

‘SLAVERY’ AND THE JENA 6: A TRAGEDY IN THREE ACTS

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‘[W]e remain imprisoned by the past as long as we deny its influence in the present.’¹

I. PROLOGUE: ART . . . AND CRAFT

Law changes things. A world of received and perceived meaning lies within this three-word mantra—the mantra of the post-Hurstian² legal historian. For the law-in-history legal

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¹ *McCleskey v. Kemp*, 481 U.S. 279, 344 (1987) (Brennan, J., dissenting). Given the relevance of his words to the topic at hand, the full drift of Justice Brennan’s comment should be recovered here:

In more recent times, we have sought to free ourselves from the burden of this history. Yet it has been scarcely a generation since this Court’s first decision striking down racial segregation, and barely two decades since the legislative prohibition of racial discrimination in major domains of national life. These have been honorable steps, but we cannot pretend that in three decades we have completely escaped the grip of a historical legacy spanning centuries. Warren McCleskey’s evidence confronts us with the subtle and persistent influence of the past. His message is a disturbing one to a society that has formally repudiated racism, and a frustrating one to a Nation accustomed to regarding its destiny as the product of its own will. Nonetheless, we ignore him at our peril, for we remain imprisoned by the past as long as we deny its influence in the present.

Id. His words are as insightful and true today as they were the day he first wrote them, twenty years ago. This paper is one more illustration of this poor ‘truth.’

² Here, of course, I mean to doff my intellectual cap to and give due

historian,³ the simple fact that conflicting parties turn to law for the resolution of real differences is a truth of the very first order.⁴ Of equal primacy is the companion truth that, as law completes its received task of preferring one pleading party while concomitantly deferring the other, inevitably and inexorably, things change. The self-conscious appeals to law for these tasks, the preferences and deferments, and the inevitable personal, social, communal and even spiritual changes that follow,⁵ form the grist of the work of the law-in-society oriented legal historian.

deference to the erstwhile *paterfamilias* of the 'law in action' legal history school, Professor J. Willard Hurst. Through the breadth of my own work, my intellectual and spiritual debt to him and his remains plain.

³ By use of the term 'law-in-history' here, I am highlighting the two major schools of legal historical scholarship broadly at play in the American legal academy at present, and I am choosing between them. The classically trained and focused legal historian is a 'history-of-law' type, applying the academic tools of the historian to the subject of her study—law—to trace out its incremental development over time. Thus, the subject of study is 'law' and tools of the historian outline the 'story' over time with regard to that subject. A good example here would be the English common law doctrine of *felony murder*. The 'history-of-law' type would begin with the law, here 'felony murder,' and trace the inevitable, incremental limits of the doctrine over time, to its final abolition in 1957. The second of these academic schools is short-formed 'law-in-history' and the dynamic is something quite opposite of that of the first school. The subject at issue here is *society* and the means by which the story of its change and development is discerned. The *lens* through which observations are made and 'meta-data' is developed, if you will, is law. For example, the picture of America's phenomenal release of entrepreneurial energy through the mid-nineteenth century becomes sharpest and clearest when the lens of law is added. See, e.g., Lemuel Shaw's critical *Commonwealth v. Alger*, 61 Mass. 53 (Mass. 1853), or Roger Brooke Taney's enormous majority opinion in *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837). Thus, for the 'second school' legal historian, the story of the development of law over time gives way to the comparatively more interesting story of the development of culture through means of law. For this historian, law is posited as an inherently dynamic force in the development and change—positive or negative—in the life of the culture it is ostensibly marshalled to serve. In this second school, then, laws are not merely 'factual' but 'arti-factual'; this value-added is difficult to over-appreciate.

⁴ In the American context, this law-and-culture dance has gone on for years, in fact throughout the whole of American history. This is not surprising in a nation like our own that imagines itself in its most orthodox identity as a nation of 'laws and not men.' In such 'rule of law' nations, private conflicts inevitably morph into legal problems and, in this form, become artifacts of great value and interest for legal historians and others.

⁵ The intellectual energy behind this concept of 'preference' and 'deferment' is more straightforward than might initially appear. The legal historian understands that the distillation of personal or communal conflicts into legal problems comes about when the opposing parties turn to the formal, public processes of law for resolution of their often essentially private conflict. In these

A familiar example from American history may serve to elucidate and underscore the configuring truth contended for here. Having treated their aboriginal territory from a high water mark of ninety million acres⁶ to a patch of land no more than a tenth that size in the northwestern corner of Georgia, the Cherokee Nation by 1830 found even this small homeland threatened by their recalcitrant treaty partner, the untrustworthy, varying leadership of the state of Georgia.⁷ At this late date, however, they decided not to seek remedy by returning to the treaty table that had so consistently betrayed them before, but turned instead to the ‘white man’s law’ through an orthodox, hyper-American process and venue: suit in original jurisdiction before the United States Supreme Court.⁸ Engaging the services of Daniel Webster himself, among others, and armed with a case they simply could not lose,⁹

situations the parties have agreed to some level of formal arbitration toward settlement of the conflicts, with ‘law’ being accepted and empowered as arbiter. In essence the law will effectively *prefer* one of the conflicting parties—raise up, empower and legitimate one—while necessarily *deferring* the other, with corresponding opposite consequences. Whether on a micro or a macro level (and historians well understand that the most sweeping cultural changes can derive from the smallest of legal decisions), this final act of preference and deferment creates dynamic social change, giving ‘life’ to the law and its outcomes, for the law-in-history scholar.

⁶ At the time of original English settlement in the ‘New World,’ Cherokee Nation territory covered what is now most of West Virginia and the western tip of Virginia, the western third of North Carolina, the western half of South Carolina, the entire north third of Georgia, the northern piece of Alabama and virtually all of Tennessee and Kentucky. By a continual series of forced cessions commencing with the Treaty of Holston in 1791, in which the Cherokee were promised perpetual autonomy and independence in their carefully bounded remainder by President Washington himself, they found themselves continually challenged within their steadily dwindling residual regularly thereafter. See *generally* THE CHEROKEE INDIAN NATION: A TROUBLED HISTORY (Duane H. King ed., Univ. of Tennessee Press 1979), and THE CHEROKEE NATION: A HISTORY (Robert J. Conley, Univ. of New Mexico Press 2005).

⁷ Georgia’s history of solemnly treating and then quickly breaking the pledge with the Cherokee and other native peoples became so notorious that the Indian treatiers came to refer to the tangible outcomes of these negotiations as “talking leaves.” Sardonicly, Indians noted that whenever the ‘inviolable’ treaties no longer suited the American signatories, they would blow away, like so many talking leaves. See *generally* <http://ngeorgia.com/history/alphabet.html>.

⁸ Cherokee Nation v. Ga., 30 U.S. 1, 1 (1831).

⁹ Rudimentary constitutional procedure clearly favored the Cherokee in this dispute. As their claim to territorial sovereignty and inviolability rested squarely on a treaty with the United States, in any dispute with contravening acts of a *petit* legislature, as was the case here with their defendant disputants, the ‘Supremacy Clause’ of the U.S. Constitution (Article VI) mandated a result preferring the treaty over the *petit*-legislation, as ‘supreme.’ U.S. CONST. art. VI. The language of Article VI was unequivocal in this way: “This Constitution, and

named plaintiff and named defendant went before law to seek resolution regarding their difficult, important problem. Mr. Chief Justice John Marshall's famous preference and deference on behalf of the near unanimous majority in that case ineluctably affected both litigants and nation in the form of explosive expansion of the 'Georgia Gold Rush,' on the one hand,¹⁰ and the *nu na hi du na tlo hi lu I*,¹¹ on the other.¹²

If the contended-for premise is accepted as relevant and true, a related premise naturally follows for the 'law-in-history' legal historian: metaphysically, "the past is not the past . . . [i]t is the *context*."¹³ In this school of legal history, there is an organic link

the Laws of the United States . . . and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.* Within that reality, the very opening sentence of Chief Justice Marshall's famous opinion makes the point fully:

This bill is brought by the Cherokee nation, praying an injunction to restrain the state of Georgia from the execution of certain laws of that state, which, as is alleged, go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force.

Cherokee Nation, 30 U.S. at 1.

¹⁰ The great Chief Justice wrote the still remarkable opinion for the majority of the bench, as was his iron-fisted custom in all cases 'of moment.' Through separate opinions, he was joined by Mr. Justice William Thompson and Mr. Justice Henry Baldwin. Native New Yorker and experienced Indian man Mr. Justice Smith Thompson dissented, in "[a]rguably . . . [his] finest opinion . . ." and certainly his most important. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 872 (James W. Ely, Jr. and Joel B. Grossman eds., Oxford Press 2005) (1992). He was joined in dissent by the famous Mr. Justice Joseph Story.

¹¹ "The trail on which we cried..." or, familiarly, the 'trail of tears'."

¹² Begun in 1828 by a South Carolinian kicking a North Georgia rock and finding gold in it, or a North Carolina prospector finding gold in a North Georgia creek, or a Georgian and/or his slave finding it in another such creek in North Georgia, all of the probably apocryphal stories had three things in common that were accurate at some level and deeply troublesome for the Cherokee: gold, 'white' persons, and the duly treated and supposedly sacrosanct Cherokee territory. By 1831, unauthorized fortune seekers in that territory numbered from 4,000 to upwards of 15,000 prospectors and, as matters turned out after the notorious *Cherokee Nation* case, Cherokee presence in their own treated territory was effectively no more. See generally DAVID WILLIAMS, THE GEORGIA GOLD RUSH: TWENTY-NINERS, CHEROKEES, AND GOLD FEVER (Univ. of South Carolina Press, 1993).

¹³ We have this from contemporary Canadian essayist and political philosopher John Ralston Saul. John Ralston Saul, *Inaugural LaFontaine-Baldwin Lecture*, in A DIALOGUE ON DEMOCRACY 2-3 (Rudyard Griffiths ed.,

between significant present day events and a discrete, discernible past—often a past involving law at some visceral level. Legal history posits a more or less distinct line tethering past law-related events to present realities, and legal historians make it their professional life’s work to trace out those links, their connections, and their consequences. In this way ‘the past’ becomes a unique resource for present-ist social thinkers; in understanding the historical roots of present-day controversies, the inquiring culture gains deeper understandings of the ‘why’ of the problem, and the ‘what’ of effective solutions, through appreciation of its discrete contextual past. This is the hope, at least, and the very best use and highest calling of the *art* of legal history, and the *craft* of the legal historian.

One of the very best examples of these twin intellectual concepts in living action, individually and in tandem, came straight from relatively recent headlines, and the modest little community of Jena, Louisiana. We are all popularly familiar with the recent past events dragging the tiny settlement of 3,000 persons from rural obscurity into international prominence, and so only the barest recitation of the events in question is necessary here. On the

2006). The full flavor of this important thought is better set out in the breadth of the quote:

But the past is not the past. It is the context. The past memory—is one of the most powerful, practical tools available to a civilized democracy. There is a phrase that has been used over the centuries by various writers in various countries: History is an unbroken line from the past through the present into the future. It reminds us of our successes and failures, of their context; it warns us, encourages us. Without memory we are a society suffering from advanced Alzheimer’s, tackling each day like a baby with its finger stuck out before the flames.

Id. Saul’s meaning here is plain, and it continues to impress me as the clearest statement implicating at the deepest level the sought-after and hoped-for *practical value* of the legal historian’s work. More to the point, in my professional view, it is profoundly true. <http://www.powersource.com/cocinc/history/trail.htm>. Interestingly, *context* is a term of art in the academic field of archeology, describing an event in time that has been physically preserved by the archeological record. This would seem to offer a compatible application of the term in purely historical circumstances. The careful reader will appreciate the difference between the present preferred phrase—and its meaning contended for here—and the famous Shakespearean aphorism, “[the] past is prologue” WILLIAM SHAKESPEARE, THE TEMPEST act 2, sc. 2 (more fully, “Whereof what’s past is prologue, what to come in yours and my discharge”). The latter makes a point very different than the one at the heart of Saul’s observation, and, in any event, beside the point contended for here. Thanks are due to my well-read brother-in-law, Daniel Richard, for this valuable lead.

morning of September 1, 2006, for reasons that have resisted full discovery,¹⁴ several nooses were found hanging from a tree in front of Jena High School, an integrated school of some 500-plus students in Jena, Louisiana.¹⁵ This occurred the day after a black student had publicly asked the principal in a school assembly whether he could sit under the tree, usually an informal gathering place for white students to the general exclusion of the black students.¹⁶ The events ensuing, including perceived lenient treatment of the responsible students,¹⁷ interracial fights

¹⁴ The fact that nooses were found hanging from the tree is established: at least two and possibly three, according to conflicting reports. National Public Radio reporter Wade Goodwyn reported "three nooses hanging from the shade tree in the courtyard," while Associated Press reporter Todd Lewan pointedly put the number at "[t]wo nooses . . . not three . . ." See Wade Goodwyn, *Beating Charges Split La. Along Racial Lines*, N.P.R., Jul. 30, 2007, available at <http://www.npr.org/templates/story/story.php?storyId=12353776>, and Todd Lewan, *Black and White Becomes Gray in La. Town*, A.P., Sep. 22, 2007 available at http://www.foxnews.com/printer_friendly_wires/2007Sep22/0,4675,APlaceCall edJena,00.html. While it is reasonably assumed that they appeared for essentially racial reasons, one report suggests that their presence was in fact a prank aimed at white members of a school athletic team. Craig Franklin, *Media Myths About the Jena 6*, THE CHRISTIAN SCIENCE MONITOR, Oct. 24, 2007, available at <http://www.csmonitor.com/2007/1024/p09s01-coop.html>. What is clear is the racial meaning assigned to the symbol by members of both racial communities, regardless of countervailing practical intention and the ensuing conflagration.

¹⁵ At the time in question, the racial profile of the consolidated high school was approximately eighty percent white and ten percent black, with various other ethnic categories managing the remainder. <http://www.city-data.com/city/Jena-Louisiana.html>. While this does qualify as an 'integrated school,' the demographic profile is nevertheless telling.

¹⁶ Far from atypical in erstwhile integrated educational settings in America, each racial group apparently tended to keep close company with its own in the Jena high school setting. Black students tended to congregate on bleachers near a school auditorium, while the tree, apparently known colloquially as the 'white tree' or the 'prep tree,' was a gathering place for white students.

¹⁷ Initially, the three white students responsible for the nooses were recommended for expulsion by the school principal, though that recommendation was overruled by the LaSalle Parish Board of Education, which action was supported by School Superintendent Roy Breithaupt. In justifying his decision to interested parents at that time, most particularly to the African-American parents challenging his leniency, he summed up his sense of the animus behind the action with the simple phrase, "Adolescents play pranks . . ." Howard Witt, *Racial Demons Rear Heads*, CHI. TRIB., May 20, 2007, §1, at 3. It was initially reported that the offending students received three days 'in-school' suspension for their actions, further aggravating parents interested in swift, substantial punishment in consequence, though it appears the ultimate response was, in fact, harsher. See Wade Goodwyn's report, *supra* note 14.

following,¹⁸ including a particular attack by six black students—the ‘Jena 6’—on one white student,¹⁹ and the harsh prosecutorial response thereto,²⁰ with widespread public protests resulting, make up the substance of the ‘Jena 6’ incident.

It does not take a trained historical eye to see in this contemporary incident vestiges of America’s tortured racial past, and the direct, strong, linear connection between that past and this present; indeed, each distinct phase of African-America’s hyper-difficult interface with the American story is symbolized in this contemporary tragedy. In the tough stance of the District Attorney—the Law—both before the attack²¹ and afterward, we see vestiges of America’s awful slavery past: the master class reacting swiftly and decisively in the face of perceived dangerous

¹⁸ A rash of “interracial fights” immediately followed the noose incident, prompting the school principal to invite LaSalle Parish District Attorney J. Reed Walters to address an all-school assembly on September 6, 2006, some four days after the event. See Elaine McKewon’s report, *Jena Six Timeline*, LOUISIANA DAILY NEWS, Sep. 21, 2007, and see Jason Whitlock, *Jena 6 Case Caught Up in Whirlwind of Distortion, Opportunism*, KANSAS CITY STAR, Sep. 29, 2007, at B11.

¹⁹ On December 4, 2006 a seventeen-year-old Jena high school student was attacked at school by six black students, bloodied and suffering a loss of consciousness at some point. He was treated at the local hospital emergency room and released, with facial swelling, bruises, and concern about a possible concussion. He was able to attend a school function that evening, though he left early due to discomfort.

²⁰ The six students were immediately expelled from high school. Five—ages sixteen, seventeen, seventeen, seventeen, and eighteen—were charged with attempted second-degree murder. The sixteen-year-old was tried and convicted in adult court and was facing up to twenty-two years in prison at the time of the intervening public protest; he eventually pled guilty to the reduced charge of battery (clearly resulting from the protests) and received an eighteen-month sentence (less time served) to be served in a Louisiana State juvenile facility. The others faced reduced charges in adult court. The sixth student, aged fourteen, faced charges as a juvenile. See generally <http://cbs11tv.com/politics/jena.6.mychal.2.507349.html>.

²¹ At the school assembly called in the immediate wake of interracial strife following the noose display, the command speaker, District Attorney Walters, made the following unfortunate pronouncements: “I can be your best friend or your worst enemy. With the stroke of a pen I can make life miserable on you or ruin your life.” Jason Whitlock, *Jena 6 Case Caught Up in Whirlwind of Distortion, Opportunism*, KAN. CITY STAR, Sept. 30, 2007, at B11. While Walters later denied that the remarks were directed at the black students, the students reported that he was looking directly at them when the remarks were made and, in any event, the students believed that to be the case. Apart from its affected hyperbole, one can easily find the ‘master’s’ unmitigated voice of careless power familiarly addressing any insolence of the controlled class. That certainly appears to have been the view of the students in this regard.

servant class insolence.²² The noose speaks symbolically of America's dark post-bellum Reconstruction past, of course—its evil 'Jim Crow' phase—when literally thousands of African-origin Americans came under the vicious, extra-legal care of feckless and bloodthirsty mobs, at awful personal and communal cost.²³ The late response of the thousands descending on Jena in the aftermath of the first trial of Mychal Bell brought instant memories of America's mid-twentieth century period—its Civil Rights period—in all its energy, pathos and glory.

If the best work of history consists in developing palpable, rational, present-day answers to interesting historical questions, then the most compelling question to be answered in the 'Jena 6' controversy is the most obvious: how did such a comparatively minor incident grow into the major international controversy it became? And in this question we see the value of the work to which the discrete sub-discipline of legal history is committed. For the question cannot begin to be satisfactorily addressed without close reference to the incidents of the past discussed above: the key seasons of African-American's troubled relationship with the American experiment, seasons effectually wrapped in law at every turn. It is in more fully appreciating both the relevant legal past and its key practical and even spiritual touch-points with the present as reified in the 'Jena 6' controversy, that the question finds its rest in the relevant context of history. Specifically, legal history is singularly suited to recovering the influence of that past

²² And this, with an arbitrariness that abrogates the rule of law and, indeed, menacingly marginalizes it. In his "I can . . . ruin your life" invective, vestiges of a law of whim and convenience in active opposition to the rule of law would not have been lost on the African-American hearers at least. *See id.*

²³ In this period, countless numbers of African-Americans were subject to mob attacks decidedly outside the protective reach of the 'rule of law,' and upwards of 3,500 fell victim to extralegal murder during a forty-year period beginning in the 1880s, by necessarily unofficial count. The famous Tuskegee Institute report on lynching put the figures at 3,437 for African Americans (1952 NEGRO YEARBOOK 275-279 (Jessie P. Guzman ed., 1952)), a figure considered to be conservative by some historians. Robert A. Gibson, *The Negro Holocaust: Lynching and Race Riots in the United States, 1880-1950*, available at <http://www.yale.edu/ynhti/curriculum/units/1979/2/79.02.04.x.html>. We short-form these violent, illegal actions as 'lynchings,' but this short-form has the natural tendency to somewhat sanitize what was in fact a base and diabolical condition. A remarkable and important historical treatment preserves too well this grisly proto-American story. *See generally* PHILLIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* (Modern Library Edition 2003) (2002).

on this present, and uniquely prepared to imagine effective solutions to surviving present-day problems following.²⁴

But in order to fully accomplish this task—to more wholly appreciate the modern energy of ‘Jena 6’ from its relevant, influencing past—a further related premise must be added to the first two to fully close the historical loop and shed maximum light in the inquiry. More conjecture than axiom, hypothesis than proof, it is as simple in form and presentation as the others and as rich in complexity and intellectual nuance as they inevitably prove to be: *jurisprudence matters*. By *jurisprudence*, it is necessary for me to mean little more than the typical and well-accepted recoveries of that term: “[t]he philosophy of law, or the science which treats of the principles of positive law and legal regulations . . . ,”²⁵ “the science of law . . . which has for its function to ascertain the principles on which legal rules are based . . . ,”²⁶ “the philosopher’s effort to understand the legal order and its role in human life . . . ,”²⁷ toward the ultimate constructive end of “raising fundamental questions and seeking the truth”²⁸ What is far more interesting and valuable, perhaps, is what is meant by the term *matters* as a qualifier of the concept word it succeeds. Rather than attempting to explain the connection here, in the abstract, I ask the reader’s short

²⁴ I do not mean to suggest that legal history occupies a *singular* place in the useful task of truly understanding the ‘Jena 6’ incident. Indeed, each and every of the human social sciences has something to add to that task of understanding, from sociology to psychology to economics, to philosophy and beyond. However, the history relevant to this particular controversy is steeped in law in a particular way. The very institution of slavery itself was prototypically a *legal* institution, created by positive law and maintained across every nook and cranny of the land by jurisprudentially similar legal edifices. It is the sheer, frightening *extra-legality* of the out-of-doors actions of the ‘lynch mob’ in the Reconstruction era (and beyond) that gives the period its outrage and its cold chill. The very goal of the Civil Rights era as a measurable solution to legally buttressed racism in post-World War II America was to fight law with law, seeking to trump the positive law of American apartheid with its jurisprudential better and master: the *natural law* of the human experience. Thus, while each social science has its rightful mode of inquiry into this controversy, given the particular related circumstances, legal history may have just a bit more to add.

²⁵ BLACK’S LAW DICTIONARY 993 (4th ed. 1968).

²⁶ THE DICTIONARY OF ENGLISH LAW 1031 (Clifford Walsh ed., 1959).

²⁷ READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY iii (Morris R. Cohen & Felix Cohen eds., 1951). Within this definitional context, the Cohens rightly reference Oliver Wendell Holmes’s evocative incantation of philosophy as a determined effort “[t]o see so far as one may, and to feel, the great forces that are behind every detail” *Id.* This observation applies with all the greater vigor to legal philosophy, or *jurisprudence*, and is especially applicable to the present project.

²⁸ JURISPRUDENCE IN A NUTSHELL: LEGAL PHILOSOPHY 1 (1993).

indulgence while I instead elucidate the relationship by showing it, in the context of the problem set out above central to this study; the reader's attention is especially drawn to 'Act III' in this regard.

For purposes of the present, it will be the modest goal of this paper to consider the twenty-first century American incident not against the panoply of African-American/American history, but rather against but one piece of it: 'Jena 6' and American slavery.²⁹ Specifically, I would like to explore the broad stresses of that particular history on this event, considering the way in which the energy of the one may have influenced the shape of the other, though I will approach this task from a very particular direction. While it is intellectually legitimate to consider the details of any imagined connection between the contemporary 'Jena 6' controversy and America's slavery history, it is my desire here instead to explore that relationship in its *negative* rather than its positive. Clearly the very influences of our discrete slavery past are not difficult to imagine or see reflected in the present details of the 'Jena 6' controversy. But how might Jena have looked against a parallel historical backdrop, a backdrop of *un-slavery*, if you will?

While our historical slavery past 'is what it is,' as with any history, it is/was very 'thin' in places, very susceptible to great changes—counter-histories—at the variance of relatively small things. Keeping the contemporary 'Jena 6' event in mind, I would like to consider three of those 'thin points' in the edifice of our slavery history—places where its life as a foundation-stone of the dystopic American slavery story was very much in the balance—and to ask naturally following questions, about Jena and beyond. It should be made clear that I do not intend to engage in an essentially counter-factual exercise: how would a 'different' slavery history have affected the 'Jena 6' events?³⁰ Rather, it is my desire to use the 'alternative histories' chronicled and explored herein to highlight the gossamer-thin strands by which any nation's history is ultimately woven together, for better and for worse. If I am successful, I believe that interesting consequences of this 'negative history' will naturally present themselves, relating to the

²⁹ I should note here that the panel on which this paper was originally delivered owes a real debt of thanks to Professor Donald Tibbs of the Drexel University Earle Mack School of Law for the intellectual energy behind the concept. As an exercise in 'active' legal history, it has been very interesting tracing a contemporary dilemma through the various vestiges of its historical roots, and I am grateful to Professor Tibbs for the 'good idea' and the opportunity of being even a small part of its realization.

³⁰ Indeed, if I am successful in fully exploring the 'un-histories' at the center of the present story, I will have much bigger fish to fry than those produced by anti-intellectual counterfactuals alone.

‘Jena 6’ tableaux, helping to place the present-day phenomenon in a compelling historical past.

With that in mind, this work will highlight three key moments in the passion play of America’s slavery history, arguably reflecting on the much later ‘Jena 6’ affair. The first—or ‘Act I’, if you will, carries us back to America’s turbulent eighteenth century revolutionary days, involving what would become the most sacred of the icons marking the character of its civil religion. Act II moves us forward almost a decade from the first, highlighting an incident less familiar than that anchoring Act I, but no less important in the slavery history of this nation or the shadows it casts across the face of Jena, Louisiana, centuries thereafter. Act III brings the before-mentioned issue of jurisprudence directly to the fore, where, through the ministrations of famous western late-Enlightenment political philosophers Thomas Hobbes and John Locke, we may consider how such jurisprudence might ‘matter’, as reflected in the Jena affair. Each act will be directly grounded in the ‘Jena 6’ history, with naturally following consequences being explored in conclusion.

II. SLAVERY AND JENA: PRESENT . . . AND PAST

*A. Act I: “to prohibit or to restrain this execrable commerce . . .”*³¹

The counter-intuition of prosecuting a popular revolution on the reified truth of a natural right to individual liberty while maintaining anti-revolutionary, anti-natural human slavery was not lost to the eighteenth-century American mind. As early as 1768, revolutionary rhetoric in the form of a popular Massachusetts circular claimed “essential unalterable right[s] . . . sacred and irrevocable . . .” inuring to “the subjects within the realm . . .” logically including African-American ‘subjects.’³² English minister

³¹ Thomas Jefferson, *Original Rough Draught of the Declaration of Independence*, in *A CASEBOOK ON THE DECLARATION OF INDEPENDENCE* 263 (Robert Ginsberg ed., Thomas Y. Crowell Co. 1967) (1834) [hereinafter *CASEBOOK*].

³² This circular letter is referenced in EDWIN CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* 79 (Cornell Univ. Press 1955). To be sure, the rights being argued for in the circular, “natural and constitutional,” were not directly connected to the human right to freedom and autonomy at the heart of the revolutionary slavery question, but rather were concerned with exclusive personalty rights against arbitrary infringement by the British Crown. Nevertheless, the intellectual heft undergirding the quote plainly applies to the situation in question, and that heft was firmly within the American

turned American Revolutionary John Allen wrote of “trifling patriots . . . advocates for the liberties of mankind . . . [while] continuing this . . . abominable practice of enslaving your fellow creatures”³³ Medical doctor and Pennsylvania revolutionary hero Benjamin Rush (himself a signatory to the Declaration of Independence) noted, poetically, for his revolutionary contemporaries, “[t]he plant of liberty is of so tender a nature, that it cannot thrive long in the neighbourhood of slavery.”³⁴ It was against this very backdrop of erstwhile hypocrisy that the American Continental Congress itself pledged in 1774 to discontinue the African slave trade everywhere, formally living up to that pledge on April 6, 1776, when it voted “that no slaves be imported into any of the thirteen colonies”³⁵

Count the famous Thomas Jefferson himself among those taking special note of the uncompromised necessity of harmony in fledgling America’s treatment of African-origin slavery in its midst against the backdrop of its war for liberation from ‘slavery’ under the British Crown. In instructions to the Virginia Delegation on the eve of the First Continental Congress, Jefferson self-consciously noted “the rights of human nature . . . [are] deeply wounded by this infamous practice . . .” of African slavery, and that “[t]he abolition of domestic slavery is the great object of desire . . .” among the colonies of America.³⁶ Himself an owner of slaves and personally

popular mind at that time, as illustrated by the quote. In point of fact, historian Philip Foner reminds us that “anti-slavery literature” and, by extension, the pristine jurisprudence undergirding it, “had been written in this country from the earliest colonial days.” Philip S. Foner, *African Slavery in America*, in 2 THE COMPLETE WRITINGS OF THOMAS PAINE 15 (Philip S. Foner ed., 1945).

³³ JOHN ALLAN, *The Watchman’s Alarm*, referenced in BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 240 (1947) [hereinafter IDEOLOGICAL ORIGINS]. In the same vein, include Puritan Minister Levi Hart, who put the matter rhetorically to the Revolutionary public in his pamphlet *Liberty Described and Recommended* (1775), when he noted America’s business with “the unhappy Africans . . . enslave[d] . . . for life” and continued “For how, when the colonists themselves ‘are the tyrants . . .’ could they plead for freedom [from England] . . . ? What inconsistency and self-contradiction is this . . . ! When, O when shall the happy day come, that Americans shall be *consistently* engaged in the cause of liberty?” IDEOLOGICAL ORIGINS at 243 (emphasis in the original).

³⁴ BENJAMIN RUSH, *On Slave-Keeping* (1773), reprinted in THE SELECTED WRITINGS OF BENJAMIN RUSH 17 (Dagobert D. Runes ed., 1967). While similar sentiments were not universal in the eighteenth-century American mind, they were certainly plentiful and regular.

³⁵ IDEOLOGICAL ORIGINS, *supra* note 33, at 246.

³⁶ 1 THOMAS JEFFERSON, *A Summary View of the Rights of British America*, August . . . , in THE WRITINGS OF THOMAS JEFFERSON 421, 440 (Paul L. Ford ed., 1892).

caught in the clinging trap of the personal convenience of life there under, his opprobrium with the institution was nevertheless legendary, extending into both personal correspondence and public life. Simply put, if revolution-era Jefferson was an ‘owner’ of other human beings, his written reflection at least had him as an uncomfortable custodian of such, ideating and chronicling against the institution for himself and the nation he would practically help create. Thus, in drafting the hyper-famous aphorism in the most significant writing assignment of his life—“We hold these truths to be Self-evident; that all men are created equal . . .”—we can be satisfied that he meant it in its most expansive, naturalistic form.

But perhaps more portentous even than this iconic aphorism are *other* words of Jefferson’s—powerful words, consistent with his articulated convictions and drafted directly into the *Declaration of Independence*, though fated never to become a part of that great document. For among the catalogue of indiscretions of King George III necessitating the revolutionary response of the American colonies, the following unequivocal passage from Jefferson’s draft *Declaration* was at least in the drafters’ minds:

[H]e has waged cruel war against human nature itself, violating its most sacred rights of life & liberty in the persons of a distant people who never offended him, captivating & carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither³⁷

Jefferson shamed in his draft that these were “persons . . . people,” not “property,” who were being victimized in this “piratical warfare . . . of the *CHRISTIAN* King of Great Britain . . . ,” emphasizing both humanity and inhumanity by adding that the King was “determined to keep open a market where **MEN** should be bought & sold”³⁸ Added to this awful work of the King was the fact that, in the face of the above, he “prostituted his negative for suppressing every [colonial] legislative attempt to prohibit or to restrain this execrable commerce”³⁹ Finally,

³⁷ CASEBOOK, *supra* note 31.

³⁸ *Id.* at 263. In examining Jefferson’s handwritten draft of this document, it is clear that he went to considerable lengths in rendering the three-letter word **MEN** in the writing, making the letters of that word three or even four times the size of any other of the many letters in the draft, capitalized in his own unsteady hand. Without a doubt it was the single most dramatically emphasized word in the entire draft.

³⁹ *Id.*

“that this assemblage of horrors might want no fact of distinguished die . . . ,” Jefferson closed his prose assault with what was to him the greatest indignity of all:

[H]e is now exciting those very people to rise in arms among us, and to purchase that liberty of which *he* has deprived them, by murdering the people upon whom *he* also obtruded them; thus paying off former crimes committed against the *liberties* of one people, with crimes which he urges them to commit against the *lives* of another.⁴⁰

Placing the whole jeremiad last, for added emphasis, in his drafted twenty-four-point parade of horrors against the King, and employing in it the most words and the most passionate language of any on the list,⁴¹ Jefferson had a two-fold agenda at least in adding this remarkable paragraph to his draft. First, he understood in his prescient way that such a document as the one he was drafting would garner great attention from the other interested ‘new world’ European contestants. In this way, with this paragraph, he hoped to embarrass the King before that coterie, winning a victory to the colonies in the ‘war of sympathies’ inevitably accompanying the anticipated hot military war to come. Second, importantly, further anticipating victory in that expected war, Jefferson sought to co-opt the high ground of universal freedom for the nation coming forth, immediately consigning human slavery to its own pre-national history.⁴² However, Jefferson’s best intentions on this critical point were destined to

⁴⁰ *Id.* at 264, emphasis in Thomas Jefferson’s own hand.

⁴¹ *Id.* The diatribe continued for 168 words and employed some of the most scathing and unequivocal phrasing of any in the entire draft document. The next longest pejorative paragraph in the list used fifty-three words.

⁴² His own reality as a slaveholder notwithstanding, Thomas Jefferson’s personal antipathy toward slavery was outstripped only by his fear of it in any fashion as an institution in the post-revolutionary republic he and many of his peers and contemporaries imagined. His actions in this regard were only a beginning. His efforts to limit the reality of human slavery in the American Republic were varied and intense, and expressed at every level of his personal and political influence, local, state, and national. Such a paragraph in its initiating *Declaration* would pronounce a first clear word on the difficult issue in favor of natural, universal human freedom. To the extent the document came to be revered as foundational to any nation emerging victorious from the revolution, that ‘first word,’ consistent with the natural law logic undergirding all of it, should prove a difficult one to ignore. This reality is exactly the thing for which Jefferson had played.

fall entirely unrealized, and a nation's history would be profoundly defined prior to its own national existence.

When Jefferson's 'draught Declaration' came before the Continental Congress for review and consideration beginning July 1, 1776,⁴³ there was reason for some optimism regarding the anti-slavery clause in question. Just the previous April—April 6, to be exact—the Congress had passed an omnibus anti-slave importation resolution, namely, “[t]hat no slaves be imported into any of the thirteen United Colonies.”⁴⁴ It was not a ‘universal abolition’ resolution, to be sure, and the all-but-assured motive behind its passage was Lord Dunmore’s notorious Proclamation offer of pardon to “all *indented servants, negroes, or others* (appertaining to the rebels) . . . that are . . . willing to bear arms . . .” in the service of His Royal Majesty against their obstreperous, rebellious colonial masters.⁴⁵ But there was in fact a good deal of true anti-slavery sentiment in Revolutionary America, both in the Continental Congress and popularly abroad, and, given the centrality of Jefferson’s universal equality concept in its preamble, morality and logic clearly lay on the side of its inclusion in the draft. However, as would prove to be the case with African-origin American slavery time and again thereafter, morality and logic

⁴³ Having taken under consideration a ‘motion for independence’ from Britain in its June 7, 1776 session, the Continental Congress four days later struck a committee of five to own the enormous task of drafting a suitable supporting document. Included in that Committee were no less colonial stars than Robert Livingston of New York, Connecticut’s Roger Sherman, John Adams, Benjamin Franklin, and the man to whom the drafting task ultimately fell, Thomas Jefferson. The ‘Committee of Five’ would report Jefferson’s draft to the Congress on Friday, June 28, 1776, that body resolving itself into a ‘committee of the whole’ on the following Monday, July 1, 1776, for deliberation and final approval. See generally DAVID HAWKE, *A TRANSACTION OF FIVE MEN* (1964), and PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* (1997).

⁴⁴ 4 J. OF THE CONTINENTAL CONGRESS 258 (1776).

⁴⁵ *Response to Lord Dunmore’s Proclamation (Nov. 1775)*, in *THE AMERICAN REVOLUTION: WRITINGS FROM THE WAR OF INDEPENDENCE* 82 (John Rhodehamel ed., 2001). Lord Dunmore’s wartime stance regarding American ‘negro’ slaves particularly, and the vulnerability of the colonies to such mercenary emancipation tactics generally, was a matter of grave concern to the American Revolutionary brain trust in considering the details of the war. Given the very pragmatic political considerations, on both sides of the ‘war equation,’ around this question of African-American bondsmen and the Revolutionary War, this is all but assuredly the major impetus behind the actions of the Continental Congress around this issue. For historical support for this point, see JOHN M. LUDLOW, *EPOCHS OF MODERN HISTORY: THE WAR OF AMERICAN INDEPENDENCE 1775 – 1783* 118 (Longmans Green and Co. 1876).

would have precious little to do with politically motivated outcomes ultimately deciding the question.

As the story of the excising of Jefferson's bold anti-slavery invective from the final draft of the *Declaration* has been told by virtually all of his major biographers, there is no need to recall it in detail here. No friend of the public vetting of any of his work, Jefferson sat among the debating delegates mostly in silence throughout the three difficult days of editing,⁴⁶ though he was noted by his near seatmate, Dr. Franklin, to have been "writhing a little under the acrimonious criticisms of some of its parts . . ."⁴⁷ He, himself, named "South Carolina and Georgia . . ." as the main culprits behind the clause's excision, "who had never attempted to restrain the importation of slaves, and who on the contrary still wished to continue it."⁴⁸ Indeed, one member of the South Carolina delegation put the matter bluntly and ominously during the draft debate when he noted, with regard to Jefferson's anti-slavery *Declaration* piece, "[I]f property in slaves should be questioned there must be an end to confederation."⁴⁹ This would have been received by the voting delegates as the threat it was intended to be,⁵⁰ and, in any event, was a wrong first step for the fledgling, hopeful nation, by application of its own preamblic expression.

And so what would soon become the greatest of American documentary icons was reported to a wondering world without the

⁴⁶ "As to myself, I thought it a duty to be, on that occasion, a passive auditor of the opinions of others, more impartial judges than I could be, of . . . [the *Declaration*'s] merits or demerits." 10 THOMAS JEFFERSON, *Letter from Thomas Jefferson to James Madison (Aug. 30, 1823)*, in THE WRITINGS OF THOMAS JEFFERSON 268 (Paul L. Ford ed., 1904-5) (1899).

⁴⁷ *Id.* In another place, he would describe the editing process and his reaction to it more acerbically, and probably more forthrightly, calling the edits themselves "depredations on . . . parts of the instrument . . ." and, of himself in that regard, "I was not insensible to these mutilations . . ." *Letter from Thomas Jefferson to Robert Walsh (December 4, 1818)*, in 10 THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON, *supra* note 46, at 120.

⁴⁸ 1 THOMAS JEFFERSON, *Autobiography*, in THE WRITINGS OF THOMAS JEFFERSON, *supra* note 36, at 28. Jefferson did not end his critique there. He added as well, "[o]ur northern brethren also . . . felt a little tender under those censures; for tho' their people have very few slaves themselves yet they had been pretty considerable carriers of them to others." *Id.*

⁴⁹ LUDLOW, *supra* note 45, at 213.

⁵⁰ The logistics of war being then what they always are, England would necessarily have been in the market for friendly colonial American ports to harbor their navy and materially support their foreign war efforts. Though South Carolina and Georgia were of the least of value to England among the pre-revolutionary American colonies by almost any measure, the deep-water ports of Charleston and Savannah alone would have been incalculable, and the corresponding detriment to the colonial war effort would have been enormous.

most ambitious of its intended social sanctions. In later describing his ultimate goal in drafting the document as he did, Thomas Jefferson the visionary noted plainly that, “it was intended to be an expression of the American mind . . .”⁵¹ to the interested world. Sadly, in its edited state, it was. In a bargain based in too many dollars and too little sense,⁵² America imagined in the *Declaration’s* soaring preamble the world’s first republican democracy based in universal, individual freedom; through its callous, politically-based excision, it effectively embraced the hypocrisy of human slavery as a cornerstone of that republic. While the disciplines of history will not allow me to imagine the ways our nation may have changed in the face of a different result on this issue, it does not take an historian to imagine *that* things would have changed, even down to the ‘Jena 6’ incident, had that result been different.⁵³

⁵¹ 10 THOMAS JEFFERSON, *Letter from Thomas Jefferson to Henry Lee (May 8, 1825)*, THE WRITINGS OF THOMAS JEFFERSON, *supra* note 46, at 343.

⁵² It has become historically elementary to suggest that the visceral energy driving America’s complex interaction with African-origin human slavery, either in eighteenth century abolitionism or expansion, was not sociologic or political or moral or psychogenic or any other such condition, but rather, at its core, economic. Interestingly enough, a combination of environmental harshness of the ‘slavery’ territories as well as a genetic fitness of sorts on the part of the African-origin persons held in bondage to slavery aided in the particular form of slavery taking hold in the section of America that it did. To describe South Carolina and Georgia at the close of the eighteenth century as little more than malarial swamps is only slightly too harsh, given the extreme lack of broad social and physical infrastructure in either place. To ‘tame the land’ they were heavily depending on labor they felt they needed but imagined they could not afford, and, in the epidemiological course of things, the African happened to be more suited to the disease climate than the white European. Particularly, the genetic recessive of the debilitating and potentially deadly ‘sickle cell anemia’ is a condition known as ‘sicklelema;’ asymptomatic in all but the most extreme environmental circumstances, it bestows upon its carrier, for the relatively benign dissipations it requires, an almost complete immunity to malaria. Thus, in a twist on a ridiculous theme, African-American slavery was not based in imagined physical and genetic inferiority to the white race but instead, effectively at one level at least, in practical genetic *superiority*. And so the states took advantage of this preference without paying for it, choosing to steal the labor of hundreds of thousands of persons in order to prosecute their desire and plan fully to exploit their land.

⁵³ This notion will be further explored, of course, in conclusion.

*B. Act II: "the fate of millions unborn . . ."*⁵⁴

The second act in our three-act tragedy stars Thomas Jefferson again, in a different role along the same lines of his dramatic *tour de force* in Act I. This act is set eight years after the first, in 1784, under very changed circumstances from the first act, in 1776. The ragtag group of colonies boldly declaring independence against the world superpower across the Atlantic Ocean, then, has given way to a young nation, thirteen states in federal union, occupying its own land and under its own constituting document, the *Articles of Confederation*. They are a nation with many problems, to be sure,⁵⁵ but they are indeed a *nation*, having nominally defeated their former colonial masters and then charting an unsteady but

⁵⁴ 4 THOMAS JEFFERSON, *Observations on the Article Etats-Unis Prepared for the Encyclopedie*, in THE WRITINGS OF THOMAS JEFFERSON 181 (Paul Leicester Ford ed., 1894).

⁵⁵ The problems facing the upstart nation under its initial configuring document were then legion, and have since become historically legendary. Heroes of the Revolution wrote more or less openly to one another of the disaster the nation had become under its *Articles of Confederation*. John Jay summed up government affairs under the *Articles* in a letter to George Washington, noting, dramatically, "Our affairs seem to lead to some crisis, some revolution—something that I cannot foresee or conjecture. I am uneasy and apprehensive; more so, than during the war [W]e are going and doing wrong" 4 GEORGE WASHINGTON, *Letter from John Jay to George Washington (June 27, 1786)*, in THE PAPERS OF GEORGE WASHINGTON (CONFEDERATION SERIES) 131 (W.W. Abbot ed., 1995). In a response to Secretary Jay, Washington acknowledged the 'crisis' then before the new nation, adding, "What astonishing changes a few years are capable of producing . . . [w]hat a triumph for the advocates of despotism to find that we are incapable of governing ourselves" 28 GEORGE WASHINGTON, *Letter from George Washington to Secretary for Foreign Affairs (August 1, 1786)*, in THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745 – 1799 503 (1938). Washington was even more pessimistic in correspondence with Henry Lee, lamenting that, "mankind when left to themselves are unfit for their own Government. I am mortified beyond expression when I view the clouds that have spread over the brightest morn that ever dawned upon any Country." 29 GEORGE WASHINGTON, *Letter from George Washington to Henry Lee (Oct. 31, 1786)* in THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745-1799 33-4 (1938). To James Madison, George Washington made the matter plainer still: "Thirteen Sovereignities pulling against each other, and all tugging at the foederal head will soon bring ruin to the whole" 29 GEORGE WASHINGTON, *Letter from George Washington to James Madison (November 5, 1786)*, in THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745-1799 52. Alexander Hamilton made an itemized list of inadequacies and failures under the *Articles* a key part of the Federalist argument supporting the draft Constitution of 1787. Alexander Hamilton, *The Federalist No. 15 82ff*, in THE FEDERALIST PAPERS 72 (Ian Shapiro ed., Yale Univ. Press 2009) (1788).

ambitious course as a sovereign power in the panoply of international communities. And, having passed on their first, best opportunity at harmonizing their internal institutions with their external professions, outlined above, they remained at that moment a nation founded on individual liberty, struggling with human slavery.⁵⁶

Having lost his gallant fight to set the nation on the right foot at its outset regarding the lamentable institution, Thomas Jefferson's public efforts in this direction were far from over. He is popularly known to have been a very enigmatic man with regard to the institution in the American character and in his own life. Privately, he was a slave owner, of course, and a deeply committed one at that: he both bought and sold human beings—some fifty or so sold between 1784 and 1794, in part to satisfy creditors⁵⁷—and lived a life of comfort and ease, “in the grand style of a Virginia aristocrat, a style that put many European aristocrats to shame . . . ,”⁵⁸ all from purloined African labor.⁵⁹ Though to observe him in his private life “one would hardly have supposed. . . that Jefferson felt the slightest repugnance to slavery . . . ,”⁶⁰ he was negative about “[t]his abomination . . .”⁶¹ in his personal correspondence, even

⁵⁶ On the one hand the *Articles of Confederation* worked a nominal upgrade in the general condition of the ‘negro’ in America (employing the eighteenth century descriptive of choice), by omission if nothing else. ARTICLES OF CONFEDERATION, Article V extended “all privileges and immunities of free citizens” to all “free inhabitants” of the nation, “paupers, vagabonds and fugitives from justice excepted[.]” By non-exception, then, ‘free Negroes’ were included. Negroes were not excluded from holding federal office under the *Articles* themselves. See Art. V, allowing for appointment of “delegates . . . annually . . . as the legislatures of each State shall direct” However, state military quotas were set “in proportion to the number of white inhabitants in such state” Art. IX. And, of course, there was no direct addressing of the ‘slavery question’ anywhere in its prescriptions. And so, even through the *Articles* period, the foundational conundrum of individual freedom and human slavery remained.

⁵⁷ JOHN CHESTER MILLER, *THE WOLF BY THE EARS: THOMAS JEFFERSON AND SLAVERY* 107 (1991). Apparently—and interestingly—Jefferson made efforts to conceal his part in these transactions by conducting them through a third party.

⁵⁸ *Id.*

⁵⁹ Jefferson ran the great-house of Monticello and a combined estate numbered at approximately 10,000 acres at its height, complete with an army of artisans—carpenters, bricklayers, cabinetmakers, blacksmiths, etc., and house persons, servants, hostlers, coachmen and grooms (not to mention agricultural service persons)—almost entirely from stolen human labor.

⁶⁰ MILLER, *supra* note 57, at 110.

⁶¹ 4 THOMAS JEFFERSON, *Letter from Thomas Jefferson to Edward Rutledge (July 14, 1787)*, in *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 54, at 410. The full quote nicely captures one aspect of Jefferson's polarity of extremes

down to the very last known written letter of his life.⁶² And his public mind on the matter, including continued efforts to set it on the wane in the developing life of the new nation he would lead and serve in so many ways, was legendary.

In the spring of 1784 Jefferson again found himself a Congressman, this time representing Virginia federally under the *Articles of Confederation*. His chance to revisit the slavery question on the national level came with his administrative assignment to draft an *Ordinance* for the orderly management of U.S. Territories at that time. As a consequence of their victorious position in the signing of the Treaty of Paris in 1783 closing the Revolutionary War, the new nation fell heir to the residual land claims of the British Empire west of the Allegheny/Appalachian mountain ridge, through to the Mississippi River. This was an enormous land mass and, once under federal control, would be used to establish states additional to the thirteen original of the United States, adding greatly to the resources and 'might' of the young nation. Jefferson was appointed to draft an *Ordinance* for the orderly transition of this territory into anticipated states, and he approached the task with his usual energy and attention to detail.⁶³

regarding the institution: "This abomination must have an end, and there is a superior bench reserved in heaven for those who hasten it."

⁶² Writing to Roger C. Weightman in 1826, but ten days before his impending death on the upcoming July 4, Jefferson talked of his wistful but impossible desire to be in Washington D.C. among friends on that Independence Day. He then wrote appropriately about the *Declaration* itself, tying it one last time to the unrequited promise of universal freedom that for him it still held:

May [the Declaration] be to the world, what I believe it will be, (to some parts sooner, to others later, but finally to all,) the signal of arousing men to burst the chains under which monkish ignorance and superstition had persuaded them to bind themselves, and to assume the blessings and security of self-government All eyes are opened, or opening, to the rights of man. The general spread of the light of science has already laid open to every view the palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God.

10 THOMAS JEFFERSON, *Letter from Thomas Jefferson to Roger C. Weightman (June 24, 1826)*, in THE WRITINGS OF THOMAS JEFFERSON, *supra* note 46, at 391-92.

⁶³ Jefferson anticipated ten states at least out of the territory in question and, typical of his fastidious approach to such assignments, he even proposed names for the anticipated states, including: Assenisippia, Cherronesus, Illinoia, Metropotamia, Michigania, Pelisipia, Polypotamia, Saratoga, Sylvania, and Washington. 6 THOMAS JEFFERSON, *III. Report of the Committee, 1 Mch. 1784*, in THE PAPERS OF THOMAS JEFFERSON 603-605 (Julian P. Boyd ed., 1952). Two

In this instance, Jefferson's abolition plan was thoughtful and simple, and had in its favor a benignity which eschewed the direct and caustic confrontation of his *Declaration* approach in favor of a quieter and more indirect campaign against the institution. Slavery had been officially abolished in Vermont seven years prior, and by negative prescription in Massachusetts through a broad reading of its *Declaration of Rights* only one year before, and was then a topic of energetic conversation in all of the northern states. As the territory in question girded the thirteen states generally and the four southern states in particular, from the Gulf of Mexico to the 49th parallel, the right approach to the task could leave slavery geographically, politically and indeed metaphysically marooned in its then present borders, being left to die an anticipated natural death in time by such isolation.⁶⁴ The key, of course, was to ensure the admission of the expected states as 'non-slave' states, and

survived in amended form, of course, and the tribute intended for America's 'first citizen' and first President would survive intact, first designating the nation's capital after Constitutional ratification, and denominating the nation's forty-second state in 1889, a little more than 100 years after Jefferson's suggestion.

⁶⁴ Jefferson counted on several cross-currents endemic of human nature and community identity and development to ground his ultimate expectations regarding the end of American slavery by this means. First, in limiting the institution to its four major southern outlets among the original thirteen—Virginia, North and South Carolina and Georgia—it would be effectively outposted there, with no other place to express itself in the nation. As the nation grew, those originals would be further and further isolated from the whole, and that by a universally acknowledged negative rather than a positive. Peer energy alone would have a strong ameliorating, harmonizing effect on these states where human slavery survived. There was the accompanying 'shame' factor as well, the remaining 'slave' states being forced to consider their continued deliberate reliance on a morally questionable institution (in its best light), and in the face of its repudiation across the breadth of even the newest entrants to the democratic cause. Finally, several strong political outcomes might be expected to have exerted their own unique pressures on the isolated, remaining 'slave' states. First, in the expected influx of immigration adding directly to the wealth of the nation, the wage/labor bargain would be the magnet pulling such labor to the new nation from around the world. To the extent a state filled its infrastructural need through uncompensated stolen labor, it would receive virtually no part of that residual, and would shrink in comparison. Second, given the cost of outfitting and maintaining the naval resources necessary to ply and affect the trade, it is difficult to imagine the whole nation continuing to cheerfully bear the cost of the trade from which, arguably, only a fragment of its fellow members 'benefited.' And with no market to receive the growing product from both natural means and diabolical Southern state breeding outcomes, what were those few isolated states to do? For these and a host of reasons both practical and creative, Jefferson was hopeful for such an outcome from such a decision by Congress.

Jefferson was not prepared to leave this critical detail to individual and serendipitous chance. And so, as a final clause to his draft *Ordinance of 1784* coming before Congress for approval that spring, he added the following simple, portentous words: "5. That after the year 1800 of the Christian æra, there shall be neither slavery nor involuntary servitude in any of the . . . states, otherwise than in punishment of crimes . . ." ⁶⁵

The *Ordinance* along with its momentous clause came before Congress for review and final consideration on April 19, 1784. According to the constitutional protocol of the day, votes were tallied under the *Articles of Confederation* not by individual delegates but rather by voting delegations, the sum total of delegates from a particular state formulating that state's delegation in Congress. As each state represented in this plan one single vote, Jefferson needed but seven of the thirteen delegated votes to carry the day, eliminating slavery from the territories in question in perpetuity, and hastening an end of slavery everywhere in the new nation. Severed from the remainder of the draft *Ordinance* and voted on separately, on account of its controversy and singular importance, the clause received six of the seven needed affirmatives, ⁶⁶ and would have garnered the prayed for seventh but for the voice of one single delegate from New Jersey, suddenly and unexpectedly ill in bed at the time of the vote. ⁶⁷ The Congressional

⁶⁵ 3 THOMAS JEFFERSON, *Ordinance of 1784 (Draft)*, in THE WRITINGS OF THOMAS JEFFERSON, *supra* note 54, at 432.

⁶⁶ The states voting unanimously in favor of inclusion of the abolition clause in the *Ordinance* were: New Hampshire, Massachusetts, Rhode Island, Connecticut, New York and Pennsylvania. Maryland, Virginia and South Carolina voted in favor of its exclusion, though the Virginia delegation was not unanimous, with the positive vote of Thomas Jefferson himself. North Carolina was divided, Richard Dobbs Spaight voting against it and Jefferson's good friend Hugh Williamson voting in favor. That left New Jersey, a vote Jefferson was right to have counted on, but for the one delegate who was ill and away from the floor at voting.

⁶⁷ That 'one vote' belonged to John Beatty, one of two delegates representing New Jersey in the Congress. A graduate of the College of New Jersey (now Princeton), he was a veteran of the Revolutionary Army, attaining the rank of Major by war's end. He practiced medicine in Princeton, NJ thereafter, until his election to the New Jersey State Council, where he served for two years. In 1784 he was appointed as one of two New Jersey delegates to the Federal Congress, and it was in this capacity that the momentous question fell to him and his fellow Congressional delegates. He would represent New Jersey in the Federal Constitutional Convention in Philadelphia in 1787 and would go on to a storied public career in politics, education, and business before his death, mere weeks before that of Thomas Jefferson, in 1826. On the day in question, Dr. Beatty was in his lodgings and the one single remaining vote of the delegation, single-term delegate and physician Samuel Dick's vote favoring

Record marks the incredible moment simply and pathetically in its April 19 official report, when it states “[s]o the question was lost, and the words were struck out”⁶⁸ for want of one single human voice.

As would be expected under the circumstances, Thomas Jefferson was devastated with the outcome, especially with regard to its accompanying circumstances. Writing to his friend James Madison just six days after the vote, its stinging rebuke was still very fresh in his mind. “The clause respecting slavery was lost by an individual vote only . . .” he wrote, continuing “[t]he 4 Eastern states N. York, Penns., were for the clause. South Carolina, Maryland, and !Virginia! voted against it.”⁶⁹ Remembering the event several years after the great loss, Jefferson was even more morose and apocalyptic in seeking to properly contextualize the scope of the pregnant moment past. “The voice of a single individual of the state which was divided,⁷⁰ or of one of those which were of the negative, would have prevented this abominable

Jefferson’s abolition clause, could not alone carry the delegation. Thus, New Jersey officially recorded a ‘nil’ vote on the matter, leaving Jefferson’s cause but one vote short of approval. Historian Fawn M. Brodie noted that, had Dr. Beatty been well and present, New Jersey “would have voted aye,” winning the day for Jefferson and abolition. FAWN M. BRODIE, *THOMAS JEFFERSON: AN INTIMATE HISTORY* 183 (1974). However, this is speculation and, further, no matter how likely to have been the case, beside the point. Beatty was fated not to be present, and the nation was fated to struggle on with this problem and its progeny, even to this day.

⁶⁸ 26 J. OF THE CONTINENTAL CONGRESS. 247 (1784). Given the singular quality of the ‘question’ that was lost that day, incalculable else was likely lost as well. In this setting, then, this must qualify as one of the most ominous sentences in American history.

⁶⁹ 10 THOMAS JEFFERSON, *Letter from Thomas Jefferson to James Madison (April 25, 1784)*, in *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 46, at 471. The plaintive emphasis marking reference to his own home state is the author’s own.

⁷⁰ Jefferson is quite correct in recognizing not one but *two* different avenues to the cherished outcome that was not to be, from the votes cast in Congress that day. We have canvassed the situation of Dr. Beatty above, whose health on the day in question prevented New Jersey from providing the seventh ‘aye’ vote to carry the day on territorial abolition. But there was another vote that could have made that difference even without a New Jersey affirmative. Aside from Jefferson, every voting Southern delegate voted against Jefferson’s proposal, with the exception of his ‘good friend’ Hugh Williamson from North Carolina. Richard Dobbs Spaight, Williamson’s companion delegate in the two-person delegation from that state, voted with the other Southern delegates, rendering North Carolina a ‘divided’ delegation in the vote. Even without New Jersey, had Spaight found his way to his co-delegate’s side in the matter, North Carolina would have added its voice against the institution and in favor of territorial abolition, winning the day for Jefferson, and the nation.

crime from spreading itself over the new country,"⁷¹ he moaned, adding with a flourish as poignant today as the day it coursed from his pen over two hundred years ago, "& heaven was silent in that awful moment!"⁷²

In summary, when a then septuagenarian Thomas Jefferson received the "momentous [Missouri] question . . ." in 1820, famously, "like a fire bell in the night . . .,"⁷³ as harsh and frightening as that alarm was, it could not have been truly unexpected. If the analogy is reasonably carried to its limit, the nation was by 1820 something of a 'tinderbox,' and human slavery formed a series of barely controlled brush fires across that land. Though the formal record is silent on the matter, in receiving the alarm of Missouri with regard to African-origin human slavery within the American experiment, it is not difficult to imagine Jefferson's mind wandering back to that spring day thirty-five years earlier, when one vote made such a great difference. Territory which would in time take on regular, familiar and even ominous names, racially speaking—Alabama, Mississippi, Tennessee and Kentucky and, by influence, Louisiana, Arkansas, and Missouri itself—all scot-free of slavery and slavery accoutrements, every inch, but for a single 'aye.' Jefferson was not exaggerating one whit when he noted of that awful historical moment, "Thus we see the fate of millions unborn hanging on the tongue of one man . . .";⁷⁴ indeed many, many millions, to be more accurate, with six young men prominent among those many, even two-plus centuries into the future, from Jena, Louisiana.

⁷¹ 4 THOMAS JEFFERSON, *supra* note 54.

⁷² *Id.*

⁷³ Though his quote is well known, it is worthy of repetition here in its entirety: "But this momentous question, like a fire bell in the night, awakened and filled me with terror. I considered it at once as the knell of the Union. It is hushed, indeed, for the moment. But this is a reprieve only, not a final sentence." 10 THOMAS JEFFERSON, *Letter from Thomas Jefferson to John Holmes (April 22, 1820)*, in THE WRITINGS OF THOMAS JEFFERSON, *supra* note 46, at 157.

⁷⁴ *Supra* note 54.

C. Act III: “the judgment of heaven on a Country”⁷⁵

For the last act of our ‘tragedy,’ Thomas Jefferson retires from the stage altogether, replaced by the quintessential ‘all-star cast,’ including such luminaries as Dr. Franklin, John Adams, James Madison, George Washington, George Mason, and the like. These are “the Fifty-five . . .” the great “Founding Fathers,” fated to have one last good go at African-origin slavery for the benefit of the “more perfect union . . .” of their late eighteenth century imagination. But the problem before them to address and solve is not merely political but *jurisprudential* also—not just a problem of resources and actions, conveniences and consequences, but one of *ideas* as well, and perhaps mainly so. In this way, if we are to fully understand the character of the work ‘the Founders’ completed in 1787, we must add two more persons to the mix, two who through their own ideas were with the fifty-five in their deliberations throughout that fateful summer: John Locke⁷⁶ and Thomas

⁷⁵ These words of Virginian George Mason at the famed Constitutional Convention of 1787 in Philadelphia, Pennsylvania, were meant to communicate his disapproval of the institution of human slavery to his fellow conventioners who were considering where it would fit in the new republic, if anywhere at all. The full flavor of Mason’s comments are worth repeating here:

Slavery discourages arts & manufactures. The poor despise labor when performed by slaves. They prevent the immigration of Whites, who really enrich & strengthen a Country. They produce the most pernicious effect on manners. Every master of slaves is born a petty tyrant. They bring the judgment of heaven on a Country. As nations can not be rewarded or punished in the next world they must be in this. By an inevitable chain of causes & effects providence punishes national sins, by national calamities.

JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1786 504 (Bicentennial ed. W.W. Norton & Co.1987)

⁷⁶ Political philosopher and English visionary John Locke was born in 1632 and died at the turn of the eighteenth century at seventy-two. He was educated as a medical doctor, though his agile and well-trained mind carried him far beyond this educational anchor-point. He was the premier natural rights philosopher of his day, arguing for popular sovereignty in direct contradistinction to ‘the divine right of kings . . .’ and its philosophical champion, Sir Robert Filmer. This brought him to the attention of Parliament in its fight against the unbridled power of the British Crown which culminated in the Glorious Revolution of 1688. Much of the strength of his arguments in that regard was distilled in his famous *Second Treatise of Government*, in which he took on the royal prerogative directly, along with many other things. Among the many intellectuals coming under the influence of the body of Locke’s great work are included all of the late Enlightenment humanists (Hume, Kant, Thomas Paine, Adam Smith, *etc.*) and, in some way, all of the American ‘Founding Fathers.’ Most prominent in that group was Thomas Jefferson who, it was

Hobbes.⁷⁷ With the inclusion of these two, along with 'the Founders'—and arguably not before or without—the *Act III* cast is complete and our stage is fully set.

If founding a nation is like building a building, then two lessons from building would have analogous application to the founding. First, the base of the building—its *foundation*, the thing upon which the visible structure will be connected and anchored—is invaluable. In executing a plan to build a building, from blueprinted drawings to first spade-turn to turn-key, up to one-third of the cost of the project can be sunk in a place where no one would think to look: its foundation.⁷⁸ The reason for this is clear, and intuitive to even the least introspective among us: foundations alone provide the 'grip' a building will depend upon to weather the inevitable and sometimes even ubiquitous storms it will encounter throughout the full course of its life. Religious antiquity in its

publicly suggested at the time, did little more than channel John Locke in the most energetic portions of his *Declaration of Independence*. There, Jefferson candidly noted, "Richard Henry Lee charged . . . [the *Declaration*] as copied from Locke's treatise on government." 10 THOMAS JEFFERSON, *Letter from Thomas Jefferson to James Madison (August 30 1823)*, in THE WRITINGS OF THOMAS JEFFERSON, *supra* note 46, at 267-68. Jefferson was quick to defend himself from that charge, noting "[W]hether I had gathered my ideas from reading or reflection I do not know. I know only that I turned to neither book nor pamphlet while writing it." *Id* at 268. For our purposes here, we will focus most of our attention on Locke's pristine ideas around governmental power, formation and dissolution in his *Second Treatise*, as it may have influenced 'the Founders' in 1787.

⁷⁷ Historian and political philosopher Thomas Hobbes was born in 1588 and died in 1679 at the age of 91. Much like his successor and philosophical antagonist follower, John Locke, Hobbes was drawn to political philosophy through observations of the events of his day, namely those around the English Civil War. Also, like John Locke and his *Second Treatise of Government*, the most famous of Hobbes's writings—*Leviathan*—came directly from observations of that conflict. While he would be listed as an influence in the development of Locke's thinking after him, that influence was mostly contrapuntal. The subject of their writing and the broad events of their day would conspire to render them antagonists on either side of the critical question, "From where does political power originate and derive, and how ought it legitimately to be expressed?" The best of their antithetical thoughts would be available to 'the Founders' as that group wrestled with the same questions in the American context a century later.

⁷⁸ I heard this 'fact' many years ago in a church sermon, and it has always fascinated me. Not conversant in any aspect of architecture or building, I was always concerned that it might derive more from homiletic hyperbole than actual fact. Nevertheless, the image was so powerful and the ensuing life-lesson so strong that I was not required to be concerned about precision, then or now. As the analogy serves something of the same purpose in this usage as it did in its original setting, I will use it here in the same spirit, with apologies to the builders among my readers who may 'know' better.

Western Christian tradition provides a vivid word-picture example of the extreme cost of failing to make room for this inviolable truth in 'building a house.'⁷⁹

A second principle follows closely after the first: as goes the foundation, so goes the building. Put another way, if one is building for longevity and antiquity, special attention must be paid to constructing according to (*i.e.*, consistent with) the quality and character of the foundation that has been laid. To build inconsistently with the foundation is to forfeit some significant portion of the security for which one pays in taking on the construction project in the first place. The house that is built inconsistently with the foundation on which it is laid is a house incompletely anchored to the very thing designed to protect it, a house that in consequence must fear a good, stiff breeze. If the building in question is 'for show' only, then the risk and possible loss is not as substantial as it might be. But if the purpose of the building is for it to be 'lived in,' then the consequences of inconsistent building are potentially far more severe, especially for the ones for whom it is expected to serve as home.

When 'the Founders' gathered in Philadelphia to begin building the 'new building' for the young nation, they had the great benefit of a firm foundation on which to lay their vital work. This foundation was the *Declaration of Independence*, of course, a 'natural law' platform of the first order, one placing universal equality, popular sovereignty, at the corner of the building—the *Republic*—from which all of the beneficences of "Nature and . . . Nature's God . . ."⁸⁰ could be anticipated to flow. Indeed, the *Declaration*-inspired revolution was Locke's naturalist *Chapter XIX* sprung to life, the colonists gaining the right to revolt "when the *Legislative* is broken, or *dissolved* . . . ,"⁸¹ "when . . . [the] Prince sets up his own Arbitrary Will in place of the Laws . . ."⁸² or

⁷⁹ Self-proclaimed rabbi and Jewish mystic Jesus Christ is reported to have related by means of a parable closing his famous 'Sermon on the Mount.' There, he illustrated the importance to a building—or, analogously, to a life—of a sure and steadfast foundation-anchor, by contrasting two houses, one built upon a rock, and one built upon sand, *i.e.*, one with and one without a sure foundation at its base. Eschatologically, the variation in the fate of the two because of the difference was nothing less than the contrast between life and death. See *Matthew 7:24-27* (King James).

⁸⁰ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

⁸¹ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 407 (Peter Laslett ed., Cambridge Univ. Press 1988) (1689) (emphasis in the original). See THE DECLARATION OF INDEPENDENCE para. 7. (U.S. 1776).

⁸² LOCKE, *supra* note 81, at 408. See THE DECLARATION OF INDEPENDENCE para. 3-5 (U.S. 1776).

"[w]hen the Prince hinders the Legislative from assembling in its due time" ⁸³ The gathering in Philadelphia itself—this naturalist *convening to constitute*—channeled Lock's *Chapters VII* and *VIII*, where "Men . . . joyn and unite into a Community . . . ," ⁸⁴ "with a Power to Act as one Body . . . ," ⁸⁵ "by the Law of Nature and Reason, the power of the whole" ⁸⁶ to create government "by settled standing Rules, indifferent, and the same to all Parties" ⁸⁷ What remained to the Conventioners was to build the building according to the foundation, and every single of the fifty-five knew that this seminal task would be most tested in the area they had neglected to settle with the *Declaration* itself or Jefferson's *Ordinance of 1784* following: ⁸⁸ human slavery in a 'free republic.' ⁸⁹

While the practical question before the Philadelphia contingent in 1787 was put in terms of how to address the matter of human slavery in the 'new republic', the meta-physical question—the real question—was much simpler than that. They had imagined, popularized, prosecuted and won a war on unalloyed natural law jurisprudence, one that had not even the smallest place for the vicious inequality of positivist human slavery; all of Enlightenment natural rights agreed. For John Locke, slavery was "so vile and miserable an Estate of Man . . . ," ⁹⁰ "*the State of War continued . . .*" ⁹¹ arguably lending extraordinary powers to the victim to meet the exquisite circumstances:

⁸³ LOCKE, *supra* note 81, at 409. See THE DECLARATION OF INDEPENDENCE para. 6, 8 (U.S. 1776).

⁸⁴ LOCKE, *supra* note 81, at 331.

⁸⁵ *Id.*

⁸⁶ *Id.* at 332.

⁸⁷ *Id.* at 324.

⁸⁸ Given the historically appreciated outcomes of these actions by 'the Founders,' we might reasonably denominate these early American efforts 'strike 1' and 'strike 2,' respectively.

⁸⁹ By the time the nation arrived at its reset point in 1787, the problem of African-origin slavery in the democratic republic was a mystery to absolutely no one. The debate was both popular and hot when 'the Founders' sat down to their task in Philadelphia that summer. Simply—and profoundly—the problem centered on the obvious oxy-moronism of the twin descriptors of America at that time: 'slave' and 'republic.'

⁹⁰ LOCKE, *supra* note 81, at 141. In fact, these are the very first words with which Locke opens the first of his two treatises of government, and he employs unequivocal language in doing so. "§1. Slavery is so vile and miserable an Estate of Man, and so directly opposite to the generous Temper and Courage of our Nation; that 'tis hardly to be conceived, that an *Englishman*, much less a *Gentleman*, should plead for't." *Id.* at 159.

⁹¹ *Id.* at 284 (emphasis in the original).

I have no reason to suppose, that he, who would *take away my Liberty*, would not . . . take away everything else. And therefore it is Lawful for me to treat him, as one who has put *himself into a State of War* with me, *i.e.* kill him if I can; for to that hazard does he justly expose himself, whoever introduces a State of War, and is *aggressor* in it.⁹²

Among natural rights theorist, including Montesquieu,⁹³ Rousseau⁹⁴ and Grotius himself,⁹⁵ Locke is unique in this way only in the extremeness of his expression of what is for natural law jurisprudence a universal position. In fact, in order to find jurisprudence for an opposite result, ‘the Founders’ would need to leave the rational confines of natural rights/natural law and enter the comparatively murky world of *positivism* and its own intellectual champion, Thomas Hobbes.

As John Locke after him, Thomas Hobbes took as his own philosophical starting point ‘the state of nature,’ though for Hobbes this was a much more extreme place than for Locke, a place of

⁹² *Id.* at 280 (emphasis in the original).

⁹³ For Charles Secondat Baron de Montesquieu the matter was simple: “Slavery, properly so called, is the establishment of a right which gives to one man such a power over another as renders him absolute master of his life and fortune. The state of slavery is in its own nature bad.” MONTESQUIEU, *DE L’ESPRIT DES LOIS (THE SPIRIT OF THE LAWS)* 235 (Thomas Nugent trans., Hafner Press 7th prtg. 1975) (1748).

⁹⁴ At the close of an erudite attack on the nominally disparate position of Hugo de Groot (Grotius) on human slavery, Jean-Jacques Rousseau was categorical in disclaiming a ‘natural right’ to human slavery:

Thus, in whatever way we view things, the right of slavery is null, not only because it is illegitimate, but because it is absurd and meaningless. These words, *slavery* and *right*, are contradictory; they are mutually exclusive. Whether addressed by a man to a man, or by a man to a people, such a speech as this will always be equally foolish: *I make a convention with you wholly at your expense and wholly for my profit, which I shall observe as long as I please and which you also shall observe as long as I please.*

ROUSSEAU, *DU CONTRAT SOCIAL (OF THE SOCIAL CONTRACT)* 12 (Charles M. Sherover trans., Harper & Row 1984) (1762) (emphasis in the original).

⁹⁵ Known popularly as the ‘father of international law,’ Dutch philosopher Hugo de Groot imagined a very narrow isthmus involving formally declared war and treated peace where slavery might preserve a small, proscribed life within a natural law regime. Short-formed ‘prize of war’ theory, it was extremely controversial, frowned upon by most of his natural law/rights fraternity, rejected altogether by Rousseau, and in any event very narrowly drawn. Suffice it to say, even in its most generous reading, it offered no intellectual or jurisprudential haven whatsoever for African/American slavery.

“that miserable condition of Warre . . .”⁹⁶ full of “our naturall Passions . . . Partiality, Pride, Revenge, and the like”⁹⁷ a place of “danger, and fear of Invasion . . . open force, and secret arts”⁹⁸ In these extremes, man has no real choice but to “conferre all their power and strength upon one Man . . . to beare their Person . . . to submit their Wills, every one to his Will, and their Judgments, to his Judgment.”⁹⁹ The gain in such a bargain, theoretically at least, is safety and security—“[that] they may nourish themselves and live contentedly . . . ,”¹⁰⁰ but here is a cost: under this regime of absolute will, law—*positive* law—is *anything whatsoever* emanating from the will of the sovereign, that he can imagine in his mind and enforce with his bare arm, his iron fist.¹⁰¹ The Philadelphia conventioners could legitimate human slavery in the republican democracy, but only by admixing natural law with ‘positive energy’; this is an ‘unholy brew’ in theory, with possible drastic negative consequences for the nation attempting it, if the ‘building’ analogies referenced above are in any way accurate.¹⁰² For these conventioners in 1787, these men of great responsibility and moment, these men destined thereafter to be popularized by and for generations following—for this very work—as nothing less than ‘*the Founders . . .*’, as between ‘high theory’ and ‘low estate’, for the ultimate good of the nation they were charged to imagine, what would they choose?

⁹⁶ THOMAS HOBBS, *LEVIATHAN* 117 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651).

⁹⁷ *Id.*

⁹⁸ *Id.* at 118.

⁹⁹ *Id.* at 120.

¹⁰⁰ *Id.*

¹⁰¹ Of course, this is a drastic oversimplification of a very subtle and important ‘truth’ for Hobbes, almost ‘cartoon Hobbes’ if you will, for the crude purposes necessary in this point. However, I do contend for its accuracy . . . if ‘cartoon,’ it is a very good and very illustrative one, for present purposes. Hobbes goes on to elaborate on this startling theory, but his elaborations do nothing to ameliorate its sharp edges. In a ‘positive law’ regime, legitimate law is limited only by the imagination of the sovereign, and his configuring strength. In Hobbes’s positive law, the moral question—the ‘ought’ of law—is entirely subsumed by the power question—the ‘can’ of law—matters being ultimately governed as *legal* depending upon what the sovereign *can* do rather than what it *ought* to do. Thus, where moral law (natural law/right) would have ‘the Founders’ recognize natural freedom in all, positive law would frame the question in power calculus terms, legitimating slavery if the sovereign could get away with it.

¹⁰² I am particularly referencing the second of the ‘building’ points raised above regarding the value, and indeed the necessity, of taking careful account of the foundation in planning and prosecuting the building.

From our vantage point, of course, the question is: what did they choose? Sixty-five years after the fact, ethical philosopher and abolitionist journalist Frederick Douglass might have provided the following answer to that foundational question:

The blessings in which you, this day, rejoice, are not enjoyed in common.—The rich inheritance of justice, liberty, prosperity and independence, bequeathed by your fathers, is shared by you, not by me. The sunlight that brought life and healing to you, has brought stripes and death to me. This Fourth [of] July is *yours*, not *mine*. *You* may rejoice, *I* must mourn. To drag a man in fetters into the grand illuminated temple of liberty, and call upon him to join you in joyous anthems, were inhuman mockery and sacrilegious irony.¹⁰³

Historian and social philosopher W.E.B. DuBois might have addressed the same question the following way at the commencement of a new century, fifty years after Douglass and more than one hundred years after this work of ‘the Founders’: “[T]he problem of the twentieth century is the problem of the color-line.”¹⁰⁴ Moral philosopher, natural lawyer and twentieth century icon Dr. Martin Luther King, Jr. answered the question in the most profound of ways when he told a 1963 crowd in Washington D.C., and the watching world: “I have a dream my four little children will one day live in a nation where they will not be judged by the color of their skin but by [the] content of their character.”¹⁰⁵ The work of ‘the Founders’ in this regard can reasonably be judged and found wanting in ultimate result by any number of persons in twenty-first century, more than two hundred years after they took it up on our behalf, not least of which are those of the ‘Jena 6.’

¹⁰³ FREDERICK DOUGLASS, *What To the Slave Is the Fourth of July?*, in THE OXFORD FREDERICK DOUGLASS READER 116 (William Andrews ed., 1996) (emphasis in the original).

¹⁰⁴ W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 1 (Penguin Books 1989) (1903).

¹⁰⁵ MARTIN LUTHER KING, JR., *I Have a Dream*, in MARTIN LUTHER KING, JR., A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 219 (James Melvin Washington ed. 1986).

III. EPILOGUE: THEN . . . AND NOW

Fresh from his party's nomination for the Illinois Senatorial contest of 1858, Abraham Lincoln rose in the Springfield statehouse on the evening of June 16, to address an audience of over one thousand of his fellow Republicans. As this would be his 'kickoff' speech to a campaign in which his opponent would be no less a statesman superstar than the 'Little Giant' himself,¹⁰⁶ there was great anticipation in the Hall of Representatives as to the words he would choose, and the tone he would take. Those who believed moderation on the 'slavery question' to have been the safest and most politically expedient course to travel could not have been pleased at Lincoln's own position in this regard, plain from the opening words of his speech:

If we could first know *where* we are, and *wither* we are tending, we could better judge *what* to do, and *how* to do it. We are now far into the *fifth* year, since a policy was initiated, with the *avowed* object, and *confident* promise, of putting an end to slavery agitation. Under the operation of that policy, that agitation has not only, *not ceased*, but has *constantly augmented*. In *my* opinion, it *will* not cease, until a *crisis* shall have been reached, and passed. "A house divided against itself cannot stand." I believe this government cannot endure, permanently half *slave* and half *free*.¹⁰⁷

Even his closest and most sympathetic supporters believed he had done himself irreparable political harm with his forthright stance, including a close co-worker, who "predicted his [Senate] defeat, charging it to the first ten lines of the speech."¹⁰⁸ Lincoln was calm in the face of unremitting criticism of his carefully chosen words, though resolute: "The time has come when these

¹⁰⁶ I am referring to the great Stephen A. Douglas, of course, and the Senatorial campaign, which would give the world the famous Lincoln/Douglas Debates.

¹⁰⁷ 2 ABRAHAM LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN 461 (Roy P. Basler ed., 1953). Given my own employment of 'building' metaphor through which to understand America's efforts and mistakes regarding law and American slavery in the nation's earliest days, Lincoln's own famous and powerful use here should be seen as more than merely coincidental. This matter is more fully explicated in the *Epilogue* to this paper.

¹⁰⁸ ABRAHAM LINCOLN, THE LINCOLN READER 229 (Paul M. Angle ed., 1947).

sentiments should be uttered; and if it is decreed that I should go down because of this speech, then . . . let me die in the advocacy of what is just and right.”¹⁰⁹ It is worth noting that he began that defensive with a simple but important conviction: “Friends, this thing has been retarded long enough.”¹¹⁰

Retarded long enough, indeed. From our vantage point in time, knowing of the days to follow Lincoln’s great speech as well as the earliest days where “it all began . . .,” we should not miss the deep irony attending his powerful preferred metaphor. If the ‘house’ was almost completely divided when Lincoln called attention to the problem in 1858, who would have dared notice that the very beginnings of the mitotic reality lay seventy-plus years earlier, and by application of the most unexpected of hands? Who was there to tell Mr. Lincoln that the ‘mess’ with which he was so totally embroiled and in service of which he would yield his own life, was effectively made by others honored in the nation’s cultural memory for their own singular service as ‘Founders’ those years before? Who would tell Chief Justice Roger Brooke Taney that the ‘Founding Fathers,’ “the men who framed this declaration . . . great men . . . incapable of asserting principles inconsistent with those on which they were acting . . .”¹¹¹ were not only capable of such, but guilty of it, in the most hypocritical of ways? Who would tell ‘the people’ fated to bleed and die a few short years after Lincoln’s bold speech, what was really happening, and why?

And who will tell the ‘Jena 6’? What will we tell them? That they were presently caught up in a passion play tracing back to the founding of America and beyond, to a problem well within the ability of the nation to have ‘fixed’ at key points of its early history?¹¹² That they battled a ghost, a phantom, a socio-cultural

¹⁰⁹ *Id.* This prescient man was even more firm in the face of almost unanimous post-speech criticism of his words, especially his unfortunate selection of the ‘house divided’ metaphor. “If I had to draw a pen across my record, and erase my whole life from sight, and I had one poor gift or choice left as to what I should save from the wreck, I should choose that speech and leave it to the world unerasd.” *Id.* I cannot leave this point without yielding to the too easy opportunity of stating the obvious: historically, this ‘house divided’ oration was not erased, of course, but instead has taken its place among the great political speeches in American history. Of course, it was not the last great speech in that man.

¹¹⁰ *Id.*

¹¹¹ *Dred Scott v. Sandford*, 60 U.S. 363, 410 (1857) [sic] (Chief Justice Roger Brook Taney, draftsman. It is worth recalling that Mr. Chief Justice Taney’s defense of the ‘Founders’ concerned the very matter at issue in this piece).

¹¹² I reference the term ‘fix’ here very carefully, of course. The dynamic of history is so pristine that it is impossible to say whether a different decision from

construct having the stuff and substance of air, but pressing down on them—on all of them—nonetheless, with a weight difficult to resist and impossible to deny?¹¹³ That in failing to do what they could to address the problem at its root, 'the Founders' have left us with a bitter harvest, coming in year after year in various forms, with particular iteration in Jena, Louisiana, resisting any and all efforts at surface-level amelioration?¹¹⁴

This last, a simple agricultural analogy, brings to mind the almost organic connection between past and present, between 'then' and 'now,' and calls upon those among us wise enough to fully appreciate this connection to deeply consider it. In each of the situations outlined above—*past* situations and *past* choices exerting pressure on our present-day realities even to today—eighteenth century America was gifted with clear information and faced with an equally clear choice. The choice was not between 'right' and 'wrong' in the purest senses of those words. When 'the Founders' met in 1787, that question had been conceptually settled nearly eleven years before, and had been understood to have been so settled, even if implications of the *Declaration's* uncompromising language were not fully appreciated. Instead, the choice was between *convenience* and *inconvenience*,¹¹⁵ between

'the Founders' on the difficult political issue facing them in 1787 would have yielded a positive result regarding the African-American historical experience. It surely would have yielded an alternative one, and it is not anti-intellectual to imagine that difference positively, when laid against the static backdrop of the actual the history with which the American experience has actually been embroiled. But it remains necessary to own the speculative nature of this 'conclusion,' of course.

¹¹³ It is one of those inevitable metaphysical consequences of history that actions in a real-time present are too often dictated by particular aspects of a past that, if intellectually accessible to us, remain almost irresistible regarding our choices and our actions. In this way, life looks too much like Shakespeare's Macbethian passion play, in which we "strut and fret[] . . . [our] hour upon the stage, [a]nd then . . . [are] heard no more" WILLIAM SHAKESPEARE, *MACBETH* act 5, sc.5. Although I should add, referencing the rest of the quote ("it is a tale [t]old by an idiot, full of sound and fury, [s]ignifying nothing"), that I see the stage dance as much more significant than does the Great Bard, from this rendering.

¹¹⁴ I offer here one further disclaimer on the counter-factual implications of this question. I do not mean to draw a direct link here between the actions of 'the Founders' and the outcomes following, including the 'Jena 6.' I mean only to suggest an influence of the one over the other, which suggestion is not outrageous under the circumstances.

¹¹⁵ This is a simple way of saying that the choice before 'the Founders' was not a moral choice, though their decision clearly had moral implications. Instead, the choice was effectively a political one, asking when and whether 'the Founders' would do the 'right thing' and set the country on the path best suited

what we should *do* over and against what we *may get away with*, what we say about ourselves and *who we are*, and we have borne the brunt of ‘the Founders’ decision on that question ever since.

One lesson we can take from this interface between foundational history and ‘Jena 6’—a lesson addressing the ‘then’ of this interface—underscores the importance of timing in attending to obvious and notorious social ills. W.E.B. DuBois puts the matter clearly and rightly in his still-important *The Suppression of the African Slave-Trade to the United States of America 1638–1870*.¹¹⁶ As to the sheer size of the choice before ‘the Founders’

to the ultimate realization of its self-identified cultural ideals. To better illustrate the point here, I will reference a letter from Revolutionary patriot and American iconic hero Patrick Henry—he of “[g]ive me liberty, or give me death!” fame—to a relative, Mr. Robert Pleasants, on the occasion of the receipt by the former of the gift from the latter of an anti-slavery invective by Anthony Benezet entitled OBSERVATIONS ON THE INSLAVING, IMPORTING AND PURCHASING OF NEGROES (1750). Henry was candid about his own thoughts in that regard:

I take this opportunity to acknowledge the receipt of Anthony Benezet’s book against the slave trade It is not a little surprising that the professors of Christianity, whose chief excellence consists in softening the human heart in cherishing and improving its finer feelings, should encourage a practice so totally repugnant to the first impression of right and wrong.

. . .

. . . Is it not amazing that at a time when the rights of humanity are defined and understood with precision, in a country above all others fond of liberty; that in such an age and in such a country we find men professing a religion the most humane, mild, gentle, and generous, adopting a principle as repugnant to humanity as it is inconsistent with the Bible and destructive to Liberty. . . ?

. . . I cannot but wish well to a people whose System imitates the example of Him whose life was perfect. – And believe me, I shall honor the Quakers for their noble effort to abolish slavery. It is equally calculated to promote moral and political good. . . .

. . . Would any one believe that I am the master of slaves of my own purchase! I am drawn along by the general inconvenience of living without them. I will not, I cannot justify it. However culpable my conduct, I will so far pay my devoir to virtue, as to own the excellence and rectitude of her precepts, and lament my want of conformity to them. . . .

PATRICK HENRY, *Letter from Patrick Henry to Robert Pleasants (January 18, 1773)*, in PATRICK HENRY IN HIS SPEECHES AND WRITINGS 66-7 (James M. Elson ed., 2007). This question was not based in *right* and *wrong* for Patrick Henry, but rather grounded itself in mundane matters of *convenience* and *inconvenience*. So it was for the bulk of his nation.

¹¹⁶ W.E.B. DUBOIS, *THE SUPPRESSION OF THE AFRICAN SLAVE –TRADE TO THE UNITED STATES OF AMERICA 1638-1870* (Russell & Russell 1965) (1896).

and its place in American history, DuBois writes, “[n]o American can study the connection of slavery with United States history, and not devoutly pray that his country may never have a similar social problem to solve, until it shows more capacity for such work than it has shown in the past.”¹¹⁷ Regarding the unvarnished pusillanimity of the choice our Fathers made in 1787, DuBois is equally candid:

[T]here began, with 1787, that system of bargaining, truckling, and compromising with a moral, political, and economic monstrosity, which makes the history of our dealing with slavery . . . so discreditable to a great people. Each generation sought to shift its load upon the next, and the burden rolled on, until a generation came which was both too weak and too strong to bear it longer.¹¹⁸

And with regard to the matter of *timing*—the proper ‘when’ of addressing such matters as those facing the Founders’ in this regard—DuBois is rightly uncompromising:

How far in a State can a recognized moral wrong safely be compromised? And although this chapter of history can give us no definite answer suited to the ever-varying aspects of political life, yet it would seem to warn any nation from allowing, through carelessness and moral cowardice, any social evil to grow. No persons would have seen the Civil War with more surprise and horror than the Revolutionists of 1776; yet from the small and apparently dying institution of their day arose the walled and castled Slave-Power. From this we may conclude that it behooves nations as well as men to do things at the very moment when they ought to be done.¹¹⁹

Another lesson to be drawn from this passion-play is rooted in the ‘now’ and it is simply this: the past is not truly ‘past’ until it is put fully to rest in some real ‘present’. Too often in the present day discourse around America’s systemic, endemic race problem, a

¹¹⁷ *Id.* at 197.

¹¹⁸ *Id.* at 198.

¹¹⁹ *Id.* at 199.

problem clearly echoing vestiges of America's under-addressed slavery past,¹²⁰ minority angst is blithely voided by the majority dismissive "That was long ago . . . why can't you people get over it?"¹²¹ If American slavery is in fact America's "original sin . . . ,"¹²² then it is a sin that has its strong echoes throughout all of American history, even to today. We cannot pretend that it does not exist and we cannot wish it away. This is a problem of our own careful construction, deliberately planted and cultivated in the earliest days of our republic and violently exposed, protected and exploited throughout our history, and 'Jena 6' reminds us at least that the problem is still in need of national attention and national resolve.¹²³

There is a third 'lesson' to be derived from this inquiry—though, given its nature as essentially speculative rather than definitive, I might more honestly present it as 'postulate' rather than 'lesson'—and it is simply this: *jurisprudence matters*. For if Lincoln's house was in fact divided "against itself . . . ,"¹²⁴ it was

¹²⁰ History traces an organic connection between America's racist past and its racial present, from slavery through post-reconstruction 'Jim Crow-ism' through American apartheid and the civil rights response through present antipathy and inequality of opportunity. Anyone ignoring this clear connection is naïve, disingenuous, mean-spirited, or some negative combination of the three.

¹²¹ Anecdotally, and frustratingly, to be frank, I have personally received this pejorative countless times. This argument is falsely conceived in so many ways as to warrant or deserve no real intellectual attention here at all.

¹²² These are the words of then-Senator-now-President Barack Obama—himself a history-maker in the ongoing drama of race in America, of course—in his famous campaign address on race in this country. If we add a rider regarding the North American Indians as of a piece with America's slavery heritage, President Obama has it just about right: Barack Obama, Remarks of Barack Obama: A More Perfect Union (Mar. 18, 2008), *available at* <http://my.barackobama.com/page/content/hisownwords>.

¹²³ I think the recent trend toward official apology from various states is an encouraging step in the direction of dialogue and acknowledgement and responsibility and healing. Nations—like people—have spirits, and as the selfless acts of acknowledgement and forgiveness have the potential of healing individual wounds and restoring individual relationships, such would seem to have the same potential regarding this problem in our nation and are thus a necessary first step in that direction in any event. Germany's proactive work in this way regarding its own mid-twentieth century national sins and responses are of some note and relevance in this regard, it would seem.

¹²⁴ These words were not Lincoln's own, of course, but were aptly borrowed from Jesus Christ, in his discourse against the Pharisees recorded in *Matthew 12:25*, more fully "Every kingdom divided against itself is laid waste, and no city or house divided against itself will stand . . ." Christ's point there was simple, and fit into Lincoln's intentions nicely: if a person or a community

also in that day fully divided, North and South, *against its own foundation*, with similarly dramatic apocalyptic results to be anticipated in the offing. Professor Arthur Bestor was quite correct in re-imagining the very conflagration anticipated by Mr. Lincoln in his 1858 address as a “constitutional crisis . . . ,”¹²⁵ and the implications deriving from that truth remain vital to this day. This being so, who can fail to note or appreciate that the foundering places in the icon at the heart of the crisis, the fault-line in the whole, if you will—the “three-fifths compromise,”¹²⁶ the 1808 slavery-ban compromise,¹²⁷ and the notorious “fugitive slave clause”¹²⁸—were the very places where the “Founding Fathers” compromised against their foundation to close their deal?¹²⁹ Who can deny that the “Founders” cold failure to build consistently with the foundation of naturalist individual liberty they deliberately laid in anticipation of the Revolutionary War, would connect itself to a still greater war—again, about human liberty—to be prosecuted by their very own grandchildren?

Following this postulate through to its logical end, the implications for the discipline of jurisprudence and the persons who practice it ought well to be considered. In these examples, of which the ‘Jena 6’ incident is but one, the jurisprudence moves from the lofty realm of meta-physics and the esoterica in which such is inevitably enmeshed, and lands in the real world, the world of sweat and tears, life and death. It is no longer a mere mind exercise or point of dry debate among a small few dusty philosophers, but a living thing itself, which may have real consequences where people live. Jurisprudence becomes not merely a way of understanding law, but *a guide to law itself*, if the matter can at least be postulated so strongly, from the ‘real world’ events this paper has considered. In short, from this take, *jurisprudence matters*, and perhaps more fully and urgently than has been popularly realized, understood or appreciated.¹³⁰

proactively acts against its own settled best interests, its very survival is in jeopardy.

¹²⁵ Arthur Bestor, *The American Civil Wars as a Constitutional Crisis*, 69 AM. HIST. REV. 327 (1964).

¹²⁶ U.S. CONST. art. I, § 2.

¹²⁷ *Id.* art. I, § 9.

¹²⁸ *Id.* art. IV, § 2.

¹²⁹ As recorded by statesman James Madison from his own copious notes taken at the Philadelphia Convention in the summer of 1787, the details of these compromises read like a ‘who-done-it.’ See generally *supra* note 75.

¹³⁰ This matter has been deliberately proposed here as provocatively as I can make it. I do not know that *any* of what I am here suggesting is in fact true, but its implication in my presentation is important, and ought to invite the attention

In closing, all of the various lessons deriving from ‘Jena 6’ and American history notwithstanding, there seems to be one pristine *truth* associated with it that ought to command the attention of every American today, however we have come to own that identity.¹³¹ Eleven score and nearly fourteen years ago, “our fathers brought forth on this continent a new Nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.”¹³² Apart from the necessary update, these words are famous words, followed when they were broadcast in 1863 by an even more famous interrogatory to the nation, put in the form of a key propositional inquiry: “Now we are engaged in a great civil war, testing whether that Nation, or any Nation so conceived and so dedicated can long endure.”¹³³ With apologies to its great author, ‘Jena 6’ (and indeed any number of similar incidents in this nation’s public history from the day he spoke until today) would recover that question more tersely, more urgently: “whether that nation, or any nation, so conceived and so dedicated, *can even exist at all.*” Within the context of the vastness of the great American ‘experiment’, the answer to that question remains “maybe . . .” even two-hundred-plus years after our ‘Founders’ first broached it; it will remain “maybe” hereafter, until either it becomes “no” or until we suffer the last of our Jena 6’s—whichever comes first.

In the end, the greatest legacy of the ‘Jena 6’ experience, and its most valuable and useful gift, may be to highlight for this nation the important reality that, where matters of race in America are

of the discipline’s expertise, toward the end of fully testing the hypothesis. My own ongoing thought and work moves deliberately in that direction.

¹³¹ I am being very deliberate here in including *all* Americans, by whatever stripe and whenever arriving, in the ambit of those who must be concerned about this part of America’s historical tragedy. Too often in the present-day debate about how effectively to address America’s continuing problem of race, persons inclined to disconnect from the problem simply shift responsibility to the erstwhile victims as a means of avoidance. The truth of the matter is simply this: American culture is an organic whole—not *mosaic* but *melting pot*—and though we maintain our unique individual heritages in private, they are intertwined, indeed *subsumed*, in our shared public life. To be *American* is to be *joint tenants* in all of its entitlements *and* its encumbrances: to partake of its benefits fully upon inclusion and to bear equal responsibility in the problems with which we all continue to struggle and to seek to overcome. Whether arriving as hopeful immigrant just yesterday or tracing ancestry back to the Mayflower itself, in being accepted into the American ‘family’ we all share in its benefits and *bear our share of its burdens*. And this includes responsibility regarding our racial problems, past and present, wherever one is situated in the American experience and whenever one became ‘American.’

¹³² 7 ABRAHAM LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 107, at 23.

¹³³ *Id.* at 21.

concerned, our present still lies in countervailing context with our past, and will, until we *embrace* that reality, and do something about it. While it is tempting to imagine that the remarkable, unprecedented events of November 4, 2008 and following have ameliorated the hundreds of years of tendentious racial history in this country preceding, such thinking is, simply, wishful and naïve. Those events have *changed* the racial discourse in America, without doubt, and that in a truly hopeful way; but they have not fully discounted the accompanying history, nor fully healed its continuing ancillary effects. For that our work still remains, work which goal it is to move our nation past benign racial tolerance and amelioration to true *reconciliation* and *healing*. Only then can we hope for incidents like 'Jena 6' to fade from our national stage, relics of an age that has rightly and courageously—and finally—been put to rest.