THE DECLARATION OF INDEPENDENCE AND THE U.S. CONSTITUTION: A POLICY-ORIENTED ANALYSIS

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Introduction

Seminal events in American history – indeed the history of the world – are measured by dates: August 1619[1]; July 4, 1776[2]; January 1, 1863[3]; June 19, 1865[4]; December 6, 1865[5]; June 13, 1866[6]; February 3, 1870[7]; 1954[8]; 1964.[9] These are a few of the dates etched into the annals of American life that hold resonance and provide starting and end points for people of African descent, particularly descendants of enslaved Africans, and their range of statuses on American soil. The dates that probably represent the problématique of America's promise

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[1] NIKOLE HANNAH-JONES, THE 1619 PROJECT: A NEW STORY ORIGIN 9-10 (Caitlin Roper et al. eds., 1st ed. 2021) ("In August 1619, just twelve years after the English settled Jamestown, Virginia, one year before the Puritans landed at Plymouth, and some 157 years before English colonists decided they wanted to form their own country, the Jamestown colonists bought twenty to thirty enslaved Africans from English pirates. The pirates had stolen them from a Portuguese slave ship whose crew had forcibly taken them from what is now the country of Angola.").

[2] The day the Continental Congress adopted the Declaration of Independence.

[3] The day the Emancipation Proclamation, ostensibly freeing enslaved people of African descent, was signed.

[4] On June 19, 1865, now celebrated as Juneteenth, a national holiday, 2,000 Union troops arrived in Galveston Bay, Texas and announced that the more than 250,000 enslaved Black people in the state were free by executive decree.

[5] The day the 13th Amendment, abolishing chattel slavery, was ratified.

[6] The day the 14th Amendment, granting American citizenship to enslaved Africans born on American soil, was ratified.

[7] The day the 15th Amendment, granting Black men the right to vote, was ratified.

[8] Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483 (1954) (holding that the "separate but equal" doctrine proclaimed in *Plessy v. Ferguson*, 163 U.S. 537 (1896) was unconstitutional. *Brown* led to the Supreme Court striking down Jim Crow segregation laws in other areas, in addition to education.).

[9] Civil Rights Act of 1964 § 701, 42 U.S.C. § 2000d *et seq.* (1964).

to people of African descent are July 4, 1776, when the Continental Congress adopted the Declaration of Independence as a rallying cry to break the bonds of British domination over its colonies, and when the 13th, 14th, and 15th Amendments to the U.S. Constitution were ratified. These dates also represent the panoply of the newly formed colonial government's interactions with Blacks. However, these dates must be juxtaposed against the context of when, why, and how America's governing documents were drafted, adopted, and/or ratified.

Thomas Jefferson and other drafters of the Declaration and Constitution, the progenitors of "the law" in the newly proclaimed America, are viewed by some as heroes and by others as some of the biggest hypocrites in American history, as Jefferson and many of the signers of the Declaration owned slaves.[10] In any event, Jefferson, the principal drafter of the Declaration, is acclaimed for his eloquent words that rallied the colonists to seek their own representative government.

Using elements of policy-oriented jurisprudence[11] analysis, this article will briefly address how and why positive and common law during America's founding paved the way for many of the social, economic, and political imbalances of the past that continue today. It will also address how the Declaration and Constitution were elasticized ultimately to bestow rights and privileges to Blacks, women, other lin-

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[10] Twelve of the first eighteen American presidents owned slaves: George Washington, Thomas Jefferson, James Madison, James Monroe, Andrew Jackson, Martin Van Buren, William Henry Harrison, John Tyler, James K. Polk, Zachary Taylor, Andrew Johnson, and Ulysses S. Grant. Jefferson, however, owned the most slaves – 600 human beings.

[11] HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992); Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959); Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1967); and MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961) (Yale Law School professor Myres S. McDougal collaborated with Professor Harold D. Lasswell, one of the founders of communications theory, in analyzing how communications affect and influence behavior and how law is influenced by such communications as an important element in the development of policy-oriented jurisprudence.).

guistic minority groups and inanimate, fictitious entities – corporations.[12] Policy-oriented jurisprudence provides a tool with which to analyze why Blacks have not realized the promises of the Declaration and certain other constitutional rights. Policy-oriented jurisprudence also provides a way forward to ensure that these promises are realized.

Slaves, enslaved Africans, Coloreds, Negroes, Blacks, and African Americans are terms used to encompass the racial and/or skin colorations of people who were and are, in many instances, categorized as being members of the Negro "race." Herein lies the crux of a social problem in America, indeed in the global community. Categorizing people as a "race" based upon outward phenotypical appearances has no basis in biology or any other natural science. Race, as it has become known and used, is nothing more than a social construct. In America, it is also a political construct that has been used to subjugate, dehumanize, and deny basic civil, political, and human rights to Blacks. The institution of chattel slavery as a social problem and its attendant consequences on the collective American psyche, despite many current attempts to rewrite history,[13] still haunt American life

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[12] Santa Clara Cnty. v. S. Pac. R. Co., 118 U.S. 394 (1886) (defining in a headnote that corporations are persons with the same rights as individuals under the 14th Amendment's equal protection clause).

[13] Several school boards and states have proposed or passed policies and/or legislation banning the teaching of critical race theory (CRT) in schools, colleges and universities, arguing that CRT attributes racism to white people. This is gaslighting, dog whistles and propaganda at their best. Opponents of CRT are attempting to rewrite history by downplaying that slavery and its attendant pernicious effects ever happened or were not that bad. *See* Brian Lopez, *State education board members push back on proposal to use "involuntary relocation" to describe slavery*, THE TEXAS TRIBUNE, June 30, 2022, https://www.texastribune.org/2022/06/30/texas-slavery-involuntary-relocation/. As Kimberly Crenshaw, one of the originators of CRT stated, "[CRT] is an approach to grappling with a history of white supremacy that rejects the belief that what's in the past is in the past, and that the laws and systems that grow from that past are detached from it." Candy Lang, *President Trump Has Attacked Critical Race Theory. Here's What to Know About the Intellectual Movement,* TIME.COM, Sept. 29, 2020, https://time.com/5891138/critical-race-theory-explained/. "Simply put, critical race theory states that U.S. social institutions (e.g., the criminal justice system, education system, labor market, housing market, and healthcare system) are laced with racism embedded in laws, regulations, rules, and procedures that lead to differential outcomes by race." Rashawn Ray, *Why are states banning critical race theory*? The Brookings Institute, Nov. 2021,

more than 400 years after those stolen Africans were sold into bondage on a Jamestown wharf.

Social problems with both domestic and international implications are rarely resolved in simple terms. It may be trite to state that today's world is more complex than ever before. However, the nostalgic longings for the "good ole days," to "Make America Great Again," and other xenophobic, homophobic, and anti-women's rights' dog whistles do not mean that the "good ole days" were without their own measure of complexity when viewed in their relevant historical, temporal framework. But the past, as a benchmark for clinging to how things used to be and ought to be today, as Myres S. McDougal so aptly stated, "is a time which has gone forever."[14]

Technological advances in the sciences, medicine and communications have created a world in which certain simplicities of the "good ole days" are long gone. Thus, today's complex world, while from objective standards has resulted in increased life expectancy, raised standards of living (for those who have the adequate means to access the basic necessities of life beyond daily sustenance and minimal shelter), carries with it great advancements for humankind as well as unparalleled challenges. Today's social problems are more complex, interdependent, and interrelated, while the difficulty in solving these problems rests only in the hearts and minds of men.

While policy-oriented jurisprudence, or the New Haven School of Jurisprudence (NHS), was initially developed by McDougal and Lasswell to solve international law issues, the NHS methodology can be utilized to solve complex domestic problems as well. Today's world is interdependent and interconnected, not just international in scope. America's domestic social problems are also interdependent and interconnected with international ramifications. Professor W. Michael Reisman advocates using the NHS methodology to solve these complex problems.

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https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/.

[14] Myres S. McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 YALE L.J. 1345, 1348 (1947) (hereinafter McDougal, *The Law School of the Future*).

> Life is complex. … NHS has developed an economical way of comprehending, addressing and devising strategies that seek to change it. … NHS is not an easy system to apply. This is not the intellectual approach of fast food and those who seek short cuts, who are impatient and who are willing to live in an illusion that the world is simpler, should not look to this method. It requires of those who use it patience, responsibility, a willingness to acknowledge the complexity and difficulty of the problems presented and the courage to make explicit statements of goal.[15]

Policy-oriented jurisprudence is traced to a rejection of positivism by the legal realists in the 1920s and 1930s. McDougal favored legal realism because "positivism failed to take into consideration the difference between law in theory and law in practice."[16] He replaced legal realism with policy-oriented jurisprudence because he viewed it as more responsive to today's current problems,[17] arguing that legal realism could not adequately respond to "the opportunities and obligations of our time."[18] More specifically, McDougal argued that policy-oriented jurisprudence applies the "best existing scientific knowledge to solving the policy problems of all our communities."[19] With Lasswell's input, policy-oriented jurisprudence adapted the analytical methods of the social sciences to the prescriptive purposes of the law.[20]

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[15] W. Michael Reisman, Panel Remarks, *McDougal's Jurisprudence: Utility, Influence, Controversy,* April 26, 1985, in 79 PROC. AM. SOC'Y INT'L L. 266, 280 (1985).
[16] Michael N. Schmitt, *New Haven Revisited: Law, Policy and the Pursuit of World Order: A Review of Lung-chu Chen's An Introduction to Contemporary International Law: A Policy-Oriented Perspective*, 1 USAFA J. LEG. STUD. 185 (1990).
[17] *See generally* W. Michael Reisman, *A Theory About Law from the Policy Perspective, in* LAW AND POLICY 75 (D. Weisstub ed., 1976) (discussing the reasons why McDougal parted with legal realism).
[18] McDougal, *The Law School of the Future*, *supra* note 14, at 1349.
[19] *Id.*
[20] Myres S. McDougal, *Remarks by McDougal*, 1947 PROC. AM. SOC'Y INT'L L. 47 (McDougal's approach to law stressed the importance of studying "how people use words," "how the human mind works," the "variables that affect the official behavior," and knowing "who is using these principles of international laws, these recognized doctrines, in what context, to get what results, with respect to whom.").

The seminal distinction between law as positivists view it and law as viewed by policy-oriented scholars is that positivists focus on "existing rules" emanating solely from entities deemed to have the sovereign authority to make or prescribe rules.[21] Positivism does not consider how law is made, applied, and changed. Under positivism, law "remains fixated in the past,"[22] where lawyers try to reap meaning from the words ("find" the law) irrespective of the context in which the "law" was written in order to resolve a problem that may have arisen in a totally different context.[23] Policy-oriented jurisprudence, unlike positivism, identifies the conditioning factors that went into creating the law (a past decision) and considers "the personality, political inclinations, gender and cultural background of the decision makers, as well as the mood of the times, and other societal factors"[24] that influenced laws. Jefferson relied on custom, common law, and positive law in drafting the Declaration.

What, Exactly, is Law?

Pursuant to the New Haven School, law is an authoritative and controlling response to conflicting claims in society.[25] Communication is at the heart of this decision process, and it is through such communication that the New Haven School seeks to resolve conflicting claims in society. In policy-oriented jurisprudence, only those decisions, i.e., communications with *policy content* that are taken from communitywide perspectives of *authority* and backed up by *control intent*, are characterized as law.[26] Decision makers are selected through a process of communication, and as the internal structure expands, contracts, or changes, so can the decision makers. Jefferson and

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[21] Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT'L L. 316, 320 (1999) (hereinafter Wiessner & Willard, *Human Rights Abuses in Internal Conflict*).
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *See generally*, Eisuke Suzuki, *The New Haven School of Jurisprudence and Non-State Actors in International Law in Policy Perspective*, 45 (Feb. 20, 2013), oai.kwansei.repo.nil.ac.jp.00021929.
[26] Wiessner & Willard, *Human Rights Abuses in Internal Conflict, supra* note 21, at 319.

the drafters of the founding documents were the decision makers of the time. The members of the executive, legislative, and judiciary branches are also decision makers, as now given authority under the Constitution.

Under policy-oriented jurisprudence, the function and purpose of law is to "serve human beings."[27] It should serve "our needs and our aspirations – particularly our aspirations."[28] In constructing law to serve human beings, the New Haven School crafted "tools to bring about changes in public and civic order that will make them more closely approximate the goals of human dignity which [the New Haven School] postulates."[29]

The New Haven School's approach to resolving problems, be they domestic or international, is to employ five intellectual [tools] tasks, which allow a rational, interdisciplinary analysis. These five tasks are:

> 1. [to identify] the parameters of the social ill or problem the law has to address [delimitation of the problem and goal clarification];
> 2. to review the conflicting interests or claims;
> 3. to analyze the past legal responses in light of the factors that produced them;
> 4. to predict future such decisions; and
> 5. to assess the past legal responses, invent alternatives and recommend solutions better in line with a good order, a preferred order we termed a "public order of human dignity."[30]

The five intellectual tasks have also been described as follows: (1) Goal Clarification; (2) Trend Analysis; (3) Factor Analysis; (4) Predictions; and (5) Invention of Alternatives.[31] Lawyers and decision

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[27] Siegfried Wiessner, *The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law*, 18 ASIA PACIFIC L. REV. 45, 51 (2010) (hereinafter Wiessner, *New Haven School of Jurisprudence*).
[28] *Id.*
[29] *Id.*
[30] *Id.* at 48 *et seq.*
[31] W. Michael Reisman*, The View from the New Haven School of International Law*, 86 Am. Soc'y Int'l Proc. 118, 123-24.

makers employ these five tasks, implicitly or explicitly, when making decisions.[32] In explaining the New Haven School, Professor Siegfried Wiessner urges us to look "at possible outcomes of the decision making process on a particular issue and recommends choosing the decision that would maximize access by all to the things humans want out of life."[33] These human wants are categorized into the following eight values or essential human strivings:

> 1. Respect – Freedom of choice, equality and recognition;
> 2. Power – Making and influencing community decisions;
> 3. Enlightenment – Gathering, processing and disseminating knowledge;
> 4. Well-being – Safety, health, and comfort;
> 5. Wealth – Production, distribution, and consumption of goods and services, control of resources;
> 6. Skill – Acquisition and exercises of capabilities in vocations, profession, and the arts;
> 7. Affection – Intimacy, friendship, loyalty, positive sentiments;
> 8. Rectitude – Participation in forming and applying norms of responsible conduct.[34]

The New Haven School recognizes that "[a]ny solution to [a] societal problem should ideally provide everybody with maximum access to the processes of shaping and sharing of all of these things humans value,"[35] and want out of life, and not things that others determine are needed.

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[32] John Moore Norton, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662, 674 (1968).
[33] Wiessner, *New Haven School of Jurisprudence, supra* note 27.
[34] MYRES S. MCDOUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS IN WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 85 (Yale Univ. Press, 1980). (This is not a closed list. More importantly, these eight values are not within the exclusive domain or province of the cultural superior, wealthy, or politically elite. They transcend culture, national boundaries, and political doctrines.).
[35] Wiessner, *New Haven School of Jurisprudence*, *supra* note 27, at 52.

Criticisms of the New Haven School

According to McDougal and Lasswell, "[n]one who deals with law, however defined, can escape *policy* when policy is defined as the making of important decisions which effect the distribution of values."[36] Some critics claim that the New Haven School's approach is an intrusion of politics into the realm of "law,"[37] and that it "conflat[es] law, political science and politics, pure and simple."[38] All law, however, is political. Jefferson acknowledged that he infused politics into the Declaration. The critiques that the New Haven School conflates law with politics and policy fail to consider how law is made, and how the Declaration was made. From the beginnings of the common-law Anglo-American legal tradition, which is based on precedent, *stare decisis,*[39] policy has always had an impact on law making.

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[36] *See* Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L J. 207 (1943) (discussing the state of legal education in law schools and the dearth of curriculum tied to the linkages between policy and law and the social sciences and law).

[37] *See* Tai-Heng Cheng, *Positivism, New Haven Jurisprudence, and the Fragmentation of International Law,* DIGITAL COMMONS @ U.M. CAREY LAW, ICLC Nov. 8, 2009, https://digitalcommons.law.umaryland.edu/iclc_papers/8.

[38] Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 305 (1999); *cf.* Oscar Schachter, *Panel Remarks, McDougal's Jurisprudence: Utility, Influence, Controversy, April 26, 1985, in* 79 PROC. AM. SOC'Y INT'L L. 266, 267 (1985).

[39] *See stare decisi*s, a Latin term that means "to stand by things decided," has been a bedrock principle in Anglo-American common law and a guiding principle in the court system. *Stare decisis* states that a court should follow precedent established by previously decided cases with similar facts and issues to provide certainty and consistency in the administration of justice; *see also* Dobbs v. Jackson Women's Health Organization, 597 U.S., 2022 WL 2276808; 2022 U.S. LEXIS 3057 (the Supreme Court abolished a women's right to privacy as set forth in *Roe v. Wade*. Fifty years of precedent were extinguished.); Merrick B. Garland, *Attorney General Merrick B. Garland, Statement on Supreme Court Ruling in Dobbs v. Jackson Women's Health Organization*, June 24, 2022, https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-statement-supreme-court-ruling-dobbs-v-jackson-women-s ("The Supreme Court has eliminated an established right that has been an essential component of women's liberty for half a century – a right that has safeguarded women's ability to participate fully and equally in society. And in renouncing this fundamental right, which it had repeatedly recognized and reaffirmed, the Court has upended the doctrine of *stare decisis*, a key pillar of the rule of law."); *see also* Devin Dwyer, *After Roe ruling, is 'stare decisis' dead? How the Supreme Court's view of precedent*

In a tripartite system of law – the legislature, the executive, and the judiciary – the legislature is the "law making" body. Simply put, legislators are politicians charged with making policy, which becomes institutionalized through law. Politicians, policy, and law are all in the same realm.

Policy-oriented jurisprudence, for all its criticism, provides indispensable tools for addressing current social problems. It encourages the decision maker to consider various factors and values in fashioning a resolution to a problem. Policy-oriented jurisprudence provides a tool to analyze the Declaration and founding documents within their historical context. It also provides a tool to rectify the damages caused to the American psyche by the scourge of slavery and the legally sanctioned debasement and dehumanization of slaves and their descendants.

Utilizing Policy-Oriented Jurisprudence to Resolve America's Dilemma Created by Slavery

In proffering a solution to today's societal problems with race as the underpinning glue, the New Haven School recognizes that the problem is multi-faceted and complex. The New Haven School offers an interdisciplinary[40] and comprehensive approach to arriving at a resolution to the racial conundrum that still impacts American life. Human dignity is critical to understanding why and how law should be, as it should advance a public order of human dignity. The interdisciplinary nature of the inquiry into the problem allows one to consider the entire playing field, the players, the conflicting claims, and the context in which they arise.[41] McDougal and Lasswell provided decision makers with a set of tools that could be utilized to answer any given domestic or international policy problem in a manner that promoted obtaining a world order founded on fundamental principles of human dignity. Human dignity is the linchpin of policy-oriented jurisprudence.

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is evolving, ABC NEWS, June 24, 2022, https://abcnews.go.com/Politics/roe-ruling-stare-decisis-dead-supreme-court-view/story?id=84997047.

[40] Wiessner, *New Haven School of Jurisprudence, supra* note 27, at 48.

[41] Wiessner & Willard, *Human Rights Abuses in Internal Conflict*, *supra* note 21, at 332.

To summarize: policy-oriented jurisprudence challenges traditional modes of thinking about what constitutes law and how it is made. More importantly, policy-oriented jurisprudence places human beings at the core of law's primary and optimal purpose, which is to serve human beings,[42] not only in their local communities, but the world. Applying a policy-oriented jurisprudence analysis provides an intellectual framework that is comprehensive, interdisciplinary, and allows the development of solutions which foster the flourishing of all.[43] It enables decision makers to make informed decisions that are in the best interest of the community.

Understanding the Declaration from a Policy-Oriented Jurisprudence Perspective

Unless we know how a problem originated, it is difficult to discuss ways to address it. Policy-oriented jurisprudence starts with the delimitation of the problem as characterized by a discrepancy between predicted and desired future decisions regarding conflicting claims on any issue in society. It suggests that the problem or issue needs to be defined precisely and comprehensively in its relevant context, using all available resources or knowledge.

Under a policy-oriented jurisprudence analysis, certain social, economic, external, and internal political factors affected the drafting and passage of the foundational documents of this nation. There have been extensive analyses and criticisms about several phrases in the following section of the Declaration:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.[44]

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[42] W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575, 580 (2007) (The New Haven School "starts from the premise that law should serve human beings.").
[43] *Id.* at 577.
[44] THE DECLARATION OF INDEPENDENCE (June 4, 1776).

Blacks, formerly enslaved and free, have argued that the Declaration's "self-evident" truths that "*all men are created equal"* applied to them as well. Other historians have argued that this phrase, by the very nature of who wrote it, when, and why it was written could not have applied to Blacks, whether free or enslaved.[45] Under policy-oriented jurisprudence, in order to understand how and why this particular text was not drafted to include Blacks, one needs to understand the background of the Declaration's principal drafter, Thomas Jefferson. The reason why he penned these words, the mood of the times in which the Declaration was written, and the power and political structure between the colonists and Britain are essential topics to consider. This analysis must be done with the next phrase as well, i.e., "*endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness*."[46] Likewise, this analysis is applicable to the Constitution.

Frederick Douglass asserted that the Negro is "self-evidently a man, and therefore entitled to all the rights and privileges which belong to human nature."[47] He referred to the Constitution as "inhuman, unjust, and affronting to God and man."[48] While one cannot take umbrage with Douglas' denunciation of America's founding documents, under policy-oriented jurisprudence, Douglas and other enslaved and free Blacks are claimants existing within the American political, legal, and social landscape. They advanced conflicting claims against Jefferson and other drafters, their intended audience – the fellow colonists who were needed to support the political, legal, social, and cultural break with Britain, and the decision makers down the line, who had to enforce, apply and/or interpret the documents. Simply put, slaves and former slaves were not part of the intended audience. They were never meant to have social, economic, and political parity with whites.

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[45] Emma Rodman, The Idea of Equality in America 67-68 (2020) (Ph.D. dissertation, University of Washington) (on file with the University of Washington Library).

[46] THE DECLARATION OF INDEPENDENCE (June 4, 1776).

[47] Frederick Douglass, *Prejudice against Color*, THE NORTH STAR, June 13, 1850, at 2 (Frederick Douglass escaped slavery and became one of the greatest abolitionists in the anti-slavery movement and a staunch supporter of the women's suffrage movement).

[48] Frederick Douglass, *The Constitution and Slavery*, THE NORTH STAR, Mar. 16, 1849, at 2; FRANCIS D. ADAMS & BARRY SANDERS. ALIENABLE RIGHTS: THE EXCLUSION OF AFRICAN AMERICANS IN A WHITE MAN'S LAND, 1619-2001 (2003).

"To understand what equality meant in the Declaration . . . requires understanding the context and intent of the document's production."[49] Understanding "the meaning of the idea of equality in the Declaration of Independence requires a contextualizing account of antecedent and hierarchical colonial society, law, politics, and relations to the metropole."[50] When the Declaration was written, equality as it was defined then provides an insight into why Jefferson thought as he did. Next, one must understand the import and purpose of the Declaration. It was a petition written to address the colonists' grievances against Britain, and thus to gather support for the colonists forming their own sovereign nation.

> [T]he revolution that occurred . . . was the unintended consequence of a dispute about law. . . . In particular, it was a dispute between two camps about how to interpret the British constitution on the question of whether colonial legislatures – and thus by extension, colonial citizens – possessed equal standing with the British Parliament.[51]

Equality, as a right of all men, did not exist under the English unwritten constitution. In British society, cultural, social, and political status were hierarchical. Not all men were considered to have the same legal, social, and political rights. Citizenship was only for men who owned significant real property, "because they alone were trusted to be independent and interested in the public good."[52] Under English common law, those who had certain legal rights, such as voting, were limited to non-Catholic male, real property owners.[53]

To argue that the Declaration was based upon egalitarian principles is fallacious. Britain did not embrace egalitarianism. The equality that Jefferson wrote about in the Declaration could not have been egalitarian. Consequently, the English notion of equality, liberty, and the hierarchy embedded in the English constitution, just like chattel

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[49] Rodman, *supra* note 45, at 13.
[50] *Id.* at 15.
[51] *Id*. at 16.
[52] *Id*. at 19.
[53] *Id*.

slavery, was exported to the colonies. Additionally, unlike in Britain, the colonists had to contend with indigenous populations, slave codes, and governmental domination by a nation thousands of miles away.[54] Colonial life, by virtue of the location, required the colonists to adapt to situations that did not exist in Britain. Land ownership, which governed the status of men in Britain socially, culturally, and politically, was more accessible in the colonies. Men who would have been commoners in Britain were able to acquire land. With land being the bedrock of social status, wealth, and power, more colonists were able to amass all three. In the colonies, land ownership led to a "wider dispersion of political and legal status and power."[55]

The colonists had conflicting claims against Britain and against their property – slaves – and the Indigenous peoples who found themselves hostage in their own land. Contextualizing the phrase, "all men are created equal," requires a paradigm shift, which is what policy-oriented jurisprudence does in looking at the backgrounds of the decision makers and the mood of the times in which the decisions were made. In doing so, one should not ponder how Jefferson and the other signers of the Declaration could own slaves and, yet seek "life, liberty, and the pursuit of happiness" only for slave owners and white men. There is no paradox in Jefferson's character, nor is there a contradiction in what the colonists sought for themselves and denied to the humans they held in bondage. Similarly, there is no paradox in American history, there are only facts.

The fact that chattel slavery in America was horrific, brutal, dehumanizing, and based upon a fallacious unscientific notion that Blacks were inferior and created to be subservient to whites, is not surprising. The Catholic Church, through the "doctrine of discovery" and papal edicts, considered all non-Catholics as pagans and therefore apt subjects of subservience to Catholic men.[56] This subservience,

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[54] *Id.* at 20.

[55] *Id*.

[56] FRANCES G. DAVENPORT, EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES 23 (4th ed. 1917) (The Doctrine of Discovery can be traced to Pope Nicholas V's issuance of the papal bull *Romanus Pontifex* in 1455, which gave Portugal's King Alfonso V permission *to invade, search out, conquer, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies of Christ wheresoever placed, and the kingdoms, the dukedoms, principalities, dominions, possessions, all movable and immovable goods whatsoever held and*

while initially not based upon race, was, nonetheless, the basis for determining which groups of human beings were entitled to be considered "equal" to white men. Such is, unfortunately, still too common throughout today's world. Our visual differences still have humankind locked in age-old, antiquated ideas that have too many of us self-flagellating ourselves over tribal allegiances based upon national origins, religious ideologies, political ideologies, and other dogmas that reject humankind's interconnectedness and interdependence in today's global world.

The beauty of the Declaration is that, as "law," the Declaration could not remain static – fixed in time. People with conflicting claims used the words in the Declaration to pursue their "unalienable rights" and human rights. Shortly after Jefferson penned his words and the Constitution was ratified, early Black activists and other abolitionists used these documents "to construct a national identity for all men and call[ed] for basic civil liberties for the oppressed through their employment of the jeremiad."[57] As James Forten writes in 1813, when the Founding Fathers "adopted the glorious fabrick of our liberties, and declaring 'all men' free, they did not particularize white and black, because they never supposed it would be made a question whether we were men or not."[58]

Jefferson and the Five Intellectual Tasks

As delineated above, there are five intellectual tasks that policy-oriented jurisprudence employs to solve complex problems. Policy-oriented jurisprudence mandates that, prior to framing or identifying what social problem needs to be resolved, the problem solver must

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possessed by them and to reduce their persons to perpetual slavery.); *see generally* Steve Newcomb, *Five Hundred Years of Injustice: The Legacy of Fifteenth Century Religious Prejudice*, INDIGENOUS L. INST., http://ili.nativeweb.org/sdrm_art.html (last visited July 30, 2022).

[57] Willie J. Harrell, Jr., *We Hold these Truths to be Self-evident: Characteristics of African American Jeremiadic Discourse, 1770-1850*, 50 CLA J. 395, 396 (June 2007) (defining Jeremiadas "a long, mournful complaint or lamentation; a list of woes.").

[58] *Forten, James (1766-1842) Letters from a man of colour, on a late bill before the Senate of Pennsylvania,* GILDER LEHRMAN INST. OF AM. HIST., https://www.gilderlehrman.org/collection/glc06046 (last visited Mar. 28, 2023).

first clarify her observational standpoint. The New Haven School challenges the person addressing a problem, known in New Haven School's parlance as "the observer," whether she is a scholar, domestic lawyer, or decision maker to recognize that, in law, objectivity is a "myth." Therefore, the observer must first know herself.[59] This is done by "examining one's standpoint and commitments and in particular, by scrutinizing the psychological and emotional factors that operate on the self."[60] The observer, like the decision maker, is both a product of the social process that created her environment, as well as a participant in that very process.[61]

Jefferson's Observational Standpoint

Jefferson was both an observer and a decision maker. Jefferson, college-educated at William and Mary, a lawyer, and a slave owner, was a part of America's "landed gentry."[62] His writings revealed that he conducted a self-introspection to ascertain the societal and environmental factors that may have influenced how he defined the problem, researched it, analyzed it, and ultimately resolved it. Jefferson, despite his age and lack of experience, was chosen for this task, rather than someone like John Adams, for the following reasons: (1) he was a Virginian, a Southerner, and he would give credibility to the independence movement, which "needed the support of one of the oldest and finest colonies … so that independence would seem the project of the entire nation, not just that of the zealous New England"[63]; (2)

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[59] "To thine own self be true." This is Polonius' last piece of advice to his son Laertes in WILLIAM SHAKESPEARE, HAMLET, act 1, sc. 3.

[60] W. Michael Reisman, *supra* note 15.

[61] Eisuke Suzuki, *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence*, 1 YALE STUD. WORLD PUB. ORD. 1, 12 (1974).

[62] THE DAILY MINING GAZETTE (Jun. 18, 2020), https//mininggazette.com/opinion/columns/2020/06/politicians-bought-by-the-middling-sort-founding-fathers-feared/.

[63] Andrei Cursaru, The Genesis of the Declaration of Independence: Difficulties Drafting the Human Rights Claims of "Life, Liberty and Pursuit of Happiness", Thesis, at 16-17 (Feb. 17, 2015), https://www.researchgate.net/publication/332345305_The_Genesis_of_the_Declaration_of_Independence_-_Difficulties_Drafting_the_Human_Rights_Claims_of_Life_Liberty_and_Pursuit_of_Happiness (referencing ROGER WILKINS, JEFFERSON'S PILLOW: THE FOUNDING FATHERS & THE DILEMMA OF BLACK PATRIOTISM 46 (2002)).

he was less obnoxious and not as unpopular as John Adams; and (3) he was a better writer than Adams, well-educated with a "reputation for literature, science and a happy talent for composition."[64]

Humans are social beings; we form who we are through various processes of socialization. Socialization begins at the micro level with the family unit, our nuclear group, and later expands to larger groups, units, and communities. Continued socialization results in shaping the observer's predisposition over time through variables, such as (1) the identifications the observer establishes in her relationship to other individuals and groups; (2) her demands for preferred interests, including those involved in the problem under inquiry; and (3) her expectations about her own losses and gains.[65] These variables shape the observer's perspectives, attitudes, and standards of behavior through her socialization process, which occurs in the context of various groups. Throughout her life, the observer will come in contact with and be a part of numerous groups, i.e., the nuclear family, national origin groups, racial, linguistic, cultural, and religious majorities/minorities within a city, state, country, or geographical region. As the observer moves in and out of these groups, her perspectives, attitudes, and behaviors are shaped by these group associations based upon her level of education, domestic and international travel, living experiences, and experiences resulting from her economic status. All these variables shaped Jefferson and determined how he sought to resolve the issue of slavery and the concomitant lack of equal rights for Blacks. "The observational standpoint is important because it affects all other relevant features: the focus of inquiry, the performance of intellectual tasks, and the postulation of goals."[66]

Jefferson was a lawyer. Like lawyers today, he faced certain geopolitical, social, and economic issues in writing the Declaration. Lawyers are "doctors of the social order."[67] Jefferson was called upon

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[64] *Id*.

[65] Suzuki, *supra* note 61, at 13-15.

[66] Myres S. McDougal, Harold Lasswell & W. Michael Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188, 199 (1967).

[67] Siegfried Wiessner, *Doctors of the Social Order: Introduction to New Haven Methodology*, *in* HANDBOOK ON HUMAN TRAFFICKING, PUBLIC HEALTH AND THE LAW 8-17 (Wilhelm Kirch et al. eds., Georg Thieme Verlag, Stuttgart, New York, 2014). *See generally* Siegfried Wiessner, *International Law in the 21st Century:*

to precisely diagnose the problem – the social ill – before he prescribed a treatment.[68] The objective problem was slavery. One of his prescriptions, the deleted draft text of the Declaration, as identified below, laid a foundation for abolishing slavery. But the problem of racial ostracism, degrading Black people, and the denial of their status as human beings had metastasized and embedded itself into America's core. Still, he considered the different variables as he tried to resolve the problem or, at the very least, alleviate the discomfort until a cure could be found.

Jefferson's perspective as a decision maker was different from his as a slave owner or a proponent of abolishing slavery. "From the perspective of the decision maker, the technical and moral problems are confronted not framed in terms of obedience but rather in terms of making choices that are appropriate for the relevant community."[69] Jefferson was tasked with selecting the right jurisprudence to advocate independence and to propose a solution to slavery. Then, as today, solving the social problems of rectifying the social, economic, and political inequities of slavery is a complex task. Under the New Haven School, jurisprudence is a theory about making choices. Jefferson could draw from positive law, common law, moral (religious) law, and/or natural law when he drafted the Declaration.

Two social and political problems confronted Jefferson: (1) how to draft a document that would win the colonists' support for extricating the colonies from British tyranny; and (2) whether to advocate a pathway to abolishing slavery. The deleted text of the Declaration identifies the audience that Jefferson penned the Declaration for.

> He has waged cruel war against human nature itself, *violating its most sacred rights of life and liberty in the persons of a distant people who never offended him,*

Decisionmaking in Institutionalized and Non-Institutionalized Settings, 26 THESAURUS ACROASIUM 137 (1997).

[68] *Id.* at 8 ("[J]ust as a medical doctor depends on a thorough diagnosis of a patient's discomfort or disease to prescribe proper treatment, the social doctor, i.e. the lawyer, depends on a comprehensive interdisciplinary study of a problem to prescribe the proper remedies in the form of legal decisions."); *see also* Wiessner, *New Haven School of Jurisprudence*, *supra* note 27, at 48 (noting that the problems that lawyers face are global and local – but often they are intertwined).

[69] Reisman, *supra* note 31, at 121-22.

> *captivating & carrying them into slavery in another hemisphere or to incur miserable death in their transportation thither.* This piratical warfare, the opprobrium of infidel powers, is the warfare of the Christian King of Great Britain. Determined *to keep open a market where Men should be bought & sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or restrain this execrable commerce.* And that this assemblage of horrors might want no fact of distinguished die, *he is now exciting those very people to rise in arms among us, and to purchase that liberty of which he has deprived them, by murdering the people on whom he has obtruded them:* thus paying off former crimes committed again the Liberties of one people, with crimes which he urges them to commit against the lives of another.[70]

Jefferson charges Britain with violating the slaves' rights. He charges Britain with the capture and unwilful transportation of slaves and, thus, creating the economic market for trading in the dark cargo. And why not? Continental European nation-states created and benefited the most from the trans-Atlantic slave trade. Thus, that slavery, which existed within the colonies, was Britain's fault. Although this passage was deleted from the final draft of the Declaration, abolishing slavery because of Britain's offense against the people who were the property of the colonists was not the purpose for rebellion against the crown.

Slavery is not mentioned in the final version of the Declaration. However, Jefferson clearly points out that slaves had "the most sacred rights of life and liberty in the persons of a distant people."[71] Although Jefferson refers to the slaves as "people," he did not mean that slaves had the same "equal" status under the law or socially as white men. To understand why Jefferson could not and did not con-

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[70] Julia P. Boyd, *Declaring Independence: Drafting the Documents Jefferson's "original Rough draught" of the Declaration of Independence*, 1 THE PAPERS OF THOMAS JEFFERSON 234-47 (1950).
[71] *Id*.

sider Black people, free or enslaved, as his equals, one needs to contextualize the reality of what "equal" meant in terms of the social, legal, economic, and political standing of "all men," black, white, Indigenous, and even women, when Jefferson drafted the Declaration.

Under the positive law at the colonies' inception, enslaved Blacks had no rights. Until the government granted a right, there was no right. Positive law is different from natural law. However, even under natural law, enslaved Blacks could not have any rights because enslaved Blacks were property, and an item of property had no rights. Under British common law, which was imported to the colonies, "rights" such as life, liberty, and the pursuit of happiness did not extend to all white men and certainly did not extend to women. Moreover, equal "rights" did not extend to all colonists and certainly did not extend to all men under British rule, whether in Britain or on colonial soil.[72]

In reviewing Jefferson's notes, writings, and considering his background, he employed the five intellectual tasks of policy-oriented jurisprudence in drafting the Declaration and tackling the social problem of slavery. Although the other drafters and members of the Continental Congress revised Jefferson's rough draft and deleted the provision assailing slavery, Jefferson, arguably, tried to reconcile the means of his source of wealth and power – slaves and the social and economic institution of slavery – with his tortured personal belief that slavery was an "abominable crime."[73] But, probably the reality of his personal life and self-survival outweighed any moral proclivities he had to continue to advocate for the abolition of slavery. As a decision maker, he proposed alternatives and recommendations. He implemented laws to prohibit the transportation of slaves in order to weaken the "Trans-Atlantic slave trade."[74] He also proposed an approval to ban slavery in the Northwestern territories.[75] But his efforts and his abomination for slavery did not mean that he considered slaves as

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[72] Rodman, *supra* note 45.

[73] *Thomas Jefferson Liberty & Slavery*, THE JEFFERSON'S MONTICELLO, https://www.monticello.org/slavery/paradox-of-liberty/thomas-jefferson-liberty-slavery/.

[74] Cursaru, *supra* note 66, at 16.

[75] *Id*.

equal to white men. In fact, Jefferson believed that whites were superior intellectually and physically to Blacks.[76] Accordingly, as the drafter of the Declaration, Jefferson never intended for Blacks to be included in the Declaration's ambit as being "created equal." However, as one versed with words, Jefferson laid an aspirational framework for equal rights in America.

Moving Forward to First Intellectual Task: Delimitation of the Problem

Jefferson began the task of delimiting the problem of the ills caused by slavery. That problem still exists today. The New Haven School is concerned with the focal lenses through which a problem is approached. The focal lenses are the way the observer looks at things and arranges them into conceptual categories.[77] Whites who view their grip on power waning because of America's changing demographics are assailing all initiatives aimed at enlightening people to recognize that systemic racism is a root cause of the problem. The first step to solving the problem is recognizing that the policies, practices, and laws that supported slavery and its attendant consequences are at the core of racial inequality and systemic oppression. This problem cannot be resolved if it is not recognized.

It has taken decades of concerted efforts by individuals committed to holding America to the tenets set forth in the Declaration, "*We hold these truths to be self-evident, that all men [and women] are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness,*" to change the law to what it should be: a maximization of access by all to the processes of shaping and sharing the eight values that all humans want out of life.

In addressing social problems, one must consider that law is not created in a "human vacuum." Human beings effectuate changes in law; the human element is essential to the lawmaking process. Law as it was written in the founding documents did not remain "the law."

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[76] Nicholas E. Magnis, *Thomas Jefferson and Slavery: An Analysis of His Racist Thinking as Revealed by His Writings and Political Behavior*, 29 J. BLACK STUD. 491 (1999).

[77] Reisman, *supra* note 31.

"[Law] is a human artifact, established, maintained and changed by the decisions of the politically relevant actors."[78] Under a policy-oriented jurisprudence perspective, domestic law cannot remain constrained by a policy that was set when the world was a much "simpler" place. A world in which law was fashioned by Christianity at a time when wars about whose God reigned supreme resulted in the malicious and wanton deaths of millions and the genocide and enslavement of ethnic, racial, and linguistic minorities. A world in which "human dignity" was not an inalienable birthright, but instead meted out according to the conscience and predilections of the ruling elite.

Since problems do not arise in a vacuum independent of human interaction within the community and law does not exist on paper independent of human involvement, "[t]he focus of inquiry must accordingly be directed to a *social process* in which people influence one another consciously or otherwise."[79] One must understand how "law," that amorphous "body of rules," as relied upon by positivists to control the outcome of judicial decisions and/or a community's response to a problem, is at the core of the racial issues in this country. The "law" pertaining to the disenfranchisement of enslaved Africans and Black Americans are all a part of how the inquiry process must be approached and how the problem must be delimited. Thus, in delimiting the problem, the focus should be on what the law should be today to ensure the maximization of human dignity for all.

Delimiting the Problem as a Denial of Human Rights for Black Americans

Broadly defined, human rights are those human desires and wants that the politically relevant members of a community decide to authoritatively protect and promote.[80] Human desires and wants are what people value. The concepts of equal rights, human rights, and

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[78] Wiessner & Willard, *Human Rights Abuses in Internal Conflict, supra* note 21, at 319.

[79] Suzuki, *supra* note 61, at 20.

[80] *Id*.; *see also* McDougal et al., *supra* note 34 (McDougal, Lasswell and Chen note that perhaps the greatest challenge in securing the protection of human rights is that scholars and decision makers "have not met their responsibilities for clarifying and promoting the demands, identifications and expectations among the peoples of the world which are an essential precondition of a public order of human dignity.").

human dignity were not crystallized when the founding documents were drafted. Human rights are an inherent and innate part of what makes one human:

> Human rights have always existed with the human being. They existed independently of, and before, the State. ... There must be no legal vacuum in the protection of human rights. Who can believe, as a reasonable man, that the existence of human rights depends upon the internal or international legislative measures, etc., of the State and that accordingly they can be abolished or modified by the will of the State?[81]

Although human dignity may be subjective, its definition varies based upon different cultural, social, and political contexts. In today's global world there are few variables as to what human dignity is not. It is not treating individuals in a manner that undermines their basic humanity, and the institution of slavery was undoubtedly an affront to the human dignity of the slave and the slave owner.

The Participants' Competing/Conflicting Claims Remain

Slavery in America was legal from approximately 1607 until 1865. The practice of relegating peoples from sub-Saharan Africa as slaves in the Western Hemisphere was justified by a fallacious, albeit scientifically unproven thesis, advanced by proponents of slavery, that Blacks were a genetically, culturally, and socially inferior class (race) of people. Therefore, it was morally justified to enslave Blacks. Although the enslavement of humans can be traced to the beginning of recorded history, it was not based upon skin color per se, as much as it was a product of war and conquests of other peoples and land. Skin color and physical traits did not matter as much as nationality, tribal, regional, or religious alliances did.

Everyone involved in the social process has a perspective. Participants, just like the observer, have a perspective. A comprehensive analysis needs to describe the participants' perspectives – from what

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[81] South West Africa (Second Phase) (*Eth. v. S. Afr.; Liber. v. S. Afr.*) 1966 I.C.J. 6, 250, 297-298 (July 18).

vantage point they see the problem; it needs to uncover their patterns of identification and disidentification, their expectations of authority, and their demands for values. Many factors shape perspectives, including the culture, class, interests, personality, and crisis experience of the participants, financial, economic and political status, education, group associations, and nationalities. Of course, the role that participants have is important and will affect their perspectives. Victims (slaves) and perpetrators (slave owners and their agents) of human rights abuses are not expected to have similar perspectives. Participants make demands for certain values with certain expectations of the conditions under which these values will be obtained.[82] Participants making demands may be doing so in their individual capacities or as a member of a larger group or entity. Individuals who represent groups or entities bring their own "human psychology and perspectives" to issues.[83]

Participants' Bases of Power

The participants operate from a range of power bases. They all have different resources from which they draw on to achieve their demands. Policy-oriented jurisprudence considers the participants' bases of power in resolving a problem. Power was at the heart of the Declaration and the Constitution. Power – who has it, who wants it, and who must retain it – is at the heart of the conflicting claims caused by the fissures of slavery. In arguing for America to live up to the "self-evident truths" set forth in the Declaration and to eradicate the trans-Atlantic slave trade and slavery, Frederick Douglass' words, in his famous speech, "What to a Slave is the Fourth of July?" still reverberate today.[84] Power is seldom relinquished without a fight.

> Let me give you a word of the philosophy of reform. The whole history of the progress of human liberty shows that all concessions yet made to her august

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[82] McDougal et al., *supra* note 34, at 275.

[83] Suzuki, *supra* note 61, at 24 (the "state" is a legal fiction that is represented by individuals whose personalities have been formed by predispositional variables).

[84] Frederick Douglass, *What to the Slave Is the Fourth of July? (1852)*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/historic-document-library/detail/frederick-douglass-what-to-the-slave-is-the-fourth-of-july-1852.

> claim, have been born of earnest struggle. The conflict has been exciting, agitating, all-absorbing, and for the time being, putting all other tumults to silence. It must do this, or it does nothing. If there is no struggle there is no progress. Those who profess to favor freedom and yet depreciate agitation, are men who want crops without plowing up the ground, they want rain without thunder and lightning. They want the ocean without the awful roar of its many waters.
>
> This struggle may be a moral one, or it may be a physical one, and it may be both moral and physical, but it must be a struggle. Power concedes nothing without a demand. It never did and it never will. Find out just what any people will quietly submit to and you have found out the exact measure of injustice and wrong which will be imposed upon them, and these will continue till they are resisted with either words or blows, or with both. The limits of tyrants are prescribed by the endurance of those whom they oppress.[85]

The goal of providing equitable rights under the law for Black Americans has been and still is a power struggle. Money is the key sustaining component of this power struggle. Private individuals organized as corporations used money to cajole judges to strip away Blacks' inalienable rights under the rationale that slaves were not "persons."[86] Once Blacks had secured the right to vote, which is a base of power, they elected persons who advanced laws and policies on their behalf. Prior to elections, as participants, one base of power for Black Americans was peaceful economic boycotts, which garnered public sympathy. Voting, as a base of power, is being stripped away in order for whites to maintain the status quo.

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[85] Frederick Douglass, *The Significance of Emancipation in the West Indies*, Speech delivered in Canandaigua, New York, Aug. 3, 1857; collected in pamphlet by author, THE FREDERICK DOUGLASS PAPERS. SERIES ONE: SPEECHES, DEBATES, AND INTERVIEWS, Vol. 3: 1855-63, 204 (John W. Blassingame ed., 1985).

[86] *See Santa Clara*, *supra* note 12 (Judges bestowed these same inalienable rights on the corporate form in *Santa Clara* and its progeny without any declaration in the body of the opinion or supported by oral argument that corporations are "persons.").

Trend Analysis

Trends analysis must be conducted to resolve the problem. "Trends are characterized by authoritative responses to the demands made by contending claimants that controversies stemming from their social interaction be solved."[87] This is a historical function, one which identifies and organizes trends in pertinent past decisions in terms of the goal expressed. Trends are based upon past decisions, not to unearth precedents, but instead to determine how similar situations were resolved. Accordingly, trends are grouped together and analyzed to determine how past decisions were made, how participants' values were shaped, and how their goals were achieved.[88]

Historically, Europe's opposition to slavery, couched as a moral issue, was the result of the Enlightenment and revolutionary movements in Europe.[89] Jefferson grappled with this. Is it morally right for man to be the property of another man? The anti-slavery laws are viewed as moral codes.[90] Moral codes, however, are not new; they evolved as hunting gave way to agriculture, then to industry, and to the present market economy. As societal morals and values progressed

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[87] Suzuki, *supra* note 61, at 38.

[88] *Id*.

[89] Several European nations abolished domestic slavery and slave trading long before the transatlantic slave trade was abolished. In 1117, Iceland abolished slavery. In 1214, the Statute of the Town of Korcula (Croatia) abolished slavery. In 1315, King Louis X of France decreed that any slave setting foot on French ground would be freed. In 1335, Sweden abolished slavery. In 1416, the Republic of Ragusa (modern Croatia) abolished slavery and slave trading. In 1569, an English court ruled in the *Cartwright Case*, 2 Rushworth 468, a case involving a Russian slave, that English law did not recognize slavery. The pendulum in English courts swung back and forth until 1807, when slavery was legally abolished. In the 16th century, Portugal passed a law banning the selling and buying of Chinese slaves. *See* LEGACIES OF SLAVERY: COMPARATIVE PERSPECTIVES (Maria Suzette Fernandes-Diaz ed., 2007). Other non-European countries also prohibited slavery. Japan prohibited Portuguese traders from exporting Japanese as slaves. *See* THEMBA SONO, JAPAN AND AFRICA 42-43 (1993). In the Americas, Providence Plantations, which at one time consisted of parts of Rhode Island, abolished slavery in 1652. This ban did not extend to the area that later became known as Rhode Island. Spain abolished slavery in Chile in 1683. *See also* Helen Tunnicliff Catterall, JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 25 (1926).

[90] *See* Jenny S. Martinez, *Anti-Slavery Courts and the Dawn of International Human Rights*, 117 YALE L. J. 550, 557 (2007).

and the sanctity of human life became more valued, practices and customs that directly violated human rights were prohibited, with slavery being one of them. One of the earliest recognized human rights was the right not to be a slave – a right independent of one's nationality, religion, or race. Under policy-oriented jurisprudence, slavery represented the most extreme deprivation of freedom of choice and violated the value of respect.[91] A slave was denied access to the process of authoritative decisions.

The Founders of America grappled with the hypocrisy embedded in a country founded on religious freedom and tolerance as it fought to liberate itself from the tyrannical oppression of the British crown and, yet, benefitted from the economic and cultural institution of slavery. This newly formed country, the land of the free and home of the brave, denied inalienable rights to Blacks, whether free or slave, and designated Blacks as "three-fifths" of a person.[92] The scourge of slavery eventually led to a civil war and the emancipation of the slaves via Constitutional amendment. During the Reconstruction period, the vestiges of slavery, the inferior civil and political status of Black Americans, and legal segregation still remained. From 1865 to 1877, federal law provided civil rights protection for freed slaves through the 13th, 14th, and 15th Amendments, known as the Civil War Amendments.[93] Congress passed the Civil Rights Act of 1875 to enforce the Civil War Amendments, making it illegal to segregate schools, places of public accommodations, modes of transportation, and juries. In 1883, however, the Supreme Court, in the *Civil Rights Cases*, declared the Act unconstitutional, holding that it was not authorized by the 13th and 14th Amendments.[94] The Court ruled that the 14th Amendment

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[91] Myres S. McDougal, Harold D. Lasswell & Lung-Chu Chen, *The Protection of Respect and Human Rights: Freedom of Choice and World Public Order*, 24 AM. U. L. REV. 920, 943 (1975).

[92] U.S. CONST. art. I, § 2, *repealed by* U.S. CONST. amend. XIV. The 3/5th status had nothing to do with slaves' legal rights. The 3/5th status was political. It was offered as a concession to the Southern slave states in which the population overwhelmingly consisted of slaves who were not citizens. It was used to give the slaveholding states a larger number of electoral votes.

[93] *See generally* Civil War Amendments (Thirteenth, Fourteenth, and Fifteenth Amendments) Constitution Annotated, constitution.congress.gov/browse/essay/intro.3-4/ALDE_00000388/.

[94] *See* The Civil Rights Cases, 109 U.S. 3, 37 (1883).

only applied to discrimination by state governments rather than discrimination by private persons such as owners of railroads, theaters, or inns.[95] Thus, the federal government was virtually powerless to control discrimination against Blacks by private persons. Southern states enacted Jim Crow laws designed to keep Black Americans under the shackles of *de facto* slavery and second-class citizenship. These laws regulated where Black Americans could live, eat, sleep, enjoy recreational activities, attend school, and/or obtain adequate health care. The laws regulated marriage, voting in elections, employment, real property ownership, entertainment, recreation, and leisure time activities.

In 1896, the Supreme Court formally legalized American apartheid and eviscerated the Equal Protection Clause for Black Americans when it ruled that states and local municipalities could provide racially segregated schools, public accommodations, and other facilities. The Court's decision in *Plessy v. Ferguson* established the "separate but equal" doctrine.[96] America was governed by this doctrine for decades until the Court ruled in 1954, in *Brown v. Board of Education of Topeka,* that "separate" public schools for black and white children are "inherently unequal."[97] Other federal regulations quickly followed, affirming civil and political rights for Blacks and women.[98]

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[95] *Id*. at 28.

[96] Plessy v. Ferguson, 163 U.S. 537 (1896).

[97] Brown v. Board of Education of Topeka, 347 U.S. 483, 495 (1954).

[98] The Civil Rights Act of 1957, 42 U.S.C.A. § 1975, the first federal legislation passed since Reconstruction, established the Commission on Civil Rights and the Civil Rights Division within the Department of Justice. The Civil Rights Act of 1964, 42 USCA § 2000e-1 *et seq*., and the Voting Rights Act of 1965, 42 USC § 1973c, legally ended the practices and policies of Jim Crow laws and *de jure* segregation, although the effects and legacy of the laws are still prevalent today. The Civil Rights Act of 1964 prohibited discrimination based on race, color, national origin, or religion in most privately owned businesses that served the public and the Act established the Equal Employment Opportunity Commission (EEOC) to eliminate illegal workplace discrimination. The Equal Employment Act of 1972, 42 USC § 2000d & 2000e, gave the EEOC litigation authority. The Voting Rights Act of 1965 prohibited state residency requirements, poll taxes (requiring a tax to be paid before voting), grandfather clauses, and candidate filing fees that were traditionally used to discriminate against poor and minority voters. The 1968 Fair Housing Act, 42 USC § 3601 *et seq*., prohibited discrimination in housing.

The Way Forward: Alternatives and Recommendations

The purpose of the law is to serve a world public order of human dignity and to show "right ways to humanity."[99] According to Professor Wiessner, the purpose of the law is to serve human beings and their needs and aspirations, to allow them to flourish and thrive.[100] If the law is to serve the people it binds, then proposing legal solutions to the race conundrum must further a world public order of human dignity. The claims that a participant makes are derived from her perspectives, which are based upon different variables. These variables may be environmental, social, educational, political, economic status, and access to power or contribution to shaping the participant's claims. Value judgments about whether a claim is right or wrong, reasonable or unjust, are simply labels attached to how, when, where, and through what means the message is communicated to the receiver. The observer must sift through this communication process, recognizing that all claims are valid based upon the claimant's pre-dispositional variables. In structuring a resolution to a problem, the observer's challenge is to have the claimants attach values to their claims and then proceed to resolve the problem in a manner that maximizes the common interests of all.

The seminal question, thus, becomes how the world community responded in the past to the conflicting claims (or similar variations) to those currently under scrutiny. In describing past trends in the decision, the observer can draw upon the "wisdom of the past," but does not rely exclusively on it to predict future trends.[101] The past trends in the decision must be viewed contemporaneously with the conditioning factors that gave rise to the decision, including the mood of the times and the background of the decision makers or the actors. The background of the decision makers is crucial to understanding the past trends in decisions because decision makers are rarely objective.

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[99] S.G. Sreejith, TRANSCENDING JURISPRUDENCE: A CRITIQUE OF THE ARCHITECTONICS OF INTERNATIONAL LAW 14 (2010).

[100] Wiessner, *New Haven School of Jurisprudence, supra* note 27, at 51-52.

[101] McDougal et al., *supra* note 91, at 926 (The "wisdom of the past" as McDougal, Lasswell and Chen explained is contextual and considered only for future guidance. Past trends cannot be usefully disaggregated from the context in which they occurred. This context includes the predispositional factors that the observer and the decision maker bring to the issue to be resolved.).

They are conditioned by factors in their immediate environment and the social and political contexts in which they operate and live. Certain pre-dispositional factors can affect a judge's decision[102] as much as environmental factors can, e.g., the *Zeitgeist*, the mood of the times – both of which can and do change over time.[103] The mood of the times clearly affected the Supreme Court's decision under Chief Justice Earl Warren when the Court rejected over fifty years of precedent, as established in *Plessy v. Ferguson,* and ruled unanimously in *Brown* that "separate but equal" had no place in American society and law.[104]

Alternatives and Recommendations for Today

Social and cultural practices that are now universally considered affronts to human dignity must be viewed in their proper historical contexts. They must also be viewed as a primer on how world societies have used morality to change the law and law to change morality.

The goal of policy-oriented jurisprudence is a world public order of human dignity. The slave was in many instances treated as subhuman. The rape of slave women by white men, property owners, and non-property owners, and the debasement of slave men to forcefully impregnate slave women and then disregard the offspring they sired, runs afoul of humanness. Thus, whether it was by divine intervention, providence, or man- and womankind realizing that a Black person bleeds red blood too, men and women of good moral conscience, even those who owned slaves, confronted the juxtaposition that human

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[102] *See* Milton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5 (1993) (discussing the background and predispositional factors of the members of the Warren Court and how these factors influenced the *Brown* decision and subsequent court decisions).

[103] Wiessner & Willard, *Human Rights Abuses in Internal Conflict*, *supra* note 21, at 327 (discussing how environmental factors and the mood of the times must be considered in analyzing past trends in decision when seeking to use past trends as future guidance).

[104] *See* Horwitz, *supra* note 102 (detailed discussion of how the Court reached its decision in *Brown*. The Warren Court in overruling *Plessy* relied upon the mood of the times as well as social science research that had evolved since 1896, when *Plessy* had been decided. Specifically, and importantly, the Court relied upon "social psychology studies that show[ed] that segregation is stigmatizing to Blacks and, hence, is inherently unequal." *Brown*, 347 U.S. at 495 n. 11).

bondage was inhumane. This realization that all humans deserve a life with dignity, while not codified in early American law, did become the foundation of the Universal Declaration of Human Rights in 1948.[105]

Human Rights for Black Americans

Despite the unintended elasticity in the Declaration, which did not effectively bestow "life, liberty and the pursuit of happiness" to enslaved and freedmen of African descent born in Colonial America or those whose unpaid labor was the underpinning of American wealth, many Black Americans believed that appealing to the moral compasses of American decision makers was futile. This was because advocating for Blacks to be recognized for their humanity and thus, being afforded the full panoply of rights that was the sum of their civil rights, was a slow-moving train. W.E.B. Dubois and el-Hajj Malik el-Shabazz, aka Malcolm X, reached the same results, albeit at different junctures in their lives. They both believed that since America was a world leader and a proponent of the Universal Declaration of Human Rights, the only way for Black Americans to reap the promises contained in the Declaration was to petition the United Nations.[106] In October 1947, the NAACP, under the tutelage of W.E.B Dubois, filed "An Appeal to the World", a petition in the United Nations protesting the treatment of Blacks in the United States.[107] The Appeal to the World set forth the following: "Our complaint is mainly against a discrimination based mainly on color of skin, and it is that that we denounce as not only indefensible but also barbaric."[108] In 1964, Malcolm X offered this solution: "[s]o all the civil rights groups have to

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[105] G.A. Res. 217 (III) at Article 8, Universal Declaration of Human Rights (Dec. 10, 1948).

[106] *(1947) W.E.B. Du Bois, An Appeal to the World: A Statement on the Denial of Human Rights in the Case of Citizens of Negro Descent in the United States of America and an Appeal to the United Nations for Redress,* NATI'L ASS'N FOR THE ADV. OF COLORED PEOPLE 14.

[107] *Id*.

[108] *Id.* (The petition to the UN was one of the first organized efforts by Americans to bring human rights issues before the United Nations. Dubois wrongly concluded that America's stature in the world after defeating the axis of evil and creating a new world order at the start of the Cold War and asserting moral leadership in human

do is expand the struggle from civil rights to human rights. And once it's expanded to the level of human rights then this puts us in a position to charge the U.S. with violating the U.N. charter on human rights."[109] On July 17, 1964, Malcolm X made the following pronouncement before the Organization of African Unity in addressing the plight of Black Americans, arguing that America's treatment of Blacks had global implications: "[o]ur problem is your problem. It is not a Negro problem, nor an American problem. This is a world problem, a problem for humanity. It is not a problem of civil rights. It is a problem of human rights."[110]

Bringing human rights abuses of Black Americans before the United Nations gained renewed traction in the wake of George Floyd's murder by Minneapolis police officers in 2020. In June 2020, the UN Human Rights Council adopted resolution 43/1 that requested UN Human Rights Chief, Michelle Bachelet, to prepare a comprehensive report on systemic racism, violations of international human rights law against Africans and people of African descent by law enforcement agencies, accountability and redress, and Government responses to anti-racism peaceful protests.[111] Bachelet also launched the "Agenda towards transformative change for racial justice and equality", which offers a way forward for States to "reverse cultures of denial, dismantle systemic racism and accelerate the pace of action."[112] The report calls on States to right historic wrongs, while addressing the current realities and lived experiences of people of African descent.

Undeniably, systemic racism, which is soaked into American soil, and the soil of former European colonies, has resulted in inequitable treatment and human rights abuses simply based upon the notion

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rights would warrant the overdue fulfillment of the promises imbued in the Declaration.).

[109] Allah, Mal'akiy, *Malcolm X and his plight for human rights*, AMSTERDAM NEWS (May 18, 2022), https://amsterdamnews.com/news/2022/05/18/malcolm-x-and-his-plight-for-human-rights/.

[110] X, Malcolm, *Panafricanism or Perish, Portion of a speech at OAU summit in Cairo, Egypt 1964*. OAU speech (July 17, 1964), http://www.oopau.org/2.html.

[111] United Nations Human Rights Council, *Seminal UN report offers an agenda to dismantle systemic racism,* June 29, 2021, https://www.ohchr.org/en/stories/2021/06/seminal-un-report-offers-agenda-dismantle-systemic-racism; *see* G.A. Res. 43/1 (June 30, 2020).

[112] *Id*.

that skin color elevates one's self-affirming superiority over another. Put succinctly, some whites view their skin color as giving them superior rights. This entrenched pathology originated with the Catholic Church's doctrine of discovery. According to Bachelet's report, "[t]he dehumanization of people of African descent is rooted in the false social constructions of race created to justify enslavement, in pervasive racial stereotypes, and in widely accepted harmful practices and traditions that have fostered a tolerance for racial discrimination, inequality and violence."[113]

It has been approximately seventy-six and fifty-nine years since Dubois and Malcolm X, respectively, sought to bring the plight of Black Americans before the United Nations. And now, their muted voices are being heard. The systemic racism that halted Jefferson's tortured attempts to abolish slavery during the birth of a nascent nation is being recognized as real, and not the imagined wrongs of Black Americans. And unlike some American politicians, who are now attempting to rewrite history and quell the challenge to white superiority, the United Nations has acknowledged the interconnectedness of the social problem of systemic racism and the havoc it has wrought on America and the world. The United Nations offers a way forward,[114] which remains to be realized, because as Frederick Douglass reminds us, "[p]ower concedes nothing without a demand. It never did and it never will."[115]

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[113] *Id*.

[114] *See id*. (The Report recognizes that: "Eliminating systemic racism would entail, among other measures, reforming institutions, legislation, policies and practices that may be discriminatory in outcome and effect, the report stated. It urges States to adopt a "systemic approach to combatting racial discrimination" through the adoption of whole-of-government and whole-of-society responses that are contained in comprehensive and adequately resourced national and regional action plans and special measures for disadvantaged groups.").

[115] *(1857) Federick Douglass*, "*If There is No Struggle, There is No Progress,"* BLACKPAST.ORG (Jan. 25, 2007), https://www.blackpast.org/african-american-history/1857-frederick-douglass-if-there-no-struggle-there-no-progress/.