMPARATIVE RELIGION* 32 (2014).

⁹¹ BUTLER, *supra* note 40, at 19.

⁹² FREDERICK DOUGLASS, *THE NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE* 101 (Boston, Anti-Slavery Off. 1845).

⁹³ MORRIS L. DAVIS, *THE METHODIST UNIFICATION: CHRISTIANITY AND THE POLITICS OF RACE IN THE JIM CROW ERA* 6 (2008).

of superiority deeply ingrained in this ideology further emboldened White people for the missionary work of “spreading the gospel to the ‘heathen.’”⁹⁴ White people believed, as did “moderate segregationists,” that it was their divine calling and authority to subdue and save the heathen while fulfilling their destiny to conquer, save, and protect the world.⁹⁵ With these spiritual, moral, and legal bookends securely in place, the enslavement of Black bodies became firmly rooted in both the American soil and psyche despite Africa being the species’ place of origin.

VII. “ANY SUCH SPECIES”

Before Walt Disney’s *The Lion King*’s Mufasa uttered from the heavens to his son, Simba, “remember who you are,”⁹⁶ “know thyself” was carved into the stone entrance to Apollo’s temple at Delphi in Greece in the fifth century.⁹⁷ Often ascribed to the Greek philosopher Socrates, “this clarion call for knowledge of self [was] the basis for true understanding of self, a possible mastery of self, development of [the] same and [of] the society for the overall benefit of self and others.”⁹⁸ Self-knowledge can be tied to discovering self-identity. Websites like Ancestry.com, MyHeritage.com, FamilySearch.com, and Archive.com have recently become part of pop culture in response to these pursuits of self-discovery. However, it was Alex Haley’s “900-page family saga, which reached back to 18th century Gambia” that fueled the “genealogy craze” that psychologist Roy F. Baumeister calls a “quest for self-knowledge.”⁹⁹

Unfortunately for Black bodies, the tragic repercussions of American slavery posed formidable obstacles to self-identity and self-knowledge because it was illegal for slaves to read or write and legally marry. Additionally, histories often died with the ancestors, and the fragility of oral traditions challenged the ability of slaves to transmit their heritage. In *The Narrative of the Life of Frederick Douglass, An American Slave*, Douglass offered an account in vivid and lucid detail of slavery’s attempt to erase his

⁹⁴ BUTLER, *supra* note 40, at 3.

⁹⁵ Katie R. Eyer, *The New Jim Crow is the Old Jim Crow*, 128 YALE L.J. 1002 (2019). Because Black people allegedly had “different moral beliefs than those possessed by middle-class white[] [people],” moderate segregationists “understood themselves to be genuinely seeking to protect and improve all races[.]” *Id.* at 1027.

⁹⁶ THE LION KING (Walt Disney Pictures 1994).

⁹⁷ Rachel Ashcroft, *Michel de Montaigne and Socrates on ‘Know Thyself’*, COLLECTOR (Oct. 18, 2022), <https://www.thecollector.com/michel-de-montaigne-and-socrates-know-thyself>.

⁹⁸ Emmanuel Eyo & Joseph N. Ogar, *The Socratic “Man Know Thyself” and the Problem of Personal Identity*, 15 SOPHIA: AFRICAN J. PHIL. & PUB. AFFAIRS 69 (2014).

⁹⁹ Gregory Rodriguez, *How Genealogy Became Almost as Popular as Porn*, TIME (May 30, 2014, 12:01 AM), <https://time.com/133811/how-genealogy-became-almost-as-popular-as-porn>.

existence and history at an early age.¹⁰⁰ As he recounted, “I have no accurate knowledge of my age, never having seen any authentic record containing it.”¹⁰¹ Today, this would be a stunning breach of duty given American hospitals’ obligation to authenticate (i.e., issue a birth certificate for) each child’s birth.¹⁰² Douglass’s inability to ascertain his age or lineage with any certainty is, arguably, one of the greatest tragedies of slavery.

Another tragedy is the severing of family ties. As Douglass noted, “[m]y mother and I were separated when I was but an infant—before I knew her as my mother. It is a common custom . . . to part children from their mothers at a very early age.”¹⁰³ He further observed, “I never saw my mother, to know her as such.”¹⁰⁴ For Douglass, this “want of information concerning my own was a source of unhappiness to me even during childhood.”¹⁰⁵ Undeniably, nonexistence and erasure are legacies of legalized slavery.

Today, the realities of racism and institutional racism erect barriers to self-knowledge that threaten to keep Black bodies trapped in the substratum of society. Donald Neeley, a homeless Galveston man, was arrested on August 3, 2019, for trespassing.¹⁰⁶ The arresting officers tied a rope around Neely’s handcuffs and walked him several blocks through downtown Galveston as they rode on horseback next to him.¹⁰⁷ More recently, on September 20, 2021, U.S. Border Patrol agents were photographed on horseback brandishing whips upon Haitian migrants in Del Rio, Texas.¹⁰⁸ Public outrage was high because the images horrifically and sadistically echo the inhumane treatment of Black bodies. These examples are stark reminders of American society’s predisposition to view the societal, sick symptomology that still views Black bodies as alien. The Statue of Liberty’s invitation to “[g]ive me your tired, your poor. Your huddled masses yearning to breathe free. The wretched refuse of your teeming shore,” amounts to nothing more

¹⁰⁰ DOUGLASS, *supra* note 92, at 1.

¹⁰¹ *Id.* at 1.

¹⁰² U.S. DEP’T HEALTH & HUM. SERVS., PUBLIC HEALTH SERV., HOSPITALS’ AND PHYSICIANS’ HANDBOOK ON BIRTH REGISTRATION AND FETAL DEATH REPORTING (1987) (available at: https://www.cdc.gov/nchs/data/misc/hb_birth.pdf).

¹⁰³ DOUGLASS, *supra* note 92, at 2.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1.

¹⁰⁶ Nick Powell, ‘Now I Feel Embarrassed’: Donald Neely Addresses His Viral Galveston Arrest, HOUST. CHRON., <https://www.houstonchronicle.com/news/houston-texas/houston/article/Now-I-feel-embarrassed-Donald-Neely-14493930.php> (last updated Oct. 4, 2019, 9:11 PM).

¹⁰⁷ *Id.*

¹⁰⁸ Bill Chappell, U.S. Border Agents Chased Migrants on Horseback. A Photographer Explains What He Saw, NPR, <https://www.npr.org/2021/09/21/1039230310/u-s-border-agents-haiti-migrants-horses-photographer-del-rio> (last updated Sept. 21, 2021, 10:22 PM).

than an invitation to a private VIP party for White bodies as Black bodies still yearn to breathe.¹⁰⁹

However, as Genesis 1:26-27 affirms:

Then God said, "Let Us make man in Our image, according to Our likeness; let them have dominion over the fish of the sea, over the birds of the air, and over the cattle, over all the earth and over every creeping thing that creeps on the earth." So God created man in His *own* image; in the image of God He created him; male and female He created them.¹¹⁰

Anthea Butler recounts an interview between CNN's religion correspondent and Trillia Newbell, an African American Christian. During the interview, Newbell affirmed that all people were made in the image of God.¹¹¹ After the interview, a White man accosted Newbell and said, "'she was subhuman, and a different species' and even wanted to use scripture to prove it to her."¹¹² This exchange was not during the fifteenth, sixteenth, seventeenth, eighteenth, or nineteenth centuries; it occurred in July 2020, in the twenty-first century!¹¹³

Newbell is correct, despite the backlash from this specific White man's twenty-first century expression of the deeply seated, distorted slaveholder's theology and gross misappropriation of scripture. All people are part of the human race and can trace their pedigree to God's image. The Lukan gospel recounts this critical genealogy in the case of Jesus Christ:

Now Jesus Himself began His ministry at about thirty years of age, being (as was supposed) the son of Joseph, the son of Heli, the son of Matthat, the son of Levi, the son of Melchi, the son of Janna, the son of Joseph, the son of Mattathiah, the son of Amos, the son of Nahum, the son of Esli, the son of Naggai, the son of Maath, the son of Mattathiah, the son of Semei, the son of Joseph, the son of Judah, the son of Joannas, the son of Rhesa, the son of Zerubbabel, the son of Shealtiel, the son of Neri, the son of Melchi, the son of Addi, the son of Cosam, the son of Elmodam, the son of Er, the son of Jose, the son of Eliezer, the son of Jorim, the son of Matthat, the son of Levi, the son of Simeon, the son of Judah, the son of Joseph, the son of Jonan, the son of Eliakim, the son of Melea, the son of Menan, the son of Mattathah, the son of Nathan, the son of David, the son of Jesse, the son of Obed, the son of Boaz, the son of Salmon, the son of Nahshon, the son of Amminadab, the son of Ram, the son of Hezron, the son of Perez, the son of Judah, the son of Jacob, the son of Isaac, the son of Abraham, the son of Terah, the son

¹⁰⁹ "The New Colossus," By Emma Lazarus, SALT (June 27, 2023), <https://www.saltproject.org/progressive-christian-blog/2020/6/23/the-new-colossus-by-emma-lazarus>.

¹¹⁰ *Genesis* 1:26-27 (New King James).

¹¹¹ BUTLER, *supra* note 40, at 142.

¹¹² *Id.*

¹¹³ *Id.*

of Nahor, the son of Serug, the son of Reu, the son of Peleg, the son of Eber, the son of Shelah, the son of Cainan, the son of Arphaxad, the son of Shem, the son of Noah, the son of Lamech, the son of Methuselah, the son of Enoch, the son of Jared, the son of Mahalalel, the son of Cainan, the son of Enosh, the son of Seth, the son of Adam, the son of God.¹¹⁴

Though their self-identity is rooted in God, Black bodies have neither been seen nor treated as people of sacred worth and value created by God. Thus, Black bodies remain a threatened species.

VIII. “TAKEN IN VIOLATION”

Against death threats and as an act of resistance that further fueled the modern Civil Rights Movement, Mamie Elizabeth Till, a Black mother, refused to have a closed casket for her fourteen-year-old son, Emmett Till, who had been murdered by White supremacists in Money, Mississippi on August 28, 1955.¹¹⁵ Visiting his family in this ironclad, racist Mississippi community for the summer, this Chicago boy was ignorant of Jim Crow etiquette. Till was unaware that he should get off the sidewalk if he saw a White person coming in his direction.¹¹⁶ He did not know that “reckless eyeballs” (i.e., making eye contact with any White person) could get him killed.¹¹⁷ He certainly did not know any real or perceived actions against or toward a White woman could sign his death certificate. Three White men kidnapped Till from his great-uncle’s home in the middle of the night, beat him within an inch of death, gouged out his eyes, smashed his teeth, shot him multiple times in the head, cut off his testicles, tied a seventy-five-pound cotton gin fan around his neck with barbed wire, and drowned him in the Tallahatchie River.¹¹⁸ Till’s body laid at the river’s bottom for three days

¹¹⁴ Luke 3:23-38 (New King James) (emphasis added).

¹¹⁵ *History: Emmett Till*, FBI.GOV, <https://www.fbi.gov/history/famous-cases/emmett-till> (last visited Feb. 1, 2024) [hereinafter *History: Emmett Till*].

¹¹⁶ Francis Mulraney, *Martyr’s Mom Mamie Till Forced to Identify Son Emmett, 14, With a Single Item After He Was Lynched and Mutilated Beyond Recognition*, U.S. SUN, <https://www.the-sun.com/news/4408979/mamie-till-identified-son-emmett-legacy> (last updated May 31, 2022, 4:38 PM).

¹¹⁷ See Tommy J. Curry, *Why is There Still No Justice for Emmett Till?*, ALJAZEERA (Dec. 31, 2021), <https://www.aljazeera.com/opinions/2021/12/31/the-enduring-racism-behind-emmett-tills-lynching> (describing how during the Jim Crow era, “reckless eyeballing” was a charge levied against Black men for looking at a White woman for longer than a few seconds that was considered rape and punishable by death). Dale Long, survivor of the 16th Street Baptist Church bombing in Birmingham Alabama on September 15, 1963, spoke in Fort Worth on Thursday, January 13, 2022, and recounted his childhood. *See 16th Street Church Bombing Survivor Dr. Dale Long Calls Meeting MLK The ‘Most Powerful Moment of My Life’*, CBS NEWS (Jan. 13, 2022), <https://www.cbsnews.com/texas/news/16th-street-bombing-survivor-dr-dale-long-meeting-mlk-most-powerful-moment-life>.

¹¹⁸ The term “take” within the ESA means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19); see also *History: Emmett Till*, *supra* note 115.

like the silt and sediment fixtures of the riverbed.¹¹⁹ This type of mob violence was seen as “divine justice.”¹²⁰

Why had such brutality been exacted upon an innocent and vulnerable member of society, hardly more than a child? Till had violated the laws of whiteness, particularly toward White women. Till was a threat that had to be eliminated. According to James Cone, “[i]n the white imagination, the image of black men was . . . [a] menacing ‘black beast rapist[,]’ the most serious threat to the virtue of white women[.]”¹²¹ Till whistled at Carol Bryant, a White woman. The assailants were charged with kidnapping and murder but acquitted by an all-White male jury, who deliberated for less than an hour.¹²² Perpetrators of violence against Black people were frequently “rewarded for putting ‘n*****s’ in their place.”¹²³

Black people knew that White people, despite the defendants admitting to kidnapping Till, would never be punished by the very legal system that reified and justified White violence.¹²⁴ In rare instances when White people were convicted of crimes against Black bodies, the punishments amounted to nothing. Cone notes that a Mississippi court awarded a family “one dollar for their loss” in a lynching, again underscoring the (literal) value placed on Black lives.¹²⁵ Mrs. Till vowed not to let her son die in vain. From the depths of her despair, she held a three-day viewing of her son’s body “so that ‘everybody can see what they did to my boy.’”¹²⁶ Seeing the value in her own son as a threatened and endangered species, Mrs. Till said, “Lord you gave your son to remedy a condition, . . . but who knows, but what the death of my only son might bring an end to lynching[.]. Darling, you have not died in vain[.] [Y]our life has been sacrificed for something[.]”¹²⁷ She also asserted: “This is not just for Emmett, because my boy can’t be helped now, . . . but to make it safe for other boys. Unless an example is made of the lynchers of Emmett, it won’t be safe for a Negro to walk the streets anywhere in America.”¹²⁸ In 2017, Bryant, then in her eighties, admitted she lied about

¹¹⁹ *History: Emmett Till*, *supra* note 115.

¹²⁰ BUTLER, *supra* note 40, at 31.

¹²¹ JAMES H. CONE, *THE CROSS AND THE LYNCHING TREE* 6 (2011).

¹²² *American Experience: The Trial of J.W. Milam and Roy Bryant*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/emmett-trial-jw-milam-and-roy-bryant> (last visited Feb. 1, 2024).

¹²³ CONE, *supra* note 121, at 68.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 66.

¹²⁷ *Id.* at 67.

¹²⁸ CHRISTOPHER METRESS, *THE LYNCHING OF EMMETT TILL: A DOCUMENTARY NARRATIVE* 32 (2002).

everything.¹²⁹ She lied simply because she could with impunity. She remained free up until her death. Though Till's death looms large in the advancement of civil rights for Black bodies, this is but a small gouge in the tower of White privilege, even as the Black body count continues to rise.

In stark contrast to Till's case, society has responded with a heightened sense of urgency to White bodies taken in violation. It took only eight minutes for nine-year-old Amber Hagerman, an Arlington, Texas girl, to be abducted after leaving her grandmother's home to ride her bike in January 1996.¹³⁰ Her body was found four days later in a creek bed a few miles away. Amber's throat had been cut, and her killer had never been found.¹³¹ Hagerman's disappearance triggered a statewide search, and Arlington, Texas, police renewed their pleas to the public to assist in finding clues in order to apprehend a perpetrator on the twenty-fifth anniversary of her murder in January 2021.¹³² The social valuation of White bodies cannot be overstated. Other White bodies have garnered similar public attention, including JonBenét Patricia Ramsey,¹³³ Laci Peterson,¹³⁴ Jessica Lunsford,¹³⁵ Caylee Anthony,¹³⁶ Megan Kanka,¹³⁷ Dru Sjojin,¹³⁸ Lori Hacking,¹³⁹ Natalee

¹²⁹ Yaron Steinbuch, *Emmett Till Accuser Admits: It was All a Lie*, N.Y. POST (Jan. 27, 2017), <https://nypost.com/2017/01/27/emmett-tills-accuser-admits-it-was-all-a-lie>.

¹³⁰ *Amber Hagerman's Murder 14 Years Ago Inspired a System That Saves Hundreds of Kids*, ABC NEWS (Jan. 12, 2010), <https://abcnews.go.com/US/amber-hagerman-namesake-amber-alert-abducted-14-years/story?id=9544038>.

¹³¹ *Id.*

¹³² *Photos: 25th Anniversary of Amber Hagerman's Abduction in Arlington*, DALLAS MORNING NEWS (Jan. 14, 2021, 8:52 AM), <https://www.dallasnews.com/photos/2021/01/14/photos-25th-anniversary-of-amber-hagerman-abduction-in-arlington>.

¹³³ See generally Carol McKinley, *Does Year 7 Mark New Beginning in the JonBenet Investigation*, DENVER GAZETTE, https://denvergazette.com/news/jonbenet-ramsey-cold-case-boulder-police/article_574f0804-616f-11ee-a5b6-839c10070c99.html (last updated Feb. 1, 2024).

¹³⁴ See generally *Scott Peterson Timeline: Key Dates in the Murder Case*, CNN (Jan. 20, 2024), <https://www.cnn.com/2024/01/20/us/scott-peterson-laci-peterson-case/index.html>.

¹³⁵ See generally Maya Bell, *Jury Hears Horrors of Jessica Lunsford's Death*, ORLANDO SENTINEL, <https://www.orlandosentinel.com/2007/03/02/jury-hears-horrors-of-jessica-lunsfords-death> (last updated Oct. 23, 2018, 8:13 AM).

¹³⁶ See generally Breeanna Hare, *'What Really Happened?': The Casey Anthony Case 10 Years Later*, CNN, <https://www.cnn.com/2018/06/29/us/casey-anthony-10-years-later/index.html> (last updated June 30, 2018, 12:54 AM).

¹³⁷ See generally John J. Goldman, *Details Convey Horror of Megan's Death*, L.A. TIMES (May 6, 1997, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1997-05-06-mn-55980-story.html>.

¹³⁸ See generally Ivan Pereira, *Missing from the Mall: How Investigators Nabbed a Serial Rapist in the Death of a College Student*, ABC NEWS (Jan. 12, 2024), <https://abcnews.go.com/US/missing-mall-investigators-nabbed-serial-rapist-death-college/story?id=105624112>.

¹³⁹ See generally Rebecca Leung, *Hidden Truth: Lori Hacking Case*, CBS NEWS (Aug. 5, 2004, 10:16AM), <https://www.cbsnews.com/news/hidden-truth-lori-hacking-case>.

Holloway,¹⁴⁰ Kristen Modafferi,¹⁴¹ and Gabby Petito.¹⁴² Most recently, on November 13, 2022, the murders of four University of Idaho students, Kaylee Goncalves, twenty-one (White female); Madison Mogen, twenty-one (White female); Xana Kernodle, twenty (White female); and Kernodle's boyfriend, Ethan Chapin, twenty (White male) sparked a nationwide manhunt for the killer. Bryan Kohberger, a White male, was charged for the murders on December 30, 2022.¹⁴³

The common denominator is that all except one are White female bodies who were either murdered, abducted, or kidnapped. Almost immediately, television coverage, newspaper bulletins, missing person hotlines, and social media harnessed their collective resources to galvanize local, state, and federal attention to rescue these White female bodies.¹⁴⁴ Gwen Ifill labeled this "missing white woman syndrome."¹⁴⁵ Ifill asserts that White women receive this attention because of the "white damsel ideology, that young white women, often attractive, are the very epitome of innocence and virtue. The devotion is nearly religious, rendering them cherubic or angelic."¹⁴⁶

Petito's disappearance highlights the divergence and lack of media coverage for Black bodies. During the nationwide search for Petito, the body of Jelani Day, a twenty-five-year-old Black Illinois State University student, was found in a river nearly two weeks after he was reported missing.¹⁴⁷ Daniel Robinson, a twenty-four-year-old geologist and another Black body,

¹⁴⁰ See generally Melanie Peeples, *18 Years After She Disappeared, Natalee Holloways' Family Finally Has Answers*, NPR (Oct. 18, 2023, 1:38 PM), <https://www.npr.org/2023/10/18/1206824624/natalee-holloway-joran-van-der-sloot-guilty-extortion-death-aruba>.

¹⁴¹ See generally Katie Utehs, *The Kristen Modafferi Mystery: 20 Years Later, Private Investigators Shed Light on Cold Case*, ABC 7 (June 23, 2017), <https://abc7news.com/kristen-modafferi-disappearance-san-francisco-coffee-shop/2134466>.

¹⁴² See generally Christine Hauser, *A Timeline of the Search for Gabrielle Petito and Brian Laundrie*, N.Y. TIMES (Jan. 16, 2023), <https://www.nytimes.com/article/gabrielle-gabby-petito-missing-timeline.html>.

¹⁴³ Alaa Elassar, Eric Levenson & Emma Tucker, *A Timeline of the Killings of Four University of Idaho Students*, CNN (Nov. 19, 2023, 4:35 PM), <https://www.cnn.com/us/idaho-student-killings-timeline/index.html>.

¹⁴⁴ Jonathan Franklin, *Racial Bias Affects Media Coverage of Missing People. A New Tool Teaches How*, OPB (Dec. 5, 2022, 10:33 AM), <https://www.opb.org/article/2022/12/05/racial-bias-affects-media-coverage-of-missing-people-a-new-tool-illustrates-how>; Charles M. Blow, *Gwen Ifill Was Right About 'Missing White Woman Syndrome'*, N.Y. TIMES, <https://www.nytimes.com/2021/09/22/opinion/petito-missing-person-cases.html> (last accessed Nov. 29, 2023).

¹⁴⁵ Blow, *supra* note 144.

¹⁴⁶ *Id.*

¹⁴⁷ Samantha Chapman, *2 Years After ISU Student Jelani Day Disappeared, Mother Seeks Answers*, ABC 7 (Aug. 24, 2023), <https://abc7chicago.com/jelani-day-update-found-missing-illinois-state-university/13696653>.

has been missing since June 23, 2021.¹⁴⁸ According to reports, he was last seen driving away from his work location in a Buckeye, Arizona desert.¹⁴⁹ His car was found destroyed off the side of a cliff, but he is still missing.¹⁵⁰ Day's and Robinson's cases received tenuous attention, and their families are convinced that law enforcement agencies neither cared nor took their cases seriously.¹⁵¹

There are even missing Black bodies just north of Southern Methodist University's campus. Enslaved bodies rest in unmarked graves at The Daniel Family Cemetery, a family that is a significant university benefactor. The historical marker states, "Interred here are Daniel family members, *family slaves*, and Daniel descendants, including veterans of four wars."¹⁵² The Daniel family owned and bequeathed at least forty slaves.¹⁵³ This historical marker is the only remaining evidence of their existence. This again raises questions of how much more America values whiteness over others.

Congress and state legislatures have enacted and named several laws to protect White bodies. The following is a short list of how the American legal system has prioritized and legitimized whiteness over "others": the Adam Walsh Act (a federal law named after a White male that protects children from sexual exploitation, violence, and abduction);¹⁵⁴ Dru's Law (a federal law named after a White female abducted by a sex offender, later incorporated by reference into the Adam Walsh Act);¹⁵⁵ Kristen's Act (a

¹⁴⁸ Eshaan Sarup, *Private Investigator Releases New Findings in Unsolved Missing Geologist Case*, AZ CENTRAL, <https://www.azcentral.com/story/news/local/arizona/2023/09/29/new-information-on-daniel-robinson-who-has-been-missing-since-2021/71007618007> (last updated Sept. 23, 2023, 4:33 PM); *See also The Daniel Robinson Investigation Overview*, BUCKEYEAZ, <https://www.buckeyeaz.gov/community/daniel-robinson-2070> (last visited Feb. 1, 2024) [hereinafter *Daniel Robinson Investigation*].

¹⁴⁹ Sarup, *supra* note 148; *Daniel Robinson Investigation*, *supra* note 148.

¹⁵⁰ *Daniel Robinson Investigation*, *supra* note 148.

¹⁵¹ *Jelani Day's Mother Calls on Local Police for Answers*, SCRIPPS NEWS (Sept. 22, 2021, 9:27 PM), <https://scrippsnews.com/stories/jelani-day-s-mother-calls-on-local-police-for-answers>; *see also* Nicquel Terry Ellis, *These Families of Missing Black People Are Frustrated With the Lack of Response to Their Cases*, CNN, <https://www.cnn.com/2021/09/23/us/families-missing-black-people/index.html> (last updated Sept. 23, 2021, 6:35 PM).

¹⁵² *See Daniel Family Cemetery*, HIST. MARKER DATABASE, <https://www.hmdb.org/m.asp?m=148834> (last accessed Nov. 29, 2023); Mark C. Grafenreed, *Critical Race Theory: Counter-Storytelling and the Case of 'Old Frank' and the Daniel Family Cemetery*, 76 SMU L. REV. F. 175. (2023) (discussing how the Texas Historical Commission, a state agency created to preserve all Texas history, might be complicit in erasing or subtracting history). While the unmarked slave graves are beyond the metes and bounds of SMU's campus, it is still part of the contiguous land donated by a significant SMU benefactor. Even in death, Black bodies cannot rest in peace. *Id.*

¹⁵³ Grafenreed, *supra* note 152.

¹⁵⁴ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, 120 Stat. 587 (2006) (codified as amended in scattered sections of 18 and 34 U.S.C.). Thirty-two Republicans and five Democrats co-sponsored this legislation. *See id.*

¹⁵⁵ 34 U.S.C. § 20922.

federal law named after a White female to assist law enforcement in tracking missing adults);¹⁵⁶ Laci and Conner's Law (a federal law named after a pregnant, White female and her unborn fetus, killed in a homicide);¹⁵⁷ Jessica's Law (a state law named after a White female child to protect potential victims and reduce a sexual offender's recidivism);¹⁵⁸ Lori's Law (a state law named after crimes committed against a White female with disabilities);¹⁵⁹ Caylee's Law (a state law named after a White female child that makes parents who knew, or should have known, that their child was possibly in danger liable to a felony charge);¹⁶⁰ Megan's Law (a state law named after a White female child requiring states to register sex offenders);¹⁶¹ and Amber alerts (a broadcast emergency response system named after a White female child alerting state and local authorities and the public of a missing child).¹⁶²

Although Congress passed the Emmett Till Antilynching Act in 2022 after centuries of violence against Black bodies,¹⁶³ it is a modicum in

¹⁵⁶ Kristen's Act, Pub. L. No. 106-468, 114 Stat. 2027 (2000) (codified at 42 U.S.C. § 14665). Sixteen Democrats and eight Republicans co-sponsored this legislation. *See id.*

¹⁵⁷ Unborn Victims of Violence Act of 2004 (Laci and Conner's Law), Pub. L. 108-212, 118 Stat. 568 (codified as 18 U.S.C. § 1841 and 10 U.S.C. § 919a). One-hundred twenty-five Republicans and eleven Democrats co-sponsored this legislation. *See id.* This Republican-laden legislation is consistent with the base's historically pro-life stance *vis-à-vis* abortions. Interestingly, the Republican-dominated United States Supreme Court struck down a woman's constitutional right to an abortion guaranteed by *Roe v. Wade*, 410 U.S. 113 (1973) in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) in one fell swoop.

¹⁵⁸ *Jessica's Law, OFFENDER WATCH INITIATIVE*, <http://offenderwatchinitiative.org/Resources/Jessicas-Law> (last visited Mar. 3, 2024).

¹⁵⁹ *See generally Lori's Law Passes, DAILY UNIVERSE* (Mar. 22, 2006), <https://universe.byu.edu/2006/03/22/loris-law-passes/#:~:text=Lori%E2%80%9Ds%20Law%2C%20which%20passed,jail%20time%20a%20convict%20receives.>

¹⁶⁰ Keith L. Alexander, *If Caylee Anthony Had Been Black, Would You Know Her Name?*, WASH. POST (July 8, 2011), https://www.washingtonpost.com/local/if-caylee-anthony-had-been-black-would-you-know-her-name/2011/07/06/gIQAtTW23H_story.html.

¹⁶¹ *Megan's Law: Crimes that Created the Sex Offender Registry*, CPI (June 19, 2023), <https://www.openfox.com/megans-law-crimes-that-created-the-sex-offender-registry>.

¹⁶² *About: America's Missing: Broadcast Emergency Response*, N.Y. STATE, <https://amber.ny.gov/about#:~:text=AMBER%20stands%20for%20America's%20Missing,was%20adopted%20across%20the%20nation> (last visited Mar. 3, 2024).

¹⁶³ The Emmett Till Antilynching Act, H.R. 55, 117th Cong. (2022); The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249. President Joseph R. Biden signed the Emmett Till Antilynching Act, making lynching a federal hate crime, on March 29, 2022, after centuries of lynching Black bodies in the United States. One-hundred-eighty Democrats and one Republican co-sponsored this legislation. Congress has introduced and failed to pass more than 200 antilynching crime bills since 1918. *See* Erin B. Logan, *Why Congress Failed Nearly 200 Times to Make Lynching a Federal Crime*, WASH. POST (July 5, 2018, 7:00 AM), <https://www.washingtonpost.com/news/retropolis/wp/2018/07/05/how-congress-failed-nearly-200-times-to-make-lynching-a-federal-crime>. Former President Barack H. Obama signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act on October 22, 2009, in memory of Shepard, a

comparison to laws named after White bodies. There is no Stinney Law (a federal law that *should be named* after George Stinney, Jr., the youngest Black male, fourteen-years-old, to be electrocuted in America when an all-White male jury wrongfully convicted him for murdering a White female after ten minutes of jury deliberation).¹⁶⁴ There is no Collin's Law (Addie Mae Collins), Wesley's Law (Cynthia Wesley), Robertson's Law (Carole Robertson), or McNair's Law (Carole Denise McNair), named for the four young Black girls killed by White supremacists' bomb while attending worship services at the 16th Street Baptist Church on September 15, 1963.¹⁶⁵ There is no law for the Black victims of Mother Emanuel AME Church who Dylann Roof mercilessly killed on June 17, 2015.¹⁶⁶ Despite George Floyd's heinous public murder on May 25, 2020, many doubted, like the Black people in the Till case, that a jury would convict the White person for killing a Black body.¹⁶⁷ On November 24, 2021, the guilty verdict came down in the case of Ahmaud Arbery, who was killed by three White men while he was jogging in Brunswick, Georgia.¹⁶⁸ Kyle Rittenhouse, a White teenager who killed two protesters and injured a third (all White males) in Kenosha, Wisconsin,

White male University of Wyoming student who was brutally attacked and tied to a fence in a field outside for being gay, and Byrd, a Black male who was brutally beaten and dragged by the ankles with a log chain for three miles by three White supremacists, who left his mangled body on the doorsteps of a Black church in Jasper, Texas. Shepard is the legislation's headliner, while Byrd serves as the undercard. Forty Democrats, three Republicans, one Independent, and one Independent-Democrat sponsored this legislation. See *Timeline of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*, *supra* note 7.

¹⁶⁴ Lindsey Bever, *It Took 10 Minutes to Convict 14-Year-Old George Stinney Jr. It Took 70 Years After His Execution to Exonerate Him*, WASH. POST (Dec. 18, 2014, 5:24 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2014/12/18/the-rush-job-conviction-of-14-year-old-george-stinney-exonerated-70-years-after-execution>.

¹⁶⁵ *Bomb Blasts Kills 4 Children, Several Injured at Church*, BIRMINGHAM POST-HERALD, Sept. 16, 1963, at 4; *The Day a Church Became a Tomb*, BIRMINGHAM NEWS, Sept. 16, 1963, at 6.

¹⁶⁶ See generally Debbie Elliot, *5 Years After Charleston Church Massacre, What Have We Learned?*, NPR (June 17, 2020), <https://www.npr.org/2020/06/17/878828088/5-years-after-charleston-church-massacre-what-have-we-learned>.

¹⁶⁷ Erica Simon, *Derek Chauvin Trial: Some Black Houstonians Skeptical of Former Officer's Conviction for George Floyd's Murder*, ABC 13 (Mar. 31, 2021), <https://abc13.com/derek-chauvin-trial-acquittal-fears-why-may-be-found-not-guilty/10464341>.

¹⁶⁸ *Jury Finds All 3 Men Guilty of Murder*, ACTION NEWS JAX (Nov. 24, 2021), <https://www.actionnewsjax.com/news/local/glynn-county/watch-live-jury-finds-3-men-guilty-murder-ahmaud-arbery/LJ6NXNET6ZAWJHAJVDTKUD72JU>. The same men were later convicted of federal charges as well. See Press Release, Off. Pub. Affairs, Dep't Just., Federal Jury Finds Three Men Guilty of Hate Crimes in Connection with the Pursuit and Killing of Ahmaud Arbery (Feb. 22, 2022), <https://www.justice.gov/opa/pr/federal-jury-finds-three-men-guilty-hate-crimes-connection-pursuit-and-killing-ahmaud-arbery#:~:text=Travis%20McMichael%2C%2035%3B%20Travis%27s%20father,street%20because%20of%20his%20race>.

was received with cautious relief.¹⁶⁹ But Rittenhouse's case involved a White male committing crimes upon White bodies *for* a Black cause—the shooting of Jacob Blake—which presents an interesting paradoxical conundrum. How will America view and value White bodies? America, again, seems to value White bodies more because a jury found Rittenhouse not guilty.¹⁷⁰ The White officer involved in Blake's case, who was shot seven times, was not charged with any crime for reasons of self-defense.¹⁷¹ The Black community, as has been its experience in America, must deal with the realities of the double standard of justice that rarely works in their favor.

Though conviction and sentencing were secured in Floyd's case,¹⁷² it is but a small ray of hope in the long and dark history of the treatment of Black bodies. Not surprisingly, the GFA, meant to establish universal policing practices and impact the disproportionate killings of Black bodies, has completely stalled in the very same Congress that enacted the ESA nearly five decades earlier to protect wildlife species.¹⁷³ There has been renewed interest without action in the GFA in the aftermath of Tyre Nichols's murder. The five former Black Memphis police officers entered not-guilty pleas to the state charges they faced concerning Nichols's death.¹⁷⁴ All five former officers were indicted on federal charges for, among other things, violating Nichols's civil rights. One former officer, Desmond Mills, Jr., accepted a plea deal.¹⁷⁵ Unfortunately, given the inconsistency within the justice system, it is anyone's prognostication of how these trials, set to begin on

¹⁶⁹ See generally Stephen Groves & Scott Bauer, *17-Year-Old Arrested After 2 Killed During Unrest in Kenosha*, AP (Aug. 27, 2020, 7:32 AM), <https://apnews.com/article/ap-top-news-racial-injustice-il-state-wire-shootings-wi-state-wire-97a0700564fb52d7f664d8de22066f88>.

¹⁷⁰ Kyle Rittenhouse Acquitted on All Counts in Kenosha Shootings, WASH. POST., <https://www.washingtonpost.com/nation/2021/11/19/rittenhouse-verdict-live-updates> (last updated Nov. 19, 2021, 10:53 PM); Lexi Lonas, *Trump Congratulates Rittenhouse on Acquittal*, HILL (Nov. 19, 2021, 7:07 PM), <https://thehill.com/homenews/state-watch/582455-trump-congratulates-rittenhouse-on-acquittal>.

¹⁷¹ MICHAEL D. GRAVELEY, COUNTY OF KENOSHA DISTRICT ATTORNEY, REPORT ON THE OFFICER INVOLVED SHOOTING OF JACOB BLAKE (2020) (available at: <https://www.kenoshacounty.org/DocumentCenter/View/11827/Report-on-the-Officer-Involved-Shooting-of-Jacob-Blake>).

¹⁷² Eric Levenson & Aaron Cooper, *Derek Chauvin Found Guilty of All Three Charges for Killing George Floyd*, CNN, <https://www.cnn.com/2021/04/20/us/derek-chauvin-trial-george-floyd-deliberations/index.html> (last updated Apr. 21, 2021).

¹⁷³ George Floyd Justice in Policing Act, *supra* note 7.

¹⁷⁴ Adrian Sainz, *August Trial Date Set for Officers Charged in Tyre Nichols Killing*, AP, <https://apnews.com/article/tyre-nichols-trial-date-bd7140843b1f80fd3d59bceaded8334d> (last updated Nov. 6, 2023); Adrian Florido, *All 5 Ex-Memphis Police Officers Plead Not Guilty in the Beating Death of Tyre Nichols*, NPR, <https://www.npr.org/2023/02/17/1157756023/memphis-tyre-nichols-police-officers-court-charges> (last updated Feb. 17, 2023).

¹⁷⁵ Sainz, *supra* note 174; Cara Tabachnick, *Former Memphis Cop Agrees to Plea Deal in Tyre Nichols' Death*, CBS NEWS, <https://www.cbsnews.com/news/former-memphis-cop-desmond-mills-plea-deal-tyre-nichols-death> (last updated Nov. 2, 2023, 8:16 PM).

August 12, 2024, will end.¹⁷⁶ But this is life for threatened Black bodies within the United States.

IX. “ACCOUNTABILITY FOR LAW ENFORCEMENT”

Nine minutes and twenty-nine seconds. That is the time Minneapolis Police Officer Derek Chauvin spent kneeling on the neck of an already arrested and subdued George Perry Floyd, Jr.¹⁷⁷ In videos capturing the event, Floyd cried out for his mother between desperate gasps for air, “I can’t breathe.”¹⁷⁸ The world watched the massacre of another Black body in horror and in real-time. The rare murder indictment and even rarer conviction of a police officer prompted Congress to introduce federal legislation requiring uniform policing policies.¹⁷⁹ H.R. 1280, the George Floyd Act, mandates greater “accountability for law enforcement misconduct, restricts the use of certain policing practices, . . . and establishes best practices and training requirements.”¹⁸⁰ The GFA, *among other things*, calls for:

TRAINING—The implementation of policies, practices, and procedures addressing training and instruction to comply with accreditation standards in the areas of—

- (A) the use of deadly force, less lethal force, and de-escalation tactics and techniques;
- (B) investigation of officer misconduct and practices and procedures for referring to prosecuting authorities allegations of officer use of excessive force or racial profiling;
- (C) disproportionate contact by law enforcement with minority communities;
- (D) tactical and defensive strategy;
- (E) arrests, searches, and restraint;
- (F) professional verbal communications with civilians;
- (G) interactions with—
 - (i) youth;
 - (ii) individuals with disabilities;
 - (iii) individuals with limited English proficiency; and

¹⁷⁶ See generally Sainz, *supra* note 174; Florido, *supra* note 174.

¹⁷⁷ ‘I Can’t Breathe’: Video Shows George Floyd Pinned Down by Police, WALL ST. J. (May 27, 2020), <https://www.wsj.com/video/i-cant-breathe-video-shows-george-floyd-pinned-down-by-police/79888134-045F-4175-A25A-A97FA6E50ED2>.

¹⁷⁸ *Id.*

¹⁷⁹ Former Memphis Police Officers Tadarrius Bean, Demetrius Haley, Emmitt Martin III, Desmond Mills Jr., and Justin Smith were charged with two counts of official misconduct, one count of official oppression, one count of second-degree murder, one count of aggravated assault and two counts of aggravated kidnapping. Sainz, *supra* note 174; Florido, *supra* note 174. See also George Floyd Justice in Policing Act, *supra* note 7.

¹⁸⁰ George Floyd Justice in Policing Act, *supra* note 7.

- (iv) multi-cultural communities;
- (H) proper traffic, pedestrian, and other enforcement stops; and
- (I) community relations and bias awareness.¹⁸¹

A cursory review of this specific provision reveals significant coding for Black bodies. Language such as “racial profiling,”¹⁸² “minority communities,” “limited English proficiency,” “youth,” “multi-cultural communities,” and “bias awareness” are subtle indicators that Black (and Brown) bodies are the subject matters and primary beneficiaries of the GFA.¹⁸³ This legislation mandates that the American legal system, primarily dominated by White people, be held accountable. Yet, as the Kerner Report argues, accountability is difficult since “it is extremely rare for white[] [people] to recognize and blame themselves for their own failures,” insights that explain this lack of accountability while seeking to raise awareness of deeply rooted inequities.¹⁸⁴

X. CRITICAL RACE THEORY

In an 1864 issue of the famous Paris newspaper *Le Figaro*, prominent nineteenth-century French literary figure Charles Baudelaire famously said, “[t]he greatest trick the devil ever pulled was convincing the world he didn’t exist.”¹⁸⁵ Baudelaire’s quote is crucially instructive when discussing CRT. CRT opponents are fully committed to pulling off a great trick: convincing Americans in a so-called post-racial society that certain annals in its long history are nonexistent. Eighteen states have imposed CRT bans in kindergarten-through-twelve education.¹⁸⁶ It is unconscionable to consider that the devil’s greatest trick may be realized if America outlaws CRT.

¹⁸¹ *Id.* at § 114(d)(1).

¹⁸² *Id.* “Racial profiling” (mentioned 42 times) is defined as:

[T]he practice of a law enforcement agent or agency relying, to any degree, on actual or perceived race, ethnicity, national origin, religion, gender, gender identity, or sexual orientation in selecting which individual to subject to routine or spontaneous investigatory activities or in deciding upon the scope and substance of law enforcement activity following the initial investigatory procedure, except when there is trustworthy information, relevant to the locality and timeframe, that links a person with a particular characteristic described in this paragraph to an identified criminal incident or scheme.

Id. at § 302(6)(A).

¹⁸³ *Id.* at §§ 114(d)(1)(C), (G), (I).

¹⁸⁴ *Riot White Paper*, L.A. SENTINEL, Mar. 7, 1968 (quoted in KERNER REPORT, *supra* note 1, at xxxi).

¹⁸⁵ See CHARLES BAUDELAIRE, *PARIS SPLEEN* 61 (Louise Varèse trans., 8th ed. 1970).

¹⁸⁶ These states are New Hampshire, Montana, Idaho, North Dakota, South Dakota, Iowa, Oklahoma, Arkansas, Kentucky, Tennessee, Virginia, Mississippi, Georgia, Florida, Alabama, Utah, Texas, and South Carolina. See Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WEEK, <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06> (last updated June 13, 2023).

This raises the question of why. Why does CRT engender such opposition? Why is there such palpable fear surrounding CRT sweeping the political, legal, and educational systems of the United States? One reason is apparent: movements by marginalized and oppressed people themselves are inherently acts of resistance. Whenever the oppressed rise like a phoenix to challenge the “[arch-defender] of the status quo,” such resistance becomes indispensably associated with self-amending humanity, dignity, and self-determination.¹⁸⁷ Such resistance gives voice to a nonnegotiable demand for what Kristina Rolin calls an “epistemic advantage” to counter their disadvantages.¹⁸⁸ CRT’s opponents argue its unpatriotic purpose is to villainize the United States and instill guilt, divisiveness, and fear.¹⁸⁹ To some, this fear makes CRT unobjective, incredulous, the new bogeyman, the hated villain.

CRT is neither a villain nor a bogeyman. Instead, it is a theoretical, scholarly, and intellectual endeavor, originating at Harvard Law School in the 1970s, that seeks to compel the United States to interrogate itself and address what is revealed.¹⁹⁰ Kimberlé Crenshaw, widely credited for coining the phrase in 1989, claims CRT is a verb, not a noun.¹⁹¹ Crenshaw noted:

It is a way of seeing, attending to, accounting for, tracing and analyzing the ways that race is produced, the ways that racial inequality is facilitated, and the ways that our history has created these inequalities that now can be almost effortlessly reproduced unless we attend to the existence of these inequalities.¹⁹²

Richard Delgado and Jean Stefancic, pioneers in the field, outlined CRT’s basic tenets.¹⁹³ Unlike the elements of a crime outlined in a penal code, each of which must be proved by a prosecuting district attorney, CRT’s tenets are disjunctive, not conjunctive.¹⁹⁴ In other words, all five tenets need not be proven to have a *prima facie* CRT claim. The presence of one or more

¹⁸⁷ Letter from Dr. Martin Luther King, Jr., to Dear Fellow Clergymen (Apr. 16, 1963) (available at: <https://bri-wp-images.s3.amazonaws.com/wp-content/uploads/Letter-From-Birmingham-Jail.pdf>).

¹⁸⁸ Kristina Rolin, *Standpoint Theory as a Methodology for the Study of Power Relations*, 24 HYPATIA 218 (2009).

¹⁸⁹ Lauren Camera, *What is Critical Race Theory and Why Are People So Upset About It?*, U.S. NEWS & WORLD REP. (June 1, 2021), <https://www.usnews.com/news/national-news/articles/what-is-critical-race-theory-and-why-are-people-so-upset-about-it>.

¹⁹⁰ CRENSHAW, GOTANDA, PELLER & THOMAS, *supra* note 53, at 2.

¹⁹¹ Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/article/what-is-critical-race-theory.html>.

¹⁹² *Id.*

¹⁹³ See generally RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 8-10 (2017).

¹⁹⁴ See generally *id.*

of the following tenets alone is sufficient to establish the presence of systemic racism and, thus, falls within the purview of CRT.

The first CRT tenet rejects notions of a colorblind society.¹⁹⁵ Race remains a factor in America as W.E.B. Du Bois noted in 1903 when he argued, “the problem of the Twentieth Century is the problem of the color-line.”¹⁹⁶ Racism is as American as “apple pie.”¹⁹⁷

Interest conversion is the second feature.¹⁹⁸ As Delgado and Stefancic observed, “[b]ecause racism advances the interest of both white elites (materially) and working-class white[] [people] (psychically), large segments of society have little incentive to eradicate it.”¹⁹⁹ For example, Arizona, which had a long history of refusing to honor Martin Luther King, Jr. Day as a national holiday, lost the right to have Phoenix host Super Bowl XXX in 1993 after a contentious vote.²⁰⁰ When Arizona elected officials discovered the enormous losses in revenue for local businesses, hotels, restaurants, goodwill, and fanfare that Super Bowls generate, Arizonans suddenly had a change of heart.²⁰¹ Arizonans agreed to honor King’s holiday and were rewarded as Super Bowl hosts in 1996.²⁰² Thus, the interests of White people converged with the interests of Black people.

The third tenet is that race is a social construct: “Race and races are products of social thought and relations.”²⁰³ Race alone has no intrinsic meaning. Race only has meaning when people assign a meaning to it. White people socially, politically, and legally constructed and assigned meaning to race and “racial Otherness.”²⁰⁴

The fourth tenet addresses anti-essentialism and intersectionality.²⁰⁵ These arise because the dominant (White) society racializes the identities of different groups at different times. However, because individuals are not

¹⁹⁵ *Id.* at 8.

¹⁹⁶ W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 13 (1903).

¹⁹⁷ MJ Rosenberg, *Trump Gets It: Racism is as American as Apple Pie*, HUFFPOST, https://www.huffpost.com/entry/trump-gets-it-racism-is-as-american-as-apple-pie_b_59cd02e9e4b0b99ee4a9cb01 (last updated Sept. 28, 2017). *See generally* NATALIA MOLINA, *HOW RACE IS MADE IN AMERICA: IMMIGRATION, CITIZENSHIP, AND THE HISTORICAL POWER OF RACIAL SCRIPTS* (2014).

¹⁹⁸ DELGADO & STEFANCIC, *supra* note 193, at 9.

¹⁹⁹ *Id.* at 8.

²⁰⁰ Jamie Warren, *The Long Road to Recognition: Arizona’s Rocky History with MLK Day and the Super Bowl*, ABC 15, <https://www.abc15.com/news/black-history-month/the-long-road-to-recognition-arizonas-rocky-history-with-mlk-day-and-the-super-bowl> (last updated Feb. 3, 2023).

²⁰¹ Gloria Ladson-Billings, *Just What Is Critical Race Theory and What’s it Doing in a Nice Field Like Education?*, 11 INT’L J. QUALITATIVE STUD. EDUC. 7, 12 (1998).

²⁰² Warren, *supra* note 200.

²⁰³ DELGADO & STEFANCIC, *supra* note 193, at 8.

²⁰⁴ CRENSHAW, GOTANDA, PELLER & THOMAS, *supra* note 53, at 278.

²⁰⁵ DELGADO & STEFANCIC, *supra* note 193, at 10.

monolithic and often embody more than a singular identity, this “differential racialization” does not account for the potential of “conflicting, overlapping identities, loyalties, and allegiances.”²⁰⁶

The final tenet involves having a “unique voice of color.”²⁰⁷ Storytelling and counter-storytelling become critical when White narratives impose themselves as normative against individuals in minority groups. This tenet essentially argues that every story has at least two sides or experiences and that the totality of the circumstances must be examined.²⁰⁸ The African proverb says, “until the lions have their own historians, the history of the hunt will always glorify the hunter.”²⁰⁹ The first and fifth tenets of CRT significantly undergird this Article. It not only argues that the United States and its laws are racially observant but also seeks to give voice to the voiceless.

CRT also seeks to understand why and how people of color continue experiencing the racial inequality that remains persistent in the United States despite the legal victories of the 1960s Civil Rights Movement. CRT challenges traditional views that racial subordination is solely an affront to the liberal legal ideal by recasting American history and society to show how the United States’ legal system conspires, aids, and abets in upholding racial, gender, class, sexual orientation, and other hierarchies. CRT examines the embeddedness of how “race and racial power are constructed and represented in American legal culture and, more generally, in American society as a whole.”²¹⁰ As James Baldwin rightly observed regarding the law’s proper place, power, and priority: “The law is meant to be my servant and not my master, still less my torturer and my murderer.”²¹¹ CRT offers a critical approach for theorizing, examining, and challenging the disparities evident in the differing fates of the ESA and the GFA, and the disparities it thus reveals cannot be ignored. As noted, Congress has amended the ESA four times to protect wildlife species.²¹² Yet, countless Black bodies are sacrificed upon the altars of oppression while Congress plays political games with the GFA.

²⁰⁶ *Id.* at 9-10.

²⁰⁷ *Id.* at 11.

²⁰⁸ *Id.*

²⁰⁹ Annalisa Quinn, *Chinua Achebe and the Bravery of Lions*, NPR (Mar. 22, 2013), <https://www.npr.org/sections/thetwo-way/2013/03/22/175046327/chinua-achebe-and-the-bravery-of-lions>.

²¹⁰ CRENSHAW, GOTANDA, PELLER & THOMAS, *supra* note 53, at xiii.

²¹¹ James Baldwin, *A Report from Occupied Territory*, NATION (July 11, 1966), <https://www.thenation.com/article/archive/report-occupied-territory>.

²¹² *History of the Endangered Species Act*, *supra* note 19.

CONCLUSION

“Our nation is moving toward two societies, one black, one white—separate and unequal.”²¹³ This is evident in legislative disparities. As previously argued, Congress and state legislatures have enacted and named several laws to protect White bodies.²¹⁴ On the other hand, few corresponding laws are named for Black bodies. In response to the 1968 Kerner Report, the federal government rejected many of the same recommendations the GFA is currently proposing.²¹⁵ Thus, it should come as no shock that the GFA, named after another Black male, sacrificed on the altar of America, has completely stalled.²¹⁶

There may be prognosticators or antagonists who might suggest the GFA will not protect Black bodies. Whether the GFA offers protection remains mere conjecture and speculation as the act dies in dormancy on Capitol Hill. What is known, though, is that, without the GFA, there is little hope of holding state actors accountable or for Black bodies being federally protected in the same manner as White American citizens. Unfortunately, Black bodies cannot reasonably look to their government for protection, particularly a government that has never fully contemplated such protections from this nation’s inception.

These failed protective systems also have biblical precedents in the Exodus narrative previously discussed.²¹⁷ Similarly, in this country, Black bodies, particularly Black boys, inhale the threat of a death sentence with their first breath. As James H. Cone observed, “[w]here there is no justice in the land, a man’s freedom is threatened[.] When a man has no protection under the law, it is difficult for him to make others recognize him, and thus his freedom to be a ‘Thou’ is placed in jeopardy.”²¹⁸ Reverend Dr. Martin Luther King, Jr., further stressed the importance of “Thou,” noting:

From time immemorial men have lived by the principle “that self-preservation is the first law of life.” But this is a false assumption. I would say that other-preservation is the first law of life. It is the first law of life precisely because we cannot preserve self without being concerned about preservation of other selves. The universe is so constructed that things go awry if men are not diligent in their cultivation of the other-regarding dimension. “I” cannot reach fulfillment without “thou.”²¹⁹

²¹³ KERNER REPORT, *supra* note 1.

²¹⁴ *Supra* Part VIII.

²¹⁵ KERNER REPORT, *supra* note 1, at 301-21.

²¹⁶ George Floyd Justice in Policing Act, *supra* note 7.

²¹⁷ *See supra* Part VI.

²¹⁸ JAMES H. CONE, BLACK THEOLOGY AND BLACK POWER 43 (1969).

²¹⁹ WHERE DO WE GO FROM HERE, *supra* note 24, at 190.

To combat this threatened status, Black bodies must fortify the “Thou.” The “Thou” continues to sustain them: the Black infrastructure, including Black churches, Black families, Black communities, Black businesses, Black heritage, Black minds, Black bodies, Black souls, Black diversity, and Black excellence. Strengthening the “Thou” will remind them of the “I,” where their identity, dignity, and authority are rooted in the *imago Dei*, the sole source of protection for people who continuously face the snares and traps set for them and whose status remains threatened.²²⁰

²²⁰ *Genesis* 1:26-28 (King James), *Psalms* 141:9-10 (King James).