

READING BACK, READING BLACK

*I. Bennett Capers**

All of us, readers and writers, are bereft when criticism remains too polite or too fearful to notice a disrupting darkness before its eyes.

– Toni Morrison¹

To choose an attitude toward interpretation—and therefore toward language—these days is to choose more than just an attitude: it is to choose a politics of reading, it is to choose an ethics of reading

– Alice Jardine²

I. INTRODUCTION

Allow me a critical gesture. More specifically, taking to heart the offer to put forth an Idea, allow me to suggest a way of reading the law. I am not suggesting a reading that is exclusivist. However, I am suggesting a reading that reveals sites of contestation, a reading that is oppositional. What I am suggesting is a way of reading, a reading practice if you will, that attends to the way judicial opinions function as cultural productions³ that create and recreate race. In short, as the title of

* Associate Professor of Law, Hofstra University School of Law. B.A., Princeton University; J.D., Columbia Law School. My thanks to Elizabeth Glazer and Seth Michael Forman, close readers both, for their helpful comments.

1. TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION 91 (1992).

2. Alice Jardine, *Opaque Texts and Transparent Contexts: The Political Difference of Julia Kristeva*, in THE POETICS OF GENDER 96, 97 (Nancy K. Miller ed., 1986).

3. Reading black is based on at least three assumptions. First, that judicial opinions function as cultural productions and, as such, are neither neutral nor universal. All judicial opinions are raced. All judicial opinions are gendered. Second, that judicial opinions deploy certain discursive strategies to mask their interests and desires. Rather, distancing is used to give the impression or illusion of objectivity and universality. Third, judicial opinions deploy codes based on “common knowledge.” These codes simultaneously serve to legitimate and authorize such “common knowledge” through the description and inscription of racial difference.

this Idea makes clear, I am suggesting a reading practice of reading back, reading black.

For some time now literary scholars have been thinking about the relationship between race and reading. In *Race, Gender, and the Politics of Reading*, for example, Michael Awkward poses a pair of questions: “[H]ow does blackness direct, influence, or dictate the process of interpretation? Is there a politics of interpretation that is determined or controlled by race in ways that can be compared to the ideologically informed readings of, for example, feminist critics?”⁴ Perhaps no one has engaged these questions with more persistence than Henry Louis Gates, Jr., who has edited two volumes of critical essays devoted to mapping the contours of black literary theory.⁵ The question of interpretation, however, was for the most part confined to texts by black authors. Toni Morrison corrected this shortcoming in her seminal *Playing in the Dark: Whiteness and the Literary Imagination*, in which she invited readers to see the “Africanist” presence that hovers, like a shadow, over much American literature, including the works of Poe, Melville, Cather, and Hemingway. Edward Said, who ushered in postcolonial theory, made a similar invitation in his *Culture and Imperialism*, enjoining readers to “read the great canonical texts, and perhaps also the entire archive of modern and pre-modern European and American culture, with an effort to draw out, extend, give emphasis and voice to what is silent or marginally present or ideologically represented . . . in such works.”⁶

Perhaps because I come to the table as a law professor, however, I find other questions insisting themselves. If the reading of Western literature can be enriched by examining such texts through the lens of race, can a similar enrichment obtain from using a similar reading practice to read the law? And what would such a reading practice entail? Would it have its own methodology? Its own ideology? Would it be applicable to judicial texts that are not, ostensibly, about race? What are the implications of such a reading practice to a law that prides itself on its neutrality, its universality? And how, exactly, would such a reading practice enrich the study of law? Stanley Fish has argued that we each belong to interpretive communities, and that members of these communities are guided in their readings of texts by a common

4. Michael Awkward, *Race, Gender, and the Politics of Reading*, 22 BLACK AM. LITERATURE F. 5, 5-6 (1988).

5. See BLACK LITERATURE & LITERARY THEORY (Henry Louis Gates, Jr. ed., 1990); “RACE,” WRITING, AND DIFFERENCE (Henry Louis Gates, Jr. ed., 1986).

6. EDWARD W. SAID, CULTURE AND IMPERIALISM 66 (1993).

“consciousness,” which produces interpretative “strategies [that] exist prior to the act of reading and therefore determine the shape of what is read”⁷ If this is true, what does it mean for the study of law to have a community of black readers?

The more I thought about these questions, the more I became convinced that they are important ones, especially for those of us concerned with making sense of this wholly racialized society in which we live. My goal, in this brief Idea, is to convince the reader of the same. After all, a judicial opinion is never just an opinion. As Robert Cover has pointed out, opinions by definition have the force of law, by definition are coercive, and by definition are violent.⁸ What I want to suggest is something more: that judicial opinions function as grand narratives, as master texts that contribute to an ideology of race and racial hierarchy. And it shows.

Part of what motivates this project is my awareness that, to a certain extent, I have always read judicial opinions “differently,” attuned to matters of race even in the face of efforts to excise race⁹—to render race invisible, immaterial.¹⁰ At least a few other scholars, particularly those engaged in critical race scholarship, also engage in this type of reading.¹¹ But what is it exactly that we do? How is our reading practice different, especially with respect to judicial opinions where race, though unsaid, unseen, is nonetheless present and informing the texts? Is there a conceptual framework that unifies this reading practice? Put differently, what does it mean to read back, and to read black?

7. STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 14 (1980).

8. See Robert M. Cover, *Essay, Violence and the Word*, 95 *YALE L.J.* 1601, 1616-18 (1986).

9. Instances of the Court erasing race are legion. One well-known example is *Terry v. Ohio*, 392 U.S. 1 (1968), in which the Court gave its imprimatur to stops based solely on reasonable suspicion. Though the defendants were in fact black, the Court made no mention of the race of the defendants, or that the officer’s explanation for why the men caught his attention was solely: “[T]o tell the truth, I just didn’t like ‘em.” See Louis Stokes, *Representing John W. Terry*, 72 *ST. JOHN’S L. REV.* 727, 729-30 (1998).

10. I am also motivated by the knowledge that blacks have rarely if ever figured as the intended or implied audience of any Supreme Court opinion. Even opinions that ostensibly benefit blacks—such as *Brown v. Board of Education*, 347 U.S. 483 (1954)—seem to be written to persuade whites. Sanford Levinson has also addressed the implied audience of *Brown*. See Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 187, 195-200 (Peter Brooks & Paul Gewirtz eds., 1996). However, Levinson does not discuss the race of the implied audience.

11. See, e.g., Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 *MICH. L. REV.* 946, 1007-11 (2002) (reading through the lens of race *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001)); see also Paul Butler, *The Case of the Speluncean Explorers: Revisited*, 112 *HARV. L. REV.* 1876, 1917-23 (1999) (reading through the lens of race Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 *HARV. L. REV.* 616 (1949)).

I employ the term “read back” because I find it particularly useful as a concept. It suggests the practice of jurors asking for a “read back” of testimony not just so that they can rehear what has already been said, but rehear it within the context of having heard and seen all of the evidence, armed with the tools to ascertain not only what was said, but what was not said. Put differently, I use the term here to suggest a rereading that reads not only contextually, but also critically, sensitive to the stated and the unstated, the revealed and the concealed, and the meaning to be gleaned from both.

Equally useful is the term “reading black.” It suggests a reading practice that is not only critical, but particularly attuned to the frequencies and registers of race. Already, I need to make a few clarifications. First, although I deploy the term “reading black,” I do not mean to suggest any racial litmus test for the reader. More specifically, one does not have to be black to read black. Nor does being black necessarily equip one with the skills or desire to read black. Justice Thurgood Marshall, I believe, read black. So did Justice William Brennan. Justice Clarence Thomas, with one or two notable exceptions,¹² generally does not. Second, by invoking the term “reading black,” I do not mean to privilege this form of reading over other forms of reading, such as reading feminist, or reading classist, or reading gay. My use of the term “reading black” owes more to Manichean assumptions, and the fact that black continues to be the ultimate trope of difference.

The black, after all, is still the figure in which power relationships of master/slave, civilized/primitive, enlightened/backward, good/evil have been embodied in the American subconscious. Because of this, reading black has the potential to include not only attention to race, but also to class, gender, sexuality and other hierarchical structures. As a reading strategy, it seeks to decode the coded, to say the unsaid, and to render visible the gaps, the fissures, and the solecisms. Reading black is

12. Two exceptions come immediately to mind. First are Justice Thomas’s statements during oral argument in *Virginia v. Black*, 538 U.S. 343 (2003), which involved a First Amendment challenge to a Virginia statute criminalizing cross-burning. *See id.* at 348-50. During the argument, Justice Thomas transformed the legal debate to a personal one by describing what cross-burning means to blacks. *See* Tony Mauro, *Remarks by Thomas Alter Argument*, LEGAL TIMES, Dec. 16, 2002, at 7; *see also* Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Crits?*, 93 GEO. L.J. 575, 609 (2005) (arguing that Justice Thomas “adopted a voice of color” in *Black* through epistemic authority and epistemic difference). Justice Thomas also arguably read black in his dissent in *Kelo v. City of New London*, 545 U.S. 469 (2005), which involved a challenge to eminent domain, by pointing to the disproportionate impact the majority’s decision would have on minorities and the poor. *Id.* at 2686-87 (Thomas, J., dissenting).

a reading against—a reading that is counter-discursive and counter-hegemonic. At the same time, it is a reading with a difference, something akin to what Gates identifies as “Signifyin(g),” or a trope of repetition and revision.¹³ It goes beyond interpretation and the question of what a judicial opinion means, as explored by “law as literature” scholars such as James Boyd White,¹⁴ Owen Fiss,¹⁵ and Sanford Levinson,¹⁶ to ask additionally what a judicial opinion *means*. Finally, it is a reading practice that requires risks, but that rewards those risks by allowing one to see how these cases function—the work they do, and for whom.

To illustrate this reading practice, I have chosen two cases that on their face do not appear to be engaged in “race work” at all. In selecting such cases, I hope to excavate the racialized thinking that informs even those opinions most removed from racial concerns. As I shall argue, each of these cases participates in forming racial identity and promulgating a type of racial hierarchy. And because these are judicial opinions, because they speak with the force of law, each of these opinions functions as an authorizing discourse on race.

Consider *The Queen v. Dudley & Stephens*.¹⁷ In this well-known case, Thomas Dudley and Edward Stephens were found guilty of intentionally killing Richard Parker, a seaman “between seventeen and eighteen years of age.”¹⁸ It was the facts of the case that made it sensational, capturing international attention. Rather than a crime of passion, the case involved a crime of reason, of survival, of cannibalism. Dudley and Stephens, together with the young Richard Parker and another crew member, Peter Brooks,¹⁹ were cast away at sea 1600 miles off the coast of South Africa after their vessel, the *Mignonette*, capsized during a storm. The men managed to scramble into a small open boat, but with no water and very little food. On their eighteenth day at sea, when they were probably still some 1000 miles from land, and some seven days after consuming the last of their food—“two 1lb. tins of turnips” taken from the ship and a small turtle caught at sea—Dudley

13. Henry Louis Gates, Jr., *The Blackness of Blackness: A Critique of the Sign and the Signifying Monkey*, in *BLACK LITERATURE & LITERARY THEORY*, *supra* note 5, at 285-86.

14. See, e.g., James Boyd White, *Law as Language: Reading Law and Reading Literature*, 60 *TEX. L. REV.* 415 (1982).

15. See, e.g., Owen M. Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739 (1982).

16. See, e.g., Sanford Levinson, *Law as Literature*, 60 *TEX. L. REV.* 373 (1982).

17. 14 Q.B.D. 273 (1884).

18. *Id.*

19. The fourth individual, Brooks, downplayed his role in the killing, and ultimately testified for the prosecution.

and Stephens “suggested that some one should be sacrificed to save the rest.”²⁰ This someone was understood to be Parker, who was already at death’s door from famine and from drinking sea water. Still, the men waited a few days hoping a vessel would appear and rescue them. When none appeared by the twentieth day, Dudley “offered a prayer asking forgiveness,” told Parker that “his time was come, [and] put a knife into his throat and killed him then and there.”²¹ The men fed on the boy for four days, after which they were rescued.

A staple of criminal law casebooks, *Dudley & Stephens* often serves as an entry point for discussing the various utilitarian and retributive rationales for punishment. Alternatively, the case is called upon to illustrate the interplay between offense conduct and justifications and excuses—clearly Dudley’s behavior satisfied each element of murder, but should he and Stephens have a defense of necessity or duress, or perhaps consent or temporary insanity? Despite the special findings of the assizes jury that “there was no appreciable chance of saving life except by killing some one for the others to eat,”²² the court rejected each of their defenses—a rejection scholars have long found problematic—and sentenced the men to death. And so ends the case.

Or does it? After all, at the time *Dudley & Stephens* was decided, cannibalism was a socially accepted practice among seamen faced with death. As A.W. Brian Simpson put it in *Cannibalism and the Common Law*:

[C]annibalism was legitimated by a custom of the sea; and the popular literature, augmented by the unrecorded tales seamen told each other, ensured that there was general understanding of what had to be done on these occasions and that survivors who had followed the custom could have a certain professional pride in a job well done; there was nothing to hide.²³

Cannibalism even figures in Théodore Géricault’s famous painting, *The Raft of the Medusa*. Indeed, the practice was so accepted that the public, including Brooks’s older brother, rallied to the defense of Dudley and Stephens.²⁴ This begs the question, or rather questions: If cannibalism among shipwrecked seamen facing death was a socially accepted

20. *Dudley & Stephens*, 14 Q.B.D. at 273-74.

21. *Id.* at 274.

22. *Id.* at 275.

23. A.W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW* 144-45 (1984).

24. *Id.* at 76-77, 83.

practice, why did the Crown insist on their prosecution? And why did the court reject their defenses, especially their seemingly meritorious necessity defense, and find them guilty?

What I hope to suggest is that a re-reading of *Dudley & Stephens* attuned to issues of race enhances, rather than detracts from, our understanding of the case. What I hope to suggest is that context matters. Consider the language used in describing the facts of the case:

[O]n July 5, 1884, the prisoners, Thomas Dudley and Edward Stephens, with one Brooks, all able-bodied *English* seamen, and the deceased also an *English* boy, between seventeen and eighteen years of age, the crew of an *English* yacht [the *Mignonette*], a registered *English* vessel, were cast away in a storm on the high seas 1600 miles from the Cape of Good Hope, and were compelled to put into an open boat belonging to the said yacht.²⁵

How do we read the repetition of the word “English”—“English seamen,” “an English boy,” “an English yacht,” “a registered English vessel”? The easy answer would be that the court emphasizes the Englishness of the parties and the yacht as an assertion of jurisdiction over an incident that occurred off the coast of Africa. But this seems unsatisfactory, especially since there is nothing in the opinion to suggest that jurisdiction was ever in doubt. Reading *Dudley & Stephens* through the lens of race not only answers some of these questions, but suggests that the case has significance far beyond the issues of rationales for punishment, or the limits of affirmative defenses. Read this way, the case is not only about Dudley and Stephens, but the very quintessence of what it means to be English at the end of the nineteenth century. And part of what it meant to be English at the end of the nineteenth century was not to be the “Other.” After all, the image that came to mind when one thought of cannibalism was not of civilized English sailors cast at sea, but of the decidedly non-English, the decidedly “uncivilized.” In fact, few things were more popular than “travel writing” at the time—think David Livingston, John Speke, Richard Burton, Henry Stanley²⁶—and the mark of most travel writing was the description of cannibalism among the “savages,” notwithstanding the fact that its practice was extremely limited. As historians Dorothy Hammond and Alta Jablow have noted: “[W]riters were far more addicted to tales of cannibalism

25. *Dudley & Stephens*, 14 Q.B.D. at 273 (emphasis added).

26. See, e.g., Patrick Brantlinger, *Victorians and Africans: The Genealogy of the Myth of the Dark Continent*, in “RACE,” WRITING, AND DIFFERENCE, *supra* note 5, at 185, 194-95.

than . . . Africans ever were to cannibalism.”²⁷ Indeed, nearly two decades later, one such writer, Joseph Conrad, would place a scene of attempted cannibalism in *Heart of Darkness*. In *Dudley & Stephens*, it was the linkage between cannibalism and the “Other” that mattered, and if the Other’s savagery was partly evidenced by his cannibalism, this could only mean that the British, to maintain their place on the evolutionary ladder, could not engage in cannibalism. After all, cannibalism was supposed to “underline[] in a most dramatic fashion that African behavior [was] a negation of European values.”²⁸ Faced with common knowledge that British sailors cast away at sea were in fact engaging in cannibalism, and presented with an actual case—the surviving crew members functioning as a loose synecdoche for British civilization—the court in *Dudley & Stephens* summarily erases this custom and supplants it with this:

The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, . . . these duties impose on men the moral necessity, not of the preservation, but of sacrifice of their lives for others, from which in no country, *least of all, it is to be hoped, in England*, will men ever shrink, as indeed, they have not shrunk.²⁹

The emphasis is, again, on England. That is, when the crew members were cast away off the coast of Africa, when they were adrift in that liminal space, it was Africa that they should have kept at bay, at least figuratively. *You’re Englishmen, for heaven’s sake*. Re-read through the lens of race, the court’s rejection of Dudley and Stephens’s seemingly meritorious necessity defense begins to make sense, however much we may disagree with the unstated reasoning.

Similar benefits obtain from a racialized re-reading of *Muller v. Oregon*,³⁰ in which the Court addressed the constitutionality of an Oregon statute that limited the workday of females employed in any mechanical establishment, factory, or laundry, to ten hours a day. The case came before the Court after the owner of a laundry required “a female, to wit, one Mrs. E. Gotcher, to work more than ten hours” on one day.³¹ Notwithstanding the fact that the Court had recently, and quite famously, invalidated an analogous statute as a violation of the due

27. DOROTHY HAMMOND & ALTA JABLOW, *THE AFRICA THAT NEVER WAS: FOUR CENTURIES OF BRITISH WRITING ABOUT AFRICA* 94 (1970).

28. *Id.* at 95.

29. *Dudley & Stephens*, 14 Q.B.D. at 287 (emphasis added).

30. 208 U.S. 412 (1908).

31. *Id.* at 417.

process right and liberty of individuals to contract their labor in *Lochner v. New York*,³² the *Muller* Court found the Oregon statute constitutional and affirmed Muller's conviction. Put differently, faced with the same due process argument that had carried the day in *Lochner*, and now faced with an equal protection argument as well, the Court found a way to distinguish, concluding that the "difference between the sexes" justified a different rule respecting the restriction of labor hours.³³

Not surprisingly, feminists have long read *Muller* as evidence of judicial paternalism and patriarchy. A re-reading of the case through the lens of race adds another layer to our understanding. After all, though unstated, the Court's paternalism was clearly bounded by race. For example, the Court relies on

reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe, to the effect that long hours of labor are dangerous for women, primarily because of their special physical organization.³⁴

The Court then posits:

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. . . . [As such], she has been looked upon in the courts as needing especial care that her rights may be preserved.³⁵

However, this condescending concern makes sense—if indeed it makes sense at all—only if one renders women of color invisible—and then some. More importantly, one has to disregard the more than 200 years of slavery that had ended barely a generation earlier, and that gave rise to the very Equal Protection Clause the Court is interpreting. Assumed in the Court's opinion is the linkage of femininity and color. Women were white, and whiteness was associated with femininity. This was true cross-racially—against the backdrop of slavery, how could it be otherwise?—but it was also true intra-racially. As cultural theorist Richard Dyer has observed: "[T]o be darker, though racially white, is to be inferior. Gender differentiation is crossed with that of class: lower-class women may be darker than upper-class men; to be a lady is to be as white as it gets."³⁶ Read in this manner, *Muller* is not only figuratively about the fairer sex, it is also quite literally about the fairer sex, about

32. 198 U.S. 45 (1905).

33. *Muller*, 208 U.S. at 419.

34. *Id.* at 420 n.1.

35. *Id.* at 421.

36. RICHARD DYER, WHITE 57 (1997).

white women in contradistinction to non-white women. And to make the circle complete, white women are associated with bearers of whiteness. After all, the Court repeatedly links the protection of women to the rearing of offspring with a view to “the strength and vigor of the race,” and “the well-being of the race.”³⁷ This is what feminist Marilyn Frye has described as the “demand that white women make white babies to keep the race afloat.”³⁸ Indeed, in speaking with the authority of the law, the case is not only describing women, but inscribing them as well, and doing so racially. It gestures toward the proper role of white women in society, and consequently, it privileges white women over non-white women, asking that white women carry the mantle associated with this privilege.

And this is my point about reading back, reading black. Far from diminishing these opinions—these grand narratives, these master texts—reading black reveals other layers, other meanings, and in the process deepens and widens our understanding not only of the holdings of these opinions, but also the how and why of them.

In “*Race, Writing, and Difference*,” Henry Louis Gates, Jr. observes that during the period of the Enlightenment, Europeans pointed to the absence of writing among African cultures as “proof” that Africans were subordinate, and *a priori* as “proof” that Europeans were superordinate.³⁹ African Americans responded to this “knowledge” about their inability to write by offering in rebuttal exhibit after exhibit: books of poetry, autobiographical narratives, abolitionist tracts. As Gates puts it:

Accused of lacking a formal and collective history, blacks published individual histories which, taken together, were intended to narrate in segments the larger yet fragmented history of blacks in Africa, now dispersed throughout a cold New World. The narrated, descriptive “eye” was put into service as a literary form to posit both the individual “I” of the black author as well as the collective “I” of the race. Text created author; and black authors, it was hoped, would create, or re-create, the image of the race in European discourse.⁴⁰

I reference Gates’s exegesis of black writing not to discredit it, but to gesture toward that which must have been equally important, if not

37. *Muller*, 208 U.S. at 421, 422.

38. MARILYN FRYE, *On Being White: Toward a Feminist Understanding of Race and Race Supremacy*, in *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* 110, 127 (1983).

39. Henry Louis Gates, Jr., *Editor’s Introduction: Writing “Race” and the Difference It Makes*, in “RACE,” WRITING, AND DIFFERENCE, *supra* note 5, at 1, 9.

40. *Id.* at 11.

more so. It was not only writing that mattered, but also reading. Of course, to a certain extent, this was true of everyone. In colonial America, the ability to read could allow one to escape the death penalty under the “benefit of clergy” doctrine.⁴¹ But it was true in a different way for blacks. After all, one of the unifying tenets of slave codes was that blacks should not read—must not read. This was certainly true in South Carolina, Virginia, Georgia, and North Carolina, where prohibitions were part of the black letter law. And it was true in other jurisdictions as well, where the white letter law⁴² of custom reigned. And yet blacks did learn to read. In fact, they risked everything to read. We know this not from judicial opinions⁴³—recourse to courts was rarely needed since the power of the master was absolute⁴⁴—but from the slaves themselves, many of whom documented the risks they and others faced in pursuit of literacy. Albert Booker, accused of “spoiling the good niggers” by teaching them to read, was whipped to death.⁴⁵ A slave owner “hung the best slave he had” for trying to teach slaves how to

41. Essentially, a defendant found guilty of a capital offense could escape the death penalty if he could read from the Bible. Though perhaps “reading” goes too far. As Lawrence Friedman has discussed, defendants were always called upon to read the same verse, Psalm 51, which meant a savvy but illiterate defendant had only to memorize the verse. Since it saved one from the gallows, the verse came to be called the “neck verse.” LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 43 (1993).

42. As I have discussed elsewhere, by “white-letter law,” I am referring to societal and normative laws that stand side-by-side and often undergird black letter law but, as if inscribed in white ink on white paper, remain invisible to the naked eye. See I. Bennett Capers, *The Trial of Bigger Thomas: Race, Gender and Trespass*, 31 N.Y.U. REV. L. & SOC. CHANGE 1, 7-8 (2006).

43. Perhaps the only known prosecution is that of Margaret Douglass, a poor white seamstress in Virginia who was sentenced to a month’s imprisonment for teaching slaves to read. PHILIP S. FONER & JOSEPHINE F. PACHECO, *THREE WHO DARED: PRUDENCE CRANDALL, MARGARET DOUGLASS, MYRTILLA MINER—CHAMPIONS OF ANTEBELLUM BLACK EDUCATION* 57 (1984). Other violations were handled extra-judicially. In 1835, in Charleston, South Carolina, for example, a mob of “respectable men” gathered to lynch a Catholic priest and demolish the school for slaves he had begun. The priest reluctantly agreed to discontinue the school. JANET DUITSMAN CORNELIUS, “WHEN I CAN READ MY TITLE CLEAR”: LITERACY, SLAVERY, AND RELIGION IN THE ANTEBELLUM SOUTH 43-44 (1991).

44. I know of no better discussion of this than that of Judge Ruffin in *State v. Mann*, 13 N.C. 263 (1829), in which the North Carolina Supreme Court held that battery on a slave was not an indictable offense:

The power of the master must be absolute, to render the submission of the slave perfect. . . . We cannot allow the right of the master to be brought into discussion in the Courts of Justice. The slave, to remain a slave, must be made sensible, that there is no appeal from his master; that his power is in no instance, usurped; but is conferred by the laws of man at least, if not by the law of God.

Id. at 266-67.

45. Janet Cornelius, “*We Slipped and Learned to Read: Slave Accounts of the Literary Process, 1830-1865*,” 44 *PHYLON* 171, 174 (1983).

read.⁴⁶ And Oliver Perry, upon discovering that his slave Nancy had learned to read, “made her pull off naked, whipped her and den slapped hot irons to her all over.”⁴⁷ More often, the punishment of choice was amputation. Perhaps because amputation was permanent—a constant reminder. What a utilitarian might call a general deterrent: A “sign for de res uv ’em.”⁴⁸

It should come as little surprise, then, that the *topos* of reading appears repeatedly in African-American literature. In *Narrative of the Life of Frederick Douglass*, as just one example, Douglass recounts overhearing his master warn:

[I]t was unlawful, as well as unsafe, to teach a slave to read. . . . “If you give a nigger an inch, he will take an ell. A nigger should know nothing but to obey his master—to do as he is told to do. . . . [I]f you teach [a] nigger . . . how to read, there would be no keeping him. It would forever unfit him to be a slave. He would at once become unmanageable, and of no value to his master”⁴⁹

This overheard warning, however, spurs Douglass to master literacy, to in fact become “unfit . . . to be a slave.” He remarks to the reader: “I now understood what had been to me a most perplexing difficulty—to wit, the white man’s power to enslave the black man. It was a grand achievement, and I prized it highly. From that moment, I understood the pathway from slavery to freedom.”⁵⁰ Douglass concludes by echoing his master’s words—through the device of chiasmus—to subvert them: “Mistress, in teaching me the alphabet, had given me the *inch*, and no precaution could prevent me from taking the *ell*.”⁵¹

Reading, then, was especially crucial for blacks. After all, for slaves, reading could mean the difference between servitude and freedom. But this is my point. It was more than just reading that mattered. It was reading critically. It was reading the Bible to see that it contained not only the story of Ham, which whites invoked to induce obedience and subservience, but also the story of the Deliverance of the Children of Israel from Egypt, which, read critically and read black,

46. CORNELIUS, *supra* note 43, at 66.

47. Cornelius, *supra* note 45, at 174.

48. *Id.*

49. FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE (1845), reprinted in THE CLASSIC SLAVE NARRATIVES 243, 274 (Henry Louis Gates, Jr. ed., 1987).

50. *Id.* at 275.

51. *Id.* at 277. Other examples exploring the link between literacy and freedom abound: Harriet Jacobs’s *Incidents in the Life of a Slave Girl*, Richard Wright’s *Black Boy*, Toni Morrison’s *Beloved*, Sapphire’s *Push*, and Edward P. Jones’s *The Known World* are just a few.

could be read as authorizing revolt.⁵² It was reading for the lapses in logic, the inconsistencies, the self-delusions, the self-interests, the coded language, the moments of blindness, the moments of sight, and the policing, sometimes stated, more often not, of race. This was not limited to written texts, but also oral texts, visual texts, and bodily texts. As a practice, as a means of survival, it required a reading through and around, a reading of both the said and the unsaid. It is the kind of reading in which Sethe in Toni Morrison's *Beloved* engages when she recalls the teachings of Schoolteacher and says, "No. Oh, no." It was a reading that, to borrow from the black vernacular, involved "ciphering."

I am proposing that we—and by we, I am not referring only to those of us who do law and literature, I am referring to all of us who do law—I am proposing that we add to the way we read. And I know that by marking this addition with race, I am suggesting a terrain fraught with history and recriminations, a terrain that is not easily traversed, which may be impossible to navigate. But given the life and death risks blacks took to read, to read critically, the risks here are relatively minor. Especially since the riches to obtain from unmasking language, unmasking the law, are manifold.

II. CONCLUSION: THE CONSTITUTION READ BACK, READ BLACK

Thinking this through, it occurs to me that reading black is not only critical, not only oppositional, but on other levels, at other frequencies, it can also be generous and visionary. Consider again Frederick Douglass, who rose from slavery to become a public intellectual—a leader in the abolitionist movement. In 1857, he delivered a speech before the American Anti-Slavery Society in New York. What was his topic? *Dred Scott v. Sandford*.⁵³ This former slave, once denied access to literacy, read this opinion in which Justice Taney concluded that blacks, whether slave or free, were not citizens within the meaning of the Constitution, and prophetically claimed that the decision, "monstrous as it appears," could not stand.⁵⁴ How did Douglass reach this conclusion? By re-

52. For example, Denmark Vesey, who organized a slave revolt in South Carolina, invited slaves to challenge white preachers about key Bible verses, and read from the Bible "where God commanded, that all should be cut off, both men, women, and children," to rally other slaves to rebel. Nat Turner, who led a slave revolt in Virginia, used his ability to read from the Old Testament to advocate seeking retribution against slave-holding families. CORNELIUS, *supra* note 43, at 30-32.

53. 60 U.S. 393 (1856).

54. Frederick Douglass, The Dred Scott Decision, Speech before the American Anti-Slavery Society, (May 11, 1857), in 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: PRE-CIVIL WAR DECADE 1850-1860, at 407, 412 (Philip S. Foner ed., 1950).

reading the Constitution, by re-reading the Declaration of Independence. I repeat portions of his speech below:

Now let us approach the Constitution from the standpoint thus indicated, and instead of finding in it a warrant for the stupendous system of robbery, comprehended in the term slavery, we shall find it strongly against the system.

....

“We, the people”—not we, the white people—not we, the citizens, or the legal voters—not we, the privileged class, and excluding all other classes but we, the people; not we, the horses and cattle, but we the people—the men and women, the human inhabitants of the United States, do ordain and establish this Constitution, &c.

I ask, then, any man to read the Constitution, and tell me where, if he can, in what particular that instrument affords the slightest sanction of slavery?

Where will he find a guarantee for slavery? Will he find it in the declaration that no person shall be deprived of life, liberty, or property, without due process of law? Will he find it in the declaration that the Constitution was established to secure the blessing of liberty? Will he find it in the right of the people to be secure in their persons and papers, and houses, and effects? Will he find it in the clause prohibiting the enactment by any State of a bill of attainder?

....

Thus the very essence of the whole slave code is in open violation of a fundamental provision of the Constitution, and is in open and flagrant violation of all the objects set forth in the Constitution.

....

As a man, an American, a citizen, a colored man of both Anglo-Saxon and African descent, I denounce this representation as a most scandalous and devilish perversion of the Constitution, and a brazen misstatement of the facts of history.⁵⁵

Douglass, in refuting the *Dred Scott* decision, in reading back the Constitution, read black. We are all the beneficiaries of his vision.

55. *Id.* at 418-20, 421.