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**"WE MUST BE HUNTERS OF MEANING":¹
RACE, METAPHOR, AND THE MODELS
OF STEVEN WINTER***

D. Marvin Jones[†]

INTRODUCTION

As a black male I have tried to come to grips with why, unless I'm wearing a suit, whites generally will not sit beside me on the train, why when I walk down the street lined with cars I am treated to a symphony of automatic door locks going off, why I cannot catch a cab in New York.

I teach Criminal Procedure, a course in which the issue of racial profiles is very much a topic of discussion. Racial profiling is something that occurs against the backdrop of

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¹ The phrase is from JEAN-PAUL SARTRE, "WHAT IS LITERATURE" AND OTHER ESSAYS 4 (1988). The full quote is "We would be hunters of meaning, we would speak the truth about the world and our own lives." *Id.* Sartre's "hunt" or search was for human possibilities in the midst of the moral complexity of WWII. Sartre's "hunt" for truth assumed that the truth is something that is obscured by our classical assumptions in philosophy and that could be gotten at only by exploring certain things which are interior to the human condition. For example Sartre sought to understand the basic impulse to produce writing or art. I chose this phrase because I believe that both Steve's project and mine hinge on a similar search for interior sources. Steve focuses on materials from cognitive psychology to map the mind itself in order to expose the internal architecture of legal reasoning. I focus on language to expose the "architecture" of racial identity. We both conduct our search amidst an equally complex discursive moment.

racial stereotypes and myths. Not so long ago at an affair for the law school I came dressed in a dark suit. One of my older white colleagues came up to me and asked, with a smile, "What are you doing dressed like that? Are you going to rob a bank?" In his day Dubois stated the essence of the black experience through the question, "How does it feel to be a problem?"² In the midst of the twenty-first century the question seems to have become, "How does it feel to be a myth?"

I see myself in the vignette told about Miles Davis who, living in a predominantly white neighborhood, was reduced to having to telephone the police to warn them whenever he went out. I see myself in the experience of Al Joyner, an Olympic bronze medallist who no longer drives in Los Angeles because of police harassment. I see myself in the experience of Earl Graves, Ivy League graduate, elegantly dressed businessman, publisher of Black Enterprise Magazine, being stopped and frisked, briefcase in hand, by policeman searching for a criminal described only as a black man with short hair.

I am haunted by Mr. Stuart's story about a black man in a rumpled jogging suit who robbed him and his wife, killed her, shot him and escaped in the darkness.³ After an extensive manhunt for the man in the rumpled jogging suit, he was later revealed to be a fiction, made up by Mr. Stuart to cover his own murder of his wife. Susan Smith told a similar story about a black man, wearing a watch cap, who hijacked her car and kidnapped her two small kids.⁴ It turned out the black male kidnapper in the watch cap was a cardboard cut out of a bogeyman. The real kidnapper was Susan Smith herself: She invented the mysterious black male to hide her own media-like murder of her kids.

² W.E.B. Dubois in his great work, *THE SOULS OF BLACK FOLK*, wrote:

Between me and the other world there is an unasked question: unasked by some through feelings of delicacy; by others through the difficulty of rightly framing it. All nevertheless flutter 'round it. They approach me in a half-hesitant sort of way . . . How does it feel to be a problem? Then it dawned on me with a certain suddenness that I was different from the others; or like mayhap in heart and life and longing, but shut out of their world by a vast veil

W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* 7-9 (John Edgar Wideman ed., 1990).

³ Larry Marx et al., *A Murderous Hoax*, *NEWSWEEK*, Jan. 22, 1990, at 16.

⁴ Gary Lee & Bobby Vobejda, *In S. Carolina, an Angry Arraignment; Mob at Courthouse Jeers Woman Who Concocted Tale of Sons' Abduction*, *WASH. POST*, Nov. 5, 1994, at A1.

Why was Mr. Stuart or Susan Smith believed?

It may have something to do with what Jesse Jackson said: He feels relieved when he finds, walking in his Chicago neighborhood that it is a "white man" that is walking behind him.⁵ Apparently, in the words of Cecil Taylor, we are as males black even to ourselves.⁶

I experience these narratives not merely as familiar, troubling anecdotes, but as memory. I remember Miles and Al Joyner and Earl Graves; I remember also Emmet Till,⁷ and the Scottsboro Boys.⁸ I remember walking behind others and sensing their fear. I remember these stories as stories both about my own identity and about identity as trope.

I. LOCATING THE CONCEPT OF RACE

For me the work of Professor Steven Winter is seminal.⁹ Steve has a soul, which seeks to map the structure of legal thought, its beginnings, sources, and foundations. This

⁵ Paul Glastris; Jeannye Thornton, *A New Civil Rights Frontier*, U.S. NEWS & WORLD REP., Jan. 17, 1994, at 38. The full quote is, "There is nothing more painful for me at this stage in my life than to walk down the street and hear footsteps and start to think about robbery and then look around and see it's somebody white and feel relieved. How humiliating." *Id.*

⁶ D. Marvin Jones, *We're All Stuck Here For a While: Law and the Social Construction of the Black Male*, 24 J. CONTEMP. L. 35, 37 (1998).

⁷ Emmet Till was a black Chicago boy who, in 1955, went to Mississippi to visit his relatives. Allegedly he whistled at a white woman. Subsequently, he was lynched. In the case of Emmet Till lynching took the form of being garroted with barbed wire, doused with gasoline and set alight. The picture of his mutilated body was prominently displayed by *Jet* magazine. The lynching of Emmett Till is the kind of story that crystallizes the larger narrative of persecution of black men to maintain racial hierarchy. For a detailed account of the Emmett Till story see STEPHEN J. WHITFIELD, *A DEATH IN THE DELTA: THE STORY OF EMMETT TILL* (1988).

⁸ The Scottsboro boys were a group of nine black men charged with rape in Alabama. The women the men were accused of raping were later revealed to be prostitutes. The charge of rape followed a fight in which a group of white youths lost. The charges were false. The black youths were convicted in a trial in which they had no counsel. They spent ten years in jail before the Supreme Court reversed their convictions because of this lack of counsel. See *Powell v. Alabama*, 287 U.S. 45 (1932). For more detail on the story of the Scottsboro boys see generally DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (1969).

⁹ Here I refer not to a particular article but to the body of thought that Winter's work represents. The relationship that Winter drew between law and cognitive structures linked to language creates an angle of vision to understand the law in new ways. See, e.g., Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

mapping, which located critical intersections between law and cognitive psychology, has informed my own.

As Steve might be paraphrased to say, law is not freestanding. Legal doctrine rests on certain shared assumptions about meaning. I would refer to these assumptions as a paradigm.¹⁰ In its simplest terms a paradigm is a model. But by paradigm I mean something closer to a pre-existing conceptual image, which is always in the background. Thus, as Thomas Kuhn has written, our perception of the world is not separate from our pontifical images of it:

Something like a paradigm is prerequisite to perception itself. What a man sees depends both upon what he looks at and also upon what his previous visual-conceptual experience has taught him to see. In the absence of such training there can only be, in William James's phrase, "a blooming' buzzing' confusion."¹¹

The thrust of Steve's work has been to interrogate the paradigm of legal thought, to challenge its pretensions, its arrogance. He locates it outside of the realm of "pure reason" in the pre-rational or antirational realm of language and cognition. I am interested in interrogating paradigms too. The paradigm I want to interrogate is the paradigm of race.

¹⁰ Professor Winter in his early work refers to these cognitive structures as Idealized Cognitive Models. See Winter, *supra* note 9, at 1385. Listen to Winter as he explains,

What explains this phenomenon is the notion that categories have an internal structure which produces these perceptions of best examples. The claim is that categories are structured by means of *idealized cognitive models*—culturally shared "theories" of how to organize some portion of our experience. These models may be organized in terms of image-schemata like the *source-path-goal* schema or in terms of a group of related propositions grounded in a physical/cultural experience. An example is the stereotypical conceptualization of "mother" by means of an idealized cognitive model that assumes natural childbirth by a woman who is married to the biological father, and who is also the primary nurturer and full-time caretaker of the child. Women who fit this idealized cognitive model are prototypical "mothers" and are referred to as such. But no prototypical mothers are marked as such by the linguistic conventions resulting from this model: They are *stepmothers*, *surrogate* mothers, *biological* mothers, *foster* mothers, *working* mothers, or *unwed* mothers.

Id.

¹¹ THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 113 (2d ed. 1970).

In legal discourse, race is posited as a fact. It is presented as something objective, natural, and inevitable. Recall, for example, in *Plessy v. Ferguson*¹² how the Court premised the reasonableness of segregation on the fact that race was a natural category:

If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.¹³

Plessy was, in a real sense, the point where the modern discourse about civil rights begins. It starts with the notion of segregation as a morally corrupt regime based on individual prejudice. This paradigm of individual prejudice visualizes the problem as one involving in Gordon Allport's terms, irrational assumptions based on race.¹⁴ This paradigm is given content by our historical experience and by the narrative which emerges from the civil rights struggle, which followed *Plessy* and culminated in the 1950s.

This is the story of the civil rights movement. It is the story of America's moral transformation. It is a story of a Manichean struggle between the forces of darkness and the forces of light: of Americans armed with fundamental American values triumphing over white extremists. In the story, southern whites turned water hoses on blacks, lynched black men, and burned crosses on the lawn of black families as a warning to those who would challenge the regime of racial caste. According to this story, the whites who engaged in these acts of hostility were extremists and by definition abnormal: they were "bad white people."¹⁵ The climax of this drama occurs when the good white people passed civil rights laws in the

¹² 163 U.S. 537 (1896).

¹³ *Id.* at 551.

¹⁴ Allport develops the hypothesis that racism is an irrational response to the neutral fact of race. He goes on to hypothesize that these attitudes flourish in a social environment of racial separation and ignorance. See GORDON ALLPORT, *THE NATURE OF RACE PREJUDICE* 261- 81 (1954).

¹⁵ Alan Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

1960s, in a definitive victory over the bad ones. Racism appears in this story as something akin to sexual lust—a deviant impulse which good, normal white people repress but extremists, bad people, give into. This Freudian notion—of racism as a deviant impulse—finds synergy with our sense of our own modernity: that we are grounded in scientific rationality.¹⁶ This rationality is expressed not only in our investment in technology but in the rule of law, which is to say, today, “equal justice under law.”

In my understanding, the wrong unit of inquiry is being used: race is an artifact of culture. *Plessy's* stigma flowed from the racial hierarchy that segregation imposed in terms of jobs and social privilege generally. Sitting in a separate railroad car took on its meaning from this larger phenomenon of racial caste. Race and discrimination can only be given meaning by social practices, not individual decisionmaking:

[H]istory and the social milieu in which we are situated create the significance of a biased decision. As such, discrimination cannot be reduced to an isolated sequence of a wrongful state of mind leading to an inequitable decision. . . . Genuine disparities may occur without an employer's wrongful state of mind. More importantly, a single employer with a wrongful state of mind cannot cause the stigma of discrimination because discrimination can only be constituted by social practice and requires a social or historical dimension to exist.¹⁷

To the extent that race is a problem of stereotypical images embedded in language there is a dimension of “unconsciousness” but not in Freud's sense.

It is wrong to think that the unconscious exists because of the existence of unconscious desire, of some obtuse . . . animalistic . . . desire that rises up from the depths and has to lift itself to a higher level of consciousness. Quite on the contrary, desire exists because there is unconsciousness, that is to say, *language*, which escapes the

¹⁶ See BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW COMMON SENSE: LAW, SCIENCE, AND POLITICS IN PARADIGMATIC TRANSITION* (1995). Santos argues that modernity is held up by the binding of two opposites: institutions of “regulation” and institutions of “emancipation.” The emancipatory aspect of modernity is defined by the impulse toward “rationality.” This emancipatory impulse is anchored by science, art, and the rule of law.

¹⁷ D. Marvin Jones, *The Death of the Employer: Image, Text, and Title VII*, 45 VAND. L. REV. 349, 366 (1992).

subject . . . and because there is always, on the level of language, something, which is beyond consciousness. . . .

[Furthermore,] [t]he . . . unconscious is therefore not so much the 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.¹⁸

Much has been written about race as a problem of coercive force, the realm of politics. I want to shift the focus to the extent to which subordination is premised on consent.

The starting point in my redescription of race, which was treated as fact both by the law and those, like Martin Luther King, who sought to change it,¹⁹ is to focus not on the morality of segregation but on the incoherence of its assumptions. One tries in vain to locate the objective boundaries of race: there are none. Race does not exist within the terrain of objectivity.

As Anthony Appiah has noted, "the truth is there are no races. . . . Talk of race is particularly distressing . . . for where race works—it does so only at the price of biologizing what is . . . ideology."²⁰ Stated another way:

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

¹⁸ FREDERICK JAMESON, *THE PRISON HOUSE OF LANGUAGE* 137 (1972) (emphasis added).

¹⁹ I still remember King's speech about how painful it was for him to "explain" to his daughter that the reason she could not go to an amusement park (Funtown) is because she is *black*: "But when you have seen vicious mobs lynch your mothers and fathers at will...when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six-year-old daughter why she can't go to the public amusement park that has just been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children...then you will understand why it is difficult to wait." Dr. Martin Luther King, *Why We Can't Wait, Letter from the Birmingham Jail*, Apr. 16, 1963, in *A TESTAMENT OF HOPE* (James Washington ed., 1986).

²⁰ Anthony Appiah, *The Uncompleted Argument: DuBois and the Illusion of Race*, in HENRY LOUIS GATES, *RACE, WRITING AND DIFFERENCE* 21 (1986).

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 genetic differences.²¹

It is elementary of critical theory to see that race is a construct. In Steve's early work he wrote a great deal about metaphor as a cognitive structure.²² I have stood on Steve's shoulders in developing my understanding of race. In my early work I went on to identify race not merely as construct or fiction but as a metaphor.

My use of the word metaphor combines two concepts. The first I trace to Aristotle. Aristotle's deceptively simple characterization was that metaphor consists of giving the thing a name that belongs to something else; the transference being either from genus to species, or from species to genus, or from species to species or on grounds of analogy.²³ As such, all metaphors are on their face what Gilbert Ryle called category mistakes.²⁴ The significance of this seeming mistake is that metaphors have as their ambition a redescription of reality.

In giving to the genus the name of species . . . and vice versa one simultaneously recognizes and transgresses the logical structure of language. . . . [I]t involves taking one thing for another by a sort of calculated error. . . . To affect just one word, the metaphor has to disturb a whole network by means of an aberrant attribution. . . . [M]etaphor destroys an order only to invent a new one: and the category mistake is nothing but the complement of the language of discovery. . . . [M]etaphor bears information because it "redescribes reality."²⁵

Race is also a metaphor in the sense used by George Lakoff.²⁶ For Lakoff, a metaphor is a linguistic structure which

²¹ JAMES C. KING, *THE BIOLOGY OF RACE* 155-57 (1981).

²² See generally Winter, *supra* note 9; see also Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441 (1990).

²³ PAUL RICOEUR, *THE RULE OF METAPHOR* 21-22 (R. Czerny tran., 1975).

²⁴ See GILBERT RYLE, *THE CONCEPT OF MIND* 16 (1949).

²⁵ RICOEUR, *supra* note 23, at 21-22.

²⁶ See GEORGE LAKOFF & MARK JOHNSON, *WOMEN, FIRE AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 113 (1987).

allows us to make sense of our conceptual universe by providing experiential referent for abstract notions.²⁷ Thus, we often speak of carrying one's burden in legal argument. A burden is something one carries along a road. The image of a road provides a visual image to anchor conceptual structures.

In both concepts the metaphor serves a cognitive role mediating between, anchoring, and giving content to the concepts of our imagination.

Race is a metaphor in the sense that it links the physical body with a racial body, which exists only in the realm of cultural meaning. The difficulty is that, through this mechanism of metaphor we conflate the real with the cultural image.

Thus, in my early work I located the problem of race within the realm of language and metaphor. Professor Winter has attempted to shift the paradigm from law as a problem of reason to the problem of discerning the interior architecture of the reasoning process—a cognitive structure. Interestingly, our racial discourse has proceeded as if the problem were a failure of individuals to reason properly. For me, what is interior to the problem of racial subordination is a set of meanings crystallized as images, which operate as windows on the social world, windows operating for both oppressor, and oppressed.²⁸

²⁷ *Id.*

²⁸

MY APPROACH	CONVENTIONAL LEGAL THEORY
What is Race: 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.	A label real or constructed.
Unit of Inquiry: Culture.	The individual.
Source of Difficulty: Language.	Irrational thinking or bigoted thoughts or both generally (some theorists give this a materialist spin tracing racism to an ideology in the service of political-economic or legal order).
Nature of Difficulty: Cognitive difficulty.	A moral problem.

II. CLAIMS OF KNOWLEDGE

To understand the shift that is necessary, let me share a few stories. The stories are drawn from my upcoming book *Race, Sex, and Suspicion*. Let us begin with the claim that race is a problem of faulty thinking or irrationality. On the contrary, I argue the problem has to do with claims of knowledge. The classic instance is the racial profile. Let me begin my first story.

A. *The Story of Henry Bibb*²⁹

In 1837, Henry Bibb boldly escaped from a plantation in Kentucky and crossed the border into Canada.³⁰ Soon after Bibb returned in disguise—he put on false whiskers—to get his wife and child. Once back in the “occupied territory” of slavocratic Kentucky he took work digging a cellar for “the good Lady where I was stopping.”³¹ Of course the whiskers did not hide who he was. In a more recent context, O.J. Simpson allegedly committed the murders wearing a sailor’s watch cap and a blue blazer with gold buttons. Johnny Cochran, ridiculing the suggestion that such a costume could conceal O.J. in all his celebrity exclaimed, “This is no disguise!” An ante-bellum Johnnie Cochran might have exclaimed the same thing about Henry Bibb’s efforts to mask his own identity. The slave catchers soon “recognized” Bibb and, treating him like a nineteenth century public enemy number one, surrounded the house in force and arrested him at gunpoint. In the story, he poignantly asks his capturers, “What crime had I committed.”³² His question, which went unanswered, still echoes down the corridors of history.

Bibb, in asking his question invoked Lockean³³ notions of the natural rights. Locke postulated that all men are by

²⁹ Excerpt from D. Marvin Jones, *Crimes of Identity: The Birth of the Racial Profile*, in RACE, SEX, AND SUSPICION (forthcoming 2002) (unpublished manuscript on file with author).

³⁰ PUTTIN ON OL’ MASSA 81-87 (Gilbert Osofsky ed., 1969).

³¹ *Id.* at 90.

³² *Id.* at 91.

³³ See JOHN LOCKE, TWO TREATISES ON GOVERNMENT (Peter Laslett ed., 1967) (1689).

nature free and enter society with natural rights. Jefferson's notion that "all men are endowed by their creator with an inalienable rights to liberty" imported this natural law thesis into the American scene. The social contract which emerges from this confers the right to liberty—to freedom subject to the condition that the individual does not break the law. Bibb implicitly invoked both Jefferson and Locke, both natural law and the social contract, in his question to his abductors. If he is a man, and if all men by nature are free, then he Bibb was also free—unless he had done something wrong. The issue becomes what is Bibb's crime? He is innocent not merely of the crime of harming others, he is innocent of being the native or savage associated with slavery: by the very act of thinking and writing. Yet despite his radical innocence he is hunted and chained as a prisoner and criminal.

Bibb claimed his freedom by rhetorically situating himself within the circle formed by the liberal narrative not merely of the American Revolution but of the enlightenment itself—a narrative of individual autonomy and freedom. This story of the enlightenment is eclipsed by an older story. This was the narrative of racial essences, a narrative which was given voice by Justice Taney in *Dred Scott*:

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. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.³⁴

As I read Taney's decision, the social contract ran only to those who were white. Blacks were not only persons without rights to a social contract; they were not persons at all. Bibb, in

³⁴ *Dred Scott v. Sanford*, 60 U.S. 393, 407 (1856).

invoking the notion of "innocence," crossed the moral line between subject and object, self and other. In the mirror of his imagination, Bibb saw himself as a free man unjustly chained. Bibb simply posited that he was free. In so doing, in his mind, he tore away the veil of race. But this subjective image was as distant from objective reality as heaven was from the terrain of the plantation. The dreamer physically remained imprisoned behind the iron curtain of the slavery—behind the veil. The slave was forced to recognize that regardless of what moral transformation he might achieve, no matter how he came to view himself, this did not affect his objective status. For the slave, his identity was defined by how whites saw him. He was both blessed and cursed by what W.E.B. Dubois calls a "double consciousness."³⁵

The Negro is a seventh son born with a veil, and gifted with second sight in this American world—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double consciousness, this sense of always . . . measuring one's soul by the tape of a world that looks on in amused contempt and pity.³⁶

Thus, as Sterling Bland writes, "African-Americans are limited by the exterior manifestations of social response and are thus able to . . . be seen only through the "revelation of the other world."³⁷

The reason Bibb's mask of whiskers does not work is because Bibb's appearance as a threat was not linked to any set of features which could be seen—and therefore disguised. Bibb is a criminal because of his race. Race, in turn, is not something that can be seen.

Race itself has never been seen by the naked eye. Beyond merely describing morphological characteristics, race³⁸ refers to an

³⁵ DUBOIS, *supra* note 2, at 3.

³⁶ *Id.*

³⁷ STERLING LESTER BLAND, RUNAWAY SLAVE STORIES AND THEIR FICTIONS OF SELF-CREATION 8 (2000).

³⁸ The origins of the word race are unsure. As Wilton Krogman has written It may be kin to the Czechrazs, referring to artery or blood, or Latin generation or old French generace. It seems to trace back most directly to Basque arraca or arraze, referring to male stud animal. It is also found in the southern Spanish race, of Arabic derivation, meaning

amorphous concept of difference between human "types." What constitutes a "type" and what constitutes a difference is contested territory and for some refers to essences, for others to biology but always to a set of abstract rules of recognition.³⁹ 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. Race is visualized not through actual observations but through the mind's eye, by "seeing" human populations as naturally, actually parsed into distinctive sub-groups. The lens through which the meaning of race is seen to be illuminated and race "as a fact" finally discerned is our sense of who we are. We actually see race through our I/eye⁴⁰ or sense of identity, as an alternating image of those who are like us, within our circle of community, and those who are not.⁴¹

Race is an inference we make based on a variety of criteria ranging from color to birth records. Race is a faceless prototype of a racial other. Bibb matched the prototype regardless of how he changed his features. He fit the profile.⁴²

head, or . . . In 1684 in France we find "especies 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* 39 (Ralph Linton ed., 1945).

³⁹ Although race originates in the ethos of culture we confront it as an authoritarian figure, much the same as we 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 26. Lakoff and Johnson have shed much light on how our conceptual world is linked to our perception and cognitive processes. The linchpin of connection is what Lakoff and Johnson refer to as "metaphor." Metaphor is a linking together of an abstract thing with something we perceive or sense. Thus, we derive a notion of argument in which we often speak of in terms of *burdens* from something we have seen, 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, with something actually perceived. Again all this occurs at a cognitive level. Law, on the other hand is explicitly addressed to the level of decisionmaking and conscious thought. Nonetheless, the analogy is there and the term rules of recognition, H. L. A. Hart's phrase, see H.L.A. HART, *THE CONCEPT OF LAW* (1961), is helpful in understanding the nature of legal rules is helpful to understanding race as a linguistic one.

⁴⁰ Ralph Ellison refers to this, after Thomas Aquinas, as the "inner eye," the "eye[] with which they look through their physical eyes upon reality." Ralph Ellison, *THE INVISIBLE MAN* 3 (1989). See also CORNEL WEST, *PROPHETIC VISIONS* 102 (1988) (referring to the cognitive structure by which race is identified as "the eye of the mind," a conception of the faculty by which we 'perceive' the abstract he traces to the ancient Greeks).

⁴¹ D. Marvin Jones, *Darkness Made Visible*, 82 GEO. L.J. 437, 449 (1993).

⁴² I would define a profile as a prototypical image of a criminal. By definition there is a close kinship between profile and stereotype. The rhetoric of law enforcement

This prototypical image, the image of the racial enemy, however invisible to the naked eye is nonetheless visible in the reactions of whites, mirrored in their fear, loathing and obsession with controlling him. It is this mask, the mask of the racial identity itself, and only this mask which the slave catchers saw: "The stereotype—the mask—defined the African American as white Americans chose to see him; outside the mask he was either invisible or threatening."⁴³

What indeed was Bibb's crime? His crime is "who he is." "Who he is" is established by his appearance. His whiskers could not hide either his race or his gender. Through the distorting gaze of slave society the simple fact that Bibb was a black male—free—established "probable cause." This is not probable cause based on what an individual has done. This is probable cause imposed on the basis of what an individual might do.

The notion of the "gaze" is familiar to anyone who has seen old films. Take the Tarzan series, for example.⁴⁴ In the Tarzan films black savages, with bones through their noses, capture genteel British explorers, truss and put them in the cooking pot. In the nick of time, Tarzan, a white man raised by

gives this stereotypical concept a scientific spin. As used by police a profile seems to refer to a set of characteristics which are thought to function as predictors of criminality. These characteristics are of two kinds. As Charles Becton explains, "As a predictive scheme the drug courier profile constitutes a hybridization of clinical and statistical models." Clinical predictions, based on the subjective judgments of experienced decision-makers, focus on the uniqueness of individuals. Statistical predictions rely on "formulas that assign fixed weights to predetermined characteristics" of individuals.

Charles Becton, *The Drug Courier Profile: "All seems infected that th'Infected Spy, As All Seems Jaundiced to the Jaundic'd Eye,"* 65 N.C. L. REV. 417 (1987).

These characteristics fall into four categories: environment, evasion, eccentricity, and earmark.

Environment factors are those from which DEA agents can infer access to drug distributors or users for example, traveling between source cities and use cities. Evasion factors are those from which DEA agents can infer an attempt to avoid surveillance or conceal identity for example, paying for a ticket with cash and checking no baggage. Eccentricity factors are those from which DEA agents can infer a state of emotional arousal—for example, rapid breathing and shaky hands. Earmark factors are related to status or personal appearance characteristics of the drug courier—for example, age, race, and gender.

Id. at 438.

⁴³ *Id.* at 12.

⁴⁴ See EDGAR RICE BURROUGHS, *TARZAN OF THE APES* (1914).

apes comes to the rescue. Leading a herd of elephants as a surrogate for the cavalry, Tarzan arrives to save the innocent white people. In portraying the Africans as savage aggressors and the British as innocents the Tarzan stories turn upside down the moral reality of colonialism: By portraying the British—and Tarzan—as a civilizing force in an uncivilized jungle, the films implicitly justifies colonialism. One's enjoyment of the film depends upon taking the racial perspective of the colonizer. This racial perspective, and the mechanisms associated with it that make it seem natural, constitute the "dominant gaze."

Bibb as a free black male appears to the "dominant gaze" as dangerous and evil as Tarzan's natives. Bibb is seen as a criminal because slave society needed psychologically to see him this way: either in chains or as an enemy of the state.

For the Greeks, the image of otherness was the foreigner who was also a barbarian,⁴⁵ for Foucault the image of the other was the mad person,⁴⁶ but for slave society the quintessential image of the other is the racial other, particularly the black male. This racial other has always represented the enemy to be subdued—much like a dangerous animal. As Vilo Harle recognized, "The point is there are some Others who are excluded from among us and are actually perceived in less human terms, below human beings, dangerous animals that can and must be killed."⁴⁷ Only if the racial other is a dangerous animal/criminal could slave society justify its cruel practices and constant surveillance.

Racism is traditionally understood as irrational. On the contrary, it is a perverse expression of rationality.

[R]acism is not simply a stupid hatred. It may be based on ignorance that breeds hatred, but it is every bit as dependant upon a form of knowledge. That knowledge, sometimes wittingly used, sometimes unwittingly, operates to reinforce the fear and hatred of others by providing rationales for hierarchizing differences.⁴⁸

⁴⁵ VILHO HARLE, *THE ENEMY WITH A THOUSAND FACES: THE TRADITION OF THE OTHER IN WESTERN POLITICAL THOUGHT* (2000).

⁴⁶ *Id.*

⁴⁷ *Id.* at 11.

⁴⁸ THOMAS DUMM, *THE NEW ENCLOSURES*, in *READING RODNEY KING: READING URBAN UPRISING* (Robert Gooding Williams ed., 1993).

Thus, our dusty old orthodoxy about race holds that stereotypes are bad. My point is that the fabric of racial identity is itself woven from stereotypical images.

This framework helps to explain the failure of our civil rights discourse. The project of racial integration has proceeded on the assumption that differences between the races are environmental and that if blacks could have access to education they could assimilate into the mainstream. In messianic fashion, the integration strategy assumes that the burden was on blacks to lift themselves up by their bootstraps and enter great America. I would argue that our basic images and notions of race police the border between America and Africans. Let me tell another story.

B. *Guess Who's Coming to Dinner*⁴⁹

In *Guess Who's Coming to Dinner*⁵⁰ Sidney Poitier, the Denzel Washington of his day, portrays a black male who attempts to break through the barbed wire of an age old racial taboo: he wishes to marry a white woman.

Sidney is a young black doctor in love with the willful, colorblind daughter of an old school white businessman (Spencer Tracy). Wearing a Brooks Brothers suit and a smile as his armor, Sidney comes to the white family's dinner table both as guest and as would be harbinger of the modern age of race relations.

The film thematizes not merely the moral anxiety over the sexual designs of black males. It posed, dramatically, the social and political question of the place of the black male in the new world order following the dismantling—officially at least—of segregation and the racial ideology on which it rested.

Sidney's black male is affluent, culturally hip, and doomed. Striving to be American and black, a rugged individualist and a representative of his race, Sidney lives split between worlds, and split inside himself.

Sidney is, as the black male in the white mind always is, an abstraction: in this case the embodiment of a modern

⁴⁹ D. Marvin Jones, *Guess Who's Coming to Dinner*, in RACE, SEX AND SUSPICION 49 (forthcoming 2002).

⁵⁰ *Guess Who's Coming to Dinner* (Columbia Pictures 1967).

liberalism. This liberalism, rising like a phoenix out of the ashes of World War II—a war against Nazism—dreamed in the colors of the rainbow. This new liberalism rejected the idea that race in a biological sense determined who one was.⁵¹ The popular liberal impulse, released by the catharsis of war, converged with other streams. Anthropologists like Franz Boaz and Otto Kleinberg began unbuilding the myth that intelligence and other mental characteristics had anything to do with heredity: “Culture not racial inheritance was the principle shaping force in determining mental characteristics of a people.”⁵² Where classical sociology had attributed the poverty of blacks to innate laziness and instability, E. Franklin Frazier, and Charles Johnson, standing on the shoulders of W. E. B. Dubois began to trace black economic inferiority to environmental causes involving racism. Of course the most pivotal work here was that of Gunnar Myrdal, whose post-war bombshell of a book, *An American Dilemma*⁵³ was cited in the *Brown v. Board of Education*⁵⁴ decision itself. Myrdal argues that the practice of segregation was inconsistent with America’s own creed and in effect was an obstacle in the road of America’s national destiny.

The historical moment of the Harlem renaissance was nourished by and itself fed into this liberal impulse. As Toni Morrison wrote in *Playing in the Dark*,⁵⁵ Daniel DeFoe’s Robinson Crusoe was “the man” because he had access to language. Man Friday, who lacks access to language and cannot speak, never becomes fully a person, hence he is “Man Friday.” Through the writers of the Harlem renaissance, blacks had begun to find their voice, radically transforming the image of blacks as they transformed themselves through their art.

⁵¹ As OMI and WINANT write: “With the advent of the vaguely egalitarian (racially speaking) vision of the new deal and of the anti-fascism of World War II . . . the ethnic paradigm definitively dislodged the biologic view in what appeared to be a triumph of liberalism.” MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 14 (1986).

⁵² See RICHARD KLUGER, *SIMPLE JUSTICE* 1975 (characterizing the conclusions of FRANZ BOAZ, *THE MIND OF PRIMITIVE MAN* (1922)).

⁵³ GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO AND THE PROBLEM OF AMERICAN DEMOCRACY* (1944).

⁵⁴ 347 U.S. 483 (1954).

⁵⁵ TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* (1992).

These streams of liberal thought converge on one point: only culture, language, and shared values—varying like the colors of the rainbow—define the boundaries of the American community.⁵⁶ These newfound streams of liberalism fed into a larger river, the legitimating myth of America as a melting pot.

In a ritual of Americanization, Henry Ford had foreign workers enter one end of a giant clay pot wearing their national costumes and come out the other end in American business suits.⁵⁷ The talisman of belief in the American creed—in this case the creed of capitalism symbolized by the business suit—had given them a new identity as Americans.

If the black male is always merely a product of the white society's gaze, Sidney is its product as it looks at the black male through the lens of the melting pot story. Through this lens the image of Sidney looks "right." He is well dressed, meticulously pronouncing all the endings on his words, trying heroically in his behavior to overawe the degraded image of his phenotype. Sidney is a doctor, who happens to be a black male. Thus, it was not Sidney's race or gender that defined him. It was the values he had chosen as reflected by his Ivy League degrees and his Brooks Brothers suit.

In these terms, Sidney's character personified a social proposition: race was like a national costume and could be taken off and exchanged for an American identity. It was axiomatic of cold war liberalism—this was the essence of the *Brown* decision, I think—that not only was the assimilation of blacks possible, but a moral imperative. As Myrdal wrote in his classic *An American Dilemma*: "If America in actual practice could show the world a progressive trend by which the Negro finally became integrated into modern democracy, all mankind would be given faith again—it would have reason to believe that peace, progress and order are feasible."⁵⁸ Within this retelling of the melting pot story the immigrant analogy was implicit: "there are no essential differences—in relation to the

⁵⁶ *Id.* at 14.

⁵⁷ Joe E. Fagin, *Old Poison In New Bottles*, in *IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 26 (Juan Perea ed., 1997).

⁵⁸ See generally MYRDAL, *supra* note 53.

larger society—between the third world or racial minorities and the European ethnic groups.”⁵⁹

It is precisely this story of the melting pot reinvented as a “table” that animated Dr. King’s appeal: “I have a dream that one day on the red hills of Georgia the sons of former slaves and the sons of former slaveholders will be able to sit down at the table of brotherhood.”⁶⁰

But there is a split here. Along the axis of race the split is between what Myrdal referred to as the American belief in equality and its practice. It flounders simultaneously on the axis of American identity itself: between two readings of the American story. One is the story of the America as a great *e pluribus unum*, out of many one, the America of Dr. King, of Langston Hughes in his poem “I, Too:”

I, too, sing America/
I am the darker brother/...
I, too, am America.⁶¹

The other story of America is the one expressed in *Dred Scott*,⁶² holding that a black man was incapable of becoming an American citizen, the America of the Chinese Exclusion Act, the America of the World War II internment of the Japanese. It was this story which Henry Pratt Fairchild, past president of the American Sociological Association, expressed in 1926 when he said: “If America is to remain a stable nation, it must continue a white man’s country for an indefinite period to come.”⁶³ This story of America as a white man’s country ironically coexisted with efforts to expand the American myth to blacks.

The split between these two stories about American identity—America as the land of the free and America as the land for white people—signifies a deeper psychological conflict: between modern liberalism and the needs of whites to claim racial superiority. As Dubois pointed out in *Black*

⁵⁹ *Id.*

⁶⁰ Martin Luther King, Jr., *I Have A Dream* (Aug. 28, 1963), in PENGUIN BOOK OF TWENTIETH CENTURY SPEECHES 330 (Brian McArthur ed., 1992).

⁶¹ *Id.*

⁶² *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

⁶³ Fagin, *supra* note 57, at 26.

Reconstruction, the wages of whiteness consisted of privileges with respect to jobs, and social status.⁶⁴ The legal and intellectual orthodoxy of blacks as just another ethnic group floundered on deeply engrained cultural norms that required that white skin remain a badge of privilege.

Thus through the colorblind lens of the film's orthodoxy, Sidney comes to dinner as an American: the very fact that he does so is a living witness that in America all can sit at the family table so long as they have the right moral credentials. But the orthodoxy of liberal intellectuals does not dissolve ideology that has been deeply entrenched.

Antonio Gramsci in his *Prison Notebooks*⁶⁵ observed that after the Italians had overthrown the official apparatus of fascism he discovered the government was only an outer ditch and that behind it the massive ideology of fascism was left untouched. There is a similar story to be told about the overthrow of the regime of segregation in the United States.

Thus, whites in the South openly, and many whites in the North covertly, never accepted the premise that blacks were just another ethnic group. As late as 1991 a *New York Times* poll found that 66% of whites were opposed to a relative marrying a black person.⁶⁶ The meaning of segregation as Gunnar pointed out in his post-war classic, was that while European groups could be assimilated the blacks could not.⁶⁷ The anti-immigrant story of America as a white man's country not only continued to resonate but also was knotted together with the anti-black story of "Negro inferiority."

"We Americans seem to have blundered about in our history with two clumsy contrivances strapped to our backs, unreconciled and weighty: our democratic traditions and race."⁶⁸ The synergy between these two stories splits Sidney in two. Sidney's project was to transform himself into an American in order to transform himself into a man: no longer a

⁶⁴ See WILLIAM EDWARD BURGHARDT DUBOIS, *BLACK RECONSTRUCTION IN AMERICA* 700 (1962).

⁶⁵ See ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI* (Quintin Hoare & Geoffrey Nowell Smith eds. and trans., 1971).

⁶⁶ ELLIS COSE, *COLOR-BLIND: SEEING BEYOND RACE IN A RACE OBSESSED WORLD* 8 (1997).

⁶⁷ MYRDAL, *supra* note 53, at 928.

⁶⁸ Gerald Early, *Performance and Reality: Race and Sports and the Modern World*, *THE NATION*, Aug. 10, 1998, at 11.

black man but simply a man. He sought finally to be whole, no longer merely a body or a pair of hands. Instead he is split in two. One of him remains in the world of the colorless individual, one of him does not. He lives in two worlds. In the world of liberal theory, a world that extends to court opinions, to official policy, to speeches by Presidents, to the conscious thoughts of enlightened people, Sidney is simply an individual, an American.

But, Sidney also lives in a world of private thoughts, a world in which the majority of white people still do not want their relative to marry one of "them." In this world America is still "white man's country." Here Sidney's visual image leads to visceral reaction both for whites and the black male who seeks to "pass":

Look, a Negro!"

Mama, see the Negro! I'm frightened! Frightened!" . . .

I could no longer laugh, because I already knew that there were legends, stories, history . . . Then assailed at various points, the corporeal schema crumbled, its place taken by a racial epidermal schema. . . . I moved toward the other . . . and the evanescent other, hostile but not opaque, transparent, not there, disappeared. Nausea.

. . .

I was responsible at the same time for my body, for my race, my ancestors. . . .

I discovered my blackness and I was battered down by Tom-toms, cannibalism, intellectual deficiency, fetichism, racial defects, slave-ships, and above all else, above all: "sho good eatin."⁶⁹

From this perspective, Sidney at Spencer Tracy's dinner table, surrounded by Spencer Tracy's white wife, white daughter, white Irish Catholic priest, looks "out of place." He is, if not a fly in the buttermilk, still a stranger in the village, much like James Baldwin, if we can picture him, when he visited the Alps.⁷⁰ He is a foreigner.

The black male carries his border with him, in his skin. Neither place of birth, nor acts of Congress change his citizenship. He remains the central character in a story about how some groups are simply incapable of being truly American.

⁶⁹ FRANTZ FANON, *BLACK SKIN, WHITE MASKS* 112 (1967).

⁷⁰ James Baldwin, *Stranger in the Village*, in *THE PRICE OF THE TICKET* 79 (1985).

Jean Paul Sartre provides an analogy for us.⁷¹ Sartre noted that despite years of residence and significant economic and cultural achievements, Jews remain "the unassimilated at the very heart of [French] society":

[The Jew] accepts the society around him, he joins the game and he conforms to all the ceremonies, dancing with the others the dance of respectability. Besides, he is nobody's slave; he is a free citizen under a regime that allows free competition; he is forbidden no social dignity, no office of the state. He may be decorated with the ribbon of the Legion of Honor; he may become a great lawyer or a cabinet minister. But at the very moment when he reaches the summits of legal society, another society—amorphous, diffused, and omnipresent—appears before him as if in brief flashes of lightning and refuses to take him in. . . . [H]e never encounters any particular resistance; people seem, rather, to be in flight before him; an impalpable chasm widens out, and, above all, an invisible chemistry devaluates all he touches. . . . Everything is accessible to him, and yet he possesses nothing; for, he is told, what one possesses is not to be bought.⁷²

As Frantz Fanon has noted the situation of blacks in a white society is analogous, but worse: "[T]he Jew can be unknown in his Jewishness His actions, his behavior is the final determinant. He is a white man, and . . . can sometimes go unnoticed. [But] I am the slave not of the 'idea' that others have of me but of my own appearance."⁷³ No matter where he is born the black male is an alien. He is alien not in the language he speaks, perhaps not in the values he holds in his heart. He is alien in terms of his mythic essence: his incorrigible sexuality, his propensity for chaos.

Similarly, our prototypical image of race operates as a lens, which intercepts the person of color precisely at the point at which s/he seeks to interrogate the dominant discourse. The same racial boundaries, which demarcated separate railroad cars for blacks and whites, demarcate separate space for blacks and white scholars to participate in discourse. Let me explain what I mean again through the agency of a story.

In 1839, Spanish slavers herd a group of kidnapped Africans aboard the schooner *Amistad*, bound from Havana,

⁷¹ JEAN PAUL SARTRE, *ANTI-SEMITES AND JEWS* 83 (G. Becker trans., 1948).

⁷² *Id.*

⁷³ FANON, *supra* note 69, at 115.

Cuba to another Cuban Port, Puerto Principe.⁷⁴ Miraculously, the Africans escape their bonds. Led by the now famous Cinque⁷⁵ they steal long bladed sugar cane knives and take control of the very ship in which they were held as cargo.⁷⁶ But why did Cinque fight? Slavery involved the uprooting of indigenous people from family, soil, and culture. It was not merely an act of physical brutality, but a process of systematically erasing the slave as an African or even a person at all. The hold of the slave ship where hapless Africans were laid spoon fashion in blood and filth, was the moral opposite of the womb: from the belly of the slave ship nothing human emerged.⁷⁷ What emerged was received as a slave, who by definition was stripped of everything that counted as human identity.⁷⁸ Henry Louis Gates tells a story about a slave who was asked about his "self." The slave replied, "I isn't got no self."⁷⁹ As I see him, Cinque fought to cross back over a line that separated not only home and alien territory, freedom and oppression, but also the line between having a name—a sense of who one is—and being nameless. In a sense Cinque fought to keep not only his body but also his "self" from being stolen, lost, or erased.

Although the Africans wrest the power over the ship, they lack the navigational skills to find their way home. Sparing and later trusting a Spanish navigator named Montes⁸⁰ who promptly tricks them by sailing East by day and North or West by night, zigzagging up the American coast.

⁷⁴ CHRISTOPHER MARTIN, *THE AMISTAD AFFAIR* 35-36 (1970).

⁷⁵ Cinque would appear to be an Anglicization of Joseph Cinquez, the name the Spanish slavers gave to the African known as Sinbe. *Id.* at 32. Reluctantly I use Cinque's slave name only because it is the name popular culture has inextricably associated with the historical African person of the story.

⁷⁶ See generally *id.*

⁷⁷ See ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 7 (1982) (speaking of the gulf between the slave and the community of Christians, and civilized persons: "[G]radually there emerged, however, something new in the conception of the black servant: the view that he did not belong to the same community of Christian, civilized Europeans").

⁷⁸ KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 109-24 (1956); WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812* (1968).

⁷⁹ HENRY LOUIS GATES, *RACE, WRITING AND DIFFERENCE* (1985).

⁸⁰ WILLIAM OWENS, *SLAVE MUTINY* 71-110 (1953).

Objectively, Cinque's struggle resonated in terms of values Americans had inscribed in blood into their own story of origins. But eventually these Patrick Henry-like rebels landed on Montauk Point, Long Island.⁸¹ Of course, Cinque and thirty-eight surviving Africans were promptly captured and indicted for murder.⁸² Although the indictments were later dismissed, the Africans were still held to determine whether or not they were properly denominated as cargo or people.

In the Steven Spielberg film⁸³ which attempts to retell this story, a venerable American sage, John Quincy Adams comes to the rescue,—he rescues not only the Africans but the American legal system from the indictment of history. Representing the Africans as kidnap victims who had a right to be free by all necessary means. While the film provides a storybook ending, with Cinque clothed in white robes of innocence returning to his native shores, the return home was not quite so simple a proposition for the Africans. Although they are freed by a Supreme Court decision—that affirmed dryly only that they were free Negroes and not slaves⁸⁴—the Africans do not go home for many months. This is where Spielberg's story trails off. In order to raise money for the voyage back to what is now Sierra Leone, Cinque and the others must work. He does this in part by giving speeches in the Mende language, by doing tricks, and by presenting himself to be gawked at much like an animal in a menagerie or zoo.⁸⁵

⁸¹ MARTIN, *supra* note 74, at 52-53.

⁸² *Id.* at 60.

⁸³ AMISTAD (DreamWorks 1998).

⁸⁴ *United States v. Amistad*, 40 U.S. 518, 595 (1841). The Supreme Court orders the Africans freed in a surgically precise opinion that affirmed the rights of the kidnapped Africans under a particular treaty without touching the moral, or international human rights issues profoundly intertwined in the facts of the case. That court opinion turns on the formal distinction between slave and free Negro, and fails to reach the issue either the morality or criminality of the treatment of the Africans themselves.

It is also a most important consideration in the present case, which ought not to be lost sight of, that, supposing these African negroes not to be slaves, but kidnapped, and free negroes, the treaty with Spain cannot be obligatory upon them; and the United States are bound to respect their rights as much as those of Spanish subjects.

Id.

⁸⁵ See MARTIN, *supra* note 74, at 208-10; OWENS, *supra* note 80, at 291-93.

Throughout the story, Cinque's every act is seen through a lens. It is this lens, which refracts Cinque's quintessentially human act of rebellion into an act of murder for which he is indicted. Through this lens Cinque is not and never becomes an individual endowed with inalienable rights, but appears as a slave who killed his master. Cinque places himself squarely within the circle of the dominant majority's stereotypes, doing tricks, performing as and conforming to a reverse image of him, in order to make money. As Cinque and the other Africans were placed on display in a church in Farmington by their abolitionist "friends," "[m]others held tightly to their babies—making sure they would never become tempting morsels for tattooed cannibals."⁸⁶ In performing as he does, it is an interesting question whether Cinque trades for money the very quality of identity that he fought originally to retain. We are free today of the curse of slavery, but in what sense are the performances of black scholars free of the curse of Cinque.

What are the implications of Steve Winter being right; that we can never separate what we perceive from the prototypical images we bring to the process of perception. How do we expose the trope of identity from behind the screen of prototypical—and tropological—images of race. How do we enter discourse, much less challenge power relationships when before we write, before we stand up to speak, these caricatured images of racial identity proceed us as much as they proceeded Cinque. Henry Louis Gates poses the question eloquently: "Can writing, the very difference it makes and marks, mask the blackness of the face that addresses the text of Western letters, in a voice that speaks English, in an idiom that contains an irreducible element of cultural difference that shall always separate the white voice from the black."⁸⁷

I wonder.

⁸⁶ OWENS, *supra* note 80, at 288.

⁸⁷ HENRY LOUIS GATES, *Writing, Race, and the Difference It Makes*, in LOOSE CANONS 67 (1992).

