"She Had Slain Her Favorite": Race, Gender, Violence, and the Rule of Law in the Military-Occupied South

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ABSTRACT. This Article excavates the 1865 trial *United States v. Temperance Neely* to analyze how emergent legal cultures in the military-occupied South calcified racial slavery's logic despite formal emancipation. Through examination of previously unanalyzed court proceedings, I demonstrate how this case illuminates three interlocking dimensions of postbellum jurisprudence: legal systems simultaneously acknowledged Black life while preserving white authority through plantation logics that naturalized Black women's subordination; violence against Black women and extraction of their labor became integral to reproducing social conditions necessary for racial-economic order; and Black witnesses' testimonies, though formally admitted, revealed systemic patterns that rendered Black women's experiences unintelligible within emergent legal frameworks. Drawing on the theoretical insights of Anthony Paul Farley, Saidiya Hartman, and Hortense Spillers, I observe the persistence of 'white-over-black' ideology through an "American grammar" of formal equality, liberal rights, and the "law's calculation of

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personhood." Situating the *Neely* case in scholarship on the Reconstruction Era, Marxist feminism, Black women's history, I consider how formal legal reasoning relied on notions of gendered sentiment, character, and subjectivity to privilege white sentiment and justify racial unfreedom. Attending the immediate post-surrender South, my reading emphasizes how legal actors allowed Black women's bodies to be contested sites of meaning, through which categories of race, gender, and labor might be explored. Challenging conventional understandings of the rule of law, I reconceptualize the rule of law as deference to legal institutions that transmute historical subjugation into contemporary unfreedom sanctioned by the state. By reading "along the bias grain" of the legal archive, this investigation reveals how postbellum legal frameworks positioned Black women as objects rather than subjects. This case illuminates the constitutive role Black women's labor played in reconstructing American society and the continuities between nineteenth-century rationalization of violence and ability of contemporary legal systems to respond to Black people's injuries and claims.

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INTRODUCTION

The history of blackness is testament to the fact that objects can and do resist.[1]

The hands were in the field harvesting—they got through at 4'o'clock.[2]

Ten-year-old Ellen had finished her work for the day. As she walked out of the oat field she heard Providence Neely—the plantation's owner—calling for her. Ellen ignored the summons, heading instead to the slave quarters where she lived with her mother and four siblings. After another young Black girl ordered to retrieve Ellen brought her to the Neely's "mansion-house," Providence instructed Ellen to fetch a bucket of water.[3] Ellen said no. At that moment, the summer of 1865, Providence informed Ellen she would receive no supper, grabbed her when she began to retort, and whipped her relentlessly with a branch from a nearby peach tree. Ellen's mother, Galina, hearing her daughter's cries, sprinted to the plantation house, burst into the living room, and pried her child from the plantation mistress's grasp.

Moments after Galina marched out with her daughter, a gunshot rang out. Then another. Twenty-eight-year-old Temperance Neely, Providence's daughter, had shot Galina in the chest. As Galina lay dying, Temperance knelt beside her, speaking words of lament: "Gal—why did I shoot you?"[4] Everyone on the plantation knew Temperance considered Galina "her favorite negro."[5] When Temperance pulled the trigger that July, it seemed unlikely she would face legal consequences. After all, she was white, a white woman, and a member of North Carolina's planter elite. She had fired shots on her family's plantation, killing a Black woman who had violated the racial decorum of the 19th-century South.

However, when Temperance killed Galina, racial slavery in North Carolina had already been brought to a formal end. In April 1865, Confederate forces in Durham surrendered to the Union Army. Legally, Black women and girls were free, no longer subject to the dehumanizing system of racial slavery. When Union officials charged Temperance with murder, they recognized Galina as a person rather than someone's property. National headlines in outlets like the *Chicago Tribune, Pittsburgh Gazette* and *The New York Times* commented on

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1. FRED MOTEN, IN THE BREAK: THE AESTHETICS OF THE BLACK RADICAL TRADITION, 1 (2003).
2. National Archives, Record Group 153, Records of the Office of the Judge Advocate General (Army), Court-Martial Proceedings, MM-2968: Temperance Neely, at 8 (proceedings), 10 (manuscript) (Nat'l Archives, Washington, D.C.).
3. *Id.* at 25 (proceedings), 27 (manuscript).
4. *Id.* at 28 (proceedings), 30 (manuscript).
5. *Id.* at 29 (proceedings), 31 (manuscript).

the potential spectacle of such a trial.[6] Temperance's fate would be determined by a panel of five men that fought in the bloodiest war in American history. Yet beyond questions of innocence or guilt, her case would pose a more fundamental question: in the age of emancipation, how—and to whom—would substantive freedoms apply?

This Article uncovers *United States v. Temperance Neely*[7], a little-known case, to illuminate how emergent legal cultures calcified the core logic of racial slavery in the postbellum period.[8] Situated in the military-occupied South, this trial illustrates how notions of white authority and gendered sentiment facilitated the ongoing denigration of Black women's labor and lives through the law. Amidst legal contradictions and social upheaval, I interrogate how a racial-economic order organized by violence and contingent on Black subservience persisted through nominal freedom.

Building on the theoretical work of Saidiya Hartman and Anthony Paul Farley, I shed light on how after legal emancipation "racial discourse ultimately refigured the status-race of chattel slavery" such that "the colorline became law's afterlife."[9] Specifically, the legal institutions, order, and norms that authorized racial slavery did not disappear with the formal abolition of slavery but rather transformed. In the postbellum period, the law played a paramount role in maintaining 'white-over-black' relations by privileging white subjectivity, naturalizing Black subjugation, and systematically excluding Black women from legal protections and full personhood.[10] As discussed in Part II, gender made possible the colorline. While enslaved women's reproductive capacity had been specifically quantified in account ledgers for purposes of profit, the postbellum courtroom enabled other forms of extraction. Newly emancipated Black women

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6. Murder Trial Extraordinary: A *W*ealthy and Accomplished Young Lady Murders a Negro Woman Trial by Military Commission—The Murder Proved Admission of Negro Testimony—The Citizens Exasperated, N.Y. TIMES (Aug. 21, 1865); Extraordinary Murder Trial—A Young and Accomplished Women Convicted of Shooting Her Slave, CHI. TRIB. 1 (Aug. 21, 1865); *THE PITTSBURGH GAZETTE* 1 (Aug 23, 1865). *See also*, Extraordinary Murder Trial, HOWARD UNION 1 (Sept. 7, 1965).

7. *United States v. Temperance Neely* (Court-Martial, Headquarters of the Dep't of N.C., Dep't of War, 1865) (the complete trial transcript housed in Nat'l Archives, Record Group 153, Court-Martial Proceedings, MM-2968, has never been fully transcribed or analyzed in legal scholarship despite its significance for understanding military justice in the Reconstruction South.).

8. Temperance Neely's case has received more than a scant mention in only three monographs—a historiography which is of interest to this project as well. *See* THOMAS LOWRY, CONFEDERATE HEROINES: 120 SOUTHERN WOMEN CONVICTED BY UNION MILITARY JUSTICE (2006); MARK BRADLEY, BLUECOATS & TAR HEELS: SOLDIERS AND CIVILIANS IN RECONSTRUCTION NORTH CAROLINA (2009); TOBIN BUHK, TRUE CRIME IN THE CIVIL WAR: CASES OF MURDER, TREASON, COUNTERFEITING, MASSACRE, PLUNDER, AND ABUSE (2012) (offering most robust treatment of Temperance Neely's case). The case is also discussed briefly in the Ph.D. dissertation of Linda A. Tvrdy, *Constitutional Rights in a Common Law World: The Reconstruction of North Carolina Legal Culture, 1865-1874* (2013) (Ph.D. dissertation, Columbia Univ.) (ProQuest).

9. SAIDIYA HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 10 (1997) [hereinafter SCENES OF SUBJECTION]; Anthony Paul Farley, *Perfecting Slavery*, 36 LOY. U. CHI. L.J. 225, 228 (2004).

10. Farley, *supra* note 9, at 225-226.

were denied the entitlements of being a man and denied access to the racially-defined category of the 19th-century woman. Yet, after the Civil War Black women would be strategically subjected to the "law's calculation of personhood" to impose obligations and duties without being afforded substantive rights.[11]

American entanglements of law and society ensured that Blackness would continue to be a "mark" of dispossession: dispossession still characterized by captivity, denigration, and having been considered property for most of American history.[12] In this Article I refer to "white-over-black" ideology—the structural positioning of whiteness as dominant and Blackness as the *mark* of non-being—to describe a fundamental organizing principle of American life.[13] Not only have institutions, structures, and norms been designed to normalize Blackness being subordinate to whiteness, but an entire society is trained in 'white-over-black' such that abstract concepts, ambiguous laws, or technically neutral ideas are interpreted to 'white-over-black' ends.[14]

Temperance Neely's trial took place in an especially unique legal context: military rule in the immediate post-surrender period. While the federal government would formally divide the ten former Confederate states into five military districts in 1867, Union Army officials began establishing military courts with jurisdiction over civilian affairs in 1865.[15] Following the Confederacy's official surrender in North Carolina, Union General John Schofield quickly established three tiers of military courts to operate in the state, including military commissions for serious crimes.[16] Looking to federal, state, and military sources of legal authority, post-surrender courts uniquely adopted forms of legal pluralism while being actively concerned with adjudicating legal cases related to race.

As a case study, *United States v. Temperance Neely* (1865) operates as a microcosm for how—just as the Civil War ended—legal mechanisms developed such that the preexisting exploitation, subjugation, and denigration of Black people became a postbellum reality.[17] Specifically, the case reveals how the specific position Black women occupy became inextricable from how formal

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11. Scenes of Subjection, *supra* note 9, at 229.

12. Anthony Paul Farley, *The Colorline as Capital Accumulation*, 56 BUFF. L. REV. 953, 953-954 (2008).

13. Farley, *supra* note 9, at 225.

14. *Id.*

15. ERIC FONER, RECONSTRUCTION: 'AMERICA'S UNFINISHED REVOLUTION, 1863-1877, 276 (1988).

16. Bradley, *supra* note 8. The two other tiers Schofield established for legal adjudication under military rule were provost courts for minor offenses and military boards for property disputes.

17. Regarding the role and rule of law transitioning from slavery to freedom, *see* ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 197-238 (1975). Regarding the reality of anti-blackness in postbellum life, *see* ""W.E.B. DUBOIS, BLACK RECONSTRUCTION ch. 16, at 670-710 (1935).

equality would coexist with substantive unfreedom.[18] In Reconstruction, the legal rights that did emerge—like the right to vote—extended primarily to Black men and, when the Union Army left the South in the mid-1870s, extralegal violence and legal repression precluded Black people from exercising their rights.[19] Despite the potential for a radical social transformation in the military-occupied, 19th-century South, Northern officials routinely embraced legal mechanisms that served projects of national reconciliation at the expense of Black people.

A monumental legal transformation was imagined to be quintessential to the abolition of slavery: formerly enslaved individuals would be entitled to the rights, liberties, entitlements, and protections of the state. As W.E.B. DuBois explained in his pivotal account of the era, *Black Reconstruction*: freedpeople saw abolition as not just the removal of subjugating forces, but a vision of freedom that recognized the affirmative remedies that would be needed for Black people to be full, meaningful citizens in a democracy.[20] The *Neely* case sheds light on how a 'white-over-black' ideology was deployed through a set of legal rules, processes, and norms that reconfigured *how* racial dominance would be maintained.[21] The "mark" of racial difference and "badges and incidents" of racial slavery that the Reconstruction Amendments sought to address in the years following Neely's case were on full display immediately after the War's end.[22]

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18. Scenes of Subjection, *supra* note 9. Hartman elaborates on the relationship between law and black non-being, describing how the law rendered enslaved people "fungible…objects of property" to be bought and sold. Id. at 52. *See also* Hortense Spillers, *Mama's Baby, Papa's Maybe: An American Grammar Book*, 17.2 DIACRITICS 64, 67, 78 (1987) [hereinafter *Mama's Baby, Papa's Maybe*]. Spillers specifically notes that upon enslavement, forcibly displaced to the African coast and stripped of any identity, while the ontological status of a human person could be found in the verb "to be", the existence of a "slave" or enslaved person was "to be *for the captor*." Further, Spillers explains "[i]f '"slave"' is perceived as the essence of stillness…or of any undynamic human state, fixed in time and space, then the law articulates this impossibility as its inherent feature."

19. During Reconstruction when legal rights were extended to Black people as American citizens, those rights applied to and were articulated for Black men exclusively and would only materialize briefly before the federal government abandoned Black communities in the South and extralegal violence replaced the US Army as the controlling force.

20. DuBois, *supra* note 17. Versions of freedom were imagined that involved land redistribution, equitable public education, the provision of basic economic resources, and the legally-protected ability to sustain social ties. Freedom might involve the absence of coerced, or even wage, labor. To be free could involve safeguards for previously exploited laborers in the service of greater economic independence and entrepreneurship and the legally-protected ability to have families and build communities. Freedom could be shaped by the idea that black life is not characterized by the perpetual threat of family separation or gratuitous violence. Thus, while the postbellum period saw formal chattel slavery gradually fade, racial slavery transformed and black freedom called for the dismantling of a racial-economic order—not relegated to the South—in the name of creating a racially just society. The meanings of abolition and black freedom documented in DuBois have been elaborated upon and theorized significantly in black studies. *See*, *e.g.*, ANGELA DAVIS, ABOLITION DEMOCRACY: BEYOND PRISON, TORTURE, AND EMPIRE (2005); ROBIN D.G. KELLEY, FREEDOM DREAMS: THE BLACK RADICAL IMAGINATION (2002); Hartman, *supra* note 9.

21. *See* Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 373-374 (1992) (discussing how "racial patterns adapt in ways that maintain white dominance.")

22. Farley, *supra* note 9; U.S. Const. amend. XIII, §2.

United States v. Temperance Neely took place in a distinctly liminal space: it brought together bodies of law and new sources of judicial authority that had yet to determine how rights, entitlements, freedoms, and personhood would be understood in a court of American law.[23] During the trial of Temperance Neely and the government's attempt to respond to the death of a freedwoman, an unquestioned deference to the rule of law emerged. Yet, the rule of law—even viewed as a system of procedural fairness—would be a system that rendered Black women as objects to be used rather than subjects to be protected.[24] Still, as the first documented military commission trial in North Carolina involving an alleged murder, the proceedings reveal moments of contingency that complicate the case's legacy.

This Article addresses my methodology before analyzing the *Neely* case in three parts. Part I considers the sequence of events leading to Temperance shooting Galina as presented at trial, how sentiment entered the courtroom in matters of law and fact, and the emergent legal cultures at play. Part II examines the relationship between violence, Black women, and America's racial-economic order by considering how court actors describe the rule—and role—of law after the Civil War. Part III situates Black witnesses' efforts to testify in a broader consideration of legal emancipation where racial notions of personhood, self-possession, and subjectivity informed whether someone had the capacity for truth. In conclusion, I suggest how the rule of law exhibited in *United States v. Temperance Neely* remains linked to state-sponsored subjugation in the criminal legal system. Broader distortions of Black women and girls, and how they maneuver the world, continue to underwrite American social life and be sustained in courts of law.[25]

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23. *See* LAURA EDWARDS, A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS (2015).

24. *Mama's Baby, Papa's Maybe*, *supra* note 18, at 67.

25. *See*, *e.g.*, Jamilia Blake & Rebecca Epstein, *Listening to Black Women and Girls: Lived Experiences of Adultification Bias* (Georgetown Law Ctr. on Poverty & Inequality Initiative on Gender Justice & Opportunity 2017) (finding white cultural stereotypes of Black women contributes to adultification bias when projected onto Black girls, adultification bias research showing adults perceive Black girls as less innocent than white girls as young as 5-9 years old.). In her seminal essay, Hortense Spillers writes "I am a marked woman, but not everybody knows my name…My country needs me, and I were not here, I would have to be invented…the nicknames by which African-American women have been called, or regarded, or imagined…demonstrate the powers of distortion that the dominant community seizes as its unlawful prerogative." *Mama's Baby, Papa's Maybe* , *supra* note 18, at 65.

The Rule and Role of Law

Despite no longer being chattel legally owned[26] nor enslaveable due to skin color[27] nor captive by nature of their mother's status at birth,[28] Black people still bore the particular "mark" of race that signified non-being.[29] While immediately after the Civil War, Galina could be told or informed of her freedom, this freedom was nominal: nothing, inherently, emanated from the written word. For Black women, legal freedom was a paradox: they simultaneously received formal rights and subjected to new forms of coercion and captivity. Yet "the flesh"—marked by slavery's violence—became the site where Black women and girls like Galina and Ellen developed ways of living that exceeded what the law recognized as freedom.[30] My methodology emerges from these practices of creating life beyond legal recognition, practices rooted in the Black radical tradition.[31]

In historicizing the relationship between race, gender, violence, and the rule of law in America, I utilize "a way of seeing and living that emerged out of collective struggle" that is "informed by historical consciousness," "contests the most fundamental terms of liberal modernity," and "enacts otherwise possibilities."[32] I deploy a critical set of analytical tools to uncover latent meanings internal to what documentation of a case or newspaper reports of a trial

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26. *See generally* JAMES PENNINGTON, CRANIA AEGYPTIACA; OR OBSERVATIONS ON EGYPTIAN ETHNOGRAPHY, DERIVED FROM ANATOMY, HISTORY, AND THE MONUMENTS (1844). Historian Walter Johnson elaborates on what Pennington calls the "soul and body of slavery…the chattel principle" in WALTER JOHNSON, SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET 19-44 (1999); *see also* STEPHANIE SMALLWOOD, SALTWATER SLAVERY: A MIDDLE PASSAGE FROM AFRICA TO AMERICAN DIASPORA (2007).

27. Federal fugitive slave laws ensured that someone perceived as black or suspected of being marked by blackness could become enslaved even if they had been born free. Namely, if a white person claimed that a person was a "runaway" and/or fit the description of a fugitive, the federal government compelled individuals in free states to send alleged fugitives into racial slavery. *See* U.S. Const. art. IV, § 2, cl. 3; Fugitive Slave Act of 17932 ch. 7, 1 Stat. 302; Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

28. Jennifer L. Morgan, *Partus sequitur ventrem: Law, Race, and Reproduction in Colonial Slavery*, 22 SMALL AXE 1, 1-17 (2018).

29. Farley, *supra* note 9, at 225.

30. *Mama's Baby, Papa's Maybe*, *supra* note 18, at *'''*67. Spillers theorizes the flesh as both the site of slavery's violence, captivity, and dispossession characterized by slavery's historical and ongoing effects and the flesh as what inscribes what Spillers calls a "primary narrative" of captive personhood that exceeds liberal humanist notions of the subject. It is distinct from the body as discussed in this Article. Scholars like Fred Moten have further theorized the flesh as both the site of subjugation and life lived otherwise. FRED MOTEN, IN THE BREAK: THE AESTHETICS OF THE BLACK RADICAL TRADITION 92-93 (2003) (arguing that ""the history of blackness is testament to the fact that objects can and do resist".")

31. *See* CEDRIC ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION (2000).

32. Kelley, *supra* note 20, at 9; Robinson, *supra* note 31, at 73; Hartman, *supra* note 9, at 65; Rinaldo Walcott, *The Problem of the Human: Black Ontologies and ''the Coloniality of Our Being'* in POSTCOLONIALITY—DECOLONIALITY—BLACK CRITIQUE: JOINTS AND FISSURES 98 (Sabine Broeck and Carsten Junker eds., 2014).

provides. Moreover, I specifically engage with legal history and the historiography of Reconstruction by utilizing terms with traditional meanings in inverted ways: namely, the rule—and role—of law. Through analyzing the trial of Temperance Neely, I observe how the rule and role of law transformed explicit racial bondage into legal subordination.

I make two primary arguments regarding law and the postbellum period. First, I argue that the rule of law operates to preserve relations that are 'white-over-black' and relies upon considering Black women as objects to be used by legal subjects in structuring society. I define the rule of law not in its traditional sense: a system where all persons are equally subject to publicly promulgated legal codes and processes. Rather, I conceptualize the rule of law as the reverence for and deference to legal institutions as supreme arbiters of social conflict. In effect, the rule of law transmutes historical forms of subjugation into contemporary patterns of unfreedom. Following Anthony Paul Farley, the rule of law makes operative "the colorline" by simultaneously offering non-Black subjects limited protections contingent on their distance from Blackness, while fostering among all those subjected by law the desire for legal recognition by the state.[33]

Regarding law and the postbellum period, my second argument in this Article concerns the *role of law*. I contend that the role of law involves transforming categories like race and gender into explanatory tools that justify hierarchy. As the *Neely* proceedings reveal, these explanations naturalize certain forms of violence while rendering certain claims of injury unintelligible before the law. My approach detours from traditions of legal theory which—while varying in their characterization of the role of law—place common emphasis on the law's role as "guiding conduct" by providing rules, operationalizing systems of norms, and utilizing principles.[34] Building on scholars who have critiqued the idea that said rules, norms, and principles can occupy a space of neutrality, I view the role of law as inextricable from everything considered outside it.[35] I

33. Farley, *supra* note 12, at 953-954.

34. Thomas Aquinas, *Summa Theologica*, pt. I-II, q. 90, art. 4, and pt. I-II, q. 96, art. 6 (FATHERS OF THE ENGLISH DOMINICAN PROVINCE trans., 1947) (Aquinas described the role of law is to act as "a rule and measure of acts, whereby man is induced to act or is restrained from acting…[e]very law is ordained to the common good"); LON FULLER, THE MORALITY OF LAW 96 (rev. ed. 1969) (Fuller states "the role of law is to subject human conduct to the governance of rules…[accomplishable] by means of rules that are merely formal, that is, that do not seek to guide conduct directly but merely serve to organize the procedures by which conduct may be officially regulated."); H.L.A. HART, ESSAYS ON BENTHAM 154 (1982) (Hart argues "[l]aw consists of social rules. Rules exist only when a human community behaves in a regular way and critically regards that regularity as a standard of conduct"."); HANS KELSEN, THE PURE THEORY OF LAW 6, 32 (MAX KNIGHT trans., 1967) (Kelsen suggests the role of law is "regula[ting] human behavior by laying down a pattern upon which men ought to conduct themselves…[its] coerc[ion]… [law] establishes sanctions as consequences of certain conditions, and thereby commands a certain behavior of men by attaching to the contrary behavior a disadvantage—the sanctions".").

35. *See* ROBERTO UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 40 (1986) (Unger argues the role of law "not simply to record a pre-established social consensus about rights and duties but to shape

specifically conceptualize the role of law, in considering the post-surrender South, as how legal institutions function to reproduce social conditions necessary for maintaining racial-economic orders. Law and legal institutions actively create market conditions using legal processes to 'objectively' structure social possibilities.

Silence as Presence in Producing the Racial Past

This Article calls attention to the incomplete nature of what an archive provides. Building on scholars of Black women's history, I "stretch archival fragments by reading *along the bias* grain."[36] Approaching evidence from the past, hoping to give voice to the lived experiences of the marginalized, dust-covered handwritten materials found routinely yield "no exhaustive account of the girl's life, but catalogues the statements that licensed her death."[37] The trial transcript provides little information about Galina or Ellen. In archival documents, Galina has no voice, does not speak, and her actions are reduced to whatever she did that others were there to see. Ellen does not testify, and court materials provide no information regarding why.

History becomes a fraught endeavor when the lives of formerly enslaved people are surfaced through the perspectives of their owners, white government actors, and—rarely—Black testimonies encumbered by the constraints and consequences of bearing witness in a court of law.[38] In the *Neely* trial, a Black woman—formerly enslaved by Providence Neely—named Sallie was the first individual invited to testify. The admissibility and treatment of Sallie's testimony would immediately become a contentious question of law. Despite her being nominally free, legal actors would examine the validity of her statements through her social position as a free woman. In the courtroom Sallie would be

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the very meaning of moral discourse in the face of conflict and uncertainty."); *see also* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 621 (1982) (Kennedy argues the role of law is to "legitimate the existing distribution of wealth and power by representing it as natural or necessary rather than historically contingent and changeable").

36. MARISA FUENTES, DISPOSSESSED LIVES: ENSLAVED WOMEN, VIOLENCE, AND THE ARCHIVE 7, 7 (2016). Fuentes notes that reading along the bias grain may bring into relief "extinguished and invisible but no less historically important lives." On black women's history *see*, *e.g*, NELL IRVIN PAINTER, SOUTHERN HISTORY ACROSS THE COLOR LINE (2002) (especially ch. 1, "Soul Murder & Slavery: Toward A Fully Loaded Cost Accounting"); Evelyn Brooks Higginbotham, *African American Women''s History and the Metalanguage of Race*, 17 SIGNS 251 (1992); Elsa Barkley Brown, *What Has Happened Here: The Politics of Difference in Women's History and Feminist Politics*, 18 FEMINIST STUD. 295 (1992); Evelyn Brooks Higginbotham, *Beyond the Sound of Silence: Afro-American Women's History*, 1 GENDER & HIST. 50 (1989); Deborah Gray White, *Mining the Forgotten: Manuscript Sources for Black Women's History*, 74 J. AM. HIST. 237 (1987); *see also* Saidiya Hartman, *Venus in Two Acts*, 26 SMALL AXE 1 (2008) [hereinafter *Venus in Two Acts*] (building on the preceding body of literature); Saidiya Hartman, *The Dead Book Revisited*, 6 HIST. PRESENT 208 (2016) (same).

37. Hartman, *Venus in Two Acts*, *supra* note 36.

38. *See generally* Hartman, *Venus in Two Acts*, *supra* note 36.

framed as an unreliable narrator, except instances where her testimony corroborated a white witness's account. Testifying, for Sallie, was an incredibly precarious act: she could face immediate consequences for her actions such as her and her husband being kicked off the Neely plantation once the trial ended. One can only imagine, and we cannot fully grasp, what Sallie might have said in the courtroom if allowed to speak freely and without the threat of punishment.

Anthropologist Ann Laura Stoler emphasizes that "working along the archival grain" draws attention to "the archive's granular rather than seamless texture" and allows one to "enter a field of force and will to power."[39] Archives reflect less what was and more what remains positioned to be found. During and after Reconstruction, attempts to reconcile the North and South relied upon certain mythologies of the past that suggested a peaceful future for the nation's white citizenry. In my archival work, therefore, I foregrounded Michel-Rolph Trouillot's call to challenge the historical guild by considering the past *and* how the past is produced.[40] This approach, which tends to examine submerged and fractured perspectives, explicitly acknowledges the impossibility of fully recovering the lives or doing justice to the experiences of the oppressed.[41] It also recognizes how historical accounts can obscure conditions in the past even when trying to reveal new truths.

My analysis underscores accounts of postbellum life that have demonstrated how formerly enslaved people immediately tested the contours of emancipation through everyday acts of refusal and resistance. In focusing on the military-occupied South, and what John Witt has called "America's Ten Year War," the killing of Galina calls attention to the scope and nature of the Union Army's mandate to actualize Black people's legal freedom, including through the adjudication of law.[42] Galina's death did not prompt the attention of international media or senior Union officials because of the tragic loss of a woman's life: her Blackness and the white womanhood of her assailant did. These factors—the agents and subjects of violation and harm—shape my attention to the explanatory

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39. ANN LAURA STOLER, ALONG THE ARCHIVAL GRAIN: EPISTEMIC ANXIETIES AND COLONIAL COMMON SENSE 53 (2009). Therefore, while important and critical methodologies exist that call for reading against the grain—measured skepticism regarding the presumptions woven into certain archival materials—the production of certain archives call for different intellectual tools.

40. MICHEL-ROLPH TROUILLOT, SILENCING THE PAST: POWER AND THE PRODUCTION OF HISTORY 19-53 (1997).

41. STEPHANIE CAMP, CLOSER TO FREEDOM: ENSLAVED WOMEN AND EVERYDAY RESISTANCE IN THE PLANTATION SOUTH (2004); JENNIFER L. MORGAN, LABORING WOMEN: REPRODUCTION AND GENDER IN NEW WORLD SLAVERY (2004); JESSICA MARIE JOHNSON, WICKED FLESH: BLACK WOMEN, INTIMACY, AND FREEDOM IN THE ATLANTIC WORLD (2020); HARTMAN, *Venus in Two Acts*, *supra* note 36. I am also informed by seminal works in subaltern studies on finding resistance amidst domination. *See also* Ranajit Guha, ELEMENTARY ASPECTS OF PEASANT INSURGENCY IN COLONIAL INDIA (Duke Univ. Press 1999) (1983); JAMES C. SCOTT, DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS (1990); PARTHA CHATTERJEE, THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES (1993).

42. JOHN WITT, Blurb on back jacket of GREGORY DOWNS, AFTER APPOMATTOX: MILITARY OCCUPATION AND THE ENDS OF WAR(2015).

meaning of categories like race and gender and aspects of one's subjectivity: their character or feelings of affection. Informed by historian Ariela Gross's study of race in 19th-century courtrooms, my analysis emphasizes how the biases internal to lines of reasoning present in any form of documentation produced by the state—here, a transcript of court proceedings—is essential to assessing how history unfolds.[43]

Additionally, following historians of Black women's lives in the 19th-century, I consider how the *Neely* case uniquely demonstrates how despite formal equality, Black women remained simultaneously "hyper-visible and invisible" in American social life.[44] Temperance's trial exposes the specific ways legal culture and American social norms could leave unaddressed the gendered vestiges of enslavement. Black people's experience of race, gender, and the violence associated with how those categories were policed, was rarely cognizable in courtrooms in the Reconstruction Era. But, more significantly, I suggest that *United States v. Temperance Neely* highlights how the devaluation of Black women's lives—before and after the Civil War and in and out of formal legal settings—informed the liberal rights that all citizens ostensibly hold.

Legal Cultures as New and Calcifying Sites

The retention of American slavery's racialized-gendered logic after the Civil War propagated legal cultures that saw Blackness and womanhood as structuring categories.[45] Legal cultures, defined by Lawrence Freidman as "the ideas, values, opinions, and attitudes of some population with regard to law and legal systems,"[46] operate in conversation with preexisting legal norms. While the Emancipation Proclamation and Reconstruction Amendments—through the formal language of liberal personhood and equal protection under the law—contained new formulations of freedom that attached to Black men and birthright

43. *See* Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the 19th-century South*, 108 YALE L.J. 109 (1998-1999); ARIELA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM (2000).

44. SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 57 (2015). Foundational works in black women's history include NELL IRVIN PAINTER, SOJOURNER TRUTH: A LIFE, A SYMBOL (1996); TERA HUNTER, TO ''JOY MY FREEDOM: SOUTHERN BLACK WOMEN''S LIVES AND LABORS AFTER THE CIVIL WAR (1997); MARTHA JONES, ALL BOUND UP TOGETHER: THE WOMAN QUESTION IN AFRICAN AMERICAN PUBLIC CULTURE, 1830-1900 (2007).

45. Following scholars like Chandan Reddy, I use the phrase "racialized-gendered" to describe race and gender as mutually-constituted categories, specifically within the arrangements of modern capitalism and the liberal state, that structure and legitimate notions of difference, subjectivity, citizenship, and freedom. CHANDAN REDDY, FREEDOM WITH VIOLENCE: RACE, SEXUALITY, AND THE U.S. STATE 223, 261 (2011) (arguing "state promotion of racial equality within US capitalism... has contributed to an expansion and made more complex racial and racialized gendered inequalities" and that "racialization is always a gendered process."). *See also* Evelyn Nakano Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, 18 SIGNS 1, 1–43 (1992); Lisa Lowe, *Work, Immigration, Gender: New Subjects of Cultural Politics*, 25 SOC. JUST. 3, 31-49 (1998).

46. LAWRENCE FREIDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 223-225 (1975).

citizens, they left Black women largely unnamed. The law provided no substantive answer to how Black women might move from slavery to freedom: the law said Black people were no longer 'chattel', but ignored how racial slavery had turned people into usable objects and fungible things.[47]

Black women in the postbellum period would continue to represent the fungibility of Black life. Fungibility, the condition of being interchangeable, would be constitutive of the "grammar" through which social meanings are articulated and affixed to certain people, "bod[ies] and flesh".[48] A 'white-over-black' ideology where the attributes of full personhood are defined through state-sponsored structures of dispossession and non-being.[49] In my reading I underscore how, in the *Neely* case, Black women function as objects to be used. This understanding surfaces the multifaceted labors of Black women and how Black women, once property to be owned and racial slavery's fulcrum, experienced formal legal equality and nominal freedom. Nevertheless, violence in the Reconstruction period—violence that tears and marks flesh—would be constitutive of the re-establishment of social order.[50] My reading of the *Neely* case emphasizes how racial logics appeared in a Southern courtroom with Northerners serving as jury and judge: Reconstruction, informally, had barely begun.

When the entire country's white citizenry faced the challenge of what to do with four million people newly free, legal settings were a primary site for the reproduction of racial dominance: where the end of formal slavery was not equivalent to people being substantively free.[51] But what I describe as *emergent legal cultures* are most visible in cases where core logics—despite how they are presented or described—are being calcified. These cases, occurring in moments of acute contingency, can expose ideas, norms, and slippages of representation that complicate how power operates even when they make certain modes of domination clear. Especially when certain individuals have not been included in conceptions of liberal personhood, the logics by which their concerns are dismissed are not always evident. More crudely, legal cases also produce

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47. AIMÉ CÉSAIRE, DISCOURSES ON COLONIALISM 42 (1950). Enslaved people in racial slavery experienced what Aimé Césaire calls "thingification" where people become things—objects denied particularity—because they exist to be used. Afro-pessimist thought argues that anti-blackness is characterized by this denial of particularity, a key aspect of full personhood. *See also* FRANK WILDERSON, RED, WHITE, AND BLACK: CINEMA AND THE STRUCTURE OF U.S. ANTAGONISMS 56 (2010).

48. *Mama's Baby, Papa's Maybe*, *supra* note 18, at 68.

49. *E.g.*, *Mama's Baby, Papa's Maybe*, *supra* note 18, at 80 (explaining how enslaved black women structured American ideas of motherhood by being simultaneous "mothers and mothers-dispossessed").

50. Political theorist Denise Ferreira da Silva's work suggests this re-establishment of social order might be better understood as the institution of an ontoepistemological context. *See* DENISE FERREIRA DA SILVA, TOWARD A GLOBAL IDEA OF RACE 15 (2007).

51. LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH 171-186 (2007). Edwards emphasizes the role of property rights and participation in the free market as core features of Reconstruction legal cultures.

archives represented as mimetic re-presentations of what happened: facts and evidence, the ostensible truth of what was said and what was done.[52]

This Article's three parts explore this little-known Reconstruction era case that—at the time— made international news, in order to consider how race, gender, and legally legitimated violence were transposed from racial slavery to nominal freedom.[53] While the case of *United States v. Temperance Neely* warrants close analysis from various intellectual postures, this Article does not seek to provide a comprehensive historical treatment of the postbellum racial-economic order. Nor does this Article substantively theorize the crucial relationship between legal cultures, racialized-gendered violence, Black women, and political economy. Instead, informed by scholars of gender and slavery, Black women's history, and critical race theory, I explore what legal scholarship has paid less attention to in understanding Reconstruction.[54] I explore how formal rights and ostensible freedom interacted with the formation of the categories "black" and "woman" in the postbellum period. [55] I argue that these formations jettisoned Black women from protections and entitlements associated with being a legal subject or a full person.

This Article is an initial inquiry into what Black studies, Marxist and Black feminist thought, and critical race theorizations of state-sanctioned violence, can tell us about the reconstructive potential—and legacy—of 19th-century American law.[56]

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52. Regarding the law and mimesis, *see* Patricia Williams, *On Being the Object of Property*, 14.1 SIGNS 5. *See generally* DAVID LLOYD, UNDER REPRESENTATIONS: THE RACIAL REGIMES OF AESTHETICS (2019) (on archives as re-presentations).

53. Temperance Neely's case has received more than a scant mention in only three monographs—a historiography which is of interest to this project as well. *See* THOMAS LOWRY, CONFEDERATE HEROINES: 120 SOUTHERN WOMEN CONVICTED BY UNION MILITARY JUSTICE (2006); MARK BRADLEY, BLUECOATS & TAR HEELS: SOLDIERS AND CIVILIANS IN RECONSTRUCTION NORTH CAROLINA (2009); TOBIN BUHK, TRUE CRIME IN THE CIVIL WAR: CASES OF MURDER, TREASON, COUNTERFEITING, MASSACRE, PLUNDER, AND ABUSE (2012) (offering most robust treatment of Temperance Neely's case). The case is also discussed briefly in the Ph.D. dissertation of LINDA A. TVRDY, *supra* note 8.

54. *See*, *e.g.*, Morgan, *supra* note 41; Saidiya Hartman, *The Belly of the World: A Note On Black Women's Labor*, 18 SOULS 1, 166-173 (2016); DEBORAH GRAY WHITE, AR''N''T I A WOMAN?: FEMALE SLAVES IN THE PLANTATION SOUTH (1985); STEPHANIE M.H. CAMP, CLOSER TO FREEDOM: ENSLAVED WOMEN AND EVERYDAY RESISTANCE IN THE PLANTATION SOUTH (2004); ANGELA P. HARRIS, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); DERRICK A. BELL, JR., *Property Rights in Whiteness—Their Legal Legacy, Their Economic Costs*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 71 (Kimberlé Crenshaw et al. eds., 1995).

55. I identify these three fields to specifically emphasize the significance of scholarship that brought them all into conversation. *See*, *e.g.*, PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); Hartman, Scenes of Subjection, *supra* note 9; ADRIENNE DAVIS, *"Don't Let Nobody Bother Yo' Principle": The Sexual Economy of American Slavery*, in SISTER CIRCLE: BLACK WOMEN AND WORK 15-38 (Sharon Harley et al. eds., 2002); DYLAN C. PENNINGROTH, THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH (2003).

56. On reconstructive potential of and in law, *see* Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741 (1994).

PART I. "WHY DID I?": WHITE SENTIMENT, PLANTATION LOGIC, AND THE ROLE OF LAW IN EMERGENT LEGAL CULTURES

Post-emancipation racial discourse ultimately refigured the status-race of chattel slavery…sentiment sanctions black subordination because affinity and desire ultimately eclipse equality.[57]

When ten-year-old Ellen left the plantation field, she heard a scolding voice from the plantation house. The widow of the plantation, Providence Neely, called out to her, wanting to know "after they got through, why she did not come to the house, as she [Mistress Neely] had plenty of work for her to do."[58] For the young girl, born into slavery on Neely's plantation and having spent her entire life enslaved by the Neely family, the nature of her servitude was unclear. For newly emancipated people throughout the South, the immediate aftermath of the Civil War involved two realities: in one sense, they had nothing—no land or clearly defined legal rights. In another, they had begun articulating what had always been theirs: small acts, movements, and choices that would have earned sharp rebuke under racial slavery now tested the boundaries of postbellum life.

For Ellen, this meant refusing to work anymore that day: refusing the labor of her hands. She was admonished for doing so. What might be read as a sense of self-possession in another sense might just be new expressions of refusal.[59] Eventually, Mrs. Providence Neely would whip the young girl for her refusal—reasserting the norms of how owners interacted with those they enslaved. Ellen had rejected a defining feature of plantation life: modes of subservience with no boundaries on when and how one must obey.

To narrativize a series of events in the mid-19th century, based on the handwritten records of eyewitness testimonies, means relying on an archive. In cases like that of Temperance Neely, the production of a legal archive amounts to a transcription of spoken language in a courtroom and the written closing arguments of counsel. In the courtroom, the work Providence Neely needed Ellen to do in that moment was undisputed: the plantation mistress wanted Ellen to bring her a bucket of water. No evidence was introduced to the contrary, and independent testimonies gave the same account. While the water Providence asked for would be a matter of fact, noted by the prosecution and defense, the law provided no answer as to whether the formerly enslaved ten-year-old needed to reply. The prosecution made no attempt to argue that the original dispute that

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57. Scenes of Subjection, *supra* note 9, at 10.

58. *Supra* note 2, at 6 (proceedings), 8 (manuscript).

59. In writing of refusal, I am informed by the work of several scholars. *See* TINA CAMPT, LISTENING TO IMAGES (2017); SAIDIYA HARTMAN, WAYWARD LIVES, BEAUTIFUL EXPERIMENTS: INTIMATE HISTORIES OF RIOTOUS BLACK GIRLS, TROUBLESOME WOMEN AND QUEER RADICALS (2019); Stephanie M. H. Camp, *The Pleasures of Resistance: Enslaved Women and Body Politics in the Plantation South, 1830-1861*, 68 J. S. HIST. 533 (2002).

led to Temperance Neely' shooting and killing Galina was based on a legally defunct system of racial slavery. Instead, the production of facts—what took place in the past—attains a certain veracity, especially in the context of law; one is left with noticeable information gaps where arguments, logic, and conclusions answer questions like *how* or *why*?

In this section, I consider how postbellum legal cultures embraced a type of 19th-century sentimentality that could be used to disavow the agency and circumstance of another. The ostensible freedom that Galina possessed for mere months had little meaning in the 1865 post-surrender courtroom: a fatal injury took place and a legal subject's behavior may have been a crime. The centering of Temperance Neely's affinities in a criminal trial—her regrets, her sorrow—is unsurprising if understood in isolation, but informative because of what was being juxtaposed. Displaced by those making legal arguments and the military commission hearing them, was the fatal injury a newly-free woman experienced: Galina was dead and her relationship with Temperance, the Neely plantation, and conceptions of freedom received scant mention in the trial.

A key, and undisputed, narrative during the trial emphasized Temperance Neely's long-standing sentiments of affection, goodwill, and care for Galina which proved that Temperance could not have intended to shoot Galian dead. Temperance's legal counsel emphasized that her deeply-felt sentiments reflected the accidental nature of Temperance's second firing of the gun. Moreover, that Temperance's first shot—intended only to "frighten" Galina—exemplified the restraint of genteel white womanhood in the 19th-century South.[60] Galina, in press coverage of the trial, was described simply as "a favorite household servant" from whom "the accused had been taught to expect servile obedience."[61] The relationship between the two women was consistently depicted in terms of Temperance's affinity for Galina and the privileged treatment Galina, therefore, received.

Temperance Neely was presented in court as an exemplary woman: white, married, and a mother of three young children, she lived on the plantation to care for her recently widowed mother Providence Neely. Reflecting 19th-century theories of gender, sex, and biology, Temperance's actions that led to Galina's death could be narrated as the measured and moral behaviors of an evolved woman. As Kyla Schuller argues, regarding postbellum understanding of feelings and sentiment, white women became associated with "vulnerability [to] and excess of sentimentality" while being "allocated increased sympathy" for their ability to "mediate their sensibility."[62] After seeing her mother disobeyed and pushed to the ground, Temperance did not, as her legal counsel framed it,

60. Supra note 2, at 3 (defendant's brief), 53 (manuscript).

61. Extraordinary Murder Trial, *supra* note 6.

62. KYLA SCHULLER, THE BIOPOLITICS OF FEELING: RACE, SEX, AND SCIENCE IN THE NINETEENTH CENTURY, 64-65 (2018).

succumb to "the heat of women's passions."[63] She did not seek retribution by intentionally killing Galina. Instead, the fact her second gunshot struck Galina was a case of "accident or misadventure."[64]

The notion that Temperance did not intend to harm or kill Galina was supported by evidence that Temperance felt a unique affinity and affection toward Galina and her children. The defense explained that Galina and Temperance had been raised together and as girls "had joined in a many a merry romp."[65] While being cross-examined, Sallie affirmed that—with respect to Temperance's treatment of Galina and her children—there was "jealousy" among other enslaved people. [66] These accounts of Temperance's mental and emotional state would go completely unchallenged by the Army's legal counsel prosecuting the case. Instead, this narrative of feelings would be treated as a matter of fact that should dictate the application of law.[67]

Reading a court transcript of praise and sympathy, reliant on gendered tropes, one could easily forget Temperance Neely was being tried for a most violent and serious crime. The case would garner international publicity: journalists wondered what bodies of law would apply, would formerly enslaved people be allowed to testify, and why had a proper woman of Southern mores pulled the trigger? Seemingly nowhere to be found, in the legal proceedings of this case, was Galina. Galina—who has no documented surname (like most Black people at the time)—the victim of the fatal crime, would be functionally written out of media coverage of the trial's proceedings. There was one exception to this erasure of Galina: one primary argument of the defense was that Galina's death tormented Temperance. Temperance cared deeply about Galina, had for years, and their relationship was unique regarding how women—free and enslaved—interacted on the plantation.[68] Indeed, Temperance—argued the defense and often commentators in national press—had suffered an insufferable anguish: "she had slain her favorite."[69]

19th-century conceptions of sentiment gave a white woman like Temperance the benefit of being perceived as having agency to act justifiably and being absolved for the fatal injury because of how emotionally attached she was to her victim. The defense highlighted white people's alleged superior ability to adapt, change, and—especially among white women—the ability to be affected by the world differently in the context of punishment. Her sorrow, regret, and lament became especially pertinent to how the Davie County courtroom regarded her

63. *Supra* note 2, at 11 (defendant''s brief), 57 (proceedings), 59 (manuscript).
64. *Id.*, at 3-4 (defendant''s brief), 49-50 (proceedings), 51-52 (manuscript).
65. *Id.*, at 2 (defendant's brief), 50 (manuscript).
66. *Id.*, at 11 (proceedings), 13 (manuscript).
67. *See* Hila Keren & Kathryn Abrams, *Who''s Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997 (2010) (noting how the legal interpretation of acts and conduct depends on emotional frameworks and how emotions shape legal decision-making often reinforcing relations of power).
68. *Supra* note 2, at 2-4 (defendant''s brief), 48-50 (proceedings), 50-52 (manuscript).
69. *Id.*, at 7 (defendant's brief), 55 (proceedings), 57 (manuscript).

response to Galina's death. Temperance's "impressionability"—one's ability to be affected and affect the world around them—meant Temperance was especially vulnerable to experiencing a kind of physical and emotional punishment, before the commission issued its decision.[70] The punishment deemed applicable, thus, was already being imposed upon the defendant by herself. Counsel for the defense made clear "[i]t is the Prisoner who of all other, white or black, exhibited the deepest distress—it is she who is most in the most harrowing mental agony."[71]

America's emergent legal cultures had little reason to reject this account. In fact, the military-occupied South was a unique opportunity for disparate legal traditions to find common ground: ultimately seeking to maintain the "racial state"[72] and authoritative force of law. Legal culture inevitably took different shapes across 19th-century America: from colonial inheritances and evolving demographics to the politics of a given jurisdiction and its local economy. Yet despite these distinctions and other differences, American legal professionals readily agreed that courtrooms ought be legitimate sources of state power as opposed to sanctioning lawless activity. In the case of Temperance Neely, crucially, this is not an instance where a white person received no punishment for racial violence or an incident was never brought before a court of law. Instead, this is a case in which a white woman was convicted of killing a Black woman and a case in which the testimony of Black people against a white defendant was allowed.

Union Brigade General Schofield, under General Order No. 35, determined the criminal case needed to be heard by a military commission and appointed Lt. Colonel Reuben Kise to preside.[73] Raising constitutional questions regarding wartime authority, Union officials like Schofield exercised unenumerated authority as an occupying force in southern states.[74] While the Supreme Court would hold in 1866 that military courts could not try civilians where civilian courts were functioning, Congress in 1867 gave military commanders the authority to use various means—including courts—to protect "life and property."[75] Schofield, acting in 1865, foreshadowed the "stunning departure from American traditions" where military officials could hold civilians

70. KYLA SCHULLER, THE BIOPOLITICS OF FEELING: RACE, SEX, AND SCIENCE IN THE NINETEENTH CENTURY (2018).

71. *Supra* note 2, at 7 (defendant's brief), 55 (manuscript).

72. DAVID THEO GOLDBERG, THE RACIAL STATE 1 (2002).

73. ROBERTA SUE ALEXANDER, NORTH CAROLINA FACES THE FREEDMEN: RACE RELATIONS DURING PRESIDENTIAL RECONSTRUCTION, 1865-1867, 142-143 (1985).

74. MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION, 1863-1869, 178-179 (1974). Benedict describes how the immediate post-surrender period involved attempting to reconcile through law federal military authority and state sovereignty.

75. Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866); Reconstruction Acts of 1867; ERIC FONER, RECONSTRUCTION: AMERICA''S UNFINISHED REVOLUTION, 1863-1877, 276 (1988).

accountable for offenses broadly conceived as against public order without jury trials.[76]

The legal representative of the United States in the trial was a man named Andrew Wood, tasked with prosecuting the case. Wood was a "judge-advocate" for the Union Army, a role that involved preparing cases for the Union Army as appointed counsel for military legal affairs. Created during the Civil War, their role as a *judge* reflected the judgment of relevant military officials—in Neely's case, officials within the Department of War—who decided to arrest, charge, and arraign someone for a crime. Their role as an a*dvocate* was not on the behalf of a victim or a normative greater good, but rather the interests of legal order amidst military rule. While the Commander-in-Chief, President Andrew Johnson, had already begun embracing a politics of conciliation with white Southerners by the summer of 1865, Wood and five members of the military commission had responsibilities to a national project intended to reassert the rule of law. While Johnson actively opposed federal laws that would protect the rights of Black people in the former Confederacy, Union officials ostensibly brought egalitarian sensibilities of Northern legal culture to courtrooms in the military-occupied South.[77]

In practice, however, the legal norms and practices brought by judge-advocate Andrew Wood privileged white subjective experience using the same "grammar" as the defense.[78] While the defense presented a narrative of Temperance Neely, based on her affinities and sentiments rather than her physical actions, counternarratives never emerged. While the archive gives voice to Temperance's affection for Galina, Wood makes no effort to humanize Galina as a victim or discuss Galina's sentiments. Instead, Temperance's narrative is treated as fact and none of the witnesses are asked to describe or elaborate upon Galina, her inner life, her relationship with Providence, and how she experienced being Temperance's "favorite negro."

For instance, while the defense emphasizes Galina's pushing Providence down as part of the inciting event in the case, the prosecution says nothing about Galina's experience of hearing her daughter's cries and rushing to the mansion-house to see her daughter being whipped. Another reading of the facts, amidst judge-advocate Wood's failure to cross-examine multiple witnesses, would characterize Galina's actions as a mother trying to save her ten-year-old

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76. *Supra* note 15, at 307.

77. After the assassination of Abraham Lincoln, Johnson steered the course of Reconstruction from April to December 1865 when Congress reconvened. During those eight months, Johnson facilitated the quick restoration of Southern state governments which quickly introduced Black Codes, issued an amnesty and pardon proclamation to most white Southerners, including many former Confederate leaders, returning any seized property to them and reinstating their civil rights, and obstructed the early efforts of the Freedman's Bureau considering their activity an infringement on states' rights. See generally ROBERT LEVINE, THE FAILED PROMISE: RECONSTRUCTION, FREDERICK DOUGLASS, AND THE IMPEACHMENT OF ANDREW JOHNSON (2002).

78. *Mama's Baby, Papa's Maybe*, *supra* note 18, at 68.

daughter's life. Wood's inaction or ambivalence toward recognizing Galina's death as harm done to a person and community added to the literal silence of the archive. While Wood during closing arguments would invite the military commission to consider Temperance's emotions as "mitigating circumstances", he made no attempt to make this a case about the woman killed or the five young children left behind.[79]

When Temperance's counsel in closing arguments called for Sallie's testimony to be impeached because her reputation for truth—according to the white witnesses called—was poor, the prosecution responded that Sallie's testimony should be regarded as that of an "interested" party rather than impeached as should the testimonies of the defendant's mother, the neighbor of the defendant, and all the other white witnesses.[80] Rather than call attention to the fact that the mother of the defendant is an especially dubious witness, judge-advocate Wood simply asks that Sallie's testimony be allowed. Despite Sallie being the sole person called to the stand who physically saw Temperance shoot Galina in the chest— according to both Black and white individuals on the plantation positioned much further away—the prosecutor asks that Sallie's visual account be treated the same as a witness that spoke only to Sallie's "bad" reputation for truth, without any corresponding evidence.[81]

With limited divergences, many points of commonality would be found between the preexisting legal environments of the North and the South. Furthermore, various legal and social norms influenced Union officials' attempts to blend federal law with state statutes minus their discriminatory features and take established legal procedures in civilian courts and apply them to military court proceedings. New legal cultures emerged in cases like *United States v. Temperance Neely*—anticipating choices in how courts might more broadly adapt to a reunited nation after formal Reconstruction—yet they retained racialized-gendered ideas present throughout the country. For example, counsel for both parties would refer to Providence and Temperance as white women of good character, and consequently their actions would be filtered in the courtroom by all parties as involving some amount of logic and reason. These court actors relayed paternalistic views that supported the idea that moral women should be trusted and their general character made them trustworthy regardless of their previous choices.

Legal realists have rightfully argued that legal reasoning lends itself to sustaining dominance and power.[82] But critical legal analysis rarely explicates how anti-blackness uniquely, though not singularly, is constitutive of American

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79. *Supra* note 2, at 74 (proceedings), 76 (manuscript).
80. *Id.* at 73 (proceedings), 75 (manuscript).
81. *Supra* note 2, at 42 (proceedings), 44 (manuscript).
82. *E.g.*, Karl N. Llewellyn, *Some Realism About Realism,* HARV. L. REV. 44 (1931); Morton Horwitz, *The Rule of Law: An Unqualified Human Good?*, YALE L.J. 86, 561-566 (1977).

law.[83] Cheryl Harris's article "Whiteness as Property" remains pathbreaking—in part—for its articulation of how white self-possession, ownership and doctrinal legal cultures in the United States are designed to reinscribe social order and protect various forms of capital associated with race. Harris's emphasis on the claim-making property-owner refers to the vestiges of slavery as a racial system as well as one of chattel. While Harris's work made explicit the ongoing relationship between racial dominance and American law, legal history often refrains from theorizing historically-specific claims. [84] As the *Neely* case demonstrates, I suggest, historically-specific claims can exhume the American legal system's characteristics and traits. Emancipatory efforts in Reconstruction came up against a need for emergent legal cultures to secure the unfreedoms and inequalities necessary for Union forces to eventually leave the South. While some hoped that free Black labor could be reconciled with the *racial* component of slavery, both the North and South had and would continue to utilize a 'white-over-black' ideology.

Temperance Neely's defense, for instance, would repeatedly state that Providence was right to expect Ellen's further labors *and* Providence was entitled to reprimand Ellen if she refused. The defendant's counsel presented—as a matter of law—that because Providence's command was made on her plantation and Ellen's ongoing servitude was implied, that Ellen ought to reply. As the defense explained:

> At common law, it was well-settled there are persons exercising authority in the domestic forum have the right to chastise—that the master or mistress of [the plantation] house has the right to control her household…That Mrs. Neely had a right to chastise Ellen for impudence no one can doubt…"[85]

Yet, these legal conclusions—as they appear in an archive—must be scrutinized in two important ways. First, did the articulated logic have resonance at the time as a sound conclusion, and second, what can we glean from a conclusion that has been archived with no material questioning its truth?

In generating a narrative based on archival materials, I emphasize where certain ideas appear in the court proceedings as official statements of what took place. Still, it is the absence of any comments made by opposing counsel, the judge-advocate, or even a transcriber's notation that allows for this representation; "documents with their own itineraries" comprised the legal archive. [86] Especially in discerning how legal arguments were produced, how

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83. *See* Jared Sexton, *People-of-Color Blindness: Notes on the Afterlife of Slavery*, 49 SOC. TEXT 31 (2011) (critiquing how generalized or cursory racial analyses, including in critical legal thought, obscure anti-Blackness as a structural position rather than a mere identity.)

84. *See* Christopher Tomlins, *Historicism and Materiality in Legal Theory*, in THEORY AND HISTORY: NEW ESSAYS ON A NEGLECTED DIALOGUE (Maksymilian Del Mar & Michael Lobban eds., 2016).

85. *Supra* note 2, at 10 (defendant's brief), 58 (manuscript).

86. Ann Laura Stoler, *Colonial Archives and the Arts of Governance*, 2 ARCHIVAL SCI. 89 (2002).

evidentiary standards were met, if at all, and discerning between matters of fact and law, I call specific attention to where social norms and legal cultures infect propositions that may otherwise be treated as conclusory.[87]

What was agreed upon at trial was that Providence Neely called for Ellen multiple times, and Ellen did not reply. Mrs. Neely, angered, called to another young Black girl who also labored on her plantation, and told her to retrieve Ellen. Ellen then made her way up to the "mansion house."[88] Mrs. Neely told the young girl, who was no longer enslaved yet still encumbered by what it was going to mean for Black people to be "free," to fetch a bucket of water. Sallie recounted that Providence told Ellen "she would not give her any supper that night" if the task was not complete.[89] The child refused. Sallie, a Black woman—formerly enslaved by Providence Neely—who still worked the Neely family's land, explained that Ellen:

> [R]eplied to Miss Providence, that she would have supper, and she could not hinder her either. Then Miss Providence told her that she would whip her when she came back for talking to her so—the girl said back to Miss Providence "no you won't whip me" when she came back. Miss Providence went to whipping her then.[90]

Miss Providence grabbed a switch from a peach tree and began beating the girl in the dining room; Ellen cried out and was heard by her mother, Galina. Galina approached the mansion house, pushed Miss Providence down and away from her daughter, and marched from the dining room out to the front of the house. A pistol shot was fired. Temperance Neely, Miss Providence's daughter, had taken the weapon from the mantle place in the mansion home and followed after Galina and Ellen. Miss Providence followed after Galina and Ellen too.

Upon the first firing of the gun, which did not strike Galina, Galina turned around. Galina, now facing Temperance and Providence, prompted Temperance to fire again this time striking Galina in the chest. In the forthcoming trial, Temperance would convey repeatedly that her intent in firing the weapon was only to "frighten" Galina.[91] Multiple witnesses recalled Temperance uttering words of lamentation asking not herself or the world but her victim, "Gal— why did I shoot you?"[92] In asking this question, Temperance indexed an array of emotions—existential guilt regarding her own actions, concern with respect to consequences she may face, genuine remorse, and bereavement—that could have all, simultaneously, characterized how she felt. Based on her social position,

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87. Robert Cover discusses the role of slavery and the judicial role, specifically the 19th-century of "judicial refusal" to "move the law in the direction of freedom" due to ideas about jurists and "a heritage of conflict over the values that ought govern judging." Robert Cover, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS at 7 (1975).

88. *Supra* note 2, at 17 (proceedings), 19 (manuscript).

89. *Id.* at 6-7 (proceedings), 8-9 (manuscript).

90. *Id.* at 7 (proceedings), 9 (manuscript).

91. *Supra* note 2, at 3 (defendant's brief), 65 (manuscript).

92. *Id.* at 30 (proceedings), 32 (manuscript).

related to her race, her victim's, and their genders, the meaning of Temperance's sentiment would be inevitably filtered through dominant social scripts. In the courtroom, her counsel presented her sentiments in such a way as to appeal to the sympathies of the military commission.

A fundamental aspect of this trial involved the acceptance, or absence of questions regarding aspects of plantation culture and relations. In the *Neely* case, legal actors all tacitly treated slaveholders' dominion over and representation of a geographic space as totalizing, despite plantation slavery's alleged end. My reading is concerned with how often the ideals and ideas of Northerners, Southerners, slaveholders, and members of the Union Army coincided even in an adversarial legal system. As geographers like Katherine McKittrick have theorized, plantation logics are framed as the rational and efficient organization of people, labor, and resources.[93] For the *Neely* court, the idea that plantation owners know best how to minimize conflict—rather than constant reassertions of surveillance and control—reflects the naturalization of exploitative behaviors and dehumanizing treatment as what any reasonable person would do. It reflects how increasingly, in mid-to-late 19th-century, white legal actors would make white people's experience of the world equivalent with validity and truth.

In his classic study, *The Black Image in the White Mind,* George M. Fredrickson considered exactly this: notions of a "white race" circulated in the mid-19th century that unified and universalized—across class lines—positive intrinsic qualities of being white.[94] The reconciliatory aspirations of postbellum legal cultures could lead white individuals, from the North and South, to trust a subjective white perspective as universal and representative.[95] Especially in the case of Temperance Neely, where legal counsel juxtaposed white sentiment and judgment with Black inferiority, one subjective white perspective became easily construed as impartial, rational, and true.[96] Both the prosecution and defense address Temperance's remorse sympathetically, with little regard for the perspective and injuries endured by—for example—Galina's children. A reconciling legal system viewed these perspectives and injuries as experienced under a proper legal subject's purview and control.

As the trial proceeded, multiple news reports chronicled the general distress of the local white community. The *New York Times* described the citizens of Davie County (the site of the trial), as in "quite a storm of rage", "as denouncing [the trial] as a secret inquisition" even though "the court has been an open one."[97] Thus, when the commission reached its decision, citizens were prepared for the

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93. Katherine McKittrick, *Plantation Futures*, 17 SMALL AXE 1, 2-3 (2013).

94. GEORGE FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND (1971).

95. *See* Sylvia Wynter, *Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, Its Overrepresentation--An Argument*, NEW CENTENNIAL REV. (2003); da Silva, *supra* note 50; DAVID LLOYD, UNDER REPRESENTATION: ESSAYS IN POLITICS AND AESTHETICS (2018).

96. da Silva, *supra* note 50; Gross, *supra*, note 43.

97. *Murder Trial Extraordinary*, *supra* note 6.

worst. The penalty for murder was death, the punishment for manslaughter was "branding on the left thumb with the letter M, and fine, to either of which may be added imprisonment in the county jail."[98] Yet, the military commission had already shown itself to not hold entire regard for the laws of North Carolina from the antebellum period. Thus, the *Times* noted that citizens were prepared and anticipated they would be successful in seeking a pardon from President Andrew Johnson if Temperance Neely were convicted of a serious crime.[99]

Here, I emphasize that in the postbellum period—entangled with freedom dreams and Black resistance—state power reinforced white authority and Black vulnerability as natural conditions. Moreover, state-sponsored or legally-facilitated violence was essential to solidifying a new racial-economic regime.[100] For example, Greg Downs's argument in *After Appomattox: Military Occupation and the Ends of War* demonstrates that Union forces were often unable to control the behaviors of organizations like the White League, which sought to maintain racial hierarchy by using extra-legal means.[101] While it is not evident whether this form of white political organizing had begun to take place in Davie County in 1865, the reported anger of local white citizens reflects complexity and controversial nature of the Union war powers as they were utilized from 1865-1871 especially as it related to by whom and how weapons could be used.[102] Crucially, however, amidst public violence among armed white groups and Black militias, firearms could escalate violent altercations that took place in private gendered spaces.[103] My contention is that both types of violence served

98. *Supra* note 2, at 1-2 (proceedings), 3-4 (manuscript).

99. *Supra* note 96.

100. In describing this relationship between the law as a conduit for violence that shapes racial-economic regimes, my analysis builds upon NIKIL PAL SINGH, RACE AND AMERICA'S LONG WAR 89-114 (2017).

101. GREGORY DOWNS, AFTER APPOMATTOX: MILITARY OCCUPATION AND THE ENDS OF WAR (2015).

102. Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 STAN. L. & POL'Y REV. 611 (2006). *See also* Laura F. Edwards, *The Peace: The Meaning and Production of Law in the Post-Revolutionary United States*, 1.3 UC IRVINE L. REV. 565-585 (2011).

103. On federal protection of the rights of armed black men, *see* Stephen Halbrook, *The Right to Bear Arms in the First State Bills of Rights*, "10 VT. L. REV. 280 (1985). While scholars of gun history and Reconstruction have documented the slew of black codes introduced to disarm black men, little scholarship has given consideration to the black codes' attendant parallel—how the state-sanctioned various forms of violence directed at black people by white citizen in the post-War period—often exploited a relative monopoly on firearms. With the introduction of black codes and vagrancy laws starting in 1865, Southern states sought to criminalize black unemployment, movement, assembly and self-defense. State legislatures immediately passed laws intended to restrict the ownership and use of personal firearms. While federal legislation in 1868 would ensure that black citizens could not be prevented from being militiamen, throughout the South white supremacist organizations, former slave patrols, and new police forces traveled home to home disarming black freedmen. For an analysis of federal policy that that foregrounds the extralegal arrangements that made monopolies on firearms crucial to racial order, *see* CAROLE EMBERTON, BEYOND REDEMPTION: RACE, VIOLENCE, AND THE AMERICAN SOUTH AFTER THE CIVIL WAR 145-167 (2013).

as fundamental to postbellum life: state-sanctioned and legally facilitated forms of harm.

The relationship between race, gender, and legal cultures in the postbellum South sheds light on how white Southerners expected the state to defend their way of life. Indeed, a war had to be fought to eradicate formal slavery; legal challenges had failed. Davie County residents—the majority of whom had not voted for North Carolina to secede from the Union, but sent a significant number of men to fight for the Confederacy—did not see the *Neely* case as a uniform imposition of Northern values being imposed on Southern life.[104] Instead, residents were distrustful that Union military officials would be respectful of race-based norms associated with slavery. They anticipated that federal officials acting, not as a military force but instead, with a reconciliatory impulse could come to Temperance's ultimate defense.

Ultimately, for the act of shooting and killing her former slave Galina, Temperance Neely was convicted of manslaughter but deemed "not guilty" of certain specifications of the crime. The military commission decided that her act was not done "willfully" or "maliciously" but rather that she was guilty, simply, of a "felonious" act.[105] The commission, thus, did not subject Temperance to physical branding, a period of incarceration, hard labor or indentured servitude, penalties that had become commonplace in the South for crimes when they were committed by Black people.[106] Instead, Temperance was fined $1,000 to be paid to the local county officials. The $1,000 fine was quickly paid by a local group of white citizens, leading to her expeditious release.[107]

For Temperance Neely—and white subjects more broadly—distress could be punishment enough. White personhood and, most especially, white womanhood became sites of sentimentality that were legible to the state in ways that the violability of Black women could not be.[108] The Court determined that while Temperance engaged in the *actus reus* components of the crime of manslaughter, her mental state at the time of the offense did not contain the necessary "malice" to receive harsh punishment for the crime.[109] The Union

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104. JOHN C. INSCOE, THE HEART OF CONFEDERATE APPALACHIA: WESTERN NORTH CAROLINA IN THE CIVIL WAR 154-178 (2000).

105. *Supra* note 2, at 3 (proceedings), 5 (manuscript).

106. *See* W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA: TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880 (Meridian Books 1968) (1935). *See also* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008); STEPHEN KANTROWITZ, BEN TILLMAN AND THE RECONSTRUCTION OF WHITE SUPREMACY (2000).

107. MARK L. BRADLEY, BLUECOATS AND TARHEELS: SOLDIERS AND CIVILIANS IN RECONSTRUCTION NORTH CAROLINA, 77 (2009). National Archives, *supra* note 2, at 43 (proceedings), 44 (manuscript).

108. *See* SHARON HOLLAND, RAISING THE DEAD: READINGS OF DEATH AND (BLACK) SUBJECTIVITY (2000); HAZEL CARBY, RECONSTRUCTION WOMANHOOD (1987).

109. *Supra* note 2, at 3 (proceedings), 5 (manuscript), 1 (defendant's brief), 48 (proceedings), 50 (manuscript).

officials that comprised the military commission, at least implicitly, rejected common theories of punishment for crime: there was no deterrence, incapacitation, or rehabilitation facet to the fine, especially when the fine could be paid by the local community to local officials. And to the extent there was retribution—a sense of moral right for the victim or community—the punishment implied that ending Galina's life could be redeemed for an economic price. Instead, punishment for Temperance Neely, was that of self-imposed inner turmoil accompanied by a monetary fine.

PART II. "SHE SHOULD NOT GO": VIOLENCE, BLACK WOMEN'S LABOR, AND SOCIAL REPRODUCTION THROUGH LAW

We must remember that the plantation household was also a workplace, not a haven from the economic world, that it was not private or made so by the nature of the labor performed within it or the sex of the managers.[110]

In cross-examining Sallie, the defense counsel asked her about a specific incident that could shed light on the relationship between Temperance Neely and Galina, the woman Temperance killed. One line of questioning led Sallie to reveal that Galina had "been directed by Mrs. Providence Neely to remove herself and children from the plantation before the 1st July 1865."[111] Sallie confirmed this fact, responding to Temperance's lawyer, "Yes sir, [Galina] had been [directed to remove herself] but Miss Temperance would not let her go after she had started."[112] The defense further steered Sallie's answers in a direction that depicted Temperance's great empathy, asking Sallie, "What did Miss Temperance say and do to stop Galina?"[113] Sallie replied that Temperance told Galina "she should not go" for Galina would be taking "her children out in the woods to perish and die."[114]

While Temperance's reply could both be construed as coming from a place of genuine care or as a thinly veiled threat, the prosecution and defense left those facets of the moment unaddressed. Counsel for the defendant began structuring their case around how the strong sense of emotional attachment between Galina and Temperance had transcended typical master-slave relations. Specifically, it was Temperance's heartfelt regard for Galina as the single mother of five young children. The defense argued, that amidst whatever reasons Providence had to expel Galina from the plantation—or reason Galina had to stay after "she had started" to

110. THAVOLIA GLYMPH, OUT OF THE HOUSE OF BONDAGE: THE TRANSFORMATION OF THE PLANTATION HOUSEHOLD 3 (2008)

111. *Supra* note 2, at 9 (proceedings), 11 (manuscript).

112. *Id.*

113. *Id.*

114. *Id.*

leave—Temperance sought peace on the plantation.[115] Ironically, after her mother ardently beat Galina's child and she fired a "warning" shot over Galina's head in order to, as the defense described it, "quell the difficulty" of the situation.[116] Then, Temperance got closer to Galina before shooting her in the chest. The narrative offered at trial that Temperance reacted in part to the physical threat that Galina posed in that moment to Temperance's mother, Providence. Galina was unarmed and, face-to-face, Temperance pulled the trigger of the gun.

In Part II, I explore how violence, especially violence against Black women and children, played an integral role in reasserting the racial-economic order of the American South after slavery's formal end. While in the military commission courtroom, legal actors argued that Temperance was justified in pulling a trigger to defend her mother Providence, the fact that Galina went to the mansion-house to rescue her own daughter from violent physical abuse is obscured. For those bearing the "mark" of blackness, traditional categories and positions did not fit: slavery had been abolished, but for Temperance and for the military-commission, Black women remained "mother[s] and mother[s]-dispossessed."[117] The particular conditions of Black women's labor in the American South, specifically domestic work, became a key site of struggle over how categories of race and gender would operate after the War's end.

In this section, I consider how the law actively produced categories of race and gender, enabling the exploitation of Black women's labor by dismissing their role as workers and creating conditions for Black women to remain unfree. Black women would be uniquely vulnerable as they labored in the domestic or private sphere where the law scarcely reached. White women of means continued to manage the plantation household and accordingly handled assigning tasks and responsibilities as well as disciplining the Black women and children under their supervision. In the postbellum period 'white-over-black' ideology would be sustained by defining citizenship, personhood, and free labor through Black women.[118]

The arguments put forward in any courtroom—namely by judges and lawyers— can obscure the presumptions baked into legal reasoning: ideas about Black women's status in the American polity. The 17th-century legal doctrine *partus sequitur ventrem* was the bedrock of racial slavery in what became the United States: translated from Roman slave law, 'that which is born follows the

115. *Id.*

116. *Id.*

117. *Mama's Baby, Papa's Maybe*, *supra* note 18, at 80.

118. JENNIFER MORGAN, LABORING WOMEN: REPRODUCTION AND GENDER IN NEW WORLD SLAVERY (2004); DARLENE CLARKE HINE, BLACK WOMEN IN WHITE: RACIAL CONFLICT AND COOPERATION IN THE NURSING PROFESSION (1989).While not specific to black women's labor, Laura F. Edwards emphasizes how rights during Reconstruction were newly-conceptualized to facilitate national economic integration. Laura F. Edwards, *The Reconstruction of Rights: The Fourteenth Amendment and Popular Conceptions of Governance*, 41.3 J. SUP. CT. HIST. 310-328 (2016). I argue the law's relationship with black women's labor, and the unfree characteristics of their labors, was integral to that story.

womb' meant children inherited the legal status of their mothers.[119] Thus, American slavery—especially after the formal end of the trans-Atlantic trade in 1808—relied upon Black women—who were not people but property—to birth enslaved laborers for the Southern economy. Throughout American slavery, the North's deep financial investment in racial slavery coincided with fugitive slave laws that meant any person who appeared Black—even if they were born free—could be subjected to an antebellum "meaning" of Blackness: enslaveability.[120] These laws made "free" Black persons in the North vulnerable to any claim that they were a "fugitive" that the American legal system required be sent back into slavery.

The core logic of racial slavery—that Blackness was the "mark" denoting one's eligibility for enslavement that legally turned captive people into fungible commodities—persisted into the age of emancipation. Despite a courtroom narrative of affinity between Temperance and Galina, Galina's place on the Neely plantation—before and after the abolition of slavery—was defined by crude understandings of Black women's labor. Racial unfreedom after the Civil War was characterized by Black women and their labors being understood as the work of unfree bodies that bestow the fungibility of Black life. That Black women could be reduced to their physical bodies, not recognized as people with thoughts, emotions, feelings, actions or agency, proved to be a prevailing dynamic in the Neely trial.[121]

In the postbellum South, attending to Black women's labor makes evident what I consider the *role of law:* securing and reproducing social relations that allowed an extractive racial-economic order to function. When Providence Neely called on Ellen to perform a household task after the girl had spent her day in the fields under a sweltering sun, Providence's demand was typical of how white Southern women engaged with those they tasked with domestic work. While in the fields when the sun rose and set established working hours, the plantation house could have around the clock demands. Plantation owners, before and after the Civil War, expected Black women and children to work in the plantation house and in the field. This structure meant that Black women and girls, especially, engaged in what is conventionally understood as productive labor as well as domestic work. On the Neely plantation, after the Confederacy had surrendered, Providence still expected Ellen to assist with household tasks.

In the *Neely* case, the necessity of Temperance's action, argued the defense, would be justified—implicitly—by the social relations that needed to be maintained. The defense explained that it was only after "exhausting ingenuity

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119. Hartman, *supra* note 54.

120. Frank B. Wilderson III, *The Vengeance of Vertigo: Aphasia and Abjection in the Political Trials of Black Insurgents*, 5 INTENSIONS (Fall/Winter 2011).

121. Further, the 'mark' of blackness after slavery's formal end continued to render black men, women, and children as fungible: interchangeable, replaceable, objects of commerce for exchange.

in the effort to prevent a contest between her Ellen and her Mother" that Temperance acted, and the question was "What course could she pursue?"[122] The argument was made that the defendant had been forced to watch as her "mother [had] been thrown upon the floor by Galina and when she would have been apt to entertain feelings of anger and a motive to injure Galina"—when, supposedly, Galina was prepared to strike her mother again, "not one act or word indicating any ill-will or a desire for revenge escaped the Prisoner throughout the whole difficulty."[123] Temperance's emotional restraint, indicative of her ability to regulate her feelings, was presented as to suggest she acted not out of her own will, but rather what was required to sustain a status quo.

Connecting emotional closeness to the innocence of intent continued. The defense, in their closing brief, argued that when Mrs. Providence Neely told Galina to leave the plantation immediately, Temperance's intervention should be understood as "this helpless female about to be turned out upon the co-ed chastise of the world. Temperance, they reasoned, acted "as an interested advocate" who "made her touching appeal…[with] sincere and natural eloquence, no mother could resist."[124] Returning to the cross-examination of Sallie, the defense sought to establish how Temperance had addressed Galina's despair:

> Question: Was not Galina crying at the time she was fixing to leave and did not Miss Temperance Neely take her youngest child in her lap and tell Galina to go out to her work; [that] she could stay?
>
> Answer: I do not know any thing about Galina's crying—but Miss Temperance did take the child in her lap and tell Galina she could stay…
>
> Question: Was not Temperance Neely very kind and much attached to Galina and her children, and did she not treat than she did any other colored people on the plantation.
>
> Answer: Yes sir.[125]

A main line of argument throughout the trial followed this strand of thought and was used to substantiate the defendant's claim that the distress of shooting "her favorite negro" was punishment enough.[126]

Another reading, however, of Temperance's actions reveals the relationship between racialized womanhood and white subjectivity in the 19th-century archive. While Providence tells a story of her daughter appealing mother to mother with Galina, that depiction obfuscates how Galina could have easily

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122. *Supra* note 2, at 5 (defendant's brief), 53 (manuscript).

123. *Id.* at 7 (defendant's brief), 55 (manuscript).

124. *Id.* at 2 (defendant's brief), 50 (proceedings). Scholars like Stephanie Camp have argued that instances of pleasure, enjoyment, and play among individuals on a plantation, were for some planters "paternalist mechanisms of social control" where "these sponsored frolics were supposed to control black pleasure by giving it periodic, approved release." Stephanie M. H. Camp, *The Pleasures of Resistance: Enslaved Women and Body Politics in the Plantation South, 1830-1861*, 68 J. S. HIST. 533, 546 (2002).

125. *Supra* note 2, at 10-11 (proceedings), 13-14 (manuscript).

126. *Id.* at 27 (proceedings), 29 (manuscript).

experienced said appeal as a threat. In explaining how perilous fleeing the plantation might be, Temperance nods toward not just the dangers of the natural world, but gender-based violence in a white society predicated on racial control. The moment Temperance takes Galina's youngest child, an "infant", into her lap is just as easily rendered as a cruel exhibition of how the less dangerous option involved the totalizing control plantation owners had over those they enslaved.[127] American slavery relied upon the routine practice of separating children from their mothers. To read along the bias grain may involve reading an archive that seeks to absolve a dominance-based society. It may suggest that, even if there may have been an appeal made between Galina and Temperance, racial slavery and plantation rule conditioned every aspect of their interactions from birth. Even if there was a closeness forged between these women, racial slavery and Blackness meant Galina's existence came with the label *to whom anything can be done.*[128]

When Providence Neely testified, she argued that Temperance had tried to prevent her from beating Ellen in the first place. According to Providence Neely, as Ellen approached the house with the bucket of water, after initially refusing and saying that she would not be subjected to a whipping, Temperance said "'Ma, don't whip her." Temperance explained, "I will call her here and shame her," and when Ellen came inside, "the prisoner called to her saying 'Come here Ellen, I want to talk to you.'"[129] Providence's testimony made no mention of an allegation made by Sallie that Temperance had instructed Galina to not enter the house. Instead, allegedly, Temperance's sole objective was to "quiet the affray" between her mother and a woman and child for whom she had great affection.[130]

Within the argument made by the defense that the first shot was intended to frighten Galina is a question of both fact and law: on what terms was Galina to be frightened? Galina and Ellen had left the mansion-house and were headed back to their own quarters, turned away from Providence and Temperance. It was only upon a first shot being fired overhead, a shot intended "to frighten" that Galina turned around.[131] Moreover, it is crucial to consider what frightening Galina was in pursuit of: while the shot being fired may have had the effect of startling Galina, that threat of violence was also intended to inform Galina that Ellen's behavior would not be tolerated. Moreover, it called attention to the fact that despite being, as Providence Neely put it, "helpless women," that the women

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127. *Id.* at 2 (defendant''s brief), 47 (proceedings), 49 (manuscript).

128. This is an adaptation of black studies scholar Christina Sharpe's pivotal assertion regarding "Black life in the wake; this the flesh, these are bodies, to which anything and everything can be and is done." CHRISTINA SHARPE, IN THE WAKE: ON BLACKNESS AND BEING 16 (2016). While Sharpe's quote crucially delineates the relationship between flesh and body, I underscore the function and utility of black life transposed from slavery to freedom even when black personhood is ostensibly recognized.

129. *Supra* note 2, at 22-24 (proceedings), 26-28 (manuscript).

130. *Id.* at 2 (defendant's brief), 50 (proceedings).

131. *Id.* at 11 of (proceedings), 13 (manuscript).

of the mansion-house "kept a pistol there to defend ourselves."[132] At the time of firing a warning shot and then firing a shot that hit Galina square in the chest, I contend that what was being exercised was the right to threaten or exercise violence in order to maintain 'white-over-black' as a social and economic arrangement.[133]

Historian Thavolia Glymph, in her study of plantation households, demonstrates how white women managed the "domestic labor" performed by Black women and girls through violence. After the Civil War, women like Providence and Temperance "fought, often physically to limit Black women's freedom and preserve…privileges of race [and] class."[134] Challenging dominant accounts of race and gender in the 19th-century South, that suggested plantation mistresses played a gentler role of managing Black labor, Glymph explains "violence on the part of white women was integral to the making of slavery" and "crucial to shaping Black and white women's understanding of what it meant to be female."[135] Providence's violence took place when Ellen was free. However, Black women and girls in the post-surrender era would experience markedly similar forms of abuse or exploitation when working in white families' homes as they had under slavery.

Girls like Ellen reflect how Black domestic labor—nominally free—was subjected to "violence and power in the great house [that was] the female side of domination…[it] came from the hands of women."[136] As historian Stephanie Jones-Rogers notes "mistresses…meted out calculated, systematic, and rationalized violence and discipline, not as masters' subordinates and surrogates, but as slave owners in their own right."[137] In the postbellum period Black women, amidst violence for which there seemed no recourse, still understood white women as employers, their domestic work as labor and argued that the conditions of their employment be addressed through contract law. Black women in 1865 North Carolina repeatedly sought to negotiate labor contracts, engaged

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132. *Id.*

133. Farley, *supra* note 6.

134. THAVOLIA GLYMPH, OUT OF THE HOUSE OF BONDAGE: THE TRANSFORMATION OF THE PLANTATION HOUSEHOLD 138 (2008).

135. Id.; *contra,* KIRSTEN WOOD, MASTERFUL WOMEN: SLAVE HOLDING WIDOWS FROM THE AMERICAN REVOLUTION THROUGH THE CIVIL WAR (2005); ELIZABETH FOX-GENOVESE, WITHIN THE PLANTATION HOUSEHOLD: BLACK AND WHITE WOMEN OF THE OLD SOUTH (1988).

136. Glymph, *supra* note 134, at 2-3.

137. STEPHANIE JONES-ROGERS, THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH 60-61 (2019) (noting that white women did this "as slave owners in their own right."). Jones-Rogers demonstrates how that white and Black people from a young age in the antebellum South received instructions about how to adhere to raced and gendered social norms. Her study looks closely at moments in which dominance is exerted, subverted, and restrained by a full array of actors, moments that push against the dominant historiography of racial slavery in the U.S. South. While Jones-Rogers research focuses on white women who were slaveholders, she complicates narratives that implied inevitable solidarity between Black and white women in the South or depictions that imply white women never engaged in violent acts in order to maintain the peculiar institution and racial order it involved.

in strikes, petitioned government officials, and pursued legal recourse.[138] White employers, invoking property rights and private domestic sphere, could use legal concepts to coerce and exploit laborers in American households. As Simone Browne writes, "within these labor conditions of hypervisibility, black domestic workers needed to assume a certain invisibility" to stay employed.[139] While Black women since the Civil War have staked their claim to legal rights as citizens, protection as persons under law, and new terms under which they labored, they have remained both hypervisible and invisible in American social life.

Just as legal actors in the *Neely* case found common ground, in post-surrender North Carolina, government officials from the North, members of the Union Army, and white Southerners demeaned the work and lives of Black women and girls. When the Freedmen's Bureau began operations in North Carolina the summer of 1865, they quickly received hundreds of letters and petitions from Black domestic workers.[140] For example, in July 1865, a Black woman Sarah Johnson reported to the Bureau that her employer had attempted to rape her and the Bureau agent "advised [the] complainant to seek different employment."[141] That October a Black woman named Lucy Freeman contacted the Freedmen's Bureau regarding being offered a contract for domestic labor by her former owner. The contract offered "no wages at all for six months, only food and shelter."[142] A Bureau agent replied to Lucy, stating she "must either sign the contract" or "leave the county within three days."[143] While Black women raised claims regarding their labor, Freedmen's Bureau officials routinely sided with white Southerners, at times even working with white planters to set particularly low wages for women's work.[144]

When the military commission declared that Temperance was guilty of manslaughter but not of the specification that her act was "willful" or "malicious," they linked her subjectivity with ideas of how an effective manager of labor might act. Temperance's response to the situation was, according to the defense, rational, logical, and the necessary response to the kind of altercation that transpired. The defense argued plainly that Temperance had no choice and

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138. Hunter, *supra* note 44, at 1-27.

139. SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 57 (2015).

140. MARY FARMER-KAISER, FREEDWOMEN AND THE FREEDMEN'S BUREAU: RACE, GENDER, AND PUBLIC POLICY IN THE AGE OF EMANCIPATION 102 (2010).

141. As cited in CRYSTAL FEIMSTER, SOUTHERN HORRORS: WOMEN AND THE POLITICS OF RAPE AND LYNCHING 85 (2009). Records of the Bureau of Refugees, Freedmen, and Abandoned Lands, Record Group 105, M843, Roll 32, Investigation Reports on Complaints of Sexual Violence, Complaint of Sarah Johnson (July 17, 1865), New Bern Field Office, National Archives and Records Administration, Washington, D.C.

142. Records of the Bureau of Refugees, Freedmen, and Abandoned Lands, Record Group 105, M1909, Goldsboro Field Office, Labor Contract Dispute Records (Oct. 1865), Testimony of Lucy Freeman, National Archives and Records Administration, Washington, D.C.

143. *Id.*

144. *See* SUSAN O'DONOVAN, BECOMING FREE IN THE COTTON SOUTH 168 (2007).

was responding to her mother's legally protected activity. In closing arguments, the defense underscored facets of common law for their claims regarding Providence Neely's right to whip ten-year-old Ellen. Providence Neely not only could whip Ellen because the reprimanding took place on the Neely plantation, but also because Providence was a "[g]uardian, employer…authority…" who had the right to "inflict necessary chastisement for the purpose of correction."[145] Conflating relations of possible care with those of contract and dominance, violence could be a legally-protected means of control.

The *Neely* case, harrowingly, elucidates how the law remained empowered to make certain forms of violence justifiable and certify modes of domination natural rather than willful. In yoking slavery and freedom, the rule of law linked white self-possession, racialized-gendered exploitation, and Black inhumanity. *United States v. Temperance* appears exemplary of what Marxist feminists describe as reproductive and socially reproductive labor. Reproductive labor—defined by scholars like Maria Mies as the labor required to furnish labor-power or all the forms of nourishment, care, and support that produce the wage laborer—thus can more broadly be construed as the work of producing white men as wage laborers.[146] White women as housewives, but also colonized people and Black people as naturally subordinate, subservient, and docile often occupy roles associated with socially reproductive labor.

The middle of the 19th century indexes a particular moment in the history of labor, the United States, and the history of capitalism on a global scale. As scholars like Amy Dru Stanley contend, the fraught aftermath of the Civil War became an opportunity to develop a national capitalist order that associated human freedom with wage labor and the freedom to contract one's labor.[147] By invoking social reproduction and its relationship with 'white-over-black' ideology, I emphasize the co-constitutive ways race, gender, and labor were construed in racial slavery through everyday interactions and then—in establishing a new racial-economic order—utilized by the reconciliatory racial state in the postbellum period.

Indeed, it was in the "age of emancipation" in the United States when the expansion of what Nancy Fraser calls "liberal, industrial capitalism" developed—a form of capitalist accumulation in which the European core intensified labor extraction in the colonies and introduced a "new gender imaginary centered on separate spheres."[148] The latter-half of the 19th century

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145. *Supra* note 2, at 10 (defendant's brief), 58 (manuscript).

146. Reproductive labor does include childbirth and rearing, framed as giving birth to future workers. *See* MARIA MIES, PATRIARCHY AND ACCUMULATION ON A WORLD SCALE: WOMEN IN THE INTERNATIONAL DIVISION OF LABOR 103-11 (3d ed. 2014); SILVIA FEDERICI, CALIBAN AND THE WITCH: WOMEN, THE BODY AND PRIMITIVE ACCUMULATION (2004).

147. *See generally* AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 60-112 (1998).

148. Nancy Fraser, *Crisis of Care? On the Social-Reproductive Contradictions of Contemporary Capitalism*, *in* SOCIAL REPRODUCTION THEORY (Tithi Bhattacharya ed., Pluto Press 2017).

marked when white women's labor, which previously had generated "the highest rates of surplus value for capitalists", would move into "hidden abodes" and become part of fueling industrial capitalism's "background conditions of possibility."[149] While productive labor became associated with men and the public sphere, the private sphere—even when aspirational for poor white families—became the site where bourgeoise Victorian ideals were performed.[150]

While European colonial powers were somewhat able to keep their conditions of possibility spatially at bay, the Victorian performances of gender and family in the United States in the mid-to-late 19th century were inextricable from the enslaved and indentured labor that cooked the food, washed the clothes, and bathed the children in the plantation home. Unfree labor furnished the ideal and made the ideal possible. The history of Black women's labor nuances Marxist feminist accounts: Black women worked in the fields and their own households and those of others, their domestic labor was profitable and socially reproductive, and they fought to make their "hidden" exploitation "political" and "public."[151] Further, it demonstrates how, through violence and law, Union officials and white Southerners in the military-occupied South consciously worked to keep Black women unfree. Domestic space in the 19th-century cannot be construed solely as a site of socially reproductive labor, when it functioned as productive labor being performed under certain conditions that capitalism, in its various iterations, hides from view.[152]

Social reproduction theory underscores the significance of social relations: how people are defined, understood, and represented by and through categories of difference. As scholarship in Black studies has shown, relations between white women and Black women were integral to the maintenance of racial order and also provided sites of refusal and subterfuge.[153] While the active production of deployable, relational, and intersectional experiences is the role of law in American life, that role crucially has extractive and capitalist ends.[154] When, where, and how the law responds to certain people, receives certain claims, and recognizes injuries is not a reflection of pre-existing and static categories of race,

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149. Nancy Fraser, *Behind Marx's Hidden Abode: For an Expanded Conception of Capitalism*, 86 NEW LEFT REV. 55 (2014).

150. *Supra* note 114.

151. Glymph, *supra* note 134, at 23-55.

152. *Id.*

153. *See generally* STEPHANIE JONES-ROGERS, THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH (2019) (demonstrating the crucial role white women played in meting out violence and exerting control over enslaved people on plantations for profit and not at the behest of a man.) Additionally, while a case study of South Carolina, the significance of gender and race to defining freedoms in the postbellum period, *see* LESLIE SCHWALM, A HARD FIGHT FOR WE: WOMEN'S TRANSITION FROM SLAVERY TO FREEDOM IN SOUTH CAROLINA 185-232 (1997) .

154. My emphasis is on linking the material realities and structural conditions that intersecting 'identities' produce and can serve obscuring the positions, locations, and relations that intersectionality—as a framework—invokes and involves. *See* Kimberlé Crenshaw, *Race, Reform and Retrenchment*, 101 HARV. L. REV. 1331, 1331-1387 (1988).

labor, and gender. The role of law is fundamentally one of social reproduction: legal activity as the ongoing establishment of dominance, social conditions, and dynamics of power as they relate to capitalist accumulation in its varied forms.

In her pathbreaking work *Reconstructing Womanhood,* cultural theorist Hazel Carby spoke to "the importance of establishing historically specific forms of racism [that] should also apply to gender oppression."[155] Carby's call to examine race and gender involved a "need to specify their particular articulation with economic systems of oppression."[156] As legal scholar Adrienne Davis has argued, racial slavery relied on a "sexual economy" of exploitation that seized on what Joy James describes as the "captive maternal."[157] The captive body of Black women structured the extraction of material resources and supply of an enslaved workforce.[158] What these Black feminist scholars call attention to are the modes of state-sanctioned and legally facilitated *extralegal* violence Black women endured. Everyday acts of violation and terror that social actors knew would go unpunished or be disregarded by a court of law could involve similar "mechanisms" of oppression, but to historically shaped ends.

For example, sexual violence before, during, and after Reconstruction played an integral role in establishing racial geographies of white extractive control:

> [R]acisms and sexisms need to be regarded as particular historical practices articulated with each other and with other practices in a social formation. For example, the institutionalized rape of Black women as slaves be distinguished from the institutionalized rape of Black women as an instrument of political terror, alongside lynching, in the South…[rape] should not be regarded as a transhistorical mechanism of women's oppression but as one that acquires specific political or economic meanings at different moments in history.[159]

The meaning of racialized-gendered domination requires attending to the specific contexts in which certain institutional projects are being advanced by state actors, reaping a particular type of accumulation, or revealing the means of social control.

It is important to historically situate the *Neely* case at the cusp of a new racial-economic order largely enforced using legal means within a broader critical discussion of violence and the law. While Temperance Neely's shooting Galina may appear as a moment of spontaneous aggression in response to

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155. HAZEL CARBY, RECONSTRUCTION WOMANHOOD: THE EMERGENCE OF THE AFRO-AMERICAN WOMAN NOVELIST 18 (1987).

156. Carby, *supra* note 150, at 18.

157. Adrienne Davis, *"Don't Let Nobody Bother Yo' Principle": The Sexual Economy of American Slavery* in SISTER CIRCLE: BLACK WOMEN AND WORK 15-38 (Sharon Harley et al. eds., 2002); JOY JAMES, *The Womb of Western Theory: Trauma, Time Theft, and the Captive Maternal*, 12 CARCERAL NOTEBOOKS 255 (2016).

158. James, *supra* note 152, at 255-258.

159. Carby, *supra* note 155, at 18.

distress or be framed as an accidental or rational act, violence sutured together the specific context of plantation rule and coerced labor more broadly. Walter Benjamin, in his essay "Towards the Critique of Violence", contends that there are two types of "law-positing violence": "law-making" violence creates legal authority and rule while "law-preserving violence" reasserts the law's legitimacy.[160] "Law-making" violence is "founding violence" for Benjamin, violence that—when considered alongside Marx's concept of "primitive accumulation"—uses systems like the law to establish capitalist relations.[161] Meanwhile, Temperance's second pull of the trigger was law-preserving: an act that reasserted racial hierarchy and plantation order.

For Benjamin, however, another type of violence exists: a "divine violence" that is "lethal without spilling blood."[162] When Ellen refused to fetch water for Providence and when Galina defended her daughter, they each engaged in acts that would not bring "guilt and retribution" but a different kind of redress. The military commission absolved Temperance, determining she lacked the mental state that would warrant the expected legal punishment for manslaughter; it recognized that her violence "set boundaries" and that her anguish was retribution enough. However, Ellen and Galina's divine violence, as treated in the courtroom, made them blameworthy: their refusal and defiance was deemed insubordination that justified uses of force against them. The meaning of their acts threatened to expose violence embedded in the legal system itself.

For Benjamin, it is only divine violence or pure force that can interrupt law-making processes in a way that offers other possibilities—founding violence does not inevitably end, and laws do not hold the promise of becoming more just.[163] Jacques Derrida, expanding on Benjamin, contends that beyond the forms of force of violence that legal institutions justify, there is a kind of authority utilized in legal domains which is decidedly distinct from justice.[164] I have referred to an unrepentant belief in this authority as the rule of law. Instead, legal authority is mystical for Derrida, in the sense discussed by Ludwig Wittgenstein, wherein what is mystical is "not how things are in the world…but [things] which

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160. Law-making violence is defined by the justness of ends guarantees the justness of the means, while and law-preserving violence is defined by just means always generate just ends. WALTER BENJAMIN, WALTER BENJAMIN SELECTED WRITINGS: VOLUME 1: 1913-1926, 236-253 (Marcus Bullock & Michael Jennings eds., 1996).

161. *Id* at 249-250. *See Primitive Accumulation* in KARL MARX AND FRIEDRICH ENGELS, CAPITAL, VOL. 1 (1867).

162. *Id.*

163. *Id.* at 240-252.

164. Jacques Derrida, *Force of Law: The Mystical Foundation of Authority* (translated by MARY QUAINTANCE) CARD. L. REV. 11 919-1045 (1989-1990). For Derrida, the state's authority is never inevitably just, even when the state sponsors myths, narratives, and stories that represent its authority that way. *See generally* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 71 (Kimberlé Crenshaw et al. eds., 1995) on how critical race theorists have specifically discussed "counterstories" as a way to challenge state narratives of colorblindness and other hegemonic practices in law.

make themselves manifest."[165] Derrida, using deconstructive methods, inspires looking at the rule of law, not as it is, but rather, in terms of what it produces.[166] The outcomes produced by state actors in post-surrender North Carolina when Black women asserted legal rights, suggest that the Southern postbellum courtroom might also authorize terror, brutality and private acts of violence that reasserted a 'white-over-black' status quo.

Benjamin's divine violence proves most relevant to what lies beneath the arguments made in Temperance Neely's case. In refusing to abide by the patterns of subservience expected in racial slavery after emancipation, Galina and Ellen engaged in 'divine violence' that sought not to injure another person. Rather their acts violated fundamental aspects of plantation rule; their behavior rejected being exploitable objects whose bodies were fungible things to be used. Recharacterizing all parties' actions in this way exposes how the rule of law allows women like Temperance and Providence Neely to operate: with the expectation the legal system will be on their side. The 'divine violence' Benjamin observes is "pure": it is suggestively anarchist, materially non-violent, and threatens the cycle of law-making and law-preserving violence, and—crucially— divine violence is emblemized by "the proletarian general strike."[167] *United States v. Temperance Neely* can only be understood in this context: the original transgression that prompted Temperance Neely to fire a gun was a form of labor insubordination.

The case of Temperance Neely reflects not just how racial subjugation was reconciled in the Union-occupied South but how conceptions of race, labor, and sentiment would be contested in the Reconstruction era. Ellen and her mother had operated, regardless of their formal status, with a sense of freedom that suggested—potentially—the other formerly enslaved laborers on the plantation may also refuse to live under the same conditions they did under racial slavery. The courtroom proceedings highlight the complex relationship between occupying Union forces, local Southern communities, and the adjudication of law. A contentious trial ensued involving Black and white witnesses testifying with regard to the facts of the case—such as the physical distance between Providence Neely and Galina when Temperance Neely fired the fatal shot. But the bulk of the trial proceedings focused on whether there was the requisite willfulness, malice, and felonious intent necessary to convict Neely of murder.

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165. *See supra* note 159, referencing LUDWIG WITTGENSTEIN, TRACTATUS LOGIC-PHILOSOPHICUS 10-18 (1961).

166. JACQUES DERRIDA, *OF GRAMMATOLOGY*, translated by Gayatri Chakravorty Spivak (1998). *See generally*, the edited collection on Derrida and deconstruction, DAVID WOOD, *DERRIDA: A CRITICAL READER* (1992). Deconstructive analysis works to recognize what is internal to the object of study—here, the rule of law—that might already suggest contradiction and deconstruction as a practice that can expose violence and rupture within moments and contexts purported to be neutral or stable.

167. Benjamin, *supra* note 160, at 246.

The documented focus on Temperance's intent and mental state displaces the context and unextraordinary orientation of Neely's violence towards maintaining 'white-over-black' rule. One need only reframe the instigating conflict: what should be understood, and problematized, as a labor dispute between a formerly enslaved Black girl and her white former owner.

PART III. RACIAL UNFREEDOM, LEGAL EMANCIPATION, AND PERILS OF BLACK TESTIMONY

The slave's struggle for the universal, for the form of law, for its justice, is what produces the master's right to rule. The slave's fidelity to law, to the not-yet of legal equality, is what gives law its authority.[168]

On the very first day of her trial, a previously unquestioned legal norm in the South was overturned: the military commission allowed Black witnesses to testify against Temperance Neely, despite multiple objections by the defense. In fact, defense counsel objected every time a Black person was offered as a witness, given "being offered as a witness for the prosecution was object to…as incompetent on the ground that he is a negro."[169] North Carolina law held that a person of color could not testify against a white person and even after the military commission applied procedures based on federal orders, objections by the defense established two things. First, that Blackness—being Black—itself signified incompetence. And, while immediately overruled, for those in the courtroom, the cognitive ability of the witness had been raised as in question. Secondly, these objections maintained the issue of including said testimonies on appeal: defense counsel likely hoped that on appeal, they could get a federal official to review and remand the case. The criminal case against Temperance Neely could—theoretically—be removed from military jurisdiction over the issue of Black witnesses, a local jury be called to hear the case under North Carolina law, and/or the testimonies of Black people be excluded entirely.[170]

It was these characteristics of the proceedings—where emergent legal cultures tried to reconcile enslaving societies with the legal emancipation of enslaved people—that garnered international attention. *The New York Times* would proclaim "MURDER TRIAL EXTRAORDINARY" on its second page.[171] Publications from the *Chicago Tribune* and Missouri's *The Howard Union* to the Scottish newspaper, *The Caledonian Mercury*, reported on the trial

168. Farley, *supra* note 9, at 225.

169. *Supra* note 2, at 14 (proceedings), 16 (manuscript).

170. *Supra* note 2, at 5-6 (proceedings), 7-8 (manuscript). *See* BUHK, TRUE CRIME IN THE CIVIL WAR, *supra* note 27, for examples of how other criminal cases in the Union-occupied South were removed from military jurisdiction and made subject to state law.

171. *Murder Trial Extraordinary*, *supra* note 6.

trying to make sense of a new status quo.[172] With the admittance of three testimonies by Black people formerly enslaved by the Neely family, the case marked a break from antebellum legal rules. The *Manchester Journal*, in Vermont, explained the monumental significance plainly "under the old rule, as the act was seen by none, but negroes, there could have been no trial."[173]

Juxtaposing the mere existence of a criminal trial for the killing of Galina with the outcome of the trial proceedings, demonstrates one mode through which postbellum legal cultures emerged: adherent to facially neutral procedures and doctrine, but in application normalizing that white experiences of events can be regarded as truth. Temperance Neely's state of mind, her *mens rea,* made her ineligible for forms of punishment many observers feared. While the admission of Black testimony gave the appearance of equal treatment in the courthouse, legal actors' treatment of their words were strategic, dismissive, and made use of 'white-over-black' ideology.[174] Black witnesses testifying against a white defendant in a court of law raised questions regarding the legibility of any Black claims in legal institutions if 'white-over-black' relations were maintained.

Part III considers how reconstructing the United States after the Civil War relied upon describing legal equality and liberal personhood as universally attainable while depriving rights and freedoms on the basis of gender and race. In *United States v. Neely*, Black testimony and white subjectivity were fundamentally at odds. While the defense, the prosecution, and the military commission accepted white witnesses as authoritative sources of truth, Black witnesses faced an illustrative "web of compulsions, constraints, and coercions" when asked to testify.[175] When Sallie, Henderson, and Cassandra testified they asserted a kind of agency for which after the trial they could easily be informally or extralegally punished.

While the military-occupied South represented a unique legal setting, Northern courts in the 1860s similarly limited Black personhood through procedural and evidentiary barriers. Courts in Northern states systematically devalued Black testimonies, often admitting them only with white corroboration and subjecting them to higher evidentiary standards.[176] In the antebellum period, judges throughout the country routinely instructed juries to assign it less weight than white testimony even in states where Black testimony was formally permitted.[177] Martha Jones, in her study of free Black litigants asserting their

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172. *Extraordinary Murder Trial*, *supra* note 6; *Extraordinary Murder Trial, supra* note 6;*'THE CHIVALRY' AND THE NEGROES*, THE CALEDONIAN MERCURY 7 (Sep. 16, 1865).

173. *CRIMES—The first conviction for murder under the new state of affairs in North Carolina…*, THE MANCHESTER JOURNAL 2 (Aug. 29, 1865).

174. Farley, *supra* note 9, at 228.

175. SCENES OF SUBJECTION, *supra* note 9, at 117.

176. Ariela Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 147 (1998).

177. KELLEY KENNINGTON, IN THE SHADOW OF DRED SCOTT: ST. LOUIS FREEDOM SUITS 89-93 (2017).

rights as citizens before the Civil War, notes how Northern courts used legal procedure to close the courthouse doors on Black people as a matter of standing.[178] The post-emancipation courtroom, across geographies, would become a site where the notion of equality, such as having the right to testify, allowed Black testimonies to be socially compelled while structural undermined.

A disputed fact in the trial is illustrative of how Union officials tacitly used and devalued Black testimony. When Sallie testified she noted that she witnessed much of the entire altercation. Sallie told judge-advocate Wood that when Galina heard the cries of her daughter and approached the mansion-house, Temperance threatened Galina, telling her "not to come in the house [and that] if she did, she would shoot her."[179] Providence Neely, on the other hand, when the military commission interjected a question, claimed that Temperance said no such thing. Sallie relayed that as soon as Galina left the mansion-house with her daughter Ellen, both Providence and Temperance followed. When Temperance fired the alleged warning shot, Providence was ahead of her, closer to Galina and Ellen. Sallie attested to the fact that after the first shot was fired Galina turned around and placed her hands in the air.[180] She rejected defense's counsel's suggestion that Galina had "raise[d] her hands" preparing to strike "Mrs. Providence Neely."[181]

However, while Providence told the defense that Galina "held her hands up as if she intended to push me again," upon cross-examination noted only that Galina was "close enough to have struck me" and "[Galina] did not draw her fists."[182] The military commission, then, interjected again. Providence was asked for Galina's age, "her weight", and "whether [Galina] was a strong healthy woman." Given the opportunity to describe the potential threat Galina posed to her, right before Temperance pulled the second shot, Providence attested that "[Galina] was a strong healthy woman."[183] She elaborated, stating that Galina was "tall, at least a head higher than I am", "180 pounds", "very stout and very strong."[184] Judge-advocate Wood, then, given the opportunity to continue cross-examining Providence regarding the relevance of this information asked Providence one unrelated question and moved onto the next witness.

When Union officials found Temperance guilty of a crime, but delivered her a minimal punishment, the military commission implicitly announced its fundamental task: they would adjudicate, but leave unchallenged the kinds of white impunity that characterized the antebellum South. In courtrooms and

178. MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 108 (2018).

179. *Supra* note 2, at 7-8 (proceedings), 9-10 (manuscript).

180. *Id.* at 14 (proceedings), 16 (manuscript).

181. *Id.*

182. *Supra* note 2, at 24-27 (proceedings), 26-29 (manuscript).

183. *Id.* at 28 (proceedings), 30 (manuscript).

184. *Id.*

communities North and South, for decades after the Civil War, political, economic, and social realities evolved within amorphous promises of justice, equality, and freedom.[185] Moreover, the significance of the military commission's admission of Sallie's testimony, the only eyewitness to the crime, would be entirely shaped by ideas about Black women. Her witnessing would reflect how 19th-century courts could formally include Black perspectives only to undermine those perspectives substantively through modes of legal reasoning and procedural tools.

Especially for Black women like Galina and Sallie, their legal freedom provided them no standing as full human beings capable of rational thought. Instead, the ability to pass on the "mark" of Blackness—of being "for the captor"—was cemented as the defining feature of Black womanhood through certain modes of violation, injury, and violence.[186] Black studies, in its broader critique of modern humanism, has emphasized how the illegibility of harm enacted upon Black people is enmeshed with presumably justifiable reason for the harm.[187] Black men's continued dispossession after the Civil War resulted in profound vulnerability to violence characterized by how debt servitude and sharecropping interacted with convict leasing: criminal law deployed for Black labor control.[188]

However, other means of white control provided for postbellum racial subordination, many of which are present in the *Neely* case. Racial unfreedom in the postbellum South would be largely secured and managed through the rule of law. Beginning in 1865 and 1866, North Carolina courts placed thousands of Black children forced apprenticeships, despite their parents' objections.[189] Black women were stripped of any entitlements associated with mothering. When free Black women fought to live in their own homes and communities, but still worked for white planters, white men made it dangerous for Black women to safely live off the plantation, to travel across town, or down the street.[190] In 1866, the North Carolina legislature passed "Act Concerning Negroes and Persons of

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185. My contention is that codified ideals—borne of the Reconstruction era—have not translated to substantiated protections nor corresponding changes in material reality. This is not to say to that a formal end to slavery wrought nothing. But rather, that as legal emancipation was detached from social transformation during and after Reconstruction, legal contradictions were no promise, but the rule of law's defining feature and the role of law's guarantee. Everyday people interacted with how, when, and where unfreedoms based on race would be entrenched, imposed, or interrupted under the pretense —rather than any natural deference to or the uniform administration—of American law.

186. Farley, *supra* note 9; *Mama's Baby, Papa's Maybe*, supra note 18, at 67.

187. *See generally* ALEXANDER WEHELIYE, HABEAS VISCUS: RACIALIZING ASSEMBLAGES, BIOPOLITICS, AND BLACK FEMINIST THEORIES OF THE HUMAN (2014).

188. James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 NYU L. REV. 1465 (2019).

189. KARIN ZIPF, LABOR OF INNOCENTS: FORCED APPRENTICESHIP IN NORTH CAROLINA 1715-1919, 43 (2005).

190. *See* CRYSTAL FEIMSTER, SOUTHERN HORRORS: WOMEN AND THE POLITICS OF RAPE AND LYNCHING (2009); HANNAH ROSEN, TERROR IN THE HEART OF FREEDOM: CITIZENSHIP, SEXUAL VIOLENCE, AND THE MEANING OF RACE IN THE POSTEMANCIPATION SOUTH (2009).

Color or of Mixed Blood" which both criminalized being unemployed and effectively excluded Black women from most occupations except for domestic service.[191]

Those tasked with enforcing laws and dictates from the federal government played an integral role in creating conditions of unfreedom for Black women. Freedmen's Bureau officials in Wilmington, North Carolina in December 1865, for example, went "door-to-door" visiting Black homes "identifying 'unemployed' women and compelling them to accept domestic positions" with former slaveholders.[192] In Granville, North Carolina in October 1865, a Freedman's Bureau noted that planters "routinely used food denial as punishment for Black women" objecting to "working hours or conditions."[193] A plantation mistress named Rebecca Cameron, in an August 1865 letter recounted how she "lock[ed] the kitchen and pantry at night" having "discovered that controlling [Black domestic workers] rations is the most effective means of ensuring compliance."[194]

After the Civil War, Black women being a site for and subject of white control shaped the racial unfreedoms the legal emancipation did not change. As Christina Sharpe has argued, in the modern world, Blackness can denote "violability and possibility" and Black women's bodies continued to be defined by the absence of autonomy or any claim to oneself.[195] Black women's bodies remained tools for white profit and pleasure, not perceived as belonging to Black women themselves.[196] Black women throughout the Reconstruction Era staked claims to the nominal rights, but freedoms were designed to subject and subjugate. Abolitionists, Black political officials, and collective organizing among Black people in the South following the Civil War spoke of freedoms that involved freedom from forced labor, exercisable freedoms made possible by material resources as well as rights, like a right to public education, that the state and its legal system would protect.[197]

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191. Hunter, *supra* note 44, at 24-26.

192. As cited in JUDKIN BROWNING, SHIFTING LOYALTIES: THE UNION OCCUPATION OF EASTERN NORTH CAROLINA 189 (2011). Records of the Bureau of Refugees, Freedmen, and Abandoned Lands, Record Group 105, Wilmington Field Office Records, Census and Labor Assignment Records (Dec. 1865), National Archives and Records Administration, Washington, D.C.

193. As cited in LAURA F. EDWARDS, GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION 53 (1997). Records of the Bureau of Refugees, Freedmen, and Abandoned Lands, Record Group 105, M1909, Roll 16, Report of Agent Thomas Young (Sept. 12, 1865), Granville County, North Carolina, National Archives and Records Administration, Washington, D.C.

194. Letter from Rebecca Cameron to Anne Cameron (Aug. 3, 1865), in Cameron Family Papers #133, Series 1.3, Correspondence 1865-1866, Southern Historical Collection, Wilson Library, University of North Carolina at Chapel Hill.

195. CHRISTINA SHARPE, IN THE WAKE: ON BLACKNESS AND BEING 75 (2016).

196. Sexual violence against Black women, as a tool of racial-economic control, operated as a form of terror that sought to reestablish white dominance, black subservience, and control physical space. *See* Darlene Clark Hine, *Rape and the Inner Lives of Black Women in the Middle West: Preliminary Thoughts on the Culture of Dissemblance*, 14.4. SIGNS 912 (1989).

197. *See supra* note 139, ROBERTS, KILLING THE BLACK BODY; *supra* note 56, DRU STANLEY, FROM BONDAGE TO CONTRACT, at 98-137.

For women like Galina, the language of freedom may be most meaningful detached from rights. Upon emancipation, Black people were dually free; following Marx's notion of "double-freedom" they were "free to exchange one's labor and free of material resources."[198] Black women experienced a most elusive notion of legal emancipation: to be brought within the language of legal and liberal rights meant an ongoing subjection of Black people by the racial state.[199] For Black women, the implicitly white subject protected by the rule of law remained produced by the role of law. In cementing Black women's status as progenitors of dispossession, legal institutions reinscribed racial-economic order through normalizing and naturalizing certain social relations. Equally, the maintenance of Black women's role in American social relations sustained the illusion that legal rights and freedoms await all self-possessed citizens, rather than being designed to privilege white entitlement and respond to white subjectivity.

United States v. Neely is a historically specific expression of white self-possession, Black subservience, and Black women's treatment as things to be used. A white woman's ability to exercise her cognitive faculties to determine how her body operates is contrasted with a Black woman who does not know what is best for herself or her children and whose death is equated to a person's "forfeiture of goods."[200] As the defense explains, in discussing why Temperance's actions do not warrant the adjudication of typical criminal punishment:

> Accident[s] of this lamentable kind may be the lot of the worst and best of mankind…in such a case the forfeiture of goods (which was then the punishment) would be heaping affliction upon the head of the afflicted and galling a heart already wounded.[201]

It is amidst Galina's nominal legal freedom that Temperance exercised what could be described as the legally justified freedom of a white person to inflict fatal harm. Informed by philosopher Denise Ferreira da Silva, my argument is that race, and specifically racial Blackness, is what transports sets of official, unofficial, legal, and extralegal unfreedoms in ways descended from *partus*

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198. KARL MARX & FRIEDRICH ENGELS, CAPITAL, VOL. 1: A CRITIQUE OF POLITICAL ECONOMY 874 (Ben Fowkes, trans., Penguin Books 1992). SAIDIYA HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA 115 (1997); KARL MARX & FRIEDRICH ENGELS, CAPITAL, VOL. 1: A CRITIQUE OF POLITICAL ECONOMY 874 (Ben Fowkes, trans., Penguin Books 1992).

199. Legal emancipation for black women disputing labor conditions in the post-surrender South, may have seemed to mean being asked to carry forward an unfree past. The role of law seemed to be to carry past the Civil War the social categories, and relations, that made Black women's lives unrecognizable as concerns for the law.

200. *Supra* note 2, at 9 (defendant's brief), 57 (manuscript).

201. *Supra* note 2, at 9 (defendant's brief), 57 (manuscript). Defense counsel here is quoting MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION FOR THE TRIAL OF THE REBELS IN THE YEAR 1746, IN THE COUNTY OF SURRY; AND OF OTHER CROWN CASES: TO WHICH ARE ADDED DISCOURSES UPON A FEW BRANCHES OF THE CROWN LAW at 246 (1762).

sequitur ventrem and slave law.[202] Black women could only pass on a mark designed to naturalize a group of people as subordinates whose subservience and docility could be innate.

The significance of Blackness as the marker of subservience is such that after the Civil War, Black unfreedom involved ostensibly free people being expected to defer to the whims and will of white people. White willfulness comes to represent the kind of universality that the rule of law needs. The white individual's reaction and response to Black insubordination was legible in the Union-occupied South for the very reason that Sallie's testimony was effectively undercut—the installation of a new racial regime would be guided not by acts that destabilized the status quo, but by the actions taken to restore law, order, and authority. Therefore, criminal charges levied, the arguments raised at trial, and the ultimate punishment imposed, could at least appear procedurally fair: the legal system was not circumvented to provide for Temperance's favorable outcome, the legal system was the avenue.

In analyzing the racial grammar through which legal arguments were made and foregrounding the racialized-gendered ways slavery and freedom were invoked, I build on critiques of liberal rights as they have been made by scholars of racial slavery and critical race theory. Built on Enlightenment ideologies, the 19th-century liberal subject was defined by equality, private property, individual liberty, and willful consent—concepts that became associated with white subjects and white subjectivity.[203] The laws of slavery, meanwhile, used a "selective recognition of slave personhood" in order to make Black people culpable for crimes while also positioning Black people to be bought and sold as items of property.[204] Importantly, the commission's choice to hear Sallie's testimony could not be extricated from racialized stereotypes that implied Black people were especially mischievous and willing to lie.

Popular representations of enslaved people, especially in Northern minstrel shows in the 1840s and 1850s, often involved actors in blackface attempting—and failing—to trick their masters to avoid discipline and abuse.[205] While Black performers in the early 19th-century depicted enslaved people as engaging in trickery to escape the totalizing and violent conditions of racial slavery, popularized white-produced shows depicted Black dishonesty as an inherent trait for comedic effect.[206] Minstrel shows, which remained popular after the Civil

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202. Jennifer L. Morgan, *Partus sequitur ventrem: Law, Race, and Reproduction in Colonial Slavery*, 22.1 SMALL AXE 1-17 (2018).

203. *See generally* LISA LOWE, THE INTIMACIES OF FOUR CONTINENTS (2015) (discussing humanism, liberalism, and the racialized-gendered configuration of the 19th-century subject); DENISE FERREIRA DA SILVA, TOWARD A GLOBAL IDEA OF RACE (2007) (same).

204. Hartman, *supra* note 8, at 97.

205. *See* ERIC LOTT, LOVE AND THEFT: BLACKFACE MINSTRELSY AND THE AMERICAN WORKING CLASS 67-94 (1993).

206. *See generally*, ROBERT TOLL, BLACKING UP: THE MINSTREL SHOW IN NINETEENTH-CENTURY AMERICA (1974).

War and increasingly involving Black actors performing Black characters, contributed broadly to caricatured versions of Blackness as the mark of a distinct race or species.[207] In Reconstruction cultural representations of Black people could depict legal emancipation as changing nothing about Blackness being a mark of natural and deserved denigration.

Postbellum ideas of race and gender, specifically Black denigration that substantiated claims of white self-possession, characterized the *Neely* trial from when "the prisoner" Temperance Neely was brought into the courtroom. Conflict arose immediately when judge-advocate Wood sought to introduce Sallie as a witness.[208] Sallie testified that—despite what the defense would claim—Temperance Neely utilized more than a warning shot to frighten Galina: she threatened to shoot her.[209] What remained most salient in the courtroom, however, remained Temperance Neely's character, the authority of white testimonies, and the notion—repeated by multiple witnesses—that in shooting Galina, Temperance had "slain her favorite."[210] The role and rule of law reinforced this emphasis in the postbellum context. The defense made the case that Temperance pulled the trigger a second time and shot Galina in her mother's defense. In his closing brief, judge-advocate Wood attempted to contravene white rationality being taken for granted. He directed the military commissioners to federal dictate Circular No. 5: it specifically called for federal officials to reject Southerners' efforts "[that] disregard the negro's right to justice before the laws" namely "not allowing him to give testimony……[211] Therefore, when Sallie spoke and testified that Galina had turned around with her hands in the air, a normative "right to justice" was at play.[212]

Sallie explained that Temperance fired an initial shot, that the defense claimed was about "frighten[ing]" Galina, and Temperance moved so she was only "about five steps" from Galina when she fired the second and fatal shot.[213] Sallie's status as a witness, despite the initial objection of the defense, initially was utilized by the prosecution and defense: the prosecution deployed white witnesses to denounce Sallie's character. The defendant's lawyers nominally introduced two local white citizens as witnesses to attest that they had informed Temperance Neely that the pistol she bore "would not kill a man" and was unable

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207. *See* DAPHNE BROOKS, BODIES IN DISSENT: SPECTACULAR PERFORMANCES OF RACE AND FREEDOM, 1850-1910 (2006) at 123-156.

208. *Supra* note 2, at 3-4 (proceedings), 6-7 (manuscript).

209. *Supra* note 2, at 7-8 (proceedings), 9-10 (manuscript).

210. *Supra* note 2, at 53 (proceedings), 55 (manuscript).

211. O.O. Howard, *Circular No. 5: Rules and Regulations for Assistant Commissioners*, WAR DEPARTMENT, BUREAU REFUGEES, FREEDMEN, AND ABANDONED LANDS, AND GENERAL ORDERS NO. 10 (May 30, 1865) as republished in *Message of the president of the United States, communicating, in compliance with a resolution of the Senate of the 12th instant, information in relation to the states of the Union lately in rebellion…* (Washington: Government Print Office, 1865).

212. *Id.*

213. *Supra* note 2, at 13 (manuscript).

to cause fatal harm.[214] These statements went alongside discrediting Sallie's factual account in cross-examination. For example, the defense queried Sallie about the timing between the first and second shots, asking:

> Question: Was not the second [shot] fired immediately after the first shot.
>
> Answer: Yes it was.
>
> Question: By the same. You have stated...the second shot was fired immediately after the first. Do you mean that—that it was just as quick as the pistol could be fired again.
>
> Answer: Not quite as quick—she had to walk apace before she fired the last time…
>
> Question. Were you not examined on oath before Brig Gen. Schofield about this matter and did you not then give a very different account of the transaction.
>
> [The witness was cautioned by the Commission that she was not obliged to answer questions unless she chose to do so. The witness declined.] [215]

Questioning Sallie's veracity, by drawing a distinction related to the mechanics of a gun, fit into a broader strategy for the defense in their rendering of Black people.

More than anything else in the defense's questioning of three freedpeople, counsel homed in on Temperance's particular affection for Galina, envy among other enslaved people, and the "harrowing mental agony…the [p]risoner."[216] When racialized-gendered notions of sentiment operated within a 'white-over-black' frame of mind—where a white woman's emotional displays were elevated to rational governing of plantation life—the killing of Galina became the Neely's lamentable tragedy.[217] The white legal actors in the courtroom converged around this shared understanding. In turn, the military court endorsed an act of disciplinary violence that not only characterized antebellum Southern life.[218] The Union Army's exercise of jurisdiction demonstrated that rule and role of law, amidst formal emancipation, in 're-presenting' constitutive violence as a regrettable necessity.[219]

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214. *Supra* note 2, at 54 (proceedings) 56 (manuscript).

215. *Supra* note 2, at 13 (proceedings), 15 (manuscript).

216. *Supra* note 2, at 7 of (defendant's brief), 53 (proceedings), 55 (manuscript).

217. *See* HARTMAN, SCENES OF SUBJECTION AT 21-25 (analyzing how white women's emotions were constructed as 'rational' governance that justified violence against enslaved people).

218. *See* JONES-ROGERS, THEY WERE HER PROPERTY AT 72-80 (documenting white women's participation in and oversight of plantation discipline).

219. *See generally*, LLOYD, UNDER REPRESENTATIONS AT 68 (2019) (examining how key Western philosophers like Immanuel Kant and Edmund Burke used representations of anonymous black women

Here was a morality play that transmuted force into sentiment and preserved how "the colorline" becomes "law's afterlife."[220]

In determining guilt and punishment in the *Neely* case, the mark of Blackness continued to signify permissible violations even in contexts of nominal freedom.[221] While the admission of testimony by Black witnesses platformed their perspective, differences in the legal cultures of white Northerns and Southerners left untouched coinciding views about the natural ethics of the white mind. The legal culture brought by Union army officials focused primarily on the veracity and importance of white subjective experience. This approach involved the same "grammar" as the prosecution and defense.[222] Blackness would be utilized in justifying the perpetuation of unfreedoms that Temperance enforced against Galina, that the *Neely* courtroom tacitly endorsed. In finding Temperance guilty of an act but not the specifications of a crime and imposing punishment through a $1,000 fine, the military commission used its legal authority to morally absolve Temperance while simultaneously reestablish the presence of the rule of law.[223]

My reading of *United States v. Neely* attends to the significant points of agreement and shared understanding that arose between the defense, the judge-advocate operate as the prosecution, the five judges, and the lead commissioner. Specifically, when white legal actors used argumentative points to consider how racial and gendered notions of personhood—ideas about how a free legal subject ought to behave—involved constructed presuppositions that a strictly jurisprudential reading might dismiss or ignore.[224] In other words, underneath the

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as the "dark counter figure of universality itself" to make claims for universal human—and legal—subjecthood, defined by excluding the racialized and colonized from the universal). In the modern world, legal actors in courtrooms and official legal archives often channel sympathies through universalism toward the only victim made legible in a case. In the post-surrender South, Temperance was the victim with whom rights-bearing audiences could identify, and legal reasoning that appealed to empathy justified the violent acts of both Providence and Temperance through universal appeals. This aspect of the trial proceedings reflects what the case makes visible—Temperance—and reveals that maintaining 'the colorline'—a state-sponsored racial distribution of harm experienced as the natural order—was at stake.

220. Farley, *Perfecting Slavery*, at 228. The violent acts of the Neely women also make clear that "the colorline" starts with violence—the state's monopoly on violence—pervades a legal order designed to deny (as much as affirm, provide, or grant prayers for relief). *See* Patricia Williams, THE ALCHEMY OF RACE AND RIGHTS 151-152 (1996) (arguing that "for blacks, then, the battle is not deconstruction of rights…nor of constructing statements of need…the goal is to find a political mechanism that can confront the *denial* of need.").

On the transmutation of force into sentiment I am suggesting white women's impressionability could be used to absolve acts of violence. *See* SCHULLER, THE BIOPOLITICS OF FEELING (showing how 19th-century modes of sentiment positioned white women as having superior capacity for feeling and moral reasoning).

222. SPILLERS, *Mama's Baby, Papa's Maybe* 68 (1987).

223. *Supra* note 2, at 1 (manuscript).

224. In thinking about normative legal subjects, I am informed by the work of Robert Cover. *See* Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986). In thinking about racialized-gendered legal personhood and the historical disciplines' attempt to explicate its formulation and form, I follow interventions made by scholars attendant to the political economy of racialized-gendered subject

legalese, white actors in the courtroom used similar frameworks to discuss how the killing of a Black woman by a white woman should be resolved. Moreover, these same themes are those marked by historical contingency: the people in that courtroom likely accepted certain ideas about race, gender, freedom, and subjectivity.

But it is a mistake to suggest that these ideas were how all white actors perceived the case at that time—others did not agree with the adjudication of the case. When the Union Army's Reporting-General for North Carolina, Thomas Ruger, was made aware of the decision he was enraged and distraught. Ruger wrote that "to a person of property such a punishment is the very lightest which could be inflicted and the effect of such an administration of justice is…to encourage crime." At the same historical juncture—the immediate postbellum period—a prominent Union official interpreted the arguments, ideas, and reasoning that led to Temperance's expeditious release in entirely different ways.[225] His perspective called into question the proper authority exercised and adjudication of Temperance's case. Ruger wrote that the commission was "wholly without precedent and unauthorized" to have the fine paid to Davie County rather than to the federal government who prosecuted the crime.[226]

While nothing came of Ruger's protest, he made clear that the criminal penalty that Temperance Neely received was "a dangerous precedent to establish, especially at this time"[227] The price of a Black life, as implied by the case's outcome, was a thousand dollars. Moreover, as her lawyers argued, Temperance had already been penalized. Reporting-General Ruger foresaw the consequences of a legal system that remained adherent to a 'white-over-black' racial regime: "that a human life can be taken almost entirely without provocation and without extenuating circumstances and without fear of greater punishment than a fine."[228] While Ellen and her four siblings lost their mother, the commission's sympathies lay with Temperance Neely, a white woman experiencing the "most harrowing mental agony," having shot and killed "her favorite negro."[229] This rendering of a fatal injury—a killing—suggests a moral

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formations. *See, e.g.*, Lisa Marie Cacho, SOCIAL DEATH: RACIALIZED RIGHTLESSNESS AND THE CRIMINALIZATION OF THE UNPROTECTED (2012); GRACE KYUNGWON HONG & RODERICK A. FERGUSON, STRANGE AFFINITIES: THE GENDER AND SEXUAL POLITICS OF COMPARATIVE RACIALIZATION (2011); LISA LOWE, IMMIGRANT ACTS: ON ASIAN AMERICAN CULTURAL POLITICS (1996).

225. In thinking about historical contingency and legal indeterminacy as it relates to the law, I draw from the major interventions of Robert Gordon. *See* Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984). My emphasis, however, differs slightly in foregrounding how contingency and indeterminacy are markers of where power, agency, and modes of resistance can be exercised and should be emphasized as such. This potentially more assertive relationship to the past is informed by scholars in black studies. *See generally*, MICHEL-ROLPH TROUILLOT, *SILENCING THE PAST* (1997); *supra* note 14, HARTMAN, LOSE YOUR MOTHER (2007).

226. *Supra* note 2, at 79 (proceedings), 81 (manuscript).

227. *Id.*

228. *Id.*

229. *Supra* note 2, at 27 (proceedings), 29 (manuscript).

tragedy of mythic proportions foisted upon Temperance rather than the result of her own actions.

The courtroom's general acceptance that whiteness could suggest one individual's moral impunity was manifested through the exploitation of Black witnesses' "encumbered individuality."[230] As the court recognized their testimony, the defense exploited the presumed fallacy of Black personhood to destabilize the facts of the case.[231] This is most evident, again, in the treatment of Sallie, the first Black witness. While Sallie's testimony proved useful to the prosecution in establishing the facts of the case and useful to the defense in confirming the affective ties between Temperance and Galina, the defense ultimately understood it was Sallie's word that they needed to undercut. Sallie had testified that Galina turned around and placed her hands in the air after a first warning shot was fired, but the defense alleged that Galina was prepared to be an aggressor. Providence Neely was asked to "state as near you can the expression of Galina's countenance and her exact attitude" when "she wheeled and faced you" to which Providence exclaimed "she look[ed] as if she intended to push me down—she held her hands up as if she intended to push me again."[232]

Given Sallie was the only eyewitness to this moment, the defense introduced two white witnesses who attested to the impossibility that Sallie could have seen this moment in the case *and* to the untrustworthiness of Sallie's word. One local white citizen, Alexander Nail, who was introduced as a "totally disinterested witness," was only asked his residence, age, and whether he knew Sallie's "general character for truth."[233] Nail replied "I know her general character. It is very bad for truth."[234] The defense also introduced a neighbor of the Neely's, George Campbell, as a witness who was asked about "the general character about the colored witness Sall[ie] for truth," to which he replied, "It is very bad—this is her reputation among her own color."[235] Echoing Ariela Goss's insights regarding the presentation of individual enslaved people's character being filtered through denigrating narratives of Black people as a race, Campbell framed Sallie as distrusted among the untrustworthy.

Remarkably, Andrew Wood—the judge-advocate prosecuting the case—did not cross-examine these character witnesses. While it was unprecedented for the military commission allowed for formerly enslaved women like Sallie to act as a witness in a criminal case with a white defendant, defense counsel wanted her testimony impeached. If the defense could not get the sole eyewitness testimony impeached, they ensured the military commission heard from several white men discrediting her. While by the 1860s Northern courts had strict evidentiary

230. HARTMAN, *supra* note 9, at 115.
231. *Id.* at 115-122.
232. *Supra* note 2, at 26 (proceedings), 28 (manuscript).
233. *Supra* note 2, at 32 (proceedings), 34 (manuscript).
234. *Id.*
235. *Supra* note 2, at 31-32 (proceedings), 33-34 (manuscript).

standards regarding character witnesses, Wood raised no concerns.[236] As judge-advocate he failed to question the basis of George Campbell's claim regarding Sallie's reputation amongst other Black people. When defense counsel asked about Sallie's "general character for truth", Wood allowed white witnesses to make assertions regarding her moral character and share individual opinions framed as widely-held assessments of Sallie.[237]

Despite two other Black witnesses independently confirming Sallie's account while testifying—Sallie's husband, Henderson, and another formerly enslaved woman on the Neely plantation, Cassandra—Sallie's version of the timeline and her location was wholly undermined. This was an especially effective strategy in the postbellum period where one's ability to acquire contracted labor largely hinged on how one was characterized by others. [238] In speaking, Sallie's freedom to act as a witness made her equally vulnerable to the kinds of slander that put her employment at risk. The right to testify, thus, reflected the aforementioned double bind of freedom and the fallacy of postbellum equality. While white womanhood was already associated with innocence, purity, and honesty, Black personhood in the postbellum period was construed as equivalent with indebtedness, untrustworthiness, and—as Schuller argues—being unimpressionable.[239] An individual Black person was nothing more than their body and their body was suited for slavish labor, not rational thought.

The way Sallie's testimony was situated in the courtroom—as inconsistent and dishonest—justified not only discounting her voice but cemented the idea that Black people needed to be acclimated to proper behavior in a civil forum. Even while the introduction of her testimony as a witness by the prosecution may have established elements of the fact-pattern the military commission ultimately perceived as true, it also allowed white legal actors to frame Black people's ability to witness. Sallie was used by both the prosecution and defense to reinforce the idea that while she could provide information that could be proven true or false, she could not morally assess Temperance's actions or intent nor complicate how affection and sentiment linked Temperance to Galina. Instead, Sallie could only be trusted to attest to a collective "jealousy" of the attention,

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236. On 19th-century court evidentiary practices, *see* JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (1904), §1608-1621. Northern courts embraced several influential legal treatises in establishing evidentiary standards regarding character witness. *See generally*, ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE IN CIVIL AND CRIMINAL CASES (1810); SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE, VOL. 1 3rd ed., 1846); JOHN APPLETON, *The Rules of Evidence: Stated and Discussed* (1860).

237. See SWIFT, *supra* note 236, at 143-146; GREENLEAF, *supra* note 236, at §461-462; APPLETON, *supra* note 236, at 123-130.

238. As Saidiya Hartman explains "regard for one's word, respect for the right of others, and self-interest required strict compliance with its terms. Abiding by the terms of a hard contract was in one's interest because the good reputation acquired by remaining true to one's promises would lead to further employment"…in regard to the contract, the espousal of volition only secured the bondage of the freed." HARTMAN, *supra* note 5, at 144.

239. *See* SCHULLER, *supra* note 62.

care, and affinity that characterized the victim's relationship with the accused.[240] Her testimony was not free to be understood as attestation but rather required manipulation because of her inherent inabilities.

From the legal archive, we cannot decipher what Sallie would or could have said given the opportunity to speak more freely or without immediate consequence. Gratuitous violence upon returning to work for the Neely family, removal from the plantation, and denial of employment in any white household in Davie County all feel possible but not certain. We cannot know whether Sallie she actually viewed the relationship between Temperance and Galina as one of pure affection. Instead, Sallie was saddled with the "burdened individuality of freedom" that selectively incorporated her as a witness but used narratives of Black inferiority to undermine her character and veracity especially when positioned against claims made by a white woman of power and esteem.[241] The defense asked the commission "[a]re the fact as stated by the colored witness, Sal or as stated by the mother of the prisoner…Can there be the least doubt as to this matter?"[242] And, as the defense went on to explain during closing arguments, Sallie's reputation "for truth has been…very bad" and need be considered against that of "the witness Neely…[who] is a lady of good character, her character was never doubted, no one, had a better character so it seems."[243]

Following a core line of critique among critical race theorists since the late 1970s, liberal notions of freedom—as understood by, through, and in law—are designed to facilitate racial inequality rather than undermine it.[244] As scholar Derrick Bell claimed "[t]he interests of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[245] Theorist Anthony Paul Farley has taken this argument further by attending to the "perfecting of slavery", the law's unparalleled role in maintaining 'white-over-black' ideology, arguing "the slave bows down before the law and then there is law."[246] In attending to rule and role of law in the *Neely* case, my contention is that racial slavery cannot be spoken of as having come to an ontological end. Blackness denotes enslaveability, engendered dispossession, and the paradoxical status of the slave as property and person that provides for the legitimacy of law.[247]

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240. *Supra* note 2, at 11 (proceedings), 13 (manuscript).

241. HARTMAN, SCENES OF SUBJECTION, at 115.

242. *Supra* note 2, at 65 (proceedings), 67 (manuscript).

243. *Supra* note 2, at 66 (proceedings), 68 (manuscript).

244. *See generally*, Jean Stefancic & Richard Delgado, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

245. Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

246. Farley, supra note 9, at 225.

247. See Zakiyyah Iman Jackson, *Review: Animal: New Directions in the Theorization of Race and Posthumanism*, 39 FEMINIST STUDIES, 669 (2013); JARED SEXTON, AMALGAMATION SCHEMES: ANTIBLACKNESS AND THE CRITIQUE OF MULTICULTURALISM (2008); Frank Wilderson, RED, WHITE, AND BLACK (2010).

CONCLUSION

The captive body, then, brings into focus a gathering of social realities as well as a metaphor for value so thoroughly interwoven in their literal and figurative emphases that distinctions between them are virtually useless.[248]

This Article foregrounds the case of Galina and Temperance Neely shedding light on how postbellum legal cultures rationalized violence that yoked racial slavery to ostensible freedom. Specifically, I contend that *Neely v. United States* is a case that on the one hand indexes how the law situated Black women's experience of moving from slavery to freedom. And, on the other, illustrates how dominance, denigration, and modes of violence were exercised through categories of race, gender, and personhood. From the antebellum period through Reconstruction, the specific relegation of Black women and their labor to worlds beyond the role and rule of law, meant that the vestiges of a formal system were more likely to endure than be transformed, reformed, or even named. Historicizing Black women's ongoing relationship with legal institutions and authority is one contribution of this work.

A key implication of my reading of the *Neely* case concerns the preservation of 'white-over-black' hierarchy through persisting—contemporary—features of the rule of law. Posed as a question, where has an uncritical submission to legal institutions and unquestioned reverence for legal authority brought us? If Ellen's provocation had not been responded to with a whip or if Galina's defense of her daughter was viewed as an aggression against Providence, these might be criminal acts. Black women are 13% of the American population, but are 30% of all women behind bars. If Temperance had not responded with a gun, but a public official—say a police officer—was summoned today, a Black woman like Galina would be nearly twice as likely as a white woman to experience an officer's use of force.[249]

Legal systems broadly continue to fuel cycles of Black women's disadvantage. While testimony from Black individuals may not be explicitly deemed inadmissible because of incompetence, empirical research shows white jurors are more likely to be biased against Black defendants, a bias exacerbated when race is *not* discussed in a trial.[250] Black women, when they report or disclose experiencing sexual assault, receive less interpersonal support and care

248. SPILLERS, *supra* note 18, at 67.

249. Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race–Ethnicity, and Sex*, 116 PROC. NAT'L ACAD. SCI. 16793, 16794 (2019).

250. Samuel Sommers & Phoebe Ellsworth, *White Juror Bias: An Investigation of Prejudice against Black Defendants in the American Courtroom*, 7 PSY., PUB. POL. & L. 201. Joseph Rand has argued that an implication of research on race and interpretations of lie detection tests bears directly on whether jurors find evidence and testimonies credible or not, disfavoring black individuals being scrutinized by white jurors. Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection and the Jury*, 33 CONN. L. REV. 1, 4-5 (2000).

from "lay people, police, judges, and juries."[251] Criminal prosecutors, for instance, to treat Black girls more punitively for minor crimes and use their discretion to dismiss approximately 70% of cases against white girls compared to just 30% of Black girls' cases.[252]

The rule and role of law operate never simply through the plain language of the law, but the prosecution and enforcement of laws. From the Freedmen's Bureau to contemporary state actors, official decisions, are accompanied by norms, practices, procedures, and that shape how people experience the law's rule and role. Recalling Temperance's words to Galina regarding about how any attempt to flee the plantation would result in her children's death, a similar sentiment pervades Dorothy Roberts's decades of research on America's system of family policing.[253] The majority of Black children in America will experience a 'child welfare' investigation before they turn eighteen and Black children are twice as likely to spend time in 'foster care' as white children.[254] Black children and their birth parents experience the legal termination of their relationships at twice the rate of the general population.[255] How white-over-black ideology sustains itself, postures itself the default rule, reminds that "the past that is not past reappears, always, to rupture the present."[256]

Black women face disproportionately high eviction rates and eviction filings at rates significantly higher than other demographic groups.[257] Black women are perceived to be less likely victims of gender discrimination compared to white women and their claims are, in turn, discounted to a greater extent. When gender discrimination claims are raised in workplace contexts, negative determinations disproportionately impact Black women.[258] Black women have 90% less wealth

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251. Rebecca Schachtman & Cheryl R Kaiser, *Bystanders' thresholds for Intervention in Black vs. White Women's Sexual Harassment*, 19 PLOS ONE (2024). *See also*, Coker et al., *Responses From the Field: Sexual Assault, Domestic Violence, and Policing*, 16 UNIV. MIAMI LEG. STUD. RES. PAP. (2015); EPSTEIN, *Discounting Credibility: Doubting the Stories of Women Survivors of Sexual Harassment*, 51 SETON HALL REV. 289 (2020).

252. Rebecca Epstein, Jamilia Blake and Thali Gonzalez, *Girlhood Interrupted: The Erasure of Black Girls' Childhood*, 12 GEORGETOWN L. CENTER ON POVERTY & INEQUALITY (2017).

253. DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 8 (2002) (noting there were twice as many black children in the 'foster care' system as their portion of the general population would suggest). DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 5, 9 (2022).

254. Roberts, TORN APART 5 (2022). E. Jason Baron et al., *Unwarranted Racial Disparity in U.S. Foster Care Placement*, NAT'L BUREAU OF ECON. RESEARCH WORKING PAPER NO. 33154 (2024) (discussing likelihood of spending time in foster care).

255. Christopher Wildeman et al., *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000–2016*, 25 CHILD MALTREATMENT 32 (2020).

256. SHARPE, *supra* note 128, at 9.

257. Peter Hepburn et al., *Racial and Gender Disparities Among Evicted Americans*, 10 SOCIOLOGICAL SCI. 649 (2020).

258. Rebecca Ponce de Leon et al., *'"Invisible'" discrimination: divergent outcomes for the nonprototypicality of Black women*, ACAD. MANAGE. J. 65, 784 (2022).

compared to white men and, due to wage disparities, over a forty-year career can experience nearly $1,000,000 in pre-tax earnings.[259]

Recalling Temperance's words to Galina regarding about how any attempt to flee the plantation would result in her children's death, a similar sentiment pervades Dorothy Roberts's decades of research on America's system of family policing.[260] The majority of Black children in America will experience a child welfare investigation before they turn eighteen and Black children are twice as likely to spend time in foster care as white children.[261] Black children and their birth parents experience the legal termination of their relationships at twice the rate of the general population.[262] The rule and role of law operate never simply through the plain language of the law, but the prosecution and enforcement of laws, and the decisions, norms, practices, procedures, and that shape how people experience the law.

I argue the postbellum court's treatment of an act of violence against a Black woman, especially in the context of racial-economic practices that extracted labor from bodies not persons, complicates several narratives associated with race, Reconstruction, and law. Broadly, legal history has marginalized the insights of historians of Black women who have challenged the idea that liberal rights and the rule of law can be understood in courtrooms divorced from plantation homes, crop fields, and everyday social encounters.[263] Examinations of Reconstruction that sideline the relationship between race, gender, and labor can too easily fail to distinguish between the modes of domination that took place immediately in the military-occupied South, urban contexts, and the domestic

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259. Michelle Holder, *How Do Wage Gaps Affect Black Women's Wealth Attainment, and Where Do Expenditures Fit In?*, THE URBAN INSTITUTE (2023), https://www.urban.org/research/publication/how-do-wage-gaps-affect-black-womens-wealth-attainment-and-where-do.

260. DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 8 (2002).

261. DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES--AND HOW ABOLITION CAN BUILD A SAFER WORLD 5, 9 (2022).

262. Christopher Wildeman et al., *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000–2016*, 25 CHILD MALTREATMENT 32 (2020).

263. The marginalized of black women's experiences with—and of—law as those experiences relate to the character and substantiation of rights, specifically in legal scholarship and legal history, has been noted by scholars since the late 1980s. *See*, *e.g.*, Patricia J. Williams, *On Being the Object of Property*, 14.1 SIGNS, 5-24 (1988); Kimberlé Crenshaw, *Race, Reform and Retrenchment*, HARV. L. REV. 101 1331-1387 (1988); Regina Austin, *Sapphire Bound!*, Wisconsin L. Rev. 539-578 (1989); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581-616 (1990); Elsa Barkley Brown, *Negotiating and Transforming the Public Sphere: African American Political Life in the Transition from Slavery to Freedom*, PUBLIC CULTURE (1994); Cheryl Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARD. L. REV. 309-409 (1996); GLENDA GILMORE, GENDER AND JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896-1920 (1996); PEGGY DAVIS COOPER, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES (1997); LAURA F. EDWARDS, GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION (1997); Katherine Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages* 11 YALE J. L. & HUM. 11 251-309 (1999); Adrienne Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221-288 (1999); TERA HUNTER, BOUND IN WEDLOCK: SLAVE AND FREE BLACK MARRIAGE IN THE NINETEENTH CENTURY (2017).

sphere. Legal scholarship that focuses on social categories and classification often occludes the paradigmatic history of how Black women fell selectively within and presumptively outside of categories that made violation of their bodies legible as legal injuries.

In focusing on "the military-occupied South" I am specifically interested in how even in cases where the fact pattern suggests adhering to dominant legal doctrines would produce a certain outcome, the adjudication of law generated alternative ends.[264] Foregrounding how social categories interacted with postbellum notions of law, the *Neely* trial is notable for how explicitly it privileged white sentiment, naturalized Black subservience, and rationalized racial violence and its ends. In reuniting North and South and reconstructing a national economy after the Civil War, emergent legal cultures reflected a need to invest in a version of whiteness, regardless of one's economic status. Entangled with patriarchy and a gendered division of labor and space, this reconciliation was American, was white-over-black, and further inscribed the colorline. The white *self-possessed* subject after the Civil War, therefore I argue, could expect in a courtroom to be centered, privileged, and justified by fact of their self-possession: no systemic history of bondage tied them to lawfulness, legality, and legitimate authority. This held true not despite a white person's gender, but rather through racialized ideas of gender like the sentimentality ascribed to Temperance Neely's acts.

In Part I, I explored how the emergent legal cultures of the military-occupied South relied on notions of white sentimentality and plantation slavery that made Temperance Neely's killing of Galina a "misadventure" rather than an act that met all the elements of a criminal offense. Part II, I placed the *Neely* case in the context of racialized labor extraction and the denigration of Black life as part of postbellum reconstructive pursuits. In the South, when federal officials grappled with how to rebuild the American nation-state and a national economy, the law's operative function was not to put white violence and Black injury on trial.

Instead, as I explore in Part III, the law gave violence both shape and structure, setting up decades of white terrorism, which would be construed as extra-legal violence and socially necessary in order to stabilize the hierarchy of 'white-over-black' in the postbellum context.[265] The testimonies of Black individuals and their treatment in court reflected how instances of Black "volition" or circumscribed humanity were used—before and after the Civil War—to reinforce ideas of white impunity and Black inferiority.[266] From slavery to the "non-arrival of Black freedom," violence directed at Black people would

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264. John Witt, back jacket of GREGORY DOWNS, AFTER APPOMATTOX: MILITARY OCCUPATION AND THE ENDS OF WAR (2015).

265. Farley, *Perfecting Slavery* (2004).

266. Scenes of Subjection, *supra* note 9, at Part II.

remain systematically enabled by the rule of law.[267] Returning to my core historiographical arguments, regarding law in the postbellum context, the rule of law calcified slavery's logics while law served the role of reproducing social conditions to racial-economic ends.

Moreover, theorizations in Black studies and critical race theory can and should inform the law's previous and current relationship with violence and a so-called rational legal subject. Analysis of 'white-over-black' ideology demands that the authoritative perspective of legal language and the ontological implications of being *made* equal, be recognized as marked by the work racial regimes do.[268] Through different bodies of law and tools of explanatory power, the rule and role of law associates whiteness with impunity and positions one's distance from Blackness as always-already related to blameworthiness.[269] The maintenance of law and order allowed Black codes to become Jim Crow laws and for the radical possibilities of Reconstruction to give way to the "nadir" of anti-black violence and racial resentment by the end of the 19th century.[270]

Foundationally, I argue that the place of Black women in America involved unfreedoms that helped transition the country from a Civil War to a reconstructed 'white-over-black' society. The law played a constitutive role in this transition in how it explicitly and implicitly excluded Black women from representations of gender or race that involved self-possession. This proved true in the immediate aftermath of the War and, despite the aspirations of slavery's abolition and radical visions of Reconstruction, became a primary characteristic of the rule and role of law. The legibility of Black women's lives and labors ran counter to the systematized administration of rules, procedures, and order that used legal structures to re-present relationships of dominance and control. Crucially, Black women resisted, agitated, and struggled against these relationships in everyday ways, including the young girl Ellen's refusal to behave as if racial slavery could only nominally end. The risk and consequences were and continue to be dire. This relationship with American law might provide the necessary insights into how state power, arrangements of violence, and American social life must be transformed. This relationship is informative—and scholars must resist an inclination to fetishize it—as liberatory visions are reconfigured, reimagined, and newly designed for freedom dreams to be material, "felt", and experienced as true.[271]

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267. Nijah Cunningham, *"The Nonarrival of Black Freedom",* 12.6 WOMEN & PERFORMANCE 84 (2017) following SAIDIYA HARTMAN, SCENES OF SUBJECTION (1997).

268. Farley, *Perfecting Slavery* (2004).

269. Scenes of Subjection, *supra* note 9, at 79-114.

270. RAYFORD LOGAN, THE NEGRO IN AMERICAN LIFE AND THOUGHT: THE NADIR, 1877–1901 (1954).

271. Audre Lorde, *Poetry is Not A Luxury,* SISTER OUTSIDER: ESSAYS AND SPEECHES 27 (1984). Lorde writes "There are no new ideas. There are only new ways of making them felt, of what those ideas feel like being lived…" *See also* ROBIN D.G. KELLEY, FREEDOM DREAMS: THE BLACK RADICAL IMAGINATION (2002).