THE RUTGERS UNIVERSITY LAW REVIEW
VOLUME 75 | ISSUE 2 Winter 2023

UNDERSTANDING BIAS IN CIVIL PROCEDURE: TOWARDS AN EMPIRICAL ANALYSIS OF PROCEDURAL RULE-MAKING'S ROLE IN CONTINUING INEQUALITY

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ABSTRACT

This Article uses the history of procedural rules governing "freedom suits" to elucidate the collection of rights that constitute the Western idea of "individual liberty," and to make a prima facie case that our current Rules of Civil Procedure are biased against the enforcement of those rights by American minorities. This history reveals a systemic inequality in procedural rights that both pre-dates race and favors the consolidation of economic and political power over the enjoyment of the rights that supply the foundation for classical liberalism. I argue that collecting demographic data on litigants' interaction with our Rules of Civil Procedure will yield not only a deeper understanding of this bias, but also potentially transformative insights for our judicial system in a time of needed reform.

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INTRODUCTION

A multitude of federal government agencies collect data on the impact of their programs across both race and gender.[1] Our federal courts, however, do not.[2] When one considers that the courts are arguably both the birthplace of our concept of individual rights and the last line of defense in their enforcement, the absence of data seems curious. Are we so sure that the Federal Rules of Civil Procedure lay out an even playing

1. Reaching back to the Civil Rights Act of 1964, the Commission on Civil Rights was mandated to "study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution because of race, color, religion or national origin or in the administration of justice . . . ." Civil Rights Act of 1964, Pub. L. No. 88-352, sec. 504, § 104(a), 78 Stat. 241, 251 (codified as amended at 42 U.S.C. § 1975a).

2. *IDB Civil 1988-Present*, FED. JUD. CTR., https://www.fjc.gov/research/idb/interactive/21/IDB-civil-since-1988 (last visited Jan. 26, 2023) (listing searchable data categories). The Civil Rights Act's command to collect information concerning a denial of equal protection "in the administration of justice" has not been interpreted to require the Commission to collect this data. sec. 504, § 104(a), 78 Stat. at 251.

field for all American litigants, regardless of who they are or where they come from?

There is ample reason to believe that the Federal Rules need reform.[3] Despite a steady stream of litigation in our federal district courts, no one appears particularly happy with the rules that drive them.[4] Defense attorneys complain of cost and delay,[5] plaintiffs' attorneys complain of overly restrictive pleading standards,[6] and litigants complain that they cannot even afford a lawyer to appear.[7]

3. A number of scholars of procedure have sounded this call. *See, e.g.*, Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform*, 108 CALIF. L. REV. 789, 879 (2020) (proposing a commission to draft rules to be implemented for a number of election cycles in the future). Some have observed potentially pernicious impacts of our procedural regime on social equality and the rights of political minorities. *See* Portia Pedro, *A Prelude to a Critical Race Theoretical Account of Civil Procedure*, 107 VA. L. REV. ONLINE 143, 153–55 (2021); Ion Meyn, *The Haves of Procedure*, 60 WM. & MARY L. REV. 1765, 1768 (2019); Ion Meyn, *Constructing Separate and Unequal Courtrooms*, 63 ARIZ. L. REV. 1, 2–3 (2021); Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1009–13 (2016).

4. One of the most respected scholars of American civil procedure has lamented the increasingly restrictive state of the Federal Rules for the past ten years. *See, e.g.*, Arthur R. Miller, *Widening the Lens: Refocusing the Litigation Cost-and-Delay Narrative*, 40 CARDOZO L. REV. 57, 59–68 (2018); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 304 (2013); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal: *A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 52–53 (2010).

5. Beginning in the 1980s, the American business community began a successful campaign to rein in the costs of litigation and discovery for defendants, yielding almost immediate results in the amendments to the Federal Rules in 1983. *See, e.g.*, PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 1–6 (1991).

6. Attacks on *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), dominated scholarly discourse on civil procedure for the decade after they were decided and continue to appear in many works on the subject. For an often-cited summary of the early debate concerning the empirical results of the decisions on litigants' activity under Federal Rule of Civil Procedure 12(b)(6), see David Freeman Engstrom, *The* Twiqbal *Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1204 (2013).

7. Concerns about the cost of legal help stand out as an important barrier to seeking legal help. Nearly one-half (46%) "of those who did not seek legal help for one or more problems cite concerns about cost as a reason why." LEGAL SERVS. CORP., THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 8 (2022). Additionally, more than one-half (53%) of low-income Americans doubt their ability to find a lawyer they could afford if they needed one. *Id.* Over the course of a year, low-income individuals will "approach LSC-funded [legal aid] organizations for help with an estimated 1.9 million civil legal problems" that are eligible for assistance. *Id.* at 9. They will receive some legal help for 51% of these problems, but even then, they will only receive enough legal help to resolve their problem about one-half (56%) of the time. *See id.*

Even after the case management reforms initiated by the Civil Justice Reform Act ("CJRA"),[8] district courts are swamped with levels of litigation that are institutionally difficult to manage.[9] Pilot groups are actively and constructively seeking answers to elements of this problem.[10] While applauding this work and calling for more of it, this Article asks whether understanding the impact of the particular Rules of Civil Procedure on American minorities might provide some critical insight about the way American litigation works—and how to make it better at resolving disputes for everyone.

Taking another step, this Article asks whether the unknown impact of the Rules of Civil Procedure has any bearing on what appears to be persistent inequality across the lines of race and gender.[11] These lines of identity, of course, delineated not only ownership of property and the full range of individual rights, but the very concept of "freedom" and "citizenship" for at least the first two hundred years of American history. By drawing on the first rules for bringing "freedom suits" to separate "servants" from "citizens" known to the common law—the precursor of the American procedural system—we may easily identify what differentiates "free" from "not free" people, as well as how procedures can affect someone's ability to enjoy that difference. This analysis allows us to take note of the basic parameters of social inequality and how that inequality may interact with rules of civil procedure.

Through the history covered by this Article, I observe that "free" people do five things in particular that ultimately form the basis of classical liberal society: (1) working and traveling as they see fit; (2) owning and disposing of private property; (3) defending themselves against physical assault and preserving their own bodily autonomy; (4)

8. 28 U.S.C. §§ 471–482. Most of the data collection and analysis performed by the Federal Judicial Center ("FJC") is a result of this legislation.

9. The FJC reports that each individual U.S. district judge had an average of 484 civil cases filed under their jurisdiction in 2021 and 1,115 pending cases (civil and criminal) on their docket. *United States District Courts — National Judicial Caseload Profile*, U.S. CTS. (Dec. 31, 2021), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile1231.2021.pdf.

10. *See, e.g.*, Emery G. Lee III & Jason A. Cantone, *Pilot Project on Discovery Protocols for Employment Cases Alleging Adverse Action*, JUDICATURE (2016), https://judicature.duke.edu/articles/pilot-project-for-discovery-protocols-for-employment-cases-alleging-diverse-action/ (last visited Jan. 26, 2023). The study notes that pre-set discovery protocols for employment discrimination cases increased the rate of settlement by 21%, reduced dismissals on the pleadings by 7%, reduced dismissals at summary judgment by 6%, and reduced the amount of motions practice by 10%. *Id.*

11. Studies documenting the continuing inequality across demographic groups are published almost monthly. For a comprehensive account of racial inequality in collected data across multiple categories, see generally NAT'L URB. LEAGUE, UNDERSTANDING THE 2022 EQUALITY INDEX (2022).

participating in democratic legislation; and (5) invoking judicial procedures to enforce the first four activities. By analyzing the source of these activities and the rules applied to differentiate who could participate in them, I argue that the procedural rule-maker occupies a peculiar position of power in the liberal system that both shapes what "liberty" looks like and deploys it to the rule-maker's advantage. In this manner, a bias toward the consolidation of political and economic power may not only be getting in the way of our enjoyment of these things, but it may also affect our conception of what "liberty" is in the first place.

In contextualizing procedural law to the political and economic conditions that created it, I also ask the reader to reflect on the possibility that the way a culture resolves its disputes may be just as unique as its art, music, or film. Trials, too, are performances. In writing the rules of this performance, rule-makers draw on shared cultural values in order to craft a system that the public will actually use. When successful, formal dispute resolution procedures are able to absorb critique from various interest groups into specific venues with particular conditions of participation and pre-determined acceptable outcomes. By imagining what our dispute resolution process would look like if we were more aware of the role that the rule-maker's bias played in it, we might materially improve the system and our society in the process. But in order to create a practical procedural system in a modern global economy, we should use all the available tools to understand facts in the most objective manner possible. I use the Anglo-American history of legal procedures to resolve disputes over "liberty" and to make a case for why collecting demographic data is important to achieving this goal.

In Part I, I compare the procedures available to a feudal lord to reclaim a fugitive laborer in thirteenth-century England with the procedures the laborer could invoke to establish their freedom by claiming residence in a city in order to show how those procedures heavily favored the lords' claims. Although a procedure for workers to transform their legal status was available, it was virtually inaccessible and largely served to consolidate political and economic power within the Crown and other prominent feudal powers. Drawing on this observation, I outline five activities that "free" citizens could do that "unfree" servants could not and argue that procedural rights in Anglo-American law are deeply connected to an individual's relationship to property and land. I identify the tendency of Anglo-American governments to use procedural rules favoring the consolidation of power over the extension of the activities associated with freedom or "liberty" as the source of a procedural bias with economic, religious, and cultural origins.

In Part II, I show how this procedural bias contributed to early class conflict—and revolt—in England over labor and property. Given the

resulting wealth inequality after the lower class's defeat, I argue that "liberty" was offered to (and sometimes forced upon) the poor to encourage emigration to the American colonies. While the activities associated with liberty expanded for English colonists, they were stripped from Africans and the original inhabitants of what is now America. I argue that the procedural bias identified in Part I was a contributing factor to the English colonialism of the sixteenth to eighteenth centuries and in the destruction of the activities associated with freedom for non-European people.

In Part III, I examine how the American colonies used procedural law governing claims to the bodies of enslaved people to enshrine this bias in a constitutional compromise. Given the competing rights among sovereign governments embodied in the federalist system, I illustrate how different political powers—northern, southern, and federal—deployed procedures to reclaim and liberate fugitive slaves to suit their own interest and advantage. To reiterate that procedure has political components, I show how these differences in procedural rules laid the battle lines for the constitutional conflict played out in the American Civil War.

In Part IV, I begin a prima facie case that procedural bias in the enforcement of the activities associated with freedom survived the elimination of chattel slavery. By taking a broad account of African Americans' lives during segregation and comparing the small amount of data available on African Americans' access to courts during the spread of codes of civil procedure and "fact pleading," I argue that the procedural bias likely survived the transition from common law to civil code and contributed to a social loss within the Black community during the segregation era.

In Part V, I continue the inference by examining the historical impulses behind the Federal Rules of Civil Procedure. I argue the Rules were intended to absorb disputes from the laboring class into venues that espoused liberal access and resolution on the merits but were highly reliant on a trial judge's ability to devote attention to those merits. I discuss how these founding principles were applied during and after the civil rights movement, when numerous substantive laws were passed in order to enforce Black Americans' ability to participate in the activities associated with freedom. By comparing continuing inequalities in Black Americans' enjoyment of these activities to the Federal Rules' shift in preference from liberal access to a resolution on the merits toward the preference for disposition of cases before trial, I suggest that existing frameworks for experimenting with procedural rules provide potential avenues to improve the enjoyment of the activities associated with

freedom for all American citizens. But these experiments should take place with as much information to support them as possible.

In conclusion, I propose that courts collect demographic data in surveys of American litigants on their experience in civil court to provide a meaningful starting point to address a likely bias that favors the consolidation of political and economic power. I argue that understanding how bias manifests itself in today's Rules of Civil Procedure is critical for expanding the enjoyment of the activities associated with success in liberal society.

I. A PROCESS FOR PROVING LIBERTY

Historians of early English law have previously found that a number of the legal procedures implemented by the Norman invaders of England served to consolidate their political and economic power during turbulent times.[12] Procedures from the same period addressing the question of "freedom," however, are particularly interesting not only because they express a similar bias towards consolidation, but because they appear at the confluence of the origins of the commercial market economy[13] and the Anglo-American legal system.[14] Although rhetoric of the era praised the system's preference for liberty,[15] there is virtually no recorded evidence that anyone ever transformed their status from servitude to freedom in a legal proceeding.[16] In other words, one of the most frequent problems

12. The preeminent example is the writ of "novel disseisin," in which the Norman kings granted an action for anyone removed from peaceful enjoyment of land. *See* R. C. VAN CAENEGEM, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL: STUDIES IN THE EARLY HISTORY OF THE COMMON LAW 267 (77 Selden Soc'y 1959) ("Royal control over seisin, and especially by the quick and efficient undoing of unlawful disseisins, means control over the lawful and rightful distribution of land, in other words over the tranquillity and solidity of the patrimonial basis of society.").

13. ROBERT S. LOPEZ, THE COMMERCIAL REVOLUTION OF THE MIDDLE AGES, 950–1350, at 155 (1976).

14. *See* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 381–82 (1983) (describing how, in the decades following the Norman conquest of England, English towns received "charters of liberties" granting their citizens rights of self-governance).

15. See, for example, Henry of Bracton, writing in the thirteenth century, that litigation over personal freedom must be conducted in the King's Court as "a concession made in favour of liberty, a priceless thing, not to be entrusted to the discretion of the unlearned and inexperienced." 2 HENRY OF BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 300–01 (Samuel E. Thorne trans., 1997).

16. While there are examples of people proving that they were not in fact born into servitude, there is only one recorded example of a former servant succeeding on a writ of proving liberty as a result of residence in a "free" town. Stephen Alsford, *Urban Safe Havens for the Unfree in Medieval England: A Reconsideration*, 32 SLAVERY & ABOLITION 363, 363–75 (2011), *reprinted in* Stephen Alsford, *Were Towns Sanctuaries for Serfs?*, FLORILEGIUM

arising in modern American litigation was present from the very beginning: a remedy might be *available*, but not *accessible* to those who could use it most.

In order to win one of these suits, unless one were already "free,"[17] a servant[18] essentially had to prove that they had left the feudal economy and successfully joined the commercial one.[19] In addition to the lord's total control over the servant, the King's procedural requirements made the process for a servant seeking to transform his legal status through litigation quite difficult, if not impossible.[20]

A. *The Twin Writs: Citizenship or Servitude*

The idea that a person could escape a state of servitude by means other than manumission (purchase of freedom or other voluntary release) arises out of the practice of prominent feudal powers granting charters to medieval cities, allowing them to offer sanctuary to fugitives.[21] A twelfth-century grant by King Henry II to the English city of Lincoln provides a useful example:

> I confirm also to them that if any remain in my city of Lincoln for a year and a day without challenge from any claimant and pay the customs of the city, and the citizens can show according to the laws and customs of the city that a claimant was living in England and did not challenge him, thenceforward as heretofore, he shall remain peacefully in the city of Lincoln as my citizen.[22]

URBANUM (citing *John de Grimstede v. Robert of Alwardbury*, *reprinted in* E.M. Thompson, *A Note on the Freedom of the City of Sarum*, 4 WILTSHIRE NOTES & QUERIES 117, 117–18 (1905)), http://users.trytel.com/tristan/towns/florilegium/community/cmmemb01.html (last visited Feb. 1, 2023).

17. For a description of the various ways a person would be born "free," see the medieval treatises including 2 FLETA 13, 14 (H. G. Richardson & G. O. Sayles eds., 72 Selden Soc'y 1955). For a description of the various methods for "enfranchisement," see 1 RANULF DE GLANVILLE, A TREATISE ON THE LAWS AND CUSTOMS OF THE KINGDOM OF ENGLAND 88 n.1 (John Beames trans., 1900) (providing Glanville's view and the translator's consolidation from multiple sections of a later treatise, "The Mirror of Justices.").

18. I use the term "servant" rather than "serf" or "villein" in this Article to avoid archaic language.

19. *See* BRITISH BOROUGH CHARTERS 1042–1216, at 104 (Adolphus Ballard ed., 1913) (showing King Henry II's charter to the city of Lincoln in 1157).

20. *See id.*

21. *See* Alsford, *supra* note 16.

22. BRITISH BOROUGH CHARTERS, *supra* note 19, at 104; *see also* Alsford, *supra* note 16. The concept of obtaining freedom through city life is also expressed in the almost thousand-year-old Western European expression: "town air makes free," or "Stadtluft macht frei." Alsford, *supra* note 16.

The realities of city and country life made this more difficult than simply reaching the city walls. First, a fugitive would have to be granted admission to a merchant or craft guild in order to remain in a city for any extended period of time,[23] and most cities prohibited strangers from staying more than a few nights.[24] Servants, on the other hand, were bound to the land they held from their lord,[25] and were required to perform any number of arbitrary services as a condition of their possession.[26] While citizens spent their time either making things or selling them depending on which guild they had joined,[27] servants worked on their lords' land for most of the year.[28]

Second, citizens could not only own private property, but, as we see above, were required to contribute it to the annual tax.[29] In contrast, the servant could own no property that the lord could not take whenever he pleased.[30]

Third, the serf was required to submit to physical violence from his lord and had no right to bring a lawsuit against him except for a felony.[31]

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23. 1 WILLIAM STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND IN ITS ORIGIN AND DEVELOPMENT 461 (5th ed. 1891) ("[T]he membership of the guild is indispensable to the full and perfect status of the burgher. Some, if not all, the towns so privileged, could confer freedom on the villein by allowing him to stay for a year and a day within their walls, or enrolling him in their guild.").

24. *See* BEVERLEY TOWN DOCUMENTS 15–16 (Arthur F. Leach ed., 14 Selden Soc'y 1900) (listing examples of borough regulations preventing citizens from harboring non-citizens).

25. The term *glebae adscriptitii* (running with the land; bound to the Earth) was often used to describe some of these servants' legal status. *See* 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 372 (1895).

26. These services could include virtually anything, although the primary attributes of serfdom were that a servant would not know in the evening what he was required to do in the morning and the requirement to pay one's lord for permission for the marriage of the servant's daughter (*merchetum*). *See id.* at 354.

27. H. ST. CLAIR FEILDEN, A SHORT CONSTITUTIONAL HISTORY OF ENGLAND 263–65 (3d ed. 1895) (describing the activities of the merchant and craft guilds of English cities).

28. *See, e.g.*, 1 SELECT PLEAS IN MANORIAL AND OTHER SEIGNORIAL COURTS 102–03 (F. W. Maitland ed., 2 Selden Soc'y 1889) (describing the term of service for the villagers of King's Ripton to include "one work" every week from the 29th of September to the 1st of August, ploughing every Friday during the same period, "saving fifteen days at the feast of Christmas and eight days at Easter and eight at Pentecost"). The particular terms of agricultural labor varied from manor to manor. *Id.*

29. *See* FEILDEN, *supra* note 27, at 266 ("The *firma burgi*, the *ferm* or rent paid to the king, was portioned out amongst the householders, and occupiers of land in the borough . . . .").

30. THE MIRROR OF JUSTICES 79 (William Joseph Whittaker ed., 7 Selden Soc'y 1895) ("[Serfs] cannot acquire anything save to the use of their lord . . . .").

31. *Id.* ("The lords may put them in fetters and in the stocks, may imprison, beat and chastise them at will, saving their lives and limbs.") The servant ostensibly had a cause of action against a lord if the lord engaged in some form of extreme violence. PAUL

The citizen, in contrast, could sue anyone for an assault, and, beyond that, was affirmatively required to contribute to the communal self-defense against thieves or invaders.[32]

Fourth, citizens were often required to participate in the election of representatives for the communal government,[33] including for urban representative legislatures that passed both substantive laws affecting life in town and procedural laws affecting life in town court.[34] Servants, on the other hand, had no say in the government of their everyday lives, but could be required to serve as the lords' "reeve," or reporter, to the King on issues of finance and fealty.[35]

Fifth, while citizens were immune to the jurisdiction of all courts except their own and the King's,[36] the servant's obligations to the lord listed above were largely enforced through mandatory attendance at the lord's court.[37]

These were all material differences in the lives of urban citizens and servants, which ultimately fell along lines of their ability to: (1) work and travel, (2) control their own bodies, (3) own private property, (4) participate in some form of representative democracy, and (5) invoke legal procedures to aid in enforcing access to the other four activities. One accessed these activities by escaping their previous "villain tenure"[38] and

VINOGRADOFF, VILLAINAGE IN ENGLAND: ESSAYS IN ENGLISH MEDIAEVAL HISTORY 47 (1892).

32. 1 BOROUGH CUSTOMS 1–2 (Mary Bateson ed., 18 Selden Soc'y 1904) (describing rules for invoking the "hue and cry" and penalties for doing so mistakenly or failing to report after another citizen's call for help).

33. *See* Maryanne Kowaleski, *Town Courts in Medieval England: An Introduction*, *in* TOWN COURTS AND URBAN SOCIETY IN LATE MEDIEVAL ENGLAND, 1250–1500, at 17, 30 (Richard Goddard & Teresa Phipps eds., 2019) (describing how municipal elections frequently took place at borough court and how attendance at court was mandatory for burgesses).

34. A wealth of these laws has been collected by Mary Bateson in 1 BOROUGH CUSTOMS, *supra* note 32, and 2 BOROUGH CUSTOMS (Mary Bateson ed., 21 Selden Soc'y 1906), and are discussed more generally in Kowaleski, *supra* note 33, at 19–20, 26.

35. *See* VINOGRADOFF, *supra* note 31, at 156.

36. FEILDEN, *supra* note 27, at 260–61.

37. 1 SELECT PLEAS IN MANORIAL AND OTHER SEIGNORIAL COURTS, *supra* note 28, at xiii–xiv (describing the functional purpose of manorial court records: "About the middle of the century many of the abbeys and other provident landowners were taking stock of their possessions, reducing into black and white the complicated terms of the customary tenure and setting an exact value on every service due from their tenants. We can soon see that the court roll was primarily an economic document . . . . [T]his is the original germ which expands and develops into a chronicle of all that happens in the court.").

38. *See, e.g.*, VINOGRADOFF, *supra* note 31, at 77–79 (describing the case of Martin of Bestenover, who successfully confirmed his status as a freeman during court proceedings against his landlord asserting his servitude).

by occupying "burgage tenure"[39] within a city. Complaining lords, often referred to as *dominus* or *domini*, claimed that fugitives owed them agricultural labor or other duties by virtue of their possession of "servile land."[40] In this way, a lord's "seisin" of a servant occupying a servile tenement was not only the basis of his claim, but the act of repossessing a servant's body also took the fugitive out of "seisin"[41] of the servant's participation in any of the five activities mentioned above.

Although not "rights" by any stretch at this time,[42] these activities and their performance can be traced through various constitutional documents of Anglo-American history.[43] Although more properly called

39. BRITISH BOROUGH CHARTERS, *supra* note 19, at 102 (describing a charter to the city of Cardiff in the twelfth century whereby "if anyone hold half a burgage in chief of our lord the earl, he shall have the same liberty as if he held a whole burgage").

40. 3 THE EARLIEST ENGLISH LAW REPORTS 24 (Paul A. Brand ed., 122 Selden Soc'y 2005) (claiming "seisin" of villeins despite their escape from the lord's "servile land"); *see also* 1 SELECT PLEAS IN MANORIAL AND OTHER SEIGNORIAL COURTS, *supra* note 28, at 169 (finding villager's claim of freedom from duties to attend lord's court based on his "free estate" by payment of fixed annual amount contradicted by his father's possession of "servile estate").

41. Professor Van Caenegem offers a useful definition: "Seisin is the normal exterior expression of right, in land and many other matters." VAN CAENEGEM, *supra* note 12, at 267. In other words, "seisin" might be thought of as an individual's public engagement in a particular activity.

42. At this time in legal history, a doctrine of individual rights was still being crafted by the canonical scholars of the Catholic Church. *See* BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS 70 (John Witte, Jr. ed., 2001). Direct remedies did not exist for the infringement of all of these activities, and it is therefore difficult to classify them as "rights" at this time in the modern sense of the term, articulated most famously by Chief Justice Marshall in *Marbury v. Madison*. 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

43. Each of these activities, other than participatory democracy, was recognized for "freemen" in the Magna Charta (also spelled Magna Carta) a century later. *See* BOYD C. BARRINGTON, THE MAGNA CHARTA AND OTHER GREAT CHARTERS OF ENGLAND 211–27 (2d ed. 1900). Also known as the "Great Charter of Liberties," the Magna Charta's guarantees around the private ownership and intergenerational transfer of property appear immediately in Article 1. *Id.* at 214 ("After the death of an Ancestor, the Heir of full age shall have his inheritance by the ancient Relief, as expressed in the Charter."). They also appear throughout the document in Articles 2–7, 15–22, 27, 32, and 34–37. *Id.* at 214–22. The activities of work and travel are contemplated in Articles 31 and 33. *Id.* at 220–21. The right to bodily autonomy is contained in Article 29. *Id.* at 220 ("No Free-man's body shall be taken, nor imprisoned, nor disseised, nor outlawed, nor banished, nor in any ways be damaged, nor shall the King send him to prison by force, excepting by the judgment of his Peers and by the Law of the land."). Guarantees regarding court processes are contained in Articles 8, 9, 14, 24–26, 29, 42. *Id.* at 215–23. The right of an early-form participatory democracy is limited to barons counter-signing the Charter throughout, but appears especially in Article 49. *See id.* at 225–27. These rights appear in their most direct form in

"liberties,"[44] at this historical moment, I will refer to these five activities as the "personal rights" for the remainder of this Article. I do so to emphasize their connection between the things to which a legal "person" or "citizen" is entitled in the eyes of the Anglo-American legal system, as compared to someone who is not considered a full person by that system.[45]

Further, there is clearly a relationship between enjoyment of the "personal rights" and "estates" in land.[46] The lord enjoys a "dominant estate" over all of his tenants; he could demand that certain "servitudes"[47] (some of which implicated personal rights other than just labor)[48] be performed for him by those who held estates adjacent, but inferior, to his own.[49] Those in the "dominant estate" could "enter" the personal rights of those in the "servient estate" in much the same way

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the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

44. The term "liberties" (*libertatibus*) is used frequently in contemporaneous documents to describe these and other activities. For example, citizens' activities are frequently referred to as "liberties" in their chartering documents. BRITISH BOROUGH CHARTERS, *supra* note 19, at 5 ("These aforesaid customs I grant to them, and all other liberties and free customs which they had in the time of King Henry my grandfather, when they best and most freely had the same.") (citing an 1155 charter from Henry II to London).

45. The term "personal rights" is also heuristic in that it indicates how deeply concepts of rights are entrenched in our culture. This term could also be properly thought of as "things free people do."

46. Many authorities are careful to point out that legal "status" and possession of a "tenure" are not equivalent. *See, e.g.*, 2 BRACTON, *supra* note 15, at 85 (footnote omitted) ("For it is one thing to hold by free service and a very different thing to hold freely, for though he holds by free service he does not on that account hold freely, because a tenement given to a villein to hold by free service does not make the villein free any more than a villeinage makes a free man a villein if he holds by villein customs, for a tenement neither adds to nor detracts from personal status . . . ."); 1 GLANVILLE, *supra* note 17, at 83 n.2 (including translator's comment on the term "Villenagium, which is used by that Author [Littleton] synonymously with Servitude, and in opposition to freedom, as a state, not a tenure."). *But see* VINOGRADOFF, *supra* note 31, at 45 n.1 (discussing Frederick Pollock's distinction between status and tenure but attempting to unravel the way they were "confused in the terminology of the Common Law"). Nevertheless, "in the middle ages liberty and property are closely connected ideas." 1 SELECT PLEAS IN MANORIAL AND OTHER SEIGNORIAL COURTS, *supra* note 28, at xx. The point Beames, Pollock, Maitland, and Vinogradoff are making is that tenure and status are not always identical. This does not mean that certain rights or services were not directly associated with possession of land.

47. *See* 1 SELECT PLEAS IN MANORIAL AND OTHER SEIGNORIAL COURTS, *supra* note 28, at 101–04 (detailing the various services demanded by an abbot against villagers).

48. *See id.* at 103–04 ("[A]lso for every pig of theirs which is a year old or more they shall give one penny and for a pig half a year old a halfpenny albeit they be fed with grain . . . .").

49. *See* 3 THE EARLIEST ENGLISH LAW REPORTS, *supra* note 40, at 25–26 (reporting lord's demand for services through writ of naifty by virtue of servant's possession of "servile land").

they might take water from a stream, remove minerals from the soil, or walk across a road on another's property. The case of *William Edrich v. Abbot of Halesowen and Others* provides a useful example. There,

> William of C. complains that the abbot of Halesowen and three of his monks had come with force and arms on such a day and year to such a place and broken into his house and taken his chattels to the value of forty shillings and carried them away and imprisoned him wrongfully etc. *The abbot* said that he was not entitled to an answer because he was his villein.[50]

We observe, first, that the abbot is able to remove William of C. from seisin of three of the activities mentioned above—travel, ownership of property, and bodily autonomy—without any legal process whatsoever. He simply gathers a posse and puts him in chains. While this right of "recaption" for lords was recognized by law,[51] at least as of Henry II, the English Crown provided a process allowing a lord to purchase a writ commanding the King's sheriff to take possession of a servant's body.[52] The treatise now commonly known as "Glanville" provides the first rules of civil procedure for this claim:

> The King to the Sheriff, Health. I command you, that justly and without delay, you cause *M.* to have *R.* his Villein-born and fugitive, with all his Chattels, and with his whole issue, wheresoever he is found in your Bailiwick, unless the fugitive be in my Demesne, after my first Coronation. And I prohibit, least any one unjustly detain him under forfeiture, &c. Witness &c.[53]

Of course, the existence of an explicit writ or cause of action to repossess the body of a fugitive servant gives some indication of where the King stood in the dispute over labor in twelfth-century England. The writ itself does not contemplate any procedures other than the seizure of a laborer, his property, his family, and delivery of these to the requesting

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50. 4 THE EARLIEST ENGLISH LAW REPORTS 566 (Paul A. Brand ed., 123 Selden Soc'y 2007).

51. The lord was permitted to engage in self-help to retrieve a villein if the escape had occurred recently. *See* 2 BRACTON, *supra* note 15, at 36 (describing how servants are under the *potestas* (power) of their lord (*dominorum*) so long as they "dwell in the villein tenement" and that "a lord always retains the ownership of his bondsmen until he loses it by negligence or by violent and unlawful resistance which he who pursues cannot overcome"); *see also* 1 SELECT PLEAS IN MANORIAL AND OTHER SEIGNORIAL COURTS, *supra* note 28, at xlviii, liv, 16 (referencing pursuit of villein without sheriff's writ).

52. *See* 1 GLANVILLE, *supra* note 17, at 237–38.

53. *Id.*

party. It does not require any affirmative proof. The writ does, however, recognize an affirmative defense. If the serf had both lived "on the [King's] demesne" and left his lord's land after Henry II's coronation, the lord would have no right to recovery.[54] That person would, instead, become the servant of the King.[55] The King's promise of freedom from the harassment of a demesne lord in this context is not entirely altruistic; he simply offered fugitives escape to his own demesne to increase the amount of labor power at his disposal and reduce that of his rivals.[56]

Henry II, however, specifically permitted the servant to put his freedom on trial. The writ *de libertate probanda*[57] contemplates a form of removal jurisdiction for any dispute that concerned the issue of freedom:[58]

> The King to the Sheriff, Health. *R.* complains to me that *N.* draws him to Villenage, although he is a free-man, as he says. And, therefore, I command you that, if the said *R.* make you secure of prosecuting his claim, then, that you put the suit before me, or my Justices, on such a day; and, in the mean time, you cause that he be in peace; and summon, by good Summoners, the aforesaid *N.* that he be then there to shew why, he unjustly draws him to Villenage. And have there, &c.[59]

This writ calls for only a few additional procedures to the previous writ *de nativus*.[60] Initially, the alleged serf must provide "security" in order to trigger the writ's protections.[61] After providing security, the case

54. 3 HENRY OF BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 85 (Samuel E. Thorne trans., 1977) (identifying as one of the grounds for disproving an accusation of servility "because [the fugitive serfs] have been resident in some privileged city or vill or on the demesne of the lord king for a year and a day without claim").

55. Alsford, *supra* note 16 ("Britton's restatement of the concept further develops the focus on royal jurisdiction by identifying the applicable liberating territories as royal demesne and royal towns or cities, adding (perhaps in reflection of court practice) that residence for the specified period required evidential support, and also making the interesting declaration, in the king's voice, that this privilege 'was heretofore granted to us by common allowance for our profit and for improvement of our towns'.").

56. *See* BERMAN, *supra* note 14, at 439 (noting that "[t]he introduction of a system of royal law into England was in part a means of" strengthening royal power and reducing the power of "barons and ecclesiastics").

57. Meaning "of proving liberty."

58. The kings required that issues of freedom must be tried in their courts only. 2 BRACTON, *supra* note 15, at 301; *see also* Henry of Berrington v. Geoffrey of Bowsden, *reprinted in* 3 THE EARLIEST ENGLISH LAW REPORTS, *supra* note 40, at 6.

59. 1 GLANVILLE, *supra* note 17, at 84–85.

60. Meaning, "of a native-born."

61. 1 GLANVILLE, *supra* note 17, at 84 ("[I]f the Villein allege himself to be a free-man, and give security to the Sheriff to prove the fact . . . the suit may be removed before the

was transferred to the King's court and the lord claiming lost service was summoned to that session.[62] Finally, and perhaps most importantly, the sheriff was to provide "peace" from the lord's harassment, which meant removal of the serf's body from the lord's possession or a prohibition from the lord asserting possession over it.[63] The physical body of the laborer and autonomy over it was the critical point of conflict in these disputes, and the assertion of "the king's peace" was a desirable benefit to those seeking to prove their freedom. The "king's peace," incidentally, also provided a monopoly on the legitimate reclamation of fugitive laborers while simultaneously fulfilling his rhetorical posture as a defender of the poor.[64]

Because testimony of witnesses of the alleged servant's condition was central to the trial,[65] the ability to secure these witnesses' appearance in court was incredibly important.[66] The landlord controlled the bodies of other servants and could compel them to attend court sessions with

Justices of the King's Court . . . ."). Security in medieval courts was not a monetary bond but the provision of "pledges" who would swear that the party would appear in court when scheduled or pay a monetary penalty (an "amercement") if the party did not show. *See id.* at 195, 202–03.

62. *See id.* at 86.

63. Joseph Wright, *On Slavery, as It Existed in England During the Saxon Era, and the Substitution of Villenage After the Norman Conquest, Until Its Gradual Extinction*, 10 HIST. SOC'Y LANCASHIRE & CHESHIRE 207, 220 (1858); *e.g.*, 1 GLANVILLE, *supra* note 17, at 84–87. For an example of royal punishment of a feudal lord disobeying the King's peace by seizing a worker and his property after issuance of a writ *de libertate probanda*, see PLEAS BEFORE THE KING OR HIS JUSTICES 1198–1212, at 153–54 (Doris Mary Stenton ed., 83 Selden Soc'y 1967); *see also* 1 GLANVILLE, *supra* note 17, at 84–87. Glanville describes the process as placing the worker "in *Seisin* of his freedom." 1 GLANVILLE, *supra* note 17, at 85 (emphasis added).

64. *See* 1 GLANVILLE, *supra* note 17, at xxxvi–vii ("How justly—how discreetly—and how mercifully—he, who loves Peace and is the Author of it, has conducted himself towards his subjects in the time of Peace, is evident, since the Court of his Highness is regulated with so strict a regard to Equity, that none of the Judges have so hardened a front, or so rash a presumption, as to dare to deviate, however slightly, from the path of Justice, or to utter a sentence, in any measure contrary to the truth. For there, indeed, the power of his adversary oppresses not the poor Man, nor does either the favor or credit of another's Friends, drive any person from the seat of Judgment.").

65. *See id.* at 85–86. Glanville provides that each party is to call witnesses of their "nearest relations and kindred" to testify on their own legal status and therefore the status of the laborer, which was considered to be hereditary. *See id.* at 86.

66. *See id.* at 87. In the event that there was doubt about the testimony, the free status of the witnesses (and therefore of the alleged servant) was to be determined by an assize, which was a self-directed group of factfinders and the precursor of the modern jury. *See id.* at xvi, 86–87. For an example of how a medieval jury determined an individual's free status, see Abbot of Crowland v. Richard of Thrupp of Wellingborough, *reprinted in* 3 THE EARLIEST ENGLISH LAW REPORTS, *supra* note 40, at 289–90.

him.[67] Conversely, without the writ's removal of the alleged servant's body from the lord's possession, the defendant's ability to gather relatives and inform them of the impending court date would be quite difficult, if not impossible.[68]

In sum, while the lord is entitled to reclamation of a servant's body upon purchase of a writ, the alleged servant is entitled to freedom upon purchase of a writ, provision of security, and proof by presentation of witnesses at trial. The comparison shows how people with access to more of the first three personal rights (work, property, self-defense) tend to have greater access to the personal right to petition as well. In this way, procedures for civil dispute resolution have both a generative and a reflective component to the social relations of those who use them. They are generative, in that they generate expectations of conduct around the particular things that free people do and give them the shape for us to understand them as "rights"; and they are reflective, in that access to them, at least in the Anglo-American context, tends to reflect the degree a person has been successful in the activities underlying "rights." If procedures shape the way people engage in these things, they also have a role in people's success with them. Changes in procedure, therefore, may change both the way people engage in the activities associated with freedom and their success in continuing that engagement when it is challenged.

For example, a servant who had recently escaped the lord's manor may not have had cash available to purchase residence in a city because a lord could repossess the servant's property at will. Nor is it likely that a fugitive servant would be able to find a neighbor citizen willing to serve as guarantor and pay a fine in the event of a non-appearance, because their inability to travel and work freely would have hampered their ability to create relationships with citizens. Indeed, most fugitives would probably have been required to leave after a few nights given most towns' prohibition on providing shelter to strangers. To be sure, each of these disadvantages were grounded in unfavorable substantive law that was not favorable to fugitive serfs, but the procedural law available to them also foreclosed relief. Rather simply, if the Crown had wanted servants to emigrate to cities en masse, it could have provided the King's peace to the purchaser of a writ *de libertate probanda* for a year and a day—the

67. *See* Charles Sumner Lobingier, *Rise and Fall of Feudal Law*, 18 CORNELL L.Q. 192, 221–22 (1933) (describing medieval English feudal lords' generally expansive powers over unfree individuals within their control).

68. *See* 1 GLANVILLE, *supra* note 17, at 85–86 ("[T]he party who claims his liberty, shall produce a number of his nearest relations and kindred, springing from the same stock from which he descended.").

time required to grant fugitives immunity under a city's jurisdiction. The landlords, whose power the Crown needed, would not have looked favorably on such a rule. In Anglo-American civil procedure, a bias towards individuals with more property, power over labor, personal autonomy, and legislative influence seems to have been present from the beginning.

B. Rule-Making and the Dominant Estate

Although a comparison between the procedural rights granted in the two writs *de nativus* and *de libertate probanda* shows a bias towards feudal landholders, a closer examination of the case of *William of C.* illustrates how Henry II implemented legal procedures to consolidate his position at the top of a feudal hierarchy of personal rights.

In arguing the abbot's case to the King's judge, the serjeant,[69] advocating for the abbot, separated William's claim into three distinct allegations.[70] First, the serjeant stated that William is not entitled to a response in court to his claim of theft of chattel because William is the abbot's villein.[71] Secondly, Howard argued that William was "disobedient in performing [the abbot's request for] villein services," and the abbot therefore "put you in the stocks as [sic] we are allowed etc."[72] In other words, the abbot is not bound to respect William's separate property, and the abbot can demand William's work and imprison him if he disobeys.

Although he argues that the imprisonment was not wrongful, the abbot's serjeant acknowledges that it is a "royal matter" that could amount to a breach of the King's peace if William were in fact not a villein.[73] When William declares that he is ready to prosecute a case against the abbot because he is "of free condition,"[74] the abbot responds

69. The parties in this case were most likely speaking through "serjeants," the original form of attorneys approved for court argument by a professional body. For more information, see 4 THE EARLIEST ENGLISH LAW REPORTS, *supra* note 50, at xli. *See also* INTRODUCTION TO THE CURIA REGIS ROLLS, 1199–1230 A.D., at 423 (C. T. Flower ed., 62 Selden Soc'y 1944) (describing some repeated references to names of particular attorneys circulating the King's Courts).

70. *See* William of Edrich v. Abbot of Halesowen and Others, *reprinted in* 4 THE EARLIEST ENGLISH LAW REPORTS, *supra* note 50, at 564–67.

71. *Id.* at 566. This is an expression of the "exception of villeinage." *Id.* The remaining quotations in this paragraph and the next are derived from this case.

72. *Id.*

73. *Id.*

74. *Id.* In this respect, we might note a separate (e)state, that of freedom, or liberty, as compared to the "servient" and "dominant" estate. William is neither servant nor lord, but claims his condition entitles him to sue the lord for trespass, a right not available to servants. Although the fact that the cause of action is recorded as a "trespass" is most

that William's status as a villein is already determined; since he previously brought a writ *libertate probanda* and lost, the issue is precluded.[75] After attempting to make a distinction between the type of status determined in the previous proceeding, the serjeant speaking for William states that he is ready to try the issue of whether the abbot breached the King's peace when he put William in stocks.[76]

This final issue—that of the "King's peace"—illustrates the way in which the King's jurisdiction (or the personal right to invoke court proceedings) and military power (or the personal right to self-defense) triumphs over the lord's in much the same way the lord's triumphs over a servant;[77] the servant may be assaulted and imprisoned by his lord, who is immune from the servant's legal complaint by exception of villeinage,[78] while the King has the right to punish the abbot for transgressing the King's monopoly on legitimate violence.[79] Although a lord could petition the King's sheriff to retrieve a fugitive laborer, he could not retrieve the fugitive himself if it required a kidnapping.[80] By assuming exclusive jurisdiction over the bodies of fugitive laborers, the Crown positioned itself in the middle of disputes over land and labor in an ongoing economic and political struggle in the transition from feudalism to capitalism.[81] Henry II either gained a citizen who would

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probably related to the fact that the abbot has entered William's home, the abbot has also "trespassed" on a number of William's personal rights, as mentioned above.

75. *See id.* at 567.

76. *Id.*

77. *See* Alsford, *supra* note 16.

78. Lobingier, *supra* note 67, at 221–22.

79. *See* Alsford, *supra* note 16. The King's "estate" in the personal right of self-defense, of course, includes the right to exact capital punishment.

80. Alsford, *supra* note 16; *accord* Prigg v. Com. of Pennsylvania, 41 U.S. 539, 571–73 (1842) (showing an equivalent rule within Justice Story's holding).

81. *See* Alsford, *supra* note 16 (arguing that the Crown stood to benefit from fugitive serfs acquiring citizen status in cities because "spreading freedom, or allowing those claiming to be free to transfer their cases before [the Crown's] courts, would prospectively increase royal revenues from legal administration"). John Norton Pomeroy noted the connection between the evolution of the common law and the transition away from feudalism in his early-twentieth-century treatise on equity:

> The local folk courts left in existence at the conquest, and even the itinerant justices and the central King's Court, for a while continued to administer a law which was largely customary. The progress of society, the increase in importance of property rights, the artificial system which we call feudalism, with its mass of arbitrary rules and usages, all demanded and rapidly produced a more complete, certain, and authoritative jurisprudence for the whole realm . . . . [T]his initial activity in creating the common law of England, was done, not by parliamentary legislation nor by royal decrees, but by the justices in their decisions of civil and criminal causes.

1 JOHN NORTON POMEROY, JR., A TREATISE ON EQUITY JURISPRUDENCE 16 (4th ed. 1918). The precise conditions for this transition have been subject to considerable debate. For one

contribute to taxes and the increase of commerce and trade, or he gained the supplication of his feudal rivals in his court.[82] And, of course, he collected a fee from both parties in the process.[83]

C. Religious and Cultural Elements of Civil Procedure

Henry II's accumulation of judicial power was not unique in twelfth-century Western Europe. Courts across the continent drew on biblical and papal authority to divine a more rigorous process God required before a ruler could pass judgment on the faithful.[84] Beginning in the mid-1100s, judgments were believed to be outside of divine law if they were issued outside the so-called *ordo iudiciarus*.[85] Ultimately, this "judicial order" was derived from the sequence of events forming the story of Adam and Eve's expulsion from the Garden of Eden.[86] Under this

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of the more contentious positions, see Robert Brenner, *The Origins of Capitalist Development: A Critique of Neo-Smithian Marxism*, 104 NEW LEFT REV. 25, 48 (1977). *See generally* ALEXANDER ANIEVAS & KEREM NIŞANCIOĞLU, HOW THE WEST CAME TO RULE: THE GEOPOLITICAL ORIGINS OF CAPITALISM (2015) (providing a more recent analysis of this transition).

82. *See e.g.*, 1 GLANVILLE, *supra* note 17, at xv ("By a free use of writs running from the King or his Justiciar, he limited the jurisdiction of all other courts, and subordinated them to the King's Court. By a regular system of removal from lord to county, and from county to King, he secured the gradual unification of the law.").

83. *See* Russell Fowler, *Henry II: Father of the Common Law*, TENN. BAR ASS'N: TBA L. BLOG (Jan. 1, 2017), https://www.tba.org/index.cfm?pg=LawBlog&blAction=showEntry&blogEntry=26853 (noting that King Henry II of England expanded access to civil jury trials in royal courts and charged "a small, standard fee to his chancery").

84. The courts of the Catholic Church were first, and their efforts can be traced at least to a letter from Bulgarus, professor at the University of Bologna, to Haimeric, a chancellor at the Papal Court. *See* BRUCE BRASINGTON, ORDER IN THE COURT: MEDIEVAL PROCEDURAL TREATISES IN TRANSLATION 82–103 (2016) (reprinting Bulgarus's letter describing the proper procedure in resolving a dispute between the Pope and an abbot). The multiple treatises exclusively covering legal procedure in church courts have been chronicled by LINDA FOWLER-MAGERL, ORDO IUDICIORUM VEL ORDO IUDICIARIUS (1984), although Fowler-Magerl's work has unfortunately not yet been translated into English. Jeremy Bentham, then, was by no means the first scholar to observe a difference between substantive and procedural law, although he reinvigorated an interest in it in the nineteenth century.

85. KENNETH PENNINGTON, THE PRINCE AND THE LAW, 1200–1600: SOVEREIGNTY AND RIGHTS IN THE WESTERN LEGAL TRADITION 139–47 (1993) (discussing the limited conditions when a judge could issue a ruling without the presence of a defendant).

86. Professor Pennington attributes this theory to the canonists Paucapalea and Stephen of Tournai. *Id.* at 142–43. Paucapalea "noted that the *ordo iudiciarius* originated in paradise when Adam pleaded innocent to the Lord's accusation. He complained to God that: 'My wife, whom You gave to me, gave [the apple] to me, and I ate it.' . . . . [E]ven though God is omniscient, he too must summon defendants and hear their pleas." *Id.* Stephen of Tournai pointed out that "Adam raised, as it were, a formal objection (exceptio),

allegorical structure, there were certain minimum requirements of a proper judicial procedure:

> The defendant shall be summoned before his own judge and be legitimately called by three edicts or one peremptory edict. He must be permitted to have legitimate delays. The accusation must be formally presented in writing. Legitimate witnesses must be produced. A decision may be rendered only after someone has been convicted or confessed. The decision must be in writing.[87]

Although the English writ, or common law, procedure was explicitly not the *ordo*, this does not mean that the English jurists did not draw on it and invoke the direct authority of God in rendering judgment.[88] Jurisdiction, the right to hold court, the right to collect fees and fines, and the right to render "mercy"[89] to litigants, quickly came to be regarded as the highest "liberty" that an individual could occupy.[90] The act of dispensing supreme justice, however, was inalienable,[91] and considered

to the Lord God's complaint (actio) and shifted the blame on his wife or the serpent." *Id.* at 143.

87. *Id.*

88. *See, e.g.*, 2 BRACTON, *supra* note 15, at 20 (footnote omitted) ("The utility [of this work] is that it ennobles apprentices and doubles their honours and profits and enables them to rule in the realm and sit in the royal chamber, on the very seat of the king, on the throne of God, so to speak, judging tribes and nations, plaintiffs and defendants, in lordly order . . . ."). The English chancery courts later adopted rules derived from the ecclesiastical courts for their proceedings in equity. Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 FORDHAM L. REV. 23, 34–35 (1951); R. H. Helmholz, *Local Ecclesiastical Courts in England*, *in* THE HISTORY OF COURTS AND PROCEDURE IN MEDIEVAL CANON LAW 344, 345 (Wilfried Hartman & Kenneth Pennington eds., 2016). For a brief comparison of the common law and ecclesiastical procedures at this time, see VAN CAENEGEM, *supra* note 12, at 375.

89. 32 BERTHA HAVEN PUTNAM, THE ENFORCEMENT OF THE STATUTES OF LABOURERS DURING THE FIRST DECADE AFTER THE BLACK DEATH 1349–1359, at 85 (1908). Monetary judgments against parties in favor of the court during this period in English history were called "amercements," referencing the King's mercy in providing a payment that presumably saved the litigant from a *harsher* judgment. *See id.*

90. *See e.g.*, 1 THE EYRE OF LONDON lxxiii (Helen M. Cam ed., 85 Selden Soc'y 1968) (describing the types of "liberties" a member of the nobility might claim, including "gallows, infangthief [trying and hanging thieves], and hundred court"). Liberties and franchises, also, were property that could be alienated by the King. The boundaries of these donations could later be tested with the *quo warranto* procedure, available exclusively to the King. The Eyre of London was largely a set of *quo warranto* actions by the King against the nobles of London seeking to reclaim various "liberties" of court or taxation that a predecessor had granted to them. *Id.* at xvi.

91. 2 BRACTON, *supra* note 15, at 167 (stating that liberties connected with "jurisdiction and the peace" belong to "no one save the crown alone and the royal dignity, nor can they be separated from the crown, since they constitute the crown").

not only the sovereign's highest duty to his subjects, but also his greatest prerogative.[92] As it gradually replaced the older forms of trial by ordeal and battle, this new method of civil procedure based on trial by evidence and witness testimony formed the kernel of the emerging Western administrative state.[93] Not only did the rulings generated by this system have the force of law and the support of a royal military presence, they were viewed as an exercise of divine will on Earth.[94] If done properly, the judgment was not only the King's, but God's as well.[95]

The King's strategy in the dispute over free and forced labor illustrates how enjoyment of the "free" and "dominant" positions within the personal rights—specifically work, property, self-defense—were becoming less dependent on raw military force and more on the invocation of judicial process.[96] From the very institution of the common law procedures, however, a reliance on an elite and learned class of professionals to manage highly complicated performances emerged that was most likely detrimental to the protection of rights among the lower class.[97] Going further, these proceedings were conducted in either Latin

92. 1 GLANVILLE, *supra* note 17, at 203; PENNINGTON, *supra* note 85, at 1–4.

93. George L. Haskins, *Executive Justice and the Rule of Law: Some Reflections on Thirteenth-Century England*, 30 SPECULUM 529, 534 (1955); *see also id.* at 536 n.61 ("Long ago Maitland remarked that 'The rule of law was the rule of writs.'"); *see also* BERMAN, *supra* note 14, at 292 ("The idea of the secular state . . . and the reality of the secular state . . . were in essence the idea and the reality of a state ruled by law . . . .") (describing the formation of competing jurisdictions in Western Europe that were each called to rule *by* law and *under* law pursuant to emerging doctrines of natural law).

94. *See* PENNINGTON, *supra* note 85, at 132–64 (discussing the role of natural law and judicial process in the eleventh and twelfth centuries).

95. *Id.*

96. *See supra* note 81 and accompanying text (discussing the economic transition from feudalism to capitalism that was underway in medieval England around the same time as writs became more common in legal proceedings to determine an individual's status as a freeman).

97. The legal treatises describing these additional procedures were also not available to the lower class. *See* JAMES A. BRUNDAGE, THE MEDIEVAL ORIGINS OF THE LEGAL PROFESSION 271–73 (2008) (noting that the cost of legal textbooks at this time could be as much as a house, meaning that "only wealthy students could afford ready-made copies of the eight or nine volumes that comprised the basic texts of the civil and canon law . . . ."). If a litigant invoked the writ *de libertate probanda*, it was because they had personally witnessed it in court, because they had heard of it by word of mouth, or because the court serjeant knew of it and knew how to call upon its power.

or the "law French" for centuries,[98] both of which were completely foreign languages to the uneducated.[99]

As a rather dramatic divergence from what we have discussed so far, consider the practice of the tribal nations who originally occupied what is now the northwestern United States called "potlatch."[100] In it, an entire community gathers to receive gifts from specified individuals.[101] This activity is used to determine the next leader and to celebrate a marriage, as well as to resolve disputes over access to water.[102] In this procedure, the person who gives away the most valuable gifts will be given control over the disputed resource because they are seen as being most capable of caring for it.[103] Consider for a moment just how foreign a mode of formal dispute resolution based purely on the act of giving is to Western society.[104] Here, instead of expending resources on a "rational" process designed to obtain the government's written approval of rights to care for (or extract) water, you are asked to show your generosity to your community. Your community will deliberate and decide according to the

98. Examples of the actual language used in the King's courts during the fourteenth century, for instance, can be found in the records of the rolls of the Eyre of London during the reign of Edward II. *See, e.g.*, 2 BRACTON, *supra* note 15, at 20; 1 THE EYRE OF LONDON, *supra* note 90, at cxvi (noting that pleas of the Crown during the Eyre of London, like other Eyres, were "reported in a welter of Latin and French"); *see also* J.H. BAKER, MANUAL OF LAW FRENCH 1 (1990).

99. *See Languages Used in Medieval Documents*, UNIV. OF NOTTINGHAM, https://www.nottingham.ac.uk/manuscriptsandspecialcollections/researchguidance/medievaldocuments/languages.aspx (last visited Feb. 2, 2023). A poem composed in the thirteenth century illustrates what may have been the sentiment of many servants of the time: "What can a serf do unless serve, and his son? . . . He shall be a pure serf deprived of freedom. The law's judgment and the king's court prove this." Paul Freedman, *Peasant Resistance in Medieval Europe: Approaches to the Question of Peasant Resistance*, 18 FILOZOFSKI VESTNIK 179, 193–94 (1997) (formatting omitted). The restrictions surrounding language and learning also mirror the American colonial practice of prohibiting African slaves from learning how to read and write.

100. *See* Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1591–92 (2001).

101. D. Bruce Johnsen, *Customary Law, Scientific Knowledge, and Fisheries Management Among Northwest Coast Tribes*, 10 N.Y.U. ENV'T L.J. 1, 17–18 (2001).

102. *See id.*

103. *See id.* at 18–19; Bobroff, *supra* note 100, at 1591–92.

104. At the same time, however, we can acknowledge that gift-giving is used in the West to informally resolve disputes in a market economy: retail sellers frequently entice customers to drop routine complaints by giving away vouchers for additional services. *See* Vamsi K. Kanuri & Michelle Andrews, *The Unintended Consequence of Price-Based Service Recovery Incentives*, 83 J. MKTG. 57, 57 (2019). We should also recognize that the ability to contribute resources to the community is also a component of the bias we have identified in Anglo-American procedures. In both systems, there is a preference for individuals who can contribute to the community, although in the Anglo-American system that preference appears bureaucratic, while in the procedure described above the distribution of resources is decentralized.

level of your ability to give. Interestingly, this procedure is just as "rational" as a trial, and the community ultimately expresses a preference for individuals whom they believe can most appropriately manage its resources. The difference, of course, lies in the process. The way that communities practicing potlatch distribute resources is vastly different, and indeed anathema to Western conceptions of the personal rights.[105] What would our "right" to own private property, for instance, look like if we were first required to give it away in order to enforce it? It may be unsurprising that Western governments outlawed this tradition; participating in potlatch ceremonies became a criminal offense in the late nineteenth century.[106]

II. PERSONAL RIGHTS AND PROCESS IN CRISIS AND COLONIZATION

While the institution of serfdom began to recede in the fourteenth century[107] and English cities grew in population,[108] the growth of economic power in England was relatively confined within a small urban elite.[109] Because of the relatively few records of serfs successfully

105. *Compare* Johnsen, *supra* note 101, at 18–19, *with* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 569, 586 (1823) (ruling that the United States government could grant land ceded to it from state governments despite Native Americans maintaining claims to that land). The personal rights I have identified in this Part by no means provide a complete picture of our understanding of liberty today, as they do not include well-established standards that an individual should be able to practice whatever religion they choose, speak in derogation of the government, or express a political position without threat of punishment or interference, each of which could result in the death penalty before the eighteenth century. The understanding of "liberty" discussed here was a product of both what had been written into substantive law, but also by how those substantive laws could be navigated, evaded, or nullified through judicial procedure. The writ *de libertate probanda*, for instance, appears to have gone completely unused by fugitives escaping to the English cities because it put the cart before the horse. As illustrated by the case of John de Grimstede and general absence of other recorded successes, a serf could not prove residency without enjoying access to the personal rights, but could not access the personal rights unless they were already considered free. *See John de Grimstede v. Robert of Alwardbury*, *supra* note 16, at 117–18.

106. Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 101–02 (1993).

107. MARK BAILEY, THE DECLINE OF SERFDOM IN LATE MEDIEVAL ENGLAND: FROM BONDAGE TO FREEDOM 5 (2014).

108. *See* Alsford, *supra* note 16.

109. *See* GEORGE HUPPERT, EUROPE AFTER THE BLACK DEATH 14–16 (1998) ("No sharper contrast can be imagined than that which greeted travelers after a day's march through the countryside: When the high stone ramparts of the city became visible in the distance, a new world beckoned, a world so different from the rural society stretched out below as to invite astonishment and wonder . . . . Behind those enormous walls, built of expensive quarry stone, lived 10,000, 20,000, even 30,000 people who ate and dressed sumptuously without plowing or herding.").

obtaining their freedom through the writ *de libertate probanda* based on residence in a city for a year and a day, it is likely that the writ itself was not responsible for the increase in urban citizenship.[110]

Nevertheless, it appears that at least some number of fugitive serfs were able to achieve a measure of success as urban citizens.[111] As the towns grew, the political power of the urban elite grew with it, and two of the most prominent citizens of each city were called upon to serve as representatives at the earliest form of Parliament.[112] The activities of English urban citizens described in Part I soon became the basis upon which theories of "liberalism" were built, including its dependence on private property, individual liberty from forced labor, representative government, and a reliable method for the administration of justice.[113]

A. Seisin of Labor and Property After Serfdom

The established order was considerably shaken in the fourteenth century when the bubonic plague killed off as much as half of the population of Europe and caused a dramatic reduction in the availability of labor.[114] The demand for labor now considerably exceeded supply, and the employing class protested that laborers were charging exorbitant

110. *See* BERMAN, *supra* note 14, at 359–60 (identifying opportunities for economic and social mobility as motivations for migration to urban areas during eleventh- and twelfth-century Europe). That honor more likely belongs to the fact that lords were beginning to realize the relative profitability of allowing their serfs to purchase their freedom through "chevage" as the economy increasingly grew to depend on cash, and less on feudal services. *See id.* at 329–31 (describing the growing tendency for landlords to "substitute fixed cash payments for labor services and rents in kind").

111. *See* Alsford, *supra* note 16.

112. 1 ELWIN LAWRENCE PAGE, THE CONTRIBUTIONS OF THE LANDED MAN TO CIVIL LIBERTY 156–57 (1905).

113. 5 JOHN LOCKE, TWO TREATISES OF GOVERNMENT 107 (Rod Hay ed., rev. ed. 1823) ("But though this be *a state of liberty*, yet *it is not a state of licence* . . . . being all *equal and independent*, no one ought to harm another in his life, health, liberty or possessions . . . . [He may] not unless it be to do justice on an offender, take away or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another." (emphasis added)). These words were repeated quite closely in the American Declaration of Independence of 1776: "[T]hat all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . ." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). As previously acknowledged, this medieval form of "liberty" did not contemplate the forms of individual expression and freedom of conscience theorized by later founders of liberal thought such as John Stuart Mill. *See* discussion *supra* note 105.

114. *See* OLE J. BENEDICTOW, THE COMPLETE HISTORY OF THE BLACK DEATH 869–75 (2021).

rates.[115] These employers now found a voice in Parliament, which passed legislation requiring any individual to accept employment at an identical price to what they had been paid before the Black Plague.[116] This substantive right to labor at legislatively deflated prices was enforced through a procedure remarkably similar to proving a claim under the writ *de nativo habendo* after defense by the servant *de libertate probanda*:

> [A]nd if any man or woman, being thus sought after in service, will not do this, the fact being proven by two faithful men before the sheriffs or the bailiffs of our lord the king, or the constables of the town where this happens to be done,-straightway through them, or some one of them, he shall be taken and sent to the next jail, and there he shall remain in strict custody until he shall find surety for serving in the aforesaid form.[117]

Denying to serve in this fashion could be enforced either through indictment by an early form of grand jury or through private right of action.[118] In a period of significant economic upheaval, this procedural right granted an employer the ability to remove a laborer from seisin of the personal right to work and travel.[119] In addition, Parliament removed the sheriff's capacity to set the servant's body free pending trial, which was previously available under the writ *de libertate probanda*.[120] By imprisoning those who refused to submit their labor at the price demanded, the legal system also explicitly connected liberty, labor, and criminality for the first time.[121] Needless to say, this procedure was not popular with the working class.

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115. 32 PUTNAM, *supra* note 89, at 2–3 ("[T]heir main object was to secure an adequate supply of labourers at the rate of wages prevailing before the catastrophe . . . .").

116. *Id.* at 3 ("[T]hese enactments . . . constitute the first important attempt of the central authorities to apply to the country as a whole, uniform legislation on wages and prices,—matters that had been previously left to local control.").

117. *The Statute of Laborers; 1351*, YALE L. SCH., https://avalon.law.yale.edu/medieval/statlab.asp (last visited Feb. 2, 2023). Incidentally, this procedure closely hews to those implemented by the Fugitive Slave Act, discussed *infra* notes 193–95.

118. *The Statute of Laborers; 1351*, *supra* note 117.

119. The procedure for indictment on oath of the assize is thoroughly detailed in 32 PUTNAM, *supra* note 89, at 66–71.

120. Treason Act of 1351, 25 Edw. 3 Stat. 5 c. 2.

121. The parallels to the Thirteenth Amendment and Michelle Alexander's groundbreaking THE NEW JIM CROW are evident. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev. ed. 2012). There is much to consider in this connection, including the fact that the Statute of Labourers is often considered the common law's first attempt to regulate poverty and is the origin of the

Many historians have connected the increasingly frequent peasant revolts of the fourteenth and fifteenth centuries to both the Black Death and to the nobility's response to it.[122] It is evident, however, that the English Peasants' Revolt of 1381 was primarily concerned with the growing class divide between laborer and "gentleman."[123] Across Europe, as in England, groups of peasants led by charismatic and often religious leaders began to attack the manors of the landed nobility, often specifically seeking to destroy the court documents evidencing their subordination.[124] Usually after a brief period of success, the rebellions were ruthlessly crushed and the principal cohort hanged for treason.[125] As rebellions driven by laboring peasants were turned back one by one, the kings and nobility gradually secured more power unto themselves by brutally repressing anyone associated with the rebellion, naturally through some semblance of a court proceeding.[126] As a result, the condition of European laborers during this time remained bleak, despite

English Poor Laws of the sixteenth century, all of which requires its own devoted analysis. *See*, *e.g.*, William P. Quigley, *Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Nonworking Poor*, 30 AKRON L. REV. 73, 82–93 (1996).

122. *See, e.g.*, M. M. KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 235 (1942) ("During the years of regency the war with France dragged on until the mounting financial levies, combined with other factors arising from the breakdown of the manorial system, produced the Peasants' Revolt in 1381. This uprising resulted in the capture of London and the mob murder of those whom the peasants considered their chief oppressors, ministers of the crown, taxgatherers, and lawyers." (citation omitted)).

123. The rhetorical theme for the 1381 Revolt was decidedly class oriented. *See* 2 EDWARD S. CREASY, HISTORY OF ENGLAND: FROM THE EARLIEST TO THE PRESENT TIME 285–86 (1870) (reprinting John Ball's lyric "When Adam delved [planted in the Earth] and Eve span [wove cloth], Where was then the gentleman?"); Freedman, *supra* note 99, at 192 ("The conjunction of expectations of improved negotiating positions for peasants and attempts of lords to preserve or reimpose servile dues and arbitrary lordship must be seen as the primary motor of revolt.").

124. Freedman, *supra* note 99, at 196 ("Not only were the rebels rather selective in what they destroyed . . . they also did not assume that all written records were tools of their subjugation."); John S. Beckerman, *Procedural Innovation and Institutional Change in Medieval English Manorial Courts*, 10 LAW & HIST. REV. 197, 250 (1992) ("[B]urnings of manorial muniments and the peasants' rampage in London against the legal establishment on June 13, 1381, demonstrate the resentment and anger with which many lawyers and their documents were regarded by many peasants.").

125. *See, e.g.*, 2 CREASY, *supra* note 123, at 292–93, 295 (After Wat Tyler, the initial leader of the 1381 Peasants' Revolt, was assassinated under trickery by men serving King Richard II, later leaders were "tried and convicted of treason in October. They were drawn, disembowelled and hanged . . . .").

126. *See id.* at 296 (describing the Bishop of Norwich's "smiting mercilessly every assemblage of the peasants, that he could discover . . . . After the battle, he assumed the functions of a judge; he solemnly tried his prisoners for treason, and sentenced them to death. He then returned to his clerical duties, and heard their confessions, and gave them absolution before they were executed.").

the fact that many of them were newly "free."[127] The condition of lower-class citizens, who likely found it difficult to produce the equity necessary to move beyond wage labor, settled into a state of stagnation.[128]

The economic condition of England immediately before colonialism was also affected by the English gentry's tendency to enclose their land to facilitate greater agricultural specialization in wool by virtue of both common law procedures[129] and the Enclosure Acts.[130] These procedural rights allowed manorial lords to divest the few servants and peasant farmers remaining on their land in the sixteenth century of seisin of whatever rights they may have had in possession of land.[131] This added to the number of newly "free" men and women living in England, but who now needed wage employment in order to survive.[132] Although the

127. Interestingly, some laborers used their "villeinage" as a basis to try to extract dues from their landlords, indicating that some individuals saw a benefit in villein status that "free" status did not contain. *See* 32 PUTNAM, *supra* note 89, at 95–96.

128. Indeed, contemporary observers would notice wide wealth disparities in European cities into the sixteenth century, as illustrated by this story:

> The mayor of the city of Bordeaux, writing around 1580, reports a conversation he claims to have had with an American Indian chief who had been brought to the French seaport city of Rouen. What struck him as most remarkable about European cities? the Indian chief was asked through an interpreter. Without hesitation, this visitor from another world is said to have replied that he was astounded by the contrast he observed in the streets of Rouen between fat, warmly dressed people on the one hand, and on the other, the mass of half-starved men and women wearing clothes that were not much better than rags. He could not understand, said the Indian, why the starving ones did not grab the fat ones by the throat.

HUPPERT, *supra* note 109, at 31.

129. *See, e.g.*, 2 SELECT CASES OF TRESPASS FROM THE KING'S COURTS 1307–1399, at 310–11 (Morris S. Arnold ed., 103 Selden Soc'y 1987) (examples of fourteenth-century writs contemplating enclosure of land); KNAPPEN, *supra* note 122, at 249–50; 2 CREASY, *supra* note 123, at 306 ("The increase of sheep-pasturage, the inclosure and appropriation, by the lords, of lands formerly commonable, and the extirpation of small peasant proprietors, were grievances practised by the great landowners on a gigantic scale during the reigns of the Tudor dynasty. But they had all begun earlier; and their origin may all be traced to the events in the domestic history of England [consisting of] . . . [t]he Black Death, [and] the labour-laws passed by the Parliaments of Edward III. and Richard II. . . . .").

130. *See* S.J. Thompson, *Parliamentary Enclosure, Property, Population, and the Decline of Classical Republicanism in Eighteenth-Century Britain*, 51 HIST. J. 621, 624 & n.9 (2008) ("The first enclosure act was passed in 1604, but it was not until after 1750 that the slow trickle of acts turned into a flood, the first surge occurring between 1755 and 1780, and the second coinciding with the outbreak of the French revolutionary wars in 1793.").

131. *See* KARL POLANYI, THE GREAT TRANSFORMATION 36–37 (2d ed. 2001).

132. *See id.* at 36–39. Writing on the early causes of the Industrial Revolution, Polanyi believed the constructive or degenerative nature of "progress" depended upon

> whether the dispossessed could adjust themselves to changed conditions without fatally damaging their substance, human and economic, physical and moral; whether they would find new employment in the fields of opportunity indirectly connected with the change; and whether the effects of increased imports induced

tendency of the Enclosure Acts to free up the use of otherwise unproductive land is often cited,[133] the legislation's economic impact on the poor has also been recognized in scholarship.[134] Despite the spread of freedom, life for much of the free remained peculiarly similar to a condition of servitude.[135] Recognition of two procedural vehicles to remove individuals from seisin of their enjoyment of labor and land contributed to the gradual transformation of the English economy, and this transition clearly favored the wealthy.

B. A Recipe for the Poor

We must consider England's most explosive period of growth—colonialism and the trans-Atlantic slave trade—within the context of this divergence in the quality of liberty between its citizens. As land and available resources began to shrink in England,[136] wealthy merchants and members of Parliament sought new opportunities to profit in new frontiers.[137] English merchants first obtained letters patent from the monarchy to explore and colonize the Americas in 1578.[138]

While the prospect of economic success for the working poor in England looked increasingly less likely,[139] they did not flock to the new colonies in any significant numbers.[140] In fact, there was very little

> by increased exports would enable those who lost their employment through the change to find new sources of sustenance.

Id. at 39.

133. *See, e.g.*, Robert C. Allen, *The Efficiency and Distributional Consequences of Eighteenth Century Enclosures*, 92 ECON. J. 937, 937–53 (1982); Leander Heldring et al., *The Economic Effects of the English Parliamentary Enclosures* 13 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29772, 2022).

134. MARC BLOCH, FRENCH RURAL HISTORY: AN ESSAY ON ITS BASIC CHARACTERISTICS 127–28 (Janet Sondheimer trans., 1970) (comparing deprivation of rights in land in England and France circa 1500). See also the seventeenth-century English folk poem, *The Goose and the Common*, UNION SONGS, https://unionsong.com/u765.html (last visited Feb. 2, 2023) ("The poor and wretched don't escape/If they conspire the law to break/This must be so but they endure/Those who conspire to make the law").

135. *See* Thompson, *supra* note 130, at 630–31.

136. *Id.* at 627.

137. *See* DANIEL K. RICHTER, BEFORE THE REVOLUTION: AMERICA'S ANCIENT PASTS 107 (2011).

138. *Letters Patent to Sir Humfrey Gylberte—1578*, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 49–53 (Francis Newton Thorpe ed., 1909) (granting Sir Gilbert "free libertie and licence . . . to discouer, , search, find out, and view such remote, heathen and barbarous lands, countries, and territories, not actually possessed of any Christian Prince, nor inhabited by Christian People . . . .").

139. Thompson, *supra* note 130, at 627.

140. *See* RICHTER, *supra* note 137, at 83–86.

interest in making a life-threatening journey across the Atlantic to live in a country without family, friends, church, or a life to speak of.[141] But the businessmen who had staked much on the colonial enterprise required more than just capital in order to ensure the success of their royally-chartered ventures: they needed labor.[142] One advocate articulated the opportunity to address these two problems with one policy in a letter to Queen Elizabeth:

> For all the statutes that hitherto can be devised, and the sharp execution of the same in punishing idle and lazy persons, for want of sufficient occasion of honest employments, cannot deliver our commonwealth from multitudes of loiterers and idle vagabonds . . . . [T]here are . . . so many, that they can hardly live one by another, nay rather they are ready to eat up one another . . . and often fall to pilfering and thieving and other lewdness, whereby all the prisons of the land are daily pestered and stuffed full of them, where either they pitifully pine away or else at length are miserably hanged, even 20 at a clap out of some jail . . . . And if it be highe pollicie to mayneteyne the poore people of this realme in worke, I dare affirme that if the poore people of England were five times so many as they be, yet all mighte be sett on worke in and by workinge lynnen, and suche other thinges of marchandize as the trade into the Indies dothe require.[143]

Following this prescription, the Virginia Company of London offered fifty acres of land to anyone who could secure the transport of immigrant laborers to the colony.[144] This "headright" system explicitly traded ownership of land—something previously exclusive for people of wealth and nobility—to people who were able to secure labor to work the new

141. *See id.* at 101 ("No one thought through exactly what the colonists would grow, why any ordinary English people would want to migrate, or how the Native people were to be convinced to supply the food and other resources necessary until the imported population became self-sustaining.").

142. *Id.* (providing the example of Elizabethan explorer Humphrey Gilbert who had hoped to build "a massive North American estate where agricultural colonists would enrich him with their varied rents and feudal dues").

143. Richard Hakluyt, *Discourse Concerning Western Planting*, *in* 2 DOCUMENTARY HISTORY OF THE STATE OF MAINE, COLLECTIONS OF THE MAINE HISTORICAL SOCIETY 1, 36–37, 160 (1877). In keeping with the connection between forced labor and criminality, the Crown also sent convict laborers to the colonies in significant numbers.

144. *See, e.g.*, Land Pattent, to Henry Palin & John Swingleton (1652), *in* 1 CALENDAR OF VIRGINIA STATE PAPERS AND OTHER MANUSCRIPTS, 1652–1781, at 1, 1–2 (Wm. P. Palmer ed., 1875) (letter in exchange for 300 acres in consideration of causing the immigration of six individuals).

plantations.[145] It also contained the hallmarks of the economic policy behind the grants of freedom to servants through residence in a city, and promised the acquisition of greater personal rights through membership and possession of property in a chartered community.[146] Although originally intended for subjects who paid their own way to the colonies as well as investors who secured immigrant indentured servants from the English population, the headright system was later expanded to provide fifty acres to any investor who provided for the emigration of African laborers to Virginia as well.[147]

The history of the English "indentured servants" who immigrated under these conditions is well told and documented.[148]But once the immigrant servant had performed their term of service, they were typically entitled to "freedom dues," which was usually a few barrels of corn and a set of clothes.[149] Indentured servants could also petition colonial government to convert unclaimed territory into their own private property recognized by law of the county courts.[150] Although this procedure was subject to manipulation by the upper classes,[151] the process of making citizens in the American colonies mirrored the practice of using liberty as an incentive to increase the political and economic power of elites chartering medieval cities.[152] It expanded the ranks of

145. *See* 1 NELL MARION NUGENT, CAVALIERS AND PIONEERS: ABSTRACTS OF VIRGINIA LAND PATENTS AND GRANTS 1623-1800, at xxiv (1934).

146. *See* Alsford, *supra* note 16 (discussing the doctrine that "town air makes free," through which servants could be granted freedom by setting roots within cities).

147. *See, e.g.*, 1 NUGENT, *supra* note 145, at 69 (The example land grant at issue provides thirty-three headrights to John Upton (1650 acres) for the emigration of various Africans, Englishmen, and possibly one tribe member ("Savage Merrie")).

148. *E.g.*, Penny Howard, *Bound to Serve: Indentured Servitude in Colonial Virginia, 1624-1776*, 1 CORINTHIAN 1, 3–5, 7–11 (1999) (examining the lives of indentured servants in colonial Virginia). The lives of these immigrants were by no means easy, and they too, were frequently subject to the legal maneuvering of the wealthy. *E.g.*, Mary Sarah Bilder, *The Struggle over Immigration: Indentured Servants, Slaves, and Articles of Commerce*, 61 MO. L. REV. 743, 761–90 (1996) (using colonial-era statutes to analyze the impact of indentured servants on commerce).

149. Bilder, *supra* note 148, at 759. If the indenture was for service in a skilled trade, the payout at the end of the term might include a set of tools. *See, e.g.*, *[15 September 1692] Petition of Indentured Servant Against His Treatment*, ARCHIVES OF MD. ONLINE, https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000535/html/am535--44.html (last visited Jan. 28, 2023) (providing a written petition by an indentured servant to a blacksmith held thirty-five days beyond his seven-year term allegedly for repayment of expenses).

150. *See* Abbot Emerson Smith, *The Indentured Servant and Land Speculation in Seventeenth Century Maryland*, 40 AM. HIST. REV. 467, 469 (1935).

151. *See id.* at 470 ("[I]t is evident that the system of freedom dues in land, like the headright system, degenerated into a means of speculation.").

152. *See* Alsford, *supra* note 16 ("But the changes stemming from the Conquest, once the initial period of national subjugation gave way to thoughts of exploitation, brought fresh

liberal citizens, the colonial territory, and immigrant laborers' personal rights—but at the expense of the country's original residents.[153] Indeed, many of America's Founding Fathers extolled the virtue of an agrarian democracy built on the ability and responsibility of individual (white) men to own property, work on it, and participate in the community decision-making of a democratic republic.[154]

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impetus because of the desire of the substituted landed elite to profit from its new-gotten estates. One way to do this was to set up towns on those estates, or to promote selected villages in advantageous locations (e.g. on communication and trade routes between established market centres) to borough status through grants of privileges such as those mentioned above . . . . Maybe we should see the rule as a tool to help deal with specific perceived situations, such as frontier protection and/or population displacement . . . .").

153. *See* 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 140–41 (James E. Thorold Rogers ed., 1869). Adam Smith described the effect of virtually cost-free land on the personal rights this way:

> Every colonist gets more land than he can possibly cultivate. He has no rent, and scarce any taxes to pay. No landlord shares with him in its produce, and the share of the sovereign is commonly but a trifle. He has every motive to render as great as possible a produce, which is thus to be almost entirely his own. But his land is commonly so extensive, that with all his own industry, and with all the industry of other people whom he can get to employ, he can seldom make it produce the tenth part of what it is capable of producing. He is eager, therefore, to collect labourers from all quarters, and to reward them with the most liberal wages. But those liberal wages, joined to the plenty and cheapness of land, soon make those labourers leave him in order to become landlords themselves, and to reward, with equal liberality, other labourers, who soon leave them for the same reason that they left their first master. The liberal reward of labour encourages marriage. The children, during the tender years of infancy, are well fed and properly taken care of, and when they are grown up, the value of their labour greatly overpays their maintenance. When arrived at maturity, the high price of labour and the low price of land enable them to establish themselves in the same manner as their fathers did before them.

Id. at 144–45.

154. For example, Thomas Jefferson famously went so far as to contrast the desirability of an agrarian economy to the skilled-labor economy that the immigrants left behind in Europe:

> While we have land to labour then, let us never wish to see our citizens occupied at a work-bench, or twirling a distaff . . . . [L]et our work-shops remain in Europe. It is better to carry provisions and materials to workmen there, than bring them to the provisions and materials, and with them their manners and principles. The loss by the transportation of commodities across the Atlantic will be made up in happiness and permanence of government. The mobs of great cities add just so much to the support of pure government, as sores do to the strength of the human body. It is the manners and spirit of a people which preserve a republic in vigour. A degeneracy in these is a canker which soon eats to the heart of its laws and constitution.

THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 165 (William Peden ed., 1982).

C. Liberty in Black and White: How Claims over Fugitives Led to the Articulation of Race in the Law

The inability of European immigrant labor to meet the demands of the tobacco, cotton, and sugar plantations of the American South complicated this vision.[155] Each of these crops required an immense amount of both manual labor and arable land in order to achieve reasonable profit.[156] While the southern colonies originally obtained African labor under similar terms as European immigrants—servants for a term of years—this equal treatment collapsed when African and European servants both began trying to escape from servitude.[157] In recording their separate punishment, the Virginia court recognized what is believed to be the first servant for life in America.[158] The colonial governments quickly instituted penalties providing for runaways to serve the time remaining on any service owed by their co-conspirators.[159] The result was a situation in which not only did African servants—and later their children[160]— become permanently subjugated by a legal condition of absolute oppression, but European indentured servants risked serving for life if they assisted the escape of an African servant.[161] In this early division of personal rights based on legal status driven by identity,

155. *See* TREVOR BURNARD, PLANTERS, MERCHANTS, AND SLAVES: PLANTATION SOCIETIES IN BRITISH AMERICA, 1650–1820, at 27–30 (2015) (suggesting that one of the primary occupations available for European immigrants was overseer of African slave labor).

156. SVEN BECKERT, EMPIRE OF COTTON: A GLOBAL HISTORY 103 (2014); *Regional Labor Experiences: Sugar and Tobacco*, LOWCOUNTRY DIGIT. HIST. INITIATIVE, https://ldhi.library.cofc.edu/exhibits/show/africanpassageslowcountryadapt/sectionii_introduction/sugar_and_tobacco (last visited Feb. 2, 2023) (noting the labor intensity of cultivating sugar and tobacco); *Pre-Civil War African-American Slavery*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/national-expansion-and-reform-1815-1880/pre-civil-war-african-american-slavery/ (last visited Feb. 2, 2023) (noting the labor intensity of cultivating cotton).

157. Ashton Wesley Welch, *Law and the Making of Slavery in Colonial Virginia*, 27 ETHNIC STUD. REV. 1, 3–4 (2004).

158. MINUTES OF THE COUNCIL AND GENERAL COURT OF COLONIAL VIRGINIA 1622-1632, 1670-1676, at 466 (H. R. McIlwaine ed., 1924) (sentencing African American indentured servant John Punch to "serve his said master or his assigns for the time of his natural Life here or elsewhere"); *Anthony Johnson, Indentured Servant Owner Born*, AFR. AM. REGISTRY, https://aaregistry.org/story/anthony-johnson-indenturd-servitude-owner-born/ (last visited Feb. 2, 2023) (noting that many historians consider Punch to be the first documented slave for life in American history).

159. English Running Away with Negroes Act (1661), *reprinted in* 2 WILLIAM WALLER 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, at 26 (1823).

160. *See infra* note 182 and accompanying text.

161. As an indicator of how powerful this tool was, I have been unable to discover any records of this punishment being executed against a European indentured servant.

European immigrants may have been drawn into the system of African oppression by coercive force, as opposed to the ideological appeal of an inherent European superiority.[162]

By replacing the system of indentured servitude limited for a term of between four and seven years with a system of lifelong slavery,[163] the basis and accessibility of wealth in colonies dependent on cash-crop agriculture relied on an individual's ability to purchase and maintain slave labor.[164] For colonists without the land or liquid capital to purchase slaves, the commercial market was particularly crowded.[165] For those able to purchase slaves, they gained seisin over the personal rights of each of them.[166] Masters held the power to (1) dictate how slaves worked and where they could go; (2) claim all property they possessed; and (3) subject them to whatever physical punishment they saw fit.[167] The slaveowners' substantive powers were recognized in procedural law, both formally and informally.[168]

162. This also complicates the commonly held belief that poor white Americans contribute to the subjugation of Black Americans because the ideology of racism or white supremacy is powerful enough to convince them to act against their own economic interest. It may be that the ideological appeal of Eurocentrism only took hold after a few centuries of government-sponsored oppression. Although not an issue of procedural rules, the way the colonial governments used disputes over interracial fugitives illustrates how courts use citizens' submissions to articulate rules of substantive law to be applied in the future. *See generally* Jeffrey Glossner, *Poor Whites in the Antebellum U.S. South (Topical Guide)*, HUMANS. & SOC. SCIS. ONLINE: H-SLAVERY (July 29, 2019), https://networks.h-net.org/node/11465/pages/4372893/poor-whites-antebellum-us-south-topical-guide.

163. *See* POLANYI, *supra* note 131, at 36–39.

164. *See* David Lyons, *Wealth Concentration, Racial Subordination, and Political Corruption*, 58 NOMOS 226, 226–27 (2017).

165. Observing this function of overcrowding centuries later in a different context, the economist John Commons observed "while liberty of access to markets on the part of an owner is essential to the exchange-value of property, too much liberty of access on the part of would-be competitors is destructive of that exchange-value." JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 17 (1924). This distinction was less pronounced in colonies where large-scale agriculture was less profitable. *See id.* at 52–53 ("Where production was isolated, or the owner held under his control all of the material things as well as the laborers necessary to the support of himself and dependents, the concept of exclusive holding for self was a workable definition of property.").

166. Johan Olsthoorn & Laurens van Apeldoorn, *'This Man Is My Property': Slavery and Political Absolutism in Locke and the Classical Social Contract Tradition*, 21 EUR. J. POL. THEORY 253, 261 (2020).

167. *See* 1 THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 83, at §86 (1858) ("Of the three great absolute rights guaranteed to every citizen by the common law, viz., the right of personal security, the right of personal liberty, and the right of private property, the slave, in a state of pure or absolute slavery, is totally deprived, being, as to life, liberty, and property, under the absolute and uncontrolled dominion of his master . . . .").

168. *E.g.*, Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864); *see also* Lyons, *supra* note 164, at 229. While slaveowners often used patrols and mercenaries to find

There were, however, "free" Africans living in colonial America.[169] Besides those who were granted "liberty" during the thirty years before the establishment of lifelong slavery, there were often situations in which slave masters found it beneficial to manumit their slaves.[170] Even before the Revolution, there was a significant population of free Africans in colonial America who frequently lived in cities.[171]

Although laws and regulations differed throughout the colonies, free Blacks were generally required to carry certificates verifying their freedom everywhere they went.[172] Because the vast majority of Blacks in America were still held in slavery, free Black people also risked the possibility of being kidnapped and sold as slaves.[173] This practice required free Blacks to live in the margins between person and property, the most significant division of rights within the liberal democratic vision.[174] While the colonial legal system always recognized a status for Africans as both persons and as property, the quality of personal rights for "free" Africans differed from Europeans rather dramatically.

This distinction—person or property—was raised early in the life of the colonies with a petition for freedom brought by Elizabeth Key

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fugitives, later cases report that colonists used the "hue and cry" procedure from medieval cities to invoke the power of the community to rights over human bondage. United States *ex rel.* Wheeler v. Williamson, 28 F. Cas. 686, 691 n.2, 695 (E.D. Pa. 1855) (noting that in the charter of Pennsylvania signed by William Penn there was "[a] practice analogous to the fugitive slave law of modern times seems to be referred to in the following minute, at page 147 of the same volume. '24th 5 mo., 1685. William Hague requests the secretary, that an hue and cry from East Jersey after a servant of Mr. John White's, a merchant at New York, might have some force and authority to pass this province and territories: The secretary indorsed it, and sealed it with ye seal of this province.'").

169. *See* Benjamin Joseph Klebaner, *American Manumission Laws and the Responsibility for Supporting Slaves*, 63 VA. MAG. HIST. & BIOGRAPHY 443, 443 (1955).

170. This may have been because they reached an age at which their labor was no longer profitable in comparison to the cost of taking care of them, or because their master had a change of heart concerning the humanity of slavery itself. *See id.* at 443–44.

171. Michael Taylor, *Free People of Color in Louisiana*, LA. STATE UNIV. LIBRS., https://lib.lsu.edu/sites/all/files/sc/fpoc/history.html (last visited Feb. 2, 2023).

172. *See, e.g.*, PHEBE R. JACOBSEN & MARYLAND STATE ARCHIVES, RESEARCHING AFRICAN AMERICAN FAMILIES AT THE MARYLAND STATE ARCHIVES 2–3 (2d ed. 2018), http://slavery.msa.maryland.gov/pdf/researching_african_american_families.pdf (describing a law passed by the Maryland legislature in 1805 requiring all free Black people to register at the county court, certifying by what means they had been freed).

173. A. Leon Higginbotham, Jr. & Greer C. Bosworth, *"Rather than the Free": Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17, 48 (1991). This practice was arguably made worse by the Fugitive Slave Acts, which federalized the procedure for recapturing Africans into a state of slavery.

174. *See* Paul Finkelman, *Slavery in the United States: Persons or Property?*, *in* THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY 105, 108–10 (Jean Allain ed., 2012).

Grinstead in about 1656.[175] As the daughter of an English planter and an African slave, her father baptized her as Christian and indentured her to serve another woman for nine years, which was probably intended to prevent her from being considered a slave.[176] Having first submitted her cause to a jury of colonists and winning, her victory was subsequently reversed by a court of appeal.[177] Grinstead appealed that decision directly to the Virginia colonial legislature,[178] who ordered their own investigation of the matter.[179]

The fact that Grinstead was able to obtain a jury trial and directly petition the legislature (which then also operated as the highest court) was partially indicative of the fact that colonial authorities recognized the importance of the issue and used the case to decide how to dispose of these sorts of claims in the future.[180] Grinstead won her claim in the House of Burgesses.[181] As a result, that body passed a new law providing that legal status, free or slave, followed that of one's mother.[182] This rule, of course, contributed to one of the most brutal practices associated with slavery. This tragic subject is better covered elsewhere.[183]

Another freedom petition brought more than 100 years later is useful for conceptualizing the benefit English governments obtained by permitting Africans to pursue their liberty in court in the first place. Again, the motivation goes beyond simple altruism. In 1772, four years before the American Revolution, the slave James Somerset was brought to England while in transit to the Caribbean.[184] While in England, an English lawyer sought a common law writ of habeas corpus before the Court of King's Bench to seek Somerset's liberation.[185]

175. Taunya Lovell Banks, *Dangerous Woman: Elizabeth Key's Freedom Suit – Subjecthood and Racialized Identity in Seventeenth Century Colonial Virginia*, 41 AKRON L. REV. 799, 810–11 (2008).

176. *Id.*

177. *Id.*

178. *Id.* If doubt remained about the connection between the urban municipal government structure and that of the English colonies, the colonial Virginia legislature was called "The House of Burgesses." *Id.* at 825.

179. *Id.* at 810–11.

180. *Id.* at 810–12.

181. *Id.* at 811.

182. *Id.* at 830–32 (explaining that a 1662 statue was enacted saying the status of the child follows the mother and thus "Elizabeth's case merely crystallized a growing concern about the status of *mulatto* children born of Englishmen and black or Indian women.").

183. For a more in-depth examination of the effects of substantive law providing that slave status follows that of one's mother, see DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 10–12 (1997).

184. Somerset v. Stewart (1772) 98 Eng. Rep. 499, 499 (KB).

185. *Id.*

Somerset's attorney attacked the legitimacy of slavery in England because there was no specific law permitting it.[186] Ultimately, in one of the more celebrated judicial decrees in Western history, Somerset's attorney argued that slavery could not survive within the "free air" of England.[187] Although sometimes misunderstood, this decision did not condemn the slave trade, but merely restated the widely accepted principle that while slavery was contradictory to natural law, it was permissible if a legislative body authorized it in positive law.[188]

The parallels to the serf's action *de libertate probanda* are immediate. Once a slave entered a "free" territory, or a serf lived in a "free" city for a year and a day, a court had the power to transubstantiate an individual from property to person.[189] Here, however, instead of a fugitive being required to prove participation in the market economy as a substantive condition for freedom, a court order could change an individual's status merely by the presence of their body in court. Why would an English or American court do this for an African slave?

On the immediate surface, the central government has an economic incentive discussed in Section I.A, above, that included the growth of trade induced by free labor and an increase in the productive tax base. But there was also a distinct rhetorical and possibly spiritual appeal that the English and later American governments drew from the premise that they were "the land of the free." Liberty and the supremacy of the rational man had quickly taken hold in the intellectual circles of the eighteenth century.[190] By staking a claim that "liberty" was universal—a creature of

186. *Id.* at 500.

187. *Id.* at 500, 510. An understanding of the connection between the term "city air makes free" (or "*Stadtluft macht frei*" on the European continent) and the grants of freedom to fugitive serfs in medieval English cities discussed in Part I lends a new understanding to what Somerset's lawyer was appealing to when he made this argument. It is also likely that the founders had Mansfield's opinion in mind when they drafted the Fugitive Slave Clause of Article IV of the U.S. Constitution. *See, e.g.*, Earl M. Maltz, *Slavery, Federalism, and the Structure of the Constitution*, 36 AM. J. LEGAL HIST. 466, 474–75 (1992).

188. *Somerset*, 98 Eng. Rep. at 510. This understanding forms a significant part of Somerset's lawyer's argument. For a discussion of how European jurists justified laws that seemingly conflicted with natural law, which called for "the same liberty of all," see BRIAN TIERNEY, LIBERTY AND LAW: THE IDEA OF PERMISSIVE NATURAL LAW, 1100–1800, at 22, 24 (2014) (discussing how doctrines of "permissive natural law" gave jurists flexibility in harmonizing authority that permitted, but did not mandate, certain conduct, including possession of humans as slaves).

189. *See supra* Section I.B (addressing the mechanics of how *de libertate probanda* writs work).

190. For summaries of the trend, see Daniel Walker Howe, *Why the Scottish Enlightenment Was Useful to the Framers of the American Constitution*, 31 COMPAR. STUD. SOC'Y & HIST. 572 (1989); William A. Aniskovich, *In Defense of the Framers' Intent: Civic Virtue, the Bill of Rights, and the Framers' Science of Politics*, 75 VA. L. REV. 1311 (1989).

natural or divine law that had only to be *earned* by the "lesser" races—the proliferation of Anglo-American governments provided a cultural justification for the subjugation and oppression of minorities across the globe. They were, in fact, spreading "liberty," even if they had to subjugate non-Europeans in the process.[191] The Court of King's Bench may have struck a blow to Somerset's master, but it advanced a rhetorical argument for an English global empire.[192]

III. HABEAS CORPUS AND POSSESSING BODIES: THE CONSTITUTIONAL CONFLICT OVER FUGITIVE SLAVES

It is likely that the Somerset decision was in the Framers' minds when they drafted the United States Constitution's Fugitive Slave Clause fifteen years later.[193] The structure of the document as a whole indicates not only recognition of the doctrine by its drafters but also the remarkable balance struck between Yankee and slaveholding interests on the basis of procedure.[194] While the Constitution did not include any

191. JACK P. GREENE, EXCLUSIONARY EMPIRE: ENGLISH LIBERTY OVERSEAS, 1600–1900, at 10–11 (2009); *"The White Man's Burden": Kipling's Hymn to U.S. Imperialism*, HIST. MATTERS, https://historymatters.gmu.edu/d/5478/ (last visited Feb. 2, 2023) (quoting the poem "The White Man's Burden" by Rudyard Kipling (1899), which is often cited as an expression of this conflict) ("Take up the White Man's burden—/Send forth the best ye breed—/Go send your sons to exile/To serve your captives' need/To wait in heavy harness/On fluttered folk and wild—/Your new-caught, sullen peoples/Half devil and Half child"); GRETCHEN MURPHY, SHADOWING THE WHITE MAN'S BURDEN: U.S. IMPERIALISM AND THE PROBLEM OF THE COLOR LINE 30–31 (2010).

192. William Blackstone seized on this impulse as well. WILLIAM BLACKSTONE, COMMENTARIES 117, 123 (Dawsons of Pall Mall 1966) (1765) ("Very different from the modern constitutions of other states, on the continent of Europe, and from the genius of the imperial law; which in general are calculated to vest an arbitrary and despotic power of controlling the actions of the subject in the prince, or in a few grandees. And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very foil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and with regard to all natural rights becomes *eo instanti* a freeman." (citing Smith v. Gould (1706) 92 Eng. Rep. 338 (KB))).

193. U.S. CONST. art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII ("No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such Service or Labour, but shall be delivered up on claim of the party to whom such service or labour may be due."). The lack of requirements other than a simple "claim" are remarkably similar to the common law writ *de native habendo*, discussed *infra* Part I.

194. There is evidence that the drafters of the Constitution struck this balance in order to consolidate disparate political interests into one federal government, which would be better able to fend off attacks from the massive imperial powers of the time. THE FEDERALIST NO. 43, at 294 (James Madison) (Jacob E. Cooke ed., 1961) (noting possibility of slave revolt in discussing desirability of consolidated military power to quell domestic disturbance and foreign invasion).

positive law permitting slavery, it provided an explicit cause of action for recovery of a "Person held to Service or Labour" who had escaped from states that had such laws.[195] For "free" Africans in the United States, the ramifications of this cursory procedure were significant. Free Africans could be deprived of their liberty with a simple administrative procedure completely devoid of evidence.[196] This procedure was written directly into the U.S. Constitution, which was later assumed to be evidence of its importance to the foundation of our country.[197]

In 1793, the U.S. Congress passed the Fugitive Slave Act, which provided for judicial recovery upon either oral testimony or even a sworn affidavit.[198] In most instances the master need not even personally appear.[199] Given the significant bias towards slaveholders, the process was routinely abused and produced many instances of fraudulent enslavement.[200]

Under federal law, slaveowners solidified their dominant estate (sometimes derived from a plantation, but not always) over the personal rights of African slaves.[201] The slaveowner could enter each of the personal rights without obstacle.[202] Although he could not control their

195. U.S. CONST. art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII.

196. *Id.*; *see* Fugitive Slave Act of 1793, ch. 7, § 3, 1 Stat. 302 (repealed 1864).

197. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 540, 611 (1842) ("The full recognition of this right and title was indispensable to the security of this species of property, in all the slave-holding states; and indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted, that it constituted a fundamental article, without the adoption of which, the Union could not have been formed.").

198. Fugitive Slave Act § 3, 9 Stat. at 462 ("[T]he person to whom such labor or service may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labor, and to take him or her before any Judge of the Circuit or District Courts of the United States, residing or being within the State, or before any magistrate of a county, city, or town corporate, wherein such seizure or arrest shall be made, and upon proof to the satisfaction of such Judge or magistrate, either by oral testimony or affidavit taken before and certified by a magistrate of any such State or Territory, that the person so seized or arrested, doth, under the laws of the State or Territory from which he or she fled, owe service or labor to the person claiming him or her, it shall be the duty of such Judge or magistrate to give a certificate thereof to such claimant, his agent, or attorney, which shall be sufficient warrant for removing the said fugitive from labor to the State or Territory from which he or she fled.").

199. *Id.*

200. *See* SOLOMON NORTHUP, TWELVE YEARS A SLAVE 165 (1853). Northup is far from the only person caught in this web. *See* Marcia C. Robinson, *The Tragedy of Edward "Ned" Davis: Entrepreneurial Fraud in Maryland in the Wake of the 1850 Fugitive Slave Law*, 140 PA. MAG. HIST. & BIOGRAPHY 167, 173 (2016).

201. *See, e.g.*, JOHN RANKIN, LETTERS ON AMERICAN SLAVERY: ADDRESSED TO MR. THOMAS RANKIN, MERCHANT AT MIDDLEBROOK, AUGUSTA CO., VA 38 (1833), https://archive.org/details/lettersonamerica00rank_0/page/38/mode/2up.

202. *See id.*

votes, his share of representative democracy was increased by his ownership according to constitutional law.[203]

While some of the northern states had already taken steps to illegalize chattel slavery,[204] and many had an abolitionist presence nearly a 100 years old,[205] these states did not have climates suitable to the cash-crop agriculture of the South. Throughout the nation, however, chattel slavery presented a downward drag on the wages of free white labor that led to a distinct political movement.[206] The northern response to African slavery was not to fully enfranchise Africans into the liberal community,[207] and there was certainly no law providing for the freedom of any African who set foot on the soil of a northern state.[208] Instead, they were primarily concerned with preserving the market for free white labor.[209]

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203. U.S. CONST. art. I, § 2 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.").

204. *See Pennsylvania - an Act for the Gradual Abolition of Slavery, 1780*, YALE L. SCH., https://avalon.law.yale.edu/18th_century/pennst01.asp (last visited Feb. 2, 2023). Pennsylvania outlawed the future importation of slaves in 1780 with "An Act for the Gradual Abolition of Slavery." *Id.*; *see also* Robert M. Spector, *The* Quock Walker *Cases (1781-83) – Slavery, Its Abolition, and Negro Citizenship in Early Massachusetts*, 53 J. NEGRO HIST. 12, 12 (1968). Massachusetts issued judicial decisions in the cases of Kwaku Walker and Mum Bett, ostensibly invalidating slave ownership in 1781. Rather complex citations for the docket records of each are available in Spector, *supra*. *See also Jury Decides in Favor of Elizabeth "Mum Bett" Freeman*, MASSMOMENTS, https://www.massmoments.org/moment-details/jury-decides-in-favor-of-elizabeth-mum-bett-freeman.html (last visited Feb. 2, 2023) (discussing the Mum Bett case).

205. Bernard Rosenthal, *Puritan Conscience and New England Slavery*, 46 NEW ENGLAND Q. 62, 63–64 (1973) (describing the abolitionist presence in the North as minimal and discussing Cotton Mather's speech objecting to the premise that Africans could not be chosen as "elect" by the Protestant God while also noting his support for a law that prevented Africans from being liberated from slavery upon conversion to Christianity).

206. Eric Foner, *Politics and Prejudice: The Free Soil Party and the Negro, 1849-1852*, 50 J. NEGRO HIST. 239, 243, 245 (1965) ("Free Soil was therefore presented as a doctrine intended for the benefit of the white man, and the party emphasized not the condition of the slave, but the economic and social plight of the poor white in slave areas.").

207. Indeed, most of them enacted "Black Codes" that made free Africans' lives much more difficult than their European counterparts. Illinois provides an often-cited example. *See* FRANK CICERO JR., CREATING THE LAND OF LINCOLN 72, 84–86 (2018).

208. This would have violated the constitutional compromise with the South embodied in the Fugitive Slave Clause of Article IV. *See* Fugitive Slave Clause, U.S. CONST. art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII.

209. This impulse even reached southern advocates of free labor. *E.g.*, Bernard Mandel, *Anti-Slavery and the Southern Workers*, 17 NEGRO HIST. BULL. 99, 101–02 (1954) (In 1849, mechanics and workers in Lexington, Kentucky "asserted that slavery degraded labor, enervated industry, interferred with the occupations of free laborers, created a gulf between

The northern states, in turn, provided some additional procedural protections to make the process for recovering slaves more accurate.[210] Generally, the northern states' procedures included requirements for witness testimony, a verified claim or petition, and penalties for removal of individuals without certification that the state's procedural minimums had been met.[211] Pennsylvania's procedures were eventually challenged after a Maryland slaveowner's agent was convicted of kidnapping following his failure to comply with state procedure.[212]

In *Prigg v. Pennsylvania*, the Supreme Court held that while the federal government could not compel state officials to enforce the federal fugitive slave procedures, state officials could also not impose additional procedures where Congress had explicitly provided for them.[213] Pennsylvania, for example, required a notarized and signed affidavit from the slaveowner as to the identity of the alleged slave.[214] The Fugitive Slave Act of 1793, however, required only the "oral testimony" of "the person to whom such labor or service may be due, his agent or attorney."[215] These additional protections implemented by the northern states, designed not to eliminate the possibility of seizure of Black bodies—but to make it more reliable—were held unconstitutional.[216] The federal law concerning reclamation continued to endanger the tenuous liberty of free Africans living in a social regime premised on African slavery.[217]

The northern states responded to *Prigg* by quickly passing laws prohibiting their officers from participating in federal reclamation

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the rich and the poor, deprived the working classes of education, and tended to drive them out of the state. While recognizing the right of property in slaves under existing laws, they concluded that, 'as slavery tends to the monopoly as well as the degradation of labor, public and private right requires its ultimate extinction.'" (citations omitted)).

210. For a summary, see THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861, at 16–18 (1974); Eric Foner, *When the South Wasn't a Fan of States' Rights*, POLITICO MAG. (Jan. 23, 2015), https://www.politico.com/magazine/story/2015/01/underground-railroad-states-rights-114536/.

211. MORRIS, *supra* note 210, at 21.

212. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 539–40 (1842).

213. *Id.* at 615–16.

214. *Prigg*, 41 U.S. (16 Pet.) at 543 (invalidating the Pennsylvania Fugitive Slave Act of 1826, "[a]n act to give effect to the provisions of the constitution of the United States relative to fugitives from labor, for the protection of free people of color, and prevent kidnapping"). The statute is reproduced in full in Justice Story's opinion in *Prigg*. *See id.* at 550.

215. Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (repealed 1864). Section 7 of the Pennsylvania Act even contemplated a period of discovery through which either party could investigate the facts underlying the alleged slave's true condition. *See Prigg*, 41 U.S. at 554.

216. *See Prigg*, 41 U.S. (16 Pet.) at 615–16.

217. *See* MORRIS, *supra* note 210, at 20–22.

proceedings.[218] The Federal Congress, in turn, responded in 1850 with a more specific and simplified version of the Fugitive Slave Act that removed all protections in favor of the alleged slave and awarded commissioners who heard reclamation proceedings larger fees for sending people back into slavery.[219] Perhaps most importantly, the Fugitive Slave Act of 1850 arguably removed the availability of a habeas corpus petition[220] for the alleged slave and made the testimony contained in the slaveowner's affidavit conclusive of the issue of liberty.[221]

Perhaps one of the most celebrated procedures in Anglo-American law, the writ of habeas corpus is intended to give an imprisoned individual the right to challenge the grounds of their detention.[222] Although there are parallels, the procedure is different from the common law writ of *libertate probanda*.[223] There, unlawful detention is not an absolute prerequisite of the cause of action.[224] Under habeas corpus ("that you have the body"), the petitioner must first surrender himself to the judicial authority in order to invoke its privilege.[225] If a suspected slave wanted to affirmatively clear him or herself of doubt regarding the condition, they, or their white attorney, first had to surrender custody of

218. Nicholas Mosvick, *On This Day, the Supreme Court Decides* Prigg v. Pennsylvania, NAT'L CONST. CTR. (Mar. 1, 2020), https://constitutioncenter.org/blog/on-this-day-the-supreme-court-decides-prigg-v-pennsylvania.

219. *See* Fugitive Slave Act of 1850, ch. 60, § 10, 9 Stat. 462 (repealed 1864). While commissioners who heard reclamation proceedings under the Act earned fees for any decision, they were paid $10 for decisions upholding slavery and $5 for decisions upholding freedom. *See id.* § 8, 9 Stat. at 464–65.

220. Habeas petitions are not explicitly mentioned. Instead, the Fugitive Slave Act of 1850 contemplates priority over "any process issued by any court." *Id.* § 6, 9 Stat. at 463–64. It is possible that contemporaneous interpretations finding that the Act would suspend habeas corpus were intended to generate additional support for opposition to the law.

221. *Id.* ("In no trial or hearing under this act shall the testimony of such alleged fugitive be admitted in evidence; and the certificates in this and the first [fourth] section mentioned, shall be conclusive of the right of the person or persons in whose favor granted, to remove such fugitive to the State or Territory from which he escaped, and shall prevent all molestation of such person or persons by any process issued by any court, judge, magistrate, or other person whomsoever."). The northern states proceeded to hold this provision unconstitutional, and many northern juries nullified application of the law. *See* James Silberman, *Are Nullification's Advocates the "Villains" of American History?*, FREE THE STATES (Mar. 26, 2019), https://freethestates.org/2019/03/are-nullifications-advocates-the-villains-of-american-history/.

222. *See* Leah M. Litman, *The Myth of the Great Writ*, 100 TEX. L. REV. 219, 228–30 (2021) (describing the laudatory capabilities of habeas corpus but noting that it is often used to extend government power as well).

223. *See* 1 GLANVILLE, *supra* note 17, at 83–84; Maurice E. Harrison, *California Legislation of 1921 Providing for Declaratory Relief*, 9 CALIF. L. REV. 359, 359–60 (1921).

224. *See* 1 GLANVILLE, *supra* note 17, at 83–84; Harrison, *supra* note 223, at 359–60.

225. Litman, *supra* note 222, at 234–37.

their body to the court.[226] Under this construction, the physical bodies of African Americans provided the trigger through which American courts could debate more abstract concepts of liberty, property, and federalism.[227]

The habeas corpus procedure, however, was typically available only in the northern states.[228] In the South, slaves were not entitled to the writ of habeas corpus, as it was an honor reserved for free men.[229] Southern states typically relied on a procedure based on the common law writ of "ravishment of ward," which required the petitioner to first secure the guardianship of a white person, who would then argue that a slaveowner had wrongfully seduced the petitioner into slavery.[230] In what amounted to a presumption of personhood in the North and one of property in the South, each jurisdiction used rules for the possession of African bodies to tilt the procedure toward different outcomes.[231]

A South Carolina appellate court articulated the potential consequences of habeas procedures on determinations of freedom.[232] Specifically, the master loses seisin of the slave's body and labor during the pendency of the proceeding:

> That the old common law proceeding is calculated to be extremely mischievous to one who turns out to be really the master, is scarcely denied at the bar, and will be strongly conceived by him who will consult the particulars of the case of *More* vs. *Watts*, in the several books where it appears: for it will be seen if the claimant fail to give surety, he is to go into the custody of the

226. *See id.* at 234, 246–47.

227. *See id.*

228. *See* Foner, *supra* note 210.

229. *Id.*; *see also* Scott v. Williams, 12 N.C. (1 Dev.) 376, 376 (1828) ("In questions of slavery or freedom, a presumption of slavery arises from a black complexion . . . ."); *accord* State v. Alford, 22 Ark. 386, 386 (1860); Miller v. Belmonti, 11 Rob. 339, 340 (La. 1845); Hughes v. Jackson, 12 Md. 450, 453 (1858); Field v. Walker, 17 Ala. 80, 82 (1849); Huger v. Barnwell, 39 S.C.L. (5 Rich.) 273, 273–74 (Ct. App. L. 1852); De Lacy v. Antoine, 34 Va. (7 Leigh) 438, 444 (1836) ("[B]ut he is black; the presumption is in favour of slavery . . . .").

230. The paternalism is evident. The ravishment of ward action was typically applied to instances of fathers seeking control over their children or other dependents. *See, e.g.*, Fernsler v. Moyer, 3 Watts & Serg. 416, 417–18 (Pa. 1842); Martin v. Payne, 9 Johns. 387, 390 (N.Y. Sup. Ct. 1812).

231. *See, e.g.*, Covenhoven v. Seaman, 1 Johns. Cas. 23, 24 (N.Y. Sup. Ct. 1799) (enslaved party) (slave released from physical custody in exchange for security on writ *de homine replegiando*); Jack v. Martin, 14 Wend. 507, 507–08, 521 (N.Y. 1835) (enslaved party) (slave and owner each filed dueling writs *de homine replegiando* and habeas corpus, respectively).

232. *Huger*, 39 S.C.L. (5 Rich.) at 276–77.

> prison keeper. Surely this is not an agreeable result to the master.[233]

Therefore, the court preferred South Carolina's legislated procedure, wherein "persons of color, can have the writ of ravishment of ward under our statute," which, according to the judge, was "far more simple, direct, expeditious and practicable: far more effectual for the security of the rights of both parties."[234] The rules accompanying habeas corpus to provide bail or security for a later appearance had meaningful benefits, such as the ability to seek out favorable witnesses and documents before trial, but which were denied to Africans in southern states.[235] Recognizing how northern procedures did not adequately account for the slaveowner's interest in reclaiming his slaves, the Supreme Court of Alabama noted:

> [I]n a proceeding by *habeas corpus* no jury is allowed, and no provision is made for taking the testimony of witnesses who may be absent from the state; so that if the witnesses reside abroad and refuse to attend the trial, the owner would have no means of establishing his right by the production of his evidence. These considerations are at least persuasive to show that the legislature never contemplated that the master's right to his slaves should be tried by this summary proceeding.[236]

Indeed, this particular judge seized on the most classic defense for slavery: holding another person as property was a matter of the owner's personal, and foundational, rights in Western society:

> If he [the slaveowner] can be deprived of the right of trial by jury in respect of the legal claim to his slave, the same principle might deprive the citizen of jury trial in respect to all property. But this would be a clear violation of the right of jury trial, as recognised

233. *Id.* at 277. More v. Watts is an eighteenth-century case concerning the liberty of a serf sought through the writ *de homine replegiando*. *See* Steven M. Wise, *The Entitlement of Chimpanzees to the Common Law Writs of Habeas Corpus and de Homine Replegiando*, 37 GOLDEN GATE U. L. REV. 219, 245–46 n.116 (2007) (citing More v. Watts, (1700) 88 Eng. Rep. 1426, 1428 (KB)). A collection of pleadings articulated in the case is collected in 1 JOHN LILLY, MODERN ENTRIES: BEING A COLLECTION OF SELECT PLEADINGS IN THE COURTS OF KING'S BENCH, COMMON PLEAS AND EXCHEQUER 293–94 (6th ed. 1792).

234. *Huger*, 39 S.C.L. (5 Rich.) at 273, 277.

235. Field v. Walker, 17 Ala. 80, 81 (1849) (enslaved party); Foner, *supra* note 210.

236. *Field*, 17 Ala. at 81.

> by the common law, by *magna charta*, and by the fundamental law of all the states in the Union.[237]

Here, the master is given the procedural protections for members created at the foundation of the liberal community; the slave—the absolute foil to the rights of the master—is not.[238] While the intricacies of habeas procedure and other causes of action in nineteenth-century American state courts would amount to its own intensive undertaking, it is enough here to note that states whose political communities preferred slavery disallowed it, while states whose political communities disfavored slavery used the procedure to protect against the fraudulent claims of slaveowners.

Perhaps even more importantly, we may consider the possession of a slave's body as a particularly consequential step in litigating a freedom suit: both the master and the slave must submit to the court in order to try claims concerning rights over the property or personhood of the slave.[239] In doing so, the courts are given the opportunity to apply procedural rules to channel the claim to emphasize particular points of dispute. In federal court: did the master or his agent provide an affidavit? In the North: does the alleged fugitive need appointed counsel, and are there witnesses with relevant information? In the South: who is going to claim responsibility for the person if he is freed? Each of these rules is an opportunity to express a policy preference regarding the "proper" outcome. Of course, each of these rules necessarily supposes that even free Africans may be required to disprove allegations that they have no personal rights.[240] In this manner, they continue to express this Article's fundamental premise: people who enjoy less facility in the personal rights of work, private property, self-defense, and representative democracy also tend to fare worse in court, and that these demarcations have foundations in the history of the American ideology of identity. Further, in making the rules that govern the enforcement of these rights, the rule-makers in each context prioritize their own political interests, which

237. *Id.* at 82.

238. *Id.*

239. *See* Litman, *supra* note 222, at 234–37; Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 625–26 (1842). Importantly, under the rule established by *Prigg*, a slaveowner was explicitly not required to invoke the Fugitive Slave Act procedures if he were able to reclaim the alleged slave without a breach of the peace. *Cf.* William Edrich v. Abbot of Halesowen and Others, *reprinted in* 4 THE EARLIEST ENGLISH LAW REPORTS, *supra* note 50, at 566–67.

240. In other words, the presumption of slavery captured in the common law decisions of southern courts was made national through the Federal Fugitive Slave Clause. *See supra* note 229.

frequently overlap with those they believe provide them with economic power.

In this process, the American courts also became the instrument by which the physical body of a human being could become "free."[241] Indeed, the judges issuing these orders often assumed an air of divinity and frequently included appeals to religion in their decision to grant or deny the petition.[242] The gravity of these proceedings may have some bearing on why descendants of Africans in America continue to view the courts as sources of potential liberation when they are so frequently also a source of oppression.[243]

Let us take the story of Jane Johnson as a particular example.[244] Imagine you are a "Negro"[245] traveling from the nation's capital.[246] Now, imagine you have two children.[247] Finally, imagine that you are a slave.[248] Your master has transported you by steamboat from Washington, D.C., to Baltimore, to Philadelphia.[249] While staying at a hotel in Philadelphia, a waiter introduces you to a man who says that he can set you free if you surrender to the city authorities.[250] Consider now

241. *See, e.g.*, Jack v. Martin, 14 Wend. 507, 533–34 (N.Y. 1835) (enslaved party).

242. *See, e.g.*, Wingis v. Smith, 14 S.C.L. (3 McCord) 400, 401 (Ct. App. L. & Eq. 1825) (enslaved party) ("Slavery has existed in almost all countries and in almost all ages of the world. It existed among the Jews, God's chosen people, and was sactioned [sic] by divine authority."). Ideology in the northern states was not directly to the contrary. *See In re* Kirk, 1 Edm. Sel. Cas. 315, 317 (N.Y. Sup. Ct. 1846) (enslaved party) (citing sheriff's writ of return on habeas corpus: "[E]vil-disposed persons have organized, and in many instances have executed, a system of robbery; and in disregard of the word of God, denouncing such doings, have feloniously abducted and carried away, and encouraged the escape of divers such persons from the possession of their lawful owners."); *cf. Jack*, 14 Wend. at 533 (in denying slaveholder's recovery on writ of habeas corpus: "Slavery is abhored in all nations where the light of civilization and refinement has penetrated, as repugnant to every principle of justice and humanity, and deserving the condemnation of God and man").

243. *See, e.g.*, Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 422, 430 (1987).

244. REPORT OF THE PROCEEDINGS ON THE WRIT OF HABEAS CORPUS, ISSUED BY THE HON. JOHN K. KANE, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA, IN THE CASE OF THE *UNITED STATES OF AMERICA EX REL. JOHN H. WHEELER VS. PASSMORE WILLIAMSON* 164–67 (1856).

245. The term as it had come to be used in America no longer meant an African, but rather *someone with at least "one drop" of African blood*. Anyone descended from an African was presumptively a slave, unless of course they appeared fully white on the surface. *See* Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600-1860*, 91 MINN. L. REV. 592, 606 (2007).

246. REPORT OF THE PROCEEDINGS ON THE WRIT OF HABEAS CORPUS, *supra* note 244, at 164–67.

247. *Id.* at 164.

248. *Id.*

249. *Id.*

250. *Id.*

the consequences if this man is wrong. You will be beaten. Your children may be beaten. Any connection and human empathy you may have begun to establish with your master will likely be destroyed. But if you do not seize the chance, you and your children will likely remain slaves forever. This is the petitioner's story recorded in *United States ex rel. Wheeler v. Williamson*, 28 F. Cas. 686 (E.D. Pa. 1855).[251]

The tension between fugitive reclamation procedures and freedom suits reached a denouement in *Dred Scott v. Sandford*, and the claim itself was a habeas petition raised in defense to a fugitive slave reclamation procedure that was denied on the basis that Scott could not invoke the diversity jurisdiction of the federal courts because he could never be considered a U.S. citizen.[252] The majority opinion authored by Chief Justice Roger Taney issued an excoriating rebuke of the entire premise of African individual liberty and membership in the American community.[253] In Taney's words, although some Africans may have had some substantive rights, "they had no rights which the white man was bound to respect."[254] A whole host of procedural and evidentiary rules prohibited free Africans from enforcing their personal rights against European Americans during this period.[255] The battle over slavery itself, however, was at least partly waged in the dueling procedures over claims to African bodies. Indeed, the federal government directly weighed in on the issue in *Prigg* and *Dred Scott*, holding that certain procedural vehicles—those intended to ensure people were in fact slaves before allowing them to be kidnapped by roving mercenaries—were not only unconstitutional, but counter to the fabric of our nation.[256]

IV. SEGREGATION AND THE ABSENCE OF DUE PROCESS

In this Part, I propose that Black Americans' lack of access to effective legal procedures provides one explanation for the violence and vigilantism that plagued their community in the 100 years after the Civil

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251. *Id.* Ms. Johnson later escaped to Canada, only to return to testify in a later proceeding originating out of a writ of habeas corpus brought John Wheeler, her former owner, against Passmore Williamson for the wrongful possession of Ms. Johnson. WILLIAM STILL, THE UNDERGROUND RAILROAD RECORDS 98, 103–04 (Quincy T. Mills ed., 2019).

252. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 406 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

253. *Id.* at 399, 407–26.

254. *Id.* at 407.

255. *See* Alfred Avins, *The Right to Be a Witness and the Fourteenth Amendment*, 31 MO. L. REV. 471, 473 (1966). Perhaps the most obvious of these is the prohibition of testimony from Black witnesses in cases against whites. *See id.*

256. *See e.g.*, Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 671–74 (1842); Scott v. Williams, 12 N.C. (1 Dev.) 376, 377 (1828).

War. In this sense, we can also think of the era of northern segregation and southern Jim Crow as a failure of the Anglo-American vision of liberal democracy on its own terms. This failure occurred alongside the creation of specific procedure—the Enforcement Act of 1871, now codified at 42 U.S.C. § 1983—that ostensibly guaranteed a remedy for the violation of the core personal rights we have previously identified.[257] Given the spread of a new procedural code that espoused liberal democratic principles and citizen individuality, the available data showing that African Americans rarely used this procedure supports the conclusion that, once again, procedures to enforce personal rights are peculiarly unavailable to those whose rights are most in jeopardy.[258] I propose that this lack of access to procedures likely contributed to social and economic loss within the Black community throughout the period. Before doing so, I identify enjoyment of the personal rights as the foundation of American liberalism.

A. Personal Rights and Citizenship in the Liberal Community

> Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen?[259]

After the elimination of chattel slavery, a foreigner to American history might assume that the answer to Justice Taney's question was quickly resolved in the affirmative. And yet if we think of membership in "the political community" that Taney refers to as the full enjoyment of the personal rights that made up the form of proto-liberalism identified in Part I, we know that Black American participation in these rights was under assault on nearly all fronts.[260] For instance, the enforcement of vagrancy laws and the practice of convict leasing quickly removed many recently freed people from their right to work and travel.[261] While all

257. 42 U.S.C. § 1983.
258. *See infra* notes 315–19 and accompanying text (discussing the work of Professor Melissa Milewski).
259. *Dred Scott*, 60 U.S. (19 How.) at 403.
260. *Id.*
261. Kathy Roberts Forde & Bryan Bowman, *Exploiting Black Labor After the Abolition of Slavery*, CONVERSATION (Feb. 6, 2017, 10:39 PM), https://theconversation.com/exploiting-black-labor-after-the-abolition-of-slavery-72482; Risa L. Goluboff, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1371 (2010). One of the

Black Americans were now legally able to own property, acquiring land was difficult, and many had to enter sharecropping agreements with their former masters in order to earn a living.[262] Private and state-sponsored vigilante groups threatened their physical safety with massive campaigns of terrorism and lynching.[263] Literacy tests, poll taxes, and grandfather clauses interfered with their ability to vote.[264] Until the passage of the Fourteenth Amendment, many northern and southern states prevented Blacks from serving on juries or testifying in court against whites.[265]

As we observed in Part I, however, each of these components was vital to citizenship in the liberal political community. William Blackstone, one of the sources for the U.S. Constitution, recognized this importance in his discussion of the "absolute rights of individuals."[266] Blackstone identified three primary rights and five subordinate rights required for all English citizens.[267] The three primary rights are easily recognizable, and have been previously identified above: "the right of personal security; the right of personal liberty; and the right of private property."[268] The "subordinate" rights, according to Blackstone, are: (1) "[t]he constitution, powers, and privileges of parliament"; (2) the "limitation of the king's prerogative"; (3) a right of "applying to the courts of justice for redress of injuries"; (4) a right of "petitioning the king"; and (5) the right "of having arms for their defence."[269] Blackstone recognizes that each of the primary rights would be a "dead letter of the laws" without the support of the five subordinate ones.[270]

Blackstone's construction of these five "subordinate" rights also ties well into the fourth and fifth personal rights observed in Part I: participation in democratic legislation and access to procedures to enforce substantive laws. The reference to Parliament in the first

primary characteristics of vagrancy convictions during this time was the lack of formal criminal proceedings. *See id.* at 1364.

262. *See* NICHOLAS LEMANN, THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA 6, 18–20 (1992).

263. EQUAL JUSTICE INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR (3d ed. 2017) (attempting to take account of every lynching that occurred in America).

264. Louisiana v. United States, 380 U.S. 145, 148−49 (1965); J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910, at 33 (1974).

265. *See* James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 910–12 (2004); Avins, *supra* note 255, at 473.

266. *See* BLACKSTONE, *supra* note 192, at 117–41.

267. *See id.* at 125, 136–39.

268. *See id.* at 125.

269. *See id.* at 136–39.

270. *See id.* at 136.

subordinate right contemplates some participation in legislative activity.[271] The second, third, and fourth subordinate rights are different articulations of the ability to seek a judicial forum to resolve their disputes.[272] The fifth right ties directly into the concept that armed revolution is the final option against governmental tyranny.[273] To bring home the point that these rights probably originated in the medieval cities, Blackstone cites "municipal law" as the source of these absolute rights, to match "common speech; for, tho' strictly that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one state or nation, which is governed by the same laws and customs."[274]

Like many of his predecessors in liberal theory,[275] Blackstone observed the necessity of an effective judicial system to enforce the rights of the individual.[276] "[T]o vindicate these rights," he wrote, "the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law."[277] In Blackstone's eyes, "[s]o long as these [personal rights] remain inviolate, the subject is perfectly free; for every species of compulsive tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed."[278] In a theoretical construct premised on a "social contract" wherein individuals relinquished their natural rights of life, liberty, health, and private property[279] to a central government that would in turn provide a more efficient and reasonable way of enforcing them, a government hostile to

271. *See id.*
272. *See id.* at 137–39.
273. *See id.* at 139.
274. *Id.* at 44.
275. *See id.* at 122. Perhaps the most prominent of these is Locke, whom Blackstone directly cites a number of times. *See id.* ("So that laws, when prudently framed, are by no means subversive but rather introductive of liberty; for (as Mr Locke has well observed) where there is no law, there is no freedom. But then, on the other hand, that constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.").
276. *See id.*
277. *Id.* at 140.
278. *Id.*
279. *See id.* at 122–23. This construction belongs to John Locke but was fully adopted by Blackstone. *See id.* ("The idea and practice of this political or civil liberty flourish in their highest vigour in these kingdoms, where it falls little short of perfection, and can only be lost or destroyed by the folly or demerits of it's owner: the legislature, and of course the laws of England, being peculiarly adapted to the preservation of this inestimable blessing even in the meanest subject."). Life, liberty, health, and private property also easily translate into personal security, free labor, and ownership of property.

the enforcement of these rights would result in a system closer to that of absolute monarchy—ripe for tyranny—which Locke dedicates his First Treatise on Government to destroying.[280] But the thrust of *Dred Scott* is that Africans were never intended to have these rights, nor were they intended to be citizens of the liberal Anglo-American community.[281] This tyranny is also, unfortunately, the story of the 100 years that followed the Civil War.

This is so even though the Reconstruction Congress passed numerous substantive laws intended to support newly freed Africans' personal rights. First, and perhaps foremost, among these laws was the Fourteenth Amendment to the Constitution, which guarantees almost all of the personal rights in itself.[282] The Thirteenth Amendment to the Constitution specifically outlaws forced labor, although in some ways the exception quickly swallowed the rule.[283] The Fifteenth Amendment to the Constitution prohibited interference with participation in the democratic process.[284] The creation of the Freedmen's Bureau envisioned government involvement in negotiating labor contracts.[285] The

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280. *See* 5 LOCKE, *supra* note 113, at 7–9. Locke's first treatise is concerned with arguing against the rule of absolute monarchs justified by the biblical account of Adam's heirs' dominion of Earth. *See generally id.* at 9.

281. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404–06 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

282. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

283. *See id.* amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."). *See generally* Ellen Terrell, *The Convict Leasing System: Slavery in Its Worst Aspects*, LIBR. OF CONG.: INSIDE ADAMS (June 17, 2021), https://blogs.loc.gov/inside_adams/2021/06/convict-leasing-system/; Forde & Bowman, *supra* note 259. "Justices of the peace," who were frequently not legal professionals, led police courts tasked with enforcing public nuisance and vagrancy laws. *See* Sara Sternberg Greene & Kristen M. Renberg, *Judging Without a J.D.*, 122 COLUM. L. REV. 1287, 1301, 1303 (2022). The convictions achieved by these courts led to a system of convict leasing that was nearly identical to slavery. Forde & Bowman, *supra* note 259. The practice of rounding up Black Americans with no visible employment and subsequently leasing them to plantation owners also resembled both the Fugitive Slave Act procedure from before the Civil War and the Statute of Labourers procedures from before the founding of America.

284. *See* U.S. CONST. amend. XV, § 1 ("The 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.").

285. Zachary Newkirk, *A Brief Moment in the Sun: The Reconstruction-Era Courts of the Freedmen's Bureau*, 101 JUDICATURE 49, 51 (2017) (quoting ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 142–43 (1988)). Congress gave the Freedmen's Bureau "control of all subjects relating to refugees and freedmen from rebel states," Freedmen's Bureau Act of 1865, ch. 90, 13 Stat. 507, a mandate that the Bureau's

Homestead Act of 1862 was now open to former slaves who were full citizens of the state and federal governments.[286] Later legislation prevented states from excluding Africans from jury service,[287] or testifying in court against white parties.[288] The Freedmen's Bureau even established a separate—although short-lived—court system explicitly for resolving claims between former slaves and masters.[289]

Beyond this comprehensive legislation targeting the personal rights, the Reconstruction Congress also passed a procedural vehicle intended to enforce them.[290] Even with this seemingly powerful procedure, we may still deduce a bias against Black Americans both by the fact that the procedure was rarely used and by the fact that their personal rights were routinely violated during the 100 years between the Civil War and civil rights movement. To be sure, both northern and southern lawmakers erected many obstacles within substantive law,[291] but the lack of virtually any challenge to violations of the core personal rights under the

commissioner Oliver Otis Howard broadly interpreted to take on "an enormous range of responsibilities." Newkirk, *supra*.

286. *See* Homestead Act of 1862, 43 U.S.C. § 161 (repealed 1976); *see also* MICHAEL L. LANZA, AGRARIANISM AND RECONSTRUCTION POLITICS: THE SOUTHERN HOMESTEAD ACT 64–71 (1990) (describing the failures of the Southern Homestead Act of 1866 to provide land to southern Black people).

287. *See* Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 LA. L. REV. 55, 59 (2020). This effort was first proposed by abolitionist Charles Sumner. *See* Forman Jr., *supra* note 265, at 924–26; CONG. GLOBE, 41st Cong., 2d Sess. 3434 (1870).

288. *See* Avins, *supra* note 253, at 500–01 (noting the vigorous objection of southern representatives to provisions in the 1866 Civil Rights Act that would allow Black Americans to testify, and that complaints that Black witnesses' testimony was not received continued after passage of the Fourteenth Amendment and was therefore included in the text of the 1870 Enforcement Act).

289. *See* Newkirk, *supra* note 285, at 51–52.

290. *See* 42 U.S.C. § 1983; *The Enforcement Acts of 1870 and 1871*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm (last visited Feb. 3, 2023).

291. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954). The "separate but equal" doctrine of *Plessy v. Ferguson* is one large-scale example. The *Plessy* doctrine, however, only arguably implicated the personal right to work and travel, and then only insofar as separate facilities could be required for work, travel, or commerce. *See id.* at 548–50. There were no legally segregated courts or judicial proceedings, for example, as the substantive laws prohibiting Black jury service and witness testimony, at least, had been repealed. *See* ALYSON A. GRINE & EMILY COWARD, RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES 7-3, 7-4 (2014), https://defendermanuals.sog.unc.edu/sites/default/files/pdf/20140457_chap%2007_Final_2014-10-28.pdf. Whether these substantive laws were enforced is the question posed by this Part IV.

Enforcement Act until after the passage of both the Rules Enabling Act and *Brown v. Board of Education* is also striking.[292]

This absence is even more interesting given that American procedure was undergoing its first formalized transition from the common law, which was intended to democratize the procedure by streamlining the process and publicizing its rules to the entire public for the first time.[293] This transition was gradual and somewhat sporadic, as certain states elected to retain common law procedures for larger periods of time and others elected to pursue their own specific codes of civil procedure.[294] A granular, post-hoc analysis of each particular state's rules poses a project that may take several lifetimes.[295] Here I provide only a prima facie case for the premise that the legal procedures available to African Americans during this time continued to dramatically underserve them.

B. The Promise of Codification

In an era of growing dissatisfaction with the legal profession, David Dudley Field famously called for a new and simplified procedure intended to make it easier for citizens to protect their individual rights and property.[296] As the beneficiaries of significant academic thought produced on the subject of codifying the laws in order to achieve a more enlightened system,[297] Field and his colleagues focused on the system of procedural rules first.[298] Creating the system now called "code pleading," Field also introduced significant innovations, such as the ability to obtain quicker results through the motion for summary judgment.[299] Demurrers against the more relaxed pleading standards no longer carried the

292. *See infra* notes 387–89.

293. Kellen Funk & Lincoln A. Mullen, *The Spine of American Law: Digital Text Analysis and U.S. Legal Practice*, 123 AM. HIST. REV. 132, 158–59 (2018).

294. *See generally id.*

295. While the data may exist, collecting it would amount to a herculean task of combing through 100-year-old court records, many of which have likely been destroyed.

296. *See* Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 326 (1988).

297. The English scholar Jeremy Bentham is most frequently credited with popularizing this sentiment in England. For a brief discussion on how the Enlightenment contributed to the drive towards codification of law, see H. Patrick Glenn, *The Grounding of Codification*, 31 U.C. DAVIS L. REV. 765, 766–71 (1998).

298. Field later turned his attention to areas of substantive law, although these projects were not realized. *See* Andrew P. Morriss et al., *Debating the Field Civil Code 105 Years Late*, 61 MONT. L. REV. 371, 373 (2000).

299. *E.g.*, Funk & Mullen, *supra* note 293, at 155–56 (noting Field's work with summary judgments shortened the length of debt collection proceedings). *See generally* John A. Bauman, *The Evolution of the Summary Judgment Procedure: An Essay Commemorating the Centennial Anniversary of Keating's Act*, 31 IND. L.J. 329 (1956) (describing the history of summary judgment procedures in England and the United States).

potential risk of losing one's entire case.[300] Ultimately, Field's ideology regarding the proper role of procedure was laissez-faire and espoused a power for individuals with as little government oversight as possible.[301]

Unsurprisingly, Field's procedures became desirable among the new western territories.[302] The implementation of the Field Code was seen as fundamental by some of these states to ensure creditors that they would have access to summary procedures to prevent citizen debtors from delaying collection.[303] In many jurisdictions, Field Code[304] was viewed as a necessary condition for the attraction of capital.[305] The Field Code's pleading regime was adopted and proposed in the middle of the Industrial Revolution.[306] Like the Catholic jurists' invocation of the Christian God's procedural minimums, the post-Enlightenment lawyers of the code pleading era relied on moral appeals to rationality, efficiency, and even populism when articulating their guiding principles.[307] In this fashion,

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300. *See* Alison Reppy, *The Demurrer — at Common Law, Under Modern Codes, Practice Acts, and Rules of Civil Procedure*, 3 N.Y. L.F. 175, 189–90 (1957). The demurrer, which still exists in many states, is the forefather of FED. R. CIV. P. 12(b). *See* Victor Marrero, *Mission to Dismiss: A Dismissal of Rule 12(b)(6) and the Retirement of* Twombly/Iqbal, 40 CARDOZO L. REV. 1, 37 (2018).

301. *See* Subrin, *supra* note 296, at 324. This outlook was emphasized in the committee minutes for the New York 1846 constitutional delegation. The committee was presented with an opportunity to enact what is now known as MSCs before trial but found it "tyrannical" and also hopelessly romantic. *See* WILLIAM G. BISHOP & WILLIAM H. ATTREE, REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 589, 645 (1846).

302. This is not to suggest that summary procedures did not exist before Field; they existed as early as the fourteenth century. Bauman, *supra* note 299, at 330−31. But the particular procedure embodied in the "motion for summary judgment" filed after a period of (equitable) discovery in a dispute (of law) was an entirely new creation of the Field Code. Subrin, *supra* note 296, at 323. Subrin also notes Field's general preference for laissez-faire economics, which was rising along with the preference for industry across the American countryside. *Id.* at 323–24. Almost every western state adopted some version of the Field Code. Funk & Mullen, *supra* note 293, at 161.

303. Funk & Mullen, *supra* note 293, at 155–56.

304. The members of the Field Committee, for instance, were New York trial lawyers, typically known for their commercial and financial clientele. *Id.* at 156, 163.

305. *Id.* at 157–58.

306. POLANYI, *supra* note 131, at 42 ("The story has been told innumerable times: how the expansion of markets, the presence of coal and iron as well as a humid climate favorable to the cotton industry, the multitude of people dispossessed by the new eighteenth-century enclosures, the existence of free institutions, the invention of the machines, and other causes interacted in such a manner as to bring about the Industrial Revolution. It has been shown conclusively that no one single cause deserves to be lifted out of the chain and set apart as *the* cause of that sudden and unexpected event.").

307. The relationship between procedure and the prevailing morality of the particular era has been explored in depth in many other works, for example, in BERMAN, *supra* note 14, at 250–53; *see also* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1,

code pleading made litigation less like a ceremony and more like a transaction.[308]

Some authorities have observed that litigants, such as large corporations and wealthy capitalists who also happened to be some of Field's clients, had a strong advantage in the code pleading system.[309] By hiring the best talent at market prices,[310] these participants had an opportunity to learn the system, master it, and re-apply their knowledge in later contests.[311] Indeed, the era of the Field Code's implementation (1850–1890) is also the era of the rise of the commercial law firm, the railroad, the robber baron, and the broader rise of capitalist industry in America.[312] In this context, notice pleading could indeed have affected a rationalization of procedural law, but it may not have had quite the desired effect of opening the courthouse doors to "ordinary" citizens.

In streamlining the process, additionally, American civil procedure begins to more closely resemble the Romano-Canonical *ordo iudiciarus*, although replacing its religious animus with an economic one.[313] Field's Code likely succeeded in its goal of reforming the justice system. The actual impacts of that reform, however, are not fully understood.[314] Given that the Field Code was implemented in the state courts, many of the more routine substantive causes of action subject to its procedures implicate not only the Enforcement Act, but the primary personal rights themselves: contracts (work), property (property), and tort (self-

18–22, 25–27 (1989) (on then-contemporary theory of code pleading as a natural evolution from primitive society); Funk & Mullen, *supra* note 293, at 158–59.

308. Professor William E. Nelson identified a similar trend in the courts of Massachusetts immediately after the American Revolution in William E. Nelson, *The Reform of Common Law Pleading in Massachusetts 1760-1830: Adjudication as a Prelude to Legislation*, 122 U. PA. L. REV. 97, 110–16 (1973) and later in WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 87–88 (1994).

309. *See* Subrin, *supra* note 296, at 323.

310. *See id.* at 321–22. Jurisdictions adopting the Field Code also typically eliminated the pre-set rates for attorneys written into statutory law. *See id.*

311. This analysis originates with Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98–103 (1974).

312. *See* Thomas Paul Pinansky, *The Emergence of Law Firms in the American Legal Profession*, 9 U. ARK. LITTLE ROCK L.J. 593, 609–16 (1986).

313. *See* VAN CAENEGEM, *supra* note 12, at 373–79. Although Professor Van Caenegem compares common law to ecclesiastical court procedures, his comparison is enlightening to illustrate how closely both code pleading and the Federal Rules follow the model used by ecclesiastical courts and later adopted by the English Chancellors in equity.

314. Funk & Mullen, *supra* note 293, at 163.

defense).[315] If the reported cases are to be believed,[316] Black Americans also brought these cases at dramatically underrepresented rates.[317]

Although we have no complete study of the states' court systems during the 100 years after the Civil War, an extensive study of appellate court records of cases litigated between Black and white parties found that 582 civil appeals were won in southern states' supreme courts by Black litigants from 1865 to 1950.[318] This suggests descendants of Africans were already beginning to understand how to navigate the rules of American litigation.[319] But it also suggests a dramatic absence of Black participation or involvement in the process beyond the trial court level. During this same period, for instance, there were over 200,000 appeals litigated by white parties.[320] In other words, Black descendants made up 40% of the targeted population, but only a fraction of 1% of the appeals.[321]

This is not to say that the common law procedures were particularly favorable to Africans, either. Many federal courts at the time found code pleading totally unworkable and continued to follow the common law procedures by virtue of their authority under the Conformity Act of 1872.[322] This may have some bearing on the reason why section 1983 cases, which were based on federal law, were brought so rarely during the first fifty years after the Act's passage. There are only 504 instances in which section 1983 was invoked in reported cases available on Westlaw before 1965, and 468 (90%) of those cases were brought after

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315. *See id.* at 157–58.

316. Note that the fact it went unreported is more likely that it was removed from the docket for some "inconsequential" or "technical" reason.

317. *See* Melissa Milewski, *From Slave to Litigant: African Americans in Court in the Postwar South, 1865–1920*, 30 LAW & HIST. REV. 723, 743 (2012) (noting that Black plaintiffs often brought personal jury suits when they "found themselves less able to litigate other kinds of suits" such as civil rights cases).

318. *See* MELISSA MILEWSKI, LITIGATING ACROSS THE COLOR LINE: CIVIL CASES BETWEEN BLACK AND WHITE SOUTHERNERS FROM THE END OF SLAVERY TO CIVIL RIGHTS 221 tbl.B.18 (2017). Milewski included the states of Georgia, Alabama, Mississippi, Louisiana, North Carolina, South Carolina, and Virginia.

319. Professor Milewski's principal observation is that, despite a reasonable expectation that African American litigants in the South would have absolutely no success in litigation whatsoever, African American litigants shaped the narrative presentation of their cases to fit within white American paternalist expectations in order to succeed. *See id.* at 67.

320. *Id*. at 207 tbl.B.1.

321. *Id.* at 224. Professor Milewski also rigorously illustrates how successful litigants shaped their narratives to appeal to prevailing cultural norms of white paternalism and Black inferiority. *Id.* at 156–59. Unfortunately, the entirety of records at the trial court level were not available. *Id.* at 195 n.2.

322. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1040–41 (1982).

1950.[323] Only fourteen section 1983 cases were brought before the adoption of the Federal Rules of Civil Procedure in 1938.[324] Section 1985, targeting conspiracies to violate constitutional rights, was cited only 243 times from its passage to 1965.[325] Either Black Americans were not bringing these claims because they did not know about the law, because the courts did not want to prosecute them, or because the courts were unavailable for those who sought redress. Perhaps a sign of the times, the first reported use of section 1983 belongs to a corporation, Northwestern Fertilizer.[326] Three of the fourteen reported cases brought pursuant to section 1983 decided before 1939 were brought by corporate plaintiffs.[327]

C. Procedure and Social Loss

Early in the "Law and Economics" movement, then-Professor Richard Posner theorized that the primary purpose of a legal system was to encourage economic efficiency.[328] Approaching the law from a perspective

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323. Although detailed statistics on the usage of the statute have not been gathered, a simple search on Westlaw for cases citing to the Enforcement Act of 1871, now codified as 42 U.S.C. § 1983, yields only 504 citing cases between 1871 and 1965. Because this data comes from Westlaw's database, it cannot be considered wholly authoritative. *See* WESTLAW, www.westlaw.com (search "42 U.S.C. § 1983"; then choose "Citing References"; then choose "Cases"; then click "Filters"; then choose "Date"; then search "All Dates Before" "1/1/1965").

324. *See* WESTLAW, www.westlaw.com (search "42 U.S.C. § 1983"; then choose "Citing References"; then choose "Cases"; then click "Filters"; then choose "Date"; then search "All Dates Before" "09/16/1938").

325. *See id.* (search "42 U.S.C. § 1985"; then choose "Citing References"; then choose "Cases"; then click "Filters"; then choose "Date"; then search "All Dates Before" "01/01/1965").

326. *See id.* (search "42 U.S.C. § 1983"; then choose "Citing References"; then choose "Cases"; then click "Sort By"; then choose "Oldest First"); Nw. Fertilizing Co. v. Hyde Park, 18 F. Cas. 393, 394 (C.C.N.D. Ill. 1873). Illinois, which exhibited a policy toward modern urban growth, had its own rules of civil procedure that permitted judges in the General Court to draw on the procedures of the English courts of equity. Harry N. Gottlieb, *Illinois Civil Procedure*, 19 CHI.-KENT L. REV. 342, 346 (1941) (citing 1813 Practice Act, now codified at ch. 735 ILL. COMP. STAT. 5/2-101–2-2301 (2022)).

327. *See* WESTLAW, *supra* note 324 (search "42 U.S.C. § 1983"; choose "Citing References"; then choose "Cases"; then click "Sort By"; then choose "Oldest First"). These are, other than *Northwestern Fertilizing* mentioned above, Mod. Amusements v. New Orleans Pub. Serv., 165 So. 137, 137–38 (1935) (African American recreational baseball league suing city government for revoking permit), and Aultman & Taylor Co. v. Brumfield, 102 F. 7, 8–9 (C.C.N.D. Ohio 1900) (corporation seeking injunction against state auditor from levying assessment).

328. *See* Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 400 (1973). Posner has sometimes indicated that this is the purpose and at other times has acknowledged the cultural benefits that a neutrally functioning legal system provides.

of value-maximization, Posner observed that procedural laws could be reduced to an equation wherein the most efficient system of dispute resolution would minimize both "'error costs' (the social costs generated when a judicial system fails to carry out the allocative or other social functions assigned to it), and the 'direct costs' (such as lawyers', judges', and litigants' time)."[329] Posner's attempt to place "a price tag on the consequences of failing to apply the substantive law in all cases in which it was intended to apply" is useful in considering the probable cause and effect of much of the oppression Black Americans faced after emancipation.[330]

Addressing civil disputes in particular, Posner began with the example of a hypothetical corporation that sells goods to a large number of consumers, which may occasionally inflict injuries on those consumers.[331] In this example, however, the company can also purchase safety equipment in order to reduce that accident rate.[332] If the company is never penalized for injuring consumers, it will never purchase any safety devices.[333] If the substantive law "is enforced flawlessly," meaning that all meritorious claims are resolved in favor of the plaintiff, and all non-meritorious ones are resolved in favor of the defendant corporation, that corporation will buy the economically optimum amount of safety equipment.[334] When errors occur in the procedural rules governing resolution, the corporation's decisions to purchase more or less safety equipment leads to a social loss deriving from their erroneous decisions producing sub-optimum value.[335]

Error costs take two forms.[336] One is a false positive, wherein the corporation is held liable but the injury was either caused by the plaintiff or a third party.[337] The second is a false negative, wherein the corporation escapes liability even though it should have been held responsible under the applicable rules.[338] In the event of procedurally "biased" error—a

329. *Id.* at 399–400.
330. *Id.* at 401.
331. *Id.* at 402.
332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.* at 403; *see also* ADAM SMITH, LECTURES ON JURISPRUDENCE 223–24 (Edwin Cannan ed., 1896) ("When people find themselves every moment in danger of being robbed of all they possess, they have no motive to be industrious . . . . Nothing can be more an obstacle to the progress of opulence.").
336. Posner, *supra* note 328, at 414 n.22.
337. *Id.*
338. *Id.* Although Posner discusses these errors in the context of the desirability of additional procedures intending to secure the innocence of criminal defendants who have not actually committed crimes and perhaps shows an outdated view of the criminal justice

preference for either plaintiffs or defendants—either of these two error costs can rise somewhat dramatically.[339] By instituting a rule that plaintiffs win every case, no corporation will ever escape liability, but victims will also fail to take their own adequate safety precautions; social loss will result by virtue of the corporation paying for an injury it had no role in causing.[340] Similarly, a rule that defendants win every case will result in a social loss arising from the additional safety expenditures victims experience because they know they will receive no redress from a court system.[341]

Posner's example does not directly correlate to the experience of Black Americans in the postbellum South; we are concerned with the vindication of personal rights upon which liberal society is based as opposed to the prevention of consumer injury. Nonetheless, the analogy is obvious. A set of legal rules that routinely produce false negative results will create social loss in the community whose individual rights are violated with impunity.[342] These communities will tend to engage in less commerce, consumption, and overall economic activity because they have no trust that the dispute resolution system will enforce their rights.[343] They may be fearful of participating in public life including voting, jury service, even shopping. Indeed, this may have been the entire point of the Jim Crow legal regime.

To be sure, prevailing interpretations of substantive law also interfered with Black Americans' enjoyment of these personal rights.[344] Many jurisdictions—including northern ones—imposed a limitation of "separateness" on the Fourteenth Amendment's Equal Protection Clause, which resulted in a number of violations of the personal rights that have been discussed elsewhere at length.[345] But we should remember that the

system (indeed, Posner states that the likelihood of false positives in the American criminal justice system is low), the construct could be applied to any dispute resolution process.

339. *See id.* at 406–08.

340. *Id.* at 405–07.

341. *Id.* at 407. Again, Posner is not discussing procedural rules per se, but rather is discussing the substantive laws of torts, considering strict liability and contributory negligence. *Id.* But the more abstract analysis can also be applied to procedural rules.

342. *Id.* at 404.

343. *See id.* at 404–05.

344. *See generally id.* Although this Article focuses on the procedural dimensions of that enjoyment, Posner's theory seems also applicable to the use of substantive law to guarantee enjoyment of the particular activities that we associate with liberal democracy. If we look at the personal rights as a sort of "natural law" of liberalism, we might ask how the positive law of segregation contributed to social loss for Black Americans.

345. *See, e.g.*, People *ex rel.* King v. Gallagher, 93 N.Y. 438, 447–50 (1883) (holding that laws treating one race differently from another race "can in no just sense be called a discrimination against such race or an abridgment of its civil rights"); State *ex rel.* Garnes v. McCann, 21 Ohio St. 198, 211 (1871) (upholding school segregation on the basis of race);

substantive aspects of the common law, contract, tort, property, crime, were not re-written by the Jim Crow courts.[346] The circumstances of the Jim Crow South were not that Black Americans never found vindication in the courts; those rights were simply vindicated much less frequently. Despite the economic vibrancy that many Black American communities were able to build within themselves,[347] the "social loss" resulting from a lack of effective rights enforcement may be illustrated by the race-based degradation endemic to these communities in the 100 years after the Civil War. In other words, the premise of the liberal social contract may have failed at least in part because of a procedural bias against Black plaintiffs.

Did Black Americans simply bring fewer claims because the court process itself was hostile,[348] or because they feared physical violence if they tried to enforce their rights? The question implicates a paradox about enjoyment and enforcement of the personal right to self-defense. Does the lack of the ability to defend oneself lead to a decision to not petition a court for physical protection, or does the knowledge that a court will not protect you lead others to be more inclined towards violence? The paradox reiterates the way in which our civil dispute resolution system has both generative and reflective functions in our system of personal rights. It both creates rights and reflects the degree to which people enjoy them; expectations around the activities associated with freedom create "rights," and "rights" protect and expand those expectations.

An illustration of the social loss that likely resulted from Black Americans' inability to access the justice system is recorded by a federal judge sitting in the district of Georgia hearing *Jamison v. Wimbish*, 130 F. 351 (1904):

> A respectable man, past middle life, accustomed to indoor work requiring no physical exertion, is arrested at night, on his way home, and hurried to the cells of the city prison. The next morning, without accusation of any sort, he is sentenced to pay fines impossible of payment, and the alternative punishment—

Cory v. Carter, 48 Ind. 327, 362 (1874) (arguing that segregating public school students on the basis of race was lawful because each race's children would still receive a free education from the state).

346. *See* Dylan C. Penningroth, *Race in Contract Law*, 170 U. PA. L. REV. 1199, 1212, 1216–22 (2022).

347. The city of Greenwood, Oklahoma, is one of the most famous examples. As a stark example, this community was destroyed by a race riot in 1921, and only 100 years later has a lawsuit been filed to compensate three of its still-surviving victims. Attorney Lien Claim at 2–4, Randle v. City of Tulsa, No. CV-2020-01179 (Okla. Cty. Dist. Ct. Sept. 1, 2020).

348. Indeed, this phenomenon was studied and confirmed in the bias reports of the 1990s. *See infra* notes 421–22 and accompanying text.

> because of its infamy violative of the Constitution—for seven months on the chain gang is at once imposed. By noon, in stripes and shackles, in easy range of the repeating rifles and shotguns of the guards, this man is toiling on the public roads with the frantic energy of one who works under fear of death, or of punishment to which, in the mind of a vast majority of men, death itself would be preferable. Before him are 210 days of agony, 210 nights in a fetid stockade.[349]

Like many Black Americans at the time, Mr. Jamison's rights to work for his own profit were frustrated by the application of state vagrancy laws, the punishment for which was forced labor.[350] Here, the judge ruled that the sentence of forced hard labor could not be imposed by a police court without a judicial officer and goes on to note that 194 men were convicted and similarly sentenced for minor offenses in the month of March 1904 alone.[351] As we applaud this judge for his decision, it is important to note that upon this habeas corpus petition, the judge is empowered only to invalidate the plaintiff's detention to the extent it violated the U.S. Constitution.[352] Habeas relief, here, does not lift the other 193 men convicted that month from their sentence of forced labor, nor does it enjoin the police court from imposing these penalties in the future. The judge notes that three men on the chain gang were shot for attempting to escape the day the case was argued.[353] Why did they not wait a day and make the same petition, let alone a case, under section 1983? There is no reported case showing that any of them, or Jamison himself, even tried.[354] While it had not enacted Field's code, Georgia

349. Jamison v. Wimbish, 130 F. 351, 362 (S.D. Ga. 1904), *rev'd*, 199 U.S. 599 (1905).

350. *Id.* at 352.

351. *Id.* at 357.

352. *Id.* at 362.

353. *Id.* at 364. There is no evidence any of their families sued to obtain relief for a wrongful death. Although there certainly could have been obvious procedural obstacles, the most obvious—admissibility of testimony by Black witnesses—was permitted by Georgia's procedural code since 1866. *See* Clarke v. State, 35 Ga. 75, 80 (1866).

354. As an interesting epilogue, *Jamison* was later overturned by the Supreme Court without opinion based on precedent that the plaintiff had failed to exhaust his administrative remedies. *Jamison*, 199 U.S. at 599. Conviction for a "petty offense" by the Macon police courts was again challenged under habeas corpus in the Georgia State Supreme Court. Pearson v. Wimbish, 52 S.E. 751, 752 (Ga. 1906). While the court found the conviction violated due process, it held the custody of the prisoner lawful because "[t]he fact, however, that the accused has been illegally sentenced, will not result in his absolute discharge from custody where a legal sentence can be imposed." *Id.* at 757. This perhaps ad hoc procedural rule is a clear example of one that would cause an adverse impact on minorities despite its neutrality.

adopted a similar approach to civil procedure and publicized its rules much like the Field Code jurisdictions.[355]

In order to achieve a fuller picture of why some citizens are unable or unwilling to enforce their rights, we should seek to understand what about these rules got in the way. Shouldn't Field's innovations or those permeating through the various state courts have resulted in a more level playing field in filing and litigating these claims? The reality was that code pleading was not all that simple, and its unforeseen difficulties quickly led to a new procedural movement that began in earnest only fifty years after the Codes were adopted.[356]

V. ACCESS TO JUSTICE AND THE LIBERAL ETHOS OF THE FEDERAL RULES OF CIVIL PROCEDURE

After the Field Code had rapidly spread to at least half of the states, many commentators and practitioners observed that it was actually quite difficult to manage and led to some odd results.[357] Coupled with a federal legislative structure that left a remarkable difference between the mode of practice and procedure in each particular federal district court, many lawyers began advocating for reform of the new code pleading regime.[358] This advocacy reached a high point in 1906, when Roscoe Pound delivered a speech to the American Bar Association on the perceived dysfunction of the American judiciary.[359]

The context of Pound's speech, the motivations of the primary drafters of the Rules Enabling Act and its rules, and global politics are important for this analysis. The U.S. Supreme Court decided *Lochner v.*

355. William B. McCash, *Thomas Cobb and the Codification of Georgia Law*, 62 GA. HIST. Q. 9, 16 (1978) (describing how Georgia's impulse to codify its laws was to permit its *lawyers* to "find the controlling laws"); *see also Report of the Committee to the General Assembly of the State of Georgia*, *in* THE CODE OF THE STATE OF GEORGIA v, v (R. H. Clark, T. R. R. Cobb, and D. Irwin, eds., 1861) (describing how codification was intended to "place the whole body of all the law within the reach of the people").

356. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 940–42 (1987) (tracing a portion of the Federal Rules to discontent with the Field Code and its revisions beginning in the 1890s).

357. Burbank, *supra* note 322, at 1038; Charles E. Clark, *The Complaint in Code Pleading*, 35 YALE L.J. 259, 262–64 (1926) (describing difficulties applying the distinction between allegations of fact, which were required, and of law, which were unacceptable).

358. Burbank, *supra* note 322, at 1038 n.93 (citing McArthur v. Moffett, 128 N.W. 445, 446 (Wis. 1910)).

359. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395, 412–14 (1906). Pound would not be the last law reformer to criticize American courts for inefficiency. *E.g.*, Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 456–58 (1943).

New York in 1905.[360] Woodrow Wilson unseated William Howard Taft as President in 1912 under a banner of breaking up monopoly, reforming the banking industry, instituting an eight-hour workday, and regulating the economy by the federal government.[361] The First World War started two years later.[362] Three years after that, Vladimir Lenin ushered in the Bolshevik Revolution over czarist Russia.[363] Many proponents of the business environment made possible by the Industrial Revolution became concerned that the American laboring class would take up the Bolshevik cause.[364]

Former President Taft himself was a drafter of the original Federal Rules of Civil Procedure, which he contributed to while serving as Chief Justice of the Supreme Court.[365] Another primary contributor to the Rules, Thomas Shelton, frequently expressed his belief that relieving judges from the overly rigid technicalities of procedure would help relieve some of the tension that led to discontent from organized labor.[366] On the other side, the young law professor Charles Clark—who would later serve as the Advisory Committee on Rules for Civil Procedure's first Reporter and principal drafter—seems to have viewed his role as one of social experimenter and innovator.[367] Professor Clark had strong ties to the

360. Lochner v. New York, 198 U.S. 45, 45, 53 (1905), *overruled by* Day-Brite Lighting Inc. v. Missouri, 342 U.S. 421 (1952), *and* Ferguson v. Skrupa, 372 U.S. 726 (1963), *and abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), wherein a New York law prohibiting employers running bakeries from requiring their employees to work more than sixty hours a week was found to violate the liberty to contract under the Due Process Clause of the Fourteenth Amendment.

361. Subrin, *supra* note 356, at 955 ("The highly charged political climate in the decade before the first World War, particularly concerning proposals for recall of judges, prohibition of labor injunctions, and prohibition of judicial comments on the evidence to juries, deeply influenced Enabling Act proponents . . . . Eugene Debs, the nominee of the Socialist National Party, garnered almost 900,000 votes. The results, as well as the campaigns, terrified some conservatives." (footnote omitted)).

362. Dennis E. Showalter & John Graham Royde-Smith, *World War I*, BRITANNICA (Jan. 18, 2023), https://www.britannica.com/event/World-War-I.

363. *Russian Revolution*, HIST. (Jan. 11, 2023), https://www.history.com/topics/russia/russian-revolution.

364. Subrin, *supra* note 356, at 959 ("[T]his is one of the things that is making Bolshevists in this country; that frequently, a sensible man, a business man, a practical business man, sits in the courtroom and sees his case thrown out on a technicality that he can not understand, and does not know why it is necessary . . . ." (citing *Procedure in the Federal Courts: Hearing on H.R. 2377 and H.R. 90 Before the H. Comm. on the Judiciary*, 67th Cong. 6, 28 (1922))).

365. *Id.* at 955.

366. *Id.* at 955–56.

367. *Id.* (contrasting the conservative leanings of Thomas Shelton and Howard Taft, who desired to rehabilitate the image of the judiciary in the eyes of an uprising labor movement, with Charles Clark, who saw his involvement in drafting the Rules as an opportunity to "[b]reak[] down old formalisms, facilitating the government's regulatory role, exploring new

rising legal realist movement and openly opined on law's ability to shape society.[368]

Both sides found common ground in the flexible procedures characteristic to equity courts.[369] In an attempt to create a set of procedures that would control all cases in all federal courts and provide a model for the individual states to emulate, the first drafters of the Federal Rules settled on a model that was known both for its willingness to entertain the pleas of everyone and its willingness to give judges wide discretion in managing disputes.[370] The result was a set of procedures that prioritized flexibility, openness, and simplicity.[371] This move cemented the growing change from common law procedures to those more closely resembling the Catholic *ordo iudiciarus*.[372]

After decades of overall rejection of the code pleading regime by the federal courts and the work of the first Rules Advisory Committee, Congress passed the Rules Enabling Act.[373] From its inception, the Act expressed a preference for rule-making by committee because of the flexibility necessary to draft workable rules.[374] The drafters believed that rule-making by committee would insulate it from the influence of elected representatives and the political bias that presumptively comes with rule-making by democratic legislation.[375] The rules were thought to operate best when they were apolitical and driven by expert opinion.[376]

roles for legal professionals" as part of his view of law and litigation as an "emerging social reformer").

368. *Id.* at 966 ("One of the most important recent developments in the field of the law is the greater emphasis now being placed upon the effect of legal rules as instruments of social control of much wider import than merely as determinants of narrow disputes between individual litigants." (citing Charles E. Clark, *Fact Research in Law Administration*, 1 MISS. L.J. 324, 324 (1929))).

369. *Id.* at 970.

370. 1 POMEROY, *supra* note 81, at 37 ("In addition to this ordinary function as a common-law judge, the Chancellor began at an early day to exercise the extraordinary jurisdiction—that of *Grace*—by delegation either from the King or from the Select Council.").

371. *See* Edson R. Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. & BAR 5, 30 (1938) ("The rules are really so simple that it is hard for those who are familiar with the technique of the modern litigation to appreciate how simple they are.").

372. The courts of equity in medieval England were more closely modeled on the ecclesiastical courts of the Catholic Church and later, the Church of England. As discussed *supra* notes 84–88 and accompanying text, these procedures were based in the trial that takes place at the end of Western Europe's creation myth.

373. *See* Burbank, *supra* note 322, at 1043–98.

374. *See id.* at 1018–20.

375. *See id.* at 1090–92 (discussing debates that occurred prior to the Act's passage over the proper allocation of procedural rule-making authority between courts and the legislatures).

376. *See id.* at 1091.

The result was a set of rules that drew on Field's code pleading regime but that sought convenience by establishing one set of rules that would govern all cases. The desire to provide a "trans-substantive" set of rules grew out of many of the same desires motivating Field's work: simplicity, efficiency, and ease of use by practitioners.[377] These rules were motivated by a desire to resolve cases on their merits and to emphasize practical results over points of procedure.[378] As noted by Professor Subrin, this theory actually had different aims than the laissez-faire theory espoused by Field, as it was grounded upon the idea that treating all cases with simple and straightforward procedures would produce the efficiency and effectiveness expected of modernity.[379] Congress enacted the Rules Enabling Act at the outset of the New Deal to facilitate this new set of procedural rules.[380] There is some evidence that the drafters intended to provide groups of workers with more effective mechanisms to enforce unionization and strike rights against corporations.[381] For the first three decades of the Rules' life, the strong preference for a resolution on the merits survived.[382]

We should not forget that the Federal Rules were generated by both politically conservative and liberal thought.[383] While conservatives sought to ease the technical restrictions placed on judges to persuade a burgeoning labor movement that the courts were not completely against them, liberals viewed the flexibility of the federal courts as a door through which the exercise of substantive rights could be secured for a

377. Subrin, *supra* note 296, at 326; Alexander Holtzoff, *A Judge Looks at the Rules After Fifteen Years of Use*, 15 F.R.D. 155, 173–74 (1954) ("[T]he code became so encrusted with technical interpretations and constructions by the courts, that it came near to breaking down of its own weight. A new group of technicalities were gradually substituted for those of the common law. Fortunately this has not happened to the Federal Rules of Civil Procedure, as they are being interpreted and applied with liberality and with a view to achieving their purpose, namely, the elimination of technicalities and a simplification of procedure.").

378. Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 916 (1976) ("[C]ases would be decided on their merits rather than by procedural rulings, and this would occur with an economy of time and resources.").

379. Subrin, *supra* note 296, at 326; Holtzoff, *supra* note 377, at 155; Pound, *supra* note 359, at 396–97.

380. *See* Holtzoff, *supra* note 377, 156–57.

381. Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462, 481–82 (2017).

382. Conley v. Gibson, 355 U.S. 41, 45–47 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), is widely considered the pinnacle of the Federal Rules' original vision of liberality of pleading, wherein a plaintiff would be dismissed only if "no set of facts" it could plead would state a cause of action, granting all inferences in its favor.

383. Subrin, *supra* note 356, at 955–66.

broader scope of citizens.[384] While conservatives sought to use the easily accessible rules to absorb disputes, liberals sought to advance a spread of government benefits and protections they believed would translate positively for them at the ballot box.[385]

A. Judicial Rejection of the Premise

Although the first twenty-five years of the simplified Rules of Civil Procedure found little criticism, there was soon evidence that the Rules were perhaps too welcoming. During the period between 1950 and 1970, the number of cases filed in federal court increased from 45,085 to 82,665.[386] They doubled again between 1970 and 1980.[387]

As a result of the groundswell of popular support for the expansion of the personal rights of Black Americans and women, culminating in a series of mass protests known as the civil rights movement,[388] Congress passed a series of laws beginning with the Civil Rights Act of 1964, the Fair Housing Act of 1968, the Voting Rights Act of 1968, and the Equal Employment Opportunity Act of 1972.[389] As in the Reconstruction era, the legislature targeted three of the five personal rights with an intent to improve the social and economic situation of minorities. Importantly, the enforcement mechanism envisioned by these laws relied on the existence and use of private procedural rights.[390]

384. *See id.* at 974 ("The symptoms [complaining of excessive cost and delay] sound like what one would expect from an all-equity procedural system. The praise for modern litigation as a creator of new rights essential for a humane society is also consonant with this diagnosis.").

385. *See id.* at 955–56, 974.

386. WILLIAM F. SHUGHART II & GÖKHAN R. KARAHAN, A STUDY OF THE DETERMINANTS OF CASE GROWTH IN U.S. FEDERAL DISTRICT COURTS, FINAL REPORT 89 (2003). For additional context, 328,107 cases were filed in the U.S. federal district courts in 2021 according to the Federal Judicial Center Integrated Database, whereas 68,136 cases were filed in 1940. *See* Rex R. Perschbacher & Debra Lyn Bassett, *The Revolution of 1938 and Its Discontents*, 61 OKLA. L. REV. 275, 276 (2008); *IDB Civil 1988-Present*, FED. JUD. CTR., https://rb.gy/dy422 (last visited Feb. 3, 2023).

387. SHUGHART II & KARAHAN, *supra* note 386, at 89–90.

388. The popular demonstration component of the civil rights movement could be interpreted as a complaint against the lack of adequate fora to resolve disputes over personal rights. Note also that there was a large increase in civil rights litigation after *Brown v. Board of Education*, 349 U.S. 294 (1955). *See* Gregory C. Keating, *Settling Through Consent Decree in Prison Reform Litigation: Exploring the Effects of* Rufo v. Inmates of Suffolk County Jail, 34 B.C. L. REV. 163, 163 (1992).

389. *See generally* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e–e-8); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.); Fair Housing Act of 1968, Pub. L. No. 90-284, tits. VIII & IX, 82 Stat. 81 (codified at 42 U.S.C. §§ 3601–3619).

390. *See* Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2184–85 (1989).

This strategy was proposed as a compromise with conservative lawmakers who opposed increased federal regulatory authority over potential violations; private lawsuits were seen as a more efficient and less intrusive enforcement scheme than regulatory oversight.[391] Because both sides acknowledged the relative inability of the targets of discrimination to afford legal representation,[392] the private plaintiffs' bar quickly became the standard-bearer in a fight to enforce the civil and personal rights of minorities.[393]

Even the amendments to the Rules on class actions in 1966 exhibit a preference for the enforcement of civil rights by and through an enlightened legal elite, often without the direct participation of the class whom they represent.[394] These amendments, along with much of the political left's activity during the first fifty years of the Federal Rules' regime, depended on a class of highly trained lawyers and an open federal court system to implement a strategy for the expansion of personal rights. While the American judiciary was initially receptive to this approach, the tide gradually turned toward a more conservative

391. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 436 n.20 (1966).

392. The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988(b), was enacted to remedy the shortage of civil rights counsel. *See* Collection of Documents Related to S. 2278 Civil Rights Attorney's Fees Awards Act of 1976, WHITE HOUSE RECS. OFF.: LEGIS. CASE FILES, GERALD R. FORD PRESIDENTIAL LIBR., https://www.fordlibrarymuseum.gov/library/document/0055/1669697.pdf (last visited Apr. 4, 2023); Stanley M. Grossman, *Statutory Fee Shifting in Civil Rights Class Actions: Incentive or Liability?*, 39 ARIZ. L. REV. 587, 593 (1997); *see also* David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 707–08 n.300 (2013) ("One can also infer a lack of private counsel willing to bring suits at the dawn of Title VII implementation – whether among black lawyers or the plaintiffs' bar – from the fact that much of the first wave of Title VII suits came from civil rights groups, particularly the NAACP (whether its national office or local branches) or its legal arm, the Legal Defense Fund.").

393. *See* Derrick A. Bell, Jr., *Serving Two Masters*: *Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 500 (1976). Derrick Bell alluded to the irony of this position in his introduction to DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 11–14 (1992).

394. Barak Atiram, *From Brown to Rule 23: The Rise and Fall of the Social Reform Class Action*, 37 REV. LITIG. 47, 80–81 (2018) ("[W]hile elite-dominated interest-group litigation possessed the symbolic impact of social-reform litigation, it also undermined the role of the social movement as an insurgent group and limited its discourse to existing frameworks of constitutional law." (footnote omitted)). The committee at the time, however, probably sought to make the class action device easier to access for those who would take these cases to court. *See* Samuel Issacharoff, *An Oral History of Rule 23*, 74 N.Y.U. ANN. SURV. AM. L. 105, 109 (2018) (In the words of Arthur Miller, reporter to the Advisory Committee at the time: "Even though *Brown v. Board of Education*, as we know, was not a formal class action, class actions were being employed in the desegregation context—certainly by '62, when the Committee really started to focus on Rule 23—so it was the banner motivation for the revision.").

approach which viewed courts as an institution primarily concerned with limiting government and protecting American business interests.[395]

The sheer number of disputes brought before the federal courts began rapidly increasing leading up to this change.[396] Litigation over new civil rights laws governing personal rights arose during a period in which more Americans were already suing each other for more disputes, and more Americans were petitioning federal courts to be the arbiter of those disputes.[397] The era of the "litigation explosion" is the one that most modern attorneys born after the "baby boom" generation are familiar with.[398] Federal judges began to struggle under the weight of the cases they were expected to hear.[399]

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395. This trend has alternatively been called "The Restrictive Ethos," and even "One-Percent Procedure." *See* A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 366 (2010); *see* Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1868, 1871 (2014); Coleman, *supra* note 3, at 1008.

396. *See* Perschbacher & Bassett, *supra* note 386, at 278–79. As another example, while only fourteen cases were reported under 42 U.S.C. § 1983 during the sixty years between its passage and the establishment of the Federal Rules in 1938, 79 cases were reported between 1938 and the passage of *Brown v. Board of Education* in 1954. *See* WESTLAW, *supra* note 324 (search "42 U.S.C. § 1983"; then choose "Citing References"; then choose "Cases"; then click "Filters"; then click "Date"; then choose "Date Range"). Between the *Brown* decision and 1965, two years after the March on Washington, 523 cases were reported. *See id.* (search "42 U.S.C. § 1983"; then choose "Citing References"; then choose "Cases"; then click "Filters"; then click "Date"; then choose "Date Range"). There were 4,280 cases containing section 1983 claims reported between 1965 and 1975; that number rose to 9,090 between 1975 and 1985. *See id.* (search "42 U.S.C. § 1983"; then choose "Citing References"; then choose "Cases"; then click "Filters"; then click "Date"; then choose "Date Range"). As of the date of writing this Article, 508,983 cases are available on Westlaw's database that reference 42 U.S.C. § 1983. *See id.* (search "42 U.S.C. § 1983"; then choose "Citing References"; then choose "Cases"; then click "Filters"; then click "Date"; then choose "All Dates After" and input "September 11, 2022").

397. Subrin & Main, *supra* note 395, at 1875 ("First, the criminal docket has put pressure on the civil docket. This may well be true, but the data is less compelling than the conventional wisdom suggests. Between 1962 and 1975 (a period of time during which the civil docket doubled), the total number of criminal defendant dispositions increased by a factor of 1.5. Between 1975 and 1983 (when the civil docket doubled again), the total number of dispositions in criminal cases decreased. To be sure, however, the Speedy Trial Act of 1974 required criminal cases to be terminated within sixty days of arraignment, adding pressure on judges and lawyers trying to handle the burgeoning civil caseload." (footnotes omitted)).

398. Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 5 (1986). One of the popular analyses of the time was provided by WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991); *see also* Douglas H. Ginsburg, *Law's Paradise Lost?*, 90 MICH. L. REV. 1609, 1610 (1992) (book review).

399. *See* Perschbacher & Bassett, *supra* note 386, at 297.

In response, conservative groups began voicing complaints about the litigiousness of American society.[400] After the election of Ronald Reagan, the Advisory Committee recommended a series of Amendments in 1983 that were intended to restrict the wide berth of the plaintiffs' bar in federal court.[401] Including new standards for attorney certification of pleadings, proportionality in discovery, and encouragement of judicial intervention in the management of cases, the federal judiciary began to codify a priority for the processing and disposal of cases as opposed to trial.[402] Beginning in 1985, the Supreme Court issued a series of decisions easing the ability of a party to obtain summary judgment, which allowed for the disposition of cases at a higher rate.[403] These procedural innovations toward narrowing the courthouse door, accomplished by slim majorities of the Supreme Court, were further cemented in a couplet of cases easing the ability of a party to obtain dismissal at the pleading stage.[404]

B. The Appeal of Cost and Delay

Many scholars have commented on the state of federal civil procedure after the Supreme Court's interpretations in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*.[405] Given that much of the substantive law targeting the personal rights passed during the civil rights movement depends on proving a defendant's intent or state of mind, it is difficult to imagine how standards of pleading and production of evidence at summary judgment that allow a judge to dismiss a case because it is

400. Meyn, *The Haves of Procedure*, *supra* note 3, at 1786–87, nn.106–07 (citing a series of *Newsweek* magazines that included advertisements titled "The Lawsuit Crisis is Bad for Babies").

401. *Id.* at 1788–89 & n.115 (citing Joan M. Hall, *New Rules Amendments Are Far Reaching*, 69 A.B.A. J. 1640, 1644 (1983)).

402. Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1142–44 (2002).

403. JOE S. CECIL ET AL., TRENDS IN SUMMARY JUDGMENT PRACTICE: 1975–2000, at 2 n.2 (2007) (citing Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROBS. 144, 158 (1948)). Although the grant rate of summary judgments clearly increased during this time, the authors credit other "changes in federal civil rules and case management practices" with this increase. *Id.* at 1.

404. Engstrom, *supra* note 6, at 1204 n.7 (listing empirical studies of *Twombly* and *Iqbal*'s effect on civil litigation).

405. *See generally* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009). Some scholars in favor of the reforms implemented by *Twombly* and *Iqbal* believe they benefit plaintiffs by dismissing weak cases sooner rather than later and by saving them the time and expense of litigation. William H. J. Hubbard, *A Fresh Look at Plausibility Pleading* 8 (Coase-Sandor Inst. for L. & Econ., Univ. of Chi. Sch. of L., Working Paper No. 663, 2015). Others see the closing of the courthouse doors as more detrimental to the enforcement of personal rights. Subrin & Main, *supra* note 395, at 1878–79.

not "plausible" would not adversely affect minorities.[406] Standards that appeal to judicial discretion are also present at critical junctures such as motions to compel discovery[407] and dispositive motions for summary judgment.[408]

The current state of the Rules involves high direct costs (drafting a complaint that will convince a judge of factual plausibility and opposing the inevitable motion to dismiss) and error costs (the risk of a judge incorrectly dismissing a valid claim) to plaintiffs at the pleading stage, a discovery regime that is highly restrictive,[409] and similarly high costs in order to advance a case through discovery to trial.[410] As a counterpoint, defendants, who are typically more wealthy than plaintiffs, are granted a series of risk-free procedural maneuvers to slow down a plaintiff's case and increase the cost of litigating.[411] The only error costs faced by a civil defendant are nuisance-value settlements and excessive jury verdicts. In a regime where less than 1% of all civil cases make it to trial, [412] error at that stage other than an excessive verdict is unlikely.

406. Indeed, there is already evidence to suggest that identity plays a role in this bias. Stephen B. Burbank & Sean Farhang, *Politics, Identity, and Pleading Decisions on the U.S. Courts of Appeals*, 169 U. PA. L. REV. 2127, 2132 (2021) (finding that appellate panels with women and non-white judges are substantially more likely to rule in favor of a plaintiff reaching discovery in certain civil rights claims).

407. FED. R. CIV. P. 26(b)(1) (requiring discovery requests to be "proportional" to the needs of the case).

408. *See* Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587–88 (1986) (holding that inferences from material fact must be drawn in light most favorable to moving party, but that trial courts are free to decline those inferences if they are not "reasonable").

409. *See* Spencer, *supra* note 395, at 364–66.

410. *See* EMERY G. LEE III & THOMAS E. WILLGING, LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 11 (2010) (noting that extensive discovery presents a .69 correlation to the most expensive cases filed); *see also* CORINA D. GERETY, EXCESS & ACCESS: CONSENSUS ON THE AMERICAN CIVIL JUSTICE LANDSCAPE 11 (2011), https://iaals.du.edu/sites/default/files/documents/publications/excess_access2011-2.pdf.

411. *See* PAULA HANNAFORD-AGOR, MEASURING THE COST OF CIVIL LITIGATION: FINDINGS FROM A SURVEY OF TRIAL LAWYERS 22–23 (2013), https://www.ncsc.org/__data/assets/pdf_file/0035/27989/measuring-cost-civil-litigation.pdf; *see also* LEE & WILLGING, *supra* note 410, at 5–8 (2010) (analyzing which portions of the Rules tend to produce the most cost).

412. *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS 4, 46–47 (2009), https://www.uscourts.gov/sites/default/files/iaals_civil_case_processing_in_the_federal_district_courts_0.pdf (noting that median cases under study, including those that did not go to trial, took about a year to resolve); *Federal Judicial Caseload Statistics 2020*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020 (last visited Feb. 4, 2023) (noting of the approximately 332,000 civil cases filed in 2020, only 23,133 cases were terminated on the merits in that year, providing an approximation that

While reducing cost and delay has an arguably universal appeal, let us keep in mind that defendants haled into federal court over claims concerning personal rights have been brought into court because they removed a plaintiff from seisin of one of those rights: the employer who fires an employee for a discriminatory purpose; the landlord who evicts a tenant for asking to pay with a Section 8 voucher; the police department whose officer shoots a citizen. In most of these situations, the defendant has already placed the plaintiff at a resource disadvantage. The plaintiff is then called to navigate the Federal Rules in order to obtain a monetary judgment that, ostensibly, will make them whole.

Although the twin focus on cost and delay arguably embodies a balance between plaintiff and defendant interests—defendants want to keep costs down and plaintiffs want a resolution as soon as possible—the way these directives are applied almost universally favor defendants.[413] First, while there has been a robust response to defendants' concern about rising discovery costs, there has been no legitimate attempt to address the primary cost facing plaintiffs: prohibitively high attorneys' fees, massive costs to obtaining testimony through deposition, and an ever-growing amount of time dedicated to fending off defendants' motion practice.[414]

Simultaneously, the desire to decrease delay appears to have created a tendency to dispose of plaintiffs' cases before informal deadlines.[415] In combination with the recent trends toward limitations on pleading and discovery, the cost and delay model seems targeted at the disposition of more claims before trial, although the ones that survive take an inordinately long time to get there.[416] With an almost poetic irony, there is some indication that even *Twombly* and *Iqbal* have led to increased expenditures of party and judicial resources because more defendants file motions to dismiss that are then vigorously opposed by plaintiffs and

only 7% of cases filed actually receive a decision from a judicial officer). On the general unavailability of trials, see Subrin & Main, *supra* note 395, at 1857–58 n.94.

413. *See* Miller, *Widening the Lens*, *supra* note 4, at 74.

414. *See id.* at 73–74.

415. *See* Miguel F. P. de Figueiredo et al., *The Six-Month List and the Unintended Consequences of Judicial Accountability*, 105 CORNELL L. REV. 363, 363–64, 418 (2020) (finding, as one example, that appellate remand is more common for motions decided immediately before the "soft" deadline of six months imposed by the CJRA's public reporting requirement).

416. The FJC reports that the average time from filing to trial for a civil case is currently almost three years (32.6 months). *Table N/A–U.S. District Courts-Combined Civil and Criminal Federal Court Management Statistics*, U.S. CTS. (Mar. 31, 2022), https://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2022/03/31-1.

granted with leave to amend, only to repeat the cycle until the judge is convinced that only the "plausible" claims remain.[417]

C. Demographic Data for Guidance in Experimentation and Improvement

Not only have our rule-making bodies been preoccupied with a somewhat superficial analysis of cost and delay, but by limiting the type of data we collect under the CJRA to the length of time a case remains on the federal docket, we have created something of a (color)blind spot to understand how our justice system works for people with a history of legalized subordination in personal rights. If that subordination occurred along lines of "identity politics" that we now reject,[418] the most direct path to understanding the impact of this likely bias against minorities is to analyze the points where they suffer statistically disproportionate adverse results.[419] Indeed, *Twombly* and *Iqbal* provide an easy example of how empirical evidence of bias against minorities[420] may signal the desirability of revisiting a procedural rule for improvement of the system more generally.[421] If, as this Article argues is the case for Africans in America, all American minorities have experienced some form of procedural bias in the enforcement of their personal rights, evidence of a statistically significant disproportionate impact of particular procedural rules on attempts to enforce those rights will likely provide a proxy for identifying rules that unjustly—and perhaps needlessly—skew towards the more powerful.[422] If this Article is correct that the five personal rights

417. *See* Miller, *Widening the Lens*, *supra* note 4, at 73–74 ("[A] Rule 12(b)(6) motion puts everyone on a potential litigation merry-go-round, a theoretically never-ending cycle that results in costs and delays."). Because these motions occur during discovery, it is also not entirely certain that *Twombly* and *Iqbal* truly serve their purpose of limiting the costs of discovery. But see Engstrom, *supra* note 6, and the many articles and debates following this issue and the objective effects of the Supreme Court's changes to pleading doctrine. Needless to say, this question should be studied.

418. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

419. Massachusetts has begun collecting such data on a voluntary basis. For an impressive visual representation of the data Massachusetts already collects, see *Massachusetts Trial Court, Department of Research and Planning*, TABLEAU PUB., https://public.tableau.com/app/profile/drap4687 (last visited Feb. 4, 2023).

420. *See* Engstrom, *supra* note 6, at 1213–14.

421. *See* Miller, *Widening the Lens*, *supra* note 4, at 76–77 (citing Marrero, *supra* note 300, at 17–18, 34) (proposing two tiers of motions to dismiss: one for discrete and decisive legal issues and the other for motions for failure to state facts sufficient to constitute a cognizable claim).

422. The concept of analyzing the situation of African Americans to predict the basis for class-based inequity comes from LANI GUINIER & GERALD TORRES, THE MINER'S CANARY:

are connected, changes to civil rules targeted to address demographic disparities have potentially trickle-up effects for all parties in a similar procedural posture, i.e., citizens claiming removal from seisin.

Although courts have engaged in detailed analyses of their own behavior and the relationship to social inequality, those studies have focused on individuals within a court system rather than on the system itself.[423] The only systemic analyses that have been conducted to date are the result of CJRA, which collects data on federal litigation in terms of how long federal cases remain on an active docket before they are resolved.[424]

The desirability of collecting data on race and gender has been recognized in many government institutions.[425] This data is gathered to understand and document these institutions' impact on American citizens.[426] Although many of the disputes over personal rights for Black Americans have been funneled into the federal courts for the past fifty

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ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 128–30, 292–95 (3d prtg. 2003).

423. For example, a number of judicially approved task forces conducted qualitative surveys regarding the experiences of minorities within the administration of particular courtrooms. *See*, *e.g.*, SPECIAL COMM. ON RACE & ETHNICITY, DRAFT FINAL REPORT OF THE SPECIAL COMMITTEE ON RACE AND ETHNICITY TO THE D.C. CIRCUIT TASK FORCE ON GENDER, RACE AND ETHNIC BIAS 13–21, 237–59 (1995). For a survey of task forces dedicated to the study of gender bias in the interpersonal relations between court personnel, litigants, and attorneys, see Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195, 2196–98 (1993).

424. The semi-annual reports required by the Civil Justice Reform Act, 28 U.S.C. § 476, list only the number of cases pending, the number of matters and motions pending for longer than six months, the number of cases pending longer than three years, and the number of bench trials conducted after six months of pending litigation. These statistics are tied to the names of individual judges. The focus on speed of disposition is also contemplated by COMM. ON CT. ADMIN. & CASE MGMT., CIVIL LITIGATION MANAGEMENT MANUAL 1 (2d ed. 2010) ("[M]anaged cases will settle earlier and more efficiently, and will provide a greater sense of justice to all participants. Even in the absence of settlement, the result will be a more focused trial, increased jury comprehension, and a more efficient and efficacious use of our scarcest institutional resource, judge time.").

425. *See* Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity, 81 Fed. Reg. 67398, 67399 (Sept. 30, 2016) (describing how racial demographic data was originally collected by the federal government in connection with a desire to measure the effects of educational policy and gradually expanded primarily due to statutory requirements for collection).

426. *See* Hephzibah V. Strmic-Pawl et al., *Race Counts: Racial and Ethnic Data on the U.S. Census and the Implications for Tracking Inequality*, 4 SOCIO. RACE & ETHNICITY 1, 9–10 (2018). There is not yet any organized empirical data on racial minorities' interaction with the Federal Rules of Civil Procedure. *See, e.g.*, Kevin R. Johnson, *Integrating Racial Justice into the Civil Procedure Survey Course*, 54 J. LEGAL EDUC. 242, 259 (2004) ("One can only wonder whether and, if so, how race may subtly influence the civil litigation process.").

years, inequalities in those rights remain significant.[427] Yet, there has been no effort to collect demographic data on how these litigants fare in their attempt to vindicate their personal rights, and where they most frequently fail in that process. I believe we need this data to fuel empirical research on civil procedure; it is the primary safeguard of civil liberty.[428]

There is already a framework to put these data to use. The Federal Judicial Center ("FJC") has made impressive steps toward recommending pattern discovery requests in employment discrimination cases that seem to have produced more efficient results, even though they may challenge the appeal of transsubstantivity.[429] In 1946, Chief Justice Warren Burger directed the Rules Advisory Committee to examine "the propriety, value and effectiveness of controlled experimentation for evaluating innovations in the justice system."[430] The Committee articulated four guidelines providing for the use of data in assessing the utility of experimental rules:

1. A rule needs "substantial improvement or be of doubtful effectiveness";[431]

2. There is "significant uncertainty about the value of the proposed innovation";[432]

427. The National Urban League has compiled a number of current studies on Black and white Americans. *See generally* NAT'L URB. LEAGUE, *supra* note 11. For example, the American Community Survey found that Black Americans' work produced 63% of the income that white Americans' work produces. *See id.* at 10. Federal Census Bureau data show that 43.1% of Black Americans own homes, while 74.4% of white Americans do so. *See id.* at 11. The U.S. Bureau of Justice Statistics data show that Black Americans are more than twice as likely to be subject to violence at police stops than white Americans. *See id.* at 24. Finally, the Census Bureau data show that 62.6% of Black Americans voted in the 2020 election, compared to 68.3% of white Americans. *See id.* at 28.

428. *See also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.").

429. *See* Laura McNabb, *Pilot Project Reduces Delay and Cost in Federal Litigation*, 41 LITIG. 55, 55–58 (2015) (discussing pattern discovery protocols in employment discrimination cases specifically).

430. Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121, 1198 (2002) (citing FED. JUD. CTR., EXPERIMENTATION IN THE LAW: REPORT OF THE FEDERAL JUDICIAL CENTER ADVISORY COMMITTEE ON EXPERIMENTATION IN THE LAW 79 (1981)).

431. FED. JUD. CTR., *supra* note 430, at 11.

432. *Id.*

3. There are "no other practical means to resolve uncertainties about the effectiveness of the proposed innovation," meaning that the experiment is unwarranted if "essential information can be obtained satisfactorily through simulation or other forms of research that do not directly affect the operation of the justice system";[433]

4. The experiment is "seriously . . . intended to inform a future choice between retaining the status quo or implementing the innovation."[434]

These standards offer a useful starting point for assessing whether experimentation is useful, whether it is feasible, and whether the rule would be well-received.[435] Given the practical realities of human behavior in systems controlled by rules, I do not propose that we structure our entire civil dispute resolution process around those rules' statistical impact on minorities. Indeed, as may have been the case in the Supreme Court's effort to minimize cost and delay in the *Twombly* and *Iqbal* decisions, a myopia on the success or failure of different demographic groups within the Rules of Civil Procedure is likely to have unintended consequences.[436] But if we believe that discrimination has no place in our

433. *Id.*

434. *Id.* at 11–12.

435. *See* Willging, *supra* note 430, at 1202–03 ("[D]istrict courts may be serving as 'very busy laboratories . . . but virtually no one is collecting data.'" (second alteration in original) (quoting A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1581–82 (1991))).

436. *See* Miller, *Widening the Lens*, *supra* note 4, at 73. Given the degree of empirical analytics already performed by multiple litigation technology services, demographic information should, at the least, be disaggregated from individual judges to avoid parties targeting particular judges with particular motions because of a perceived statistical likelihood for decision-making correlated with a party's identity. *See infra* note 453.

judicial system,[437] we cannot be sure that discrimination does not exist if we fail to ask the question.[438]

CONCLUSION

The sum total of the history included here leads to a finding that is ultimately unsurprising and perhaps even intuitive: our legal system tends to work best for people who can help lawmakers consolidate their own power. The aim of reiterating this point throughout five distinct periods in Anglo-American history—from the origins of our legal system to the present day—is to suggest that the role of procedural law in creating this system is probably underappreciated; in many ways, procedural law *is* the system. The problem for scholars interested in changing it is what we do about it.

The likelihood that the effort suggested here will produce immediate results is quite low. Procedural rule-making is a slow process, and the time needed to conduct studies on experimental rules is considerable.[439] Further, it is difficult to draw conclusions from the mere collation of demographic data with the information currently available because it consists only of procedural events represented as points in time of a lawsuit.[440] But the use and collection of data to inform the rule-making process is almost universally recognized as a force yielding more positive results and ones that appear more objective to the public.[441]

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437. *See* MODEL CODE OF JUD. CONDUCT r. 2.3(B) (AM. BAR ASS'N 2020) ("A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation . . . ."); *see also id.* at r. 2.3 cmt. 1 ("A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute."). The ABA has also recently called on law schools to educate students on their obligation as lawyers to eliminate bias, discrimination, and racism in the legal profession. *See* STANDARDS & RULES OF PROC. FOR APPROVAL OF L. SCHS. ch. 3, standard 303(c) (AM. BAR ASS'N 2022).

438. Of course, the suggestion that civil procedure may discriminate against minorities is not new. *See, e.g.*, ROY L. BROOKS, CRITICAL PROCEDURE 230–33 (1998) (discussing various critical perspectives on primary rules of civil procedure and their possible impacts on racial and gender minorities).

439. *See* Willging, *supra* note 430, at 1202–03.

440. *See id.*

441. *See id.*; *see also* Robert H. Hall, *Federal Circuit Judicial Councils: A Legislative History and Revisions Needed Today*, 11 GA. ST. U. L. REV. 1, 2 (1994) ("It is now appropriate for the judiciary to reevaluate the administration of the federal justice system and to permit the councils to provide leadership in areas uniquely suited to judicial council action.").

Given procedural rule-making committees' membership of experts with expertise in civil litigation who are selected independently from the political process,[442] they have the capability to study and collect data on the rules' operation and implement reform in the way they see most beneficial from the standpoint of that expertise. Without evidence-based support, the committees cannot be as effective as they could with that data.[443] To this end, the committees already collect significant data on litigants' interaction with the state and federal justice system.[444] This data does not yet consider the litigants' identity in this analysis.[445]

The point of this Article is to demonstrate that, when writing the rules of the game, culture, and identity probably make a difference.[446] While this Article uses the procedures governing forced labor, freedom, and the activities associated with each to offer a different interpretation of racial inequality in Anglo-American society, similar analyses could

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442. *E.g.*, *Committee Membership Selection*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection (last visited Feb. 4, 2023) (describing the federal rule-drafting committees, whose members are appointed by the Chief Justice of the United States Supreme Court and "include not only federal judges, but also practicing lawyers, law professors, state chief justices, and high-level officials from the Department of Justice and federal public defender organizations").

443. James B. Eaglin & Matthew Alex Ward, *Enhancing the Administration of Justice and Strengthening Judicial Independence Through Independent, Judicial-Based Applied Research Centers*, 7 J. LEGAL TECH. RISK MGMT. 77, 102 (2014) (noting benefits of "empirical research to ascertain what works by informing policymakers; measuring new proposals; examining the judiciary's efficiency; assisting judicial training and education; and informing the public and educating citizens. Together, this improves the judiciary's procedural and administrative independence, which strengthens judicial independence." (footnote omitted)).

444. *See* KATHRYN GENTHON & DIANE ROBINSON, COLLECTING RACE & ETHNICITY DATA 4 (2021), https://www.courtstatistics.org/__data/assets/pdf_file/0018/42255/Race_Ethnicity_Data_Collection_2.pdf (noting that "70% of 30 jurisdictions (primarily states) responding indicated that their courts collect race and ethnicity data, though most do not collect it for all case types.").

445. *See id.*

446. This may not be a function of an express desire to oppress other people, but rather a function of the assumptions and heuristics collected over the course of an individual's experience. Thus, the fact that nearly ninety percent of procedural rule-making committees for the Federal Rules of Civil Procedure have been staffed by white men may have some bearing on who those rules tend to favor. *See* Brooke D. Coleman, *#SoWhiteMale: Federal Civil Rulemaking*, 113 NW. U. L. REV. 407, 421–22 (2018). Significant research has also indicated that judges, too, are human; they are not immune to their own implicit biases. *See* Allison P. Harris & Maya Sen, *Bias and Judging*, 22 ANN. REV. POL. SCI. 241, 242 (2019); Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37, 52–53 (2015). *See generally* Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 203, 214, 222–23 (2017).

likely be drawn for gender, sexual orientation, religion, national origin, and disability. Noting that the precepts of Western civil procedure were founded by European men who were above all concerned with the protection of property and its passage between generations by heterosexual marriage,[447] we begin to see how analysis from any of these perspectives may illuminate a path to transformative innovation. Without any sort of check on the power of the procedural rule-maker, however, it appears quite difficult to maintain neutrality. We should view the collection of demographic data from litigants as a step towards correcting a system under stress.

And yet we cannot forget that some of these most critical innovations—trial by jury, for example—were quite popular. Code pleading, for instance, seems to have been more popular than common law pleading; and common law pleading more popular than the ordeal or trial by battle.[448] We should not neglect the faith the American public has in the legal trials performed in courtrooms every day: there are core competencies built into our system that are clearly worth keeping. But ones that perpetuate unequal and inefficient differentiations in enjoyment and enforcement of the personal rights do not share this characterization. Modern jurists have an opportunity to expand their field of vision.

A more thorough analysis of litigant data is likely to improve the operation of our justice system—whether one agrees that the Rules of Civil Procedure had a role in creating a system of racial differentiation in the personal rights or not. Because the tendency to use procedural rules to express political and economic imperatives pervaded the Western procedural method before both "white supremacy" and "white" people, the improvement considered here has the potential to improve the quality of substantive rights for citizens regardless of their race. Because the reason for procedural bias is ultimately based on a preference for the distribution of personal rights among a favored elite,[449] there is strong potential for improving access to justice along lines of class. Elites versed in economic theory may share the desire to expand access to personal rights in order to expand economic growth.

Understanding the role that legal procedure plays in shaping disputes over enjoyment of the primary component rights of liberalism allows us to see procedural rule-making for the formidable, and in some

447. This is perhaps most clearly expressed in the first article of the Magna Charta of 1215. *See* BARRINGTON, *supra* note 43, at 214–15.

448. *See* Clark, *supra* note 357, at 259. This is not to say that every era of legal procedures lacked its critics. *See* BRUNDAGE, *supra* note 97, at 215–16.

449. *See* Newkirk, *supra* note 285, at 52–54.

ways, reality-shaping power that it truly is. In this light, our current "post-racial" environment may be seen as the natural outgrowth of a capitalist system that leveraged racism for a rush of necessary (human) capital and has now (correctly) determined that racism no longer serves an economically productive purpose. The problem appears to be that the system does not know how to correct itself.[450] By more deeply understanding the concepts of both liberty and the procedures by which our courts enforce it, we might more intimately understand the nature of our "capitalist" system, which has always acknowledged both the tendency of the wealthy to pressure the lower classes and the need to relieve that pressure in public venues.[451]

One may come away from this Article with an impression that "liberty" or "capitalism" is bad, and that "something else" is good. Yet, we must acknowledge that "liberty" or "liberalism" has accomplished significant progress in the service of freeing individuals from the arbitrary authority of monarchs and has placed tangible value in the hands of its citizens. Putting aside the question of whether liberty or liberalism is the final stopping point in societal development, we might view the procedural rule-making power as a way to expand both access to and the quality of personal rights for everyone. Scholars have already called for this type of experimentation,[452] and as it has in many other places, the West might find something to gain by looking outside of itself.[453] But if we choose to implement new rules, it will be difficult to

450. *See* Glenn Hubbard, *America Needs to Fix Capitalism to Save It*, ECONOMIST (Oct. 18, 2019), https://www.economist.com/open-future/2019/10/18/america-needs-to-fix-capitalism-to-save-it; Noah Smith, *Capitalism Needs Reform, Not Revolution*, BLOOMBERG (Mar. 29, 2019, 9:00 AM), https://www.bloomberg.com/opinion/articles/2019-03-29/capitalism-needs-reform-not-the-risk-of-revolution; Richard Tudway & Tim Worstall, *Reforming Capitalism Isn't So Easy*, GUARDIAN (Oct. 1, 2019, 1:16 PM), https://www.theguardian.com/business/2019/oct/01/reforming-capitalism-isnt-so-easy.

451. Indeed, our system depends greatly on our concept of the rule of law and the availability of a forum. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

452. *See* Victor D. Quintanilla, *Human-Centered Civil Justice Design*, 121 PENN STATE L. REV. 745, 745–46 (2017) ("[D]esigners harness pilots to develop insight from stakeholders on the causes, conditions, and nature of civil justice problems. These pilots are empirically tested with randomized controlled trials (RCTs) to explore their system-wide effects before interventions are adopted.").

453. For example, African interpretations of Christianity have developed significant popular variations and innovations, like gospel. *See* Paul Gifford, *Some Recent Developments in African Christianity*, 93 AFR. AFFS. 513, 516 (1994). The same relationship is true of jazz and European classical music, as well as hip-hop and the music recording industry as a whole. *See* Sarah Grace Shewbert, *The Bible's Influence in American Music*, WASH. TIMES (Dec. 12, 2014), https://www.washingtontimes.com/news/2014/dec/12/bibles-influence-american-music/.

determine their utility without collecting data on the citizens impacted by the change.

Imagine that you are a practitioner. You go to electronically file your client's complaint as is required in federal courts and in the majority of local counties. Before submitting your filing, you are asked to check a box that asks: "I certify that I have asked my client whether they wish to participate in a voluntary survey to improve our justice system based on their personal experience."[454] If the United States truly were a business and its elected officials truly executives, this exceedingly simple survey would have been implemented a decade ago. But we are not *consumers* of justice, we are *constituents* in it. If our private sector sees the benefit of a deeper understanding of our public processes,[455] we as a community should ask nothing less of the rule of law—the crown jewel of Western society.

454. While mandatory collection of data may create some pushback from unwilling litigants, voluntary collection may at least create some basis for a statistically significant sample from which to craft future experiments.

455. A growing number of litigation service providers collect analytical data on judges, attorneys, and their tendencies to track certain behavior. *See, e.g.*, LEXMACHINA, http://www.lexmachina.com (last visited Feb. 4, 2023); CASETEXT, http://www.casetext.com (last visited Feb. 4, 2023); LEGAL ANALYTICS: BLOOMBERG LAW, https://pro.bloomberglaw.com/legal-analytics/ (last visited Feb. 4, 2023); LEXISNEXIS, https://www.lexisnexis.com/en-us/products/lexisnexis-profile-suite.page (last visited Feb. 4, 2023); WESTLAW, https://1.next.westlaw.com/Profiler (last visited Feb. 4, 2023).