

# Occupying the Universal, Embodying the Subject

AFRICAN AMERICAN LITERARY JURISPRUDENCE

Imani Perry\*

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*Abstract. This article introduces a theory of jurisprudential critique that has developed in African American letters. The author describes this form of critique as “sympathetic occupation”—a means of using the idea of the universal subject alongside racial subjectivity in order to transform the reader’s interpretation of the law with respect to African Americans. Her argument is fashioned using nineteenth- and twentieth-century works of literature, yet she locates “sympathetic occupation” within contemporary debates about critical race theory scholarship, and suggests that her theory may be used as a critical lens for interpreting critical race theory scholarship itself.*

*The intelligent mind uses up a great part of its lifespan trying to awaken its consciousness sufficiently to comprehend that which is plainly there before it. Every generation or so some individual with extra keen perception grasps something of the obvious about us and hitches the human race forward slightly by a new law. Millions of things had been falling on men for thousands of years before the falling apple hit Newton on the head and he saw the law of gravity.*

—Zora Neale Hurston<sup>1</sup>

The epigraph to this piece is (at least emotionally) consistent with the ideal of American law. The law is not static, and neither is it random. It aspires to move forward: revising, improving, and learning. Hurston describes the process of

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learning new “law” as a discovery of what is already present, and as a collective human self-revelation.<sup>2</sup> And yet, she suggests that this discovery occurs in a moment of interpretive clarity with respect to a specific event, like the apple falling on Newton’s head. The discovery of collective truths through specific experience is the aspiration of much human inquiry, including both the legal and the literary. A tension has existed in Western culture, however, between the universal subject status appealed to in such inquiries, and the politics of difference, specifically race, class, gender, and sexuality. The normative subject has often cast those marked with difference outside the realm of collective truth. And yet, subaltern movements within outsider communities have challenged the conception of the normative subject. This essay is concerned with such a challenge as issued to American law, from the African American literary tradition.

The African American literary tradition is rich with social, political, and legal commentary. As an imaginative tradition it is both highly creative and philosophical. Critical race theory is, outside of law and humanities, the most literary of legal scholarship, using the techniques of storytelling and dramatic narration. This article seeks to wed an analysis of the African American literary tradition with some of the ambitions of critical race theory. In particular, this work is consistent with three of the central ambitions of critical race theory:

1. It makes an argument about how the centralization of black experience (here in literature) provides important insights about the operation of American law.
2. It demonstrates the significance of story telling and narrative structure in making these insights.
3. It shows how the tradition described challenges the reification of reason over emotion, and the divisions between mind and body assumed in Anglo-American jurisprudence.

Specifically, this article advances a theory of how a particular body of works in the African American literary tradition have been a profound source of legal critique. I have termed this theory “sympathetic occupation.” I begin with a description of the features of sympathetic occupation, including elucidatory exempla from literary works where necessary, and move on to several sections devoted to various types of legal critiques made through “sympathetic occupation.” While theoretical, this work considers each work discussed in the specific historic and cultural context out of which it emerged, under-

standing that the work of law in society is an ever-shifting reality. I conclude by discussing how contemporary legal issues might be addressed by the African American literary tradition today, and how that tradition might be used by, or provide insight for, the work of critical race theoretical scholars, and law and humanities scholars.

In 1829, black American David Walker first published his *Appeal*, which was to be recognized as “the most seminal expression of African American political thought to come forth in the early nineteenth century.”<sup>3</sup> This classic of anti-slavery literature sent waves of fear throughout the nation. Copies of the *Appeal* were smuggled onto shipping vessels and disseminated throughout the southern United States, ending in the hands of enslaved black people. He called for widespread insurrection. The courage and brilliance of Walker’s work are undeniable. Using rhetorical techniques inherited from the Revolutionary and Early Republic era, Walker adopted the intellectual traditions of the nation to argue for the inclusion of the enslaved in national membership.<sup>4</sup> He used classical references, negatively comparing American slavery with Roman slavery. He used the constitutional assertions of equality and the right of dissent, biblical mandates of human equality, and posited a self-reliance model for African Americans. He wrote with emotion and passion, as well as intellect. The features of his text—the occupation of a political theoretical tradition, the critical subjective stance of the black person in body and intellect, all toward a literary end of struggling for political and civic equality for African Americans—anticipate the development of what I have termed “sympathetic occupation” in the African American literary tradition, and thus his work operates as an urtext for the development of that tradition which has flowered over the subsequent two centuries.<sup>5</sup>

Sympathetic occupation is at once the occupation of a normative notion of personhood or citizen in society, and the use of that occupation as a context in which to evoke sympathy from a potential readership. In this context, then, when a person with whom the reader identifies encounters the abuses, contradictions, or inequities of American racial politics, the occupation has transformative potential for the racial philosophies of the reader.<sup>6</sup> I term this a “sympathetic occupational trope,” or simply sympathetic occupation—that tradition of occupying the space of the human in humanities, or the universal subject.<sup>7</sup> In works using this trope, the “self” of the text encounters its black dermis, in moments both mundane and uncanny, and the effects of that encounter illuminate the world of American race relations.

The sympathetic occupation trope does its critical work primarily through variations upon the theme of double consciousness.<sup>8</sup> The doubleness and contradictions of being both Black and American, analogically also appears as the doubleness of being intellectually a member of organized society and yet subject to lawless treatment; between culturally learned notions of civilization and being conceived of as savage; between the experience of the sacred and the profane realities of American life; even between the universal human aspiration toward freedom and American specificity and exceptionalism. The encounter between these differences is terrorizing or disorienting, and through the trouble created by the encounter the critique emerges. The denial of firmly held normative assumptions or aspirations to those in darker bodies is profoundly depicted. Fundamentally, the sympathetic occupation trope challenges the ideologies that have been used to exclude black people from the notion of “the people” in this purportedly democratic society, through identification with universals.<sup>9</sup> But more than that, it does so without sacrificing a holistic sense of black experience.

#### ENCOUNTERS WITH THE BLACK SELF: THE TERROR OF DOUBLE CONSCIOUSNESS

Throughout the African American literary tradition, encounters with the grotesqueness of the abuse of black people in the United States provide scenes of terror. We find this in “Kabnis,” the final section of Jean Toomer’s classic Harlem Renaissance novel, *Cane*.<sup>10</sup> We also see it in Sutton E. Griggs’s 1905 novel, *The Hindered Hand: Or, The Reign of the Repressionist*, in the psychological and physical torture of three characters,<sup>11</sup> and in Ralph Ellison’s *Invisible Man*, in both the Battle Royal scene and the Trueblood encounter.<sup>12</sup> The grotesqueness of racial violence, as presented through the eyes of a narrator or principal character with whom the reader has already established an identification, is particularly devastating, a bloody collision between the sense of humanity and the ugliness of race in the United States, particularly in its own “states of nature” outside the figurative city borders of civil society.

Here the DuBoisian veil<sup>13</sup> is pulled back. Ralph Ellison, as critic, posits that the revelation of life behind the veil is in fact at the very heart of the American novel. He writes, “It is by appealing to our sense of experience and playing upon our shared assumptions that the novelist is able to reveal to us that which

we do not know—that is, the unfamiliar within the familiar—and affirm that which we assume to be truth and to reveal to us his own hard-won vision of truth. In this sense the novel is rhetorical.”<sup>14</sup>

The rhetoric is full of claims that question the presumptions of Anglo-American legal and political thought. The rhetoric of sympathetic occupation is sensitive and aggressive, a “rope-a-dope.” It entices the reader’s identification through one kind of normative tool or another, only to then remind you that the self identified with is black; and this fact changes the realities we assume will play out in the narrative posed. Novelist and critic Charles Johnson argues that “each plot—how events happen and why— is also an argument. To plot well is to say, ‘this is how the world works.’”<sup>15</sup> So, for example, in Charles Chesnut’s 1901 novel, *Marrow of Tradition*, a fictional account of the events leading up to the 1898 Wilmington, North Carolina, race riot, the noble and servile Negro butler Sandy is mimicked in blackface by a degenerate white aristocrat, and falsely accused of a murder the white masquerader actually committed. It is not clear, however, that he will be exonerated, because the society is unjust. Sandy will likely be lynched, without a trial, unless a powerful figure intervenes. Chesnut thus says, about the way the world worked at that time, that without the intervention of the powerful (that is, the elites, the federal government, etc.) black people would continue to suffer under the injustices of lynch law; that the victims of lynching were often falsely accused (an idea that was not widely understood until the 1892–1894 anti-lynching campaigns of Ida B. Wells); and that the avoidance of law enforcement was often rational and self-preserving on the part of black Americans.<sup>16</sup>

Constitutional scholars Laurence H. Tribe and Michael C. Dorf note that one of the most important similarities between literature and law is that in both there is always more than one consistent ending to any given story, and “that what causes one reader to prefer one ending and another reader to prefer a different ending is not consistency in the abstract, but aesthetic value judgments of one sort or another. These value judgments are necessarily external to the text.”<sup>17</sup> That is to say, ideas of what the conclusion should be come from experience that precedes the text. In employing the sympathetic occupation trope, the external experiences are recruited to lead to a particular conclusion. The African American literary figure employs narratives or ideas that the imagined reader would have brought from external experience, and then denies them to create the sense of injustice. On another level, subsequent to the reader’s consumption of the novel, the work of fiction itself might

become an element in the kind of external value judgment that is brought by the reader to later legal interpretation. Chesnutt hoped, for example, that his writings would be read by legislators who would respond by acting on behalf of the rights of Southern blacks.<sup>18</sup>

The role that fiction using sympathetic occupation aspires to play in legal interpretation is not limited to constitutional law, or simply to general legal-theoretical principles. Regardless of the particularity of the critique, the trope fundamentally begs for a more humanist notion of law altogether, as narrative expands interpretive skill as well as the realm of sympathy. The trope, in fact, in a given text, might operate as a test of a given law, or of democracy, or of a legal presumption, providing an instructive descriptive of law in action.

### SPECIFIC UNIVERSALISM

The long-standing assertion that what distinguishes good literature is its universalism and transcendence has been critiqued from various quarters, and yet it persists in Western literary culture. I want to take the notion of literary universalism from another perspective. Rather than arguing for an objective universalism that is necessarily correlated to quality, an author may adopt the features of universalism to appeal to certain reader proclivities and beliefs as to how to measure value, or to readers' sense of what constitutes human experience. This is a perspective that conceives of universalism as a tool that might be employed in order to do certain work with a text. There are, of course, narratives in every culture that rise to what could be described as universal narratives because they are repeated, widely understood, and their conclusions are assumed as part of our collective understanding of the human condition. The employment of what is valued as literary (or popular literary) at a given moment in time is a useful device.<sup>19</sup> There are as well, however, specific features of human character, reactions, and culturally based philosophical assumptions or perspectives that I would also classify as a species of universalism that might be employed textually. These are what I term specific universals.

Within this trope, it is generally not a universal absolute self that erases race, gender, culture, class, or history, but rather one or a number of features of universal human sentiment or philosophy that can be employed to elicit reader identification. Such universals provide both intellectual and emotional links to national communities, links that are necessary to effect their own

subversions. In its work critiquing law, the sympathetic trope first requires some engagement with, and frequently endorsement of, values that are considered constitutive in the Anglo-American legal tradition to employ its strategy of critique from a simultaneous interior/exterior position.

## SYMPATHY AND EXPERIENTIAL TRANSCENDENCE

The mechanics of *sympathy* in sympathetic occupation merit further explanation. Sympathetic here means that which appeals to the capacity of the person of sensibility to obtain a concordance of feelings with another. As Burke wrote, “Sympathy must be considered as a sort of substitution by which we are put into the place of another man, and affected in many respects as he is affected.”<sup>20</sup> Hence, it is something more nuanced than simply the gut emotional response to which we colloquially ascribe the term sympathy. The literary works to which I refer train sensibility through the use of the sympathetic occupation trope. Sympathy is a critical element in the ability of the reader to occupy the experience of the other and transcend his or her own experience.

Literary theorist Terry Eagleton states that “experience is not only the homeland of ideology, the place where it takes root most effectively; it is also in its literary form a kind of vicarious self-fulfillment.”<sup>21</sup> In sympathetic occupation—the narratively executed experiential occupation of the black person in the universal space—racial ideology may be reformed, challenged, or re-conceived. Simply put, this trope has been used as a means of struggling for the application of the principles of liberty and justice substantively to the lives of black people. As Ralph Ellison writes,

It is the black American who puts pressure upon the nation to live up to its ideals. It is he who gives creative tension to our struggle for justice and for the elimination of those factors, social and psychological, which make for slums and shaky suburban communities. It is he who insists that we purify the American language by demanding that there be a closer correlation between the meaning of words and reality, between ideal and conduct, our assertions and actions.<sup>22</sup>

In the imaginative literary world, that insistence to which Ellison refers emerges through the construction of character and narrative. In addition to the more philosophical realm of universals, sympathetic occupation uses character as a means of appealing to the emotional self, a movement that is necessary for the

deeper experiential identification by readers to take place and that enriches the transformative possibilities of the fiction.

Literature is an art of appeal. It is rhetorical. It appeals to the holistic self and the spiritual self, not as an abstraction, but within the specific historical and cultural context of the literary production. Literature aspires to something that is both more compelling and deeper than what traditional legal thought will admit to, but which it nevertheless always appeals to: contingent emotional specificity.<sup>23</sup> As Larry Dimatteo has noted, the process of determining the reasonable person in the operation of law is a normative evaluation, “through the mind of the judicial interpreter.” He goes on to say, “This normative filtering has at times been described as the notion of sympathy, ‘when we sympathize with the other, we open our hearts to his or her subjective predicament, rather than our minds to his or her behavioral (objective) choices or preferences.’”<sup>24</sup> It is not a simple proposition, however, to create art that opens the reader’s hearts to a subjective predicament that is not generally his or her own, that is, his or her racial experience. To do so requires a particular rhetorical art. Charles Johnson writes that “language is transcendence. And so is fiction. They comport us ‘other there’ behind the eyes of others, into their hearts, which might make some few of us squeamish, for suddenly our subjectivity is merged with that of a stranger.”<sup>25</sup> This discomfiture, particularly with respect to merging subjectivity with a member of another social group, often creates resistance from the reader. Much of sympathetic occupation arguably has failed not because it was ineffective, but rather because it was too unpleasant for readers. Johnson goes on: “Writing, Merleau Ponty tells us in *The Prose of the World*, ‘is the trespass of oneself upon the other and of the other upon me.’” Johnson asks, “Why else do we fling books into the fire if not because in the case of great fiction, and deep within our depths, the writer is leading us in a direction which we know is inevitable but toward which we sometimes do not wish to go, especially if it will shatter our smugness, or displace us from our fondest prejudices?”<sup>26</sup>

## THE MIND AND BODY

The legacy of the Enlightenment remains with us, and sympathetic occupation is engaged in a struggle with Enlightenment conceptions of rationality and selfhood. The rational mind, posed in opposition to the irrational and

emotional body, is a persistent Enlightenment binary. Moreover, the gender and racial politics of this divide continue to haunt our culture. The female body is still regarded as the irrational one, as is the colored body. Hence the persistent description of black athletes as instinctual rather than intelligent, and women as “emotional.” Enlightenment thought reified the mind over the body and the rational over the emotional. In that period (and now through its legacy), “the suppression and distancing of the physical self became the very sign of rationality, wit and judgment . . . the grotesque physical body existed as what Macherey calls ‘a determining absent presence’ in the classical body of Enlightenment poetic and critical discourse, a raging set of phantoms and concrete conditions to be forcefully rejected, projected or unacknowledged.”<sup>27</sup>

The physical self to be rejected, projected, or unacknowledged is, in American legal history, the black self. The 3/5ths clause haunts the Constitution as the headless ghost of the black worker, represented by her thinking white master. Thomas Dixon and the early twentieth-century Columbia school of historiography portrays Reconstruction as a grotesque spectacle of corporeal, irrational, and chaotic occupation of government by black people and their vicious manipulators, the Radical Republicans. The persistent notion, after Emancipation, that black people were not rational beings at all, but rather objects to be worked—property not the propertied—was a pernicious extension of both Enlightenment thought and plantation ideology. Postcolonial theorist Radhika Mohanram has argued persuasively that notions of property are embedded in the construction of race and the rational self. She writes:

It is in its function in the interstices of ontology and political philosophy that the body becomes property. If body is property, the differential capacities of individuals are marked onto the body itself. The kind of ‘man’ you are is visible at a glance. Property grants invisibility—an ideal—to the body and poverty makes it visible. Poverty therefore is to be abhorred within liberal democratic discourse as it draws attention to the body. For the rich white man the mind spills over into the body, making it disappear altogether; for the black and/or poor man, it is the body that is highlighted.<sup>28</sup>

In the sympathetic occupation trope, the philosophical and the emotional are both employed as means of nurturing reader identification and what follows, social and political transformation. Analogously, both the mind and body are united, challenging the relegation of the black self simply to the physical and emotional, and yet resisting the urge to reject emotion and physicality as

irrelevant to political and legal questions, particularly given the centrality of the body in racism. In this trope, the correlation between the rational self and the white self is dismantled. The black subject is the transcendent one, and the thinking one. But to be the transcendent figure does not mean a mere occupation of the rational self. The sympathetic occupation trope, in its holism, challenges both the racial politics of Enlightenment notions of rationalism, and the divide between mind, emotion, and body. Therefore it is a more compelling rhetorical device than that to which much of law presumes, the purely rational self.

Much of the writing employing the sympathetic occupation trope, in fact, wrestles directly with Enlightenment conceptions of mind/body, white/black distinctions, and their role in suppression and exclusion in American culture and history. Literature that has treated the history of black individuals “passing” for white has done so by exploring the immersion of the black self into the white body-world. Others use geographies of aboveground and underground, or dark space and light space, to metaphorically express the Enlightenment binaries. For example, in Richard Wright’s “The Man Who Lived Underground,” underground darkness is a Kafkaesque metaphor for the abyss-like black encounter with the criminal justice system.<sup>29</sup> The darkness motif might also be a “you-can’t-see-me” assertion of the reality of the intellectual self being hidden by the meaning of the black body in this society—a description of the veil, or rather a retreat behind the veil itself. Ellison’s invisible man retreats underground into a space we imagine is dark, but which is, subversively, full of light due to his rigging of electricity, a profound metaphor. The space which is imagined as being without light (lightness is, of course, a metaphor for Enlightenment thought), because it is beyond our material world, is in fact light-filled. W.E.B. DuBois used an alternative theoretical model to contest Enlightenment divisions of mind and body in the classic *Souls of Black Folk*.<sup>30</sup> Goethe’s *Sturm und Drang* movement was a useful model for DuBois, a celebration of a robust Promethean humanism in contrast to Enlightenment rationalism, one in which the mind and body could coexist harmoniously, or at least interdependently.

In confronting presumptions of the rational self in American jurisprudence, the sympathetic occupation trope requires that the body politic and social realities of those experiencing racial injustice be fully engaged. For example, in the second decade of the twentieth century, the preeminent legal realist Justice Oliver Wendell Holmes, as a member of the United States Supreme Court,

responded with hostility to the majority Court's decisions in response to the phenomenon of debt peonage in the American South; decisions that declared unconstitutional a number of Southern laws criminalizing the breach of labor contracts, and related legislation. In *Reynolds v. U.S.*, 235 U.S. 133 (1914), the Court invalidated an Alabama statute which provided for surety arrangements that would allow a third party to intervene and pay off the debt incurred by breach of the contract.<sup>31</sup> This third party would then become the employer of the (usually) black agricultural worker. One of the features of the surety system was that frequently the surety arrangement would result in a period of forced labor for the breaching party that would be longer than the prison sentence for contract breach.<sup>32</sup> As a result of brutal treatment, the workers would often leave this work as well, return to court for another breach, and therefore be trapped in a cycle of forced labor. In two previous peonage cases Holmes had dissented, but in *Reynolds* he surprisingly concurred; however, he didn't fail to express his disdain for the decision. With condescension he wrote:

There seems to me nothing in the 13th Amendment or the Revised Statutes that prevents a state from making a breach of contract, as well a reasonable contract for labor as for other matters, a crime and punishing it as such. But impulsive people with little intelligence or foresight may be expected to lay hold of anything that affords a relief from present pain, even though it will cause greater trouble by and by.<sup>33</sup>

He describes these black laborers as lacking in intelligence and foresight. So, he says implicitly, although there is nothing legally wrong with the statute, they must be "protected" from their own stupidity. It is in some ways the flip side of his earlier dissent in *Bailey v. Alabama*, 219 U.S. 219 (1911), in which he advocated absolute freedom of contract and the constitutionality of criminal punishment for breach if parties had willingly agreed to a contractual relationship that might lead to their imprisonment if they breached the agreement. In both cases, Holmes neglects to consider the workers as those possessed of intelligent citizenship capacities, rather, in one he wants to punish the perceived intellectual failure, and in the other, to protect against it. *Reynolds* is suggestive of an eugenicist theory with paternalist policy.

In contrast to Holmes's analyses, literary examples ranging from the novel *The Colonel's Dream* (1905) by African American novelist, lawyer, and legal stenographer Charles Chesnutt, and the novels *A Fool's Errand* (1879) and *Bricks Without Straw* (1880) by the white Radical Republican judge, novelist,

and lawyer Albion Tourgee,<sup>34</sup> demonstrate that the choice to accept surety rather than a short sentence was not irrational, but rather desperate and self-preserving. The conditions of the overwhelmingly black convict labor camps to which these workers would be sent if convicted and unable to pay fines were so terrible, disease-infested, and brutal, that to go to one was to risk one's life. Therefore, to prefer a longer sentence on a small private farm was a reasonable decision, although a decision made under duress. The characters in Chesnutt and Tourgee's work who confront these choices are noble, intelligent, and hard-working people with whom the readership is encouraged to identify, and who are denied any fulfillment of the American dream as a result of racism.

In contrast, in *American Siberia: Twenty Years in a Georgia Convict Labor Camp* (1891), J.C. Powell describes the horrible conditions of the convict labor camps in vivid detail, mimicking George Kennan's popular journalistic descriptions of Siberia as a Russian prison colony.<sup>35</sup> However, he interprets these conditions as the necessary consequence of dealing with grotesque and animalistic black prisoners.<sup>36</sup> Therefore, the literary depiction of the potential convict laborer as a thinking, emotional person in the work of Chesnutt and Tourgee, among others, challenges both flawed legal interpretation, as in the thought of Holmes, and the racist construction of black criminality and animalism, as in the work of Powell.

The inadequacies of litigation remedies to complex racial problems, of which debt peonage was merely one example, are treated in other manners by the sympathetic occupation trope. In the final story in Jean Toomer's *Cane*, Kabnis, the title character, a Northern Negro teacher at a historically black college in Georgia, is the vehicle for the sympathetic occupational trope. His alienation from the South, and the assumptions he makes about rules of class and law, having come from the North, provides the sympathetic space through which the encounter, or collision, with black reality occurs. He is roundly disabused of his sense of how the world works. Kabnis is told in conversation, to his surprise, that being an elite Negro, a gentleman, and an upstanding citizen, will provide him with no safety from lynch law. It is not the distinction between law-abiding and criminal, but rather black and white, that matters. Kabnis responds to the information by commenting, "Things are better now though since that stir about those peonage cases, aren't they?" The response he receives is: "Ever hear tell of a single shot killin moren one rabbit, Professor?"<sup>37</sup>

The constitutional interpretation of specific types of effectively racist labor contracts, and the Court's striking of those laws that were deemed unconstitu-

tional, was clearly inadequate to address the panoply of racial problems, rooted in culture and economics. One of those problems, as Kabnis terribly learns, is that for black people, law did not provide its fundamental function of shaping useful expectation, which was, after all, Holmes's central argument for the purpose of legal objectivity. Kabnis learns that in the early twentieth-century South, black people were extremely vulnerable, even with hyper-vigilance and good behavior. The discomfort of losing the ability to anticipate consequence is passed onto the reader through the awkwardness of Kabnis. Most dramatic is the evidence that Kabnis witnesses, and the reader witnesses through Kabnis, of the kind of brutality meted out to black people in Georgia. The absolute mutilation of the bodies of black people, brutal lynching, a baby cut out of a woman's belly and then murdered, and more. The text screams at us, "This problem goes much farther than contractual interpretation!"—rather, it is a question of the interpretation of the social contract, not simply the specific contract. Simply addressing the law of contract, as the character Halsey says, is like throwing a brick in a hornet's nest.<sup>38</sup>

The legal commentary and critique we find in the trope of sympathetic occupation is various and abundant. In the second half of this article I will turn to give examples of several types of legal critique in this trope. As a body of critique, it is far broader than what is discussed here: it is both procedural and substantive, it is specific and general, at times it is a critique of linguistic interpretation—words of law as it were—and at other times it is a critique of abstract conceptions unnamed but well known.

## LOCKEANISM

*Every man has a property in his own person. The labor of his body and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature has provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property.*

—John Locke<sup>39</sup>

One of the most abundant forms of critique in sympathetic occupation is responsive to Locke's concept of labor desert, and specifically treats the denial of both the property value in one's own labor and the failure to reap the fruits of one's labor in black experience. In the poem "Fifty Years," commemorating

the fiftieth anniversary of the Emancipation Proclamation, James Weldon Johnson adopts a Lockean labor desert sense of land ownership, a basic precept of American culture, and applies it to black American experience.

This land is ours by right of birth,  
This land is ours by right of toil;  
We helped to turn its virgin earth,  
Our sweat is in its fruitful soil.<sup>40</sup>

The land, in Weldon's lines, is owed to black people in exchange for the generations of labor and cultivation.

To gain these fruits that have been earned,  
To hold these fields that have been won,  
Our arms have strained, our backs have burned,  
Bent bare beneath a ruthless sun.<sup>41</sup>

Weldon goes on to mention the Revolutionary War figure, Crispus Attucks, adding to the labor desert sensibility an image of black citizenship at the moment of national formation, the primordial black citizen as it were. He wrote this poem in the midst of a period in which debt peonage and convict labor camps were prevalent, and Jim Crow had been firmly established. The federal government had failed to respond adequately to the exclusions from public and private law and the extralegal violence visited upon African Americans. Weldon, however, nevertheless appeals to the Lockean expectation, which it provides an opening for the occupational critique. Even as the individual's aspiration is denied, because of race, the intellectual and emotional self occupies that very American space of the person of property.

Arna Bontemps similarly uses the labor desert sensibility, that of the man of property and the hard-working self-made man, to make his appeal, but he uses the first-person voice, thus furthering the possibility for a reader to identify with the black subject. He writes of spending a lifetime sowing:

I scattered seed enough to plant the land  
In rows from Canada to Mexico  
But for my reaping only what the hand  
Can hold at once is all that I can show.<sup>42</sup>

This is clearly an invocation of the realities of debt peonage and a metaphor for the exclusion from the American Dream of the self-made man as farmer. He concludes:

Yet what I sowed and what the orchard yields  
 My brother's sons are gathering stalk and root,  
 Small wonder then my children glean in fields  
 They have not sown, and feed on bitter fruit.<sup>43</sup>

Countee Cullen hopefully writes in "From the Dark Tower," "We shall not always plant while others reap" and "in the dark we hide the heart that bleeds, And wait, and tend our agonizing seeds."<sup>44</sup> Even Jean Toomer's *Cane*, which places enormous significance on the earth with respect to Southern blackness, invokes the important relationship between the worker of earth and the earth itself, in the understanding and expression of the human self. The haunting song he hears in the night, a refrain throughout the text, beginning while he rests in bed, is an announcement:

White man's land,  
 Niggers sing.  
 Burn, bear black children  
 Till poor rivers bring  
 Rest, and sweet glory  
 In Camp Ground.<sup>45</sup>

Noteworthy is the doubleness of till in this song. Toomer writes it "till," rather than "'til," suggesting tilling the white man's land, a dangerous dispossession. These black people will till (un)til death and resurrection, "In Camp Ground."

Philosopher Bernard Boxill argues that Frederick Douglass used Locke as well, in particular Locke's argument that laws frequently keep people in moral ignorance and separate from the sense of fulfillment provided by reason. Despite the fact that Locke failed to extend this element of his thought to the enslaved, Douglass applied it to slavery, writing that "to enslave . . . it is necessary to have their minds occupied with thoughts and aspirations short of the liberty of which they are deprived." According to Douglass, "the very submission of the slave to his chains is held as evidence of his fitness to be a slave, it is regarded as one of the strongest proofs of the divinity of slavery, that the Negro tamely submits to his fetters."<sup>46</sup> Similar to Locke, Douglass argues instead for a reasoned and moral foundation to the creation of law, and

that the correlation between work, the self, and production is at the heart of the creation of property as a legal institution.

In Toni Morrison's contemporary novel depicting slavery and its aftermath, *Beloved*, the sense of labor desert as tied to self-fulfillment, property, and reason are engaged as well.<sup>47</sup> The plantation from which the central character, Sethe, escapes is referred to as Sweet Home. In the days before the abusive master, School Teacher, the original master, Garner, created an exceptional environment for the enslaved. They were treated as thinking beings, contrary to the traditional reality that "if a slave ever ventures 'to vindicate his conduct when harshly and unjustly accused' or suggests 'a better way of doing a thing, no matter what,' then he must be whipped for being impudent and officious."<sup>48</sup> The Sweet Home men were treated as men by Garner, "Allowed, encouraged to correct Garner, even defy him. To invent ways of doing things; to see what was needed and attack it with permission."<sup>49</sup> The Sweet Home men had a sense of the exchange value of their intellectual and physical labor. In Frederick Douglass's *Narrative*, he writes, "you have seen how a man was made a slave, you shall see how a slave was made a man,"<sup>50</sup> locating his emancipation not with his arrival in the North, but in the moment he refuses to be treated as chattel any longer. This has been referred to as Douglass' "chiasmus" in African American literary criticism.<sup>51</sup> Morrison creates a reverse chiasmus, in which at first you see how a slave is made a man (when master Garner allows his slaves to earn wages and make decisions, and have independent farms) and then how a man is made a slave (when all that is taken away following Garner's death). The fragility of any freedom they experienced is heartbreakingly clear.

While Lockean thought is formative in American legal thought, it nevertheless occupies more of a philosophical or theoretical space. Sympathetic occupation, however, has addressed that which is more explicitly legal. One such area has been that of constitutional interpretation and the experience of African American citizenship.

## CONSTITUTIONAL INTERPRETATION—FORMATIVE CITIZENSHIP

In post-Emancipation African American literature, much of the constitutional interpretation concerned the question of national and local citizenship. According to commentary in the post-Civil War era, black people validated their

citizenship when they fought valiantly in the Civil War.<sup>52</sup> Douglass wrote himself into the Constitution by describing how a “slave was made a man” and therefore a subject recognized by law.<sup>53</sup> Paul Laurence Dunbar recounted the en masse movement of black people into the position of constitutional subjects through their valor during the Civil War. In his “The Colored Soldiers,” the narrative voice uses the heroic tale as a means of articulating how black soldiers fought their way into citizenship.<sup>54</sup> He writes:

They were comrades then and brothers  
 Are they more or less today?  
 They were good to stop a bullet  
 And to front the fearful fray.  
 They citizens and soldiers  
 When rebellion raised its head;  
 And the traits that made them worthy,—  
 Ah! Those virtues are not dead.<sup>55</sup>

For centuries, narratives of military valor have invoked admiration and the imagined grandness of the military hero. Dunbar used this narrative style to entreat his contemporary Americans to see their colored brothers as fellow citizens. In particular, he powerfully invokes the bearing of arms in the military as a symbol of consent to national membership. Even though African Americans were legally citizens following the Civil War, the struggles over their actual acquisition of complete citizenship rights would continue to be waged for the better part of the following century. In the years following Emancipation, authors such as Dunbar and Douglass used their texts explicitly to argue for guarantees of a more robust notion of citizenship for African Americans. Charles Mills, in analyzing Frederick Douglass’s notion of constitutional original intent in the pre-Emancipation era,<sup>56</sup> notes the sympathetic occupation trope in his Fourth of July speech, saying,

In recounting the official white narrative [of the Fourth of July] Douglass may, if only for the duration, pretend to an honorifically colorless civic status. But the problem is that he is both a part of and apart from his “fellow citizens,” being a black American, a walking oxymoron, an unacknowledged child from the slave quarters who cannot legitimately speak of our white fathers. . . . The illusory inclusiveness of abstract, colorless “citizens” is thus thrown off, and Douglass unequivocally adopts what in contemporary vocabulary would be called the epistemological standpoint of race.<sup>57</sup>

Mills describes Douglass's use of the techniques of reversal adopted from the enlightenment rhetoric of Locke and the Founding Fathers, and from the cadences of William Lloyd Garrison and Daniel Webster: "The 'antithetical prose style' of eighteenth century England . . . is a matter not merely of style and oratorical flourish but of calculated dialogical techniques of reversal."<sup>58</sup> Literary scholar Robert Stepto describes the self-liberation process in Frederick Douglass's work of fiction, *The Heroic Slave*. This historical fiction is about a character named Madison Washington, leader of a ship revolt in Virginia. Stepto argues that Douglass uses the theme of doubleness with respect to Virginia, the land of heroic statesmen and the unsung Negro hero alike, and with respect to the naming of his hero. Stepto refers to this as a useful artmaking that liberates the hero from the "chattel records" to the realm of heroic freedom.<sup>59</sup>

Both Mills and Stepto have observed sympathetic occupation in the literary production of the man who has been deemed "the father of African American literature," and have observed him apply it through the use of constitutional jurisprudence. This constitutional focus would extend throughout the African American literary tradition, if for no other reason than that the document itself is so central to American identity. Ralph Ellison writes of the Constitution, "I look upon the Constitution as the still vital covenant by which Americans of diverse backgrounds religions and interests are bound. They are bound by the principles with which it inspires us no less than by the legal apparatus that identifies us as a single American people. The Constitution is a script by which we seek to act out the drama of democracy and the stage upon which we enact our roles."<sup>60</sup>

For African Americans, entrance into the body politic was arduous, and the Civil War amendments would become the symbols of citizenship and its denial from the late nineteenth through the twentieth century. Moreover, these amendments resonated beyond the specificity of race, to the nature of our citizenship and constitutional rights in general. They were at the center of twentieth-century American jurisprudence. As Guyora Binder writes,

[T]he legitimacy crisis which American legal scholarship has struggled with for the better part of a century is not occasioned by the resistance of language in general to interpretation. It is occasioned by the resistance to interpretation of the Civil War amendments in particular. Its roots are in enduring cleavages to American society and politics and its challenges are political rather than technical. If literary theory is to help us meet these challenges, it must do so in, not in the place of, politics.<sup>61</sup>

Hence the interpretive strategies of African American literature, engaged in for the sake of ensuring African American rights, actually speak to the problems of constitutional interpretation as a whole.

The African American literary tradition of the late nineteenth and early twentieth century was replete with what I have termed “racial twinning” narratives,<sup>62</sup> which were powerful means of critiquing American law. These narratives used the literal division of the segregated railroad cars as a metaphoric departure for narrative descriptions of the distinction between the promises of the Civil War amendments—equal protection, suffrage rights—and the reality of black American experience. In these racial twinning stories, characters on opposite sides of the color line were “twinned,” bearing the same name, or sharing a parent or physical appearance. The course of their lives, however, diverged dramatically as a result of which side of the color line they occupied. Frequently a train scene, with one of the twins in the white car and the other in the colored car, heralded this bifurcation. Moreover, generally the Negro heroes and heroines of these works were ideal citizens, physically beautiful and morally superior to their white twins, thus making the denial of their rights all the more egregious.<sup>63</sup> These novelistic accounts put the lie to the figment of separate but equal, and demonstrated the denial of the abstract ideals of a just society that the Civil War brought to the Constitution. Ralph Ellison noted that the inconsistency between the acts of racism and the professions to equality “made for a split in America’s moral identity that would infuse all of its acts and institutions with a quality of hypocrisy. Worse, it would fog the American’s perception of himself, distort his national image, and blind him to the true nature of his cultural complexity.”<sup>64</sup>

While racial twinning stories have been one means of exposing the hypocrisy of constitutional promises, in African American literature another has been the embodiment of the figure of justice herself. In Melvin Tolson’s poem, “Ex-Judge at the Bar,” a judge sitting at a bar (of course “bar” is a double entendre here) reflects upon his career as an executor of injustice, and refers to Pilate’s judgment against Christ as a “Caesarean precedent,” one which he followed. Atop the bar upon which he sits, the late Justice appears, removes her blindfold, and says,

To make the world safe from Democracy,  
 You lost a leg in Flanders fields—oui oui?  
 To gain the judge’s seat, you twined the noose  
 That swung the Negro higher than a goose.<sup>65</sup>

When justice removes the blindfold, vision of injustice is actually possible. Just as the veil is an obfuscation, so is the blindfold. “Blind justice” is not a positive, but rather a means by which hypocrisy is facilitated. The metaphor of a blind Justice who hides reality is a subversion of Western blind idealism, arguing instead that such a neutral principle might mask the true. In another play on the figure of Justice, Langston Hughes’s Justice wears a blindfold as a bandage over her wounded eyes.<sup>66</sup> The sight of the world has offended her sensibilities. Again, blindness is no romantic trait.

Jim Crow was the most dramatic public manifestation of the failure of constitutional interpretation following the Civil War amendments. Homer Plessy, the plaintiff in *Plessy v. Ferguson*, 163 U.S. 537 (1896), attempted to argue at one and the same time that the property rights he had in his reputation as a white man were denied by the Louisiana separate cars statute, and that the creation of the distinction according to race to which he was subject was unconstitutional. He argued with his one body on both sides of the color line, in an effort to challenge the legitimacy of segregation. This strategy did not cease with the failure of Plessy’s litigation, however. Passing fiction in the African American literary tradition similarly recounted standing on both sides of the color line as a means of challenging normative assumptions of American citizenship as possessed only by white people. This genre flourished during the Harlem Renaissance.

Nella Larsen’s novel, *Passing*, included two characters who articulated both the danger and instability of the color line with their ambiguous “passing” bodies, as did the biracial character, Helga, in her novel *Quicksand*.<sup>67</sup> She wrote in a period in which the color line flourished in both North and South: in the South with public segregation, in the North with racial covenants and widespread acts of violence meted against African Americans who breached informal practices of residential segregation.<sup>68</sup> These characters move across the boundaries, questioning and threatening but also being threatened by the tension between the cultural self and American ambition. Larsen explores the exhaustion of trying to adhere to earlier bourgeois African American literary and social strategies of being ideal citizens, and in so doing Larsen actually creates her own brilliant strategy for articulating the humanity of black women, and of course both the instability—and dangerousness—of legally prescribed racial boundaries. Thus like Plessy, this work puts lie to the ideology of Jim Crow.

In general, the Harlem Renaissance heralded broader cultural exploration and celebration, which introduced readers to more sophisticated descriptions

of black American cultural life than ever. I do not, however, regard this as being somehow weaker than the assimilationist occupation that we found in much of earlier black literature; rather, if we use Hortense Spillers's idea of the distinction between flesh and body—where body represents the “corporeal object which not only labors but is disciplined and tortured. Flesh on the other hand can be understood as that which holds, channels and conducts cultural meanings”<sup>69</sup>—we can see a dimension added where the black self internally can be articulated as fully black without accepting the Enlightenment notions of the black body in opposition to the rational or even complexly emotional self. The black self also responds with emotion to the insult of Jim Crow, as Marita Bonner so elegantly states in her essay “On Being Young, a Woman, and Coloured.” “In Heaven's name, be bigger than they are: exhort white friends who have never had to draw breath in a Jim Crow train, Who have never had petty putrid insult dragged over them—drawing blood-like pebbled sand on your body where the skin is tenderest, On your body where the skin is thinnest and tenderest.”<sup>70</sup>

## PRIVACY, PROPERTY, AND CONTRACT

There are numerous examples of the use of sympathetic occupation to respond to private law issues. Certainly, in Frederick Douglass's *Narrative*, his exercise of freedom of contract once he hires himself out is part of his articulation of freedom. Douglass is devastated when he is prohibited from entering contracts any further by his master, who believes that his slave has become too independent. In African American literature, breach of the individual labor contract is often a metonymic representation of the breach of the social contract against African Americans. Or, contract might be symbolic of deeper affiliations. In Charles Chesnut's short story, “The Partners,” the notion of contract maintained by two newly emancipated men is one inherited from slavery, such that it takes on a filial nature, and yet it is in a sense a way of articulating an enduring social relationship, not unlike marriage, that could bind black people together, a dramatic contrast to the filial uncertainty in slavery, when families were routinely sold away from each other.<sup>71</sup>

For much of black women's literature, that filial uncertainty also takes shape in notions of privacy held by Anglo-American legal philosophy. A song-poem in Toomer's *Cane* engages another kind of filial possessory relationship made strange by race in the South: he intersperses the words of “Rock-a-Bye-Baby”

with a description of the black mother with the white child. Because she doesn't carry her own child, it is a skewed Madonna and child.

Rock a by baby . . .  
Black mother sways, holding a white child at her bosom.  
When the bough bends . . .  
Her breath hums through pine cones.  
Cradle will fall . . .  
Teat moon children at your breasts,  
Down will come baby . . .  
Black mother.<sup>72</sup>

The threat of rape, analogically related to the lack of domestic privacy and the necessity of domestic privacy in maintaining the integrity of the mother-child bond, is present throughout black women's history. Thus, in Harriet Jacobs's slave narrative, *Incidents in the Life of a Slave Girl*, the author employs the philosophical models of middle-class white femininity in order that the reader might understand the outrages against the black female body during slavery.<sup>73</sup> In *Beloved*, the central character, Sethe, is raped by a group of white young men who "steal her milk" while she is still nursing her youngest child. The horror of this violation, along with the other breaches of privacy that slavery allows, leads her to kill her children when she is threatened with their return to slavery by the implementation of the fugitive slave law. The property that the former slaves have obtained, in the form of the house, proves inadequate protection from white supremacy, and Sethe responds with violent self-protection. Only in death does she imagine her children could be safe.

Lorraine Hansberry's *A Raisin in the Sun* is another work in which private space and private law are the subjects of legal critique.<sup>74</sup> The Younger family aspires to the American ideal of home ownership. The domestic space is a metaphor for fulfillment, as it is in American popular culture as a whole. The deferral of the dream of that domestic space occurs as a result of racially restrictive covenants. Hansberry's subject refers to *Hansberry v. Lee*, 311 U.S. 32 (1940), a suit brought by her father against a racially restrictive covenant in Illinois. In the play, Hansberry replaces her own middle-class family with the working-class Youngers. It is not exceptional blacks that the viewers are to identify with, and whose heartbreak and injustice they experience, but regular working-class black people as representatives of a community excluded from the American dream.

## PROBLEMS WITH THE THEORY OF SYMPATHETIC OCCUPATION

As Leonard Harris has noted, “The beings that often inhabit works of philosophy are presented as real beings for our emulation. If the practices and reasoning of such beings are believed manifestations of their traditions, their traditions stand for the collective being of those with right dispositions, right thinking, and practices that make possible right choices.”<sup>75</sup> Harris’s comment is instructive for this work. Sympathetic occupation is a device for making certain kinds of interpretive claims about what is just, and this necessarily is risky for two reasons. First, sympathetic occupation is a mechanics not a conclusion, and therefore nothing requires that it will be put to humanitarian, egalitarian or anti-oppressive use. Second, in the process of creating the means for sympathy, values that are exclusionary and inhumane might be validated. In the African American literary tradition, I would argue that both the biases of the literary class and the employment of the mechanics of sympathy have led some authors who use sympathetic occupation to lend ideological support to classisms, sexism, nativisms or bourgeois notions of value.<sup>76</sup> This is a frequent phenomenon in the “politics of respectability”<sup>77</sup> fiction of the late nineteenth and early twentieth century in which ideal-citizen, virtuous, middle-class characters, frequently white-looking women, are presented as racial representatives. Often in these texts a class-based distinction is drawn between the respectable and lawful and the lawless and unruly, cutting through the color line. Dr. Miller, Chesnutt’s hero in *Marrow of Tradition*, argues that there should be a better distinction than race for drawing lines for the purposes of segregation on trains, and implies that might be social class.<sup>78</sup>

The resort to other sorts of social biases in the process of sympathetic occupation employed for racial justice, is a likely but not necessary consequence of a trope which appeals to certain normative conceptions of citizenship in order to subvert others.<sup>79</sup> Moreover, at times it has had as part of its strategy an authorial and/or narrative de-racialization that at the very least complicates the project of locating authoritativeness in black experience. However, on the other hand, an absent but implied author and/or narrator might themselves have constructive and instructive ambiguity.

Critical race theory (CRT) scholarship exposes a problem with sympathetic occupation: its reliance upon Enlightenment ideals and the tradition of liberal thought, even as it attempts to challenge the racism embedded within those

traditions. CRT scholars have critiqued the liberal model's use of Enlightenment-derived conceptions of rationality, humanism, and the like, and been critical of its imposition of norms that privilege whiteness and maleness and upper class status. It is undeniable that sympathetic occupation invests in some ideals of liberal thought, and therefore there is the potential that the practice constitutes an investment in the mechanism by which black Americans have been dominated. My response to such danger is that, notwithstanding, it retains strong liberatory potential. On multiple levels the trope engages in a deconstruction of some of the binaries of liberal thought: emotion and reason, mind and body, state of nature/civilization, and black/white. Race and identity groupings are interdependent and mutually constructed. Appealing to the universal—that which is normally the province of the master class, the class that shapes the master norm<sup>80</sup>—and making the universal experience encounter the specificity of racism and otherness, at the very least exposes the dialectic of racial construction, and at best challenges it for the reader. Moreover, the linguistic meaning-making of civil society in these texts is occupied by those encased in black bodies, destabilizing the role of the “other” against which the normative citizen is traditionally defined. It thereby is disruptive (and redemptive) of the cultural logic of legal discourse.

Even if the subversive potential of sympathetic occupation is met, there is still an oppressive dimension to the practice, resulting from the coercive nature of ideation in a racially stratified society. I believe the story of Ellen and William Craft has significant symbolic resonance here. Ellen and William Craft were an enslaved couple who escaped to freedom. The light-skinned Ellen donned the attire of a white gentleman, passing race and gender lines, and pretended to be her husband's master. They traveled by train and boat to freedom. The Crafts subterfuge was clever and successful, but in order to enact it, they were forced to pantomime the very structure of their oppression. She occupied the role of white male privilege, and he enslavement, to trick all parties surrounding them and thereby obtain freedom.<sup>81</sup> Sympathetic occupation is similarly situated tricksterism; the writer is coerced into an appeal to universalism as a feature of liberal thought in order to assert her humanity.<sup>82</sup> But perhaps rather than describing the practice as a performance, we should see it as an exercise in translation, articulating black humanity in the dominant code. Only in “American” language might black subjectivity be intelligible to an American readership.

Another problem with sympathetic occupation is that the trope has been

employed in imperialist fantasies about developing nations, as in Sutton Griggs's *The Hindered Hand* (1905).<sup>83</sup> Additionally, it continues to include the frequent celebration of American exceptionalism, even as it exposes the hypocrisies of American rhetoric. The limitation of American language is felt in these texts with respect to developing nations and also in the silences (often the most horrific, uncanny, and absurd features of black experience) that are lost in translation; and in the fragmentation of holistic black hermeneutics for the sake of argumentation.

Sympathetic occupation has been and will continue to be a powerful trope for legal, social, and political critique in this culture. However, it should be critiqued as it critiques, acknowledging that tools for social transformation might be useful even as they are forged in the dominant epistemological universe.<sup>84</sup>

## CONCLUSION

I want to return for a moment to the strategy of idealized citizenship as one of the manifestations of this trope, because the lived and theatrical corollary to that literary device became extremely important during the civil rights movement. At that time, televisions across the country and world shared narratives of clean-cut, conservative black students, domestic workers, children, and others, simply seeking to enter into public spaces, who were confronted by wild, vicious, and out of control white mobs. While the black individuals were breaking the law, the image of lawlessness belonged to the white mob. This strategy was identical to that present in much argumentative realist black literature, in which Jim Crow was unjustly inflicted upon ideal black characters, regardless of the declared legality of Jim Crow. Civil rights protest as a political strategy, among other things, was a call appealing to a white Northern viewership, not unlike the literary call to white Northern readership in early African American literature. Both were demands for the strengthening of national citizenship and democratic ideals. The sit-in, however, was as something embodied, a living, radical reinterpretation of the Civil War amendments—defiant and brave. It was the sympathetic occupation trope in its most elegant political moment, a literal occupation of white space, that would be followed by various sorts of occupations of conscience, of buildings, of rights. The political theatrical extension of this moment was found in the Oakland Black Panthers' celebration of the Second Amendment by bearing arms. They posed poignant

questions to the civil rights revolution: “How far is my citizenship status, my right to dissent as a citizen, going to carry?” And, more importantly to the self-proclaimed revolutionary, would they, like the colored soldiers of the Civil War, use the right to bear arms to free themselves?

In the post-*Brown*, post-civil rights era we have found new struggles with the Civil War amendments, namely the backlash against affirmative action and other civil rights gains, and the racial politics of the system of criminal law enforcement. In the context of affirmative action, philosopher Robert Westley argues that in the process of validating claims of “reverse racism” and the anti-affirmative action moves of American courts, the racialization of white people has actually been exercised without attention to continuing racial power imbalances. According to Westley, white normativity is never threatened, remains as strong as ever, and is not included in the calculus of evaluations of color-conscious actions.

[C]urrent hegemonic interpretations of equal protection have led to the racialization of white Americans in a historically unprecedented way . . . the equal protection rhetoric that places affirmative action in jeopardy and questions its constitutionality, concurrently displaces whiteness from a positive of normativity by racializing it . . . The transformation of whiteness from a position of normativity to the racial margin, however, is merely doctrinal. White normativity persists, rearticulated as a social ideal of colorblindness and equality of opportunity. Moreover, because of the persistence of even racialized white normativity, state racial policy, under the banner of colorblindness and equality of opportunity, can now be formulated without appearing to be racial at all.<sup>85</sup>

This reality is found not only in the context of affirmative action, but also in many areas of American culture, including drug sentencing, regulations of public housing, the welfare system, the foster care system, and more.

Gary Peller argues further that this normativity relies heavily upon the notions of objective standards, those of worthiness, that are imagined as superior to race consciousness. He writes that “integrationists, organizing their perception of racial justice around images of objectivity, rationality, and neutrality, never considered whether this language for distinguishing the worthy from the unworthy itself might serve to help justify racial domination.”<sup>86</sup> It has come to pass that notions of worthiness continue to be racialized without claiming to be, thereby putting a blindfold on society which hides the persis-

tence of racism and racial injustice. In the literary realm, the work of authors such as Gayl Jones,<sup>87</sup> Toni Morrison,<sup>88</sup> Edwidge Danticat,<sup>89</sup> and David Troutt,<sup>90</sup> who embrace the occupation of lives which are deemed by the society at large as belonging to the “less worthy” because of their class, or criminal behavior, or mental illness, or illegal immigrant status, and so forth, become critically important. It is not simply race, but the codes for race that must be revealed, challenged, and struggled over in the contemporary critical work of “sympathetic occupation.” The characters created by these authors and others argue that we adopt a sensibility for the experience of those who do not adhere to the standards of dominant society, or perhaps even to the mainstream of communities of color. These works argue that such persons have something to tell us as well about legal norms, their fallibilities, their necessary revisions, and, most importantly, about grace as a social aspiration.

Michelle Cliff dramatically suggests that today the DuBoisian veil separates not simply black and white, but the imprisoned and the free:

I got brothers and sisters in prison,  
All across the USA,  
Yes I got brothers and sisters in prison,  
All across the USA  
Some folks broke the rules  
Others just been put away.<sup>91</sup>

And so legal scholars are called by the literature not simply to discuss the policies related to criminal law enforcement, but rather to use sympathetic occupation to deepen understanding of the lives of those behind the veil, in prison, in poverty, and otherwise excluded and marginalized. Perhaps the next social movement will, similar to the civil rights movement, actively animate the sympathetic occupation of those who are marginalized and reviled.

This trope is consistent with much of the work in critical race theory, particularly that which uses the law professor’s racialized experience as a space of critical subjectivity. The narrativity of experience and identity that is a feature of CRT that has been much criticized by those without is, in fact, often a practice of sympathetic occupation. In addition to the philosophical imperative involved in using narrative, the rhetorical power of narrativity has assisted CRT scholars in putting forward new interpretations of law. The lawyering frameworks of argumentation, hypotheticals, and problem solving, are the

“universals” of the legal profession appealed to in CRT,<sup>92</sup> and yet the fallibility of legal process is exposed with stories of the absurdity, abuse, and illogic faced by the legal thinker of color.

While teaching a course in critical race theory, I noted that students appreciated the practice of personal storytelling in CRT. They said it was a good practice, it “made them identify with the writer,” or it made them capable of imagining how the writer felt, and thus had enormous rhetorical power. Hence, while CRT provides useful philosophical challenges to the African American literary tradition as a political tradition, the trope herein described provides a mode of analyzing CRT as well. To the extent that narrative has been understood as key to a plethora of critical legal approaches in recent years, especially law and literature, sympathetic occupation stands at the crossroads of critical approaches because it suggests a way of thinking about how narrative has been used and how to use narrative, as a site of critical inquiry. It might even suggest something about canon formation for lawyers. If we argue that lawyers should be familiar with some literary works or traditions, doesn’t sympathetic occupation provide at least one compelling idea of what lawyers might learn from the literary about how to think about the law, its operation and its impact on individuals and racial communities?

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1. Robert Hemenway, “Folklore Field Notes from Zora Neale Hurston,” 7 *The Black Scholar* 39–46 (1976), at 41.
2. This idea is in sympathy with the concept of “found” law, as a species of legal science. However, authors like Hurston, through their engagement with black subjectivity, challenged the embedded white normativity in traditional legal science.
3. David Walker, *David Walker’s Appeal, in four articles; together with a preamble, to the coloured citizens of the world, but in particular, and very expressly, to those of the United States of America, 3rd and final edition, rev. and Published by David Walker* [1830], James Turner, ed. (Baltimore: Black Classic Press, 1993), 9.
4. He writes, “Now Americans! I ask you candidly, was your suffering under Great Britain, one hundredth part as cruel and tyrannical as you have rendered ours under you? Some of you, no doubt, believe that we will never throw off your murderous government and ‘provide new guards for our future security.’ If Satan has made you believe it, will he not deceive you?” *Id.*, at 95.
5. Urtext is a literary term referring to an idealized primordial version of a particular type or genre, often hypothetical. Although here I refer to an actual text, the role the *Appeal* had in propelling an imaginative literary tradition makes the term appropriate.

6. This seems to suggest implicitly that the reader imagined is a white or other non-black reader, but in reality challenges to racial ideologies widely held in a society are illuminating to the marginal and the mainstream as well, particularly if they become part of a popular discourse through which everyone in the community begins to re-think race.
7. This line of thinking owes a debt to Cornel West's description of the humanist tradition in African American literature in his book *Prophesy Deliverance: An Afro-American Revolutionary Christianity* (Philadelphia: Westminster Press, 1982). While I believe the strategy that I am describing exists in writing that is not necessarily technically of the humanist tradition, it certainly depends to some extent upon the understanding of the self therein entailed. As West describes it: "The humanist self image of Afro-Americans is one neither of heroic superhumans untouched by the experience of oppression nor of pathetic subhumans devoid of a supportive culture. Rather, Afro-Americans are viewed as both meek and belligerent, kind and cruel, creative and dull—in short, as human beings" (85).
8. W.E.B. DuBois, philosopher, coined the term double consciousness, which has become a critical theoretical tool in African American literary, cultural, and philosophical thought. See W.E.B. DuBois, *The Souls of Black Folk* (Chicago: A.C. McClurg, 1903).
9. Many scholars of critical race theory have challenged the concept of universality because it is a feature of liberal thought that imposes norms that privilege the dominant class. While this essay does not directly respond to this challenge, it is considered in the analysis of the potential difficulties of this trope.
10. Jean Toomer, *Cane* [1923] (New York: Liveright, 1975).
11. Sutton E. Griggs, *The Hindered Hand: Or, The Reign of the Repressionist* (Salem, NH: Ayer, 1905). Two of Griggs's characters are graphically tortured before they are lynched in response to their activism. A third character is psychologically tortured when her plan to pass for white unravels in a courtroom scene and she subsequently descends into madness.
12. Ralph Ellison, *Invisible Man* [1952] (New York: Random House, 1994). In the Battle Royal scene the "invisible man," before receiving a scholarship, is forced to compete in a grotesque ritual fight to the end along with other young black men, and then tortured by electrically charged money thrown into the ring that they fight to retrieve. In contrast, in the Trueblood event the narrator encounters—alongside a white visitor to whom he gives a tour of the city surrounding his college—an incestuous black family that shames the University community.
13. DuBois uses the veil as a metaphor for the dividing line between the races: the veil might be seen out of but not seen into. Life within the veil, then, is hidden from mainstream American experience, even as it is a feature of that experience.
14. Ralph Ellison, *Going to the Territory* (New York: Random House, 1986), 243.
15. Charles Johnson, *Being and Race: Black Writing since 1970* (Bloomington: Indiana University Press, 1988), 38.
16. Charles Chesnutt, *Marrow of Tradition* (Boston: Houghton Mifflin, 1901).
17. Laurence H. Tribe and Michael C. Dorf, *On Reading the Constitution* (Cambridge: Harvard University Press, 1991), 82.
18. See "To Bean Author": *Letters of Charles W. Chesnutt, 1889–1905*, Joseph R. McElrath, Jr., and Robert C. Leitz, III, eds. (Princeton, NJ: Princeton University Press, 1997).
19. Here I am arguing at a place somewhere between a traditional doctrine of evaluation and a materialist aesthetic of Adorno: while I do not claim that there is necessarily an awareness of the materialist aesthetic in the literary project, the project may very well be using "traditional doctrines of evaluation [which] take as their starting point the idea that there are aesthetic values which have trans-historical validity." Peter Burger, "The Problem of Aesthetic Value," in *Literary Theory Today*, Peter Collier and Helga Geyer-Ryan, eds., 23–35 (Ithaca, NY: Cornell University Press, 1990), 27. It is in fact an appeal to a materialist aesthetic, historic in nature, that makes sympathetic occupation work. I also assume that popular forms contain structures of value, history, and tradition similar to those of high literature.
20. Edmund Burke, "On the Sublime and Beautiful" [1757], in vol. 24, part 1 of *The Harvard Classics*, Charles W. Eliot, ed. (New York: P.F. Collier & Son, 1909–1914), 13.

21. Terry Eagleton, *Literary Theory: An Introduction*, 2nd ed. (Minneapolis: University of Minnesota Press, 1996), 23.
22. Ellison, *supra* note 14 at 111.
23. The “reasonable person” standard in the law of contracts and torts, for example, is often applied in an emotional manner dependent on the specifics of the given case, rather than in a manner that would be deemed to have a philosophically rational basis.
24. Larry Dimatteo, “The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment” *South Carolina Law Review* 293–356 (Winter 1997), quoting Robin West, “Disciplines, Subjectivity, and Law,” in *The Fate of Law*, 119–157 (Ann Arbor, University of Michigan Press, 1991), 153.
25. Johnson, *supra* note 15 at 39.
26. *Id.*, quoting Maurice Merleau Ponty, *Sense and Non-Sense*, Hubert L. Dreyfus and Patricia A. Dreyfus, trans. (Evanston, IL: Northwestern University Press, 1964), 26.
27. Peter Stallybrass and Allon White, *The Politics and Poetics of Transgression* (Ithaca, NY: Cornell University Press, 1989), 105. See also Pierre Macherey, *Pour une théorie de la production littéraire* (Paris: Maspero, 1966).
28. Radhika Mohanram, *Black Body: Women, Colonialism, and Space* (Minneapolis: University of Minnesota Press, 1999), 37.
29. Richard Wright, “The Man Who Lived Underground,” [1942] in *The Norton Anthology of African American Literature*, Henry Louis Gates, Jr., and Nellie Y. McKay, ed., 1414–50 (New York: W.W. Norton & Company, 1997).
30. W.E.B. Dubois, “Souls of Black Folk” [1903], in *Norton Anthology, id.*, at 613–740.
31. In 1914, the final of three Alabama laws was struck down for its role in leading to peonage. It allowed people who were convicted of a misdemeanor, and fined, to accept a surety in the amount of the fine from some third party and then to reimburse that person by working for him on terms that were to be approved by the court. “This labor is performed under the constant coercion and threat of another possible arrest and prosecution in case he violates the labor contract which he has made with the surety, and this form of coercion is as potent as it would have been had the law provided for the seizure and compulsory service of the convict. Compulsion of such service by the constant fear of imprisonment under the criminal laws renders the work compulsory, as much so as authority to arrest and hold his person would be if the law authorized that. Under this statute, the surety may cause the arrest of the convict for violation of his labor contract. He may be sentenced and punished for this new offense, and undertake to liquidate the penalty by a new contract of a similar nature, and, if again broken, may be again prosecuted, and the convict is thus kept chained to an ever-turning wheel of servitude to discharge the obligation which he has incurred to his surety, who has entered into an undertaking with the state, or paid money in his behalf.” *U.S. v. Reynolds*, 235 U.S. 133 (1914), at 147.
32. Those black agricultural workers convicted of breach were generally unable to pay off the value of their contracts or the advances in equipment they were given at the beginning of the season. Consequently, most were sentenced to convict labor camps, run by private contractors who hired them at minimal cost from the state. The prisoners received no compensation for this work.
33. *U.S. v. Reynolds*, *supra* note 31 at 146.
34. Charles Chesnut, *The Colonel’s Dream* (New York: Doubleday Page, 1905); Albion Tourgee, *A Fool’s Errand: By One of the Fools* (New York: Fords, Howard, & Hulbert, 1879); and *Bricks without Straw* (New York: Fords, Howard, & Hulbert, 1880). Notably, Tourgee served as counsel for Homer Plessy in *Plessy v. Ferguson*, 163 U.S. 537 (1896).
35. See, for example, George Kennan, *Tent Life in Siberia* [1870] (Laverne, TN: University Press of the Pacific, 2001).
36. J.C. Powell, *An American Siberia: Of Fourteen Year’s Experience in a Southern Convict Camp* [1891] (Gainesville: University Press of Florida, 1976).
37. Toomer, *supra* note 10 at 87.

38. *Id.*, at 87–88.
39. John Locke, *Two Treatises of Government* [1690] (Cambridge: Cambridge University Press, 1988), 287–88.
40. James Weldon Johnson, “Fifty Years: Today Is the Fiftieth Anniversary of Lincoln’s Emancipation Proclamation” [1913], in *Norton Anthology*, *supra* note 29, 770–73 at 771.
41. *Id.*, at 771–72.
42. Arna Bontemps, “A Black Man Talks of Reaping” [1926], in *Norton Anthology*, *supra* note 29 at 1242.
43. *Id.*
44. Countee Cullen, “From the Dark Tower” [1927], in *Norton Anthology*, *supra* note 29 at 1315.
45. Toomer, *supra* note 10 at 81.
46. Frederick Douglass, quoted in Bernard Boxill, “Two Traditions in African American Political Philosophy,” in *African American Perspectives and Philosophical Traditions*, John Pittman, ed., 119–35 (New York: Routledge, 1997), 128.
47. Toni Morrison, *Beloved* (New York: Alfred A. Knopf, 1987).
48. Boxill, quoting Frederick Douglass, *supra* note 46 at 129.
49. Morrison, *supra* note 47 at 125.
50. Frederick Douglass, *Narrative of the Life of Frederick Douglass, An American Slave: Written by Himself* [1845], Houston A. Baker Jr., ed. (New York: Penguin Books, 1982), 107.
51. See, for example, the work of Robert Stepto, *From Behind The Veil: A Study of Afro-American Narrative* (Urbana: University of Illinois Press, 1979).
52. See Elsie Freeman, Wynell Burroughs Schamel, and Jean West, “The Fight for Equal Rights: A Recruiting Poster for Black Soldiers in the Civil War,” 56 *Social Education* 118–20 (February 1992); and Joseph T. Glatthaar, *Forged in Battle: The Civil War Alliance of Black Soldiers and White Officers* (New York: Macmillan, The Free Press, 1990), 46.
53. James M. McPherson, *Blacks in the Civil War, 1861–1865* (New York: Facts on File, 1994).
54. Paul Laurence Dunbar, “The Colored Soldiers” [1895], in *Norton Anthology*, *supra* note 29, 889–91 at 890. This poem is one of many attempts to appeal for the rights of black people through the use of the notion of the bearing of arms as a sign of consent, membership, and a writing of oneself into citizenship. Dramatically, the interpretation of the Second Amendment changed in Southern courts in the aftermath of the Civil War to one which was illustrative of the militia right, apparently, as a means of preventing black citizens from bearing them.
55. *Id.*, at 890.
56. Frederick Douglass was originally a Garrisonian abolitionist, following the philosophies of William Lloyd Garrison who believed that the Constitution was a fundamentally unjust document because it was a pro-slavery document, and therefore that it was immoral to vote under the Constitution. After travel abroad and years of consideration of the issue, Douglass altered his position to believe that the Constitution might be interpreted as a just document rather than a fundamentally pro-slavery document, because of its roots in natural law. Hence, Douglass argued, it simply had to be interpreted correctly, rather than rejected, and therefore it was right for him to vote under the Constitution in order to support legislators who would interpret the Constitution according to its natural law spirit.
57. Charles Mills, “Whose Fourth of July? Frederick Douglass and ‘Original Intent’” (Ithaca, NY: Cornell University Press, 1998), 169.
58. *Id.*, at 170.
59. Robert Stepto, “Storytelling in Early Afro-American Fiction: Frederick Douglass’s ‘The Heroic Slave,’” in *Black Literature and Literary Theory*, Henry Louis Gates, Jr., ed. (New York: Methuen, 1984), 179–80.
60. Ellison, *supra* note 14 at 330.
61. Guyora Binder and Robert Weisberg, *Literary Criticisms of Law* (Princeton, NJ: Princeton University Press, 2000), 114.

62. This literary device is discussed in detail in the doctoral dissertation of Imani Perry, *Dusky Justice Race in US Law and Literature: 1878–1914*, Harvard University Program in the History of American Civilization, Spring 2000.
63. Examples of racial twinning may be found in Chesnutt, *Marrow of Tradition*, *supra* note 16; George Washington Cable, *The Grandissimes* (New York: Charles Scribner's Sons, 1880); Griggs, *The Hindered Hand*, *supra* note 11; and Jessie Fauset, *Plum Bun* (New York: Stokes, 1929).
64. Ellison, *supra* note 14 at 333.
65. Melvin Tolson, "An Ex-Judge at the Bar" [1944] in *Norton Anthology*, *supra* note 29 at 1330.
66. Langston Hughes, *Scottsboro Limited, Four Poems and a Play in Verse*, with illustrations by Prentiss Taylor (New York: Golden Stair Press, 1932), 8.
67. Nella Larsen, *Passing* (New York: Alfred A. Knopf, 1929); and Larsen, *Quicksand*, in *The Complete Fiction of Nella Larsen Passing, Quicksand and the Stories*, Marita Golden, ed. 29–162 (New York: Anchor Books, 2001).
68. See Leonard Rubinowitz and Imani Perry, "Crimes without Punishment: White Neighbors Resistance to Black Entry" 92 *Northwestern Journal of Criminal Law and Criminology* 335–428 (Fall 2001/Winter 2002).
69. G.M. James Gonzalez, "Of Property: On 'Captive' Bodies, Hidden 'Flesh' and Colonization," in *Existence in Black: An Anthology of Black Existential Philosophy*, Lewis R. Gordon, ed. (New York: Routledge, 1997), 130. Gonzalez is commenting on Hortense J. Spiller, "Mama's Baby, Papa's Maybe: An American Grammar Book," 17 *Diacritics* 65–81 (1987).
70. Marita Bonner, "On Being Young, a Woman, and Coloured" [1928], in *Norton Anthology*, *supra* note 29, 1206–9 at 1208.
71. Charles Chesnutt, "The Partners," 30 *Southern Workman* 271–78 (May 1901).
72. Toomer, *supra* note 10 at 82.
73. Harriet Jacobs (Linda Brent), *Incidents in the Life of a Slave Girl Written by Herself*, L. Maria Child, ed. (Boston: Published for the Author, 1861).
74. Lorraine Hansberry, *A Raisin in the Sun* [1959] (New York: Prentice Hall, 1994).
75. Leonard Harris, "The Horror of Tradition or How to Burn Babylon and Build Benin while Reading 'A Preface to a Twenty-Volume Suicide Note'," in *African American Perspectives and Philosophical Traditions*, John. P. Pittman, ed., 94–118 (New York: Routledge, 1997), 102.
76. See Burger's discussion of Bourdieu, *supra* note 19. "[The] use of symbolic objects (particularly including their position within hierarchies of value) serves a strategy of opposition between the higher and the lower classes: 'the manner of using symbolic goods . . . constitutes one of the key markers of 'class' and is also the ideal weapon in strategies of distinction.'" *Id.*, at 23, quoting from Pierre Bourdieu, *Distinction: A Social Critique of the Judgment of Taste*, Richard Nice, trans. (New York: Routledge and Kegan Paul, 1984), 66.
77. A concept articulated by Evelyn Brooks Higginbotham in her historical work *Righteous Discontent: The Women's Movement in the Black Baptist Church 1880–1920* (Cambridge, MA: Harvard University Press, 1993). Comporting oneself according to middle class religious ideals of respectability became a political strategy for black female activists in the late nineteenth century.
78. Chesnutt, *supra* note 16 at 61.
79. What happens with this, I think, depends upon the extent to which the strategy of the text lends itself to the idea that this is a vehicle rather than a specific. Charles Johnson writes that he understands the suspicion that "words cannot be trusted, least of all metaphors, that, if scratched deeply enough, reveal bourgeois ideology, the panathropic content of traditional humanism, and, by implication, lead to what I would call a form of interpretive imperialism closing out all other visions of Being" (Johnson, *supra* note 15 at 33), and here that being might be a mimicry of American exceptionalism and bourgeois values.
80. See Maria Grahn-Farley, "A Child Perspective on the Juvenile Justice System," 6 *Journal of Gender, Race & Justice* 297–335 (2002). Grahn-Farley's concept of the master norm is, as she describes it, the

structural representation of hegemony. She argues that for critical analysis to be truly alternative it must depart from making the master and his norm the central frame of reference. I am compelled by this argument, but I believe this work at once fails and succeeds in meeting her challenge. Certainly the universals appealed to in sympathetic occupation are normative ideas of human experience that are created by hegemonic forces. And yet, the practice attempts to move those outside of the master norm, into the critical subjective space. This “spook who sat by the door” sort of inside outsider practice is the essence of tricksterism.

81. William Craft, *Running a Thousand Miles for Freedom; or, the Escape of William and Ellen Craft from Slavery* (London: William Tweedie, 1860).
82. The coercions of liberal thought for a black population are dramatically elucidated by Saidiya Hartman in *Scenes of Subjection: Terror, Slavery and Self-Making in Nineteenth-Century America* (New York: Oxford University Press, 1997).
83. Griggs, *supra* note 11.
84. Here the work of Patricia J. Williams comes to mind, in particular her assertion in response to critical legal studies scholars’ rejection of rights-talk, that rights, despite their “contradictory, indeterminate, reified and marginally decisive” nature, were important concepts for people of color and the poor in their struggles for civil rights. I think somewhat analogically about the appeal to ideas of universal humanity, even understanding how their reification is part of the hegemonic structure of white supremacy. Patricia J. Williams, “Alchemical Notes: Reconstructing Ideals from Deconstructed Rights,” 22 *Harvard Civil Rights Civil Liberties Law Review* 401–33 (Spring 1987).
85. Robert St. Martin Westley, “White Normativity and the Rhetoric of Equal Protection,” in *Existence in Black*, *supra* note 69 at 92.
86. Gary Peller, “Race Consciousness,” *Critical Race Theory: The Key Writings that Shaped the Movement*, Gary Peller, Neil Gotanda, and Kimberle Crenshaw, eds. (New York: The New Press, 1996), 133.
87. Gail Jones, *Corregidora* (Boston: Beacon Press, 1975); and Jones, *Eva’s Man* (Boston: Beacon Press, 1977).
88. Toni Morrison, *Paradise* (New York: Alfred A. Knopf, 1998); and Morrison, *Beloved*, *supra* note 45.
89. Edwidge Danticat, *Farming of the Bones* (New York: Soho Press, 1998).
90. David Dante Troutt, *The Monkey Suit* (New York: The New Press, 1998).
91. Michelle Cliff, “Within the Veil” [1985], in *Norton Anthology*, *supra* note 29, 2463–66 at 2465.
92. For example, scholars like Derrick Bell and Richard Delgado literarily depict the Socratic method of discourse and deliberation; Patricia J. Williams and Paul Butler respond textually to experience with philosophical inquiry. Others, such as Charles Lawrence and Kimberle Crenshaw, use epigram and anecdote in the manner they are used by many trial attorneys, as emotionally captivating exempla. Those who argue that critical race theorists depart from standard legal discourse are only right in the formal sense. Critical race theorists may not always adhere to the formula of traditional law review articles, yet they consistently use established techniques of legal argumentation, analysis, and thought. Moreover, because, as Penelope Pether has noted (“Measured Judgments: Histories, Pedagogies and the Possibility of Equity,” 14 *Law and Literature* 489–543 [Fall 2002]), the rhetorical dimension of lawyering is submerged in American legal education and legal academia, the narrative techniques of critical race theory are under-analyzed for their success as part of rhetorical style.

