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Black Deaths Should Matter, Too! Estate Planning as a Tool for Antiracists

*Terrence M. Franklin**

*And since I feel today New York is really
My personal property I'll tell you what I'm gonna do. . .
Since I like you very much,
So very, very much,
I'm gonna split it with you.
Since I like you very much,
So very, very much,
I'm gonna split it with you!¹*

I. INTRODUCTION: BLACK PEOPLE NEED TO KNOW ABOUT ESTATE PLANNING AT LEAST AS MUCH AS EVERYBODY ELSE

Just as the negative effects of most legal policies and practices have a disproportionately greater negative impact on people of color, and particularly Black people, it may be especially important for Black people to be aware of the importance of planning for death, disability, and illness. I learned from the story of my great-great-great-great grandmother's emancipation from slavery in 1846, that doing an estate plan may be also an important way to be an antiracist.

What does it mean to be an antiracist? Author, professor, and antiracism activist Ibram X. Kendi has explored the roots of racism, and how to dismantle it wherever it exists, by taking action to be antiracist. Kendi recognizes race as a construct introduced and developed to situate power in the hands of white people, preserving that power there, and exclusively transferring that power from white hands to white hands.²

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¹ SWEET CHARITY (Universal Pictures 1969).

² See IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 9 (2019) (ebook) (stating that to be "antiracist" is to endorse the idea of racial equality).

Kendi focuses on the importance of seeing and exposing racist policies and practices, so they can be disrupted and dismantled. He warns against focusing on and calling individuals out as racists. Doing so, he says, is not the most effective way to create change in society that is truly effective at improving equitable outcomes.³

Rather, focusing on the racist policies and practices that result in inequality takes some emotion out of the discussion, and frees people to work together to attack policies with racially inequitable consequences. Black people should look squarely at what can be done with “estate planning” and then act in antiracist ways – to disrupt policies, laws, and practices that have inequitable racist effects.⁴ We may insist that Black Lives Matter, but in the end, shouldn’t Black Deaths Matter, Too?

II. WHY I’M FAMILIAR WITH THE PROBLEM

I am familiar with the problem of Black people not doing estate planning because of my personal experience. I have been a trusts and estates litigator since 1992, handling disputes in the context of wills, trusts, and the control of property. We do not write estate plans. Rather, we fight when something goes wrong, or a dispute arises because there is no plan, or because the plan is subject to conflicting interpretations. I have seen far too many situations where Black people didn’t have effective estate planning in place, the famous cases — like Prince, Aretha Franklin and James Brown — being just examples of a wider phenomenon.⁵

The American College of Trust and Estate Counsel, ACTEC, is an invitation-only association of trust and estate lawyers, often considered preeminent since its founding in 1949. ACTEC’s invited members, known as “Fellows”⁶ must have a well-deserved reputation in the trust and estates field, with substantial experience adding to the development of the law in the practice area through speaking, writing and bar activities.

In 2001, I was nominated to become a Fellow in ACTEC, encouraged and supported by my white law partner, who used his privilege and reputation to mentor me, introducing me to others in the College.⁷ I

³ *See id.*

⁴ *See id.* at 11.

⁵ *See* Matthew Erskine, *Lessons to be Learned from Failed Celebrity Estates*, FORBES (June 18, 2021, 5:59 PM), <https://www.forbes.com/sites/matthewerskine/2021/06/18/lessons-to-be-learned-from-failed-celebrity-estates/?sh=6cdda97f7f69> [<https://perma.cc/HLC9-59CV>].

⁶ *Nomination to ACTEC*, ACTEC, <https://www.actec.org/assets/1/6/Nomination-to-ACTEC.pdf>.

⁷ Bruce S. Ross, former ACTEC President.

was shocked to discover that I was ACTEC's first known African American Fellow. And in the twenty years since then, our numbers have increased, resulting in a still disheartening total of . . . six Black fellows out of approximately 2500. I love the organization, have benefitted from it professionally, and I have become fast friends with many Fellows. Every Fellow I have ever spoken to on this subject is shocked at the statistics, disappointed that the percentage is not higher, and frustrated that there are not more Black attorneys ready for nomination. This sounds like the old "not enough qualified Black people" excuse. But as someone trying to widen the pipeline, it may be an explanation and a call to action.

Frustration with the narrow pipeline of Black trust and estates lawyers is real. I consistently try to identify African American attorneys doing sophisticated trust and estates work to encourage them to attempt to qualify for ACTEC membership. Some already have solid practices, with a good client base, and do not think the time working on articles and speeches in order to qualify for ACTEC justifies the benefits of membership. Others underscore a chicken-and-egg dilemma: why would they want to be a part of an organization that cannot demonstrate by its numbers, that it is committed to welcoming and including diverse attorneys? This, despite countless hours of work that our Diversity and Inclusivity Committee has invested in developing diversity statements, conceiving and implementing fellowships that support potential future Fellows, and other practical initiatives to encourage young people of color to consider law, and specifically trusts and estates, and put in extra effort to speak and write and do bar activities. For many solos or small firm lawyers, it's not a practical way to spend limited time. The National Conference of Bar Examiners has recommended eliminating wills and trusts as a subject on the multistate bar exam, so the remaining law schools that still teach the subject will dwindle.⁸ And many of the large law firms, colloquially "BigLaw" have already eliminated trust and estate departments because the billing for those services often does not fit with the large firm's emphasis on racking up billable hours.⁹

III. WHY MIGHT RELUCTANCE TO DO ESTATE PLANNING BE GREATER AMONG BLACK PEOPLE?

The same barriers to estate planning exist for African Americans as for others. People resist doing estate planning for many reasons: denial,

⁸ See Karen Sloan, *Bar Exam Overhaul Plans Go Public. So Long, MBE*, LAW.COM (Jan. 4, 2021, 2:15 PM), <https://www.law.com/2021/01/04/bar-exam-overhaul-plans-go-public-so-long-mbe/?sreturn=20210431132006> [<http://perma.cc/GVB8-H7BY>].

⁹ Kelly Dancy & Eido Walny, *The Future of Estate Planning: Focus on The Legal Practitioner*, NAEPC J. EST. & TAX PLAN., 2014, <https://www.naepcjournal.org/journal/issue19a.pdf>.

or reluctance to face real risks in life, or the certainty of death. People fear that estate planning means loss of control; they may feel that estate planning is for wealthy people; they do not want to incur the cost now for something that they will personally never have to deal with, and they think someone else can deal with the cost.

People fear being vulnerable and sharing confidential financial information and are perhaps embarrassed for a lawyer – a stranger, or more embarrassing, an acquaintance — to know that they are not in better financial shape. Sometimes, complex family dynamics – past or existing conflicts, difficulty communicating, unresolved traumas – stifle productive interaction before a family member dies. Those dynamics do not get easier after death. So, folks “lawyer up” and take the issues to court. That is how I make my living, so it works for me. Thinking about this question led me to wonder if there are societal, historical, and cultural barriers that African Americans experience in unique ways that may not be experienced by others.

A single monolithic “African American community” does not exist, so from here on I’m trying to avoid sweeping generalizations about how “Black People” feel about doing estate planning.¹⁰ I cannot speak for everyone. This article is personal, so I speak to what affected my own family, causing me, the metaphorical cobbler, to recognize the repair that needs to be done on my estate planning “shoes.”

Estate planning was never a cultural norm for me in my working-class Black neighborhood on the South Side of Chicago where I grew up. My dad was born to a teenage single mother in rural Alabama in the 1930s and followed his mother to Chicago to the “Warmth of Other Suns,”¹¹ known as “The Great Migration.” I remember studying the Great Depression as a kid, and asking my paternal grandmother, born in 1917, about her experience. “Depression?” she scoffed. “That didn’t matter to us. We didn’t have nothing before the Depression, so we didn’t have nothing less because of it.” After his 1956 post-high school marriage to my mom, and serving a couple of years in the Army, Dad began working for the federal government and spent his entire career there. My mom started her post-high school life as a telephone operator and remained with “the telephone company” until she retired decades later. Neither came from wealth.

¹⁰ See Christine Tamir et al., *Facts About the U.S. Black Population*, PEW RSCH. CTR. (Mar. 25, 2021), <https://www.pewresearch.org/social-trends/fact-sheet/facts-about-the-us-black-population> [<https://perma.cc/E7M9-2FAG>] (finding that Black Americans are diverse, and consist of individuals with different racial and ethnic identities and experiences).

¹¹ ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA’S GREAT MIGRATION* 9 (2010).

Working daily to pay for food, the mortgage on a house that the GI-Bill¹² helped my parents buy in a neighborhood where we were among the first Black residents, as whites decamped to suburbs or other “white” areas within Chicago, my parents didn’t focus much on wealth accumulation or transfer through estate planning. They applied their resources and energy to the family’s daily needs.

But my parents also spent their hard-earned dollars for my brother and me in the moment, whenever there was an opportunity for us to grow and advance. They used their disposable funds to provide us opportunities like summer day camps, sports activities, and family cultural outings to plays and shows, and to see The Harlem Globetrotters when they came to town.

Michelle Obama, formerly Robinson, and I were high school Honors French classmates. I was struck reading a section of her memoir, *Becoming*. We shared the experience of not wanting to tell our parents about a trip to France with a favorite teacher because we worried they couldn’t afford it.¹³ Like my parents, hers insisted that it was they, not us, who would decide on what to spend money.¹⁴ “We were their investment . . . Everything went into us,” the former First Lady wrote.¹⁵ And that’s exactly how I think my parents regarded the situation. If this was important to me, they would find a way to make it possible. They wanted me to not worry about where the money would come from. My responsibility was to continue to work hard as a student and do my chores around the house.

When former President Barack Obama delivered the eulogy for John Lewis, he related the story of Lewis’ mother insisting that “once you get something inside your head, no one can take it away.”¹⁶ That comment underscored that the impulse to make sure that what we Black people give our children cannot be taken away has a long, rational history, drawn from practical experience.

¹² See *VA Home Loans*, U.S. DEP’T VETERANS AFFS., <https://www.benefits.va.gov/homeloans> [<https://perma.cc/BQY8-7KKF>]; see also *About GI Bill Benefits*, U.S. DEP’T VETERANS AFFS., <https://www.va.gov/education/about-gi-bill-benefits/> (Dec. 30, 2020) [<https://perma.cc/7CLV-9QZE>].

¹³ See MICHELLE OBAMA, *BECOMING* 60 (2018).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Barack Obama, *Former President Barack Obama Eulogy at Rep. John Lewis Funeral*, YOUTUBE (July 30, 2020), <https://www.youtube.com/watch?v=8P3X9AiN8E4> [<https://perma.cc/TZ4S-XSFF>].

IV. LOOKING AT THE HISTORY OF SLAVERY AND RACISM

To be antiracist, Kendi starts with the premise that policies and practices that have inequitable results based on race are racist, and we should focus on changing those instead of on changing hearts and minds.¹⁷

A great starting point is the stream of articles and books discussing the ongoing impact that American racism and slavery have on the future of the entire country, not just African-Americans. Ta-Nehisi Coates's groundbreaking article made the case for reparations cataloging some of the myriad ways slavery, built on and buttressed by white supremacy, has a continuing impact on Americans, Black and white.¹⁸ Other thinkers have applied the same kind of historical analysis to other contexts to gain insight.¹⁹

All these thought leaders have been looking at how the history of American slavery continues to negatively impact the descendants of former slaves. Looking back helps the present come in focus to move to a better, more equitable future.

¹⁷ See KENDI, *supra* note 2, at 9, 11.

¹⁸ See Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631> [<https://perma.cc/45NY-59VT>].

¹⁹ *The Warmth of Other Suns*, and pointedly, Wilkerson's newest book, *Caste* asks whether that word better describes the entrenched hierarchical racial class structure of America. See WILKERSON, *supra* note 11; see also ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 17 (2020). *The New Jim Crow* looked at the impact of slavery and racism on the mass incarceration of Black people. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 138 (2010). *The Burden: African-Americans and the Enduring Impact of Slavery* is a collection of essays looking at the phenomenon of ongoing impacts of slavery in various disciplines in various contexts. ROCHELLE RILEY, *THE BURDEN: AFRICAN AMERICANS AND THE ENDURING IMPACT OF SLAVERY* (2018). The introduction to *The Burden: African-Americans and the Enduring Impact of Slavery* was written by Nikole Hannah-Jones, in the news recently for rejecting a non-tenured teaching position at her alma mater the University of North Carolina at Chapel Hill in favor of a tenured spot at historically Black institution, Howard University. Her Pulitzer Prize-winning New York Times "1619" series of articles, podcasts, and the forthcoming book and documentary provide a wide-angle lens considering the impact of race across various dimensions of American life, since the first Africans were brought to Jamestown, Virginia, as indentured servants in 1619. Wilson Wong, *Nikole Hannah-Jones Declines UNC's Tenure Offer for Position at Howard University*, NBC NEWS (July 6, 2021, 2:11 PM), <https://www.nbcnews.com/news/nbcblk/nikole-hannah-jones-declines-unc-s-tenure-offer-position-howard-n1273116> [<https://perma.cc/EA7J-X2FR>]; see also *The New York Times Magazine Presents The 1619 Project*, N.Y. TIMES <https://timesevents.nytimes.com/1619NYC> [<https://perma.cc/8GRT-3XS7>].

Kendi assesses the history of racism to offer guidance for challenging racist policies and practices by being “antiracist”²⁰ instead of simply “non-racist” in a world where racist policies and laws are entrenched in systems of property ownership and transfer.

I have been on a personal journey into history, having discovered the last will and testament of John Sutton, my white fourth great-grandfather, who owned my fourth great-grandmother, whom he described in the will as his “mulatto slave Lucy, aged about 45.”²¹ John’s will set Lucy and their eight children and six grandchildren free, with explicit instructions for the family to leave Florida, where legally they could not be emancipated, and be taken to a free state like Illinois, where they arrived in December 1846, less than a year after John marked the will with his “X” about five months before he died near Jacksonville, Florida.²²

By creating a will, John counteracted the racist law of Florida that made it illegal to emancipate enslaved people in the state. In what I would describe as an act of antiracism, John did the will, preventing the racist law that kept Lucy and their family enslaved from controlling their fate.

I do not have physical evidence yet, but I believe that Lucy exercised whatever persuasion or control she had within the limits of being enslaved, to coerce John to do that will and protect their family since John was elderly and ailing. She had already convinced him to move from Georgia where they were certain John could not emancipate them, to Florida where they thought he could, only to find out the truth after they had already decamped one hundred miles with some 400 cows to Florida.²³ And yet, as the history played out, John’s younger brother Shadrack challenged the will in court, arguing that the will was invalid, violated Florida law, that John lacked the mental capacity to do the will, was unduly influenced and defrauded by Lucy who allegedly kept him plied with alcohol (“ardent spirits”) to deprive Shadrack of property that Shadrack claimed was his rightful inheritance – the lives of my ancestors.²⁴ The outcome of that trial meant the difference between my ancestors remaining enslaved from 1846 potentially through the end of the Civil War, or being free almost twenty years before the war began.

²⁰ KENDI, *supra* note 2.

²¹ Terrence M. Franklin, *The 1846 Last Will of John Sutton-What’s Not so New in Will Drafting and Contests*, WEALTH STRATEGIES J. (Sept. 27, 2018), <https://wealth-strategiesjournal.com/2018/09/27/the-1846-last-will-of-john-sutton-whats-not-so-new-in-will-drafting-and-contests> [<https://perma.cc/6D8E-SRDL>].

²² *Id.*

²³ *Id.*

²⁴ *See id.*

V. THE COMPLICATED RELATIONSHIP OF BLACK PEOPLE TO PROPERTY IN THE US FROM THE FOUNDING THROUGH THE CIVIL RIGHTS MOVEMENT

While it's too facile to blame slavery alone for the fact that my parents are not steeped in the tradition of retaining, investing, and transferring property to the next generation, history is a useful lens to ponder why not, and then ask how we can disrupt that historical pattern in antiracist ways.

Kendi addresses why immigrants, including immigrants of African descent, often fare better on various metrics, like wealth, than African Americans as a whole.²⁵ Individuals who migrate are a self-selecting, group, motivated by an internal drive for success and are uniquely resilient and resourceful.²⁶ The difference between the level of success by African Americans and immigrants is not a matter of race, but rather by what sociologists refer to as the “migrant advantage.”²⁷ Immigrants and migrants of all races tend to be more resourceful and resilient than the natives of their old countries and their new countries.²⁸ Black people were brought to this country with nothing. They were stripped of language, culture, religion.²⁹ And in many instances, during the middle passage, or “seasoning” in the West Indies, of life itself. Before arrival, they had no reference for thinking of themselves as part of a “Black” collective, but rather as part of tribal ethnic groups. The “Black” identity was forced on them as violently as the chains that restrained their bodies. They came without possessions, even the clothes on their backs, unlike other immigrant groups. They were snatched from their existences as humans in their homeland, transformed into free labor to build America, and forced to accept a new reality *as property*. The upshot is that African Americans came here lacking one of the key elements that vested our founding fathers with their sense of humanity – the capacity to not be property but to *own* property.

There is some debate about the ultimate source of Thomas Jefferson's use of the term “life, & liberty and the pursuit of happiness” in the Declaration of Independence.³⁰ Jefferson was familiar with and influenced by Enlightenment Era thinkers such as John Locke, who argued that political society existed for the sake of protecting “property,” which

²⁵ KENDI, *supra* note 2, at 67.

²⁶ *See id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *See id.* at 86.

³⁰ Julian P. Boyd, *Jefferson's "Original Rough Draught" of the Declaration of Independence*, LIBR. CONG., <https://www.loc.gov/exhibits/declara/ruffdrft.html> [<https://perma.cc/BXC5-5RUF>].

he defined as a person's "life, liberty, and estate."³¹ The "sacred & undeniable" rights of "men" (the gendered term "man" as a formulation of the rights of all humans), appeared in Jefferson's initial draft.³²

Jean-Jacques Rousseau, another Enlightenment Era thinker, writing about the invention of private property, noted:

The first man who, after enclosing a piece of ground, took it into his head to say, "This is mine," and found People simple enough to believe him, was the true Founder of civil society. How many Crimes, how many Wars, how many Murders, how many Misfortunes and Horrors would that man have saved the Human Species who pulling up the stakes or filling up the Ditches should have cried to his Fellows: Be sure not to listen to this Imposter. You are lost, if you forget that the Fruits of the Earth belong equally to us all, and the Earth itself to nobody!³³

But at the time of the founding of America, no real resistance to the idea of private property as being a fundamental element of the rights of "mankind" "humanity" or "man" seems to have had any political sway.

Jefferson, a slaveholder, complained that the Continental Congress "mangled"³⁴ his draft, including by removing his passionate assault on slavery and the slave trade. How he reconciled his proclamation of the rights of all men with his condemnation of slavery, even as he held slaves and had sex with the enslaved Sally Hemings, who could not legally give her consent, and who gave birth to the children Jefferson fathered, is already the subject of volumes of impressive scholarship, like Annette Gordon-Reed's *The Hemingses of Monticello*.³⁵

In short, in the experience of the framers, the natural rights of human beings included the right to own property. But even as white landholders were proclaiming universal equality of men, others – women and people of color, including the natives on the continent long before Europeans – were not supposed to be included. Broadly, Black people were specifically being denied the right to be human beings.

In most jurisdictions throughout the southern United States, even Black people who were not property belonging to white people under

³¹ JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* (1690), *reprinted in* THE LIBRARY OF LIBERAL ARTS 48 (Thomas P. Peardon ed., Bobbs-Merrill Co., Inc. 1952).

³² Boyd, *supra* note 30.

³³ JEAN-JACQUES ROUSSEAU, *A DISCOURSE UPON THE ORIGIN AND FOUNDATION OF THE INEQUALITY AMONG MANKIND* 97 (1755).

³⁴ See *The Declaration of Independence: How Did it Happen?*, NAT'L ARCHIVES, <https://www.archives.gov/founding-docs/declaration/how-did-it-happen> (Dec. 14, 2018) [<https://perma.cc/27XM-M9QJ>].

³⁵ ANNETTE GORDON-REED, *THE HEMINGSSES OF MONTICELLO* 290 (2008).

the law were nonetheless expressly prohibited by law from owning property themselves, from the years of Slave Codes to Black Codes, through Jim Crow. Meanwhile, the United States government expanded control across the geographic breadth of the continent by offering land grants to white men who were simply willing to arm themselves and help “remove”³⁶ native people, or control Black people, and in exchange stake a claim to ownership of the land.

When slavery ended after the Civil War, and the laws that expressly prohibited Black people from owning property were officially unconstitutional with the ratification of the Fourteenth Amendment, Black people were still kept from property ownership by law, custom, practice, and the very real terrorist threat of harm and death.

After slavery, nine states passed vagrancy laws making it a crime to not have a job,³⁷ laws that applied only Black people;³⁸ eight of those states allowed prisoners to be hired out to plantation owners with little or no pay going to the prisoners themselves, under conditions that were more harmful to the Black laborers than slavery, since there was no incentive to look out for their long-term health.³⁹

White resistance to Reconstruction revealed the fragility of Black rights, including property rights. When the U.S. Supreme Court had the opportunity to reject Jim Crow laws, it instead preserved them in 1896, in *Plessy v. Ferguson*,⁴⁰ stating that such laws “reflected customs and traditions . . . and preserv[ed] . . . public peace and good order.”⁴¹

The message from the High Court was not lost on the people. White terror raged across the country, as exemplified by the Wilmington, North Carolina Insurrection of 1898, a violent overthrow of the duly elected officials, in a majority-Black town, the only successful coup d’état ever to take place on American soil so far.⁴²

³⁶ Minutes of the Bladen, Brunswick, Duplin, and Wilmington-New Hanover County Committees of Safety, Wilmington Comm. of Safety (N.C. 1775), <https://doc-south.unc.edu/csr/index.php/document/csr10-0012> [<https://perma.cc/2JNG-C9PG>].

³⁷ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 28 (rev. ed. 2012).

³⁸ *Id.*

³⁹ *See id.*

⁴⁰ 163 U.S. 537, 550 (1896).

⁴¹ *Id.*

⁴² *See* LERAE SIKES UMFLEET, *A DAY OF BLOOD: THE 1898 WILMINGTON RACE RIOT*, at xix, 104 (rev. ed. 2020). Mobs of white supremacists, having failed to politically wrest power from a biracial progressive coalition, resorted to violence by taking up rifles and Gatling guns, setting fire to the offices of the local paper. They then went on a white supremacist rampage into Black Wilmington neighborhoods, destroying Black businesses and property, and assaulting Black inhabitants with a mentality to of killing “every damn nigger in sight.” *See* Timothy B. Tyson, *The Ghosts of 1898 Wilmington’s Race Riot and*

In the end, as many as 250 Black residents were killed, 2000 Black people were displaced, the Fusionist party of Blacks and whites that supported Reconstruction was disbanded and the town newspaper was torched and gutted.⁴³ The message went far beyond the boundaries of the City of Wilmington throughout the south and across the nation – whiteness trumped legal citizenship, including rights to own property, that were supposed to be guaranteed to all citizens, including Black people, under the Fourteenth Amendment.⁴⁴

Over 4000 lynchings have been documented in the country between the end of the Civil War and the Civil Rights era.⁴⁵ Many lynchings were immediate reactions to Black people acquiring property – a car, a home, money.⁴⁶ Many lynchings were reactions by white communities to the very notion of Black people owning property, which would put them on a human equal footing with whites.⁴⁷ Lynchings affected not just the individual victims at the ends of the noose, but like a pebble thrown in a pond, affected concentric circles of families, communities, and others within and beyond earshot, cutting a wide swath of terror to wield power, exactly as terrorism is intended to do.⁴⁸

Civil Rights activist and author James Weldon Johnson, who co-wrote “Lift Ev’ry Voice and Sing” (the Black National Anthem), coined the term “Red Summer” to describe the period from late winter through early autumn of 1919 where white supremacist terror and massacres raged across three dozen U.S. cities and a rural county of Arkansas.⁴⁹ The destruction of “Black Wall Street”⁵⁰ in the 1921 Tulsa Race Massa-

the Rise of White Supremacy, NEWS & OBSERVER (Nov. 17, 2006), <https://media2.newsobserver.com/content/media/2010/5/3/ghostsof1898.pdf>.

⁴³ See UMFLEET, *supra* note 42, at 83-84, 113, 120; David Zucchino, *The 1898 Wilmington Massacre is an Essential Lesson in How State Violence Has Targeted Black Americans*, TIME (July 1, 2020, 12:30 PM), <https://time.com/5861644/1898-wilmington-massacre-essential-lesson-state-violence> [<https://perma.cc/WU6D-PHGK>].

⁴⁴ LERAE SIKES UMFLEET, 1898 WILMINGTON RACE RIOT REPORT 222, 255-56 (2006).

⁴⁵ EQUAL JUST. INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* 4 (3d ed. 2017).

⁴⁶ Todd Lewan, Dolores Barclay & Allen G. Breed, *Landownership Made Blacks Targets of Violence and Murder*, AUTHENTIC VOICE (Dec. 3, 2001), https://theauthenticvoice.org/mainstories/tornfromtheland/torn_part2 [<https://perma.cc/BNN2-KWBM>].

⁴⁷ *Id.*

⁴⁸ EQUAL JUST. INITIATIVE, *supra* note 45 at 38.

⁴⁹ CAMERON MCWHIRTER, *RED SUMMER: THE SUMMER OF 1919 AND THE AWAKENING OF BLACK AMERICA* 11, 13 (2011); see *Lift Every Voice and Sing*, PBS, <https://www.pbs.org/black-culture/explore/black-authors-spoken-word-poetry/lift-every-voice-and-sing> [<https://perma.cc/QP7U-5XE7>].

⁵⁰ History.com Eds., *Tulsa Race Massacre*, HISTORY, https://www.history.com/topics/roaring-twenties/tulsa-race-massacre#section_1 (Aug. 30, 2021) [<https://perma.cc/76QX-R6TB>].

cre in which whites burned down a thriving economic Black community, killing hundreds of people, including an air assault on the Black Greenwood district, which many Americans first learned of from the Emmy-nominated “Watchmen”⁵¹ centered around that massacre, was already a familiar tale of trauma among many African-Americans.

The history of the accumulation of the primary source of American wealth, homeownership, is also replete with examples of government-supported or tolerated racism. Redlining of Black communities, like the Auburn-Gresham neighborhood in Chicago where I grew up, is one the most prominent ways that law was used in white supremacist ways affecting cities from coast to coast.⁵² In 1934, the Federal Housing Authority created a risk rating system that routinely and systematically rated Black neighborhoods as too risky, thus establishing “redlining” of neighborhoods, limiting Black access to the homes of their choice, making it easier for local governments to ignore the needs of these communities, and thus creating inequitable disparities between the value of the properties of law-sanctioned “Black” versus “white” neighborhoods.⁵³ Indeed, until 1950, the Realtor’s Code of Ethics prohibited selling a home in a white neighborhood to a Black buyer so realtors could lose their licenses if they sold to a Black person.⁵⁴ The Federal Housing Authority underwriting group reinforced its racist policies determining that incompatible racial groups should not be permitted to live in the same communities.⁵⁵ As a result, the FHA recommended the building of freeways to divide neighborhoods.⁵⁶

Racially restrictive covenants were another racist tool used to limit Black people’s access to the property of their choice. In 1940, 40% of new housing developments in Minneapolis for example, where George Floyd was murdered at the hands of police in 2020, had racially restrictive covenants.⁵⁷ The play “Raisin in the Sun”⁵⁸ was inspired by Lor-

⁵¹ WATCHMEN (Paramount, Oct. 20, 2019).

⁵² See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA*, at vii-viii (2017).

⁵³ See *id.* at 64-65.

⁵⁴ See Brad Broberg, *Learning from Our Past: The History of the Fair Housing Act*, NAT’L ASS’N REALTORS (May 15, 2018), <https://www.nar.realtor/on-common-ground/learning-from-our-past-the-history-of-the-fair-housing-act> [<https://perma.cc/NAA4-MWW3>].

⁵⁵ See FED. HOUSING ADMIN., HA FORM NO. 2049, *UNDERWRITING MANUAL: UNDERWRITING AND VALUATION PROCEDURE UNDER TITLE II OF THE NATIONAL HOUSING ACT* § 9, ¶ 937 (1938).

⁵⁶ See *id.* ¶ 938.

⁵⁷ *Covenants and Civil Rights: Race and Real Estate in Minneapolis*, HISTORYAPOLIS PROJ. (Sept. 22, 2015), <http://historyapolis.com/blog/2015/09/22/covenants-and-civil-rights-race-and-real-estate-in-minneapolis> [<https://perma.cc/388G-9NJ4>].

⁵⁸ See LORRAINE HANSBERRY, *A RAISIN IN THE SUN* (Vintage Books 1994) (1959).

rairie Hansberry's family's 1940 legal battle in the US Supreme Court case of *Hansberry v. Lee*⁵⁹ to challenge such a covenant in the Washington Park neighborhood of Chicago. It was not until eight years later, in 1948, that the case of *Shelley v. Kramer*⁶⁰ finally struck down racially restrictive covenants, since their enforcement required the participation of the state, implicated under the Fourteenth Amendment. But that case did not swing open the doors for Black people to be treated fairly concerning property.

After the US Supreme Court ruled in 1954 that the doctrine of "separate but equal" was unconstitutional in *Brown v. Board of Education*,⁶¹ 19 U.S. Senators and 82 U.S. Representatives from southern states signed the Southern Manifesto in 1956 pledging to maintain Jim Crow notwithstanding the *Brown* decision.⁶²

Limitations of time and space make it impossible to exhaustively list all the laws and policies that have been used to deprive Black people of property and their right to own and transfer it as they choose. But the handful of examples here make the point.

With such a rich and widespread institutional history of property being so desired by whites in power, and so clearly understood as the basis for maintaining power and control – and with property being so persistently taken away from Black people through means woven into law, or custom, or through terror, with those thefts of property routinely supported and enforced by racial laws and customs built on white supremacy, is it any wonder that my parents, and perhaps other Black parents, have focused less on attempting to acquire, retain and transfer material wealth across generations? Is it any wonder that they rationally focused more on transferring something into "heads" than into pockets? And is it surprising that the primary Black cultural support institution, the Church, has often focused on rewards in heaven instead of material rewards on earth, which have been so systematically and consistently taken away?

Is it surprising that my parents sought to reassure me that I should not worry about the financial ramifications to them of their investment in opportunities for my brother and me, as long as we were working hard to do well in school, so that we would confidently take advantage of every opportunity to make ourselves self-reliant and independently viable, without relying on any future inheritance?

⁵⁹ 311 U.S. 32, 38 (1940).

⁶⁰ 334 U.S. 1, 23 (1948).

⁶¹ 347 U.S. 483, 495 (1954).

⁶² *The Southern Manifesto of 1956*, U.S. HOUSE REPRESENTATIVES, <https://history.house.gov/Historical-Highlights/1951-2000/The-Southern-Manifesto-of-1956> [<https://perma.cc/7PTS-Z92L>].

Is it any wonder that there is a tradition of Black people needing to be responsible for taking care of their parents as they age?⁶³ Many Black people I know are less concerned about leaving a legacy for their children than they are about not being a burden on them. They do not have an expectancy of being able to inherit anything from their parents, but rather are happy if they can help support their parents in their old age, and make sure that there is enough money to bury them. Accordingly, when we age, we may count ourselves fortunate if we can take care of our parents in their old age, and not leave behind too much debt for our progeny.

VI. BEING ANTIRACIST

One of the challenging aspects of Kendi's focus on attacking racist policies and practices, and not people, is that it demands that anyone with any power be accountable either for the perpetuation of racist systems, or responsible for taking antiracist steps to disrupt and dismantle them. He says, "I thought only White people could be racist and that Black people could not be racist because Black people did not have power . . . I had no sense of the reactionary history of this construction, of its racist bearing."⁶⁴

"The powerless defense,"⁶⁵ Kendi says, "shields people of color from charges of racism even when they are reproducing racist policies and justifying them with the same racist ideas as the White people they call racist."⁶⁶ "The truth is: Black people can be racist," he writes, "because Black people do have power, even if limited."⁶⁷ So, those elected to office, or in positions of responsibility in corporate contexts, or sitting on the Supreme Court, or members of associations, like myself, must use the power they have to be antiracist. Citing as inspiration Carter G. Woodson, the "father" of Black History Month, Kendi argues:

[T]he only way that White power can gain full control is by convincing us [Black people] that White people already have all the power. If we accept the idea that we [Black people] have no power, we are falling under the sort of mind control that will, in fact, rob us of any power to resist.⁶⁸

⁶³ See Sara Rimer, *Blacks Carry Load of Care for Their Elderly*, N.Y. TIMES (Mar. 15, 1998), <https://www.nytimes.com/1998/03/15/us/blacks-carry-load-of-care-for-their-elderly.html?auth=link-dismiss-google1tap> [<https://perma.cc/Y3FM-376F>].

⁶⁴ KENDI, *supra* note 2, at 140.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 141.

⁶⁸ *Id.* at 142.

VII. SO, HOW CAN BLACK PEOPLE BE ANTIRACIST IN THE ARENA OF ESTATE PLANNING?

For me, it means using whatever power I have to push for policies, and actions that counteract the inequitable results of existing racist policies and practices. I can advocate within my circles, like ACTEC, to call out racism and to make authentic and meaningful outreach to attorneys who may not even be aware of the benefits of undertaking the effort to qualify for nomination in the organization, by encouraging and supporting them in developing the speaking and writing portfolios. I can also call on ACTEC to study its membership requirements and assess whether they have racist impacts and act to change them.

I can point out the racist rules and policies that trusts and estate lawyers employ to facilitate transfers of wealth from generation to generation and argue that they should look for anti-racist alternatives.

I can encourage Black people to stop and think about what will happen to their property and those they love after they are gone and encourage them to take steps while they are alive and competent to exert control and not leave it to racist structures to control what happens.

I can encourage young people to think about their futures, so that some may consider choosing the law as a career, and that some will even think about estate planning so that they can help a coalition of heirs to consolidate the power of family shares into a limited liability company that can pay the taxes, develop property and generate income for the family.

Thinking about and taking action to do estate planning is a way to be antiracist – to not let a network of policies of property ownership and transfer that have negative impacts on Black people continue to control how we live our lives. And I promise, this week, I am going to make an appointment to get my estate plan up to date.

