Demons, Savages, and Sovereigns: On Whiteness and Law

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Race is commonly understood to refer to a particular combination of a set of certain phenotypic traits—skin color, nose shape, etc.—and ethnic heritage, sometimes with associated cultural characteristics and predispositions. It is an ascribed trait, something people are born into and cannot change (with the important exception of "passing," where some people can adopt another racial identity due to ambiguous phenotypic characteristics). It is often recognized as one trait among many others, such as age or gender. Like other characteristics, race is widely understood to have significant social ramifications and occupy one of several roles in the stratification of American society; the prevailing story is that people of one race oppress people of other races, people of one gender oppress people with other gender identities, and so on. However, the social meaning something like race is given is often not thought to imply anything about "race" in and of itself. In other words, race is seen by many *as* a given, and, according to proponents of this view, people have simply handled this given category in inappropriate ways.

This paper seeks to challenge the "givenness" of race in the United States, to complicate its relationship to phenotype and culture, and to interrogate its relationship to state power. Specifically, this paper will posit a conception of race as we know it—whiteness in particular—as not merely a descriptor, but as a way of reordering people and land, making both revolve around people who are called white and whiteness as an entity. In short, I argue that whiteness is at once a compelled aspiration, a doctrine, and an organizing principle for people and the spaces they inhabit, and the law arises from and helps to accomplish these. First, this paper will review some paradigmatic examples of how race is understood in legal thought, particularly in the writings of Randall Kennedy (and the scholars he cites—Derrick Bell, Richard Delgado, and Mari Matsuda), Daria Roithmayr, and Cheryl Harris, to begin to articulate an alternative theoretical framework for the function of race in the law and its attendant institutions. Then, this paper will develop and illustrate this framework by examining, interpreting, and juxtaposing the ways in which law coalesces around whiteness in *Johnson v. M'Intosh* and in Darren Wilson's grand jury testimony and its context. I argue that these are exemplars of how whiteness works in the United States, whereby both Native American and Black peoples are continuously (re)defined and (dis)placed phys-

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ically and existentially within white supremacist formations of space and thought via the state and law more broadly.

LITERATURE AND THEORY

Various scholars have discussed how race functions in and through the law. Entire schools of thought, Critical Race Theory in particular, are dedicated to this inquiry, and their insights are crucial to our understanding of the legal operations of white supremacy, that imputing of power and authority to white people over all others. In his article "Racial Critiques of Legal Academia," Randall Kennedy critiques some foundational Critical Race Theory perspectives put forward by Derrick Bell, Richard Delgado, and Mari Matsuda. He first addresses Bell's argument that, at predominately white law schools, Black candidates are routinely and actively overlooked in the hiring process because of a perceived threat to the law school's ideological regime. According to Kennedy, Bell argues that discrimination occurs despite Black candidates' qualifications, and he critiques the conventional standards (e.g. grades) used to determine whether someone is qualified at all. He argues that they are vectors for societal bias and are, in fact, not the most accurate predictors of good legal scholars or teachers. Kennedy's response in his article is that, rather than discrimination, there is simply a lack of qualified Black candidates and that, even if the conventional standards are potentially problematic, this "cannot properly be determined wholly by reference to consequences measured by bare statistics—such as disparities between the number of students of color in law school and the number of professors of color."[1] Against Delgado, who argues that academic discourse systematically excludes nonwhite work, Kennedy argues that Delgado does not pay proper attention to the actual quality of the scholars' work that he seeks to include and that "[o]ne's racial (gender, religious, regional) identity is no substitute for the discipline study essential to achieving expertise" in a given field.[2] And to Matsuda, who argues that the white domination of academia leads to limited perspective and that, as such, a scholar's race should itself be considered a qualification, he responds that, given the fact that people who share the same race may not share the same racialized experiences, it is dangerous to generalize various experiences of race into a singular measure of merit.[3]

Kennedy's critique of Bell is emblematic of his understanding of race as a given category with little inherent meaning. In his writings, Bell sought to capture not only the ingrained processes of exclusion in faculty hiring, but also how the standards used to make those decisions are themselves reflections of how and the means by which white supremacy propagates itself. In other words, Bell is calling into question those arrangements in our society which appear natural and intuitive, and he is exposing them as entirely contrived and socializing conditions that center

1. Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1763 (1989).
2. *Id.* at 1777.
3. *Id.* at 1782.

white standards of intelligence and competency. Kennedy avoids dealing substantively with this point by calling for more proof from Bell than the number of non-white faculty and, in doing so, fails to acknowledge that Bell was making a more nuanced point than seeking to "prove" bias by an appeal to empirical findings. Bell's critique is a beginning of the disruption of the very basis by which legal academia accepts knowledge, intelligence, and capability as universal, natural categories, and Kennedy does not engage this.

Put differently, Kennedy's perspective is, in some ways, constrained by his understanding of what race is. For him, although he briefly acknowledges some of the history of racist policies and attitudes in the United States, he implies that this history is largely the result of one group of people simply behaving badly toward another.[4] But, similarly to his understanding of qualifications, he seems to understand the groups themselves as natural, given categories without giving much critical thought to the processes of "grouping" by which race as we know it exists. It therefore follows that what is at issue is not exclusionary processes of faculty hiring or inherently biased and white supremacist hiring standards, but rather deficient Black people. It follows that the processes of exclusion determining which forms of knowledge are worthy do not serve as racist gatekeepers to academic discourse as Delgado argues, nor is academia resistant to epistemological challenges to its white intellectual regime, but rather that Black scholarship might simply not be good enough. And it follows that, as he argues against Matsuda, we ought not consider race to be a factor of merit because a race is, after all, little more than a collection of people with some loosely shared history and characteristics, not necessarily having the same experiences and perspectives (notwithstanding his usage of the infamous, widely critiqued Moynihan report in service of his own claims about the deficiencies of Black people[5]).

On one hand, Bell, Delgado, and Matsuda challenge the kind of inherently white-interested, epistemological hegemony that textures the academy and knowledge production more generally. On the other, though, is Kennedy's response; according to him, these scholars do not pay enough attention to "objective" qualifications of nonwhite people. This disconnect, I argue, occurs at the site of race conception, particularly Kennedy's failure to account for ongoing processes of racial formation and their relation to institutional and state power. Because of his misunderstanding of what race is and how it functions, Kennedy shrouds the oppression of Black people and the suppression of their voices underneath individual Black persons' character and intellectual profiles. Such a misunderstanding causes him to slide past the operations of whiteness that engender prevailing standards of what an intelligent, qualified, or otherwise worthy person is in the first place and, more fundamentally, what a "person"

4. *Id.* at 1745–60.
5. *See, e.g., id.* at 1813.

is—ideations of what constitutes humanness are themselves bound up in power.[6]

Conversely, in *Reproducing Racism*, Daria Roithmayr is primarily concerned not with any individualized shortcomings of Black people, but rather with the systems that create racial stratification, particularly from an economic point of view. She contends that racial inequality persists in the United States largely due to a set of positive feedback loops, compounding itself. According to Roithmayr, present patterns of economic inequality between the races began with slavery and Jim Crow, and they were maintained and expanded through what she calls "lock-in," a "self-reinforcing system of distribution of resources and opportunities."[7] The story she tells is one of the initial monopolization of resources by white people, particularly by what she refers to as "racial cartels," which includes unions, political parties, and other groups of white people that explicitly excluded nonwhite competitors to material resources.[8] Over time, the evolution of our institutions and markets continued to entrench these structural patterns of white advantage as both wealth and poverty were passed down and expanded between generations.[9]

Roithmayr's work on the mechanisms of white supremacy and its intersections with capitalism is important. She casts light on ostensibly race-neutral policies and practices which, in reality, have had disproportionate, devastating effects on Black communities for many decades. Her work is a direct counter to some of the conclusions Kennedy comes to in his work—the more fundamental problem, she argues, is with systems designed to secure white advantage, not with individual Black persons. Additionally, her point about the present continuation of these systems because of institutional inertia is insightful, and it has necessary implications for any meaningful change to the status quo.[10]

However, similarly to Kennedy, Roithmayr takes for granted how these racial categories and their associated logics came to be. She, for example, frames her argument with economics in mind; in her argument, the problem is that white people have cornered the market, both the actual market and a general "market" of material resources and wealth. This theory presumes the prior, natural existence of that market, and it assumes that it is something all should have access to. Her argument does not take into account how such a market might be inherently racialized, nor what it might mean that this market to be accessed and enhanced is founded on the slavery she decries and rests on the lands and graves of Native American peoples. Roithmayr instead implies that the injustices of slavery and Jim Crow most relevant to her argument is that they created an unfair distribution of resources and wealth between Black people and

6. *See* Sylvia Wynter, *Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, Its Overrepresentation—An Argument*, 3 CR: THE NEW CENTENNIAL REVIEW 257 (2003).
7. DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE 7 (2014).
8. *See id.* at 53.
9. *See id.* at 57.
10. *See id.* at 114–20.

white people.[11] Although this is certainly true, it obscures the brutal mechanics of capitalistic resource extraction that occasion such a hypothetical, "fair" distribution of them, along with how certain peoples came to be "Black" sites of capital production (and capital themselves) in the first place—as Cedric Robinson explains in *Black Marxism*, capitalism in the West was predicated on racialization, arising from a fusion between race-making mythology and economic oppression in feudal Europe, which was followed by the race-based projects of slavery and colonialism elsewhere that were constitutive parts of early capitalism.[12]

This perspective is not necessarily contradicted by Roithmayr's analysis, but her framework slips past the essence of the more fundamental problem, which is not just the inequitable automatism of our various institutional arrangements, but the fact of and context surrounding these machines' existence in the first place. This framework allows her to uncritically prescribe state remedies to problems created by the inextricable union between white supremacy and that very state,[13] legitimating its authority and that of the institutions connected to it which have long insisted on the (economic) domination of white people over all others, their lands, and their resources. It is this collaboration between state, institution, and white interest that created and continue to create the legal foundations of the mysterious, extractive market forces we contend with today. The essence of the racial stratification Roithmayr is describing, then, cannot be a group of white cartels solidifying their advantage over Black people in the presence of an otherwise neutral state or economy. The grouping itself, the ongoing creation and implementation of whiteness, is what occasions the advantage. Put differently, "white" people *are* the cartel, with whiteness serving as their collective force, organizing power and matter around itself and its vectors, including the state, the market, and people determined to be white or in alignment with whiteness's demands (ideas, morals, virtues, standards, etc.). Some of this is indeed automatic, the result of inertia and faithful adherence to tradition, as Roithmayr argues. However, even the self-propelling character of systemic racism is enabled by the acceptance of certain presuppositions that ground it, including our understandings of what is natural, rational, effi-

11. *Id.* at 62.

12. CEDRIC ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION 66–68 (2000). Chattel slavery was, of course, a unique socioeconomic and metaphysical rupture in the world, not reducible to a point on some universal spectrum of oppresion, nor is it properly understood as one variant of a set of hegemonic, colonial, and/or racially oppressive projects throughout history. More precisely, Robinson argues that the racial order developing within feudal Europe formed a historical, material, and sociocultural base for the leap into the making of Blackness and whiteness through chattel slavery, which, combined with trade and colonization, formed the basis for nascent capitalism. *See id.* at 109–10. Even if it is genealogically related to the feudal experiments in Europe by which the consolidation of power and resources came to take on ethnocentric meaning, the inauguration and enforcement of a worldwide social order built necessarily and specifically on anti-Blackness and the perpetual slavery of Black people "has no analog." Jared Sexton, *Unbearable Blackness*, 90 CULTURAL CRITIQUE 159, 167 (2015). *See also* Anthony Paul Farley, *The Apogee of the Commodity*, 53 DEPAUL L. REV. 1229 (2004).

13. *See* ROITHMAYR, *supra* note 7, at, *e.g.*, 139–41.

cient, just, and human(e). These presuppositions are inseparable from the mechanics of white hegemony and the institutional arrangements that Roithmayr observes.

In "Whiteness as Property," Cheryl Harris more directly confronts this relationship between whiteness and the establishment of American society, arguing that whiteness has come to share essential elements with those of property, particularly the right to exclude.[14] Furthermore, she argues that there is a property interest in whiteness that is legitimated by the law and that the dominance of white people rests on this legitimation, evolving from historical forms of racial subordination to those we see today. She discusses how this led to the initial appropriation of land from Native Americans, since they did not have the necessary whiteness to legitimate their claim to it,[15] in addition to the lack of legal protection for enslaved Africans due to their lack of whiteness—"[w]hiteness was the characteristic, the attribute, the property of free human beings."[16] In this way, the law reified and concretized whiteness into something that could be possessed, an "objective fact, although in reality it is an ideological proposition imposed through subordination,"[17] and this "construct evolved for the. . . purpose of racial exclusion."[18] And, importantly, she recognizes the inseparability of racial formation (and its state sponsorship) and white supremacy: "In the realm of *social* relations, racial recognition in the United States is. . . an act of race subordination. In the realm of *legal* relations, judicial definition of racial identity based on white supremacy reproduced that race subordination at the institutional level."[19]

Adjacent to Harris, I add that whiteness is not only something which state authority privileges, but which makes, in the United States context, state authority (and our understanding of property) possible. However, from her theoretical interventions, and building on those of the aforementioned scholars, we can derive some principles necessary for the present inquiry and for, I argue, any true consideration of how race works here. First, as Harris notes, whiteness is chiefly an ideological proposition. It is a set of ideas and arguments about dignity, about what ought and what ought not to be, about how space is to be arranged and to whom the space belongs, and about what belonging means. Second, whiteness is given shape through the domination of the nonwhite. There can be no neutral racial category of "white"; the very concept necessitates separation from the nonwhite. And whiteness does not position itself as merely one of several possibilities in such separation, but as the ideal, the telos, the end goal which presupposes all of our institutions and societal formations. These logics of whiteness, then, are linked to the extraction and resource allocation for which they are mobilized. In other words, whiteness means superiority, and it means profit at the expense of those posi-

14. Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714 (1993).
15. *Id.* at 1724.
16. *Id.* at 1721.
17. *Id.* at 1730.
18. *Id.* at 1737.
19. *Id.* at 1741.

tioned to be inferior. Finally, and relatedly, Harris highlights the fact that whiteness is inextricably linked to social control, both in essence and in the inner workings of government. Whiteness as an ideological presupposition tilled and forcibly appropriated the soil from which the United States government could grow, and it prepared African peoples to be enslaved while their own land and resources were taken from them. The states, laws, and institutions that would follow from this presupposition produce and govern racialized subjects in accordance with it, for the sake of its continuity and its progeny's. The following examples, *Johnson v. M'Intosh* and the grand jury testimony of Darren Wilson, tell this story and serve as points of departure for this paper's explication of these operations of whiteness in and through law.

JOHNSON AND GRAHAM'S LESSEE V. MCINTOSH (SUPREME COURT OF THE UNITED STATES, 1823)

The central question of this case is whether a title to a plot of land granted, whatever that means, by the Illinois and Piankeshaw nations to Thomas Johnson (the lessees of his descendants are the plaintiffs in this case) is to be recognized over a title to the same land granted by the United States government to Defendant William McIntosh. Conspicuously absent from these proceedings are the presence and voices of the Illinois and Piankeshaw nations. This land dispute is, from the outset, to be determined by white people for white people.

In the majority opinion, which is still law, Chief Justice John Marshall begins his reasoning by explaining that "society" has the right "to prescribe those rules by which property may be acquired and preserved" and that such rules "must be admitted to depend entirely on the law of the nation in which they lie." Application of these rules must be carried out with "principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man" and naturally bear on "the rights of civilized nations."[20] This introductory paragraph is incredibly dense, full of culturally specific meaning. First, who and what constitute society, and how might their origins matter? What is property (that is, what and whom can be owned?), and from what kinds of legacies (e.g. mercantilism, individualism) have we come to conceive of it? Relatedly, what is law, and who decides—must it be written down, for example? What is "abstract justice," and what are its philosophical legacies and biases? Who is this Creator, and how has this Creator been revealed, and to whom—and why? Which nations count as civilized, and who decides? What are the implications of disagreement about any of these? Who wins in such a disagreement, and why? A full answer to any of these sets of questions is outside of the scope of this paper, but the salient point here is that each building block in this introductory paragraph, which sets the tone for the rest of Justice Marshall's judicial opinion, is derived from a specific epistemological and cultural frame. This "civilized" frame illustrated by Justice Marshall is distinctly Western European,[21] with all of the

20. *Johnson v. M'Intosh,* 21 U.S. (8 Wheat.) 543, 572 (1823).
21. *Id.*

region's accompanying assumptions and biases, developed in the context of centuries of imperialism and violently imposed on what colonizers called the "New World" and the peoples therein through ideas, statutes, and judicial decisions such as this one. The law of the land that would come to be called the United States, then, has sprung from (white) hegemony.

This hegemony has led to the silencing of Native American voices in Justice Marshall's opinion, which is in large part devoted to explicating the doctrine of discovery. This doctrine, he argues, is an agreement between "European governments," whereby whichever European nation comes into contact with lands in the "New World" before the others has the exclusive right "of acquiring the soil from the natives, and establishing settlements upon it."[22] Great Britain encountered the land in question first among these, their title passed to the Virginia colony after the Revolutionary War, and this title eventually passed to the United States as it was established as the federal government. Justice Marshall invokes the doctrine as a sort of common law; he emphasizes throughout his decision that this doctrine is one to which "all assented," which was "understood by all,"[23] and which "has never been doubted."[24] This, of course, raises questions about who Justice Marshall was thinking of when he claims that the doctrine of discovery has never been doubted, what "assent" truly means, and whose assent matters. This is fundamentally an issue of recognition, and he veils it behind a false consensus; as he admits early in his opinion, the doctrine mediates between European powers only, and Native American peoples and their lands are little more than former owners, spoils of war, and/or the reward for the fastest ships. Justice Marshall's invoking of the pact between European governments (and certain European governments at that—who counts as European at this time?), then, is a reification of the authority of European peoples—those who would come to identify as "white" in their encounters with the rest of the world—over others. Put differently, authority is circumscribed by the boundaries of whiteness, in line with Harris's observations. And, more broadly than property rights, this whiteness has not only been imbued with special privileges, but it has fundamentally shifted worlds; it has laid the theoretical groundwork for the extraction of land from the nonwhite, and it has reduced any nonwhite claim to the land or anything else to a subordinate position. Whiteness is considered the supreme power to acquire and define, and this is what Justice Marshall's argument rests on. It is this line of thinking which makes something like Western imperialism possible and, lying underneath what Harris noted in her work, crowds out any contrary definitions of property, humanity, and law in the first place. This exclusive, sovereign power to recognize and to remove recognition from people and principle, a power which whiteness claims, is an example of what theologian Willie Jennings refers to as Euro-

22. *Id.* at 573.
23. *Id.* at 574.
24. *Id.* at 585.

pean colonizers' "reconfiguration of bodies and space."[25] The state is an extension of this reconfiguration, whereby authority is made evident in difference, with whiteness as the final arbiter of whether one people's characteristics are superior to another's:

> Although we do not mean to engage in the defense of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.[26]

However, more than removing others physically, whiteness functions by establishing its particular political, legal, cultural, and epistemological standards as those to which all people must conform. In other words, whiteness is a process of becoming, and it is its own telos. In explaining how the United States' title to the land, acquired through conquest, which "[a]ll our institutions recognise," is "incompatible with an absolute and complete title in the Indians,"[27] Justice Marshall writes of how the conquered peoples are customarily "incorporated with the victorious nation." Eventually, according to him, the differences between these peoples, which, as illustrated before, justified white authority in the first place, slowly fade, "and they make one people." Justice Marshall argues that this incorporation ought to eventually result in equitable treatment between the conquered and their conquerors, and this equality "should gradually banish the painful sense of [the conquered] being separated from their ancient connexions."[28]

It is unclear where he derives this rule from, but it may be safely assumed that, in this case, the solvent which ideally dissolves the conquered is whiteness; slowly, nonwhite peoples should lose their distinctiveness and become grafted into that force which has overwhelmed them. Syncretism is not contemplated by Justice Marshall since he (rightfully) imagines a painful separation from Native American ancestral claims, as opposed to a combination of different ancestral claims in what would become the United States, for example. Whiteness is the law of the land, the aforementioned means of accession and what all must accede to, however painful it may be.

Native Americans, however, are an exception to this general custom of assimilation: "But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest."[29] We can see that the choice whiteness confronted Native Americans with was between a slow kind of oblivion through compliant assimilation and a quick one through execution, two kinds of death. And although their resistance was reason enough for the mercy of slow erasure to be denied to them, it is evident to Justice Marshall that their genocide and/or domination was predestined because of

25. WILLIE JAMES JENNINGS, THE CHRISTIAN IMAGINATION: THEOLOGY AND THE ORIGINS OF RACE 24 (2010).
26. *Johnson*, 21 U.S. at 589.
27. *Id.* at 588.
28. *Id.* at 589.
29. *Id.* at 590.

who they were, not only what they did; they were savages, they were "warlike," they were forest-dwellers. In his words, "What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword. . . ."[30] It is inevitable that Europeans would attempt to wipe out Native Americans, but, somehow, it is also inevitable that Native Americans would be absorbed into whiteness—this is a paradoxical collision of inevitabilities, but, one or way or another, Native Americans are bound to disappear. But, importantly, despite its apparent aims, whiteness as expressed here relies on the difference between white people and Native Americans to justify its totalizing process; the telos, the purifying aim, of whiteness is always in interaction with and dependent on the existence of the so-called deficient nonwhite. In this situation, the case law constituted by Justice Marshall's opinion has codified difference—as determined by people calling themselves white—as the foundation for the appropriation of nonwhite resources, the erasure of their cultures, and the displacement of their bodies, with state and non-state violence. Through this marking of difference and the injection of meaning into this difference, the construct of whiteness is at once the operative principle for the legal establishment of white authority and the normative framework in which further exploitation and coercion, even the ostensibly soft coercion of slow assimilation, can occur.

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Over the next 200 years, Justice Marshall's logic extends and concretizes into countless instances of land theft, racialized societal organization, and structural arrangements that primarily benefit the white, the rich, and the male. One of these is the phenomenon of the police. As Paul Butler illuminates in *Chokehold*, the police are an important instantiation of state dominance over Black people.[31] The police, in other words, are a positive assertion of state authority which extends into the lives of state subjects, and, as discussed before, state subject formation is necessarily tied to racial formation—whiteness creates conditions for statehood and citizenship, statehood and citizenship enshrine whiteness, and so on.

In the case of Darren Wilson, the police officer who killed Michael Brown, Wilson's presence was the first problem. The police, in line with Justice Marshall's recounting of history, spring from a set of rules which society has prescribed. And, as in *Johnson v. M'Intosh*, "society" is still a heavily loaded word, its implicit meaning further textured by the context of generations of trauma, exclusion, social control, and violence more generally, and society's boundaries are continuously inscribed and re-inscribed by the state and the citizens it privileges. There is, in the words of Harris, a property interest in these boundaries, and, as much as police purport to make people safe, they have also been instrumental in these boundary-making processes. Central to these are the patterns of social,

30. *Id.*

31. PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 9 (2017).

economic, and geographic restriction (redlining, regressive taxes, racially restrictive covenants, etc.) which have long characterized neighborhoods like Ferguson, enforced by the police for the good of the more affluent white in surrounding areas.[32] These restrictions are not only enabled by whiteness, but are also core to its purpose, its ideology, and its attendant institutions, as discussed before. The police are outgrowths of this extracting, constraining machinery, what Loïc Wacquant refers to as the centaur state, whereby the privileges of prosperity and freedom are maintained for those at the top of the social hierarchy while they are upheld by a repressed, exploited underside.[33]

The story of Darren Wilson and Michael Brown, then, begins with theft, not of a box of Cigarillos, but from a people. On March 4, 2015, the Department of Justice issued an extensive report on the policing and judicial practices in Ferguson, where they famously found a system that ravaged Black communities in the city. The sheer cruelty and violence of the practices of the police officers is well-documented, but equally important are the principles of extraction that grounded those practices of enforcement. The report found "a significant and increasing amount of [city] revenue from the enforcement of code provisions,"[34] and courts, prosecutors, and the police as state agents conspired to increase the flow of money coming into the city government from fines.[35] These injustices epitomize the intimate ties between extraction and the violent, carceral state, organized by and for the profit of whiteness as from the beginning, as affirmed in *Johnson v. M'Intosh*. With these tactics, Ferguson teaches us that, as the arm of a state made possible and upheld by violence for the purpose of taking, policing is synonymous and coextensive with brutality, even before an eighteen-year-old Black boy is killed. Against this backdrop of racial terror and Black poverty manufactured by the state, Mike allegedly stole a box of Cigarillos, which, according to Wilson, set into motion the events that led to his death.[36]

Ferguson also illustrates another principle evident in *Johnson v. M'Intosh*, that some bodies are inherently noncompliant:

> "African Americans [67% of Ferguson's population] account for 95% of Manner of Walking charges; 94% of all Fail to Comply charges; 92% of all Resisting Arrest charges; 92% of all Peace Disturbance charges; and 89% of all Failure to Obey charges."
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> "In the officers' view, the man resisted arrest by pulling his arms away. The officers drive-stunned him in the side of the neck."

32. *See* Walter Johnson, *Ferguson's Fortune 500 Company*, THE ATLANTIC (Apr. 26, 2015), https://www.theatlantic.com/politics/archive/2015/04/fergusons-fortune-500-company/390492/.
33. LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 43 (2009).
34. U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9 (2014), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.
35. *Id.* at 10.
36. Transcript of Grand Jury Volume V, Missouri v. Darren Wilson 202 (Sept. 16, 2014), https://www.documentcloud.org/documents/1370658-grand-jury-volume-5.html.

> "Officers pushed him to the ground, began handcuffing him, and announced, "stop resisting or you're going to get tased." It appears from the video, however, that the man was neither interfering nor resisting."
>
> "The overwhelming majority of [police use of] force—almost 90%—is used against African Americans."[37]

How might we make sense of these numbers? What stories do they tell? And whom does the marking of the Black body as unruly serve? *Johnson v. M'Intosh* is instructive here as its ideas rush into present day; as expressed in Justice Marshall's opinion, some people, because of who they are, are doomed to death or a kind of dissolution into proper "society." But, for Black people, it is not as simple as trying to make them disappear. Just as whiteness alleges and uses difference to work the genocide and displacement of Native Americans, Black people are also necessary components to the formation and work of whiteness, constiuting a defining foil to be contrasted with. The Black body is the hypervisible referent of white supremacy, always having to be captured, changed, constrained, put to work, and safeguarded against by and for the sake of humanity and the authority claimed by whiteness. There is, in the arrangement of peoples and bodies in this racial hierarchy, a paradoxical, permanent position which Black people occupy, and this position is necessarily opposed to that of white people—the complete assimilation of Black people is not a true goal of whiteness and is, indeed, impossible. Doctrines like the "one drop rule" and *partus sequitur ventrem* illustrate this principle, where even the faintest trace of Black ancestry contaminates so-called white purity. Subject to the teleological force of whiteness, then, Black people must always be made into something more tolerable, more in alignment with social standards governing society, which are dictated by whiteness. But if perfect accession to whiteness cannot happen (and, by definition, it cannot—non-passing Black people are fixed in their racial position), then the Black body must either be altered and used up so that some value can be salvaged in spite of its taintedness, or it must be exterminated. This is the story of Ferguson, where the contorted logics of whiteness form the pavement; Black existence is noncompliant by definition, never able to fully meet the demands of whiteness because of an inherent and necessary incompatibility between the two, and the city funds, builds, and organizes itself through the punishment of this noncompliance.

These colonial logics are the other side of the story of Native Americans; indigenous peoples of Africa were seasoned by whiteness, deemed Black, and taken from their lands to prepare the soil of others for foreign dominance, even while those others, the indigenous peoples of their destinations, were being prepared for the same. And still today, despite its apparent demand for either erasure or perfect assimilation, whiteness needs the Black body to remain Black so that whiteness (and, as we know

37. DEP'T OF JUSTICE, *supra* note 23, at 62, 36, 28, and 28.

it, "humanity" in general[38]) is legible, establishing its ever-present moral and legal mandate to defang what is deemed threatening and prepare the wild for "true" humanity, perpetually aligning and drawing all bodies and spaces toward itself.

In Ferguson, Missouri, these logics of plunder enfolded the events of August 9, 2014. On that day, there was an altercation between Darren Wilson and Michael Brown. Many facts are in dispute about this confrontation, including Wilson's language, Mikes's language, and who attacked whom, but there is a general consensus that some sort of physical struggle between the two occurred, and this led to Wilson discharging his weapon from the inside of his car and later on the street. But there is an intervening event between the initial encounter and the end of their altercation, a quick yet complicated calculation that Wilson made about what exactly Mike was. He testified that he grabbed Mike's arm in an alleged attempt to defend himself, and he "felt like a five-year-old holding onto Hulk Hogan. . . . that's just how big he felt and how small I felt just from grasping his arm."[39] And, according to Wilson, when he fired his weapon the first time moments later, "[Mike] looked up at [Wilson] and had the most intense aggressive face. The only way I can describe it, it looks like a demon, that's how angry he looked."[40] These statements represent a complex, dense knot of race, theology, sociology, and law. In a split second, Wilson made an assessment about Mike's (non)humanity, informed by the force of centuries' worth of social programming as dictated by whiteness. In *In the Wake: On Blackness and Being*, Christina Sharpe discusses this programming:

> . . .Black people. . . become the national symbols for the less-than-human being condemned to death; become the *carriers* of terror, terror's embodiment. . . and not the primary objects of terror's multiple enactments but the ground of terror's possibility. . . . Recall Bill Bennet, former US Secretary of Education and "values czar": "If it were your sole purpose to reduce crime," Bennet said, "You could abort every black baby in this country, and your crime rate would go down." This is an execrable arithmetic, a violent accounting. Another indication that the meaning of *child*, as it abuts blackness, falls . . . apart.[41]

The alleged noncompliance of Mike was joined to historical legacies of Black people being coded as both subhuman and superhuman, requiring extraordinary violence for the good of all, and the interaction between this alleged resistance and race was enough to disfigure an admittedly troubling, physical interaction with a teenager into something else entirely. This boy was made by whiteness to be like the others: an obstacle to be moved and taken from, a threat, demonic—an affront to the spiri-

38. *See* Frank B. Wilderson III, *Afro-Pessimism and the End of Redemption* (Franklin Humanities Institute at Duke University, 2016), https://humanitiesfutures.org/papers/afro-pessimism-end-redemption/.
39. Transcript, *supra* note 25, at 212.
40. *Id.* at 225.
41. CHRISTINA SHARPE, IN THE WAKE: ON BLACKNESS AND BEING 79–80 (2016).

tual core of this nation and humanity more broadly. It was at the moment of his resistance that Mike's fate had been sealed, and there was no other tenable option under whiteness than to extinguish him:

> I don't know how many [times I shot Mike], I know at least once because I saw the last one go into him. And then when it went into him, the demeanor on his face went blank, the aggression was gone, it was gone, I mean, I knew he stopped, the threat was stopped.[42]

And the United States's legal institutions, as from the beginning, continue to affirm these, the principles and demands of whiteness enacted via state power, contorting themselves when necessary, transforming people into non-people, human geographies into sites of extraction, state agents into five-year-olds, children into non-children, murder into nothing; Darren Wilson, like so many others, was never indicted for killing Mike, his role in the state's race-making violence.

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The goal of this paper is not to posit a solution, but to more precisely apprehend a problem. Our institutions need improvement and, in the case of certain technologies of dominance, abolition, which also means replacement. However, the problem, I argue, is not primarily one of structural issues, but of who built the structures, where their bricks come from, where their foundations were laid, what conceptual moves are needed to accomplish that laying, and which conceptual moves come forth from it. In other words, even if our structures were made more equitable and efficient, there is still the problem of the blood-soaked soil on which they rest and the largely unchecked presumptions of power that continue to give authority to end and alter life. Of course, in the name of harm reduction, there may be some necessary interim reform of bad law and deadly institutions; a responsible program of liberation is capacious of short-term solutions. But, in addition to this, thinkers like Angela Davis teach us that the change justice demands—the abolition of prisons, for example—requires a total re-imagination of society, our ways of relating to one another, and our values.[43]

This paper, then, is meant to trouble our presumptions, those things which shackle our imaginations to bolster the authority of whiteness, and their relationship to the law, down to our assumptions about what a person is and ought be, to our very souls. The particular assumption I am interested in here is about what "white" is and how it relates to governing. In short, to be white is not a neutral, gentle thing. Whiteness is imputed sovereignty, full of legal significance. It is a status and an organizing principle that hijacks life, land, and thought, and the law—statutes, decisions, institutions, governments, and agents—issues forth from and strengthens it, securing the interests of those deemed

42. Transcript, *supra* note 25, at 229.

43. *See* ANGELA DAVIS, ARE PRISONS OBSOLETE? 106–08 (2003).

white at the expense of the nonwhite. And if we were able to see this, to destabilize popular notions of race as some vapid marker of skin color or mere collection of cultural forms, we might also see our deadly systems and the ideas that give rise to them for what they are, and we could begin to count the bodies, make repair and restitution where possible, and, with enough fortitude, imagine alternatives to those things which kill and steal.