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Darkness Made Visible: Law, Metaphor, and the Racial Self

D. Marvin Jones*

Then it dawned upon me with a certain suddenness that I was different from the others; or like, mayhap, in heart and life and longing, but shut out from their world by a vast veil. . . . The shades of the prison-house closed round us all: walls strait and stubborn to the whitest, but relentlessly narrow, tall and unscalable to sons of night who must plod darkly on in resignation, or beat unavailing palms against stone, or steadily, half hopelessly, watch the streak of blue above.1

In August 1862, Abraham Lincoln called a number of “Negro” leaders to the White House. Laboring under harsh racial assumptions, which conflicted with the moral eloquence to come at Gettysburg, Lincoln told his assembled audience, “You and we are different races. . . . This physical difference is a great disadvantage to us both, as I think your race suffer very greatly, many of them by living among us, while ours suffer from your presence.”2 With these prefatory remarks, Lincoln proceeded to try to persuade his audience to the merits of his plan: To emancipate slaves and expatriate them to a colony in Central America.3

Lincoln’s plan, and the very formative moment of American thought that the plan represents, reflected a world view that resonated with the concept of race. Race signified a natural and immovable wall between communities, a wall of difference. Implicit in this world view was the

* Associate Professor of Law, University of Miami School of Law. This paper, in embryonic form, was presented in June 1992 at the Critical Race Theory workshop at the Mercy Center in Madison, Connecticut. I wish to thank, therefore, Kendall Thomas, Linda Greene, Mari Matsuda, Charles Lawrence, Lani Guinier, Gerald Torres, Derrick Bell, Taunya Banks, Kellis Parker, Margaret Russell, Adrian Davis, and Lisa Ikemoto for their patience with the very early draft that was presented. I also wish to thank the many friends at the University of Miami who helped with helpful suggestions, hard questions, encouragement, and debate. I am grateful to Lilli Levi, Steven Schnably, Ken Casebeer, Martha Mahoney, Bruce Winick, John Simon, David Abraham, Steve Diamond, Pat Gudridge, and Richard Mendales, who commented either directly on the paper or the premises advanced. I am particularly grateful to Steven Winter, whose earlier work with semiotic theory and whose insightful challenges to my critical project have been invaluable. It was Steve’s work that drove home to me the importance of the interconnection between law and language. Finally, thanks to Lenny Lopes and Shannon Campbell for research assistance that was a sine qua non of producing this work. Of course, these heartfelt thanks must not obscure the fact that any failings in this work are entirely my own.

3. Although colonization became impracticable, Lincoln’s plan represented a political consensus among Northern Republicans. See George M. Fredrickson, The Black Image in the White Mind 151 (1971).

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premise that homogeneity is the basic stuff of the social bond, and that
society requires an irreducible minima of shared attributes among the
individuals who compose it. By invoking the notion of race, and invoking it
in a strong essentialist sense, Lincoln rhetorically posited that blacks and
whites lacked any basic human bond upon which they could form one
society. Race reverberated as a metaphor of kinship, denying that there
was the requisite brotherhood between blacks and whites, and denying
that blacks and whites could co-exist on the same social status plane.

Historically, this world view was most explicitly expressed in institutional
structures such as de jure and de facto segregation. It was also expressed,
somewhat less obviously, in a legal framework in which segregationist
structures were rationalized. Against the equality-based claims of “blacks”
for inclusion in the society of post-Reconstruction America, courts inter-
posed the legal notion of the “private sphere”: an idea that there was a
sphere of individual liberty in which government had no right to intrude
for purposes of imposing public norms. This notion of a private sphere, I
suspect, was animated at a deep level by the notion of a sphere of social
autonomy for whites as members of a natural, cohesive community; blacks,
who were obviously “different” and not members, were not part of this
sphere.

This bleak nineteenth century world view continues to resonate pro-
foundly in our current constitutional jurisprudence. The idea of race as a
natural, objective demarcation of difference between groups remains as
the lens through which courts continue to view claims by blacks. Thus, in

4. By essentialist, I refer to the notion that there is some unchanging, imminent nature in
things. See GARTH L. HALLETT, LANGUAGE AND TRUTH 7 (1988). Essentialism is an epistem-
ological stance that posits “actuality” beyond the subjectivity through which it is perceived.
Thus, Thomas Aquinas wrote, “Properly speaking . . . truth is in the intellect in its function
of affirming and denying one reality of another; and not in sense, nor in the intellect knowing
the meaning.” Id. at 8 (quoting 1 THOMAS AQUINAS, SUMMA THEOLOGIAE, pt. 1, quest. 16,
art. 2 (Thomas Gornall trans., Blackfriars ed. 1964)). From an essentialist perspective, race
is an immutable essence and “exists” independently of what individuals might think about it.

5. This framework provided the organizing logic for Southern opposition to the Civil
Rights Acts of the Reconstruction Era. Thus, in opposing the Civil Rights Act of 1871,
Joshua Hill argued:

I must confess, sir, that I cannot see the magnitude of this subject. I object to this
great Government descending to the business of regulating the hotels and common
taverns of this country, and the street railroads, stage-coaches, and everything of
that sort. It looks to me to be a petty business for the government of the United
States.

CONG. GLOBE, 42d Cong., 2d Sess. 242 (1871).

And he further explained: “What he may term a right may be the right of any man that
pleases to come into my parlor and to be my guest. That is not the right of any colored man
upon earth, nor of any white man, unless it is agreeable to me.” Id. The same framework
reappears as constitutional doctrine in the Civil Rights Cases. See D. Marvin Jones, Unright-
able Wrongs: The Rehnquist Court, Civil Rights, and an Elegy for Dreams, 25 U.S.F. L. REV. 1
City of Richmond v. J.A. Croson Co., Justice O'Connor criticizes as fundamentally illogical the means-ends connection of a set-aside program requiring thirty percent participation by "minorities," which in subtext is read "blacks." O'Connor explains:

[T]he 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing. It rests upon the "completely unrealistic" assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.

On the surface, this opinion represents hostility toward using groups, rather than the individual, as the unit of social inquiry, a relentlessly particularizing perspective that denies both the problem of caste and the relevance or reality of societal discrimination. Moreover, it is a denial that group disparities between the socioeconomic situations of blacks and whites are legally meaningful. The source of this denial of meaning is a conception of race as difference. O'Connor seems to say: "Blacks and whites are different races . . . . Why assume they would have similar interests or display statistically similar occupational patterns?"

But race, for all its rhetorical power, is an incoherent fiction. "The truth is," as Anthony Appiah notes, "there are no races." Racial categories are

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6. 488 U.S. 469 (1992). Although less explicit, the classical framework is still vital. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982) ("Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power . . . as directed against state governments and private interests."). The public-private dichotomy, maintained through the vehicle of the state action concept, continues to haunt blacks—particularly in the area of hate "speech." See R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (striking down a statute criminalizing "hate speech"; defendants were prosecuted under this statute for burning a cross on a black family's lawn).

7. 488 U.S. at 507.


9. "The truth is there are no races . . . . Talk of "race" is particularly distressing for those of us who take culture seriously. For, where race works . . . it does so only at the price of biologizing what is culture, or ideology." Anthony Appiah, The Uncompleted Argument, in Race, Writing, and Difference 21, 35-36 (Henry Louis Gates, Jr. ed., 1985); see also Peter Figueroa, Education and the Social Construction of "Race" 9-10 (1991) ("'Physical and cultural differences do not of themselves create groups or categories.' Race and ethnicity are not natural or fixed categories. 'It is only when physical and cultural differences are given cultural significance . . . that social forms result.' " (quoting M. Ban- ton, Racial and Ethnic Competition 105 (1983))); Ashley Montagu, Statement on Race 10 (Oxford University Press, 3d ed. 1972) ("For all practical social purposes 'race' is
neither objective nor natural, but ideological and constructed. In these
terms race is not so much a category but a practice: people are raced. Consequently, the problems of race have been viewed not only as political
or psychological or cultural, but somehow external to language itself.

For these reasons, the problem in conventional legal theory is that
significance is often irrationally attributed to race. Race is understood as
something that is already “there,” freestanding. This conventional account
ultimately collides with its own lurking objectivism. Thus, as a construction,
as a social product, and as a barrier to discourse, race lies beyond the
ken of the conventional legal theory.

From President Lincoln to Justice O'Connor, from classical to modern
American law, this specious perspective has imposed false horizons on our
values and discourse. This figure of race seeks to draw its line of difference
in the dialogue about democracy and equality between those who fit within
and those who fit without. So long as this unreconstructed trope of difference
remains as the lens—indeed as the dark glass—through which we
view the world, it will distort our vision and conceptions of law, justice, and
ourselves.

not so much a biological phenomenon as a social myth.”); Barbara Fields, Ideology and Race
in American History, in REGION, RACE, AND RECONSTRUCTION 144 (J. Morgan Kousser &
James McPherson eds., 1982) (arguing that race has no objective dimensions whatsoever,
that race is constructed differently over time by persons of similar class status and differently
contemporaneously by persons of differing class status).

In a similar vein, James King wrote:

[What constitutes a race and how one recognizes a racial difference are culturally
determined. Whether two individuals regard themselves as of the same or of
different races depends not on the degree of similarity of their genetic material but
on whether history, tradition, and personal training and experiences have brought
them to regard themselves as belonging to the same group or to different groups.
Since all human beings are of one species and since all populations tend to merge
when they exist in contact, group differentiation will be based on cultural behavior
and not on genetic difference.

10. Professor Kendall Thomas, perhaps the most distinctly postmodern of the Critical
Race Theory Group, introduced me to this notion. It is not enough to say that race is socially
constructed. Race is a construct that only has meaning—and can only have meaning—
through the dynamic social practices by which it is “made.” My effort here is to trace the
“practice” of racemaking to its sources in language and to what I refer to in this article as
the “historical narrative.”

11. My point is that the problem of race is quintessentially a problem of language—words
create worlds. As Chinua Achebe wrote, “[I]n the creation myth of the Hebrews, God made
the world by word of mouth; and in the Christian myth as recorded in St. John’s Gospel the
Word became God Himself.” Chinua Achebe, HOPES AND IMPEDIMENTS 129-30 (1989). The
stories of origin may be read either as ancient, mythic representations of the spiritual source
of life or as a symbolic expression of modern or postmodern insights as to the role of
language in our inner life. Words still have power to create worlds and to become, if not
flesh, at least an ordering force.


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In this paper, I argue for a hermeneutic turn in our discourse on racial issues to address the figure of race as a problematic, a notion that is itself prior to and distinct from the inferences one makes about race and prior to social structures of race-based domination. My concern is not with the court as an articulator of rules with ideological content. Rather, it is with the court as a creator of meaning and symbols in which blacks are represented, within the logocentric universe of law, as the “Other.”

In Part I, I try to situate the discussion. My text, by presenting an interrogation of race, responds to and is linked to texts written by Critical Race Theorists. Consequently, I begin by identifying and seeking to revise the basic canons of Critical Race Theory. In Part II, I ask the question

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<tr>
<th>Modern/Postmodern Race Conceptions of Race</th>
<th>Classical/Conventional Conceptions of Race</th>
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<tr>
<td><strong>What is Race?:</strong></td>
<td>A label real or constructed</td>
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<tr>
<td>A signifying practice and a social practice in which meaning and societal dysfunction are mutually entailed. Race may be used as a verb: People are raced.</td>
<td></td>
</tr>
<tr>
<td><strong>Source of Difficulty:</strong></td>
<td>Individual mindset (Some theorists give this a materialist spin, racing racism to an ideology in the service of political, economic, or legal order.)</td>
</tr>
<tr>
<td>Language</td>
<td></td>
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<tr>
<td><strong>Nature of Difficulty:</strong></td>
<td>Problem is moral in the first instance.</td>
</tr>
<tr>
<td>Problem is of Weltanchung (worldview) and “cognition.”</td>
<td></td>
</tr>
<tr>
<td><strong>Solution:</strong></td>
<td>Individuals must not act irrationally nor attribute undue significance to race.</td>
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<tr>
<td>Race as a cognitive concept must be bracketed as irrational.</td>
<td></td>
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<tr>
<td><strong>Moral Unit of Inquiry:</strong></td>
<td>The individual</td>
</tr>
<tr>
<td>Society as a whole</td>
<td></td>
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</tbody>
</table>

13. See generally HANS GEORG GADAMER, TRUTH AND METHOD (Joel Weinsheimer & Donald G. Marshall trans., 2d ed. 1989) (explaining hermeneutics as a phenomenon of understanding). Methodologically, this project draws heavily on the modernist approaches to interpretation of the Frankfurt school as well as postmodern approaches. See generally JACQUES DERRIDA, WRITING AND DIFFERENCE (Alan Bass trans., 1978); GADAMER, supra; GEORGES POULET, THE INTERIOR DISTANCE (Elliot Coleman trans., 1964); Georges Poulet, Criticism and the Experience of Interiority, in READER RESPONSE CRITICISM (Jane P. Tompkins ed., 1980). I will attempt to use these hermeneutic methods to explore “race” in order to bring to law a discussion that is well engaged in literature. See, e.g., Appiah, supra note 9, at 36.

14. The differences between the paradigm I outline here and the more traditional paradigm of racism may be expressed in chart form reflecting how the two structures of thinking would answer certain questions:

15. I want to begin by recognizing both my debt to the small brilliant group of scholars within the Critical Race Theory school and by pointing out how my methodological path, focusing on language as a dimension of racial politics, is both different and deserving of fellow travelers.
"what is race in and of itself?" Finding an answer is difficult, because race is a concept that has a series of contradictory meanings linked together in oppositional layers of significance. Nevertheless, I attempt to entomologically, historically, and phenomenologically explore the meaning of race. I begin by acknowledging the metaphorical figures through which race has been given meaning and, in turn, go further to identify the historical narratives through which these metaphors have been given life. My discussion is bound up with an analysis of how race has shaped the models of equality operative in our legal discourse about civil rights.

In Part III, I explore how these historical narratives operate to normalize and reify racial difference in the law, resulting in the construction of an inside/outside, we/they dichotomy window from which to view the social world. I focus on cases involving brutality against blacks, in which the symbiology of the narratives are reinscribed, in a sense, on the bodies of blacks. In Part IV, I conclude by outlining a new legal discourse amidst the project of unbuilding racial categories and rearranging the social models that rested upon them.

I. SITUATING THE DISCUSSION: CRITICAL RACE THEORY AND A CALL FOR A HERMENEUTIC TURN

I placed a jar in Tennessee,
And round it was upon a hll . . .
The wilderness rose up to it,
And sprawled around, no longer wild.16

Critical race scholarship is defined in part by its modern/postmodern17 challenge to concepts of universalism undergirding current legal doctrine, and in part by its attempt to spread doctrine out over concentric circles of contextualization, including historical and social circles. To do this, Criti-

17. Postmodernism is difficult to define. It is a name less of a school of thought than of an attitude or stance toward knowledge and the self. The postmodern stance is: (a) the self is not autonomous; (b) there are no foundational principles; (c) there can be no such thing as knowledge or reality apart from context. See generally Peter C. Schanck, Understanding Postmodern Thought and Its Implications for Statutory Interpretation, 65 S. CAL. L. REV. 2505 (1992). There are resonances of this postmodern aspect of Critical Race Theory in a number of early writings. See, e.g., THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970); JEAN F. LYOTARD, THE POSTMODERN CONDITION (Geoff Bennington & Brian Massumi trans., 1984); MICHAEL POLANYI, PERSONAL KNOWLEDGE (1958). On postmodernism, see FREDRIC JAMESON, POSTMODERNISM OR THE CULTURAL LOGIC OF LATE CAPITALISM (1991) (referring to postmodernism not as a freestanding structure of thought, but as an “effect” of contemporary conditions under capitalism—more malaise than philosophy). See generally LINDA HUTCHISON, THE POLITICS OF POSTMODERNISM (1989); PAULINE M. ROSENAN, POSTMODERNISM AND THE SOCIAL SCIENCES (1992).
Critical Race Theory weaves together a number of different strands of thought. There is a poststructuralist strand of deconstruction that traces its roots to Jacques Derrida, Roland Barthes, and Michel Foucault. There is a second strand that focuses heavily on questions of ideology and on the means by which law conceals the partisan exercise of power. This weave of political philosophy and poststructuralism is expressed frequently through narrative structures rather than through mere expository prose. In Critical Race Theory, there is an attitude toward discourse that understands the need to speak differently, rather than merely argue well, and that understands that narratives, rather than rigid analytical frameworks, are the best vehicles for expressing the lived experience of blacks.

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18. "Critical theory is the name Max Horkeiner, an early director of the Institute for Social Research (established in Frankfurt, Germany—hence the name ‘Frankfurt School’), gave to what he projected as the appropriate character and agenda for theoretical work directed at understanding and in transforming social formations that ... blocked ... human freedom.” Lucious Outlaw, Toward a Critical Theory of Race, in Anatomy of Racism 69 (David Goldberg ed., 1990). The variation that Critical Race Theory represents is the intersection of this genre with the political agenda of people of color in academia.

19. Poststructuralism and postmodernism are not distinct. Poststructuralism is an expression of postmodernism as a methodology, typically under the heading of deconstruction. On poststructuralism, see generally Art Berman, From the New Criticism to Deconstruction (1988); Jonathan D. Culler, On Deconstruction (1982); Terry Eagleton, Literary Theory (1983).


22. See generally Michel Foucault, Discipline and Punish (Alan Sheridan trans., 1979).

23. The focus on ideology may be traced back to Gramsci. See generally Selections from the Political Writings 1910-1920: Antonio Gramsci (Quinton Hoare ed. & John Mathews trans., 1977) (observing that domination has two aspects: one is dominated not only by means of physical power, but also by a system of beliefs that permeates social consciousness and that causes dominated groups to accept an oppressive regime as inevitable). The genius of ideology as an apparatus of control is that it is hidden from those who accept the ideology: “‘Ideology’ is not (quite) the same as lying .... [T]he liar tries to falsify the thought of others while his own private thought is correct .... A person who falls for an ideology is himself deluded in his private thought, and if he misleads others, does so unwillingly and unwittingly ....” Clifford Geertz, The Interpretation of Cultures 196 (1975) (quoting Werner Stark, The Sociology of Knowledge 48 (1958)); see generally Douglas Hay et al., Albion’s Fatal Tree (1975). I share this concern about ideology and identify racist thinking as a pervasive ideology in law. However, unlike Gramsci and Critical Theory materialists, I trace this ideology less to formal structures of power in the political realm than to prepolitical images and narratives going well back into our psychohistory. Racial ideology is less a reflection of class interests as a text than it is a reflection of a deeper historical and cultural text. See Cornel West, Prophetic Fragments 101 (1988) (identifying “cultural practices” and “discourses” as the medium in which racial subordination and other institutional forms of life are produced).


The cure is storytelling .... As Derrick Bell, Bruno Bettelheim, and others show, stories can shatter complacency and challenge the status quo .... [S]ories build
Each of the strands that Critical Race Theory weaves together has a canon\(^{25}\) of its own. Although I cannot name the canon, it can be found in the works of Derrick Bell\(^{26}\) who writes in almost "pure" narrative, of Gerald Torres\(^{27}\) whose work tends toward political philosophy, of Richard Delgado who writes penetrating critiques of scholarship as empire,\(^{28}\) and of Pat Williams who writes about her own experiences as a doorway to discussing complex cognitive frameworks within legal doctrine.\(^{29}\) The canon is "critical" in a sociopolitical way; it focuses on law as the structure of rules or values existing in society as a mechanism of tyranny and power. It perceives that, either through legal ideology or its universalist perspective, the law prevents blacks from articulating their experiences and needs. Thus, the canon of Critical Race Theory looks outward at law, at ideology, at political order, at things exterior to language itself. The canon is defined as well by an instrumentalism: Critical Race Theory is a form of political and intellectual discourse and, as such, a form of identity politics.

This instrumentalism, however necessary to the project of deconstructing race, is unmistakably an "evil" that has caused Critical Race Theory to give cursory attention to the critical and primary question "What is race in and of itself?" Critical Race Theorists quickly deconstruct "race," but only

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The attraction of narrative is that it corresponds more closely to the manner in which the human mind makes sense of experience than does the conventional, abstracted rhetoric of law. . . . In narrative, we take experience and configure it in a conventional and comprehensible form. This is . . . what makes narrative a powerful tool of persuasion and, therefore, a potential transformative device for the disempowered.


25. "Canon" descends from the ancient Greek, *kanon*, meaning "reed" or "rod." John Guillory, *Canon, in Critical Terms for Literary Study* 233 (Frank Lentricchia & Thomas McLaughlin eds., 1990). Most broadly, it means something like rule or law. *Id.* In literary contexts, it refers to the rule of selection by which some authors are deemed worthy, but others not. *Id.* Canons create a body of authoritative texts within an interpretive community where consensus exists. The mere stating of a canon without explanation commands authority. This makes discourse possible, but orthodoxy and "convention" inevitable.


as part of a larger sociopolitical critique. The role of deconstruction here is only to get at a relation (e.g., between race and legal ideology). It observes the nature of race only in passing during the journey toward the site of sources of ideology in law: “we know it is a construction let’s go on.” Like the rider in the poem, Critical Race Scholarship has theoretical “promises to keep”. Its primary imperative is to reveal how race is being used against us while hidden in some neutral-looking guise; that is, how race is used, rather than what it is. The emphasis is on how blinding assumptions about neutrality hide bias based on race, rather than on why race itself is used to structure such blinding assumptions.

An example of this differing emphasis can be found in the works of Charles Lawrence, who identifies intent as a standard of proof in antidiscrimination law and as a conception of individual responsibility that in


31. Others, of course, have examined the “what” of race, but, in prior works, this examination has been peripheral to other core interests. They looked at “race,” but chose to train their critical lenses on matters other than race itself as the problematic. Pat Williams, for example, has written eloquently that

the image of race as a phantom-word came to me after I moved into my late godmother’s home. In a respectful attempt to make it my own, I cleared the bedroom for painting. The following morning the room asserted itself, came rushing and raging at me through the emptiness, exactly as it had been for twenty-five years. One day filled with profusion and overwhelming complexity, the next day filled with persistently recurring memories . . . .

The power of that room, I have thought since, is very much like the power of racism as status quo: it is deep, angry, eradicated from view, but strong enough to make everyone who enters the room walk around the bed that isn’t there, avoiding the phantom as they did the substance, for fear of bodily harm.

Patricia J. Williams, The Obliging Shell: An Informal Essay on Formal Equal Opportunity, 87 Mich. L. Rev. 2128, 2141-42 (1989). Thus race is not objective, not real, yet it imposes itself on us at a deep level. For Professor Williams, this is a descriptive point in a line that marches toward a more analytical destination, critiquing formal equality and how formal equality works to suppress the voices and needs of blacks. The discussion of race blends in and merges with a discussion of racism within the context of law’s formal neutrality. For me, what was a point observed en route becomes the destination. See generally Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331 (1988) (identifying the construction of race consciousness as a tool for subordination and focusing on the non-neutrality of antidiscrimination law).

There is common to all these works a kind of “semantic horizon” that appears by accepting the trope of race as a coherent term. The problem is not with Williams or Crenshaw, but rather with “racism” as a structure of thought that presupposes “different” races.

32. See generally Charles R. Lawrence III, The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism, 39 Stan. L. Rev. 317 (1987) (arguing that equal protection doctrine, by insisting on intent or “purposeful” discrimination, cannot reach the problem of racism as it exists in the real world because much racism is unconscious). Lawrence focuses on “racism” as the “problem,” which assumes that mental processes within individuals are the “evil” and that race itself, as a structure of thought, is a passive category lacking agency of its own.
both instances relies on outmoded understandings of the social psychology associated with race. He implicitly identifies race as a construct, but his focus is on how race, acting through unconscious processes, distorts decision making in the marketplace and how law, by insisting on intent, suppresses an inquiry into racism rooted in the unconscious. For Lawrence the intent standard is problematic because it seems to be a linchpin for an ideology of white superiority hidden by or within a legal concept.

This deconstruction of legal doctrine is, however, still a critique external to the language out of which it is woven. Thus, the insight that unconscious processes—such as the unconscious racism in the intent standard—are at work in shaping legal contours takes us a good way toward understanding law as human expression. It is essential to recognize Jacques Lacan's insight, however, that the precondition of the unconscious is language, whether in law or life, has no structure except in the interior space that exists between meaning and sign. The sociopolitical approach, although ultimately an approach external to language, fails to explore this interior space and to recognize race as a practice of signification, as a metaphorical source of false images of identity and community internal to and embedded in legal ideology.

33. In making this claim, Lawrence follows a furrow of critical analysis that intersects the one ploughed by Allen David Freeman. Freeman argues that the social assumptions embedded in legal doctrine advance an ideology of white supremacy, whereas Lawrence argues that the psychological assumptions—or the social psychological assumptions—create the problem. See, e.g., Alan D. Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 MINN. L. REV. 1049 (1978).

34. JACQUES LACAN, TELEVISION 5 (Joan Copjec ed. & Denis Hollier et al. trans., 1990).

35. The concept of the unconscious, pivotal to Lawrence's inquiry, is also important when trying to understand the figure of race because much of the significance of this figure of race resides at a level not accessible to us. However, although I also draw upon the concept of the unconscious, I use it in a different sense. Lawrence uses the word in a Freudian sense, referring to a process within the individual. I use it in a structuralist sense. As Frederick Jameson explains:

The . . . unconscious is therefore not so much that dark inner reservoir of desire and instinct which used to be our image of the Freudian id, occasionally breaking into the realm of consciousness or insinuating its way there through the disguises of dreams. Rather, it is an absolute transparency, an order which is unconscious simply because it is infinitely vaster than our individual minds, and because they owe their development to their positions within it.


36. Jameson quotes Vladimir Propp in his work as follows:

"It's wrong to think that the unconscious exists because of the existence of unconscious desire, of some obtuse, heavy caliban, indeed animal unconscious desire that rises up from the depths, . . . and has to lift itself to the higher level of consciousness. Quite on the contrary, desire exists because there is unconsciousness, that is to say, language which escapes the subject . . . and because there is always, on the level of language, something which is beyond consciousness . . . ."

Id. (quoting VLADIMIR PROPP, QU'EST QUE LE STRUCTURALISME? 252-53 (1968)).

As Toni Morrison writes, "Race has become metaphorical—a way of referring to and
For this reason, I want to “open” the Critical Race Theory canon. I want to go in a different direction; not outward, toward structures of ideology, but inward into the internal architecture or cognitive structure on which ideology must rest. An inward direction will explore what is embedded in our language, in the interstices between sign and signified, and in the “What” of race itself.

This is not to abandon the project of destabilizing law as a means of empowering blacks. We still need to interrogate law as masked power. We still need to pose the question of context to law’s universal perspective and the question of ideology to the neutrality espoused by the law. The canon on which this inquiry has rested is not unlike Wallace Stevens’s hill.\(^{37}\) It is massive in its authority, unchanging as canons are wont to be, and has been there for some time. I want to alter the picture only by providing a new container for the questions already being asked: I want to place a jar, containing my hermeneutic project, on the hill. This jar contains questions about language as a substrata of power and about the word race both as a figure of language and as an inquiry in and of itself.

II. RACE AS METAPHOR\(^{38}\)

Strange it is that our bloods,
Of colour, weight, and heat, poured together,
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Would quite confound distinction, yet stands off
In differences so mighty. . . .

Throw the children into the river; civilization has given us too many. It is better to die than it is to grow up and find out that you are colored.

A. A FIRST LAYER OF MEANING: SYNCHRONIC AND DIACHRONIC USAGE

Race itself has never been seen by the naked eye. Beyond merely describing morphological characteristics, race refers to an amorphous concept of difference between human "types." What constitutes a "type" and what constitutes a "difference" is contested territory; for some it refers to essences, for others to biology. But all of these reference points are structured by a set of abstract rules of recognition. These rules of recognition impose upon perception a kind of grammar, commanding us at the deep level of how we see the world to parse persons we encounter into different categories. Because of these imposed perceptions, we visualize race not through actual observations but through the mind's eye, by "seeing" human populations as naturally parsed into distinctive subgroups.

something is done are prior to questions of what is done. See generally Gary Peller, The Metaphysics of American Law, 73 CAL. L. REV. 1151 (1985). Race attempts to organize the world by defining the boundaries of legal norms, drawing lines historically beyond which guarantees of substantive rights cannot otherwise reach. See GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980) (illuminating the way in which our conceptual world is linked to our perception and cognitive processes). Lakoff and Johnson refer to metaphor as a linking together of something abstract with something we perceive or sense. Thus, we derive a notion of argument in which we speak in terms of burdens from something we have seen—for example, the image or metaphor of a path. Similarly, race as a metaphor—or incantation of metaphors—is linked to something we have seen: blood and color. Race works as metaphor by linking abstract ideas about human types with observations of the human body. Again, all this occurs at a cognitive level.

41. The origins of the word "race" are obscure:
   It may be akin to the Czech raz, referring to artery or blood, or Latin generatio or old French generace. It seems to trace back most directly to Basque arrace or arraze, referring to a male stud animal. It is also found in the southern Spanish ras of Arabic derivation, meaning head . . . In 1684 in France we find "espéces ou races d'homme," in the sense of referring to stem or family.

Wilton Krogman, The Concept of Race, in The Science of Man in the World Crisis 38 (Ralph Linton ed., 1945) [hereinafter SCIENCE OF MAN]. This point feeds back into the argument of Barbara Fields and others that "race" has no objective dimensions and that our modern notion of "race" is very recently "constructed." See supra note 9.

42. Although race originates in the ethos of culture, we confront it as an authoritative command, as we would confront a statute or law. Of course, the level at which we confront race—the level of metaphor—is a level addressed to cognition. See generally LAKOFF & JOHNSON, supra note 38. Law, on the other hand, is explicitly addressed to the level of decisionmaking and conscious thought. Nonetheless, the term "rules of recognition," H.L.A. Hart's phrase, is as helpful in understanding race as a linguistic rule as it is in understanding the nature of legal rules. See H.L.A. HART, THE CONCEPT OF LAW (1961).
The lens through which the meaning of race is illuminated and through which race "as a fact" is discerned is ultimately our sense of who we are. We see race though our I/eye\(^{43}\)—our sense of identity—as an alternating image of those who are like us and who are within our circle of community, and those who are not.

As a product of the human imagination, the contours of the concept of race have varied over time. Around the time of the Civil War, a widespread notion of race was that it was largely synonymous with nationality.\(^{44}\) Whiteness, a concept that was a little more than a vague notion in the early nineteenth century,\(^{45}\) became entrenched only in the aftermath of emancipation as a reply to the insurgent notion of black equality.\(^{46}\) Race was therefore a category invented to draw a line of defense at the borders of European ancestry to keep out blacks as the apotheosis of racial inferiority.\(^{47}\) Moreover, through the middle of the eighteenth century, there was no agreement on whether races represented different species

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43. Drawing on Thomas Aquinas, Ralph Ellison refers to this as the "inner eye," the "eye[s] with which they look through their physical eyes upon reality." RALPH ELLISON, INVISIBLE MAN 1 (1980); see also WEST, supra note 23, at 102 (referring to the cognitive structure by which race is identified as "the eye of the mind").

44. For an extended discussion of the mid-nineteenth century conception of race as ethnic groups, see Saint Francis College v. Al-Khazraji, 481 U.S. 604, 611 (1987).

45. See REGINALD HORSMAN, RACE AND MANIFEST DESTINY 1-2 (1981) (arguing that in the 1850s the ascendent notion of race was Racial Anglo-Saxonism); DAVID ROEDINGER, THE WAGES OF WHITENESS 43-65 (1991) (tracing the evolution of the concept of the "white worker" to a period that began in the early nineteenth century and was "long established" by the Civil War).

46. According to Roedinger, the construction of whiteness was, among other things, a means of mediating certain class conflicts of the nineteenth century. He wrote that "[w]hite workers could, and did, define and accept their class positions by fashioning identities as 'not slaves' and as 'not blacks.'" ROEDINGER, supra note 45, at 13.

So mutually exclusive were the categories of white and black that whites were by definition incapable of roles analogous to those of blacks. Roedinger explains:

Charles W. Janson ... visited an acquaintance in New England and asked the maid who answered the door, "Is your master at home?" Not only did the maid make it clear she had "no master" but she insisted, "I am Mr. ___'s help. I'd have you know, man, that I am no servant; none but only negroes are servants."

Id. at 47. Whiteness as an identity was a vehicle for the "white" worker to deny his "despondency" at the hands of the "master" during the nineteenth century. Id.; see also W.E.B. DUBOIS, BLACK RECONSTRUCTION 700-01 (1935). The instrumentalism involved in the construction of white identity and the fact that race was a tool in class politics must not obscure the fact that antiblack symbiology goes back at least to the ancient Greeks. Race and class interpenetrate each other, but this truth must coexist with the fact that their origins diverge and that race plays a psychohistorical role separate and distinct from class.

47. See MARK TUSHNET, THE AMERICAN LAW OF SLAVERY: 1810-1860, at 38 (1981) (arguing that categorizations by race were designed to mark the boundary between the regime of slavery, governed by paternalistic "sentiment," and the regime of labor, dominated by economic interests and market forces). Tushnet's account, which explores the internal tensions of slave law, is deeply flawed in that he suggests that racial understandings in the law represent an instrumental effort by slaveholders to reconcile their property and economic interests with paternalistic or humanitarian feelings of the slaveowner.
or subgroups of the same species, at least in the idiom of Linnean taxonomy.\footnote{48. See WINTHROP JORDAN, WHITE OVER BLACK 234-36 (1968).} At the time, the debate was dominated by the world views of the Christian Church and the Social Darwinists; writers debated whether blacks were descended from the same set of parents (Adam and Eve),\footnote{49. See THOMAS GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA 44 (1969).} and whether blacks originated from a separate set of ancestors, perhaps monkeys.\footnote{50. See JORDAN, supra note 48, at 230.} There is also ambiguity concerning the standards of racial classification. This is in part because there are two approaches\footnote{51. See MICHAEL BANTON, RACIAL CONSCIOUSNESS 18 (1988).} to classification, each associated with the same idea: a historical approach that defines race according to lineage\footnote{52. See id.} and emphasizes connectedness over time, and a classificatory approach that emphasizes common characteristics or traits.\footnote{53. See id.} These two approaches to the meaning of race are in "tension" because each is both overinclusive and underinclusive from the standpoint of the other.

For example, to classify race based on characteristics such as dark skin would be overinclusive from the standpoint of ancestry. It would include Dravidians who have traditionally been classified as nonblack on the basis of ancestry despite their dark skin and curly hair.\footnote{54. See SCIENCE OF MAN, supra note 41, at 52, 55.} At the same time, to use skin color as a litmus test for race would be underinclusive, allowing some to "pass" as Caucasian\footnote{The term "caucasian" comes from Johann Frederich Blumenbach, who identified five racial groups in 1720: Caucasian, Mongolian, American, Ethiopian, and Malay. Caucasian described a race that originated "on the southern slopes of Mount Caucuses." HORSMAN, supra note 45, at 47. The idea of whites as a race originating in the Caucasian Mountains resonated for the nineteenth century writers who developed a mythology of a white race that originated in Asia and followed the sun Westward, conquering as they went. As Jules Michelet wrote, "Follow the migrations of mankind from East to West along the sun's course and along the tracks of the world's magnetic currents... observe its long voyage from Asia to Europe, from India to France..." Id. at 36 (quoting Jules Michelet).} who are light-skinned, but black on the basis of lineage.\footnote{56. In scientific terms, lineage as a criterion would refer to a genetic concept of race. However, as postwar anthropology recognizes: [T]here are no pure (in the sense of homozygous) human groups, of whatever category-size. This takes us a step further; namely, that any categories or classifications we set up are not only unequally defined but inadequately defined as well. \textit{Since genetic variability is the rule}, then overlapping in type must be the accepted principle.} On the other hand, to base race on lineage would avoid the problem of underinclusion, but does so only by denying the significance of traits and by including in the category of "black" persons those who have blond hair, blue eyes, pale skin, aquiline noses, and thin lips. Intuitively,
this seems overinclusive from the standpoint of racial trait classification. But despite the antithetical quality of these two appearances, both have combined to contribute to the received understanding of race.

Thus, a contemporary dictionary defines race as "the descendants of a common ancestor: a family, tribe, people, or nation belonging to the same stock," and further as "a class or kind of individuals with common characteristics, interests, appearance, or habits as if derived from a common ancestor." Both lineage and trait approaches to race can be commingled within a common definition because race refers to the image of the "not like us," the "stranger" in the Bible, an abstract, conflicted image existing only in the mind.

Race is made to appear by rhetorical association of the race fiction with the body. Thus, Oswald Spengler explains:

What has inhabited the earth since the Ice Age is man, not "peoples." In the first instance, their Destiny is determined by the fact that the bodily succession of parents and children, the bond of the blood, forms natural groups, which disclose a definite tendency . . . . This I call race. Tribes, sects, clans, families—all these are designations for the fact of a blood which circles, carried on by procreation, in a narrow or wide landscape.

. . . . . In the limit, every race is a single great body . . . .

The racial body, in turn, is represented by two metaphors that articulate the duality of the race conception: Through the twin metaphors of blood and of color, metaphors of the body, we construct a notion of race as something real, natural, and inevitable.

B. A SECOND LAYER OF MEANING: THE METAPHOR OF BLOOD

One mechanism for smuggling the metaphor of race into ordinary lan-

57. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1870 (1966).
58. Id.
59. Leviticus 19:34.
60. An example of the ephemeral quality of race can be found in a press account of a judicial hearing in Pretoria, South Africa:

The Supreme Court here today upheld the classification of 11-year-old Sandra Laing as colored (mixed race), although her parents and their other children are all classified as whites.

Sandra was reclassified colored by the Race Classification Board . . . . She was said by South African officials to be a genetic throwback, showing strong nonwhite characteristics.

Dismissing an application . . . for Sandra to be classified as white, Justice Oscar Galgut said the girl might still become white under legislation now before Parliament that would make descent, rather than appearance and general acceptance, the standard for race classification.

guage has been the institution of law. Historically, American law used rules of descent\textsuperscript{62} to draw boundaries between racial categories. These rules posited that blacks and whites are, at least originally, distinct and pure races, and accord a person "white" status only if there is no trace\textsuperscript{63} of black ancestry.\textsuperscript{64}

Thus, Homer Plessy,\textsuperscript{65} though appearing "white," was legally black for purposes of a criminal statute that required him to sit in a separate railcar reserved for blacks. What mattered was not what could be seen—his skin color—but what could not be seen: the problem, in a word, was his "blood."\textsuperscript{66} Even Plessy's small degree of African consanguinity sufficed to make him black. Black blood was, and still is, conceived of as a kind of taint. As Langston Hughes noted:

[J]ust one drop of negro blood makes a man colored. One drop you are a negro. Now why is that? Why is Negro blood so much more powerful than any other kind of blood in the world? If a man has Irish blood in him people will say "He's part Irish." If he has a little Jewish blood they'll say "He's half-Jewish." But if he has just a small bit of colored blood in him—bam! He's a negro! Not just part negro. No, be it ever so little if that blood is black, he's a negro.\textsuperscript{67}

Lexical meaning and legal meaning are reciprocal here: the significance of race in law that requires blacks and whites sit in separate compartments mirrors the function of race as an organizing idea. The essence of the race problematic is the compartmentalization of people into radically separate categories determined by "blood." Through an objectivist acceptance by the Supreme Court of the significance of "blood," the rule of segregation and the linguistic rules of race have become interdependent and indistinguishable from one another.

\textsuperscript{62} For a description of how early ethnographers charted the operation of such rules, see BANTON, supra note 51, at 34. The effort to base race on lineage represented a choice of viewpoint: a historical view emphasizing connectedness over time was chosen over a classificatory view based on present differences. This historical view is not entirely workable, however, because of the difficulties of tracing genealogy. To the extent one accepts the orthodox Christian notion that all men and women were descended from Adam and Eve, the idea of "pure" races collides with a notion of blood as a distinguishing criterion. See JORDAN, supra note 48, at 220-21.

\textsuperscript{63} See, e.g., ALA. CODE § 2 (1940) (defining a person of color as one who is descended from a Negro to the third generation); LA. REV. STAT. ANN. § 42:267 (West 1982) (anyone with one thirty-second negro blood is a negro).

\textsuperscript{64} See MARVIN HARRIS, PATTERNS OF RACE IN THE AMERICAS 35, 56 (1964) (referring to a rule of classifying descendants according to a distinction between superordinate and subordinate parents).

\textsuperscript{65} Plessy v. Ferguson, 163 U.S. 537 (1896).

\textsuperscript{66} See Abdul R. JanMohamed, Colonialist Literature, in RACE, WRITING, AND DIFFERENCE, supra note 9, at 78-107 (stating that blacks were unacceptable as a natural result of their racial character—not because they were generally impoverished or ill-educated—and referring to this treatment as the "fetishization of the Other").

\textsuperscript{67} LANGSTON HUGHES, SIMPLE TAKES A WIFE 85 (1953).
Both in *Plessy* and in Langston Hughes' work, blood is a central figure in a classic narrative of immutable racial difference. As a figure it represents the metaphorical structure of fetishization: blacks are reduced to an essence that blood represents. The figure of blood imprisons "black" identity within the confines of essentialist assumptions by metaphorically transforming assumptions about race as an essence into received biological attributes. Blood in this narrative is the carrier of racial character, something deep within that determines one's social destiny.68

No matter what Plessy felt, what he aspired to, what qualities of sensitivity or reflection he had cultivated as an individual, the level of his social rank was determined by blood. By blood, social differences are converted into natural differences. As a result of this conversion, evil traits often associated lexically with certain races are not products of socialization, nor even products of individual choice: they are inherent—"in the blood." All individuality disappears in this milieu. As Mary Louise Pratt explains,

> [There is] a very familiar, widespread, and stable form of "othering." The people to be othered are homogenized into a collective "they," which is distilled even further into an iconic "he" (the standardized adult male specimen). This abstracted "he"/"they" is the subject of verbs in a timeless present tense, which characterizes anything "he" is or does not as a particular historical event but as an instance of a pregiven custom or trait... Through this discourse, encounters with an Other can be textualized or processed as enumerations of such traits.69

The blood, a great river of significance in the folklore of race, categorically separates white and black, purity and taint.

*Plessy* mobilizes this magical idea of "blood" to create an order for the post-Reconstruction world that paralleled the slave regime; blood demarcated a boundary not merely between different "races," but concomitantly

68. This link between race and destiny is explored by Faulkner in his work entitled *Light in August*. See generally WILLIAM FAULKNER, *LIGHT IN AUGUST* (1932). The protagonist is Joe Christmas, a man who looks black but believes he is white. Apparently, his mother had slept with a black man, which led to his supposed father being killed by Christmas's grandfather and his mother being allowed to die in childbirth. Thus, although his appearance is white and pure, there is the notion that he carries with him and is linked to the "iniquities" of his birth. He is later killed for the murder of a white woman who had first slept with him but later tried to murder him, perhaps an allegory for the alternative, sexually charged impulses of Southern society against blacks.

Christmas's guilt in killing the white woman is presumed not from evidence related to the crime, but from revelations that Christmas, whom everyone thought was white, is really black. We never know whether Christmas really has "black blood" or is in fact innocent. We know only that the tag of race, once affixed to Christmas, caused a predictable series of sex-aggressive and violence-aggressive reactions in whites. In terms of the implicit brutality of racial categories, we are all Joe Christmas.

69. Mary Louise Pratt, *Scratches on the Face of the Country; Or What Mr. Barrow Saw in the Land of the Bushmen*, in REGION, RACE, AND RECONSTRUCTION, supra note 9, at 139.
between different spheres of social life. This was the basic vision of *Dred Scott*, which also relied upon the notion of blood in its legitimation of the slave regime.\(^7\) *Plessy* attempts to reimpose the basic structure of *Dred Scott*, according to which power relations are defined by terms such as master and slave—upon a society in which master and slave were, constitutionally, no longer operative categories.

This ordering of the social world along the lines of blood—the framework of the slave regime—was in profound, radical, and absolute opposition to the thrust of the Fourteenth Amendment. The Fourteenth Amendment provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.\(^7\)

The Fourteenth Amendment may be thought of as an effort in renaming; it purport ed to rename former slaves as citizens as a way of naming them “free.”

But the text of law is subordinate to the language we use. Even the Constitution is subordinate to language, which the *Plessy* Court demonstrated by compressing the scope of the Fourteenth Amendment by limiting the meaning of “citizen” through the metaphor of blood. The meaning of citizen implicit in *Plessy* is someone who is entitled to participate as part of the community that creates and is created by the law. The *Plessy* Court, however, discovered a dichotomy to maintain separation within the redefined “citizenry”: blacks are entitled to be equal before the law in political (i.e., public) matters, such as voting and participation in government, but they are not entitled by virtue of citizenship to equality in private and social matters, such as admission to privately owned inns and railroads.\(^7\)

The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based on color, or to enforce social, as distinguished from political equality. . . .\(^7\)

*Plessy* thus used the image of “blood” to make separation in the area of “private” social life seem natural and inevitable. The Fourteenth Amendment succeeded in transforming blacks into citizens, but failed to transform the cognitive and linguistic assumptions upon which the “citizenship”

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71. U.S. CONST. amend. XIV (emphasis added).
73. *Id.* at 544.
project foundered. The “blood” again worked its magic; after transforming blacks into an essence, it transformed the text of the Constitution.

The idea that blood defines human categories—tribe, clan, or people—has been a constant in Western thought, at least since the time of Tacitus. Modern notions of racial differences as subgroups of human species with certain shared genetic characteristics represent simply a twentieth-century variation on an ancient theme based on “blood” differences. Further, although the number of racial categories have varied over time, blacks and whites have always been held to be significantly unalike.

Within the internal architecture of the idea of race, the metaphor of race as blood is joined with the metaphor of color. The blood metaphor creates a rule of differentiation; the metaphor of color valorizes or gives normative content to the differentiation. Three historical narratives create the meaning of color for purposes of racial understanding and reveal the significance of race through a process that the philosopher Maurice Merleau-Ponty refers to as sedimentation. Merleau-Ponty explains:

When I move about my house, I know without thinking about it that walking towards the bathroom means passing near the bedroom, that looking at the window means having the fireplace on my left, and in this small world each gesture, each perception is immediately located in relation to a great number of possible co-ordinates. When I chat with a friend whom I know well, each of his remarks . . . contains, in addition to the meaning it carries for everybody else, a host of references . . . without our needing to recall previous conversations with each other . . . In the same way there is a “world of thoughts,” or a sediment left by our mental processes, which enables us to rely on our concepts and acquired judgments as we might on things there in front of us . . . without there being any need for us to resynthesize them.

74. See Tacitus, Dialogus, Agricola, Germania 269, 275, 277 (1963) (declaring that “in the peoples of Germany there has been given to the world a race untainted by intermarriage with other races, a peculiar people and pure, like no one but themselves”).

75. See West, supra note 23, at 100 (acknowledging that, although it would not be until the late seventeenth century that racial dichotomies were codified into an articulated taxonomy, the dichotomy and opposition between Europeans and blacks “[was] rampant [in Europe] throughout the middle ages”).

76. The schema is that race as an idea relies on metaphor, and metaphor upon the structure of narrative for the creation of meaning. The narratives in turn rely upon history, western religious and ethical traditions, and, ultimately, science for their foundations. My interpretation of the meaning of race is drawn not from a dictionary, but from our culture as a whole. My approach to the interpretation of the “race” is thus as an interpretation of culture. The work of Henry Louis Gates provides analogies to my interpretive project. See Henry Louis Gates, Jr., The Signifying Monkey 39 (1988).

Similarly, race is a word or sign that incants identity, the roots of which go deep into culture, like those of religious ritual. As such, it can only be understood by interpreting the sign against the background of various aspects of our culture as a whole.

77. Maurice Merleau-Ponty, Phenomenology of Perception 129-130 (1962); see also Steven L. Winter, Indeterminacy and Incommensurability in Constitutional Law, 78 Cal.
Language and history, or more particularly race and historical narrative, reference each other in the same way as the window and fireplace in the picture painted by Merleau-Ponty. The three historical narratives referred to above are animated by opposing notions of black and white, and an implicit ranking of black as inferior to white.

According to Jacques Derrida, the ranking of black as inferior to white flows in part from the antinomies themselves.

Western thought has always been structured in terms of dichotomies or polarities: good vs. evil, being vs. nothingness, presence vs. absence, truth vs. error, identity vs. difference, mind vs. matter, man vs. woman, soul vs. body, life vs. death, nature vs. culture, speech vs. writing. These polar opposites do not, however, stand as independent and equal entities. The second term in each pair is considered the negative, corrupt, undesirable version of the first, a fall away from it. In other words, the two terms are not simply opposed in their meanings, but are arranged in a hierarchical order which gives the first term priority.

Set in motion by the antinomies of color, each narrative revolves around a distinct axis; the axis of history, of religion, and of science. The narratives mirror each other in the consistent ambition of the white mind to draw a clear line of demarcation between the white self and the black other. Like Ezekiel's wheel within a wheel, the structure of the narratives is like that of interfaced images, each narrative reflecting the "shades" of meaning for black and white that are reciprocally reinforcing and implicit in each other.

C. A THIRD LAYER OF MEANING: THE METAPHOR OF COLOR

1. Historical Sources

We raise de wheat,
Dey gib us de corn;
We bake de bread,
Dey gib us de cruss;
We sif de meal,

L. REV. 1441, 1499 (1990). On sedimentation see E. HÜSSELI, THE CRISIS OF EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY 52 (David Carr trans., 1970) (referring to the "implications of meaning which are closed off through sedimentation or traditionalization, i.e., of the constant presuppositions of [our own] constructions, concepts, propositions, theories").

78. The three narratives to which I refer are: (1) the narrative associated with historical experience and interactions between blacks and whites—particularly "the Story of the Slave" and "the African Travel Story"; (2) the narrative of religion associated with the "Curse of Ham"; and (3) the narrative associated with science and the "Great Chain of Being."

79. JACQUES DERRIDA, DISSEMINATION viii (Barbara Johnson trans., 1981).
80. See Ezekiel 1:16 (King James).
Dey gib us de huss;
We peal de meat,
Dey gib us de skin,
And dat’s de way
Dey takes us in.
We skim de pot,
Dey gib us the liquor,
And say dat’s good enough for nigger.  81

The Darkling Sea: The Story of the Black as Slave. To a large extent the meaning of being “black” is one forged in the crucible of history. The meaning of blackness is largely constituted of the treatment blacks received and the social, political, and legal status that flows from that treatment. To say that someone is black is to engage in a thick description 82 of the history and experience of blacks. Within this welter of experience, one particular experience is the most formative and paradigmatic of the power relations between blacks and whites: the experience of slavery.

Historically, the categories of black and slave were not distinct. As Winthrop Jordan explains:

By the end of the first quarter of the seventeenth century it had become abundantly evident in England that Negroes were being enslaved on an international scale. . . . By 1589 Negroes had become so pre-eminently “slaves” that Richard Hakluyt gratuitously referred to five Africans brought temporarily to England as “black slaves” . . . an equation had developed between African Negroes and slavery.  83

Slavery was therefore a relation that involved “captivity,” service for life, inherited servitude, and sale.  84 Certainly, whites and Indians were forced to be indentured servants, but from 1619 when “came a Dutch man of warre and sold [to colonists at Jamestown] twenty Negars,” it was blacks

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81. We Raise de Wheat, in Eric J. Sundquist, To Wake the Nations 128 (1993) (citing Frederick Douglass, My Bondage and My Freedom (Notable American Authors Ser., 1992)).
82. See Clifford Geertz, The Interpretation of Cultures 3 (1973) (defining a “thick description” as an evaluation so implicitly and deeply understood that its normative content is perceived as mere observation). To say someone is black is “thick description” in its tacit reference to genealogy. The genealogy—that all blacks are descendants of slaves—is received less as a historical fact than as a moral judgment. That is, to be descendant of slaves seems to mean not only that every “black” person has a slave antecedent, but that each black person partakes of the moral character of those slave antecedents, which in the narrative sketched below, is presumed to be bad.
83. Jordan, supra note 48, at 60.
84. Id. at 53-55. “Slavery was also thought of as a perpetual condition. . . . [I]n contrast to servitude, it did not involve a definite term of years. Slavery was perpetual also in the sense that it was often thought of as hereditary.” Id. at 53. And, “[m]ore than any other single quality, captivity differentiated slavery from servitude.” Id. at 55.
who were, as a rule, "slaves." Indeed, Jordan often refers to "Negro Slavery" as synonymous with American "slavery" itself. 85

Because of this abominable history, it follows that to say someone is black is to say implicitly, "You are a descendant of slaves." Moreover, the slave was classically understood to be somehow sinful—there is a close conceptual connection between slavery and punishment. To say someone is the descendant of slaves is to say that they remain genealogically tied to the original sin. The taint may be diluted by time, by education, or by social class, but it remains indelible within the trope of color. The image of the slave, with its concomitant taint, is perpetually incanted within the thick, dense image of blackness itself. Of course the slave, with all the pejorative baggage he was made to carry, was a construct; the black slave was no more a real person than the white master. Both were artificial figures created within what I refer to as the Narrative of the Slave.

The Narrative of the Slave is a story within a story. The primary story is one that reposes within the Declaration of Independence. It is our "story of origins" of a nation forging out of the wilderness and into the legacy of the enlightenment, a nation that would be distinguished by its shining ideals. However, on the tension bridge between the lived experience of white Americans and the nomos of this legitimating narrative stood the slave. Her presence constituted an opposition, her experience a counternarrative to white America's interpretation of history and national identity that the slaveocratic regime sought to construct.

The story of the slave is the story of attempts to remove the slave as an obstacle on the tension bridge. This is accomplished in terms of Cartesian dualities, by splitting off one dimension of a slave's being—her mind—and reconstructing her only as a body—a pair of hands; or, relying upon the same mind-body dualism, reconstructing her as a subhuman or beast lacking the intellectual faculties of whites. This splitting is reflected in the constitutional reference to three-fifths of a man: what would be only part of a white man stood for the whole of the slave.

The content of the slave narrative is the collective experience of slavery, viewed through the psychological need to legitimate the master's reign over the slaveocratic regime. This narrative is a story with a moral. The story is that the slave was dominated, chained, raped, beaten, sold, slapped, lynched, made voiceless, and forbidden to be taught. The moral is that these experiences were natural and inevitable, and merely confirmed the moral superiority of the master. The authenticity of these power relationships is validated through the medium of the body of the slave. What is done by the master to the slave's body, how the master may whip, work, rape, dismember, inflict pain upon, and exert power over the slave's body, becomes the very source of its own justification.

85. See id. at 44, 71-85.
Thus, if the slave is dominated as if she had no will of her own, as if she were a mere "body," this confirms that she is a mere "body"; if blacks are seen to be treated as animals, this confirms that they are animals; if blacks are treated as things, this confirms that they are things. The undeniability of the pain, suffering, and oppression becomes conflated with the undeniability that master and slave relations were objective realities. Thus, people were not merely enslaved but "were slaves." That is to say, there was an essence associated with the status that would appear to substitute cause for effect. But in the illogic of race,\(^{86}\) cause and effect are ignored as separate categories and collapsed, just as signifier and signified, slave and subhuman, are collapsed into one.

By using the body as a site of inscription or encoding, the slave is not merely dominated, she is erased as a subject. The story reverses the Cartesian framework of *Cogito ergo sum*—I think, therefore I am. The slave, as body, did not think for herself—and therefore was not. Through this reversal, a whole slew of inherently contradictory relationships could also be reversed: between democracy and a regime; between slave master and his professed egalitarian morality steeped in Jeffersonian principles; between a noble story of origins and ugly historical truth. Thus, the black self as an individual, subjective entity is disassociated from the slave body that is worked, whipped, and bred in the field. The slave identity becomes coterminous with a body that could be controlled and directed. As a result of this disassociation, the slave self could participate in the world only as a disembodied, voiceless ghost capable of witnessing oppression but not capable of human agency.\(^{87}\) The story of the slave is therefore a monstrous fraud in which blacks could bake the bread and be given the "cruss" and the result was just, given the "essential" relations between slave and master.\(^{88}\)

\(^{86}\) I refer to the illogic of race as a cognitive mechanism that structures not merely how we perceive, but also how we think and configure our assumptions about the world. The classic example of "racial reasoning" is the tendency during the slave regime to conflate race, legal status as slave, and natural condition.

\(^{87}\) See, e.g., Gerald Torres, *Translating Yonnondio, Precedent and Evidence: The Mashpee Indian Case*, 1990 Duke L.J. 625, 630. Catharine MacKinnon has written of the plight of women in a man's world that

> when you are powerless you don't just speak differently a lot, you don't speak. Your speech is not just differently articulated, it is silenced. Eliminated. Gone. You are not just deprived of language with which to articulate your dreams though you are; you are deprived of a life out of which the articulation might come.


\(^{88}\) The essentialism within the narrative—the idea of the slave as subhuman, animalistic, and childlike—is, of course, a Freudian projection. The slave is constructed to conform precisely in his animalness, inhumanity, and beastiality to the moral identity of the slavemaster, who imposed the brutal, slaveocratic regime on hapless blacks. The slave/other is the alter ego of the master's self.
If the medium on which the narrative of the slave was written was the body of the slave, the instrument of its inscription reposed within the symbol-laden structure of slave life. Slavery was not merely a structure of force and brutality, it was an organizing principle dependent upon a system of rituals in which the relations of master and slave were "naturalized." One such ritual was the manner in which the slaves were fed. Frederick Douglass wrote:

Our food was coarse corn meal boiled. This was called mush. It was put into a large wooden tray or trough, and set down upon the ground. The children were then called, like so many pigs, and like so many pigs they would come and devour the mush; some with oyster shells, others with pieces of shingle, some with naked hands, and none with spoons.89

As Henry Louis Gates noted, mush is to food as nature is to culture. The dichotomy between culture and nature in turn reflects an undergirding dichotomy between animal and human.90 Thus, culture is seen to be absent in the slave.

In addition to the absence of culture, the slave identity was associated with the absolute absence of liberty or freedom, an absence to the construction of the slave. "[T]he 'slave's' loss of freedom was complete. 'Of all men which be destitute of libertie or freedome... the slave is in greatest subjection, for a slave is that person which is in servitude or bondage to an other, even against nature.'"91

Winthrop Jordan concurs, "So much was slavery a complete loss of liberty that it seemed to Englishmen somehow akin to loss of humanity. No theme was more persistent than the claim that to treat a man as a slave was to treat him as a beast."92 In Western thought, a corollary of being an

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89. HENRY LOUIS GATES, JR., FIGURES IN BLACK 96 (1987) (quoting FREDERICK DOUGLASS, NARRATIVE 13-15 (1845)).

90. The dissociation of blacks from humanity as "slaves" expressed not merely a perceived opposition between blacks and whites in terms of autonomy and power, but also an internal conflict in which racial categories were mobilized in the service of whites to deny that those subjugated by slavery were similar to themselves.

Even in an age thoroughly accustomed to the hovering omnipresence of early death, the enormous toll of Negro life must have caused many white men to withdraw in silent horror, to refuse to admit identity with a people they were methodically slaughtering year after year... To the horrified witness of a scene of torture, the victim becomes a "poor devil," a "mangled creature." He is no longer a man. He can no longer be human because to credit him with one's own human attributes would be too horrible.

JORDAN, supra note 48, at 233. The black person, as a subhuman empty of humanity, became the vessel in which was poured the anxiety of whites confronting their lack of moral wholeness vis-à-vis the brutality of the slave regime.

91. JORDAN, supra note 48, at 53 (citing HENRY SWINBURNE, BRIEFE TREATISE OF TESTAMENTS AND LAST WILLES (1590)).

92. Id. at 54.
autonomous individual was to be endowed with certain inalienable rights. Rights were concomitant, in classical legal theory, with subjectivity. This follows within the narrative, where the slave is created as a reverse mirror image of the autonomous individual; the absence of freedom in the slave was particularized by, and grounded in, a palpable absence of legal rights. As Foner explains:

Each slave state regulated the condition of slavery through codes of laws... The slave could not own personal property, rent real estate, make any civil contract, or lawfully be taught to read and write.... Thus he could not bear witness against his master, nor could he institute a suit in his own behalf.93

But the absence of rights stood for more than the absence of liberty, it stood for the absence of “subjecthood” itself. This absence of “subjecthood” was perfectly expressed by the notion that the slave was property. Thus, Harriet Beecher Stowe could write:

The slave-code... of the Southern States, is designed to keep millions of human beings in the condition of chattels personal; to keep them in a condition in which the master may sell them, dispose of their time, person, and labour; in which they can do nothing, possess nothing, and acquire nothing, except for the benefit of the master; in which they are doomed in themselves.... 94

Thus, the legal definition of blacks as property95 was part of a relentless system of representing “slave” as the absence of subjectivity.96

In addition to the absence of culture, liberty, and subjectivity, there was the enforced absence of knowledge. This knotting together of absence of culture, liberty, subjectivity, and knowledge within the conditions of slave

94. HARRIET BEECHER STOWE, THE KEY TO UNCLE TOM’S CABIN 132, 133 (1968); see also FRANK TANNENBAUM, SLAVE AND CITIZEN 82 (1946) (stating that the slave was “a chattel under the law and, in practice, an animal to be bred for the market”).
95. Although blacks were legally defined as property, this categorization was in profound tension with itself. Although blacks might be portrayed as property, they might act like people in such a way as to require, in the eyes of the law, punishment. For the purposes of conceptualizing punishment of slaves, the fiction of the slave as chattel became the fiction of the slave as animate chattel. See WILLIAM STYRON, THE CONFESSIONS OF NAT TURNER 21-22 (1967) (using his character, T.R. Gray, to explain to Nat Turner how he could be punished).
96. The characterization of blacks as things or objects continues to resonate in contemporary life. Frantz Fanon describes the feeling of “blackness” in the following way: “I came into the world imbued with the will to find a meaning in all things, my spirit filled with the desire to attain the source of the world, and then I found that I was an object in the midst of other objects.” FRANTZ FANON, BLACK SKIN, WHITE MASKS 109 (C. Lammarkman trans., 1967).
life represents a knotting together of several categories: the slave is outside of culture and therefore is nonhuman; is deprived of freedom and therefore is a beast; is voiceless and therefore is an object; is ignorant and therefore is a child. In addition, there is rhetorical knotting together of slaves and blacks. The essentialism of color and the essentialism of slave and master are mutually apprehended. The black man and the slave/subhuman/object become signifiers of each other.  

So totally were the categories slave/black/subhuman compressed into one that blacks were not only spoken of as morally like beasts, but also considered physiologically identical. Thus, whites could freely substitute the anatomical parts of animals when talking about the anatomical parts of blacks:

[A] gentlewoman traveling through the back settlements of Connecticut in 1704 could slip into complaining about the “too great familiarity” accorded Negroes by the white inhabitants who allowed Negroes “to sit at Table and eat with them . . . and into the dish goes the black hoof as freely as the white hand.”

A similar substitution occurs in American law. As Mark Tushnet explains:

[L]ines drawn on the basis of race and those drawn on the basis of condition were almost identical, slave law could have been recharacterized as black law . . . for the rhetorical opposition of slaves and white men, not slaves and free persons, proved nearly impossible to resist.

This recharacterization was done in two rhetorical moves. First, there was the positing in slave law of a radical dichotomy between citizen and noncitizen. These respective legal categories tracked the ontological fault line between person and nonperson. Second, slave law generally posited that neither slaves nor blacks were citizens: only whites could be citizens. In so positing, the signifying chain of slave/black/subhuman, which already existed in the ethos of Southern social life, was wholly implanted within the slaveocratic regime of antebellum law and was used to order its allocation of rights.

Thus, in Bryan v. Walton, in which an estate administrator sued a freed black to recover slaves bequeathed to the freed black by will, a

97. Toni Morrison refers to this as *metaphysical condensation*. Toni Morrison, Playing in the Dark 68 (1992). What occurs in the local narratives of literary works also occurs on a larger scale in the historical narrative of race.
98. JORDAN, supra note 48, at 234.
99. TUSHNET, supra note 47, at 140.
100. 14 Ga. 185 (1853).
Georgia court was able to presume that free blacks were "in a state of perpetual pupilage or wardship." The court explained:

The act of manumission confers no other right but that of freedom from the dominion of the master, and the limited liberty of locomotion; that it does not and cannot confer *citizenship*, nor any of the powers, civil or political, incident to *citizenship*; that the social and civil degradation, resulting from the taint of blood, adheres to the descendants of Ham in this country, like the poisoned tunic of Nessus; that nothing but an Act of the Assembly can purify, by the salt of its grace, the bitter fountain—the "darkling sea." The legal meaning of both slave and black continued to be noncitizen, which implied nonperson. Thus, the slave was (a) unfree; (b) black; and (c) a nonperson. On the other hand, a citizen was (a) free; (b) white; and (c) a person. Consequently, "slave" and "black" and "nonperson" became legally compressed together not through any legislative means, nor through any reference to natural law or precedent, but through the *Bryan* court's unanchored, intuitive, rhetorical fiat in which it tethers both slaves and blacks to the noncitizen concept.

Of course, the classic instance of this is the case of *Dred Scott v. Sandford*. In *Dred Scott*, Justice Taney was called to decide whether or not the sojourn of a slave in a free state extinguished his master's rights of ownership. Reaching out to an issue not before the Supreme Court, Taney instead addressed the question of whether Dred Scott could sue in a U.S. court. Taney's decision inscribed indelibly into constitutional law the linkage between slave and black and noncitizen, thus permanently separating the categories of black and citizen. The difficulty was that there was no textual justification in either the Declaration of Independence or the Constitution for such separation. On the contrary, the Declaration of Independence referred to "all men" as equals and provided that "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Moreover, there was ample historical evi-

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101. *Id.* at 198.
102. *Id.*
103. 60 U.S. 393 (1856).
104. *Id.* at 406.
105. Taney framed the issue as follows:

  The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.
dence of at least ambivalence on the part of many states as to the question of whether to confer aspects of personhood upon blacks.\textsuperscript{106} Undaunted by history and heedless of constitutional text, Taney "reasoned" that blacks, emancipated or not, could not be citizens. As Taney infamously explained:

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race.\textsuperscript{107}

Again, the collapse of the categories of blacks, slaves, and noncitizens into one seems to flow from a conflation of cause and effect.\textsuperscript{108} Stretched out in a syllogistic framework, Taney's argument is that because blacks were treated in a dramatically inferior way, this was evidence of inferior legal status. Ultimately, Taney's argument is purely rhetorical and no more than a bald assertion that legal differences of race are "obvious" historically.\textsuperscript{109}

After all, slavery was so inconsistent with humanity, it could only be explained by reference to some radical difference between the enslavers and the enslaved. The difference could not be demonstrated by legal or logical argument, but only rhetorically posited by referencing the historical narratives of race. Taney's rhetoric relies on the power of the slave story as a logic derailing device, as a story that moves us from the tension bridge between the present and the historical past to an imaginary, fictive past of saintly white patriarchs.

*Dred Scott* is less a story about law's racism than about the distorting power of slavery/race as a lens. *Dred Scott* is an incantation of a signifying chain, a chain of categories knotted together through historical narrative

\begin{itemize}
\item \textsuperscript{106} Don Fehrenbacher explains that, at the time the Constitution was adopted,
\item \textit{[i]n some respects, such as property rights, a [free] black man's status was superior to that of a married white woman, and it was certainly far above that of a slave. He could marry, enter into contracts, purchase real estate... and... seek redress in the courts.}
\item DON FEHRENBACKER, THE DRED SCOTT CASE 349 (1978).
\item \textsuperscript{107} *Dred Scott*, 60 U.S. at 407.
\item \textsuperscript{108} One might argue that there was internal logic to the Supreme Court's opinion, albeit the logic of originalism. In these terms, Taney was marshalling evidence from the Framers' conduct as to whether they intended to include blacks in the polity. That they treated blacks so inhumanly is evidence, we are to suppose, that the Framers did not think of blacks as citizens. Assuming arguendo originalism was operative, Taney's original intent argument depends on the idea that the Framers were not, or could not have been, hypocritical. The moral rectitude of the Framers is not demonstrated by Taney, it is assumed.
\item \textsuperscript{109} *Dred Scott*, 60 U.S. at 411-12.
\end{itemize}
to maintain power. It is here that law as a structure of reason begins to collapse into race, creating a structure of incoherent categories and meanings. This is why race construction is destabilizing to the law. The law created both the categories of "slave" and "free man." It needs both categories. When the category of slave merged with the category of race, the dichotomy decreed by law evaporated. Taney maintained power relationships in *Dred Scott*, but at the expense of jettisoning all pretense of stability in the very categories needed to create law in the slave regime.

The African Travel Story. The linkage between color and subhuman status is powerfully reinforced by another narrative, which I will refer to as the African travel story. This narrative arises out of the anxiety of early European contacts with Africa. The contrast between the physiognomy, customs, and cultural traditions of Europeans and Africans created, once again, an opposition. The opposition could be configured as whites and blacks on a continuum with some hypothetical norm in the center. But this can be conceptualized only if the European cultural perspective is decentered and moved to one side of the norm. Abdul JanMohamed explains:

Genuine and thorough comprehension of Otherness is possible only if the self can somehow negate or at least severely bracket the values, assumptions, and ideology of his culture. . . . However, this entails in practice the virtually impossible task of negating one's very being.  

It follows that to affirm their identity, Europeans attempted to see encounters with Africans in a manner that valorized their own superiority. Thus, instead of seeing blacks as cultural alterities, blacks were made into the "other," a reverse mirror image of Europeans: "[I]nstead of seeing the [African] as a bridge toward syncretic possibility, it use[d] him as a mirror that reflect[ed] the colonialist's self-image."  

The othering process began with the naming of Africa. Historically, Africa was called different names by different peoples. The Europeans, who until the sixteenth century had little contact with the continent, would often refer to it as *terra incognita*. By the Greeks, it was called Aethepia (land of sunburnt races); by the Romans, Africa. But it is its Arabic etymology that is most revealing:

Africa is called in Arabic Ifrichia, from the word *faraca*, which has the meaning of the Latin word *separavit* ["it has separated"]. There are two opinions on the origin of this label. The first is based on the fact that this part of the world is separated from Europe and from a part of Asia by

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110. JanMohamed, supra note 66, at 84.
111. Id.
the Mediterranean. The second is that this name derives from Ifricos, king of Yemen [Arabia Felix], who was the first to come and inhabit it. 112

Thus, two images redound from Africa’s etymological background. The first, Africa terra incognita as the place we know nothing about, was a place impenetrable to European knowledge because of its dense naturalness. A land without the light of reason, it was “a void and a nothingness until the arrival of an outsider,” 113 a blank slate on which the name of the first comer would be forever inscribed. 114 The second image, from Africa’s Arabic roots, portrays a land separate from, and outside of, the lights of civilizations, waiting to be defined by influences from without.

The Europeans thus equated “the unknown” with the uncivilized, and uncivilized men with animals. Hence, it is not surprising that the early Roman historian Herodotus reported that Africa was filled with “dog eared men, and the headless that have eyes in their chests.” 115 The historical record is replete with examples of Europeans attributing animal characteristics to blacks, culminating in controversial conjecture originating in the seventeenth century England that blacks had sprung from apes. 116

112. CHRISTOPHER MILLER, BLANK DARKNESS 13 (1985) (quoting A. Eaulard, Introduction to LEO AFRICANUS, DESCRIPTION DE L’AFRIQUE at v-xxii (1956)).
113. Id.
114. Thus, Joseph de Gobineau, a “natural philosopher,” explained:

For the first time, our research has now found in Ethiopia one of those countries adjacent to a great foreign civilization, possessing that civilization only in an incomplete fashion, absolutely as the moon does with the light of the sun.

Id. at 18.
116. A Dutchman named Struys reported in 1677 that he saw “a black man with a tail one foot long.” The French, as late as 1851, referred to Africa as a land of Niam-Niams or “men with tails.” See, e.g., FRANCIS DE CASTELNAU, RENSEIGNEMENTS SUR L’AFRIQUE CENTRALE ET SUR UNE NATION DE NIAM-NIAM OU HOMMES A QUEUES QUI S’Y TROUVERAIT, D’APRES LES NEGRES DU SUDAN (1851). Castelnau wrote:

They all had tails, about forty centimeters long and perhaps two or three in diameter; this organ is smooth; among the cadavers there were those of many women who were formed in the same fashion; aside from this, they were the same as the other negroes; they were absolutely naked. . . . Manuel was in the advance party and saw many of these people killed; he examined the cadavers, measured the tails, and can conceive of no doubt concerning their existence.

Id.

This “observation,” relying on the untrained eye of a slave named Manuel, unwittingly confused an actual tail with a leather tail worn as an ornament.

The fable was recognized by Dutch anatomist Peter Camper, who observed “[t]he striking resemblance between the race of Monkeys and of Blacks, particularly upon a superficial view, has induced some philosophers to conjecture that the race of blacks originated from the commerce of the whites with oranges or pongos.” JORDAN, supra note 48, at 237 & n.43 (quoting Peter Camper). A parallel narrative held that if blacks were not actually descended from apes they were nonetheless physically similar:
This likening of blacks to beasts took on particular intensity when discussing sexual characteristics. Jobson reported that African men were "furnisht with such members as are after a sort burthensome unto them," and another seventeenth century writer wrote of their "large Propagators." African women also had comparatively large sexual organs according to traveler's accounts, with some having breasts so long they could suckle children on their backs "by throwing the breast over their shoulders." The enlarged sexual organs begat an image of blacks as oversexed animals, which led directly to a notion of blacks as lewd, licentious, and morally lawless.

One European wrote that "in Ethiopia . . . the race of men is keen and lustful," and that African women were "hot constitution'd ladies".

I cannot help observing too, that the conformation of the face, in a great majority of them, very much resembles that of the baboon. I believe indeed there is, in most of the nations of Africa, a greater elongation of the lower jaw, than among the people of Europe.

2 BRYAN EDWARDS, HISTORY OF THE BRITISH WEST INDIES 89 (1966). Buffon in his Histoire Naturelle, while acknowledging that blacks were not descendants of apes, states that they were beast-like in primitiveness and physiognomy, "equally wild, and as ugly as these apes."


117. JORDAN, supra note 48, at 34.
118. Id.
119. CHARLES WHITE, AN ACCOUNT OF THE REGULAR GRADATION IN MAN 62-63 (1799).
120. Thus, in 1556, Leo Africanus wrote:

The Negros likewise leade a beastly kinde of life, being ytterly destitute of the use of reason, of dexteritie, of wit, and of all artes. Yea they so behaue themselves, as if they had continually liued in a forrest among wilde beasts.


Perhaps one of the most colorful restatements of this early view of blacks appears as late as 1948:

The black man's sword is a sword. When he has thrust it into your wife, she has really felt something, it is a revelation. In the chasm that it has left, your little toy is lost. Pump away until the room is awash with your sweat, you might as well be singing. This is good-by . . . . Four Negroes with their penises exposed would fill a cathedral. They would be unable to leave the building until their erections had subsided, and in such close quarters that would not be a simple matter. To be comfortable without problems, they always have the open air. But then they are faced with a constant insult: the palm tree, the breadfruit tree, and so many other proud growths that would not slacken for an empire, erect as they are for all eternity, and piercing heights that are not easily reached at any price.

FANON, supra note 96, at 169 (quoting MICHAEL COURNOT, MARTINIQUE 13-14 (1948)).
121. JORDAN, supra note 48, at 150 (quoting WILLIAM SMITH, NEW VOYAGE TO GUINEA 146 (1967)).
122. WILLIAM SMITH, NEW VOYAGE TO GUINEA 146 (1967); see also JORDAN, supra note 48, at 150.

Next comes a warmer race, from sable sprung,
To love each thought, to lust each nerve is strung;
The Samboe dark, and the Mulattoe Brown,
The Mestize fair, the well-limbed Quaderoon,
possessed of a "temper hot and lascivious, making no scruple to prostitute themselves to the Europeans for a very slender profit, so great is their inclination to white men."\textsuperscript{123} Moreover, natural philosophers cited the accounts of travelers when reporting that African women had voluntary intercourse with apes.\textsuperscript{124}

The association of Africans with animals enabled Europeans to view them as just a component of the territory of Africa to be explored and, of course, conquered. The colonialist's eye therefore saw Africans as only a part of a panorama of the African landscape.

The Natives were Africa in flesh and blood. . . . [The various cultures of Africa, the mountains, the trees, the animals] were different expressions of one idea, variations upon the same theme. It was not a congenial upheaving of heterogeneous atoms, but a heterogeneous upheaving of congenial atoms, as in the case of the oakleaf and the acorn and the object made from oak.\textsuperscript{125}

By packing Africans into nature, the "natives" lost all subjectivity and were again an uncivilized void waiting to be filled (i.e., by European civilization).

The result of making blacks part of "native" was a "metonymic displacement" because only part of Africa—the land/nature part—stood for its whole. In this metonymic process, "all specificity and difference" was transformed into a single magical essence in the colonial imagination. It seemed logical to conclude that blacks in Africa were part of nature rather than human culture because Africa is defined by nature—a land without civilization—and therefore black identity, like that of the flora and

\begin{quote}
And Jetty Afric, from no spurious sire,
Warm as her soil, and her sun—on fire.
These sooty dames, well vers'd in Venus' school
Make love an art, and boast they kiss by rule.
\end{quote}

Id. (quoting Jamaica, a Poem, in Three Parts 22-23 (London, 1777)).

123. JORDAN, supra note 48, at 35.
124. BUFFON, supra note 116, at 40, 66. Jefferson gave credence to this notion of coitus between apes and black women in his own writings. He wrote:

Is not the foundation of a greater or less share of beauty in the two races? Are not the fine mixtures of red and white, the expressions of every passion by greater or less suffusions of colour in the one, preferable to that eternal monotony, which reigns in the countenances, that immovable veil of black which covers all the emotions of the other race? Add to these, flowing hair, a more elegant symmetry of form, their own judgment in favour of the whites, declared by their preference of them, as uniformly as is the preference of the Oran-ootan for the black women over those of his own species.


125. ISAK DINESEN, OUT OF AFRICA 21 (1937) (reprinted in JanMohamed, supra note 66, at 86).
fauna of Africa, is absorbed in the idea of Africa itself. Through this metonymic mechanism, the metaphysical difference between Europeans and Africans was made to seem as far apart in nature as the geographic distance between Europe and Africa. The Europeans felt it was their duty to bring civilization to this purely natural state and enlightenment to its cultural darkness.

In the confrontation between European traveller/conqueror and native, as in the confrontation between master and slave, the knowledge or what passes for knowledge of blacks is mediated by power and the need to impose it. The metonymic mechanism in which Africans are collapsed into Africa dehistoricizes and desocializes the conquered world and presents it as a metaphysical "fact of life," reducing those who have fashioned the colonial world to passive spectators in a mystery not of their own making.126 This collapse allows for the story of confrontation to be one in which European domination was natural and inevitable.

There is an even more interesting dimension. Africa was not merely nature: it was the heart of darkness, a place of evil. The struggle to conquer Africa is intertwined with the struggle against evil. This construction presents European identity as heroic, civilizing, and moral. Two themes thus emerge: one of Africa as a mass in profound opposition to whiteness, to autonomous subjectivity, and to civilization. The second theme is that of whiteness as heroic, civilizing, and moral; it paints brightly upon the "blank darkness" of the African Other. The fact that these inextricably linked themes are actually inherently contradictory is exposed when they were extended to civil rights law.

It is in the legal framework of Jim Crow segregation that the symbiology of the African as "opposite" was powerfully expressed. "Segregation," a disciplinary regime of subordination rather than separation, was supported at a conscious level by notions of blacks as inferior. But at a deeper level of awareness, the problem is a notion of "difference" as antithesis; that is, race perceived as a dividing line between two mutually exclusive categories of human beings. Thus, when Ollie's Barbecue refuses to serve blacks,127 to explain this decision solely on the basis of black inferiority is an incomplete explanation because it does not comprehend why races dining

126. JanMohamed, supra note 66, at 87.
127. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McLung, 379 U.S. 294 (1964). In Heart of Atlanta, the Supreme Court jointly heard the arguments of two parties, the Heart of Atlanta Motel, and Ollie's Barbecue, a restaurant in Birmingham, Alabama. Heart of Atlanta established the plenary authority of Congress over "local" businesses under Title II of the Civil Rights Act of 1964. Because the federal government purported to act under the Commerce Clause, its authority was limited to interstate commerce.

Ollie's Barbecue did not dispute the existence of an overt policy of refusing to serve blacks, but argued that because it had few if any interstate travelers, it did not participate in interstate commerce and hence fell outside the ambit of the statute.
together is so abhorrent. The belief that races must not mix is based on a notion of black racial identity as something so opposite to whiteness—to order and reason—that it must be kept at a distance.\textsuperscript{128}

One additional example illustrates this point. In \textit{Brown v. Louisiana},\textsuperscript{129} five black men went into the "public room" of the Audubon Regional Library in Clinton, Louisiana. There was no one in the room except the blacks and a library assistant, who was a white female.

The branch assistant... met the men "between the tables" and asked if she "could help." Petitioner Brown requested a book, "The Story of the Negro" by Arna Bontemps. Mrs. Reeves checked the card catalogue, ascertained that the Branch did not have the book, [and] so advised Mr. Brown... Mrs. Reeves testified that she expected that the men would then leave. They did not. Petitioner Brown sat down and the others stood near him. They said nothing; there was no noise or boisterous talking.\textsuperscript{130}

Despite their silence, despite the fact that all they had done was to ask for a book in a library and then sit down, Brown and his fellow protesters were arrested and convicted for breach of the peace.\textsuperscript{131} This was true despite the fact that there was no statute or written rule barring blacks or "negroes" from entering or using the public library. In fact, their actions did not establish the elements required by the statute under which they were prosecuted: the statute required both a lawful order to leave, which was present, and action—"the defined breach of the peace"—which was not.\textsuperscript{132}

This result is not surprising because the issue was not what they had done. It was their very presence that "disturbed the peace": the very presence of the blacks in a place reserved for whites destabilized order. This destabilization seems particularly true when the blacks have invaded

\begin{flushright}
128. This symbiology is implicit in the Ollie’s Barbecue story told in \textit{Heart of Atlanta}, but it is virtually explicit in \textit{Brown v. Louisiana}, 383 U.S. 131, 136 (1966). \textit{Heart of Atlanta} is, for our purposes, important not as a legal doctrine, but as a mirror reflecting racial mores and norms. From the perspective of Ollie’s Barbecue, the point of \textit{Heart of Atlanta} is that the restaurant need not hide its policy of not serving blacks and that federal intervention to impose alien racial norms is unmistakably oppressive. The gap between the position of the federal government and the southern barbecue house is the distance between reformed federal policy on public accommodations and unreformed practices of language.


130. \textit{Id.} at 136.

131. \textit{Id.} at 138.

132. The statute read:

\begin{quote}
Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby: (1) crowds or congregates with others...[in a] public place or building...and who fails or refuses to disperse and move on, when ordered so to do by any law enforcement officer...or any other authorized person...shall be guilty of disturbing the peace.
\end{quote}

\textit{LA. REV. STAT. ANN.} § 14:103.1 (repealed by \textit{Acts} 1976, No. 489 § 1) (West 1986).\end{flushright}
the sphere of learning and reason. In the final analysis, the problem is not
their inferiority, but their radical opposition to the white sphere of life.
The blacks in *Brown*, like the blacks encountered by European travellers to
Africa, represented man as “nature” and thus stand in opposition to man
as “man.” Said another way, the blacks in *Brown* were the African Other,
metonomically merged with apes and antelopes and radically incongruent
with and dangerous to white culture (particularly to white women like Mrs.
Reeves).

2. Religio-ethical Sources: The Curse of Ham

There is a genuine connection between color and meaning. Both black
and white are problematic as symbols, however, because they represent the
lack of color:

Black is . . . the total absence of color, due to the absence or total absorption
of light . . . “White” is “fully luminous and devoid of any distinctive
hues.” That void is the point where white and black meet and reverse;
for if white is an empty fullness (fully luminous but void), then black is a
full emptiness (total absence).133

The fact that black and white represent a falling out of color represents
the idea that ultimately black and white signify a falling out of meaning134

133. MILLER, supra note 112, at 30-31.
134. Ralph Ellison, in his classic work, *The Invisible Man*, presents a literary treatment of
the consequences of race construction and humorously examines this point concerning the
incoherence of color as a signifier. For example, he writes:

“Brothers and sisters, my text this morning is the ‘Blackness of Blackness.’ ”
And a congregation of voices answered: “That blackness is most black, brother,
most black . . .”
“In the beginning . . .”
“At the very start,” they cried.
“. . . there was blackness . . .”
“Preach it . . .”
“. . . and the sun . . .”
“The sun, Lawd . . .”
“. . . was bloody red . . .”
“Red . . .”
“Now black is . . .” the preacher shouted.
“Bloody . . .”
“I said black is . . .”
“Preach it, brother . . .”
“. . . an’ black ain’t . . .”
“Black will git you . . .”
“Red, Lawd, red: He said it’s red!”
“Amen, brother . . .”
“Yes it will . . .”
“. . . an, black won’t . . .”
“Black will make you . . .”
Thus, as Anthony Appiah has stated, race has no real side referent. Black and white may just be signifiers of each other before they are signifiers of any meaning. However paradoxical and incoherent, Western culture has fixed blackness within the deep structure of language, firmly entrenching blackness as a signifier of negation. The root of this negative image of blackness in the English language is traceable to a religio-ethical tradition of associating whiteness with purity and blackness with sin. It is a tradition as old as Plato's narrative vision of the soul. Similarly, Horace associates blackness with a power of evil. Blackness has also been perceived as a mark of cursedness because "nearness" to the sun suggested a punishment of some kind. Moreover, in the Christian tradition, white refers to innocence or wisdom (or both) and blackness is tied directly to sin.

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"Black . . ."
". . . or black will un-make you."
"Ain't it the truth Lawd?"

ELLISON, supra note 43, at 7-8.

135. Christopher Miller explains:

Pure darkness is felt as a force so powerful that is [sic] must be repressed as a "criterion for evaluating men." The consequence of this, however, is that meaning itself will fall out of a secure grounding in symbolism and be forced always to point elsewhere. . . .

. . . Black and white are to color what promiscuous concubinage, squeaking, and nakedness were to marriage, speech, and clothing: they negate the category they occupy.

MILLER, supra note 112, at 30-31.


137. See MILLER, supra note 112, at 30.

138. Frantz Fanon writes:

In Europe . . . the Torturer is the black man, Satan is black, one talks of the shadow, when one is dirty one is black—whether one is thinking of physical dirtiness or moral dirtiness . . . Blackness, darkness, shadow, shades, night, and the labyrinths of earth, abysmal depths, blacken someone's reputation; and on the other side, the bright look of innocence, the white dove of peace, magical, heavenly light.

FANON, supra note 96, at 188-89.


140. See JORDAN, supra note 48, at 13.

141. Daniel 12:10 (“Many shall purify themselves and make themselves white, and be refined; but the wicked shall do wickedly; and none of the wicked shall understand; but those who are wise shall understand.”); Isaiah 1:18 (“[L]earn to do good; seek justice, . . . plead for the widow. . . . [T]hough your sins are like scarlet, they shall be as white as snow . . . .”).

142. An English writer pondering the question of whether blacks were capable of salvation concluded that they were, but that in redemption they shed their color:

Quest.: Whether negroes shall rise on the last day?
Answer: The pinch of the Question only lies—Whether White or Black is the better
A variation on this theme of blackness as the absence of virtue—i.e., sin—is the idea that blackness represents the absence of intelligence. Black is a color that does not reflect. As such it was an easy, if illogical, step to extend Gobineau's "Le noir ne reflechit pas" (the color of black does not reflect) to the notion that the black man does not "reflect" (i.e., think). Color and mental qualities are thus conflated. Consequently, Hume could posit a fundamental identity between color, intellectual achievement, and intelligence. Hume wrote:

I am apt to suspect the negroes, and in general all the other species of men (for there are four or five different kinds) to be naturally inferior to the whites. There never was a civilized nation of any other complexion than white, nor even any individual eminent either in action or speculation. No ingenious manufactures amongst them, no arts, no sciences . . . . Such a uniform and constant difference could not happen, in so many countries and ages, if nature had not made an original distinction betwixt these breeds of men. Not to mention our colonies, there are Negroe slaves dispersed all over Europe, of which none ever discovered any symptoms of ingenuity . . . . In Jamaica indeed they talk of one negro as a man of parts and learning; but 'tis likely he is admired for very slender accomplishments, like a parrot, who speaks a few words plainly.

JORDAN, supra note 48, at 258 (quoting THE ATHENIAN ORACLE, I, 435-36 (2d ed. 1704); see also FRANK SNOWDEN, BLACKS IN ANTIQUITY 200 (1970) (stating that "Christ came into the world to make blacks radiantly white"). The imagery of blackness as sin continues today, in songs that are presently sung:

On the Cross at Cavalry,
Jesus died for you and me
There he shed His precious blood
That from sin we might be free
O cleansing stream does flow
And it washes white as snow


This symbolic framework drew together notions of spiritual equality and secular inferiority. This imagery was instrumental throughout the slave and colonial regimes in reconciling religious egalitarianism with institutions of colonial domination and slavery. See, e.g., WILLIAM H. FOOTE, SKETCHES OF VIRGINIA 232-33 (2d ed. 1856) (recounting the preachings of Reverend Cary Allen).

143. See MILLER, supra note 112, at 31.

Similarly, Kant stated that “[s]o fundamental is the difference between [the black and white] races of man . . . it appears to be as great in regard to mental capacities as in color.”\textsuperscript{145}

The Biblical justification for regarding blacks as cursed is associated with the book of Genesis, which suggests that blacks are the sons of Ham who were cursed by Noah.\textsuperscript{146} After the flood, Noah became drunk. One of his three sons, Ham, looked upon his drunken father in his nakedness and tells his brothers, who covered up their father without looking. When Noah awakens, he realizes Ham’s transgression and curses Ham’s son, Canaan, saying that he will be a “slave of slaves.”\textsuperscript{147}

The connection between the curse on Ham’s descendants and blackness, however, is not clear from the biblical text itself. Jordan theorizes that the missing link is supplied not through the Christian sources but rather through Jewish ones: “[T]he approximately contemporaneous Talmudic and Midrashic sources contained such suggestions as that ‘Ham was smitten in his skin,’ that Noah told Ham ‘your seed will be ugly and dark skinned.’”\textsuperscript{148} However exogenous this attribution may be to the biblical text, this narrative was received throughout the Middle Ages as biblically based.\textsuperscript{149}

In Freudian terms, the story of Noah and Ham refer to the universal inner conflict between son and father. Ham, by gazing upon his father’s

\begin{enumerate}
\item \textsuperscript{145} \textsc{Immanuel Kant, Observations on the Feeling of the Beautiful and Sublime} 111 (John T. Goldthwait trans., 1960).
\item \textsuperscript{146} \textit{See Genesis} 9:20-25.
\item \textsuperscript{147} \textit{Id.} at 9:25. A similar mythological explanation of the cause and meaning of color can be found in George Best’s account:

Noah “commanded” his sons and their wives to behold God “with reverence and feare,” and that “while they remained in the Arke, they should use continencie, and abstaine from carnall copulation with their wives: . . . which good instructions and exhortations notwithstanding his wicked sonne Cham disobeyed and being persuaded that the first childe borne after the flood . . . should inherite . . . all the dominions of the earth, hee . . . used company with his wife, and craftily went about thereby to dis-inherite the off-spring of his other two brethren.” [As a punishment,] God willed that “a sonne should bee born whose name was Chus, who not onely it selfe, but all posteritie after him should bee so blace and lothsome, that it might remain a spectacle of disobedience to all the worlde. And of this blace and cursed Chus came all these blace Moores which are in Africa.”

\textit{Jord\textsuperscript{148}n, supra note 48, at 41 (quoting George Best)}.
\item \textsuperscript{148} \textit{Jord\textsuperscript{149}n, supra note 48, at 18 (citation omitted). As Jordan astutely notes, these myths draw together in what I call a “signifying chain” of blackness, sin, and sexuality. \textit{Id.} at 18149. As Jordan explains:

The writings of the great church fathers such as St. Jerome and St. Augustine referred to the curse in connection with slavery but not with Negroes. They casually accepted the assumption that Africans were descended from one or several of Ham’s four sons, an assumption which became universal in Christendom despite the obscurity of its origins.

\textit{Id.} The gratuitous linkage between the midrashi narrative and \textit{Genesis} was no doubt augmented by the fact that Ham originally meant both “dark” and “hot.”
\end{enumerate}
nakedness, challenged the authority of the father in the realm of sexual knowledge. This bespeaks the unmistakable connection between what one knows and power. Ham, in seeking the knowledge of his father for himself, sought to usurp authority. Ham is a mythical image of the Id, with an instinctive desire for forbidden sexual knowledge that parallels the innate desires identified in the Oedipus myth. Consequently, by constructing blacks as descendants of Ham, whites construct an alternative self that is identical to their own Id-based desires. Blackness itself represents instinctive but forbidden desire, while whiteness represents virtuous authority—the father—that casts out the bad.

The Noah-Ham narrative absorbs additional symbolic representations of blackness. Ham, by being cast out of the family, is in essence thrust out of the body. Blacks, as descendants of Ham, have been thrust out of the body and thus are symbolically associated with bodily wastes. If the construction of blacks as morally bad promoted a regime of domination, the construction of blacks as filthy (or filthy) is associated with a regime of aversion in which even to touch a black person is unacceptable.

Ironically, this symbiology is expressed in Brown v. Board of Education. Standing Plessy on its head, Brown held that state-sponsored racial “segregation” of children in public schools violated the Equal Protection Clause. Doctrinally, Brown is a story of triumph: a historic triumph of the egalitarian spirit of American law over formal structures of segreg-
tion. In addition to its role as a catalyst for the civil rights movement, Brown’s continuing legacy is manifest in its roles both as an anchor for a fragile consensus on the value of equal opportunity and as a model of public litigation in which traditional precepts of judicial power are vastly expanded. It continues to flicker in our political-legal order as a candle of justice, lighting the way to our highest constitutional aspirations.

However, at the level of language and the power relationships hidden by the language of the case, the narrative of Brown as a triumph is revealed as myth. Brown relies upon the metaphor of segregation to conceptualize the harm that black school children experienced. The Supreme Court was asked to answer the following question:

Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other “tangible” factors may be equal, deprive the children of the minority group of equal educational opportunities?\(^\text{157}\)

But segregation connotes a notion of banning or, more exactly, of being pushed out,\(^\text{158}\) making the analogy of segregation as merely separate false

\(^{155}\) Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform, 76 VA. L. REV. 349 (1990) (identifying Brown as promoting a redistributive model of antidiscrimination, but arguing for a theoretical reorientation of Brown in the antiredistributionist model of equality that became “entrenched” in the 1990s).

\(^{156}\) See, e.g., RICHARD KLUGER, SIMPLE JUSTICE 748-49 (1976) (describing Brown as the capstone of a long struggle for racial equality under law). Kluger explains:

Not until the Supreme Court acted in 1954 did the nation acknowledge that it had been blaming the black man for what it had done to him. . . . [T]he quest for meaningful equality . . . had begun.

. . . [Brown meant that] black bodies had suddenly been reborn under a new law. . . . The mass movement sparked by Brown was unmistakably thriving as soon as six months after the Court handed down its implementation decree.

Id.; see also J. HARVIE WILKINSON, FROM BROWN TO BAKKE 3 (1979) (noting that “[o]ne quite remarkable aspect of the Civil Rights struggle of the mid-twentieth century is that the Court sired the movement”). See generally MARK TUSHNET, THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987) (discussing Brown as a turning point in American racial politics).

\(^{157}\) See Abram Chayes, The Role of Judge in Public Law Litigation, 89 HARV. L. REV. 1281 (1976) (differentiating between traditional legal disputes between private parties and public law litigation, which often involves issues of regulatory policy and some form of ongoing judicial oversight). The public law model differs from the traditional model in that the traditional model was bipolar with the litigation centered around two autonomous parties, while the public law model is structured around many parties and many centers, allowing the court to perform in a quasi-legislative fashion. Id. at 1282-84. Chayes traces the origins of the public law model to conceptual changes in litigation beginning in the nineteenth century. Id. at 1288-89. This model of liberal judicial intervention flowered after 1954 and was used powerfully in the early days of civil rights litigation.

\(^{158}\) Edmond Cahn explains:

When the members of a community decide to exclude one of their number from the
because blacks and whites were not just separate in the context of southern life—blacks were powerless. Southern “segregation” at the time of Brown was not “mutual separation of whites and Negroes, [but rather] one . . . group enjoying full normal communal life and one . . . group that is barred from this life and forced into an inferior life of its own.”

This idea of segregation as the core evil in the Brown narrative suppresses an equally compelling alternative conception of the problem: one of domination and lack of power. The true problem, the lack of power, is transformed into terms of association: the difficulty is that blacks are being walled away from whites. The effect of this transformation is that, although walls are broken down by the Court’s doctrinal holding, the rhetorical framework in which they conceptualized the race problem has walled out any inquiry into black powerlessness. The very rhetoric Brown deploys to attack racial injustice becomes the means by which a critical dimension of that injustice is isolated from attack.

While the Brown court attempts to reverse the process of “separation,” it rhetorically situates us within a world in which the inherent separateness of white and black are deeply assumed and in which white (referring to group life without killing him outright, what else can they do but force him to remove himself physically (as in the case of Cain), ostracize him for what they consider the general welfare (as the Athenians did), banish him from the cluster of community dwellings (as in outbreaks of leprosy or other plague), assign him a fixed area or ghetto to occupy (as with the Jews in medieval times), or lock him in a penitentiary (as we do with convicted criminals)?


160. Howard Moore made a similar point:

The fault in Brown is the same as that in Dred Scott and Plessy v. Ferguson. Each of these decisions assumes that whites are racially superior to Blacks. Brown is bottomed on the assumption that white schools are superior to Black schools, and that Black schools cannot even be made equal to those attended by whites. Brown accepts without question white domination of the institutional life of the nation.

Howard Moore, Jr., Brown v. Board of Education: The Court’s Relationship to Black Liberation, in LAW AGAINST THE PEOPLE 55, 58 (Robert Lefcourt ed., 1971). Moore’s critique begins to expose a duality in the meaning of Brown that tracks a duality within the civil rights struggle as a historical phenomenon. From an outside, superficial examination, Brown is the apotheosis of civil rights, a liberating affirmation in the law. However, from the inside—in terms of what Brown deeply assumes about the race problem (i.e., that it is simply a problem of associating with whites)—Brown is imprisoning.

The civil rights movement, with its parallel assumptions about the legitimacy of both the segregation and integration frameworks, is likewise imprisoning. Malcolm X suggests:

The entire civil-rights struggle needs a new interpretation, a broader interpretation. We need to look at this civil-rights thing from another angle—from the inside as well as from the outside. To those of us whose philosophy is black nationalism, the only way you can get involved in the civil-rights struggle is give it a new interpretation. The old interpretation excluded us. It kept us out.

inside the body) and black (referring to outside the body) are basic to the scheme. This symbiology of black representing that which is “cast out” while whites represent that which remains within is precisely the symbiology of “the curse of Ham” resurrected. *Brown* morally denaturalizes and forbids the “casting out,” but reifies the *myth* that the problem of blacks is that they are cast out.

The failing of *Brown* is not in its political impulse, but in its implicit theory of language that allows a freewheeling objectivism about language and race to collide with its own social agenda. The ultimate agenda of *Brown* was the creation of meaning: it was to provide us with an idea of what sense we should give to the notion of equality. However, the discernment of this concept of equality occurs, if at all, through the lens of “objective” racial categories, a mechanism operating tacitly within the imagery of the opinion. This failing of *Brown* is instructive in that it illustrates the inadequacy of analyzing race along a political or social axis without simultaneously conducting an analysis along an interpretive axis focused on the language being used. Race as politics is deeply interpenetrated by race as trope. Any meaningful legal discourse about equality must proceed along these two seemingly incommensurate but ultimately parallel lines.

3. Intellectual Sources: The Great Chain of Being

A third narrative, which both contradicts and reinforces the other two, involves a bundle of ideas that converge in a story sometimes referred to as “The Great Chain of Being.”

161. The meaning of equality is quintessentially contested territory. In *Plessy*, equality was defined vis-a-vis a theory of the state in which the “[federal] government serves in the role of policeman.” Note, *Overcoming Original Sin: The Redemption of the Desegregated School System*, 27 Hous. L. Rev. 557 (1990) (stating that members of society tolerate, but do not trust, policemen). The policeman is limited to enforcing political rights attendant to the social contract. The entire pattern of interlocking rules and customs that disadvantage blacks in social life is explicitly beyond the ken of equal protection claims. *Plessy* built a wall of contractarian rhetoric around equality claims. In *Brown*, equality is expanded by expanding the policeman’s role to enforcing rights that are social in nature. However, the content or scope of this expanded norm is left ambiguous: is the meaning of equality that blacks be treated with “impartiality” or does it mean they should be free from subordination? See David Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. Chi. L. Rev. 935 (1989) (arguing that *Brown* has been weakened by judicial interpretations that require only impartiality). Race, operating through the metaphor of “segregation,” obscures the subordination conception in favor of impartiality norms. The metaphor of segregation renders invisible a meaning of equality that *Plessy* had rhetorically posited as illegitimate. The two approaches are thus strikingly similar.

162. The notion of the Great Chain of Being was succinctly captured by Alexander Pope. Pope wrote:

Plac’d on the isthmus of a middle state,
A Being darkly wise, and rudely great:
With too much knowledge for the Sceptic side
The idea of the Great Chain, which can be traced back at least to classical Greece, is that creation is hierarchical and "commenced with inanimate things and ranged upwards through the lowliest forms of life, through the more intelligent animals until it reached man himself; but it did not stop with man, for it continued upward through the myriad ranks of heavenly creatures until it reached its pinnacle in God." Although the Chain of Being was by definition hierarchical, this cosmetology did not address racial difference. Rather, its original function was to organize the natural (Christian) world and to map alternative spiritual possibilities—"it served to formulate men's vague sense of the beast within themselves and their capacity for rising above bestiality." What had once served as a means of constructing religious identity would eventually be harnessed as a means of constructing racial identity.

The first conceptual move towards using the Chain to construct racial hierarchies occurred with the introduction of categories of "man" (tentatively by Bernier in 1684, and authoritatively by Linneaus in 1758). Linneas divided men into seven categories: American, European, Asiatic, African, wild men, Monstrosus, and Troglodytes. The categories represented variations of species, or groups of like kind grounded in the assertion of a basic similarity or kinship between human beings. This taxonomy rejected a notion of hierarchy and of the qualitative differences of superiority and inferiority that such a structure implied. It was thus in harmony with both the religious and philosophical traditions of the time. The orthodox Christian view was of a unity of all mankind founded in a belief in monogenesis (the idea that all were descended from Adam and Eve). Similarly, the enlightenment tradition, with its commitment to universal reason and the quality of reason to transform, was fundamentally opposed to a division of men into groups whose qualities were innately fixed.

With too much weakness for the Stoic's pride,
He hangs between; in doubt to act, or rest:
In doubt to deem himself a God, or Beast.

ALEXANDER POPE, AN ESSAY ON MAN (1732-34), reprinted in JORDAN, supra note 48, at 219.

163. JORDAN, supra note 48, at 219.
164. Id. at 220.
165. Id. at 217-18 (quoting Bernier).
166. Linneas's Systema Naturae introduced his taxonomy of "man" and his idea of fixity of species (his main theoretical contribution to natural history). See GOSSETT, supra note 49, at 35; HORSMAN, supra note 45, at 46-52.
167. Linneas subdivided the species Sapiens, attributing physical and emotional characteristics to each category. See JORDAN, supra note 48, at 222-23. Johann Friedrich Blumenbach, perhaps the founder of modern anthropology, reduced these categories to five: American, Ethiopian, Caucasian, Malay, and Mongolian. Id. at 223.
168. It was the hope and belief of the enlightenment that, at birth, the mind of a child was a tabula rasa, an empty receptacle. Education and environment could make any child into a completely reasonable and intelligent being. The idea of innate characteristics were more
Orthodox scholars, like George Buffon,169 Dr. John Hunter,170 and Samuel Stanhope Smith171 recognized differences in physiognomy—for example, that Africans were darker than Europeans—but believed that this darkness was due to their proximity to the hot sun and that, if those conditions were taken away, the color of Africans would return to “normal.” Although the analysis of these orthodox thinkers reflected their ethnocentric perspective, they rejected as radical and unenlightened the idea of race as a category of essential difference.172

However, Linnaeus’s originally innocent notion that men could be differentiated by traits was later combined with elements of the Great Chain idea to subvert these enlightenment and Christian understandings and to inscribe a prototypical, essentialist notion of race into the discourse of philosophy and science. The foundation for this new framework of race was laid by writers such as Voltaire,173 Lord Kames,174 and Dr. Charles White.175 These writers argued that blacks were either a separate creation or a separate species.

Later, men of science attempted to buttress this claim. In the 1770s, Dutch anatomist Peter Camper found in his collection of skulls a “facial

akin to discredited Calvinist ideas of predestination. If the mind of man should prove not to be a tabula rasa at the time of birth, then hopes for universal progress would receive a crushing blow.

169. See Gossett, supra note 49, at 36 (stating that race is an environmental product that would “persist [only] as long as the milieu remains and disappears when the milieu is changed”) (quoting George Buffon). Thus, although Buffon posited white skin as the norm, he believed that after several generations in a European climate blacks would resume their “normal” skin color. Id.

170. See id. at 37 (attempting to improve upon Buffon’s environmental explanation of color and recognizing that Europeans did not become dark after several generations in the tropics, Hunter argued that one must take into account varying modes of life (quoting Dr. John Hunter)).

171. See Gossett, supra note 49, at 39-40 (discussing an essay written in 1787 by Reverend Samuel Stanhope Smith that referred to dark skin as a “universal freckle” caused by a combination of sun, elevation, and soil).

172. See id. at 34 (discussing Liebnitz’s objection to the initial move by Bernier to divide human populations into races). “I recollect reading somewhere, though I cannot find the passage that a certain traveller had divided man into certain tribes, races or classes. He made one special race of the Lapps or Samoyedes, another of the Chinese and their neighbors, another of the Caffres and Hottentots.” Id. (quoting Liebnitz).

173. See id. at 45 (discussing Voltaire’s writings on race). Voltaire wrote:

The negro race is a species of men as different from ours as the breed of spaniels is from that of greyhounds. . . . If their understanding is not of a different nature from ours, it is at least greatly inferior. They are not capable of any great application or association of ideas, and seem formed neither for the advantages nor the abuses of philosophy.


174. See generally Lord Kames, Sketches of the History of Man 72-84 (1788) (arguing that different races are different species based on perceived radical differences in character).

175. See generally Charles White, An Account of the Regular Gradation of Man (1799).
angle” that revealed a gradation of similarity starting from apes and continuing through Negroes to Europeans. By the 1830s, Camper's foundation (linked with the Linnean-Blumenbachian racial hierarchy) led to explicit “scientific” claims that blacks were innately inferior to whites. Phrenology—roughly defined as the study of skull size—was used by nineteenth century scientists to show that blacks had smaller brains and that small brains were necessarily inferior in “basic organization.” As Horsman explains:

The accusation of inferior basic “organization” was typical of the analyses of the phrenologists . . . . In the dark races of man, the anterior and superior portions of the head were depressed. Accordingly, although improvement, and even great improvement, was possible, this would take generations and even centuries.

But as scientists, their work was quintessentially hollow—many of their lectures took place at antiabolitionist rallies where prescientific notions were given a veneer of objectivity. This was science only in form.

Science is an effort to explain the world. The real significance of the work of these “scientists” was as weavers of a new racial myth/narrative with which to mystify the world. They expressly argued that their research proved the existence of an immutable Chain of Being with blacks located

176. See Gossett, supra note 49, at 69-70 (stating that Camper defined “facial angle” as the angle made by the intersection between an imaginary vertical line drawn from the top of the forehead to the bottom of the chin and an imaginary horizontal line at the bottom of the chin). Camper's line was either Orthognathous or Prognathous. Id. at 70. Based on the measurements he took of statues, Camper believed that the ancient Greeks were an ideal Orthognathous group with a facial slope of approximately 100 degrees. Id. He held that Blacks, in terms of facial angle, were the opposite and thus were the most Prognathous of races because their facial angle was 60 to 70 degrees. Id.

177. See Charles Caldwell, Thoughts on the Original Unity of the Human Race (2d ed. 1852) (arguing that findings of scientific research were incompatible with the ideas that God created only one species of man, that blacks were a different species of man, and that, as a species, blacks were endowed in an inferior way); J.H. Guenebault, Natural History of the Negro Race 29, 30, 32-36 (George H. Calvert ed., 1832) (stating that “[n]o skill or education or control of outward circumstances could ever enlarge to excellence the intellectual capacity of an individual with a brain like that of the [inferior races]”).

178. Horsman, supra note 45, at 121. Another important work in this area was Dr. Samuel Morton’s Crania Americana, which observed that modern skulls from one race were similar to ancient skulls of the same race, but that skulls from different races consistently differed. Fredrickson, supra note 3, at 74. Morton, who also established the world’s largest collection of human skulls, gave a new veneer of scientific authority to the notion of race as a separate species. Morton was joined in the 1840s and 1850s by a renowned Swiss biologist, Louis Agassiz, who was convinced that difference in man was the result of separate creations. Id. They were later joined by Dr. Josiah Nott. In collaboration with Egyptologist George R. Glidson, the group produced a large book entitled Types of Mankind, which marshalled all the available evidence to show the unalterable differences between the races. Id.
on a link below that occupied by whites: "[T]here existed a 'gradation between the two extremes' of human races,... 'until you can fall upon some plan by which seventeen cubic inches of brain can be added to that of the Hottentot... you cannot add to his intellect, or his capacity for civilization.""\textsuperscript{179} In this new narrative, the notion of a Great Chain of Being is transformed from an image of polarities within the soul to an image of supposed racial polarities in the social world: it is transformed from a religious metaphor into a metaphor for the hierarchy of race. While co-opting the Christian image of a Chain of Being, the "scientists" disagreed with Christian orthodoxy: they held that blacks and whites were different species, thus challenging biblical notions of a single creation.

The Chain of Being as a narrative parallels the earlier narratives (The Story of the Slave, the African Travel Story, and the Curse of Ham) in its opposition of black and white, in its hierarchy of white over black, and in the absolute difference posited between the two antinomies. It is the same story, but with variations mediated by shifting the balance of authority from religion to science in American life.

\textit{The Chain of Being and Racial Darwinism.} As the end of chattel slavery and the dawn of the golden age of capitalism approached, the narrative shifted again: the Chain of Being was absorbed by Darwinism. In 1859, Charles Darwin published \textit{On the Origin of Species},\textsuperscript{180} which propounded the theory that there existed a framework of regularity and order of the organic world comparable to that of physics or chemistry in the inorganic sphere. Darwin's theory holds that the different traits of particular species "evolve" through a process of natural selection. "Wedges" of predators, food supply, and climate converge to separate out less adaptive organisms, and hence less adaptive traits. There is a rigid determinism that perceives this framework of the natural world as the product of conflict and competition among different forms of life.

Darwinism as theory was inconsistent with the ideas of the earlier ethnographers. While Morton and Nott held that the races represented different species, Darwin held that "man" was one species whose traits were in a process of evolution. Darwin broke the theoretical bottle in which an earlier group of thinkers had attempted to place the modern idea of race. But his philosophy did not end the narrative of race; rather, it put it in a new bottle. Darwin's ideas had a certain discursive duality: they affected the scientific discourse in a way to make phrenology obsolete, but they also affected the cultural discourse in a way to make the image of race more reflective of the world view of the later nineteenth century.

\textsuperscript{179} \textbf{William R. Stanton, The Leopard's Spots} 182 (1960).
\textsuperscript{180} \textbf{Charles Darwin, On the Origin of Species} (1859).
Natural Darwinism led to its counterpart, Social Darwinism, a collection of ideas that drew upon Darwinian determinism to order the social world as mechanically as Darwin had ordered nature. The Social Darwinist conception of race (“Racial Darwinism”) was that races represented different levels of evolutionary development. As Herbert Spencer, one of the leading proponents of Social Darwinism, stated:

How races differ in respect of the more or less involved structures of their minds will best be understood on recalling that unlikeness between the juvenile mind and the adult mind among ourselves, which so well typifies the unlikeness between the minds of savage and civilized.¹⁸¹

As Social Darwinism held that “survival is to the fittest,” its corollary in Racial Darwinism was captured in the idea of survival of the fittest race—a notion that served to naturalize the subordination of blacks.¹⁸²

A corollary of the idea that blacks were naturally and innately laggards in the “social struggle” was the need for a strong disciplinary regime to protect the fittest from the unfit, to restrain the instinctive impulses of blacks to usurp the social position of whites.¹⁸³ Above all, discipline and punishment were employed to maintain the existing social stability neces-

¹⁸¹. GOSSETT, supra note 49, at 149 (quoting Herbert Spencer).
¹⁸². As Thomas Huxley, a continental Social Darwinist explained:

[W]hatever the position of stable equilibrium into which the laws of social gravitation may bring the negro, all responsibility for the result will henceforward lie between Nature and him. The white man may wash his hands of it, and the Caucasian conscience be void of reproach for evermore.

FREDRICKSON, supra note 3, at 235-36 (quoting THOMAS H. HUXLEY, Emancipation—Black and White [1965], in SCIENCE AND EDUCATION 66-67 (1896)).

¹⁸³. See generally FOUGAULT, supra note 22. I use “disciplinary regime” in a Foucauldian sense to denote a regime in which punishment is used not so much to prevent “bad” behavior as to appropriate black bodies as a medium to express and to create the illusion that white domination is natural, or at least inevitable.

The emblem of this disciplinary regime was the lynching of blacks who transgressed white supremacist rules. From 1899 until 1922, over 3,436 people were lynched, most of them “negroes.” JOHN H. FRANKLIN, FROM SLAVERY TO FREEDOM 431 (1966). The intimate interconnection between violence and power is captured best in a poem written by David Diop:

The white man killed my father
Because my father was proud
The white man raped my mother
Because my mother was beautiful
The white man wore out my brother in the hot sun on the roads
Because my brother was strong
Then the white man came to me
His hands red with blood
Spat his contempt into my black face
Out of his tyrant’s voice:
Hey boy, a basin, a towel, water.
sary for the protection of the white woman. Her sex was less a source of forbidden carnal knowledge than a source of forbidden transformation and power for the inferior race. As Lester Ward warned:

This is the . . . imperious voice of nature commanding him at the risk of “lynch law” to raise his race to a little higher level. . . . Although the enraged citizens who pursue, capture, and “lynch” the offender do not know any more than their victim that they are impelled to do so by the biological law of race preservation, still it is this unconscious imperative, far more than the supposed sense of outraged decency, that impells them to the performance of a much greater and more savage “crime” than the poor wretch has committed.\textsuperscript{184}

The subordination of blacks flowed not from slavery, segregation, nor any other historical experience; the fault was in their gene pool.

The Social Darwinist notion to connected two dialectically related sources of meaning for race: the notion of race as physiognomy (black skin, thick lips, etc.) and the notion of genetic inheritance or lineage. This Darwinist view of the natural world was the linchpin that linked the metaphors of race as color and as blood. In addition, the fatalistic premises of Darwinism led unerringly to speculation that blacks would soon be extinct.\textsuperscript{185}

Darwinism ultimately becomes the milieu in which the old symbiology of race is reinterpreted and reinscribed.\textsuperscript{186} In Darwinism, whites again con-


185. Darwin explained in his work \textit{The Descent of Man} that “[a]t some future period, not very distant as measured by centuries, the civilized races of man will almost certainly exterminate and replace the savage races throughout the world.” \textit{See FREDRICKSON, supra} note 3, at 230 (quoting Darwin). Social Darwinism’s gospel of doom for blacks was, however, most colorfully stated by Dr. Edward Gilliam, who predicted that blacks would not become extinct, but rather would revolt through their strength in numbers. Gilliam wrote:

“This dark, swelling, muttering mass along the social horizon, gathering strength with education, and ambitious to rise, will grow increasingly restless and sullen under repression, until at length, conscious through numbers of superior power, it will assert power destructively, and, bursting forth like an angry furious crowd, avenge in tumult and disorder, the social laws broken against them.”

\textit{Id.} at 240 (quoting Dr. Edward Gilliam). Gilliam believed that the only way to “avert such a catastrophe” was to “embark immediately on a massive program to colonize blacks abroad.” \textit{Id.}

186. As a narrative, Racial Darwinism represents, in Edward Said’s words, a “romantic regeneration” of the notion of race. Said explains:

[There is] a conspicuous romantic tendency, after the rationalism and decorum of the enlightenment . . . [to revert] to the stark drama and suprarational mysteries of the Christian story and doctrines and to the violent conflicts and abrupt reversals of the Christian inner life, turning on the extremes of destruction and creation, hell and heaven, exile and reunion, death and rebirth, dejection and joy, paradise lost
front blacks in a manner similar to that seen in the religious narrative in which Ham is punished for seeking sexual knowledge to gain power, in the African Travel Story in which creatures of instinct hostile to social order must be dominated, and in the Story of the Slave in which bodies without minds must be controlled, dominated, and subdued. This cultural undercurrent towards Racial Darwinism is increasingly apparent in modern-day constitutional jurisprudence.

_Racial Darwinism and Equal Protection Jurisprudence._ There is a distinct Racial Darwinist strain in recent Equal Protection Clause doctrine. The great office of Racial Darwinism is to serve as a legitimating narrative for courts that would reject historical context as a frame of inquiry. The exemplar for this relatively recent legal trend is _Regents of the University of California v. Bakke._

_Bakke_ involved a challenge brought under the Equal Protection Clause to an affirmative action program administered by the University of California Medical School at Davis. At issue was a special admissions program that reserved a set number of seats for blacks, Asians, Chicanos, and American Indians. The question in _Bakke_ was whether race-conscious remedial measures enacted by state institutions were constitutionally permissible and, if so, whether the measures could utilize racial quotas.

In raising this question, _Bakke_ gave voice to the smoldering resentment and anger felt by many whites due to the social changes of the liberal era (which I trace to 1954 and _Brown)._ _Bakke_ had translated this racial hostility into a formal attack on the citadel of values and assumptions shared by...

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and regained . . . But since they lived, inescapably, after the enlightenment, Romantic writers revived these ancient matters with a difference: they undertook to save the overview of human history and destiny, the existential paradigms, and the cardinal values of their religious heritage, by reconstituting them in a way that would make them intellectually acceptable, as well as emotionally pertinent, for the time being.


187. See supra Part II.c. 1.-2.
189. Id. at 269.
190. Id. at 274.
191. The case arose out of a bifurcation of the admissions procedure into two tracks: one referred to as “the regular admissions program,” and one called “the special admissions program.” Id. at 273-76. The regular admission candidates were required to have at least a 2.5 grade point average, but this requirement was waived for the special admission candidates. Id. at 275. The special admission candidates did not compete with the candidates for regular admission; they competed only among themselves. Id. at 277-78. Although the “special admissions” program was nominally designed to increase the number of generally “disadvantaged students,” only blacks, Asians, and Chicanos had been admitted since the program’s inception. No “disadvantaged” white applicants had been admitted under the program. On the other hand, “For the class entering in 1973, the total number of special applicants was 297, of whom 73 were white. In 1974, 628 persons applied to the special committee, of whom 172 were white.” Id. at 275 n.5.
blacks and their liberal allies. In doctrinal terms, the constitutional question was whether the Equal Protection Clause required a “colorblind” approach. In other words, should strict scrutiny be mechanically triggered whenever race is used to classify or exclude, or should a different rule be applied when race-conscious measures are “benign?”

But this doctrinal question was merely a setting in which political struggle was taking place. Beyond the superficial neutrality of the constitutional question was a politically motivated effort to deprive minorities and their allies not merely of a medical school’s affirmative action program, but also of its vocabulary; the implicit strategy was to redefine affirmative action—from “benign program” to “reverse discrimination.” Worse, the Bakke decision reconfigured the concept of equal protection itself: the notion of equal protection, which since Brown was perceived as a counter-majoritarian device, was reconceived as a majoritarian tool.

The linchpin for the worldview of affirmative action as benign and of equal protection as counter-majoritarian was an historical view of blacks as unique because of their experiences of subjugation and exclusion. It was precisely this historically grounded argument that led the Supreme Court to authorize strict scrutiny in the famous “footnote four.” This historically-grounded argument, which undergirded Brown and its prodigy, was referred to by Justice Powell in Bakke as a claim of “societal discrimination.” Powell deploys a number of strategies in dealing with this historical claim of blacks as special victims, including: (1) an appeal to dehistoricizing, text-based interpretation; and (2) an appeal to “neutral principles.”

192. Id. at 287-91, 300-05.
193. United States v. Carolene Products, Co., 304 U.S. 144, 152 n.4 (1938) (noting that “discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”).
195. “The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.” Id. at 289-90.
196. “The white majority itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination. . . . There is no principled basis for deciding which groups would merit ‘heightened judicial solicitude’ and which would not.” Id. at 295. This idea is also present in Wygant, in which Powell expanded on his idea that societal discrimination is incompatible with his notion of “equality.” Powell wrote:

Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy . . . . No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.

All this brings me to my point. The Supreme Court's arguments spring forth like spokes from a wheel, with a Racial Darwinist conception of social life as its hub. When Powell says that other groups have also been victims—that victimhood alone is no justification for preferential treatment—he relies upon the assumption that a group can overcome victimhood without such treatment. This assumption is deeply embedded in the story of the "melting pot" (taught as American history) of how the Irish, the Poles, and the Greeks survived and came to form one nation. Thus, the Racial Darwinist asks: "Since we know from the American story that victimhood can be overcome without preferential treatment, why have not blacks overcome already? Why, so late in the day, do they ask for preferential treatment that no other group has had?" More specifically, the Darwinist asks: "What right do blacks have to a different set of admission standards than other groups who have also had societal problems?" The only coherent answer, if we accept Powell's assumptions about all ethnic experiences being relative, is that blacks can also "make it" but are too lazy to do so; consequently, they are undeserving mendicants who are not behaving according to the self-reliant American spirit and are of weaker "stuff."

At the edges or margins of Powell's opinion, one can make out a kind of pentimento\textsuperscript{197} of the images painted earlier by Dr. Gilliam and Lester F. Ward. Powell's dismissal in Bakke of the powerful historical claims of blacks relies on the ranking of blacks at a rung lower than other ethnic groups in self-reliance and character, if not in ability. Traces of the narrative of The Great Chain exist in Bakke.

**III. LAW THROUGH THE EYE/I OF THE OTHER: RACIAL IDENTITY AS A LENS**

We wear the mask that grins and lies, 
It hides our cheeks and shades our eyes, 
This debt we pay to human guile, 
With torn and bleeding hearts we smile; 
And mouth with myriad subtleties.\textsuperscript{198}

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  \item[197.] Hellman defines pentimento as follows:
  Old paint on a canvas, as it ages, becomes transparent. When that happens, it is sometimes possible to see original lines: a tree will show through a woman's dress, a child will make way for a dog, a large boat will no longer be in open sea. This is called "pentimento" because the painter "repented" and changed her mind. Perhaps it is correct to say that the old conception replaced by a later choice is a way of seeing and then seeing again . . . to see what was there . . . once, what is there . . . now.
\end{itemize}
\end{footnotesize}
Race is a mask that grins and lies. Its assumptions distort our images of ourselves and close off our vision of the world. Like the doll-wood mask of African ritual, its cramped confines become the limits of our vision. The black mask envelops us in a sealed hemisphere where we may observe only the darkness of the masks own interiority. The white mask becomes a lens through which the eye/I may visualize itself at the center of the universe, hermetically sealed. The mask—black or white—becomes a massive screen between self and other. The two masks represent a singular phenomenon—the radical falsification of the self. The mask of race does not merely divide between self and other; it divides internally. We become two people, inhabiting radically different worlds. One of us is a child of the enlightenment: an autonomous, individual actor with discrete tastes and values. Our other person is an undifferentiated part of a whole. We live as a fragmented entity, with two faces, two lives, and two identities: one individual and one racial.

The white minstrels of the nineteenth century wore a mask when they painted themselves with black greasepaint symbolic of racial identity. This racial identification permitted and prompted the acting out of fantasies, referring equally to the imagined caricatures of blacks they sought to represent and to the inner conflict about their own powerlessness in the changing industrial order. This process of both racial identification and the acting out of internal instability occurred as parody in the minstrel shows and continues as an unconscious ongoing drama in contemporary Ameri-
DARKNESS MADE VISIBLE

By accepting the posts inscribed with the historical narrative of black and white to which we have been tied, we engage in the psychological equivalent of the putting on of greasepaint. The categories of racial identity become the massive mask or screen that stands between the judge or jury and the black subject.

This problematic of racial identity accounts for a number of cases that the conventional problematic of racism does not. The conventional problematic of "racism" conceives of the difficulty as a problem of ethos—in the moral sphere.\textsuperscript{202} The problematic of race locates it as a problem of worldview, structured by historical narratives that transform our picture of experience. Racism understands the problem in terms of moral opposites: in good/bad and like/dislike distinctions. The problematic of race understands the problem as a cognitive difficulty flowing from positional status in which notions of inside versus outside and center versus periphery structure both empathy and perception.

Race inscribes its meaning through the ordinary rituals of adjudication. Historically, race was an idea whose significance was worked out on the bodies of blacks, particularly black slaves. Uncannily, the significance of race is particularly apparent today in cases in which black men have been brutalized or killed. In our modern context, the body\textsuperscript{203} remains the medium in which the significance of race is most dramatically seen in law. I trace this to a cognitive problem—an almost systematic distortion of thinking and perception that is not random, but follows the pattern (or a variation of the pattern) of historical narrative. It is as though the judge or jury is looking at the record through a filter constituted by the symbiology, concepts, and imagery of race. Rather than reconstruct what happened and search for truth within the welter of statements and circumstances presented in the legal record, their search is conducted among the ruins of our racial mythology. It is as if, when race is involved, we substitute the notion of an essentialistic model of truth as internal to race itself for a notion of truth as empirical. A few examples will illuminate this point.

A. A DARK NIGHT OF THE SOUL

When a white man faces a black man, especially if the black man is helpless, terrible things are often revealed.\textsuperscript{204}

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  \item \textsuperscript{202} For a classic expression of this conception, see MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 28 (1964) (speaking of racial problems as moral and spiritual problems); cf. ANTHONY APPIAH, IN MY FATHER'S HOUSE (1992) (speaking of racialism or the problem of race as implicit in the claim of racism).
  \item \textsuperscript{203} See ELAINE SCARRY, THE BODY IN PAIN 27-59 (1985) (writing about how the "victim" of torture is or is made to appear inscribed by pain; pain's incontestable reality is made to appear as evidence of the incontestability of the agency that inflicts it).
  \item \textsuperscript{204} JAMES BALDWIN, THE PRICE OF THE TICKET 355 (1985).
\end{itemize}
At 12:47 a.m., California Highway Patrol officers are in pursuit of a white Hyundai for failing to yield. The driver is Rodney Glenn King—a black, unemployed construction worker—who will later say he fled from police because he felt the traffic infraction would interfere with his parole. After several units of the Los Angeles Police Department (LAPD) take up chase, Rodney King’s vehicle is finally stopped in full view of the Mountainback apartment complex. There, he finds himself surrounded by over twenty armed LAPD officers, several of whom proceed to “beat him half to death” while he is laying defenseless on the ground. King is hit between fifty-three and fifty-six times by officers wielding their batons. The bones holding his eye in its right socket are broken, and he suffers broken bones at the base of his skull. In addition to clubbing him wildly, one officer stomps on his head.

At first blush, the story of King’s midnight beating sounds a familiar note. Brutality against blacks by police officers in urban areas is generally not exposed to the light of day. It generally occurs in darkness: in neighborhoods and settings where the only witness is the victim or his peers, who are also victims of socioeconomic disadvantage. Within the shadow of race and class and attendant matters such as criminal records, a black person becomes invisible. Miraculously, King found visibility through a black and white videotape that shows, in grisly detail, King—prone and unarmed—being beaten by at least three officers. There is no apparent resistance by King while ten or more officers stand around. After the beating, the following transmissions occur over police computers:

209. See Seth Mydans, Los Angeles Policemen Acquitted in Taped Beating, N.Y. TIMES, Apr. 30, 1992, at A1 (stating that “two dozen officers were present”).
213. Id.
214. The failure of the legal system to recognize that rights are being violated reflects this invisibility. As one journalist has noted: “Typically police get fired for using cocaine, suspended for a month for using marijuana, and reprimanded for showing disrespect to a citizen. But the average penalty for assaulting a citizen is literally ‘nothing.’” Ted Gest, Why Brutality Persists: There Would Be Much Less of a Problem if Bad Cops Weren’t Coddled, U.S. NEWS & WORLD REP., Apr. 1, 1991, at 24, 26. To the extent there is a gap in justice, blacks are more likely the ones to suffer.
From Powell and Wind to Foot Patrol Officers: “Oops.”
From Foot Patrol Officers to Powell and Wind: “Oops, what?”
Powell and Wind to Foot Patrol Officers: “I haven’t beaten anyone this bad in a long time.”
From Sergeant Stacy Koon to Watch Commander: “U (Unit) just had a big-time use of force. Tased and beat the subject of a CHP pursuit big time.”
From Watch Commander to Sergeant Stacy Koon: “Oh well... I’m sure the lizard didn’t deserve it.”

At the hospital, Officer Powell jokes with King: “Don’t you remember the hardball game? We hit quite a few home runs.” And before the King incident, Powell referred to a previous police encounter with blacks in which he (Powell) was involved as something straight out of “Gorillas in the Mist.”

Thus far, all this fits neatly within the simple, conventional notion of racism, a problem of “sick minds.” Perhaps. However, what happens at trial, I suggest, is more complex. Officers Tim Wind, Laurence Powell, Stacey Koon, and Theodore Briseno were charged, inter alia, with assault with a deadly weapon. They were tried before a jury of ten whites, one Asian, and one nonblack Hispanic.

At trial, there was no claim that the officers acted in self-defense, no claim that King was armed, and no denial of participation. The video tape and all of the computer messages containing racial slurs referring to gorillas in the mist and lizards, were played and entered as exhibits in the record.

The officers told a story dramatically different from what appeared on the film. They began by claiming that the video did not film the entire event. They said that King, in a desperate attempt to escape the California Highway Patrol, had caused a traffic accident and that when he finally was blocked and made to stop, he got out of the car and shook his behind at the police officers. The officers also characterized the scene on the tape

219. All four officers were charged with assault with a deadly weapon and with unnecessarily beating a suspect under color of authority. Officers Powell and Koon were also charged with filing a false report. Powell v. Supreme Court of L.A. County, 232 Cal. App. 3d 785, 789 (1991).
220. Mydans, supra note 209, at A1, D22.
222. Richard A. Serrano, CHP Officer Describes Chase, Beating of King, L.A. TIMES, Mar. 7, 1992, at A1. The struggle between King and the police takes place on a field of pain
in a way to suggest a struggle. They claimed that King refused to be handcuffed, acted oblivious to blows and tasing, charged into police officers, and swung his arms in a wild and hostile manner. They also argued that their blows were "jabs." Officer Briseno, who was observed by witnesses and was captured by the film stomping King's head, testified he was only trying to get King to stay down. The police embellished a story of embattled police handling an unruly suspect with statements from a defense witness that King was in a "trance-like" state, and that he was on PCP.

The story of the police was contradicted—in some instances by the film itself and in other instances by eyewitnesses, including police officers:

- King caused accident during chase. CHP officer Melanie Singer, said no.
- King was on PCP. Dr. Mancia who treated King said no.
- King charged into over 20 armed policemen. Eyewitnesses consistently said no.
- King swung his arms wildly and in hostile manner. According to L.A. Times reporter who saw tape, King moves his arms "feebly."

The question before the jury was simply whether the force used to subdue Rodney King, the fifty-six baton blows (many to the head), the stomping on King's neck, the tasing while he was unarmed (most of it... and violence and a field of symbolic expression. That is, the violence against King is intended as a particular representation of something more specific than white supremacy. It seems to stand for something like white manhood. If King was a threat to the police officers, I suggest he became a threat at the point at which white maleness is constructed, a juncture at which race and sex intersect. Under this view, King's shaking his behind at the police officers was qualitatively the same as shaking his penis at them. As it is traditionally constructed, maleness is concerned with domination and power, and depends on hierarchy for coherence. The notion of white maleness depends for its coherence not only upon domination vis-à-vis women, but also vis-à-vis blacks. King's wagging of his body represented a negation of that hierarchy and, therefore, his beating was no doubt designed to represent a restoration of the "proper order."

228. Id.
while he was prone on the ground) was reasonable. The jury, however, found none of the officers guilty. Three of the policemen were acquitted outright and the jury hung on the others.

For the jury to find that the force used was reasonable, the jury had to see something different from what the witnesses saw at Mountainback, different from what the reporters saw who viewed the film, different from what I saw. One juror, for example, said that he saw clearly that some of the blows did not connect. I submit that what they saw, at a deep cognitive level, was race.

However contradicted, the story told by Sergeant Koon—of a black man who was in a trance, immune to electric shock, unfazed by blows, who kept fighting, charging unarmed into a crowd of LAPD—was the old story of blacks as beasts or animals. The initial corollary is that black men like Rodney King are particularly dangerous because they are semi-animals, dramatically less controlled, less rational, and less predictable than white men. Moreover, the scene of the beating—across the street from a place where drugs are sold—is, in a real sense, a jungle (albeit an urban version). This, at a cognitive level, argues for a different way of looking at things. A second corollary, which seems to repose within the penumbra of the historical narratives about blacks as Others, is the idea of the black man as anticitizen, as the archetypical threat to law and order. Rodney King, by failing to yield, causes car accidents and endangers life instead of submitting to arrest. In this narrative sequence, the defendants used these corollaries to create its theme: the problem of white police officers faced with an alien “black” consciousness that does not partake of the notions of responsibility accepted by whites. This theme was applied to Rodney King, who is perceived by all of the interpretive communities as a representation of urban blacks and whose status as an anticitizen is buttressed by his status as an unemployed and uneducated parolee. But this implicit dialogue of citizenship was equally important to the minority community, who saw the trial as a potential story about the promise made by the Fourteenth Amendment during the Reconstruction Era and remade within the framework of the panoply of state and federal laws that were passed over the last thirty years guaranteeing equal treatment of blacks—the “second reconstruction.” The unconscious image of black identity as somehow in opposition to the citizenship idea—the black as anticitizen—became the counterstory to the narrative about equal citizenship that minorities and many others would have liked to tell. This same image of black identity worked as a distorting prism, powerfully filtering how the jury saw the film.

231. Id.
The jury (unless they were out and out bigots, which seems too simple) simply revised what they "saw" to fit the narrative they already knew, a story that resonates deep within our social history. None of the racial slurs, none of the contradictions in the testimony, and none of the graphic brutality of the video really mattered to the jurors. It was the race story that mattered to the jurors. The jury merely chose the essentialist knowledge of the story over the lived experience-as-knowledge of the film. This phenomenon has been referred to as a function of the "mythic mentality."

In the mythic mentality,

the nuances of significance and value which knowledge creates in its concept of the object, which enable it to distinguish different spheres of objects and to draw a line between the world of truth and the world of appearance, are utterly lacking . . . . Instead of the dialectical movement of thought, in which every given particular is linked with other particulars in a series and thus ultimately subordinated to a general law and process, we have here a mere subjection to the impression itself and its momentary "presence."233

The will to knowledge,234 like a rushing river, is drawn down through the

232. Adjudication or factfinding is in a real sense a form of interpretation. This is particularly true in a trial in which the task of the fact finder is to view a film and draw conclusions about the "reasonableness" of force. The jurors in the Rodney King trial were asked to interpret the film and to determine the legal significance of events unfolding on the screen. It follows that interpretation is not a passive process, but "‘a constructive act,’ not merely reflecting but forming reality: ‘the individual apprehends the resources of reality (including language . . . ) as he relates to them in such a way that they replicate his identity.’" STEVEN MAILLOUX, INTERPRETIVE CONVENTIONS 24 (1982) (quoting Norman N. Holland, The New Paradigm: Subjective or Transactive?, in NEW LITERARY HISTORY 7, 343 (1976)). As such, "interpretation is a function of identity." Id.

In interpreting, the interpreter tends to recreate himself. Norman N. Holland, Transactive Criticism: Recreation Through Identity, 18 CRITICISM 334, 340 (1976) (suggesting that “[w]e seem to be caught in a circular argument, but it is not the argument which is circular—it is the human condition in which we cannot extricate an ‘objective’ reality from our ‘subjective’ perception of it”); see also Jones, supra note 8, at 391 (discussing the nexus between identity and interpretation in the context of antidiscrimination law).


234. Nietzsche refers to this as an aspect of the "will to power" in which our desire to affirm ourselves mediates between the world as it is and our perceptions. In this phenomenology about how we know and how we perceive, Nietzsche speaks of affirming the survival of the physical self as critical. "It is improbable that our ‘knowledge’ should extend further than is strictly necessary . . . ." FRIEDRICH WILHELM NIETZSCHE, THE WILL TO POWER 272 (Walter Kaufman ed. & R.J. Hollingdale trans., 1968). For Nietzsche, it is the survival of the physical self—the arbiter of knowledge—that is most important. This analysis would also seem to be applicable to the survival of the racial self because the "will to power" understands thinking as less about what is true than about what fits into a set "schema." "‘Thinking’ in primitive conditions . . . . is the crystallization of forms . . . . In our thought, the essential feature is fitting new material into old schemas . . . making equal what is new." Id. at 273.
primitivism of racial symbols, from the experientialist conceptions of truth down a more ancient path. We leave a surface legal world of rationality and empiricism, and descend to a subterranean world of racial essentialism and mythic models of knowledge.\textsuperscript{235}

From this perspective, the filmed experience cannot penetrate the darkness. How could the film help us to know what happens in the ghetto anyway? Like Africa, the ghetto is a place beyond the experience of whites and, hence, a place of darkness. Who knows what happened? Who knows what happens? King's blackness blended with both the blackness of the setting and the black and white of the video to become a screen upon which the image of race and racial fears could be projected.

The source of the projection would seem to be the problematic of the racial self: the jurors identified with the white policemen who were “like them.” An admission of racial barbarism on the part of the officers would be an admission of their own racial barbarism and, as such, self-negating. Like Joseph Conrad's Kurtz,\textsuperscript{236} the jury flees from “the horror” into the primitive narrative fantasies of the colonial regime.

B. THE MANICHIEAN WORLD

Nightmare
That's what I am
America's Nightmare
I am what you made me
The hate and evil that you gave me . . . \textsuperscript{237}

According to the Transit Authority Police, “[a] middle-aged man with a silver-colored pistol strode into a subway car rolling through lower Manhattan yesterday and shot four young men he had apparently singled out from among the passengers.”\textsuperscript{238} In this second story, life imitated film: the shootings by Bernard Goetz—a thirty-nine year old, straitlaced\textsuperscript{239} white man—appeared to parallel the ritualized violence of the protagonist in

\textsuperscript{235} Paraphrasing Franz Boas, it would seem that mythological worlds were built up around race only to be shattered—but new worlds were built from these fragments. See Franz Boas, \textit{Introduction} to James A. Teit, \textit{Traditions of the Thompson River Indians of British Columbia} 18 (Memoirs of the American Folklore Society, 1898).

\textsuperscript{236} Kurtz is a figure who resides at the “inner station” in the “Congo.” Alone in this “dark” place, Kurtz dies muttering about “the horror.” Joseph Conrad, \textit{The Heart of Darkness}, in \textit{Tales of Land and Sea} 33 (1953). According to the orthodox interpretation, Kurtz represents the deterioration of the mind from solitude and isolation. However, the imagery speaks, even if only unconsciously, of fantasies of Africa not merely as a land of dark people, but as a place of darkness that is the moral antithesis of Europe. This demonizing of Africa and Africans is a projection of the evil of colonialism itself.


\textsuperscript{239} Goetz in many ways is a Babbitt-like character. See generally Sinclair Lewis,
Death Wish, who walked the streets hunting for “criminals” to execute. Witnesses and police on the scene stated that Goetz pursued the men from car to car and shot each of the four “methodically”—shooting two of his victims in the back. Goetz would later confess on videotape that he calmly drew a pistol from his belt and shot at each of the four teenagers. As Goetz himself stated, he shot them while they were running away: “[T]hey trapped themselves. The two from left to right, they had nowhere to go. . . . The two on my left, they tried to run through the crowd and of course they had nowhere to run, because the crowd would stop them and I . . . got em . . . .” When he discovered that the fourth man, cowering on a bench, was not bleeding, he said, “You seem to be alright, here’s another.” In his confession, Goetz stated, “I know this sounds horrible, but my intention was to murder them, to hurt them, to make them suffer as much as possible.” This gratuitous gunplay against four unarmed teenagers was referred to the morning after as “one of the worst crimes of the year.” Yet, immediately after the shootings, the gunman clearly perceived himself as a hero. He helped frightened women off the floor and held a conversation with the conductor before jumping from the train and fleeing “in the dark tunnel.”

Goetz was later indicted and tried for attempted murder and assault. BABBITT (1922). He is straitlaced and respectable-looking, but under his respectable veneer he is essentially hysterical. Goetz’s well-adjusted, neat appearance masked deep trauma apparently associated with a prior mugging.

Like the protagonist in The Bonfire of the Vanities who made a fateful wrong turn, Goetz got off at the wrong subway stop and ended up in Harlem. TOM WOLFE, THE BONFIRE OF THE VANITIES (1987). Goetz ran his own electronic calibration company and was carrying several devices worth thousands of dollars at the time of the mugging. Goetz was attacked by three black men who beat him, stole his equipment, and left him seriously injured with torn cartilage in his ribs. Goetz attempted to prosecute the men, but they counterclaimed, incredibly, that the diminutive Goetz attacked them. Goetz’s case was thrown out, leaving emotional injuries that apparently exceeded his physical ones.

240. See generally DEATH WISH (Paramount Pictures 1974); DEATH WISH II (Paramount Pictures 1982). In the original film, Charles Bronson plays an architect who becomes a self-appointed executioner of criminals after his wife is murdered and his daughter raped by New York muggers. Interestingly, the muggers who rape Bronson’s daughter are cast as blacks. Bronson, who portrays in his role the growing racially adumbrated rage that would produce a Bernard Goetz, described his role in these films not as brutal but as heroic—that of a gardener ridding his garden of snakes.

245. Id. This man, Daryl Cabey, is permanently paralyzed from the waist down. Dennis Hevesi, Goetz Confronts Victims in Court Suit Hearing, N.Y. TIMES, Sept. 27, 1990, at B2.
246. “. . . You Have to Think in a Cold-Blooded Way,” supra note 244, at B6.
248. Id.
249. Marcia Chambers, Goetz is Accused of Trying to Kill Four Men on Subway, N.Y. TIMES, Mar. 28, 1985, at A1.
He pleaded self-defense. Legally, if the facts were as initially described by the transit police, by the witnesses on the scene, and by Bernard Goetz himself in his confession, his defense should fail. As Police Commissioner Benjamin Ward stated: "You don't shoot two people running away from you and say it's self-defense." However clear and grotesquely culpable the actual events appeared, they were later shrouded in the minds of the jury in ambiguity and shadow. For example, there was a ballistics expert who testified with "certainty" that the defendants were standing up when shot, but on cross-examination admitted that they could have been sitting down. Another expert, former medical examiner Dr. Dominick DiMaio, testified that he "believed" the youths were not "in full retreat" when shot because the trajectory of the bullet upon bodily entry was not fully perpendicular to the body of the victim. Although these opinions were rational, they were also quintessentially equivocal. They may not have been running but turning, either looking behind while doing so or not yet running but turning to begin running. In form, the opinions are scientific conclusions because delivered by "experts" whose presence and form of testimony are used to provide at least a veneer of intellectual authority; but in substance (like a postmodern text) the testimony is altogether empty. Their opinions were no more than guesses. This kind of transparent speculation was what the defense put forward as scientific authority. Also, although Goetz never testified, a police detective testified that one of the "youths admitted standing around the white guy." As fleshed out by this "evidence" and the opening and closing statements of the defense attorneys—oration that legally is not evidence—the four youths got up and went over to Goetz to ask for five dollars. Three of the victims had large screwdrivers in their jacket pockets, but Goetz couldn’t have known that. The victims all had criminal records, but Goetz could not have known that either. Goetz

250. Under New York penal law, a person is authorized to use deadly force when she "reasonably believes" that another person is using or is about to use deadly force and that the use of deadly force is necessary to avert the threat. N.Y. PENAL LAW § 35.15 (McKinney 1987); see People v. Goetz, 68 N.Y.2d 96, 96 (1986). This standard contains both objective and subjective elements. The loose totality of circumstances test embodied in the statute, however, would not allow a person to shoot someone who is running away. There would have to be some evidence of menacing. Id.


253. Id.


255. McFadden, supra note 238, at A1.

256. Selwyn Raab, Four Youths Shot by Goetz Faced Criminal Counts, N.Y. TIMES, Jan. 10, 1985, at B3. Mr. Cabey was arrested in the Bronx for armed robbery on October 13, 1984, and was convicted of disorderly conduct in 1982, of possession of stolen property in April
confessed that the shooting was not linked to anything they said. Rather, he based the “threat” on two things: the fact that they were standing there and the fact that they had “shiny” eyes that communicated the threat.\textsuperscript{257} The image the defense literally conjured up for the jury—less from the spotty and inconsistent record than from courtroom theatrics and lawyer oratory—was of four black men standing around Goetz, menacing him with their presence and “looks,” thus prompting him to draw his revolver and shoot them out of fear.

Much was made to hinge upon whether the youths actually stood around Goetz. Although standing around conveys no objective threat, there was the notion that one with street sense would recognize a potential threat when certain types of kids gather around in certain ways. There is much in this particular flight into “common sense”: this arbitrary and subjective reasoning represented the collapse of legal reasoning or legal sense into a sense of fear and the substitution of racial assumptions or fantasies for traditional factual determinations (i.e., Was there a threat? Was there a use of force?). For example, asserting that the youths were standing and “menacing” would require an explanation of how the bullets ended up in the backs of two of the teenagers.\textsuperscript{258} Aside from the self-contradictory and transparently speculative ruminations of “experts” paid by the defense, there was literally no evidence whatsoever to explain the position of the bullets. The only uncontroversial evidence that explains why two of the

\textsuperscript{257} Goetz explained:

“I looked at his face, and, you know, his eyes were shiny . . . . [T]hey wanted to play with me . . . like a cat plays with a mouse before, you know, it’s horrible . . . . [I]t’s the confrontation, that was the threat right there. It was seeing his smile and his eyes lit up and the presence of the other four . . . .”

\textsuperscript{258} Cabey was “shot in the back.” His spinal injury was from a bullet fired while he had his back toward his assailant. This scenario was verified by Goetz in his confession and by two witnesses. See Kirk Johnson, Jury Watches an Angry Goetz on Tape, N.Y. TIMES, May 14, 1987, at B1; Kirk Johnson, Goetz Judge Prohibits Testimony as “Hearsay,” N.Y. TIMES, May 8, 1987, at B3. Allen was shot between his spine and left shoulder blade. Bullets Still in Two Men Shot by Goetz, Dr. Says, CHI. TRIB., May 12, 1987, at C4. The defense conceded Barry Allen was shot in the back when it offered into evidence a jacket belonging to Allen that clearly showed a bullet hole in the back. At first, the defense objected to the jacket saying it had not been properly linked to Allen. Later, defense counsel offered the jacket into evidence because a screwdriver had been found inside, and it wanted to use the screwdriver to suggest that Allen was armed and dangerous. The defense did not vigorously argue that the injuries were not to posterior portions of the upper body; rather, the defense argued that the youths were facing Goetz when the shooting occurred and then turned their bodies at odd angles when Goetz started shooting. In this, the defense substituted hypothesis for factual presentation.
victims were shot in the back was Goetz’s own statement: “[M]y inten-
tion was to murder them.”

Thus, how to get from the physical evidence (from the explicit, detailed
confession) to a finding that Goetz was innocent of attempted murder and
assault was less a matter of what happened and more a matter of who was
involved. Logic and reason were overshadowed by the invocation of histori-
cal narratives of race. The story of actual events, as told by the physical
evidence and by Goetz himself, was transformed by the manichean allegory of an inner story of racial symbols that appeared within the
surface narrative of evidence and facts.

In this narrative, middle class people are cast as innocent victims who
work hard and are preyed upon by shiftless, dirty criminals who come out
of the alleys and dim recesses of the urban sprawl. Meanwhile, the legal
system designed to protect middle class people has become so corrupted
with liberalism—sympathizing with blacks and other minorities—that the
system no longer works. To New Yorkers and other American urban
dwellers, the legal system has become part of the darkness.

Implicit in the story is a familiar representation: the criminals are
stereotyped as black and the innocent victims are stereotyped as white.
The criminal is not merely black, he is the African Other constructed by
the early European travelers: he is uncivilized and part beast. This African
Other was explicitly invoked when Slotnick, Goetz’s lead defense counsel,
called the black victims “savages.” The imagery of a moral Great Chain
of Being was also mobilized when Slotnick alternatively referred to the
victims as “predators” and as a “wolf pack.” The moral of the story is that it is
natural for whites to subdue savages who threaten social order. This is the
same story that was told by white vigilance committees (referred to as
Vigilantes) to spur white farmers to violence against abolitionists and
blacks demanding emancipation. There is a strong notion of a manichean
conflict, a struggle between the forces of light and the forces of darkness:
criminal-blacks are creatures of the urban jungle, forces that come out

259. "... You Have to Think in a Cold-Blooded Way," supra note 244, at B6.
260. Manicheanism is a syncretistic religious dualism that originated in Persia and was
widely adhered to during the Roman empire in the third and fourth centuries A.D. It was
also followed in Central and Eastern Asia for a longer period, teaching—as a saving wisdom
given through Hebrew prophets, Jesus, and Mani—that a cosmic conflict exists between a
good realm of light and an evil realm of darkness. See WEBSTER'S THIRD NEW INTERNA-
TIONAL DICTIONARY 1375 (Phillip Babcock ed., 1971).
261. Kirk Johnson, Everybody Is Edgy as Goetz Trial Opens, N.Y. TIMES, May 3, 1987, § 4,
at 6.
262. Margot Hornblower, Jury Exonerates Goetz in Four Subway Shootings; New Yorker
263. It is interesting to ask in what sense the blacks Goetz shot are criminals. Clearly the
means by which Goetz identified the youths as criminals—or proper targets for execution—
had little to do with any behavior or actus reas, at least in a traditional sense. It had to do
with the cultural values they expressed and exuded. The youths were boisterous, from the
of the shadows to tear down, to "menace" innocent people (read white people). Circle up the wagons when encountering the black "savages," the Willie Hortons, the youths in Goetz's subway car. They must be kept at bay and at gunpoint by decent whites.

Goetz was cast in this drama not merely as someone acting in self-defense, but also as the vanguard of the forces of light who comes to enforce rough justice upon the untamed, dark hordes. Through the economy of manichean allegory, all individuality vanishes, allowing a synchronic and diachronic transference of the anger (felt by Goetz and white society) to black society, as represented by four anonymous, faceless black youths. In this projection of negative personhood, Cabey, Canty, Ramseur, and Allen cease to be victims or youths or even criminals. They are quite simply black and, as such, proper targets for shooting.

The process at work here is neither the individual desire for domination or aversion, nor a problematic of ethos or morality. That would be far too simple. Rather, it is a process of a collective unconscious perception: a paradigm of cognition. The metaphor of race as embedded in historical narrative becomes a lens that polarizes and colors how we see the social world.

This contemporary narrative revises and reinscribes the historical narrative. Its truths are the "truths" of racial myths: truths that do not vary over time or social contexts. The revised historical narrative transforms the experienced facts of a particular case into an invocation of racial essence, racial identity, and racial fear. Racial fear becomes the cognitively distorting medium in which Goetz's confession is silenced, in which physical evidence dissolves, and in which some of our aspiration for community disappears.

C. THE REBIRTH OF BIGGER THOMAS

She was dead and he had killed her.

He was a murderer, a Negro murderer, a black murderer. . . . 264

Bronx, and dressed like street kids. They acted in a manner described as defiant and that many would no doubt characterize as wild and unruly, as if to signify rejection of "the qualities and demands of modern life, a rejection of Americanism itself." Cabey, Canty, Ramseur, and Allen exuded anger from their every word and move, and were the real-life versions of the "Gangstas" touted in the rap music of the streets.

The youths were to Goetz—and to the society for which Goetz was both caricature and emblem—negations of one another: white society with its values, aesthetics, mores, and perspectives is to the black youths as man is to nature, as night is to day. The very presence of the blacks challenged the coherence of Goetz's own white racial and cultural identity. In shooting the youths, there was a symbolic blasting of a part of Goetz's inner life. The expression of an untamed, outlaw self qua black self—so much an alternative, reverse mirror image of Goetz's own self—was integral to the "threat" the youths were perceived to pose.

264. RICHARD WRIGHT, NATIVE SON 75 (1940) (emphasis added).
We are here in the realm of fiction, with which it is said the law has always been connected.265

The Boston Globe reported the story: "A Reading man and his pregnant wife were shot in Roxbury last night by a gunman who forced his way into their car after the couple left Brigham Women's Hospital." The suburban couple had come into the inner city to attend childbirth classes. Carol Stuart was shot in the head and her husband Charles in the abdomen by a gunman who fled with Carol's purse and about one hundred dollars in jewelry. Although Carol died shortly after the incident, her seven month old fetus was delivered by cesarean section. Officers at the highest levels of the police department participated in the telling of the story. The Deputy Superintendent offered an explanation as to why the shooting occurred: "The gunman who robbed the couple apparently thought the driver was a police officer, perhaps because he saw a cellular phone in the car."267 Before he shot the Stuarts, the Deputy Superintendent alleged that the gunman said, "I think you're five-o," a slang term for police.268

In the story, the police go on to describe Charles Stuart as ignoring pain, making a desperate call for help for his wife and himself on his cellular phone. Charles reportedly blacked out, but the phone line remained open. The story of heroic intervention continued with the police dispatcher, resourcefully ordering cars to take turns turning on their sirens. The couple's location is triangulated by matching sounds heard through the phone with the actual location of police cars. The murderer, who fired a thirty-eight caliber round into Carol Stuart's head, was described as a black man with a raspy voice dressed in a jogging suit.

The story combined elements of melodrama and fevered racial vision: it portrayed white heroes as the personification of innocence and a black villain as the personification of evil.269 The police and newspapers painted

266. Peter S. Canellos & Irene Sege, Couple Shot After Leaving Hospital; Baby Delivered, BOSTON GLOBE, Oct. 24, 1989, Metro Sec., at 1. 
267. Id.
268. Id.
269. The black man who supposedly murdered the pregnant Carol Stuart and shot her apparently loving husband is characterized as the extreme instance of a depraved black criminal. He bears an uncanny resemblance to Bigger Thomas, a figure created by Richard Wright in the classic Native Son. See generally Wright, supra note 264. Bigger is a fearful, and in a deep sense innocent, black man who in a moment of fear of being caught in a white woman's bedroom "accidentally" smothers her. He is portrayed and hunted as a sadistic murderer, a negro murderer, a black murderer, becoming the incarnation of racial fears. So is the black man with the raspy voice equally an incarnation of the same fear, not a real person, but a figure who expresses, and allows for the expression of, shared anxiety. He also resembles a character created by the poet Imamu Baraka, named "Black Dada Nihilismus." Baraka writes:

Plastique we do not have,
Only thin heroic blades
The ... razor . . .
a picture of a suburban white couple mercilessly gunned down when they entered the inner city for the most blameless of purposes. The narrative continued with both Charles and the police painted in bright colors as heroes, overcoming odds to snatch the lives of Charles and his young son from the jaws of death.

The story told first by Charles Stuart, then adopted almost simultaneously by the staid Boston Globe and the normally skeptical Boston police, is a story about the indiscriminate quality of violence in the city; it is a story about dark men in rumpled jogging clothes who come out of the fog to invade cars, abduct families, shoot helpless pregnant women, and then fade back into the fog. The story brimmed over with archetypical images of urban “savages” threatening the “innocent.” The then-Mayor of Boston, Raymond Flynn, injected into the story: “I demand that the Boston Police department continue to be extremely aggressive in cracking down on people who are using guns and killing innocent people. It’s intolerable. We will use every lawful tool to support our police officers in cracking down on gun-wielding criminals.” Again, the innocents are white and the savage, real or imagined, is black.

The “crackdown” that actually occurred following the incident involved indiscriminate stops and, in some instances, strip searches of scores of black men whose only crime was being young and black. During the manhunt for the killer, a minister reported watching as “officers lined 15

Come up Black Dada Nihilismus
Rape their fathers,
Cut the Mothers throats.


This poem can be easily misinterpreted. Baraka is constructing a word mirror to allow rage or fear (that is, black rage and white fear) to gaze upon itself. Black Dada Nihilismus is simultaneously a verbalization of the repressed racial fears of whites and a verbalization of the repressed anger of blacks. He is in either instance an image of anxiety in a Kierkegaardian sense, of a desire for something one dreads: for whites, expiation of racial guilt by physical immolation; for blacks, terrible and immoral revenge. Black Dada Nihilismus is a means of drawing the interpreter, white or black, into an implicit examination of internalized images of violence.

The murderer in the Stuart case appeared real, I think, because he so closely matched a deeply internalized image of racial violence similar to “Dada Nihilismus.” The black man in the jogging suit who murdered a pregnant woman and shot her husband so remorselessly was an incarnation of anxiety, believed in because people desire to believe in that which they so dread. In a sense, Boston, in the Stuart case, lived the racial neurosis examined in Baraka’s poem.

270. Archetype is a Jungian term. See, e.g., JOSEF GOLDBRUNNER, INDIVIDUATION; A STUDY OF THE DEPTH PSYCHOLOGY OF CARL GUSTAV JUNG 104-06 (Stanley Godman trans., 1964) (stating that archetype refers to a deep structure, an image without form—the specific era and culture gives it form—in the unconscious in which the experiences of history repose). I use the word “archetype” loosely to refer to images in which our racial history has been condensed. These images are translated by literature into figures such as Bigger Thomas. Historically, the quintessential images of racial fear would have been images of slaves in revolt.

271. Canellos & Sege, supra note 266, Metro Sec., at 1 (emphasis added).
black teen-agers against a wall and made them empty their pockets and drop their pants and undershorts. 'After about 15 minutes there were 15 bare bottoms displayed on the street.' 

The searches were not limited to gang members or even to particular places; black men were searched in frontyards, in pizza shops, and on their way to work. Soon thereafter, two black teenagers overheard a relative of a black man named Bennett jokingly say he believed Mr. Bennett had committed the killing. They were repeatedly picked up and threatened with twenty years in prison unless they signed an affidavit implicating Bennett.

In their zeal to find the black killer, the police failed to learn that a thirty-eight caliber revolver had been stolen from the fur store where Charles Stuart worked, or that Charles had recently taken out large amounts of insurance on his wife.

Charles eventually killed himself by jumping into the Mystic river. His brother confessed that he and Charles had done the deed. In the end, the black man with the raspy voice who stepped out of the fog to penetrate the lives of suburban whites was imaginary. If Ellison is correct that a living black exists as an invisible man, as a reified abstraction to whites who refuse to see the actual "person," then the phantom of the Stuart case was the invisible man's twin. The raspy-voiced man was a mirage, but one no less illusory than the image the jurors had of Rodney King, the image Goetz had of the Bronx teenagers he attempted to kill, or the image the police had of the black youths they searched and violated.

It is in this context of clouded vision that the omissions made by the Boston police must be understood. The omissions were not conceivably part of a conscious conspiracy. The enormity of the crime precludes that possibility: the police sincerely wanted to find the killer. On the surface, their failure can be explained in terms of unconscious racism. Indeed, there were racial stereotypes that the real killer, Charles Stuart, did not fit, but that were embodied in his fictitious robber. This is very close to the explanation and apprehends the result as a failure to examine certain bigoted assumptions often made about other groups.


273. Id.

274. Id.

275. Ellison wrote:

I am an invisible man. No, I am not a spook like those who haunted Edgar Allan Poe . . . . I am a man of substance, of flesh and bone, fiber and liquids—and I might even be said to possess a mind. I am invisible, understand, simply because people refuse to see me. Like the bodiless heads you see sometimes in circus sideshows, it is as though I have been surrounded by mirrors of hard distorting glass. When they approach me they see only my surroundings, themselves, or figments of their imagination . . . .

ELLISON, supra note 43, at 3.
But I think there is something more precise than unexamined racial assumptions that would explain why only the usual suspects were rounded up, why the most obvious suspect was never questioned, why the most elementary police work was not done, and why the black robber in the jogging suit was seen to be so apodictically real. There is operating in this story something that is internal to the racial stereotype, something that is all-encompassing in its cognitive effect. It is our set of basic assumptions about self and other that have become intertwined in the problematic of the racial self. The omissions of the Boston police were less a problem of negligent looking than of outward looking. Race, the great signifier, draws a circle around the signified. It is quintessentially a figure of inside/outside distinctions. Inside the circle, individuals are presumed to be good, decent, normal, and white. Outside the circle is the realm of criminals, deviants, and savages. The circle of race traces the dividing line of innocence and guilt along the dividing line between self and other, which is cognitively a difference between the within and the without. For the police to look at Charles would have required them to look within the circle, to look within themselves in a sense. More than that, to recognize Charles as "the savage" raises questions about the coherence of the circle altogether.

In each of these three cases there is a clear intersection between the plane of interpretation and adjudication, and the plane of historical narrative. There are many other examples. These cases or narratives are not

276. There is, of course, the case of Soon Ja Du, a Korean shopkeeper in Los Angeles, who shot a black teenager named Latasha Harlins on March 16, 1991. Chung, L.A. Market Shooting Remains a Symbol of Black Asian Rift, L.A. CHRON., May 25, 1992, at A4. Allegedly, Harlins approached the counter and Du grabbed at the teenager's sweater and accused her of taking a bottle of orange juice that was in Harlins's knapsack. *Id.* When Du grabbed the sweater, Harlins punched her four times in the face. *Id.* Du fell back, picked up a stool, and threw it at Harlins. *Id.* Harlins then slammed the juice on the counter and attempted to leave the store. But before Harlins was able to leave, Du picked up a gun and shot Harlins in the back of the head. *Id.* The orange juice in question was worth only $1.79. Du was charged with murder and, at the trial, witnesses testified that there was no attempt at shoplifting and that Harlins approached the counter with money in her hand. Andrea Ford & John Lee, *Slain Girl Was Not Stealing Juice Police Say*, L.A. TIMES, March 19, 1991, at B1. Du was convicted by a jury, but the sentencing was presided over by a judge who had earlier expressed "fear" that jurors would be intimidated by the prevailing hostility of blacks in South Central Los Angeles. Andrea Ford, *Videotape Shows Teen Being Shot After Fight; Trial Opens for Korean Grocer Who Is Accused in Slaying of Fifteen Year Old Black Girl*, L.A. TIMES, Oct. 1, 1991, at B1. The same judge sentenced Du, convicted of murder by her peers, to only six months in jail. See Chung, supra, at A4. I assume that this made sense to the judge and that his vision of the facts was mediated by his identification with the blinding racial fears of Ms. Du. Racial identity becomes a lens again.

The paradigm of the racial self as a lens through which adjudication and interpretation occurs can affect blacks as well as whites. In the "Crown Heights" case, an escort car in the convoy of Chief Lubavitcher Rabbi Menachem Schneerson swerved out of control and struck a seven year old black child named Gavin Cato. Martin Gottlieb, *Emotions Rise on U.S. Inquiry in Crown Heights*, N.Y. TIMES, Nov. 9, 1992, at B1. In a subsequent riot by blacks on August 19, 1991, Yankel Rosenbaum, a Jewish scholar, was attacked and killed by a mob of approximately 20 angry black men. *Id.* A man named Lemrick Nelson was caught running
merely dramatically similar, they are variations on common themes. They are, like the racial myths they reflect, reducible to certain constituent components, as if they were expressions of deep structures within our social and legal culture, rather than random or peculiar events. In every case, there is an opposition in which whites confront real or imagined blacks as "blacks"; that is, as blacks asserting themselves such that whites are physically threatened (Stuart), their manhood is threatened (King), or their sense of well-being is threatened by cultural alterity (Goetz). This confrontation leads to a moment of what I call "racial recognition." It takes the white observer to a mental plane at which logic and reason occur along an essentialist axis.

In adjudication, whites insist upon an interpretation of the facts that does violence to notions of equality and truth as lived experience. The illogical (seemingly impossible) results are entirely logical within the mythic zone of race. The idea of race is not to frame truth from past events, but to convert events into their own mythical structure with cognitive and cosmological distortions as the result. What emerges from cases like People v. Powell, the Goetz case, and the Stuart case is not justice or truth, but a picture of race as a practice and as a source of signification that still mediates between us and the world as it is.

V. ONWARD TILL MORNING: TOWARD A POSTMODERN THEORY OF RACE

For African-Americans, our post-modern condition is characterized by

from the scene. Id. The police found a bloody knife in his pocket. Before Mr. Rosenbaum died, he identified Nelson: "The red shirt, the red shirt, that's him—why did you stab me?" Id. The same problem of race that led to the stabbing led to difficulties in its adjudication. Nelson was charged, inter alia, with murder, but was acquitted by a jury of six Blacks, four Hispanics, and two Whites after Nelson's attorney, Arthur Lewis, argued that it was a "frame-up engineered by corrupt officers and a confession coerced from an emotionally disturbed youth." The attorney suggested, incredibly, that the lone Mr. Nelson might have provoked the attack (picking on the 20 black men) and that the police, the medical examiner, and the medical experts all colluded to frame Mr. Nelson. The incubus of racial identity was, I suspect, the handmaiden of the conspiracy theory as it "won" (or rather lost) the day in this case.

277. See JEAN PIAGET, STRUCTURALISM 5 (Chaniannah Maschler trans., 1970) (stating that "the notion of structure is comprised of three key ideas: the idea of wholeness, the idea of transformation, and the idea of self-regulation"); CLAUDE LEVI-STRAUSS, THE SAVAGE MIND (1966). A Gestalt is a kind of structure, the idea that "complex perceptual units like a melody or a person's physiognomy have perceptual qualities that accrue to them as configurations." PIAGET, supra, at 5. Thus, we tend to see the same "person" even when they go from slim to fat, or from young to old. We do this also with race. We tend to recreate the old narratives within new contexts and to see within shifting contexts newly transformed expressions of old racial themes.

278. Afficionados of jazz musician Grover Washington will immediately recognize this phrase as a title of one of Washington's jazz renditions. It seems altogether appropriate because my notion of that which is postmodern is linked to qualities of postmodern expression like disaggregation of convention and play, and an aspiration to express truth in a
continued displacement, profound alienation, and despair... Radical Post-modernism could be a fertile ground for the construction of empathy—ties that would serve as a base for solidarity and coalition.279

Race is, finally, a name for a distance. It both describes and participates in creating a gulf between ideals of equality and a legal culture in which the meaning of blackness continues to correspond with powerlessness, voicelessness, and “objecthood.” It is a kind of incantation through which discourse, concerned with leveling difference, is transformed into its opposite. Through the machinations of race, courts attempt to conceptualize equality and thus tend to internalize liberating narratives and myths that conceptualize and perpetuate the very attitudes and practices that were to be eliminated. The great project in Critical Race Theory, subsuming the challenge to the universalist ideal in law and subsuming the challenge to the perspectivelessness in conventional legal theory, has been and is to conceptualize and to “name” a new social and political reality.

Slaves, when “freed,” often referred to themselves by a new name.280 Similarly, the Black Muslims, in an effort to change their identities as subordinate in the political and social world, changed their names.281 But renaming cannot be accomplished at the surface level of surnames, nor even at the deeper level of social and political discourse. This is true because the problematic of race is accessible only at a deeper level—a level that mediates between the social and political, and between sign and meaning. Both at the level of how we “name” or conceptualize equality and at the level of how we “name” ourselves, race mediates to hyphenate each notion with its own name, thus intermeddling both in the realm of discourse and in the realm of our own objective identity.

personal voice rather than the univocal voice. These postmodern qualities are also qualities of jazz. It is this spirit that I invoke as I discuss a postmodern approach. See John Calmore, Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World, 65 S. CAL. L. REV. 2129 (1992) (making a similar point).


280. Litwack writes:

“When us black folks got set free,” Alice Wilkins recalled, “us’n change our names . . .”

. . . . Leon Guidon recollected, “a heap of people say they was going to name their selves over. They named their selves big names. . . Some of the names was Abra-ham an’ some called their selves Lincum.

. . . . Whatever names the freed slaves adopted, whether that of a previous master, a national leader, an occupational skill, a place of residence, or a color, they were most often making that decision themselves. That was what mattered.


281. See THE AUTOBIOGRAPHY OF MALCOLM X 199 (1964) (“The Muslim’s ‘X’ symbolized the true African family name that he never could know. For me, my ‘X’ replaced the white slavemaster name of ‘Little’ which some blue-eyed devil named Little had imposed upon my paternal forebears.”).
It is this intermeddling with identity that Dubois and Fanon spoke of as a doubling or splitting. In writing, the doubling occurs at the juncture between the black writer and her contemplation of her own sense of otherness. Homi Bhabha writes:

[T]he very place of identification, caught in a tension of demand and desire, is a place of splitting. The fantasy of the native [slave] is precisely to occupy the master's place while keeping his place in the slave's avenging anger. "Black skin, white masks" is not, for example a neat division; it is a doubling, dissembling image of being in at least two places at once that makes it impossible for the devalued, insatiable to accept the colonizer's invitation to identity: "You're a doctor, a writer... you're different, you're one of us." ... [T]o be different from those that are different makes you the same—that the Unconscious speaks of the form of Otherness, the tethered shadow of deferral and displacement. It is not the colonialist [master's] Self or the colonized [slave] Other, but the disturbing distance in between that constitutes the figure of colonial [black] otherness—the white man's artifice inscribed on the black man's body.

This relates, ultimately, to the problem that there is no place outside of language where we might stand. Frederick Jameson explains:

The very problem of a relationship between thoughts and words betrays a metaphysics of "presence," and implies an illusion that univocal substances exist, that a pure present exists, ... Meaning is in its very structure always a trace, an already happened.

The corollary is that race as a sign is "always and already there." It is situated not only within the law—through language—but also within the renaming, liberationist scholarship that people of color would write. Race, once iterated, smuggles into our discourse the discourse of master and slave, of African and European, of black and white. When we write, a trace of race as a prism continues to color the importance, the authoritativeness, and the efficacy of the act of writing itself.

282. See G.W.F. Hegel, The Phenomenology of Mind 229 (2d ed. 1964) (stating that "self-consciousness exists in itself and for itself, in that, and by the fact that it exists for another self-consciousness; that is to say, it is only by being acknowledged or 'recognized'.")


285. The phrase is borrowed from Fish. See Stanley Fish, Doing What Comes Naturally 27 (1989) (pointing out that our perspective or situatedness is "always and already" "there, that there is no given meaning, only meanings we impose on texts). Fish could be read to say we are always and already "situated" in interpreting the text of race. Our situatedness is given by historical narratives deeply embedded in language and culture.
A "negro" poetess named Phyllis Wheatley required eighteen citizens of Boston to attest not merely that her poems had merit, but that she had actually written them.\textsuperscript{286} It was, in part, a problem of assumed intellectual inferiority. Because many viewed blacks as lacking the capacity of complex thought, authentication was required. But the problem of blackness as lacking intelligence is, as noted above, interpenetrated with the more fundamental problem of black versus white and subject versus object. When Phyllis Wheatley wrote, the question was not merely one of meaning, but also involved racial defense because writing by blacks had always been understood as an inchoate encroachment on privilege and power: What does this negro want? Does she want to take our place? Does not a trace of this problem continue to pervade the academy? Have we not, as scholars, inherited from history the curse, if not of Ham, of Phyllis Wheatley? From within the circle of race are we to enter the world of discourse? The circle of race to which we have been confined is finally the circle of language itself.

Man lives with things mainly, even exclusively—since sentiment and action in him depend upon his mental representations—as they are conveyed to him by language. Through the same act by which he spins language out of himself he spins himself into it, and every language draws a circle around the people to which it belongs, a circle that can only be transcended insofar as one at the same time enters another one.\textsuperscript{287}

We must step out of the circle. We need new terms to redescribe and reconfigure the units of our intersubjective world. We need a way to get beyond the reductionism of self and other in order to find a doorway between difference and community within ourselves. But the project is quintessentially less about learning new concepts than about learning a way of writing about them. It is about learning a way to explore the duality of our identity, discerning both a sense of race as it appears in our historical consciousness—massive, immovable, and real—and a sense of race as trope.

We need to take a page from the African-American literary canon and its long tradition of addressing questions of identity. We need to learn to "signify." Henry Louis Gates describes signifying as "rhetorical play": the "metaphorical substitution and pun" in which there is a formal revision and exchange of given meanings for denoted meanings peculiar to the worldview and context of "black" life.\textsuperscript{288} As Claudia Kernan explains:

\textsuperscript{286} See Gates, Jr., supra note 89, at 5.
\textsuperscript{287} See id. at xxi (quoting Wilhelm von Humboldt).
\textsuperscript{288} See Gates, Jr., supra note 76, at 46-47.
The black concept of *signifying* incorporates essentially a folk notion that dictionary entries for words are not always sufficient for interpreting meanings or messages, or that meaning goes beyond such interpretations.\textsuperscript{289}

Signifying is often thought of in terms of the rhyming, troping responses made by blacks to get the verbal upperhand on someone else:

And they asked me right at Christmas
If my blackness, would it rub off?
I said, "Ask your mama?"\textsuperscript{290}

There are many similar examples in popular black literature, but historically "signifying" was a means of using language as a medium on which to encode messages of unity or resistance.\textsuperscript{291}

Perhaps the most common instances of signifying in popular culture occurs in practices of referring, in black vernacular, to good versus "bad," of an upbeat emotional state as "down." Signifying is an appropriation of language,\textsuperscript{292} in the service of a cognitive reorientation. Henry Louis Gates explains:

Let me attempt to account for the complexities of this (re)naming ritual . . . . [B]y supplanting the received, standard English concept associated by (white) convention with this particular signifier, they (un)wittingly disrupted the nature of the sign = signified/signifier equation itself.

. . . .

. . . To revise the received sign . . . at its most apparently denotative level is to critique the nature of (white) meaning itself . . . .\textsuperscript{293}

\textsuperscript{289} CLAUDIA MITCHELL-KERNAN, LANGUAGE BEHAVIOR IN A BLACK URBAN COMMUNITY 92-93 (1976).
\textsuperscript{290} LANGSTON HUGHES, ASK YOUR MAMA: 12 MOODS FOR JAZZ 8 (1961).
\textsuperscript{291} For instance,
When de niggers go around singin' "Steal away to Jesus," dat mean dere gwine be a 'ligious' meeting dat night. Dat de signification of a meetin.' De masters 'fore and after freedom didn't like dem 'ligious' meetin's, so us natcherly slips off at night, down in de bottoms of somewheres.
\textsuperscript{5} GEORGE P. RAWICK, THE AMERICAN SLAVE 198 (1970).
\textsuperscript{292} Saussure explains:

[T]he signifier . . . is fixed, not free with respect to the linguistic community that uses it. The masses have no voice in the matter, and the signifier chosen by the language could be replaced by no other . . . . [T]he community itself cannot control so much as a single word; it is bound to the existing language.

FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 66 (1976).

The "black" practice of signifying is an act of rebellion by the community and a way of suggesting a chain of new meanings for old ideas.
\textsuperscript{293} GATES, JR., supra note 76, at 46-47.
Through metaphor, irony, synecdoche, or parody, we must make a similar appropriation of race.

This strategy in another context was expressed by Mikhail Bhaktin. He explained:

[L]anguage for the individual consciousness lies on the borderline between oneself and the other. The word in language becomes “one’s own” only when the speaker populates it with his own accent, when he appropriates the word, adapting it to his own semantic intention. Prior to this moment of appropriation, the word does not exist in a neutral and impersonal language (it is not, after all, out of a dictionary that the speaker gets his words!) but rather it exists in other people’s mouths, in other people’s contexts, serving other people’s intentions; it is from there that one must take the word and make it one’s own.²⁹⁴

The circle of race—a circle of real subordination interpenetrated by false notions of equality, of group unity and doubled individual identity—traces the boundaries of the “frontier” we must cross. To cross out of the circle of race constructed for us by history, we must step into a circle that is not of history, and yet surrounds it. It is the circle of a new language of identity, a hermeneutic universe in which our imagination will no longer be imprisoned but opened, a place where we will have the power to interrogate race at the very source of its claims to meaning. In this place, we will find the words to name our reality and, by the magic of that naming, discover a self that spans between the dark night of our past and the morning, the dawn to come:

Africa I have kept your memory Africa
you are inside me
Like the splinter in the wound
Like a guardian fetish in the center of the village
make me the stone in your sling
make my mouth the lips of your wound
make my knees the broken pillars of your abasement
AND YET
I want to be of your race alone
workers peasants of all lands . . .
. . . white worker in Detroit black peon in Alabama
. . .
destiny ranges us shoulder to shoulder
repudiating the ancient maledictions of blood taboos
we roll away the ruins of our solitudes
If the flood is a frontier
we will strip the gully of its endless
covering flow

²⁹⁴. Id. at 1 (quoting Mikhail Bhaktin).
If the Sierra is a frontier
we will smash the jaws of the volcanoes
upholding the Cordilleras
and the plain will be the *parade ground of the dawn*
where we regroup our forces sundered
by the deceits of our masters
As the contradiction among the features
creates the harmony of face
We proclaim the oneness of the suffering and the revolt
and we mix the mortar of the age of brotherhood
to the dust of our idols.295