Welcome to the "Slavery, Captivity, and the Meaning of Freedom" Research Focus Group – and thank you for your interest in this draft of "The Slave Race," the first chapter of my manuscript, "Bound to Respect: Democratic Dignity and the Indignities of Slavery."

This chapter reassesses the central terms structuring current critical discussions of slavery: dignity, humanity, and personhood. I wanted, therefore to seize this excellent opportunity to receive rigorous cross-disciplinary criticism from colleagues and students in classics, history, and anthropology (and beyond). So again, thanks in advance!

As you'll see below, this chapter is preceded by an introduction and followed by chapters devoted to close readings of tort proceedings (Chapters 2 & 3) and narratives by Frederick Douglass, Herman Melville, and Mark Twain (Chapters 4-6).

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THE "SLAVE RACE": NATURALIZING PERSONHOOD

Chapter One of "Bound to Respect: Democratic Dignity and the Indignities of Slavery"

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Persona est homo cum statu quodam consideratus

(Legal maxim: A person is a human being considered with reference to a certain status.)

In his influential re-reading of the master-slave dialectic, sociologist Orlando Patterson triangulates George Wilhem Friedrich Hegel's account of "Lordship and Bondage." If "the degradation of the slave nurtured the master's sense of honor," Patterson contends, the surrounding community of nonslaveholding "free persons," "shar[ed] in the collective honor of the master class" and thus "legitimized the principle of honor."[1] In the antebellum South, the latter group included plebeian whites.[2] In a rapidly industrializing, urbanizing, and democratizing United States, the antebellum South's honor culture, like the slavery on which it rested, could make the section seem like a throwback to feudal Europe.[3] But Frederick Douglass (among others) exposed this myth of Southern exceptionalism by calling attention to the broader "Skin Aristocracy in America" that had replaced rank with race *throughout* the nation.[4] Like Ishmael, the narrator of Herman Melville's *Moby-Dick* (1850), many Americans were proud of having discarded an Old World "dignity of kings and robes" for a new "democratic dignity."[5] But, as Ishmael tacitly acknowledges, this was a *Herrenvolk* dignity, one that defined itself against what novelist and critic Ralph Ellison once called "the indignities of slavery."[6]

Like their European counterparts, nineteenth-century Americans understood dignity primarily as a matter of status hierarchy rather than shared humanity. In making this claim, I join the classicists, political theorists, philosophers, and legal historians in the emerging field of dignity studies who seek to historicize the concept. This chapter thus begins by distinguishing the current notion of dignity as intrinsic human worth from the traditional view that, for millennia, understood dignity primarily in terms of rank. Until very recently, we have traced the turn in dignitarian thought to the beginning of the long nineteenth century and the ethics of Immanuel Kant. Increasingly, however, Kant scholars are questioning this tendency to credit the Enlightenment philosopher with the modern concept of a specifically *human* dignity, noting that his usage is more consistent with the traditional status-based view. This revisionist account of Kantian dignity affirms the growing critical consensus that the sort of universal, intrinsic human dignity described in the UN's Universal Declaration of Human Rights (1948) is very much a twentieth-century development.

When we understand "dignity" as referring not to a transcendent inner worth but to a hierarchical ranking, we necessarily shift our focus from the metaphysical value of humans to the status of legal persons. Tracing the origins of legal personhood to Greek drama and Roman law, this chapter's second section explores the tension in modern Anglo-American law between making and knowing persons – between legal artifice and ontological certainty. What is at stake when legal forms become naturalized by being associated with particular kinds of human beings? As this chapter's third section elaborates, the "democratic dignity" that Melville's Ishmael sees "shining in the arm that wields a pick or drives a spike" was less the dispensation of a "great democratic God"

than the product of an exclusionary "upwards equalization of rank," in which the able-bodied white man of sound mind became Jacksonian America's "default legal person."[7] Examination of the nation's first law dictionary and first legal textbook suggests that even as Americans identified the abstraction of legal personhood with the democratization of status, particular forms of ascriptive personhood perpetuated and modernized status hierarchies through attributions of race and gender.[8] In particular, the readings of *Federalist* 54 and Kant's *Doctrine of Right* in this chapter's fourth section demonstrate how the artifice of slave personhood became naturalized through the identification of "Negroes" with this legal fiction. Much as *Herrenvolk* democratic dignity lay in the equally elevated legal status of white men of sound mind and body, the indignities of slavery arose from the imputation to African Americans of the slave's "mixed character" as a civilly dead yet criminally culpable legal person.[9]

To illustrate the counter-intuitive (and far from original) claim that slavery was premised upon the exploitative *recognition* rather than the *denial* of Black humanity, I conclude with an analysis of the federal mail theft case, *United States v. Amy* (1859).[10] The case centered on the doctrine of slave personhood, prompting first the prosecution and then the defense to examine the terms of this legal artifice, especially as it pertained to the undisputed humanity of the enslaved. *U.S. v. Amy* demonstrates that in the antebellum period it was not only insightful Black and brown critics of American racism who took "the humanness of African Americans as a given"; indeed, the case reminds us that U.S. slavery was *premised* on that assumption.[11] More significantly, in *U.S. v. Amy*, as in *Federalist* 54 and the *Doctrine of Right*, we see the legal and cultural creation of what Amy's lawyer called "the slave race."[12] For, as the legal proceedings discussed in

this and the following two chapters illustrate, the naturalization of the artifice of slave personhood continued the indignities of slavery well after emancipation and abolition by extending the slave's civil incapacity and criminal liability collectively to African American *people*, regardless of condition.

Defining Dignity

Even before the U.S. Supreme Court in *Obergefell v. Hodges* (2015) "decisively established that 'dignity' is no mere rhetorical flourish, but a core element of the Fourteenth Amendment," the concept had gained fresh urgency across a range of discourses and disciplines.[13] Prior to the federal government's legalization of same-sex marriage, developments in biological and information technology had renewed interest in dignity in science, medicine, politics, ethics, and religion.[14] In the academy, humanities scholars deepened and widened the discussion beyond such twenty-first century concerns, creating what is, in effect, the interdisciplinary field of dignity studies. Today, critics are no longer preoccupied with whether dignity is, in philosopher Arthur Schopenhauer's resounding dismissal, merely "the shibboleth of … all empty-headed moralists."[15] Instead, they have compiled a rich history of the concept by examining dignity on its own terms, rather than reducing it to a puzzling adjunct of human rights.[16] (Is dignity the *basis for* or *the result of* human rights claims?)[17] Neither cipher nor tautology, dignity, when examined in the various historical, cultural, and political contexts that have given it meaning, emerges as a protean but by no means amorphous concept.

The touchstone for the current pairing of dignity with rights – and of both with the human – is the United Nation's Universal Declaration of Human Rights (1948). The UDHR opens with the claim that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world."[18] Until very recently, critical scrutiny focused on the "the equal and inalienable rights," rather than the "inherent dignity," attributed to humans in the UDHR and similar documents. Were modern human rights "invented," as Lynn Hunt has argued, in the late eighteenth century with the Enlightenment; the American, French, and Haitian revolutions; the rise of republicanism; and the emergence of transatlantic reform movements, especially those advocating the rights of women and the enslaved?[19] Or, as Hannah Arendt maintained, did the human rights asserted in the aftermath of World War II in instruments like the UDHR represent a profound break from the earlier "Rights of Man and Citizen"?[20] Or is even the UDHR too early a benchmark, as Samuel Moyn maintains?[21]

As historians and political theorists continue to debate the origins and meanings of human rights, philosophers and legal scholars have directed increasing scrutiny to the "dignity" that is often reduced to "mere ascription or convention" in such discussions.[22] In particular, these scholars have sought to historicize what Kant scholar Oliver Sensen has identified as "the *contemporary* paradigm of dignity" articulated by the UDHR and similar instruments: "that dignity is an absolute inner value all human beings possess and a value that grounds the requirement to respect others."[23] Prior to the mid-twentieth century, under the "traditional paradigm," dignity designated the "rank or elevated position" of particular persons, as well as "the behavior and esteem appropriate to such

standing."[24] In contrast to the modern notion of a universal, transcendent human worth, this dignity could be gained or lost, "realized," or "wasted."[25] Accordingly, the traditional view of dignity emphasizes duties over rights, and specifically, the duty fully to realize one's status-based dignity through one's behavior.[26] Scholars have sought to track the concept's evolving meaning by charting its changing relationship to cognate notions of "honor" and "worth."[27] Hence the critical endeavor to distinguish modern "human" dignity – also known as "intrinsic," "internal," "inherent," "universal," "general," or "moral" dignity – from the traditional understanding of what has been variously labeled "external … dignity," "particular dignity," "social dignity," "contingent dignity," "dignity proper," "hierarchical dignity," or simply "honor."[28]

From classical antiquity through early modern Christianity, the concept of *dignitas* anchored a tradition of insistently hierarchical dignitarian thought centered on persons rather than humans.[29] Absent from this tradition is the identification of a specifically human dignity with the sort of "equal and inalienable rights" asserted by the UDHR.[30] As Arendt observed in *On Revolution* (1963), appeals to the "inalienable political rights of all men by virtue of birth would have appeared to all ages prior to our own as … a contradiction in terms."[31] To illustrate this point she glosses the classical distinction between *persona* and *homo*, noting that "the Latin word *homo*, the equivalent of 'man,' signified originally somebody who was nothing but a man, a rightless person, therefore, and a slave."[32] Before its migration into "legal terminology," *persona* originally "signified the mask ancient actors used to wear in a play."[33] Thus, Arendt explains, the "distinction between a private individual in Rome and a Roman citizen was that the latter had a *persona*, a legal personality …; it was as though the law had affixed

to him the part he was to play in the public scene. … Without his *persona*, there would be an individual without rights and duties, perhaps a 'natural man' – that is, a human being or *homo* … indicating someone outside of the range of the law and the body politic of the citizens, as for instance a slave – but certainly a politically irrelevant being."[34] As Arendt was at pains to insist, the modern dignity of the international human rights regime represents an innovation in that it does not attach to a legal *persona* but is intrinsic to the definitively "natural" *homo*.[35]

Like "dignities" in the English legal tradition, the ancient Roman *dignitas* referred to ranks and titles of honor and, in this sense, attached to persons in the social and political hierarchy. As a designation for elevated status, however, *dignitas* was by no means exclusive to persons. Superior examples of architecture or dogs could, for example, have *dignitas*.[36] Cicero's *On Duties* (*De officiis*; 44 BCE) – a key source for Kant – builds on these meanings to elaborate the "dignity of man" (*dignam hominis praestantia*) in a stratified natural world.[37] Drawing on Stoic ethics, Cicero maintains that "the superiority and dignity" of human nature over that of "cattle and other beasts" imposes a duty of temperance so that we not reduce ourselves to their inferior level.[38] In keeping with this duty to respect one's own elevated human dignity is the duty to extend this respect to others in this elevated human community. "The better and more noble … the character with which a man is endowed, the more does he prefer the life of service to the life of pleasure," Cicero observes, concluding, "Whence it follows that man, if he is obedient to Nature, cannot do harm to his fellow man."[39] Even as Cicero identifies the duties entailed by a distinctly *human* dignity, he follows broader Roman usage in understanding *dignitas* as "merited, outward looking, and comparative."[40] As with other

instances of *dignitas*, Cicero's human dignity is a matter of rank or standing – whether of humans as against non-human animals or of nobility of character *among* humans.[41]

A similarly hierarchical approach characterizes Judeo-Christian understandings of dignity from late antiquity through the early modern period. Human dignity is associated with *imago dei*, the doctrine that God created humans in his image and likeness.[42] But human beings were not unique in this respect; *imago dei* also applied to angels, a superior form of rational being. Creation, moreover, preceded the Fall and the introduction of human sinfulness into the world. In different ways, St. Augustine, Pope Leo I, and Thomas Aquinas all understood dignity as occurring within a "cosmic hierarchy": humans have more than animals but less than angels, for example; similarly, penitent Christians have more than their non-penitent or non-Christian human counterparts.[43] Pico della Mirandola's vaunted *Oration on the Dignity of Man* (1486/1496) thus exhorts humans to improve their ranking relative to the "seraphim" and "cherubim": "let us emulate their dignity and glory, unwilling as we are to yield to them and unable to endure second place. … If we too live that life (and indeed we can), we will be equal to their lot."[44] Even for Mirandola, even in the heavenly realm, this aspirational merit-based dignity is ultimately a matter of comparative status.

Such defenses of a specifically human dignity were just that, written in response to the long "line of Christian assaults on the human condition," notably *De Miseria Humane Conditionis* (*On the Misery of the Human Condition*; c.1194-95) by Cardinal Lotario dei Conti di Segni (Pope Innocent III).[45] Far from celebrating a transcendent human dignity, medieval and early modern Christian anthropology limned what literary critic Erich Auerbach calls a "radically creatural picture of man."[46] Speaking of late

medieval culture more broadly, Auerbach explains that this view of humanity "combines the highest respect for man's class insignia with no respect whatever for man himself as soon as he is divested of them"; underneath "there is nothing but the flesh, which age and illness will ravage until death and putrefaction destroy it."[47] Perversely, then, this is "a radical theory of the equality of all men, not in an active and political sense but as a direct devaluation of life," which denuded of status, "has neither worth nor dignity."[48] This is the precarious state that, from Auerbach's late medieval Christianity, through antebellum abolitionism, to twentieth-century fascism, Arendt refers to as "the abstract nakedness of being human."[49]

For many, Kant's theory of dignity marks the advent of modernity: the moment when the current notion of universal, intrinsic human worth superseded the traditional view of dignity as elevated status.[50] This view is usually traced to Immanuel Kant's *Groundwork of the Metaphysics of Morals* (1785), which is widely understood to argue that, as beings with a rational nature, humans have an unconditional value; we therefore have a duty to respect the worth in ourselves and others by treating humans as ends, not as means.[51] But what if modern dignity is even more modern than suspected, originating not in Kant's late eighteenth century, but in the UDHR's mid-twentieth century (or later)?[52] An increasing number of scholars see Kant's theory of dignity as more of a bridge than a break from traditional Western understandings of the concept.[53] Indeed, Kant explicitly situates his work in this tradition when, in the *Doctrine of Virtue* (1797), he invokes Cicero to emphasize "*duties*" over "*rights*" (6:239) and glosses dignity (*Würde*) with a parenthetical reference to the Latin *dignitas* (6:462). Moreover, like ancient Roman *dignitas*, Kant's dignity appears to be "neither inalienable nor unmerited";

it "comes and goes."[54] Thus, an alternative formulation of Kantian dignity posits that whereas human beings are elevated by their shared *capacity* for morality, they only realize their potential dignity through meritorious *exercise* of that inherent moral capacity.[55] Duty remains as at least as important in this schema as rights: the duty not to elevate oneself against others, not to impose upon their freedom, is a duty of respect toward oneself and others.[56] Surveying the 111 times the term dignity (*Würde*) appears in the published work, Sensen finds that whether Kant is speaking of the dignity of a monarch or royalty, or of the dignity of man or humanity, he uses "dignity" not as "the name for a value" but "to express that something is raised above something else."[57] For Kant, dignity "is not a notion that carries a justificatory weight"; instead, "[i]t expresses the special standing of something, but it depends on the context for an explanation of what is elevated and in what respect" – a king, say, or morality.[58] Thus, even as Kant introduced an ethics centered on humans' shared capacity for morality, he did so by retaining and refining the traditional European concept of dignity as the elevated status primarily associated with persons.

If we accept the revisionist account of Kantian dignity as a concept expressing relative status rather than an intrinsic value, we cannot dismiss *persona* in favor of *homo*. On this view, the modernization of dignity did not entail its humanization so much as its democratization. The best-known exponent of this theory, the legal and political philosopher Jeremy Waldron, rejects the narrative that has the traditional understanding of dignity as "the honour, the privileges and the deference due to rank or office" being "superseded by" a "notion of the dignity of humanity as such."[59] Instead, Waldron contends, "what happened was a generalisation of high-rank – a sort of levelling up," in

which "the modern notion of *human* dignity does not cut loose from the idea of rank; instead it involves an upwards equalisation of rank, so that we now try to accord to every human being something of the dignity, rank, and expectation of respect that was formerly accorded to nobility."[60] This dignity is not located in the essential equal worth of humans, but in the equally elevated status of legal persons.

Over the course of the long nineteenth century that separated Kant's *Groundwork* from the UDHR, this upward leveling was simultaneously realized and racialized in a United States whose Constitution explicitly prohibited titles of nobility while implicitly protecting slavery. As cultural historian Peter de Bolla has observed of Anglo-American rights talk in the previous century, dignity remained a productively "fuzzy concept" into the early twentieth century.[61] The very "mobility" of the concept of dignity in nineteenth-century America made it both "politically expedient" and "conceptually satisfying," in that "one can do more and different things with concepts that operate in a dual phase and have a plastic structure" than one can with concepts whose meanings seem comparatively stable and fixed.[62] In Part Two of this book we shall see this generative instability at work – or, rather, at play[63] – as Frederick Douglass, Herman Melville, and Mark Twain suggestively toggle back and forth between the traditional notion of dignity as the elevated status conventionally associated with persons and an emergent association of a metaphysical dignity with the newly "hinged concept" of "*human-rights*."[64]

Legal Persons

In modern human rights discourse, "dignity" refers to the equal metaphysical value of the human as a unique bundle of blood, bones, and tissue; traditionally, however, the term

indexed the differential status of legal persons as varying bundles of rights and duties, powers and obligations. Like nineteenth-century Americans, we tend to use the words "human" and "person" interchangeably in everyday speech; indeed, they are often confused in the relevant scholarship.[65] Anglo-American law, however, has historically identified its subjects as persons or citizens, rather than humans.[66] In his *Analysis of American Law* (1859), Joseph White Moulton asserted that "*Persons*, and their rights, powers, duties, and responsibilities, are the only subjects of law."[67] He went on to explain that a "corporation … is called an artificial *person*, to contradistinguish it from a *natural* person."[68] To clarify his usage, the antebellum New York lawyer quoted the eighteenth-century English jurist, Richard Wooddeson: "I do not affix to the word person its popular signification merely, but, by a metaphor, originally assumed, perhaps from the drama, and, according to the use of it among the Roman jurists, intended to express that part or character which every man, and every society of men is invested with, either by nature or positive institution."[69] Like his American successors, Wooddeson focused not on "persons such as they are by the law of nature," but "such as they become by the law of civil society."[70] This principle is encapsulated in the legal maxim that serves as this chapter's epigraph: "*Persona est homo, cum statu quodam consideratus*" (A person is a human being considered with reference to a certain status).[71]

In these efforts to define legal personhood, law functions as technology rather than epistemology. This is because, as legal theorist Alain Pottage has observed, "techniques of personification and reification are constitutive rather than declaratory of the ontology upon which they are based."[72] As jurists like Wooddeson and Moulton explain how law makes persons out of humans, they also demonstrate how the same

process makes *homo* out of *persona*: Arendt's oxymoronic "rightless person," Auerbach's human being denuded of status. However much Pottage's observation may align with current social-constructivist thinking, it derives from ancient Roman law. Wooddeson, like Arendt, traces the *persona* of Roman law to ancient Greek theater. *Prósōpon* (πρόσωπον) could mean either "face" or "mask," but, as Wooddeson's usage suggests, law's origin stories identify *persona* with the mask an actor wore to indicate a specific character or role. In Roman law, Pottage and other legal scholars emphasize, *persona* remained very much a term of art – not simply as jargon but as the product of "legal rhetoric as *techne*; that is, as an art, technique, craft, or strategy."[73] Thus, Pottage contends, "legal technique is about making rather than knowing."[74] Building on French scholar Yan Thomas' "archeology of Roman law," Pottage explains that "Roman law addressed wrongs not as the expressions of some complex authorial psychology," but, rather, much as with "the *personae* of Roman theatre…, the qualities of the criminal actor were really the properties of a typified action that entirely eclipsed the person that was annexed to it: 'The relation did not run from the agent to the act, but from the act to the agent.'"[75] This dynamic should not be confused with Michel Foucault's account of the modern penological reorientation from conduct to character, from criminal act to criminalized individual.[76] In Roman law, the act created the agent only provisionally, for the purposes of the proceeding at hand. Different forms of legal personhood could be donned and doffed like masks. For legal scholars Edward Mussawir and Connal Parsley, this history "expresses a fundamental element crucial to an emergent legal science: the difference that is necessary in law in order to separate the identity of a real living subject from that of a purely artificial, fabricated role that is reserved and instituted at the level of

juridical existence."[77] Prior to the medieval insertion of the person in a "transcendent, theological, metaphysical, or meta-juridical frame" from Boethius onward, they emphasize, "the Roman law did not mould its persons on a pre-existing biological human substrate."[78]

By contrast, modern law has been torn between making legal persons and knowing them to be human beings. As the distinction between "artificial" and "natural" legal persons suggests, Anglo-American law struggles to disregard what it sees as persons "such as they *are* by the law of nature" in its dealings with persons "such as they *become* by the law of civil society." In fact, the "artificial" and the "natural" person are both artifices: one is just more evidently the product of legal technology than the other. This confusion leads Mussawir and Parsley to caution that even as "modern legal doctrine freely proliferates technical or abstract senses of the person to satisfy the grammar of its actions" in the classical tradition, "it also seems to be in thrall to a naturalized image of the human in whose service it curtails its own potential operations."[79] Their concern – "in thrall"? – seems counterintuitive in an era when it is the artifice of legal personhood that typically provokes consternation. The current outrage over corporate personhood arises from the notion that law can *make* a person when the lay public intuitively *knows* that only humans can be persons. As we have seen, however, the legal concept of personhood originates not in the human being (the actor) but in an artifice (the mask). What, then, is at stake when we refuse to separate the mask from the actor beneath? When the mask permanently molds to the contours of the actor's face? When the actor can play no other role? Contrary to prevailing sentiments, the problem may lie not in the artifice, but in the naturalization of legal personhood. Mussawir and

Parsley suggest as much when, warning that "calls for an outdated law to 'better reflect life'" may "have limitations both as jurisprudence and as political action," they emphasize the "*critical* potential… to be drawn from a return to a casuistic, concrete and immanent conception of the jurisprudential art of crafting the person."[80] Building on their insight, this and the following two chapters examine the legal, political, and cultural effects of naturalizing the particular form of legal personhood assigned to the slave. As we shall see, the definitive African descent of the fictive slave person encouraged the ongoing identification of African Americans with a civilly incapacitated legal agency primarily legible as criminality.

The American Law of Persons

Joseph Moulton and other antebellum jurists saw the abstraction of legal personhood as directly proportionate to the democratization of American law even as they registered particularly undemocratic sorts of legal persons.[81] When Timothy Walker published his *Introduction to American Law: Designed as a First Book for Students* (1837, rev. 1846), most would-be lawyers still immersed themselves in William Blackstone's *Commentaries on the Law of England* (1765-69). Walker could not "forbear" noting that, unlike in England, the American law of persons had achieved an exemplary democratic simplicity "in consequence of our entire abolition of privileged orders."[82] The American "doctrine of equality" assumes that "in theory at least, all men start equally; they are born with equal rights; and their distinctions in after life, are mainly made by themselves."[83] Doubtless anticipating his section on subordinate persons in "the *domestic relations*," notably wives and slaves, Walker hastens to note that to this "general rule … there are

some slight exceptions founded on expediency."[84] Having made this concession, Walker hastily returns to the gratifying contrast with England, with its "fundamental division of persons … into the *nobility* and *commonalty*," which "gives rise to a variety of subdivisions, rendering the classification of persons exceedingly complicated," as any reader of Blackstone could see. By contrast, Walker crowed, American categories of legal personhood "can be described in half the space required there":

> 1. Persons are either natural or artificial. 2. They are either public or private. 3. They are either citizens or aliens. 4. They are either males or females. 5. They are either infants or adults. 6. They are either sane or insane. 7. They are either freemen or slaves, masters or servants, principals or agents. 8. Indians sustain relations different from any other persons. 9. The death of persons creates the relations of ancestors and heir, devisors and devisees, and executors or administrators.[85]

Nearly all these divisions appear in Blackstone. In place of the *Commentaries*' coverage of royalty and the ranks of nobility, Walker introduces two raced categories of personhood: "slaves" and "Indians."[86] Thus, as legal historian Susanna Blumenthal observes, the nineteenth-century American "legal model never entirely displaced the traditional English law of persons. American jurists continued to speak in terms of status relations"; the difference was that instead of arising from a combination of birth and rank, status now derived from "what were regarded as natural differences in people's mental and physical attributes."[87] In this way Americans' "gradual dismantlement of a 'law of persons' with roots in feudal society" enabled their creation of a "default legal person."[88] Abstracted as it was, this model of a "free and independent man" was intuitively known to be male, white, able-bodied, and of sound mind.[89]

By the close of the eighteenth century, Enlightenment philosophy and republican political revolutions had established the theoretical equality of human beings and of

citizens, respectively. Yet, as the first dictionary "Adapted to the Constitution and Laws of the United States of America" confirms, American legal doctrine continued to rank legal persons by a status that simultaneously determined and reflected the rights and duties of individuals associated with particular groups. In his *Law Dictionary* (1839; rev. 1856), John Bouvier opens the entry for "person" with the proviso that, "[i]n law, man and person are not exactly synonymous terms."[90] Like Moulton and Wooddeson before him, Bouvier explains that, whereas "[a]ny human being is a man whether he be a member of society or not, whatever may be the rank he holds, or whatever may be his age, sex, &c.," legally, "a person is a man considered according to the rank he holds in society, with all the rights to which the place he holds entitles him, and the duties which it imposes."[91]

The lengthy definition of "person" in the nation's first legal lexicon struggles to contain the tensions and contradictions between democracy and hierarchy, abstraction and ascription, artifice and nature, making and knowing. Thus, the *Law Dictionary* notes, although "[t]his word is applied to men, women and children, who are called natural persons … It is also used to denote a corporation, which is an artificial person." Bouvier goes on to stipulate that "when the word 'persons' is spoken of in legislative acts, natural persons will be intended, unless something appear[s] in the context to show that it applies to artificial persons." Here the tacit identification of natural persons with human beings (as opposed to those artificial persons known as corporations) overlooks the fact that law can only consider human beings according to the rank they hold in society, with the corresponding rights and duties or powers and obligations. Itself a term of art, "natural person" always already invokes the artifice of legal personhood.[92]

That "natural person" cannot serve as a synonym for *homo* becomes clear when Bouvier proceeds to list the various kinds of legal personhood into which "[n]atural persons are divided." His inventory differs somewhat from Walker's: here the categories are "males … and females"; "free persons and slaves"; "citizens … and aliens"; the "living" and the "civilly dead"; "legitimates and bastards"; "parents and children; husbands and wives; guardians and wards; and masters and servants." Some of these distinctions are more evidently the product of legal technology than others, notably those differentiating the "civilly dead" from the "living," or "bastards" from "legitimates." Other categories of personhood combine human 'nature' with legal artifice: "Women," for example, "cannot be appointed to any public office, nor perform any civil functions, except those which the law specially declares them capable of exercising." Even more striking is the *Law Dictionary*'s characterization of the "slave," who is "sometimes ranked not with persons but things," but, as "a negro[,] is in contemplation of law a person, so as to be capable of committing a riot in conjunction with white men." In such instances, Mussawir and Parsley point out, ascribed qualities of gender or race are treated not as "the effect of a legal classification but only a 'truth' or 'nature' received independently of any legal function and taken as inseparable from [the] natural person."[93] Thus even as the entry acknowledges how law produces slave personhood by combining civilly dead property with criminally liable person, it also discloses its knowledge that, in the antebellum U.S., only "a negro" can be a slave. The *Law Dictionary* thus reveals that the "natural person" to be a remarkably generative fiction, whether it yields the default legal person or his variously incapacitated and subordinated counterparts: the wife, the

slave, and the (il)legitimate child. (Each of which, of course, designates a form of legal personhood.)

Because particular combinations of rights and duties define the person "according to the rank he holds in society," Bouvier's entry for "right" acknowledges the hierarchy among legal persons in the U.S. as it explains the difference between "political and civil rights."[94] "[F]ixed by the constitution," political rights "consist in the power to participate, directly or indirectly, in the establishment or management of government." Thus, Bouvier observes, even "the humblest citizen possesses" the "right of voting for public officers, and of being elected."[95] Civil rights, by contrast, "are those which have no relation to the establishment, support, or management of the government … consist[ing] in the power of acquiring and enjoying property, of exercising the paternal and marital powers, and the like." Whereas "every one, unless deprived of them by a sentence of civil death, is in the enjoyment of his civil rights," this "is not the case for political rights," a discrepancy that Bouvier illustrates with the example of the alien, a legal person who "has not political, although in the full enjoyment of his civil[,] rights." Bouvier's invocation of the "humblest citizen" conveniently ignores those citizens who lack the franchise – women, minors, and most free African Americans – while his allusion to "every one" who enjoys "civil rights" ignores the millions of slaves who, as Bouvier acknowledges elsewhere, share the felon's condition of civil death. The entry thus obscures, even as it discloses, the anti-democratic stratification that structures the United States as a "representative democracy."[96]

The detailed entries for "person" and "right" form the backdrop against which to read the American *Law Dictionary*'s omission of an entry that routinely appears in

English legal lexicons: "dignity." The "dignity" entries in the law dictionaries compiled by Jacob Giles, Thomas Cunningham, and Richard Burn all begin by indicating that the term "signifies honour and authority; reputation, &c."[97] Instead, Bouvier provides the following entry:

> DIGNITIES, *English law*. Titles of honor.
> 2.They are considered as incorporeal hereditaments.
> 3. The genius of our government forbids their admission into the republic.[98]

Bouvier fulfills his duty to inform American readers whose legal system derives from English law that dignities are intangible, heritable rights deriving from property. In his third definition, however, the French émigré and naturalized American citizen shifts from impartial lexicology to editorial chauvinvism. By providing an entry for "dignities" and not "dignity," Bouvier effectively renders the latter a self-evident truth in American law. Like Melville's Ishmael, Bouvier finds a new "democratic dignity" in Americans' rejection of the Old World "dignity of kings and robes." (In his fervor, Bouvier neglects to cite Article 1, Section 9 of the U.S. Constitution: "No Title of Nobility shall be granted by the United States.")[99] Here, as in *Moby-Dick*, however, the surrounding text reveals this to be a *Herrenvolk* democratic dignity. The American law of persons may have done away with "dignities," but, as the entries on "person" and "right" illustrate, it did not eliminate the "sense of rank or high status" through which, Jeremy Waldron reminds us, law has "[h]istorically" sought to "protect and vindicate dignity."[100]

For Waldron and other dignity scholars, law continues to serve this function in liberal democracies by granting, in effect, "universal nobility."[101] This upward equalization of status, Waldron contends, was achieved by eliminating the very "sortal status" outlined by Moulton, Walker, and Bouvier. Sortal status assumes that ostensibly

"different kinds of human – slaves and free; women and men; commoners and nobles; black and white –" require "public determination and control of the respective rights, duties, powers, liabilities, and immunities associated with the personhood of each kind."[102] Dignitarian upward leveling, Waldron suggests, means that the "standard status for people now is more like an earldom than like the status of a peasant; more like a knight than a squire" – or, to dispense with "the quaint Blackstonian conceits: it is more like the status of a freeman than a slave or a bondsman; it is more like the status of a person who is *sui juris* than the status of a subject who needs someone to speak for him; it is the status of a rights-bearer … rather than the status of someone who mostly labors under duties."[103] (One who is *sui juris*, Bouvier explains, "has all the rights to which a freem[a]n is entitled; one who is not under the power of another, as a slave, a minor, and the like."[104]) Broadly, then, Waldron suggests that "dignity works as a legal concept" through law's normative structural features such as due process, representation, and isonomy; dignity thus inheres in the equally elevated status of those who can claim "ordinary civil liberties as well as rights of legal participation."[105] In the nineteenth-century U.S., it was the explicitly male, tacitly white, able-bodied, and mentally competent default legal person who assumed the democratic dignity of this *sui juris* status against the backdrop of the degraded sortal statuses of women and people of color, especially those consigned to the indignities of slavery.

THE INDIGNITY OF SLAVE PERSONHOOD

Other than the corporation, no other form of personhood exposes the conflict in Anglo-American law between making and knowing quite like the slave. Slave personhood

originates in Roman law where it was a "purely technical and functional" category.[106] Thus, although "slaves" constituted one of the two main divisions of the law of persons in Gaius' *Institutes* (c. CE 161), slaves could also be treated as "things."[107] Physiological attributes such as age and sex could determine slave status for the purpose of manumission or under the doctrine of *partus sequitur ventrum* (the condition of the child follows that of the mother). But, as Thomas Jefferson claimed in *Notes on the State of Virginia* (1785), Roman slaves were distinguished from the master class only by "condition," not "nature."[108] Thus whereas Roman slavery was for Jefferson and others of like mind merely a formal status, American slavery grounded that status in natural difference. "Among the Romans," the father of Sally Hemings' children observed, "[t]he slave, when made free, might mix with, without staining the blood of his master. But with us," Jefferson continued, in an appeal for colonization, the emancipated slave should, ideally, "be removed beyond the reach of mixture."[109] As the legal artifice of slave personhood became naturalized and racialized, it became increasingly identified with "the blacks on the continent of America," whether enslaved or free.[110] Whereas Roman law could make and unmake slaves, Jefferson suggests, American law knew slavery to be bound up with Blackness.

A concise summary of the doctrine of the slave's "mixed character" as legal person appears in the *Federalist Papers* (1788), the collection of essays that John Jay, James Madison, and Alexander Hamilton wrote under the pseudonym "Publius" to garner popular support for New York's ratification of the U.S. Constitution. *Federalist* 54, attributed to Virginian James Madison, addresses Article 1, Section 3's already controversial Three-Fifths Clause, which counted a state's slave population at that

fraction of the free population in the apportionment of taxation and representation.[111] Along with its candid exposition of the fiction of slave personhood, the passage offers a revealing glimpse into the naturalization and racialization of this legal artifice.

Publius, speaking as "one of our Southern brethren," rejects the assumption that "slaves are considered merely as property, and in no respect whatever as persons."[112] Because "they partake of both these qualities," he maintains, the "federal Constitution" correctly follows state and local law in viewing slaves "in the mixed character of persons and of property" (332). He goes on to explain that, "[i]n being compelled to labor, not for himself, but for a master; in being vendible by one master to another master; and in being subject at all times to be restrained in his liberty and chastised in his body, by the capricious will of another – the slave *may appear* to be degraded from the human rank, and classed with those irrational animals which fall under the legal denomination of property" (332; emphasis added). As Bouvier's *Law Dictionary* would later point out, it was as a result of this legal construction of the slave as civilly dead person, not some perceived innate inferiority, that enslaved natural persons "are sometimes ranked not with persons but with things."

Criminality resuscitated slave personhood from this civil death. As Publius went on to clarify, "in being protected … against the violence of all others, even the master of his labor and his liberty; and in being punishable himself for all violence committed against others – the slave is no less evidently regarded by the law as a member of the society, not as a part of the irrational creation; as a moral person, not as a mere article of property."[113] In practice, the formal protection of slaves against violence spoke more to their value as property than their status as persons.[114] In any case, it was in their potential

culpability as the perpetrators of unlawful violence that enslaved African Americans were credited with a vital legal capacity. Reanimated as a criminally responsible defendant, the civilly dead slave is no longer to be seen "as a part of the irrational creation" or "a mere article of property," but "as a member of the society" and "as a moral person." ("Moral" should be read here as designating "social.")[115] Because legal personhood comprises duties as well as rights, the officially administered punishment of enslaved offenders amounted to punitive recognition of their accountability to the polity of which they, in the breach, were retroactively acknowledged to be members.[116]

In his exposition of "mixed character," Publius (itself a fictive persona!) appears to adopt Roman law's "purely technical and functional" approach to legal personhood, slave personhood in particular. In Publius' account, slaves' "mixed character" derives from their condition as human property subject to social control. The reference to "human rank" confirms that the slave falls into the (fictive) category of the "natural" rather than the "artificial" person, but otherwise Publius' description resists naturalizing what appears to be a gender- and even race-neutral category of legal personhood. In fact, in the U.S. as in the colonies, slave personhood was born of the coupling of legal classifications of sex and race. The doctrine of *partus sequitur ventrem*, combined with the restriction of bound servitude to those of African descent, naturalized a matrilineal racial Blackness as at once the purported cause and a very real effect of slave personhood.[117] In *Federalist* 54, however, Publius only once identifies "Negroes" with the "slaves" alluded to (but not named) in the Constitution. Publius insists that it is with "great propriety" that the Constitution "views" slaves in "the mixed character of persons and property," because that is "the character bestowed on them by the laws under which they live" (332). These

are the state and local "laws [that] have transformed the Negroes into subjects of property" in the first place (332). Conversely, Publius reminds his readers, "if the laws were to restore the rights which have been taken away, the Negroes could no longer be refused an equal share of representation with the other inhabitants" (332). Publius' alternating references to commodified or rights-bearing "Negroes" suggests how the law makes – and can unmake – particular kinds of legal persons. At the same time, this passage shows how law not only made people of African descent slaves; it made race in the process.

To identify "Negroes" with the "mixed character" of slave personhood meant associating African Americans not only with civil incapacity but with criminality. If we turn once again to Bouvier's *Law Dictionary*, we begin to see the implications of this simultaneously legal and cultural opposition of Blackness to the "civil." The entry for the latter begins by noting the term's "various significations." When "used in contradistinction to *barbarous* or *savage*," Bouvier explained, the word indicates "a state of society reduced to order and regular government; thus we speak of civil life, civil society, civil government, and civil liberty."[118] Bouvier's second definition of "civil" is even more relevant: the word, he notes, "is sometimes used in contradistinction to *criminal*, to indicate the private rights and remedies of men, as members of the community, and in contrast to those, which are public and relate to the government; thus we speak of civil process and criminal process, civil jurisdiction and criminal jurisdiction."[119] Finally, the entry concludes, "it is also used in contradistinction to *military* or *ecclesiastical*, to *natural* or *foreign*; thus we speak of a civil station as opposed to a military or an ecclesiastical station; a civil death, as opposed to a natural

death; a civil war as opposed to a foreign war." From the exclusion from civil life, to the association with a legal agency discernible only as criminality, to the attribution of civil death, the definitive opposition of "slave" – and, by association, "Negroes" – to the "civil" would prove one of the most enduring indignities of slavery.

For a formulation of this logic, we need only return to the work of Immanuel Kant. As noted earlier, Kant's most influential (and arguably most misunderstood) references to "dignity" (*Würde*) appear in the *Groundwork to the Metaphysics of Morals*. Although the *Groundwork*'s account bristles with legal terms (law, duty, legislation, judge, person), Kant is concerned in that work with the universally valid moral law that human beings set for themselves, uninfluenced by external standards, subjective motivations, or possible outcomes.[120] (Against this "principle of … autonomy," or the law of the self, the state-based legal system is, literally, "heteronomy," the law of another.)[121] Twelve years later, in the *Doctrine of Right* (1797), Kant made only passing reference to "dignity" – specifically, "the dignity of a citizen"(6:330) – in his effort to envision an ideal "system of laws for a people" who, as "individuals" in "a civil condition (*status civilis*) … united through their common interest in being in a rightful condition," constitute "a *state* (*civitas*)" in the form of "a *commonwealth* (*res publica latius si dicta*)."[122] To realize this rightful condition through positive law, this ideal commonwealth would necessarily recognize that each individual has "one innate right": that is, to "*Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law" (6:237). This "principle of innate freedom" implies "an innate *equality*" that confirms "a human being's quality of being *his own master* (*sui iuris*), as well as being a human being

beyond reproach (*iusti*), since before he performs any acts affecting rights, he has done no wrong to anyone" (6:237-38). Under Kant's Universal Principle of Right, neither slavery nor "titled positions of dignity" would appear to have any place in this ideal republic (6:329).[123] One cannot contract oneself into slavery: such a complete renunciation one's "freedom" would make any such contract "null and void, since by it one party would cease to be a person and so would have no duty to keep the contract but would recognize only force" (6:283). The same principle of innate freedom would exclude from the republic "*dignities*" in the form of a "*hereditary* nobility": "Since we cannot admit that any man would throw away his freedom, it is impossible for the general will of the people to assent to such a groundless prerogative, and therefore for the sovereign to validate it" (6:328-29).

It is at this point in the *Doctrine of Right* that Kant turns to the concept of "dignity" (6:330). Kant seems poised to discuss how, once "the division into sovereign, nobility, and commoners has been replaced by the only natural division into sovereign and people" in both law and "public opinion," the republican "dignity of a citizen" will supplant outmoded hereditary "dignities" (6:329-30). Such a discussion would have provided an excellent opportunity to calibrate the "moral dignity" (whether potential or realized) of the human being as outlined in the *Groundwork* with the public, status-based dignity of the citizen in the *Doctrine of Right*'s ideal commonwealth.[124] Does the democratization of dignity envisioned here mark a new epoch, when the one replaces the other?[125] Or, to the contrary, is Kant suggesting that "mere citizenship may be seen as something higher even than the high dignity of human moral capacity"?[126] Kant does none of this. Instead of elaborating the "dignity of a citizen," he defines this concept

through negation. The "dignity of a citizen" acquires meaning only in opposition to the slavery that Kant here abruptly reintroduces into his ideal state:

> Certainly no human being in a state can be without any dignity, since he at least has the dignity of a citizen. The exception is someone who has lost it by his own *crime*, because of which, though he is kept alive, he is made a mere tool of another's choice (either of the state or of another citizen). Whoever is another's tool (which he can become only by a verdict and right) is a *bondsman* (*servus in sensu stricto*) and is the *property* (*dominium*) of another, who is accordingly not merely his *master* (*herus*) but also his *owner* (*dominus*) and can therefore alienate him as a thing, use him as he pleases (only not for shameful purposes), and *dispose of his powers*, though not of his life and members. No one can bind himself to this kind of dependence, by which he ceases to be a person, by a contract, since it is only as a person that he can make a contract. … For if the master is authorized to use the powers of his subject as he pleases, he can also exhaust them until his subject dies or is driven to despair (as with the Negroes on the sugar islands); his subject will in fact have given himself away, as property, to his master, which is impossible. (6:330)

In Kant's ideal republic, the gradual disappearance of "hereditary privileges contrary to right" will ensure that every citizen has dignity – that is, an elevated status (6:329). The exception to this republican dignity is the criminal whose "transgression of public law" renders him "unfit to be a citizen," "condemned to lose his civil personality," and therefore uniquely subject to another's "right of ownership" (6:331, 6:283).[127] To be sure, others in the state lack civil personality due to their dependent status – namely, "apprentices," "domestic servants," "minor[s]," and "all women" (6:314). Yet, as Kant emphasizes, these "*passive* citizens[']… dependence upon the will of others and … inequality, is … in no way opposed to their freedom and equality as *human beings*, who together make up a people" (6:314-15).[128] As such, these "underlings of the commonwealth" have "at least the dignity of a citizen" (6:315, 6:330). Indeed, we might conclude that the "dignity" of these lowly, "passive citizens" who "do not possess civil independence" *derives* from their elevated standing *in comparison to* the criminal-cum-

slave who is "without any dignity" (6:315). Like them, the criminal lacks civil personality; unlike them, he becomes the "exception" to Kant's republican dignity due to his exceptional status as "another's tool," that is, "a *bondsman* (*servus in sensu stricto*)" who "is the *property* (*dominium*) of another, who is accordingly not merely his *master* (*herus*) but also his *owner* (*dominus*)." To underscore this point, Kant, in the portion of the passage omitted from the above excerpt, distinguishes the slave from both the wage laborer and the tenant farmer. Kant refers to the deadly "use" of "the Negroes on the sugar islands" in order to illustrate his contrast of slavery with such contractual labor arrangements. After identifying his republican slaves with "Negroes" in the Caribbean colonies, Kant backtracks by noting at paragraph's end that the "subjection" of his republican slaves "cannot be *inherited*" (6:330).

Kant's invocation of the harsh reality of "the Negroes on the sugar islands" jarringly intrudes on his normative vision of an ideal state. Unlike the *Federalist*, the purpose of which was to promote an actual, flawed constitution for an actual, flawed polity, the *Doctrine of Right* imaginatively constitutes a model republic. Yet Kant's précis on the indignities of slavery resembles *Federalist* 54 not merely in its evocation of the slave's "mixed character," but also in its naturalization of this legal artifice by reference to "Negroes." The key difference is that the *Doctrine of Right* transforms what the *Federalist* describes as the legal *effect* of slavery – criminal culpability combined with civil incapacity – into its *pretext*. Under Kant's Universal Principle of Right, both slavery and nobility would be prohibited as hereditary conditions. The term-limited enslavement of criminals is justified, however, because they have either rejected the authority of the law or exempted themselves from it (6:320n). Either way, criminals prove

their unfitness for citizenship by hindering others' freedom and must therefore themselves be hindered by being made subject to another, either the state or a citizen.[129] The republican slaveholder in Kant's commonwealth – who unquestionably "has the dignity of a citizen" – can legitimately and ethically claim ownership of another human being, who is not merely consigned to civil death but has been reduced to property status on the basis of his or her criminality. Kant's republican slaves, of course, bring this condition upon themselves through their criminal acts, whereas the exclusively criminal legal capacity of the *Federalist*'s slaves derives from their status. In the *Doctrine of Right*, this criminal legal agency is the cause rather than the effect of the slave's degraded status. Kant's account can be read as a backstory for the "mixed character" attributed to actual slaves in a republic like the United States. As such, it serves a strikingly similar function to that of the fictive social compact. For Kant, when we allude to the "act by which a people forms itself into a state" as "the *original contract*," we do not necessarily refer to an actual historical event, but "only the idea of this act, in terms of which alone we can think of the legitimacy of the state" (6:315). Just as the historical fiction of the social contract legitimates the political status quo, Kant's narrative of the criminal-turned-slave is an authenticating back-formation of the legal fiction of "mixed character."

In both *Federalist* 54 and the *Doctrine of Right*, the knowledge of race slavery intrudes on a formalist account of how law makes slaves. Like Publius, Kant naturalizes the legal category, "slave" – those "human beings" who for Kant are "without personality" because they "have only duties but no rights" (6:241) – by invoking "Negroes" in the Americas. The effect is to identify all "Negroes," regardless of condition, with the indignities of slavery. No matter that the slave who stands as the

"exception" to "the dignity of the citizen" in Kant's ideal republic is not, "as with the Negroes of the Sugar Islands," a hereditary bondsman. It is not the "*inherited*" aspect of slavery that denies dignity to the enslaved in Kant's account. Nor, as noted earlier, is it the fact of having committed a crime. Dignity is "lost" when one becomes another's "tool," occupying the status of a "*bondsman* (*servus* …)" and "the *property* of a "*master*" who is also one's "*owner*." Enslaved status deprives one of the baseline dignity that is available to all other citizens in the republic, regardless of their lowly status, civil incapacity, or dependent condition. This civic dignity is lost when one is transformed *legally* ("by a verdict and right") into the means for another's ends: that is, when one is subject to a master who "is authorized to use" one's "powers … as he pleases." Notably, Kant does *not* identify enslavement – whether in his ideal republic or "in the Sugar Islands" – with dehumanization. Degradation to property status does not negate the "humanity" that many associate with Kantian dignity in the *Groundwork*; instead, it deprives the "human being in the state" of "the dignity of a citizen," that is, of his or her comparatively elevated status.

In his opposition of the citizen to the slave, Kant invoked an ancient trope, albeit one that had become newly relevant in a U.S., where, in the absence of a constitutional definition of citizenship, "one thing was absolutely clear… : no slave was a citizen."[130] What makes the passage from the *Doctrine of Right* so extraordinary is the dignitarian cast Kant gives to this opposition of the citizen to that enslaved "someone" whose combined criminal culpability and lack of civil personality conjures "Negroes on the sugar islands." Here, instead of merely representing the obverse of the citizen, the slave negatively defines the concept of dignity *itself*. In this remarkably prescient, often

neglected passage, Kant defines the "dignity of a citizen" in a republic founded on the "principle of innate freedom" – that is, "the human being's quality of being *his own master* (*sui iuris*)" – against the exceptional indignities of legal slavery: civil death paired with criminal liability.

THE VERY IDEA OF A SLAVE IS A HUMAN BEING IN BONDAGE

The federal mail theft case of *United States v. Amy* would not seem to offer a tableau of the indignities of slavery. Turning on the technical question of slave personhood, this late antebellum case contrasts with contemporaneous portrayals of African Americans either as the grotesque buffoons of blackface minstrelsy or as abject victims in abolitionist propaganda. Yet this forensic debate over the meaning of slave personhood illustrates the legal and cultural consequences of identifying the slave's mixed character with "Negroes" as a particular group of human beings: the creation of a civilly dead, criminally culpable "slave race."

U.S. v. Amy was tried in Richmond, Virginia before a circuit-riding Supreme Court Chief Justice Roger B. Taney two years after Taney handed down his infamous decision in *Dred Scott v. Sandford* (1857). Amy was enslaved by Samuel W. Hairston, of Patrick County, Virginia. Somehow, she was indicted under a federal statute against mail theft for stealing "a letter" or "letters" (apparently "with … money in them") from that county's Union Furnace post office (164, 202).[131] Beyond this brief, mysterious, and almost certainly misleading glimpse, the case tells us nothing about Amy or her experiences. The facts of the case were not at issue; the dispute was over a point of law. The defense attorney, John Howard, speaking not for Amy, but "for the owner of the

defendant," sought to protect Hairston's property interest in Amy by arguing that "a slave is not a 'person' amenable to the act" (164). That is, he argued that Amy's enslaved status should shield her from criminal prosecution as a responsible legal person. James D. Halyburton, the presiding judge at the original trial, convicted Amy of the theft but purposely overruled the latter point so as to ensure its review by Supreme Court Chief Justice Taney who "was shortly expected" in Richmond (164). Upon his arrival, Justice Taney joined Judge Halyburton in hearing arguments "for a new trial on the reserved point" of the applicability of the language of personhood to an enslaved criminal defendant(164). Taney, of course, had provoked national controversy when his rambling, unorthodox *Dred Scott* decision broke with long-established precedent in Missouri freedom suits by denying standing to the enslaved plaintiff. Taney's gratuitous observation (*obiter dictum*) in *Dred Scott* that by the time of the nation's founding, Americans of African descent had "been regarded as … so far inferior, that they had no rights which the white man was bound to respect" only deepened the outrage prompted by his ruling's largely tangential denial of citizenship to African Americans, slave *or* free.[132] Taney's *dictum* ignored, but by no means ended, the pervasive, everyday legal activity by both enslaved and free African Americans throughout the U.S.[133] Indeed, Amy's very appearance at the Fourth Circuit Court in Richmond two years later spoke to the juridical "respect" accorded to the procedural "rights" accorded to enslaved defendants subject to criminal prosecution.[134] Taney upheld Amy's conviction, ruling that, in keeping with the language of the U.S. Constitution, the federal statute's use of the word "*person* … may be construed as including slaves" (163). As Taney noted, the case hinged on "the two-fold character which belongs to the slave" as "*person* and also

property" (199). What was not in dispute was Amy's humanness, which each of the proceedings' white, male Southern legal professionals not only assumed as a given but expressly acknowledged over the course of the proceedings.

Amy, Chief Justice Taney's decision confirmed, was just the sort of a civilly dead, criminally culpable slave person we saw described in *Federalist* 54; her federal conviction for mail theft stood. What makes the case so revealing is the two attorneys' unexpected and unorthodox inquiry into the relationship of the slave's humanity to her legal personhood. The prosecutor, John M. Gregory, District Attorney for the United States, took a comparatively small speaking part in the published proceedings: his argument occupies less than one full page of the 38-page printed report that appeared in Virginia's *Quarterly Law Journal*. After all, he had only to remind the court of the well established legal doctrine that "slaves are property; but it is equally true that they are recognized in all modern communities where slavery exists as persons also," noting that "they are recognized as persons in every State in the Union, and punishable as persons for the commission of offences in violation of the penal laws" (169).

Gregory enlivened this straightforward doctrinal argument, however, when he abruptly departed from professional convention. "I deem it would be a rather useless waste of time to refer more particularly to authorities," he asserted, adding that, "I cannot prove more plainly that the prisoner is a person, a natural person at least, than to ask your honors to look at her! There she is. She is beyond doubt a human being, and it is not pretended she is not of sound mind" (170). With this unexpected appeal to vernacular common sense – that a person is a human – the U.S. District Attorney highlighted the artifice of legal reasoning, the fiction of slave personhood in particular. He did so, we

should recall, not to assert Amy's inherent rights and equality as a fellow human being, but to win a ruling that would merely (and temporarily) change the terms of her captivity, from private enslavement to federal incarceration.

John Howard, the defense attorney, hastened to flag "the great mistake into which… the learned counsel for the United States has fallen" in making "profert of Amy in open court" "as if in triumphant and conclusive proof that a slave is a person, a natural person, at least, a human being" (170). As Howard pointed out, the prosecution's unorthodox resort to Amy's evident humanness in place of the relevant legal authorities "entirely overlooks a broad, radical and most important distinction, which is the basis of all our civil and criminal jurisprudence in respect to slaves": that between "the legal character and attributes of the African slaves in the United States, who are purely *chattel slaves* – with their character and attributes as *natural persons*" (170). Notwithstanding this commitment to legal doctrine, Howard's argument – that Amy was not indictable as a "person" under the terms of the statute – would lead him to fudge the terms of this distinction.

The challenge facing the defense was well-nigh insurmountable: to persuade the court to make what was, in effect, an exception to the doctrine of culpable slave personhood so as to ensure that Samuel W. Hairston would retain his property right to Amy and her labor. To that end, Howard all but ignored the civil/criminal divide from which the slave's "two-fold character" arose, supplanting it with a distinction between *federal* and *state* jurisdiction over slaves. Specifically, Howard sought to prove that Amy was not a legal person as contemplated by the federal mail theft statute by arguing that not only did "the utter civil non-entity of the slave" deprive her of any rights under the

law, but that it also exempted her from any legal obligations or duties (177). This formulation flew in the face of the doctrine of the slave's "mixed character." Howard therefore sought to limit jurisdiction over the latter to *state* law. States' punitive recognition of criminous slaves, Howard argued, formed "part of their municipal polity and police…, upon the idea that by tying the self-interest of the master the more closely to the common-weal, greater diligence would be encouraged on his part, alike by coercion and kind treatment[,] to keep his slaves in due subordination and goodly courses" (193). Basically, Howard sought formal authorization for what was commonly referred to as "plantation justice." He envisioned a private, extralegal disciplinary control over slaves that would be minimally under the purview of state governments, while being protected from oversight by the federal government – whose own two-fold character as a union of slave and free states was, by 1859, perceived as a dangerous threat to slaveholders' property rights. Finally, as a backup, Howard maintained that if the reference to "person" in the federal statute was found to be applicable to slaves, then the statute itself was unconstitutional, because its punitive consequences would lead to an unlawful taking of private property under the 5th Amendment. Nowhere did such a brief require any consideration of Amy's humanness; at its most persuasive, Howard's argument addressed how punitive recognition of Amy's legal obligations as a criminally culpable person would have impinged upon Hairston's right to her as his property.

Howard's awareness of the irrelevance of Amy's humanness to the legal question of her personhood did not, however, prevent him from emphasizing that humanity so as further to entrench her property status. Despite his consternation at Gregory's distracting display of Amy's human presence, Howard readily affirmed the fact of slave humanity.

Indeed, the prosecution's unorthodox, off-topic introduction of humanness into the legal dispute over slave personhood prompted the defense attorney to some revealing admissions. "It is true," Howard acknowledged, "that the negro did not cease to be a *natural person*, a human being, by becoming a slave." Indeed, he maintained, "[t]he very idea of a *slave* is a human being in bondage. A slave is, and must, of necessity, continue to be a natural person, although he may be a legal *chattel*" (172). Later, Howard went on to offer the following remarkable concession: "If it be said that although a *chattel*, he [the slave] cannot be divested of his characteristics as a natural person, a human being, – a human body inspired with intellect, feeling, volition – that is conceded – (it is that which makes him so valuable a chattel)" (176). Howard's own tangential observations on the slave's humanness merely articulated what slaveholding practice had long made clear: slavery rested on the profitable exploitation, rather than the denial, of Black humanity.

Howard's resort to the animal kingdom to elaborate his point would appear to complicate these assertions. Once he had acknowledged that the slave's value lies in his or her distinctly human "intellect, feeling, and volition," Howard went on to argue that "the natural character of the *chattel* must determine the manner and kind of treatment it receives from its owner or others. Thus a horse, or a dog, a slave, or a pet lamb, would not be treated as a bale of goods" (176). Disturbing as Howard's analogy of enslaved human beings to non-human pets and livestock is, it alerts us to the need for analytical precision. Howard's white supremacist ideology, in keeping with that of the slaveholding class he (literally) represents, was far more insidious than abolitionists and many modern critics would have it. Howard and his slaveholding client Hairston did not justify their inhuman treatment of the enslaved Amy by refusing to recognize her as a fellow human

being – as "a Woman and a Sister," in the words of the abolitionist motto. Instead, Howard frankly acknowledged, slaveholders consciously recognized and exploited the slave's humanity as "that which makes him so valuable a chattel."

Today, Howard's analogy of the defendant's chattel status to that of nonhuman animals would seem to include *U.S. v. Amy* in the "archives of dehumanization."[135] In fact, the argument for the defense illustrates how a narrow critical focus on the category of the human can occlude other, more relevant, forms of racist subjectification. Consider another instance where Howard appears to slight, if not to deny outright, slave humanity in his effort to reject Amy's culpability as a responsible "person" under the federal statute against mail theft. Howard alludes to "laws against cruelty to animals," as well as "laws prescribing death or punishment for certain animals in case of dangerous or troublesome insubordination, roving, or ferocity," to argue that "these laws" do not "recognize any legal or civil rights in the brute creation – [in] the animals protected, or punished" (177). "And so," he analogizes, "with the laws punishing offences committed upon, or committed by slaves. *The slave is still but a chattel, in which no legal or civil personal right inheres*. The fact that he is protected by the law, or is punished by the law, is no concession to him of legal rights or responsibilities, any more than in the case of other chattels, the accidents of whose natural characteristics are animate existence, and some sort of intelligence, volition, and feeling" (177). The glaring flaw in this analogy is that it was precisely the criminous slave's "legal… responsibilities" under the doctrine of mixed character that distinguished her from the vicitimized, insubordinate, roving, or ferocious non-human animals whom the law might well protect, confine, forfeit, or exterminate, but did not punish.[136] Personhood lay in such official penal recognition of criminal liability.

As we have seen, Howard's professional commitment to defending the property interests of Amy's master (rather than Amy herself) and thus ensuring her continuing enslavement did not prohibit him from acknowledging her humanity. Indeed, he emphasized that her humanness was the source of her comparatively high value among other chattels. The irony here is that Howard's full-throated acknowledgement of captive Black humanity sought to realize a vision of near-absolute private control that would reduce enslaved existence to something very like the "bare life" described by philosopher Giorgio Agamben, with the emphatically human slave stripped of legal personhood as its *homo sacer*.[137]

Howard's frank recognition of Amy's humanity while denying her legal personhood brings to mind Hannah Arendt's criticism in *The Origins of Totalitarianism* (1951) of the human rights movement that was emerging in the wake of World War II. Concerned by the movement's reorientation from *persona* to *homo*, Arendt noted of those rendered stateless in early twentieth-century Europe, that "innocence, in the sense of complete lack of responsibility, was the mark of their rightlessness as it was the seal of their loss of political status."[138] If, as she maintained, "the first essential step on the road to total domination is to kill the juridical person in man" (447), the "best criterion by which to decide whether someone has been forced outside the pale of the law is to ask whether he would benefit by committing a crime" (286). As part of his effort to assert the "total domination" of a white slaveholder like Hairston over an enslaved woman like Amy, Howard argued for her "complete lack of responsibility" before the law. That he could couple this denial of the slave defendant's juridical personhood with an enthusiastic acknowledgement of her humanity validates Arendt's caution regarding the political

valence of humanitarian appeals. As Arendt understood, inhuman treatment does not necessarily indicate subhuman status.[139] To characterize hereditary slavery as a "crime against humanity," as she did, was not to say that slaves had been denied *their* humanity (297). "Slaves still belonged to some sort of human community; their labor was needed, used, and exploited, and this kept them within the pale of humanity" (297). This very acknowledgment of Black humanity, she went on to argue, impeded contemporary African Americans' civic inclusion as free members of the polity. In modern nation-states built on the indispensable artifice of political equality (the origin story that "all men are created equal"), Arendt suggested, racism manifests itself in an inability to see those perceived as ethnically "alien" as fellow citizens, regarding them instead as mere humans (302). Her case in point is "the Negro in a white community" (302). Excluded from "that tremendous equalizing of differences which comes from being citizens of some commonwealth… no longer to partake in th[at] human artifice," the racial other is reduced to "some specimen of an animal species, called man" (302). This, of course, is exactly what Howard's catalogue of animate, volitional, affective chattels accomplishes in its equivalency of "a horse, or a dog, a slave, or a pet lamb." In this way *humanization* becomes a tool of, rather than a shield against, degradation.

Crucially, Howard sought to "kill the juridical person" in the enslaved by coupling their "complete lack of responsibility," not with the dangerous "innocence" of the stateless, but with an innate criminality. Remarkably in this trial over a slave's alleged mail theft, it is the attorney for the *defense*, not the prosecution, whom we find pointedly referring to "the peculiar pecadilloes of theft for which" the "negro slave… would seem to be endowed with an inborn genius and proclivity" (180). Howard offered these

observations about a racial propensity for crime in an effort to extend "the utter legal incapacity and impersonality of the slave" beyond civil death, to include criminal liability as well (175). His redundant reference to an "inborn genius" for crime strove to transmute the culpability that constitutes artificial slave personhood into a natural "negro" attribute, regardless of condition. Having done so, he could then speak authoritatively of "the broad and complete contrast between the social, civil, and political condition of the dominant and the slave race" (181). In short, he transformed the slave from a particular kind of artificial legal person into the representative of a "race." With this understanding, Howard could insist that "[s]o absolute and wide-pervading is the ethnological, civil, social and political difference between the dominant and the subject races – the white *American sovereign* and the black *African slave* – that they are not, and cannot be, governed by the same system of penal laws" (179). Howard's call to limit prosecution to the terms of the relevant slave codes blurred into a call for separate criminal justice systems for "the dominant and the subject races," which would be based on innate "ethnological" differences, rather than formal differences in "civil, social," or "political" standing. Such a bifurcated legal system, of course, need not end with abolition and emancipation.

Regardless of whether Roger B. Taney shared Howard's view of Black criminality, the chief justice clearly understood that to exempt the enslaved from accountability would pose a threat to legal order. Taney's brief decision repeatedly emphasized the dangers that would ensue "if a slave is not within the law" (199). "It is true that a slave is the property of the master," Taney affirmed, "And it is equally true that he is not a citizen, and would not be embraced in a law operating on that class of

persons. Yet, he is a person, and is always spoken of and described as such in the State papers and public Acts of the United States" (198). Taney's ruling in *U.S. v. Amy* indicates that the co-constitutive legal and cultural processes of racialization operate by differentiating how various groups of humans are held "within the law" as persons, rather than "disciplin[ing] humanity into full humans, not-quite-humans, and nonhumans."[140] The slave was as uniquely disempowered, obligated legal (or juridical) person. As one of the nation's most infamous expounders of racist legal thought, Taney took the slave's humanity for granted, understanding that it was the contours of slave *personhood* that mattered most for the preservation not only of slavery, but of the white supremacist legal order built upon it.[141] Despite its unorthodox deviation into the realm of the human, *U.S. v. Amy* makes it clear that from a cultural as well as a legal perspective, the humanity of enslaved African Americans was key to "the very idea" of slavery as well as to the enhanced value of that particular form of property. Far from liberating, recognition of enslaved Black humanity was enlisted by both sides in order to intensify the slave's captivity, either as convicted felon or as private *homo sacer*. Revealing as the tangential discussion of slave humanity is in *U.S. v. Amy*, the case suggests that slavery rested on the peculiarly fractional, and fracturing, logic of a personhood that combined civil death with criminal culpability.

Piercing the Veil of Slave Personhood

In the doctrinal dispute over slave personhood in *U.S. v. Amy*, U.S. District Attorney John M. Gregory "deem[ed] it a … waste of time to refer … to [legal] authorities" to prove the enslaved defendant's criminal liability; instead, urging the judges to "look at her,"

Gregory presented Amy herself as "a person, a natural person." In corporate law, this gesture of looking behind the artificial person, to the natural person(s) beneath, has become known as "veil-piercing." This chapter closes with a discussion of veil-piercing to illustrate the political value of viewing the legal person not as a human being but, in John Dewey's formulation, a "right-and-duty-bearing unit."[142] In doing so, I depart from the current critical and popular tendency to deplore the artifice of legal personhood as inherently oppressive while simultaneously valorizing the category of the human. As noted earlier, this tendency is particularly evident in the widespread assumption that exposing and rejecting the artifice of corporate personhood will somehow curtail the anti-democratic economic, social, and political power exerted by corporations at the local, state, national and global scale. Particular forms of legal personhood such as the corporation and the slave are, unquestionably, oppressive. The question is whether the remedy lies in acknowledging persons to be humans or in creating more equitable forms of legal personhood – and whether, as I argue here, the former preempts the latter.

The corporate person is, ironically, one of the least corporeal forms of legal personhood: indeed, an important function of the corporation is to transcend the finite lifespan of the natural persons who are its shareholders.[143] In addition to this "perpetual succession," other characteristics of the corporate person include "limited liability, … unified management, the power to sue and be sued, and to take or convey property in the corporate name."[144] (Limited liability allows individual shareholders to receive profits while shielding them from debts or other liabilities incurred by the corporation.) Like the slave or the femme couvert, the corporation is a particular kind of right-and-duty-bearing unit. As we have seen, under the doctrine of "mixed character," the fictive slave person

combined civil incapacity with criminal liability. Under coverture, "the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and *cover*, she performs every thing."[145] Analogously, the early twentieth-century Supreme Court formally restricted corporations to having, in effect, "*property* rights but not *liberty* rights."[146] This distinction, which can be traced back to Blackstone, made the corporate person a very different sort of right-and-duty-bearing unit than individual shareholders, who presumably could claim both liberty and property rights.[147]

If the corporation does not take the corporeal form of other legal persons, it is not therefore incorporeal. One need only to walk into McDonald's or Target to appreciate the corporation as a real, physical entity. As early twentieth-century legal scholar Arthur W. Machen insisted, it was not the "entity" but "the personality" that was "a fiction."[148] This may be what U.S. Supreme Court Chief Justice John Marshall meant when, in *Trustees of Dartmouth College v. Woodward* (1819), he characterized the corporation as "an artificial being, invisible, intangible, and existing only in contemplation of the law."[149] (After all, Marshall could have walked into Dartmouth College almost as easily as we can McDonald's or Target.) Because the "artificial" corporate person is less anthropomorphic than "natural" legal persons, however, we tend to forget that the "personality" attributed to the latter is equally incorporeal, realized in rights and duties, rather than blood, bones, and flesh.[150]

The Jim Crow-era case of *People's Pleasure Park Co. v. Rohleder* (1908) illuminates the political possibilities of an artificial, invisible, and intangible legal personhood. Founded by the formerly enslaved Spanish-American War commander,

Major Joseph B. Johnson, People's Pleasure Park Company was a "corporation composed of negroes who purchased land" on a former Confederate battlefield outside of Richmond, Virginia "for the purpose of establishing an amusement park … for colored people."[151] The corporation acquired the real estate through a deed that "contained a covenant that the title to the land should never vest in a person of African descent or colored person."[152] People's Pleasure Park won the case, but not because the Supreme Court of Appeals of Virginia found this discriminatory deed invalid.[153] Forty years after the Thirteenth and Fourteenth Amendments, the legacy of slave personhood was legible in just such restrictions on African Americans' civil capacity. Instead, the court ruled that the transfer of the segregated land parcel was valid due to the logic of corporate personhood: "even though all the members and stockholders of the corporation were negroes … the corporation was an entity distinct from its members, and was not a 'colored person' within the covenant."[154] People's Pleasure Park Company could acquire property (and be sued) as a corporate person with duties and rights distinct from those of "a person of African descent or colored person" in segregated Virginia. By preserving the distinction between the corporate entity and its members, the *People's Pleasure Park Co.* ruling enabled the African American shareholders to exercise the right of the "artificial…, invisible, intangible" corporate person to acquire and profit from segregated real estate. Ultimately the case circumvented, rather than challenged, the legal segregation structured upon such restrictive covenants. Nevertheless, it dramatizes how, over the course of the long nineteenth century, "Black litigants claimed legal personhood through the language of property" under racist legal regimes.[155] The presence of masses of pleasure-seeking African Americans at an amusement park in an otherwise whites-

only area of suburban Richmond offers a delightfully material illustration of how, by "leveraging the language of property in their lawsuits, … black litigants also made claims to civic inclusion."[156] Disturbed by the "'incessant' 'hurrahing and whoops'" of African Americans enjoying their leisure on the former Confederate battlefield, white resident Richard Rohleder claimed to have "personally suffered nearly every indignity and all the odium the presence of large numbers of idle and depraved negroes could put on any man of refinement."[157] Corporate personhood allowed People's Pleasure Park's African American shareholders to surmount (however provisionally) the denial of Black civil capacity as one of the enduring indignities of slavery; so doing, the Park and its customers chipped away at the *Herrenvolk* dignity still claimed by whites like Richard Rohleder.

One of the most outspoken contemporaneous legal critics of the *People's Pleasure Park* decision was I. Maurice Wormser, popularizer of the concept of corporate veil-piercing.[158] To pierce, or lift, the corporate veil is to treat the rights or duties of a corporation as those of its shareholders – usually with the effect of holding the latter legally responsible for the corporation's liabilities.[159] Courts were justified in doing so, Wormser maintained, when "a corporation is organized as a mere sham or device in order to evade an existing legal obligation."[160] By this logic, he contended, the Supreme Court of Appeals of Virginia should have pierced the corporate veil in *People's Pleasure Park v. Rohleder* because the "sole purpose of organization of the corporation was obviously to evade and circumvent the title restriction forbidding negroes from taking the land."[161] Here, however, is where the difference between natural persons and human beings becomes relevant. Rather than piercing the corporate veil and treating the rights and

duties of the corporate persons as coextensive with the underlying natural person(s), Wormser suggested that the court should have disregarded personhood altogether by attributing to the corporate entity the ascriptive characteristics of a particular group of human beings, "negroes."[162] Wormser proposed that the court should have naturalized and thus racialized the corporate person – much as James Madison, Immanuel Kant, and John Howard had done with the artifice of slave personhood.

Corporate veil-piercing clarifies the importance of distinguishing the legal artifice of the natural person from the flesh-and-blood human being. For even when the practice of lifting the corporate veil revealed shareholders, in Wormser's words, to be "acting and living men and women," courts have persisted in viewing them as right-and-duty bearing units, not as embodied humans. Consider the case usually cited as the earliest American instance of veil-piercing: *Bank of the U.S. v. Deveaux* (1809), which involved the constitutional provision granting federal jurisdiction over "controversies … between Citizens of different States."[163] The Constitution's reference to litigants as "Citizens" rather than "persons" threatened to limit the U.S. Supreme Court's authority over cases involving corporations and not just individual citizens. Chief Justice Marshall discerned the requisite diversity of citizenship when he pierced the corporate veil in order "to look to the character of the individuals who compose the corporation."[164] Corporations were not citizens, but veil-piercing enabled the court to extend to the corporate person the relevant citizenship rights claimable by individual shareholders. Similarly, in both in *Citizens United vs. Federal Election Commission* (2010) and its successor, *Burwell v. Hobby Lobby Stores, Inc.* (2014), the Roberts Court pierced the corporate veil to reveal not merely a group of rights-bearing natural persons but an association of U.S. citizens

with constitutional rights to free speech and religious liberty, respectively.[165] If the Fourteenth Amendment's definition of citizens as "persons *born* or naturalized in the United States" seems to "refer unambiguously to human beings," it nevertheless recognizes them only as "persons" with a distinctive set of rights and duties.[166] As Chief Justice Marshall suggested in *Bank of the U.S. v. Deveaux*, when the courts pierce the veil of artificial personhood to scrutinize natural persons, they still "look to the character" – the *persona* – of these individuals.

This is precisely what U.S. District Attorney John Gregory did when, in *U.S. v. Amy*, he insisted, "I cannot prove more plainly that the prisoner is a person, a natural person at least, than to ask your honors to look at her! There she is. She is beyond doubt a human being, and it is not pretended she is not of sound mind." Despite Gregory's emphasis on the enslaved defendant's humanity, his sole reference to her body was a remarkably disembodied one that immediately recuperated her personhood as a right-and-duty bearing unit. With his allusion to Amy's "sound mind," or *compos mentis*, Gregory asserted the mental capacity that Blumenthal identifies as a definitive characteristic of the default legal person. The prosecutor merely reinforced his argument when he pierced the veil of slave personhood to reveal this underlying natural person: both the slave and the default legal person could be held criminally responsible. The risk, as defense attorney Howard seems to have intuited, was that Gregory's veil-piercing would puncture the more obviously artificial component of the slave's mixed character – civil death – and thereby restore Amy's *sui juris* status.[167] As we shall see in Chapter Two, this was precisely the logic of so-called freedom suits, which proceeded under the fiction that the enslaved plaintiff, like "other persons," had the civil standing to sue the slaveholder for

wrongs such as assault and battery or false imprisonment.[168] In *U.S. v. Amy*, however, recognition of the defendant as a mentally competent natural person did not lead the court to recognize in her a default legal personhood that would have endowed her with a civil as well as a criminal personality.

As we have seen, defense attorney John Howard responded to the prosecution's veil-piercing by taking what Arendt called "the first essential step on the road to total domination" by seeking "to kill the juridical person in man." He did so by redirecting the court's attention from the abstracted legal personhood of the enslaved defendant to her embodied humanness, repeatedly using the ascriptive terms "negro," "African," and "black" (none of which were spoken by the prosecution). If U.S. District Attorney Gregory briefly lifted the veil of slave personhood to expose the underlying natural person as *sui juris*, Howard sought to render mask and actor inseparable by imposing the slave's mixed character on the entire "race." As the slave takes on the ascriptive characteristics of the "negro," people of African descent are attributed the status of the fictive slave person: the mixed character of criminal culpability and civil incapacity. Hence Howard's reference to "the slave race." Howard may have lost this particular case, but his broader effort was realized in legislation that, like the restrictive covenant cited in in *People's Pleasure Park*, constrained the civil capacity of a fully naturalized "person of African descent or a colored person."

As Publius acknowledged in *Federalist* 54, if "laws … transformed the Negroes into subjects of property" under slavery, other laws could "restore the rights which ha[d] been taken away." This was, to a significant extent, the failed promise of Reconstruction: to remake the slave person into the *sui juris* legal person. The problem was that, for over

a century, in politics, philosophy, and law, the artifice of slave personhood had become naturalized by its identification with those human beings known as "Negroes." Thus, by the dawn of the twentieth century, the veil of slave personhood had been woven into what W.E.B. DuBois called the "Veil of Race."[169] That DuBois also spoke of "the veil of crime" is no coincidence.[170] For, as Chapter Two will argue, these interwoven veils of slavery, race, and crime would form the fabric of African Americans' legal personhood well after abolition and emancipation.

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[1] Orlando Patterson in *Slavery and Social Death: A Comparative Study* (Cambridge, MA: Harvard University Press, 1982), 99.

[2] Patterson, *Slavery*, 94-97; Patterson's discussion of white Southern honor draws on John Hope Franklin, *The Militant South 1800-1861* (1956; Urbana: University of Illinois Press, 2002), 34-35. In her classic study of yeomanry in the Low Country of antebellum South Carolina, Stephanie McCurry rejects "political fictions about white equality or 'herrenvolk democracy,'" but notes that white men's mastery over dependents, notably women, children, and enslaved people, made them "independent men and masters, entitled to the respect and public rights accorded such men [notably, planters] in slave society"; Stephanie McCurry, *Masters of Small Worlds: Yeoman Households, Gender Relations, and the Political Culture of the Antebellum South Carolina Low Country* (New York: Oxford UP, 1995), 93, 95. Wyatt-Brown thus speaks of "the honor of having a white skin" in the South as fostering "a fraternity of all whites against all blacks"; Wyatt-Brown, *Southern Honor*, 66.

On Southern honor culture more broadly, see W. J. Cash, *The Mind of the South* (1941; Vintage-Random House, 1991), 62-63; Rollin G. Osterweis, *Romanticism and Nationalism in the Old South* (New Haven: Yale University Press, 1949); William R. Taylor, *Cavalier and Yankee: The Old South and American National Character* (New York: Harper and Row, 1961); Bertram Wyatt-Brown, *Southern Honor: Ethics and Behavior in the Old South* (Oxford: Oxford University Press, 1982); John Fraser, *America and the Patterns of Chivalry* (Cambridge: Cambridge University Press, 1982), 3-83; Kenneth S. Greenberg, *Honor and Slavery: Lies, Duels, Noses, Masks, Dressing as a Woman, Gifts, Strangers, Humanitarianism, Death, the Proslavery Argument, Baseball, Hunting, and Gambling in the Old South* (Princeton: Princeton University Press, 1996); Bertram Wyatt-Brown, *The Shaping of Southern Culture: Honor, Grace, and War, 1760s-1880s* (Chapel Hill: University of North Carolina Press, 2001); Ariela J. Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom* (Princeton, N.J.: Princeton University Press, 2000), 47-71; Elisa Tamarkin, *Anglophilia: Deference, Devotion, and Antebellum America* (Chicago: University of Chicago Press, 2008), 178-246; Christopher Hanlon, *America's England: Antebellum Literature and Atlantic Sectionalism* (Oxford University Press, 2013). For an excellent overview of the literary critical debate over the "myth of the aristocratic South" and analysis of the Southern literature that challenges that myth, see Paul Christian Jones, *Unwelcome Voices: Subversive Fiction in the Antebellum South* (Nashville: University of Tennessee Press, 2005), quotation at 4

[3] Without a doubt, "honor existed before, during, and after slavery in the Southern region," but by the antebellum period slavery had become central to the sections honor culture. Wyatt-Brown, *Southern Honor*, 16.

[4] "The Skin Aristocracy of America: An Address Delivered in Coventry, England, on 2 February 1847," as reported by the Coventry *Herald and Observer*, John W. Blassingame, ed., *The Frederick Douglass Papers: Series One: Speeches, Debates, and Interviews*, Vol. 2: 1847-54 (New Haven: Yale University Press, 1982), 3.

[5] Herman Melville, *Moby-Dick*, 2nd ed., ed. Hershel Parker and Harrison Hayford (1851; New York: W.W. Norton, 2002), 103.

[6] Ralph Ellison, *The Collected Essays of Ralph Ellison*, John F. Callahan, ed. (New York: Modern Library, 2003), 781, 103. All further references to this text will be noted parenthetically. George M. Fredrickson, *The Black Image in the White Mind: The Debate on Afro-American Character and Destiny, 1817–1914* (Middletown: Wesleyan University Press, 1971), 61, 64. Fredrickson initially demonstrates how "the conflict between a developing *Herrenvolk* ideology and an aristocratic or seigneurial philosophy theoretically incompatible with democracy served to divide the mind of the Old South"; ibid, 61. Ultimately, however, he concludes this internal dispute amounts to a distinction without a real-world difference: "the attempt to develop a consistent philosophical defense of the institution led inevitably to efforts to derive the argument principally from one facet or the other. Emphasis on slavery per se as an organizing principle of society led to genuinely reactionary and paternalistic theory of society; but if racial differentiation was seen as the heart of the matter, then the result, in the larger American ideological context was '*Herrenvolk* democracy' or 'egalitarian' racism"; ibid, 64. For a similar argument, see Cash, *Mind*, 38-43. Roediger argues for the alternative phrase, "*herrenvolk* republicanism," in light of the fact that in the Jacksonian North "racism was not effectively linked to any significant social or political leveling among whites. … Rather than levelling, there was a simple pushing down on the vulnerable bottom strata of society, even when there was little to be gained, except psychologically, from such a push"; *Wages*, 59. With "dignity" replacing the noun "democracy," which is now transformed into a compound adjective with "*Herrenvolk*," I hope to have repurposed what Barbara Jeanne Fields concurs is a "specious concept" into one that suggests how such dignity "is more a symptom of white [working] people's exploitation than a remedy or compensation for it"; Fields and Fields, *Racecraft*, 144, 160. (This, in fact, is precisely Douglass' point, as explored in Chapter Four.) It is dignity, rather than power, that whites of many classes can claim as members of the same caste. On the inner workings of (socio-economic) class within the caste system (color as a hereditary condition) in the antebellum slave narrative, see William L. Andrews, *Slavery and Class in the American South: A Generation of Slave Narrative Testimony, 1840-1865* (New York: Oxford UP, 2019). Thus Wyatt-Brown uses "*Herrenvolk* democracy" to refer to "the honor of having a white skin" in the South, rather than the political system, noting that "honor in the Old South applied to all white classes, though with manifestations appropriate to each ranking"; *Southern Honor*, 66, 88.

[7] Melville, *Moby-Dick*, 103. Jeremy Waldron, "How Law Protects Dignity," *Cambridge Law Journal* 71, no. 1 (March 2012): 213; although Waldron includes in "standing" both "formal legal standing" and "more informally, the moral presence," his argument focuses on the former; Susanna L. Blumenthal, *Law and the Modern Mind: Consciousness and Responsibility in American Legal Culture* (Cambridge, MA: Harvard University Press, 2016), 9.

[8] See Blumenthal, *Law*, 50-58. Wyatt-Brown lists "family integrity, clearly understood hierarchies of leaders and subordinates, and ascriptive features of individuals and groups" as the basis for a Southern honor culture deeply attuned "to the legal system and its demands." I follow him in understanding "ascription" to indicate such perceived "biological determinants as race and color, gender, bloodlines, physique and physical skill, age, and inherited position"; Wyatt-Brown, *Southern Honor*, xxxiv-vii.

[9] James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers* (New York: Penguin, 1988), 332.

[10] See Leonard Cassuto, *The Inhuman Race: The Racial Grotesque in American Literature and Culture* (New York: Columbia University Press, 1997), xiii; Saidiya V. Hartman, *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America* (New York: Oxford University Press, 1997), 5; Christopher Freeburg, *Black Aesthetics and the Interior Life* (Charlottesville: University of Virginia Press, 2017), 88-89. Hartman turns to embrace a humanitarian rhetoric in *Lose Your Mother: A Journey along the Atlantic Slave Route* (New York: Farrar, Strauss, Giroux, 2008).

[11] Lloyd Pratt, *The Stranger's Book: The Human of African American Literature*, (Philadelphia: University of Pennsylvania Press, 2016), 2.

[12] "Mail Robbery by a Slave. *United States v. Amy*," [Richmond] *Quarterly Law Journal* 4, no. 3 (July 1859), 181. All further references will be noted parenthetically.

[13] John Felipe Acevedo, "Restoring Community Dignity Following Police Misconduct," *Howard Law Journal* 59, no.3 (2016): 624. For critiques, see Katherine Franke, "'Dignity' Could Be Dangerous at the Supreme Court," *Slate.com*, June 25, 2015; Yuvraj Joshi, "The Respectable Dignity of *Obergefell v, Hodges*," *California Law Review Circuit* 6 (November 2015): 117-25; Laurence H. Tribe, "Equal Dignity: Speaking Its Name," *Harvard Law Review Forum* (November 2015): 16-32.

[14] See, for example, President's Council on Bioethics, *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics*(Washington, D.C., March 2008). U.S. Bioethics Commissions Archival Collection http://hdl.handle.net/10822/559351. For a theoretical overview, see Alain Pottage, "*Unitas Personae*: On Legal and Biological Self-Narration," *Law and Literature* 14, no. 2 (2002): 298, 301. Not coincidentally, these developments have called into question the foundational Western legal distinction between persons and things; see Alain Pottage, "Introduction: The Fabrication of Persons and Things," in *Law, Anthropology, and the Constitution of the Social: Making Persons and Things*, ed. Alain Pottage and Martha Mundy (Cambridge: Cambridge UP, 2004), 4.

[15] Arthur Schopenhauer, *On the Basis of Morality*, quoted in Michael Rosen, *Dignity: Its History and Meaning* (Cambridge, MA: Harvard University Press, 2012), 1. The argument that dignity is a "squishy subjective notion" emerged primarily in the context of bioethics: see Steven Pinker, "The Stupidity of Dignity," *The New Republic*, May 28, 2008; see also Ruth Macklin, "Dignity Is a Useless Concept," *British Medical Journal* 327 (Dec. 2003): 1419-20. On the legal relevance of the concept notwithstanding the inconsistency of a "jurisprudence of dignity" in both international and U.S. constitutional law, see Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," *European Journal of International Law* 19, no.4 (2008): 655-724, and Leslie Meltzer Henry, "The Jurisprudence of Dignity," *University of Pennsylvania Law Review* 160 (2011): 169-233.

[16] For a comprehensive overview, see Marcus Düwell, Jens Braarvig, Roger Brownsword, and Dietmar Mieth, ed., *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge: Cambridge University Press, 2014).

[17] On this question of dignity as "source" versus "content" of human rights, see Jeremy Waldron, "Dignity and Rank," *European Journal of Sociology* 48, no. 2 (Aug. 2007): 203-211; for a discussion of this shift in U.N. documents, see Oliver Sensen, *Kant on Human Dignity* (Berlin: De Gruyter, 2011), 149-52. For an overview of the debates about the specific meaning of dignity in such declarations of rights, see Rosen, *Dignity*, 1-62.

[18] "Universal Declaration of Human Rights," Düwell et al., *Cambridge Handbook*, 563.

[19] Lynn Hunt, *Inventing Human Rights: A History* (New York: W.W. Norton, 2007), 116.

[20] Hannah Arendt, "'The Rights of Man': What Are They?" *Modern Review* 3, no. 1 (Summer 1949): 24-37; see also Christoph Menke, "The 'Aporias of Human Rights' and the 'One Human Right': Regarding the Coherence of Hannah Arendt's Argument," *Social Research* 74, No. 3 (Fall 2007): 739-62.

[21] Moyn's "alternative history of human rights" locates this "utopian" appeal for "another, better world of dignity and respect" in the 1970s, with "the collapse of prior universalistic schemes," such as Christianity, revolutionary nationalism, or Communism. Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Belknap-Harvard University Press, 2010), 7, 4, 7.

[22] Sensen, *Kant*, 147.

[23] Sensen, *Kant*, 147, 143.

[24] Sensen, *Kant*, 146.

[25] Sensen, 146, 163.

[26] Sensen, *Kant*, 163; Miriam Griffin, "Dignity in Roman and Stoic Thought," in *Dignity: A History*, ed. Remy Debes (Oxford: Oxford University Press, 2017), 47-67.

[27] See Meir Dan-Cohen "Introduction: Dignity and Its Discontents," 3-5 in Jeremy Waldron, *Dignity, Rank, and Rights* (New York: Oxford University Press, 2012), as well as Waldron, *Dignity*, 23-27. See also Kwame Antony Appiah, *The Honor Code: How Moral Revolutions Happen* (New York: W.W. Norton, 2010), 101-36. For a fuller exploration of the terminology of dignity, see Aurel Kolnai, "Dignity," *Philosophy* 51, no. 197 (July 1976): 251-71; Waldron, "Dignity and Rank." On the discrepancy between words and complex concepts, see Peter de Bolla, *The Architecture of Concepts: The Historical Formation of Human Rights* (New York: Fordham University Press, 2013), 19-26.

[28] Emphasis omitted. ("Particular" vs. "general"): Georg Lohmann, "Dignity and Socialism," trans. Joana Rancine, in Düwell et al., *Cambridge Handbook*, 126; ("intrinsic-universal" vs. "social honor or dignity"): Lorberbaum, "Human Dignity in the Jewish Tradition," 136; ("social," "contingent," "proper," vs. "human"): Christian Neuhäuser and Ralf Stoecker, "Human Dignity as Universal Nobility," in Düwell et al., *Cambridge Handbook*, 298; ("contingent" vs. "intrinsic"; "internal vs. external"): Carter Snead, "Human Dignity in U.S. Law," in Düwell et al., *Cambridge Handbook*, 386; ("moral" vs. "hierarchical dignity"): Bayefsky, "Dignity, Honour," 817. See also Darwall's comparative analysis of the "orders of

honor and mutual accountability"; Stephen Darwall, *Honor, History, and Relationship: Essays in Second-Personal Ethics II* (Oxford: Oxford University Press, 2013), 11-29.
[29] For studies exploring the concept of dignity in ancient Greece, see Patrice Rankine, "Dignity in Homer and Classical Greece," in Debes, *Dignity*, 19-45; Josiah Ober, "Democracy's Dignity," *American Political Science Review* 106, no.4 (November 2012): 827-46.
[30] As the Law of Nations and the Council of Valladolid document, however, an increasingly expansive European imperialism posed urgent legal and theological questions over the status, even rights, of non-Christian human others. See Mieth, "Human Dignity"; Lars Kirkhusmo Pharo, "The Council of Valladolid (1550-1551): A European Disputation about the Human Dignity of Indigenous Peoples of the Americas," in Düwell et al., *Cambridge Handbook*, 95-100.
[31] Hannah Arendt, *On Revolution* (1963; New York: Penguin, 2006), 36.
[32] Ibid.
[33] Ibid., 97.
[34] Arendt, *On Revolution*, 96-97.
[35] See Arendt, "'The Rights of Man.'"
[36] Griffin, "Dignity," 50; Brian Copenhaver, "Dignity, Vile Bodies, and Nakedness: Giovanni Pico and Giannozzo Manetti," in Debes, *Dignity*, 148. Rosen notes the related usage of *dignitas* "in Latin as part of a critical vocabulary in relation to art and, particularly, rhetoric… to characterize speech that was weighty and majestic, in contrast to discourse that was light and charming," a usage which often extended to the speaker, a practice continued in our own use of the word "dignified"; Rosen, *Dignity*, 12-13.
[37] Cicero, *On Duties*, trans. Walter Miller (Cambridge, MA: Harvard University Press, 1913), I.107.
[38] Ibid., I.107, 105. On the Stoic and Ciceronian influence on Kant, see Reich, "Kant"; Oliver Sensen, "Kant's Conception of Human Dignity," *Kant-Studien* 100, no. 3 (Sept. 2009): 309-331; Martha C. Nussbaum, "Kant and Stoic Cosmopolitanism," *Journal of Political Philosophy* 5, no. 1 (1997): 1-25. See also H. Cancik, "'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Ciecero, *De Officiis* I," in David Kretzmer and Eckart Klein, ed., *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002), 105-107.
[39] Cicero*, On Duties*, III .v. 25. As an influence on Kant's Categorical Imperative, see Reich, "Kant," 457-59.
[40] Griffin, "Dignity," 50.
[41] Ibid. See also Copenhaver, "Dignity, Vile Bodies."
[42] See Dietmar Mieth, "Human Dignity in Late-Medieval Spiritual and Political Conflicts," trans. in collaboration with Naomi van Steenbergen, in Düwell et al., *Cambridge Handbook*, 74-84; Piet Steenbakkers, "Human Dignity in Renaissance Humanism," in Düwell et al., *Cambridge Handbook*, 85-94; Ruedi Imbach, "Human Dignity in the Middle Ages (Twelfth to Fourteenth Century)," in Düwell et al., *Cambridge Handbook*, 64-73; Oswald Bayer, "Martin Luther's Conception of Human Dignity," in Düwell et al., *Cambridge Handbook*, 101-107; Yair Lorberbaum, "Human Dignity in the Jewish Tradition," in Düwell et al., *Cambridge Handbook*, 135-44.
[43] Bonnie Kent, "In the Image of God: Human Dignity after the Fall," in Debes, *Dignity*, 81. Thus the Incarnation of Christ "was not a tribute to human dignity, let alone an award for human merit. It was the only way fallen human beings could be redeemed"; ibid., 86. On Pope Leo I, see also Sensen, *Kant*, 157-59
[44] Pico della Mirandola, *Oration on the Dignity of Man: A New Translation and Commentary*, ed, Francesco Borghesi, Michael Papio, and Massimo Riva (New York: Cambridge University Press, 2016), §49, 53. For analysis, see Sylvia Wynter, "Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, Its Overrepresentation – An Argument," *CR: The New Centennial Review* 3, no. 3 (Fall 2003): 276-7. My own reading has been influenced by Copenhaver's persuasive analysis of the concatenation of factors that have led generations of scholars mistakenly to assign a pivotal role to Mirandola's *Oration*. In neither of the two instances in which the word appears in the *Oration* "does *dignitas* belong to humans, except aspirationally, and neither justifies 'dignity' as a translation, with all the Kantian baggage of the modern English word," much less as the titular designation for this untitled work – which was "disseminated … to American college students" in an influential "collection of Renaissance texts" published in 1948 – the same year as the UN's Universal Declaration of Human Rights. Copenhaver finds a more sustained treatment of the topic in Giannozzo Manetti's *On the Dignity and Excellence of Man* (c.1452-53), in which, whether applied to humans or Manetti's volume itself, *dignitas* remains "relative … expressing rank"; see Copenhaver, "Dignity, Vile Bodies," 135, 172, 161.

[45] Copenhaver, "Dignity, Vile Bodies," 140-41, 155-58; quotation at 155.
[46] Erich Auerbach, *Mimesis: The Representation of Reality in Western Literature*, trans. Willard R. Trask (1953; Princeton, Princeton University Press, 2003), 249. See also Copenhaver, "Dignity, Vile Bodies."
[47] Auerbach, *Mimesis*, 249-50.
[48] Ibid., 250.
[49] Hannah Arendt, *The Origins of Totalitarianism* (New York: Houghton Mifflin Harcourt, 1994), 297. Later, with the rise of what Michel Foucault "biopolitics" or "biopower," this precarious state would resemble what Giorgio Agamben has theorized as "bare life"; see Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France, 1975-1976*, trans. David Macey (New York: Picador-St. Martin's Press, 2003), 243-63; Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller- Roazen (Stanford: Stanford University Press, 1998). On biopolitics in the context of global imperialism and race slavery, see Achille Mbembe, "Necropolitics," trans. Libby Meintjes, *Public Culture* 15, no. 1 (2003): 11-40.
[50] Sensen, *Kant*, 146. See, for example, Francis Fukuyama, *Identity: The Demand for Dignity and the Politics of Resentment* (New York: Farrar, Straus, and Giroux, 2018), 36, 39.
[51] Immanuel Kant, *Groundwork of the Metaphysics of Morals,* rev. ed., trans. and ed. Mary Gregor and Jens Timmermann (Cambridge: Cambridge University Press, 2012), 40-51; Immanuel Kant, *The Metaphysics of Morals,* trans. and ed. Mary Gregor and Jens Timmermann (Cambridge: Cambridge University Press, 2007), 187-89, 209. For elaboration, see Thomas E. Hill, Jr., *Dignity and Practical Reason in Kant's Moral Theory* (Ithaca: Cornell University Press, 1992); for critical developments of Kantian dignity, see George Kateb, *Human Dignity* (Cambridge: Belknap-Harvard University Press, 2011); and Samuel J. Kerstein, "Dignity and the Preservation of Personhood," in Paulus Kaufmann, Hannes Kuch, Christian Neuhäuser, and Elaine Webster, ed. *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Springer: Dordrecht, 2011), 231-41.
[52] As with human rights, Moyn sees human dignity in the political sense as a late twentieth-century development; see Samuel Moyn, *Human Rights and the Uses of History* (London: Verso, 2014), 19-33.
[53] Although this point is most fully developed in Sensen, *Dignity*, 143-214, others also emphasize Kant's mobilization of the traditional concept of dignity; see Klaus Reich, "Kant and Greek Ethics II," *Mind* 48, no. 192 (Oct. 1939): 446-63; Mika LaVaque-Manty, "Dueling for Equality: Masculine Honor and the Modern Politics of Dignity," *Political Theory* 34, no. 76 (December 2006): 715-40; Dietmar von der Pfordten, "On the Dignity of Man in Kant," *Philosophy* 84 (2009): 388-89; Jeremy Waldron, *Dignity, Rank, and Rights* (Oxford: Oxford University Press, 2012), 23-27; Rachel Bayefsky, "Dignity, Honour, and Human Rights: Kant's Perspective," *Political Theory* 41, no. 6 (2013): 809-37; Copenhaver, "Dignity," 127-30, 143-48.
[54] Griffin, "Dignity," 50; Copenhaver, "Dignity, Vile Bodies," 145.
[55] On Kant's suggestion that "people can lose their dignity" as belying the sort of inherent dignity asserted in human rights declarations, see Bayefsky, "Dignity," 822; on Kant's dignity as not simply a moral capacity but a realization of that capacity, see Sensen, *Kant*, 180-88; Darwall, *Honor*, 247-70; on dignity as "a feature of behavior," see Rosen, *Dignity*, 30; for the disaggregation of the Second and Third Formulas of the Categorical Imperative, which serves to identify human dignity with self-legislation rather than "End-in-Oneselfness," see Pfordten, "On the Dignity." For a response to such critiques, especially from Rosen, see Thomas E. Hill, Jr., "In Defence of Human Dignity: Comments on Kant and Rosen," in *Understanding Human Dignity*, ed. Christopher McCrudden (Oxford: Oxford University Press, 2013), 313-25.
[56] Kant, *Metaphysics*, 6:239; Sensen, *Kant*, 169-71. For a reading that foregrounds rights over duties see Ripstein, *Force and Freedom*.
[57] Sensen, *Kant*, 143, 144.
[58] Ibid., 144. In Sensen's reading of the *Groundwork*, "it is not humanity as such that has an inner worth, but morality," for "Kant does not conceive of worth as a distinct metaphysical property." Thus, whereas "morality has dignity in the sense that it should be sought above all else, humanity has dignity in the sense of being elevated over the rest of nature in being capable of a morality." Ibid., 183-84, 186.
[59] Waldron, "How Law," 212. Chapter Three will take up this discussion in more detail. See Gregory Vlastos, "Justice and Equality," in Jeremy Waldron, ed., *Theories of Rights* (Oxford: Oxford University Press, 1989), 54; James Q. Whitman, "Enforcing Civility and Respect: Three Societies," *Yale Law Journal* 109, no. 6 (April 2000): 1279-1398; James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between American and Europe* (Oxford: Oxford University Press, 2003); James Q.

Whitman, "The Two Western Cultures of Privacy: Dignity Versus Liberty," *Yale Law Journal* 113 (2004): 1151-1221; Jeremy Waldron, "Dignity and Rank," *European Journal of Sociology* 48, no. 2 (2007): 201-237; Waldron, *Dignity*; Christian Neuhäuser and Ralf Stoecker, "Human Dignity as Universal Nobility," in Düwell et al., *Cambridge Handbook*, 298-309; Ralf Stoecker, "Three Crucial Turns on the Road to an Adequate Understanding of Human Dignity," in Paulus Kauffman et al, *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Dordrecht: Springer Science & Business Media, 2011), 7-17; Ober, "Democracy's Dignity."

[60] Waldron, "How Law," 212-13. Moyn's rejection of Waldron's secular account of the democratization of dignity as social status neglects to address the importance in Christian thought of *dignitas* as a hierarchical concept; his adoption of the conventional view of Kant's "metaphysical promotion of the centrality of human dignity" leads to a similar neglect of the traditional, hierarchal aspects of Kantian dignity; see Moyn, *Human Rights*, 19-33. Darwall contends that Waldron's approach "lacks the second-personal element that it essential to the idea of dignity," because "mutually respecting and accountable persons do not merely look upon one another, third personally, as peers, they look *to* one another by holding themselves answerable to one another. They do not merely defer to others in matters of right, but take others to have the standing to claim their rights and hold them answerable for respecting them"; Darwall, *Honor*, 29 n25. Darwall seems not to appreciate the extent to which the latter dynamic structures the legal proceduralism that Waldron sees as enacting this upward leveling of dignity; as I suggest in Chapter Two, what Darwall calls second-personalism drives dignitary tort litigation in particular. For a Kantian analysis of the broader field of tort law that emphasizes "the narrow question of how things stand between the rights of two persons," see Arthur Ripstein, *Private Wrongs* (Cambridge, MA: Harvard University Press, 2016), quotation at 16.

[61] De Bolla, *Architecture*, 43. The gradual redefinition of dignity during this period appears to follow the eighteenth-century Anglo-American reorientation from "rights understood as a property held by the individual," toward "rights understood as aspirations voiced in the collective"; ibid., 139. DeBolla's digital humanities approach to the history of ideas involves data collection of word usage, limiting his analysis to the Anglophone Atlantic. DeBolla suggests that, after the Revolution, the "colonists quickly discovered that both the federal and the state constitutions adopted over the 1780s, and the eventual Bill of Rights, could all function adequately under the rubric of positive law," which effectively "sealed the fate of 'human rights' for the following two centuries" ; ibid., 140-42. This conclusion follows in the tradition of Hannah Arendt, who argued that, due to the commitment of modern nation-states to securing "inalienable rights" through positive law, "the concept of human rights was treated as sort of a stepchild by nineteenth century political thought"; Arendt, "The Rights of Man," 24. Similarly, Waldron characterizes the long nineteenth century as "a period of decline and hibernation," when some aspects of natural rights thinking "died and rotted," while others "lay fallow and sprang up again when the rains came … in the twentieth century"; Jeremy Waldron, "The Decline of Natural Right," *The Cambridge History of Philosophy in the Nineteenth Century (1790–1870)*, Allen W. Wood and Songsuk Susan Han, ed. (New York: Cambridge University Press, 2012), 649. For Moyn, "rights became less salient the more the nineteenth century passed" due to the growing awareness that "not the assertion of abstract principles but the achievement of specific citizenship is what truly mattered"; Moyn, *Last Utopia*. In the caesura between eighteenth-century natural rights and twentieth century human rights, the rights and duties of the artificial person preoccupied nineteenth-century American law and culture.

[62] De Bolla, *Architecture*, 116. In keeping with de Bolla's emphasis on how the structure, or architecture, of concepts at once shapes and reflects their meanings, it bears noting another parallel that may help to clarify nineteenth-century notions of dignity. Just as the instability of the eighteenth-century concept of rights is traceable to inconsistencies in seeing rights as a "deposit," containing a variety of distinct rights claims (i.e., security, property, etc.) *and* as a "load-bearing" "platform" upon which to base such claims, we can contrast the previously dominant Western view of dignity as a deposit that held many different distinct status-based claims to dignity (high birth, rank, office) with a comparatively monolithic platform for a "comfortably vague" idea of human dignity as a basis upon which to mount assertions of equality; ibid.,138.

[63] DeBolla associates the initial operation of a concept entering its productively fuzzy dual phase with "play, in the sense of a machine's variability in the function of its moving parts" that arguably "open[s] up the possibility for a new conceptual architecture to become established"; ibid., 119. It bears noting that in this study, I could have taken the obverse approach to the unstable concept of dignity in nineteenth-century

American literature. Instead of highlighting how Douglass, Melville, and Twain alert us to how the seemingly outmoded status-based notion of dignity informs Jacksonian America's *Herrenvolk* dignity, this study could have located traces of the contemporary paradigm of human dignity and the related insistence upon slavery as dehumanization. This more teleological approach has characterized much of the scholarship on dignity in Melville's *Moby-Dick* in particular (see Chapter Five) as well as on slavery and its so-called afterlives (see Introduction).

[64] Ibid., 282.

[65] See, for example, the contention that the reference to "men" in the Declaration of Independence and the Declaration of the Rights of Man and Citizen "then as now means not just males, but also persons, that is, members of the human race"; Hunt, *Inventing*, 21. Or see civil rights attorney Michelle Alexander's surprising endorsement of the popular misreading of Article 1, Section 2 of the U.S. Constitution: "Under the term's of our nation's founding document, slaves were defined as three-fifths of a man, not a real, whole human being"; thus, whereas Alexander correctly observes that "upon this racist fiction rests the entire structure of American democracy," the fiction in question is not Black sub-humanity but, as we shall see in the discussion of *Federalist* 54, the specific legal fiction of slave personhood under the doctrine of "mixed character." Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, rev. ed. (New York: New Press, 2012), 26.

[66] By contrast, see Justinian's distinction of the law of nations (*ius gentium*) from both natural law and civil law, as law "common only to human beings among themselves." Justinian, *The Digest of Justinian*, ed. Alan Watson (Philadelphia: University of Pennsylvania Press, 2009), I:1. I am indebted to Nan Goodman for alerting me to this reference. The strict "Legalistic" understanding of "person" as a metaphor for law's subject is permeated, of course, by philosophical, religious, and scientific discourses identifying personhood with humanness; see Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin, and the Legal Person* (Portland, OR: Hart, 2009).

[67] With this claim, he was making the point that the other traditional subject of law, property, "is a mere right attached to persons." Joseph W. Moulton, *Analysis of American Law, Presented in a Chart, with Explanatory Concepts* (New York: John S. Voorhies, 1859), 18-19.

[68] Ibid., 19.

[69] Ibid., 19. Moulton misattributes the quotation to Wooddeson's earlier work, *Elements of Jurisprudence* (1783); the passage actually appears in Richard Wooddeson, *A Systematical View of the Laws of England; as Treated of in a Course of Vinerian Lectures, Read at Oxford, during a Series of Years, Commencing in Michaelmas Term, 1777*, Vol I. (London, 1792), 2. *Hathitrust Digital Library* https://babel.hathitrust.org/cgi/pt?id=uc2.ark:/13960/t8bg2m50c;view=1up;seq=1;size=75.

[70] ~~Ibid., 73.~~

[71] XX ~~Wooddeson, *Systemical View*, 73nb.~~

[72] Pottage, "Introduction," 9.

[73] Pottage, "*Unitas Personae*," 275. On personhood as the product of "a juridical art, an *ars iuris* embedded in the technologies and fictions of law," see Edward Mussawir and Connal Parsley, "The Law of Persons Today: At the Margins of Jurisprudence," *Law and Humanities* 11. 1 (2017): 47.

[74] Alain Pottage, "Law after Anthropology: Object and Technique in Roman Law," *Theory, Culture, and Society* 31, no. 2-3 (2014): 156.

[75] Pottage, "Law," 154 (quoting Yan Thomas, "Acte, agent, société: Sur l'homme cupable dans la pensée juridique romaine," *Archives de la philosophie du droit*, 22 [1977]: 67-85; citations omitted).

[76] See Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage-Random House, 1995), 100; see also Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–1978*, ed. Michel Senellart, trans. Graham Burchell (New York: Picador-Palgrave Macmillan, 2007), 4 and Michel Foucault, *Abnormal: Lectures at the Collège de France, 1974–1975*, ed. Valerio Marchetti and Antonella Salomoni, trans. Graham Burchell (New York: Picador-Palgrave Macmillan, 2003), 21.

[77] Mussawir and Parsley, "Law of Persons," 46. For a nineteenth-century American reference to this narrative, see *Brent v. City of New Orleans* 48 La. (1889), *Southern Reporter, Containing All the Decisions of the Supreme Courts of Alabama, Louisiana, Florida, and Mississippi* Vol. 5 (St. Paul: West, 1889), 793. For Darwall, this derivation of person/persona is emblematic of Western honor culture, in which "one person respects another by recognizing or *honoring* him as having some *specific* social role, status or place" – hence concerns about "losing" or "saving" "face" as the social presentation of the self; Darwall, *Honor*,

15; see also Erving Goffman, *The Presentation of Self in Everyday Life* (New York: Anchor, 1959); and Greenberg, *Honor and Slavery*.
[78] Mussawir and Parsley, "Law of Persons," 47, 49.
[79] Mussawir and Parsley, "Law of Persons," 45-46.
[80] Ibid., 57, 46.
[81] This and the following paragraph are indebted to Blumenthal, *Law and the Modern Mind*, 50-58.
[82] Timothy Walker, *Introduction to American Law, Designed as a First Book for Students.* 2nd ed. (Cincinnati: Derby, Bradley & Co., 1846), 205.
[83] Ibid., 205.
[84] Ibid., 221, 205.
[85] Ibid., 206.
[86] Blackstone addresses the status of slaves by referring to the Somerset decision, which held that slavery must operate through positive law, effectively illegalizing slavery in England while retaining it in the colonies. Blackstone also addresses "Jews" in the context of naturalization and inheritance. William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769*, vol. 1 (Chicago: University of Chicago, 1979), 123, 363, 413, 437.
[87] Blumenthal, *Law and the Modern Mind*, 55, 7.
[88] Ibid., 7.
[89] Ibid. Blumenthal emphasizes that "race and gender did not simply supersede titles of nobility as the determinative characteristics of legal personhood, for American jurists articulated the rules of legal capacity and responsibility in psychological terms, setting up additional criteria for regarding individuals to act independently which they proceeded to apply to white men as well as to others. They presumed a mental baseline in the form of the default legal person who possessed a set of intellectual, moral, and volitional faculties that enabled him to follow the precepts of reason and natural justice, as well as those of the positive law"; ibid., 9. See also Welke, *Law*, for a discussion of the importance of physical ability to nineteenth-century legal personhood.
[90] John Bouvier, *Law Dictionary: Adapted to the Constitution and Laws of the United States of America and of the Several States of the American Union*, rev. 6th ed. (Philadelphia: Childs & Peterson, 1856), s.v. "person."
[91] Ibid.
[92] See Roberto Esposito, "The *Dispositif* of the Person," *Law, Culture, and the Humanities*, 8, no. 1 (2012): 23. XX elaborate his account of suppression of animal/body to create person.
[93] Mussawir and Parsley, "Law of Persons," 56.
[94] Right is "that quality in a person which he has to do certain actions, or to possess certain things which belong to him by virtue of some title"; furthermore, "right is the correlative of duty, for, wherever one has a right due to him, some other must owe him a duty." In a rather Arendtian strain, Bouvier acknowledges that "[r]ights might with propriety be also divided into natural and civil rights; but as all the rights which man has received from nature, have been modified and acquired anew from the civil law, it is more proper, when considering their object, to divide them into political and civil rights." Bouvier, *Law Dictionary*, 1856, s.v. "right." For a more elaborate early twentieth-century taxonomy of "right," "power," "privilege," and "immunity" and their respective corollaries, see Wesley N. Hohfield, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Journal* 23, no. 1 (1913): 16-59 and Wesley N. Hohfield, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," 26, no. 8 (1917): 710-770.
[95] Here it bears recalling the absence of a definition of citizenship in the original Constitution; see Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1999); Carrie Hyde, *Civic Longing: The Speculative Origins of U.S. Citizenship* (Cambridge, MA: Harvard University Press, 2017).
[96] Bouvier notes that "the term *representative democracy* has been given to a republican government like that of the United States"; Bouvier, *Law Dictionary*, 1856, s.v. "democracy."
[97] Giles Jacobs, *The Law-Dictionary: explaining the rise, progress, and present state, of the English law, in theory and practice; ... Originally compiled by Giles Jacob; and continued by him, and other editors, through ten editions: now greatly enlarged and improved, ... by T. E. Tomlins, ... In two volumes.* Volume 1. London, 1797. *Eighteenth Century Collections Online.* Gale. University of Toronto Libraries. 23 Apr. 2019, s.v. "dignity." See also T. Cunningham, *A new and complete law-dictionary, or, general abridgment*

*of the law: on a more extensive plan than any law-dictionary hitherto published.*Vol. 1., 3rd ed. Corrected, augmented, and improved, (London, 1783) *Eighteenth Century Collections Online*. Gale. University of Toronto Libraries. 25 Apr. 2019; Richard Burn, *A new law dictionary: intended for general use, as well as for gentlemen of the profession…* (Dublin, 1792). *Eighteenth Century Collections Online*. Gale. University of Toronto Libraries. 25 Apr. 2019.

[98] Bouvier, *Law Dictionary*, 1856, s.v. "dignities."

[99] U.S. Const. art. 1, § 9.

[100] Waldron, *Dignity*, 47.

[101] Ibid., 47.

[102] Ibid., 59.

[103] Ibid., 59-60.

[104] Bouvier , *Law Dictionary*, Vol 2 (1856),. s.v. "sui juris."

[105] Waldron, *Dignity*, 47, 60.

[106] Mussawir and Parsley, "Law of Persons," 48.

[107] After enumerating the divisions of law – referring to persons, things, or actions, respectively – Gaius' *Institutes* states:

> (9) The principal division of the law of persons is the following, namely, that all men are either free or slaves.
>
> (10) Again, men who are free are either freeborn or freedmen.
>
> (11) Freeborn are those who are free by birth, freedmen are those who have been manumitted from legal slavery.
>
> (12) Moreover, there are three classes of freedmen, namely, Roman citizens, Latins, and *dediticii*.

Gaius, *Institutes*, 1.9-12,

[108] Thomas Jefferson, *Notes on the State of Virginia* (Philadelphia: Prichard & Hall, 1788), 152. Documenting the American South https://docsouth.unc.edu/southlit/jefferson/jefferson.html

[109] Ibid., 154.

[110] Ibid., 151.

[111] In keeping with the Framers' refusal to include explicit reference to slavery in the original Constitution, the relevant clause reads: "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." U.S. Const. art. 1, §3.

[112] Madison, Hamilton, and Jay*, Federalist*, 332.

[113] Ibid.

[114] Jenny Bourne Wahl, *The Bondsman's Burden: An Economic Analysis of the Common Law of Southern Slavery* (Cambridge: Cambridge University Press, 1998), 126-320.

[115] "Relating to, affecting, or having influence on a person's character or conduct, as distinguished from his or her intellectual or physical nature"; *Oxford English Dictionary Online*, s.v., "moral"; "Relating to the practice, manners or conduct of men as social beings in relation to each other, and with reference to right and wrong"; Noah Webster, *American Dictionary of the English Language* (New York: S. Converse, 1828), vol. 2, s.v., "moral." *Sabin Americana 1500-1926*.

[116] See Jeannine Marie DeLombard, *In the Shadow of the Gallows: Race, Crime, and American Civic Identity* (Philadelphia: University of Pennsylvania Press, 2012_.

[117] Freedom suits based on descent were often determined not only by the mother's enslaved or free status, but, by extension, the racial or ethnic identity ascribed to her. See Honor Sachs, " 'Freedom By A Judgment': The Legal History of an Afro-Indian Family," *Law and History Review* 30, no. 1 (February 2012): 173-203; Jessica Millward, *Charity's Folk* (Athens: University of Georgia Press, 2015).

[118] John Bouvier, *Law Dictionary* (Philadelphia: Johnson, 1839), s.v. "civil." *Sabin Americana*. For the argument that, from classical antiquity through the late eighteenth century, Western "political thinking was inherently and logically resistant to the idea of race as we understand it; it was more concerned with something called the 'civic,'" see Ivan Hannaford, *Race: The History of an Idea in the West* (Baltimore: Johns Hopkins University Press, 1996), 8-9.

[119] Bouvier, *Law Dictionary*, s.v. "civil."

[120] On Kant's legal metaphors, see David W. Tarbet, "The Fabric of Metaphor in Kant's *Critique of Pure Reason*," *Journal of the History of Philosophy* 6, no. 3 (July 1968): 265-70; Bayefsky suggests that Kant's

use of "dignity" is a legal metaphor of sorts, in that it redeploys the legal understanding of dignity as privileged status in the service of the concept of moral human dignity; Bayefsky, "Dignity, Honour," 819.
[121] Kant, *Groundwork*, 4:433.
[122] Kant, *Metaphysics*, 6:311.
[123] "Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law. If then my action or my condition generally can coexist with the freedom of everyone in accordance with a universal law, whoever hinders me in it does me *wrong*, for this hindrance (resistance) cannot coexist with freedom in accordance with a universal law"; Kant, *Metaphysics*, 6:230-31.

Imagining "the subjects between whom a relation of duty can be thought of (whether admissibly or not)," Kant vacates the category that would describe the "relation in terms of rights of human beings towards beings that have only duties but no right" on the basis that "these would be human beings without personality (serfs, slaves)"; ibid., 6:241.
[124] Bayefsky, "Dignity, Honour," 817.
[125] For a rehearsal of this narrative, see ibid., 810-12; for an illustration, see Charles Taylor, "The Politics of Recognition," in *Multiculturalism: Examining the Politics of Recognition,* Charles Taylor, et. al. (Princeton: Princeton University Press, 1994), 25-73.
[126] Jeremy Waldron, "Citizenship and Dignity," in *Understanding Human Dignity*, Christopher McCrudden, ed. (Oxford: Oxford University Press, 2014), 330.
[127] His rejection of the possibility of contracting oneself into slavery notwithstanding, Kant's awkward back-formation of slave from criminal in the above passage recalls John Locke's notorious death-contract. Locke, *Second Treatise*, 15–16; see Abdul R. JanMohamed, *The Death-Bound Subject: Richard Wright's Archaeology of Death* (Durham, N.C.: Duke University Press, 2005), 17. For a critique of necropolitics from the vantage of slave legal personhood, see DeLombard, *Shadow*, 81-86.
[128] Kant distinguishes those "*active*" citizens who are "fit to vote" from "*passive* citizens" whose dependent status deny them "civil personality." At one point, he suggests that enfranchisement distinguishes "citizens" from "mere associates in the state," apparently those whom he repeatedly designates "*passive* citizens." Acknowledging that "the concept of a passive citizen seems to contradict the concept of citizen as such" Kant concludes that the laws of the civil union should somehow ensure "that anyone can work his way up from this passive condition to an active one"; *Metaphysics* 6:314-15. Waldron reaches a similar conclusion regarding those included in "the dignity of a citizen; Waldron, "Citizenship," 329.
[129] For a discussion, see Ripstein, *Force and Freedom*, 300-323.
[130] Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge, MA: Harvard University Press, 1998), 16.
[131] The 1825 Act of Congress provides that if "any person shall steal a letter from the mail, the offender shall, upon conviction, be imprisoned no less than two nor more than ten years"; quoted in "Mail, "163.
[132] *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).
[133] See, for example, Kimberly M. Welch, *Black Litigants in the Antebellum American South* (Chapel Hill: University of North Carolina Press, 2018), 11, 64; Martha S. Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* (Cambridge: Cambridge University Press, 2018). Due to a combination of factors, however, freedom suits in Missouri did diminish significantly in the wake of *Dred Scott*; see Kelly M. Kennington, *In the Shadow of Dred Scott: St. Louis Freedom Suits and the Legal Culture of Slavery in Antebellum America* (Athens: University of Georgia Press, 2017), 176-81.
[134] The appearance of enslaved people in such formal proceedings was, however, the exception, not the rule. On "the barriers designed to limit black access to the legal process," see Christopher Waldrep, *Roots of Disorder: Race and Criminal Justice in the American South, 1817–80* (Urbana: University of Illinois Press, 1998), 22.
[135] Pratt, *Strangers*, 118.
[136] For a discussion of this question in connection with the English common law of deodands, see DeLombard, *Shadow*, 58, 331 n44.
[137] Agamben, *Homo Sacer*.
[138] Arendt, *Origins*, 295.
[139] David Brion Davis first acknowledges, then collapses, this difference in *The Problem of Slavery in the Age of Emancipation* (New York: Random House, 2014).

Arendt's own racism toward people of African descent compromised her analysis of racist oppression; see Kathryn T. Gines, *Hannah Arendt and the Negro Question* (Bloomington: Indiana UP, 2014).

[140] Weheliye, *Habeas Viscus*, 24.

[141] For a similar observation with respect to the Missouri bar, see Kennington, *Shadow*, 74-75.

[142] John Dewey, "The Historic Background of Corporate Legal Personality," *Yale Law* Journal 35, no. 6 (1926): 656.

[143] See Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights* (New York: Liveright-W.W. Norton, 2018), 44-473.

[144] Arthur W. Machen, Jr. "Corporate Personality (continued)," *Harvard Law Review* 24, no. 5 (Mar. 1911): 353.

[145] Blackstone, *Commentaries*, 1: 430.

[146] Winkler, *We*, 183. The case was *Northwestern National Life Insurance Company v. Riggs* (1906). As Winkler goes on to recount, corporations gradually attained liberty rights, notably the free speech rights granted to newspapers in the face of repressive taxation by Louisiana Governor Hughie Long; ibid., 231-376.

[147] Ibid., 47-51.

[148] Machen, "Corporate Personaity (Continued)," 348.

[149] *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819). Marshall's account has not gone uncontested: to paraphrase Arthur Machen, an artificial lake is not an invisible or an intangible lake, and Dartmouth College, like other corporations, certainly is a real entity that exists not "only in contemplation of law." Arthur W. Machen, Jr. "Corporate Personality," *Harvard Law Review* 24, no. 4 (Feb. 1911): 257.

[150] This is the source of Machen's own confusion: for Machen "the essence of juristic personality does not lie in the possession of rights but in subjection to liabilities," yet he forgets this incorporeal aspect of *all* legal personhood when he treats the legal personality of the corporation as a "metaphor" for the human being whom he then treats as the normative legal person; Machen, "Corporate," 263.

[151] "People's Pleasure Park Co., Inc., et al. *v*. Rohleder," *Virginia Law Register* 14, no. 7 (Nov. 1908): 548-49. https://www.jstor.org/stable/1102494?seq=1#page_scan_tab_contents. On the site's Confederate history, see Richard R.W. Brooks, "Incorporating Race," *Columbia Law Review* 106, no. 8 (Dec. 2006): 2050 n105.

[152] "People's Pleasure Park," 548.

[153] Notably, "Judge R. Carter Scott of the Circuit Court of Henrico found this title restriction repugnant" and "voided it as "an unreasonable alienation [and] contrary to public policy," while enjoining People's Pleasure Park's operations on the land until "the company or some one for it [paid Florence Rohleder] the market value on her property," at which point the company appealed. The Supreme Court of Appeals of Virginia did not take up the former issue. Brooks, "Incorporating," 2056.

[154] Ibid., 549. Subsequent litigation would pierce the corporate veil to endow corporations with the race or ethnicity claimed by a majority of their shareholders; see Winkler, *We*, 275-78; Brooks, "Incorporating," 2060-94.

[155] Welch, *Black Litigants*, 13.

[156] Ibid., 14.

[157] Richard Rohleder deposition quoted in Brooks, "Incorporating," 2051.

[158] I. Maurice Wormser, *Disregard of the Corporate Fiction and Allied Corporation Problems* (1927; Littleton, Co.: Fred B. Rothman, 1999), 26-27, 91; see also I. Maurice Wormser,"Piercing the Veil of Corporate Entity," *Columbia Law Review* 12 (1912): 496-518; For this characterization see Brooks, "Incorporating Race," 2057 n163 (citing Stephen B. Presser's *Piercing the Corporate Veil* [1991], §1:5, at 1-26 to 1-30.

[159] For a range of mostly late nineteenth-century examples, see Wormser, "Piercing."

[160] Wormser, "Piercing," 505.

[161] Wormser, *Disregard*, 27.

[162] My emphasis on the distinction between legal persons and humans leads me to a slightly different conclusion than that of Brooks who highlights "the difference between piercing the corporate veil (i.e., assigning corporate liability or status to shareholders) and assigning shareholder status or characteristics to the corporate entity," and specifically "to attribute shareholders' ascriptive features as if they were the corporation." Brooks, "Incorporating," 2057. In fact, from at least *Bank of U.S. v. Deveaux* onward, veil-

piercing involved attributing the shareholders' status as persons – specifically, citizenship – to corporations; key here is the attribution of the ascriptive features of a particular group of *human beings* to the artificial person.

[163] U.S. Const. art. 3, § 2. Perhaps the earliest reference to the corporate "veil" occurred in 1839: Connecticut Supreme Court of Errors Chief Justice Thomas Scott Williams, while acknowledging the corporate person as an "artificial, intangible being, created by the act of incorporation," noted that "there are cases, however, in which courts have drawn aside the veil and looked at the character of the individual corporators." *Fairfield County Turnpike Co. v. Thorp*, 13 Conn. 173, 179 (Conn. 1839).

[164] *Bank of the United States v. Deveaux*, 9 U.S. 61, 90-91 (1809).

[165] Corporations have gained inordinate power under U.S. law, Adam Winkler contends, not through the artifice of corporate personhood – which, he maintains, has historically served to constrain the rights of corporations while requiring their accountability – but, rather, due to the repeated occasions when courts pierce the corporate veil in order to treat the corporation as an association of rights-bearing natural persons and more particularly, as citizens with constitutional rights. Winkler, *We*, 364, see 380-81, 386-89. See also Leo E. Strine, Jr. "Corporate Power Ratchet: The Courts' Role in Eroding We the People's Ability to Constrain Our Corporate Creations," *Harvard Civil Rights-Civil Liberties Law Review* 51, no. 2 (2016): 423-80.

[166] U.S. Const. amend XIV, §1 (emphasis added), Winkler, *We*, 130. Winkler makes this claim in order to argue against a construction of the Fourteenth Amendment that would include artificial persons – i.e., the corporation – as well as natural persons. Winkler's own usage of "persons" and "people" as synonyms unnecessarily confuses his otherwise persuasive argument. See also Sanford A. Shane, "The Corporation is a Person: The Language of a Legal Fiction," *Tulane Law Review* 61 (1987): 587.

[167] Defense counsel Howard himself referred to this default legal person in his opening statement when he noted that, "Aliens, citizens of the different States, not naturalized as citizens of the United States, and free negroes – all have their respective rights and obligations – they are all *sui juris* – and may, or may not, be held sueable, or responsible in the civil and criminal courts of the United States"; "Mail Robbery," 166. Ignoring the slave's status as a criminally culpable legal person under the doctrine of "mixed character," he tried to argue that "with slaves, it is different," because "[t]hey have no legal rights or obligations"; ibid., 166. Howard was wrong, as Taney's ruling confirmed: slaves did have obligations as criminally liable legal persons.

[168] *Laws of a Public and General Nature, of the District of Louisiana, of the Territory of Louisiana, of the Territory of Missouri, and of the State of Missouri, up to the year 1824.* Vol. 1 (Jefferson City: W. Lusk and Son, 1842), 96. This was originally an 1807 territorial statute; revised in 1825 and onward, the statute continued to allow enslaved people to bring suit in their own names. On similar statutes in Arkansas, Florida, and Delaware, see Kennington, *Shadow*, 28.

[169] W.E. Burghardt, *The Souls of Black Folk; Essays and Sketches*, 2nd ed. (Chicago: A.C. McClurg, 1903), 77,79. Documenting the American South, https://docsouth.unc.edu/church/duboissouls/dubois.html.

[170] W.E.B. DuBois, "The Value of Agitation," *The Voice of the Negro* (March 1907), 110.