

**CORRECTION OF MONUMENTAL JUDICIAL  
MALPRACTICE: THE CASE FOR CLEARING  
SECESSIONIST AND SLAVEHOLDING SYMBOLS  
OF “JUSTICE” FROM THE COURTHOUSE**

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In disconnecting the “political bands” that linked “the thirteen United States of America” to Great Britain,<sup>1</sup> the founders of our nation said that “all men are created equal . . . [and] are endowed . . . with . . . unalienable Rights . . . [to] Life, Liberty and the pursuit of Happiness.”<sup>2</sup> What the founders intended was something entirely different.

Noble as those words and principles may have been—for the first time, the people of a nation announced to the world their intent to form a government of their choosing—they did not apply to everyone. Left unbroken were the shackles binding the captured, enslaved souls who toiled on plantations, in pine barrens, and at wharves. The purported unalienable rights to life, liberty, happiness, self-determination, and their attendant freedom came with a caveat: they did not apply to slaves.

That exception, of course, was enshrined in the Constitution of the United States of America. Reflected in the document that purported to “establish Justice” and “secure the Blessings of Liberty” for the “People of the United States,”<sup>3</sup> the Constitution made the point that an enslaved individual counted as only three-fifths of a person.<sup>4</sup> Chiseled into the bedrock of our democracy was an acceptance of the enslavement of human beings in what ironically had been declared to be a land of innate liberty and unyielding equality.

So was born a country of freedom for some, justice for fewer than all, and an original sin that this now mature nation struggles with even today. The protests that swept the nation in 2020 reflect as much. How to best respond to some of the systemic issues highlighted by the objections of “today” might require a brisk but careful response to be carried out not

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<sup>1</sup> THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

<sup>2</sup> *Id.* para. 2.

<sup>3</sup> U.S. CONST. pmbl. (alteration in original).

<sup>4</sup> *Id.* art. I, § 2.

immediately or reflexively, but “tomorrow.” Certain symbolic, yet significant, measures can be taken immediately.

Democracy, at least at some level, is freedom from arbitrary actions, be they of government or of citizens. That freedom is protected by justice, which guarantees fair treatment and proper administration of laws.<sup>5</sup>

However, how we personify justice in this country sometimes suggests that yesterday’s view—that the extent of liberty and justice that one is entitled to depends on the shade of that person’s skin—still prevails today. Throughout this country, allegories of justice are told through the conspicuous heraldry of Confederate figures and of slaveholders at courthouse steps and on courthouse walls. Slavery and the institution that supported it are the worst forms of racism, and racism is incompatible with justice. It should take no time to conclude that there is no justification for using those figures as representatives in our halls of justice. Along those lines, it also should take no time for American courts experienced in the practice of adopting “bright line rules” to implement this practice in the narrow circumstance of courthouse iconography. Although it is appropriate and, in fact, important to remember positive contributions and achievements in American society, our modern illustration of justice should be free from the taint of slavery and the Confederacy. So, if a figure of yesterday “preached equality, but . . . didn’t practice it,”<sup>6</sup> insofar as they bought, owned, leased, loaned, or traded another human being, or if the figure fought for the Confederacy in support for that practice, then they should not be used to symbolize justice at the modern courts of today.

This article touches upon those points. Parts I and II of this article, respectively, consider our nation’s original sin and its reluctant reconciliation with its history of slavery and its consequences. Parts III through V of this article, in turn, briefly note the national and international shift in the understanding and acceptance of symbols of inequality before suggesting a responsible, reasoned review of our illustrations of justice. In Part VI, this article announces its bright-line rule for modern metaphors of justice: those who engaged in the practice of slavery, and those of yesterday who supported the renegade faction in this country who took up arms in support of that practice, cannot symbolize justice today. Finally, in Part VII, this article notes the relevant demand of justice in this area, namely, that courts replace antiquated articulations of a justice that applied only to some with inclusive representations that best symbolize our national covenant of equal justice, at all times and for all.

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<sup>5</sup> See *Justice*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>6</sup> Shamar Walters & Maia Davis, *Image of Thomas Jefferson Alongside Black Descendant Holds ‘a Mirror’ to America*, NBC NEWS (July 4, 2020), <https://www.nbcnews.com/news/us-news/image-thomas-jefferson-alongside-black-great-grandson-holds-mirror-american1232913> [<https://perma.cc/V499-2VAT>].

## I. THE ORIGINAL (SECULAR) SIN

This country's original sin traces back to the 1619 arrival of the White Lion privateer ship in Point Comfort, Virginia.<sup>7</sup> The ship delivered approximately twenty kidnapped humans into slavery,<sup>8</sup> and it brought what those who witnessed it saw as an inhuman "curse [of] nations" to American shores.<sup>9</sup>

In the years that followed, humans born rich with the skin of significant melanin pigments, but poor in luck, were bought, sold, leased, and traded. Those unfortunate people were exploited and abused, be it through barbarous physical treatment, mandatory unenlightenment, or "merely" degradation with the insupportable insult that they were not of the human family.<sup>10</sup>

Underlying those mistreatments was the fallacy of natural inequality. Science was—unsuccessfully—used in an attempt to establish a difference between people of color and others that was more than skin deep.<sup>11</sup> Perversions of religion were used to teach that "God," as the "*sole proprietor* . . . of the WHOLE human family," somehow "made the Africans for nothing else but to dig [the] mines and work [the] farms" of White people.<sup>12</sup>

Rhetoric, too, was a yoke of bondage. One of our country's greatest characters, known more for his perhaps still unequaled political philosophy and less for his personal beliefs, at one time arguably was the nation's most effective proponent of the baseless speculation used to rationalize the brutal practice of enslaving other human beings. "[B]lacks," Thomas Jefferson conjectured, were "*inferior* to [] whites in [] endowments both of body and mind[.]"<sup>13</sup> The man whose words birthed our nation and gave us the lofty democratic ideals to which we have aspired for hundreds of years also wrote of what he deemed a comprehensive inferiority in Blacks that obstructed their emancipation and required the prevention of intermixture with other races for the protection of what then was an overwhelmingly White American experiment with democracy.

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<sup>7</sup> *The 1619 Project*, N.Y. TIMES MAG., <http://nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html?smtyp=cur&smid=tw-nytmag> [https://perma.cc/C8U6-9W5X].

<sup>8</sup> *Id.*

<sup>9</sup> PETER P. HINKS, *DAVID WALKER'S APPEAL TO THE COLOURED CITIZENS OF THE WORLD* 4–5 (Peter P. Hinks ed., Penn State Univ. Press 2000).

<sup>10</sup> *Id.* at 12, 25.

<sup>11</sup> Linda Villarosa, *Myths About Physical Racial Differences Were Used to Justify Slavery—and are Still Believed by Doctors Today*, N.Y. TIMES MAG. (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/racial-differences-doctors.html> [https://perma.cc/X9QJ-TKC2].

<sup>12</sup> HINKS, *supra* note 9, at 7.

<sup>13</sup> *Id.* at 29.

Those indictments of myth—those expressions of racism—were used to legitimize the enslavement of Black labor that helped build a country that refused to treat those with dark skin as equals. Those falsities also fueled a racial antipathy that was woven into the fabric of American law. Contrary to the principles of universal liberty and equality expressed in the Declaration of Independence, the Federal Constitution accepted and condoned the most invidious form of racism and characterized an enslaved human being as only three-fifths of a person.<sup>14</sup> Afterward, to maintain “a more perfect Union,” and to promote “domestic Tranquility” and “secure the Blessings of Liberty,”<sup>15</sup> this country regularly compromised its promise of universal liberty and equality with concessions to the intentionally mischaracterized “Peculiar Institution.”<sup>16</sup> The Fugitive Slave Act of the 1790s denied even freed slaves constitutional protections such as the right to a jury trial.<sup>17</sup> The 1820 Missouri Compromise allowed Missouri to be admitted to the union as a slave state,<sup>18</sup> with a provision in its constitution that explicitly precluded “free negroes and mullatoes from coming to and settling in th[e] State.”<sup>19</sup>

Later, the House of Representatives gagged abolitionist petitions in the 1830s and 1840s,<sup>20</sup> and it regularly retracted the coverage of liberty in exchange for the tractability of slaveholding interests in the 1850s.<sup>21</sup> Slaves, we repeatedly said, were not to be accounted for in our pursuit of greatness as a nation. Only in the 1860s did America vanquish slavery and begin to consider the repentance of its original sin.<sup>22</sup>

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<sup>14</sup> See U.S. CONST. art. I, § 2.

<sup>15</sup> U.S. CONST. pmbl.

<sup>16</sup> John C. Calhoun, *Southern Address*, CHARLESTON COURIER (Feb. 1, 1849), reprinted in <http://www.civilwarcauses.org/address.htm> [<https://perma.cc/S57S-8XTN>].

<sup>17</sup> *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875*, LIBRARY OF CONGRESS, <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=003/llac003.db&recNum=702> & <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=003/llac003.db&recNum=703> [<https://perma.cc/AC7S-E7DB>] & <https://perma.cc/9GJ6-XRA9>].

<sup>18</sup> See *Dred Scott v. Sanford*, 60 U.S. 393, 519 (1857) (Catron, J., concurring), superseded by constitutional amendment, U.S. CONST. amend. XIV; see also *Ngiraingas v. Sanchez*, 495 U.S. 182, 195 n.2 (1990) (Brennan, J., dissenting).

<sup>19</sup> MO. CONST. of 1820, art. III, § 26.

<sup>20</sup> See Lynn D. Waddle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 ALB. L. REV. 853, 930-31 (1999).

<sup>21</sup> See Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (1850) (repealed 1864).

<sup>22</sup> See U.S. CONST. amend. XIII.

## II. RELUCTANT RECONCILIATION

Slavery was the worst form of the worst of prejudices. Although slavery was abolished, its underlying bigotry has persisted.<sup>23</sup> “Black Codes” unsubtly limited civil rights and freedoms for African-Americans in post-Civil War society.<sup>24</sup> Jim Crow laws codified racial segregation,<sup>25</sup> and universal Black suffrage was an unfulfilled promise for decades even after the passage of the Thirteenth, Fifteenth, Nineteenth, and Twenty-Fourth Amendments.<sup>26</sup>

Even today, our country struggles to reckon with its original sin and, in many respects, still proceeds haltingly toward the perfection of our union.<sup>27</sup> The protests that followed the killing of George Floyd in Minneapolis, Minnesota, which surely arose from frustrations that transcend that horrible incident,<sup>28</sup> starkly remind us that racial iniquity lurks and lingers among us.

The republic was compromised at its inception, perhaps naturally, since its founders were inexperienced in the delicate business of nation-building. No matter, there remains work—much of it, in fact, and much of it difficult—to be done to reach the ideals of equality and justice to which we aspire.

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<sup>23</sup> This turn of phrase is borrowed from Jeff Bezos’s observation that “[s]lavery ended a long time ago, but racism didn’t.” Annie Palmer, *Read the Memo Jeff Bezos Sent to Amazon Employees About Juneteenth*, CNBC (June 17, 2020, 9:13 AM), <https://www.cnbc.com/2020/06/17/read-the-memo-jeff-bezos-sent-to-amazon-employees-about-juneteenth.html> [https://perma.cc/4PUA-7M6G].

<sup>24</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441–42 (1968).

<sup>25</sup> *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 393–94 (1978) (Marshall, J., concurring).

<sup>26</sup> The Thirteenth Amendment of the United States Constitution, ratified in 1865, abolished slavery. U.S. CONST. amend. XIII. Five years later, the requisite number of states ratified the Fifteenth Amendment, guaranteeing that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” *Id.* amend. XV, § 1. The Fifteenth Amendment did not address women’s right to vote. *See id.* Only in 1920, with the ratification of the Nineteenth Amendment, did this country guarantee that “[t]he right of citizens of the United States to vote [would] not be denied or abridged . . . on account of sex.” *Id.* amend. XIX. Likewise, it was not until 1964 that citizens of any color or sex could vote in any federal election without being “denied or abridged by the United States or any State by reason of failure to pay poll tax or any other tax.” *Id.* amend. XXIV.

<sup>27</sup> *Statement by the President on the Observance of Juneteenth*, WHITE HOUSE: PRESIDENT BARACK OBAMA (June 19, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/06/19/statement-president-observance-juneteenth> [https://perma.cc/GBS7-D5BY].

<sup>28</sup> *In Their Words: Protesting for George Floyd*, NBC NEWS (June 3, 2020), <https://www.nbcnews.com/news/nbcblk/their-words-why-black-men-women-are-protesting-george-floyd-n1223486> [https://perma.cc/A89C-TJJB].

### III. A SYMBOLIC SHIFT

How those aspirations are to be met is a question that this country has grappled with for centuries. It undoubtedly cannot be answered by one person, it cannot be answered simply, and it surely cannot be answered here.

When that question is ultimately answered, it will have been addressed through significant, sustained, and sincere action. Some of the action will be inspired. Some will be planned. Some will be begrudging. Some parts will be effective, and other parts will not. Most of it will be long overdue.

Some of that action also will be symbolic. In Great Britain, protesters deposited a statue of a seventeenth-century slave trader in the abyss of the River Avon.<sup>29</sup> The NASCAR auto racing series banned the Confederate flag from its premises.<sup>30</sup> Mississippi has removed the Confederate battle emblem from its state flag.<sup>31</sup> Statues and other commemorations of Confederate figures have recently and rapidly been removed from public places,<sup>32</sup> including the United States Capitol,<sup>33</sup> and for good reason. The Confederacy was founded, in part, based on the idea “that the African race” was “rightfully held and regarded as an inferior and dependent race,” and could be “beneficial or tolerable” in the Confederacy “in that condition only.”<sup>34</sup> Today, at their core, monuments to the

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<sup>29</sup> Max Foster, Nada Bashir, Rob Picheta, & Susannah Cullinane, *UK Protesters Topple Statue of Slave Trader Edward Colston in Bristol*, CNN (June 8, 2020, 11:39 AM), <https://www.cnn.com/2020/06/07/europe/edward-colston-statue-bristol/index.html> [https://perma.cc/DK5F-LUPQ].

<sup>30</sup> Steve Almasy, *NASCAR Bans Confederate Flags at All Races, Events*, CNN (June 10, 2020, 11:29 PM), <https://www.cnn.com/2020/06/10/us/nascar-bans-confederate-flag-spt-trnd/index.html> [https://perma.cc/85RZ-9282].

<sup>31</sup> Paul LeBlanc, *Mississippi State Legislature Passes Bill to Remove Confederate Symbol from State Flag in Historic Vote*, CNN (June 29, 2020, 3:08 PM), <https://www.cnn.com/2020/06/28/politics/mississippi-flag-confederate-emblem/index.html> [https://perma.cc/FUD7-64PM].

<sup>32</sup> Alisha Ebrahimji, Artemis Moshtaghian, & Lauren M. Johnson, *Confederate Statues Are Coming Down Following George Floyd's Death. Here's What We Know*, CNN (July 1, 2020, 3:45 PM), <https://www.cnn.com/2020/06/09/us/confederate-statues-removed-george-floyd-trnd/index.html> [https://perma.cc/S57S-8HYS].

<sup>33</sup> Emily Cochrane, *Pelosi Orders Removal of Four Confederate Portraits from the House*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/us/politics/pelosi-confederate-portraits-house.html> [https://perma.cc/M9NV-LJAP]. In banishing four portraits of previous Speakers of the House from the United States Capital, current Speaker Nancy Pelosi observed that “the halls of Congress are the very heart of our democracy,” and that “[t]here is no room in the hallowed halls of Congress or in any place of honor for memorializing men who embody the violent bigotry and grotesque racism of the Confederacy.” *Id.*

<sup>34</sup> *Confederate States of America - A Declaration of the Causes Which Impel the State of*

Confederacy and to Confederate figures emphasize white supremacy over Black people.<sup>35</sup>

#### IV. THE CHANGING FACES OF JUSTICE

Those, and other similar individual actions, share a common purpose of illustrating an intent to eradicate injustice throughout society.<sup>36</sup> A question naturally following that broader change in narrative is whether the justice system—where this country upholds rights and protects from wrongs—should reexamine its own depictions of justice, fairness, and equality under the law. It should, but in a judicious manner.

The judiciary, by nature, is a cautious branch of government, and any hurried, wholesale reinvention of courthouse art and allegory would be inconsistent with the deliberative nature of that branch of government. A rational first step, though, would be to ensure that our judiciary does not use symbols of the Confederacy or symbols of slaveholders to illustrate justice today.<sup>37</sup>

Taking that rational, cautious step of reimagining how stories of justice are told requires recognizing that some of those who come before the judiciary for judgment do so for reasons attributable to bias.<sup>38</sup> The original sin of slavery traces to segregation, and traceable from segregation

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*Texas to Secede from the Federal Union*, AVALON PROJECT, [https://avalon.law.yale.edu/19th\\_century/csa\\_texsec.asp](https://avalon.law.yale.edu/19th_century/csa_texsec.asp) [https://perma.cc/U36Q-JW3M]; see *Confederate States of America - Georgia Secession*, AVALON PROJECT, [https://avalon.law.yale.edu/19th\\_century/csa\\_geosec.asp](https://avalon.law.yale.edu/19th_century/csa_geosec.asp) [https://perma.cc/45TK-97F2]; *Confederate States of America - Mississippi Secession*, AVALON PROJECT, [https://avalon.law.yale.edu/19th\\_century/csa\\_missec.asp](https://avalon.law.yale.edu/19th_century/csa_missec.asp) [https://perma.cc/FT6L-GND4]. Confederate Vice President Alexander H. Stephens expressed the same thought in slightly different words in his “Cornerstone Speech,” declaring that the Confederacy’s “foundation[] [was] laid” and “its corner-stone rest[ed] upon the great truth, that the negro is not equal to the white man; that slavery—subordination to the superior race—is his natural and normal condition.” Alexander H. Stephens, Cornerstone Speech, *in* THE CIVIL WAR AND RECONSTRUCTION: A DOCUMENTARY READER 1, 59, 61 (Stanley Harrold ed., 2008), (Mar. 21, 1861).

<sup>35</sup> *Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019), <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy> [https://perma.cc/J7M7-THLH] [hereinafter S. POVERTY L. CTR., *Public Symbols*]. White supremacist groups have staged hundreds of rallies to protest the removal of Confederate statues in the South. *Id.*

<sup>36</sup> *Id.* Removing Confederate symbols is “about acknowledging the injustices of the past as we address those of today.” *Id.*

<sup>37</sup> *Id.* In the South, “[c]ourthouses, capitols and public squares are adorned with resplendent statues of [Confederate] heroes . . .” *Id.*

<sup>38</sup> *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENT’G PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [https://perma.cc/J4YW-CNLC]. Racial disparity permeates our justice system. Black Americans are more likely than White Americans to be arrested, convicted, and serve lengthy prison sentences. *Id.*

are significant economic problems that linger today.<sup>39</sup> Data shows that unemployment disparity follows racial lines; Black unemployment nearly doubles White unemployment, and White household median income is substantially higher than Black households.<sup>40</sup> Affordable housing and low-income housing tax credits have been concentrated in high-poverty segregated neighborhoods.<sup>41</sup> Persistent housing segregation, in turn, restricts access to good jobs.<sup>42</sup>

The absence of upward economic mobility that flows from these economic conditions contributes to an increase in crime,<sup>43</sup> and it arguably gives rise to disproportionate policing.<sup>44</sup> Disproportionate policing, of course, is a gentle way of referring to such things as inordinate stop and frisks of African-Americans,<sup>45</sup> predictive law enforcement that unfairly leads to heavier policing of communities of color,<sup>46</sup> and the stopping of Black motorists at higher rates than White drivers.<sup>47</sup> Also included in heavier policing are, among other things, higher arrest rates for low-level crimes like

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<sup>39</sup> Alana Semuels, *Segregation Has Gotten Worse, Not Better, and It's Fueling the Wealth Gap Between Black and White Americans*, TIME (June 19, 2020, 8:53 AM), <https://time.com/5855900/segregation-wealth-gap/> [<https://perma.cc/7B9Z-P2W9>] (“The numbers reflect the long-term consequences of segregation, which has contributed to denying Black Americans the jobs, salaries and other opportunities that are key to upward mobility.”).

<sup>40</sup> *Id.* In January of 2020, unemployment among Black Americans was 6.0% versus 3.1% for White Americans. *Id.* As of 2017, the median income for Black households was \$40,258 versus \$68,145 for White households. *Id.*

<sup>41</sup> *Id.*

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

<sup>43</sup> See *Evidence Matters*, U.S. DEP'T. OF HOUSING AND URB. DEV. 1, 3 (2016) <https://www.huduser.gov/portal/sites/default/files/pdf/EM-Newsletter-summer-2016.pdf> [<https://perma.cc/J4UM-9XXE>].

<sup>44</sup> See *id.* at 4.

<sup>45</sup> See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 668, 672 (S.D.N.Y. 2013) (acknowledging the “targeting [of] racially defined groups for stops” and noting that such practice “perpetuates the stubborn racial disparities in our criminal justice system”); *cf. Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that a police officer may stop and frisk a person when the officer “observes unusual conduct which leads him [or her] reasonably to conclude in light of his [or her] experience that criminal activity may be afoot and that persons with whom he [or she] is dealing may be armed and presently dangerous . . .”).

<sup>46</sup> *Los Angeles Discontinues a Predictive-Policing Program*, SENT'G PROJECT (May 11, 2020), <https://www.sentencingproject.org/news/race-justice-news-los-angeles-discontinues-predictive-policing-program/> [<https://perma.cc/P5NA-HJYB>].

<sup>47</sup> See *Findings*, STAN. OPEN POLICING PROJECT, <https://openpolicing.stanford.edu/findings> [<https://perma.cc/MUJ6-ZJKE>] (finding, among other things, “that police require less suspicion to search Black and Hispanic drivers than White drivers. This double standard is evidence of discrimination.”).

marijuana possession,<sup>48</sup> and a fatality rate for police encounters involving African-Americans that paradoxically is too high,<sup>49</sup> while it is also too low.<sup>50</sup>

None of these points are novel, and none of these issues can be adequately or properly addressed overnight. In fact, the root causes of these problems are beyond the reach of the judiciary and should not be addressed in that arena. However, this is not to say that the judiciary should not be sensitive to these concerns. There is also the attendant optical problem that figures who practiced gross inequality by holding slaves and laying down their lives in support of a cause premised upon a belief of natural inequality are used to symbolize justice today.

Justice, of course, is many things, including the public expression of love,<sup>51</sup> and that love is communicated through the fair and equal application of the law to all. Yet, at the door to many courts—our temples of justice—are statues of slaveholders and those who fought for the Confederacy, and therefore to preserve slavery, in the Civil War.<sup>52</sup> A monument, too, is many things. It is the preservation of an image or an idea.<sup>53</sup> It reflects an instinct to perceive part of ourselves in others. It is the idolatry of a select part of the past.<sup>54</sup>

And on the steps of a courthouse, it can convey a message that the promise of fair and equal treatment under the law might come with an asterisk.<sup>55</sup> When courts use symbols of those who engaged in slavery, and risked life and limb to support that institution, as illustrations of modern justice, they (intentionally or otherwise) risk mimicking segregationists who erected Confederate monuments in town squares across the South. Those

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<sup>48</sup> *Marijuana Arrests by the Numbers*, ACLU, <https://www.aclu.org/gallery/marijuana-arrests-numbers> [<https://perma.cc/6JFC-Z2SZ>] (“Despite roughly equal usage rates, Blacks are 3.73 times more likely than Whites to be arrested for marijuana.”).

<sup>49</sup> Aubrey Clayton, *The Statistical Paradox of Police Killings*, BOS. GLOBE (June 11, 2020, 1:00 PM), <https://www.bostonglobe.com/2020/06/11/opinion/statistical-paradox-police-killings/> [<https://perma.cc/T42Y-D5Z3>] (“A black person in America is roughly three times more likely than a white person to be killed by police.”).

<sup>50</sup> *Id.* Black people have many more interactions with police in non-deadly situations than White people. The higher number of non-lethal police encounters synthetically inflates the number of such encounters and skews the fatality rate for Black police encounters. *See id.*

<sup>51</sup> Harvard University, *Askwith Forum: Cornel West - Spiritual Blackout, Imperial Meltdown, Prophetic Fightback*, YOUTUBE (Oct. 4, 2017), <https://www.youtube.com/watch?v=zuxqhsrCGeg> [<https://perma.cc/RJ26-MQV5>].

<sup>52</sup> Beth D. Jacob, *Confederate Monuments That Remain*, A.B.A. (May 16, 2019), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/black-to-the-future/confederate-monuments/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future/confederate-monuments/) [<https://perma.cc/7ZKZ-LAST>].

<sup>53</sup> *See id.* (quoting *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 470 (2009)) (“A monument, by definition, is a structure that is designed as a means of expression.”).

<sup>54</sup> *Sumnum*, 55 U.S. 460, at 468. When a government arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure. *Id.* at 470.

<sup>55</sup> *See generally* Jacob, *supra* note 52.

monuments were intended to instill fear in the Black population, emphasize white supremacy, normalize racial inferiority, and communicate that those whose accidents of conception resulted in a darker skin tone might not be treated fairly inside the courthouse they are about to enter.<sup>56</sup> Justice, it might seem, may not be blind after all.<sup>57</sup>

## V. RESPONSIBLE REIMAGINATION

Surely, there are those who will argue that to hurriedly remove statues, rename streets and buildings, and otherwise attempt to rewrite history would be a mistake borne of the passion of the moment.<sup>58</sup> They have a point.

Generally, it should be a community responsibility to determine whether to remove a monument of a historical figure or strip the name of that figure from a building or a road. The past cannot and should not be erased, but the present may purposefully determine who it wishes to honor and in what way. It may well be that a community chooses to honor only parts of the legacy of an imperfect figure or that certain contributions of that flawed figure are acknowledged in the context of the presentation of the full historical picture of that character.<sup>59</sup>

There may be others who say that the next perfect person we honor will be the first and that it is unfair to judge figures of the past through the lens of the present. They, too, may be right. Perceptions change with time, and even recent history has plenty of figures who walked a jagged line in the pursuit of equality.<sup>60</sup> For those reasons, it is eminently reasonable to conclude that the reexamination of statues, monuments, and other idolatry should be done in the context of the period in which the person lived and in the context of their entire legacy.

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<sup>56</sup> *See id.*

<sup>57</sup> *Id.*

<sup>58</sup> *See* Senator Tom Cotton, *Senator Tom Cotton Against the 1619 Riots*, AM. MIND (June 22, 2020), <https://americanmind.org/essays/senator-tom-cotton-against-the-1619-riots/> [https://perma.cc/TAL6-H8TM].

<sup>59</sup> The debate with respect to the legacy of President Millard Fillmore is instructive here. *See* Stephen T. Watson, *A Reckoning: Reconsidering Millard Fillmore's Legacy*, BUFF. NEWS (July 19, 2020), [https://buffalonews.com/news/local/a-reckoning-reconsidering-millard-fillmores-legacy/article\\_0050e600-c832-11ea-883a-13b1bc0f917a.html](https://buffalonews.com/news/local/a-reckoning-reconsidering-millard-fillmores-legacy/article_0050e600-c832-11ea-883a-13b1bc0f917a.html) [https://perma.cc/K6AR-736W].

President Fillmore's record includes the signing of the Fugitive Slave Act. *Id.* But as a citizen, Fillmore made significant and lasting contributions to his local community, including founding what today have become an important regional hospital and a premier public research-intensive university. *Id.*

<sup>60</sup> *See, e.g.,* Katy Steinmetz, *See Obama's 20-Year Evolution on LGBT Rights*, TIME (Apr. 10, 2015), <https://time.com/3816952/obama-gay-lesbian-transgender-lgbt-rights/> [https://perma.cc/2GD3-EV2U].

Still, more may say that the heat of the moment should not melt memories of those who took great risk to forge the democracy of today. They also have a point. Several of this country's "founding fathers"—George Washington, John Hancock, Thomas Jefferson, and John Jay among them—owned slaves.<sup>61</sup> Perhaps that sin was mortal; that debate is one for a different place and a different time. But the fact remains that those figures exposed themselves to perils that yielded the fortune and prosperity of today.

Indeed, the flamboyance of John Hancock was an early mark of American boldness and bravery.<sup>62</sup> The character and political selflessness of George Washington helped create the indomitable American spirit that has persevered through war, depression, and plague.<sup>63</sup> John Jay's work abroad helped to end the Revolutionary War and secure American independence.<sup>64</sup> Thomas Jefferson's words, though produced by an imperfect person and initially subject to selective application, are of a logic pristine and pure that has withstood the test of centuries of time.<sup>65</sup> Those actions cannot be erased and should not be forgotten, and it is absolutely appropriate to celebrate those accomplishments in modern America. Greatness has a price and those who paid it—no matter how imperfect their legacies—should be remembered in appropriate ways.

## VI. MODERN METAPHORS OF JUSTICE

That balanced approach can even extend to the courthouse. Our justice system was undoubtedly built with contributions from some with a troubled legacy on the question of race, and it is perfectly reasonable to acknowledge those contributions in places where justice is administered.<sup>66</sup> However, acknowledging contributions from such a figure and upholding that figure as a modern *symbol of justice* are entirely different matters.

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<sup>61</sup> Anthony Iaccarino, *The Founding Fathers and Slavery*, BRITANNICA, <https://www.britannica.com/topic/The-Founding-Fathers-and-Slavery-1269536> (July 28, 2016) [<https://perma.cc/P8G2-3FNG>].

<sup>62</sup> See History.com Editors, *John Hancock*, HIST. (Nov. 9, 2009), [https://www.history.com/topics/american-revolution/john-hancock#section\\_4](https://www.history.com/topics/american-revolution/john-hancock#section_4) [<https://perma.cc/J4GG-T252>].

<sup>63</sup> History.com Editors, *George Washington*, HIST. (Oct. 29, 2009), <https://www.history.com/topics/us-presidents/george-washington> [<https://perma.cc/4WGW-93MZ>].

<sup>64</sup> History.com Editors, *John Jay*, HIST. (Jan. 28, 2010), <https://www.history.com/topics/us-government/john-jay> [<https://perma.cc/3NSH-VNK6>].

<sup>65</sup> History.com Editors, *Thomas Jefferson*, HIST. (Oct. 29, 2009), <https://www.history.com/topics/us-presidents/thomas-jefferson> [<https://perma.cc/WN44-W32R>].

<sup>66</sup> See Katherine J. Rosich, *Race, Ethnicity, and the Criminal Justice System*, AM. SOC. ASS'N (Sept. 2007), [asanel.org/sites/default/files/savvy/images/press/docs/pdf/ASARaceCrime.pdf](https://asanel.org/sites/default/files/savvy/images/press/docs/pdf/ASARaceCrime.pdf) [<https://perma.cc/B2AB-ATYK>].

This brings us to two classes of concern. First, the issue of the appropriateness of continued reverence for Confederate figures in and around our halls of justice should be easily resolved.<sup>67</sup> Those figures betrayed the United States of America and took up arms for causes that included apartheid and slavery.<sup>68</sup> It is utterly perplexing that courts—let alone any other subdivision of our country—would honor those who were on the wrong side of history and humanity and, in doing so, sometimes require a Black person to walk past a towering statue of a Confederate figure to enter a hall of justice. It is equally stunning that we could suggest to a Black child that racism is over when that child might live on a road and go to a public school named after a Confederate general.<sup>69</sup> In short, there is no place for the veneration of a Confederate figure anywhere on courthouse grounds, and no space in which a Confederate figure could or should be used to symbolize the justice of today.

Second, opposite that point lies the more difficult question: whether continued courthouse honor should be given to slaveholders who were not complicit in the Confederacy. Perhaps relevant to that issue is the axiom that those who cannot remember the past are condemned to repeat it.<sup>70</sup> There is value in the scrapbooks of history and, without some remembrances of slaveholders,<sup>71</sup> the story of our country—the good, the bad, and even the downright miserable—cannot be told.<sup>72</sup>

In fact, our national quest for a more perfect union is dotted with imperfections. It is not simple to determine where to draw the line with respect to the blemishes that should be addressed immediately and those that remain questions for tomorrow. To give history a quick, comprehensive scrub of every figure with any degree of antebellum stain, arguably, would be to play a dangerous game.

But this is not to say that a line cannot be drawn or that certain veneration cannot be consigned to a more appropriate corner of history.

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<sup>67</sup> See generally J. Michael Martinez, *State Displays of Confederate Symbols: Legal Challenges and the Political Question Doctrine*, 25 POL. & POL'Y 1 (Nov. 12, 2008), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1747-1346.1997.tb00456.x> [<https://perma.cc/SA8T-ZLM7>].

<sup>68</sup> *Id.*

<sup>69</sup> See S. POVERTY L. CTR., *Public Symbols*, *supra* note 35. Confederate memorials still speckle the southern landscape as well as the parks, streets, schools, dams, capitols, and other places that still adorn that area. *Id.* The illustration used in this essay is drawn from Manassas, Virginia, which has a fire department, a road, and at least two schools named after Confederate figures. *Id.*

<sup>70</sup> GEORGE SANTAYANA, *THE LIFE OF REASON: REASON IN COMMON SENSE* 284 (Scribner's ed. 1905).

<sup>71</sup> For example, presidents George Washington, Thomas Jefferson, James Madison, James Monroe, and Andrew Jackson each owned slaves. See Iaccarino, *supra* note 61.

<sup>72</sup> HINKS, *supra* note 9, at xxv (noting Walker's reference to the "miserable condition" of African Americans).

Like elections, revolutions have consequences. Monuments to Lenin, Stalin, and other authoritarian figures fell with the Soviet Union in the early 1990s.<sup>73</sup> In this country, colonists burned, melted, and destroyed figures of King George III in 1776.<sup>74</sup> In perhaps the closest model for modern America, “the purging ritual that comes with revolution” toppled statues and removed portraits of apartheid figures in South Africa in the mid-1990s.<sup>75</sup>

The American social revolution of 2020 emphasizes that there is no excuse for ignoring that slavery is racism and that those who supported the institution supported racism.<sup>76</sup> We are the world’s beacon of democracy, and to uphold as *symbols of justice* those who fought for and engaged in the most “monstrous *injustice*” in our nation’s history at doorsteps to the halls and houses at which this country dispenses due process and applies the rule of law today is antithetical to any notion of logic or common sense.<sup>77</sup> It cedes the moral high ground of justice, enables skeptics of the institution, and exposes the judiciary to taunts about hypocrisy and insincerity.<sup>78</sup> It congests space “for . . . conversation toward progress.”<sup>79</sup> It empowers memories of inequality sanctioned by the highest court of our land.<sup>80</sup>

It also sows doubt in the minds of people of color,<sup>81</sup> whose interaction with the justice system sometimes comes about for systemic

<sup>73</sup> See Pavlo Podobed, *Від ленінізму до ленінопаду* [*From Leninism to the fall of Lenin*], RADIO LIBERTY (Dec. 30, 2014) (Ukr.), <https://www.radiosvoboda.org/a/26770232.html> [<https://perma.cc/H2RD-7EXE>].

<sup>74</sup> See Andrew Lawler, *Pulling Down Statues? It’s a Tradition that Dates Back to U.S. Independence*, NAT’L GEOGRAPHIC (July 1, 2020), <https://www.nationalgeographic.com/history/2020/07/pulling-down-statues-tradition-dates-back-united-states-independence/#close> [<https://perma.cc/HC5F-CPUB>].

<sup>75</sup> Isabel Wilkerson, *Apartheid Is Demolished. Must Its Monuments Be?*, N.Y. TIMES ARCHIVES (Sept. 25, 1994), <https://www.nytimes.com/1994/09/25/world/apartheid-is-demolished-must-its-monuments-be.html> [<https://perma.cc/PB7A-XBQL>]; see also Deborah Douglas, *In Dealing with Confederate Monuments, South Africa Provides a Model*, THE CHI. REP. (Aug. 18, 2017), <https://www.chicagoreporter.com/in-dealing-with-confederate-monuments-south-africa-provides-a-model/> [<https://perma.cc/LQ32-72VQ>].

<sup>76</sup> See John R. Allen, *Systemic Racism and America Today*, BROOKINGS (June 11, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/06/11/systemic-racism-and-america-today/> [<https://perma.cc/TZH9-G9DR>].

<sup>77</sup> Abraham Lincoln, Peoria Speech (Oct. 16, 1854) (emphasis added) (transcript available at <https://www.nps.gov/liho/learn/historyculture/peoriaspeech.htm> [<https://perma.cc/R27A-F2X8>]).

<sup>78</sup> See Douglas, *supra* note 75.

<sup>79</sup> See *id.*

<sup>80</sup> See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) (upholding the constitutionality of racial segregation under the “separate but equal” doctrine).

<sup>81</sup> See W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* xxviii (2015). “Daily the [person of color came] more and more to look upon law and justice, not as protecting safeguards, but as sources of humiliation and oppression.” *Id.* Du Bois made this point well over 100 years ago. *Id.* The continued heraldry of such figures implies that there may be a measure of continued vitality in that observation. See *id.*

reasons.<sup>82</sup> Hardly anyone standing in those shoes could be assured of a fair shake in a place that, even unintentionally, clings to hints of a time when they might have counted as only sixty percent of a person and might have been deemed inferior, or outright denied liberty, because of a richness of melanin.<sup>83</sup> To distinguish those figures as modern-day pinnacles of the law is to flirt with the recall of “peculiar” views of justice from days past.<sup>84</sup>

In fact, all of that symbolism could well be considered part of an infrastructure of division in this country.<sup>85</sup> It is no accident that symbols of the Confederacy—which, as a nation 150 years removed from the Civil War, we now know to represent racism and an ideology of hate—were erected in most significant number in two twentieth-century periods in which what some have described as America’s racial caste system was alternately waxed and weakened.<sup>86</sup> The early 1900s saw southern states enact Jim Crow laws to disenfranchise African-Americans and re-segregate post-Civil War society.<sup>87</sup> That period also saw a significant increase in the dedication of Confederate iconography, as did the civil rights movement of the 1960s.<sup>88</sup> The message of the misplaced esteem afforded to those relics is clear: liberty and justice might be for all, but in varying degrees and at varying times. And so, it should be easy to draw a narrow line in the narrow circumstance of courthouse iconography. Although appropriate and important to honor positive contributions and achievements in American society, our modern illustration of justice must be free from the taint of slavery and the Confederacy. So, if a figure of yesterday “preached equality, but . . . didn’t practice it,”<sup>89</sup> insofar as it bought, owned, leased, loaned, or traded another human being, or if the figure fought for the Confederacy in support for that practice, then they should not be used to symbolize justice at the modern courts of today.

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<sup>82</sup> *Id.* at 10–11.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See Isabel Wilkerson, *America’s Enduring Caste System*, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/07/01/magazine/isabel-wilkerson-caste.html> [<https://perma.cc/JYX8-RUA6>] (discussing whether our founding promises of “liberty and equality” have been compromised by a “racial caste system” that preceded this country’s founding and still persists today).

<sup>86</sup> *Id.* “Waxed and weakened,” of course, is an alliterative turn of phrase illustrating the point that the timing of the erection of such monuments was intentional; some were raised in support of the racial caste system in the Jim Crow era, and others were erected as those barriers were challenged during the civil rights movement of the 1960s.

<sup>87</sup> See S. POVERTY L. CTR., *Public Symbols*, *supra* note 35.

<sup>88</sup> *Whose Heritage? 153 Years of Confederate Iconography*, S. POVERTY L. CTR., [https://www.splcenter.org/sites/default/files/com\\_whose\\_heritage\\_timeline\\_print.pdf](https://www.splcenter.org/sites/default/files/com_whose_heritage_timeline_print.pdf) [<https://perma.cc/RRY8-WR44>].

<sup>89</sup> Walters & Davis, *supra* note 6.

## VII. CONCLUSION

Law is to be practiced, and justice is to be constantly pursued because while we can and, in fact, mostly find excellence in those areas, perfection is not attainable in either of those related fields. The most pervasive symbol in American courtrooms—Lady Justice—perfectly illustrates the fallibility of our justice system. Lady Justice is not naturally blind; therefore, she is naturally partial, and she must ensure her evenhandedness and fairness by covering her own eyes with a cloth.

So too must those who practice law, and those who pursue justice demand better symbolism of justice at courthouse doors. Simply because something—slavery and its attendant racism—was normal “then” does not mean that it is acceptable now. To this point, there intentionally has been no reference to the number of symbols that dot the landscape because even one such veneration is too many. Even today, there stand nearly 800 monuments to the Confederacy across the country,<sup>90</sup> most of which are spread across the southern United States, and dozens, if not hundreds, of which stand on courthouse grounds.<sup>91</sup> That heraldry is not just an “innocent remembrance[] of a benign history.”<sup>92</sup> Rather, it “purposefully celebrate[s] a fictional, sanitized Confederacy” and ignores the “death, . . . [and] the enslavement, and the terror that it actually stood for.”<sup>93</sup> To the extent such reverence on courthouse grounds is given to a slaveholder who preceded the Confederacy or who did not support secession, the intent of the veneration may be pure, but the underlying imperfection remains. The horror of the Confederacy rested in its enslavement and dehumanization of people of color, and anyone who engaged in that obsolescent practice of yesterday is not someone who should be used to symbolize the modern, evolved system of justice today.

Surely there are more such illustrations sprinkled throughout courthouses across the country in the form of portraits, plaques, or other markers of significance. To allow for the expression of an idea of justice rooted in a time of slave and master when the worth of an individual was measured by quantity—not of character, but of melanin—is malpractice. Injustice at that part of the courthouse implies injustice everywhere in the

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<sup>90</sup> See *Whose Heritage? Public Symbols of the Confederacy*, *supra* note 35.

<sup>91</sup> *Id.*; *Whose Heritage: Public Symbols of the Confederacy*, GOOGLE MAPS, <https://www.google.com/maps/d/viewer?mid=1yDVZz93PUT3wDXpl4I-qmEQiSWqNtpzA&ll=23.210013016804186%2C-99.77699332146352&z=4> [https://perma.cc/ER49-6VJC] (monument and marker map).

<sup>92</sup> *Mitch Landrieu’s Speech on the Removal of Confederate Monuments in New Orleans*, N.Y. TIMES (May 23, 2017), <https://www.nytimes.com/2017/05/23/opinion/mitch-landrieu-speech-transcript.html> [https://perma.cc/AE8K-Y8XW] (remarking on the removal of three prominent Confederate monuments in New Orleans, Louisiana).

<sup>93</sup> *Id.*

courthouse. There is no better time than now for courthouses to discard the antiquated, habitual depictions of justice through those who participated in slavery and of those who fought and, in some cases, died for the belief that melanin-based inequality was a “great” and “natural” “truth.”<sup>94</sup>

Much as there was meaning in the rise of those illustrations, there will be meaning in their fall. Courthouse grounds and halls are “place[s] that everybody should feel a part of.”<sup>95</sup> There surely are more laudable and less imperfect figures to allegorize impartiality and fairness on our courthouse steps and in our courthouse halls.<sup>96</sup> Justice demands that we find them.

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<sup>94</sup> Stephens, *supra* note 34.

<sup>95</sup> *Whose Heritage?*, S. POVERTY L. CTR., <https://www.splcenter.org/data-projects/whose-heritage> [<https://perma.cc/F2RR-TKN9>] (highlighting former South Carolina Governor Nikki Haley’s remarks on July 10, 2015 regarding the removal of the Confederate battle flag from State House Grounds in Columbia).

<sup>96</sup> There is a temptation to specify a number of such figures. Ultimately, though, the determination of who to honor, and how to bestow such honor, should be a local decision. To the extent it is needed, and to the extent it would be welcomed, perhaps some guidance could be found in these exemplars. Louis Napoleon, born to a slave in New York City in 1800, helped conduct the Underground Railroad. Later, despite his illiteracy, he obtained a writ of habeas corpus for slaves transported to New York State that gave rise to what is colloquially referred to as the Lemmon Slave Case. See *Louis Napoleon*, HIST. SOC’Y OF THE N.Y. COURTS, <https://history.nycourts.gov/figure/louis-napoleon/> [<https://perma.cc/CMK6-M9UA>]; see also *Lemmon v. People*, 20 N.Y. 562 (1860). That case, of course, saw New York State free slaves transited through that state and perhaps was one of “the final development[s] of the law of freedom” within the state action realm. William H. Manz, *A Just Cause for War: New York’s Dred Scott Decision*, 79 N.Y. ST. BARJ. 10, 21 (2007). Others, whose efforts moved the law in matters of civil rights, may also merit consideration, such as Virginia Minor, whose battle for women’s suffrage took her to the United States Supreme Court and eventually contributed to the passage of the Nineteenth Amendment to the United States Constitution. See *Minor v. Happersett*, 88 U.S. 162 (1874). Similarly worthy is Gustavo Garcia, who won a landmark case challenging the systematic exclusion of Mexican-Americans from jury duty in Texas. See *Hernandez v. Texas*, 347 U.S. 475 (1954).