

First-Time Encounters: "Passing" Revisited and Demystification As a Critical Practice

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I. INTRODUCTION

I hope the reader will indulge me in my use of the terms "white," "black," "mulatto," and "Negro." Admittedly, they are very loose and laden with powerful emotional charges. But most who read this book will know their weaknesses and recognize their strengths as necessary symbols in talking about these subjects.

—Joel Williamson¹

A. Green, Black, and White

Robert Green filed suit to have the New Orleans Bureau of Vital Statistics change the race on the birth certificate of Jacqueline Ann Henley.² Green wanted to adopt the child who was four years old; however he could not because he was Black and the child was listed as white on her birth certificate.³ A curator ad hoc was appointed by the court to represent the child's interests. Based on the curator ad hoc's answer to Green's allegation that the child was Black, the court dismissed Green's suit, and Green then appealed.

The child, Jacqueline Ann Henley, was born on November 2, 1950. Her mother Ruby Henley Preuc was a divorced white woman. Shortly after Jacqueline was born, Ruby turned her over to the child's aunt, Mrs. Harold McBride, to care for her. Two years later, Ruby died of cancer without ever having revealed the identity of the Jacqueline's father. On August 1, 1952, a couple of months before Ruby Preuc's death, Mrs. McBride asked the Department of Welfare to take Jacqueline because "she could no longer permit the child to remain in her home, since the neighbors were beginning to comment about the medium brown color of the child's skin."⁴ At that time, proceedings

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1. JOEL WILLIAMSON, *NEW PEOPLE* xii (1984).

2. *See Green v. City of New Orleans*, 88 So. 2d 76, 77 (La. Ct. App. 1956).

3. *See id.*

4. *Id.*

began to declare Jacqueline abandoned, and she was soon placed in a Black foster home.

Green, Jacqueline's foster parent, sought to adopt her. His application was approved by the Department of Welfare until an examination of her birth certificate revealed that she was registered as white. When the Bureau of Vital Statistics refused to reclassify her racial status, Green was not allowed to adopt Jacqueline. At that time, Green filed suit to prove that Jacqueline Ann Henley was indeed Black, and that her birth certificate should be changed to reflect that fact. Green would then be eligible to adopt her.

Green's case was based on the testimony of several witnesses. Ruby Henley Preuc had been a barmaid at a "Negro saloon," and the plaintiff sought to use this fact to prove her child was likely fathered by a Black man.⁵ One of his witnesses was a Black man named Herbert Stanton who did not testify that he was the father or that he had had a sexual relationship with the child's mother. Instead, he testified that he wrote to Ruby while she was in Detroit, and he showed the court a letter to her containing such phrases as "but you know I'll always love you" and "I wish you was home I miss you so."⁶ The court of appeals characterized the testimony of Stanton as an example of the trial judge "most liberally relaxing the rules of evidence" so as to give the plaintiff every opportunity to prove his case.⁷

Green also offered the testimony of Mrs. Emma Smith, the woman who was responsible for filling out the birth certificate. She stated that she had not inquired about the race of Jacqueline's father. She further testified that, whenever the mother is white, she does not ask if the father is white. Instead, she "take[s] it for granted he is white."⁸ Mrs. McBride, the child's aunt, then testified about her sister leaving the child with her, and her decision to turn the child over to the Department of Welfare. She stated that she told a Mrs. Oberholtzer at the Department of Welfare that the child "didn't fit in [her] family, she was too dark," and that people had made comment that "the child was possibly a nigger."⁹ However, Mrs. McBride had no knowledge pertaining to the actual race of the child's father or whether Ruby Preuc had ever had a relationship with a Black man outside of her work. Both Mrs. Oberholtzer from the Department of Welfare and a lawyer named Charles Collins testified that Mrs. McBride had spoken to each of them about her concerns that the child was Black and that Mrs. McBride, who lived in an all white neighborhood, would not be able to keep the child in her home.¹⁰

5. *Id.* at 78.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *See id.* at 79.

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The witness that the court found most compelling was the only expert witness, Dr. Arden R. King. Dr. King was a Tulane University professor of anthropology.¹¹ Dr. King testified that he had examined Jacqueline Ann Henley and that she was probably part Black. He based his conclusion on “three characteristics which are distinctly Negro in this child.”¹² Those three characteristics were “lip seam,” “distinctly small, delicate ears,” and “concentrations of pigments in diagnostic positions of the anatomy.”¹³ He testified that while those characteristics could appear in someone who is not Black, the chances would be very low. While he stated on cross-examination that he could not positively say that the child was Black, he would be in a better position to do so when she reached the age of nine or ten.¹⁴ The dissent, however, pointed out that Dr. King was certain that the child’s father was not white.¹⁵

The court did not give much weight to any of the testimony other than that of Dr. King since the other witnesses had no actual knowledge of the father’s race. The court was also somewhat skeptical of Dr. King’s testimony and stated that “all the methods presently in use to determine race are precarious and . . . their provisional findings must be accepted with the utmost caution.”¹⁶

While the general rule for civil cases is that the plaintiff does not have to prove his case beyond a reasonable doubt, this court interpreted precedent to require that in cases where a person seeks to change the race listed on a record, he must prove his case such that there is no doubt that the race should be changed.¹⁷ The majority found that Green had not proven his case adequately since even his best witness could not yet be certain that the child’s father was Black.

Instead of dismissing the suit, however, they chose to nonsuit Green so that he could file suit at a later time when Dr. King would be able to testify as to the race of the child’s father with more certainty.¹⁸ Judge Janvier in his dissent, however, believed that the court should go ahead and order the change of the child’s race on the birth certificate immediately, since Dr. King was certain that the child’s father was not white.¹⁹ The dissent believed that despite a lack

11. *See id.*

12. *Id.*

13. *Id.*

14. *See id.*

15. *See id.* at 82 (Janvier, J., dissenting).

16. *Id.* at 80.

17. *See id.* at 80; *see also* *State ex. rel Treadaway v. Louisiana State Bd. of Health*, 61 So. 2d 735, 739 (La. 1952) (“The registration of a birthright must be given as much sanctity in the law as the registration of a property right.”); *Sunseri v. Cassagne*, 185 So. 1, 5 (La. 1938) (“[Defendant’s] marriage should not be annulled on the ground that she is of the negro race unless all the evidence adduced leaves no room for doubt that such is the case.”); *State ex. rel Treadaway v. Louisiana State Bd. of Health*, 56 So. 2d 249, 250 (La. Ct. App. 1952) (“[T]here must be no doubt at all . . .”).

18. *See Green*, 88 So. 2d at 81.

19. *See id.* at 82 (Janvier, J., dissenting).

of substantial evidence, there was no doubt that the child was Black and should be adopted by a Black family.

Trials of racial determination in the United States reach back at least to the nineteenth century and forward to the latter part of the twentieth.²⁰ Although contexts and the tests used by courts have varied over time,²¹ a bedrock criterion has remained the visible or phenotypic appearance of the individual whose race was in question. The reliance on appearance as a legal criterion to determine racial status reflects a sufficient although not always necessary incident to the social practice of racial sorting. Determinations of racial status occur routinely as part of everyday interactions. Especially in the context of first-time encounters, Americans are wont to surmise the racial identity of those persons with whom they come into contact. The criteria for making racial judgments are social and automatic. They are hardly ever subject to scrutiny in the immediacy of racial recognition and are rarely revised. For the most part, racial recognition is a visual phenomenon. I see you and, by the very act of seeing, know that you are Black, white, or Asian. What cannot be discerned from mere sight—parentage, ancestry, self-identification, language, education, class, national origin, cultural affiliation, and so forth—is subordinate to the racial judgment. These other factors come into play, if at all, when the visual apprehension of race yields uncertainty or doubt. To articulate the criteria of racial classification, one cannot rely only on doubtful cases. One must begin with plain cases in order to explain doubtful cases, and not vice versa.²²

This Article will examine the visually overdetermined²³ racial situation of Black Americans in law and society and examine where such overdetermina-

20. See generally IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); see also Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOYOLA L. REV. 255 (1983); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South*, 108 YALE L.J. 109 (1998); Chris Ballentine, Note, "Who is a Negro?" Revisited: *Determining Individual Racial Status for Purposes of Affirmative Action*, 35 U. FLA. L. REV. 683 (1983).

21. Tests for racial status have included "blood" or ancestral relation, color or appearance, community knowledge, expert knowledge, national origin, and self-identification. For the "blood" relation test, see, for example, Diamond & Cottrol, *supra* note 20, at 257, who relate the codification of the Louisiana law that restricted white racial status to those having one-thirty-second or less of "Negro blood." For color or appearance, also described as the "eyeball" test, see Gross, *supra* note 20, at 137 (citing *Garvin v. State*, 52 Miss. 207, 209 (1876), for the proposition that a "colored person" may be "brought to [the jurors'] attention of proof by ocular demonstration"). For community and expert knowledge tests, which tended to combine with notions of racial status as based on national origin, see HANEY LÓPEZ, *supra* note 20, at 63-64 (noting that federal appellate courts in the late 19th and early 20th centuries mainly used "science" and "common knowledge" to decide whether immigrants should be considered white persons). For an administrative regime that appears to be based solely on self-identification, see Ballentine, *supra* note 20, at 689 (reporting that Department of Commerce guidelines permit an individual to choose his own racial status).

22. In *Dred Scott v. Sandford*, 60 U.S. 393 (1857), for example, the Court appears to be absolutely certain about who is "a negro" and who is "white." It appears that visual appearance, common knowledge, and social status as a slave were sufficient to lead the court to conclude that Dred Scott was "a negro."

23. On my use of the term "visually overdetermined," see *infra* note 130 and accompanying text.

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tion exceeds credulity in the case of individuals who “pass” for white. It has been suggested that whiteness may be viewed as property,²⁴ and thus “passing” for white is treated as a kind of group identity trespass. But judicial determinations of race indicate that if whiteness is to be viewed as property, it is a very special kind of property, which is on the one hand heritable, transparent, and exclusive, yet on the other hand defeasible and socially ambiguous. As in the example of *Green v. City of New Orleans*, whiteness can only be properly transferred intergenerationally when both parents are also white. But even assuming that both of Jacqueline’s parents were white, due to the absence of her father, her claim to whiteness is treated as both transparent and exclusive—it is taken for granted that the father is white²⁵ and this presumption can be defeated only by a standard that exceeds the criminal burden of proof. Yet her whiteness is subject to the analytic gaze of science and the racially suspicious surveillance of the community. Jacqueline, at some indefinite point in her progress toward maturity, may turn out to be Black.

There are several points to be made about this schema of racial determination that will be developed in the course of this Article. First, in the absence of artifice, no one who is visually apprehended as Black in a relatively anonymous context (what I will call “first-time encounters”)—where parentage, ancestry, self-identification, national origin, and so forth, are unknown—turns out to be white.²⁶ By virtue of this intransitivity, the color line is endowed with remarkable stability and ideological persuasiveness. The judgment of Blackness is fixed, immediate, irrevocable; the judgment of whiteness is ever subject to modification, revision, error. Second, the focus on first-time encounters is justified by the fact that casual contexts in which a body sees another body provide the experiential staging ground for both racial determination and racial discrimination. There is no Rawlsian veil of ignorance that shields us from one another’s racial gazes. Third, in order to reveal the ideological character of racial identities implicated in the American schema of racial determination, it will be necessary to examine constitutively and phenomenologically what is meant by Black and white in the discourse of race. As will be shown, “passing” is the key concept that unlocks the door to racial identity. Put another way, there is no racial identity without “passing,” since “passing” marks a boundary between us and them, Black and white, one and the other. Finally, in order to challenge the ideology of race, it will neither do to complain, along with anti-essentialist critics, that the line of division is arbitrary, nor is it sufficient to add, along with the multiracialist movement, new categories of racial division.

24. See generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); see also *State ex. rel. Treadaway v. Louisiana State Bd. of Health*, 61 So. 2d 735, 739 (1952) (comparing the birth right of white racial status to property rights).

25. See *supra* note 8 and accompanying text.

26. This is a social observation, but it may be legally accurate as well.

As Kimberlé Crenshaw has said, engaging in self-conscious ideological struggle requires transcendence of "the oppositional dynamic in which Blacks are cast simply and solely as whites' subordinate 'other.'"²⁷

The decision to retell the story of Jacqueline Green's trial of racial determination as a method of introduction to the subject of "passing" driven by the way in which its narrative provides a context, both familiar and strange, for consideration of the points to be made about the American schema of racial determination. Although it could be said that Green failed to "pass"—because of her "medium brown color" she was placed with a Black family—Green was nevertheless presumed to be white by the court and officially so designated by the state. The presumption of the court, however, was not shared by the community in which Green lived. Thus, *Green* exemplifies the split between law and society created by the contradiction of a white legal subject who cannot "pass" for white. Legal discourse and popular discourse on "passing," it will be shown, are committed to this contradiction for a similar set of reasons.

Moreover, that Green's racial future should be made to depend on physical characteristics such as lip seam, small ears, and pigment concentrations, highlights the reification of the look in racial discourse. Thus, *Green* is a good example of whiteness being subject to investigation and modification based on a visual paradigm of race that nevertheless invokes the notion of racial blood. The legal presumption of Green's whiteness unravels in the context of first-time encounters in which she is seen as Black. The legal presumption of whiteness forces Green to "pass" as that for which she would never be taken, as a subject capable of demarcating the white side of the race line. It also reveals that "passing" defines what would be the successful occupation of that subject position.

Just as importantly, *Green* surfaces the value that is placed on whiteness by detailing the extent to which individuals operating within the system of racial discrimination were willing to go to protect whiteness from Black encroachment in particular. Jacqueline Green was abandoned by her blood relative because she "possibly was a nigger."²⁸ Yet, based on the fact that she was only four years old, it can perhaps be safely assumed that the concern over her race was an issue only for the adults. As a child, Jacqueline Green's lack of identity investment in the racial order points to another split that will be useful to explore: the split between identity and subjectivity in the construction of racialized bodies. Analysis of this split and of the social valuation that continues to be afforded to whiteness will shed light on at least part of what is at stake in current attacks on race-conscious discourse, such as colorblindness and multi-racialism.

27. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1385 (1988).

28. *Green v. City of New Orleans*, 88 So. 2d 76, 78 (La. Ct. App. 1956).

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B. Outline of the Argument

My critical strategy returns us to the historical development and milieu of "passing" in order to uncover the discursive foundations of that authority in the juridical investment of the racial condition of the individual. It will be argued that a dividend of this investment is the "black homunculus," a metaphor of the metaphor of the Blackness within, which is key to an elaboration of authentic whiteness—"purity"—and the stylization of the person of partial African descent as impure—"having Black blood." Part II begins with the definition of the legal status of the "passing" person in the antebellum South and then turns to its postbellum constitutionalization and a critique of its enforcement in the contemporary period. This backdrop centers on a rereading of cases from the nineteenth and twentieth centuries, in which judicial scrutiny of race reinforces not only white discourse agreements²⁹ about the racial condition of the individual, but also marks the person of partial African ancestry as racial trespasser on whiteness. These cases, taken together, link past to present by supporting a consistent and characteristic evasion of the discourse agreements of white authority—evasion of the sociopolitical meaning of the claim to whiteness. Part III considers how the uses of "passing" in popular consciousness recirculate the judgments of legal discourse about the racial condition of the "passing" person. Part IV offers some critical evaluations of two seemingly opposed doctrinal responses to our racial social system, the turn to colorblindness and multiracialism. Finally, Part V concludes this examination in light of the precautions against white supremacist racial ideology with which we began. Before embarking on this Article's analysis, however, a note on the origins of this Article and its methodological approach to the subject of "passing" is in order.

C. A Note on Origins

Perhaps it is somewhat anomalous near the end of the twentieth century to revisit an issue such as racial 'passing.'³⁰ Why, after all, would a legal-

29. For explanation of the term "discourse agreement," see *infra* note 68.

30. Carol-Anne Tyler states, "Ours is the era of the passing of *passing* as a politically viable response to oppression." Carole-Anne Tyler, *Passing: Narcissism, Identity, and Difference*, 6 DIFFERENCES 212, 212 (1994). The former reference to passing signifies a connection to death, while the latter refers to racial "passing." In this Article, racial "passing" appears in quotation marks in order to highlight its contested meaning in racial discourse. Tyler's contention appears to be born out by the proliferation of writers phenotypically qualified to "pass" who nevertheless claim a Black identity. For examples of such authors, see generally SHIRLEE TAYLOR HAZLIP, *THE SWEETER THE JUICE* (1994); JUDY SCALES-TRENT, *NOTES OF A WHITE BLACK WOMAN: RACE, COLOR, AND COMMUNITY* (1995); GREGORY HOWARD WILLIAMS, *LIFE ON THE COLOR LINE: THE TRUE STORY OF A WHITE BOY WHO DISCOVERED HE WAS BLACK* (1996); Adrian Piper, *Passing for White, Passing for Black*, 58 Transition 4 (1993); Judy Scales-Trent, *Commonalities: On Being Black and White, Different, and the Same*, 2 YALE J.L. & FEMINISM 305 (1990). The topicality of the "passing" narrative is evidenced in both the

historical account of "passing" constitute more than the racial arcana of a by-gone era? To such skepticism, I offer at the outset two brief responses, one based on a personal relationship and the other on an intellectual commitment.

The arguments of this Article were born out of many intense conversations over a long period of time with Professor Paul Rogers.³¹ Like myself, Professor Rogers is a Black male academic who has discovered that a rigorous and nuanced appreciation of race matters is important to our scholarly work and professional development. Thus, many of the texts cited here are texts that we have shared critically. As an art historian, the focus of his analyses has been the representation of race in the visual image.³² As a philosopher and legal academic, my focus has been on the discursive practices surrounding race in the law.³³ Our mutual experience has been that, in applying our insights on race to the issue of "passing," we have felt the exhilaration of both reclaiming a subjectivity too often denied in racial discourse and re-articulating an element of an uncompromising antisubordination perspective.³⁴ That element, which is recurrently honored in the breach even among our most astute and critical commentators, is the obligation to demystify racial categories.³⁵ The typical way in which "passing" is discussed serves as the focal point of this lapse into mystification. It thus provides a particularly dense, albeit panic-stricken, expression of racial categorization that is ripe for intervention on both the visual-analytical and the juridical-discursive levels.³⁶

scholarly and popular attention which is now being paid to it. See Harris, *supra* note 24, at 1712-13 (arguing that "passing is not an obsolete phenomenon that has slipped into history" because of the white supremacist economic logic that continues to motivate it). Most recently, in October 1996, there was a graduate student conference held at Columbia University devoted to the topic of "passing." Nevertheless, it is not altogether clear that the concept of "passing" is being refunctioned beyond the ambitions of the bi-racial/multi-racial movement. See MAUREEN T. REDDY, *CROSSING THE COLOR LINE* 65-103 (1994); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 267-75 (1995).

31. Whatever enlightenment this article may bring, I share with my friend and soulmate. Any failings should be attributed to the author alone.

32. For one example of Professor Rogers's work, see Paul Rogers, *Hard Core Poverty*, in *PICTURING US: AFRICAN AMERICAN IDENTITY IN PHOTOGRAPHY* 158 (Deborah Willis ed., 1995).

33. See, e.g., Robert Westley, *White Normativity and the Racial Rhetoric of Equal Protection*, in *EXISTENCE IN BLACK: AN ANTHOLOGY OF BLACK EXISTENTIAL PHILOSOPHY* 91 (Lewis R. Gordon ed., 1997).

34. I do not use the term "subjectivity" casually, nor as a synonym for "identity," which it is not. For one attempt to tease out the relation between "identity" and "subject," see Jennifer Wicke, *Postmodern Identity and the Legal Subject*, 62 U. COLO. L. REV. 455, 463 (1991). Provisionally, it should be stated that my use of the term subjectivity will function in most instances as a synonym for subject position. See Charles R. Lawrence, III, *The Word and the River: Pedagogy As Scholarship As Struggle*, 65 S. CAL. L. REV. 2231, 2252-70 (1992) (discussing three separate though interrelated meanings of the term subjectivity as indicating 1) positioned perspective, 2) nonneutrality of purpose, and 3) occupying the linguistic position of subject rather than object). For more on the relation between subject and identity, see *infra* Parts I.D & III.

35. See Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 326-27 (1987).

36. See generally Karst, *supra* note 30 (providing an example of such a juridical-discursive intervention based on the metaphors of both "passing" and "outing").

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It is my intellectual commitment to strengthen and support the antistubordination project of the Critical Race Theory movement.³⁷ Critical Race Theory has been described as embracing "a movement of left scholars, most of them scholars of color, situated in law schools, whose work challenges the ways in which race and racial power are constructed and represented in American legal culture and, more generally, in American society as a whole."³⁸ Some of the main methodological directions Critical Race Theory scholars have taken include the analysis of the role of race/gender essentialism in legal theory,³⁹ the use of narrative and autobiography in minority critiques of the law,⁴⁰ the need for an intersectional approach to race and gender issues,⁴¹ and multiple consciousness.⁴²

A crucial aspect of the antistubordination project of Critical Race Theory involves the demystification of categories and discursive practices within the law.⁴³ For it is through various acts of mystification—conflation of categories,⁴⁴ reification of identity,⁴⁵ bifurcation of social existence,⁴⁶ and the im-

37. Many thanks to those both in and out of the movement who read earlier versions of this article. I especially wish to acknowledge Celina Romany and Rachel Moran for their comments at the 1995 Annual Hispanic Bar Association Conference, Francisco Valdez, Angela Harris, Robert Chang, Adrienne Davis, Ray Diamond, Wendy Brown-Scott, and my research assistants, Charles Hamilton, Heather Auyang and Dita Kavyas for their supererogatory efforts.

38. CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberlé Crenshaw et al. eds., 1995).

39. See generally, e.g., Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994) (analyzing the role of race); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (analyzing the role of race and gender).

40. See generally Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (discussing the use of narrative and autobiography in minority writings); James R. Hachney, Jr., *Derrick Bell's Re-Sounding: W.E.B. Du Bois, Modernism, and Critical Race Scholarship*, 23 L. & SOC. INQUIRY 141 (1998) (same) (reviewing PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (8th ed. 1995)); Sandra S. Polin, Book Review, 22 N.C. CENT. L.J. 83 (1996) (same).

41. See generally, e.g., Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN L. REV. 1241 (1991) (using an intersectional approach to analyze violence against women).

42. See generally, e.g., Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989) (discussing multiple consciousness).

43. For examples of Critical Race Theory texts that demystify categories, see generally Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991); Harris, *supra* note 24; Lawrence, *supra* note 35; Haney López, *supra* note 39; Gerald Torres & Kathryn Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L. J. 625; Francisco Valdez, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

44. See Valdez, *supra* note 43, *passim*.

45. See Gerald Torres & Kathryn Milun, *Stories and Standing: The Legal Meaning of Identity, reprinted in AFTER IDENTITY: A READER IN LAW AND CULTURE* 129 (Dan Danielson & Karen Engle eds., 1995) (discussing the reification of identity).

46. On racial bifurcation, see generally Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1265 (1993); Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome,"* in ASIAN AMERICANS AND THE SUPREME COURT 1087 (Hyung-Chan Kim ed., 1992); Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571 (1995). On

sition of semantic structures that misrecognize (however subtly) the experiences they purport to render meaningful or meaningless⁴⁷—that certain forms of subordination become not only possible, but invisible. As Torres and Milun observe,

The problem with conflicting systems of meaning is that there is a history and social practice reflected and contained within the language chosen. To require a particular way of telling a story not only strips away nuances of meaning but also elevates a particular version of events to a non-contingent status.⁴⁸

In this Article, I want to argue that the continuing ability of the Black figure to elicit lure and loathing,⁴⁹ to be ever serviceable to a process of totemization—or, as Professor Rogers would have it, “Samboification”—suggests the need to construct novel readings of the operations of racial categories in order to demystify the discursive terms under which social justice claims will be fashioned. The impetus toward novel readings takes on a sense of urgency in the glare of the untimely disintegration of the civil rights consensus on the left, the ominous consolidation of judicial and political power on the right, and the apocalyptic pessimism of a postmodern takeover within the American academy.⁵⁰

D. *A Note on Methodological Approach to the Subject of “Passing”*

This Article seeks to accomplish an intervention on the racial ideology that equates partial African ancestry with Blackness, and a recharacterization of what is at stake in identity politics for the visibly Black subject. This will require us to observe a meaningful distinction between the terms “identity” and “subjectivity.” As the French structuralist philosopher Louis Althusser demonstrates in his celebrated essay, *Ideology and Ideological State Apparatuses*,⁵¹

race/sex bifurcation, see generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Crenshaw, *supra* note 41.

47. See generally Daniel A. Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (utilizing the somewhat infelicitous expression “voice of color” to launch a doggedly misguided semantic attack on the “difference” line of thought contained in some Critical Race Theory writing); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, in MARXISM AND LAW 210 (Piers Beirne & Richard Quinney eds., 1982) (distinguishing between the “perpetrator perspective” and “victim perspective” on racial discrimination); Lawrence, *supra* note 35, (positing the thesis of “unconscious racial motivation” as an explanation for some of the legal positions taken on remedies).

48. Torres & Milun, *supra* note 43, at 629.

49. On loathing, see Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 139 (1982) citing the correlation between degree of darkness of skin for Blacks and the level of discrimination induced stress. See also Leonard M. Baynes, *If It's Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow Than Lightness? An Investigation and Analysis of the Color Hierarchy*, 75 DENVER U. L. REV. 131, 133 (1997) (noting that darker-skinned persons of color experience greater discrimination than their lighter-skinned counterparts).

50. See Wicke, *supra* note 34, at 469-72.

51. See LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses*, in LENIN AND

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the ordinary use of the term “subject” carries two divergent significations.⁵²

On the one hand, subject means “a free subjectivity,” a centre of initiatives, author of and responsible for its actions. On the other hand, subject means “a subjected being” who submits to higher authority and is therefore stripped of all freedom except that of freely accepting his submission. In Althusserian terms, moreover, the individual is *interpellated* as a subject.⁵³ Interpellation as a subject occurs quite simply when an individual is “hailed,” for instance, when a police officer (or other) hails: “Hey, you there!” For Althusser, when the individual recognizes that it is she who is being hailed, then the individual becomes a subject. Responding to the hail makes the individual a subject in both senses of the term. As a center of initiatives, she chooses to turn around; choosing to turn around, she submits to the authority of the hailing.

This seemingly mundane articulation of subject formation acquires its weight in relation to a consideration of its ideological functioning, and for present purposes, a consideration of its functioning within the corporeal schema of racial ideology. This Article argues that under the corporeal schema of racial ideology the Black subject is interpellated differently than the subject capable of “passing” for white. Further, this Article argues that this difference is not necessarily hinged on how the individual personally identifies. Identity, in contrast to subjectivity, is an expression, based in processes of affinity and affiliation, of how the individual personally identifies himself or herself, as a man or woman, as gay or heterosexual, as Black or white, and so on.⁵⁴ Recognizing this distinction between subject and identity becomes a way of taking seriously the Critical Race Theory arguments against essentialism and in favor of a social constructionist view of identity categories, while at the same time acknowledging the importance of subject position to one’s experience of racial discrimination.

“Passing” has been defined as crossing the race line and winning acceptance as white in the white world.⁵⁵ In this view, racial “passing” is a distinctly post-bellum concern that reached its peak in the early part of the twentieth century.⁵⁶ The difficulty that might be raised with this view of “passing” as a sociopolitical phenomenon is that it remains firmly entrenched inside white supremacist racial discourse.⁵⁷ This is so because “passing” is assumed to be the

PHILOSOPHY AND OTHER ESSAYS 127 (Ben Brewster trans., 1971).

52. *See id.* at 170-71.

53. *See id.* at 173-74.

54. *See* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 42-48 (1990).

55. *See* WILLIAMSON, *supra* note 1, at 119-20. In this regard, Williamson’s grammar reflects the dominant view of “passing.” *See also* 1 GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 683-88 (1944) (discussing passing as moving from Black to white and not vice versa).

56. *See* WILLIAMSON, *supra* note 1, at 119-20.

57. *See* ALDON LYNN NIELSEN, READING RACE: WHITE AMERICAN POETS AND THE RACIAL DISCOURSE IN THE TWENTIETH CENTURY 14-15 (1988) (citing George M. Fredrickson’s six elements of

crossing of a coherently demarcated "race line," and by implication, crossing illegitimately.⁵⁸ In this view, to "pass" for white is a kind of trespass on another's identity. It is also a betrayal of the "Blackness within."⁵⁹ There are those who perpetrate whiteness—the "passers"—and then those who are "really" white, "pure" white.⁶⁰ Conversely, there is no trespass on Black identity, and no betrayal of the "whiteness within" implied by "passing," since there is no suggestion that anyone would "cross the race line" to win acceptance as Black in the Black world.⁶¹ In any event, "acceptance as white" is meant to distinguish something other than simply "being white" in a manner that makes "winning acceptance as white" a teleology worthy of description.

Alternatively, "passing" could be described as the social process whereby the phenotypically qualified accept a racial identity in order to function within a system of racially justified privileges and exclusions. To be phenotypically

racist ideology emerging from nineteenth century discursive practices in GEORGE M. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914*, at 321 (1971)).

58. Fredrickson lists as his fourth element of racist ideology the belief that Because of these permanent or deep seated differences, miscegenation, especially in the form of intermarriage, is to be discouraged (to put it as mildly as possible), because the crossing of such diverse types leads either to a *short-lived and unprolific breed* or to a type that even if permanent is *inferior to the whites* in those innate qualities giving Caucasian civilization its *progressive and creative characteristics*.

FREDERICKSON, *supra* note 57, at 321 (emphasis added).

59. See Williamson, *supra* note 1, at 182 (describing the "mulattoes of lighter hue" who chose the white side, giving up "the thought of their blackness"). Throughout his text, Williamson employs the trope of the blackness when discussing persons of partial African ancestry, at one point making the participation of the "mulatto elite" in the Harlem Renaissance "one of the most critical turns that Afro-American history has taken" since it "signified the essential [one might as well say *essentialist*] acceptance by the Negro world of the one-drop rule," *id.* at 152, and at another point bemoaning the fate of "mulattoes who could pass for white" because they suffer "extreme discrimination within the Negro world, one that borders on a rejection of the one-drop rule," *id.* at 190. Williamson, however, never questions the coherency of the rule, or, for that matter, who made it up.

60. See *id.* at 108 (describing the phenomenon of the "biologically purely white" who becomes "behaviorally black").

61. In this Article, the term "passing" refers specifically to a subjective possibility for those who are visually indistinguishable from the in-group but would be rejected by that group based on a real or imagined ancestral relation to an out-group. If this definition were limited to an actual ancestral relation, it would not be broad enough to encompass instances of so-called "soulmaning," nonblacks who cosmetically alter their appearance in order to "pass" as black. For the term "soulmaning," see Luther Wright, Jr., *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 559 (1995). Author John Howard Griffin "soulmaned" in his celebrated ethnojournalistic experiment, *BLACK LIKE ME* (1966). Although Griffin hoped to utilize his racial imposture as a tool for antiracist social critique, Gayle Wald argues persuasively that Griffin fails by positioning the white researcher as a privileged voice to authenticate racism while reifying Blackness and romanticizing "real" Black people. See Gayle Wald, *"A Most Disagreeable Mirror": Reflections on White Identity in Black Like Me*, in *PASSING AND THE FICTIONS OF IDENTITY* 151 (Elaine K. Ginsburg, ed., 1996) (suggesting that the book owes its enduring popularity to the persistence of white incredulity at Black peoples' interpretations of their experience). To the extent that such impostures involve artifice, seek recognition as illusory, and are readily abandoned, it is uncertain whether blackface minstrelsy, see generally ERIC LOTT, *LOVE AND THEFT: BLACKFACE MINSTRELSRY AND THE AMERICAN WORKING CLASS* (1993) (discussing minstrelsy), or "soulmaning," however motivated, should be conceptualized as identity-based "passing." For further elaboration on the thematics of "passing," see *infra* notes 136-154 and accompanying text.

qualified, ancestry will matter, but only insofar as that ancestry is ascertainable in the individual by social perception and customary usage. Under this description, the white supremacist tautology that a white person is white because she is white—or has "white blood"—is no longer permitted. A white person is white because she is socially perceived to be white according to customary usage. She is phenotypically qualified to adopt a white racial identity; and the visual idiom, in which racial ideology finds both its genesis and vitality, confirms her acceptance of her whiteness. She is white because she "passes" for white. Our definition allows us to now state clearly that *everyone who is white* "passes" for white, where whiteness signifies phenotypically qualified access to a racial spoils system.

This re-reading of "passing" is a point of entry for discussion of certain lapses in critical literature and visual texts that purport to analyze, examine, and represent the phenomenon.⁶² My understanding of race critical discourse is that matters have proceeded this far: First, "race" must be a sociohistorical, cultural concept.⁶³ This is so despite the historical attempt of race theorists to naturalize "race" by making it an *idée fixe* in scientific discourse, a difference rooted in biology, blood, and genes.⁶⁴ Second, as a social construct, the concept of "race" has had a pernicious career, making racism endemic to American life.⁶⁵ Thus, racism must serve as a primary hermeneutic in the study and analysis of corrupt political, economic, and legal institutions.⁶⁶ Third, racism terminates neither in petty personal discriminations (micro-aggressions)⁶⁷ nor in a range of systemic social and institutional limitations placed on the excluded. Rather, it extends to the discursive practices which coerce these arrangements over time through a set of "discourse agreements."⁶⁸

62. For an historical treatment of "passing," see generally WILLIAMSON, *supra* note 1. For law, see generally Harris, *supra* note 24 at 1709. For literary treatment, see generally JUDITH BUTLER, *BODIES THAT MATTER* 171 (1993) ("Clare passes not only because she is light-skinned, but because she refuses to introduce her blackness into conversation, and so withholds the conversational marker which would counter the hegemonic presumption that she is white."); Lauren Berlant, *National Brands/National Body: Imitation of Life*, in *COMPARATIVE AMERICAN IDENTITIES: RACE, SEX, AND NATIONALITY IN THE MODERN TEXT* 110 (Hortense J. Spillers ed., 1991); Claudia Tate, *Nella Larsen's Passing: A Problem of Interpretation*, 14 *BLACK AM. LITERATURE F.* 142 (1980); Cheryl A. Wall, *Passing for What? Aspects of Identity in Nella Larsen's Novels*, 20 *BLACK AM. LITERATURE F.* 97 (1986). For a philosophical treatment, see generally BERNARD R. BOXILL, *BLACKS AND SOCIAL JUSTICE* 12 (1984) ("[T]he black who can pass as white . . . cannot choose not to be black . . .").

63. See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1990S*, at 60 (1994).

64. See *id.* at 63-64.

65. See DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* 2-3 (2d ed. 1980).

66. See *id.*; see also MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH AND THE FIRST AMENDMENT* 6-7 (1993).

67. See Peggy C. Davis, *Law as Microaggression*, 98 *YALE L.J.* 1559-77 (1989); see also Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 *RUTGERS L. REV./CIV. RTS. DEVS.* 673, 687 (1985) (listing as one of the six elements of the new racism: "indirect 'micro-aggressions' against [B]lacks which is expressed in avoidance of face-to-face interaction with [B]lacks and opposition to racial change for ostensibly nonracial reasons").

68. See STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* 242 (1980) ("When we communicate, it is

Here it is posed that language functions dialogically as both the terminus and the generator of racist thought. What is left for dead in racial terms revivifies at the level of everyday (normative) thought and survives as frozen metaphors. Interlaced into this fabric of expressive relations is the pattern of white authority.⁶⁹ "Passing," as the crossing of the race line, is one such frozen or dead metaphor, one that obeys the logic of white supremacist discourse agreements. "Passing" relies on the tautology of white racial identity, the myth of racial purity, and the fiction of the Blackness within as it evokes the image of the "tragic mulatto."⁷⁰ Examining "passing" narratives as dead metaphors opens a conceptual path to demystification of these white myths. Investigating "passing" in its historical development starkly reveals the elements of white discourse that survive today in the rhetoric of both colorblindness and multiracialism.

II. LEGAL-HISTORICAL PERSPECTIVES ON "PASSING" AND RACE

The following legal-historical examples serve as a point of departure for discussion of the complicity of the law in the construction of "passing" as a racial transgression. As will be shown, there is always already an antecedent Blackness, whether figurative or real, that is assumed in order to sustain the racially transgressive view of "passing." I argue that that antecedent Blackness, even though absent from adjudication and unacknowledged by courts, nevertheless is made to support and validate white supremacist discursive practices. I conclude that despite alternative tests of racial recognition adopted by courts, the discernment of Black subjectivity, unlike whiteness, is dependent on the visual apprehension of race.

To show the presence of antecedent Blackness in legal discourse, I begin the analysis with a case from the text of slavery in the nineteenth century and the development of the Harper doctrine. This analysis will show the imperatives that stood behind the treatment of whiteness as insufficiently captured by the eyeball test of racial determination and white supremacy's need for a concept of racial blood. However, it will be argued, the imperatives that stood be-

because we are parties to a set of discourse agreements which are in effect decisions as to what can be stipulated as fact. It is these decisions and the agreement to abide by them, rather than the availability of substance, that make it possible for us to refer"); ALDON LYNN NIELSEN, *READING RACE: THE WHITE AMERICAN POET AND THE RACIAL DISCOURSE IN THE TWENTIETH CENTURY* 12 (1985). Applied to the present discussion, the premises that underlie the categorization of the "passing" person as Black, rather than the substance or truth of such designations, function as "discourse agreements."

69. In this Article, "white authority" broadly refers to discursive practices which employ or defer to the discourse agreements of white supremacy.

70. The so-called tragedy of the mulatto, contrary to Williamson's belief, is not that he suffers "extreme discrimination within the Negro world," WILLIAMSON, *supra* note 1, at 190, but that he is "almost white"—his tragic flaw or moral weakness is his partial African ancestry. *Cf. supra* notes 58-59 (discussing Frederickson's view of the inferiority of persons with partial Black ancestry and Williamson's discussion of the participation of a mulatto elite in the Harlem Renaissance).

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hind development of alternative tests of racial recognition involve the first order mystification of the so-called "Black within."

The second order mystification occurs in *Plessy v. Ferguson* where the Supreme Court exploits the legal fiction of the "Black within" to justify Black subordination under the regime of "separate but equal." The Court's construction of "passing" as transgression and its bestowal of purity and privilege on whiteness depends on the concept of the "Black within." Moreover, it will be argued, the "Black within" assumes an antecedent condition of Blackness that can only be verified by the presence of visual Blackness.

Finally, in a *reductio ad absurdum* of the logic of "passing," the argument turns to the late twentieth century case of Susie Phipps, the Louisiana woman who sued to become white under the state's Black blood law and lost. The Phipps case is useful for what it reveals about how Black subjectivity is constituted and the improbability that a visibly Black person could ever disprove her documentary designation as Black.

A. *The Harper Doctrine: The Legal Status of the "Passing" Person Defined*

I know that this is a view of the subject that it is thought best for women to ignore but where we see so many cases of mulattoes commanding higher prices, advertised as "fancy girls," o is it not enough to make us shudder for the standard of morality in our Southern homes.

—Ella Gertrude (Clanton) Thomas⁷¹

The insufficiency of whiteness as a purely visual idiom of racial ideology was apparent to those living in slavocratic communities of the nineteenth century and was a source of apprehension and dread well into the twentieth century.⁷² Being white was a matter of blood, just as being Black was the pollution of blood.⁷³

Over time, the visual idiom of racial ideology proved unworkably ambiguous to support a system of white supremacy based on racial slavery for the Black alone. Sexual mixing resulting from both the purchase that European-descended slavocrats had on the sexual lives of their African-descended captives⁷⁴ and the free play of common folk⁷⁵ blurred the visual idiom. The pres-

71. VIRGINIA INGRAHAM BURR, *THE SECRET EYE: THE JOURNAL OF ELLA GERTRUDE CLANTON THOMAS, 1848-1889*, at 168 (1990) (entry of Jan. 2, 1858).

72. See WILLIAMSON, *supra* note 1, at 63-97; cf. Gross, *supra* note 20, at 140 ("A litigant trying to prove someone's blackness and slave status might have described the person as white in appearance, while emphasizing the trickery involved in making that person *appear* white.").

73. See WINTHROP JORDAN, *WHITE OVER BLACK* 165-67 (1968) (tracing the "embryonic significance" among early colonists of the notion of racial blood); WILLIAMSON, *supra* note 1, at 93.

74. See A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* 40-47 (1978).

75. See *id.* at 42.

ence among slavocrats of mixed people (both free and unfree) in sufficient numbers challenged their basic tenet of racial slavery that freedom was for the white and enslavement for the Black.⁷⁶ The existence of "fancy girls" challenged the self-conception of white supremacy on the visual order.⁷⁷ Whites, according to the visual order, who had an African-descended ancestor or parent, were slaves alongside Blacks.⁷⁸ These threats to the visual idiom contributed to the discursive supplementation and elaboration of whiteness. Consanguinity, if known, while sufficient for Blackness, was not sufficient for whiteness.⁷⁹ Because Blackness would not remain on the surface, whiteness had to be interiorized as well.

Legal discourse subscribed the elaboration of an interiorized whiteness by enforcing an emerging vocabulary of racial definition and description.⁸⁰ The obiter dicta of Judge William Harper of South Carolina in 1835 is exemplary for its rejection of the visual paradigm of race:

The condition of the individual is not to be determined solely by the distinct and visible mixture of negro blood, but by reputation, by his reception into society, and his having commonly exercised the privileges of a white man . . . it may be well and proper, that a man of worth, honesty, industry, and respectability, should have the rank of a white man, while a vagabond of the same degree of blood should be confined to the inferior caste. . . . It is hardly necessary to say that a slave cannot be a white man.⁸¹

What cannot go without saying is that by 1850, though a slave could not be a

76. See WILLIAMSON, *supra* note 1, at 73.

77. Williamson reports that

Fredricka Bremer, a widely read Swedish writer and traveler, crossed the path of the trade in "white" women as slaves several times during her journeys through America in 1850 and 1851. In a Washington slave pen she saw a "slave lady," a mulatto woman who had been reared to sew, read, make conversation, and so on. She had become too "uppity," however, and was being sold away to bring her down. In Richmond, in another slave pen, Bremer encountered a bevy of "fancy girls." She observed that "they were handsome fair mulattoes, some of them almost white girls."

Id. at 69.

78. See *id.*

79. Although by 1940 the so-called one-drop rule was used in the interpretation of the antimiscegenation statutes of only seven states of the former slave South—seven other states electing the more liberal one-eighth rule, two providing no statutory definition, and one having no prohibition at all—the one-drop rule has come to exemplify the extreme limit of the racial imagination as an abandonment of the visual order. As Williamson observes, long before we reach this limit it becomes necessary to begin talk about "invisible blackness." *Id.* at 97-98.

80. Louisiana Creole society probably contributed more to the range of racial descriptions than any other by distinguishing a person one-sixty-fourth Black as a "sang-mele," a person one-sixteenth black as a "meamelouc," a person three-quarters Black as a "sambo," and a person seven-eighths Black as a "mango." As Williamson reports, "mulatto" was an Iberian word, and "it was the gentlemen of the deep South who virtually made a class out of 'quadroons' (a word of Spanish and French origins) and went on sometimes to misappropriate 'mustee' from 'mestizo,' meaning a mixture of European and Indian, and apply it to persons one-eighth black." *Id.* at 24; see also VIRGINIA R. DOMINGUEZ, *WHITE BY DEFINITION: SOCIAL CLASSIFICATION IN CREOLE LOUISIANA* (1986).

81. *State v. Cantey*, 70 S.C.L. (2 Hill) 614, 616 (1835); see also *White v. Tax Collector*, 31 S.C.L. (3 Rich.) 136, 141 (1846); *Johnson v. Boon*, 28 S.C.L. (1 Speers) 268, 270 (S.C. 1843).

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white man, many men and women who could “pass” for white were legally held as slaves, often enough, of their own family, simply by virtue of an African-descended ancestor or parent.⁸² The mere presence of these “white slaves” was a living refutation to a racial defense of the slave system, as well as a source of moral terror for Southern white women whose own status in slavocratic households seemed threateningly reflected in the lives of “fancy girls.”⁸³

The rise of laws prohibiting miscegenation paralleled the need to create descriptive categories that fit the distinctions that custom had made.⁸⁴ Thus, many of our racial categories attempt an approximation in terms of degree of blood or ancestry.⁸⁵ A “mulatto” has generally been understood to refer both to those in whom the mixture of Black and white is visible, and to persons having one Black and one white parent.⁸⁶ Importantly, it is the divisible fraction of “Black blood” in these categories that mattered for purposes of the legal proscription of miscegenation. As the optimism implicit in perpetual slavery for Blacks was destroyed on the field of battle, the quantum of “Black blood” necessary to be Black became decidedly less generous.⁸⁷ The one-drop rule was merely the

82. See WILLIAMSON, *supra* note 1, at 63.

83. The diary entry of Ella Thomas which serves as the epigram of this section gives an indication of white women's concerns about “fancy girls.” Since captive women could not legally refuse the sexual aggressions of slavocrats, and “fancy girls” were often kept as higher-priced concubines or courtesans, from the perspective of white women, whose ability to refuse the venereal attentions of their husbands was likewise limited by the law (but for a different set of reasons), white marriage came to resemble forced prostitution. Moreover, as “fancy girls” were valued because they were “almost white,” it became more difficult for white women to use race as the measure of difference between how they were treated by white men and how captive women were treated. See generally CATHERINE CLINTON, *THE PLANTATION MISTRESS: WOMAN'S WORLD IN THE OLD SOUTH* (1982) (describing the ambiguous status of elite white women in society that was both patriarchal and racist).

84. See WILLIAMSON, *supra* note 1, at 97.

85. See *id.*

86. See *id.* at xii.

87. The history of Virginia antimiscegenation laws bears out the climatic nature of these prohibitions, reflecting the white optimism of the antebellum period and the white pessimism of the postbellum period. Virginia first moved to discourage miscegenation in 1662 when it declared that mulatto children of slave mothers would be slaves. See 2 WILLIAM WALLER HENING, *STATUTES AT LARGE OF VIRGINIA* 170 (New York, R. & W. & G. Bartow 1823), thus abandoning the English rule that the child followed the status of the father. In 1691 the legislature imposed a heavy fine or a five year period of servitude on Englishwomen who gave birth to “a bastard child by a Negro,” and the child was to be sold as a servant until he or she reached the age of thirty. Further, interracial couples who married were to be banished “forever” from the colony within three months of the ceremony. See 3 HENING, *supra*, at 86-88. In 1705 the sentence imposed on whites who married Negroes or mulattoes was increased to include six months in jail, and all mulatto children were made servants until they were thirty-one years old. See 3 HENING, *supra*, at 447-62. The 1705 prohibition against Black/white marriage was reenacted in 1792 without alteration, and without, unsurprisingly, a penalty of imprisonment imposed on the Black partner in crime. See HIGGINBOTHAM, *supra* note 74, at 46. Moreover, in 1848 the imprisonment of whites marrying Blacks was increased to twelve months. See *id.* (citing JUNE PURCELL GUILD, *BLACK LAWS OF VIRGINIA* 32 (1969)). Amended again in 1932, the statute finally imposed a penalty of imprisonment on both Blacks and whites for intermarrying and the term was increased to confinement in the penitentiary for one to five years. See *id.* (citing GUILD, *supra*, at 36). Because of these discriminatory laws, the number of mulatto slaves increased dramatically during the eighteenth century in Virginia. Cf. JORDAN, *supra* note 73, at 137 (stating that racial intermixing was highest during this period). But the relatively generous one-quarter fraction of “negro blood” defining the person whom whites could not marry held until 1910. In that year, the fraction was lowered to one-sixteenth. Finally, in 1930 Virginia outlawed

next logical step in the racial ideology of a preemptively broken slavocracy.⁸⁸

The standard announced by Judge Harper to determine the racial "condition" of the individual embodied the needs of the slavocracy (and the republic) by marking the limits of the visual idiom ("not to be determined solely by distinct and visible mixture of negro blood"), by acknowledging the need for active intervention on the part of the state to secure whiteness as valued property ("reputation"), by positing the de facto perpetuation of racially bifurcated social existence ("reception into society"), and making clear the purpose and utility of racial distinctions was to serve the interests of white supremacy ("having commonly exercised the privileges of a white man"). Therefore, we are not entitled to consider, as Judge Harper probably did, that his race determinants are merely legal standards for deciphering facts; rather, they should be seen as juridical imperatives for securing a white supremacy that has been threatened with dissolution on the visual order. Judge Harper's *coup de grace*—"a slave cannot be a white man"—sets up purity of blood, of character, of liberty, and of personhood as natural barriers to the demise of race distinction through mixing.

The effect of the Harper doctrine was to make race anterior to any discussion of race and to give whiteness and, in a distorted way, Blackness, an interior landscape. The Harper doctrine made whiteness natural, something that resided internally in the purity of blood and character. As a just social consequence of its purity, whiteness was rewarded externally with liberty and the relations proper to personhood. Having been assigned the qualities of property and the privileges of membership, whiteness, however, was not indefeasible. Once whiteness was interrogated with respect to its authenticity, there was always a passing possibility of "passing." White paranoia generated by both the socioeconomic desirability and judicial defeasibility of whiteness situates Blackness at a subcutaneous, but nevertheless definitive level of the white body. Discursively added to the interior landscape of the white subject is the metaphorical figure of the Black homunculus, signifying the Blackness within the white body.

This discursive marker of white interiority, the Black homunculus, will emerge in any representation that places the visually effective whiteness of an individual in doubt on the basis of a purported blood relation to Blacks.⁸⁹ Neither the judicial nor the legislative mind has been immune from the habit of raising such doubts. It is therefore not idle to question what assumptions about race are carried forward in these articulations, to wonder to whose benefit they

marriage between whites with anyone with any "negro blood" at all. See WILLIAMSON, *supra* note 1, at 97-98.

88. See WILLIAMSON, *supra* note 1, at 97-98.

89. See generally VALERIE BABB, WHITENESS VISIBLE: THE MEANING OF WHITENESS IN AMERICAN LITERATURE AND CULTURE (1998).

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may accrue, and to challenge the mystifications contained in them.

B. Plessy's Prison: The Legal Status of the "Passing" Person Constitutionalized

Let them be severely brought to book, when they go wrong, but by those who will take the trouble to understand them.

—Learned Hand⁹⁰

The power of this thought figure of the "Blackness within" on the judicial mind as an immovable discourse agreement among whites played a barely acknowledged role at the end of the nineteenth century in the Supreme Court's deservedly infamous separate-but-equal case, *Plessy v. Ferguson*.⁹¹ In fact, the Black homunculus inside Homer Plessy was a key figure among the *dramatis personae*. Plessy, in the racial lexicon of Louisiana, was an octoroon. In other words, according to the conventions of the visual idiom, Plessy "passed" for white. His arrest in Louisiana in 1892 for taking a seat in a train car reserved for whites only was part of a legal strategy to end segregation in public transportation.⁹² In a case laden with irony, the greatest irony may be that white authority sought to adjudicate the exclusion from society of absent Blacks through the medium of the figurative Black within the white body of Homer Plessy.

Bernard Boxill has said that the claim in Plessy's plea that the mixture of African blood was not discernable in him was "mainly a snare for the opposition"—and that "[c]annily, the court refused the snare."⁹³ It is true that the Court, in its discussion of Plessy's claim, employs language that makes race anterior to the discussion of race. Thus, even in the passage of the opinion most noted for its virulent rejection of the claim of insult to Blacks implied by segregation, the Court speaks as though the validity of race were beyond question:

[T]he underlying fallacy of the plaintiff's argument [consists] in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction on it.⁹⁴

By refusing Plessy's claim to whiteness, the Court actually disavowed responsibility for the state's role in determining the racial condition of the individual—reputation, reception into society, and having commonly exercised the

90. THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 110 (Irving Dillard ed., 1952).

91. 163 U.S. 537 (1896).

92. See CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 28-43 (1987).

93. BOXILL, *supra* note 62, at 9.

94. *Plessy*, 163 U.S. at 551.

privileges of a white man.' However, the *Plessy* Court clearly understood, as Judge Harper had over sixty years earlier, the white supremacist need for the ruse that the visual idiom was insufficient to determine whiteness. The segregation of the "two races" put Homer Plessy on the nonwhite side of the race line, despite the testimony of the eyes, because race was not merely a matter of color. Additionally, the Black homunculus inside the white body had to be accounted for, vicariously disciplined, and separated from pure whiteness. Plessy's whiteness could be suspended because "passing" was possible. The decision against Plessy required him to perform Blackness so that the Black within could be excluded. In this sense, it is hard to imagine a more unabashed judicial theatricalization of minstrelsy,⁹⁵ of white power talking to itself.

It is well to recall that Plessy claimed both a denial of equal protection⁹⁶ and a denial of property—whiteness—without due process. According to his brief, the "reputation" of being white "has an actual pecuniary value," of which he would be deprived without due process of law if a train employee could arbitrarily refuse to seat him in the whites-only train car.⁹⁷ Again, the Court refused the snare, asserting that the issue of Plessy's race did not "properly arise upon the record."⁹⁸ But then, the Court went on to conclude that, "[i]f he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called property."⁹⁹ Thus, without ever articulating a rule of racial definition, the Court upheld the Harper doctrine with respect to the need for active intervention on the part of the state to secure whiteness as valued property and with respect to making clear that the purpose and utility of racial distinctions was to serve the interests of white supremacy. Plessy's so-called property rights were to be determined as a matter of state law, where it was assumed that "if he be a colored man" he had none.

The insistence that *Plessy* should be read as a case about the legal status of the "passing" person, as well as a case about Black subordination, arises from the coincidence of the evasion of Plessy's claim to whiteness with the existential situation of whiteness at large. It is not simply that whiteness is structured as the ability to "pass" (over, muster, by), but also the right to pass judgment with or without evidence, with or without rational rules of definition, and with or without jurisdiction over the person proscribed. Thus, Plessy's failed "passing" puts into circulation its deligitimating significations: to pass off a fake as genuine, to trespass on another's property, to pass for what one is not, to pass on contamination, and finally, to pass away. Rather more importantly, evasion

95. See generally LOTT, *supra* note 61 (discussing minstrelsy).

96. See *Plessy*, 163 U.S. at 542.

97. *Id.* at 549.

98. *Id.*

99. *Id.*

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takes place against the unstable backdrop of a visually over-determined (tyrannized) Blackness. Judicial scrutiny of race in *Plessy* reinforces white discourse agreements concerning the racial condition of the individual in order to restrict the liberty and affront the personhood of Blacks. Heightened scrutiny of race should be expected to confront the basis of white racial identity and, consequently, white authority.

C. *The Case of Susie Phipps: A Critique of State-Enforced Racial Classification*

There is no way to determine just how many mixed-bloods have chosen [passing], and how many, for reasons of affection, family ties, etc., have declined the opportunity. Nevertheless, there can be little doubt that manifold numbers of “white” Americans in fact carry some degree of black blood in their veins, although in most instances, probably unconsciously.

—John G. Mencke¹⁰⁰

Reading forward in time across the tableau of judicial encounters with “passing,”¹⁰¹ the most recently celebrated case of *Doe v. State of Louisiana*,¹⁰² in which several members of the Guillory family sued unsuccessfully to be designated white on their birth certificates,¹⁰³ would seem to be as imperfect an exemplar as *Plessy*. In a sense, the lawsuit itself disqualifies the case as an attempt at “passing” since, traditionally conceived, “passing” is a secretive affair, the silent insinuation of the “passer” into a community of whites whose only referents for race are status and the visual idiom.¹⁰⁴ By openly demanding official designation as white, the Guillory family tipped its hand to the state of Louisiana, whose long history of racially motivated legislation revealed that it did not accept the constraints of the visual idiom. Rather, Louisiana, true to its Latin origins, enlarged on the visual idiom by inventing fractional definitions of race. At the time the Guillory family brought its case, one-thirty-second or less of Negro blood was needed to be designated white in Louisiana.¹⁰⁵

100. JOHN G. MENCKE, *MULATTOES AND RACE MIXTURE* 9 (1979).

101. It is beyond the scope of this Article to review individually the copious body of judicial cases in which the issue of “passing” has been adjudicated. A representative sampling of cases would include: *Sunseri v. Cassagne*, 185 So. 1 (La. 1938); *Green v. City of New Orleans*, 88 So. 2d 76 (La. Ct. App. 1956); *State ex rel. Francis v. Louisiana State Bd. of Health*, 179 So. 2d 681 (La. Ct. App. 1965); *State ex rel. Heno v. Drake*, 176 So. 2d 226 (La. Ct. App. 1965); *State ex rel. Treadaway v. Louisiana State Bd. of Health*, 56 So. 2d 249 (La. Ct. App. 1952); *Malone v. Civil Service Commission*, 646 N.E.2d 150 (Mass. App. Ct. 1995).

102. 479 So. 2d 369 (La. Ct. App. 1985).

103. See *id.* at 371.

104. See Winthrop Jordan, *American Chiaroscuro: The Status and Definition of Mulattoes in the British Colonies*, 19 WM. & MARY Q. 183, 191 (1962) (“The success of the passing mechanism depended upon its operating in silence. Passing was a conspiracy of silence not only for the individual but for a biracial society which had drawn a rigid color line based on visibility.”).

105. See *Doe*, 479 So. 2d at 371. See also Diamond & Cottrol, *supra* note 20, at 257.

The advantage of fractional definitions of race over the one-drop rule had always been the ability of white authority to flex to meet changing social conditions.¹⁰⁶ In the ebb and flow of the racial boundary, then, we see not a challenge to white authority, but the fetishism of whiteness as the only source of social, even if no longer legal, privilege and esteem.¹⁰⁷ The outcry among commentators induced by the Guillory case, and the embarrassment of Louisiana officials who were eventually persuaded to abandon the so-called "Black Blood Law," was related to the fact that this battle was taking place in 1982-83—twenty-eight years after the *Brown*¹⁰⁸ era had begun and fifteen years after *Loving*.¹⁰⁹ Clearly, these decisions could not have had the effect of making race irrelevant; but they should have had the effect of putting state officials on notice that the legal enforcement of race classifications was of dubious constitutional validity.

As reported by Calvin Trillin,¹¹⁰ the Guillory case first arose in 1977 from a dispute between Susie Guillory Phipps and the Louisiana Department of Health and Human Resources over the designation of her parents as "Col." on her birth certificate.¹¹¹ Phipps had been born in Louisiana in 1934 and had grown up in Acadia Parish in a poor French-speaking farm family.¹¹² When she found herself in need of a passport for the first time at the age of forty-three, Phipps drove from her home in Sulfur, Louisiana, to the Division of Vital Records in New Orleans to obtain a copy of her birth certificate, which she needed for the passport application. For forty-three years, in Trillin's words, Phipps

106. See Tanya Kateri Hernández, "Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97, 124-28 (1998) (arguing that the structural recognition of intermediate racial groups of mixed Black and white ancestry in places as diverse as Brazil, parts of Latin America, apartheid South Africa, and certain parts of the U.S. South have historically functioned as a "buffer" class, receiving greater privileges than Blacks, but fewer than whites). Hernández argues persuasively that structural recognition of racial buffer classes tracks demographic patterns in which Blacks outnumber a ruling white elite that therefore feels compelled to share its privileges with the middle-tier group while continuing to subordinate Blacks. See *id.*; see also CARL N. DEGLER, NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES 103 (1971) (discussing the gradations of color and the higher ranking of value attached to those closest to white); DOMINGUEZ, *supra* note 80, at 121-22 (describing the Louisiana legislature's formation of a militia corps comprised solely of Creoles).

107. In *Bowen v. Independent Publishing Co.*, 96 S.E.2d 564 (S.C. 1957), the Supreme Court of South Carolina upheld a libel action by a white person against a newspaper for publishing an article in which she was identified as a "Negro," citing the majority view that calling a person "colored" when that person is white is actionable per se.

108. *Brown v. Board of Education*, 347 U.S. 483 (1954) (forbidding de jure segregation in public schools as a violation of the equal protection clause).

109. *Loving v. Virginia*, 388 U.S. 1 (1967) (forbidding laws that ban interracial marriage between Blacks and whites); see also *Palmore v. Sidoti*, 466 U.S. 429 (1984) (holding that the Equal Protection Clause prohibits a state from divesting a divorced white woman of custody of her child, on petition of the child's natural father, because of the mother's remarriage to a Black man).

110. Calvin Trillin, *American Chronicles: Black or White*, THE NEW YORKER, Apr. 14, 1986, at 62.

111. See *id.*

112. See *id.*

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“lived as a white woman. . . . Nobody had challenged any of that.”¹¹³ But what she discovered when she examined her birth certificate sent Phipps into shock and, according to her own recollection, she was sick for three days.¹¹⁴

Phipps would say often, “I was brought up white, I married white twice.”¹¹⁵ Her shock, therefore, which provided the impetus for her quest to become white, did not relate to any limitations placed on her life or her marriage. As Trillin reports, Mr. Phipps expressed his support for his wife by saying, “Hell, she ain’t a nigger.”¹¹⁶ Rather, Phipps required vindication of her creed, “I am white,” which referred not simply to her color, as Trillin supposes, but to her race. It should be underscored that, unlike *Plessy*, dismantling Jim Crow segregation was not at stake, nor, as Trillin correctly observes, were voting rights, lunch counters, or seat assignments on the public buses.¹¹⁷ This case was about Phipps’ right to claim a nineteenth-century version of racial whiteness and be believed.

Let us remind ourselves again of the elements of that version: Whiteness was a matter of blood lines. Blackness was the pollution of blood. Freedom was for the white, enslavement for the Black. And yet, under the benevolent offices of Judge Harper, the racial condition of the individual was not to be determined solely by distinct and visible mixture of “negro blood,” of which Phipps apparently showed no signs. The judge should also consider reputation, reception into society, and whether the individual commonly exercised the privileges of a white man.

We begin to get a sense of what made Phipps sick, but from what perspective? Presumably Phipps’ parents, designated Black on her birth certificate, were closer to her in affinity than a distant great-great-great-great grandparent.¹¹⁸ But in fact, Phipps’ ancestor, Margarita, was adduced by the state against her claim to whiteness and admitted into evidence.¹¹⁹ This meant that Phipps had all this time been “passing”: At school, at work, in her marriages, and even in her family home as a child, Phipps had crossed Louisiana’s elastic yet definitive race line as a fugitive great-great-great-great granddaughter of a once captive Black woman. Shock and nausea are part of the grand narrative of white supremacist discourse when white and Black come into too close of contact.

Nevertheless, we should not yield to the urge to vomit rather than digest the fetid fruits of the Guillory case. The grounds on which we might seek to di-

113. *Id.* at 64.

114. *See id.* at 62.

115. *Id.* at 63. Even the attorney who defended the department’s refusal to alter Phipps’ birth certificate came to remark, “Susie looks like a white person.” *Id.*

116. *Id.* at 74.

117. *See id.* at 64.

118. *See id.* at 71.

119. *See id.* at 78.

minish this case abound. As an instance of racial atavism, it represents an admittedly localized legal discursive return to biologism that, at least *de jure*, has been superannuated.¹²⁰ With respect to the legal status of the "passing" person, we have already noted its limitations. And as an example of Black subordination, there is precious little at stake beyond the power of self-nomination without government imposition. Belatedly, that power (limited to the universe of ready-made racial categories, of course) has been granted.¹²¹ Phipps did get to be white in Louisiana, whether through repeal of the Black blood law or by sinking back into the obscurity of first-time encounters. It is at this point, however, that rigor demands that we inquire further into the fate of Margarita, who, as unimpeachable evidence of Phipps' Blackness, is said to be "history."¹²²

Margarita's relevance to the Guillory case raises important questions for critical methodology. Since Susie Phipps herself "look[ed] like a white person," the proof of her Blackness had to proceed genealogically, which is to say, historically, through the examination and presentation of documents and records. Such records as remain of Margarita's existence, however, describe her as a "slave,"¹²³ and then later a "free Negress."¹²⁴ So perhaps the first question that confronts a race critical methodology is whether there can be written documentary evidence of Blackness that is not visibly apparent. Further, can such evidence be drawn from records made during a period when the power of self-nomination without government imposition was formally denied to all and practically to most? In other words, in order to *prove* that Susie Phipps was Black, the state first had to prove that Margarita was Black. But if Phipps could escape her Blackness, not only by the testimony of the eyes, but by exercising the power of self-nomination, where does that leave Margarita? Following Judge Harper's lead, is the fact that Margarita was held captive by a slavocrat evidence that determines she could not be white and must therefore be Black? Moreover, the description of Margarita as a "free Negress," rather than a mulatto or quadroon or octoroon, which seems *prima facie* to save the inference of her visible Blackness, actually complicates matters more in the case of Susie Phipps' invisible Blackness. Could Margarita, like her great-great-great-great granddaughter, ever disprove the authenticity of her documentary designation

120. After the decision of the trial court in *Doe v. Louisiana*, the so-called "Black blood" law, LA. REV. STAT. ANN. § 42:267 (1970), that defined a white person as "one who has one-thirty-second or less of Negro blood" was repealed. See 1983 La. Acts 811 ("To repeal R.S. 42:267, relative to the criterion for signification of race by public officials in Louisiana, and otherwise to provide with respect thereto. Be it enacted by the Legislature of Louisiana: Section 1 R. S. 42:267 is hereby repealed in its entirety.").

121. The racial categories used by the Federal Census Bureau in the last decade were (1) American Indian or Alaska Native (2) Asian (3) Black or African American (4) Hispanic or Latino (5) Native Hawaiian or Other Pacific Islander (6) White. See 62 Fed. Reg. 58,789 (1997).

122. See Trillin, *supra* note 110, at 78.

123. *Id.* at 71.

124. *Id.* at 78.

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despite the presumption created by her visible Blackness? The answer must be “no.”¹²⁵ But if this answer is correct, we must further suppose either of two conflicting possible readings of Margarita’s relation to Phipps. Either a Black ancestor can generate white progeny or the Blackness of an ancestor is a permanent stain that is present though not visible in persons who only appear to be white.¹²⁶ Of course, the latter possibility is the one that has been upheld judicially under the one drop rule and reflects what I have called a discourse agreement of white supremacy.

Despite their separation in space, time and circumstances, one must not overlook the extent to which the racial situation of Margarita resembles that of Jacqueline Green more than that of Susie Phipps. If we place the three women, Susie Phipps, Margarita and Jacqueline Green, side by side, the differences between Margarita and Green, on the one hand, and Phipps, on the other, emerge. There is Phipps, who looks white but who is designated by the law as Black; there is Margarita, who presumably looked Black and is designated Black; and there is Jacqueline Green, who looked Black but is designated white. Based on appearance alone, Green could not start out being legally designated as Black and later be reclassified as white. In this respect, she resembles Margarita. However, Green in fact starts out being designated by the law as white because she has a white mother, but the efficacy of this designation is put into question due to her medium brown color. Margarita’s is the presumptively easy case: She starts out Black, is designated Black, and remains Black, even after death. (Green starts out white, but her claim to whiteness is undermined by her appearance, because in those contexts she is encountered as colored.) By contrast, Susie Phipps starts out colored by law but, based on appearance alone, lives her entire life as white and is later reclassified as white. The very thing that enables Phipps to become white by law—her appearance in the context of first-time encounters—disables Green from maintaining her status as white and makes impossible any claim that Margarita might have to whiteness.

Margarita’s assumed color functions as a gravitational constant in racial discourse. Her visible Blackness leaps out across durational time to snag even the blonde-haired and blue-eyed by her definition. Her power is not merely

125. The answer must be “no” even if Henry Louis Gates, Jr. is correct that, “[t]he mistake is to assume that birth certificates and biographical sketches and all the other documents generated by the modern bureaucratic state reveal an anterior truth—that they are merely signs of an independently existing identity. But in fact they constitute it.” Henry Louis Gates, Jr., *White Like Me*, THE NEW YORKER, June 17, 1996, at 78. For even after it is revealed that documents generated by the modern bureaucratic state constitute a *legal* (racial) identity, it would remain to show the way in which ideology constitutes a *social* (racial) identity through the rules of racial recognition upon which the law relies. It is an overstatement of the power of the law simply to assert with Gates that “[t]he social meaning of race is established by these identity papers.” *Id.*

126. See generally James W. Gordon, *Did the First Justice Harlan Have a Black Brother?* 15 NEW ENG. L. REV. 159 (1993) (connecting Justice Harlan’s “progressive views on race” to the possibility that he had a Black half-brother who is described as “blue-eyed, light-skinned Robert”). In what socially meaningful sense is “blue-eyed, light-skinned Robert” Black, other than as a stain?

historical, but transhistorical. In legal discursive terms, Margarita is not just some evidence of Susie Phipps's Blackness. She is conclusive evidence. The late twentieth-century synthesis of the nineteenth-century attempt to fix racial condition by status and circumstances of birth completes the circuit of white supremacist discourse agreements through employment of an unalterable set of signifiers, duly recorded, "slave" and "free Negress."

Moreover, Margarita's fate provides us with semiotic insight on the figure of the Black homunculus. Her visually-coerced, government-backed, discursively-overdetermined Blackness sets the stage for the "passing" person's dilemmas of social and economic mobility within a racial spoils system. Her serviceability to white authority's need to intimidate through mechanisms of control and exclusion consummates the *mise en scene* of raciality itself. Her epidermalized presence in the body politic is background that intrudes into the foreground only to be left behind (until needed) again. She is more of an emanation from a dusty document than an actual presence; she is more spectral than substantial reality; she was left for dead. Margarita's role as evidence of unimpeachable Blackness in a dispute among whites about access to whiteness encapsulates what is intended to be described by the expression Black homunculus.

Finally, Margarita's fate in legal historiography leads to a consideration of how Black subjectivity is constructed, not merely in law through recordation of an unalterable set of racial signifiers, but in society as well through the operation of first-time encounters. The assumption of her visible Blackness created by the signifiers is rooted in the social experience of those for whom the visual idiom of racial ideology is insufficient to determine whiteness, but who nonetheless find themselves reliant on the visual apprehension of Blackness in order to guarantee the stability and persuasiveness of the color line.

III. BLACK BY POPULAR DEMAND: FIRST-TIME ENCOUNTERS AND THE USES OF "PASSING" IN POPULAR CONSCIOUSNESS

Naturally for the convenience and clarity of my little theoretical theatre I have had to present things in the form of a sequence, with a before and an after, and thus in the form of a temporal succession. Individuals are walking along. Somewhere (usually behind them) the hail rings out: "Hey, you there!" One individual (nine times out of ten it is the right one) turns around, believing/suspecting/knowing that it is for him, i.e. recognizing that "it really is he" who is meant by the hailing. In reality, however, these things happen without any succession. The existence of ideology and the hailing or interpellation of individuals as subjects are one and the same thing.

-Louis Althusser¹²⁷

127. ALTHUSSER, *supra* note 51, at 163.

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"Look, a Negro!"

-Franz Fanon¹²⁸

Even though they mark relatively brief, ephemeral social interactions, first time encounters should be the principal vector of insight on racial ideology. It is perhaps safe to say that every other experience of racialization, including its documentary production within the law, has as its origin the visual apprehension of difference, which seemingly naturally and simultaneously is categorized as an apprehension of *racial* difference.

Thus, racial truth claims take on an air of self-evidence in social contexts devoted to the purity of social identities. Yet the issue that is logically prior to the question of purity, the validity of the categories of racial discourse, typically is never posed. In the Fanonian interpellation, "Look, a Negro," it is not possible to look and not "see" the Negro, or if one fails to see the Negro the failure is not due to some fault of the communication. The Negro passed too quickly. Or he was never there, and someone is playing a joke. Or the Negro is hiding, perhaps beneath the mask of white skin.

The person subjected to the hail of "Negro" finds that his options are likewise limited. This is so because the Fanonian interpellation functions as a racial truth claim that demands from the person subjected to it recognition that *it is really he who is meant by the hailing*. To be on the receiving end of the racial gaze and the target of discrimination is a simultaneous operation.

This is the interpellative aspect of racial ideology: self-recognition in the categories imposed by others, from which the subject cannot take flight, so long as the validity of the categories retains the force of common sense and popular acknowledgement. Even as the factors¹²⁹ to be considered have shifted emphasis over time, lack of social mobility with respect to racial identity has been the historical fate of the visibly Black subject since the first racial defense of slavery. It is for this reason that I have concluded that to be Black is to be visually overdetermined.¹³⁰

In the context of a first-time encounter, such as that described by Fanon,

128. FRANZ FANON, *BLACK SKIN, WHITE MASKS* 109 (1967).

129. There are at least six means by which racial identity is typically determined during first-time encounters. These include visual appearance (or the eyeball test), name or surname, context or status, self-nomination or proclamation, and voice or spoken language.

130. It is undeniable that layers of social, political, and economic meaning have been antecedently encoded around Blackness and are automatically triggered by the sight of a Black person to the detriment or outright denial of individual characteristics or differences. In recognition of this dynamic, Martin Luther King, Jr., expressed the hope that someday his children would be judged not "by the color of their skin, but by the content of their character." Martin Luther King, Jr., *I Have a Dream*, Speech at the Civil Rights March on Washington (Aug. 28, 1963), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 217, 219 (James M. Washington ed., 1986).

Fanon is simply walking down the street, minding his own business when he is confronted by a racial interpellation. In that context, the operative rule of racial recognition is clearly based on a visual apprehension of Fanon. Without knowledge of Fanon's parentage, ancestry, self-identification, spoken language, education, class, or national or cultural affiliation—Fanon is apprehended as “a Negro” and is thereby made to see himself as a Black subject. But the notion of a first-time encounter should not be limited to being accosted verbally on the street,¹³¹ for first-time encounters occur anytime an individual exposes herself to a public in which racial ideology is endemic.¹³² Both verbal and nonverbal signals cue the racial subject that he or she is an outsider to someone else's inside and thus establish both a division and a hierarchy of racialized bodies.¹³³ Interpellation as a racial subject thus occurs within a social context where the corporeal schema of racial ideology is already firmly established and race functions as the ultimate trope of difference. As Althusser admonishes, “[t]he existence of ideology and the hailing or interpellation of individuals are one and the same thing.”¹³⁴

Just as the Althusserian notion of interpellation grounds the racial subject outside (at least, initially) of any internal consciousness of subjects thus hailed, the Fanonian description of a first-time encounter links up with the notion of prejudice as both bias and injury. The law's prohibition on racially discriminatory acts leaves untouched the underlying phenomenon of prejudice, and arguably relies on its perpetuation. It is left to cultural institutions, if at all, to contend with prejudice. But in the absence of an effective distinction between racial subject—located outside of consciousness—and racial identity—lodged within consciousness—the discourse agreements of white authority are merely recirculated and further entrenched. Race may still be seen as “an essence, a natural phenomenon, whose meaning is fixed, as constant as a southern star.”¹³⁵ The uses of “passing” in popular consciousness, in particular, reveal the circuitry of this ideological entrenchment.

The concept of “passing” in popular consciousness shares certain repetitive themes that center on experiences of imposture and mistaken identity encoun-

131. See Davis, *supra* note 67, at 1565 (describing microaggressions as “subtle, stunning, often automatic, and non-verbal exchanges which are ‘put downs’ of blacks by offenders”); Chester M. Pierce, et al., *An Experiment in Racism: TV Commercials*, in TELEVISION AND EDUCATION 62, 87-88 (Chester M. Pierce ed., 1978) (concluding, based on an empirical study, that there are numerous and excessive negative representations of Black persons in TV commercials). Being called “a Negro” or “Black” need not be considered a put down. The aggression occurs when the speaker intends it that way.

132. See Lawrence, *supra* note 35, at 322 (stating that “Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites.”).

133. Fanon calls this division and hierarchy of racialized bodies the “corporeal schema” of racial ideology. FRANZ FANON, BLACK SKIN, WHITE MASKS 111 (1967).

134. Althusser, *supra* note 51, at 163.

135. OMI & WINANT, *supra* note 63, at 13.

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ters.¹³⁶ As in Werner Sollors' documentation of the thematics of "passing,"¹³⁷ the "passing" person has been portrayed in American literature as a runaway slave,¹³⁸ a cross-dresser,¹³⁹ a parvenu or emigrant,¹⁴⁰ a spy,¹⁴¹ a trickster or rebel,¹⁴² a victim or coward,¹⁴³ a self-serving opportunist,¹⁴⁴ a traitor to kin,¹⁴⁵ and a criminal.¹⁴⁶ These tropes serve as the vehicles through which the "pass-

136. Narratives that focus on the social experience of characters of partial African ancestry who nevertheless can "pass" for white include: WILLIAM DEAN HOWELLS, *AN IMPERATIVE DUTY* (1891); MARK TWAIN, *PUDD'NHEAD WILSON* (1894); CHARLES W. CHESTNUTT, *THE HOUSE BEHIND THE CEDARS* (1900); JAMES WELDON JOHNSON, *THE AUTOBIOGRAPHY OF AN EX-COLOURED MAN* (1927); JESSIE FAUSET, *PLUM BUN* (1928); NELLA LARSEN, *PASSING* (1929); FANNIE HURST, *IMITATION OF LIFE* (1933); GOD'S STEPCHILDREN (Micheaux Book & Film Co. 1938), *ALIEN LAND* (Willard Savoy 1949); *LOST BOUNDARIES* (Warner Studios 1949); and *PINKY* (20th Century Fox 1949).

137. See WERNER SOLLORS, *NEITHER BLACK NOR WHITE YET BOTH: THEMATIC EXPLORATIONS OF INTERRACIAL LITERATURE 246-84* (1997).

138. Sollors speculates that the first uses of "passing" to signify "crossing the color line" appeared in notices concerning runaway slaves. See *id.* at 255. As evidence of this early usage, see RICHARD HILDRETH, *THE SLAVE; OR, MEMOIRS OF ARCHY MOORE* (Boston, Bela Marsh 1836) (including text of Charles Moore's advertisement of five hundred dollars reward for the recapture of Archy and Cassy, two runaway slaves and Moore's children, who may attempt to "pass for white"); HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN 70* (Boston, John H. Eastburn 1851) (quoting advertisement for the recapture of George Harris, a runaway slave, whom the subscriber states may "try to pass for a white man"). The trope of the "passer" as runaway slave is also developed in MARK TWAIN, *PUDD'NHEAD WILSON* (Hartford, American Publ'g Co. 1894) (telling the story of the consequences of slave baby (read Black) and free baby (read white) switched at birth).

139. See generally WILLIAM CRAFT, *RUNNING A THOUSAND MILES FOR FREEDOM* (1969) (recounting the legendary escape from slavery of William and Ellen Craft in which Ellen disguised herself as a white master of her slave William).

140. As Sollors shows, the emigrant, as one who changes society by geographical relocation, and the parvenu, as one who changes society by social climbing, are linked to a primary condition for the emergence of "passing" themes in nineteenth and twentieth century literature: geographic mobility and the anonymity of cities. See SOLLORS, *supra* note 137, at 247-48. Thus, the portrayal of "passing" descends from a tradition that makes a motif of the character with no known or suspicious origins and the social upstart. See generally GUSTAVE DE BEAUMONT, *MARIE; OR, SLAVERY IN THE UNITED STATES* (Barbara Chapman, trans., Stanford University Press 1958) (1835) (representing a person of partial African ancestry as a parvenu and emigrant); CHARLES CHESNUTT, *THE HOUSE BEHIND THE CEDARS* (1900) (representing a "passer" as an emigrant); VICTOR HUGO, *BUG-JARGAL* (Paris, Urban Canel 1826) (telling the story of rich planter of "doubtful color" who switches from the white side to the Black side during a rebellion).

141. See generally JAMES FENIMORE COOPER, *THE SPY* (Philadelphia, Coney, Leon, and Blanchard 1836) (telling the story of a white slaveowner who pretends to be a slave in order to escape imprisonment during the revolutionary war).

142. See generally FRANK WEBB, *THE GARIES AND THEIR FRIENDS* (1969) (representing voluntary "passing" character as both a spy and trickster on white racist sensibilities).

143. See generally, e.g., *id.* (representing involuntary "passing" character as psychologically tormented by his secret and complicit in racist joking).

144. See SOLLORS, *supra* note 137, at 257 (stating that the "passing" character of Victor Hugo's novel *Bug-Jargal* "maintains this [white] identity only as long as it is advantageous; at the height of the revolution, when he is in the hands of the black rebels, he changes his tune and now declares with some pathos that he is a Mulatto").

145. See LANGSTON HUGHES, *Passing*, in *THE WAYS OF WHITE FOLKS* 49 (treating ironically a "passing" theme with an epistolary story in which the letter writer apologizes to his own mother for not having greeted her in the street in downtown Chicago).

146. The origins of "passing" in the concerns of slavocrats marked its detection from the very start as a criminological investigation wherein Black signified guilt. As the narrator of Gustave de Beaumont's novel, *Marie*, is made to complain:

Public opinion, ordinarily so indulgent to fortune-seekers who conceal their names and previ-

ing" person confronts or evades in her dealings (mostly) with whites the dilemma of a blood relation to Black family members. Thus, the situation of the "passing" person in popular portrayals is inherently anxiety-ridden and melodramatic. As an imposter, one who does not "correct" the mistaken assumption of whiteness, the "passing" person withholds the secret of Black identity beneath the camouflage of white subjectivity.¹⁴⁷

In the melodrama of the "passing" narrative, the infamy of escape from or return to the Black community is everywhere sentimentalized, moralized, and made the object of nostalgia. This plantation aesthetic has proven to be remarkably durable for a discourse whose basic logic is to impose penalties on Blacks for being Black, to punish the "Black within" when the visible Black is nowhere in sight, and to criminalize escape attempts from a racial caste system that provides no exit. The distinction between subjective experience, through which individuals are coerced by racial categories, and identity, on which individuals exercise agency and choice, is a necessary, albeit routinely ignored, condition for articulation of the dilemma of escape or return in the "passing" narrative. Although an improbable target of the Fanonian interpellation, "Look, a Negro!," the "passing" person in popular consciousness is an individual who, based on identity alone, would feel certain that it is really he who is meant by the hailing.

Thus, the narrator of James Weldon Johnson's controversial novel, *The Autobiography of an Ex-Coloured Man*, is tormented by the question of his racial identity and expresses an irresistible need to divulge the secret he has "guarded more carefully than any of [his] earthly possessions."¹⁴⁸ Johnson's narrator, who never gives his name throughout the novel, ultimately decides he will "neither disclaim the black race nor claim the white race; but [decided] that [he] would change [his] name, raise a moustache, and let the world take [him] for what it would."¹⁴⁹

Commenting on this gesture, the literary critic Judith R. Berzon accuses Johnson's narrator of deceit. She concludes that, "since he does not look like a Negro, according to the conception of most whites, he must know that he will be treated as a white man. Once that occurs, he will have to practice some con-

ous lives, is pitiless in its search for proofs of African descent. . . There is but one crime, of which the guilty bear everywhere the penalty and the infamy; it is that of belonging to a family reputed to be of color.—Though the color may be effaced, the stigma remains. It seems as if men could guess it, when they could no longer see it. There is no asylum so secret, no retreat so secure as to conceal it.

SOLLORS, *supra* note 137, at 257. In this passage, "passing" becomes the metonymic displacement of the runaway slave's "theft" of himself. Rather than recapture, however, the penalty for "passing" is a symbolic and social, if not a material and physical, return to the Black community. In other words, the penalty is the infamy of that return.

147. See Tyler, *supra* note 30, at 214-15 (describing conceptual artist Adrian Piper as "camouflaged" in her encounters with other whites).

148. JOHNSON, *supra* note 136, at 3.

149. *Id.* at 190.

scious deception”¹⁵⁰ Berzon is able to conclude that the narrator’s decision to “pass” is deceitful only because she assumes the “one-drop rule” conception of race. Since the ex-coloured man appears to be white, he would be treated as white, which would be deceitful because, for Berzon and many others, the “passing” person is really Black. Such nonsense has brought not only many fictional characters to grief, but also many living characters as well.¹⁵¹

In the terms suggested by this modest *theatrum philosophicum*, the ex-coloured man is interpellated as white and is (subjectively) white because he “passes” for white. But everyone who is white “passes” for white. If there is deception, it is in the project underwritten by the one-drop rule of determining race by rigorous examination and documentation of ancestral ties. This strictly legal undertaking is not merely reductive and circular; it too, just as the critic of “passing” who complains that a white man only appears to be white, must end by holding simulacra to be originals—or in more Freudian terms, that ontogeny recapitulates phylogeny—thereby transposing the subjective experience of Blackness to an internal process of identification and blood.

This transposition of subjectivity and identity points to another peculiar feature of the racial condition of the “passing” person, namely the necessity of proclaiming one’s Blackness in the context of first-time encounters in order to correct the mistaken assumption of whiteness. Whereas the common subjective experience of Blackness is visually overdetermined—to be Black by popular demand—the “passing” person only becomes Black in such contexts by proclamation, which is considered a revelation of the true self. The conceptual artist Adrian Piper has made a career of such outings of herself.¹⁵² The credibility of Piper’s proclamation of her Blackness depends, however, on transposition and the exaggeration of her “Negroid” features. In order to make her Blackness visible, Piper finds that she must exaggerate and remonstrate with other

150. JUDITH R. BERZON, NEITHER WHITE NOR BLACK: THE MULATTO CHARACTER IN AMERICAN FICTION 156 (1978).

151. In the epigram that precedes his essay on the life of Anatole Broyard, Henry Louis Gates, Jr. tells us that “Broyard wanted to be a writer, not a black writer. So he chose to live a lie rather than be trapped by the truth.” See Gates, *supra* note 125, at 66. Broyard’s “truth” according to Gates was that he was really Black although he “passed for white” among all those who were unaware of his family background. Indeed, Gates remarks that Broyard “kept the truth even from his own children.” *Id.* This becomes in Gates’s essay one of the most salient aspects of Broyard’s anguished racial imposture, which went so far that he once cut out the contributor’s note from an early article that he had written because it referred to his “first hand” knowledge of the situation of the American Negro. And yet, much of Broyard’s anguish, as Gates correctly points out, is a product not of his own creation, but of the modernist demand for authenticity. Coupled to this demand for authenticity, however, is also the continuing acceptance—certainly during Broyard’s life and even today—of the nineteenth century notion of racial blood. Under such conditions, Broyard’s “passing” is neither deceit nor living a lie, as Gates suggests; rather, it is best understood as submission to the hail of his subjective experience.

152. See Piper, *supra* note 30, at 213 (including a 1981 pencil sketch by the artist entitled, “Self-Portrait Exaggerating My Negroid Features”); see also Adam Shatz, *Black Like Me*, LINGUAFRANCA, Nov. 1998, at 39 (reviewing Piper’s artistic installations from 1968 to the present).

whites.¹⁵³ Nevertheless, as Carole-Anne Tyler insightfully observes, “Piper repeats in uncanny fashion that which she would critique. She assumes she can see—or hear—who is white, interpellating people as white by giving them her card. She divides the world into black and white, passing over people of color unless they are (black) like her and share her sense of what racism is.”¹⁵⁴ Implicitly, then, the transposition of subjectivity and identity, required in the “passing” narrative, cannot be articulated coherently without resort to visible (that is to say, unmistakable) Blackness as its epistemological guarantee.

This is especially so with regard to visual, as opposed to literary, representations of “passing.” At some indefinite yet undeniable point, it is no longer possible to “see” the Black. Having reached that point, the “passing” person’s Blackness becomes an insider’s joke, representable only through proclamation, exaggeration, and association with other visible Blacks.¹⁵⁵ In the “passing” film, just as in all “passing” narratives, “passing” is only representable as the desire to “pass.” Because the representation of “passing” is dependent on the spectatorial distance of a readership or viewership, the anonymity required by the “passing” person remains a desideratum, structurally deferred by relation of the “passing” narrative itself. However, when the “passing” narrative is submitted to the cinematic codes of film representation, its reliance on visible Blackness as its epistemological guarantee, easily unmarked and elided in literary treatments, is forced to the surface. In order to see and thus know the “passing” person, the audience must see Blackness.

Douglas Sirk’s film, *Imitation of Life*¹⁵⁶ has been the subject of extensive contemporary criticism.¹⁵⁷ As one commentator has suggested, “the film’s pre-

153. As part of her public performance of Blackness, Piper passes out cards to those whom she believes have made anti-Black comments in her presence which read:

Dear Friend:

I am black.

I am sure that you did not realize this when you made/laughed at/agreed with that racist remark. In the past I have attempted to alert white people to my racial identity in advance. Unfortunately, this invariably causes them to react to me as pushy, manipulative, or socially inappropriate. Therefore, my policy is to assume that white people do not make these remarks, even when they believe there are no black people present, and to distribute this card when they do.

I regret any discomfort my presence is causing you, just as I am sure you regret the discomfort your racism is causing me.

Sincerely Yours,

Adrian Margaret Smith Piper

Tyler, *supra* note 30, at 215.

154. *Id.* at 220.

155. In writing this Article, I pondered what a film about “passing” would look like that included no Black characters.

156. *IMITATION OF LIFE* (Universal Studios 1959).

157. See Valerie Smith, *Reading the Intersection of Race and Gender in Narratives of Passing*, 24 *DIACRITICS* 43-46 (1994) (commenting that Sirk’s film has garnered more attention in contemporary criticism than John Stahl’s *Imitation of Life* (1934) because of its comparative stylistic sophistication); see generally, e.g., BUTLER, *supra* note 62, at 167-86; *IMITATION OF LIFE* (Lucy Fischer ed., 1991) (containing critical commentaries on the film, reviews, and the continuity script); Berlant, *supra* note 62,

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occupation with issues of artificiality makes it especially suitable for arguments that explore the cultural construction and contestation of gender and race.”¹⁵⁸ As a remake of John Stahl’s *Imitation of Life*¹⁵⁹ which itself was based on the Harlem Renaissance novel of the same title by Fannie Hurst, Sirk’s film condenses and revivifies many of the tropes and discursive ploys of the “passing” narrative, even as it purports to unmask the artificiality of racial and gender hierarchies. In Sirk’s *Imitation*, like *Pinky*¹⁶⁰ and the earlier version by John Stahl, *Lost Boundaries*,¹⁶¹ the popular portrayal of “passing” as imposture is reiterated. However, Sirk’s *Imitation* has attracted the special interest of white feminist critics, not because of its reiteration of “passing” as imposture on the brink of the Civil Rights movement of the 1960s, but because this reiteration occurs within the context and conventions of the white woman’s maternal melodrama, which issued as a mechanism for exposing the vacuity of specifically female departures from the familial ideology of the white middle-class. Thus, Sirk’s *Imitation* is imitative in a double sense: it imitates through repetition (copy) as well as through the production of its own artificiality (counterfeit).

In Sirk’s version, the “passing” character is embodied by Susan Kohner, a white actress who plays the role of Sarah Jane, the daughter of a visibly Black woman, Annie Johnson. Annie volunteers to be the servant of the white actress Lora Meredith (played by Lana Turner) who also has a daughter, Susie. This embodiment of the “passing” character by a white actress is particularly sensitive, as Mary Ann Doane observes, because “[t]here is one body too much.”¹⁶² The spectator is confronted by the sight of “a white pretending to be a Black pretending to be a white.”¹⁶³ But if we subtract the “Black pretending,” the Black who is in fact not there, we have instead a white pretending to be a white, which is the situation that the character Sarah Jane finds herself in. Curiously, one might even say perversely, the enforcement of Sarah Jane’s Blackness is undertaken in the film, with the exception of one scene, not by any of the white characters, but by the visibly Black character of her mother, Annie. While Annie sets herself the task of returning Sarah Jane to the Black community through a series of interventions that finally leads Sarah Jane to plead with her mother, “If—by accident—we should ever pass in the street, please don’t recognize me.”¹⁶⁴ Sirk, for his part, sets himself the project in the film of un-

at 110-40; Mary Ann Doane, *Dark Continents: Epistemologies of Racial and Sexual Difference in Psychoanalysis and the Cinema*, in *FEMMES FATALES: FEMINISM, FILM THEORY, PSYCHOANALYSIS* 209 (1991).

158. Smith, *supra* note 157, at 46.

159. *IMITATION OF LIFE* (Universal Studios 1934).

160. *PINKY* (20th Century Fox 1949).

161. *LOST BOUNDARIES* (Warner Studios 1949).

162. Doane, *supra* note 157, at 235.

163. *Id.*

164. *IMITATION OF LIFE*, *supra* note 157, at 140.

masking Sarah Jane's "pretense" that she is not Black through the betrayal, not of her mother or her race, but that of her own body.

It is indeed fascinating to watch how the white body, under the direction of the master myth-maker, is made to betray its intrinsic Blackness, or more accurately, how the invisible Black within the visible white is made visible. Invisible Blackness in Sirk's *Imitation* reveals its hidden truth in both subtle and blatant ways. In one scene Sarah Jane dances in her bedroom over records scattered across the floor in an exaggerated exhibition of Negro rhythm and Black female wantonness. This is the racial logic of Sirk's *Imitation*: The fetishized "blood" of the one drop rule, or what I have referred to as the Black homunculus, must be made to dance, to perform itself into recognition.

In another scene Sarah Jane is asked to serve Lora Meredith who is meeting with her agent and an Italian director in the living room. Sarah Jane mocks Meredith by carrying the tray of food into the living room on her head and, using the exaggerated accent of a French market fruit vendor, announces, "I fetched you-all a mess o' crawdads."¹⁶⁵ When Lora asks her where she learned this, Sarah Jane replies, "Ah I'arned it from my mammy . . . and she I'arned it from Massa fo' she belonged to you."¹⁶⁶ This dialogic marker of Sarah Jane's Blackness, though it is motivated by the desire to mock those who would impose Blackness on her by making her into a servant, actually naturalizes Blackness as a figure of speech. The philosopher and feminist critic Judith Butler suggests in her analysis of Nella Larsen's novel, *Passing*, that the protagonist, Clare Kendry, "passes not only because she is light-skinned, but because she refuses to introduce her blackness into conversation, and so withholds the conversational marker which would counter the hegemonic presumption that she is white."¹⁶⁷ Sirk's use of Blackness as a figure of speech in Sarah Jane's performance, rather than exposing the artificiality of racial stereotypes, buttresses the film's project of Samboifying Sarah Jane through reification of Blackness as a conversational marker.

Blackening Sarah Jane is made even more difficult by the fact that her identity is not at war with her subjectivity. In other words, she experiences no internal conflict with her whiteness. This lack of an identity crisis creates a crisis of representation that leads ultimately to violent reprisal. Since her racialization is often made to follow a parallel track as her sexualization, that reprisal comes in the context of a sexual affair. When Sarah Jane's white boyfriend discovers that her mother is Black, he beats her. With this assault, viewers glimpse briefly for the last and only time in the film the sociopolitical dimension of segregated race relations implied by Sarah Jane's desire to "pass," and thus nativize her whiteness. To be Black is to be the object of white violence

165. *Id.* at 116.

166. *Id.*

167. See BUTLER, *supra* note 62, at 171.

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and revulsion unrestrained by deference to gender differences.

In the closing shot of the scene in question, Sarah Jane's white body, slapped, beaten, and defeated, sinks into a black pool of water, a visual metaphor for the concession to the "lesson" she has just learned. The implicit threat of further miscegenation, its invisibility making it all the more threatening and potent, must be stopped with physical violence—violence itself being one of the constitutive elements in the construction of Black subjectivity. With the exception of this scene in which Sarah Jane is made to share culpability with her attacker, thematization of the sociopolitical dimension of the "passing" person's dilemma is otherwise forestalled and submerged in the film's focus on the family.

As can be safely argued, Sarah Jane not only sets the film's racial drama in motion in her effort to nativize her whiteness, she more importantly carries the burden of responsibility for all of the racial tensions negotiated by the film. Because the film never delves explicitly into the question of why Sarah Jane is motivated to "pass," thereby giving her actions social and political meaning, she, in effect, remains racially "out of control" in the strangest of isolation. Consequently, the social vexations she confronts are of her own creation. This narrative extrication from the sphere of social interaction, constitutes a biologized remission to a position outside the public sphere. In this sense, her transgression reads thematically (continuous with her mother, Annie) from the nineteenth century text of slavery and its attendant problematic of unlicensed Black freedom. Indeed, the plot intensification of the efforts to police and bring back Sarah Jane each time she escaped into her whiteness makes of the film a revamped fugitive slave narrative.

The discourse of slavery is established early in the film in the person of Sarah Jane's mother Annie, who is the only visibly Black character in the film that affects the articulation of Sarah Jane's "passing" dilemma. Annie makes visible, via substitution and example, what is insufficiently seen in Sarah Jane: her putative, legally mandated Blackness. Through this blood relation, Annie serves the important function of articulating for the viewer an understanding of the proper social position/status/function of the Blackness that Sarah Jane refuses to occupy. The interminably stable Black identity evinced by Annie anchors viewers' comprehension of the quiddity or "whatness" and, crucially, the "howness" of the Blackness defied by the evidence of Sarah Jane's white body. Thus, Annie is made to serve in the film the same function in relation to Sarah Jane as Margarita served in the courtroom in relation to Susie Phipps, that is, as unimpeachable evidence of a white relative's Blackness. Indeed, Annie's Blackness is constituted in terms of a blissful and ever-vigilant servitude, a self-objectification as property under the sign of serviceability. In this sense, the positiveness or certification of her Blackness, presented as her goodness, her lovingness, her affection for "pretty things," remains understood in terms

of an unproblematic accedence to the status of slave despite the historical condition of post-Emancipation. As the only visible and self-contented Black in the film, Annie becomes representative of a racial Blackness that is understood in terms of her behavior, which the film presents as reducible to a flawless serviceability.

Thus, it is no exaggeration to describe Annie as a metaphorical embodiment of a Southern antebellum wish fulfillment: the contented slave, brimming over with enthusiasm for her condition. Annie enters the film offering herself for practically nonrenumerated employment to Lora Meredith, then an unemployed aspiring actress, as:

A maid to live in? Someone to take care of your little girl? A strong healthy settled-down woman who eats like a bird—and doesn't care if she gets no time off and will work real cheap? . . . Seems to me Miss Meredith, I'm just right for you. You wouldn't have to pay no wages. Just let me come and do for you.¹⁶⁸

Ostensibly a desperate response to a zero-sum situation (she and Sarah Jane are apparently homeless) Annie's undeliberated enthusiasm (she doesn't even haggle over board) smacks of self-satisfaction with her requested condition of unrequited servility. Annie's solid embodiment of Blackness as a contented servile condition enables the blonde ambition that the Lana Turner character, according to her upscale bombshell aesthetic, epitomizes. In this respect, the whiteness of Meredith is subtended by the specter of a replete Blackness embodied in the figure of Annie.

Questions of property and its productive relations to the proper place of differently racialized bodies undergird the thematic structure of the film. We are made aware of this issue from the beginning as Sarah Jane's racial dilemma is initiated. In the first scene to explore the incipient dynamic of family relations within Meredith's household, Sarah Jane, *à la Brown*,¹⁶⁹ refuses the black doll offered by Susie, and seizes the white one, disregarding Susie's stated unwillingness to give it up. Meredith, recognizing the youthful innocence of the dilemma, begins to approach Sarah Jane with a smile that is interrupted by an angry approaching Annie who chastises Sarah Jane for her lack of manners. As Annie takes the white doll from her, Sarah Jane pleads that she doesn't want the Black one, and begins to cry. In a closeup shot of her face regaining composure, Sarah Jane drops the Black doll on the floor behind her.

In this succinct passage, we have an encapsulated textualization of the film's symbolic racial and property relations. Guilt and innocence are negoti-

168. *Id.* at 46-47.

169. In *Brown*, the Supreme Court relied in part for its conclusion that segregation was unconstitutional on social science data that was collected by Professor Kenneth Clark. See *Brown v. Board of Educ.*, 347 U.S. 483, n.11 (1954) (citing K. B. CLARK, EFFECT OF PREJUDICE AND DISCRIMINATION ON PERSONALITY DEVELOPMENT (1950)). The Clark data was based on experiments in which Black children were given white and Black dolls and asked to describe their reactions, which were generally negative toward the Black dolls.

ated across the white body of the doll, the figure of symbolic whiteness. Here we witness a centering of whiteness as the object of the film’s racial contention—at issue, who gets to possess or own it. This dynamic is deployed across the bodies of the four female characters: Susie’s innocence is established immediately as she is the victim of the theft of whiteness; in this instant, the momentary snatching away of her whiteness takes on grave implications as she indicates she’s had it “all her life.” Meredith is shielded from displaying wrath—and thereby retains her innocence—by Annie’s spirited intervention. Moreover, at this key moment in the film, we witness the foregrounding of the volatile nature of Annie’s relationship to Sarah Jane that will continue for the remainder of the film: the mother-daughter relationship is undermined, since, from this moment on Annie will grant virtually all of her motherly physical affection to Susie. Indeed, as the principal agent of the film’s criminological investigation of Sarah Jane’s crime of “passing,” this Black mother-daughter relationship is thematized as that of a policewoman/parole officer to a truant. Significantly, with the exception of Sarah Jane’s white boyfriend, Annie remains throughout the film the sole admonisher of Sarah Jane; no other whites ever chastise her for attempting to “pass.”

It has been argued that Sarah Jane’s self-development mimics—in a lower class register—that of Lora Meredith.¹⁷⁰ After her failed and violently-ended attempt at inhabiting her whiteness within the economy of heterosexual relations—she is beaten by her boyfriend—for the remainder of the film Sarah Jane attempts to go native as first a saloon torch singer and then a dance hall girl. Both efforts are readily understood as adulatory emulations of Lora’s life as public entertainer. But there is a crucial difference in the modality of their public “enfleshment.” As noted by many critics, Meredith’s stardom, her public embodiment, is celluloid, all glamour and lights, held out at arm’s length, a spectacle beheld from a distance.¹⁷¹ Despite the sleaziness of some of her career tactics, the film allows Meredith to maintain the appearance of purity and dignity threatened by the lures of her career trajectory—especially the kind of unwanted advances from men that, if acceded to, would “spoil the gal” irreparably. By contrast, Sarah Jane’s choice to inhabit the red light district as her place of employment, along with the “in the flesh” nature of her work, makes her choice unavoidably sleazy—whether singing on stage or rocking in the dance line, you can reach out and touch her. There is no question of her profligacy as it is brazenly constituted through her performance.¹⁷²

170. See Berlant, *supra* note 62, at 130; see also Doane, *supra* note 157, at 236.

171. See Berlant, *supra* note 62, at 136-37.

172. See Berlant, *supra* note 62, at 131 (“Sarah Jane’s mode of self-instrumentality is to hyper-emphasize her body in the present tense of performance . . . by making herself a thing, she takes over her own cultural objectification as a racialized subject, relying on male narcissism to separate her sexual ‘value’ from her juridical body.”). The importance of this observation needs to be amended in relation to the film’s production of a racialized subjectivity that is not there within the enclosure of the visual id-

Thus, the aloofness of Meredith's celluloid celebrity stands in stark opposition to the fleshy proximity of Sarah Jane, and there is an implicit inversion or exchange operative here: Sarah Jane makes visible the limit threshold of Meredith's career trajectory. It is Sarah Jane, and the extrusion of her "Blackness" onto the stage, that makes apparent how far Meredith did not go, the limit itself a point demarcating the proper(ty) and valuating line between whiteness and Blackness, and even "woman."

One cannot underestimate the stake the film has in maintaining the sanctity of Lora Meredith, despite the film's suspicion of commercialized, "imitative" culture, and the consequent flagellation of her character. The enfolding of the public issues of women's status and work roles within a patriarchal society into the familial and personalizing confines of the melodramatic genre work to obscure the significant process of racial (political, economic, cultural) valuation performed by the film. Yet, in negotiating a critique of the patriarchal domination immanent in the film, much recent feminist criticism has overlooked the racializing dimension of the construction of "woman" as subject, the schema of normalization by which this gender category slips into whiteness, reified and splayed back across the screen in the angelic glow of the star Lana Turner. There is no question that Meredith's career success is made ambiguous by her failings within the heterosexual familial matrix. She loses touch with her daughter who falls in love with her love interest (and Susie's substitute father), Steve, who is equally distressed in his relations with Meredith over her seeming contempt for the borders of the patri-dominant household/lifestyle.

Here we get another glimpse at the process of defining the proper gender role of woman through the alembic of race. On the one hand, Sarah Jane's "Blackness" performs the surrogate role of defining the transgressive limit of whiteness in female terms. Her erotophilic spectralization is offered as a threat inherent in Meredith's aberrant career "womanhood." On the other hand, and from another perspective of domination, the retributive visitation of a potential "incest" upon Meredith's household serves, in its definition as (against) nature, to name the "unnatural" characteristic of Meredith's extra-familial behavior. The crucial element is the age-old threat of Nature, here in the enfleshed form of the "Black" woman, Sarah Jane. As an Ur-category of patriarchal discourse, a threatening nature justifies the control—in the name of Nature's opposite, Culture—of otherwise "out of control" female bodies—a condition latent in the

iom. In each of these scenes, Sarah Jane is a white woman, and, because she is there, understood as such. It is the desire constituted by the film—to see the "Blackness" of Sarah Jane—that motivates her placement into a workplace that strategically demands/allows/begs for the white woman to make of herself a "nig." In this instance, the desire of male narcissism structures a self-allowance; the racialization is merely a mode of gaining access to an otherwise "pure" social artifact: the unsullied white woman exemplified by Lora Meredith. Within this particular scene, the value of the white woman Sarah Jane, under this "erotico-contractualized" social relation, lies in her ability to be what she is not, viz. Black; but from a critical vantage point, it is the film, through its contextualization of a set of white supremacist discourse agreements, that makes this performance a representation of an underlying racial being.

public embodiment of Lora Meredith.¹⁷³ With the exemplary signpost of Sarah Jane on one side and a potentially disastrous incest on the other, the category of "white woman," again, epitomized by Meredith, is subject to a process of stabilization. To step outside the bounds of proper white woman's behavior—centered in the hetero-patriarchal home—threatens the sanctity of the category with a verboten Blackness. In short, labor and independence are reworked symbolically as a luring and disastrous Black womanhood. Thus, the fairytale return of Meredith to the nuclear fold—a closure that rewrites Annie's funeral scene at the end of the film as Meredith's wedding, an apotheosis of the white heterosexual family—secures the sanctity of the white:woman dyad.

Just as Meredith represents a wholesale seizure (through the defining process) of the category of whiteness (being morally, if not visually, what Sarah Jane is not), her characterization amounts to an equal (if problematically apprehended) subsumption of the category of woman. It is not that Sarah Jane and Annie become not-Woman in some totalizing sense, but perhaps, "awoman," in relation to this unequal distribution within the process of (en)gendering. The mutual substantiating that occurs through the embattled pairing of "woman" with "whiteness" creates a kind of moral and racial prohibitory structure—the "white woman." At the same time, the alpha privative "Black (a)woman" defines that which is to be excluded or prohibited.

This uneven opposition precludes or makes substantially suspicious a critical strategy that arrogates the gender status of "woman" to an undifferentiated category of oppression.¹⁷⁴ The engendered privilege of white woman (comprehended now through the overwriting masculinist terms of Culture and Society—career success, cash and property, respectability), in contrast with the abjection of Black woman (an outgrowth of an uncivilized, uncultured, and domestic(ated) Nature), is herewith overwritten by a panoply of entitlements with crucial determining effects upon both the gender and racial categories. To put this in the crudest material terms, the white woman, Meredith, has a successful career, makes the money, purchases the property, and sends her daughter to college, all accoutrements of the masculine public sphere, *and* keeps her scruples and gets the man, both of which result in her gendered normalization. In stark, almost brutal opposition, the Black woman, Annie, dies with a broken heart riven by an unarticulated political invasion into her already

173. See Patricia Cooper, "A Masculinist Vision of Useful Labor": *Popular Ideologies About Women and Work in the United States, 1820 to 1939*, 84 KY. L.J. 827, 837 (1995-96) (explaining that, as early the nineteenth century, "[w]hites displayed considerable anxiety about black women who chose to stay home, rather than work, and decried 'female loafism' at the same time that white women's domesticity was encouraged and celebrated").

174. See Harris, *supra* note 39, at 587-90; see also LEWIS R. GORDON, BAD FAITH AND ANTIBLACK RACISM 124-129 (1995) (discussing the misogynistic dimension of anti-black racism and the ambivalent deployment of the white woman in a variety of social and discursive structures). See generally Ruth Frankenberg, WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS (1993).

fragile family structure. And the white woman of known African ancestry, Sarah Jane, collapses with her life strategy foiled and corrupted, at least for the moment.

Lauren Berlant is certainly correct in arguing that

once the women have leisure and security [although it is not clear in the film how these two accomplishments pan out in the lives of Annie and Sarah Jane], their bodies reemerge as obstacles, sites of pain and signs of hierarchy: the white daughter falls in love with her mother's love object [and the death of Annie]; the light-skinned African-American daughter wants to pass for white, and so disowns her dark-skinned mother, whose death from heartbreak effectively and melodramatically signals the end of this experiment in a female refunctioning of the national public sphere.¹⁷⁵

But it is clear that because of their relatively diametric material conditions, Lora Meredith is not Annie Johnson. And where both figures are engaged textually in the elaboration of what Berlant calls a "nationalist politics of the body,"¹⁷⁶ it is ultimately race, not gender, that effectively draws the line of inclusivity within the borders of the "nation." This is accomplished through the film's scopic reinvestment of a fetishizing transit running between *real property* and the scintillating bodily surfaces of Meredith. The accession of Meredith to *her* property (the fame, the fortune, and Annie) is legitimated by Sirk's lush and magisterial long shots of interiors and by the close up shots framing the glowing pearlescence of her ever-composed visage. And while this accession may have been troubled (by the Susie problem) with the intervention of a patriarchal imaginary that disallowed a successful and male-excluding matriarchal independence to go unpunished, the denouement of her relationship to Steve details the inclusion of the white woman into the nation framework, of course within the confining protocols of the hetero-nuclear family matrix.

The effective misogyny of this imaginary's work through the body of Meredith is undeniable: the white woman has obviously been made to sacrifice some degree of independence in determining the status of that inclusion. Yet, the structuring of her character as a representative inclusion/exclusion mechanism along the axes of race and gender underscores the multi-valenced dimension of the patriarchal project, its ability to split social subjects in caste-like ways.

Finally, an adequate investigation of the production of white racial subjectivity in Sirk's *Imitation* must address the constitutive alibi of colorblind racial innocence that finds its characterological embodiment in the astounding community of white racial "innocents" populating the film. It is this innocence that makes the tragedy of the film so ironic, so unbelievable. While white segregation from and discrimination of Blacks formulate the substance of the politics

175. Berlant, *supra* note 62 at 115.

176. *Id.*

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of "passing," in Sirk's *Imitation*, whites bear no agency in relation to these respective practices. Indeed the incriminating substance of these practices seems to hover like some miasma over the social realm, disembodied from the specificities of racialized social, political, economic, residential, and employment practices. Astoundingly, there is throughout the film no express interest in the maintenance of the racial color line by any of the whites.

Three consecutive scenes exemplify this production of white subjectivity as a constitutive racial innocence, exonerating the whites from responsibility for the racial histrionics otherwise understood as Sarah Jane's personal problem. In the first scene, Annie has arrived at the public school and entered Sarah Jane's classroom to give her a package. The white teacher informs her "I don't have any little colored girl in my class."¹⁷⁷ Annie spots Sarah Jane, approaches her, and upon being addressed, Sarah Jane, bursting into tears, runs out of the classroom. As Annie pursues her, the teacher tells her, "we didn't know."¹⁷⁸ This appeal to ignorance is the first positioning of the white subject as innocent bystander to the "passer's" thusly personally cohesive transgression of the racial order, one that we should begin to suspect floats unhinged to any human agency.

Later, when the older Sarah Jane is tracked down by her mother in barroom, as she leaves, the white man murmurs, "your mother[?] Well I'll be . . ."¹⁷⁹ Just as the befuddled glance of the white woman enacts a refusal to interrogate the racial fixity of the "we" that "did not know," the uttered fascination of the white man repeats this claim to innocence. Yet this lack of knowledge shared within the white community of the film finds its corollary imperative in Annie's astounding ventriloquization of the segregationist racial order that for the whites must remain unknown and unspoken.

This is made clear in the next sequence outside the school. Amid snowfall, Sarah Jane cries, "Why should I tell them, they didn't ask me!" to which Annie replies, "because that's what you are and it's nothin' to be ashamed of." Sarah Jane pleads, "why do you have to be my mother? Why?" and runs off.¹⁸⁰ The black mother/daughter relationship is renamed according to a displacement of a politico-racial dilemma—white segregation policies—to an outgrowth of discourse within the familial fold. Annie can give no meaningful words to her love and care for Sarah Jane, for to do so would reveal the culpability of white discourses/structures that seek to harm for the transgressions of her daughter. Sarah Jane, driven by a representational strategy that makes her transgressions a personal matter of bad (mixed) blood—a "Black" out of control—can only articulate her objections as far as her personal being extends socially—the pro-

177. *IMITATION OF LIFE*, supra note 157, at 73.

178. *Id.*

179. *Id.* at 132.

180. *Id.* at 75.

hibitive blood embodied in the visible Blackness of her mother. Crucially, neither can perform a political reading of their situation. Indeed Sarah Jane, like her mother, pronounces the alibi of white innocence in revealing that the whites never asked of her race, implying that they could care less.

Throughout the remainder of the film, it will be Annie who enforces the racial line, demanding that Sarah Jane "return" the property (whiteness) she has stolen. In a deft closure, the film seals both culpability and censure within the Black family. In doing so, it makes the political choice of presenting the destruction of this family unit as a necessary component of a white subject-constituting strategy in the form of an exonerating ignorance that conceals the agent of its destruction.

In the next scene back at Meredith's apartment, in the complaining tones of a subordinate to a superior, Annie informs Meredith that Sarah Jane is "passing" at school, and to ensure both Meredith and the viewer understand what "passing" is, tells us, "pretending she's white." In the same shot, the camera focuses upon Sarah Jane as she turns to Meredith in a closeup that bifurcates her scowling face in a chiaroscuro that serves as a visual contradiction of the claim she growls, "but I am white, I'm as white as Susie." Meredith, searching for a way out of her confusion, reaches for Sarah Jane and tells her, "Honey don't you see, it doesn't make any difference to us because we all love you. I'll take you back to school myself." Outraged, Sarah Jane yells, "I'm never going back to that school, never, as long as I live," and runs out of the room. In the remaining seconds of this scene, we witness the extent to which the film mystifies racial politics. The dialogue unfolds as follows:

Meredith: Annie don't be upset. Children are always pretending. You know that.

Annie: No. It's a sin to be ashamed of what you are. And it's even worse to pretend, to lie. Sarah Jane has to learn that the lord must have had his reasons for making some of us white and some of us black.

Meredith: Don't worry Annie, I'm sure you'll be able to explain things to her.

Annie, shaking her head: I don't know, how do you explain to your child she was born to be hurt.¹⁸¹

Sarah Jane's "dilemma" can find no consolation in political analysis. Rather, as a product of providential design, her antics are not only the pretenses of a child, but a sin. The whites, represented here by Meredith, whose anxiety serves as the fundamental origin of the "passing" problematic, are oblivious to its operations—they can voice no explanation. Yet Annie too is confined within the limits of the naturalizing discourses of God and Nature. A fundamentally masochistic venture, her interpretation is also an auto-critique as her history/experience/circumstance sustains no interpretation of the harm that

181. *Id.* at 76-77.

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both she and Sarah Jane suffer. There is no racist text, no history of domination, no circumstantial subjugation; there is only the Black body stricken with self-lament.

Given the necessary production of white innocence for the realization of a "post-racial" liberal politic, it is only logical that the text of white supremacy and its retrospective defense of the color line be given voice in the form of the undeniably Black body. Like Plessy's African ancestors and Phipp's Margarita, Annie's body and voice enact the trans-historical Blackness that snags (thereby making visible) the white body intent on "passing" into invisibility. For it is Annie, the stalwart Black homunculus revived, who brings calm to the submerged agony of the film's criminological investigation: how to locate the "Black" white, circulating within the segregated social realm, without anchoring the search to a measurable white guilt or accountability.

Thus we are left to imagine that somewhere off screen, Sarah Jane's desire to nativize her whiteness developed according to some element of social logic. But who took Sarah Jane to school? How did she occupy a seat in the classroom without the administration knowing that her mother was Black? If her partial African ancestry were known, would she be allowed in the classroom — no Black children were present? (Were there any Blacks in the school at all?) Perhaps criticism of the film's refusal to articulate an origin of Sarah Jane's desire to inhabit her whiteness is unreasonable; after all, a film cannot cover all ground. Yet it is these explanatory absences, often bordering on the absurd, that sustain the development of the tale of Sarah Jane's racial "crime."

Without the conveyance of determinate action into a position outside the filmic production of knowledge, the questions of racializing origins, politics, and strategies suffer a critical blanching. This same outside space of spectatorship and social interactions functions in part to reinvest white discourse agreements: "miscegenated" Blackness remains "Black" (the one drop rule) despite the evidence of the visual idiom. This racial order that prevails in popular consciousness and in law exists in excess of individual white culpability for that order, just as it had in *Green*. However, it exercises and establishes its limit upon the subject as it transgresses its boundaries.

Yet this exercise must be understood as the fictive play of the Black homunculus lodged at the center of this discourse, a fiction that was destined to come to an end, because Sarah Jane and the "subject" she represents, like Susie Phipps, Anatole Broyard, and countless others before them, escaped into her whiteness. With the turn to colorblind ideology in contemporary politics presaged by the film's enactment of white innocence of and the death of her mother, the Black homunculus was left for dead. The mandate of antisubordination resistance politics, as well as that of an antiessentialism critique, is that it should be demystified and rejected, rather than revived.

IV. CURRENT MOVEMENTS AND THE REVIVIFICATION OF "PASSING" DISCOURSE

Colorblindness and multiracialism purport to be discourses of racial transcendence. In the case of colorblindness, the basic oppressive dynamic of white supremacy is to be overcome by treating race as an irrelevant natural fact and ignoring it. Multiracialism shares a similar outlook that race is irrelevant, but rather than ignore it, pursues a strategy of multiplying the categories of racial difference to promote the irrelevance of all racial categories. The following arguments attempt to show that both colorblindness and multiracialism fail in their attempt to overcome the basic oppressive dynamic of white supremacy.

A. *A Critique of the Turn to Colorblind Constitutionalism*

But that is not all: there is a great chasm fixed between us; no one from our side who wants to reach you can cross it, and none may pass from your side to us.

Luke 16:26 (from the parable of Lazarus)

It is with the precautions in mind with which this inquiry began that I examine the colorblind thesis. In his *Plessy* dissent, Justice Harlan formulated the constitutional principle of colorblindness as a moral and policy response to the racial social system. The *Plessy* majority disagreed that separation on the basis of race was "wholly inconsistent with . . . civil freedom and . . . equality before the law."¹⁸² Harlan's vision was that "our Constitution is colorblind."¹⁸³ In the particular circumstances of the case, a colorblind Constitution would have meant that the question of Homer Plessy's race—not color—could be avoided just as effectively as it was avoided by the meretricious arguments of the majority. Harlan's colorblind counterpoint to the majority's "separate but equal" argument makes the Court's evasion of Plessy's claim to whiteness key to both his victory and his defeat. The profundity of this evasion (which will be unpacked momentarily) should not distract us from the point that Harlan's vision, like King's dream, was much more jeremiad than restatement of law. It was a moral response to the continuing crisis of abuse, turned acute, of the Black body.¹⁸⁴

182. *Plessy v. Ferguson*, 163 U.S. 537, 562 (1896) (Harlan, J., dissenting).

183. *Id.* at 559.

184. *United States v. Cruikshank*, 92 U.S. 542 (1875), grew out one of the bloodiest massacres in Louisiana history. The Supreme Court held that the criminal conspiracy section of the Enforcement Act of 1870 was inapplicable to the lynching of two Blacks because no national rights had been violated and that in order to invoke due process protections of the Fourteenth Amendment state action was required. A similar result was reached in *United States v. Harris*, 106 U.S. 629 (1882), with respect to the criminal conspiracy sections of the Ku Klux Klan Act of 1871. The Court held that Congress lacked the power to punish members of a lynch mob who had seized prisoners held by a state deputy sheriff because the Fourteenth Amendment did not reach purely private conduct. These decisions had the effect of declaring open season on the lynching of Blacks from a federal enforcement standpoint since the states

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The colorblind critique most often seeks the moral high ground of humanism by denying the coherence of race. Dissatisfied, however, with demonstrations of incoherence, the critique moves on to further assert the lack of relevance of race. Once relevance is shown to be lacking, the critique concludes with arguments purporting to show the unfairness of racial classification. All along the way, principled resistant reading of colorblind criticism is forced to disaggregate the various ways in which Black bodies and voices are used either a) to teach whites a lesson, or b) to make whites feel more comfortable, or c) to reveal dissension among Blacks in order to install the white-favored version of a Black view.

Color, according to the advocates of colorblindness, is a natural fact about human beings that 1) no one chooses, 2) no one can change, and therefore 3) should not be given a positive or negative value (nor even noticed) in our dealings with one another. As such, colorblindness expresses a millenarian ideal in a society vexed by color discrimination.¹⁸⁵ Professor Boxill, however, has already effectively shown that, assuming the validity of 1 and 2, 3 does not follow. His point is that since “it may be perfectly just to discriminate between persons on the basis of distinctions they are not responsible for having,” the so-called “responsibility criterion” cannot account for the injustice of racial discrimination.¹⁸⁶ On the basis of our analysis, however, we cannot join Boxill in simply conceding the validity of 1 and 2.

Quite to the contrary, color as an index of the racial condition of the individual can be rejected, and the coercion of the visual idiom resisted. In fact, such resistance was typical of the nineteenth century slavocracy for which, it was hardly necessary to say, a slave could not be a white man. True, color is not chosen (nor changed) in the same sense that one chooses or changes one’s mind about a meal or even a hairstyle.¹⁸⁷ Color as an index of racial condition, it should be understood, is not simply color, but a system of valuation of color. Indeed, the first evaluative step of colorblindness is its acquiescence in and (often enough) advocacy of color as an adequate index of *racial* condition. Again, the anteriority of race to racial discourse emerges. For the “passing” person, that is to say, for whiteness, colorblindness nullifies by fiat the effectivity of the Blackness within. Consigned to irrelevance, it is the Black homun-

could not be relied on to protect Blacks from white violence or to convict whites who committed such violence. See also *Civil Rights Cases*, 109 U.S. 3 (1883) (holding that the Thirteenth and Fourteenth Amendments do not give Congress the power to prohibit private discrimination in public accommodations).

185. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520-529 (1988) (Scalia, J., concurring).

186. BOXILL, *supra* note 62, at 15.

187. One of the criticisms that has been made of the popular singer Michael Jackson is that between the release of his albums *Off the Wall* and *Thriller*, he surgically altered his appearance to make himself look more like a white person. See MICHAEL ERIC DYSON, *REFLECTING BLACK: AFRICAN-AMERICAN CULTURAL CRITICISM* 47-48 (1993).

culus that is left for dead without ever undergoing the scrutiny that would expose its entrenchment in the imperatives of white racial discourse.

What makes this consignment profound, however, is not merely what gets trashed, but rather what is retained. In contrast to the interiorization of whiteness performed by the nineteenth century jurist, which was itself, as we have seen, a kind of colorblindness, the colorblind principle invokes a vestibular accession to surfaces, within which whiteness survives, this time as a purportedly irrelevant, but nevertheless newly *indefeasible* property claim grounded in the visual order. In terms of Plessy's rejected plea, lately valorized in the colorblind principle, whiteness is now property that cannot be taken away without due process of law, and property whose legitimacy cannot even be questioned by the state. Racial blood, as it turns out, was only skin deep. For the "passing" person, the vestibular quality of this accession appends to its moral enablement of a passionate detachment to a racial superstructure on which the door is firmly closed, but to which the colorblind cloakroom is permanently stuck.

The moral dilemmas, therefore, historically given to the "passing" person as racial trespasser, with colorblindness, have, so to speak, passed out of history. What were those dilemmas? Were there not suspicions of illegitimacy (because miscegenation was illegal) that could only be alleviated by acknowledging subterfuge? And didn't charges of inauthenticity also have to be made for adopting the project of being simply white with guilty knowledge of an African-descended ancestor? And worse, because whiteness was pure, was not "passing" the most complete and intimate betrayal of not only the family, but society and the state as well? Was "passing" not a false claim to legal personality and social innocence in the face of undeniable yet perilous obligation: the *sui generis* affinity based on the bonds of kinship? But that is not all. Did these dilemmas not pertain to a great chasm fixed between us wherein no one from our side who wants to reach you can cross it, and none may pass from your side to us?

The turn to colorblindness has dissolved these moral dilemmas in the fashion of a closing door. Believing that nothing on the other side bears any importance to those of us here in the ahistorical present, that those left there were left for dead, our moral situation, in opposition to the circle of understanding, takes on the character of a willed linearity according to which every discursive revivification of racial valuation pops up like a surprise, elicits sympathetic responses (among the best) and reflexive dismissal as singularly odd.

Despite its moral intonations, then, the very formula by which we derive the colorblind principle—a natural fact that no one chooses, no one can change—can be seen to be methodologically enchanted by extant social forms. Where the moral dilemmas of the "passing" person as racial trespasser were lived and real, but based on white supremacist assumptions and practices, colorblindness substitutes the reassuring tactic of willed innocence. Without real

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resolution, however, that is, without abrogation of the discourse agreements of white authority, this tactic tends to perpetuate the characteristic evasion of racial discourse, the evasion of the sociopolitical meaning of the claim to whiteness.¹⁸⁸

To be sure, it is a compelling goal of Critical Race Theory to develop an emancipatory perspective, one which takes account of our historical situation and is oriented towards an ethical form of life. From the start, it was clear that such a task demanded massive material reconstruction along the fault lines of the normatively excluded. The role of legal discourse in this project cannot be restricted to purely formal adjustments inherent in Harlan's received conception of a colorblind Constitution. Indeed, the colorblind thesis, as the fate of the moral dilemmas of the "passing" person reveals, only begs the question of racial categorization. The damage is manifold. For not only is whiteness made secure, its right to exclude vulcanized, and its authority and value given unimpeachable privilege, but the exploration of Blackness, as a category of emancipatory interest, rather than biological or genealogical destiny, is indefinitely deferred.

B. *Multiracialism After Identity: A Critique of the Return to Vulgar Essentialism*

The social dimension of race is illuminated by terms such as quadroon, octoroon, or mestizo which attempt to make distinct from whites those individuals with identical physical appearances but fractions of speciously documentable nonwhite blood. These terms illustrate that, as a means of human classification, race can ignore shared physical resemblance and categorize on the basis of assigned social legacy.

—Valerie Babb¹⁸⁹

Some of the most strident critics of racial classification are an elite group of white women who have become the mothers of Black mixed-race children.¹⁹⁰

188. See generally HANEY LÓPEZ, *supra* note 20 (discussing the assumption of whiteness as non-raced).

189. BABB, *supra* note 89, at 10.

190. See *Review of Federal Measurements of Race and Ethnicity: Hearings Before the Subcomm. on Census, Statistics and Postal Personnel of the House Comm. on Post Office and Civil Service* 103d Cong. 119 (1993) [hereinafter *Multiracial Hearings*] (wherein Project RACE President Susan Graham testified that her children have three histories: "They have their father's history, their mother's history, and they have a multiracial history, too, and they do identify with other multiracial people."); see also JANE LAZARRE, *BEYOND THE WHITENESS OF WHITENESS: MEMOIR OF A WHITE MOTHER OF BLACK SONS* 67, 79 (1996) (recognizing the desire of white parents to protect their Black children from the effects that the children's appearance have upon racist persons in society); REDDY, *supra* note 30, at ix (expressing concern that others will find her Black son racially threatening and thereby presume him to be a criminal); Carol R. Goforth, "What is She": *How Race Matters and Why It Shouldn't*, 46 DEPAUL L. REV. 1, 107-08 (1996) (concluding, upon analysis of the multiracial census movement, that racial classifications should be abolished); cf. Lewis R. Gordon, *Specificities: Cultures of American Identity—Critical 'Mixed Race'?*, 1 SOC. IDENTITIES 381, 382 (1995) (observing that the focus of the multiracial movement is upon the presumed classification needs of Black biracial persons); Kenneth E. Payson,

They do not want their children to suffer the pain of racism. For this reason, they have become very sensitive to the subject of race and have entered racial discourse in order to dismantle or deconstruct it.¹⁹¹ They complain that strangers ask about the racial identity of their typically mixed-race children.¹⁹² They fret over census forms and college applications that inquire into their children's racial status.¹⁹³ They balk at the suggestion that their own racial status might be a detriment to their children's adjustment to a society in which race still matters.¹⁹⁴ They invent and defend new terms like biracial and multiracial to deflect any implication that their children's Black ancestry or dark complexions should determine their racial identity.¹⁹⁵ Quite simply, they advocate acceptance of the multiracial category on the one hand, and on the other oppose the use of racial labels,¹⁹⁶ as a means to improve the quality of their own familial relationships and their own sense of interracial harmony. This form of opposition is avowedly individualistic in its outlook and upholds colorblindness.¹⁹⁷

Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People, 84 CAL. L. REV. 1233, 1235-36 (1996) ("Those advocating [a multiracial category] are largely multiracial persons, parents in interracial unions who advocate on behalf of their mixed-race children. . ."). Project RACE (Reclassify All Children Equally), along with another powerful advocacy group, the American Association of Multi-Ethnic Americans (AMEA), has as one of its stated goals the inclusion of a "multiracial" classification on all state and federal forms that request racial identification, with a special focus on gaining recognition in the United States census.

191. The philosopher Naomi Zack, who is herself a mixed-race person of partial African ancestry, has said that "[t]o attempt to create a racial identity of mixed race, based on the history of mixed race in the United States, would involve not only many intensely deconstructive dialogues with past texts but positive reconstructions and constructions in racial theory and practice." NAOMI ZACK, *RACE AND MIXED RACE* 144 (1993).

192. See Goforth, *supra* note 190, at 107-08. But cf. JON MICHAEL SPENCER, *THE NEW COLORED PEOPLE: THE MIXED-RACE MOVEMENT IN AMERICA* 59, 60 (1997) (reporting the reaction of one mixed-race Black woman to Susan Graham's Project RACE: "It is not coincidental that the woman spearheading a movement for a 'multiracial' category is white . . . What's so bad about being just Black? . . . If society had defined Susan Graham's children as White she would not be fighting for a 'multiracial' category. Project RACE? More like Project RACIST!").

193. See SPENCER, *supra* note 192, at 60.

194. See *id.*

195. Some supporters of the multiracial category have defined 'multiracial' in such a way that only interracial parentage, rather than mixed ancestry, can produce a multiracial or biracial individual. See Candace Mills, "Multiracial": *Worth Fighting For?*, *INTERRACE*, Nov. 1993, at 25. One impact of this narrow definition is to provide the children of interracial couples a 'multiracial' escape hatch from identification with subordinated minority groups, while closing the 'multiracial' door on the majority of Black Americans who are in fact of mixed ancestry. See SPENCER, *supra* note 192, at 70 (estimating that 70 % of the Black community has a multigenerational lineage that is multiracial).

196. Responding to a proposal that would offer a multiracial box followed by the additional question of the respondent's component racial ancestry, Susan Graham of Project RACE stated that it would be "an invasion of privacy with no justification" to have mixed-race people mark the component categories of their racial ancestry. *Multiracial Hearings*, *supra* note 190, at 120. Based on that response, we can surmise that she would be unsatisfied with the adoption by the Office of Management and Budget [hereinafter OMB] of a proposal that would permit persons of multiple racial ancestry to check all racial classifications that apply on federal forms. See *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 Fed. Reg. 58,782, 58,788-90 (1997) [hereinafter *Revisions to Directive No. 15*]. See also Barbara Vobejda, *Census Expands Options for Multiracial Families*, *WASH. POST*, Oct. 30, 1997, at A11 (quoting Susan Graham of Project RACE complaining that "OMB is trying to erase 'multiracial' from the vocabulary").

197. See Goforth, *supra* note 190, at 104.

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It is believed by supporters of the multiracial category that the middle category illuminates the binarisms of race.¹⁹⁸ It is even asserted that by occupying the middle multiracial individuals “possess unique credentials for mediating racial conflict.”¹⁹⁹ This same author who believes that multiracials are natural mediators of racial conflict opines that the multiracial’s ability to “pass” from minority (read Black) to majority (read white), without detection, is an asset in interracial conflict mediation.²⁰⁰ One must suppose, along with Valerie Babb, that interracial conflict mediation is part of the assigned social legacy of the multiracial as “passer,” regardless of how these persons choose to “identify.”²⁰¹ More pointedly, the multiracial “passer,” regardless of how she chooses to identify, is assumed, contrary to the position advanced in this Article, to “pass” whenever she fails to reveal mixed parentage or ancestry. But so-called mistaken identity encounters can occur only when the person under racial scrutiny has already failed the eyeball test of racial recognition, which is the ideological origin and anchor of racial classifications *ab initio*. Failing the eyeball test for Blackness, yet being reinscribed as Black, requires reassertion of the one drop rule and the discourse agreements of white authority. Thus, multiracial discourse, in addition to essentializing racial identities and capacities,²⁰² revives the discourse agreements of white authority by combining “passing” rhetoric with the myth of mulatto exceptionalism.²⁰³

In the biracial worldview blacks and whites are monoracial.²⁰⁴ Those who are monoracial are the material, the stuff, out of which the biracial or multiracial gets made. What the multiracial requires of the monoracial is that the categories by which the monoracial are defined remain fixed in space and time in order that the multiracial may elide or even transcend the binarism and unidimensionality of monoracialism. Being both Black and white, the biracial subject is free to be neither Black nor white. The freedom to be neither because

198. Although the focus here is avowedly on the Black/white binarism, this Article assumes that for the multiracial category movement all interracial offspring constitute a middle category. See Bijan Gilanshah, *Multiracial Minorities: Erasing the Color Line*, 12 LAW & INEQ. J. 183, 190 n.34 (1993) (asserting that multiracial persons have three identity choices: to identify with maternal racial heritage, paternal racial heritage, or assimilate both “by developing a ‘fluid’ third identity”).

199. *Id.* at 198.

200. *Id.* at 198 n.80.

201. See generally Gilanshah, *supra* note 198 (asserting that multiracials have racial identity “choices”).

202. Cf. Harris, *supra* note 39, at 581-616 (defining gender essentialism as the notion that there is a monolithic “women’s experience” that can be described independent of race, class, and sexual orientation).

203. On the myth of mulatto exceptionalism, see E.B. Reuter, *The Superiority of the Mulatto*, 23 AM. J. SOC. 83, 83 and *passim* (1917) (arguing that the American mulatto is superior to “Negroes of pure blood”); see also SPENCER, *supra* note 192, at 81-84 (complaining that multiracial category advocates are appropriating prominent mixed-race Black historical figures and celebrities and reclassifying them as multiracial).

204. See Itabari Njeri, *Sushi and Grits: Ethnic Identity and Conflict in a Newly Multicultural America*, in LURE AND LOATHING: ESSAYS ON RACE, IDENTITY AND THE AMBIVALENCE OF ASSIMILATION 13, 24-25 (Gerald Early ed., 1993).

one is both is a freedom to be position of privilege whose effectiveness is not possible without the cooperation of the monoracial in the assessment of themselves as both racial and unidimensional. On the other hand, what monoracialism requires of the multiracial is suppression of a kind of truth, a racial truth, the truth of consanguinity, of mixture, of human multiplicity. On the one hand, multiracialism rejects the one-drop rule of Black hypodescent in order, on the other hand, to generalize this rule to all racial categories: one drop of any mixed blood is sufficient to reproduce the multiracial in all its multiplicity of racial extraction, irrespective of phenotype. It is, of course, not to be overlooked the way in which monoracial rejection of what may be called the multiracial thesis also appears to replicate a basic oppressive dynamic of the "passing" narrative, a dynamic in which the "passing" person must deny the "truth" of who she is. It will be helpful to consider what is believed to be at stake in the recognition of the multiracial subject.

Part of the problem is that, in defining who qualifies as multiracial,²⁰⁵ multiracial category advocates rely on the disreputable nineteenth-century notion of racial blood or biological race for which the one-drop rule has been roundly criticized. Part of the problem is that in criticizing the multiracial category movement's concept of race as biology, opponents of the multiracial category movement either fail to articulate their own concept of race, or similarly rely on the disreputable nineteenth century notion of racial blood. The latter problem points in the direction of what may be a more general lapse in Critical Race Theory to suggest and defend a concept of race that could coherently replace biological race and yet remain faithful to everyday racial experience.²⁰⁶ Part of the problem is the theoretical assumption that race is a feature of experience over which individuals equally exercise choice, and at the same time, are sociopolitically, if not biologically, compelled to acknowledge.

This Article suggests that race, as it has come to be used in American law and society, is composed of both identity claims and subjective experience. This much can be acknowledged without essentializing race or even allowing that it is something real. What is real is that none can escape the construction of the self subjectively as a particular type of racial being. Most often identity

205. See Gilanshah, *supra* note 198, at 183 n.2 (defining biracial as "someone with two socially and phenotypically distinct racial heritages—one from each parent" and defining multiracial as "the biracial person and persons synthesizing two or more diverse [racial] heritages") (quoting Maria P.P. Root, *Within, Between, and Beyond Race*, in *RACIALLY MIXED PEOPLE IN AMERICA* 3 n.1 (1992)).

206. See Haney López, *supra* note 39, at 5 (noting that critical race theorists "argue for race consciousness, yet do so without explicitly suggesting what race might be"). After making this criticism of Critical Race Theory, Haney López does no better in his own definitional approach to race. Like Gilanshah, Haney López places too much emphasis on the racial identity choices that some, like himself, make to the detriment of recognizing race as part of an assigned social legacy that for others permits no such choice. DuBois does better when he suggests that a Black person is "a person who must ride 'Jim Crow' in Georgia," even though that system of segregation as a benchmark for racial recognition has ended. W.E.B. DU BOIS, *DUSK OF DAWN: AN ESSAY TOWARD AN AUTOBIOGRAPHY OF A RACE CONCEPT* 153 (1940).

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will coincide with the subjective construction of the self as a particular type of racial being, but sometimes identity claims will place one at variance with subjective experience. In the event that there is dissonance between racial subjectivity and racial identity, it is the latter over which individuals may exercise agency and choice. By contrast, racial subjectivity remains an unsuitable site for transcendence. Its durability is guaranteed by the body and the accumulation of historical meaning and ideological investment that surrounds its mode of appearance in the context of first-time encounters.

Thus, rejection of the multiracial thesis may be premised on refusal to accede to the discourse agreements of white authority, and recognition that the mere multiplication of racial categories does nothing to increase the emancipatory possibilities of those who, based on their bodies alone, will be discriminated against as Blacks.

CONCLUSION

This idea you have of making a Negro out of yourself is nothing more than a sentiment; you do not realize the fearful import of what you intend to do. . . . I can imagine no more dissatisfied human being than an educated, cultured, and refined coloured man in the United States.

—James Weldon Johnson²⁰⁷

Colorblindness and multiracialism purport to be discourses of racial transcendence. In the case of colorblindness, the basic oppressive dynamic initiated by white supremacy is to be overcome by treating race as an irrelevant natural fact and ignoring it and the relevance society has given it. Multiracialism shares a similar outlook that race is irrelevant, but rather than ignore it, pursues a strategy of multiplying the categories of racial difference in order to promote the irrelevance of all racial categories. The preceding arguments have attempted to show that both colorblindness and multiracialism fail in their attempt to overcome the basic oppressive dynamic of white supremacy.

Colorblindness fails by not taking into account social divisions and hierarchies based on race sedimented in American culture over the years through the treatment of race as biological concept and acceptance of the notion of racial blood. To the extent that race is not reducible to color, colorblindness falsely equates race consciousness with consciousness of color. Moreover, in its quest for transcendence colorblindness elides rather than confronts the mystifications embedded in white race consciousness. In the discourse of "passing" this elision translates into a refusal to acknowledge the subjective experience of those whose partial African ancestry makes their claim to whiteness questionable. Thus, white race consciousness, under a regime of colorblindness, can maintain

207. JOHNSON, *supra* note 136, at 145.

its claim to racial purity and innocence, while avoiding the sociopolitical meaning of the claim to whiteness.

Multiracialism fails as a discourse of racial transcendence both because it adopts a colorblind perspective on race and because it combines "passing" rhetoric with the myth of mulatto exceptionalism. Multiracialism both essentializes and biologizes racial categories, ignoring the important distinction that this Article has attempted to draw between subjectivity and identity. Thus, the multiracial category movement is fairly charged with attempting to create for the children of white/minority interracial couples a multiracial escape hatch from identification with subordinated minority groups, as well as a racial buffer class that will enjoy fewer privileges than whites, but more than Blacks. Finally, it can be said that multiracialism advocates have failed to defend adequately the proposition that the mere multiplication of racial categories will reduce race-based discrimination, render racial classifications meaningless, or increase social harmony and equality.

Indeed, given the normalization of white supremacist discourse agreements, the visually overdetermined racial situation of Blacks in law and society under the corporeal schema of racial determination, the reification of the look in racial discourse, the treatment of whiteness as valued property to be protected at all costs, and the evasion of the sociopolitical meaning of the claim to whiteness, the pursuit of transcendence may turn out to be chimerical. If "passing" is no longer a politically viable response to oppression, as Carole-Anne Tyler asserts,²⁰⁸ then perhaps the pursuit of racial transcendence too has proved to be an illusion, nothing more than a sentiment that acts as a firewall against radical antisubordination critique of race. Demystification as a critical practice will not allow critical theorists to maintain the illusion of racial transcendence, which invests the racial condition of the individual with too much choice, or to maintain the illusion of racial purity, which affords no choice at all.

In this Article, I have attempted to show that the assumptions and ideological investments that underlie "passing" as it has been traditionally been conceptualized support white supremacy. I have tried to show this by arguing that in law and popular consciousness appearance operates as the epistemological guarantee of racial determination, despite all other tests devised to determine race, including ancestry. Race is determined in the context of first-time encounters. "Passing" for white, from this perspective, is no different than simply being white. And yet, the discourse on "passing" has attributed Blackness to the "passer" as a means of subordinating Blacks, when in fact there is no racial identity without "passing."

Key to this demonstration has been the exploration of the split created be-

208. See *supra* note 30.

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tween law and society by the contradiction of the Black white person circulating in our midst, and the split between identity and subjectivity in the construction of racialized bodies. In order to reclaim Black subjectivity from white racial discourse, it was necessary to expose the absurdity of the construct of the Black person who “passes” for white.

Critical Race Theory has challenged white supremacy but has yet to articulate a conception of race that could replace biological race and still remain faithful to everyday racial experience. In the absence of such a conception, critical literature on “passing” has generally lapsed into the racial ideology that equates partial African ancestry with Blackness and has failed to apprehend “passing” as part of the discourse of white supremacy.

As a consequence, the tautology of white identity, the myth of racial purity, the fiction of the Black within, and the construction of “passing” as a racial transgression are perpetuated in current movements for racial transcendence such as colorblindness and multiracialism. By the terms set, it is a transcendence that will never come.

