

BOOK REVIEW

This Land Is Not Our Land

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“The story of our relationship to the earth is written more truthfully on the land than on the page. It lasts there. The land remembers what we said and what we did.”

—Robin Wall Kimmerer, *Braiding Sweetgrass* 341 (Milkweed 2013)

“The land and the wealth that began in it still carry the shape of history. . . . The land remembers.

But what do we remember of it? Every political contest over claims on the land is, in part, a contest over what will be remembered and what will be forgotten.”

—Jedediah Purdy, *This Land Is Our Land: The Struggle for a New Commonwealth* xvii (Princeton 2019)

INTRODUCTION: HISTORY, ERASURE, AND THE LAW

In asserting that “this land is our land” in his new book by that title,¹ Professor Jedediah Purdy hopes to craft a narrative of possibility and common plight that can serve as a banner high and wide enough for all to unite beneath. The task he undertakes in this meditative collection of essays, written in a colloquial and often poetic tone, is no less than to sketch out a “horizon to aim for”—for *all* to aim for—a vision of the future to guide the kind of legal, social, and political change he wishes to see.² What Purdy imagines is unabashedly idealistic and unapologetically above the

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¹ Jedediah Purdy, *This Land Is Our Land: The Struggle for a New Commonwealth* (Princeton 2019).

² *Id.* at 3.

world of concrete prescription: he dreams of “an economy that prizes the work of sustaining and renewing the human world,”³ a society in which institutions would support “the flourishing of everyone and everything would sustain the flourishing of each person.”⁴ To reach that horizon, he emphasizes throughout that we must overcome our conflicts and divisions and prioritize that *shared* vision of the future: we must reach “answers that people can live by together.”⁵ For Purdy, the land is a metaphoric resource, a keeper of history, and the literal ground of our common condition. In those capacities, it helps him underscore that, for better or worse, we are all here, to flourish or perish together.

In this book, which he pitches to a popular audience, Purdy turns to the land as a means of reorienting a divided American public toward more communitarian values and norms. In doing so, he follows in the footsteps of such introspective environmentalists as Henry David Thoreau and Wendell Berry, and, like them, anchors his hopeful imaginations in a critique, made all the more urgent by the looming threat of climate disaster, of the dire inequality and degradation of all forms of life that dominant capitalist modes of production and exchange have wrought. As he builds his historical narrative of how we arrived at this point, Purdy also describes the inequalities and racial violence of the present as legacies of colonization and slavery; and he explains that these largely “forgotten” histories⁶ nevertheless have determined the shape of the landscape, the infrastructure, and the dynamics of our interactions in the present. In this way, Purdy explicitly directs his message at *everyone* who belongs to this fractured populace, to call them into concerted action. This ambitious project attempts to provide universal answers to some of the most critical yet seemingly insoluble questions of our times: How can we cultivate communication across our differences that will make it possible to work together in the face of existential threats to our collective survival? How can we learn to understand one another when the tremendously violent histories that sowed the terrain of conflict today have been suppressed for so long and in so many ways, such that we lack the information to know where others, and perhaps where we, ourselves, are coming from?

³ Id at 148.

⁴ Id at xiii.

⁵ Purdy, *This Land Is Our Land* at xxiii (cited in note 1).

⁶ Id at xvii.

This Book Review reflects on the importance of the questions that Purdy presents, especially for the legal academy, as well as the shortcomings of his own engagement with them. Purdy rightly calls for a reframing of our collective relationship to the land and each other. Furthermore, he understands that recognizing the histories of conquest and slavery and their erasure is critical to any project that aims to unify a deeply divided public. Foregrounding this problem simultaneously invites and creates space for a difficult but necessary set of conversations about our differences, our divergent perspectives, and the ways those histories have shaped both. This choice is all the more commendable because it is relatively unusual in legal scholarship; underlining suppressed historical foundations is especially rare when the focus of a work, like this book, is not itself to engage in the task of recovering these histories. However, Purdy's invocation of these histories raises more questions than he answers about their connection to the stories, ideas, and experiences he shares in the rest of the book. Further, though the book poses questions about the significance of these histories and the problem of erasure that are especially salient for the legal academy, it does not appear conscious of what these histories can tell us about the law and legal institutions, nor of the specific dimensions of what doing this kind of work entails.

By prioritizing these histories in his work nonetheless, Purdy's goal appears to be to raise up the concerns of broad and diverse social movements and to bring them into the fold of his own communitarian vision. His choice to highlight these questions feels deliberately resonant with broader messages from global political movements of the moment. These movements, chiefly led by youth, have popularized a range of critiques of capitalist markets, their devastation of the environment, and the intertwined histories of colonization and growth of the Atlantic slave trade out of which those markets arose.⁷ Over the last decade, and at an intensifying pace, public awareness of these histories has burgeoned, spurred by broadly publicized police and

⁷ Purdy also aligns himself with these movements by insisting on hope. One of his main goals appears to be to convert the despair and abandonment of the future of cynics and nihilists into a sense of urgency about the present. For example, he diagnoses a "creeping nihilistic" view that "we are just waiting for the end" and concludes: "We are suffering not from ignorance or innocence but from a lack of faith that understanding can help us." See *id.* at 149.

military brutality and worldwide demonstrations following the police murders of George Floyd and Breonna Taylor, protest movements in Ferguson and in Standing Rock, activist organizations like Black Lives Matter and Idle No More, and landmark commentaries from Michelle Alexander and Ta-Nehisi Coates.⁸ Indeed, in “The Case for Reparations,” Coates laid confronting the history of slavery and its aftermath down as a gauntlet for the future, writing: “We cannot escape our history. All of our solutions to the great problems of health care, education, housing, and economic inequality are troubled by what must go unspoken.”⁹

This rising public engagement with the past has fostered the dismantling of more and more Confederate monuments, statues, and plaques;¹⁰ the end of Santa Fe’s Entrada pageant celebrating conquest;¹¹ the growing replacement of Columbus Day with Indigenous People’s Day¹² and observation of a National Day of Mourning on Thanksgiving;¹³ the renaming of residential community names¹⁴ and the revision of university seals,¹⁵ state flags,

⁸ See generally Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New Press 2012); Ta-Nehisi Coates, *The Case for Reparations* (The Atlantic, June 2014), archived at <https://perma.cc/R4JJ-RDPD>.

⁹ See Coates, *The Case for Reparations* (cited in note 8).

¹⁰ See Jasmine Aguilera, *Confederate Statues Are Being Removed Amid Protests Over George Floyd’s Death. Here’s What to Know* (Time, June 9, 2020) archived at <https://perma.cc/3294-DC7A>; Bonnie Berkowitz and Adrian Blanco, *Confederate Monuments Are Falling, But Hundreds Still Stand. Here’s Where*. (Wash Post, July 2, 2020) archived at <https://perma.cc/S2FK-NPSM>; *Confederate Monuments Are Coming Down Across the United States. Here’s a List*. (NY Times, Aug 28, 2017), archived at <https://perma.cc/YT69-UCST>.

¹¹ See Daniel J. Chacón, *Fiesta Drops Divisive Entrada Pageant in Santa Fe* (The Santa Fe New Mexican, July 24, 2018), archived at <https://perma.cc/58P7-Q9YT>.

¹² See AJ Willingham, *These States and Cities Are Ditching Columbus Day to Observe Indigenous Peoples’ Day Instead* (CNN, Oct 14, 2019), archived at <https://perma.cc/YS7W-7GRQ>.

¹³ See Kelly Wynne, *What Is National Day of Mourning? How Anti-Thanksgiving Day Started and Everything to Know About It* (Newsweek, Nov 27, 2019), archived at <https://perma.cc/3XFV-JGX2>.

¹⁴ See, for example, Andy Newman and Vivian Wang, *Calhoun Who? Yale Drops Name of Slavery Advocate for Computer Pioneer* (NY Times, Sept 3, 2017), archived at <https://perma.cc/96HC-D67V>.

¹⁵ See, for example, Abby Jackson, *Harvard Law School Finally Removed the Seal of a ‘Brutal Slaveholder,’ but Not Everyone Agrees with the Decision* (Business Insider, Mar 15, 2016), archived at <https://perma.cc/ATY6-HD92>.

school mascots,¹⁶ and professional sports teams' names;¹⁷ Indigenous mapping projects;¹⁸ a congressional hearing on reparations¹⁹ and the creation of university reparations funds;²⁰ new media projects;²¹ and increasing recognition of Indigenous and Black struggles across the country and worldwide.²² The growing public conversation has also increasingly knit itself to and raised the profile of historical scholarship that examines the ways that conquest and slavery shaped, for example, insurance systems,²³ foreclosure,²⁴ credit markets,²⁵ investment banking,²⁶ and accounting practices.²⁷ Last year, the launch of the *New York Times's*

¹⁶ See, for example, Christine Hauser, *Maine Just Banned Native American Mascots. It's a Movement That's Inching Forward* (NY Times, May 22, 2019), archived at <https://perma.cc/HA85-ZUN7>.

¹⁷ See, for example, Terence Moore, *Washington Redskins Name Change Makes Atlanta Braves, Kansas City Chiefs and Others Look Clueless* (Forbes, July 13, 2020), archived at <https://perma.cc/9K3S-VTYU>.

¹⁸ See, for example, UCLA American Indian Studies Center, *Mapping Indigenous LA: Place-Making Through Digital Storytelling*, archived at <https://perma.cc/53TH-XG2B>; David Grossman, *Tribal Map of America Shows Whose Land You're Actually Living On* (Popular Mechanics, Oct 14, 2019), archived at <https://perma.cc/LHR7-3BA7>; Hansi Lo Wang, *The Map of Native American Tribes You've Never Seen Before* (NPR, June 24, 2014), archived at <https://perma.cc/4Y2L-MNYS>; Cecilia Keating, *Indigenous Geographies Overlap in This Colorful Online Map* (Atlas Obscura, July 24, 2018), archived at <https://perma.cc/G37L-JUPP>.

¹⁹ See Sheryl Gay Stolberg, *At Historic Hearing, House Panel Explores Reparations* (NY Times, June 19, 2019), archived at <https://perma.cc/T6DK-PXVS>.

²⁰ See, for example, P.R. Lockhart, *Georgetown University Plans to Raise \$400,000 a Year for Reparations* (Vox, Oct 31, 2019), archived at <https://perma.cc/FC6Z-6P7J>.

²¹ See, for example, Tim Baysinger, *HBO Orders 'Exterminate All the Brutes' Docuseries from Raoul Peck* (The Wrap, Feb 18, 2020), archived at <https://perma.cc/C7UR-8DF5>.

²² See text accompanying notes 70–81.

²³ See Sharon Ann Murphy, *Securing Human Property: Slavery, Industrialization, and Urbanization in the Upper South*, in Sharon Ann Murphy, *Investing in Life: Insurance in Antebellum America* ch 7 at 184–206 (Johns Hopkins 2010). See also generally Michael Ralph, "Life . . . in the midst of death": *Notes on the Relationship Between Slave Insurance, Life Insurance and Disability*, 32 *Disability Stud Q* (Summer 2012).

²⁴ See, for example, K-Sue Park, *Money, Mortgages, and the Conquest of America*, 41 *L & Soc Inquiry* 1006, 1009–14 (2016). For a broader discussion of the role that mortgages on slaves played in powering the Southern economy, see generally Bonnie Martin, *Slavery's Invisible Engine: Mortgaging Human Property*, 76 *J S Hist* 817 (2010).

²⁵ See generally Joseph E. Inikori, *The Credit Needs of the African Trade and the Development of the Credit Economy in England*, 27 *Explorations in Econ Hist* 197 (1990).

²⁶ See generally Kathryn Boodry, *August Belmont and the World the Slaves Made*, in Sven Beckert and Seth Rockman, eds, *Slavery's Capitalism: A New History of American Economic Development* 163–78 (Penn 2016).

²⁷ See generally Caitlin Rosenthal, *Accounting for Slavery: Masters and Management* (Harvard 2018). Much of this scholarship belongs to the growing field of work on racial capitalism, following the lead of such early prominent and influential thinkers as Eric Williams, W.E.B. Du Bois, and Professor Cedric Robinson. See generally Eric Williams,

landmark 1619 Project ignited a cacophony of granular debates about the history of slavery across the Twitterverse. Its pieces explored the legacy of the slave trade in, among other things, the evolution of American capitalist market practices and the racial wealth gap, carceral and medical practices and institutions, culture and its appropriations, and democracy itself.²⁸

In foregrounding these long-buried histories in his book, which was published just one month after the 1619 Project's inaugural issue, Purdy both signals solidarity with these movements and presents the problem of historical erasure to legal scholars. However, by breaking new ground, these movements have also made clear how unaccustomed the nation still is to dealing with the racial, legally constructed violence of its present and past. The challenge of building productive dialogue on these issues continues to plague political movements and institutions, especially the broadly construed Left—for which Purdy speaks as a thought leader—and the legal academy, of which he is an established part.

This Book Review examines the way Purdy, not always successfully, negotiates the challenges of understanding the consequences of erasure and building solidarity across racial divides. From this critique, it draws some lessons: First, it is critical, beyond acknowledging these histories, to work to understand their effects—which are *not* always self-evident, especially in the study of the law. Second, as a consequence of the first point, naming erasure is not sufficient to remediate it. And third, mentioning diverse perspectives must be the prelude to actually attempting to learn from them, and recognizing that a collective understanding of the past and vision for the future requires listening and dialogue. Further, this Review introduces other scholarship in order to show that the concrete work of understanding how long-suppressed histories have shaped fundamental bodies of American law requires reconstructing both erasures and historical narratives; diagnosing the theoretical consequences of erasure; and

Capitalism & Slavery (UNC 1994); W.E.B. Du Bois, *Black Reconstruction in America* (Touchstone 1995); Cedric J. Robinson, *Black Marxism: The Making of the Black Radical Tradition* (UNC 2000).

²⁸ See Jake Silverstein, *Why We Published The 1619 Project* (NY Times, Dec 20, 2019), archived at <https://perma.cc/NZM6-2PM2>. For a discussion of critical scholarly reactions to the Project, see Adam Serwer, *The Fight over the 1619 Project Is Not About the Facts* (The Atlantic, Dec 23, 2019), archived at <https://perma.cc/4V3T-AZJR>.

retheorizing the law and legal development using new narratives and perspectives.

This project, which has long remained relatively obscure and marginal in the legal academy, takes up a critical and urgent task—describing our common history, how we came not to know it, and its significance for the study and practice of law. Legal scholars will increasingly find themselves pressed to confront these questions in this climate; people in the legal field, and especially law students, will notice and inquire about the absence of information about these histories from legal texts and law school curricula. Many people in and outside the legal academy already understand that law played a key role in facilitating the conquest of Indigenous lands and the trade of human beings, and that these histories therefore raise special questions for the discipline and legal institutions. Legal scholars are in many ways best positioned to illuminate the technical role that the law and legal institutions played in those processes and the impact that this role had on the different practices, doctrines, and institutions that constitute our legal system today. However, doing so will require openness to questioning what we think we already know, as well as to rethinking how we conceive of both our methodology and our field.

Part I outlines the challenges of studying how the erasure of histories of racial violence have shaped our understanding of American law and legal institutions. Part I.A describes Purdy's project and his efforts to unite a broad readership, which include foregrounding the histories of conquest and slavery and their relevance for the present. By doing so, he signals his concern for contemporary issues of racial inequity and violence, yet the idea that erasures have impeded our ability to understand these histories as our common legacy runs contrary to prevailing presumptions in much of legal scholarship.²⁹ His adoption of what I will call a "presumption of erasure" raises questions about how such a presumption might disrupt established narratives about law that are based on a contrary presumption—that there has been no such erasure. Part I.B suggests that the inquiry into how the histories of conquest and slavery shaped the main doctrinal fields of law—for example, the subjects studied by first-years—remains

²⁹ The one exception here is legal historical scholarship, where the quantity of work on these topics is high.

undeveloped. In part, it is difficult to pursue such questions because the bar for attempting to show the relevance of historical foundations that are notably absent from the touchstone narratives in the American legal academy is high.³⁰ Speaking into the space of an erasure that no one perceives frequently requires first establishing or proving erasure as a precondition to making a positive claim.³¹ This Part describes a growing mass of legal scholarship that finds erasure across a number of doctrinal areas, indicating that broad patterns and mechanisms of erasure—including citational practices and segregation of source materials—pervade legal literatures generally,³² and suggesting that there is evidentiary basis for adopting a presumption of erasure.

Part II turns to the subtler, constitutive effects of erasure to show how its consequences on understanding the law are more than a matter of historical accuracy. Part II.A explores the conceptual consequences of erasure. Many widely accepted theoretical frameworks developed from established historical narratives about America evaded the histories of conquest and slavery; the

³⁰ See generally, for example, James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Wis 1956); Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Harvard 1977); Lawrence Friedman, *A History of American Law* (Simon & Schuster 1973). Professor James Willard Hurst's text provides an excellent example of how a scholar can completely elide the history of conquest, even while, in essence, writing about it. He begins his work with a detailed discussion of a settlers' compact in Pike Creek, who had moved onto unceded lands claimed by the Oceti Sakowin, Miami, Kickapoo, Potawatomi, and Peoria in anticipation of their future conquest. Yet Hurst frames the agreement they form not in terms of how such settlers constituted an informal labor force that the nation incentivized with land grants to occupy lands held by Native Nations, but as an example of citizen-made law, freedom, and democracy. See Hurst, *Law and the Conditions of Freedom* at 3–6. See also Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* 124–29 (Harvard 2005); K-Sue Park, *Insuring Conquest: U.S. Expansion and the Indian Depredation Claims System, 1796–1920*, 8 *Hist of the Present* 57, 64–68 (Apr 2018).

³¹ Historical interpretation has never been a uniform or uncontentious endeavor. However, the breach between versions of American legal history that engage with the histories of conquest and slavery and those that do not presents a distinct challenge. This disparity creates a different order of dispute in that such differences rest not on divergent interpretations of facts or marginally varied information, but on substantially different fact sets. Further, the strength of such arguments determines the influence they will have less than do the powers of habit, inertia, and path dependence.

³² Such work usually limits its claims to the boundaries of discrete fields, no doubt in part because the work of tracking such erasures more broadly would be unmanageable. While these patterns and mechanisms are general, the work of identifying such omissions in casebooks, treatises, judicial opinions, and legal scholarship, as well as analyzing the consequences of erasure and the significance of omitted material is highly specific to the doctrine, subject, and field of practice. See, for example, text accompanying notes 84–96.

abstract principles extracted from those frameworks therefore bear the marks of that erasure, insofar as different historical accounts would likely have produced different theoretical conclusions about the operation of law. Interrogating the conceptual consequences of erasures therefore means reassessing longstanding and widely embraced interpretations, if they were developed from partial historical accounts. Different historical narratives shape our perspectives and ideas, which, once shaped, are more recalcitrant to change than accounts of history from which they derive.

As Part II.B explores, it is therefore possible to formally acknowledge these formerly erased histories without appreciating the extent to which they have shaped one's own intellectual outlook and mode of address. The perspectives and ideas that Purdy acknowledges encompass one kind of erasure—the historical erasure of conquest and slavery—but omit another: the erasure of minority perspectives on these events and the law more broadly. Consequently, though his call for a collective ethos appears to be earnest, Purdy's ideals, attachments, and the lineages he offers themselves reflect a failure to engage with the Indigenous call to recognize that this land is *not* our land. Tacking on acknowledgments of differential distribution of harm cannot substitute for the lesson, long elaborated by critical race theorists, that representation of and engagement with different perspectives will substantively change the shape of one's intellectual questions, narrative accounts, and theoretical conclusions. Insensitivity to what experiences and horizons are shared and which are not is not a problem specific to Purdy's book; rather, it is one with which he and the broad left/liberal movements committed to universal ideals must contend if they ever wish to truly build *with*, and avoid alienating, marginalized groups. The ability to discern what is universal and what is particular cannot grow from a dearth of perspectives. Failing to include long-ignored perspectives in popular politics *and* primary legal narratives risks generating more “universal” perspectives that continue to suppress the same voices even as they purport to stand in for “all.”

I. ADOPTING A PRESUMPTION OF ERASURE

This Part considers the importance of history to creating a common narrative, both as Professor Purdy presents it and as the work of scholars who have investigated the problem of erasure in

the study of law reveals. Part I.A describes Purdy's project in *This Land is Our Land*, the way it aims at inclusivity by acknowledging the histories of conquest and slavery and their erasure, and some of the contradictions between this acknowledgment and the universal prescriptions of the book. Part I.B endorses and underscores the particular salience for the legal academy of Purdy's proposition that histories of racial violence inform the present. It describes a growing body of scholarship that has tracked the erasure of these histories across many legal fields, suggesting that that there is good reason to adopt a presumption of erasure in the study of the law and that the mechanisms of this erasure have constituted a fairly consistent set of citational, framing, and organizational practices.

A. Purdy's Vision of a Commonwealth

The political ideal that Purdy recommends we embrace in *This Land is Our Land* is that of a "commonwealth"—a term he traces back to Middle English that denotes "the general good' or the well-being of the whole community."³³ The freedom, dignity, and health that he imagines this form of political organization will bring depend, in his conception, on a reorganization of the economy and a new approach to infrastructure.³⁴ This emphasis on the material underpinnings of freedom and politics accords with the emphasis on political economy that Purdy has championed within the legal academy. He writes:

No story or picture of the world matters much if it floats too far from what people do with one another's bodies and with soil and weapons and other tools; but also and by the same token, no material change in power will go forward without ideas and images that give it shape and a horizon to aim for.³⁵

As more of a philosopher than a materialist—Purdy is much more theorist than wonk—he devotes most of the content of his book to describing the latter project of sketching the horizon through narrative example and self-reflection, emphasizing the material stakes and motivations of our institutions. By doing so, he hopes

³³ See Purdy, *This Land Is Our Land* at xi–xii (cited in note 1).

³⁴ See, for example, *id.* at xiv (citing Bayard Rustin's calls "for public works and training, for national economic planning, for federal aid to education, [and] for attractive public housing").

³⁵ *Id.* at 3.

to convince us that “a commonwealth is not a gauzy utopian ideal: it is radical and practical.”³⁶

The tour Purdy takes us on—“how American earth has always held the people on it apart together, and how the borders at the country’s edges and the borderlines that fracture ‘the homeland’ are linked in a single web”³⁷—moves through fights over public and private lands, including Ammon Bundy’s occupation of the Malheur Wildlife Refuge in Oregon; the Bears Ears and Grand Staircase-Escalante National Monuments in Utah; Appalachian coal country, where Purdy grew up; Flint, Michigan; and Durham, North Carolina, where Purdy lived for many years while he was a law professor at Duke. To guide us through this landscape and communicate his political vision, Purdy draws on his own personal experiences and love of nature to bring this work into the “self-as-story” genre that has been effectively vitalized by writers such as J.D. Vance and Ta-Nehisi Coates in recent times.³⁸ His embrace of a method of introspective philosophical reflection also places him squarely within a transcendentalist tradition that encompasses a number of his heroes—such as Henry David Thoreau, Wendell Berry, and Rachel Carson—in addition to such contemporary writers as Rebecca Solnit and Marilyn Robinson. In lines that could pass as a paraphrase of John Locke’s first and most famous statements about property, Purdy wields this geography, form, and tradition to argue that “[t]he world belongs in principle to all who are born into it. . . . A commonwealth’s engagement with the problem of global sharing must start from the premise that everyone alive has an equal claim to thrive in this world.”³⁹

In the first essay of this collection, which goes by the book’s title, Purdy describes the problem of “civic enmity” and presents his central idea that the land “belongs originally and essentially to everyone, that it is a commonwealth.”⁴⁰ The second, “Reckonings,” describes the toxic effect of industries on the people whose livelihoods and survival depend on them in Appalachia and elsewhere. Purdy’s third chapter, “Losing a Country,” provides an

³⁶ Id at xx.

³⁷ Purdy, *This Land Is Our Land* at viii (cited in note 1).

³⁸ See generally J.D. Vance, *Hillbilly Elegy: A Memoir of a Family and Culture in Crisis* (HarperCollins 2016); Ta-Nehisi Coates, *Between the World and Me* (Spiegel & Grau 2015).

³⁹ Purdy, *This Land Is Our Land* at 98–99 (cited in note 1).

⁴⁰ Id at 1, 28.

extended meditation on his own shock in the wake of the 2016 election in conversation with Thoreau and the natural landscape. His fourth focuses on infrastructure, the heedless and dangerous logic behind its current growth, and the possibility of rebuilding it to support a different way of living. The last essay offers a genealogy of “The Long Environmental Justice Movement” as a source of inspiration. And, finally, his conclusive “Forward” addresses the need to prioritize “the value of life” rather than conceptualize value primarily through “the more precise and neutral concept of price.”⁴¹

Across this collection of essays, Purdy’s reflections shift smoothly between descriptions of material conditions in the landscape he charts and such subjects as the way historical violence has shaped American identities, the link between environmental and economic vulnerability, the power of the built environment to determine how we live and to shape our choices and outlooks, the commitments that drive different political factions, and the problem of denialism. In particular, for Purdy, climate denialism is not merely a denial of the validity of scientific claims, but an “ethos that refuses to see how the world is deeply plural at every scale *and* that we are in it together.”⁴²

Over this survey of our national landscape and its afflictions, Purdy elaborates the ethic that he believes must guide a new and egalitarian approach to constructing an economy and infrastructure in sweepingly broad terms: We must believe, he argues, in “a way of living in deep reciprocity as well as deep equality,” not only with one another, but with the planet.⁴³ “We should root ourselves,” he further urges, “in helping the world, human and natural, to go on being.”⁴⁴ Developing this relationship with the natural world and one another, Purdy recognizes, depends on cooperation: “No one can choose these values alone because they depend on the shared commitments of others and on the shape and terms of a built and shared world.”⁴⁵ A world guided by this communitarian ideal, he cautions, will require us to take responsibility for our own actions and to confront our accountability to others: “The freedom of that community would not be freedom

⁴¹ Id at 142.

⁴² Id at 14–15 (emphasis in original).

⁴³ Purdy, *This Land Is Our Land* at xiii (cited in note 1).

⁴⁴ Id at 148.

⁴⁵ Id at 150.

from the consequences of your actions. It would not be freedom from dependence on others, or from responsibility for them.”⁴⁶ Perhaps above all, a new economy that could support this set of relationships would require us to sacrifice ways of living that we have come to take for granted as we “ask what wealth itself is and what is the value of life.”⁴⁷ In the future, Purdy hopes, “value will lie in work that does what is necessary and sustains its own conditions of possibility, in rest that contemplates a broken but still wondrous world.”⁴⁸

The path that bridges the troubled present to this possible future in Purdy’s account is recognizing our inescapable connect-edness, and the key to doing so, for him, lies in learning the history of the land itself. To the end of illuminating that history, Purdy not only shares stories of communities’ struggles in relation to the land in parts of West Virginia, Kentucky, Durham, and elsewhere, but also commits clearly to the premise that conquest and enslavement laid the foundation for colonial growth and the very possibility of the nation. He writes that “[c]olonists ‘justified’ taking the land of Indigenous people by insisting that only settlers and farmers could properly own and rule a terrain”;⁴⁹ and “[a]fter the land itself, the other great extraction of wealth was from the labor of enslaved people.”⁵⁰ Further, the “cycles of boom and bust” fueled by land speculation in “frontier land,” Purdy tells us, “never really ended.”⁵¹ And “[a]fter the frontier came redlining,”⁵² so that “[t]he chasm between white and black wealth is rooted in control of property, and it abides there.”⁵³

Furthermore, as he insists on these long-buried truths as foundational, Purdy also squarely acknowledges that he is speaking into a void of erasure that has shaped dominant popular consciousness. Though “[t]he land remembers” the history that shaped its terrain, he writes, we have largely lost the ability to do the same: “[W]hat do we remember of it?”⁵⁴ He explains that these erasures matter because they inform the claims people make on

⁴⁶ Id at xiii.

⁴⁷ Purdy, *This Land Is Our Land* at xxiii (cited in note 1).

⁴⁸ Id at 150.

⁴⁹ Id at ix.

⁵⁰ Id at xv.

⁵¹ Purdy, *This Land Is Our Land* at ix (cited in note 1).

⁵² Id at xvi.

⁵³ Id at xvii.

⁵⁴ Id.

the land today: “Every political contest over claims on the land is, in part, a contest over what will be remembered and what will be forgotten. With forgetting, the way things are sinks into the land itself, as if it became nature.”⁵⁵ “Forgetting,” for Purdy, has bred national mythologies in the negative space of the histories of colonization and slavery, while continuing to facilitate violent processes targeting non-white people. Purdy spies the “ecological echo” of Jim Crow in the “green canopy over the white boulevards” that mark “the old color line” where historically segregated suburbs began.⁵⁶ And ongoing gentrification, he asserts, is the direct descendant of redlining: “‘color-blind’ markets have replaced poorer black and Latino residents with whiter and wealthier people almost as systematically as segregation once did—albeit with more nuance and deniability.”⁵⁷

In short, Purdy locates the roots of what he later calls “our civic enmity”—the bitter dissension that rends the American public—in the nation’s tremendously violent, suppressed inheritance. In his introduction, Purdy pointedly outlines the sweeping impact of this past upon the present: “[T]he history of this continent’s past five centuries,” he writes, “is woven from fantasy on the one hand and the relentless and often inhumane and destructive extraction of wealth on the other.”⁵⁸ Further, the great “differential violence that molds white, black, and brown bodies to the concrete abstractions of race and caste”⁵⁹ remains “written on the land: in how people are distributed across it, who owns it and who can imagine, after a few generations, that their people have a claim that is nearly primordial and even in harmony with the expectations of the place itself.”⁶⁰ These far-reaching observations have huge implications for precisely the kinds of projects in which Purdy is professionally invested—namely, legal scholarship and political ideation. The questions they raise about the fantasies of liberal democracy—historical narratives about the country premised, as Purdy notes, on the omission of the destructive extraction that underpinned the country’s development, and the violence visited on racial minorities whose bodies and lands were sites of

⁵⁵ Purdy, *This Land Is Our Land* at xvii (cited in note 1).

⁵⁶ *Id.* at xvii.

⁵⁷ *Id.* at xvi.

⁵⁸ *Id.* at xv.

⁵⁹ Purdy, *This Land Is Our Land* at xvi (cited in note 1).

⁶⁰ *Id.* at xvi.

extraction—are equally applicable to both types of endeavors. To what extent have those narratives informed our understanding of legal and political institutions, of the political ideals we hold dear, the horizons of our political imaginations, and our very sense of self?

In the face of these crucial questions, and the scars of the violence that perpetuate deep inequalities, Purdy's later prescription that what we need is to recognize that "[a]ny arrangement for living together has both sides, and they have to be understood together,"⁶¹ frankly feels evasive. Elsewhere, too, he calls for unity on a theory that seems based more on co-residence than on the project of unpacking the profoundly troubled history that produced the schisms of today. The doors he opens to an inquiry about the past collapse into the present, for example, when he writes that "[t]he land exemplifies the country all too truly: it is the site of fights over whose country is being taken away, who is the patriot and who is the usurper or trespasser."⁶² To whom is this claim addressed? Can Purdy be speaking to the descendants of the people who lost their land to settlers? Is it the descendants of those settlers? Is he attempting to speak to both at once, or to mediate their concerns by suggesting they are equivalent? Do the specific histories that underpin such conflicts suggest that a single answer is appropriate for "both sides"?⁶³ Is the observation that "there is no agreement on the answer" to the question "how [] people who live together come to see one another as enemies"⁶⁴ all we can draw from the past? The histories that Purdy laid down as fundamental to the nation seemed to *confirm* that usurpation and trespass occurred, and that there is a long and complicated story to be told about how people in America came "to see one another as enemies." The ideas that "[t]here has never been enough public space for the contending publics who want it,"⁶⁵ or that "the things that tie people together and the things that divide them tend to be the same things,"⁶⁶ irresolutely back away from the lessons that particular histories have to teach us about the

⁶¹ Id at 3.

⁶² Id at 9.

⁶³ Purdy, *This Land Is Our Land* at 3 (cited in note 1).

⁶⁴ Id at 1.

⁶⁵ Id at 9.

⁶⁶ Id at 3.

specific common ground and sources of injury between people, especially if we could learn them together.

This tension, however, is a productive site for returning to Purdy's own insight that the key to resolving our conflicts lies in recognizing—and probing—the long-buried history of the great racial violences that produced this nation and the contours of the land. Purdy's difficulty in developing this analysis speaks less to any personal failing than to the points where this public conversation very commonly stalls: What is the purpose of acknowledging these histories, and what do we gain from studying them? How do we differently understand the United States, our place in it, the problems that fester across it, the institutions that govern it, and future possibilities for any of these things if we undertake a collective examination of this common but suppressed past? These questions have been so infrequently asked by the American public at large that we have a generally underdeveloped sense of how to ask them and few specific answers to them yet. So it is hugely valuable, as Purdy does, to raise these questions in such a way that frames the inquiry as our collective task. The next Section, Part I.B, examines the specific challenges and contours of taking erasure as an object of inquiry within Purdy's field—law—before turning in Part II to subtler challenges of erasure that impact our understandings of law and legal institutions, but also political conversations and the possibility of mutual understanding that Purdy foregrounds as critical to building solidarity and movements on the Left.

B. Taking Erasure as an Object of Inquiry

A growing body of legal scholarship suggests that erasure of the histories of conquest, slavery, and race is widespread across doctrinal areas. This scholarship demonstrates that, methodologically, the work of (re)constructing how the histories of conquest and slavery affected the development of law and legal institutions requires both gleaning stories from the record and investigating how they became invisible in legal scholarship, legal education, and legal practice. These findings concerning erasure give us a more precise understanding of the mechanisms through which that erasure occurred, including path-dependent citational practices that reproduce choices about framing, selection, and editing in casebooks, treatises, court documents, and scholarship. Additionally, the sources containing information about minority

groups, and thus about conquest, slavery, or race, are sometimes different than those that contain the traditional records of reference for a field of study, producing the tendency to read segregated records as absence. Though ongoing and incomplete, this scholarship accords with a well-developed and abundant historical scholarship that suggests there is good reason to presume widespread erasure in historical accounts of American development, including American legal development.⁶⁷

In general, the scholarship addressing erasure is difficult to characterize because it is ongoing and uneven with respect to conquest, slavery, and race more generally, as well as across legal fields. Scholars of constitutional law may have most clearly articulated the problem of erasure after Professor Sanford Levinson identified the absence of slavery in the field in the early 1990s,⁶⁸ triggering a shift in the canon. Following in this vein, Professor Gregory Ablavsky showed recently in a series of articles that omitting Natives has led to incomplete and inaccurate readings of the Constitutional Convention,⁶⁹ the importance of the land

⁶⁷ See notes 29–32 and accompanying text. See also generally Sarah Haley, *No Mercy Here: Gender, Punishment, and the Making of Jim Crow Modernity* (UNC 2016) (accounting for the violent exploitation of Black women prisoners in late nineteenth and early twentieth century Georgia); Sven Beckert, *Empire of Cotton: A Global History* (Vintage 2015) (mapping the role of the slave trade in global industrial cotton production); Walter Johnson, *River of Dark Dreams: Slavery and Empire in the Cotton Kingdom* (Harvard 2013) (examining how slavery in the Mississippi Valley grew out of an imperial capitalist project and produced unrealized imperial capitalist visions in the antebellum period); Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed 2d ed 2012) (discussing Indigenous perspectives on academic research that traditionally made Indigenous people its object); Jean M. O'Brien, *Firsting and Lasting: Writing Indians Out of Existence in New England* (Minn 2010) (chronicling how New England colonists omitted tribal names and the existence of Native Americans when scripting their local histories and renaming places, catalyzing the erasure of Natives from American history); Saidiya Hartman, *Venus in Two Acts*, 26 *Small Axe* 1 (June 2008) (reflecting on the voices left out of the archive of slavery through an analysis of the traces in the record of girls and women on slave ships); Jennifer L. Morgan, *Laboring Women: Reproduction and Gender in New World Slavery* (Penn 2004); Robert A. Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford 1990) (discussing the evolution of the “discourse of conquest” Spanish, English, and then early American jurists developed regarding Native Americans, with particular focus on *Johnson v McIntosh*, 21 US (8 Wheat) 543 (1823)).

⁶⁸ See Sanford Levinson, *Slavery in the Canon of Constitutional Law*, 68 *Chi Kent L Rev* 1087, 1094 (1993) (highlighting the “necessity of teaching [slavery-related] materials in law school as part of a standard . . . course on constitutional law”).

⁶⁹ Gregory Ablavsky, *The Savage Constitution*, 63 *Duke L J* 999, 1038–50 (2014).

question to the Founders,⁷⁰ and the rise of dual federalism.⁷¹ Last year, noting the broad success of Levinson's intervention, Professor Maggie Blackhawk also argued for another paradigm shift in the field with respect to colonization.⁷² Blackhawk showed that "[m]any areas of constitutional law were built and refined by interactions with Native Nations, Native peoples, and Native lands."⁷³ Observing that "a state of near erasure of Native Nations and indigenous peoples" prevails in canonical constitutional texts, she added that examining the history of US interaction with Native Nations, beyond simple inclusion in the canon, "could contribute to a fundamental rethinking of public law principles"—including different views of the treaty power, separation of powers, the war powers, and powers inherent in sovereignty, among others.⁷⁴

The work of uncovering counternarratives is relatively advanced in property law as well, where today, virtually every property law casebook in circulation acknowledges the foundational status of *Johnson v M'Intosh*,⁷⁵ an 1823 Chief Justice John Marshall decision that identified conquest at the root of every chain of title in the United States.⁷⁶ A few casebooks also address the topic of slavery, and Professors Alfred L. Brophy, Alberto Lopez, and Kali N. Murray have written a wonderful supplement elaborating on conquest, slavery, and other parts of the history of race and property.⁷⁷ Nonetheless, there are many ways that these histories have become imprinted upon the field of law that few realize. For one anecdotal example, I recently stumbled across William M. Burwell's *White Acre vs. Black Acre: A Case at Law*,⁷⁸ and only thereby learned that "Blackacre" and "Whiteacre"—the legal

⁷⁰ Gregory Ablavsky, *The Rise of Federal Title*, 106 Cal L Rev 631, 680 (2018).

⁷¹ See Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 Yale L J 1792, 1824–27, 1855–61 (2019).

⁷² Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 Harv L Rev 1787, 1804 n 74 (2019) (referencing Levinson's "successful campaign to bring slavery into the constitutional canon").

⁷³ Id at 1804.

⁷⁴ Id at 1793–94, 1797, 1806–45.

⁷⁵ 21 US (8 Wheat) 543 (1823).

⁷⁶ Id at 588–89 (noting that "[t]he title to a vast portion of the lands we now hold" was acquired "by the sword").

⁷⁷ See generally Alfred L. Brophy, Alberto Lopez, and Kali N. Murray, *Integrating Spaces: Property Law & Race* (Wolters Kluwer 2011).

⁷⁸ William M. Burwell, *White Acre vs. Black Acre: A Case at Law; Reported by J. G., Esq., a Retired Barrister, of Lincolnshire, England* (J.W. Randolph 1856).

kadigans for fictional estates that appeared, though infrequently, in English legal treatises and now pepper property-law hypotheticals and bar questions⁷⁹—constituted the title of a proslavery novel published the same year as *Dred Scott v Sandford*⁸⁰ in response to Harriet Beecher Stowe’s *Uncle Tom’s Cabin*.⁸¹ In this exceptionally dehumanizing work, the White Acre farm represents an incompetent northern farm and Black Acre represents a southern plantation tended by loyal, hardworking slaves.⁸² Likely neither professors nor bar examiners who use these terms are aware of this particular part of their history, nor can they make informed choices about their continued use of them.

Recently, I examined approximately two hundred property law casebooks for any mention of conquest, slavery, or race,⁸³ beginning with the first, published in 1888 by Professor John Chipman Gray.⁸⁴ It is worth noting that casebooks offer a useful index of erasure, as they play a critical role in first-year legal education and in maintaining a fairly stubborn canon.⁸⁵ Levinson’s comment about casebooks was widely applicable—substituting virtually any subject for “constitutional”—in that it remains

⁷⁹ Edward Coke, *First Part of the Institutes of the Lawes of Englande, or, A Commentarie upon Littleton, Not the Name of a Lawyer Onely, But of the Law It Selfe* 148 (2d ed 1629); Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius* 89 (5th ed 1788). For an example of historical use of the Blackacre/Whiteacre terminology, see Sir Thomas Edlyne Tomlins, *The Law-Dictionary: Explaining the Rise, Progress, and Present State of the British Law* 441 (Payne 3d ed 1820). See also Jesse Dukeminier, James E. Krier, Gregory S. Alexander, Michael H. Schill, and Lior Jacob Strahilevitz, *Property* 101 n 28 (Aspen 9th ed 2018) (discussing the historical origins of the terms and suggesting they might indicate lands growing different crops or receiving different rents with no mention of the novel).

⁸⁰ 60 US (19 How) 393 (1856).

⁸¹ See generally Harriet Beecher Stowe, *Uncle Tom’s Cabin* (John P. Jewett and Co 1852). Burwell’s book was part of a spate of publications known as “anti-Uncle Tom literature,” which even included children’s books. See Stephen Railton, *Uncle Tom as Children’s Book*, available at <https://perma.cc/JP8G-4KQ2>. See also Thomas F. Gossett, *Uncle Tom’s Cabin and American Culture* 212–38 (SMU 1985).

⁸² See Burwell, *White Acre vs. Black Acre* 238, 242 (cited in note 78). The recent reprint I obtained, published by Scholar Select, reads, on the back: “This work has been selected by scholars as being culturally important, and is part of the knowledge base of civilization as we know it.”

⁸³ My team and I scanned the casebooks in their entirety for these terms and a cluster of related terms, as well as any case in which they appeared, to gather information about the patterns I discuss below.

⁸⁴ John Chipman Gray, *Select Cases and Other Authorities on the Law of Property* (Sever 1888).

⁸⁵ The relatively limited number of casebooks in print and in use at any given time and the substantial uniformity of core curricula in legal education contribute to this stability.

only slightly hyperbolic to say that any students whose knowledge of American constitutional history will be derived from their immersion in [such casebooks] will have only the dimmest realization that the United States ever included a system of chattel slavery or, just as importantly, that its implications pervaded every single aspect of constitutional law (and constitutional interpretation).⁸⁶

I found that despite “the magnitude of the interest in litigation”⁸⁷ at the time *Johnson* was decided, its frequent appearance in nineteenth-century treatises,⁸⁸ and its ubiquity now, not a single property law casebook between 1888 and 1959 included a reprint of the case.⁸⁹ Nor did any casebook describe legal approaches to extinguishing Indian title, a centuries-long preoccupation of governments, nor how property law practices in the colonies or the United States helped established Anglo-American claims to lands held by Native Nations. Rather, casebooks avoid law from colonial America altogether, despite key developments from that period in land laws and practices that heavily informed the United States’ land system, such as the headright system, land grants and subsidies through which governments procured the labor of settlement, the survey system, preemption laws, and foreclosure. With respect to the United States, the casebooks contain no mention of the surveyor general, the Land Office, the Preemption Act or the Homestead Act, which constitute such an important part of the country’s lore. Instead, they incorporated nearly as many English

⁸⁶ Levinson, 68 Chi Kent L Rev at 1089–90 (cited in note 68). Levinson also elaborated on the significance of the casebook: “[T]eachers construct their syllabi by reference to what is easily available . . . [and] very few professors include in their syllabi material that is not presented in one or another of the standard casebooks.” Id at 1088.

⁸⁷ *Johnson*, 21 US (8 Wheat) at 604.

⁸⁸ James Kent, 1 *Commentaries on American Law* 242–43 (O. Halsted 1826); Joseph Story, 1 *Commentaries on the Constitution of the United States* §§ 2–8 at 4–7 (Little, Brown 2d ed 1851); Joseph Kinnicut Angell, *A Treatise on the Right of Property in Tie Waters and in the Soil and Shores Thereof* 41 (Harrison Gray 1826); Timothy Walker, *Introduction to American Law: Designed as a First Book for Students* 33, 147 (Little, Brown 10th ed 1895); Joseph Kinnicut Angell and John Wilder May, *A Treatise on the Limitations of Actions at Law and Suits in Equity and Admiralty* 416–17 (Little, Brown 1869).

⁸⁹ There are two instances in which casebooks cited *Johnson* during this period. See, William L. Burdick, *Illustrative Cases on the Law of Real Property* 37 (1914) (reproducing a case involving the execution of a will, *Barnett v Barnett*, 117 Md 265 (1912), that briefly cited *Johnson* for the proposition that title was absolute); John E. Cribbet, William F. Fritz, and Corwin W. Johnson, *Cases and Materials on Property* 24 n 2 (Foundation 1960) (citing *Johnson* in a footnote for its holding that some traditional rules of property were inapplicable to the “savage[]” Natives).

as US federal and state cases, and focused their discussions of historical foundations on feudal English land practices.⁹⁰ As a result of these framing choices,⁹¹ students whose understanding of property law was based on *any* casebook in the field published before 1974 would have had no notion that title to every parcel of land within the territorial boundaries of the United States derives originally from Indian title or cession, or that laws played a critical role in the dual processes of conquest and establishment of the US land system.

The inclusion of the topic of slavery today remains highly uneven, and the record shows that this partial, persistent erasure is the result of a history that has taken more than one turn. For the first two decades after 1888, *all* property law casebooks that I examined included cases directly involving or citing cases involving property in enslaved people to teach doctrines such as conversion, statutes of limitation, replevin, trespass, bailment, ejection, and more.⁹² Most casebooks included several slavery cases until the 1930s, when the number of casebooks that dropped all cases involving property in enslaved people from their texts increased.⁹³

⁹⁰ See, for example, Ralph W. Aigler, Allan F. Smith, and Sheldon Tefft, 1 *Cases and Materials on the Law of Property* 382–91 (West 2d ed 1951).

⁹¹ Though preliminary because analysis is in progress, similar framing choices appear to have contributed to the absence of racial zoning cases prior to the 1950s. For example, *Buchanan v Warley*, 245 US 60 (1917), did not appear in any casebook until 1948, in keeping with a general exclusion of public law in property law casebooks before then (by contrast, *English* public law, such as rules concerning consequences of knighthood and socage, frequently appeared). Cases addressing racially restrictive covenants were also largely, though not entirely, absent from casebooks during the period in which such cases proliferated, but casebooks began to incorporate *Shelley v Kraemer*, 334 US 1 (1948), relatively soon after the decision.

⁹² See, for example, William A. Finch, *Selected Cases on the Law of Property in Land* 570, 968–69 (Baker, Voorhis 2d ed 1912); John Chipman Gray, *Select Cases and Other Authorities on the Law of Property* 33–38, 474–76, 611–13 (Kent 2d ed 1906); Grant Newell, *Elements of the Law of Real Property with Leading and Illustrative Cases* 344–48 (Flood 1902); William A. Finch, *Selected Cases on the Law of Property in Land* 218–30, 489–99, 551–555, 570, 968–69 (Baker, Voorhis 1898); Jasper C. Gates, *Cases on the Law of Real Property* 57–64 (West 1898); Elmer E. Barrett, *Cases on the Law of Real Property* 38–43 (West 1898); Christopher G. Tiedeman, *Selected Cases on Real Property* 18–25 (Thomas Law Book 1897); W.S. Pattee, *Illustrative Cases in Realty* 606–13 (Johnson 1896) Gray, *Law of Property* at 50–64, 271–80, 638–40 (cited in note 84).

⁹³ Nonetheless, a few casebooks, including the three that Professor Harry A. Bigelow co-edited with others (Professor Francis William Jacob, Judge J. Warren Madden, and Professor William Leland Eckhardt in 1931, 1934 and 1942, respectively) and Professor Ray Andrews Brown's 1936 casebook, continued to include several cases involving property in enslaved people. See Harry A. Bigelow and Francis W. Jacob, *Cases on the Law of Personal Property* 28–29 (West 1931); Harry A. Bigelow and Joseph Warren Madden,

The last casebook to include slavery cases appeared in 1942,⁹⁴ after which I could find *no* casebooks that included any. Some included an edited version of a case that had cited slavery cases, but with that portion edited out.⁹⁵ The history of slavery thereby became invisible in casebooks, so that for the following several decades, students would have had no inkling from the property law casebooks that “the United States ever included a system of chattel slavery”⁹⁶ and that enslaved people for centuries constituted a highly significant form of property in America. Before then, some students might have had a sense of how common it had been to claim property in human beings, but they would not have had tools to understand the legal structure of the institution, its arc or end, the racial social order it entrenched, or its relationship to the growth and development of the land market in the colonies and the United States.

However, as I teach my own students, relatively newly acquired land and enslaved people together constituted the vast majority of *all* property held by colonists on the eve of the Revolution;⁹⁷ enslaved labor fueled territorial expansion, while territorial expansion drove the growth of the slave trade; and enslaved labor presents the most profound institutional contradiction to the theory that labor creates property entitlements⁹⁸—a

Introduction to the Law of Real Property 489, 671 (West 2d ed 1934); Harry A. Bigelow and Willard Leland Eckhardt, *Cases and Other Materials on the Law of Personal Property* 35, 342 (West 3d ed 1942); Ray Andrews Brown, 1 *Treatise on the Law of Personal Property* 334 (Callaghan and Co 1936).

⁹⁴ See Bigelow and Eckhardt, *Cases and Other Materials on the Law of Personal Property* 35, 342 (cited in note 93).

⁹⁵ The case was *Chapin v Freeland*, 8 NE 128 (Mass 1886). For this case’s discussion of cases involving property in enslaved people, see *id* at 132. See also Cribbet, *Cases and Materials on Property* 59–61 (cited in note 89).

⁹⁶ Levinson, 68 *Chi Kent L Rev* at 1089 (cited in note 68).

⁹⁷ Land and enslaved persons collectively constituted about 75 percent of all property across the thirteen colonies: roughly 72 percent in New England, 66 percent in the “Middle Colonies,” and 80 percent in the South. See Alice Hanson Jones, *Wealth of a Nation to Be: The American Colonies on the Eve of Revolution* 97 tbl 4.3 (Columbia 1980). See also *id* at 95–100 (generally discussing physical wealth in the colonies).

⁹⁸ Virtually all property law casebooks teach this theory as a justification for property rights, using the case *International News Service v Associated Press*, 248 US 215 (1918). Yet the labor theory of value played a crucial role in justifying colonists’ appropriation of lands held by Native Nations for centuries, in writings from Richard Hakluyt to Samuel Purchas to, most famously, John Locke. See Stuart Banner, *How the Indians Lost their Land: Law and Power on the Frontier* 31, 46–48 (Belknap 2005); Williams, *The American Indian in Western Legal Thought* at 246–49 (cited in note 67); John Locke, *Two Treatises of Government and A Letter Concerning Toleration* 111–21 (Yale 2003) (I. Shapiro,

ubiquitous part of property law syllabi—in American history. The civil rights movement of the 1960s, and the climate created by the Black Power movement, the American Indian Movement (AIM), and others, seem to have ushered in a significant shift with respect to casebook authors' willingness to confront the ways that race historically shaped property and property law in America.⁹⁹ In 1974, Professor Charles Donahue and his co-authors incorporated the text of *Johnson* into a casebook for the first time,¹⁰⁰ and property law casebooks increasingly began to incorporate *Johnson* thereafter.¹⁰¹ In 1978, Professor Richard Chused published an extraordinary casebook that included lengthy sections on *Johnson*, conquest, federal Indian law, slavery, racial and gender discrimination in housing, as well as women's property rights.¹⁰² And in the 1990s, Professor Joseph Singer's integration of elements of the histories of conquest and slavery with the doctrines of the traditional property law curriculum greatly helped to normalize acknowledgment of the centrality of these histories to the field.¹⁰³ Though these casebook authors did not explicitly address the problem of erasure, they offered material to counter it, and thereby reset the margins of the field.

ed) (originally published 1689); Christopher Tomlins, *The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century*, 26 L & Soc Inquiry 315, 364 n 67 (2001).

⁹⁹ Prior to that, casebooks began to include public law in the 1950s in another notable shift. Authors began to cut material on the English feudal land system and to incorporate more material on the public records and the US land system. However, in contrast to the English historical framing they often nevertheless retained, their discussions of the public land system were completely ahistorical.

¹⁰⁰ Charles Donahue Jr, Thomas E. Kauper, and Peter W. Martin, *Cases and Materials on Property: An Introduction to the Concept and the Institution* 235–43 (West 1974).

¹⁰¹ See, for example, Charles Monroe Haar and Lance Liebman, *Property and Law* 3–13 (Little, Brown 1977); Jesse Dukeminier and James E. Krier, *Property* 113–14 (Little, Brown 1st ed 1981).

¹⁰² See Richard H. Chused, *A Modern Approach to Property: Cases, Notes, Materials* 83–98 (West 1978) (referencing and discussing *Johnson* in text and accompanying notes); id at 98–126 (discussing cases regarding the removal of the Cherokees); id at 644–47 (discussing slavery, with particular focus on *Dred Scott*); id at 648–69 (discussing racial discrimination in housing, with particular focus on *Clark v Universal Builders, Inc.*, 501 F2d 324 (7th Cir 1974), a 1974 Seventh Circuit case addressing claims of racially-based housing discrimination in Chicago); id at 294–336 (discussing marital estates, with focus on the historical evolution of women's property rights).

¹⁰³ See Joseph William Singer, *Property Law: Rules, Policies, and Practices* 23–42 (Aspen 2d ed 1997) (discussing conquest); id at 1326–42 (discussing slavery).

Nonetheless, some of the most widely adopted casebooks continue to eschew any mention of slavery.¹⁰⁴ Further, while canonicity matters greatly (since “very few professors include in their syllabi material that is not presented in one or another of the standard casebooks”¹⁰⁵), the mere availability of materials does not ensure that people will teach those topics. Teachers are likely to default to subjects more familiar and comfortable to them, and conquest and slavery are unlikely to be familiar or comfortable subjects for any who have not made them a special area of research. Though *Johnson* is now ubiquitous, casebook authors’ notes for the case vary widely,¹⁰⁶ addressing principles such as first-in-time,¹⁰⁷ certainty,¹⁰⁸ and only occasionally, the crucial issue that the case actually settled—chain of title.¹⁰⁹ Often, the explanations of the discovery doctrine are limited and sometimes inaccurate,¹¹⁰ and Chief Justice Marshall’s admittedly winding discussion of how European and colonial entities applied the discovery doctrine to their conquests almost never appears.¹¹¹ The result is more confusion than clarity about the history of conquest. Just as *Johnson*

¹⁰⁴ The current, 2018 edition of the leading casebook by Dukeminier, et al, mentions slavery twice: first, in a footnote about Chief Justice John Holt, an English judge who “laid down the rule that the status of slavery could not exist in England; as soon as a slave breathed the air of England he was free” (this misleading account of slavery in England cites *Smith v Brown & Cooper*, 2 Salk 666, 90 Eng Rep 1172 (1703)). See Dukeminier, et al, *Property* 36 n 17 (cited in note 79). Then, as a passing addendum to Locke’s labor theory introducing cases about property in one’s bodily cells (“every man has a property in his own person”): “Slavery, obviously, was in opposition to that proposition, but slavery has been abolished. So, can we now say, without qualification, that you have property in yourself?” Id at 167.

¹⁰⁵ Levinson, 68 Chi Kent L Rev at 1088–90 (cited in note 68).

¹⁰⁶ See Dukeminier, et al, *Property* at 10–19 (cited in note 79).

¹⁰⁷ See, for example, Dukeminier, et al, *Property* at 12–15 (cited in note 79).

¹⁰⁸ See, for example, Jerry L. Anderson and Daniel B. Bogart, *Property Law: Practice, Problems, and Perspectives* 17–27 (Wolters Kluwer 2015).

¹⁰⁹ See, for example, Thomas W. Merrill and Henry E. Smith, *Property: Principles and Policies* 119–20 (Foundation 2d ed 2012); John G. Sprankling, *Understanding Property Law* 5 (Carolina 4th ed 2017).

¹¹⁰ Professors Thomas W. Merrill and Henry E. Smith accurately describe the operative principle of the discovery doctrine as a first-in-time right to possess. But Merrill and Smith, Professor John G. Sprankling, and Professors Jerry L. Anderson and Daniel B. Bogart all omit a basic explanation of what the discovery doctrine was, which Chief Justice Marshall himself explains quite clearly. See Merrill and Smith, *Property: Principles and Policies* at 90, 97–101 (cited in note 109); Sprankling, *Understanding Property Law* at 35–36 (cited in note 109); Jerry L. Anderson and Daniel B. Bogart, *Property Law: Practice, Problems, and Perspectives* at 25–27 (Wolters Kluwer 2019). But see Dukeminier, et al, *Property* 11–12 (cited in note 79) (providing such an explanation).

¹¹¹ For one exception, see Dukeminier, et al., *Property* at 4–6 (cited in note 79).

is a difficult case to teach in the absence of expertise or adequate teaching aids, property law professors that do address slavery usually excerpt *Dred Scott*, whose convoluted discussion focuses on constitutional law questions of federalism and citizenship that are challenging and involve more complex legal questions than those typically presented during the first year. The difficulty of clearly connecting the case to property law—beyond the point that to treat human beings as property crosses moral boundaries that should also be legal boundaries—further deters many from teaching this history at all. Moreover, though important, both *Johnson* and *Dred Scott* are monumental Supreme Court cases unrepresentative of property cases in general, or, more specifically, the extensive body of colonial, state, and US cases involving property law questions and Indian title or property in slaves. Many property law professors, in keeping with firmly established tradition and likely their own legal education, are likely not to prioritize teaching these histories, even if some material about them is available, and even if they are open to unconventional approaches to the subject.

A key conundrum of attempting to teach into the space left by an erasure is that the information that demonstrates the connection between histories of conquest and slavery and any given area of law is largely not available, even to scholars in the field, without taking erasure itself as an object of study. We are newly aware, for example, of the breathtaking extent to which “judges and litigants [] continue to treat slave cases as good law” because of Professor Justin Simard’s painstaking research, now catalogued in a public database, containing over three hundred disputes in which contemporary judges cited slavery cases.¹¹² Simard found that approximately 80 percent of cases that cited slavery in the last thirty-five years—including in decisions from courts in a majority of states, most federal courts of appeals, and the Supreme Court—did not acknowledge the content of slavery in the case.¹¹³ If he had not tracked, compiled, and studied the original texts of these cases, it would be impossible to realize when a single case from a string cite or block quotation represents the living legacy of slavery, to understand the cumulative extent of this

¹¹² See Justin Simard, *Citing Slavery*, 72 Stan L Rev 79, 94, 97 (2020). For the database, see Justin Simard, *Citing Slavery* (2019), archived at <https://perma.cc/5NYY-B5GB>.

¹¹³ Simard, 72 Stan L Rev at 81–82, 97–98 (cited in note 112).

legacy, or to ask questions about its effects. Moreover, the collection of this erasure permits Simard to observe that the law of slavery penetrated and pervaded the fields not only of property, but also “contracts, [] civil procedure, criminal procedure, statutory interpretation, torts, and many other fields.”¹¹⁴ Scholars have traditionally conceived of the “law of slavery” as consisting of laws governing the status and disability of enslaved persons, their punishment, and their capture¹¹⁵—a now obsolete body of law. However, the fundamental legal subjects from which that body was distinguished in fact regulated commerce in slaves, in ways that may well have influenced their development. As Simard writes, slavery cases were “part of the foundation of American jurisprudence,”¹¹⁶ and judges facilitated this all-important market through common law cases concerning disputes about “negligent damage to property, adverse possession, double jeopardy, the conduct of executors, contract interpretation, jury discretion in forfeiture cases, dram-shop liability, marriage, estoppel, capacity, examination of witnesses, fraudulent conveyance, statutory interpretation, and many other doctrines.”¹¹⁷

Despite the fact that, as Simard’s research affirms, virtually every area of law constituted a part of the law of slavery¹¹⁸ (not to mention conquest¹¹⁹), erasures of these histories have received even less attention than most of the other basic subjects of the law school curriculum. The citational mechanics of how omissions perpetuate omissions accord, and sometimes converge, with the ways that legal citational practice hides historical context. The study of such erasures suggests that the various processes that produce it include, *inter alia*, choices of frameworks, selection, and editing. From one edition of a casebook or treatise to the next, we see selection and editing choices in omissions of *cases* involving Native people, slaves, free Black people, or other nonwhites,

¹¹⁴ *Id.* at 81.

¹¹⁵ See *id.* at 86. See also generally Thomas D. Morris, *Southern Slavery and the Law, 1619–1860* (UNC 1996).

¹¹⁶ Simard, 72 *Stan L Rev* at 85 (cited in note 112).

¹¹⁷ *Id.* at 94–95.

¹¹⁸ See *id.*

¹¹⁹ See Blackhawk, 132 *Harv L Rev* at 1800 (noting that “interactions between the national government and Native Nations shaped the warp and woof of United States constitutional law from the Founding”) (cited in note 72); Angela R. Riley, *Native Nations and the Constitution: An Inquiry into “Extra-Constitutionality”*, 130 *Harv L Rev F* 173, 173 (2017) (acknowledging that “virtually every area of law in the American canon has an ‘Indian law’ component”).

or *portions* of cases mentioning them, or even, in some instances, specific *words* identifying nonwhites in the text of cases. With respect to race, for example, Professor Kevin Johnson noted that between the seventh and eighth editions of their civil procedure casebook, one set of authors edited language out of a 1961 “garden-variety automobile accident case” from the Mississippi Supreme Court “not[ing] that a witness (Hal Buckley) was ‘a Negro man.’”¹²⁰ Professor Dylan Penningroth has conducted extensive primary research for an article-in-progress to identify similar examples of erasures in influential casebooks, treatises, and articles.¹²¹

In addition to citational practices, erasure in legal texts also results from the particularity of sources that contain records pertaining to conquest, slavery, and race. The long history of segregation is reflected in the fact that the sources of records concerning nonwhites frequently cannot be found in precisely the same places that records concerning whites are kept, even with respect to parties’ involvement in the same kind of transaction, doctrine, or practice.¹²² Cases involving litigants of color, for example, might not reach appellate courts, leading scholars examining records from higher courts to miss their role in shaping legal practices and norms.¹²³ My research on the history of mortgage foreclosure in colonial America describes transactions for land between Native people and colonists that are memorialized in public deed records and private account books,¹²⁴ but did not appear in the colonial legislation that other scholars have

¹²⁰ Kevin R. Johnson, *Integrating Racial Justice Into the Civil Procedure Survey Course*, 54 J Legal Educ 242, 259 (2004), citing John J. Cound, Jack H. Friedenthal, Arthur R. Miller, and John E. Sexton, *Civil Procedure: Cases and Materials* 1011 (St Paul 7th ed 1997), and John J. Cound, Jack H. Friedenthal, Arthur R. Miller, and John E. Sexton, *Civil Procedure: Cases and Materials* 1049 (St Paul 8th ed 2001).

¹²¹ See Dylan Penningroth, *Race and Contract Law* *46 n 210 (unpublished manuscript, 2020) (on file with author).

¹²² Another major example is treaties, which came to form a distinct collection of records after the federal government claimed prerogative to transact with tribes for land under the Trade and Intercourse Acts, 1 Stat 137 (1790), and contracts for land no longer belonged to the same genre as other kinds of contracts, as previously. Similarly, petitions for “Indian depredations,” or indemnity claims for property losses incurred by settlers on the frontier form their own discrete record set at the National Archive, distinct from other kinds of petitions. See National Archives, *Guide to Senate Records: Chapter 12 Indian Depredations 1893–1921* (Aug 15, 2016), archived at <https://perma.cc/CFV9-US95>.

¹²³ See generally, for example, Penningroth, *Race and Contract Law* (cited in note 117).

¹²⁴ See generally Park, 41 L & Soc Inquiry 1006 (cited in note 24).

examined.¹²⁵ The difficulty of anticipating the variety of relevant sources to the history, in other words, has made it easy to overlook the earliest history of foreclosure in America.¹²⁶

The work that has engaged the legal academy in the task of investigating erasure suggests that it is reasonable to adopt a presumption of erasure, or at least, raises the question of what evidence would justify one. Acknowledging these histories and their erasure, as Purdy does, is a necessary first step; however, tracking erasures by considering these various possibilities and (re)constructing the history of a legal doctrine or practice requires significant labor. Scholars looking only at legislation but not county deed records, at records from higher courts but not lower ones, or even lower court decisions but not county records, might perceive absence of nonwhites in a field where they were highly active. The difficulty of knowing whether information is missing from a given record, what the significance of that information is, and whether other pertinent archives exist is formidable. Nevertheless, work inside and outside the legal academy further suggests that the regulation of the trade in enslaved persons was a massive part of regulating market activity for courts;¹²⁷ that conquest and creating a system of property law in America were part of the same endeavor; that everyday business could not proceed without transacting with racial minorities, leading to claims that would have come before courts. It appears from this work that frequently, by failing to consider these histories, we have formed conclusions and presumptions about law on the basis of incomplete information, both with respect to individual cases and structural questions concerning the development of key doctrines and practices. The pervasiveness of patterns of erasure across fields—together with the challenges of identifying and understanding erasures—further advise that the work on erasure and these histories' role in shaping American law likely represents merely a floor of significance.

¹²⁵ See generally, for example, Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 Harv L Rev 385 (2006) (analyzing colonial laws relating to the rights of holders of real property against creditors).

¹²⁶ Difficulty locating the sources that contain relevant information, especially pertaining to earlier historical periods, also contributes to the challenges of recovering an understanding of how those histories impacted a single case, an entire doctrine, or practice.

¹²⁷ See, for example, Simard, 72 Stan L Rev at 90–94 (cited in note 112).

II. CONSEQUENCES OF ERASURE

Recognizing erasure is a necessary first step for understanding how histories of conquest, slavery, and race shaped American legal institutions. However, erasure presents problems that are not solely a matter of correcting the historical record, or of factual inaccuracy. The legacies of erasure are also conceptual and social, affecting perspective, representation, inequality, and the very possibility of communicating effectively across differences. While the relationship between perspective and representation may already appear intuitive—for example, it is a familiar idea that including (and representing) different groups in institutions brings diverse perspectives—this Part examines the ways that each concept constitutes a consequence of erasure and requires engaging an additional body of literature.

Part II.A addresses the necessity of looking at historical accounts of legal doctrines or practices that do *not* discuss conquest, slavery, or race, in order to determine how much the history influenced the theory. Many broadly accepted ideas, norms, and ideals about the US legal system derive from filtered narratives. As Professor Purdy sensitively shows, one's acceptance of specific histories, and not others, shapes one's *perspectives* and one's attachment to such ideas, norms, and ideals.

Part II.B discusses how literature from federal Indian law, legal history, and critical race studies helps furnish some of the information that is absent from other literatures. By describing how the laws during conquest, slavery, and their aftermath produced persistent problems of representation of nonwhites—through formal exclusion, predatory inclusion, and cultivation of harmful racial stereotypes—this literature also highlights the value of representation: other perspectives on, contributions to, and conceptions of the law whose absences have both distorted our understandings of how we arrived at our present predicaments and challenged our ability to communicate about our collective history.

A. The Challenge of Perspective

Throughout his book, on the wide terrain for “everyone” that Purdy maps, he routinely marks the problem of different

perspectives.¹²⁸ The thread of the book is his reference to “the world we have made,” but of course, he acknowledges, “it isn’t simply ‘we’—it’s the effects some of us are having on the planet, unequally visited on others, through the medium of the world itself, its floods and droughts and killing heat.”¹²⁹ Mentioning the deportation of Samuel Oliver-Bruno from Durham, where Purdy himself lived free from this threat, he comments, “[s]ome have more to fear than others.”¹³⁰ Similarly, he describes “what the United States has often promised and sometimes delivered to its insiders, the ones who have been counted as full members in the community”¹³¹—“the promise that leaders and prophets have made again and again, at least to those insiders who have counted as ‘real Americans’”¹³²—to implicitly underscore the exclusion of many outsiders. Equality, dignity, and safety are promises he wants for everyone, but because of the nation’s foundational history, land’s “ownership means power for some over others”;¹³³ “[t]he land is sorted into those who own the places where they live, those who own another’s place[,] . . . and those who work there on the sufferance of at-will hiring and firing.”¹³⁴ For Purdy, perspective comes out of the past and will shape the future: History “confirms that what Americans inherit in common is terribly unequal and compromised.”¹³⁵ And without a new commons, he warns, “those of us who enjoy some freedom and small power in this world will have to choose between cynically hoarding a chance at half decent survival for our own families and closest allies or nihilistically watching crises crash at the walls of this unequal world.”¹³⁶

Indeed, Purdy places a chapter on appreciating the total, embodied, and affective character of perspective at the very center of his book.¹³⁷ In “Losing a Country,” he writes about his response to President Donald Trump’s election, confessing that “nothing has

¹²⁸ See, for example, Purdy, *This Land Is Our Land* at 1–2 (cited in note 1) (contrasting two different viewpoints on “the nature of our civic enmity”).

¹²⁹ *Id.* at 21.

¹³⁰ *Id.* at viii.

¹³¹ *Id.* at xii.

¹³² Purdy, *This Land Is Our Land* at xiii (cited in note 1).

¹³³ *Id.* at x.

¹³⁴ *Id.*

¹³⁵ *Id.* at xx.

¹³⁶ Purdy, *This Land Is Our Land* at xxiii (cited in note 1).

¹³⁷ See *id.* at 55–75.

hit me quite like 2016.”¹³⁸ He locates the root of his shock in having felt the boundaries of his own perspective: “Shaken,” he wondered, “What else have I failed to understand about this place?”¹³⁹ Reeling, he finds a point of identification and guidance in an 1854 essay by Thoreau called “Slavery in Massachusetts,” and, in particular, Thoreau’s “disorientation” and visceral sense that his world was falling apart after Massachusetts’s return of Anthony Burns to a Virginia slaveholder¹⁴⁰ in compliance with the Fugitive Slave Act.¹⁴¹ Indeed, his chapter takes its title from Thoreau, who wrote, “I have lived for the last month . . . with the sense of having suffered a vast and indefinite loss. I did not know at first what ailed me. At last it occurred to me that what I had lost was a country.”¹⁴² Purdy, like Thoreau, details the emotional upheaval that comes with feeling one’s perspective shift: “Losing a country,” he realizes, means “losing your way of living with it. The country has not receded far away, but grown overwhelmingly close. It occupies your head in the most disruptive and intolerable ways.”¹⁴³ Further, he continues,

A country lost in this fashion may never have been more than a pleasing illusion, a gauze of selective ignorance or indifference. “Losing a country” may be a way of describing coming to see it more clearly. . . . Thoreau is complaining about, among other things, losing the privilege of ignoring slavery much of the time while also disapproving of it.¹⁴⁴

Somewhat fleetingly, Purdy acknowledges other perspectives and the pattern of erasure that left Anthony Burns’s thoughts out of the court record (and Thoreau’s musings).¹⁴⁵ He imagines Burns “knew a great deal about the United States, and it seems likely that in his mind he had no country to lose.”¹⁴⁶ However, he admits, “I am much more Thoreau than Burns,”¹⁴⁷ acknowledging that “to

¹³⁸ Id at 56.

¹³⁹ Id at 57.

¹⁴⁰ Purdy, *This Land Is Our Land* at 57–59 (cited in note 1).

¹⁴¹ 9 Stat 462 (1850), repealed by An Act to Repeal the Fugitive Slave Act of 1850 and All Acts and Parts of Acts for the Rendition of Fugitive Slaves, 13 Stat 200 (1864).

¹⁴² Id at 57 (quotation marks omitted) (alterations in original), quoting Henry David Thoreau, *Slavery in Massachusetts* (1854).

¹⁴³ Purdy, *This Land Is Our Land* at 59–60 (cited in note 1).

¹⁴⁴ Id.

¹⁴⁵ See id.

¹⁴⁶ Id.

¹⁴⁷ Purdy, *This Land Is Our Land* at 61 (cited in note 1).

be able to make this complaint publicly, to report on your new and unsettling experience of citizenship, is also a part of privilege.”¹⁴⁸

By speaking from his own standpoint, Purdy grounds us in the question of perspective, as he reports: “This is a deliberately personal way of talking about paths out of, or through, the dark wood where some of us woke up on November 9, 2016, and have been wandering since.”¹⁴⁹ The election outcome that disturbed his consciousness and sent him reeling took Purdy to the history of slavery, and Thoreau’s similarly shattered faith. Through that identification, Purdy recognizes that neither Massachusetts’s enforcement of the Fugitive Slave Act nor Trump’s election would necessarily have caught someone else so off guard. As he understands, someone enslaved, like Burns, would have comprehended the risks of fugitivity under the country’s laws; someone who regularly bore the brunt of white supremacy in the United States might have better anticipated the powerful appeal of the racism that brought Trump to power.¹⁵⁰ Throughout this essay, Purdy registers his own sense of shock at the difference between his own and another’s perspective—between their experiences, sensibilities, worldviews, attachments, and expectations. The limit of his own consciousness that so hurt him appears to be a recognition that the difference between him and another was that other’s experience of unequally distributed violence—a perspective erased within his own experience—which might have led the other to have expected the outcome of the election.

Purdy’s lengthy set of reflections here indexes how viscerally painful it is to release attachments to concepts and understandings of the world that arose—in ways he did not fully understand until the contradictions broke—from the erasure of others’ worldviews. The difficulty of reassessing foundational assumptions and wrestling with the significance of erasure occurs across varieties of experiences, domains of practice, and dissemination of scholarship, including legal scholarship. In law, moreover, the challenge of rethinking meets a particularly obdurate set of

¹⁴⁸ Id at 60. Burns did, however, wage an extremely active public campaign against slavery after the experience Thoreau (and Purdy) describe. See generally Gordon S. Barker, *Anthony Burns and the North-South Dialogue on Slavery, Liberty, Race, and the American Revolution* (unpublished PhD dissertation, The College of William & Mary, 2009), archived at <https://perma.cc/5EPC-2RGF>.

¹⁴⁹ Purdy, *This Land Is Our Land* at 68–69 (cited in note 1).

¹⁵⁰ See id at 60.

foundational assumptions, and many of these assumptions are formulated abstractly rather than as a matter of historical commitment or formation. Concepts of law, like the ideals and norms associated with them, are not always understood as products of historical formation; the abstract terms used to summarize these basic subjects often seem to float independently above our shifting sense of the nation's historical arc.

An outcome that did not accord with how Purdy understood his world forced him to search for new stories or facts that could explain it, leading him to newly conceptualize the world and his position in it. Similarly, new insights into the historical development of legal fields can affect parts of the conceptual universe that legal scholars have long taken for granted, and in general, offer evidence germane to questions about the development of different areas of law. I have argued, for example, that the system of Indian depredation claims—an independent archive of petitions turned claims against the government to indemnify losses incurred by settlers on the frontier—constitutes a part of the history of federal torts, and shed light on the way the federal government utilized the tort structure to provide a system of social insurance that supported westward expansion.¹⁵¹ Similarly to the way Morton Horwitz theorized courts' shift from strict liability to negligence in torts cases to create a subsidy for employers at a time when increasing numbers of people were suffering from workplace injuries,¹⁵² the history of Indian depredation claims suggests that the government created a subsidy for itself by delaying compensation that it had guaranteed to individuals to induce them to settle on the frontier and thereby further its goals of conquest.¹⁵³

Methodologically, attempting to understand the significance of erasure in specific fields of law requires comprehensively engaging scholarship about a legal doctrine or practice generated

¹⁵¹ See Park, 8 *Hist of the Present* at 60–64 (cited in note 30). The system of Indian depredation claims predates even the pension program for Civil War veterans that is usually said to be the earliest example of a major government experiment in social insurance. See, for example, Patricia E. Dille, *The Evolution of Entitlement: Retirement Income and the Problem of Integrating Private Pensions and Social Security*, 30 *Loyola LA L Rev* 1063, 1096–1102 (1997) (discussing the Civil War pension system and calling it “the United States' first mass-scale federal social welfare program”).

¹⁵² See Morton J. Horwitz, *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy* 54–63, 123–36 (Oxford 1992).

¹⁵³ See Park, 8 *Hist of the Present* at 68–73 (cited in note 30).

from a standpoint without access to buried material or a presumption of erasure. That literature may contain clues about the configuration of the erasure so that this study is correlated with building a positive account using new material from the archive. However, many widely established theories about legal doctrines that appear in works that do not themselves engage with history were nevertheless developed from interpretations of historical accounts. It is therefore also critical to examine the general literature in order to understand whether its conceptual conclusions rely on accounts of the historical development of the legal doctrine or practice. If they do, one must ask *how* they do, and whether a different historical account accords with, adds to, contradicts, subtends, or otherwise modifies the conceptual frameworks that have been based on narratives from which key histories have been effaced.

B. The Challenge of Representation

The connection between the pattern of omitting histories of conquest, slavery, and race from legal texts and the persistent legacies of the formal exclusions that were a part of those histories may already seem clear. However, there are many different problems of representation that stem from erasure—minorities' contributions have been erased from historical records, but they have also historically experienced actual exclusion from institutions. Both make members of minority groups and the particular obstacles they face invisible, but the tendency to conflate discursive and material exclusions only exacerbates the erasure of their contributions—how they acted to shape law and legal practice, in addition to experiencing hardship because of it. This Section describes why it is essential to synthesize the kind of primary source research discussed in Part I, with the literature premised on erasure discussed in Part II.A, and the rich existent literature in federal Indian law, legal history, and critical race studies that has focused on the experiences of minority groups and the legal challenges they have faced. The complementary and in some ways derivative project of examining the impact of these histories on the law highlights again the importance of representation put forward by this literature long ago: bringing omitted voices into conversations about institutions in which they were always involved, in order to understand more about those institutions, their human and other effects, and our collective world.

The literature on the ways laws have affected nonwhite groups because of conquest and slavery has been extensively established by scholars of Native American history, federal Indian law, African American history, and legal history.¹⁵⁴ That work addresses the segregated legal forms that applied specifically to nonwhites, including laws of Indian Affairs, later federal Indian law, as well as many iterations of Black Codes and the legal regime of Jim Crow.¹⁵⁵ In somewhat complicated ways, nonwhite groups have also long had restricted and limited access to the legal venues and processes that white people used, though they were long excluded from lawmaking, judgment, and other processes of institutional decisionmaking.¹⁵⁶ Interracial transactions and commerce were ordinary, everyday, and indeed indispensable. Without it, for example, colonists could not have come into possession of most of the territory in their jurisdictions, which they boasted of acquiring by purchase; and many early techniques of commercial predation likely developed through such commerce.¹⁵⁷ However, legal texts also helped cultivate racial stereotypes that justified and facilitated conquest, slavery, and a range of forms of racial exclusion and predatory inclusion that constituted a part of these processes and exceeded them. A voluminous literature has amply described and documented how nonwhites served as malleable and peripheral figures in legal discourse

¹⁵⁴ See generally, for example, Lisa Brooks, *Our Beloved Kin* (Yale 2018); Yasuhide Kawashima, *Puritan Justice and the Indian: White Man's Law in Massachusetts, 1630–1763* (Wesleyan 1986); David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (Texas 1997); A. Leon Higginbotham Jr., *In the Matter of Color: Race and the American Legal Process. The Colonial Period* (Oxford 1978); Thomas D. Morris, *Southern Slavery and the Law, 1619–1820* (North Carolina 1996).

¹⁵⁵ See generally, for example, Walter R. Echo-Hawk, *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided* (Fulcrum 2010) (describing the legal miscarriages of justice Natives have suffered in US courts); Vanessa Holloway, *Black Rights in the Reconstruction Era* (Hamilton 2018) (explaining the limitations on African Americans' access to justice during the Reconstruction era).

¹⁵⁶ See generally, for example, Vine Deloria Jr and Clifford M. Lytle, *American Indians, American Justice* (Texas 1983); Natalie J. Ring and Amy Louise Wood, eds, *Crime and Punishment in the Jim Crow South* (Illinois 2019). But see Melissa Milewski, *From Slave to Litigant: African Americans in Court in the Postwar South, 1865–1920*, 30 *L & Hist Rev* 723, 724 (2012). But see generally Lyle Koehler, *Red-White Power Relations and Justice in the Courts of Seventeenth-Century New England*, 3 *Am Indian Culture & Rsrch J* 1 (1979).

¹⁵⁷ See generally Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Belknap 2005) (discussing US acquisition of Natives' territory as a result of military conquest, consensual sales, and legal frameworks which ultimately privileged white ownership and definitions of property). See also note 122.

during colonization and slavery.¹⁵⁸ Native and Black people received whatever attributes helped to justify the violence colonists enacted upon them in order to extract value, in land or labor, from them: they became prehistoric, savage, criminal, or inhuman beasts, as the theory required.¹⁵⁹ These stereotypes erased or minimized the humanity of nonwhite groups and profoundly shaped social relations. Consequently, colonial and US literature grew less inclined over time to recognize the extent to which nonwhite groups participated in the development of the colonies, the country, and the laws. Indeed, nonwhite groups helped colonial communities survive by economically and politically transacting with white people, in addition to asserting their own humanity, freedom and habeas suits and political independence through negotiations, treaties, and wars.¹⁶⁰

The persistence of ideas about nonwhite groups that erase their agency—historically and in the present—runs parallel to the complicity of legal institutions in racializing, subordinating, and extracting wealth from legal texts. Scholars of Native American history, federal Indian law, and the history of enslaved and freedpeople, both in and outside of the legal academy, have indeed addressed both sides of this problem—the resilience and development of these groups as well as the specific laws and institutions that challenged their survival. In so doing, this literature has

¹⁵⁸ The literature is too voluminous to attempt to summarize, but no one has more thoroughly accounted for the ways that Spanish, English, and Anglo-American legal discourses fashioned the idea of “the Indian” as a foil for theories of conquest espoused by European sovereigns during the Age of Discovery than Robert A. Williams Jr in *The American Indian in Western Legal Thought*. See generally Robert A. Williams Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford 1990). A. Leon Higginbotham Jr’s *In the Matter of Color* is also exemplary. See generally Higginbotham Jr, *In the Matter of Color* (cited in note 154). For other classic titles exploring this issue in the colonial period, see generally Theodore W. Allen, *The Invention of the White Race: Racial Oppression and Social Control* (Verso 1994); Winthrop D. Jordan, *White Over Black: American Attitudes Towards the Negro, 1550–1812* (W.W. Norton 1977).

¹⁵⁹ See, for example, *Johnson*, 21 US (8 Wheat) at 590 (“[T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest.”).

¹⁶⁰ See, for example, *Commonwealth v Aves*, 35 Mass (18 Pick) 193 (1836) (adjudicating a habeas corpus suit brought by an enslaved person). See also John William Tebbel and Keith Warren Jennison, *The American Indian Wars 1–146* (Harper 1960) (chronicling the military conquest of the United States in the colonial American Indian wars). See also generally Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* (California 1994) (discussing the hundreds of treaties that were ratified between the United States and Native Nations from 1778 and 1868 and their unique situation in American history).

established a foundation for understanding the laws that structured conquest, slavery, and their aftermath, furnishing the basic tools necessary for inquiring about the impact of the histories of colonization and slavery. Thus, though those fields have been held as separate and nonessential to the study of the fundamental law subjects discussed above,¹⁶¹ scholarship that asks how the histories of subordination and extraction shaped the basic components of our legal system is properly understood as an outgrowth of the literature that has placed its emphasis and centered its frames on marginalized groups.¹⁶²

The project of exploring the impact of these histories on the shape of the law therefore illuminates the inherent relationship between fields that have long been viewed as marginal and elective versus the core of the study of US law. Both work that focuses on affected groups and that which focuses on accounts of the law respond to and attempt to remediate historical patterns of erasure. The social as well as political and economic legacies of formal exclusion have meant that integration and representation of minority groups in legal fields has increased slowly over time, but also that social barriers have outlived the barriers of formal legal exclusion.¹⁶³ Early, prescient critiques that drew attention to the social consequences of erasure more than three decades ago also focused on the ways in which legal education and other factors marginalized the experiences and perspectives of women and minority students.¹⁶⁴ Even without the information surfacing now

¹⁶¹ It is possible that this distinction came about in part because of—and may have found some justification in—the fact that sometimes material concerning nonwhites within a particular field of law or practice was located in different sources than material concerning transactions between white people. See Part I.B.

¹⁶² Though closely allied, these types of projects have distinguishable foci and aims as a result of their different frames. Work that explores the different challenges groups faced during colonization, slavery, and their aftermath more directly illuminates the reasoning and support for reparations and affirmative action policies, for example. Work that focuses on the ramifications of these histories on the law itself more directly raises questions of structural change and systemic (re)design. These distinctions, however, are somewhat artificial and reflect differences in degrees of pragmatism more than substantive commitment.

¹⁶³ For an example of a recent work describing this dynamic in the context of housing, see Keeanga-Yamahtta Taylor, *Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership* 18–19 (UNC 2019) (describing the discriminatory nature of the Federal Housing Administration program that extended mortgages to communities of color after decades of redlining and showing how discrimination can occur through predatory inclusion as well as formal exclusion).

¹⁶⁴ See Kimberlé Williams Crenshaw, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 Natl Black L J 1, 9–10 (1988); Lani Guinier, *Of Gentlemen and Role Models*,

about the extent and mechanisms of erasure of race and histories of subordination in the main first-year subjects, Professors Kimberlé Crenshaw and Lani Guinier both described the alienation students felt in classrooms where the issues that they understood best and that most affected them did not appear in the curriculum.¹⁶⁵ Crenshaw commented that “[t]he racial dimensions of traditional law school subject areas are seldom discussed. On the few occasions when racial dimensions are considered the issues raised are either summarily addressed or mentioned only in passing.”¹⁶⁶

Guinier, speaking perhaps to her own sense of isolation on a faculty at the time, likewise spoke of the need for professors who could “acknowledge[] where appropriate the relevance of race or gender.”¹⁶⁷ Both Guinier and Crenshaw observed the harmful effects of erasure on students who were expected to model a view of “perspectivelessness”¹⁶⁸ in the classroom, “ignorant to differences of culture, gender and race.”¹⁶⁹ As work on erasure and representation continues to grow, so do the dimensions of this critique: this year, Professor Blackhawk renewed Guinier and Crenshaw’s observations about the failure of the legal academy to confront its own erasures in a personal essay about confronting the invisibility of Native Nations and her experience as a Native person at Stanford Law School in the late 2000s.¹⁷⁰ “One way that Native people combat the active erasure of Indian Country,” Blackhawk writes of the burden that individuals who experience erasure carry, “is to self-identify. In doing so, we put our bodies and our reputations between the force of erasure and the furtherance of the American colonial project.”¹⁷¹

Of course, the way that students of color and women have felt their own experiences and perspectives rendered invisible and delegitimized through erasure in the classroom—erasure of their

6 Berkeley Women’s L J 93, 93–97 (1990). See also Judith G. Greenberg, *Erasing Race from Legal Education*, 28 U Mich J L Ref 51, 67–80 (1994) (discussing the “color-blind” orientation of legal education and the pernicious effects that this orientation can have on Black students).

¹⁶⁵ See Crenshaw, 11 Natl Black L J at 9–10 (cited in note 164); Guinier, 6 Berkeley Women’s L J at 93–97 (cited in note 164).

¹⁶⁶ Crenshaw, 11 Natl Black L J at 9 (cited in note 164).

¹⁶⁷ Guinier, 6 Berkeley Women’s L J at 104 (cited in note 164).

¹⁶⁸ Crenshaw, 11 Natl Black L J at 2–3 (cited in note 164).

¹⁶⁹ Guinier, 6 Berkeley Women’s L J at 93 (cited in note 164).

¹⁷⁰ See generally Maggie Blackhawk, *On Power & Indian Country*, 1 Women & L 39 (2020) (joint publication of the top sixteen law reviews).

¹⁷¹ *Id.* at 43.

capacities, talents, and the histories from which they may descend—requires no scholarly proof to be a matter of concern. In that sense, Crenshaw, Guinier, and Blackhawk all highlight what Purdy also focused on in his chapter on losing a country, albeit from an outside perspective—the serious affective dimensions of erasure that constitute an overlooked aspect of its social effects and challenges.¹⁷² The affective experiential challenges of erasure must be at least as profound as that of realizing the erasure of others' experiences; and the attempt to counter erasures often requires disrupting people's affective attachments to frameworks and worldviews built upon them.

What we learn from considering the familiar priorities of representation and perspective as part of the question of historical erasure and its impact on the legal field and scholarship are some important lessons about precisely the problems that Purdy sets out as the topic of his book—the challenges of speaking across differences to build a commons. The lessons (in reverse order of this Review's discussion) are as follows: 1) individuals feel the harm of erasure and resistance to it on a deeply personal level, so that the attempt to communicate across chasms of presumptions often diverts to those feelings instead of to the underlying intellectual question; and 2) as a result of many sedimented layers that produce the erasure of specific histories at the root of these disagreements, we lack a great deal of information that could inform our common understandings of the institutions that govern us at both a factual and conceptual level. A general presumption of erasure of the histories of conquest, slavery, and race in the main fields of law, such as those studied by first-years, would greatly facilitate the common project of understanding the common terms of their legacies. As part of this endeavor, revisiting the problem of perspective as central to inquiries about the composition of fields of law clarifies why representation must be central too. For it is the missing voices of the figures erased from our history—what they did as well as what happened to them—and the voices of the people who care about them and resist their erasure (whether because they descend from them, or for other reasons, have not believed in their absence and pursue their stories) that make it possible to tell the story of how conquest, slavery, and their

¹⁷² Purdy, *This Land Is Our Land* at 55–75 (cited in note 1). See also text accompanying notes 137–53.

aftermath produced our past and our present, both in legal institutions and outside of them.

The structural importance of erasure also highlights some frequently overlooked aspects of the significance of representation. Extending the questions of perspective and representation historically often reveals new information about the ways that minorities used, changed, and shaped the law. Understanding how our legal system grew out of the histories of conquest and slavery does not merely mean recovering the histories of the violence they enacted, facilitated, and legitimated. While Purdy acknowledges the violence of racist representations,¹⁷³ his account could more deeply engage with what representation means beyond acknowledging violence and unevenly distributed harm. Early in the book, he suggests that “our civic enmity”¹⁷⁴

is a matter of some people starting to see what many others have known for a long time: that, depending on who you are, the police are dangerous, the courthouse is a menace, the official statues are civic graffiti and insults; that *la migra*, ICE, will grab and expel with one American hand the same migrants that the other hand, the economic sectors of building and cleaning and harvesting, has been beckoning and exploiting.¹⁷⁵

In keeping with this summary, the nonwhites who he names mostly suffer and absorb the violence of racism in his text:¹⁷⁶ Samuel Oliver-Bruno is arrested;¹⁷⁷ Professor Pauli Murray suffered

¹⁷³ “Settlers,” Purdy asserts in his introduction, “made indigenous Americans into a kind of narrative resource, a flexible key to imagining ways of being ‘the land’s.’” Purdy, *This Land Is Our Land* at xviii (cited in note 1). “[D]ifferential violence”—violence distributed unevenly to different groups in part as a consequence of law—“molds white, black, and brown bodies to the concrete abstractions of race and caste.” Id at xvi.

¹⁷⁴ Id at 1.

¹⁷⁵ Id at 2.

¹⁷⁶ Other than President Barack Obama, who is mentioned sporadically, see id at 10, 17, 23, 102, the exceptions to this rule are the following individuals: Bayard Rustin, id at xiv (has a political idea); Ta-Nehisi Coates, id at xv (has a critique); Representative Alexandria Ocasio-Cortez, id at 102–06 (advocates for the Green New Deal); and Professor Aziz Rana, id at 110 (has a historical insight). While Purdy mentions no Native people by name, when he refers to them collectively it is often in the same register, in keeping with the observation that “American Indians and Indigenous people are all too often solely associated with loss—whether it be our lands or our lives.” Mishuana Goeman, *The Land Introduction: Beyond the Grammar of Settler Landscapes and Apologies*, 73 W Humanities Rev *4 (forthcoming 2020) (on file with author).

¹⁷⁷ See Purdy, *This Land Is Our Land* at viii (cited in note 1). Oliver-Bruno was later deported. See Meagan Flynn, *Feds Deport Undocumented Immigrant Whose Church*

multiple forms of oppression as a child in the Jim Crow South;¹⁷⁸ and Anthony Burns is re-enslaved.¹⁷⁹ Before his eventual deportation, however, Oliver-Bruno lived in a church for almost a year as possibly the most famous figurehead of the recent revival of the sanctuary church movement.¹⁸⁰ Murray, among other accomplishments, supplied arguments that Justices Thurgood Marshall and Ruth Bader Ginsburg drew upon for landmark cases that transformed US law in the twentieth century.¹⁸¹ Burns was a preacher who eventually obtained freedom and left some record of his thoughts.¹⁸² After his removal under the Fugitive Slave Act from Boston, which provoked massive protests,¹⁸³ Burns was imprisoned in Richmond, which permanently damaged his health, and then sold to a North Carolina slave trader.¹⁸⁴ In 1855, a group of Boston African Americans led by Leonard Grimes purchased his freedom for \$1,300.¹⁸⁵ Burns studied theology at Oberlin, drew on his experiences to campaign against slavery in New England, and moved to preach in Baptist churches in Indianapolis and then Saint Catharines, Upper Canada, where he died in 1862, at only twenty-eight years of age.¹⁸⁶

Supporters Went to Jail to Protect Him (Wash Post, Nov 30, 2018), archived at <https://perma.cc/YKH5-KW2Z>.

¹⁷⁸ See Purdy, *This Land Is Our Land* at xxvi, 41–42 (cited in note 1).

¹⁷⁹ See id. at 58.

¹⁸⁰ See Flynn, *Feds Deport Undocumented Immigrant* (cited in note 177); Catherine E. Shoichet, *They Thought Living in Churches Would Protect Them. Now They Fear Nowhere Is Safe* (CNN, Dec 22, 2018), archived at <https://perma.cc/W7QL-ALVA>.

¹⁸¹ See Kathryn Schulz, *The Many Lives of Pauli Murray*, (The New Yorker, Apr 10, 2017), archived at <https://perma.cc/AXX9-5CUG>. As a law student, Murray wrote a paper that her professor passed on to the legal team that argued *Brown v Board of Education*; 347 US 483 (1954), she wrote a nearly 750-page treatise on state segregation laws that the ACLU and the NAACP widely distributed and used; she helped found the National Organization for Women; and she furnished arguments that then-advocate Ruth Bader Ginsburg used to argue that the Equal Protection Clause applied to women, among other accomplishments. See id.

¹⁸² See Paul Finkelman, *Anthony Burns (1834–1862)* (Library of Virginia, 2001), archived at <https://perma.cc/2RNH-FHL5>.

¹⁸³ See id. During the course of which a newly deputized marshal was killed; Burns's removal required more than 1,500 troops and between \$40,000 and \$50,000 of government spending. See id.

¹⁸⁴ See id.

¹⁸⁵ See id. In 1856, Charles Emery Stevens published an account of Burns's arrest, re-enslavement, and liberation. See generally Charles Emery Stevens, *Anthony Burns: A History* (Jewett 1856).

¹⁸⁶ Finkelman, *Anthony Burns* (cited in note 182). It is also possible to know something of his thoughts: upon his arrest in Boston, he initially refused the help of an anti-slavery lawyer, believing his return to Virginia inevitable, but was eventually convinced

Of course, highlighting historical racial violence is crucial for many reasons. We must grapple with the human costs of our institutions, the extent of which we are still uncovering and learning. A clear-eyed look at past institutional development sheds light on the logic and dynamics of institutions, systems, and practices that continue to operate in the present. However, even during the periods most famous for racial violence, such as the land grabs of the eighteenth century, the antebellum period, and Jim Crow, nonwhites survived those challenges and acted in ways that shaped the world. They engaged with those systems in ordinary, inventive, and subversive ways, participated in them as they could to gain advantages, and challenged them directly, individually and en masse.¹⁸⁷ All of this activity both shaped our institutions and furnishes rich lessons about human resiliency, the kinds of incentives institutions can create that foster or hamper collective action and life, the strength of communities and their traditions, and the structural limitations of institutions we have built.

The absence of people of color from narratives in which they acted therefore reinforces the erasure of their humanity and capacities; this is the legacy of both formal exclusions and harmful stereotyping. In his chapter “The Long Environmental Justice Movement,”¹⁸⁸ Purdy describes “the history of environmentalism,” as “a microcosm of American history generally.” Yet, what he means by that claim is especially perplexing with respect to the question of representation.¹⁸⁹ Purdy structures the essay as an address to the environmental justice movement’s critique that mainstream environmental law organizations did not adequately attend to questions of distribution, or the disproportionate impact of environmental harms on nonwhite and poor people.¹⁹⁰ Racism

to accept representation. See *id.* This information, unlike some of what I described above, was not buried deep in the archive; rather, thanks to Paul Finkelman’s labor, it was immediately available through a Google search.

¹⁸⁷ See, for example, Beryl Satter, *Family Properties: Race, Real Estate, and the Exploitation of Black Urban America* 272–320 (Henry Holt 2009) (describing the efforts of the Contract Buyers League in the 1950s and 1960s, including payment strikes and legal challenges); N.D.B. Connolly, *A World More Concrete: Real Estate and the Remaking of Jim Crow South Florida* 19–43 (Chicago 2014) (discussing activities of Miami’s Colored Board of Trade in the early twentieth century).

¹⁸⁸ See Purdy, *This Land Is Our Land* at 102–40 (cited in note 1).

¹⁸⁹ *Id.* at 110.

¹⁹⁰ See *id.* at 108. Purdy lists two other parts of the movement’s critique in this distillation of its concerns—focus on the outdoors and nature preserves rather than

appears to be its principal topic, and Purdy goes into relatively extensive detail to name and describe the vitriolic racism of several early environmentalists, including Madison Grant, President Theodore Roosevelt, Irving Fisher, Governor Gifford Pinchot, and John Muir.¹⁹¹ He then describes the beginning of the mainstream environmental law movement, including the Sierra Club membership's negative response to a poll asking if the Club should concern itself with "the urban poor and ethnic minorities."¹⁹² He does relate that "[i]n 1987, the United Church of Christ's (UCC) Commission for Racial Justice published an influential report that . . . called th[e] unequal vulnerability [of minority communities to toxic exposure] 'a form of racism.'"¹⁹³

Yet Purdy never mentions the great grassroots movements of black communities, led by Dollie Burwell and Reverends Leon White and Benjamin Chavis Jr, nor the UCC—which was also led by Black women, Reverends Adora Iris Lee and Bernice Powell Jackson—the organization that ultimately produced this report.¹⁹⁴ It would be equally difficult to know that it was this mass movement of people of color who named their struggle "environmental justice" and popularized the term. This movement gathered in 1991 for the First National People of Color Environmental Leadership Summit in Washington, DC, which produced a

neighborhoods and workplaces and overvaluation of litigation at the expense of popular engagement—but only engages the first substantially in this essay. See *id.* Benjamin Chavis's work for the Commission of Racial Justice provides an illuminating scholarly literature that details this historical debate. See United Church of Christ Commission for Racial Justice, *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites* (1987). See also generally Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 Cal L Rev 775 (1998); Gerald Torres, *Environmental Justice: The Legal Meaning of a Social Movement*, 15 J L & Commerce 597 (1996); Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 Fordham Urban L J 523 (1994); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw U L Rev 787 (1993). For a contrasting point of view, see generally Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 Yale L J 1383 (1994).

¹⁹¹ See Purdy, *This Land Is Our Land* at 111–20 (cited in note 1).

¹⁹² *Id.*

¹⁹³ *Id.* at 120–21.

¹⁹⁴ See Brooks Berndt, *A Case for the Mother of the Environmental Justice Movement: Dollie Burwell* (United Church of Christ, Sept 20, 2017), archived at <https://perma.cc/FZG9-ASQW> (discussing the leadership roles of Burwell, White, and Chavis). For the UCC's report, see United Church of Christ Commission for Racial Justice, *Toxic Wastes and Race in the United States* (cited in note 190).

visionary document outlining a series of “principles of environmental justice.”¹⁹⁵ Under the leadership of the Congressional Black Caucus, in 1990, the Environmental Protection Agency (EPA) established the Environmental Equity Workgroup.¹⁹⁶ In 1992 and 1993, the EPA formed the Office of Environmental Equity and the National Environmental Justice Advisory Council, respectively.¹⁹⁷ And in 1994, President Bill Clinton renamed the office as the Office of Environmental Justice and issued an executive order creating an Interagency Working Group on Environmental Justice and requiring that each federal agency “make achieving environmental justice part of its mission.”¹⁹⁸ In other words, grassroots movements of communities of color, led mostly by Black women and men, thereby succeeded in making environmental justice a federal agenda item. As an outsider to the field, one of the most striking things about the extensive literature on the environmental justice movement is its clear pride in memorializing the landmarks of its history, the diverse coalitions it built across the country, and its leaders, including Professor Robert Bullard—sometimes called the father of the environmental justice movement—and especially women leaders, such as Peggy Shepard, Margie Eugene Richard, Professor Beverley Wright, and many more.¹⁹⁹

¹⁹⁵ See Robert D. Bullard and Glenn S. Johnson, *Environmental Justice: Grassroots Activism and Its Impact on Public Policy Decision Making*, 56 J Soc Issues 555, 556–57 (2000).

¹⁹⁶ Environmental Protection Agency, *EPA, Congressional Black Caucus Visit Oakland on Joint Environmental Justice Tour* (Oct 16, 2010), archived at <https://perma.cc/5X3T-2ZAS>.

¹⁹⁷ See Bullard and Johnson, 56 J Soc Issue at 560 (cited in note 195).

¹⁹⁸ Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 3 CFR 859 (1995). See also Dina Gilio-Whitaker, *As Long as Grass Grows: The Indigenous Fight for Environmental Justice, From Colonization to Standing Rock* 20 (Beacon 2019).

¹⁹⁹ For examples of this type of literature, see generally Robert D. Bullard, *Dumping in Dixie: Race, Class, and Environmental Quality* (Westview 1990); Robert D. Bullard, ed, *The Quest for Environmental Justice: Human Rights and the Politics of Pollution* (Sierra Club 2005); Robert D. Bullard, ed, *Confronting Environmental Racism: Voices from the Grassroots* (South End 1993); Bunyan Bryant, ed, *Environmental Justice: Issues, Policies, and Solutions* (Island 1995); Laura Westra and Bill E. Lawson, eds, *Faces of Environmental Racism: Confronting Issues of Global Justice* (Rowman & Littlefield 2d ed 2001). See also Foster, 86 Cal L Rev at 775 (cited in note 190) (including a detailed recounting of a poor African-American community’s efforts to save their community from the proliferation of toxic waste facilities); Cole, 21 Fordham Urban L J at 523 (cited in note 190). For a closer examination of the role that women of color have played in the environmental justice movement, see Robert D. Bullard and Damu Smith, *Women Warriors of Colors on the Front Line*, in Robert D. Bullard, ed, *The Quest for Environmental Justice* 62–84 (highlighting

It is difficult to guess why none of this history appears in Purdy's account of the environmental justice movement, especially given the concerns he repeatedly expresses about structural racism, perspective, and erasure. Instead, pivoting from his specific descriptions of early environmentalists' racism (which apparently inspired both Adolf Hitler and an anti-immigrant killer of sixty-nine young Labour party members in Norway in 2011),²⁰⁰ Purdy swiftly declares that "there is another history of environmentalism" that can prevent us from being "trapped by our history of self-division."²⁰¹ The alternative genealogy he then offers is another series of early white environmentalists who did not advocate for race science and genocide;²⁰² instead, they gave some consideration to cities, factory workers, and chemicals. One man, Robert Marshall, even participated in "reforms that increased the sovereignty and cultural autonomy of Native American nations."²⁰³ Purdy finally returns to the environmental justice movement's criticisms of major environmental law institutions, to declare that "[l]eaving out distribution" was a mistake made in "good faith," because in the early 1970s, those organizations had good reason to believe that the world would only grow more equal.²⁰⁴ In "this time of fresh mobilization and new alliance," he reclaims the term "environmental justice movement" for a "long" movement that has grown from the genealogy he has described.²⁰⁵ In closing, Purdy notes that "[e]conomic power, racial inequality, and the struggles of Indigenous peoples are not optional or supplemental. They are at the heart of the work. They have always been."²⁰⁶ Yet nowhere does he engage with the rich literature by Indigenous writers, who have not only ensured the survival of their own histories of struggle, but also offer the fullest, most deeply developed accounts that we have of how to relate to the

the roles of Wright, Emelda West, Susana R. Almanza, Sylvia Herrera, Professor Gail Small, Cassandra Roberts, and Richard, among others, in leading communities in the fight for environmental justice).

²⁰⁰ See Purdy, *This Land Is Our Land* at 113 (cited in note 1).

²⁰¹ *Id.* at 123.

²⁰² See *id.* at 123–28.

²⁰³ *Id.* at 127.

²⁰⁴ See Purdy, *This Land Is Our Land* at 130 (cited in note 1).

²⁰⁵ See *id.* at 123–24, 138.

²⁰⁶ *Id.* at 140.

land and one another beyond the framework of property and the market.²⁰⁷

Admittedly, a number of movements working for environmental justice predate and exceed this specific, well-known movement that popularized the term, as its own members and chroniclers concede. In the 1960s, for example, César Chávez organized Mexican farmworkers in California not only to improve working conditions, but also to combat pesticide abuse.²⁰⁸ “The struggles of indigenous peoples,” too, have indeed been at the heart of the environmental justice movement for centuries, but at their heart have also always been Indigenous leaders, and especially women and youth, who all too frequently go unnamed and unrecognized by people outside of their own communities. Some are nonetheless well-known: the Zapatistas have been waging one of the most visible Indigenous resistances to toxic development in the world since the 1990s;²⁰⁹ the Ojibwe environmentalist Winona LaDuke founded Honor the Earth, a national advocacy group encouraging public support and funding for Native environmental groups in 1993;²¹⁰ and Ken Saro-Wiwa and, more recently, Berta Cáceres famously lost their lives leading struggles for environmental justice.²¹¹ In his book, Purdy mentions Standing Rock and Bears

²⁰⁷ See generally, for example, Goeman, 73 W Humanities Rev *1 (cited in note 176); Nick Estes, *Our History is the Future: Standing Rock Versus the Dakota Access Pipeline, and the Long Tradition of Indigenous Resistance* (Verso 2019); Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom Through Radical Resistance* (Minnesota 2017); Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Duke 2014); Mishuana Goeman, *From Place to Territories and Back Again: Centering Storied Land in the Discussion of Indigenous Nation-Building*, 1 Intl J Critical Indigenous Stud 23 (2008); Jennifer Nez Denetdale, *Reclaiming Diné History: The Legacies of Navajo Chief Manuelito and Juanita* (Arizona 2007); Ned Blackhawk, *Violence Over the Land: Indians and Empires in the Early American West* (Harvard 2006); Winona LaDuke, *All Our Relations: Native Struggles for Land and Life* (South End 1999); Mario Gonzalez and Elizabeth Cook-Lynn, *The Politics of Hallowed Ground: Wounded Knee and the Struggle for Indian Sovereignty* (Illinois 1999); Vine Deloria Jr, *God is Red* (Grosset & Dunlap 1973).

²⁰⁸ See Laura Pulido, *Environmentalism and Economic Justice: Two Chicano Struggles in the Southwest* 114–20 (Arizona 1996).

²⁰⁹ See Carmen G. Gonzalez, *An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms*, 32 U Pa J Intl L 723, 730–31 (2011) (describing the Zapatista uprising as “an example of fierce opposition by indigenous communities to . . . the neoliberal development strategies that threaten indigenous lands, livelihoods, and lifeways”).

²¹⁰ See Honor the Earth, *About Us*, archived at <https://perma.cc/X6QZ-29ZH>.

²¹¹ See John H. Knox, Michel Forst, and Victoria Tauli-Corpuz, *Protecting Those Who Work to Defend the Environment Is a Human Rights Issue* (The Guardian, June 5, 2016), archived at <https://perma.cc/BY8Q-YFDN>.

Ears more than once, but in disembodied ways.²¹² Yet Standing Rock youth initiated the NoDAPL direct action protests;²¹³ LaDonna Brave Bull Allard and Joye Braun of the Indigenous Environmental Network then established the water protectors' camp,²¹⁴ while David Archambault II led the Standing Rock Sioux Tribe through that period.²¹⁵ In July 2015, leaders from the Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, Pueblo of Zuni, and Ute Indian Tribe formed the Bears Ears Inter-Tribal Coalition to protect the sacred, spiritual, historical, natural, scientific and cultural resources of the lands.²¹⁶ That coalition and the non-profit Utah Diné Bikéyah have been fighting against Trump's reduction of the monument.²¹⁷

Purdy's call to include everyone under the umbrella of "environmental justice" is an impetus and ethic that these groups and individuals already share. They have, of course, their own genealogies of environmental justice predecessors, so it is not clear if Purdy means to offer them an alternative, or to add the lineage he constructs to theirs. Certainly the genealogy he constructs here, on its own, feels out of sync with a youth-led environmental movement that is rising globally. While this movement's most famous face may be Greta Thunberg's, it is constituted overwhelmingly by Indigenous youth and youth of color,²¹⁸ who are more likely to find their inheritances and inspiration in the long legacies and resilience of Indigenous people and people of color who have defended their communities and the Earth.

Those youth would likely notice, too, if they read his book, that though Purdy frequently refers to racism, erasure, and the disproportionate harms borne by communities of color throughout his book, and though people of color organized and led many of

²¹² See, for example, Purdy, *This Land Is Our Land* at 4–6, 23 (cited in note 1) (discussing Bears Ears); id at 102–03 (discussing the Dakota Access Pipeline).

²¹³ Matt Petronzio, *How Young Native Americans Built and Sustained the #NoDAPL Movement* (Mashable, Dec 7, 2016), archived at <https://perma.cc/29FB-V536>.

²¹⁴ Rebecca Bengal, *Standing Rock Rising: Inside the Movement to Stop the Dakota Access Pipeline* (Vogue, Nov 22, 2016), archived at <https://perma.cc/Y45N-34J4>.

²¹⁵ Sam Levin, *Standing Rock Chairman Looks to History as Divisions Emerge Among Activists* (The Guardian, Feb 13, 2017), archived at <https://perma.cc/9PLJ-A2WT>.

²¹⁶ Bears Ears Inter-Tribal Coalition, *Who We Are*, archived at <https://perma.cc/M6UR-2RJ5>.

²¹⁷ See Zak Podmore, *Native Americans Win Elections in Utah After Voicing Support for Bears Ears* (Sierra, Nov 15, 2018), archived at <https://perma.cc/5MVJ-MFX5>.

²¹⁸ See Maia Wikler and Thanu Yakupitiyage, *11 Young Climate Justice Activists You Need to Pay Attention To* (Vice, Oct 1, 2019), archived at <https://perma.cc/482V-J3SZ>.

the movements and issues that he describes, the number of people of color he *names* does not exceed the fingers on my two hands, and includes no Indigenous people. The few named individuals who *act* in the text, rather than just suffer, are some of the most visible people of color in the world—President Barack Obama, Representative Alexandria Ocasio-Cortez, Reverend Jesse Jackson, and Ta-Nehisi Coates.²¹⁹ Perhaps Purdy is neither speaking to those youth nor to the people who are not reflected in his accounts of the movements he describes. Perhaps his audience is the community of people, like him, who felt they lost their country; who have recently felt the disorientation of their own limited perspective; who he worries will turn to cynicism and nihilism from that emotional disturbance instead of a collective, common cause. Perhaps his audience is a group of people he hopes to bring into a broader movement, not those who are already inside of one, building and leading it.

Purdy's appreciation of the total, affective, and embodied nature of perspective also illuminates why speaking across different perspectives, built on different understandings of the world, often presents such an insoluble challenge. Yet similarly, recognizing the limits of one's own perspective, and that others who experience erasure also have perspectives, are perhaps the necessary requisites for engaging substantively in conversations one has never had before. Engaging with critical race studies scholarship, which long ago described the holistic importance of representation,²²⁰ might have inspired Purdy to describe and also show his audience how the contributions of the nonwhite individuals that both appear and are subsumed in his book shaped the world that he describes. An engagement with the literatures on the history of conquest and slavery might have made the term "Commonwealth" feel too drenched in the history of the British Empire—and in an English era that saw the consolidation of its colonial enterprises in America and the creation of the Royal African Company—to serve as a banner term for movements led by Indigenous peoples and the descendants of the enslaved. An engagement with

²¹⁹ See Purdy, *This Land Is Our Land* at 17, 23 (cited in note 1) (Obama); id at 102–06 (Ocasio-Cortez); id at 15 (Jackson); id at xv (Coates). See also text accompanying notes 176–84; note 176.

²²⁰ See generally, for example, Crenshaw, 11 *Natl Black L J* 1 (cited in note 164); Guinier, 6 *Berkeley Women's L J* 93 (cited in note 164). See also text accompanying notes 164–67.

Indigenous scholars would have clarified that Indigenous claims to political sovereignty and their traditional homelands remain unmistakable and unbroken, and revealed how much the claim that “this land is our land,” however innocently offered, appears as an affront to those claims.

Purdy’s sense of a possessory interest in land is not a narrow, individual one—but neither does it defer to Indigenous claims or reflect Indigenous concepts. This absence is curious because Purdy’s vision of the commons, leaving aside his genealogies, resonates strongly in many ways with Indigenous philosophies, teachings, and writings, with which he does not engage but from which he could draw insight and begin to build real relations. Potawatami scholar and scientist Robin Wall Kimmerer, for example, uses the Haudenosaunee idea of “One Bowl and One Spoon,” which teaches that “the gifts of the earth are all in one bowl, all to be shared from a single spoon”; according to this worldview, earth “exists not as private property, but as a commons, to be tended with respect and reciprocity for the benefit of all.”²²¹ As a starting point, in light of Indigenous claims and concepts, as a non-Indigenous person, the conversation must begin precisely with the recognition that this land is *not* our land. While the hundreds of different Native Nations in America hold different mythologies about the land and different traditions of land tenure, there is a common baseline, which LaDuke captures when she writes: “It is not our land. It is the land to which we belong.”²²²

The value of representation is not the tokenistic inclusion or acknowledgment of different bodies, but rather, beginning a relationship in which these bodies might listen to and learn from one another. In legal scholarship, the challenge of working in the space of erasure is to integrate literatures containing erasures with the works that offer the stories that literature does not contain. The importance of representation—of different types of sources, containing different perspectives—lies in the possibility of a true exchange and growth from that exchange. Tonawanda Band of Seneca scholar Mishuana Goeman recently reflected on the difference between a limited “acknowledgment” and approaching this richer, more substantive relationship in the

²²¹ Robin Wall Kimmerer, *Braiding Sweetgrass* 376 (Milkweed 2013) (quotation marks omitted).

²²² Winona LaDuke, *The Winona LaDuke Reader: A Collection of Essential Writings* 147 (Voyageur 2002).

context of tribal land acknowledgments, writing: “Perhaps we should not . . . understand[] these processes of stating whose lands you are on as a land acknowledgement but think of a place-based, community consulted understanding of whose land we are on as a Land introduction. That leaves [open] so many relations and places to grow.”²²³

The goal of building our fractured narratives into a place of exchange and mutual respect is indeed an urgent one, in which many people, coming from different perspectives, and in their own ways, are working to tend. The work of difficult conversations is the work of cultivating the commons of Purdy’s dreams. In that respect, his account feels like an accurate index of the many ways in which that conversation has begun and progressed, and also, of the space where it has room, in our current moment, in Goeman’s positive framing, to grow.

CONCLUSION

This Book Review has proceeded in the spirit of Professor Purdy’s exhortation to shoulder the challenge of building unity at a time when the grim consequences of denying our interconnect-edness are visible in stark relief and quickly magnifying across the globe. In taking up this work, it agrees with Purdy that beginning with the history of the nation and the land on which we reside—the great violence and the erasure of that history—is key to understanding that challenge and each other. It parts ways with Purdy where it perceives that here, with his proclamation that “this land is our land” and his call for a “commonwealth,” he replicates a specific failure to practice real inclusion within a universalizing vision that has perennially plagued left/liberal movements and hampered their ability to build effective coalitions. In order to bring people together, acknowledging their diverse experiences should be the beginning of a process of learning from experiences outside one’s own, and being willing to rethink even the norms and ideals that one holds most dear. Because people have not had the same experiences, the challenges of this conversation are not the same for everyone. The task for someone used to having a voice is not to solve the problem of how to speak *for* people

²²³ Personal Correspondence from Mishuana Goeman, Associate Professor, University of California, Los Angeles, to K-Sue Park, Author (on file with author). See also generally Goeman, 73 *W Humanities Rev* *1 (cited in note 176).

accustomed to having their histories and perspectives erased; it is to learn to listen and to hold a true dialogue *with* them. Insofar as that conversation concerns the particular histories of the land and the law that shape our lives in common, there is much left for all of us to learn, and it is imperative that we do it together.

This Review has therefore also reflected on the related and particular task of building legal scholarship from suppressed historical foundations: understanding the ramifications of the histories of conquest and slavery for law and legal scholarship is an ongoing and incomplete process, one that requires enormous and particular labor that is not widely or well understood. Scholarship on erasures so far suggests that they are ubiquitous across doctrinal fields, and it offers a more precise understanding of the mechanisms by which they occur. Taking erasure as an object of scholarly inquiry is challenging in many ways, and obliges us to consider a different approach to methodology and the idea of a field: it is hard to find the stories we have lost because it is almost impossible to know when a positive representation of facts contains an erasure, or that an archive could represent only one set of experiences with a part of the law, and where else other information, if it exists, is to be found. Furthermore, curing erasure means researching buried stories, but also coming to understand that the conventions of one's canons and the ideals that may structure one's political imagination may also be limited by the failure to appreciate other experiences and other perspectives, whether because the stories have been inaccessible or because traditional institutional practices have cast them as peripheral, unimportant, and invisible. Nonetheless, the traces of erasure, its symptoms and patterns, are also everywhere.

The work of understanding the significance of historical erasure from the study of law requires putting stories from the archive into conversation with the theoretical frameworks that omitted them and the scholarship that furnishes the intersecting histories and theoretical frameworks that help explain them. This work of synthesis presents the process of reaching a collective understanding of the history of our institutions, the positive constitution of our legal systems, and our social world. These observations proceed in the spirit of Purdy's effort to build common ground on which to reach a collective understanding of how we arrived in the riven present. The rising volume of the conversation about these histories outside of the legal academy means that legal

scholars who take up this challenge come into dialogue in new ways not only with one another but also with the public. If we do not, the rifts between that public and the legal academy—as well as the parts of the legal academy that reference increasingly different versions of American history in their teaching and scholarship—will widen.

This Review calls for a general presumption of erasure that would put us on notice that accepted accounts of the law that bear no trace of the foundational histories of conquest, slavery, and the deeply racialized transactional world that followed in their wake may represent conclusions drawn from an incomplete record. We should further reexamine the conceptual norms, ideals, and practical conventions that emerged from incomplete, whitewashed narratives about the historical development of American law. These conventional norms and ideals that appear “raceless” have spread beyond the parts of legal scholarship, teaching, and practice that focus on historical research. At the same time, the racism that stems from these histories, in ways that we continue to learn more about, remains rife in these spheres in many dimensions. We fail to perceive the connection between segregation in thinking and in our communities at our peril—once more, at the cost of understanding the institutions that govern us and how we might remake them. Because law and legal thinking have helped shape the world we live in, the legacies of these omissions hold significant stakes for people everywhere; their stakes are epistemological, scholarly, material, and practical, all at once. One of the greatest rewards, as well as challenges, of articulating the significance of these histories to law in ways that might channel new insights into effective collective action toward the goal of transformative change.