COLORED BODIES MATTER:
THE RELATIONSHIPS BETWEEN OUR BODIES & POWER

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Abstract. The United States Constitution recognizes citizens as human beings with certain rights that are meant to guarantee a certain level of equality and humanity. Disparately, the legal status of the human body itself is unclear. This thesis examines how different actors within the legal system, specifically the Court and police officers, systematically decline legal recognition of the body, resulting in abuse and degradation of the body, in order to create and maintain power. Further, this thesis aims to identify how this disregard of the body adversely affects ethnic bodies. An examination of criminality, pain, interrogation practices, use of the Fourth Amendment, and broadening police powers will illustrate a power structure that has purposely failed to address the body in the law in order to dehumanize certain groups and maintain a system of privilege and power that robs ethnic bodies of their personhood and legal consciousness.
INTRODUCTION

Everybody has a body. Everybody shares some belief in a right to control what is done to their body. We believe that we own our bodies. How true that is, is a separate issue. One could assume that because we all have bodies and the ability to experience pain, the threat of pain or injustice to those bodies, would be able to unite us to challenge those systems that inflict pain. However, pain is often inexpressible and is experienced differently by everyone. As a result, we focus on our bodies, pain, and experiences, and we interpret the pain of others through the lens society gives us and the narratives told about the people in pain. Because the law is able to deliberately inflict pain on the body in order to “make” and “unmake” persons so that authority can be established this affects these voiceless people in a persistently detrimental way, as they find their stories told in a way that justifies their pain (Scarry 20). What I want to examine is how institutions of the law, specifically The United States Supreme Court and the police, can inflict pain on the body by ignoring or disregarding the treatment of the body as a means to an end. The means being the creation of a system of privilege through the abuse of Black slave bodies that has transformed into a massive prison system. The ends being maintained power by the state, through the continued dehumanization and abuse of these Black bodies.

The disregard of the body in exchange for fighting crime impacts everyone negatively because it limits our autonomy. Furthermore, when disregard for the body translates to broadening police powers, despite public perception that this is only relevant to criminals, we are all affected. As Martin Luther King Jr. said, “An injustice anywhere is a threat to justice everywhere”. The way we view criminality in society impacts ethnic bodies and allows them to be mistreated by the law. Even worse, people are dehumanized and reduced to just bodies while
their experiences become held outside of the law. This is especially true of the Black bodies, Hispanic bodies, the bodies of foreigners, and people accused or suspected of terrorism.

A study of the theory surrounding the body shows the importance of understanding the body as a tool for power and the importance in recognizing the detrimental significance of the Court making rulings without considering the impact on bodies as a substantial consequence, and the affect that has on how society views the body and the rights of criminals. The historical focus placed on the Black body through slavery, lynching, and police brutality illustrate that the laws abuse and degradation of minority bodies as a form of policing and power, is not a recent development. It lends credence when looking at the shift to the prison industrial complex. That historical analysis of the laws abuse of the body is also helpful in understanding how the perception of criminality is embedded in race and illustrates why the body should be regarded by the Court when reading the Fourth Amendment and granting broad power to law enforcement.

Colin Dayan looks at the abuse of persons to look at how the law deprives certain groups of their personhood by using violence to construct their identities and “unmake” them. To illustrate how certain people are deprived of their personhood by the law, Dayan uses slaves, terrorists and prisoners, and the abuse they suffer by prison facilities or the state in general, to illustrate how certain groups can become dehumanized by both the law and society that ignore their plight because they are unmade until they are no longer functioning members of society. Dayan engages in historical analysis of the treatment of slaves and prisoners, the prison systems in America, as well abuse by the law. This is a critical focus in showing how the prison industrial complex employs pain against the body as a tool for power and how this especially impacts minorities and dehumanizing them for the benefit of maintaining a hierarchy within society. In addition, studying structures like Guantanamo Bay as well as cases like Rumsfeld v. Padilla
(2004) and Rasul v. Bush (2004), reveal how expanding government as well as police powers in relation to terrorism are a disregard for the body that result in abuse of the body.

In summation, my thesis aims to illustrate how the Court disregards the body; why this is allowed; and how this relates to criminality and its perception being embedded in race.
THESIS STRUCTURE

This thesis relies heavily on theory about “the body” and its importance as a tool for the state to create and maintain power by dehumanizing the people inhabiting those bodies. I build on the theory that argues the importance of the body by supplying a history of abuse of the body as well as case studies that reveal how the state deliberately declines to give the body rights so it can continue bodily abuse for power purposes. Specifically, I examine how the Court disregards the rights of the body, which helps further the abuse of the body by the police and prison industrial complex. The thesis is organized into four chapters to give attention to each of these aspects individually.

Chapter 1 engages in a literature review of works on the body. This chapter seeks to explain why the body is important as a tool of examination by showing how power can be achieved through its abuse and control. This chapter makes an important starting point: we do not own our bodies. From there, using the works of other scholars, I explain why we do not own our bodies, the implications of that fact, and how treatment of the body can be dehumanizing. This provides the tools of analysis for understanding the significance of decisions made by the Court, police actions, practices that have been employed during and after slavery, and the current practices being employed within the prison industrial complex. Chapter 1 also engages in a discussion of criminality has been constructed around the Black body in America. This frame of analysis is necessary to move into later chapters that build on that understanding to reveal the issues that derive from the combination of criminality and bodily abuse, when dealing with the Court, police, and prisons.
Chapter 2 specifically looks at the Black body. This chapter focuses on the historical constructions and inaccuracies of the Black body as violent, brutish, rapists, hypersexual, criminals, and how these have impacted the “white gaze”, and continue to effect the treatment of the Black body. Looking at how these constructions have become embedded in American society is important for understanding Chapter 3’s focus on what is problematic about the Court’s discussion of the body, levels of police scrutiny, and certain police powers and practices. Chapter 2 places a focus on slavery because the system was the epitome of ethnic bodies without rights and provides a clear illustration of how the state benefits from denying people the right to property of their own bodies. Further, this lends plausibility to viewing the prison industrial complex as another way of the state taking advantage of the perception of Black bodies and benefiting off the reduction of Black people to mere bodies without rights, within the prisons. It reveals the prison industrial complex as a contemporary slavery rather than the culmination of “tough on crime” policies.

Chapter 3 will take an in depth look at Supreme Court decisions, rational and language as it pertains to the body. I aim to make a connection between the language the Court uses in regards to the body and certain decisions and the implications for the body and certain criminalized groups. Importantly, I am going to examine the Court’s actions and interpretations of the Fourth Amendment as well as Court decisions that have expanded police powers, search and seizure laws, and stop and frisk laws. This will be done through a series of case studies that highlight how violence, pain and degradation are used as tactics against criminalized persons within the criminal justice system. Overall, this chapter serves to reveal how the Court has participated in the abuse of the body as well as to act as a Segue into an examination of the
Court’s holdings in application through police power expansion and actions, and thus negatively impacts ethnic bodies as a result of criminality.

Lastly, Chapter 4 will look at the way the law operates when dealing with people classified as "enemies of the state", and how structures like Guantanamo Bay operate outside of the law to engage in abuse of bodies.
CHAPTER 1:

Literature Review: The Body

Power exists through transference. Certain groups are able to exercise and maintain power through the subjugation of others. It is my argument that historical mistreatment of the body and lack of formal acknowledgment of the body as property, allows for the maintenance of power at the expense of ethnic minorities. It is also my contention that the rights inherent to the human body have been deliberately unaddressed. In his article The Reconstituted Body in Law, John Nguyet Erni asserts that the fragmentation of the human body in the law and the lack of a clear legal status fuel the belief that our bodies are not valued by the law. However, early treatment of African Americans in American history and treatment of Black bodies through a study of slave-hood reveals that the law does recognize the value of the body and intentionally denies it legal protection to allow for its continued exploitation in order to secure maintenance of a hierarchy America is embedded upon.

There is no shortage of works about the body, racial discrimination, criminality, and power. However, they are usually conversations being had in separate discourse communities, but I see an intersection. The body and its treatment should be central to a discussion of rights, humanity and personhood. While there is a preponderance of historical evidence detailing the abuse of African Americans, it is easy to forget to hone in on how their bodies are defined as hyper-sexual, beasts, and criminal, in need of being controlled. As a result, one does not make the connection to how problematic definitions like that were central to justifying their torture and continue to effect the way we view criminals and their rights contemporarily. Specifically, we need to look at how the perception, treatment, and disregard of the body, connects with power.
The body is exploited as a means for power in numerous ways. Violence, degradation, and sexualization, are just a few tools.

**THE BODY AS PROPERTY**

**ERNI**

John Nguyet Erni examines how our commonly held idea of the body and rights are recreated by the law as well as how the law has failed to create a uniformed definition of the body and its legal rights. Specifically, he focuses on how the body is reassessed in terms of the right to property. Erni argues that the law has always undersold the value of the body in order to give privilege to the mind. Though the body is seen by people as essential to one’s human-ness because society maintains this 19th century view of the body as sacred, Erni argues that the body is being degraded as a result of commerce and biotechnology. In fact, the law does not necessarily recognize the body and its importance as a whole. Instead, giving the human self the status of “citizen” in common law tradition and as “property” in private law tradition.

Erni argues that the degradation of the body in order to fuel commerce and biotechnology has forced us to question the worth of the body and how that worth varies depending on whose body it is, when we are not guaranteed the right to our bodies as property because that is actually given to judges to decide and they tend to deny people their body as property rights. Erni makes an important claim: in the law, the body as a whole is usually interchangeable with personhood so rather than challenge the right to the entire body as property, the law involves itself in distribution of body parts, for which there is no universal designation as property. In *Redefining stewardship over body parts*, A. E. E. Blue says that the work by scholars as well as the legal doctrine about how to treat body parts is inconsistent. Erni puts forth three legal regimes that he
believes the body has been disaggregated into: (1) the market regime, (2) the liability regime, and (3) the privacy rights regime.

The market regime determines how flexible the right to property can be defined in order to determine rightful compensation in body transactions. The liability regime deals with wrongful treatment of the body and body parts in transactions, and the privacy rights regime lends privilege to the body as property of the person whom the body belongs to. Most important as tools of analysis for my thesis are the market regime and the privacy rights regime in conjunction with Erni’s understanding of the states right to bodies. Erni argues that the law has given the property rights of our bodies to the states. Further, that the foundation of state sovereignty is not only embedded upon ownership of land, sea, and airspace, but of the body of each citizen because that is where the states gets its authority, to collect bodies during war, regulate public health, and most importantly, to criminalize certain persons. Accepting these claims, if the state owns the property rights of bodies, the market regimes ability to assess the flexibility of one’s right to property when compensation is involved, can be used to assess how the body is deliberately treated and unprotected by the law when it is to the monetary value of the state, like when dealing with the prison industrial complex. Furthermore, Erni expands on the privacy rights regime and how there is a distinction between the legal understanding of the body-as-possession and the body-as-property. We are usually given a right to our bodies as possession (things like the abortion rights and sexual rights), but not as property. The privacy rights regime as well as the regime system in its entirety, supports the argument that our body is ultimately property of the state to be used for the state’s goals and reveals motive in deliberately denying the body a unified legal status.
Robin Feldman expands on some of Erni’s ideas in her thesis *Whose Body is it Anyway?* Feldman points out the discrepancy between our conceptualization of ownership and assumed belief that we own our bodies and the legal inconsistencies pertaining to those beliefs. Like Erni, she cites the fragmented doctrine pertaining to property laws as a source for her core argument that there is no clear doctrine that acknowledges our bodies as our property. She points blame at the numerous doctrinal thread on the body that have been written separately to address different emerging issues with the body as property rather than creating one standard rule. Feldman highlights the discussion of the body by the law in relation to science, in which the Court declines to discuss the body as a whole but only in parts. Thus, while discussing the body in terms of property, the Court still evades clearly granting the entire body status as property owned by the inhabitant.

**RENDER**

Meredith Renders’ *The Law of the Body* prefaces itself on the assertions that there is no law of the body and it is both overdue and should be defined in terms of property. Render also asserts that the legal status of the body has been circumstantially defined through fragmented doctrine. She sees this as an injustice.

Render argues that the Court has declined to view the human body as property based on (1) misunderstandings about the nature of property, (2) conceptual misunderstandings about the body, persons, and the ability to oneself, and (3) misunderstandings about necessary consequences of adopting property framework. Render addresses the absence of the body’s recognition of property and charges that it should have been long established as such because it meets the 2 sufficient criteria for property. The first is that an entity be valuable, which we already acknowledge the human body to be. The second is the ability to be owned.
Like Feldman’s use of science and body parts in relation to Court doctrine on the body, Render uses *Moore v Regents of the University of California (1990)* as precedent for the Court’s unwillingness to consider the entire human body as property. This case involves John Moore’s, a man whom had hairy-cell leukemia, interest in the ownership of his spleen upon removal. However, his spleen was retained by doctors for medical research when they recognized that his white blood cells were unique and would serve them purpose in research. In the Court’s ruling in that case, they expressed their biggest concern about considering body parts as property. The Court said:

“The extension of conversion law into this area will hinder research by restricting access to the necessary raw materials... This exchange of scientific materials, which still is relatively free and efficient, will be surely compromised if each cell sample becomes the potential subject matter of a lawsuit.” (Render 571)

Render identifies fear as a critical component of the Court’s rationale. Render claims the Court’s rationale is that if they extended property rights to bodily materials, it would create an uncertainty of title that would be problematic for biological research which is considered a “public good”. Acknowledging the body as property in the law is not considered worthwhile in exchange for what the Court can deem as a public good. While the Court is rationalizing this in terms of science, analyzing this in terms of public good sets a standard that if something can be considered in the best interest of the public, it both trumps and serves as justified reasoning for denying the legal status to the body. It helps encourage analysis of what other benefits to the public come from denying the body legal status as property. Like Scarry, Render is identifying the Court’s deliberacy in denying the body status.

Subsequently, the precedent set by *Moore v Regents of the University of California* fails to recognize the body as property as well as the rights appertaining to. Being the closest the
Court has gotten to a legal status of the body, at best, this fragmented doctrine only sees body parts as property once separated from our bodies.

Render uses this fragmented doctrine to contrast our societal understandings of the body and ownership. While Erni discusses 19th century views as a source for our misunderstanding of the body in relation to the law, Render analyzes it from the societal understanding of ownership. She cites a child saying “Mom, my sibling is touching me” to illuminate our sense of ownership rights that encompasses control over what is done to the body. This also highlights the importance of a legal doctrine of the body as property: some control over what is done to one’s body. Ultimately, we need a legal status for the body that aligns with our social practices and understanding of body ownership.

Render addresses opposing arguments that a person cannot own themselves, which is expressed in a quote by Kant:

Man cannot dispose over himself, because he is not a thing. He is not his own property—that would be a contradiction; for insofar as he is a person, he is a subject, who can have ownership of other things. But now were he something owned by himself, he would be a thing over which he can have ownership. He is, however, a person, who is not property, so he cannot be a thing such as he might own; for it is impossible, of course, to be at once a thing and a person, a proprietor and a property at the same time (Render 583).

Render responds to this by explaining that it is based on the conventional or societal understanding of what a person is rather than a legal concept. She explains that the difference between the conventional and legal concept of the body is that the legal concept of the body means that a person is an entity to whom rights and duties attach and laws apply. It does not delve into the conventional sense of personhood. Under this definition, ownership of the body is applied to the person that inhabits the body. Accordingly, Kant’s objection is irrelevant because
when ownership of one’s body is discussed, what is referred to are the legal concepts of “person” and “own”.

**HARDCASTLE**

In *Law and the Human Body*, Rohan Hardcastle argues that it is not possible for one to own their own body as a result of the common law principle of property. In *United States v General Motors (1966)*, the Court defines property as “the group of rights which the so-called owner exercises in his dominion of the physical thing...as the right to possess, use, and dispose of it” (Hardcastle 13). Conception of the “thing” is characterized as something that must be separate from the human body, meaning the body itself cannot be held as property by its “owner” (or inhabitant). Hardcastle offers important definitions of ownership and owner. Hardcastle defines ownership as “the greatest possible bundle of rights in a thing which a mature system of law recognizes” (Hardcastle 14). An owner is then defined as having dominion over a “thing” including the night to possess, use, and dispose of something. Under this common law interpretation of property, our bodies are not property and we cannot own it and control its treatment. Further troubling is that common law tradition does recognize body parts once separated as able to be owned by others, in order to assist the scientific community. Enforcing the idea that use of the body is more important when advantageous to institutions within society than to the people who inhabit the bodies.

Moreover, Michelle Render points out how this has historically worked against Black bodies. Render recognizes that while we do have an inherent self-ownership of our bodies, legal ownership allows for the exploitation of the body, the individuals time, ability, effort, and attention (Render 592). As already established, according to the legal recognition of body and property, we do not legally own our bodies, but our bodies and its parts can be owned. As
Render discusses, it is that reality that allowed for ownership of slaves, revealing how historically lack of property rights of the body impacted Black bodies. And today, the body still lacks recognition as property owned by its inhabitants, that instead of slavery, impacts the way Black bodies are treated within the criminal justice system.

**VIOLENCE AND POWER**

**SCARRY**

In her book *The Body in Pain: The Making and Unmaking of the World*, scholar Elaine Scarry examines the body as a tool of deliberate exploitation by state power through pain and violence. Specifically, Scarry studies violence against the body through interrogation and torture practices against prisoners. The importance of Scarry’s study is that she illustrates the way pain is used against the body in order to make certain persons, specifically prisoners, invisible to us. In addition to being unable to share the experiences of their pain because as Scarry contends, pain is its own language, they do not share a space with other citizens’ which further isolates them, rendering them invisible to us. Scarry’s discussion of pain inflicted by the state upon bodies as a tool of converting pain to power is important because it will serve as a tool of analysis when looking at historical forms of torture and brutality against ethnic bodies that was legitimized by the state both during and after slavery. Further, Scarry’s use of prisoner’s bodies as her focal group of analysis when studying the use of violence against their bodies as a means of isolating and dehumanizing them to create power, is especially helpful. Because the prison industrial complex is largely comprised of ethnic bodies, Scarry’s examination of how their bodies are systematically used for power will speak to a central issue this thesis will explore, criminality and how it relates to ethnic bodies and maintenance of power through dehumanization.
Scarry examines the importance of the body in terms of creating and maintaining power by focusing on (1) the difficulty of expressing physical pain, (2) the political and perceptual complications that arise as a result of that difficulty, and (3) the nature of both material and verbal impressibility or the nature of human creation.

Scarry insists that inflicting pain upon prisoners in order to create “absolute” power is a deliberate display of agency. Agency, she says, is the weapon used against the tortured, for which there are many. While most, if not everyone, is able to feel pain, people experience pain differently and when trying to express or describe one’s pain to another, it is difficult for the listener to attempt to experience that pain and make it a reality. Scarry makes the argument that usually there is no language for pain because while the person in pain is certain of their pain and believes that they can verbalize it accurately, they typically do not possess the ability to do so and there is doubt in the minds of the people not experiencing the pain. However, Scarry argues that while there are tools and resources that can be used to verbalize another person’s pain (which she refers to as agency), they are limited and the language used by agency can have both benign potential and be radically sadistic, or be inseparable. This inexpressibility of pain and power are intertwined.

As a result, there is a distance between people experiencing pain from others and their pain is confined to their bodies. So, Scarry contends that pain is inflicted on prisoners in order for this internalization of suffering that eventually isolates prisoners and damages them and their consciousness. The use of physical pain is extended in the language of torture, which Scarry calls a “demonstration and magnification of the felt-experience of pain” (Scarry 27). The power of torture rests in its ability to communicate the usually inexpressibility of pain that is confined to
the sufferer by continuous processes of pain that make the tortured aware of their reality, the power being held over them and the power of the system; and to then deny that reality.

Scarry continues to deconstruct torture and explain how power comes from this. She argues that if certain people are oppressed, abused, or tortured by the law or politics, they have little opportunity or ability to verbalize their pain. Further, the people who attempt to speak on their behalf did not experience their pain and can only attempt to verbalize and convey it in public discourse, so their pain goes ignored or is given the least attention. This issue in language and speech allows for power to be maintained by the law. Overall, Scarry argues that in order for physical pain to be verbalized, language must be shattered.

**COVER**

Robert Cover’s *Violence and the Word* also examines how use of violence and pain on the body relates to power. Cover claims that the law itself is violence and has an invested interest in the reproduction of violence. Cover views the ability of the law to be interpreted as a dangerous power that causes violence and/or justifies it because the effects of the law being interpreted have very real consequences on the people who can be caused pain. Cover believes that even the most routine of legal acts are grounded in legal interpretation’s infliction of pain through punishment and the knowledge that if one does not comply with legal interpretation, they can be forced. He also argues that because the legal practice can only operate with violence because violence must occur in society to give the legal practice purpose, the mechanisms in society that allow for violence must be related to the mechanisms in the legal system. What is noteworthy about Cover’s contribution is not necessarily his assertion the word of law itself is violence, and that that violence is justified. His contribution is that the violence inflicted by the state is difficult to hide because it is so heavily inflicted.
DAYAN

Similar to Elaine Scarry, Colin Dayan uses interrogation practices, violence, and practices within prisons as a means of illustrating how the state exerts power over certain groups through acts against the body. However, Dayan specifically examines the state as a racist institution that employs these violent and degrading practices against the body as a means of dehumanizing African Americans, which supports the link between ethnic bodies, criminality, and power that I aim to explore.

In *The Law is a White Dog*, Dayan explains his perception of the law as a white dog because he believes that law creates identities for people, dehumanizes people and holds some people outside of the law. To illustrate this, Dayan focuses on the notion of “negative personhood” through examination of America’s treatment of slaves, animals, criminals and detainees through the law.

Negative personhood refers to how the law has the ability to not just recreate peoples identities and dehumanize them, but have them perceived negatively and their experiences and beliefs discounted because the incarceration system in America can do such damage to people deemed criminals, that once they are released from jail, they are beyond repair. This is similar to Scarry’s argument that inexpressibility of experiences of pain and torture makes it difficult for prisoners pain to be understood and the effects of that isolates them and prevents them from connecting within society.

Dayan discusses an interview with Terry Stewart where he responds to being asked why he did not use real criminals and their experiences in his presentation, with “Why can inmates say? They’re liars, they’re thieves, and they’re cheats. Who would believe an inmate anyway?” Not only does this quote successfully point out how actors within the law perpetuate negative
personhood but it also supports Dayan’s theory that criminals undergo “social death”. This also speaks to the perceptions of criminals and thus, groups in society who are associated with criminality. Though Dayan is specifically examining personhood and how the state deprives ethnic minorities of their personhood, his analysis focuses on invasive and violent interrogation practices. This exposes how depriving certain groups of personhood negatively impacts their bodies and supports Scarry’s argument about how the law uses violence and interrogation against the body to dehumanize people and create power.

**CRIMINALITY AND THE BODY**

This abuse of the body as a means of achieving power and economic benefits through false justification that gain legitimacy, persists today. Contemporarily, legitimized forms of abuse take place through police practices, interrogation practice and within the prison industrial complex. These forms of abuse gain their legitimacy from a society that believes the people on the end of the abuse to be deserving “criminals”. The idea that some institutions within society discriminate against particular groups, specifically ethnic minorities, is a common view. Furthermore, within certain communities, as a result of violent and discriminatory practices throughout history that persist today, it is an accepted view that institutions like the criminal justice system, the police force, and the prison industrial complex are inherently racist. However, the perception of what criminality is and who constitute as criminals has become inherent to the way people subconsciously view certain groups of individuals and allow for them to be denied basic human rights, a right to their body. I believe that this maintenance of power within society is done through “unmaking” certain persons by both degrading and abusing their bodies and justifying it by linking their bodies to the idea of criminality. Specifically, historical forms of
abuse like punishment forms during slavery, lynchings, mob violence, police brutality (past and present), and contemporary forms of abuse seen in interrogation practices and in prisons.

MILLS AND HOBBES

While we lack fundamental rights to our own body, an examination of the social contract theory reveals how we lend authority over our bodies to the government. In Thomas Hobbes’s *Leviathan*, he proposes that before there were societies with formal governments, we existed in a state of nature filled with chaos and anarchy where people lived in fear. The argument is that in order to escape the dangers that existed within the state of nature, we created the social contract where people essentially gave up our absolute freedom and authority in order to empower the Leviathan (the state) to “control and protect the body”, in exchange for our security (Mills 584). Therein lies where the ownership of our bodies as property of the state derives. Charles Mills explores why this is problematic in *The Body Politic, Bodies Impolitic*. He questions how the state can properly control and protect the body when bodies are not White.

Mills points out the flaw in Hobbes’s construction of the social contract. Hobbes believes that when individuals transition from the state of nature into Leviathan-run society, they are unchanged. They continue on as their “natural bodies” and rationally behave in order to avoid returning to the chaos of the state of nature. Hobbes does not recognize how the body then interacts with the body politic and how the images and ideas associated with certain bodies are then constructed within society. Mills argues that within the society created by the authority given to the Leviathan, ethnic bodies are morally stigmatized and viewed as inferior. He argues that it is this perception of the body that constructs race, causing the interactions between the Leviathan and individuals to be based on the body politic, not the natural body. His argument is
that the Leviathan constructs Whiteness, race, and what is associated with races; that these were not concepts existing in the state of nature. Whiteness was created by the Leviathan as superior bodies to be treated differently.

Mills cites Anthony Marx’s discussion of race in America. Marx says:

Nationhood was institutionalized on the basis of race; the political production of race and the political production of nationhood were linked” (Marx 1998:25). “Before even turning to how the state controls and protects the body, we need to see how the state creates the body politics and the bodies that are deemed to be worth protecting and necessary to control” (Mills 595).

Essentially, the social contract gave authority to control and protect bodies from the state of nature, but instead the politics of bodies are created and Black bodies are identified as inferior to White bodies, not to be protected. This is the beginning of recognizing how the state constructs negative narratives around Black bodies to maintain its power.

**ANGELA DAVIS**

Angela Davis says that “Race has always played a central role in constructing presumptions of criminality”. That belief is why Angela Davis’s discussion of criminality is central to understanding why the lack of legal status of the body coupled with police practices and expanding the Fourth Amendment negatively impact ethnic minorities and their bodies. Plainly, Davis’s work serves as a link between why a clear legal status for the body is needed because it negatively impacts minorities, though they are not always the focus of scholars’ discussion of the body. Our judicial system has declined to give the body a legal status, our criminal justice system abuses ethnic bodies, and a clear legal status that respects the body as property would be beneficial to all, but particularly minorities.
In *Are Prisons Obsolete?*, Angela Davis analyzes the prison industrial complex’s devastating effects on African Americans as well as how and why the complex came to be established. This discussion will be important to expand on in Chapter 4 of this thesis. She also engages in a discussion of slavery, its practices, as well as post-slavery practices, and its role in maintaining a system of power and constructing social identities. That discussion will be important in the following discussion. However, what is pertinent as a foundation of analysis for the thesis now is her examination of criminality.

Throughout this work, Davis discusses slavery and the prison industrial complex’s abuse and degradation of the body, though the body is not the focus of her study. Davis’s focus is to advocate prison reform and abolition. In order to do this, she begins an analysis of how America came to have a prison system that contains more inmates than some countries, without objection or resistance from the masses. She initially attributes the beginning of this problem to the Reagan Era’s “tough on crime” policies that was claimed to be attempting to make communities safer. However, Davis asserts that communities have not become safer while prisons just continuously become larger. Moreover, the prison populations consist of mostly Latinos and African Americans, who are minorities in the overall U.S. population.

Bypassing a discussion of the racial motivations of the “tough on crime” policies momentarily, we are able to answer the question of why the prison industrial complex does not meet resistance:

We thus think about imprisonment as a fate reserved for others, a fate reserved for the “evildoers,” to use a term recently popularized by George W. Bush. Because of the persistent power of racism, “criminals” and “evildoers” are, in the collective imagination, fantasized as people of color. The prison therefore functions ideologically as an abstract site into which undesirables are deposited, relieving us of the responsibility of thinking about the real issues afflicting those
communities from which prisoners are drawn in such disproportionate numbers” (Davis 16).

Before one can be deposited into the prison system, one interacts within the police system. Both systems criminalize, degrade, and abuse ethnic bodies. However, this is not met with mass resistance from society because crime is accepted as wrong and a problem that needs to be dealt with. So when “tough on crime” policies emerge, the majority do not perceive them as theoretically racialized or problematic or even in the results, which we know to disproportionately affect minorities. This is a result of systems throughout history, like slavery and Jim Crow laws, which have criminalized African Americans and other minorities as mischievous people that the law must deal with accordingly. That perception has become pervasive and entrenched in the subconscious of American society. As Davis says:

“This is the ideological work that the prison performs—it relieves us of the responsibility of seriously engaging with the problems of our society, especially those produced by racism and, increasingly, global capitalism” (Davis 16).

We do not analyze the social issues that lead certain groups to crime and being placed into the prison system, and how that reproduced the conditions that fuel the prison cycle because those people have already been criminalized and deserving of these results, throughout American history. Furthermore, contemporary society continues to criminalize them through the media’s representation of criminals and the prison system.

ALEXANDER

Angela Davis argues that society does not respond to abuse of certain groups because they have been criminalized. In The New Jim Crow, Michelle Alexander explores the war on drugs as a war on race. She argues that tough on crime policies are racially motivated and that
society does not discuss it as such because we have both conscious and unconscious biases that are embedded. Those biases can be linked to the history of mass incarceration of African Americans so we have come to see the treatment of African Americans as fair. While embedded in society, even on unconscious levels, this is still an injustice. This historical criminalization of African Americans is connected to the treatment of Black bodies. As a result of legal and social justifications in America’s early history, this treatment of the body as well as the negative perceptions and narratives have persisted in its subjugation of Black bodies within society and assists discriminatory practices and policies against the body, in maintaining power.
CHAPTER 2: 

The Black Body

Carla Peterson tells us that while we think of the body in its biological terms or its composition, we must think about the body in its social and political context because the body is never free from its perception and interpretation. This is the premise of George Yancy’s examination of the Black body as its own separate entity from the body, in his book Black Bodies, White Gazes. Yancy explains that the Black body has been “historically marked, disciplined, and scripted and materially, psychologically, and morally invested in to ensure white supremacy... as a Black person, this is my existential standpoint, my past inheritance, that informs my sense of agency” (Yancy 1). In other words, the Black body and identity has been constructed as a part of the foundation for fueling White supremacy and this still impacts Black persons in society. This is a core component of my argument when looking at the way ethnic bodies are impacted by stop and frisk laws and search and seizure laws, as a result of this historical abuse of the body, made possible by interpretations of the Fourth Amendment and denial of property rights.

Yancy argues that the Black body has been “confiscated” (Yancy 1). Yancy’s discussion of the confiscation of Black bodies refers to the physical abduction of Black people from African in order to enslave them in America and other countries. However, Yancy argues that Black bodies have still been confiscated from the social space in America because they are not being seen as themselves, but through a “white gaze” (Yancy 2). He believes that the dehumanization of Black bodies we experience through this white gaze is a confiscation of Black bodies that is no worse than the physical act of bondage and kidnapping Black bodies experienced during slavery (Yancy 2). The violence of slavery created power and the consequent shift of more
covert discrimination that the historical narratives of the Black body creates, is converted into laws and discriminatory practices. As Cover says, the word and the law itself is violence and that violence is power. This is a system of power and its maintenance.

Essentially the Black body has been robbed of its true definition or ability (agency) in society, as a result of slavery, sexual abuse, mutilation, violence, and breeding (Yancy 2). The Black body was abused as a means of fulfilling the purpose of Whites and justifications were provided to sustain the abuse (Yancy 2). Yancy argues that these practices dehumanized the Black body and person and affects them in today’s social sphere through self-alienation, self-hatred, racial-profiling, hyper-sexualization of Black bodies, and mass incarceration of Blacks (Yancy 2). Yancy believes that dark skin in itself is a “signifier” of negative values in American society because American history has deemed “Blackness” as evil, untrustworthy, and guilty (Yancy 3). Guilt and wrongdoing have been attached to the narrative of Blackness. This perception of Blackness is what Yancy calls the “white gaze” (Yancy 3).

This white gaze serves as the perception we should be weary of when looking at how the law, Court, and police view and interact with Black bodies. We should use this to recognize the implications of lowering police scrutiny from probable cause to reasonable suspicion, or the complacency with which society views disproportionate incarceration rates within the Black community.

The badge of guilt and wrongdoing Yancy discusses is embedded in America’s perception of criminality and their equation of criminals with Blackness can be seen in every mainstream media coverage of Black murders today. Law and actual guilt is disregarded, as well as Black people are essentially blamed for their own murders. The response to their deaths is as
if some justification must be given to excuse their murders, rather than purport to the normal system of law that aims to punish people who commit a crime. Both society and the media instead try to paint the Black victim as a criminal in order to excuse crimes done to them.

For example, we can take a brief examination of the case against Trayvon Martin\(^1\). Trayvon Martin was walking home with an Arizona ice tea and a pack of skittles wearing a hoody as he walked through a white suburb. As a result, George Zimmerman, who had been warned repeatedly by police not to approach Martin, attacks and kills him. While blatant racial profiling and disregard for the law have been displayed in this case by Zimmerman, the media coverage instead ignores the facts of the case and instead focuses on justifying what happened to Martin. The media argued that he was a thug, that he should not have been wearing a hoody, that he had been suspended from school before, that he had “ghetto” tweets, and may have used marijuana. Each of these facts has nothing to do with the fact that at the time of his death, he was committing no crime and was wrongfully murdered. But even regardless of the facts of the case, they do not determine that Martin was a thug or a criminal, and even if they had, does that determine he is not worthy of justice by the law? Furthermore, it is important to look at how social stereotyping and profiling somehow become law or used against Black bodies in the law in cases like this. A hoody is an article of clothing and it is not against the law to adorn them. But society has attached a stigma of criminal behavior to Black people who wear them, and then it is conveniently used as a justification for why Zimmerman was racially profiling Martin. This suggested that despite the fact that Martin was innocent of a crime and Zimmerman stereotyped him as a criminal due to his race, gender, and clothing, because America has a history of these kind of racist attitudes towards Black people, it is instead the responsibility of Black people to

\(^{1}\) State of Florida v Zimmerman (2012)
not wear these kinds of clothing or do things that may cause White suspicion, or we will be responsible and guilty for what happens to us.

**SLAVERY**

The purpose of studying the body and its lack of property rights, tied in with their construction of criminality, is to reveal how this affects ethnic bodies. My overarching argument is that the ownership of bodies by the state coupled with the demonization of Black bodies is a deliberate act to create and maintain power. Additionally, these bodies are inflicted with a pain and a series of dehumanization tactics that are justified by the state and serve a grave purpose in the maintenance of power. Using the previous examination of the body, this study of the treatment of the Black body in the United States reveals the state is deliberate in its non-recognition of a legal status of the body by showing how it has advantaged the state.

As a source of cheap labor to fuel production, particularly in Southern States, slavery was an abuse of the Black body that was sanctioned by the law and deprived African Americans of personhood. Many arguments and justifications, both social and legal, were provided for the enslavement of Black people as well as the terrible treatment and conditions they were subjected to. Arguments ranged from an inherent inferiority of Black people that many believed to have a religious backing based on the Curse of Ham. Many considered Black people to simply be sub-human or animals. Scientific arguments expressed during things like the Tuskegee Syphilis Study, insisted that the brains of Black people were “primitive and underdeveloped” (Yancy 1).

The law justified the abuse of African Americans because they were considered wild and unhuman, which is culminated by the founders only recognizing African Americans as 3/5 of a person in the United States Constitution. And even that sub-human recognition was only done
for the benefit of large slaveholder states. The abuse of slaves was also legitimized because it was considered necessary to keep slaves docile and obedient by preventing them from developing a sense of rights and consciousness and thus, preventing them from resistance and rebellion. The purpose of these practices was meant to maintain the business of slavery which was fundamental to capitalism in America.

The original construction of slavery in the world as a whole was not confined to the enslavement of Black persons. Additionally, the initial justification or purpose of slavery was because it was seen as a necessity for continuing ancient trading patterns (McIntyre 4). In order to continue these trading patterns, human bodies were sanctioned as commodities (McIntyre 4). The English 1777 “An Act to Settle the Trade in Africa”, asserted that slavery of Africans was beneficial to the English Empire and that it thus, must belong (McIntyre 7). This historic rationalization of sacrificing the body and its rights in exchange for state power corresponds with the Court’s current decision making in cases like Moore v Regents of the University of California where they admitted a reluctance to consider the entire human body property of the people who inhabit the body because it would not be beneficial to them because the body is of secondary concern when dealing with power and mobility of the state and the larger entities.

Importantly, the justifications for slavery show that society adapts its beliefs and practices to rationalize the abuse of ethnic bodies for the benefit of the state. Because slavery was in contradiction with Christian morality, in order to justify it, the English insisted that slaves who were Christians could be freed. The argument was created that slavery was not immoral but instead benefiting these pagan Africans who would benefit from being converted to Christianity (McIntyre 7). Then, when the continued enslavement of now Christian Africans needed to be justified, they rested on the argument that Blacks were descendants of Ham, a cursed people in
The Bible (McIntyre 7). Thus, deserving of their condition. This justification is similar to the rationalization of mass incarceration and police brutality against Blacks today that insist Black men are thugs who commit crimes and thus deserve to be incarcerated and/or killed. It shows that our system changes its methods but the underlying foundation and reasoning persist.

A part from the issue enslavement in itself posed for body rights and power, the practices employed to maintain slavery reveal how dehumanization of a people, both physically and mentally, can be achieved through abuse of the body and is a significant contributor to shaping identity through the white gaze, and thus state power.

Consequently, we see how the law was aware of the power in denying Blacks and their bodies a legal status that allowed its abuse. So what are the implications of that past on modern-day America’s continued failure to supply the body with a legal status? It cannot simply be an oversight because history identifies an awareness and strategic system. If in the past abuse of Black bodies was justified through a denial of personhood and rights to secure slavery’s economic benefits to privileged White Americans, it follows through that the continued abuse of Black bodies through inhumane practices by police and in prisons, that effectively robs them of their personhood, is done to secure the economic benefits of a prison industrial complex that displaces African Americans and maintains White privilege. This is shown through the fact that abuse by police officers, the prison system, and interrogation practices, disproportionately affect ethnic bodies more than any others because more ethnic bodies are imprisoned and/or accused of crimes in this country because the very concept of criminality is linked to race.
BLACK BODY IN PAIN

Slavery is important when looking at the Black body because slavery treated the Black person as nothing more than a body, for which the slave-owner had all control, and the identity of Blacks was created through. The rape of Black women during slavery is historically documented and widely discussed. However, the sexual abuse of male slaves as well as the fixation on Black male sexuality that continued long after slavery is very minimally discussed. Thomas Foster, bell hooks, Patricia Collins, and a number of other historians discuss the perception of African American males as beasts, brutes, and hypersexual rapists to be feared. Thomas Foster’s *The Sexual Abuse of Black Men under Slavery* discusses the vulnerability of all enslaved Black persons who could be raped, forced to rape others, or passively observe these acts. Foster delves into the sexual abuse of Black men by both white men and women. That abuse extended beyond rape, and included forced reproduction, sexual coercion and manipulation, and psychic abuse (Foster 447). Forced activities like these are critical in historical depictions of Blacks as hypersexual and Whites as passive (Foster 448). Forced reproduction is important because the production of offspring was critical for slave-owners, in order to provide them with more slaves without going out and purchasing more. More importantly though, the constant reproduction of slaves, though forced, helped enforce this false stigma of hyper sexuality.

The assignments of hyper sexuality through forced activity like rape, does more than stereotype and irritate Black people. It also contributes to the construction of criminality. Foster tells a story of an enslaved man being forced by his White master to rape an enslaved woman in 1787 (Foster 445). This story did more than serve as an example of how the Black body was abused, it reveals how stigmas, like rapists and hyper sexuality, were assigned to these Black
bodies and then actions were forced on them to make those constructions appear real. Moreover, what is critical is, by forcing slaves to engage in sexual activity and rape, not only does this force this false perception of hyper sexuality upon them, but creates a criminal construction. Rape is a crime. By being forced to commit the crime and tying that into an idea of them as hypersexual beasts, a historical narrative was formed.

bell hooks recognizes how this idea of the Black male rapist was imposed on history through stories like the one above, and has become central to the perception and understanding of Black male sexuality. hooks talks about how the idea of the Black male rapist is central to the fear of Black male sexuality (hooks 67). This fear of Black male sexuality is because the Black male body has been historically constructed as a brutish one to fear, is the focal point because fear is the pervasive attitude towards the Black body in society as a whole because all aspects of the Black body have been constructed to portray a criminal in need of being controlled. There is no arena in which the Black body is not treated as something to fear or in need of taming by society. Slavery insisted Black bodies served the purpose of working and in order to keep them working, it was necessary to deny them the rights to their body so that one could whip them, mutilate them, rape them, and kill them. Black male sexuality is not treated as a sexuality of its own, but rather a predator attempting to force itself upon the White female. This is imperative to understanding how the Black identity in American society is constructed in a way that allows for disproportionate incarceration of African Americans.

Furthermore, the story Thomas Foster Tells and hooks discussion of Black sexuality makes a very important reveal about the White gaze. hooks asserts that the Black male was never obsessed with sex when they were brought to America (hooks 69). They came from a country where survival was more important than sexual desire and sexual activity (hooks 69). Yet, the
slave-owners insisted on portraying slaves as hypersexual (hooks 69). hooks discusses slave narratives in which slaves actually feared the White obsession with sexuality because it could mean rape, mutilation, and lynching (hooks 69). In accordance with that fear of the White male, Foster’s story showed how sexual acts were forced upon slave in order to fulfill this White obsession. Both hooks discussion of the slave narratives and Foster’s story reveals how these constructions of the Black male body and Black sexuality should be more telling of the White identity, but the White gaze does not view it that way. This sexual mutilation was a continued process after slavery that persisted into lynching, where sexual organs would often be cut off of slaves and pictures would be taken (Massey 462).

Slavery as an institution incorporated lynching as well as many other forms of violent tactics used against the slaves as a way of maintaining social hierarchy. However, upon the ending of slavery, in order to solidify the hierarchy slavery had assumed, within the social sphere lynching was adopted as a system of its own. The Post-Reconstruction Era showed a rise of lynching, legal execution, and incarceration as a means of maintaining the social hierarchy in the South (Massey 458).

After Emancipation in the South, prisons that were formally populated with White people because Blacks were punished on plantations became largely populated with Black prisoners (Massey 459). However, sentences were not typically being served within prisons (Massey 459). Instead, a convict leasing system was implemented where businesses would lease convicts out for cheap to free labor (Massey 459). These convict leasing systems ended up being worse in their treatment of Black bodies because slave masters had the incentive of wanting to keep their slaves alive so they could reproduce them or simply not have to bare the financial burden of replacing them or buying more, so there was an economic value, even if minute, attached to the
Black body under slavery. However, the convict leasing system allowed companies to replace prisoners for very little because Black bodies were constantly deposited into this incarceration system so that they could be worked to death without concern because they were easily replaced and there was no financial incentive. A part from the abuse felt by these bodies in the convict leasing system, what was even worse is how much death in itself was used as a form of social control of Black bodies in the South (Massey 459). Between the 1880s and the 1930s, lynchings and legal executions of Black bodies accounted for over 6000 deaths (Massey 459). This disposure of Black bodies (as their lives have been reduced to bodies), as a means of implementing a social hierarchy influences the sentiments of society today as well.

In Patterns of Repressive Social Control, James Massey and Martha Myers examine how lynching developed as a system and how it was connected to incarceration and legal execution because the threat of lynching was always present. Massey and Myers assert that the use of lynchings rose as White fear increased due to the belief that with slavery’s absence, Blacks no longer “knew their place” (Massey 462). In Black Lynching: The Power Threat Hypothesis Revisited, Massey, along with Stewart Tolnay and E.M Beck, further examines this White fear of Blacks, but from the angle of examining lynchings in the South from 1889 to 1931 to focus on the theory that Southern Whites lynched Blacks because they feared the loss of their political hegemony (Tolnay 605). They asserted that there are 2 general types of perceived threats that would lead a majority group to discriminate against a minority group: competition over economic resources and competition over political power. Balock believed that the discrimination against Blacks related to fear over retaining political power because the actions taken were (1) restriction of a minority groups political rights; (2) symbolic forms of segregation; (3) a threat oriented ideological system and (4) symbolic or ritualistic forms of violence like
lynchings (Tolnay 606). Though their research revealed that the prevalence of lynching was so significant and often in relation to the amount of Blacks in the population rather than in relation to an instance of political threat (Tolnay 606). However, while their research was inconclusive as it pertains to disproving the political threat hypothesis, it does reveal the use of lynchings as a systematic tool of social control of Black bodies through violence and elimination, and as a response to fear in general, because the lynchings increase drastically as the Black population increased.

Lynching as an institution intersects with incarceration as well as served similar purposes. The connection lynching has to incarceration immediately was that while incarceration was being utilized as a means of controlling Black bodies, just being a Black body on the receiving end of a criminal accusation put one at risk for being lynched, regardless of the legal outcome (Massey 462). Essentially, if one were not lynched, one was at great risk for a “legal” execution and vice versa (Massey 462). Lynchings were more brutal and inhumane than legal executions because lynchings were public spectacles that usually involved physical torture, mutilation, and desecration of the body afterwards (Massey 462). When Black men were lynched, they often had their sexual organs cut off, pictures were taken, and the pictures as well as the organs themselves were sold as souvenirs. This was the case of Jesse Washington.

Massey and Myers discuss the shift from lynching to incarceration and legal executions. Over time, lynchings shifted from public spectacles to private affairs as the legality of them

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2 Jesse Washington was an African American teenage boy who was accused of murdering a White woman in Waco, Texas in 1916. With no witnesses to the crime and a brief trial, he was found guilty and was dragged out of court by a mob. Washington was castrated before being hung and lowered over a bonfire repeatedly until he died. There was said to be a crowd of over 10,000 excited onlookers. Parts of his body was sold as souvenirs. This event was one that would eventually be investigated by the NAACP. See Bernstein, Patricia. *The First Waco Horror: The Lynching of Jesse Washington and the Rise of the NAACP*. College Station: Texas A & M UP, 2005. for more information.
changed and the burden of social control of Blacks was placed on the prison system (Massey 463). By the end of what is referred to as the “lynching era”, incarceration rates were way higher than ever before (Massey 463). This is used to support an argument Massey and Myers adopt from Durkheim 3, that “deprivation of liberty” grew as a primary means of penal social control (Massey 463). Furthermore, this supports my earlier argument that systems of ethnic bodily abuse have just been reshaped in America. This focus has shown a shift from a system of slavery to lynching in the Post-Reconstruction Era, to the prison system that has since exploded into the prison industrial complex we have today. This not only chronicles the abuse of the Black body, but (1) it shows the way the state has viewed Black people as mere bodies utilized for state gain (2) how the systems adjusts to camouflage itself to deal with the changing social climates, like lynchings gradually becoming more private affairs until moving into the prison system, which is now often looked at without the racial lens 4 and (3) it reveals the states motives for abusing the Black or ethnic body: continued economic gains by maintain a hierarchy established with slavery.

Lynching was a method of policing Black bodies that rested on the myth of hyper sexuality of Black men. Lynching was a response to these constructions of Black identity and

3 David Émile Durkheim is a French sociologist credited with being the father of Sociology.
4 In The New Jim Crow, Michelle Alexander makes the argument that the prison industrial complex is “The New Jim Crow” period because she believes that the prison industrial complex is a new caste system that Americans do not recognize because of this perception of “colorblindness” (Alexander 223). Alexander insists that the prison industrial complex is a deliberate way of maintaining White privilege within American society by relying on the criminal justice system to disproportionately and deliberately target African Americans. She equates this to the “Jim Crow” period because history now recognizes that “justice” for African Americans was a myth during that period, and she believes the same of today. This argument Alexander makes is important because the study of lynchings showed the emergence of the incarceration system picking up the efforts of lynching, but Alexander studies how this system has continued its efforts but has become a backstage effort Americans have lost focus on in the same way lynchings continued in private. Alexander further argues that the divisive difference between the Jim Crow period and the prison industrial complex today is that racism is not de jure as it was during the Jim Crow Era because we use “colorblindness” to eliminate the racial component of issues. This is an important argument because that colorblindness is what I am arguing allows for society to turn a blind eye to the problematic results of the Court’s latest interpretations of the Fourth Amendment, stop and frisk laws, the narrative around Black bodies as criminals in society, and the disproportionate rates of African Americans incarcerated.
sexuality which reveals how Black sexual identity played an intimate role in criminality, policing, and bringing harm to the Black body. Lynching showed how Black murder becomes sanctioned by the state when social constructions and myths about Black bodies are used to justify white fear and violence. This has become pervasive in our society that still responds to the murder of Black bodies by using myths and constructions of thugs and criminals to provide an excuse for White crime against Black bodies. Importantly, we must recognize that social lynchings was widespread and an early form of legitimised policing in America. As a result, the beginning of policing history in America begins with a foundation of abusing the Black body based on stereotypes. The effects of that are present today when looking at racial profiling, who gets searched or arrested by the police, incidents of police brutality and more.
CHAPTER THREE

The Fourth Amendment to the U.S. Constitution places limits on the power of the police to make arrests, search people and their property, and seize objects and contraband (such as illegal drugs or weapons). However, as the government becomes more insistent upon “tough on crime” policies, we see the Court making decisions that appear to limit the Fourth Amendment and allows for the broadening of police powers in how they conduct searches as well as the creation of controversial stop and frisk laws, search and seizure laws, border search exception, and the treatment of people suspected of terrorism. Stop and frisk laws and search and seizure laws can be a polarizing topic amongst citizens when some argue their necessity and others see the laws as unjust or an invasion of privacy. However, people do not usually consider how these laws affect the body.

We know that the Bill of Rights was put into the Constitution as a compromise between the federalists who feared the government having too much power over the people. As such, The Bill of Rights are a set of guaranteed freedoms meant to protect citizens from tyranny. The Fourth Amendment reads:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The language of the Fourth Amendment is very clear: probable cause is a necessary component for searches, frisks, and the like, to be conducted. It is this probable cause that serves
to curtail racial profiling. The Court has often been divided as to whether or not the unreasonable searches and seizures clause is independent or in conjunction with the warrant clause (O’Brien 890). Meaning, the Court has been unsure as to whether or not the Constitution outright forbid unreasonable searches and seizures or allowed them so long as they were obtained with a warrant that was achieved through probable cause. Regardless of the position held on the Court, one recognizes the necessity of obtaining probable cause in order to obtain a warrant to conduct a search, or forbids the searches altogether. There is no language that suggests another standard may be applied to eliminate needing a warrant or making the task easier. While there is some debate as to how this clause of the Fourth Amendment was supposed to be interpreted, a framer’s intent \(^5\) argument would suggest that the framers intended for the warrant clause to be a condition necessary for the searches (O’Brien 891). Furthermore, the framers deliberately limited searches and seizures in the Constitution as a result of the opposition against the Crown’s use of general warrants (O’Brien 891). The framers denounced general warrants as “grievous and oppressive” (O’Brien 891). This would suggest that not only would the framers have intended for warrants to be necessary for searches and seizures to be conducted, (thus attaching the probable cause clause to the searches and seizure clause), but that they would have intended for those warrants to be limited in scope in order to protect the privacy and freedom of citizens from tyranny (O’Brien 891). Groh v Ramirez (2004), supported this assumption when the Court maintained that warrants and probable cause needed to be based on specificity of what was being searched and seized (O’Brien 894). A warrant that failed to specify its purpose and appeared vague was a violation of the Fourth Amendment.

\(^5\) Framer’s intent is a form of constitutional interpretation that rests on trying to determine what the Framer’s political thought was, how they intended an area of the Constitution to function, etc. Diamond, Martin. "Democracy and The Federalist: A Reconsideration of the Framers’ Intent." *American Political Science Review* 53.01 (1959): 52-68.
Consequently, the law based on the Fourth Amendment was that police needed to obtain warrants to make searches and arrests from “neutral and detached magistrates” (O’Brien 893). This was eventually made applicable to the states in *Coolidge v New Hampshire (1971)*. It was held by the Court that police were required to demonstrate probable cause that a person had committed a crime before they were able to obtain a warrant, and that upon receiving a warrant and carrying out a search, evidence will be recovered (O’Brien 893). The Court also upheld that even in the case of possible warrantless searches and seizures by police, they too must be based on probable cause (O’Brien 893). The Court determines that probable cause exists when a “reasonable” person or judge would determine that an officer had enough information to conduct a search or seizure (O’Brien 893). This means that conducting these searches and seizures were not left up to mere police discretion.

The Warren Court brought about a change in how the Court treated the Fourth Amendment. Prior to the Warren Court Era, although search warrants only allowed police to search and seize specific areas and items, and the Court had recognized the framers intent for warrants that rested on probable cause and were limited in scope, police had been allowed to engage in large searches while making arrests regardless of whether or not they had a warrant (O’Brien 894). However, beginning with *Chapman v United States (1961)*, the Warren Court began limiting warrantless searches as well as what could be searched even with a warrant and making arrests. In response to the widespread use of confidential informants as probable cause by police, causing their affidavits for warrants to be vague, the Warren Court established a two-prong test (O’Brien 894). The test was used to establish probable cause in the event that the police did not establish it when trying to obtain a warrant (O’Brien 894). The test required the

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police to (1) explain how an informant knows the information he/she claims to know, and (2) to
explain why they trust that the information is accurate and reliable (O’Brien 894). The test was
established in the case *Aguilar v Texas (1964)*. Despite this early pattern of upholding the
Fourth Amendments requirement for probable cause and warrants when engaging in searches
and seizures, *Terry v Ohio (1968)*, brought about the Court’s altering of the Fourth Amendment’s
original interpretation and following, the scope of its protection.

In *Terry v Ohio (1968)*, John Terry and two other men were stopped and frisked by
policemen who claimed the men appeared to be “casing” the place or prepared to do a “stick-
up”. The policemen found concealed weapons on the men and they were sentenced to three years
in jail as a result. Terry petitioned the Supreme Court on the grounds that his Fourth Amendment
right to not be searched without probable cause had been infringed upon. In an 8-1 decision, the
Court held that the Fourth Amendment had not been violated because the “exclusionary rule” of
probable cause hindered the ability to prevent crime and protect police officers. They further
insisted that in this particular case against Terry, it was “reasonable” for the police to assume the
three men were going to commit a crime and that their safety would be put at risk as they
investigated them.

The argument made by the Court was that though probable cause was not present, the
search was not unconstitutional because “reasonable suspicion”, an entirely new standard put
forth by the Court and not mentioned in the Fourth Amendment, is present. Yes, Terry and the
other men were in fact concealing weapons, but the decision and reasoning supplied to justify the
police actions, by the Court are both incorrect and problematic for several reasons. Whether or
not the “exclusionary rule” in the Fourth Amendment hinders the ability for crime prevention is

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8 *Aguilar v. Texas, 378 U.S. 108 (1964)*
irrelevant as that is not the intended purpose of the Fourth Amendment and thus has no bearing on the constitutionality of the polices actions. The amendment is meant to protect the people against searches and seizures without probable cause. Probable cause was not present in the case against Terry. This “reasonable suspicion” the Court discusses in the decision is establishing a new, lowered, form of scrutiny to answer a question that was not presented to the Court. They were asked whether or not Terry’s Fourth Amendment rights were infringed upon but they essentially replied with ‘no, the Fourth Amendment hinders police ability to prevent crime and feel safe’, both of which are separate issues not before the Court, and do not answer the question they were asked. Terry’s Fourth Amendment rights were clearly infringed upon because probable cause was not established and reasonable suspicion is not a standard given by the framers for the Fourth Amendment.

If the Court felt that the Fourth Amendment should be reinterpreted to include a reasonable suspicion doctrine, they could have acknowledged their limitations like Chief Justice Marshall did in *Marbury v Madison (1803)*⁹, and authored an opinion that established that new doctrine but recognized that the actions of the police in this case did infringe upon the Fourth Amendment as it stood. What the Court does here is essentially engage in “Judicial Activism”¹⁰. They used this case to insert themselves within the issue of tough on crime policies, when their job is merely to interpret the Constitution. They blatantly ignored the intended purpose of the Fourth Amendment and apply a new standard to assist with the apparent agenda of preventing crime and making the job of policemen easier, which is political, not judicial. We can see this as

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⁹ *Marbury v. Madison*, 5 U.S. 137 (1803) is a landmark Supreme Court decision where Chief Justice Marshall established judicial review. In this case, the Court held that Marbury had a right to have his commission delivered but that the Court did not have the jurisdiction to hear the case and thus, did not have the authority to grant the writ of mandamus.

¹⁰ Judicial activism is judicial rulings suspected of being based on personal or political considerations rather than on existing law.
the Court basically deciding that the Fourth Amendment’s purpose of protecting citizens is not as significant as the desire to incarcerate them in exchange for safer streets, so they reshape the Amendment, which is not their constitutional right to do. They later apply similar reasoning in *Montoya de Hernandez v United States* (1986).

The lone dissenter in this case was Justice Douglass. Douglass argued that:

> Police officers up to today have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of probable cause. At the time of their "seizure" without a warrant, they must possess facts concerning the person arrested that would have satisfied a magistrate that "probable cause" was indeed present. The term "probable cause" rings a bell of certainty that is not sounded by phrases such as "reasonable suspicion." Moreover, the meaning of "probable cause" is deeply imbedded in our constitutional history. As we stated in *Henry v. United States*, 361 U.S. 98, 100-102: “The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of "probable cause" before a magistrate was required.

Douglass is asserting that probable cause is a constitutional standard set forth by the framers to combat a prior issue in the nation’s history, and it has since been rooted in precedent. It is not an arbitrary standard to be discarded because it protects citizens from having their freedom infringed upon and it also protects police in the event of a search that turns up nothing. If it was felt that the Fourth Amendment as it stood was a hindrance on the nation’s ability to enact “tough on crime” policies, it was Congress’s prerogative to attempt to amend it. However, the Court acted outside its jurisdiction and authority. Following, this case’s limitation on the Fourth Amendment’s scope of protection expanded police powers and the trajectory of these searches has critically impacted ethnic bodies (Starkey 135).
While Justice William Brennan did not dissent in *Terry v Ohio* (1968), he writes a memorandum to Chief Justice Earl Warren expressing his worries about the outcome of affirming *Terry*, and encouraging the Court to be cautious in its language. Brennan says:

I’ve become acutely concerned that the mere fact of our affirmance in *Terry* will be taken by police all over the country as our license to them to carry on, indeed widely expand, present “aggressive surveillance” techniques which the press tells us are being deliberately employed in Miami, Chicago, Detroit and other ghetto cities. This is happening of course, in response to the “crime in the streets” alarums being sounded in this election year in Congress, the White House and every Governor’s office. Much of what I suggest be omitted from your opinion strikes me as susceptible to being read as sounding the same note. This seems to me to be particularly unfortunate since our affirmance surely does this: from here on out, it becomes entirely unnecessary for the police to establish “probable cause to arrest” to support weapons charges, an officer can move against anyone he suspects has a weapon and get a conviction if he conjure up “suspicious circumstances,” and courts will credit their versions. It will not take much of this to aggravate the already white heat resentment of ghetto Negroes against the police – and the Court will become the scapegoat. The alternative would of course mean a reversal of this conviction- a holding that there is no constitutional authority to frisk for weapons unless the officer has probable cause to arrest for the crime of carrying a weapon. I recognize that police will frisk anyway and try to make a case that the frisk was incident to an arrest for public drunkenness, vagrancy, breach of the peace, etc. – but at times I think these abuses would be more tolerable than those I apprehend may follow our legitimating of frisks on the basis of suspicious circumstances. This states frankly my worries. But if we are to affirm *Terry*, I think the tone of our opinion may be even more important than what we say. If I have exceeded the proprieties, I hope you will forgive me- I am truly worried” (O’Brien 914-915).

Brennan’s memorandum poses a series of issues to consider as well as it raises a number of questions. The first obvious question upon reading this is why didn’t Brennan dissent? Though interesting, it is irrelevant to this discussion. Overlooking the fact that Brennan refers to cities with higher minority populations as “ghetto cities” and what this says about his perception of minorities, we see that he recognizes that polices are targeting those areas. He also recognizes this as a response to the governments focus on “tough on crime” policies in these specific areas. What is important here is that Brennan advises against the Court targeting these same areas in
their opinion if they are to affirm Terry, which alludes to some level of disagreement with those practices. Brennan recognizes that this decision will result in an abandonment of probable cause by the police. This acknowledgment is important because it shows that the Court, whether or not they believe it constitutional to create a reasonable suspicion level of scrutiny, does know that their decision will give way to abandoning a central clause of the Fourth Amendment, which would make their decision to affirm as well as the police action that follows, unconstitutional. Additionally, this is also a vacate from precedent established in *Yick Wo v Hopkins* (1886), where the Court determines that a law is unconstitutional if it is neutral in language but discriminatory in practice, because here, Brennan is acknowledging that affirming in Terry will adversely and disproportionately affect “ghetto” minorities, but is encouraging Chief Justice Warren to author the opinion with language that does not specifically call for the action nor target these communities as the White House had. Furthermore, Brennan repeatedly assures Chief Justice Warren that he recognizes that regardless of the Court’s decision, the police will carry out searches and arrests and find reasons to justify it. Aside from the fact that this reluctance to make a decision that is likely to be ignored and expose the Court’s weakness is the same logic employed by Chief Justice Marshall in *Marbury v Madison* (1803), this is a recognition of the corruption and lawlessness within the police system. Following, Brennan recognizes the Black community’s distrust of the police, but equates the Black community to “ghetto Negroes” (O’Brien 915). Though one could choose to dismiss this as him merely referring to that facet of the Black community, we know the distrust of police Brennan is referring to when he says “white heat resentment”, exists within the Black community as a whole as a result of history. Consequently, he is referring to the community at large as “ghetto Negroes” (O’Brien 915). Also, despite discussing his recognition that police target Black
communities as well as his belief that police will unlawfully create circumstances to justify stopping and searching Blacks, he makes the Black community’s possible response to this seem unwarranted. His only focus and worry instead rests on the fact that the Court may be held to blame, or become a “scapegoat” by Blacks, as he puts it (O’Brien 915). Brennan’s response is as enlightening as it is problematic. Brennan’s memorandum does me the service of revealing that the Court does recognize the malpractices of police as well as my argument that the Court simply chooses to disregard ethnic bodies, it reveals the attitudes towards the Black community, and the disregard the Court treats the possible outcome of their rulings effect on Black bodies. Like in the case of Moore v Regents of the University of California (1990), the Court decides that the effect on bodies is outweighed by the states interest. Brennan highlights the negative outcomes that will ensue if Terry were affirmed, but not because those outcomes will affect minorities, but because the Court may be held responsible. Furthermore, just the fact that Brennan is trying to determine how the Court should rule based not on the language of the Fourth Amendment and the Constitution, but the possible backlash for the Court, is political, not a power of the Court, and thus, unconstitutional in and of itself.

Though we disregarded the first question, why Brennan did not choose to dissent, as irrelevant, it would seem fair to say that he determined the consequences that minorities would suffer, were not as significant as the benefit of the police, the Court, and the government.

Following the affirmation of Terry, as Brennan predicted, the Fourth Amendment is failing to prevent ethnic bodies from being disproportionately affected by stop and frisk searches, which impacts the disproportionate arrests and incarceration within the prison industrial complex (Starkey 139). Looking at New York City in 2011 alone, 680,000 stops were made by police using the reasonable suspicion standard. Over 87% of those stops were of Black and Hispanic
bodies (Starkey 138). Worse, showing the ineffectiveness as it relates to the prevention of crime, but the correlation between racially profiling criminality, in one poor Brooklyn neighborhood during a 4 year span, 52,000 stops were made and only 25 guns were retrieved and 1% of arrests were made (Starkey 138). As this shows, massive amounts of ethnic bodies are having their privacy invaded based on suspicion and alleged intent of preventing crime, but these searches are not yielding the intended results.

The culmination of apparent racial correlation with stop and frisk laws is evident in *Floyd v City of New York (2013)*. *Floyd v City of New York (2013)* is a class action lawsuit, led by the named plaintiff David Floyd. Floyd is a 28 year old African American man who had been stopped and frisked while trying to help his tenant get into his locked apartment in the Bronx, NY. The lawsuit argues that New York’s use of stop and frisk laws employ racial profiling and violate both the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment (Starkey 136). However, we know that *Terry v Ohio (1968)* reinterpreted the Fourth Amendment to treat these searches as constitutional. Furthermore, the “intent doctrine” the Court uses when looking at the Fourteenth Amendment insists that though we see racial disproportion in the use of these searches, the *intent* to racially profile or to be discriminatory in application of the stops and searches, must be proven in order to constitute a violation of the Fourteenth Amendment’s Equal Protection Clause (Starkey 136). This too is a deviation from precedent established in cases like *Yick Wo v Hopkins (1886)*\(^\text{11}\) where the Court held that a law violated the Fourteenth Amendment’s Equal Protection Clause if it was discriminatory in practice, even if the language is racially neutral. So what we see is two stark deviations from precedent that

\(^{11}\) Yick Wo v. Hopkins, 118 U.S. 356 (1886)
negatively impact the ethnic body and limit its protections from the police and the Court’s assistance. It seems naïve to believe that this is mere coincidence.

The major problem with the reasonable suspicion standard is not only is it a lower standard than probable cause, but the Court established it without guidelines and left the application of it up to the interpretation and discretion of police officers (Avdija 27). Avdija examines reasons given by police as constituting reasonable suspicion to initiate a stop and frisk procedure. Avdija argues that there are many factors that determine why a police officer chooses to initiate a stop and frisk procedure. These reasons range from the height of crime in the area to what time of day it is (Avdija 30). Avdija is admittedly skeptical about the arguments for and studies supporting the idea that the decision to initiate these procedures are largely racial. Avdija puts forth extreme effort in trying to deemphasize the racial component and initially only focuses on the reasons the police in the study provided for initiating the procedures. However, the studies he cited and conducted showed that of 1500 sample cases in New York, only 8.5% of the people who were stopped were White, in comparison to 49.5% being Black and 26.5% being Hispanic/Latino (Avdija 29). Of the people that were frisked upon being stopped, 7.3% were White, 57.7% were Black, and 32% were Hispanic/Latino (Avdija 29). The numbers were already shockingly high as it pertained to the stops of ethnic bodies but they increase when looking at these frisks of their bodies.

The studies repeatedly show minorities overrepresentation when police engage in these searches (Avdija 32). To combat the racial element, Avidja focuses on the gendered aspect of policing. He points out repeatedly that males are far more likely to be stopped and frisked than women, as a means of attacking the argument for racialized policing (Avdija 33). However, this argument seems nonsensical because we know that Black and ethnic males have been
specifically targeted as being criminals and thugs within the narrative of criminality surrounding ethnic bodies. Race and gender are not mutually exclusive in this arena and they work together to negatively impact the ethnic body in these scenarios so it would follow that the Black and Hispanic male body is more likely to be stopped and frisked than the Black and Hispanic female body. That does not decrease the racial component in these procedures.

These studies of the stop and frisk laws racially disproportionate application show how the Court’s latest interpretation of the Fourth Amendment has allowed ethnic bodies to be targeted and invaded by the police, but in addition to those issues, the case of Rosa Elvira Montoya de Hernandez shows how the Court explicitly disregards the body and its abuse in exchange for these expanded police powers.

In *Montoya De Hernandez v United States (1986)*, on March 5, 1983, the defendant Rosa Elvira Montoya de Hernandez had been detained at the Los Angeles International Airport after a 10 hour flight from Bogotá, Colombia. The reasons she was detained that the officers believed constituted reasonable suspicion was based on the location she was traveling from, the amount of luggage she had with her, the duration of her stay, and what they called a noticeable bulge in her abdomen. She was subjected to being strip searched naked as well as forced to defecate in front of TSA officers for a 16 hour rectal examination until she produced over 88 balloons filled with cocaine.

Montoya de Hernandez filed suit claiming that her Fourth Amendment rights had been violated based on an unreasonable detention as well as an unreasonable search and seizure. While the Ninth Circuit Court held that her rights had been violated, the Supreme Court of the United States reversed the decision. Chief Justice William Rehnquist stated in the majority
opinion that police officers have the right, that detention and searches beyond the routine searches are acceptable even if there is only reasonable suspicion. The body can be subjected to many kinds of pain, some more inexpressible than others. In situations like the one Montoya de Hernandez found herself in, her body was subject to a pain that was less physical, but more mentally and emotionally degrading. Still, the Court held that this was a “trivial loss of liberty”. The Court is recognizing the suffering the body is undergoing for these lowered standards for police investigations and holds that the body is not a significant price to pay. However, we have examined the personal effects on people who have their bodies abused and degraded as well as how this impacts society, and we know the Court’s sentiment to be false.

While decisions like this may be intended to protect the nation from crime, they have serious implications for both the body and racial discrimination. As a result of the decision in that case, while thousands of people have been subjected to strip-searches, the U.S Customs GAO study has revealed that and over 77% of people were innocent. Further, the GAO study confirmed that there was a racial bias in who was likely to be selected for a search. This reveals how the disregard of the treatment of the body in order to fight crime can result in violations and abuse of the body. It also opens a larger discussion that I want to explore. Why are citizens so prepared to allow for the disregard of the body to fight crime and why does that disregard more negatively impact racial minorities?

The general answer for this question is not very complicated. The law is able to disregard and thus abuse the body because like in the case of Montoya de Hernandez v United States (1986), the Court disregarded the body of people who could potentially be criminals. Even though in actuality, the bodies of more innocent people than criminals are likely to be violated by broadening police search powers, society condones this because they believe only criminals are
being affected and the rights or bodies of criminals are not important to them. However, the issue with this disregard for the treatment of the bodies of people perceived as criminals goes beyond just a discussion of prisoners’ rights and voices. In Angela Davis’s *Are Prisons Obsolete?*, she discusses criminality and how it is embedded in race in addition to how the prison industrial complex serves as an example for how the Black body is abused by the law. Davis argues that the concept of criminality was constructed in a connection to race throughout American history after slavery was abolished in order to maintain authority over African Americans. She argues that this was done using the creation of things like Black codes. Davis believes that because of history, Americans have been trained to associate criminality with African Americans subconsciously. So the problem we have today is that citizens are viewing these new limitations on the Fourth Amendment that negatively impact the body as a trivial loss in exchange for fighting crime because they do not recognize the harm on the body or the heightened danger for the Black body.
CHAPTER FOUR

Previous chapters focused on understanding how and why certain people are dehumanized and have their bodies abused as a means of achieving and maintaining power. We have analyzed how certain bodies are valued and others are depicted in society in ways that render them targets by the state without any societal outrage in response. Lastly, we have followed a timeline showing how abuse of ethnic bodies exists within American institutions and how those institutions reshape themselves with time, beginning with slavery and involving into the prison industrial complex we have today. This chapter focuses on analyzing how the torture and particular practices to unmake the body; how prisons abuse minority bodies; how structures like Guantanamo Bay function outside of the law; and how bodies, rights, and laws are ignored when issues like terrorism are discussed.

Our focus has specifically been placed on how colored bodies (those in minority groups), are the beneficiaries of bodily abuse by the law as a result of societal deconstruction and dehumanization. While Dayan does pay special attention to the treatment of African American bodies within the prison system, his overall argument is that the law is able to, and does, create new identities for certain people in order to dehumanize them and engage in treating them outside of the authority of the law. This act of negative personhood, while usually reserved for colored bodies, has been extended to detainees and people classified as terrorists, enemy combatants and the like. Focusing on these people illustrates why as a society, we should fear the use of the body for power, not being granted our bodies as property, the dehumanization of people, and the vacation of our rights – because it can extend beyond the minority populations usually bearing the cost. Also, it shows how the Court can and does justify the abandonment of
civil liberties and due process in exchange for state power, particularly when easily able to do so without repercussion because of the stigma attached to the people in question.

We have talked about the ways in which people are theoretically held outside of the law by making their voices worth less, by making their experiences un-relatable, dehumanizing them etc. Now we discuss an actual institution set up to operate outside of the law and our rights as we understand them. Guantanamo Bay. Guantanamo Bay is able to do this because it deals with people society has no interest in protecting.

Johem Steyn refers to Guantanamo Bay as a "legal black hole". The United States Constitution affords The President and Congress the rights and ability to defend national security lawfully. While America has been known to limit civil liberties in some capacities during times of war, Guantanamo Bay represents something more drastic. The Guantanamo base is located in Cuba but all legal authority over the base is retained by the United States. Guantanamo functions to arrest and detain people suspected and accused of any kind of terrorist activity or affiliation, where they can be detained indefinitely, denied access to legal counsel, not be made aware of the charges against them, be tortured while they await trial in front of military courts (which already function outside of the law in their own sense, as they maintain their own authority). People held at Guantanamo Bay are denied the basic rights usually given to people facing charges in America, habeas corpus and due process, as well as they can be subjected to well beyond the kinds of physical harms that would render any information obtained inadmissible in regular court. Guantanamo curves the law with numerous loopholes. The experiences of people held at Guantanamo Bay are not only devalued, but almost rendered nonexistent as they are locked under the seal of confidentiality of the base as well as military courts.

Steyn argues that while the Court's job in this situation where the executive branch is in some ways unlawfully detaining hundreds of people, should be to offer a check to the executive branch, they are avoiding doing so. While Steyn acknowledges that sometimes injustices must occur in the name of
national security, it is the Court's duty to protect people from heavy-handed executive response to security threats because things like Guantanamo Bay are not only major human rights violations, but have the potential to allow for further abuses of power by the executive branch.

The following cases deal with people classified in some form, as enemies of the state, as a result of heightened security following the 9/11 attacks and are an example of how the law operates drastically different when dealing with detainees and Guantanamo Bay and similar structures.

*Rumsfeld v Padilla (2004)* involved Jose Padilla seeking a writ of habeas corpus from the United States Supreme Court because he was being detained by the military under the instructions of Secretary of Defense Donald Rumsfeld, who had classified him as an enemy combatant. Jose Padilla, who was an American citizen, had been arrested in Chicago's O'Hare International Airport after returning a trip to Pakistan in 2002. He was initially detained as a material witness in the government's investigation of the al Qaeda terrorist network, but was later declared an "enemy combatant" by the Department of Defense. Despite being an American citizen, the argument by the FBI was that he has returned to America in order to carry out acts of terrorism. As a result of this classification, he was able to be held indefinitely without being brought before a court to face charges, given access to a lawyer, anything. He was not entitled to due process.

Donna Newman, who had initially represented him when he was still held under the guise of being a material witness, filed a petition for habeas corpus on his behalf. The U.S. District Court for the Southern District of New York ruled that Newman had standing to file the petition despite the fact that Padilla had been moved to a military brig in South Carolina. However, the court also found that the Department of Defense, under the President's constitutional powers as
Commander in Chief and the statutory authorization provided by Congress's Authorization for Use of Military Force, had the power to detain Padilla as an enemy combatant. The district judge rejected Newman's argument that the detention was prohibited by the federal Non-Detention Act, which states that no "citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

On appeal, the Second Circuit Court of Appeals panel reversed the district court's "enemy combatant" ruling. The panel found that the Authorization for Use of Military force did not meet the requirement of the Non-Detention Act and that the President could not, therefore, declare American citizens captured outside a combat zone as enemy combatants. The question before the Court was whether or not Congress's "Authorization for use of Military Force" authorized the President to detain a United States citizen based on a determination that he is an enemy combatant, or is that power precluded by the Non-Detention Act?

The case was then appealed to the United States Supreme Court on writ of certiorari where. However, in a split decision, the Court held that they did not have jurisdiction over the case because the motion for habeas corpus had been improperly filed. The overall argument by the Court was that the petition for habeas corpus was filed in the U.S District Court for the Southern District of New York but that it should have been filed in the United States District Court of South Carolina where the base he was being held was located. Further, the Court claimed that the suit should have named his "immediate custodian" rather than the U.S Secretary of Defense Padilla. This argument was based on the fact that Rumsfeld was being held in a military prison in South Carolina and the person in charge of that prison is who the Court believes should have been named in the suit. The Court reversed the decision of the lower court and ordered the dismissal of the case without prejudice, allowing the case to be refiled.
It could be argued that the Court found an excuse not to rule on the issues of this case as to avoid inserting themselves into conflict with the executive branch because they could have probably just as easily put forth a rationale to explain why they did have jurisdiction to hear the case. It would not be the first time the Court has seemingly created a shaky jurisdiction technicality argument to hear or not hear a case, like in the case of *Cherokee Nation v Georgia* (1831). Moving beyond the possibility that the Court declined to rule on the issues of this case because it may not have been to the best interest of the Court, Justice Ginsburg offered some interesting insight during oral arguments. Justice Ginsburg asked Principal Deputy Solicitor General, Paul Clement, about the issues of torture. Specifically, she asked whether or not torture was employed by the executive branch as a means of obtaining information from detainees. Clement informed her that the executive branch did not. Ginsburg also questioned whether or not it was the Court's job to act as the constraint between the executive branch being able to torture detainees.

The case *Rasul v Bush* is important because it was heard by the Court despite the objections of the executive branch. This case involved Guantanamo detainees who had filed habeas corpus petitions, specifically, 2 Australians and 12 Kawaitans. Before this case was heard by the Supreme Court, it was dismissed with prejudice by the district court that argued they had no jurisdiction to hear the case because the United States had no sovereignty over Guantanamo Bay. The appeals court affirmed this decision.

The issue of jurisdiction in this case is important even beyond the fact that it could be interpreted as another instance in which a court used shaky jurisdiction arguments to its advantage. The argument put forth by the district court was that because the detainees were not American citizens and Guantanamo Bay is located in Cuba, the Court did not have jurisdiction.
However, as the detainees argued, the United States, as stated in the treaty between Cuba and the U.S over Guantanamo Bay, has "complete jurisdiction" over the base, regardless of the fact that Cuba has "ultimate sovereignty". Since jurisdiction is the issue, whether or not America has sovereignty over Guantanamo Bay seems irrelevant, which further adds to the idea that the court was merely looking for an excuse not to hear the case. Furthermore, while the detainees may not be American citizens, the Constitution affords them the same rights as American citizens within America's borders or under American law, which Guantanamo Bay should fall under regardless of its physical location.

Despite the district court’s dismissal of the case, it was heard by the Court. The Court did struggle with whether or not they had jurisdiction and whether or not the detainees had a right to habeas corpus. The Court did eventually find in a 6-3 decision that because the United States had control over the Guantanamo Base, detainees were entitled to the right to habeas corpus regardless of citizenship. Justice Stevens asserted that the issue of sovereignty was irrelevant. The opinion granted detainees the right to challenge the constitutionality of their detainments. Justice Scalia authored the dissent where he argued that the right to habeas corpus did not extend to non-citizens.
Conclusion

Our bodies are important to us in the everyday sense that we see them as intrinsically ours. However, our bodies are a source of political power because we do not actually have legal ownership of our bodies as property. This fact may not appear critical on a daily basis or something we ever explicitly realize when confronted by the law. But whether it is through systems that blatantly claim ownership of our bodies and use them as sources of physical labor; systems that destroy our bodies to solidify social hierarchies; or laws that invade our bodies and act as mediums to our imprisonment and dehumanization; our bodies are being used against us by the law. Society has constructed ideas about different colored bodies that as it stands, leave them and other stigmatized bodies on the receiving end of injustice and violent hierarchies. However, this problem is not confined to those targeted color bodies. This is a human problem that affects society as a whole. We must acknowledge that the abuse and degradation of some groups and their bodies not only can expand to include others, but it has. We have seen how slavery and lynchings were systems that rested on the abuse of Black bodies, but have transformed into the prison system that also highly impacts the Hispanic body. We see how structures like Guantanamo Bay are able to abuse colored bodies as a result of the narrative around Muslims, people of Middle Eastern descent, and more.

Injustice only grows and power is not merely achieved, but it must be maintained. As a result, the mechanisms for injustice will only continue to expand in order to allow power to expand and be maintained. As citizens, we have to understand that disproportionate incarceration rates among minorities are not mere coincidence. We must know and understand history in order to make connections to the stereotypes, media coverage, and discussions around colored bodies today. We need to hold our branches of government accountable. It is our executive branch's job
to protect all citizens equally and lawfully, as it is the Court's job to check them if they fail to. It is the Court's job to interpret the Constitution and not to read into the Constitution its own standards that adversely impact some groups in society. We must value everyone's bodies equally and analyze the ways in which our society and government exploits them.
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