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Death in the Shadows

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This paper is about the law and visual culture. Its centerpiece is Parson Weems' Fable (1939) (fig.1), a painting by the American artist Grant Wood (1891-1942) that depicts the apocryphal story of George Washington and the cherry tree. At first glance, Wood's image appears to celebrate an enduring myth of American virtue, namely Washington's precocious inability to tell a lie. Studying the picture more closely, however, one finds a pair of black figures, presumably two of the Washingtons' slaves. Stationed beneath dark storm clouds and harvesting cherries from a second tree, these slaves invoke yet another national myth, that of the domestic serenity that supposedly reigned on Virginia's colonial plantations. In the process, they quietly invoke the country's grievous history of racial oppression, coercion, and brutality.

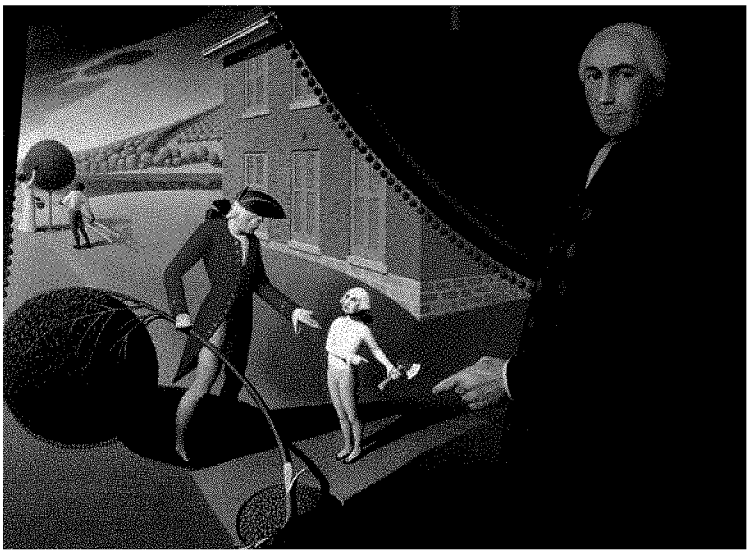
This isn't the only place where Woods' painting speaks of racial violence. To the contrary, Parson Weems' Fable also raises the specter of lynching. Examining the shadows directly beneath the Washingtons and their fabled tree, one discovers a hanging black body. Intentional or not, this dangling corpse conjures the spectacular acts of theatrical violence that mobs of Euro-Americans inflicted on African Americans during the late nineteenth century and well into the twentieth. By the 1930s, heated protests emerged against lynching—in popular songs, magazines, and art exhibitions, as well as more traditional political arenas. Unlike the painters most closely associated with him, Wood didn't participate directly in such moments of artistic protest. Nonetheless, he would have been exposed to them as he painted Parson Weems' Fable in the winter of 1939.

Regardless of Wood's intentions, the work he created persistently connects the country's origin myths to the murderous violence the U.S. has repeatedly inflicted on persons of color. Moreover, as the painting itself seems to realize, the law and culture forged by colonial Virginia planters like George Washington eventually morphed into a collective white psychopathy that found vicious expression in the practice of spectacle lynching. This colonial legal regime was deeply visual—a fact that accounts for not only its power, but also for the fundamental influence it continues to exert on current American conceptions of race.

A deep reading of Parson Weems' Fable in the context of both its time

(1939) and its setting (1736) reveals the extent to which the law is visual and the visual is legal. Indeed, the painting gives us a valuable lens for perceiving the pervasive connections that run between the two. Our thesis is that the profoundly visuo-legal nature of the country's racial foundations helps explain the lack of progress the nation has made in dismantling the color line. As a result, the impulse to join the seemingly unrelated disciplines of legal study and art history isn't an academic gimmick, but rather a necessity. For centuries, images have worked in tandem with statutes, judicial decisions, and various forms of legal (and illegal) punishment to indelibly imprint a logic of racial violence in our collective mindset. In order to fully excavate this logic, we need scholars who can analyze pictures as well as the law.

In terms of structure, we begin by introducing the painting and our analytical framework and method. After that, we explain the theoretical foundations for studying law and culture in this context. Finally, we connect colonial Virginia's legal and cultural landscape to the traumatic racial violence that continues to haunt our national mythology.



Grant Wood, *Parson Weems' Fable*

Introduction

"Grant Wood paints George Washington & the C herry Tree," *Life* magazine announced on February 19, 1940, heralding a new work by the

famed creator of *American Gothic* (1930).[1] As the magazine eagerly reported, this latest Wood painting, *Parson Weems' Fable* (1939), depicted a key episode in the first president's illustrious existence. "The crucial moment when Washington Sr. discovers the mutilated cherry tree is shown here at the left [of the image]. Hatchet in hand, little George is making his immortal confession: 'I can't tell a lie, Pa; I did cut it with my hatchet.'"[2] Wearing a pair of bright blue tights and, even more incongruously, the face of Gilbert Stuart's famed portrait of Washington at age sixty-four, the future leader of the Republic performs his legendary act of self-incrimination while two African slaves harvest a second, intact tree in the background.

Interestingly, a fifth figure stands at the far right of the picture, lifting the heavy scarlet curtain that frames the scene and pointing at the Washington drama unfolding center stage. As the painting's title tells us, this is Parson Mason Locke Weems (1759-1825). An Episcopalian minister, traveling book seller, and author in his own right,[3] Weems dreamed up the cherry tree incident for the 1806 edition of his popular biography *The Life of George Washington*.[4] Although generations of Americans would go on to accept Weems' story as historical fact, it was, in actuality, pure fiction. As Wood's painting literally foregrounds, the country's canonical account of its *pater patriae*'s inability to dissemble was itself something of a lie.[5]

"It didn't seem right to separate Weems from the story he invented," Wood explained to a reporter shortly after completing the work.[6] Right or not, his decision to call attention to the apocryphal nature of Washington's escapades in arboreal honesty sat poorly with a national audience that had come to embrace Wood as a downhome practitioner of so-called "real" American art[7]—the sort of painter who would publicly declare, "all the really

1. *Parson Weems' Fable*, LIFE, Feb. 19, 1940, at 33.

2. *Id.*

3. Steven Biel, *Parson Weems Fights Fascists*, COMMON-PLACE (July 2006), http://www.common-place-archives.org/vol-06/no-04/biel/.

4. MASON LOCKE WEEMS, THE LIFE OF WASHINGTON A NEW EDITION WITH PRIMARY DOCUMENTS AND INTRODUCTION 9-10 (Peter Onuf ed., 1996). On the fictional nature of the cherry tree story, see *Shirley Reece-Hughes, Moments of Discovery in Grant Wood's Theatrical Paintings*, in BARBARA HASKELL, GRANT WOOD: AMERICAN GOTHIC AND OTHER FABLES 55 (Yale Univ. Press 2018) ("Weems draws back a stage curtain [in Wood's painting] as he points to his apocryphal tale of Washington at the cherry tree"); R. TRIPP EVANS, GRANT WOOD: A LIFE 266 (1st ed. 2010) ("Weems's story has long been dismissed by serious historians").

5. *See* WANDA M. CORN, GRANT WOOD: THE REGIONALIST VISION 120 (1983) ("Mason Locke Weems, the late-eighteenth-century Anglican clergyman who fabricated an apocryphal tale about George Washington and the cherry tree").

6. *Grant Wood Tells Story of Latest Work*, IOWA CITY PRESS-CITIZEN, Jan. 6, 1940, at 12.

7. Maynard Walker, *Mid-West is Producing an Indigenous Art*, 7 ART DIGEST 7, 10 (Sept. 1, 1933) (quoted by Barbara Haskell, *Grant Wood: Through the Past, Darkly*, *in* BARBARA HASKELL, GRANT WOOD: AMERICAN GOTHIC AND OTHER FABLES 26 (Yale Univ. Press 2018) [hereinafter Haskell, *Grant Wood, Through the Past, Darkly*].

good ideas I'[ve] ever had [have] come to me while I was milking a cow"[8] while publicly rejecting the sophisticated influence of the European and New York art elite.[9] Gertrude Stein might have delighted in Wood's satirical side, christening him "the all-ti me menace."[10] In general, however, 193 0s Americans lauded Woo d and his fellow Regionalist painters as the champions of "a dem ocratic, populist a rt that could be understood by the masses."[11] As Wood him self put it, "a work which does not make contact with the public is lost."[12]

As Wood qui ckly discovered, *Parson Weems Fable* largely made the *wrong* sort of contact with its public in the winter of 1939 and 1940.

Even as the painting debuted at the Whitney Museum's prestigious biennial exhibition—selling for $10,000 only a day after Wood shipped it from his stu dio in Iowa to his gallery in Manhattan [13]—the work's frank acknowledgement that Weem s, himself, pl ayed a central role in the cherry tree tale sparked nothing short of a sca ndal. Not only did Wood receive a flood of angry letters and telegrams accusing him of staging "a 'debunking' crusade against Washington,"[14] newspapers throughout the nation castigated him for his treat ment of American history. "Unfortunately, there are ultra-sophisticates in this world who believe the cradle is the place to rob childhood of its fondest fancies. Wh at's going to become of our faith in heroes when all of our cherished stories have been debunked," the *Philadelphia Inquirer* demanded in an article entitled "Debunke rs Can't Chop Stor y of Cherry Tree."[15] "So the Washington-cherry tree deal i s a myth, eh? . . . Maybe Washington was not presi dent of these United States. None of us can be sure," an irate letter to the editor of the *Des Moines Register* sniped.[16] As

8. Jean Kinney, *Grant Wood: He Got His Best Ideas While Milking a Cow*, N.Y. TIMES (June 2, 1974), https://www.nytimes.com/1974/06/02/archives/grantwood-he-got-his-best-ideas-while-milking-a-cow-grant-wood-he.html.

9. *See, e.g.*, Grant Wood, *Revolt Against the City*, *in* 1 WHIRLING WORLD SERIES 131 (Frank Luther Mott ed., 1935) ("The great central areas of America are coning to be evaluated more and more justly as the years pass. They are not a Hinterland for New York; they are not barbaric.").

10. Gertrude Stein, quoted in EVANS, *supra* note 4, at 156.

11. Haskell, *Grant Wood: Through the Past, Darkly*, *supra* note 7, at 25.

12. Karla Ann Marling, *Of Cherry Trees and Ladies' Teas: Grant Wood Look at Colonial America*, *in* THE COLONIAL REVIVAL IN AM. 299 (Alan Axelrod, ed., 1985) (q uoting THIS IS GRANT WOOD COUNTRY 1 (Joan Liffring-Zug & J ohn Zug, eds., in cooperation with Nana Wood Graham, Davenport Municipal Art Gallery, 1977)).

13. Mark Thistlewaite, *Nationalism & Truth in Grand Wood's Parson Weems' Fable*, *in* DE GRUYTER, PICTORIAL CULTURES & POL. ICONOGRAPHIES: APPROACHES, PERSP., CASE STUD. FROM EUR. & AM. 111 (Udo J. Hebel & Christoph Wagner, eds., 2011).

14. Cherry Tree Fantasy Explained Artist: Grant Wood Says He means No Offense in Painting of Washington and Hatchet, SAN BERNARDINO CTY SUN, Jan. 4, 1940, at 3.

15. *Debunkers Can't Chop Story of Cherry Tree*, PHILA. INQUIRER, Feb. 22, 1940, at 21. ("If Washington didn't cut down the cherry tree who did use the hatchet?" the article continued, clearly undeterred by facts not in evidence.")

16. *Grant Wood Art Stirs Her Wrath*, DES MOINES REG., Jan. 14, 1940, at 11.

Life's own coverage of *Parson Weems' Fable* noted, "Almost before the paint was dry on this picture it started a battle."[17]

According to Wood, he had "no intention of 'debunking'" either Washington or Weems' story with his painting.[18] To the contrary, he insisted, he wanted to find a way to open up the power of America's founding folklore to those who would otherwise view it with derisive skepticism. The winter before he began work on the canvas, Wood had been deeply struck by an article he'd read in *The Atlantic Monthly*. Written by the literary critic Howard Mumford Jones and entitled "Patriotism—But How?" the piece wrestled with the question of how to approach American history with sufficient self-consciousness to avoid virulent nationalism, but enough romance to sustain the country's spirits in a potential war for democracy.[19] Disturbed by the rise of fascism in "dictator countries,"[20] which fueled their populaces' patriotism with "glamorous mythological images,"[21] Jones concluded: "[t]he only way to conquer an alien mythology is to have a better mythology of your own."[22] Wood hoped his canvas might provide just this type of "realistic-minded, sophisticated" myth.[23] "It is, of course, good that we are wiser today and recognize historical fact from historical fiction," he explained in a public statement about *Parson Weems' Fable*. "Still, when we began to ridicule the story of George and the cherry tree and quit teaching it to our children, something of color and imagination departed from American life. It is this something that I am interested in helping to preserve."[24]

As we'll see, Wood's painting ultimately preserved something much darker than such chipper nods to national flair. "[A] play within a play, a fable about the making of fables,"[25] *Parson Weems' Fable* quietly confesses to the acts of theatrical racial violence that frequently undergird America's stories of national greatness. The only image Wood ever created that depicts Africans or African Americans,[26] the painting invokes one of the nation's ugliest racialized crimes: lynching. Defined here as the ritualistic torture and murder of black individuals by white mobs,[27] the majority of lynchings

17. *Parson Weems' Fable*, LIFE, *supra* note 1, at 33

18. *Artist Denies Intent to 'Debunk' Legend: 'Clarifies' Picture of Washington and the Cherry Tree,* N.Y. TIMES, Jan. 3, 1940, at 18.

19. Howard Mumford Jones, *Patriotism—But How?* 162 ATLANTIC MONTHLY, NOV. 1938, at 585, 585–92.

20. *Id.* at 585.

21. *Id.*

22. Jones, *supra* note 19, at 590.

23. *Artist Denies Intent to 'Debunk' Legend: 'Clarifies' Picture of Washington and the Cherry Tree*, supra note 18.

24. *Id.*

25. CORN, *supra* note 5, at 120.

26. EVANS, *supra* note 4, at 276.

27. *See* Shawn Michelle Smith, *The Evidence of Lynching Photos*, *in* LYNCHING

"occurred between 1880 and 1930, primarily in the South."[28] During these years, Euro-Americans killed at least 4,697 African Americans in profoundly social, performative ways.[29] Crowds of up to fifteen thousand white spectators gathered to watch as other whites torm ented and often mutilated their black victims before burning, shooting, dragging, or hanging them to death.[30] "'Lynch parties' concluded with frenzied souvenir gathering and display of dismembered parts"[31] as members of the mob ripped bloody clothing, bones, and even genitalia from the massacred corpses.[32] Crucially, lynchings were not simply eruptions of racial hatred. Instead, they were one way in which "white southerners sought to restore their dominance in the face of emancipation and the threat of black enfranchisement and social autonomy."[33] Designed to terrorize entire communities of black Americans,[34] lynchings and the memorabilia they produced gave savagely spectacular form to the same racist ideologies that produced the country's

PHOTOGRAPHS 15 (Dora Apel & Shawn Michelle Smith eds., 2007) ("Lynching is defined as murder committed by a mob of three or more. In the United States, however, lynching has been practiced and understood primarily as a racialized and racist crime: the majority of lynching victims have been men and women of color, and the largest number of them have been women, and children, often unmasked, and sometimes numbering the thousands."); Amy Louis Wood, LYNCHING AND SPECTACLE: WITNESSING RACIAL VIOLENCE IN AMERICA, 1890-1940 4 (2009) ("[T]he vast majority of lynchings at the turn of the century took place in former slave states, and the overwhelming majority of those were perpetrated against black men. Even more important here, most Americans at the turn of the century understood lynching as a southern practice and as a form of racial violence that white mobs committees against African American men."). *But see*, Evelyn M. Simien, *Introduction*, *in* GENDER AND LYNCHING: THE POLITICS OF MEMORY 3 (Evelyn M. Simien ed., 2011) ("The term 'lynching' evokes an image derived from a collective memory which African American men and women both share, but to which only African American men claim entitlement—i.e., a charred male figure swinging from a tree or a telegraph pole amidst an angry mob. Such an image has overshadowed the equally representative experience of African American women who were similarly tortured and mutilated, as well as raped and killed, by angry mobs.").

28. Smith, *supra* note 27, at 15.

29. Smith, *supra* note 27, at 15.

30. *See* Dora Apel, *Lynching Photographs and the Politics of Public Shaming*, *in* LYNCHING PHOTOGRAPHS 44 (Dora Apel & Shawn Michelle Smith eds., 2007) ("Thousands of people were attracted and fascinated by the ritualized murder of the spectacle lynching. Sometimes lynchings were publicized in advanced by local newspapers, supported by railroads that ran special excursion trains to the lynching sites or added extra railroad cars to bring people from surrounding areas, and by schools that let out for the day, not to mention communities that attended en masse.").

31. *Id.*

32. *Id.* at 59 (lynch victims' "blood clothes were torn apart as prized souvenirs"); WOOD, *supra* note 27, at 21 ("[O]ne young man brought remnants of [lynch victim's] bone as an offering), and *id.* at 99 ("After the Jesse Washington lynching in 1916 in Waco, Texas, NAACP investigator Elizabeth Freeman reported that one white townsperson was carrying Washington's penis as a souvenir.").

33. WOOD, *supra* note 27, at 3.

34. *See id.* at 1 ("Despite, or even because of, its relatively rarity, lynching held a singular psychological force, generating a level of fear and horror that overwhelmed all other forms of violence. Even one lynching reverberated, traveling with sinister force, down city streets and through rural farms, across roads and rivers.").

black codes and Jim Crow laws.[35] In the process, spectacle lynchings revealed the extent to which the visual and the legal don't occupy separate cultural spheres but instead often share their driving impulses.

As strange as it might initially seem, Wood's painting does something similar. Created by a man once described as "the most celebrated white hope of 100 per cent Americanism in art,"[36] the painting gestures at lynching itself *and* shows us something of the profoundly visual legal traditions that sit at the practice's core. Put differently, when it comes to the deep connections that run between American art, American law, and the long history of race-based brutality embedded in the country's self-congratulatory national mythology, *Parson Weems' Fable* cannot tell a lie.

Coordinates

In keeping with the painting's candor, we'd like to begin with some admissions of our own. Or at least a few material facts. First, we are an art historian with a J.D. (Dr. Campbell) and a law professor who teaches and practices law (Prof. Jewel). We are also both white, Ivy League-educated, and tenured. In other words, we are (among other things) two highly privileged academics who have chosen to write about—and therefore advance our careers through—a type of violence and oppression that we will never personally experience nor ever fully understand. Moreover, as white women we belong to a group that has historically been the proximate cause of—or at least a convenient justification for—a staggering amount of race-based atrocity in this country.[37] It's enough to cue the stand-up comedian Dave Chappelle: "Come on, white woman, you know what it is. You was in on the heist, you just don't like your cut."[38]

We're not comfortable with this situation, nor do we think we should be. To the contrary, we've repeatedly considered abandoning this project for fear of compounding the harm. (Critics might say that here we're simply genuflecting with a show of anxiety and moving on. They very well might be right.) Ultimately, however, we've chosen to continue in this field because we believe we have something valuable to say. Equipped with our

35. *See id.* at 98–99 ("They lynchers did literally to black men what Jim Crow effectively achieved in rendering them economically and politically dependent and powerless. Cutting off his genitals rendered the black man a negation of white masculinity against which white men could define themselves.").

36. *We'll Tell You*, THE HONOLULU ADVERTISER, Sept. 1,1940.

37. *See* Emma Coleman Jordan, *Crossing the River of Blood Between Us: Lynching, Violence, Beauty, and the Paradox of Feminist History*, 3 J. GENDER RACE & JUST. 545, 556 (2000) ("[W]hite women benefited from their elevated position in the racial hierarchy built on lynching.").

38. Geoff Herbert, *Dave Chapelle recalls 'horrifying' Syracuse show in new Netflix Comedy special*, SYRACUSE.COM (Mar. 22, 2017), https://www.syracuse.com/entertainment/index.ssf/2017/03/dave_chappelle_netflix_comedy_special_syracuse.html.

collective background in law, visual history, and rhetoric, we perceive cultural patterns that other scholars overlook, specifically the extent to which the visual and the legal have long worked together to produce the world we inhabit. Certainly, we do not see the way we would if we lived in different bodies. As this country's perverse investment in the distinction it calls "race" continues to reveal just how abhorrent and tenacious it's always been, however, we do think we see in a way that's useful—white blindness, white cataracts, white privilege, and all.

Method

One last prefatory matter: methodology. In our experience, it's a word that's capable of inducing panic in a fair number of law-trained academics. Because a J.D. is a sufficient terminal degree to become a professor at many law schools, numerous legal scholars don't have the sort of explicit methodological training that most other academics receive as part of their Ph.D. programs. Or at least that's how the story goes. As anyone who's survived the first year of law school can tell you: the legal process is its own methodology, often confusing, alienating, or just plain weird to those unfamiliar with its basic moves.[39] At base, practitioners of the legal method read law texts critically and draw connections between those texts and the larger culture. Schooled in the hierarchy of legal knowledge, law academics deeply research and critically read law from primary and secondary sources. Through deductive and inductive reasoning, we then uncover hidden connections in these sources, connecting the dots to formulate synthesized understandings of law and culture. At base, we attach law (in all of its nuanced permutations) to facts. For critical legal scholars, the "facts" are gleaned from a variety of sources, from majoritarian understandings of social norms to the social realities experienced by oppressed minorities, realities that are often excluded from dominant legal meanings.

Interestingly, art historians do something similar. Like lawyers and legal historians, art historians tease out meaningful links between their chosen texts and the surrounding culture, using each to illuminate the other. Admittedly, the art historian's basic texts tend to differ from those studied in the law. For the art historian, after all, the fundamental primary source is almost always something visual: an image, object, or performance that, whether part of the "high" cultural canon (like the contents of the Louvre) or the product of marginalized groups (like folk art, graffiti, etc. by the untrained). The academic initially submits to iconographic and formal questions. In layman's terms: what and how does a particular piece show?

39. Here, we're writing explicitly, but not exclusively, about the American legal system with its roots in British common law.

This second, formal question—the *how* of showing—usually begins with an analysis of aesthetic elements like the work's composition, color palette, and lighting. From there, however, art historians frequently read their chosen images and objects more broadly, approaching them as material manifestations not only of their creator's skill, conscious intent, and unconscious impulses but also of the larger social and political forces that swirled outside of his or her studio door. In the wonderful formulation of the art historian Bryan Wolf, "[w]hat is art if not a lump of history, uttered with precision, from the situated position of an author."[40] Or, in Grant Wood's own words, "[a] painter expresses the times as well as himself."[41] In linking a painter's expression to his or her times in this way, art historians turn to the same sorts of cultural texts that legal historians do, including diaries, newspaper accounts, religious sermons, estate documents, and even statutes and trial transcripts. Bastardizing Rule 401 of the Federal Rules of Evidence a bit, if a particular scrap of the historical record tends to demonstrate the existence or occurrence of a consequential fact, it's relevant for art historical purposes.[42]

One final word about method. Because if law professors tend to worry they lack one, art historians are plagued by a different methodological angst, namely the specter of over-interpretation. Here let's be frank: our treatment of Grant Wood's painting and its implications will almost certainly strike some readers as a stretch, if not an historically reckless over-read. Scanning *Parson Weems' Fable*, after all, one can legitimately demand, "Where's the lynching?" Moreover, Wood never discussed the image in the context of race-based terrorism, nor does he appear to have been particularly preoccupied with the phenomenon in general. Finally, were one to ask the Iowa painter whether the sustained public butchering of black Americans by white Americans affected what went on in his studio, he almost certainly would have said no. Unlike his fellow Regionalist artists, Thomas Hart Benton and John Steuart Curry, Wood was not particularly vocal when it came to the American color line, and he never made work that addressed the issue directly. When it comes to concrete evidence that Wood intended *Parson Weems' Fable* as a statement about lynching, we have nothing.

Do we really need such dispositive proof of Wood's artistic *mens rea*, however? Does one actually want to confine the meaning of a painting—or a novel or a song—to its creator's demonstrable state of mind? The law

40. BRYAN J. WOLF, VERMEER AND THE INVENTION OF SEEING 17 (2001).

41. Haskell, *Through The Past, Darkly*, *supra* note 7, at 31 (quoting Arthur Millier, *Could Be Good Farmer!: Grant Wood Denies Reputation as Glamour Boy of Painters*, L.A. TIMES, Feb. 19, 1940).

42. Fed. R. Evid. 401. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."

certainly doesn't approach creative activity this way. One doesn't need to be overtly aware that one is borrowing from protected material in order to be guilty of copyright infringement, for example. In *Bright Tunes Music v. Harrisongs Music*,[43] a district court for the Southern District of New York concluded that George Harrison's popular song "My Sweet Lord" unlawfully borrowed from Ronald Mack's "He's So Fine" despite the fact that Harrison did not appear to have been conscious of Mack's specific influence on him. "Did Harrison deliberately use the music of 'He's So Fine'? I do not think so," the court concluded:

> [A]s he tried this possibility and that [in his own composition], there came to the surface of his mind a particular combination that pleased him as being one he felt would be appealing to a prospective listener; in other words, that this combination of sounds would work. Why? Because his subconscious mind knew it already had worked in a song his conscious mind did not remember.[44]

As the *Bright Tunes* court recognized, ambient cultural influences seep into us without our conscious awareness and, in the case of artists, often reemerge unbidden in their work. Rather than a tidy catalogue of prior art from which new makers affirmatively pick and choose, our common creative landscape exists as a sort of gravitational pull or tide—a powerful current capable of guiding artistic choices with or without an individual maker's knowledge.

Strange Fruit

Turning to *Parson Weems' Fable*, lynching was both on and in the air the year Wood painted it. 'Billie Holiday, buxom blues singer at New York's swank Café Society night club in Sheridan Square is now heard in what is believed to be the first phonograph recording in America of a popular song that has lynching as its theme," the front page of Manhattan's *New York Age* newspaper reported in June of 1939, months before Wood started work on the canvas.[45] The song, of course, was "Strange Fruit." Originally written as a poem by the school teacher Abel Meeropol in 1937[46] and first played on

43. *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976).

44. *Bright Tunes Music Corp.*, 420 F. Supp. 177 at 180.

45. *Night Club Singer Records Song About Lynchings in the South*, N.Y. AGE, June 17, 1939, at 1.

46. *See* Elizabeth Blair, *The Strange Story of the Man Behind Strange Fruit*, NPR MORNING EDITION (Sept. 5, 2012 3:24 AM), https://www.npr.org/2012/09/05/158933012/the-strange-story-of-the-man-behind-strange-fruit.

the radio two years later,[47] the work's haunting lament memorialized the gruesome image of "[b]lack bodies swinging in the southern breeze," the "smell of [their] burning flesh" mixing with the "[s]cent of magnolias, sweet and fresh."[48] Given the song's explicitly political subject matter, Holiday initially hesitated to perform it in public, even for Café Society's liberal, integrated audiences.[49] Moreover, Columbia Records refused to record the track, leaving the job to Commodore Records, "a small left wing company run out of a music store on East 42nd Street."[50] Nonetheless, by July of 1939, "Strange Fruit" had climbed "to number 16 on the charts"[51] and "was widely publicized" in the national press.[52] Although we don't know whether Wood ever heard the song, it certainly kept lynching's "strange and bitter crop" in the public conversation.

So did the type of pictures that originally inspired Meeropol's poem. "Way back in the early Thirties, I saw a photograph of a lynching published in a magazine devoted to the exposure and elimination of racial injustice," Meeropol remembered in 1971. "It was a shocking photograph and haunted me for days. As a result, I wrote 'Strange Fruit.'"[53] The image in question was taken by Lawrence Beitler on August 7, 1930 in Marion, Indiana and shows two young black men, Thomas Shipp and Abram Smith, hanging from a tree, their mutilated corpses thronged by a crowd of white spectators. With its graphic juxtaposition of dead black flesh and live white triumph, Beitler's image is often considered "*the* generic lynching photograph."[54] As this suggests, the picture wasn't unique. To the contrary, lynch mobs began celebrating their kills this way as early as 1889, turning the camera's lens on the devastated bodies they left in their wake.[55] "Hundreds of Kodaks clicked all morning at the scene of the lynching [of Thomas Brooks in Fayette County, Tennessee] . . . Picture card photographers installed a portable printing plant at the bridge and reaped a harvest in selling postcards showing

47. *See Gene King Wires That WEVD's Midnight Jamboree Has Been Airing that Sensational Anti-Lynching Song, "Strange Fruit Grows on the Trees Down South," Ever Since the Number Was Released*, N.Y. DAILY NEWS, Nov. 10, 1939.

48. *See* Blair, *supra* note 46.

49. *See* David Margolick, *Performance as a Force for Change: The Case of Billie Holiday and 'Strange Fruit*, 11 CARDOZO STUD. IN L. & LITERATURE 91, 98 (1999).

50. *Id.*

51. *Id.* at 101.

52. Margolick, *supra* note 49, at 101.

53. Abel Meeropol (a.k.a. Lewis Allan), *Political Commentator and Social Conscience Nancy Kovaleff Baker*, 20 AM. MUSIC 25, 45 (2002) (citing Lewis Allan, letter to Miss [Linda] Kuehl, July 28, 1971, in the Meeropol Collection).

54. JAMES H. MADISON, A LYNCHING IN THE HEARTLAND 116 (2003); ASHRAF H. A. RUSHDY, THE END OF AMERICAN LYNCHING 61 (2012).

55. *The Lynching of George Meadows, January 15, 1889, Pratt Mines, Alabama*, reproduced in JAMES ALLEN, WITHOUT SANCTUARY LYNCHING PHOTOGRAPHY IN AMERICA figs. 95, 96 (Twin Palms 10th ed. 2000).

a photograph of the lynched Negro," *The Crisis* reported in 1915.[56] Whether taken by snap-happy amateurs or professional photographs like Beitler, the act of "[m]aking a photograph became part of the ritual, helping to objectify and dehumanize the victims and, for some, increasing the hideous pleasure."[57] It also produced an abundance of lynching imagery that Americans—particularly those in the South—bought, displayed, and shared.[58]

As "Strange Fruit" itself reveals, these pictures were inherently unstable, their meaning highly contingent on the audiences who consumed them.[59] A picture like Beitler's could simultaneously act as "a tool of the mob, used to determine how a lynching should be pursued, announced, remembered, and understood"[60] *and* inspire Holiday's chilling dirge, a song once described as the black South's own "Marseillaise."[61] In keeping with this, lynching photographs appeared in both the white and the black press during the early twentieth century, visual evidence of black men's supposed sexual rapacity and, in other publications, Euro-Americans' capacity for sadism. Admittedly, "white-owned papers in both the North and the South were more reluctant to" run such imagery than African American outlets like *The Crisis* and *The Chicago Defender*.[62] In 1937, however, *Time* and *Life* both ran photographs of the notorious Duck Hill, Mississippi lynching. Had Wood picked up a copy of either magazine—both of which published articles on him and his work during the 1930s[63]—he likely would have seen the picture of Roberts McDaniels' dead body chained to a tree. One of "two Negroes accused of murdering a white man," *Life* reported, McDaniel was "tortured with a blowtorch and lynched."[64]

Finally, lynching imagery made its way into the New York art scene during the 1930s. In 1935, two anti-lynching art exhibitions opened in Manhattan, both designed "to draw public attention to the horrifying fact that lynching continued to be a problem"[65] and to garner publicsupport for federal

56. ALLEN, *supra* note 55 (quoting *Opinions, Lynching*, 10 THE CRISIS 71–72 (June 1915)).

57. Apel, *supra* note 30, at 16.

58. For descriptions of lynchings and souvenir culture, see *id.* at 44; Fumiko Sakashita, *The Politics of Sexuality in Billie Holiday's "Strange Fruit," in* GENDER AND LYNCHING: THE POLITICS OF MEMORY 113–114 (Evelyn M. Simien ed., 2011); WOOD, *supra* note 27, at 99.

59. Smith, *supra* note 27, at 15; WOOD, *supra* note 27, at 179–222.

60. Smith, *supra* note 27, at 14.

61. Margolick, *supra* note 49, at 101 (internal citation omitted).

62. WOOD, *supra* note 27, at 211.

63. *See* EVANS, *supra* note 4, at 163, 168, 176–77, 194, 238.

64. *Life on the American Newsfront: One Lynching Spurs Congress to Stop Others*, LIFE, April 26, 1937, at 26.

65. Helen Langa, *Two Antilynching Art Exhibitions: Politicized Viewpoints, Racial Perspectives, Gendered Constraints*, 13 AM. ART 10, 11 (1999).

legislation on the issue—legislation that regularly made the national news.[66] Entitled "An Art Commentary on Lynching" and "Struggle for Negro Rights," the two shows included work by seventy-seven artists,[67] including well known figures like Isamu Noguchi, George Bellows, and Reginald Marsh.[68] Although Wood famously prided himself on *not* belonging to the New York art world, living and working in Iowa his entire life, he had a gallery in Manhattan and showed there somewhat regularly. More importantly, Benton and Curry each contributed work to the NAACP-sponsored "Art Commentary" exhibition.[69] Indeed, the show's catalogue featured Curry's powerful 1935 lithograph *The Fugitive* on its cover (fig. 2). By the time Wood began work on *Parson Weems' Fable*, therefore, he stood a good chance of encountering lynching imagery—be it pictorial, written, or musical—in the news, on the radio, or even in the work of his colleagues. Returning to *Bright Tunes*, it's entirely possible that as Wood painted, he responded to the magnetic pull of pervasive influences "his conscious mind did not remember."[70]

The Lynching in the Painting

Even here, however, we focus on Wood's state of mind. What was his particular level of awareness? Further, isn't it possible that some of the meaning contained in an image, Wood's or otherwise, fundamentally exceeds its creator's desires, conscious *and* unconscious? If we accept a work of art as a material condensation of both an individual's and a culture's particular historical moment, must we see this image or object as having something like its own unconscious—a cluster of fantasies, nightmares, and even shames embedded deep in its visual structures?

Approaching *Parson Weems' Fable* in this spirit, what do we see? What does the painting itself seem intent on showing us? The cherry tree tale, of course, as well as the artificial theatricality of such nationalist story-telling, highlighted by the curtain, the parson, and the 'jarring quotation' of the dollar-bill Washington's face."[71] Moving to the far left of the image, we also have the two slaves, engrossed in their work and seemingly unaware of the domestic disturbance occurring around them. As Wood's biographer R.

66. *See* Margaret Rose Vendryes, *Hanging on Their Walls: An Art Commentary on Lynching, the Forgotten 1935 Exhibition*, *in* RACE CONSCIOUSNESS: AFRICAN-AMERICAN STUDIES FOR THE NEW CENTURY 153, 154 (Judith Jackson Fossett & Jeffrey A. Tucker, eds., 1997).

67. *See* Langa, *supra* note 65, at 18.

68. Although the two shows also included powerful work by African American artists, the press tended not to focus on them. *See* Vendryes, *supra* note 66, at 162.

69. *See* Langa, *supra* note 65, at 13, 15; Vendryes, *supra* note 66, at 157, 162.

70. *Bright Tunes Music Corp.*, 420 F. Supp. 177 at 180.

71. EVANS, supra note 4, at 271.

Tripp Evans observes, the canvas's original critics didn't seem to notice these figures. Or, if they did, they didn't mention them in their reviews.[72] Moreover, the pair—typically accepted as a mother and son[73]—don't appear in Parson Weems' original tale of the cherry tree. As such, these black harvesters initially seem like nothing more than pictorial garnish—a pretty evocation of Washington's plantation childhood that the painting stashes firmly in the back of its imagined world.

Upon closer inspection, however, one discovers that these slaves occupy a crucial position in Wood's composition. Stationed directly beneath the ominous storm clouds and completing the implied line that runs from Weems' pointing finger through the Washingtons' gesturing hands, the black figures and their tree stand at the canvas's vanishing point.[74] The spot where an image's underlying structural lines converge to create a sense of three-dimensional space, the vanishing point literally anchors a picture's illusion of reality, its claim to exist as "an open window through which [you] see"[75] rather than a flat canvas or piece of paper. Taking advantage of this pictorial importance, artists since the Renaissance have used the vanishing point to emphasize key elements in their works. The vanishing point in Leonardo da Vinci's *Last Supper* (1495-1498) lies directly behind Jesus's head, while Jacques-Louis David placed the vanishing point in his *Coronation of Napoleon* (1807) at the crown suspended in the new emperor's hands. The fifteenth-century artists whom Wood adored often approached their vanishing points as a way of deepening the viewer's understanding of a painting's theme. As Evans discusses in his excellent analysis of *Parson Weems' Fable*, Renaissance images of the Annunciation frequently embed their vanishing points in "tiny depictions of Adam and Eve's expulsion from the Garden of Eden; thus a scene of punishment throws into relief the angel's redemptive visitation to Mary."[76] Wood's work flips this trope, juxtaposing the slaves' seemingly peaceful harvest with the young Washington's orchard crime.[77] Evans concludes, from a purely compositional point of view, these slaves are "at least as important to the work's hidden order as the figures of Washington and his father in the middle ground."[78]

It's an interesting idea, this notion of the painting's "hidden order." The art historian Wanda Corn writes of something similar in the catalogue that

72. EVANS, *supra* note 4, at 276.

73. *Id.*

74. *Id.* at 278.

75. LEON BATTISTA ALBERTI, ON PAINTING AND ON SCULPTURE: THE LATIN TEXTS OF DE PICTURA AND DE STATUA 55 (Cecil Grayson trans. & ed., 1972).

76. EVANS, supra note 4, at 278.

77. *See id.* at 279 ("Whereas a Renaissance artist might have placed a redemptive scene in the foreground, Wood follows crime with punishment.").

78. *Id.* at 277.

accompanied her important 1983 show of Wood's work. "[E]verything seems all right on the surface [of the image]," Corn observes, "until we look closely and encounter the irrational juxtapositions and startling visual puns."[79] Corn refers here to the young Washington's mask-like face, as well as the surfeit of gesturing hands in the mid- and foreground—a pictorial situation she aptly describes as "a kind of comedy routine, everyone pointing to something else."[80] Notice, however, exactly *where* Parson Weems points. Even as Augustine Washington extends his hand for the offending axe and George points at the weapon as if to say, "Yes, *mea culpa*, with the hatchet," Weems subtly directs the viewers gaze *away* from this central action. Extending his index finger, the reverend does not point at either the Washingtons or the axe. Instead, he calls our attention to the shadows they cast.[81] As if heeding Emily Dickinson's call to "[t]ell all the truth, but tell it slant,"[82] the work's painted narrator quietly suggests that the heart of the image lies not in the story it explicitly tells but rather in that tale's dark underside.

The shadows themselves are unexpectedly unnerving. Mentally turning the painting counterclockwise so that Weems' form lies horizontal across the top of the canvas, we see Augustine's figure reduced to a shape that resembles a round base and tall pillar, while the umbral George exists as nothing more than a partial torso and pair of dangling legs. The arc of the butchered tree trunk bends its own shade a short way beneath these black limbs and the child's buckled shoes, evoking the sight of a headless figure suspended above a platform. Looking at the grass beneath the protagonists' feet, we seem to see a body hanged.

Not every hanging is a lynching. At the same time that the hangman's noose evokes Holiday's notorious poplar trees and NAACP-leader Walter White's *Rope and Faggot: A Biography of Judge Lynch* (1929), it also speaks of suicide and even state-sanctioned public executions. "Until the mid-nineteenth century," Amy Louise Wood writes, "condemned criminals were usually executed in public hangings before large, often festive, crowds."[83] Although the Northern states transitioned to private executions before the Civil War,[84] with the Midwest and West making the shift during the post-bellum years, the practice persisted in the South. "[T]he tradition of public execution was tenacious [in this region]," the historian Michael Trotti notes.

79. CORN, *supra* note 5, at 122.

80. *Id.*

81. My thanks to Bryan Wolf for calling this to my attention.

82. Emily Dickinson, *Tell All the Truth But Tell It Slant*, in EMILY DICKINSON, THE COMPLETE POEMS OF EMILY DICKINSON 506–7 (T. H. Thompson ed., 1961).

83. WOOD, *supra* note 27, at 27.

84. Michael A. Trotti, *The Scaffold's Revival: Race and Public Execution in the South*, 45 J. OF SOC. HIST. 195, 201 (2011); *see also* WOOD, supra note 27, at 27.

"Even when newspaper reports called an execution 'private,' that meant only that a barrier was in some way involved in the process; it did not mean that a crowd was not watching the hanging."[85] Indeed, Southerners remained so attached to their spectacular demonstrations of state violence that they didn't fully abandon the habit until 1936. Three years before Wood painted *Painted Weems' Fable*, authorities in Owensboro, Kentucky hanged twenty-seven-year-old Rainey Bethea before a crowd of thousands.[86]

Like so many of those executed in America, Bethea was black. And like so many lynch victims, he had been found guilty of raping and murdering a white woman, albeit by a court of law rather than a vigilante posse hell-bent on extrajudicial self-help. At this point, however, the line between the legal execution of a black man and a lynching was far from bright. To the contrary, the latter was "firmly rooted in the traditional social performance of public executions," with "[l]ynch mobs even appropriate[ing] many rituals of public execution—the declarations of guilt, the confessions, the taking of souvenirs and photographs—to confer legitimacy on their extralegal deeds."[87] Although the mobs pursued their "power to punish . . . with a ferocious vengeance that the state could not grant,"[88] lynchings and public executions often shared a resemblance to today's stadium shows. Like contemporary rock concerts and football games, lynchings and public executions electrified huge audiences with highly theatrical displays of bodies and souls in extremis. Unlike today's performances, however, the lethal effects of the pyrotechnics were immediately apparent.

Returning to *Parson Weems' Fable*, we see something of this visceral, performative violence. Not only does the work's hanging shade lie at the intersection of all those pointing fingers and, chillingly, the axe, the brutality the dark figure embeds in the painting's soil seems to spread throughout the canvas. As numerous scholars have noticed, the tone of Wood's image diverges markedly from that of the original cherry tree story, which focused not only on "the Founding Father's precocious integrity, but also [on] Augustine Washington's loving inculcation of virtue."[89] Punishment certainly lurks in the background of Weems' tale, with Augustine announcing early on, "Oh George! My son! . . . gladly would I assist to nail you up in your little coffin, and follow you to your grave . . . rather than see [you] a common liar."[90] Despite his apparent willingness to have a mendacious child dead, Augustine never threatens George in Weems' account, even after he discovers his ruined sapling and the identity of its assailant. To the contrary,

85. Trotti, *supra* note 84, at 202.
86. *Id.* at 207.
87. WOOD, *supra* note 27, at 24.
88. *Id.*
89. EVANS, *supra* note 4, at 266.
90. WEEMS, *supra* note 4, at 12–13.

the father responds to his son's confession with joy. "Run to my arms you dearest boy," he declares, "Glad am I, George, that you ever killed my tree . . . Such an act of [honest] heroism in my son, is worth more than a thousand trees, thou blossomed with silver, and their fruits of pure gold."[91] In the original Weems' tale, the destructiveness of young Washington's actions subsides in the benevolence of the elder Washington's paternal love.

Not so in Wood's painting. As Corn observes, "[T]his is not a moment of forgiving, as we can tell from the storm clouds in the sky, but of punishment."[92] Adding to the weather's intimations of retribution, Augustine Washington looms over his son, his face ominously stern and his right hand seizing the broken tree in a manner that suggests its trunk might soon become a whip. A close inspection of this hand reveals that Augustine's fingers are drenched in red fluid—cherry juice, maybe, or perhaps blood.[93] Finally, as Evans discusses, the combination of the slaves and the Weems' figure invoke biblical notions of original sin. Comparing the reverend's strangely crossed arms to "traditional [pictorial] allegories of Deceit"[94] and lingering on the reptilian quality of Weems' green coat,[95] Evans argues for the parson as "a snaky character who sets the scene in motion,"[96] a trickster serpent who looks on as a woman picks red fruit. As anyone who has read Genesis knows, it's not a story that ends well.

Crucially, Wood's canvas repeatedly racializes these moments of bloody reprisal. The hanging black body, the slaves as Adam and Eve, the whip-like bend of the tree and its attendant suggestion of the plantation master's lash, and the refrain of strong diagonal lines (ladder, red sleeve, child's forearms, even the torqued tree trunk) that visually links the painting's fantasy of happy blackness and its buried image of lynching's black death—again and again the painting anchors its tale of a Founding Father's legendary virtue in intimations of Euro-American savagery and African-American pain. Created during a post-Depression, pre-war period when the country "sought reassurance and strength in what novelist John Dos Passos identified as knowledge of the 'kind of firm ground other men, belonging to generations before us, have found to stand on,'"[97] *Parson Weems' Fable* dissolves the ground beneath George Washington's feet into a dark constellation of punishment, brutality, and even murder. In the process, the painting

91. WEEMS, *supra* note 4, at 14.
92. CORN, *supra* note 5, at 123.
93. EVANS, *supra* note 4, at 274.
94. EVANS, *supra* note 4, at 269.
95. *Id.*
96. *Id.* at 279.
97. Haskell, *Grant Wood: Through the Past, Darkly*, *supra* note 7, at 13 (quoting JOHN DOS PASSOS, THE GROUND WE STAND ON 3 (1941)).

confesses to the long history of racial debasement that continues to lurk beneath the surface of America's myths of national greatness.

Law and Culture in *Parson Weems' Fable* – Theoretical Foundations

As we've seen, Grant Wood was "determined to rekindle national pride" with *Parson Weems' Fable*.[98] Be that as it may, he ultimately created a work that speaks to the same racial terror memorialized in "Strange Fruit," countless lynching photos, and the anti-lynching art exhibitions of 1935. Moreover, by embedding its shadowy figure in the ground just beneath the father-son duo and their legendary tree, the image plants its lynch victim in the soil of Washington's childhood. In this respect, Wood's canvas gets it right. As the painting—although certainly not Wood himself—seems to understand, spectacle lynching's roots lie in colonial Virginia, specifically in the colony's intensely violent, deeply visual legal culture. As discussed below, lynching's hidden seeds of colonial law and culture germinated in medieval England, survived the cross-Atlantic voyage, and developed a hardy root structure in the southern colony.

The law and the culture of colonial Virginia illuminates the meanings embedded in *Parson Weems' Fable*. On this point, the law-culture-law/cycle helps explain how legal meanings get produced and reproduced. The law-culture-law theory of legal meanings is quite simple: social norms and culture influence the law and vice versa.[99] Law creates the social world, but the social world first creates the law.[100] Through a process of legitimization, the law converts social norms into "accepted facts."[101] The law's power only exists if it reflects the values and norms of the people.[102] One cannot change or transform society by decree.[103] However, it is usually the majority voice that is the gage for societal values and norms; minority voices are not heard or valued.[104] When the law strays from collectively held majoritarian norms,

98. HASKELL, *supra* note 7, at 30.

99. Elizabeth Berenguer, *Disaster Unaverted: Reconciling the Desire for a Safe and Secure State with the Grim Realities of Stand Your Ground*, 37 AM. J. TRIAL ADVOC. 255, 260–61 (2013) (citing ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 8 (2000)) [hereinafter Berenguer, *Disaster Unaverted*].

100. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814, 839 (1987) (translated by Richard Terdiman).

101. *Id.* at 817.

102. Berenguer, *supra* note 99, at 262–63 (citing WINSTON P. NAGAN, CONTEXTUAL-CONFIGURATIVE JURISPRUDENCE: THE LAW, SCIENCE, AND POLICIES OF HUMAN DIGNITY 82–83 (2013).

103. Bourdieu, *supra* note 100, at 840 (internal citation omitted).

104. Berenguer, *supra* note 99, at 262 (citing WINSTON P. NAGAN, CONTEXTUAL-CONFIGURATIVE JURISPRUDENCE: THE LAW, SCIENCE, AND POLICIES OF HUMAN DIGNITY 69

it loses its power.[105] When these cultural norms change, the law eventually catches up to mirror them.[106]

This law-culture-law process has neurological, psychological, and visual dimensions. The recursive process generates legal categories, which are then imbued with a cognitive dimension, and eventually become entrenched in the collective mindset of the populace.[107] Culture constructs categories that become entrenched in individual and collective minds. Through continued use, neural pathways are forged that provide a rapid and unconscious path for making sense of the world.[108] In this way, legal meanings are forged in a collective awareness in unseen and unconscious ways.

We base our analysis on a law-culture-law theory, but we also look beyond it. We are wrestling with cultural norms that made their way into formal law but that have now been eradicated through the common law process of new cases and new statutes. What remnants of these seeds are still in the American populace?[109] Neuroscientist Antonio Damasio devised the term "somatic marker" to highlight how conceptual stimuli (words, images, laws) leave marks in our minds and bodies.[110] Thus, a somatic marker is an imprint left in our bodies and minds, a reminder of a previous signs (words or images) that we have seen and heard over and over again.[111] Collective cultural experiences can produce widely shared somatic markers which affect our judgment and decision-making, often in an unconscious way.[112] Somatic markers are hidden underground seeds that continue to exact influence even though the law and culture has changed aboveground. Lynching was fueled in part by somatic markers, borne out of preexisting cultural and legal forms traceable to colonial and medieval legal systems. And, these markers continue to thrive, a kind of cognitive virus that lives in all of us.

The presence of somatic markers suggests that rationality is embodied, thriving on narrative and metaphor, rather than a product of abstract reasoning separate from the body, as Descartes thought.[113] Rather, "[a]

(2013)).

105. *Id.* at 262–263.

106. *Id.* at. 263.

107. *Id.* at 260–61.

108. Lucille A. Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 MD. L. REV. 663, 664 (2017) [hereinafter Jewel, Neurorhetoric].

109. *See id.* at 672 (citing ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN 171 (1994)).

110. *Id.*

111. *Id.*

112. *Id.* (citing WILLIAM E. CONNOLLY, NEUROPOLITICS: THINKING, CULTURE, SPEED 34–37 (2002)).

113. Lucille A. Jewel, *Old School Rhetoric and New School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 LEG. COMM. & RHETORIC: J. ALWD 39, 44–45 (2016)

person's ability to reason and formulate thoughts and concepts is physical experiences within the world."[114] The contemplation of images (though long thought to be an abstract process of high thought) is also an embodied process.[115] Art history professor David Freedberg observed that people are "sexually aroused by pictures and sculptures; they break pictures and sculptures; they mutilate them, kiss them; cry before them. . ."[116] The intellectual approach to art history would class these reactions as "too embarrassing" and "too uncultured," and repress them because "they have psychological roots that we prefer not to acknowledge."[117] *Parson Weems' Fable* surfaces these shadowy connections between the legal, the visual, the ritualistic, and the unconscious.

As we explain below,[118] collective social understandings are often *visually* produced through cultural and legal iterations. Specifically, colonial Virginia's punitive legal regime was carried out on the body of the condemned and through the eyes of its spectators. Visual images provide especially fecund seeds for the production of shared cultural meanings. Because visual imagery is so memorable and vivid, it's extremely susceptible to mass adoption into holistic narratives.[119] Visual imagery is "emotionally interesting, concrete, and imagery provoking . . ., proximate in a sensory, temporal, or spatial way."[120] Such imagery creates a "harmonic effect on perception and retention of information that flows from stimulating the mind when changing input from many senses, each alternatively primary and then secondary, all repeating and therefore reinforcing, a common message."[121] The embodied power of visual imagery also explains how the law becomes intertwined with the visual to produce deep-rooted collective belief systems that perpetuate domination and oppression. As described more fully below, a fusing of the legal and visual is particularly discernible in the way colonial legal codes are described public corporal punishment.[122] Powerful embodied

[hereinafter Jewel, Old School Rhetoric].

114. Elizabeth Berenguer, *Gideon's Legacy: Taking Pedagogical Inspiration from the Briefs that Made History*, 18 BARRY L. REV. 233 (2013) (citing AMSTERDAM & BRUNER, *supra* note 99, at 9).

115. *See* DAVID FREEDBERG, THE POWER OF IMAGES: STUDIES IN THE HISTORY OF THEORY OF RESPONSE 1 (Univ. of Chicago Press 1989).

116. *Id.*

117. *Id.*

118. *See infra* notes 195-200 and surrounding text.

119. Lucille A. Jewel, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 S. CAL. INTERDISC. L.J. 237, 290 (2009) [hereinafter Jewel, *Visual Rhetoric*].

120. Brad E. Bell & Elizabeth F. Loftus, *Vivid Persuasion in the Courtroom*, 49 J. OF PERSONALITY ASSESSMENT 659, 659 (1985).

121. Sam Guiberson, *Digital Media as Evidence and Evidence as Media*, 19 CRIM. JUST. 57, 58 (2004).

122. *See infra* notes 188-194 and surrounding text (discussing the visuality of Virginia's

reactions to the visual also explains how white supremacy is perpetuated—from white Virginia Supreme Court Judges rhapsodizing about supposedly visual attributes of race[123] to white rancor over the removal of confederate statues in Charlottesville.[124]

Because this paper grapples with how the law reproduces and reinforces racialized power dynamics and collective social realities, Pierre Bourdieu's theories are instructive. Bourdieu eloquently argued that legal language (court cases and statutes) has the power to construct reality.[125] The power to make reality resides in the person who possesses the most juridical power, the power, in the words of Captain Picard, to "make it so."[126] And, this reality is constructed in a way that benefits those groups who are already in power.[127] In this way, law reifies majoritarian norms and tends to ignore or silence minority voices.[128]

Pierre Bourdieu argued that legal meanings are constructed to produce a robust collective mindset, or *habitus*.[129] Everyone who operates in the legal "field" believes in the rules of the game and, by virtue of playing the game, grows the habitus.[130] The habitus operates like an apparatus, exerting a powerful form of social control to organize group relations.[131] Order is maintained because but all the actors involved buy into the complex set of rules, customs, and attitudes that constitute the social and cultural ecosystem.[132] The habitus does not create order by resorting to actual forms of corporal violence.[133] Instead of physical coercion, institutional

colonial laws concerning race and crime).

123. *See* Hudgins v. Wright, 11 Va. 134, 139 (1806) ("Nature has stampt upon the *African* and his descendants two characteristic marks, besides the difference of complexion, which often remain visible long after the characteristic distinction of colour either disappears or becomes doubtful; a flat nose and woolly head of hair.").

124. The 2017 Charlottesville white supremacist rally began as a protest against the city of Charlottesville's plan to remove a statue of confederate general and Virginia planter Robert E. Lee. Bill Morlin, *Bickering Galore Precedes "Unite the Right" Rally*, SOUTHERN POVERTY LAW CENTER (Aug. 3, 2017), https://www.splcenter.org/hatewatch/2017/08/03/bickering-galore-precedes-"unite-right"-rally; *Unite the Right Rally*, WIKIPEDIA, https://en.wikipedia.org/wiki/Unite_the_Right_rally.

125. Bourdieu, *supra* note 100, at 827, 831.

126. *Id.* at 827. On this point, Bourdieu is borrowing from Speech Act Theory, a philosophical theory that engages with the power of words to make social meanings. *See* Richard Terdiman, *Translator's Introduction The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 809 (1987) (citing J. AUSTIN, HOW TO DO THINGS WITH WORDS (1962) and J. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (1969)).

127. Bourdieu, *supra* note 100, at 817.

128. Berenguer, *supra* note 99, at 262–63 (citing WINSTON P. NAGAN, CONTEXTUAL-CONFIGURATIVE JURISPRUDENCE: THE LAW, SCIENCE, AND POLICIES OF HUMAN DIGNITY at 69 (2013)).

129. Bourdieu, *supra* note 100, at 818–19, 833.

130. *Id.* at 818, 820, 831.

131. *Id.* at 818–19.

132. *Id.*

133. *See id.* at 831.

mechanisms and the habitus keep everyone in line.[134] Bourdieu referred to this non-corporal system of social-control as "symbolic violence."[135] Unlike other forms of symbolic power, the law's unique force derives from the collective buy-in of the habitus but also from the fact that the law is vested with the power of the sovereign state.[136]

Contemporary society is indeed kept in check through variegated and diffuse forms of symbolic power enervated by the habitus, which is similar to Foucault's theory of discipline.[137] Analyzing this close connection between actual violence and symbolic violence and understanding the embodied way that the collective habitus developed augments Bourdieu's theories, rendering them more applicable to enduring racial striations in U.S. society.[138] The somatic markers of racial terror, visually reproduced in the law and culture, have forged especially deep neural pathways. Combining neuroscience theory with Bourdieu's theory, one can infer that the embodied process has rendered the race-law habitus uniquely robust and intractable. With respect to race relations in the U.S., the law's habitus has been forged from recurring nightmares of corporal violence inflicted painfully on the body in a public manner.

According to Bourdieu, the cycle of culture-law-culture strengthens the habitus and makes social relations seem normal.[139] To the extent that the law is to be reformed or remodeled, it must be based on "pre-visions." Reform of the law can only work if it announces what is already in the process of being developed.[140] This raises a key question: What happens when the law changes, but segments of the society reject the pre-visions? As we show below, from colonial beginnings, a deeply discriminatory mindset originated from a religious and social culture that valued strict hierarchical order based on race, class, and gender. The law was deployed to enforce that order through torturous corporal punishment. This law-culture-law cycle injected the seeds of racial violence into the collective mindset. After the Civil War, when the law diverged from its colonial foundations, certain segments of U.S. society rejected the pre-visions and the post-Civil War legal reforms that

134. PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 82, 190–92 (Richard Nice trans., Cambridge Univ. Press 1977).

135. *Id.*

136. Bourdieu, *supra* note 100, at 837–38.

137. *See* FOUCAULT, DISCIPLINE AND PUNISH (Vintage Books Edition 1979).

138. Bourdieu and his adherents have been criticized for elevating social class over race as an explanatory factor for how social hierarchy is created. For a thoughtful exposition on this point, see Audre Devine-Eller, *Rethinking Bourdieu on Race: A Critical Review of Cultural Capital and Habitus in the Sociology of Education Qualitative Literature*, May 2, 2005, *available at* http://audreydevineeller.com/Devine-Eller,%20Rethinking%20Bourdieu,%20A%20Critical%20Review%20of%20Cultural%20Capital.pdf.

139. Bourdieu, *supra* note 100, at 839.

140. *Id.*

abolished slavery and granted civil rights to the formerly enslaved people. The citizens who particip ated in lynching clung to older (but not ancient) forms of law that often deploy ed injurious physical coercion to maintain control.

Colonial Virginia as Germline

Our socio-legal archeology project, which delves into the legal and cultural world of colonial Virginia, uncovers artifacts of white supremacy and connects those artifacts to toda y's racial wounds that refus e to heal. *Parson Weems' Fable* is ostensibly set at George Washington's childhood home in colonial Virgini a. Home to founding fathers Thomas Jefferson, James Madison, George Washington and Patrick Henry, Virginia provided "significant leadership" fo r the developm ent of the l egal system for what would eventually become the United States.[141] Part of Virginia's legacy was its early adoption of legalized race-based slavery, developing a robust set of statutes that sanctioned violence to cont rol Virginia's slave labor force, a system applied in the south until the end of the Civil War.[142]

The powerful white men who began cultivating Virginia's tobacco with slave labor thought of themselves as heroic "cavaliers"[143] wresting the land from a state of nature.[144] Virginia's elite immigrants used the cavalier term to reference their hon or, dignity, and aristocratic support for t he Stuart monarchy during the English civil war.[145] George Washington's immediate ancestors, John Washington (paternal) and Colonel William Ball (maternal), were immigrants belongi ng to cavalier culture.[146] Virginia's colonia l

141. A. LEON HIGGINBOTHAM, IN THE MATTER OF COLOR 19 (Oxford Univ. Press 1980).

142. *Id.* at 39 (The first slave control statute "would become the m odel of repression throughout the South for the next 180 years").

143. *See id.* at 210–224, 397 (explaining that Virginia's cavalier identity derived from the chivalrous and aristocratic ideals held by elite royalists residing in the South and West of England).

144. David Wag goner, *An Inquiry into White Supremacy, Sovereignty, and the Law*, 45 SOUTHWESTERN L. REV. 897, 899–900 (2016) (explaining that state of nature was a metaphor for both land and labor—the land was to be cultivated with harnessed labor in order to bring the land into civilization).

145. DAVID HACKETT FISHER, ALBION'S SEED, FOUR BRITISH FOLKWAYS IN AMERICA 207 (Oxford Univ. Press 1989). For a slightly more nuanced explanation of Virginia colonial planter culture, see BROWN, *supra* note 145, at 154–179. In the context of Nathaniel Bacon's 1676 rebellion against Virginia Governor William Berkeley, Professor Brown argues that Bacon and his followers forged an masculine identity that relied on aristocratic ideals, but which also emphasized military valor, fetishized firearms, and glorified racial domination over Virginia's indigenous people. *Id.* at 158,161, 174. Both Berkeley's royalist clique and Bacon's rebellious faction considered themselves high-born, even if Bacon's populist rhetoric drew in more Virginians of middle-class status. *See id.* at 154–179. Fisher's Virginia cavalier thesis could perhaps be a bit more granular, but one can clearly see the traces of Bacon's identity in future generations of southern culture, particularly in civil war/lost cause tropes.

146. FISHER, *supra* note 145, at 214.

aristocrats developed an ironic sense of "liberty" that eventually became inscribed in the U.S. mindset. This profoundly inegalitarian concept encompassed the power to rule over the less powerful, but not be overruled.[147] Virginia colonist John Randolph captured the sentiment succinctly: "I am an aristocrat. I love liberty; I hate equality."[148]

As this suggests, colonial Virginia's legal system was markedly different from the federalist system that emerged for states after the revolution. Virginia began as a corporate business, with settlers being governed as employees by executives of the Virginia company authorized by the king to settle Virginia.[149] Moving away from the corporate governance model, the King of England nonetheless kept control of Virginia by appointing the governor and the council (both of whom reported to the King).[150] Later, Virginians constituted an elected assembly, but its power was held in check by the council.[151] From 1640-1706, all of the men who won a seat on the assembly had arrived in the colony as freeholders; "the rigidity of social orders was very great."[152] Virginia colonial law was also theocratic—the church and the state were not separate.[153] Moreover, Virginia's Anglican religion was deeply rigid as well: "ceremonial, liturgical, hierarchical, and ritualist."[154]

Colonial Virginia is akin to a foreign legal system. Thus, to a certain extent, this paper looks at the legal system of colonial Virginia from a comparative standpoint. Comparing legal systems is a difficult proposition, particularly because a comparison of the language of two different legal systems (e.g., statutes and cases) does not tell the full story.[155] Comparative law scholars recommend that these inquiries peer into the culture that underlies and surrounds the legal system being studied, looking to the legal consciousness of those who are subject to a particular system's laws.[156] The

147. FISHER, *supra* note 145, at 411.

148. *Id.* at 412 (quoting WILLIAM CABELL BRUCE, 2 JOHN RANDOLPH OF ROANOKE 1773-1833 203 (New York 1922)).

149. ARTHUR P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 3-4 (Univ. Chicago Press 1930).

150. SCOTT, *supra* note 149, at 3–6.

151. *Id.* at 8–9.

152. FISHER, *supra* note 145, at 384.

153. *See generally*, WILLIAM WALLER HENNING, 1 HENING'S STATUTES AT LARGE 240–41, 310 (1645) (setting out a process by which church wardens would notify the county courts of individuals who had been found to engage in punishable sins such as swearing, fornication, drunkenness, and adultery) [hereinafter Hening's Statutes].

154. FISCHER, *supra* note 145, at 233.

155. *See* Pierre Legrand, *How to Compare Now*, 16 J. LEGAL STUD. 232, 234 (1996) and Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. OF COMP. L. 1, 12 (1991) (both opining on the difficulties of comparing laws because of the difficulty in translating concepts).

156. David Nelken, *Defining and Using the Concept of Legal Culture in* COMPARATIVE LAW:

inquiry should also study the language of the law as well as the more implicit rules that the legal actors actually followed and applied.[157]

This paper also inquires into the cognitive frameworks held by the powerful actors who forged political and social realities in colonial Virginia. The culture that underlies a foreign legal system necessarily includes a cognitive component. All legal cultures contain a "[cognitive] framework of intangibles within which an interpretative community operates."[158] This mental framework, contains "ways of organizing one's place in the moral universe through commitments to standards of reference and rationality." This point, from comparative law scholars Roger Cotterell and Pierre Legrand, aligns directly with Bourdieu's habitus concept, the idea that social control results from a complex process engaging people, institutions, and psychological mindsets.[159]

The mindset of colonial Virginians was a product of both law and culture. And through the culture-law-culture cycle, this anti-humanistic mindset became deeply embedded in its constituents. For generations, this mindset has been reinforced and reproduced, influencing U.S. culture to this day. On the issue of cultural influence, one can glean immense value from David Hackett Fisher's *Albion's Seed*, a historical masterwork that traces the influence of British folkways on the colonies.[160] Fisher's thesis is that regional American cultures can be traced back to specific regions in England. Fisher traces Virginia's colonial culture to the society that existed in the Southern and Western parts of England.[161] Thus, Fisher's study of colonial Virginia brightly illuminates the cultural practices and belief systems that came to deeply influence the culture of the American South.[162] Fisher notes that England and Colonial Virginia were both "marked by deep and pervasive inequalities, by a staple agriculture and rural settlement patterns, by powerful oligarchies of large landowners . . ."[163] Notably, the southern part of England (which is where most Virginia colonists hailed from) practiced slavery extensively in the eighth and ninth centuries, so much that medieval English slaveholdings reached levels comparable to those in the American South.[164] The dialect of Colonial Virginia (which eventually morphed into Southern American speech patterns) also mirrored speech patterns of Southern

A HANDBOOK 111–112 (Esin Orucu and David Nelken eds. Hart Publishing 2007).

157. Sacco, *supra* note 155, at 27.

158. Roger Cotterell, *Comparative Law and Legal Culture in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 721 (Mathias Reimann and Reinhard Zimmerman eds., 2006) (quoting PIERRE LEGRAND, FRAGMENTS ON LAW-AS-CULTURE 19, 27 (Tjeenk Willink 1999)).

159. *See supra*, notes 129–140 and surrounding text.

160. FISHER, *supra* note 145.

161. FISCHER, *supra* note 145, at 208.

162. *Id.* at 207–418.

163. *Id.* at 246.

164. *Id.* at 243.

England, sharing words like howdy, grit, moonshine, yonder, taters, and holler.[165]

Whips and Pillories

At the same time that colonial Virginia maintained the Motherland's general investment in inequality, particularly in slavery, it preserved the English taste for corporal punishment. Beginning in the fourteenth century, British lawmakers had turned to the older Norman practice of maiming criminals in order to protect its rigid feudal labor system.[166] Three hundred years later, British colonists would import such physical chastisements to the New World,[167] flogging, hanging, and fatally burning an assortment of wrongdoers during Virginia's first years alone.[168] Dale's Laws, a set of notoriously severe legal codes published between 1611 and 1619, gives a sense of early disciplinary measures in the colony—perhaps most notably in its mandate that bakers who overcharged for bread have their ears sliced off.[169] (The laws prescribed the same treatment for cooks who stole from their masters' kitchens.[170]) Under the direction of Dale's Laws, colonists dealt with a man found guilty of stealing three pints of oatmeal from the public store by shoving a bodkin through his tongue and tying him to a tree to die of starvation.[171]

Although Virginia repealed Dale's Law in 1619,[172] the community went on to promulgate new measures that, if slight less draconian, were still viciously corporal. In addition to ear-cutting and tongue-boring, colonial statutes and decrees teem with references to gauntlet-running, branding, and, most commonly, whipping.[173] "[T]he simplest, least costly, and most

165. FISHER, *supra* note 145, at 257–261.

166. KELLY ROBERTSON, THE LABORER'S TWO BODIES 2, 14, 16, 20, 33 (Palgrave 2006). As Prever discusses, feudal workers who refused to comply with Britain's stringent labor laws could expect to be placed in the stocks or, in extreme cases, be branded on the forehead with the letter F for false or "fauxine." *Id.* at 16.

167. As in most of the colonies, corporal punishment was the go-to method for maintaining control over the populace. Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 256 AMERICAN J. OF LEGAL HIST. 328–29 (1982).

168. Robertson, *supra* note 166, at 16.

169. On the law's harsh cruelty, see SCOTT, *supra* note 149, at 8–9, 141; David Thomas Konig, *"Dale's Laws" and the Non-Common Law Origins of Criminal Justice in Virginia*, 26 J. OF AM. LEGAL HIST. 354, 354 (1982). On separating bakers and cooks from their ears, see SCOTT, *supra* note 149, at 8–9.

170. SCOTT, *supra* note 149, at 141.

171. *Id.* at 142.

172. *Id.* at 8–9, 141.

173. *See* SCOTT, *supra* 149, at 150 (acting against one's commanding officer to garner a penalty of having one's sword broken and ears cut off, unless one can pay a 100 pound fine; man who spoke out against the governor received an awl through his tongue and then subjected to the gauntlet); 1 Hening's Statutes 254–55 (1642-43) (runaway servants branded with the letter R on the

immediate form of punishment,"[174] whipping—or "lashes" and "stripes" as it was commonly called—was applied to a wide variety of infractions, including drunkenness and cursing;[175] fornication and adultery;[176] incest;[177] manipulating the tobacco market by cutting plants;[178] and disobeying the lawful commands of a sea captain.[179]

As one might expect, the nature and severity of an offender's sentence often depended on the person's place in Virginia's rigid social hierarchy, with women, low-status workers, and people of color receiving harsher penalties than the colony's upper-class white men. Such disparities stemmed in part from the former groups' inability to pay the fines that were sometimes offered as an alternative to physical mortification.[180] Under one 1696 statute, for example, a person found guilty of drunkenness had the option of paying a fine of either 10 shillings or 100 pounds of tobacco or, alternately, lying in the stocks for two hours.[181] The same statute set the penalty for fornication and adultery at 500 shillings, 1000 pounds of tobacco, "twenty-five lashes well laid on," or two months in prison.[182] A later law would formalize this money-or-suffering calculus, explicitly equating every 500 pounds of tobacco levied for a violation to twenty lashes.[183] Because women, indentured servants, and enslaved persons generally lacked the financial resources to satisfy such statutes, they depended on their husbands, employers, and owners to pay for their transgressions. If such parties declined, vulnerable convicts had no choice but to discharge their sentences in the currency of pain.[184]

Adding to such profoundly unequal protections of the law, certain Virginia codes dictated different sentences depending on a wrongdoer's class, gender, or race. Whereas free men convicted of trading with indigenous people were sentenced to a month of labor, servants and enslaved people found guilty of the same offense received 20 stripes.[185] In a similar vein, men weren't subjected to the ducking stool. In order to find yourself publicly strapped to a chair and plunged into a pond in colonial Virginia, you needed to be a woman—generally an unruly woman who couldn't control her

face in 1630); Preyer, *supra* note 167, at 348.

174. Preyer, *supra* note 167, at 348.
175. 3 Hening's Statutes 153 (1699).
176. 3 Hening's Statutes 139 (1696).
177. 3 Hening's Statutes 246 (1730).
178. 1 Hening's Statutes 164 (1631).
179. 4 Hening's Statutes 107 (1722).
180. SCOTT, *supra* note 149, at 239–251.
181. 3 Hening's Statutes 139 (1696).
182. *Id.*
183. 3 Hening's Statutes 452 (1705).
184. *See id.*
185. 1 Hening's Statutes 167 (1631).

gossipy tongue.[186] Finally, colonial laws frequently subjected people of color to more extensive physical punishment than their white counterparts. One statute from 1699 mandated 25 stripes for white hog thieves but 39 (the maximum allowed by the Bible)[187] for those who were black.[188] In this case, the extra 14 lashes attached regardless of whether the offender was slave or free. In other instances, the colonial legal system reserved the full 39 blows for slaves alone, including those who ran away,[189] forged false certificates of freedom,[190] or possessed guns or other weapons.[191] As savage as these whippings undoubtedly were, they paled in comparison to slave punishments dictated by other statutes, at least two of which expressly authorized the courts to have runaways dismembered.[192]

According to one such law, dismembering enslaved people who tried to escape would "terrify [y] others from like practices . . . ."[193] This suggests that the sentence was to be carried outpublicly. Even if recaptured runaways weren't to be ripped apart in front of an actual crowd, colonial legislators at least envisioned a situation in which accounts of the physical desecration would make their way back to the slave population, deterring others from trying for freedom by packing their minds full of horrifying images of bodies disjointed and torn. Indeed, the trinity of escape, apprehension, and mutilation didn't even have to occur for such terrible mental pictures to take shape. As mandated by law, statutes of particular importance—including the slave codes that authorized extreme whipping and dismemberment for

186. BROWN, *supra* note 145, at 147-148.

187. Deuteronomy 25:3 (King James Version) ("Forty stripes he may give him, *and* not exceed: lest, *if* he should exceed, and beat him above these with many stripes, then thy brother should seem vile unto thee."). In Talmudic law, the number was reduced to 39 to avoid exceeding 40 even by mistake. *See Flogging*, JEWISH VIRTUAL LIBRARY, https://www.jewishvirtual library.org/flogging.

188. 3 Hening's Statutes 179 (1699). Unsurprisingly, white thieves were also allowed to pay a tobacco fine—an option not available to their black counterparts. *See id.* Moreover, in case of a second offense, black hog thieves were to have their ears nailed to the pillory and then cut off—a particularly gruesome punishment that the courts also inflicted on people of color who gave false testimony. 3 Hening's Statutes 179 (1699); 4 Hening's Statutes 127–128 (1723). Admittedly, white Virginians sometimes received this sentence, as well; ear-cutting was fairly common throughout the colonies and in England. *See* HUGH F. RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA 196 (Univ. of Virginia Press 1965) (at British common law, a conviction of forgery came with the penalty of having one's ears cut off); SCOTT, *supra* note 149, at 8–9, 141 (Bakers could lose an ear for overcharging for bread).

189. *Id.* at 456–57 (This particular statute authorized "as many lashes as appropriate not exceeding the number of thirty-nine.").

190. 3 Hening's Statutes 455 (1705).

191. 4 Hening's Statutes 131 (1723).

192. *See* 3 Hening's Statutes 460–61 (1705) (Despite the fact that dismembering was explicitly authorized, there is not much historic evidence of this being carried out.) SCOTT, *supra* note 149149, at 301 (This could be an example of Damocles' sword hanging by a thread, but not cutting); 4 Henning's Statutes 132–33 (1723).

193. 3 Hening's Statutes 460–61 (1705).

runaways—were to be posted on church doors and read aloud "after the sermon/divine service is ended."[194] In Virginia, even blindness and illiteracy could not save you from violent penal imagery.

As this reveals, the colonial legal system revolved around something more than the blunt infliction of pain or even death. At the same time that Virginia's laws and judicial decrees relied on the threat of physical suffering to keep the community in line, it used the *sight*—real or imagined—of such agony as a disciplinary tool. In keeping with this attention to the visual, the colony ordered convicts whipped in public[195] and frequently exhibited the bodies of the enslaved and other marginalized people it executed. After beheading and quartering the enslaved Scipio and indigenous Salvadore for planning a rebellion in 1710, the colony ordered pieces of their bodies strung up in four different counties for *ad terrorem* effect[196]; having dealt with the remains of two Goochland County slaves executed for treason in 1733, a local sheriff requested reimbursement for the supplies and labor involved in "carrying and setting up the heads and quarters of the two at the places mentioned by order of the Court."[197] In these cases and others like them, the juridical apparatus amplified its power by transforming those it classified as wrongdoers into extravagant displays.

The shaming punishments so prevalent in the colony worked in a similarly visual fashion.[198] By law, every county in Virginia was required to maintain a pillory, a set of stocks, and a ducking stool.[199] Although each of these devices acted on its victims' bodies, it also mortified their souls by holding them open to the community's scrutiny and scorn. Subjected to the ducking stool, for example, a woman not only had to endure the physical torture of repeated near-drowning, she also had to withstand the crushing

194. 3 Hening's Statutes 460 (1705).

195. *See, e.g.*, 3 Hening's Statutes 278 (1705) (punishment administered at the common whipping post for hog stealing); 4 Hening's Statutes 174 (1726) (punishment administered at the public whipping post for counterfeiting a servant or slave's travel pass); 4 Hening's Statutes 213–14 (1727) (punishment administered at the public whipping for women convicted for bastardy).

196. 4 Hening's Statutes 174 (1726); 4 Hening's Statutes 213–14 (1727).

197. RANKIN, *supra* note 188, at 225 (internal citation to contemporaneous newspaper reports omitted). In 1739, a slave was convicted of burning the owner's manor house. The court ordered that the slave be hanged, that his head be cut off and displayed on a pole in a public place. *Id.* at 133 (citing York County Records, Wills, Deeds and Orders 489 (1728-1732), Virginia State Library Richmond Virginia; York County Records, Wills, Deeds and Orders 419–420 (1768-1770), Virginia State Library Richmond Virginia; T.C. CAMPBELL, A HISTORY OF CAROLINE COUNTY, VIRGINIA 337 (Richmond 1956). In 1767, four slaves were hanged and their heads were placed on the chimney at the Alexandria Virginia courthouse. RANKIN, *supra* note 188, at 225 (internal citation to contemporaneous newspaper reports omitted).

198. Clearly, one can't draw a sharp distinction between punishments that were strictly corporal and those that were purely shame based. Instead, the majority of the colony's legal sanctions relied on a mixture of both.

199. 2 Hening's Statutes 75 (1661).

humiliation of being publicly exhibited as a reprobate. Similarly, a man confined to the pillory (head and hands) or stocks (feet) might be physically assaulted by the crowd that gathered around him. Even if his neighbors refrained from such abuse, however, he still had to weather the social horror of being labeled an offender in such graphic fashion.[200] Although the law obviously tempered the full force of its violence when it employed strategies of painful humiliation rather than outright execution, a tremendous amount of brutality still sprang from its power to turn the guilty into public symbols of transgression. As with its displays of mutilated bodies and decapitated heads, the legal system demanded obedience from all by visualizing itself on the condemned in extremely visceral ways.

This impulse to corporealize likely stemmed in part from Virginia's theocratic nature. As mentioned above, the colony maintained no sharp distinction between secular government and what it saw as God's dictates. Not only did certain legal punishments derive directly from the Old Testament,[201] church attendance was mandatory, and ministers were required by statute to preach in the morning and catechize in the afternoon.[202] Moreover, the community charged church wardens with policing crimes like blasphemy, swearing, and drunkenness, as well as sending the violators to the county court to be punished.[203] Unsurprisingly, Sabbath-breaking in this culture exposed one to legal punishment, as did boating, shooting a gun, or travelling unnecessarily on a Sunday.[204] (Luckily for such miscreants, arrests couldn't be executed on Sundays either.[205]) As previously noted, certain laws were also posted and read aloud at church.[206] In this strict Christian environment, the Bible animated nearly every aspect of daily life, and everyone in power would have known their scripture, including John 1:14's pronouncement that "the Word was made flesh, and dwelt among us . . . ."[207] As if mirroring God's decision to incarnate his sacred text in the form of Jesus Christ, Virginia repeatedly incised its legal codes into the flesh of the

200. Even here, Virginia law seems to have reserved the cruelest penalties for non-whites. To the extent that colonial statutes law explicitly prohibited whipping a "white Christian servant" naked, we can infer that it was acceptable—and likely common—to whip persons of color naked, thereby intensifying the punishment's mixture of physical and emotional pain. *See* 3 Hening's Statutes 449–450 (1705).

201. As discussed above, whipping had biblical precedent. *See supra* note 187. Moreover, at least one court sentenced a man to death based on a passage from Leviticus. OLIVER PERRY CHITWOOD, JUSTICE IN COLONIAL VIRGINIA 1 (John Hopkins Press 1905).

202. FISHER, *supra* note 145, at 234; 1 Hening's Statutes 385 (1657).

203. 1 Hening's Statues 310 (1645).

204. 1 Hening's Statutes 457 (1657).

205. *Id.*

206. *See supra* note 194.

207. John 1:14 (King James Version).

convicted, ensuring that the colony's juridical mandates lived among its inhabitants in extremely literal, visible ways.[208]

Here again we see that punishment was not simply a matter of injury and deterrence in Virginia. Instead, penalties like dismembering, ducking, and public whipping served to render the community *legible*; they worked to contain disruptive members of the populace by visually putting them in their place.[209] In this context, it should come as no surprise that the law sometimes mandated actual branding, ordering an "R" seared into the cheeks of runaway servants, for example.[210] Like the whip scars, missing ears, pierced tongues, and burned hands[211] the colonial legal system created, this single letter ensured that even after the culprits' corporal pain ended, their social suffering and, just as important, social *utility* would continue as those around them read their bodies as an alphabet of sin.[212] Implementing the sort of "punitive semiotics" that the literary historian Kellie Robertson discusses in the context of medieval England,[213] Virginia's legal system compelled intransigent—or often simply defenseless—members of the colony to literally embody its doctrines. Over and above inflicting pain, the law inflicted visual significance.

(Dis)order

According to the Anglican "Homily of Obedience," God keeps a tidy house. "Almighty God has created and appointed all things in heaven, earth and water, in a most excellent and perfect order," the sermon teaches:

> In heaven he hath appointed distinct and several orders and states of arch-angels and angels. In earth he hath assigned and appointed kings, princes, and other governors under them, all in good and necessary order . . . The sun, moon, stars, rainbows,

208. *Cf.* Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457, 494 (1997). ("The racial contours of the legislatively color-lined bodies stand out from the statute books like lovingly carved temple dancers Bodies are typed and arranged in every possible permutation.").

209. *See also* 1 Hening's Statutes 517 (1658-59) (required that the hair of runaway servants be cut off, "so that they can be better apprehended.")

210. 1 Hening's Statutes 255 (1642-43).

211. During the colonial era, benefit of the clergy was a legal fiction (although it had ecclesiastical roots) that allowed defendants to obtain clemency. RANKIN, *supra* note 188, at 105–107. In order to receive the benefit of the clergy, which could only be offered once, the recipient agreed to have his or her hand burned in open court. 4 Hening's Statutes 325–26 (1732). By effectively branding certain individuals with fire, the community ensured that no one would receive the benefit of the clergy twice. At the same time, the practice overtly marked those who took the benefit as wrongdoers, thereby reminding them (and anyone who saw their scarred hands) of their status as transgressors.

212. The colony insisted on this sort of hyper-visibility outside the legal context as well.

213. ROBERTSON, *supra* note 166, 16.

> thunder, lightning, clouds and all the birds in the air do keep their order. The earth, trees, seeds, plants, herbs, corn, grass, and all manner of beasts keep themselves in order . . . . And man himself hath all his parts . . . members of his body in a profitable, necessary and pleasant order. Every degree of people in their vocations, calling and office, hath appointed to them their duty and order. Some are in high degree; some in low, and every one have need of the other.[214]

Sitting in church, colonial Virginians likely would have heard this tribute to God's proclivity for arranging and sorting; they likely would have absorbed the homily's vision of the divine necessity of separation and hierarchy in all things, especially the social framework, be it of angels or of men.[215] Stepping outside the church's door, those with power then set to work molding the colony into a reflection of such sacred categories, relying in no small measure on codes and judicial decrees that distinguished the dutiful from the wayward by marking the latter with visible signs of their (dis)order.

Here lies the fundamental similarity that links colonial Virginia's legal regime and the race-based lynchings that ripped through nineteenth- and twentieth-century America. It's not only that white mobs staged lynchings as quasi-religious rites, invoking evangelical traditions, holy relics, and powerful Christian imagery to "re-creat[e] divine judgment on earth"[216] in ways that echo the colony's overt merger of disciplinary violence and sacred ritual.[217] Nor is it the fact that both the colony and the lynch mob policed their respective populations through horrifying acts of torture, mutilation, and dismemberment—acts that concentrated either disproportionately or exclusively on people of color. Instead, it's the extent to which such acts sought to stabilize colonial Virginia and post-Civil War America by savagely *displaying* those who threatened the status quo. Whether dealing with eighteenth-century enslaved people who jeopardized the colony's property regime through their attempts at escape or post-bellum African-Americans who disturbed the racial hierarchy by asserting their rights (or even just their existence), colonial courts and lynch mobs seized such offenders and tore them—sometimes literally, sometimes figuratively—into images.[218]

214. FISCHER, *supra* note 145, at 398 (quoting *An Exhortation to Obedience*, *in* BOOK OF HOMILIES (1562)).

215. In the Anglican religion, the opposite of order is the sinful concept of "commingling" or "confusion." FISCHER, *supra* note 145, at 398.

216. WOOD, *supra* note 27, at 65.

217. For lynchings as religious rituals, see WOOD, *supra* note 27, at 60–65.

218. *See id.* at 76 ("The lynching victim was in this way himself a representation—a signifier of black inferiority and depravity and, in turn, of white female power and supremacy.").

Reducing their victims to a ghastly mass of garbled flesh, British Virginians and lynch mobs alike rooted the "profitable, necessary and pleasant order"[219] of their respective worlds in exhibitions of black *disorder*;[220] they ensured the integrity of the white body politic by ravaging the bodies of those who dissented, even if that dissent was nothing more than the color of their skin. Whether such strategies of discipline stemmed from legal codes and decisions or instead violated the law as it was written seems less important here than the shared reliance on a particular kind of theatrical visuality, a particular type of corporal symbolism. Turning their violent attentions to the "turbulent traitor[s]"[221] who stood before them, the colonial legal system and white lynch mobs didn't simply make these transgressors suffer. Instead, they made them *mean*.

Violent Delights

According to the legal scholar Anthony Farley, such vicious imposition of meaning is nothing less than race itself. As Farley discusses in his seminal article "The Black Body as Fetish Object," "white" and "black" aren't neutral descriptive terms but rather elements of "a sadomasochistic form of pleasure"[222] in which people who identify as white project their collective knowledges, needs, fantasies, and fears onto people they characterize as black.[223] In addition to physically assaulting African-Americans, Farley argues, Euro-Americans thrill to the power they flex by battering them *semotically*—by forcing people of color to bear certain stories, by insisting

219. FISCHER, *supra* note 145, at 398 (quoting *An Exhortation to Obedience*, *in* BOOK OF HOMILIES (1562)).

220. *Cf.* WOOD, *supra* note 27, at 8 ("[lynching] rituals enacted and embodied the core beliefs of white supremacist ideology, creating public displays of bestial black men in visible contrast to strong and commanding white men. Lynching allowed southerners to perform and attach themselves to these beliefs—to literally inhabit them.").

221. Unlike the modern conception of treason, the crime was defined more broadly during the colonial period to include instances where a social inferior killed a superior, such as the killing of a father by a son, a husband by a wife, or a master by a servant or slave. RANKIN, *supra* note 188, 223–234; FISHER, *supra* note 145, at 280. Rebellion and insurrection were also included in the crime of treason. SCOTT, *supra* note 149, at 154; RANKIN, *supra* note 188, at 223–224. If a slave crossed the color line to strike out against his/her master, that constituted treason. This conception of treason explains why, in the seminal case *State v. Mann*, Judge Ruffin referred to the tension between masters and their "turbulent traitor" slaves. State v. Mann, 2 Dev. 263, 267 (1829). It also suggests that lynch mobs punished their black victims for perceived acts of treason, whether they defined such so-called violations of the social order as such or not.

222. Farley, *supra* note 208, at 461.

223. *Id.* ("I describe 'race' as a sadomasochistic form of pleasure. I employ an existentialist definition of sadomasochism throughout: 'The existentialist definition of 'sadism' briefly is this. It is the process by which one man tries to transform another into a mere object of his will. The masochist is delighted by the spectacle of himself as the object of another's will. The two attitudes are, of course, linked.").

that they stand for this fact or demonstrate that truth. Seen this way, race isn't a natural category but rather a crime of non-consensual signification.[224] Labelling other human beings as "black," whites effectively slice them into the flags of racial semaphore.[225] Although the marks this dissection leaves aren't as overtly bloody as those found in the colonial magistrate's severed heads or the lynch mob's mutilated bodies, they, too, solidify white power by forcibly converting people of color into the register of metaphor. Like the magistrates and mobs who came before, contemporary whiteness continues to command obedience to its "good and necessary order"[226] by transforming those it christens "Other" into symbols that it then circulates and displays.[227]

As Farley demonstrates, this racial meaning-making takes place in two stages, with whites first defining blackness and then repudiating any involvement in such aggressive projections. In Farley's words, "[r]ace is a form of pleasure in one's body which is achieved through humiliation of the Other and, then, as the last step, through a denial of the entire process."[228] Such denials have taken numerous forms over centuries, including the colonial fiction that enslaved black people weren't full, rational humans;[229] pseudoscientific theories that African Americans belonged to a different species than Euro-Americans;[230] and contemporary arguments that the U.S. is a colorblind society, with race playing no role in the continuing disparities and deprivations suffered by people of color.[231] Through it all, however, "[t]he pleasure of whiteness [has been] achieved through the degradation of

224. For this reason, Farley compares race to rape. As he argues, "The rapist seeks to impose *his* meanings on *her* body . . . . The rapist experiences the same pleasure during the struggle over the rapist as in the struggle over the meaning of the rape, for in both cases he struggles to impose his theme [meaning] upon his victim's body." *Id.* at 472. Like the rapist, whites derive deep satisfaction from forcing their black targets to embody particular meanings, to take white definitions of blackness into themselves in a way that violates the basic boundaries of the self.

225. As Farley writes, "[t]o be the matized as black is a form of humiliation in and of itself . . . . There can be no such thing as good race relations for it is the category of race itself which constitutes the humiliation. Blackness is the yellow star, the pink triangle, the scarlet letter, and the bad reputation. To be black *is* to occupy the role of inferior-for-whites, specifically, to be black is to be available for racial humiliation." *Id.* at 473–74.

226. FISCHER, *supra* note 145, at 398 (quoting *An Exhortation to Obedience*, *in* BOOK OF HOMILIES (1562)).

227. *See* Farley, *supra* note 208, at 463 ("The satisfaction of this will-to-whiteness is form of pleasure in and about one's body. It is a pleasure which is satisfied through the production, circulation, and consumption of images of the not-white.").

228. *Id.* at 464.

229. *Id.* at 470; *see also* Waggoner, *supra* note 144, at 899–904 (explaining that Enlightenment philosophers believed that non-European people of color did not have the capacity to reason or participate in civilization).

230. This pseudo-scientific theory was called "polygenesis" and was most famously advocated by the Swiss biologist Louis Agassiz. For more on Agassiz and polygenesis, see inter alia, STEPHEN JAY GOULD, THE MISMEASURE OF MAN 74–81 (New York: W.W. Norton and Company, rev. ed. 1996).

231. Farley, *supra* note 208, at 469, 525–26.

black bodies and a masking of the means by which that degradation is achieved."[232] The gratifications of whiteness, in other words, depend on the double-action of story-telling and disavowal. Within this system, it's not enough to impose one's meanings on another's body. To truly savor the satisfactions of race, whiteness must instead camouflage "the social as the natural"[233] by shoving its identity as the author of its racial mythologies far below the surface.[234]

Much as *Parson Weems' Fable* forces its hanging black figure beneath the surface of its patriotic tale. Returning to Grant Wood's painting one last time, the work's "effort to preserve and celebrate the art of fable making itself as a part of the American national identity"[235] now reads very differently. "[An] image of a clever author making up a story about not telling lies,"[236] the canvas presents us with a diagram of race as a visuo-legal fiction in this country: its origins in colonial Virginia's deeply visual legal regime, its murderous reification in postbellum America's theater of lynching, its persistence as the country's *ur-* (or maybe *unter-*) narrative—the story of black abjection that gives rise, as it does formally in Wood's picture, to the rest of our fables, the rest of our icons and symbols and tales. Seen this way, the figure of Parson Weems doesn't simply pull the curtain on the violence of American nationalism. Instead it personifies the reptile brain of the country's legal system and its longstanding demand—allegorized so forcefully in Weems' pointing figure—that we look. "[A] ghost story wrapped in the comforting illusion of a patriotic subject," in Evans' wonderful words,[237] *Parson Weems Fable* confronts us with the strange fruits of race that continue to haunt us all.

232. FARLEY, *supra* note 208, at 502.

233. *Id.* at 475.

234. *See id.* ("Race is not a matter of 'difference'; it is a matter of power . . . . The ideology of 'difference' functions as denial in our culture by masking, on the ground of nature, the sadomasochistic relationship between whites and blacks. The discourse of 'racial difference' is not solely a way of representing the social as the natural, it is also a pleasure-in-itself.").

235. CÉCILE WHITING, ANTIFASCISM IN AMERICAN ART (Yale Univ. Press, 1989), 104.

236. Thistlewaite, supra note 13.

237. EVANS, *supra* note 4, 280.

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