After slavery:

strange fruits of aftermath

By Faith Marchal

Once to every man and nation
Comes the moment to decide,
In the strife of truth with falsehood,
For the good or evil side.
Some great cause, some great decision,
Offering each the bloom or blight,
And the choice goes by forever,
'Twixt that darkness and that light.

~ James Lowell

In the end, we will remember not the words of our enemies,
but the silence of our friends.

~ Dr Martin Luther King, Jr.

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I could not have written this booklet, let alone the doctoral thesis on which it is based, without the encouragement, help and support of family, friends, fellow students, librarians, museum curators, archivists, and my research supervisor. I thanked them all in my thesis, and I thank them all again here. They know who they are, or should know by now.

About the front cover

There are many thousands of images readily available on the internet that I might have used on the front cover. I saw some of the more gruesome ones at a photographic exhibition in London entitled *Without Sanctuary**, which illustrated not only the stark terror of lynching but the sheer spectacle involved. Crowds would turn up to watch, some parents even taking their children. At the exhibition I learned that some of the photographers of these horrific events turned their photos into commercially-available postcards. Other people bought them and mailed them to friends and family. The United States Post Office, an arm of the federal government, processed them and delivered them.

In 2015, the Equal Justice Initiative published a ground-breaking report about the extent of lynching in the United States, entitled *Lynching in America: Confronting the Legacy of Racial Terror*. According to the report, over 4,400 people were brutally lynched between 1870 and 1950 – far more than originally thought.** The Equal Justice Initiative has gone on to establish the National Memorial for Peace and Justice, as well as a programme of historical markers on the sites of lynchings and slave markets, in hopes that it will inspire more open, constructive dialogue about slavery, Jim Crow, and their ongoing legacies.

I was torn between using an image of terror and an image of inspiration. In the end, I decided that neither would do. Instead, I used an image that illustrates just one of the myriad indignities drip-fed onto millions of African Americans and other people of colour *every day* during the Jim Crow period, in which even more millions of Americans were tacitly, and not so tacitly, complicit.

Faith Marchal
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* There is a book by the same name, by James Allen, and a website, at https://withoutsanctuary.org.

** At the time of writing, this report was and may still be available online at https://eji.org/reports

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Introduction

This booklet is the second in a short series. It started life as a chapter from my doctoral thesis which was entitled *'Comes the moment to decide': slavery, abolition and human rights activism through the unholy, unruly rule of law*. The part of the title in quotes is from the first verse of a favourite hymn I have known since childhood, 'Once to every man and nation', that was written by abolitionist James Lowell. As for the unholy, unruly rule of law, it was not the rule of law as we understand it today, that is, that no one is above the law, and that the law should treat everyone subject to it fairly and equitably. Rather, it was slaveholder law in the United States: unruly because it could bend and flex according to the changing interests of slaveholders, and unholy because it legitimised the dehumanisation and enslavement of human beings, recognised early on as an evil, albeit in the eyes of many – including the founding fathers – a *necessary* evil.

I did not approach my research with the intention of adding to the academic discipline of the history of slavery and abolition. That field is already large, and our knowledge in these areas continues to expand, thanks to the work of so many excellent historians. Instead, I approached it from the perspective of a student of human rights, interested particularly in human rights activism and its impact on legal and social change. In my thesis, I made the point that there have been far too many appalling human rights abuses in history. Many of these occurred in the 20th century, the best known of which is of course the Nazi Holocaust. However, I also asserted that the form of racialised chattel slavery practiced in the United States must be included among those human rights abuses. This is because rarely if ever in the course of post-Enlightenment history has such systematic oppression been so deliberately undertaken against a group of people for such a prolonged period, based solely on the colour of their skin, in a country that from its very inception had promoted itself to its own citizens and across the world as a champion of equality, freedom and democracy. Furthermore, the 'peculiar institution', as slavery was euphemistically known, was not the result of some historical accident but the product of deliberate decisions embedded in the laws of the land from the country's earliest days. Those many moments of decision could have been otherwise, and we continue to live with their aftermaths today, not only in the United States but globally. Exploring these aftermaths is the point of this booklet.

During the course of my research, I discovered that the word 'aftermath' actually has two meanings. The first and best known refers to a consequence – especially the consequence of a disaster or misfortune, or the period of time following such a disaster. However, its other meaning

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has been all but forgotten. Aftermath (from the Old English word *mæth*, meaning 'a mowing') also means the second crop of grass from land that has already been mowed. After the havoc and devastation of the American Civil War, what kind of aftermath would emerge in the peace that should have followed? What kind of crop could grow from the deep tap-roots of slavery, roots that the northern victors assumed had been severed for once and for all by the horrors of the Civil War and the passage of Constitutional amendments guaranteeing the civil and political rights of black Americans?

As it turned out, what grew from these toxic tap-roots were strange fruits indeed. 'Strange Fruit' is the title of jazz singer Billie Holiday's best known song, first performed in 1939, ironically the same year in which the Hollywood blockbuster *Gone with the Wind* was released. Written by Abel Meeropol, 'Strange Fruit' is a searing, graphic depiction of lynching in the American South, in all its horror: 'a strange and bitter crop' indeed.[1] That 'crop' was characterised by decades of discrimination and repression of African Americans, underpinned by the emergence of virulent, hate-filled anti-black racism. Such unprecedented levels of overt racism were in part fuelled by pseudo-scientific 'evidence' of white supremacy. This would go on to inform a growing body of state and local laws which legalised and institutionalised that repression, much as the law of the land had previously legitimised slavery. Lawmakers of the day also legitimised practices such as mass incarceration and the enforced – but no longer illegal – labour of recently freed blacks; displacement; and the racialisation of poverty. This was the system known as Jim Crow, and its legacies linger on in the 21st century. [2]

As my entry points to these 'strange fruits', I examine three documents, each written approximately fifty years apart. In reverse chronological order, they are George Harrison Burwell III's 1958 description of the funeral of a former family servant; a review of George Spring Merriam's 1906 volume, *The Negro and the Nation*; and Abraham Lincoln's Second Inaugural Address of 1865. Together, these documents illustrate three different but interconnected strands of aftermath: 1) the construction of a nostalgic view of slavery which helped to perpetuate notions of white

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[1] See Margolick, D. (2000). *Strange Fruit: Billie Holiday, Cafe Society, and an Early Cry for Civil Rights*. Philadelphia, Pennsylvania: Running Press.

[2] For an early account of the development of Jim Crow, written while it was still in place, see C. Vann Woodward's 1957 volume, *The Strange Career of Jim Crow: A Brief Account of Segregation*. Oxford: Oxford University Press. His book expands on lectures given 'before unsegregated audiences' at the University of Virginia in 1954 (see Preface). This was the year that the Supreme Court's *Brown v. Board of Education* judgment overturned *Plessy v. Ferguson* – which had legitimised the provision of 'separate but equal' public facilities for over 50 years.

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supremacy, thus enabling the system of Jim Crow to take root in law; 2) the impact of scientific racism on the struggle for racial justice, including legal judgements; and 3) the construction of what Saidiya Hartman has called the 'fiction of debt', which prompts us to explore whether apologising for *past* injustice can ever be enough to secure *future* justice, and whether it can ensure that today's efforts at legal and political transformation are remembered, and built upon, by future generations.

I also question the apparent silence between the disbanding of the abolitionist societies after the Civil War and the Civil Rights movement of the 1950s and 60s. It is not as though abolitionists remained silent, or that emancipatory literature disappeared. Hartman has suggested that abolitionist literature in the post-bellum period 'yielded ambivalent effects – elitist and racist arguments about the privileges of citizenship, an inordinate concern with discipline and the cultivation of manhood, and *contractual notions of free labor*.'[3] In other words, if we take Hartman's text at face value, abolitionist literature had nowhere to go, and their books aimed at newly freed black Americans had little if anything constructive to say.

There is a problem with this analysis. Many abolitionists regarded the struggle to achieve full racial equality as different from the fight against slavery, but nevertheless a battle which they believed had been won with the passage of the 13th, 14th and 15thAmendments to the Constitution. However, this does not mean that they remained indifferent to the racial injustices which followed. Indeed, many anti-slavery activists wrote their memoires in an attempt not only to ensure that their struggles to achieve the end of slavery would not be forgotten, but to inspire others to *continue* working for equal rights for all Americans. They also went on to engage with or instigate many of the social reform movements that sprung up in the latter half of the 19th century and the first half of the 20th, reforms which in their view would benefit white *and* black Americans alike, helping to foster better relationships between both races. Among the various causes that former abolitionists continued to pursue, long after the formal abolition of slavery, were workers' rights including the introduction of an eight-hour working day; prison reform; limitations on child labour; women's rights; and state-provided health care.[4] To argue

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[3] Hartman, S.V. (1997), p. 137 (emphasis added). *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth Century America*. New York and Oxford: Oxford University Press.

[4] See Cumbler, J. T. (2008), p. 12. *From Abolition to Rights for All: The Making of a Reform Community in the Nineteenth Century.* Philadelphia: University of Pennsylvania Press. See also Jeffrey, J. R. (2008). *Abolitionists Remember: Antislavery Autobiographies and the Unfinished Work of Emancipation.* Chapel Hill, NC: The University of North Carolina Press.

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otherwise is to under-represent – indeed, misrepresent – their broad social justice efforts.

Alongside the broader social reform movements, black writers, activists, educators and scholars, including Frederick Douglass and, later, Booker T. Washington, W.E.B. Du Bois, Carter Godwin Woodson and others carried forward the fight for racial equality, refusing to let that unfinished project be subsumed or diluted by other pressing social issues of the day. Indeed, two decades before W.E.B. Du Bois famously predicted that the problem of the 20th century would be the colour line, Frederick Douglass published an essay entitled 'The Color Line in America', in which he analysed the nature of prejudice itself, calling it 'a moral disorder, which creates the conditions necessary to its own existence, and fortifies itself by refusing all contradiction'.[5] Douglass also asserted that prejudice on grounds of colour must be *learned*, his view supported by his observation of young white children who, when encountering a black person for the first time, showed a natural curiosity, but not prejudice itself.

For black Americans, the recognition of their humanity itself was at stake. Many involved in that struggle came to the view that the struggle for civil rights – which, in theory, had been successfully established in law by the 13th, 14th and 15th Amendments to the Constitution – must be aligned to and furthered by the wider struggle for *human* rights on a global scale. Their educational strategies and approaches differed significantly. Educators such as Booker T. Washington, born in the South during slavery, advocated a gradualist approach, through providing young black people with technical skills-based education in order to make them, as skilled workers, indispensable – and, crucially, politically non-threatening – to white society. In sharp contrast, Du Bois – the northern-born Harvard-educated scholar, sociologist and black rights activist – advocated an approach based on classical higher education and scholarship, with a view to developingthose people he called 'the talented tenth', that is, those young black Americans with the potential to step into political and other leadership positions in black businesses, colleges, and communities.[6]

Despite their differences, advocates of both approaches found themselves up against a mutual, shared problem. It was that the impact of the various strands of aftermath, three of which I explore in this booklet, combined to construct an almost impenetrable bulwark of white supremacy through

[5]Douglass, F. (1883 – Kindle edition 2015), location 37 of 221. *The Color Line in America*. New York: Firework Press.

[6] For a discussion on the differences between Washington's and Du Bois' approaches, see Morris, A.D. (2015), pp. 8 – 16. *The Scholar Denied: W.E.B. Du Bois and the Birth of Modern Sociology*. Oakland, CA: University of California Press.

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which voices of protest and advocates of legal, political and social progress for black Americans struggled to be heard at all.

It would be remiss of me not to mention one of the most significant aftermaths of slavery: its continuance into the 21st century. Slavery has been transformed, as we shall see in the final section of this booklet, but it continues to be one of the most persistent human rights abuses imaginable.

First, let us look at each of the strands of aftermath in turn.

Claims to benevolence: 'Bennie and I used to shoot sparrows'

In 1958, George Harrison Burwell III, from Mt Airy, Millwood, Clarke County, Virginia, wrote the following observations after having attended the funeral of Ann Jones, one of his family's black servants: 'I wish that everyone who votes these days could go to a high-class colored funeral in the country. They are not quite as emotional as they used to be, but you still have a wrung-out feeling when it is over. . . We were in the back pew. In the one in front of us was Bennie Carter. His father used to drive my Grandmother Whiting to church. . . Bennie and I used to shoot sparrows with an air rifle, dress, stuff and cook them like turkeys, much to the disapproval of the old cook, Lizzie Brown. . . Bennie's father was Old Uncle Nat Carter, the sexton and grave digger at the Old Chapel.'

Up to this point, Burwell's account does not indicate the presence of any obvious racial tension. In tone, he sounds almost nostalgic for a fondly remembered childhood, which included among his playmates black children including Bennie Carter. Burwell paints a portrait of youthful innocence that had since been lost. However, he then goes on to ask, 'Is such interest and background knowledge of any value at the present time on the questions that now beset us? Some say one thing and some another, but I know that my thoughts during the time that I could not follow the funeral service were that that day in 1619 when the Dutchmen sold the first slaves at James Town was a black day for the white Virginian and the dawn of a brighter day for every African.'[7]

What could Burwell have meant by these thoughts, and what could have influenced his views? To answer this, it is necessary to contextualise his comments. Since the end of the Civil War and for most of the following century, Virginia – together with other southern states – devised and implemented the body of laws known collectively as Jim Crow, which imposed and legitimised racial segregation and other forms of repressive

[7] Burwell, G. H. (1958). *Ann's Funeral*. Reference 1985.173.03, Clarke County Historical Association, Berryville, Virginia (hereinafter referred to as CCHA).

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discrimination against black Americans in practically every sphere of civil, political and social life. In 1896 the Supreme Court, via the now-infamous *Plessy v Ferguson* case, had legalised the principle of having 'separate-but-equal' facilities in public services including schools, but 'separate' rarely if ever meant 'equal' in practice. Even minor infringement of these laws – for instance, if a black person drank out of a water fountain reserved for whites – could result in harsh fines, imprisonment, or worse – including lynching.

To give another example, the laws against inter-racial marriage were relaxed upon emancipation, but as Lewis explains, 'new codes were soon forthcoming. . . .If a bi-racial couple should marry outside the State and then return, the two should be held to be "as guilty as if the marriage had been in the State", and should be sentenced to serve from two to five years in the penitentiary'. Indeed, the problem of 'passing for white' was disturbing enough to white Virginians that 'in 1930, the Negro's racial identity was determined with legal, if not anthropological exactitude: every person in whom there is "ascertainable any Negro blood shall be termed a colored person".'[8] Ariela Gross tracks this development specifically to Virginia's Racial Integrity Act of 1924, which 'put into place a new state bureaucracy to track people from birth, prohibiting whites from marrying persons of any other race, strictly defining white racial "integrity".'[9] She goes on to say, 'in the aftermath of slavery, Americans re-created race by retelling the past as a history of separation. In doing so, they helped to shape the future.'[10]

In practice, however, the history of slavery had not been one of *separation* of black from white at all. Far from it. In the vast majority of slaveholding households in the American south, enslaved people and their owners lived and worked in close proximity to each other and their families. The fear of inter-racial marriage which helped to spur such draconian laws was based, ostensibly, on the alleged need to 'protect' vulnerable white women from the sexual advances of black men, as well as the need to maintain racial purity. Such fears, portrayed for a mass audience in novels such as Thomas Dixon's *The Klansman* and its highly influential cinematic adaptation, D.W. Griffiths' 1915 *Birth of a Nation*, conveniently ignored the fact that enslaved black women had always been more vulnerable and had

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[8]Lewis, R. (1940 – this edition 1994), p. 262. *The Negro in Virginia.* Winston-Salem, North Carolina: John F Blair, Publisher (originally published by Hastings House, New York). The volume is credited to 'Workers of the Writers' Program of the Works Projects Administration in the State of Virginia'. Roscoe Lewis, credited here, supervised the project.

[9] Gross, A. J. (2008), p. 100. *What Blood Won't Tell: A History of Race on Trial in America*. Cambridge, MA: Harvard University Press.

[10] Gross, A. J. (2008), p. 110.

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never had protection – legal or otherwise – from sexual exploitation by predatory, exploitative white male masters, or indeed anyother white male.

Jim Crow statutes dictated all manner of behaviour along racial lines, ranging from where a person could sit on a train or bus, to where they could stand on a streetcar, to which water fountains they could drink from, which toilets they could use and, in clear breach of the 15th Amendment, who was entitled to vote. Similar Jim Crow laws affected black Americans around the country, many of whom were terrorised into compliance with the rise of the Ku Klux Klan, who carried out thousands of extrajudicial lynchings. Like slaveholder law before it, Jim Crow laws did not establish standards of behaviour. Rather, they legitimised *existing* societal norms, growing haphazardly but steadily with the express purpose of buttressing – or, in the case of the South – *re-establishing* white power structures, adapting them to the then-emerging institutions by throwing obstacles in the way of black Americans seeking to exercise their civil and political rights. The Northern states could no longer lay claim to the moral high ground, as racial discrimination was not confined to the South – and, indeed, it never had been. It was particularly virulent in the larger cities, towards which thousands of former slaves had flocked in search of employment.[11]

Burwell's turn of phrase, 'everyone who votes these days' may have indicated his awareness that not everyone who had the constitutional right to vote was able to cast their vote in practice. In Virginia, the selective imposition of poll taxes and stringent voting eligibility requirements regarding the understanding and interpretation of the Virginia Constitution had the impact of disenfranchising thousands of people of voting age, primarily and disproportionately African Americans. However, by the time Burwell wrote his account, things were changing: the 1957 Civil Rights Act had been passed a year earlier, in an attempt to ensure that African Americans could freely exercise the vote. Three years earlier, the landmark Supreme Court decision in *Brown v. Board of Education* of 1954 had overturned the 1896 'separate-but-equal' provisions established in *Plessy v. Ferguson*. As a response to Brown, Virginia Senator Harry Byrd co-ordinated significant resistance to school integration, vowing to close public schools rather than allow them to be integrated.

[11] For a comprehensive analysis of racial inequity and discrimination in the north from the early 20th century to the present day, see Sugrue, T. J. (2008). *Sweet Land of Liberty: The Forgotten Struggle for Civil Rights in the North*. New York: Random House.

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Burwell's account also reveals the persistent presence of yet another line of thinking that pro-slavery apologists had used to defend the 'peculiar institution', as American slavery was euphemistically called. This was the suggestion that African-Americans had been better off in slavery than they would have been in their ancestral lands, had the transatlantic slave trade never existed, and far better off than the poorly-paid exploited white workers of northern factories. This notion had had its origins across the Atlantic well over a century earlier, when comparisons began to be made between the workers in English factories and enslaved people in the West Indies, who, according to an anonymous Manchester journeyman, apparently enjoyed *better* working conditions.[12] On the American side of the Atlantic, a vigorous defence of the slave system could be found in William Grayson's 1854 poem, 'The Hireling and the Slave', in which he purported that 'the hireling, not the slave, is the "subject of distress", for only the labourers of free society are the "slaves of endless toil", and the victims of misery, starvation and brutality.'[13] Not only that, 'Slaveholders, including the most pious, stoutly defended slavery as a system of organic social relations that, unlike the market relations of the free-labor system, created a bond of interest that encouraged Christian behaviour. . . . Sensible slaveholders understood that brutality, neglect, and inconstancy provoked covert or overt slave resistance that, in turn, threatened social order.'[14] The argument that slavery had been humanitarian in nature – that is, in comparison to the predominant free labour system – rapidly took hold. Harrison's thinking reveals a misplaced, nostalgic perception that, for white slaveholders, slavery had been a *burden*, characterised not by the pursuit of profit but by a duty of care for the welfare of their black slaves.

To give another example, let us examine what H J Eckenrode, the first director of the Virginia Writers Project, wrote in 1938 of slavery in Virginia: 'The history of American slavery has never been written. Tons of literature have been printed . . . but, with the exception of a few good monographs, it has been mere propaganda, and worthless as such . . . The Revolution and the humanitarian movement contemporary with it changed the whole aspect of life, and particularly slavery. The negro slave came to be looked on as a human being with a body to be cared for and a

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[12] Davis, D. B. (1999), p. 244. *The Problem of Slavery in the Age of Revolution, 1770 – 1823*. New York: Oxford University Press.

[13] Jarrett, T. D. (1951), p. 488. 'The Literary Significance of William J Grayson's "The Hireling and the Slave"'. In *The Georgia Review*, vol. 5, No. 4 (Winter – 1951), pp. 487 – 494.

[14] Fox-Genovese, E., and Genovese, E.D. (2005), p. 368. *The Mind of the Master Class: History and Faith in the Southern Slaveholders' World.* Cambridge: Cambridge University Press.

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soul to be saved . . . The reason that the negro slaves did not rise in rebellion in 1862 – 65 was that most of them were too well satisfied to do so. They did not feel the restraints of slavery as galling, for those restraints were reasonable. . . . Flogging was carefully regulated and was not cruel; indeed, it was not very painful.'[15]

This rose-coloured representation of the United States' slaveholding past was in fact no accident. During the first half of the 20th century, accounts of that past were being actively and deliberately re-written, significantly downplaying the devastating physical and psychological effects of enslavement. If Eckenrode had ever personally witnessed a flogging, then it is hard to see how he could have written these lines unless he was in a state of utter denial. In the previous century, the writings of former fugitives – notably those of Frederick Douglass, Solomon Northup, and Harriet Jacobs – had vividly exposed the cruelty and injustice inherent in enslavement, and this exposure had been crucial to the successful abolition of slavery in the first place. Closer to Eckenrode's own time, the first-hand experiences of formerly enslaved people, being documented for the Federal Writers Project during the 1930s, also stood in sharp contrast to Eckenrode's accounts, and to the popularly held nostalgic notions of slavery as portrayed in the popular novel and film, *Gone with the Wind*.

Decades later, the ways that slavery and African Americans were beginning to be represented in the history of the country were changing. As Nicholas Lemann has suggested,'As time passed and the goals of the Redeemers were enshrined in law, the political risk of offending public opinion in the North disappeared, and the South became much more unapologetic. The Redemption story became a durable, emotionally stirring defining myth, informally passed along on front porches and, later, openly celebrated with monuments and commemorations. For at least three quarters of a century, it was an important part of what white Southerners knew about themselves.' [16] 'Redemption', as Lemann explains, was 'the word white Southerners chose to denote the bloody events of the mid-1870s; and the leaders of the successful campaign of political violence, defiance of the national government, and local repeal of part of the Constitution called themselves "Redeemers". The name implied a divine sanction for the retaking of the authority the whites had

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[15]Eckenrode, H. J. (1938), pp. 193 - 200. 'Negroes in Richmond in 1864', in *The Virginia Magazine of History and Biography*, Vol. 46, No. 3 (July 1938). Eckenrode does not capitalise Negro in his text. He is also quoted on p. x of Charles L Perdue Jr.'s foreword to Lewis, *The Negro in Virginia*. Perdue's foreword is undated; however, from his bibliography we can safely assume that he was writing after January 1974.

[16] Lemann, N. (2006), pp. 185 - 186. *Redemption: The Last Battle of the Civil War*. New York: Farrar, Straus and Giroux.

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lost in the Civil War, and it lent a heavenly quality to the reestablishment of white supremacy in the post-Reconstruction South'.[17] It was not only the descendants of slaveholding families who helped to construct this mythology of redemption but the descendants of non-slaveholders who embraced the notion of white superiority.

Like Burwell, Eckenrode was a product of his time. For decades beforehand, not only had slavery been recast as a benevolent institution, but Reconstruction itself – that short-lived period after the Civil War which, for a few years, offered hope for civil and political equality to African Americans around the country – had also been recast in popular imagination. Lemann explains: 'It [Reconstruction], like the Wild West, was a standard topic in the new national entertainments, and it was usually presented from the Southern point of view, because that matched the country's prejudices at the time.'[18] The Southern point of view was not only that Reconstruction was harsh and oppressive towards former slaveholders and anyone who had pledged loyalty to the Confederacy, but that it was also cynically exploitative of newly freed black people. Lemann highlights the importance of works such as those of Thomas Dixon, whose Reconstruction trilogy – in particular, his novel entitled *The Clansman* – would later inspire D. W. Griffiths' blockbusting, opinion-forming film of 1915, *The Birth of a Nation,* mentioned earlier. Dixon's writings expressed 'the standard views of white Southerners of his generation and class – and he couldn't have made it plainer that his warmth and good intentions toward black people were contingent on the firm understanding that they were inferior in every way, economically, politically, socially, even biologically', and furthermore, that the 'peculiar institution' was *morally superior* to the free labour movement now being imposed on the South. Without that condition, 'the warmth turns steely and cruel.'[19]

It is not clear how widely Eckenrode's views were read, or by whom. One thing is certain: they were neither unique nor ground-breaking, nor were they confined to the less well-educated segments of the white population. His views echoed not only the popular culture of the day but, significantly, the views of the majority of historians and scholars in American universities. From the beginning of the 20th century onwards, they portrayed Reconstruction as having failed for having over-estimated the ability of formerly enslaved African Americans to take on the responsibilities of freedom – that is, freedom in a market-driven society – or indeed the responsibilities of full citizenship. As Lemann further

[17] Lemann, N. (2006), p. 185.
[18] Lemann, N. (2006), p. 186.
[19] Lemann, N. (2006), p. 187.

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suggests, 'they [the scholars] were dispassionate enough not to traffic in the romantic and quasi-religious concept of redemption; instead they showed the end of Reconstruction as something more practical, though not much less noble: as reunion, as the knitting together, after fifteen years of tribal and sectional horrors, of a great modern nation.'[20] Such academic endorsement served to validate such views across the nation.

The year after Eckenrode's article was published saw the release of the immensely successful film, *Gone with the Wind*. It played – and, arguably, continues to play – a key role in American popular culture, helping to cement the misplaced, nostalgic perception that slavery had been a benign, even humanitarian institution, concerned for the welfare and betterment of *everyone* involved in plantation households.[21]

As for the notion that slavery was a humanitarian institution, it is important to note that the growth of humanitarianism in American culture had had convoluted, tangled roots. If today we are prompted to act in compassionate response to images of *sufferers* of hunger, disease, human trafficking, natural disaster and war, by contrast in the late 18th century it was not the suffering of *slaves* at the roots of anti-slavery humanitarian sentiments: rather, it was the risk of the moral danger to *slaveholders* incurred by the infliction of unnecessary pain. By the 1830s, notions of what it was to be humane had developed into opposing, contradictory views of what it was to be a moral person, bringing into question the very utility of humanitarianism in the slavery debate. [22] If one's moral sensibilities had been awakened by the suffering of the slave, would it be better to fight for the abolition of slavery as an institution or to campaign for more humane treatment of enslaved people? For some people, this was an ongoing dilemma, for which there was no clear answer.

The growth of scientific racism: 'A savage child of nature'

Let us now turn our attention to our second entry point. In September 1906, Charles A. Ellwood, Professor of Sociology from the University of Missouri – who would later become the fourteenth president of the American Sociological Association – reviewed George Spring Merriam's book, *The Negro and the Nation: A History of American Slavery and*

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[20] Lemann, N. (2006), p. 191.

[21] *Gone with the Wind* was of course the film adaptation of Margaret Mitchell's 1936 novel of the same name, which won the Pulitzer Prize that year. It was – and remains – the most successful film in box office history. The Academy Award for best supporting actress was given to Hattie McDaniel, for her role as Scarlett O'Hara's slave 'Mammy' – the first Academy Award ever given to a black person.

[22] Abruzzo, Margaret (2011), pp. 50 ff. *Polemical Pain: Slavery, Cruelty, and the Rise of Humanitarianism*. Baltimore, Maryland: The Johns Hopkins University Press.

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Enfranchisement, published in New York earlier the same year. In his review, Professor Ellwood was generally complimentary of Merriam's work. Here, he reveals why: 'Though written from the northern point of view, the book is distinctly fair and even conciliatory towards southern views. The writer frequently quotes from southern sources, and is always careful to give the southern side of any argument.'

Ellwood's praise was not without reservations. Although he commended Merriam's book as 'evidence that the time has arrived when the negro question can be approached by writers in both sections in an impartial and scientific spirit', he goes on to say: 'It must be said that the author's view of negro character is decidedly too optimistic. That tendency to idealise the negro which has been the bane of almost every northern writer on the negro question since the publication of *Uncle Tom's Cabin*, is not wholly absent from this book, in spite of its sane and judicious spirit. This seems to be unfortunate; for it is only through the full recognition that *the average negro is still a savage child of nature* that the North and the South can be brought to unite in work to uplift the race.'[23]

A few years later, in 1910, Ellwood would write a text that sold well over 200,000 copies, called *Sociology and Modern Social Problems*. In it, he devoted a separate chapter to 'The Negro Problem', explaining what he referred to as 'racial heredity'. Although he expressed the opinion that although 'racial heredity does not foredoom any people to remain in a low status of culture', he also suggested that racial heredity had *contributed* to the status of African Americans. Close examination of his text suggests he mistakenly confused nature with nurture, that is, heredity with physical environment and upbringing: 'It is not claimed that the shiftlessness and sensuality of the masses of the American negroes today can be wholly attributed to hereditary influences, but it would be a great mistake to suppose that the African environment did not have something to do with these two dominant characteristics of the present American negro. . . the chief beneficial influence of slavery on the negro was that it taught him to work, to some extent at least.'[24]

It had been fifty years since the close of the Civil War and the Constitutional amendments formally abolishing slavery in the United States, extending the right of citizenship to African Americans, as well as the right of black men to vote. What could have spurred Ellwood – a

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[23] Ellwood, C.A. (1906). Review of *The Negro and the Nation: A History of American Slavery and Enfranchisement*, by George S. Merriam. In *American Journal of Sociology*, Vol. 12, No. 2 (September 1906), pp. 274 – 275 (emphasis added). Note: Ellwood does not capitalise the word Negro in his text.

[24] Ellwood, C. A. (1910 – Project Gutenberg e-Book number 6568, September 2004). 'The Negro Problem', Chapter 10 in *Sociology and Modern Social Problems*.

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trained social scientist – to refer to African Americans in such shocking, derogatory terms?

A clue can be found in the concluding pages of Merriam's own volume, wherein he urged the national government to 'follow those principles which are in the best sense American. Thus the executive, in its appointments to office, ought to recognise an equality of race, like that which the Constitution affirms as to civil rights and the suffrage. It is of vital moment that the American nation – whatever local communities may do – should not bar competent men from office because of race. . . If it is said "This is offensive to Southern people," the answer is, Who are the Southern people? Not the white people only but the black people also.'[25]

Although tame by 21st century standards and enshrined in anti-discrimination legislation since the latter half of the 20th century, his racial equality recommendations were at the time as offensive to his readership as Ellwood's terminology appears to us today. It is little wonder that Merriam's comparatively progressive views were criticised as being overly optimistic. They came at a period when – despite the publication of Darwin's ground-breakingstudy *On the Origin of Species by Means of Natural Selection* nearly fifty years earlier in 1859 – so-called 'scientific racism' had firmly established itself in the intellectual life of American universities as a reputable branch of the social and biological sciences. Indeed, scientific racists employed selective use of Darwin's theory of natural selection to lend credence to their own theories of how different racial characteristics had evolved.

Although Bethencourt argues that 'in the United States, there was no particular event that spurred on scientific racialism',[26] Farrow, Lang and Frank are of a different view, claiming instead that its origins can be found deep within Thomas Jefferson's 1787 publication, *Notes on the State of Virginia*.[27] In the chapter of *Notes* entitled 'Query XIV – The Administration of Justice and Description of the Laws', after a synopsis of the history of slavery, Jefferson cautiously speculated: 'I advance it therefore as a suspicion only, that the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowment of both body and mind.'

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[25]Merriam, George S. (1906 – this edition 1970), pp. 390-391.*The Negro and the Nation: A History of American Slavery and Enfranchisement.* New York: Haskell House Publishers Ltd (Publishers of Scarce Scholarly Books).

[26]Bethencourt, F. (2013), p. 272. *Racisms*. Princeton, New Jersey: Princeton University Press.

[27] Farrow, A., Lang, J., and Frank, J. (2006), pp. 180 – 182. *Complicity: How the North Promoted, Prolonged, and Profited from Slavery.* New York: Ballantine Books (an imprint of Random House).

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Jefferson's statement was underpinned by an assumption that, whatever the cause, black-skinned people are 'a distinct race' which simultaneously threw open the question of who actually constituted a human being. This is despite his continued reference to blacks throughout his text as 'people'.[28] Jefferson then sought to justify his 'suspicion' by aligning it to the field of natural history, when he stated how 'different species of the same genus, or various of the same species, may possess different qualifications'. Despite the rather twisted route he took towards his conclusion, that conclusion was unequivocally damning: 'This unfortunate difference of color, and perhaps of faculty, is a powerful obstacle to the emancipation of these people.'[29] This is from same Thomas Jefferson – third President of the United States and traditionally acknowledged as one of the Founding Fathers – who drafted the Declaration of Independence.

Jefferson's views had not gone unchallenged by black intellectual Dr James McCune Smith. In an essay entitled 'On the Fourteenth Query of Thomas Jefferson's Notes on Virginia', published in the *Anglo-African Magazine* in August 1859, McCune Smith – writing as a social scientist, with a primary focus on ethnology[30] – used his own scientific knowledge as a University of Glasgow-educated physician to demolish Jefferson's arguments, as well as those of the self-proclaimed race scientists of McCune Smith's own time. McCune Smith set out the following intellectual challenge: 'if there be any reason why they [the black and the white] can not live together and contribute to the general advancement, this reason must be found either in the institutions of the country, or in the nature of the people.' On examination, he argued that 'there is no such reason to be found in the institutions of the country, when those institutions are in accordance with the principles of democracy', using the examples of the institutions of the northern states, where he finds 'all men, including black and white, living in peace and harmony'. He then turned his attention to the physiognomic issues Jefferson raises. Analysing bone structure, hair, skull size and shape, and skin colour one by one in forensic detail, noting 'that the hue of a white man can be greatly changed by a residence in a torrid climate', he went on to expose Jefferson's confusing and inconsistent use of terminology, stating that the word 'people' (as used in *Notes* when referring to blacks) had been defined by Jefferson himself as 'men endowed with certain inalienable rights; men exercising

[28] This is a crucial point that James McCune Smith would observe in his articles for *The Anglo-African Magazine*, discussed in the following paragraphs.
[29] Jefferson, Thomas (1787, republished 1853),Location 2962, Kindle version. *Notes on the State of Virginia*.Originally published in Richmond, Virginia: J.W. Randolph.
[30] Stauffer, J. (2006), p. 245. This is from John Stauffer's introduction to the articles that McCune Smith wrote for *The Anglo-African Magazine*.

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those rights, the noblest of which as the great, God-like right of governing themselves!'[31]

That, in a nutshell, was McCune Smith's own exposé of the contradiction between slavery and liberty which had characterised the foundation of the United States. McCune Smith's conclusion begins with the observation that 'the newspapers, sure indices of public opinion, NOW call this same class [of blacks] "*colored people*". The class is the same, the name is changed; they are no longer blacks, bordering on beastiality; they are "colored" and they are a "people". . . The same import which the word "people" had then, the same import it has now. . . call men "people", and those men, residing in this Republic, are already raised by the public voice into the dignity and privileges of citizenship . . . the physical distinctions of the black class in this country are not any longer a bar against their being incorporated with the people of the State.'[32]

Unfortunately, the writings of McCune Smith remained little known outside the black readership of the relatively ephemeral and sometimes short-lived publications in which his essays and prose sketches appeared. As Stauffer suggests in his introduction to McCune Smith's collected works, 'McCune Smith also failed to create an enduring public persona, and this failure helps explain his erasure from the historical record. . . . In a sense, McCune Smith was too smart for his own good, for despite his insights on race and slavery, his prose was at times cryptic and always demanding, though immensely rewarding for patient readers'.[33] McCune Smith's 'patient readers' would almost certainly *not* have included slaveholders.

If Jefferson advanced his theories as 'a suspicion only' in his *Notes on the State of Virginia*, Farrow, Lang and Frank argue that 'after the Revolution – and despite its high minded principles and ideals – this careless, almost oblivious white prejudice against blacks began to harden into an aggressive racist ideology', and that Jefferson's 'musings against blacks became a founding document in a new race science that reached its poisonous fruition in the decade before the Civil War'. Its most serious proponents either came from the Northern states or 'enjoyed the prestige bestowed on them by elite Northern colleges. . . In the nineteenth century, the race scientists made the circle even more vicious [than black equalled slave equalled black]: black equalled slave equalled biologically subhuman'. [34] In light of the eager embrace of scientific racism by

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[31] See McCune Smith (2006), pp. 264 - 281. These quotations are on pp. 265, 278, and 279. Emphasis added.

[32] McCune Smith (2006), pp. 279 – 280. Italics and capitalisation as in the original.

[33] Stauffer, J. (2006), p. xxxiii.

[34] Farrow, et al. (2006), pp. 180 – 182.

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intellectuals in Northern universities, McCune Smith's comments on the institutions in the northern states now appear overly generous, erring on the naïve side of optimism, even taking into account his qualification that those institutions must be 'in accordance with the principles of democracy'.

For white slaveholders, moreover, the growing popularity of scientific racism in academic circles meant that they could claim Jefferson's own writings not only to justify their notions of white supremacy – that is, who controls the institutions of power – but as evidence for white *superiority.* According to this logic, to be white was to be better *by design* in all the things that mattered in a civilised society. It was a notion that, perhaps surprisingly, verged on heresy at the time: its key proponent, Dr Samuel Morton, had proposed that the Bible itself 'had been misread. Caucasians and Negroes were too different to both be descended from Adam through Noah. . . In other words, there must have been a *second* creation, one that made separate but unequal.'[35] When Morton died in 1851, a Charleston, South Carolina newspaper credited him 'for aiding most materially in giving to the negro his true position as an inferior race'. [36]

Morton was not alone. His followers included the noted Harvard professor Louis Agassiz, who theorised and promoted the notion of a hierarchy among human races, positioning them as different species altogether. He would later go on to 'tarnish his brilliant reputation by leading the American opposition to Darwin. Wrong about evolution, wrong about blacks and whites being separate species, Agassiz and his fellow race scientists still have not been fully discredited. Their insidious legacy lives on in a world that continues to see race as biology fixed in black and white.'[37]

Nearly twenty years after Ellwood's review of Merriam's book, the controversy continued to rage. In 1925 high school teacher Thomas Scopes was found guilty of breaking the Butler Act, which had made it unlawful to teach Charles Darwin's theory of evolution in any state funded school in the state of Tennessee.[38] Scopes' trial and subsequent conviction made national headlines as the so-called 'monkey trial', thirty years later inspiring Jerome Lawrence's and Robert Edwin Lee's award-winning Broadway play and film, *Inherit the Wind*. Portrayed as a debate between Christian creationist fundamentalism and science itself, it is important to remember that earlier race scientists such as Benjamin Rush claimed that

[35] Farrow, et al., p. 185-6.
[36]Quoted in Farrow, et al., p. 189.
[37] Farrow, et al., p. 191.
[38] The Butler Act remained on Tennessee's statute books until 1967.

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black people were on a lower evolutionary scale than white people. In compliance with Biblical tradition that all people were descended from the same creation with the same common ancestor, Adam, it was therefore the *same* evolutionary scale. If Rush's evolutionary ladder theory held true, then the result would be that white people must have been descended from black people. For white slaveholders, this would have been an untenable notion to sustain.

Thus, it is not difficult to see how race scientists such as Morton and others like him, such as Josiah Clark Nott and Louis Agassiz, came to challenge the religious authority of Genesis itself, verging on heresy by making the claim that blacks and whites must have come from a second, *separate* creation process, and, later, for that claim to be seized upon by further generations of white supremacists. The final word about Agassiz and his followers thus belongs to Bethencourt: 'Agassiz's book encapsulates what scientific racialism in the United States was really about: a politically committed development in the theory of races on behalf of southern policies of exclusion, segregation, and discrimination that lasted until the 1960s under the benevolent gaze of northern white pragmatists who shared the same basic racial prejudices.'[39]

Darwin's *On the Origin of Species* had successfully proved that the evolution of all living things, including the human race, had taken millions, not thousands, of years. It flew in the face of theories of a 'second creation' propounded by the so-called race scientists. It would take time for Darwin's science to persuade other learned men who, by the mid-1840s had 'brought the human species under the yoke of classification and . . . have placed us [blacks] in the very lowest rank.'[40] Indeed, as late as 1911 the *Encyclopaedia Britannica* defined 'Negro' as 'the designation of the distinctly dark-skinned, as opposed to the fair, yellow and brown variations of mankind . . . The negro would appear to stand on a lower evolutionary plane than the white man, and to be more closely related to the highest anthropoid'.[41]

Public opinion would take even longer to shift, and despite Bethencourt's statement about such opinion persisting 'until the 1960s', there is evidence that the vestiges of scientific racism have not yet fully disappeared. There continue to be those who reject Darwin's theory of evolution, believing instead in what is known as 'intelligent design', that is, the notion that all living things came into being not as a result of evolution but somehow having 'arrived' on this earth fully formed. It does not take an enormous

[39]Bethencourt, F. (2013), pp. 287-8.
[40] McCune Smith (2006), p. 53.
[41]Farrow, et.al. (2006), p. 179

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leap of the imagination to perceive that underlying the notion of intelligent design is an unspoken assumption that some groups of people might have been 'designed' to be better than others.

Indeed, as recently as 2005, the Dover (Delaware) Area School District passed a measure requiring teachers of 9th grade science students – normally 14 to 15 years old – to present 'intelligent design' as an alternative to natural selection and the theory of evolution. The measure was challenged, and in *Kitzmiller v. Dover Area School District*, decided in December 2005, the requirement was defeated on the grounds that intelligent design was not a legitimate science that could be proven by scientific method. Rather, in the opinion of the court it was a re-branded form of religious creationism: thus, although it was deemed unconstitutional on the grounds of the Article One of the Bill of Rights which establishes the separation of church from state, intelligent design *could* still be taught in classes on religious education.

A period of erasure: 'With malice towards none'

In Abraham Lincoln's Second Inaugural Address of March 1865, the newly re-elected President attempted to reinvigorate a process of national reconciliation that had been kick-started with his famously short Gettysburg Address of 1863. He did so by casting both northern *and* southern participants in the prolonged and bloody conflict as victims, as survivors-in-common of forces that had threatened to tear the country apart. He showed political genius in his attempt to accommodate the element of struggle alongside the *pastness* of that struggle from the perspective of looking ahead towards the eventual end of the war, casting both strands as a story not only of the nation's survival but of its rebirth. Lincoln envisioned the moral afterlife of a future America as an antidote to the evils of slavery, on the basis that, through the crucible of war, Americans themselves had been changed, transformed, reborn. The self-proclaimed 'self-evident truths' that had underpinned the nation's founding had been shattered, resulting in 'a nation of the wounded, a nation in recovery.' [42]

One can see where Lincoln drew his inspiration. When he said, 'Both parties deprecated war, but one of them would make war rather than let the nation survive, and the other would accept war rather than let it perish, and the war came,' he bracketed the evils of slavery and the evils of war *together*. Indeed, Lincoln referred to slavery in the same Address as 'one of those offenses which, in the providence of God, must needs come,

[42] Meister, R. (2011), p. 100. *After Evil: A Politics of Human Rights*. New York: Columbia University Press.

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but which, having continued through His appointed time, He now wills to remove'. If slavery was an offence which 'must needs come', the implication was that God himself had *willed* slavery and, through the tragedy of war, its subsequent abolition. Furthermore, regarding the cause of the war, 'He gives to both North and South . . . as the woe due to those by whom the offense came'. It was as though both war *and* slavery were separate entities that both sides had been powerless to avoid in the face of the Almighty, who 'has his own purposes'.[43]

By doing so, however, at a stroke Lincoln removed the culpability of all Americans not only for having resorted to a bloody civil war, but for the *reasons* for going to war, including slavery itself. Cast as God's will, what this would come to mean was that neither slavery nor war would be anyone's *fault*. It would be no one person's or government's responsibility either for slavery or for its legacy. In other words, there was to be no identified *perpetrator* of slavery. This would make efforts to seek redress, let alone achieve it, all but futile – at least in *this* world. This kind of 'no-fault' response would be re-stated – albeit without any reference to God's will – over a century later when, in 2008 and 2009, the House of Representatives and the Senate eventually issued resolutions apologising for slavery and Jim Crow. We will examine these resolutions later.

A few weeks after his Second Inaugural Address, Lincoln was critically wounded from gunshots fired at him from the stage of the Ford Theatre. He was quickly hustled out of the theatre to a house across the street, where he died a few hours later. The end of the Civil War followed swiftly, culminating in the surrender of southern forces at the Virginia town of Appomattox. Far from embracing Lincoln's vision of blame-free reconciliation, from the spring of 1867 the federal government instead pursued a period of enforced Reconstruction.

Views of Reconstruction differed, of course, depending on which side of the slavery debate one stood. For people who had been enslaved, Reconstruction meant the exhilarating promise of guaranteed freedom. Freedom also involved the requirement to take responsibility for one's *own* progress and development in a landscape where the very notion of self-determination had, for black Americans, been brutally repressed for centuries. Thus, it also suggested the promise – and the risks – of opportunity.

For people who had previously owned slaves, however, Reconstruction meant the sudden removal of their former rights and privileges. Those

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[43] All of the quotations in this paragraph are from *Second Inaugural Address of Abraham Lincoln*, delivered Saturday, 4 March 1865. The full text of the address is available online at http://avalon.law.yale.edu/19th_century/lincoln2.asp (accessed 13 November 2014).

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southern men formerly in positions of power or influence found themselves stripped of that power as well as of the right to vote. Those who had held federal office before the start of hostilities were treated as political traitors, on the grounds that they had wilfully and deliberately broken their oaths of office. They saw their world being turned upside down.[44]

It was not only their political and social world being turned upside down but the economic foundations of that world. Chase explains how this happened: 'The historically crucial clause of the Fourteenth Amendment, which many educated people seem never to have read, states: "neither the United States nor any State shall assume or pay any debt of obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall beheld illegal and void". . . Here was creative destruction with a vengeance: the old South was destroyed precisely in order to eliminate "those economic relationships" which interfered with – from the northern perspective – *America's* rise to power.'[45] Thus, the Fourteenth Amendment imposed on former slaveholders a different version of what the Civil War was actually fought over, compounded by the lack of compensation for their lost 'capital'.

As Ira Berlin put it, 'The Radicals in Congress gained control over federal policy toward the South and expanded the rights of black people . . . In quick order, black men became citizens, voters and – in some places – officeholders. Although the power of black lawmakers was limited by the covert enmity of their white Republican allies as well as the overt hostility of white Democratic enemies, they helped enact legislation providing black people with access to justice, schools, and a variety of social services. The revolution in black life would stall again, and before long, would move backward, as the Northern interest in remaking the South waned and the old regime reasserted itself. But the transformation that accompanied wartime emancipation changed the lives of black Southerners forever.' [46]

The sudden acquisition of rights for formerly enslaved African Americans did not mean am equally sudden, positive transformation in attitudes towards them, however benign or hostile they may previously have been. What emerged alongside new rights and freedoms was also what Saidiya

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[44] Interestingly, these particular 'traitors' did not suffer the traitor's usual fate of capital punishment. Their punishment was to be barred from taking part in political life.
[45] Chase, A. (1997), pp. 156 – 157. *Law and History: The Evolution of the American Legal System.* New York: The New York Press.
[46] Berlin, I. (2010), p. 131. *The Making of African America: The Four Great Migrations*. London: Penguin Books.

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Hartman has described as the 'fiction of debt'. Various pamphlets and guide books informed the newly freed 'that their freedom was purchased by treasure, millions of government dollars, and countless lives . . . The blood of warring brothers and mothers' sons that stained the war-torn landscape of the United States granted the enslaved freedom, but the blood regularly spilt at the whipping post or drawn by the cat-o'-nine tails in the field, the 200,000 black soldiers who fought for the Union, or the hundreds of thousands of slaves who contributed to the defeat of the Confederacy by fleeing the plantation and flocking behind Union lines failed to be included in these accounts of slavery's demise.'[47] This notion of indebtedness promulgated after the Civil War would 'bind one to the past, since what is owed draws the past into the present, and suspend the subject between what was and what is . . . indebtedness was central to the creation of a memory of the past in which white benefactors, courageous soldiers, and virtuous mothers sacrificed themselves for the enslaved. This memory was to be seared into the minds of the freed.'[48]

The fiction of indebtedness was, albeit unwittingly, absorbed by even the most dedicated and vociferous of champions for racial equality. Life-long abolitionist and activist Lydia Maria Child was not only a vigorous campaigner for the abolition of slavery. She also championed for full racial equality throughout her life. Optimistic in her view that freedmen's newly conferred rights would henceforth be legally protected, and radical in her recommendation that women should be included in decision-making, Child accurately foresaw the many difficulties the newly freed African Americans would encounter 'before the new order of things can become settled on a permanent foundation . . . Slavery was a powerful snake, that would try to do mischief with its tail after its head was crushed.' Her book of advice to freedmen, *The Freedman's Book*, published in 1865, is full of practical advice on dealing with the rights and responsibilities of independence. However, she also goes so far as to suggest – using the example of the Golden Rule almost as an apology for such an uncharacteristic recommendation – 'If your former masters and mistresses are in trouble, show them every kindness in your power, whether they have treated you kindly or not . . . they cannot be expected to change all at once.'[49]

The transformation Ira Berlin mentions was in any case a short-lived one. The programme of Reconstruction as official national government policy ended abruptly in 1877, only twelve years after the end of the Civil War,

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[47] Hartman, S.V. (1997), p. 130.

[48] Hartman, S. V. (1997), p. 131.

[49] Child, L.M. (1865 – Kindle version 2012), locations 3376 and 3384.*The Freedman's Book*.Originally published in Boston, Massachusetts: Ticknor and Fields.

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and only two years after the Civil Rights Act of 1875 had come into force. In the case of *United States v. Stanley* of 1883, 'the decision overturned the Civil Rights Act of 1875 and undermined the Fourteenth and Fifteenth Amendments [to the Constitution] by ruling that the equal protection clause of the Fourteenth Amendment only applied to the states. Thus the only recourse available to an individual whose civil or political rights were violated lay in state rather than federal action.'[50] The retreat of federal government from its first hesitant steps towards supporting racial equality meant that state and local law enforcement, buttressed by a growing body of state and local laws, would support the interests of state and local social norms, that is, *white* social norms, free from federal government interference until the middle of the twentieth century. What changed for African Americans was the very landscape of hope itself. The fleeting vision of racial equality and the United States as a land of opportunity, which during Reconstruction had seemed almost within reach, was rapidly receding from view.

When I submitted my thesis in 2017, a formal state apology for slavery had not yet been offered by the federal government, and at the time of compiling this booklet it is unlikely that such an apology will be forthcoming any time soon. The problem is, an apology may serve as expiation for *past* deeds, but in itself it does not change people's *current* biases or behaviours. Racism is insidious: it operates at both conscious and unconscious level in varying degrees. Research has shown that we are not as 'objective' as we like to think we are, and that we all have unconscious as well as conscious biases. Like other biases, racism's most obvious effects – such as an employer's decision not to hire someone because of their race or colour or some otherpersonal characteristic – *can* be minimised with practice and attention. However, it requires determined, conscious effort to do so, as well as an awareness of how biases impact upon people's everyday lives.[51]

Racism permeated American society from its very inception, and at every level: it was socially acceptable. This simple fact had enabled slavery not only to persist after the American Revolution but to *expand*. Such social acceptability may have disappeared temporarily from the surface of social and political life but racism has never really gone away. Scratch the surface and what can be found is a fear of racism, or more specifically, a fear of being *seen* as racist, alongside more subtle forms of

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[50] Jeffrey, J. R. (2008), pp. 198-199. *Abolitionists Remember: Antislavery Autobiographies and the Unfinished Work of Emancipation*. Chapel Hill, North Carolina: The University of North Carolina Press.

[51] See Kandola, B. (2009), pp. 175 - 177. *The Value of Difference: Eliminating Bias in Organisations*. Oxford: Pearn Kandola Publishing.

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discrimination.[52] Meister makes a similar point, where he mentions that the essence of affirmative action is to 'replace racism with a fear of racism, revolutionary politics with a fear of revolutionary politics, and so on. A deep ambivalence is thus built into it.'[53] Recent events indicate, however, that expressions of racism – at times disguised as anti-immigration and anti-terrorist rhetoric – are not only on the rise but are increasingly seen as socially acceptable. [54]

When the House of Representatives and the Senate eventually passed separate resolutions apologising for slavery and Jim Crow, they coincided closely with the election of the United States' first black president. On 19th July 2008, the House of Representatives issued House Resolution 194 (EH), *Apologising for the Enslavement and Racial Segregation of African-Americans.* This resolution wasfollowed by a Senate resolution with the same title (the House of Representatives 'concurring') in June the following year. The Senate document appears to speak for 'the sense of the Congress', Congress being comprised of both the House of Representatives *and* the Senate, but the two resolutions were never formally brought together as one, or signed by the President. As such, they carry no appreciable weight.

Both documents are similar in aim and structure, with both sets of resolutions preceded by similar sets of 'whereas' clauses. However, their differences are striking. The Senate document contains the following 'whereas' clause: 'whereas African Americans continue to suffer from the consequences of slavery and Jim Crow laws – long after both systems were formally abolished – through enormous damage and loss, both tangible and intangible, including the loss of human dignity and liberty'. The mirror-image clause in the earlier House document goes on to mention 'the frustration of careers and professional lives, and the long-term loss of income and opportunity'. However, this wording, with its explicit financial and social implications was expunged in the Senate version.

Both documents also acknowledge 'the fundamental injustice, cruelty, brutality, and inhumanity of slavery and Jim Crow laws'. The House document 'expresses its commitment to rectify the lingering consequences

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[52] I am grateful to members of the Race Equality Action Group, which I convened at Anglia Ruskin University for two academic years from 2010 - 12 for this insight.
[53] Meister, R. (2011), p. 104
[54] During July and August 2019, the White House itself was embroiled in accusations of racism, following President Trump's derogatory remarks concerning four Democratic members of the House of Representatives, all women of colour, and his long silence when crowds at a Republican rally chanted 'send them back', although all the Congresswomen are United States citizens.

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of the misdeeds committed against African Americans under slavery and Jim Crow and to stop the occurrence of human rights violations in the future', but the Senate document stops short of saying that the *government* of the United States should commit itself to these aims. Also, in the Senate document there is no link between slavery and Jim Crow and *human rights* violations, either past or present. Instead, the Senate document 'calls on the people of the United States to work toward eliminating racial prejudices, injustices, and discrimination from society'. Thus, the entire onus – and by implication the blame for any lingering injustice – is placed squarely on 'the people', that is, everyone *and no one*.

While each documents closes by proffering an apology on behalf of the House and the Senate, the Senate resolution differs significantly from the House version by effectively closing the door on the prospect of any future *financial* settlement, with the following disclaimer: 'Nothing in this resolution a) authorises or supports any claim against the United States; or b) serves as a settlement of any claim against the United States'. [55]

In other words, while recognising that slavery and Jim Crow happened, the federal government to date has taken no responsibility for making reparations or attempting to make any kind of financial settlement in respect of any disadvantage – whether past, present *or* future – arising from such a toxic history.

Brooks' distinctions between two different forms of redress may be helpful here: 'Responses that seek atonement for the commission of an injustice are properly called *reparations*. Responses in which the government does not express atonement are more suitably called *settlements* . . . Usually, a reparation is easily distinguishable from a settlement by the presence or absence of an accompanying statement of apology.'[56]

Meister expands on this distinction in his discussion of the kinds of affirmative action that arose from the Civil Rights movement of the 1960s: 'Viewed as reparations, affirmative action programs almost always do too little too late. Reparations in their essence aim at closure; they can be discharged within a finite period of time, perhaps a generation or two beyond the lifetime of the original victims. Affirmative action is potentially interminable precisely because it is not a form a reparation but, rather, a defence mechanism that guards against the return of racism.'[57]

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[55] See H. Res. 194, in the House of Representatives, July 19, 2008, and S. Con. Res. 26, June 19, 2009, both available online from the Government Printing Office, http://www.gpo.gov

[56] Brooks, R. L. (Ed.) (1999), pp. 8 - 9. *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice.* New York: New York University Press.

[57] Meister, R. (2011), p. 103.

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The problem is that that the government's gradual retreat from such affirmative action programmes, in the interests of pursuing so-called 'colour-blind', race-neutral policies, has been paralleled by sharp rises in other forms of adverse racial discrimination – though under different names and guises.[58]

The continuing need for the kinds of defence mechanisms that Meister mentions – including the need for on-going affirmative action and enforcement of other anti-discrimination laws – indicates not only the ongoing presence of racial bias, but people's concerns at being *seen* as racist. If such biases were not still present, it follows that there would be no need for such defence mechanisms. I suggest that defence mechanisms such as affirmative action were established not so much to guard against the return of racism, as Meister suggests – since, arguably, it has never gone away – but in order to protect employers and public service organisations against being *accused* of institutional racism. This is at the heart of what is commonly known as 'political correctness', which in my view is characterised not by the entirely laudable aim of 'putting things right' but by the more cynical fear of 'getting things wrong', along with the attendant risk of damage to organisational reputations – and subsequently, profits.

By Brooks' definition, affirmative action programmes would be categorised as non-monetary *settlements*, and not a form of reparation.[59] Thomas Geoghegan disagrees, suggesting that the Second Inaugural Address was itself a form of apology. Geoghegan argues that when Lincoln said, 'until every drop of blood drawn with the lash, shall be paid by another drawn with the sword', he was indicating that 'saying "sorry" isn't enough, and even money isn't enough', but that 'sorry' was expressed nonetheless. Geoghegan goes on to say, 'You'd think the whole drama of apology – followed by [Lincoln's] assassination – would be burned in our brains, but it's apparent people have forgotten. What we remember from the Second Inaugural is the conclusion, the words, "with malice toward none, with charity for all." '[60]

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[58] See Wise, T. (2010). *Color-Blind: The Rise of Post-Racial Politics and the Retreat from Racial Equity.* San Francisco, CA: City Lights Books. See also Chapter 5 of Michelle Alexander's 2010 volume, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*.

[59] In the 6 April 1998 edition of *U.S. News & World Report*, an article appeared saying, 'In stopovers in Africa last week, President Clinton was careful not to issue a formal apology for America's slave past, but rather to express regret and contrition. One reason, aides say, was to avoid being unnecessarily divisive at home. But another important factor – rarely discussed at the White House – is concern over the legal implications of a formal apology.' Quoted in Brooks, R. L. (1999), p. 352.

[60] See Geoghegan, T., *Lincoln Apologises*, in Brooks, R.L. (1999), pp. 360 - 1.

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If as Brooks suggests the presence of an apology distinguishes between reparations and settlements, then it would appear that the apologies from the two Houses of Congress contribute to neither of these strands. In light of what we now know about the disproportionate and devastatingly adverse impact of the United States' criminal justice system on black Americans, particularly young black males, which has escalated exponentially especially since the declaration of the so-called 'war on drugs' in the 1980s, these separate resolutions are empty of all but rhetoric.[61]

It is becoming clear that calculating the impact of the loss of human dignity and liberty is likely to remain confined to the conceptual, intangible level. The violence of abstraction – where the value of enslaved people was quantified in balance sheets – appears to have remained largely in tact. Indeed, it would be impossible to accurately quantify the totality of such losses in purely financial terms. Meister suggests that 'the biggest obstacle to valuing unjust enrichment as something other than a debt is the absence of a putatively just starting point from which ill-gotten gains can be traced. How well off would U.S. blacks have been had there been no slavery? (Is the real question how well off would Africa have been?)'

To answer these questions – as well as a related question that Meister does not ask, namely how well off would the United States have been, had it not profited from nearly 250 years of slavery – would require us to construct an imaginary, present-day, 'what if' scenario, in which the transatlantic slave trade and the long history of slavery in the United States had *never* happened. We would have to imagine how the country – and indeed every other country associated with the transatlantic slave trade, the cotton trade, and the sugar trade, and all the other ancillary businesses that fed these burgeoning global trades– would have developed *without* slavery. These industries would have included lumber-jacking, rope and sail-making for the construction of slave ships; ironmongery for ships' anchors, nails and bolts, slave chains, collars, shackles and locks; barrel-making for storing fresh water and ship-board

[61] See Alexander, M. (2010 – my edition 2012). *The New Jim Crow: Mass Incarceration in the Age of Colorblindness.* New York: The New Press. Alexander analyses in forensic detail the various stages of the criminal justice system from arrest to sentencing to post-sentence, and how at each stage black Americans – and young black men in particular – are systematically, and legally, disadvantaged. This includes the impact of plea bargaining which – if a person pleads guilty in exchange for a shorter sentence – can render them ineligible *for life* to public housing, food stamps, consideration for employment, and – in some states – the right to vote, even after their sentence has been fully served. See also Glenn Greenwald's 2011 book, *With Liberty and Justice for Some: How the Law is Used to Destroy Equality and Protect the Powerful.*

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provisions, and so forth.[62] How far back in time would it be necessary to go, in order to construct such a scenario? Clearly this would be an impossible task.

However, as Meister also suggests, 'neither should a remedy for slavery require us to imagine a world in which it never happened. It is the actual history of unjust inequality that makes its remediation an *option*.'[63] He proposes the establishment of constructive trusts as 'creating a double view of the present – seeing it simultaneously as it is and as it might have been', and as such 'it is an available remedy in cases of exceptional culpability, and for wrongs that might be profitable because the victim was not at the table to bargain.'[64]

Jonathan Kaplan and Andrew Valls take a different view. The premise of their argument is that 'an important part of the story of racial inequality today is the history of housing and lending discrimination in the second half of the twentieth century. . . due largely to government policies that (in many cases intentionally) excluded Blacks from the opportunities to get into the home market and benefit from home equity growth.' Thus, they argue, 'housing discrimination should form one of the central pillars in the argument for black reparations.'[65]

Thomas Sugrue has exposed how thoroughly and how insidiously housing discrimination and segregation after World War II formed part of public policy and market forces, a factor that continues today where, 'at the opening of the twenty-first century, the fifteen most segregated metropolitan areas in the United States were in the Northeast and Midwest' and 'the five states with the highest rates of school segregation . . . are all outside the South. Rates of unemployment, underemployment, and poverty reach Third World levels among African Americans in nearly every major northern city, where the faces in welfare offices, unemployment lines, homeless shelters, and jails are disproportionately black.' Sugrue also says that by the mid 1990s, 'unprecedented numbers of blacks served on city councils, school boards, in local and federal courts, and in state-wide offices. The surge in black political power may have been the most enduring consequence of the civil rights revolution, but the gains came with ever growing burdens. Just as blacks took the helm,

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[62] This is not to say the slave trade was the *only* trade which these industries supplied: however, it is safe to say that the slave trade could not have been undertaken without them.

[63] Meister, R. (2011), p. 249 – 250.

[64] Meister, R. (2011), p. 240.

[65] Kaplan, J., and Valls, A. (2007), p. 258. 'Housing Discrimination as a Basis for Black Reparations'. In *Public Affairs Quarterly*, vol. 21, No. 3 (July 2007), pp. 255 – 273. (pp. 255-6).

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federal expenditures on cities and social welfare programs began to plummet; suburbanization continued apace; and the flight of jobs and capital accelerated.'[66]

Thus we are not looking at a southern problem, as might have been the case in the decades immediately after the Civil War, but a *national* problem. It is now apparent that W. E. B. Du Bois underestimated just how long that the problem he articulated in 1903 would continue to apply. Over a century later, the problem of the twenty-first century *continues* to be the colour line.

Terms such as 'loss of opportunity' are indeed problematic and difficult to quantify. Such calculations are not like scientific experiments where there is a control factor: when a person takes one job instead of another, all other factors do not remain the same. However, 'loss of income' – including the differential gains in home equity that Kaplan and Valls mention – *can* be expressed in straightforward financial terms, if analysed by group affiliation, as the campaign to close the gender pay gap by ensuring equal pay for work of equal value has successfully demonstrated.

Lincoln himself was assassinated in April 1865 and he never witnessed the tangled aftermaths of the Civil War. It is of course impossible to know for certain what would have transpired had Lincoln lived to see his vision of the future bear fruit. Nevertheless, we must question, and attempt to understand, the possible implications had that vision been realised. If, as Lincoln's speech suggested, it was generally accepted that slavery had been *God's* will, then what hope could be entertained towards the possibility of restorative justice – the proverbial 'forty acres and a mule' – not in the next world but *this* one, for the millions of newly emancipated African Americans? With responsibility for slavery so deftly delegated to the Almighty, what mortal person, group or government would feel comfortable assuming responsibility for an act of God, let alone offer an apology or consider the possibility of reparations, and on whose behalf? As it happened, Lincoln's Second Inaugural Speech provided what we might call 'wiggle room', that is, room for future governments to manoeuvre out of addressing the issue of racial justice altogether. As we have seen, the Senate resolution delegated that responsibility to everyone – and no one.

In any case, Lincoln's vision for a truly united country was never realised. His vision crumbled on the rocks of a failed Reconstruction – failed in that the hard-won legislative and political gains for black Americans that were

[66]Sugrue, T. J. (2008), pp. xix and xxii. *Sweet Land of Liberty: The Forgotten Struggle for Civil Rights in the North*. New York: Random House.

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achieved in the wake of the Civil War did not last beyond the 1870s, thwarted as they were by the predominance of a new – new at least for the South – free market framework, perhaps even from the outset. This was followed by over a century of deepening racial prejudice supported by ever-more-blatant discriminatory practices at every level of civic and political life, buttressed once again by an unholy, unruly rule of law at the highest possible level, including the Supreme Court. The incalculable debt that the United States incurred from over two hundred years of unpaid, forced labour of black Americans under the pervasive system of slavery would go unrecognised, unrewarded, and all but written out of the nation's history books.

This sad, unjust state of affairs would lead black educator Carter Godwin Woodson to write, despairingly in 1933, about the teaching of history (and here I quote him at length):

> 'Starting out after the Civil War, the opponents of freedom and social justice decided to work out a program which would enslave the Negroes' mind inasmuch as the freedom of body had to be conceded. It was well understood that if by the teaching of history the white man could be further assured of his superiority and the Negro could be made to feel that he had always been a failure and that the subjection of his will to some other race is necessary the freedman, then, would still be a slave. If you can control a man's thinking you do not have to worry about his action. . . If you make a man think that he is justly an outcast, you do not have to order him to the back door. He will go without being told; and if there is no back door, his very nature will demand one.'[67]

Aftermaths revisited: slavery today

Yesterday's legalised form of racialised chattel slavery may have officially ended, but today, slavery itself has been transformed and expanded in ways that could not have been imagined by the 19th century abolitionists. The International Labor Organisation (ILO) estimated that 'about 21,000,000 men, women and children are in forced labor, trafficked, in debt bondage or work in slave-like conditions'. Their May 2014 report into the prevalence and profitability of forced labour refers to a catalogue of anti-slavery conventions, protocols and other international instruments, including the United Nations Convention against Transnational Organized Crime (2000), which 'criminalises trafficking in persons,

[67]Woodson, C. G. (1933 – this edition 2010), p. 48. *The Mis-Education of the Negro.*Seven Treasures Publications.

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whether it occurs within countries or across borders, and whether or not conducted by organized criminal networks.'[68]

Human trafficking is described in the ILO report as a specific form of modern slavery, which involves 'men, women and children being brought into a situation of exploitation through the use of violence, deception or coercion and forced to work against their will. . . . From women forced into prostitution, children and adults forced to work in agriculture, domestic work, or factories and sweatshops producing goods for global supply chains, entire families forced to work for nothing to pay off generational debts; or girls forced to marry older men, the illegal practice still blights contemporary world.' Although the risks to traffickers are high, the illegal profits are astronomical: the ILO estimates that 'the total illegal profits obtained from the use of forced labor worldwide amount to $150.2 billion per year. More than one third of the profits - $52.2 billion – are made in forced labor exploitation, including nearly $8 billion generated in domestic work by employers who use threats and coercion to pay no or low wages.'[69]

The Global Slavery Index 2014 (the Index) suggests modern slavery is more prevalent than the ILO suggests, perhaps because the Index uses a broader definition. The Index states there are 35.8 million people living in some form of modern slavery globally, a significant increase from 2013, explained largely by 'the improved accuracy and perceiving of our measures, and that we are uncovering modern slavery where it was not found before.' The 2016 Index increases this figure further, to 45.8 million.[70] It is clear from their calculations that these organisations use different counting methodologies, but what is equally clear is the message behind both organisations' reports: slavery has not gone away. It has gone global, and it has also gone underground. It hides in the shadows of a globalised economy, in lengthy outsourced supply chains far away from the consumers of its products, that is to say, *us*.

However, there is another important, and normally overlooked, similarity: 'what African Americas endured in the post emancipation [that is, during over 100 years of Jim Crow] is precisely what vulnerable people the world over endure today.'[71]

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[68] International Labor Office (2014), pp. 1 and 4 (note 3). *Profits and Poverty: the Economics of Forced Labor*. Geneva: International Labor Office.

[69] International Labor Office (2014), p. 16. Figures are in US dollars.

[70] Walk Free Foundation, *Global Slavery Index 2014*, p. 6. Online at www.globalslaveryindex.org, accessed 14 December 2014. The 2016 Index is online at the same website, accessed 21 October 2016.

[71] Stewart, J. B. (2015), p. 131. Using history to make slavery history. In *Social Inclusion*, Vol. 3, Issue 1, pp. 125 – 135.

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As for today's anti-slavery activism, despite advances in modern technology and the various funding streams available to anti-slavery organisations, it is difficult to form an overall picture of its effectiveness, when we attempt to compare it to the anti-slavery activism of the 19th century. To begin with, identifying the number of people held in slavery or slave-like conditions is problematic, as we have seen: different counting methodologies reveal different figures. As for the monitoring of progress, in 2016 Professor Kevin Bales, the lead author of the *Global Slavery Index* and a director of a relatively new philanthropic anti-slavery initiative called *The Freedom Fund*, told me in response to my question that unfortunately there was no central register.[72]

Nevertheless, attempts *are* now being made to assess anti-slavery activism's effectiveness in quantitative terms. The Freedom Fund's website claims that it is the world's first philanthropic initiative dedicated to ending modern slavery. It works with some ninety-five anti-slavery organisations, focusing on world 'hotspots' where modern slavery is most prevalent. Its 2015 annual report estimates that 36 million people are in slavery, reflecting the 2014 Global Slavery Index. The report also claimed that since its inception it had 'impacted on' some 151,653 people (the website updated this figure to 207,383 from the organisation's inception to June 2016), and had 'liberated' some 6,642 people (updated to 8,923 as of June 2016). In total, some 216,306 people appear to have been impacted on or liberated, using the Freedom Fund's 2016 estimates.[73] As of December 2018, those figures had risen to 511,400 people 'impacted on', and 21,724 'liberated'. While it may be reasonable to assume that 'liberated' means 'freed', it is not clear from the report what 'impacted on' actually means.

However, when we look at the vast number of those held in modern slavery today, the successes mentioned by the Freedom Fund compare poorly with the successes of the activists of the Underground Railroad in the United States, who worked with limited resources; slow methods of communication; and – in sharp contrast to today's anti-slavery organisations – no professional, paid staff. Unlike today's human rights and anti-slavery activists, whom we discuss below, the law was *not* on their side. If Tom Calarco's estimates are correct, then the enslaved people assisted by the Underground Railroad equated to approximately 2.5% of the total enslaved population at its peak. It follows that, collectively,

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[72] This was in response to my question about how many people had been rescued from modern-day slavery in the past decade. My query was made during an online learning course on ending slavery, operated by Future Learn, of which Professor Bales was lead educator. See www.futurelearn.com/courses/slavery. The online discussion took place on 21 October 2016.

[73] See http://freedomfund.org, accessed 21 October 2016, and again on 30 July 2019.

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today's anti-slavery organisations will need to have freed (that is, 'liberated') over 1.1 million people to be able to claimsimilar levels of success. Clearly, today's anti-slavery efforts have a long way to go.

To be fair to the Freedom Fund and its anti-slavery partner organisations, it may be simply *because* modern slavery is unlawful, so resolutely hidden from the public gaze, that the problem remains so difficult to assess, and progress so difficult to monitor. Therein lies a problem for the future: without effective monitoring, it will be difficult to know to what extent, or indeed even *whether* progress is being made towards achievement of Sustainable Development Goal 8.7, which includes an international commitment to end modern slavery by 2030. Furthermore, without similar commitments to ending both global poverty and armed conflict including civil wars, vulnerable and displaced people will be susceptible to traffickers, who promise – but do not deliver – a better life elsewhere.

As for prevention, of the 167 governments investigated in the 2014 Index, only three have plans at national level to actively address modern slavery through their governmental procurement policies, and in the supply chains of businesses operating within their borders. One of these countries is the United States.[74] The United States in fact is commended in the Index for its zero-tolerance policy on human trafficking in government contracting.[75] What this means is that, unlike the slave catchers in the 19th century United States, today's human traffickers operate *outside* the law, and the American government appears to be doing what it can through its purchasing policies to eradicate the taint of trafficking from the supply chains involved.

The problem that further relates this 21st century phenomenon to 19th century American slavery and anti-slavery resistance is that, for all its commendable efforts to abolish *international* human trafficking, there seems to be little if any incentive to abolish the use of forced labour *within* the United States. What I am referring to here is not the illegal trafficking of people to the United States from other countries, but the forced labour of American citizens who are incarcerated in American jails and prisons, including a growing number of privately-run prisons, and the sale of their labour to private enterprise. [76] Like slavery *before* the Civil War, today's

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[74] *Polaris Project – Trafficking Victims' Protection Act (TVPA) – Fact Sheet*, (2008). This factsheet is available online at www.PolarisProject.org

[75] Walk Free Foundation, *Global Slavery Index 2014*, p. 22. The Index goes on to say that some 60,100 people are in a form of modern slavery within the United States (p. 61).

[76] See Mason, C. (2012). *Too Good to be True: Private Prisons in America*. Washington, DC: The Sentencing Project. Using 2010 census figures, a 2012 study by The Sentencing Project reported that although, in percentage terms, the number of people in private prisons comprised only 8% of the total incarcerated population (up from 5.2% in 1999),

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forced prison labour in both government-run and privately-run prisons is big business, and it is perfectly legal, based on the law's protection of economic and enterprise liberties. A report in the 21 September 2015 issue of *The Atlantic* said that, 'with few exceptions, inmates are required to work if cleared by medical professionals at the prison. Punishments for refusing to do so include solitary confinement, loss of earned good time, and revocation of family visits. For this forced labor, prisoners earn pennies per hour, if anything at all.'[77]

According to Douglas Blackmon, this has been the case since shortly after the Civil War, which ended over one hundred and fifty years ago. To appreciate the scale of the issue, a 2008 report from the Pew Center on the States said that for the first time in American history 'more than one in 100 American adults is behind bars.' In numbers, the report said that almost 1.6 million people were in prison, with another 723,000 people in local jails. The incarceration rate differs significantly by ethnicity: one in 15 black adults is in jail, as is one in nine black men aged between 20 and 34.[78] The statistics are damning. Leah Sakala's 2014 report for the organisation Prison Policy concurs, stating that according to 2010 US Census figures, the project of criminalisation has put more than two million people behind bars at any one time, with over five times as many blacks incarcerated per 100,000 of population than whites. Despite comprising some 13% of the American population as a whole, they comprise 40% of the incarcerated population. According to the report, 'social science research has time and again come to the robust conclusion that exposure to the criminal justice system has profound and intergenerational negative effectson communities that experience disproportionate incarceration rates.' [79]

The reasons for this are almost certainly historical. Section 1 of the 13th Amendment to the American Constitution formally abolished slavery and involuntary servitude, but in respect of the latter there was a notable exception: 'except as a punishment for crime whereof the party shall have

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the growth in numbers of people in private *federal* prisons was up by a staggering 784%. This was in contrast to private *state* prisons, which held three times as many prisoners as private federal prisons, but showed a much smaller growth in percentage terms, at 'only' 40%, during the same decade.

[77]Benn, W. (2015). Prison Labor in America. In *The Atlantic*, 21 September 2015. Online at https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/, accessed 3 March 2017.

[78]The Pew Center report is referred to in Adam Liptak, *"1 in 100 US Adults Behind Bars, New Study Says"*, *New York Times*, 28 February 2008. Accessed 24 March 2015, http://www.nytimes.com/2008/02/28/us/28cnd-prison.html?_r=0

[79] See Sakala, L. (28 May 2014). *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity.*This report available online at https://www.prisonpolicy.org/reports/rates.html Accessed 3 March 2017.

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been duly convicted...' The ILO's Forced Labor Convention of 1930 (No. 29) echoes Amendment 13, making an exception for 'work as a consequence of a conviction in a court of law and carried out under the control of a public authority' (Article 2.2).[80] In other words, they exclude the work of convicted prisoners. However, until relatively recently, the buying and selling of the forced labour of imprisoned people has been most noticeable by its absence in scholarly discussions concerning modern slavery.

There are notable exceptions. In his 2008 volume, *Slavery by Another Name: The Re-enslavement of Black Americans from the Civil War to World War II,* Blackmon provides the historical context for the high rates of incarceration for minor non-violent charges – including violations of laws specifically written to intimidate blacks – from the 1860s onward. Blackmon makes this indictment: 'the record is replete with episodes in which public leaders faced a true choice between a path toward complete repression or some degree of modest civil equality, and emphatically chose the former. These were not unavoidable events, driven by invisible forces of tradition and history.'[81] In other words, they were *preventable*. Other decisions could have been taken. Michelle Alexander's ground-breaking book of 2010, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness,* turns the spotlight on the present-day processes of the United States' ostensibly 'colour-blind' but racially discriminatory criminal justice system, shining a spotlight on how black and white offenders and suspects are treated differently at each stage of the system, particularly in the enforcement processes of the so-called 'War on Drugs'. Another notable exception is the work of academic and activist Angela J Davis who for decades has consistently and outspokenly campaigned against what she refers to as the 'prison-industrial complex' that inextricably links prison labour with capitalist modes of production.

It seems that, for all the American government's efforts to abolish international human trafficking and forced labour, the opposite has happened regarding the domestic imprisoned forced labour supply that Blackmon refers to as 'slavery by another name'. One cannot help but draw parallels between this latter development and what happened after the cessation of the transatlantic slave trade over two hundred years ago. What happened was this: the rapid growth of the 'home-grown' enslaved population, combined with the internal trafficking of more than 700,000 enslaved people from the upper to the lower south, more than compensated for the loss of trafficked labour directly from Africa.

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[80] International Labor Office (2014), p. 3.

[81] Blackmon, D. (2012), p. 7. *Slavery by Another Name: The Re-enslavement of Black Americans from the Civil War to World War II.* London: Icon Books Ltd.

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The gap between civil rights and human rights in public perception

A further problem is the gap between notions of *civil* rights – which in the United States tends to be associated primarily with the struggle for racial equality at the civil and political level – and notions of *human* rights, which extend to economic, social, and cultural rights. Indeed, the conceptual link between civil rights and human rights – so eloquently and explicitly articulated in Articles 2 and 7 of the 1948 Universal Declaration of Human Rights[82] – has been strained, if not altogether broken, in recent years. There seems to be a widening gap between the two concepts in people's perceptions, possibly explained by their different starting points.[83]

To illustrate these different starting points, let us look at the example provided by the United Kingdom. Since the 1960s and 70s, equality legislation in the UK has been the mechanism by which individuals are protected *by the state* from unfair discrimination, based on their sharing one or more 'protected characteristics'. Equality legislation is primarily concerned with civil rights: it protects people from direct and indirect discrimination – whether witting or unwitting.[84] Despite the attempt by the Cabinet Office to brand equality legislation as so much 'red tape'[85], and despite the sharp reduction of discrimination cases taken to the UK's Employment Tribunals following the introduction of applicant fees, equality legislation is nevertheless recognised as the primary means of redress when people are unfairly treated.

It is rooted in the 19th century when advocates of the emerging trade unions were fighting the exploitation of workers by their employers, particularly the most vulnerable, such as young children and people

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[82]Article 2 states: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status.' Article 7 states: 'All are equal before the law and are entitled without any discrimination to equal protection of the law.'

[83] This section is based largely on my 2015 essay, 'Probing the gap between equality and human rights', in *Beyond 2015: Shaping the Future of Equality, Human Rights and Social Justice*, pp. 23 – 29. London: Equality and Diversity Forum.

[84] Direct discrimination occurs when a decision is taken because of one's race, gender, disability or other protected characteristic, normally to the person's detriment, as in the decision not to employ someone because of their disability, race, gender, or other protected characteristic. Indirect discrimination occurs when a seemingly neutral policy, procedure or practice results in disproportionately adverse outcomes for people sharing a protected characteristic.

[85] The government's Red Tape Challenge website contains 29 themes, one of which is 'Equalities'. See www.redtapechallenge.cabinetoffice.gov.uk , accessed 28 January 2015. Interestingly, there was no obvious human rights theme on that site when last accessed.

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employed in dangerous occupations. While they have not yet been fully realised, the employee rights that UK workers currently enjoy are the result of restrictions and requirements placed upon employers by the state, *not* the result of workers having rights 'by right', that is, positive rights. Such rights are not, therefore, inviolable.[86]

By contrast, human rights legislation comes from the notion that we have rights because we are human beings.[87] The principles underpinning this notion have been articulated for centuries, though human rights *law* is considerably more recent. Human rights do not depend on our having earned them or having been granted them: they apply – or should apply – to everyone, however humane or inhumane a person's actions may have been towards their fellow humans. This can be hard to accept, particularly when we are repeatedly confronted with footage of people committing horrific crimes on our television screens. Human rights law asserts that people – regardless of their group affiliation, innocence or guilt – have the right of protection *from the state* and from the power of those able to use the machinery of the state for their own ends, and this is a key difference from equality law. In effect, human rights law imposes *limits* on such state and market forces over the individual, with states regularly monitored for their compliance with a range of international conventions and other United Nations instruments.[88]

One outcome of this crucial difference is that although equality law is generally seen as there to assist 'us' if we need it, human rights law in the 21st century is regularly misrepresented in the mass media as something to assist 'them', indiscriminately lumping together asylum seekers, illegal immigrants, the poor, the homeless, welfare recipients, prisoners, and other minority groups with whom 'we' – that is to say, the majority of their audiences – may find it difficult to empathise. Worst of all, human rights law has been branded a 'charter for terrorists' – a toxic, damning indictment of law that is there to protect our fundamental rights as human beings to decent treatment. This kind of coverage cynically preys on and exploits the general public's worst fears.[89]

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[86] It is difficult to know the extent of the impact of the United Kingdom's planned withdrawal from the European Union, currently scheduled for 2020, will have on workers' rights in years to come.

[87] Notions of who fully 'counts' as a human being have considerably changed over time.

[88] For a comprehensive list of international human rights instruments, see the annexe in Steiner, H., Alston, P., and Goodman, R. (2007), pp. 1465-1472. *International Human Rights in Context: Law, Politics, Morals.* Oxford: Oxford University Press. Another useful source is Feldman, D. (2002). *Civil Liberties and Human Rights in England and Wales*. Oxford: Oxford University Press.

[89] This is not to say equality law has had an uneventful ride. For example, the rights to protection on grounds of religion or belief and sexual orientation can appear to clash, and

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Despite the key role British lawyers played in drafting the European Convention on Human Rights, and although the UK was among the first countries to ratify it, the notion of human rights is also regularly misrepresented as a European imposition. The net result is that although human rights law has never interfered with Parliamentary sovereignty or prevented British courts from imprisoning criminals convicted in a British court of law, public perception is that the UK has become a soft touch and that human rights are there to protect the guilty, possibly at the expense of the innocent. Given such media coverage, it is not hard to understand this sentiment, when criminals from other countries who – if on deportation to their home countries are likely to be subjected to torture or capital punishment – can instead languish for years in British prisons at taxpayers' expense.

Another outcome is that such lopsided media coverage has distorted public perceptions of human rights law to the extent that many people find it easier to respond to humanitarian crises abroad than to recognise the prevalence of human rights abuse at home. In the heat of such toxic coverage and in the relative lack of positive human rights stories in the media, it is easy to forget that the UK's Human Rights Act exists to provide redress for British citizens through British courts, in case of human rights abuse. We also tend to forget that human rights abuse can happen anywhere – from a prison cell to a care home for the elderly to behind our own front doors – at any time, and to anyone. Thus, our human rights need to be defended *and* promoted everywhere, all the time, and by everyone.

Stepping away from the UK-specific context, in times when the perceived threat of terrorism is high, our understandable desire for security in our daily lives is pitched *against* our desire for the rights and liberties we take for granted, including our right to privacy. There is a persuasive argument that we cannot have security without the significant erosion of our rights and liberties – an argument used to justify mass surveillance and data capture of people who are not under suspicion of anything at all. The argument is buttressed by the notion that innocent people should have nothing to fear, nothing to hide. The attendant risk, though, is that unless we are careful, there will be nowhere to hide, that is, no remaining barriers against unwarranted state intrusion into our personal and private lives. As Benjamin Franklin predicted over two hundred and fifty years ago, if we privilege security over liberty, we could wind up with neither.

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there has been some interesting case law since these protections came into force in 2003. Various facets of the more recent Equality Act 2010 may not have been implemented, but – unlike the UK's Human Rights Act – I have not come across public or political suggestions that equality legislation should be jettisoned altogether.

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Human rights activism: still a risky business

Arguably, we would not have equality under the law, or indeed any of the human rights we take for granted – such as the right to life, liberty and security of person; the right to recognition as a person before the law; the right to a nationality; and indeed the right not to be unfairly discriminated against – without the efforts of people prepared to stand up and defend those rights.

Like the Underground Railroad activists of yesterday, today's human rights defenders knowingly continue to put themselves at risk of physical and psychological harm in the interests of upholding and defending the rights of others. Unlike the operators of the Underground Railroad, the human rights defenders of today are supported in their work by a range of internationally ratified United Nations declarations, conventions and resolutions, including the aforementioned Declaration on Human Rights Defenders. This latter Declaration is an example of 'soft law', which – like the better-known Universal Declaration of Human Rights – has no judicial force of its own but which opens a country's practices to external scrutiny and making the findings of such scrutiny available to the public.

The human rights defenders of today include people who work with recognised, well-established human rights organisations, who approach their work with a level of professionalism unheard of in the 19th century.[90] Others choose not to define their work in such terms, although the grass-roots nature of their work invites the most direct comparison with Underground Railroad participants.[91]

Despite these developments, the risks to human rights defenders continue unabated throughout the world. In 2011, Margaret Sekaggya, who at that time was the United Nations Special Rapporteur on human rights defenders, issued her report on the situation of this group of men and women who work to ensure respect for human rights and to expose human rights abuse in people's everyday lives, in countries around the world. They include grass-roots community workers, teachers, lawyers,

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[90] Human rights defenders can achieve significant professional recognition through the various awards and prizes. These include a United Nations Prize in the Field of Human Rights, and a Human Rights Defender award conferred by Human Rights Watch.

[91] R. Redhead and N. Turnbull, 'Towards a Study of Human Rights Practitioners', *Human Rights Review*, Vol. 12 (2011), 173 – 189. This article includes interviews with four human rights practitioners, three of whom described themselves as 'professionals'. One was a lawyer; one worked for Amnesty International; one was an academic activist; and one worked at grassroots level with asylum seekers and refugees. It was the latter person who 'considers his work a calling or a vocation and . . . resists referring to it as a career.'

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doctors, and journalists, as well as employees of specialist human rights organisations. In some countries, particularly those whose regimes are hostile to criticism, their work is extraordinarily risky. According to Sekaggya's report, human rights defenders have been subjected to 'killings, attacks, disappearance, abduction, torture and [other forms of] ill-treatment', sometimes involving 'the abusive use of legal frameworks against them and the criminalisation of their work'. Much of this harm is perpetrated by 'State actors, including Government officials, State security forces and the judiciary'. [92] The same concerns are echoed in her successor Michael Forst's report of December 2014.

As for hostility towards human rights defenders in the United States, the Equal Justice Initiative (EJI),an American non-profit organisation that provides legal representation to people who have been treated unjustly by the criminal justice system, and works for the reform of those systems, reported in January 2015 that 'there has been an increase in resistance to civil rights and an increase in anti-civil rights rhetoric in America' since the election of the country's first black president in 2008. The report suggests that 'many anti-civil rights activists have seized the narrative that racial justice is no longer a legitimate social goal, and that efforts aimed at eliminating racial discrimination are actually anti-white measures that promote inequality.'[93]

The Equal Justice Initiative is attempting to turn the tide on such perceptions through a number of work strands that seeks to uncover previously hidden history. One of these is a project in Alabama that aims to place roadside markers commemorating the sites where lynchings and slave markets took place. This project – coupled with a community remembrance project – is designed to help break the silence to which so many incidents of historical violence are consigned, thus opening the door

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[92] Margaret Sekaggaya, *Report of the Special Rapporteur on the Situation of Human Rights Defenders, Margaret Sekaggya* (Reference A/HRC/19/55), paragraphs 40 and 117. Observer organisations such as Peace Brigades International (PBI) confirm the content of Sekaggya's report. See their publication, *Criminalisation of Human Rights Defenders.* See also the PBI Annual Review 2010, at www.peacebrigades.org.uk, and *Attacks on Lawyers: Human Rights Defenders under Siege*, published by the National Union of Peoples' Lawyers, Quezon City, Philippines, 2011. These publications were provided to delegates at the *Defending Human Rights Defenders* conference in London on 24 February 2012, organized by the Haldane Society, which I attended. Since 2014, Mr Michael Forst has been the special rapporteur. His first report, reference A/HRC/28/63, was published in December 2014 and re-iterates Sekaggya's concerns: see paragraphs 108-113.

[93]Equal Justice Initiative, "*Anti-Civil Rights Incidents Increase*", 23 January 2015. Accessed 25 February 2015, at http://eji.org/news/anti-civil-rights-incidents-increase At the time of writing, of growing concern are the comments emanating directly from the White House itself, which appear to validate the views of *anti*-civil rights activists.

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for continuing constructive dialogue.[94] As such, the project attests to the presence of hope that something *can* yet be done.

Another such project is the Tracing Center. Based in Boston, Massachusetts, this is a programme whose mission is to 'educate the public about the history and legacy of race and other forms of discrimination, in order to change hearts and minds, foster dialogue, and encourage healing and justice'. Among the organisation's work strands is a project to 'research, evaluate, and disseminate, via writing and training, best practices for interpreting the history of slavery at museums and historic sites', a project that has included constructive face to face meetings and discussions in local communities. [95]

These inspiring examples of using history as a positive catalyst for constructive change through dialogue can be easy to overlook when governmental and media attention is focused on horrific incidents of *international* human trafficking and forced labour. It may be an unintentional side effect, but the focus on international problems may be deflecting attention – and resources – that could be used to address, and rectify, the significant growth in the domestic prison population, especially the black prison population, in recent decades.

More worrying is that perhaps the deflection of public attention from domestic to international forced labour is not, after all, *unintentional*. It may be that today's 'colour-blind' race-neutral criminal justice policies are no more 'colour-blind' than the earlier Jim Crow laws were. It is an unsettling suggestion to make, but perhaps such policies are symptomatic of a newer, more subtle version of white racism which dares not (yet) openly speak its name. Paradoxically, it – like slavery itself – has gone global and it has gone underground. As a blogger on *The Daily Beast* put it from the anonymity of the internet, 'White supremacy is a racket. American slavery and labor struggles are two sides of the same coin, the exploitation and degradation of human beings with the assistance and connivance of the state.'[96]

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[94]Updates on the progress of this project can be found at http://eji.org/news/eji-lynching-marker-project-grows

[95] See The Tracing Center's website, at http://www.tracingcenter.org I am grateful to Norma Johnson, Director of the Josephine School Community Museum and Center for African American History in Berryville, Virginia, for information about this project, when I met with her on 18 September 2015. Ms Johnson's Museum co-hosted such a discussion on 21st June 2014.

[96] The blogger self-identified as 'Mee2'. The comment was in response to an article by Eric Herschthal, 'How Slavery Gave Capitalism its Start', published online on 24 April 2015, at www.thedailybeast.com and accessed 29 April 2015.

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It should be clear, then, that the United States is not yet 'done with all that'. There is simply too much unfinished business. Indeed, Tim Wise suggests that it is the on-going 'avoidance of race issues that has now made it more difficult than ever to address ongoing racial bias.'[97] It is for precisely this reason that the United States cannot claim 'done with all that', if indeed it ever can be, and for precisely this reason that we cannot begin to understand the successes of and continuing challenges to human rights activism today without also understanding the successes and challenges to human rights activism of yesteryear.

If the struggle for racial equality appears to have been interrupted, and if the causal links between abolitionism and anti-slavery activism then and human rights activism now appear to have been ruptured, there is nevertheless an unbroken thread – nothing more, nothing less than racism itself – whose tensile strength serves to connect the two time periods. It has surfaced at different times and in different guises, but although attempts have been made to shunt it into the back pages of the history books, it has never truly gone away.

In the end, it is *people* who abuse our human rights and the rights of others, and it follows that only people can promote and defend them. Now, as then, people power could be our best hope; indeed, it could be our only hope.[98]

[97] Wise, T. (2010), p. 15. *Colorblind: The Rise of Post-Racial Politics and the Retreat from Racial Equity.* Cambridge, Massachusetts: Harvard University Press.
[98] Marchal, F. (2015), p. 28. 'Probing the gap between equality and human rights'. In *Beyond 2015: Shaping the Future of Equality, Human Rights and Social Justice*. London: Equality and Diversity Forum.

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About the author

Faith Marchal was awarded her doctorate in June 2017 from the School of Law, Birkbeck College, the University of London, where in 2010 she also achieved her Master of Laws in Human Rights. For her PhD she investigated anti-slavery resistance in the United States before the Civil War, regarding the Underground Railroad as an early example of grass-roots human rights activism in practice. In an attempt to answer 'what is to be done when injustice persists after justice has apparently been done', she also explored slavery's lingering aftermaths – the subject of this booklet – drawing unsettling parallels between the successes (and failures) of today's, and yesterday's, anti-slavery activism, linked by what she referred to as 'the unholy, unruly, rule of law'.

At the time of writing she is the programme action officer for her local branch of Soroptimist International, and she supports a number of human rights organisations including Anti-Slavery International.

Other publications include

- 'Probing the gap between equality and human rights', in *Beyond 2015: Shaping the Future of Equality, Human Rights and Social Justice* (2015, Equality and Diversity Forum)
- 'When freeing the slaves was illegal: "reverse trafficking" and the unholy, unruly rule of law', in *The Palgrave International Handbook of Human Trafficking* (November 2019).

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