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### Dark Connections

Lucy Jewel

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## DARK CONNECTIONS

LUCY JEWEL<sup>†</sup>

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### I. INTRODUCTION

The United States is in a process of reckoning with its history of violent, genocidal, race-based enslavement.<sup>1</sup> Many articles linking the reckoning concept with race began to proliferate during the summer of 2020, as protests mobilized across the country in response to law enforcement’s murder of George Floyd and so many other Black people. The Washington Post started publishing a series entitled “Race & Reckoning.” The highly contested 1619 Project can also be considered a historical reckoning of the outsized role that slavery played in the founding of the United States. Within the last two years, several New York Times bestsellers such as Clint Smith’s *How the Word is Passed*<sup>2</sup> and Tiya Miles’s *All That She Carried: The Journey of Ashley’s Sack*<sup>3</sup> engaged with this historical reckoning.

Reckoning refers to the “action or process of calculating or estimating something.”<sup>4</sup> It is a term that is frequently used in nautical or

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<sup>†</sup> Professor of Law and Director of Legal Writing. Thank you to my dear friend Teri McMurtry-Chubb for writing this brilliant book, which I am honored to comment on. Thank you also to Professors Danni Kie Hart and Victoria Haneman for their efforts in planning this symposium issue.

1. CLINT SMITH, *HOW THE WORD IS PASSED: A RECKONING WITH THE HISTORY OF SLAVERY ACROSS AMERICA*, at 4–5 (2021) (Kindle ed.) (“[C]ities across the country have begun to more fully reckon with the history [of slavery].”).

2. *Id.*

3. TIYA MILES, *ALL THAT SHE CARRIED: THE JOURNEY OF ASHLEY’S SACK, A BLACK FAMILY KEEPSAKE*, (1st ed. 2021).

4. *Reckoning*, THE BRITANNICA DICTIONARY, <https://www.britannica.com/dictionary/reckoning> (last visited Oct. 21, 2022).

aviation navigation, where the pilot uses plotting tools to determine the ship or airplane's location. In fact, "dead reckoning" refers to being dead sure of the location, because of the process used.<sup>5</sup> If reckoning refers to the action of "calculating or estimating something," what are we calculating when we use the term reckoning to refer to America's ugly history with the painful, violent, assaultive, and sexually predatory acts that comprised slavery? We are calculating the cost that enslavement continues to exact on society. If reckoning is a navigational concept, we are also calculating and estimating the breadth of the continuing terror, locating where, within U.S. society, the trauma of enslavement still exists. Moving beyond a strictly color-blind liberalism, the racial reckoning project has, at its core, a goal of repairing the long festering wounds from enslavement, wounds that are still infecting U.S. law and society. The reckoning project seeks to draw connections between the past to the present and explain why Black people continue to suffer (unequal health outcomes, educational outcomes, economic outcomes) on all fronts. To fully repair, we need to calculate the damage.

Professor McMurtry-Chubb's exceptional monograph, *Race Unequals: Overseer Contracts, White Masculinities, and the Formation of Managerial Identity* (hereinafter, *Race Unequals*), aligns with this racial reckoning project.<sup>6</sup> McMurtry-Chubb deploys contracts, case law, and statutes to illustrate how the law constructed a specific type of White Masculine identity for the overseers charged with managing the enslaved persons providing labor on the South's cotton plantations. Legal language and documents helped construct an identity for the overseer that benefited from White Supremacy, yet this identity was still situated well below the status of the master-class planter.

The connections that can be uncovered by studying history are deeply intriguing. *Connections*, the educational television series and book by British author James Burke, is fascinating. In *Connections*, one learns that "we lie surrounded by the end products of thousands of connections," such as the connection between a mechanism for running an intricate weaving pattern on a loom, the punch card method of calculating, and ultimately the binary code of modern computing.<sup>7</sup>

In Professor McMurtry-Chubb's book, the connections are much darker and more troubling. For instance, the monograph describes the

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5. Straight Dope Staff, *Is "dead reckoning" short for "deduced reckoning"?*, THE STRAIGHT DOPE (Nov. 21, 2002, 12:00 AM), <https://www.straightdope.com/21343189/is-dead-reckoning-short-for-deduced-reckoning>.

6. TERI A. MCMURTRY-CHUBB, *RACE UNEQUALS: OVERSEER CONTRACTS, WHITE MASCULINITIES, AND THE FORMATION OF MANAGERIAL IDENTITY IN THE PLANTATION ECONOMY* (Lexington Books 2021).

7. JAMES BURKE, *CONNECTIONS* 15, 193 (1ST ED. 1978).

overseer's supervision of the brutal "pushing" method that forced enslaved persons to pick cotton as fast as possible, under penalty of the whip.<sup>8</sup> The pushing method can be connected to modern, Taylorist modes of industrial production, which seek to identify the most rapid and efficient methods for wringing labor from a human body.<sup>9</sup> By cataloging the themes in the overseer/plantation owner relationship, one can discern the unsettling and subtle ways that White Supremacy operates in our culture today. In this way, *Race Unequals* aids the reckoning process.

This Comment will explore the troubling cultural connections between plantation management relations and the patriarchy, pugilism, and privilege that run through contemporary U.S. business culture. First, the Comment will briefly describe some theoretical concepts that explain why an interdisciplinary study of legal history and culture provides value for scholars interested in stopping the same old hierarchical patterns from recurring. Second, the Comment will summarize the plantation owner's and overseer's dichotomous social identities, as McMurtry-Chubb expertly describes them. Third, the Comment will undertake a deep reading of *United States v. Hazelwood*,<sup>10</sup> a recent United States Court of Appeals for the Sixth Circuit case that grapples with heinous racist behavior in a business milieu.<sup>11</sup> The *Hazelwood* case illustrates the dark connections between the plantation and modern business and helps plot the course lines for an accurate reckoning.

## II. WHY STUDY LEGAL HISTORY?

Scholars often look to interdisciplinary sources within both culture and history for markers that continue to obstruct progress for true equity and justice, particularly people who have been minoritized because of their race, gender, class, LGBTQ status, and/or ability. Interdisciplinary work is sometimes criticized because the connections between other disciplines and the practice of law are not prominently visible.<sup>12</sup> However, a large part of interdisciplinary work rests on the

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8. McMURTRY-CHUBB, *supra* note 6, at 31–64.

9. Taylorism is a regimented form of work organization in which managers strictly divide up and control the laborer's tasks. Taylorism derives from the theories of Frederic Winslow Taylor, considered the father of scientific management theory. See Alex Kemp, *Frederick Winslow Taylor: Hero of Scientific Management*, QAD BLOG, (April 17, 2018), <https://www.qad.com/blog/2018/04/frederick-winslow-taylor-scientific-management>.

10. 979 F.3d 398 (6th Cir. 2020).

11. *United States v. Hazlewood*, 979 F.3d 398 (6th Cir. 2020).

12. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (utilizing an example of such a critique).

task of unmasking hidden connections, gears, and machinery that animate the complex system of culture, legal institutions, and laws that organize our society. If we can see the hidden infrastructures that produce injustice or hinder healing, we can train advocates to tweak the machinery or at least lay bare the apparatus, which can change how judges and other legal actors think. There are at least two related ways a historic study like *Race Unequals* illuminates current legal and social problems: (1) understanding the power that the historic legal language wielded and still wields in our culture; and (2) visualizing the collective mindset, produced by the historic legal language, which still exists in a vestigial form today.

First, *Race Unequals*, speaking through its primary legal sources of contracts, statutes, and case law, unveils the legal words that created the social realities of the participants in the plantation economy. Speech action theory explains how legal language carries the power to make social reality.<sup>13</sup> Because it is imbued with the power of the state, legal language binds everyone under the state's jurisdiction and control.<sup>14</sup> Collective buy-in (the belief that the legal language is binding) then seals legal language's power.<sup>15</sup> In *Race Unequals*, we see how the language of a contract, laying out the job responsibilities of the overseer (must not drink alcohol or entertain) makes the social reality of who an overseer is, and who a plantation owner is (a lavish entertainer, a libertine consumer of alcohol whose moral status is nonetheless impeccable). *Race Unequals* is valuable because the social realities of the plantation owner and overseer were created through legal language. And these social realities, or at least remnants of them, are still in our culture today.

Second, *Race Unequals* expands the conversation about the law-culture-law cycle, particularly the connections between enslavement and today's masculine business culture. The law-culture-law cycle is the idea that culture informs the law and the law then feeds back onto the culture. Professor Elizabeth Berenguer lucidly explained the process as a narrative process, "cultural narratives influence the creation of laws, which then impact the cultural narrative, cycling back to affect changes in the law."<sup>16</sup> In her article, Berenguer described how the

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13. See JOHN R. SEARLE, MAKING THE SOCIAL WORLD: THE STRUCTURE OF HUMAN CIVILIZATION 7, 12 (2009); J.L. AUSTEN, HOW TO DO THINGS WITH WORDS 7 (J.O. Urmson & Marina Sbisa eds., 2d ed. 1962).

14. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical World*, 38 HASTINGS L.J. 814, 818, 838-39 (Richard Terdiman trans., 1987).

15. *Id.*; SEARLE, *supra* note 13, at 166.

16. Elizabeth Berenguer (née Megale), *Disaster Unaverted: Reconciling the Desire for a Safe and Secure State with the Grim Realities of Stand Your Ground*, 37 AM. J. TRIAL ADVOC. 225, 257 (2013).

language within Stand Your Ground<sup>17</sup> criminal self-defense statutes derived from cultural narratives about safety of the home, self-defense, and dangerous trespassers. The statute then echoed back these narratives in a way that further reinforced the culture.<sup>18</sup>

It is also helpful to understand what happens when the law-culture-law feedback loop operates on a more subtle level, on a micro-level. Neuroscientist Antonio Damasio described this phenomenon in terms of “somatic markers,” which represent entrenched thought patterns that guide the direction, rapidly and unconsciously, of collective and individual thought processes.<sup>19</sup> Somatic markers operate at a pre-conscious and unconscious level and do not deliberate, instead operating as a “biasing device.”<sup>20</sup> Somatic markers are imprints in individual brains, experienced collectively.

Culturally ingrained stereotypes function as somatic markers. An example of a somatic marker born out of bias would be the feeling of fear that some people have when they see a Black male walking down the street at night.<sup>21</sup> Culture carves the somatic marker linking the body of a Black male with fear of injury into the individual and collective brain. A broadly White supremacist culture produces this somatic marker, through news, television, and the words of public figures. The cultural production of the marker that resides in our neural pathways then becomes reinforced through the law, through self-defense narratives that justify police brutality toward Black males.

Studying legal history and scouring contemporary culture for noxious remnants of the past is part of the reckoning process. Understanding how the law-culture-law cycle operates aids in the method. The somatic marker concept helps us understand how the cycle works on a more infrastructural level. As this Comment explains below, for instance, somatic markers can explain the connections between slavery and White leisure behavior, between slavery and White business behavior, and between the historic legal lines between public and private.

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17. The focus of this article was on Florida’s stand your ground law. FLA. STAT. ANN. § 776.012(1) (West current through 2022).

18. Berenguer, *supra* note 16 at 259.

19. ANTONIO R. DAMASIO, DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN 171, 173–75 (1994).

20. *Id.* at 174.

21. See CLAUDE STEELE, WHISTLING VIVALDI: AND OTHER CLUES TO HOW STEREOTYPES AFFECT US 6–7 (1st ed. W.W. Norton & Co. 2010).



### III. WHAT WAS THE SOCIAL AND WORK IDENTITY OF THE OVERSEER AND THE PLANTATION OWNER?

In *Race Unequals*, we learn that there was a rigid social division between plantation owners, White members of the South's master class, and overseers, members of poor White society.<sup>22</sup> The planters and the overseers, however, were united in that White Supremacy gave them both a position far above that of the enslaved Black people who toiled on the land.<sup>23</sup> Planters were truly elite in Southern society. Only one percent of Southern men were wealthy enough to own more than five enslaved persons, the cut-off for being considered a "planter."<sup>24</sup> And yet, planters were dependent on both enslaved people and the overseer. In 1860, on the eve of the Civil War, there were 38,000 overseers managing the labor of over one-million enslaved persons.<sup>25</sup>

Intense income inequality afflicted the plantation economy. In South Carolina, for instance, plantation owners controlled ninety percent of the wealth whereas yeoman farmers controlled five percent.<sup>26</sup> As Thomas Jefferson explained, being an autonomous, self-sufficient farmer—whether as a wealthy planter or yeoman farmer—was ideal in Southern antebellum culture.<sup>27</sup> "In Jefferson's view, because these yeoman owned their own land and provided their own subsistence, they could not be bought or bossed: they did not need to work for a wage or enter into entangling relationships of debt that would make them economically vulnerable."<sup>28</sup> Working for wages, as an overseer did, was considered distasteful and lowly.<sup>29</sup> But very few White men could afford to own enough land and human capital to subsist outside of the wage/labor system.<sup>30</sup> The overseers existed at the bottom of White society and the law mirrored and reproduced their position. In lawsuits between planters and overseers, legal outcomes tilted heavily in favor of the planters.<sup>31</sup>

In managing the plantation, overseers were responsible for inflicting the terror and pain on the enslaved people working the fields where "[u]nfathomable forms of brutality were the rule and not the

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22. McMURTRY-CHUBB, *supra* note 6, at xiv–xv.

23. *See id.* at 9.

24. *Id.* at xiv.

25. *Id.* at 31–32.

26. *Id.* at 16–18.

27. WALTER JOHNSON, *RIVER OF DARK DREAMS: SLAVERY AND EMPIRE IN THE COTTON KINGDOM* 24 (2013).

28. *Id.*

29. McMURTRY-CHUBB, *supra* note 6, at 3.

30. *Id.* at 18.

31. *Id.* at 21–23.

exception.”<sup>32</sup> Because of the need for intensive surveillance (by the overseer, but also for the social control of the overseer himself) antebellum employment agreements and legal statutes required overseers to live on the plantation.<sup>33</sup> The system employed on the cotton plantation was known as the push system, which placed the most efficient enslaved person as the leader of the line.<sup>34</sup> If others on the line did not keep up with the labor of the leader, the overseer managed the punishment (through the threat of a vicious dog attack, whipping, beating, and/or starvation) to ensure that production kept up.<sup>35</sup>

The planter paid the overseer wages for his facility for numeracy, literacy, and agricultural rationality. Grid-like measurement and calculation tools gave the overseer a view of how much forced labor would be necessary to increase profits. The overseer knew how to create spreadsheets that quantified each enslaved man, woman, and child as a rate of investment (ROI), based on the person’s efficiency in picking cotton and the market price of cotton that year.<sup>36</sup> Historian Walter Johnson makes a similar point about the visuality of the plantation’s agrarian order. The linear grid that the enslaved people imposed on the land itself, with its neat parallel rows, gave the overseer a constant line of sight, a “disciplinary acrostic they could use to measure and regulate the rate at which their slaves worked, marking the otherwise invisible conversion of human beings into labor.”<sup>37</sup> Constantly surveilling and measuring the labor, the work structure left no time for the overseer’s leisure or separate social identity, apart from his job. Born out of the enlightenment’s regimented approach to knowledge,<sup>38</sup> grid-based forms masked the torture and pain that the overseer inflicted. In reality, these proto-spreadsheets outside-panopticons were tools of violence, pain, and terror.

In the South’s aristocratic culture, obsessed with status and honor, White planters and Black enslaved people alike came to refer to overseers as White trash, members of the basest parts of White society.<sup>39</sup> Planters held and circulated stereotypes describing overseers as “prone to intemperance, brutishness, and excess.”<sup>40</sup> Overseers, because of these base tendencies, “needed the structure of plantation management to enact discipline on the planter’s land and labor, and,

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32. *Id.* at 33.

33. *Id.* at 42–43.

34. *Id.* at 31–64.

35. *Id.*

36. *Id.* at 45–52.

37. JOHNSON, *supra* note 27, at 166–67.

38. See, e.g., René Descartes and the Fly on the Ceiling, <https://wild.maths.org/ren%C3%A9-descartes-and-fly-ceiling> (last visited Oct. 22, 2022).

39. McMURTRY-CHUBB, *supra* note 6, at 3.

40. *Id.* at 44; see *id.* at 52, 66–67, 83, 87.

in turn, to be disciplined by its tenets themselves.<sup>41</sup> Contractual language was necessary to control the overseer's mores. Thus, overseers were prohibited from entertaining others or from drinking alcohol.<sup>42</sup> As the antebellum period progressed and the South became concerned with the perspective that enslaved people were being treated too brutally, laws emerged regulating the treatment of enslaved laborers. This in turn required overseers to take on a relatively paternal role, that of caretaker for enslaved when sick.<sup>43</sup> In contrast to the heavily regulated overseer, the planter was never concerned with his own temperance, or other moral nitpicking. The virtuous morality of the planter was "already assumed."<sup>44</sup> In contrast to the forced sobriety of the overseer, the Planter carried on a lavish cosmopolitan lifestyle, frequently entertaining guests and consuming copious amounts of alcohol.<sup>45</sup>

To understand the social and cultural aspects of the plantation economy that Professor McMurtry-Chubb describes, it helps to look at the South's social and cultural folkways. *Albion's Seed*, David Hackett Fisher's 1989 book, described the British cultural influences that would take hold in early U.S. society.<sup>46</sup> Fisher divided early-American southern culture into two main strains—the Cavaliers, immigrating from aristocratic strongholds in southern England, and the Scots-Irish, who immigrated from the borderlands between Scotland, England, and Ireland. Fisher explained that the Cavaliers were extremely hierarchical and hegemonic, so much so that Fisher credits Cavalier culture for creating race-based slavery.<sup>47</sup> The Cavaliers, living in Virginia's tidewater area, became elite slave-holding planters.<sup>48</sup>

The overseer's cultural identity can be traced to two possible other groups: the indentured servants who emigrated to Virginia alongside the Cavaliers and the Scots-Irish who emigrated and settled in the more western, mountainous areas of the colonies. Both of these groups have been put down.<sup>49</sup> The "white trash" slur and the similar

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41. *Id.* at 44; *see id.* at 52, 66–67, 83, 87.

42. *Id.* at 69–71, 87–88 (citing slave contracts).

43. *Id.* at 35–36, 72–73.

44. *Id.* at 89.

45. *See id.* at 85, 93, n.58 (describing the planter as an entertainer and man of the world); *see also*, Dennis J. Pogue, *Drink and Be Merry: Liquor and Wine at Mount Vernon in DINING WITH THE WASHINGTONS* 97 (Stephen McLeod ed. 2011) and SHARON V. SALINGER, *TAVERNS AND DRINKING IN EARLY AMERICA* 126 (2002) (both describing the antebellum planter lifestyle as heavily focused on alcoholic beverages).

46. DAVID HACKETT FISHER, *ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA* (1st ed. 1989).

47. *See id.* at 255–56.

48. *Id.*

49. *See* HORACE KEPHART, *OUR SOUTHERN HIGHLANDERS: A NARRATIVE OF ADVENTURE IN THE SOUTHERN APPALACHIANS AND A STUDY OF LIFE AMONG THE MOUNTAINEERS*

“cracker” designation<sup>50</sup> were often applied to the indentured bond servants who originated in Britain’s lower classes.<sup>51</sup> It was thought that the spread of race-based slavery caused these unskilled laborers to fall further below in rank. One social cartographer described indentured servants as springing “from a more or less degraded stock, still branded by caste, untrained to any career demanding skill and intelligence.”<sup>52</sup> The white trash epithet, as McMurtry-Chubb points out, “degrad[ed] the overseer” but also “reify[ed] the supremacy of planter’s White manhood.”<sup>53</sup>

In contrast to the elite and aristocratic Cavaliers and the lowly English people who served as indentured bondspeople, the Scots-Irish occupied a more middle-class position.<sup>54</sup> They emigrated to back-country areas of the colonies, in the Appalachian mountains west of the tidewater establishment dominated by the Cavaliers.<sup>55</sup> Despite their internal sense of self-worth, commentators nonetheless maligned the many Scots-Irish who fell into poverty as being “cursed with a considerable incubus of naturally weak or depraved characters, . . . which, after more or less circling round and round, w[ere] drawn into the stagnant eddy of highland society.”<sup>56</sup>

The class snobbery imposed upon the Scots-Irish helped fuel their fierce individualism and clan-based warrior ethic.<sup>57</sup> The Scots-Irish “distrusted all authority save that of conspicuous merit and natural justice.”<sup>58</sup> The anti-authoritarianism, individualism, and pugilism of the Scots-Irish gained much resonance in the American genealogical imagination, as writer/politicians like Jim Webb<sup>59</sup> and J.D. Vance<sup>60</sup> have celebrated the values and ethics of this ethnic group. Psychologists Richard Nisbett and Dov Cohen, searching for an explanation as to why southern White men are more aggressive and pugilistic than northern White men, pointed to Scots-Irish herding culture as the rea-

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430–32, 445–47 (1984) (referencing pages 430–32, the author discusses the low-caste indentured servants, and on pages 445–47, he discusses poor people of Scots-Irish descent).

50. See McMURTRY-CHUBB, *supra* note 6, at 3.

51. ISENBERG, *WHITE TRASH: THE 400-YEAR UNTOLD HISTORY OF CLASS IN AMERICA* 13, 25–28 (2016).

52. KEPHART, *supra* note 49, at 432.

53. McMURTRY-CHUBB, *supra* note 6, at 3.

54. *Id.* at 613–14.

55. FISHER, *supra* note 46, at 635–39.

56. KEPHART, *supra* note 49, at 446.

57. FISHER, *supra* note 46, at 615, 621–32, 639.

58. *See id.* at 439.

59. JIM WEBB, *BORN FIGHTING: HOW THE SCOTS-IRISH SHAPED AMERICA* (2004).

60. J.D. VANCE, *HILLBILLY ELEGY: A MEMOIR OF FAMILY AND CULTURE IN CRISIS* (1st ed. 2016).

son.<sup>61</sup> The Scots-Irish culture, unlike the Cavalier culture, came to pride itself on being non-elite and popularly democratic, as in the manner of Andrew Jackson, famously of Scots-Irish descent.<sup>62</sup>

Despite the plebian theme associated with Scots-Irish culture, most Scots-Irish were White supremacists.<sup>63</sup> Their fierce dedication to preserving “their” land led one commentator to opine that “if any race was ordained to exterminate the Indians that race was the Scot[s]-Irish.”<sup>64</sup> As the Scots-Irish culture of violence and honor wove its way into Southern culture, Black people became the scapegoats.<sup>65</sup> After the civil-war, the Klu Klux Klan emerged out of a reverence for pugilism, honor, and Scottish culture. A “clan” was a revered Scottish familial concept and Scottish fighters burned crosses as a war signal.<sup>66</sup> While one should avoid a too-heavy reliance on grand-narrative explanations, we can generalize that Fisher’s aristocratic Cavaliers provided the cultural seeds for the planter’s cultural identity whereas indentured servants and Scots-Irish immigrants were the seeds of the overseer’s identity.

#### IV. THE VISIBLE OVERSEER AND THE PLANTATION OWNER IN *UNITED STATES V. HAZELWOOD*

At first glance, this was a run-of-the-mill white collar crime case involving a scheme to defraud eighteen-wheeler truckers out of thousands of dollars of promised rebates for purchased gasoline.<sup>67</sup> Upon further glance, this case reveals troubling somatic markers from antebellum times. Mark Hazelwood, one of the defendants, was the President of the Pilot Corporation, which is headquartered in Knoxville, Tennessee.<sup>68</sup> The Pilot company was started by Jimmy Haslam II. James Haslam’s son, Jimmy Haslam III also worked as CEO of the Pilot Company and his other son, Bill Haslam, is the former governor of Tennessee. Because of the Pilot Corporation’s and the Haslam family’s deep connections to Knoxville, Tennessee, the case against

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61. RICHARD E. NISBETT & DOV COHEN, *CULTURE OF HONOR: THE PSYCHOLOGY OF VIOLENCE IN THE SOUTH* (1st ed. 1996).

62. See WEBB, *supra* note 59, at 289–90. See also, Judy M. Cornett, *Hillbilly Atticus*, 69 ALA. L. REV. 561 (2018).

63. See KEPHART, *supra* note 49, at 447–49. While many Scots-Irish opposed the Confederacy on principle, this did not make them egalitarian abolitionists. *Id.*

64. *Id.* at 436.

65. ORLANDO PATTERSON, *RITUALS OF BLOOD* 191 (1998).

66. *Id.* at 217; Video Documentary: *Who Put the Klan Into Klu Klux Klan* (Dreamscape Media April 10, 2018).

67. *United States v. Hazelwood*, 979 F.3d 398, 402–06 (6th Cir. 2020).

68. See *Pilot Corporation*, WIKIPEDIA (Sept. 23, 2022, 16:46 UTC), [https://en.wikipedia.org/wiki/Pilot\\_Corporation](https://en.wikipedia.org/wiki/Pilot_Corporation); *Jim Haslam*, WIKIPEDIA (Aug. 30, 2022, 4:26 UTC), [https://en.wikipedia.org/wiki/Jim\\_Haslam](https://en.wikipedia.org/wiki/Jim_Haslam).

Mr. Hazelwood received intense media coverage in Knoxville, Tennessee, where the author of this Comment resides.

At trial, a jury convicted Hazelwood of criminal fraud. On appeal, a majority of the Sixth Circuit panel overturned the conviction, holding that a jury should not have been allowed to hear a tape recording of Mr. Hazelwood's conversation because the recording unfairly prejudiced Mr. Hazelwood.<sup>69</sup> A governmental informant made the tape recording. After the Sixth Circuit's decision, the prosecution moved to dismiss the case on the basis that they lacked the resources to retry it.<sup>70</sup> The prosecution's motion was granted and Hazelwood now walks free.<sup>71</sup>

The recording captured Pilot's upper-management team carousing at a lake house. The party was exclusively male; there were no women around. The gathering was part of an upper-management meeting, to discuss gas sales and pricing strategies. The men watched professional football games and drank large amounts of alcohol. Along with other slurs, Hazelwood uttered the N-word over and over again. He made baldly racist statements about fans of the Cleveland Browns and Oakland Raiders football teams. Hazelwood can be heard cackling along with a profoundly racist and misogynistic country-music song by David Allan Coe.<sup>72</sup> While showing Hazelwood some spreadsheets documenting the profits that could be made by manipulating rebate terms, a manager remarked that the song was "the best s\*\*t [he had] ever heard."<sup>73</sup>

At the trial, the defense introduced testimony that Hazelwood was a "good" businessman who would not engage in dumb or illegal business schemes, such as the one he was accused of knowing about. The prosecution introduced the tape to rebut the testimony that Hazelwood was a good businessman.<sup>74</sup> Analyzing Federal Rules of Evidence 404 and 405, the panel majority found that the tape was not relevant to show that Hazelwood was or was not a good businessman. Rather, the tape reflected his reprehensible personal and private views. After all, according to the majority, Henry Ford was an exceptional businessman who held racist, antisemitic views.<sup>75</sup> Accordingly,

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69. *Hazelwood*, 979 F.3d at 408–16.

70. Ken Otterbourg, *Mark Hazelwood*, NATIONAL REGISTRY OF EXONERATIONS (July 18, 2021), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6010>.

71. *Id.*

72. *Id.* at 402–06; Ben Axelrod, Dave DeNatale, & Jamie Satterfield, *Tapes Reveal Racist Remarks Made About Cleveland Browns by ex-Pilot Flying J President*, WKYC (Mar 8, 2018).

73. *Hazelwood*, 979 F.3d at 414.

74. *Id.* at 403–04.

75. *Id.* at 709.

the tape should have been excluded as irrelevant and as unfairly prejudicial.<sup>76</sup> Sixth Circuit Judge Bernice Donald authored a dissent, stating that the division between public and private or business and personal conduct was not clear, that the the tape was relevant to whether or not Hazelwood was a good businessman, and that the tape was also relevant to whether Hazelwood had the requisite intent to commit fraud.<sup>77</sup>

The outcome of this case is profoundly troubling. Beyond the doctrinal dispute for how the Federal Rules of Evidence should be interpreted and applied, the case is upsetting because it illustrates such an ugly style of White masculinity, ubiquitous in business and in the South. The case is a window that shows what many already know—(1) powerful White men sadistically enjoy being racist and misogynistic, and (2) this oppressive hedonism is part and parcel of U.S. corporate culture. Fueled by a mean-spirited embrace of White supremacy, this style of White masculinity originated in the antebellum law and culture that Professor McMurtry-Chubb details in her monograph. Drinking and entertaining during one's leisure time, Hazelwood is displaying the manners and behavior of the master-class planter.<sup>78</sup> Overseers were prohibited from drinking alcohol or entertaining guests.<sup>79</sup> But, in terms of social class climbing, as a mere company President (and not the Pilot Corporation's owner and not the owner of the Cleveland Browns football team), Hazelwood might also be viewed as a wage-earning overseer who has made it into the planter class, but who is psychologically afraid of losing that status. Let's break down the tableau piece by piece.

#### A. FOOTBALL AND THE PLANTATION

While at first glance, the fact that the men were watching and talking about professional football does not seem related to the plantation economy or its culture, there are connections between the sport of football and antebellum enslavement. Peppering his opinions with racial slurs, Hazelwood can be heard making fun of the fact that Cleveland Browns and Oakland Raiders (NFL teams) fans are mostly Black. Notably, Jimmy Haslam III, the son of the Pilot Corporation's founder, Jimmy Haslam II, owns the Cleveland Browns football team along with his wife Dee Haslam.<sup>80</sup> Contextually, one of the reasons the Cleveland Browns had and continue to have such a robust Black

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76. *Id.* at 408–15.

77. *Id.* at 416–26.

78. McMURTRY-CHUBB, *supra* note 6, at 69–71; *see also Hazelwood*, 979 F.3d 398.

79. McMURTRY-CHUBB, *supra* note 6, at 69–71.

80. Dave DeNatale, '100% Committed': The 10-year saga of the Haslam ownership of the Cleveland Browns, WYKC (Aug. 19, 2022), <https://www.wkyc.com/article/sports/>

fanbase is because this team was among the first to racially desegregate its players, hiring star players like Marion Mottley and Buddy Young.<sup>81</sup>

The NFL has a racism problem. Recently, Brian Flores, an NFL manager, filed a class action lawsuit charging the NFL with rife racism in its hiring practices. Paragraph four expounds on the connections between football and the plantation:

In certain critical ways, the NFL is racially segregated and is managed much like a plantation. Its 32 owners—none of whom are Black—profit substantially from the labor of NFL players, 70% of whom are Black. The owners watch the games from atop NFL stadiums in their luxury boxes, while their majority-Black workforce put their bodies on the line every Sunday, taking vicious hits and suffering debilitating injuries to their bodies and their brains while the NFL and its owners reap billions of dollars.<sup>82</sup>

Besides the extreme racial imbalance within football's managerial ranks, there are historical analogues. During slavery, for instance, masters and overseers hosted elaborate Saturday night sports contests between enslaved men from different plantations. The enslaved men demonstrated their physical prowess and the White masters and overseers frequently bet on the outcomes of the contexts. The activities were designed to promote Blacks as uniquely endowed with physical attributes best managed by White overseers. The games also drained the men of their energy “thereby reducing the level of potential threat to the slave owners and overseers.”<sup>83</sup>

In terms of masculinity, football values aggression and violence. It is the “perfect enactment of masculinity, the warrior mentality.”<sup>84</sup> However, on the field, Black players are penalized if they fail to play the sport with the requisite amount of military style regimentation

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[nfl/browns/100-committed-10-year-saga-haslam-ownership-cleveland-browns/95-8d37b3eb-b61d-442f-92a3-779499c95621](https://www.nfl.com/news/nfl-browns/100-committed-10-year-saga-haslam-ownership-cleveland-browns/95-8d37b3eb-b61d-442f-92a3-779499c95621).

81. See JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 179–180 (1st ed. 1998) (explaining why Justice Marshall rooted for the Cleveland Browns football team).

82. Complaint at 2, Flores v. The Nat'l Football League, Case No. 1:22-cv-00871 (S.D.N.Y. Feb. 1, 2022); see also Jamel K. Donnor, *Towards an Interest-convergence in the Education of African-American Football Student Athletes in Major College Sports*, 8 RACE ETHN. AND EDUC. 45, 48 (2005); Tim Cresswell, *Black Moves: Moments in the History of African-American Masculine Mobilities*, 6 TRANSFERS 12, 17 (2016).

83. Benny Carlyle Guilbeaux, *A Tale of Modern Day Exploitation: A History and Analogy of African American Collegiate Football Players at Predominately White Institutions of Higher Learning*, Master's Thesis 30 (May, 2011), available at Proquest LLC (citing Claud Anderson, *Black Labor, White Wealth* 216 (1994)).

84. Pamela R. Sailors, *Personal Foul: An Evaluation of the Moral Status of Football*, 42 J. OF THE PHILOS. OF SPORT 269, 279 (2015).



and order, as directed by football impresario Walter Camp.<sup>85</sup> When Black players popularized touchdown celebrations at the end-zone, the NFL reacted by enacting rules that prohibited excessive celebration after a touchdown.<sup>86</sup> The actual movement in a touchdown celebration threatens “traditional versions of White masculinity with what appeared to be excessive emotion, feminized bodily movements, and a degree of self-expression that appeared to work against regimented versions of teamwork that American football h[as] been built on.”<sup>87</sup> The ban on end-zone celebrations is another example of power that acts like an overseer, stepping in to police and control the labor of the Black body.

Like laboring on the plantation, playing football breaks the body. The sport inevitably leads to grievous brain injuries, chronic traumatic encephalopathy, a disease that “strangles” the brain.<sup>88</sup> That White owners, corporations, and colleges and universities continue to reel in millions of dollars from the body-breaking labor of Black football players carries the “unmistakable whiff of the plantation.”<sup>89</sup>

#### B. DAVID ALLEN COE, A SCOTS-IRISH RACIST

David Allen Coe, a country-singer, wrote the racist song that Hazelwood and his friends were listening to and singing along to. David Allen Coe styles himself as a member of the “outlaw” genre of country-music popular in the 1970’s.<sup>90</sup> However, the more famous proprietors of the genre, Willie Nelson and Waylon Jennings, are hesitant to include him in their ranks.<sup>91</sup> The song appears on an album that Coe self-released (that is, the album was not released on a major label).<sup>92</sup> Coe claimed he wrote this song (and the other offensive songs on the album) while living in Key West Florida and that the author Shel Silverstein encouraged him to record it.<sup>93</sup> Discovered by legions of fraternity brothers, Coe’s album of offensive songs lives on in dorm rooms (and apparently corporate get-togethers) every year.<sup>94</sup>

David Allen Coe represents the modern day, Scots-Irish overseer. Though not performed by him, Coe’s most popular song is entitled

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85. Cresswell, *supra* note 77 at 18.

86. *Id.* at 17.

87. *Id.* at 18 (citation omitted).

88. Sailors, *supra* note 79, at 270–71.

89. *Id.* at 276.

90. Neil Strauss, *Songwriter’s Racist Songs From 1980’s Haunt Him*, N.Y. TIMES, Sept. 4, 2000.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

“Take This Job and Shove It.”<sup>95</sup> Scholars have identified “Take This Job and Shove It” as an exemplary artifact demonstrating the Scots-Irish ethos of individualism and distrust of authority.<sup>96</sup> As explained above, within David Hackett Fisher’s cultural taxonomy, the plantation owner descends from the Cavaliers, while the overseer is Scots-Irish. Whether the overseer privately expressed disdain for the more upper-class plantation owner, we do not know, but we can infer that the Scots-Irish disdain for authority and embrace of a common-man mentality was reinforced by the relationships between the 38,000 overseers and their bosses that existed in the U.S. in 1860.

There are frequent celebrations of the Scots-Irish and their contributions to American culture—Andrew Jackson, Ronald Reagan, and Bill Clinton all count as Scots-Irish.<sup>97</sup> These narratives split Whiteness into variegated pieces, celebrating the more egalitarian Scots-Irish as an alternative to the WASP (White Anglo-Saxon Protestant, mostly Anglican and Puritan) establishment and planter class. The Scots-Irish narrative also challenges the concept of White privilege. The rural poverty experienced by Scots-Irish descendants living in Appalachian is often used to show how the benefits of White privilege does not apply to everyone. However, this type of Whiteness narrative obscures the historical fact that the Scots-Irish, though more egalitarian than the East Coast WASP’s, were nonetheless deeply ensconced within White supremacy. Andrew Jackson and David Allen Coe are both racists with little to celebrate.

The cultural DNA of both the planter and the overseer are visible here. Hazelwood’s planter descent is visible in the alcohol-fueled, all-male party at a lake house mansion. Hazelwood’s overseer descent is visible in his performative rebelliousness, aligned with Scots-Irish culture and undertaken at the expense of women and Black people. In joyously singing along to this particular David Allan Coe song, Hazelwood and his friends luxuriated in a rebellious individualism that celebrated White supremacy. The song and its composer represent a Scots-Irish influence. It is likely that this Scots-Irish culture similarly animated the mindset of the lower-middle class/middle-class plantation overseer.

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95. *Take This Job and Shove It*, WIKIPEDIA (April 15, 2022, 23:24 UTC), [https://en.wikipedia.org/wiki/Take\\_This\\_Job\\_and\\_Shove\\_It](https://en.wikipedia.org/wiki/Take_This_Job_and_Shove_It).

96. Ronald R. Stockton, *Are the Evangelicals an Ethnic Group? Thoughts on Scots-Irish Politics* 12 (draft paper July 2, 2010), available at <https://deepblue.lib.umich.edu/bitstream/handle/2027.42/110131/EvangelicalEthnic2013.pdf;sequence=1>.

97. WEBB, *supra* note 55, at 10, 287–88.

## C. PERSONAL AND BUSINESS CONDUCT, A FALSE DICHOTOMY

During the party that was surreptitiously taped, a lower-level manager showed Hazelwood spreadsheets detailing manipulated rebate pricing strategies while also remarking that the David Allen Coe song was the “best s\*\*t [he had] ever heard.”<sup>98</sup> And yet, the Sixth Circuit held that Hazelwood’s behavior related to his personal views, not his business acumen.<sup>99</sup> It was not relevant to the Court for the question of whether he had the type of character to engage in the fraudulent rebate scheme.

Giving Hazelwood the benefit of having personal, or private thoughts that exist separately from a public/business purpose is a privilege that can be traced to the plantation. If we categorize Hazelwood as a modern-day planter, he is entitled to privacy, to entertain, and to drink alcohol. His adherence to moral standards is “already assumed.”<sup>100</sup> In this way, the Sixth Circuit’s decision to categorize Hazelwood’s conduct, captured on tape, as personal and not related to his business would be to treat Hazelwood as a planter.

If we situate Hazelwood as an overseer, then there is no privacy and there is no personal time. The overseer’s work is never finished; he is always surveilling and exhorting the enslaved labor force. While he is not personally surveilled, his job operates as a kind of universal surveillance, ensuring that he is always doing the plantation owner’s work.<sup>101</sup> Categorizing Hazelwood’s behavior at the management party as business behavior would be to treat him more like an overseer.

The problem with both of these options is that for the plantation owner and the overseer, the behavior behind closed doors should be considered a blend of private and public conduct. The plantation owner’s lavish entertaining, and drinking would have reinforced the social capital that greased the wheels of racial capitalism’s cotton economy. Hosting dinners and drinks for other master class men most certainly created an uninhibited atmosphere conducive for the planter’s trade and business. Similarly, a CEO’s attendance at an upper management meeting, albeit with entertainment going into the night, still greased the wheels of commerce (and, in this case, fraud). At the party, Hazelwood looked at spreadsheets showing how profits could be increased by manipulating the numbers. Then, at the same place and the same time, he laughingly uttered and sang racial slurs. The boozy, uninhibited atmosphere—masculine and devoid of all kindness toward people of color and women—supports the inference

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98. *Hazelwood*, 979 F.3d at 414.

99. *Id.* at 409–16.

100. McMURTRY-CHUBB, *supra* note 6, at 89.

101. *See id.* at 43–44, 52, 66–67.

that Hazelwood and the others in attendance had the mindset to knowingly adopt the fraudulent rebate scheme.

On the other side of both the overseer and the planter were the lives of the enslaved, who received absolutely no privacy whatsoever. Southern enslavers and the Southern States constantly surveilled enslaved people, subjecting them to “seemingly unceasing surveillance, to ensure their subordination to the planters who owned them and the overseers who managed them.”<sup>102</sup> Unable to find any enclaves, enslaved people were subjected to all manner of violence, physical and sexual, “[b]ehind closed doors, in outbuildings, or in the woods at the margins of the fields, the choreography of service, surveillance, and space.”<sup>103</sup> Moving forward to today, racial profiling by the police and the calling of police by White people for innocuous activity illustrate that Black people are still surveilled at a rate that vastly exceeds White people. This is another connection to the plantation.

Part of what makes this case so troubling is the rapid way that the Sixth Circuit categorized Hazelwood’s heinous conduct as personal and private, unrelated to his business character. Historically, individuals residing below the master class had few chances to even argue for this kind of haven—for private moments and private thoughts. Granting the CEO of the Pilot Corporation this space, without delving deeper into the public/private dichotomy, is the largest error in the case’s reasoning. The court incorrectly assumed that the tape recording had no bearing on Hazelwood’s virtuousness as a businessman.

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102. *Id.* at 41.

103. JOHNSON, *supra* note 23, at 170.

