Back to the Future: Law, Literature, and History in African American Life

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Back to the Future: Law, Literature, and History in African American Life*

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This essay reflects on matters raised in the following studies of race and the law:

- Frankie Y. Bailey and Alice P. Green. *"Law Never Here": A Social History of African American Responses to Issues of Crime and Justice* (Praeger, 1999);
- Randall Kennedy. *Race, Crime, and the Law* (Pantheon, 1997);
- Gail Williams O'Brien. *The Color of the Law: Race, Violence, and Justice in the Post- World War II South* (University of North Carolina Press, 1999);
- Katheryn K Russell. *The Color of Crime: Racial Hoaxes, White Fear, Black Protectionism, Police Harassment, and other Macroagressions* (New York University Press, 1998).

The "shocking" murder of old Mrs. Ochiltree in Charles W. Chesnutt's 1901 novel, *The Marrow of Tradition*, prompts the immediate formation of a white vigilante committee. This "spontaneous" generation of activity, Chesnutt writes, was part of

> the American habit of lynching [that] so whetted the thirst for black blood that a negro suspected of crime had to face at least the possibility of a short shrift and a long rope, not to mention more generous horrors, without the intervention of judge or jury.

In the Ochiltree case, the suspect is Sandy Campbell, long-time Negro retainer in the retinue of the venerable Mr. Delamere. The true murderer, however, is Tom Delamere, the old man's dissolute grandson who had blackened his face and stolen clothes from Sandy's room to complete his disguise. Soon the murder and robbery are tainted with rumors of rape and agitators begin to raise the cry of "Burn the nigger!" Sandy is saved by his employer's intervention, but the community is eventually engulfed in a "riot" that end with the deaths of some black citizens of the town and the disenfranchisement of the rest. The white perpetrators of this

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* Some arguments of this essay are derived from sections of my book, *Whispered Consolations: Law and Narrative in African American Life* (University of Michigan Press, 2000).

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homegrown, Americanized version of "ethnic cleansing" seize control of the city from its interracial elected government.

Chesnutt's novel, grounded in events that took place in and around Wilmington, North Carolina, in 1898, could have been cited in any or all of the four books under consideration here. One of them, Katharine Russell's *The Color of Crime...*, deals specifically with racial hoaxes. She writes of sixty-seven cases between 1987 and 1996, fifty-one of which involved the false identification of an alleged perpetrator as a person of color. All of the books, each written by a black scholar or team of scholar/activists, try to come to grips with one or more dimensions of the apparent disparity between the law's promise and its actual effect in the lives of African Americans. The attempts cover a considerable field of experience with the law, from local sheriffs' offices to the United States Supreme Court. Taken as a whole, these efforts suggest that the history of African Americans is perhaps best understood as "legal history," if we can mean by that a story of the creation, maintenance, and regulation of a "black" social identity in the United States through legislation, litigation, prosecution, and incarceration.

In a similar construction, I would argue that the literary history of African American narrative, certainly almost all of that written between 1820 and 1960, has at its center a reading of those texts as a cumulative critique of American law and that those texts can and should be read collectively, not only for that critique but because its centrality in the texts revises our understanding of black American cultural production when seen in its continuity. Consequently, I was curious about these studies by black social scientists and lawyers. Actually, I was curious to see what the critique from those quarters looked like at this moment in our history, to see if and how and where these commentators would differ from their novelistic predecessors and how and if their studies would illuminate the argument I want to make.

Like their literary predecessors, each of the recent authors assumes that the experience of Americans of African descent with American law is significantly different in kind and in degree from that of whites. One point, for example, comes through quite clearly in these later texts: a central problematic of race and the law is that of proportion and position. Each asks, in one way or another, "To what degree is the application of the law's punitive and protective power skewed by race in this country?" Bailey/Greene and Russell take as a given that black positionality vis a vis the law's punitive powers is de facto oppositional. Bailey and Greene quote Angela Davis's notes for her trial defense in 1971: "I begin by directing the court's attention to the fact that as the accused in this case, I find myself at an enormous disadvantage. As a Black woman, I must view my own case in the historical framework of the fate which has usually been reserved for my people in America's halls of justice" (p. 184).

Russell writes, "American racism and criminal justice, which involved the systematic denial of basic human rights to Blacks for more than three hundred years, simply cannot be dismissed as irrelevant to today's criminal justice system" (p. 150). For Russell, the question of the abuse of punitive power is not of its existence but solely of its degree (pp. 44–46).

O'Brien's analysis, tempered by the nature of her inquiry, looking at one Tennessee town in 1946 and the lynching that *didn't* happen there, posits that the historically observable problem of the law in black life, until the mid-twentieth century, was the lack of protection from extra-legal violence given to blacks by the law. The decline of lynching and other extra-legal attacks on black autonomy since then has been accompanied by an increase in the application of punitive police powers in the black community; *i.e.*, more blacks have come to the attention of the law and more arrests and convictions have followed (p. 255).

While Kennedy would not deny the evidence of a historically systemic predisposition against black people in American society, he would argue that institutional racism is not the same as "disparate treatment" under the law (p. 362ff). There appears to be enough honest ground, for example, for disagreement about the relative effects of crack and powder cocaine to suggest that while the effect of the law may be felt disproportionally in the black community, that result is more likely to be the result of a mistaken policy than of a racist policy; meanwhile, the law is what it says it is and the highest court requires that the government must be shown to act because of and not simply despite foreseen racial consequences (pp. 380–386). Kennedy shares some of O'Brien's perspective in that he can understand increased police and policy attention to drugs and their effects in the black community as a correction of the problem of the historical underprotection of African Americans from illegal acts (p. 363).

The record in black narrative literature supports Kennedy and O'Brien in this discussion. From *Our Nig* (1854) through *Invisible Man* (1952), African American writers construct their stories around the complexities of civil life in a society in which the protection of the law provided for in its canonical texts are not afforded to their protagonists or the community to which they belong. These novels and stories carry in them the exquisite irony that those most thoroughly denied the protection of the law are its most devoted servants. These texts are almost never about unwarranted prosecution, or even persecution, by the law as much as they are about the failure of the law to protect black Americans, Americans who are shown to love the law almost blindly even as they lament its betrayal of them. Whether the Declaration of Independence before 1865 or the Constitution after 1867, the mighty texts of American entitlement get invoked time and again as standards against which white

Americans are measured and found wanting. An occasional voice, Harriet Jacobs's being the most powerful, does reject the entire premise that African Americans can find justice under American law, but by the end of the nineteenth century, most novels by black writers include near their conceptual centers something like those found in Frances E. W. Harper's *Iola Leroy* and Pauline Hopkins' *Contending Forces*, in which earnest members of the Black Bourgeoisie of the late nineteenth century praise American law and condemn American whites for their betrayal of it.

In general, a reading of two centuries of African American narrative that focuses on the nature and reality of black life under law finds itself buttressed by the analyses in these studies. The literary record and these studies are congruent in their representation of that life as one characterizable by the lack of protection prior to 1954 and by the increase in punitive attention after 1954. The problem is that there is a limit to the ability of these studies to vivify that life, despite each's attempt to provide an historical context for it. Even Bailey and Green, whose intent is to relate something of the history of black social and cultural responses to these matters often lose track of their project and offer us pages of general social history empty of black voices, crime, or law. As variously useful as they all are in helping a lay audience make sense of the national dialog on race and crime, there seemed a significant omission at the heart of each of the books. Somehow, despite Bailey and Green's survey of cultural representations, despite Russell's tables, charts, and surveys directed at the less than affirmative application of law to the protection of black lives, egos, and properties, despite page after learned page of cases and adumbrations of law review arguments in Kennedy's usually balanced and carefully moderated analysis of how blacks have fared under criminal law, even despite O'Brien's masterful recreation of 1946 Columbia, Tennessee, in all its racial and class complexity, a disturbing misrepresentation emerged.

Simply put, to try to understand the place of law in African American life by looking at the mechanisms of the criminal law alone is a mistaken endeavor. I'm not suggesting that the problems of the treatment of black folks by America's criminal justice system do not present serious challenges to our sense of ourselves as citizens of a nation of laws, nor that the practices of the criminal justice system are not chronically damaging to the health of the black community, but when we allow the discourse of the criminalization of African American life to occupy the center of our consciousness of black American relationships to the history of American law we run the risk of misunderstanding those relationships quite fundamentally. Most specifically we blind ourselves to the point that African Americans have identities as Americans with both political and cultural citizenship and that their dual citizenship is not

historically based on the criminal law but on the development of American law in its entirety, as amended by legislation and shaped by its own traditions of judicial review. As a consequence, black folks in America have a legal history as a group quite unlike that of white Americans; they are, for example, the most litigated and legislated people in American legal history. Cases involving African Americans qua African Americans have occupied local, colonial, state, and federal courts for 350 years; the legislative records at every level of government are filled with bills and acts to define, enslave, amortize, transfer the ownership of, fix responsibility for, contract for the labor of, liberate, enfranchise, disenfranchise, circumscribe, incarcerate, and execute people of African descent in America.

Look for a moment at the post-Reconstruction south. Law in the rural south was designed, implemented, and manipulated to control the social and economic activities of blacks, not to regulate their extra-legal or "criminal" activities. A black man or woman was more likely to be jailed or given some form of corporal punishment for overstepping social boundaries or for exercising economic independence than for theft or murder (as long as the victim was not white). Such an emphasis, as W. E. B. Du Bois reported in *The Souls of Black Folk* (1903), had

> resulted in the refusal of whole [white] communities to recognize the right of a Negro to change his habitation and to be master of his own fortunes. A black stranger in Baker County, Georgia, for instance, is liable to be stopped anywhere on the public highway and made to state his business to the satisfaction of any white interrogator. If he fails to give a suitable answer, or seems too independent or "sassy," he may be arrested or summarily driven away. (pp. 115–116)

In cities however, where "the chance for lawless oppression and illegal exactions" are far less than in the country where most serious encounters of blacks with the law arise out of what Du Bois calls, "disputes between master and man," the legal history of black life becomes a narrative of strangers, property, and violence (p. 116). In 1903, Du Bois explains,

> Daily the Negro is coming more and more to look upon law and justice, not as protecting safeguards, but as sources of humiliation and oppression. The laws are made by men who have absolutely no motive for treating the black people with courtesy or consideration; and finally, the accused is tried, not by his peers, but too often by men who would rather punish ten innocent Negroes than let one guilty one escape.[1] (pp. 131–132)

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1 Du Bois (*Philadelphia*) noted that the proportional responsibility for crime in general in the city that could be attributed to Blacks was *less* in 1896 (4 % of population: 9 % of crimes) than it had been in 1850 (5 % of population: 32 % of crimes) (pp. 238–239).

It may have been the case that these perceptions were influenced by the shock of the new. Du Bois notes that urban crime had increased immediately after the Civil War as white soldiers flocked to the cities instead of back to the farms and hamlets from which they had come. By the 1880s, however, when the first of the black migrations to the cities began, those rowdy white boys and men had been assimilated and the level of physicality of city life had adjusted itself upward but more or less comfortably. The influx of black newcomers with no urban socialization caused a new wave of extra-and illegality perhaps no greater than that caused by the white veterans and their younger brothers of twenty years previously but certainly as remarkable as that had been and now with the appearance of a singularity and a causality that could be attributed to racial difference (Philadelphia, pp. 238–240).

Du Bois argued that black Americans, because of their experiences with southern police and legal infrastructures designed in the first instance to control and even reenslave Negroes, had an unexpected, or as he put it, "curious," response to white obsession with black crime. "Negroes refused to believe the evidence of white witnesses or the fairness of white juries, so that the greatest deterrent to crime, the public opinion of one's own social caste, was lost, and the criminal was looked upon as crucified rather than hanged" (Soul, p. 133). Whites, on the other hand, "used to being careless as to the guilt or innocence of accused Negroes, were swept in moments of passion beyond law, reason, and decency" (pp. 133–134). Du Bois' own short story of black frustration in the face of white racism, "Of the Coming of John," ends in such a moment of white passion beyond the law, albeit, as Du Bois makes clear, a passion in response to the equal passion for retribution felt by his protagonist (pp. 166–180).[2]

What this synthesis of observations by Du Bois suggests to me is that there could well be some other way of looking at this issue of the relationships between "race" as we understand it (or attempt to do so) in America and the law. I'm going to suggest one that is made up of two impulses. The first impulse, somewhat emblematized by Du Bois, is to realize that the untold story of black Americans and the law is found not in tables and statistics but in African American narrative, primarily in African American fiction since the antebellum period of our common history. The second, emblematized by the historical event of Emancipation, is to realize that a common ideological ground underlay

2 Horace Cayton's unpublished biography of Richard Wright indicates that Wright read both *The Philadelphia Negro* and *The Souls of Black Folk* sometime after 1927. There is a common tenor to Du Bois's story and Wright's short fiction of southern life in *Lawd Today!*

both ante-and postbellum attitudes to blacks in American law and toward law in American literature by blacks and whites, a ground we can label for discussion, "romantic."

The first impulse, if followed, leads one to consider specific writers, specific texts. Du Bois not only wrote sociology and history; he wrote novels to bring to life those problems he feared would lie inert on the pages of sociology texts. His 1928 romantic fantasy of the black diaspora, *Dark Princess*, for example, is a curious mixture of folk motif and political science, of observation of the law and reverence for the people's wisdom and is exemplary of his dictum that "Negro" art must be propaganda. I'm not going to pursue this impulse too far here because a review essay of four social science texts is not the place to attempt complex readings of an entirely "other" body of writing, but let me just name some of the African American writers who have written fictions or other extended narratives devoted to or containing explicit critiques of American law. Roughly chronological in order of appearance (excluding for brevity's sake the many fugitive and slave narratives of the ante-and postbellum periods) are: Frederick Douglass, Harriet Jacobs, Harriet Wilson, William Wells Brown, Frank J. Webb, Martin R. Delany, Walter Stowers, W. H. Anderson, James D. Corrothers, Pauline Hopkins, Frances E. W. Harper, Sutton E. Griggs, Charles W. Chesnutt, Jack Thorne, Paul Laurence Dunbar, James Weldon Johnson, Walter White, Jessie Fauset, Rudolph Fisher, Wallace Thurman, William Pickens, Claude McKay, Langston Hughes, Nella Larsen, George Schuyler, Zora Neale Hurston, Richard Wright, William Attaway, Chester Himes, Willard Motley, Ann Petry, Ralph Ellison, Lloyd Brown, and James Baldwin.[3]

After 1960 the list gets too long and too dense to reproduce here and most readers are likely to be able to construct their own from that point on. But I want to point out that these writers are, for the most part, ignored by the four books under review here. Not that we ought expect too much, but given the subtitle of their book, for instance, Bailey and Green ought to have had a field day with black writers on American law and justice. Yet, with the exceptions of a few familiar names, African American writers are missing from the discussion and none is actually represented as having produced an alternative narrative of race and law of any significant depth or length nor is any such work discussed. Bailey/Green do give space to discussions of films, more than to print fictions, but few of those films are made by African Americans. Their filmography does not include any black film maker prior to Gordon

3 For discussion at length of these and other writers, see my study, *Whispered Consolations: Law and Narrative in African American Life* (University of Michigan Press, 2000).

Parks, whose entry is for 1969. A cultural and social history of African American responses to issues of crime and justice in which nearly sixty percent of the cultural references are to white representations of blacks and criminal justice and to which is appended no bibliography of African American literature is, *prima facie*, problematic.

That there is little reference to any literature or to any particular idea of narrative in the other books is scarcely surprising, although we hear much these days of the "narrative turn" in the social sciences. Russell, for instance, introduces the black subject in only one chapter, via a survey, asking young college men to respond to prompts about race and crime. Her discussion of the racial "hoax," in which a white commits a crime and accuses a black man or woman of it (as in the infamous "Susan Smith" case), makes no mention of the uses in American literature of boundary transgressions, passing, or drag, yet all of those enter into the racial hoax. Americanists in literature remember the combination of drag and racial hoaxing in Twain's *Pudd'nhead Wilson* and African-Americanists know Chesnutt's use of the racial crime hoax in *Marrow of Tradition* as well as the considerable body of fiction surrounding passing and the notion of race as property to be transgressed.

There is no use of black narrative in Kennedy's book. He finds the speaking black subject to be the black lawyers and law professors among the more numerous white commentators against whose positions he seeks to argue, but no black subjects speak from the hundreds of cases Kennedy cites. He draws, as he must, on appellate records of the findings of a predominately white judiciary and those records capture none of the voices of the principals. It is perhaps not fair to expect him to know that court cases and discussions of appellate law abound in and are integral to much of African American fiction. Only O'Brien has, or uses, an array of written and oral sources that give her access to the experiences and expressions of the principals in the matter she undertakes to understand.

To privilege the primary ethnographic narrative of a specific act as a kind of "proof," as O'Brien does, however, is not the same thing as accepting some other narrative, fiction, for example, as evidentiary in your scholarship. It happens now and again, principally in the work of Critical Race theorists on the law, but by and large fiction's gloss on the law is not cited, if it is known. All of this is not to argue petulantly for "inclusion," for a sort of wilful interdisciplinarity for its own sake. There is more at stake here, for the fact is that not only is there an extensive body of African American fiction that comments on American law but that it does so with such consistency and intensity that it could serve as a counter-narrative of American legal history. As a body of literature it makes up what I'd call the "traditional African-American narrative" and at its center is the issue of African American legal identity. This narrative

was so powerful that its imperatives interdicted the advent of modernism in the African-American novel until the mid-1950s.

The imperatives were these: to examine American experience in the light of the Declaration of Independence and of the Constitution; to record and critique the history of white stewardship of the explicit and implicit legal promises imbedded in those two texts; to create a literary record of romantic cultural and political citizenship for African Americans based on principles of autonomy, authenticity and irony; and to give voice to African American desire for a coherent legal identity that would be as unamendable as that enjoyed by whites. The pursuit of these imperatives varied in its emphases over the period 1830-1954, but in so much of the African American narrative that has survived from those 125 years, the field of the law is the clearly visible (or unspoken yet fundamental) ground from which human relationships emerge. In many, if not most, the central problem of the text is the resolution of the legal identity of one or more of the black protagonists. The grounding presence of the law has escaped notice in African American narratives, including fiction, primarily because it is so fundamental, because in the nineteenth century and for much of the twentieth century, these narratives promoted, argued, defended, lamented, put case for, and premised every action on the question of the legal status of African Americans. Further, it was upon this constantly contested status that all substantial African American life was based. Consequently, all resistance in African American fiction through the middle of this century might be understood as resistance to the law and/or to the constraints of legal status as romantically constructed.

Beyond the question of legal identity in African American literature lie other issues, some fairly straightforward and others more difficult to tease out. The issues related to African American life and criminal law, the foci of the books that prompt this essay, are not difficult to uncover. This is not to say that their implications are not far reaching and complex. All of the authors discuss "lynch law," for example, and each addresses the problem of disproportionality in the application of the law's ability to punish and to protect. Both of these find expression in African American fiction. Other matters, of contract, of the nature of property, of citizenship, of the suppression of desire and the consequences of "passing," of the effects of Emancipation and the origins of black melodrama in post-Emancipation marriage law require that we look quite consciously at the intertextual relationships between American legal history and African-American literary history.

What kind of literary scholarship is needed to show us the effects of such grand legal gestures as Emancipation not only on African American literature but on American literature? Brook Thomas's work on contract and the passing of equity in the nineteenth century presents a potential

model.[4] As Thomas considers the legal historical moment of transition from equity to contract in shaping literary realism, let us consider Emancipation as the same sort of inherently legal historical moment as the Closure Acts in England. Then we could ask ourselves, where is the literature that reflects the changes in the relationship to the land of the rural peasantry? Was there an American writing who tells us what it meant to suddenly stop being property and just as suddenly become one of the potentially propertied? There were several and they were African Americans: Walter Stowers and William H. Anderson (*Appointed*), James D. Corrothers (*The Black Cat Club*), Jack Thorne (*Hanover*), and Sutton Griggs (*Imperium in Imperio*) among the less heralded today, the recently rediscovered Pauline Hopkins (*Contending Forces*, *Of One Blood*) and Frances E. W. Harper (*Iola Leroy*), and the "canonical" figures Charles W. Chesnutt and Paul Laurence Dunbar.

"Potentially" is the key to this paradigm. Freedmen in post-Emancipation America were like English peasants after Enclosure: just as the English peasant was "freed" from the commonality of property (as people who worked/grazed common land) to occupy a new status of purveyor of abstract labor (labor as potential, not tied to an originating space for its value or meaning) and so made their way to the cities, so upwards of five million freed slaves entered a labor market as putative free agents of their own potential. Opposed to their entry were an array of positions taken by white southerners such as political and even armed resistance to post-bellum economic empowerment through land reparations, the Black Codes of 1865 and subsequent versions, post-Reconstruction Supreme Court decisions, the advent of "Jim Crow" laws, and eventual legally formal racial segregation after *Plessy* v. *Ferguson* which were to limit severely the rights of those freedmen and women to sell their labor on the open market. Gradual urbanization of African American life began by the mid-1870s and by 1917 black Americans were ready to flee to the cities by the hundreds of thousands. And they did.

Some results resembled those experienced in England earlier: the dislocation of people by class (in America by race operating to define class), vagrancy and loitering laws to control both the dislocation itself and the economic impact of it, the breakdown of family cohesion as urban life redefined personal space and personal identity. And this "moment" brought a new literature in each case. Let me eschew English literary history here and just concentrate for a bit on American literary responses. White reactions fell generally into two categories; the romance

4 Brook Thomas, *American Literary Realism and the Failed Promise of Contract* (Berkeley: University of California Press, 1997).

of the "Old South" controlled both. One was the literature of *die Volke*, the "old folks back home," of happy days on the plantation. The other was of Paradise lost, of the fall of the innocent darky in post-Edenic, Reconstruction America to the depths of degradation and rapacity that were the certain consequences of Emancipation. While the work of Kate Chopin and Albion Tourgee remind us there were exceptions to this observation, for the most part white American attitudes were versions of a century old response to the presence of Africans in America deeply informed by a particularly American romanticism. To go back and pick up the primary threads of that romanticism would also allow us to open the question of Romanticism's influence on American legal imagination in the nineteenth century and its construction of citizenship in a romantic republic . Finally, it would suggest the ideological world to which African American fiction responded over the course of a century and a half.

Citizenship in America's romantic republic was denied to Americans of African descent, as was citizenship in the legal entity of the United States, long before Emancipation.[5] By "romantic" in this case I refer to attitudes about self, imagination, community, property, and privacy that emerged in European and North American consciousness after 1790 and that became the unspoken premises from which white Americans in general reasoned toward their understanding of the social body of the United States throughout the nineteenth century.[6] It is

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5 Rollin Osterweis, in *Romanticism and Nationalism in the Old South* (New Haven: Yale, 1949), investigated a more traditional line of inquiry in a search of sources and influences from the literature of English Romanticism on slaveholders and their legislative allies. The shortcomings of Osterweis' study have been addressed on Michael O'Brien's *Rethinking the South: Essays in Intellectual History* (Baltimore: Johns Hopkins University Press, 1988). His references constitute a comprehensive bibliographic record of the inquiry into romantic impulses in both the Old and New South.

My questions are more argumentative and suggestive than they are amenable to documentation, having to do with the presence within the general culture of a discourse representing attitudes and assumptions so sympathetic to the perceived realities of the historical moment that few Americans of the period would think to question or even remark on the centrality of their content, whatever side any given participant might take on a specific issue. The presence of those assumptions must be teased out of the social texts of the period, if they are to be seen at all, by intertextual readings.

Nevertheless, see Myra Jehlen, *American Incarnation: The Individual, the Nation, and the Continent* (Cambridge: Harvard University Press, 1986) for her reading of the founding experience as an encounter with "entelechy" or endless possibility, making America the most romantic site in European experience. Dr. Harold K Bush pointed out Jehlen's study in an email message to the AMLIT-L list on July 2, 1997.

6 Considering how influence happens in culture, Ann Douglas writes: "But I do believe, with Freud and Fitzgerald, that history works as much by something like telepathy as by cause and effect, as much by the apparent coincidences of what Hegel called the

Romanticism's function as an epistemology that generates the conflict between the reality of life for black Americans in the nineteenth century and the ability, or the willingness, of the law to describe that reality, from enslavement through Emancipation to state-sponsored segregation in the wake of *Plessy* v. *Ferguson*. By the end of the century, African Americans found they were "of" this land only as they were defined through a system of laws designed and enacted in the first instance to incorporate their enslavement and only historically to admit their citizenship. The conflict resides in the fact that their antebellum enslavement was situated in the recognition of a body of "natural" rights, including rights to property, that was to be protected for all citizens while their postbellum citizenship was situated in a category of "status" that was textualized as an "amendment" to the "natural" rights embedded in the Constitution.

Because it is highly unlikely that the law, as one of the two primary texts of American life in the nineteenth century (literature being the other), would fail to exhibit any characteristics of Romanticism — the primary cultural paradigm in American life in the nineteenth century — an examination of notions of privacy, liberty, and the freedom to associate as aspects of definitions of self, property, and national identity should explicate the conflict between white and black statuses vis a vis rights and amended identities. It should show those notions to be not redactions of rational principles but inscriptions of desire, in this case, of "white" desire. The obverse inscription of each of these terms then would be seen to be inscriptions of the role of the "other" against whom or which the desiring subject struggles in the quest for autonomous identity.

The role of the "other" has not escaped attention in American literary history by any means, but the point here is how America's romantic embrace of the other was inscribed it its legal imagination as well as in its fictions. Briefly put, the desiring subject in American culture of this period is the romantic hero, emerging first out of the Enlightenment, who reaches out/across the problematic of isolation to union/re-union with a larger identity — nature in one inscription but

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Zeitgeist as by calculable economic or cultural influences; in an important essay of 1893, Twain christened this view of history-as-mind-reading 'mental telegraphy'" (*Terrible Honesty: Mongrel Manhattan in the 1920s* [New York: Farrar, Straus and Giroux, 1995], p. 201). While I am less mystical than Douglas, I do assume that some paradigms through which cultures arrange experience become embedded in the design of everyday life, almost as matrices or templates through which the raw material of cultural production passes everywhere on its way to becoming law, novel, poem, advertisement, hymn, video game. This is how Romanticism continues to shape our representations and perceptions.

also the state or nation or the romantic republic. His guide in this quest is what he is not — a totally "natural" being, the (savage) other who emerges not as a monadic figure from the Enlightenment but appears enveloped in his natural circumstance, one with it and multiple. The (savage) other is synecdochic for all nature while the emerging romantic hero stands for no thing except his exceptional self. It will be his encounter with the other that will stamp his romantic identity. The (savage) other, in this case the Negro in America, on the other hand must be understood as a supraromantic consciousness not separated from natural forces or natural law and so while suited to introduce the hero to these states of being, not suited to join him in the ensuing world he will make, the world of civil society, private property conceived of as a natural phenomenon, and of the contracts which will govern this marriage of enlightenment and nature. That last provision seals the Negro's fate; contract becomes our text of law. To be excluded from it by virtue of one's essential, natural being, is to be excluded from the body of the romantic republic.

Romantic epistemologies and ontologies in the texts of our legal and cultural history therefore should be seen as defining self, property, and national identity such that the fundamental assumptions upon which Constitutional protections were based pre-emptorily and ironically excluded the supraromantic African in America from any enjoyment of those protections that were not first carefully and exhaustively argued. The origins of these paradigms are clear enough. As Bernard Bailyn notes, colonial America as a wilderness was "a place where the ordinary restraints of civility could be abandoned in pell-mell exploitation, a remote place where recognized enemies and pariahs of society — heretics, criminals, paupers — could safely be deposited [...] and where putatively inferior specimens of humanity, blacks and Indians, could be reduced to subhuman statuses [...]."[7] Even though the Mansfield decision in Somerset's Case (1772) made any Negro free the moment his foot touched England, in "America," on the romantic western periphery of European consciousness, "restraint on brutal exploitation" would not hamper relationships between the colonial master and his property (p. 114).

Michael O'Brien argues that the new America became a romantic culture much sooner and with more alacrity than either France or Britain "because Romanticism had special appeal for those who felt themselves on the periphery" (p. 50). As a provincial culture in the throes of self-creation, the United States was receptive to Romanticism as "the doctrine

7 Bernard Bailyn, *The Peopling of British North America: An Introduction* (Madison: University of Wisconsin Press, 1985), p. 113.

of the outsider" seeking to turn the isolation of the "parvenus, the migrant, the odd" into "a proclamation of self-worth" (p. 51). The mark of worth was taken quite literally in practice and liberty became the right to have a personally identifiable "worth," measurable as a quantity of attributes or properties and, of course, property.

This "liberty," then, written in American mythology for two hundred years as a body of singular rights adhering to the individual, emerging from principles attributed to the "Enlightenment," might better be seen as a codification of desire, as the romantic pursuit of autonomous but natural identity, able of necessity in the last instant to stand apart from and to withstand community while longing for it nonetheless. More to my point, the desire is to withstand community's jurisdiction over worth, private property. Put another way, the desire was to have/master property and to be of it/in it at the same time. It is in this way that Romanticism in America is more clearly understood: not as a simple inscription of the natural but as a colonial ideology. The combination of property relations as systematized violence and the "bizarre distentions" (Bailyn, p. 114) of European culture that flourished in isolation at its far western reaches produced in America the fullest realization of Romanticism's colonialist impulses. Consequently, autonomous identity as a manifestation of those impulses underwrites citizenship in America's romantic post-revolutionary republic and at the same time validates (even demands) a seemingly paradoxical post-revolutionary, internalized colonialism, slavery. And it is, of necessity, this same autonomous, romantic capacity, to withstand community's jurisdiction over worth, private property, that is systematically denied under the law to African Americans throughout the nineteenth century.

The key to the persistent power of this denial lies in the Constitution's establishing premise of the rights of white males to hold citizenship and to exercise its prerogatives, and its assumption of the referentiality of common law to be always and naturally to white males. These assumptions privilege white men organically in the text of American positive law as romanticized natural beings and so gives them status as situated in a pre-extant condition to the law itself. African Americans in the post-Enlightenment romantic republic, however, are no longer natural (savage) others but artificial beings in a romantic text of the law, amendments to the natural narrative of American legal and social reality and their individual and collective existences must always be argued rather than assumed.[8]

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8 In 1888, thirty years after *Scott* v. *Sandford* and twenty years after the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments (1865, 1868, 1870), Aaron A. Mossell found it necessary to refute Taney's assumption of Negro inferiority and

What was not then, and has not since been, appreciated is how deeply romantic the premise that liberty is the political expression of the primacy of the private over the public was and how tied it was to legal and cultural denials of African-American subjectivity. The black American was the necessary "other" against which both privacy and difference were employed; he became first the property "other" which one had the liberty to own and then the social "other" against whom one could assert the right not to associate, a sort of "negative capability," to borrow a term from romantic poetics, inherent in the First Amendment. The emergence of ideas of personal liberty was the product of romantic sensibility also insofar as this emergence was predicated on recognizing some potential inherent in privacy, since liberty was, for the Framers, first and foremost the agency through which we are to exercise our "right" to own and dispose of productive private property, *i.e.*, property held apart from the community. On that premise, a conscious difference between the races based on the history of blacks as property, as private property, was constructed.

It is on this "difference" that the post-Civil War influence of Romanticism on American culture and law, specifically in the legal textualization/marginalization of African American life as embodying a romantic notion of "the other" is based. While the legal and social position of the African American as enslaved body is easily understood as an expression of romantic "otherness," what needs to be understood as well is how "otherness" as a romantic notion after Emancipation operated to keep African Americans at the margins of American community. Just as the "natural" position of white males as antecedent to the law privileged them in the Constitution and other political texts, so the centering of the white male in romantic cultural narratives of emotional, social, and economic self-realization wrote the lives of African Americans out of the texts of the law and of white "literature" as subjects. As romantic property, blacks could be written about and litigated over but in no text could they be allowed to frame the "agon," the conflict to be entertained. Only after Emancipation and the passage

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lack of qualifications for citizenship with a statement of the effect of the amendments: "The Negro by the force of them became an adopted citizen, a member of that body politic termed the people of the United States, and as such is entitled to all the privileges and immunities that are other citizens" ("The Unconstitutionality of the Law against Miscegenation", *A.M.E. Church Review*, 5, 2 [October 1888], p. 73). Mossell's use of the word "adopted" suggests that the rhetoric of citizenship contained more than ample room for intimations of degrees of citizenship. That Mossell must argue ab novo the case for black citizenship even after the events of the previous three decades may also be taken as evidence of the difficulty African Americans had even then establishing as a *premise* their "American-ness."

of the post-war Amendments were Africans in America in any position to become the true subjects of their own civil discourse.

After the Civil War, however, it was only a matter of time before white dependence on these differences reproduced the relationships of production of the antebellum South as closely as was legally possible without repealing the Thirteenth Amendment, primarily through the enactment of laws designed to limit the freedom to work for wages (to own one's labor as property) and to limit the acquisition of property-as-capital itself. At the same time, a non-economic argument for white resistance to association with people of color emerged from the same romantic notion of privacy, in this case the commitment to the idea of the right of citizens to choose with whom they are to associate. The essential term in the argument for whites was "choice," based on a notion of "privacy as agency" that is itself rooted in the romantic ideal of the singular personality developing through a context of will (or divine attribute in the case of romance heroes of most literary kinds) over circumstance. This choice, too, was protected by the Constitution as amended. The right to associate implies its mirrored act, the choice not to associate. Just as liberty demanded the right to hold property apart from the common weal, so the freedom of association implied the right to refuse to associate, to withhold affection or comradeship from the common bond. Whites could also argue that because black Americans historically occupied a status, by custom, history, nature and law, by definition and statute, alien to the paradigm of individuation in which the romantic life of the citizenry was grounded, they were not entitled to the same choices emanating from privacy. It was the post-Reconstruction return of these assertions to the forefront of a national consciousness that threatened African American citizenship.

At a deeper level, African-American desire for citizenship failed to prevail over white separatism at least in part because of the romantic understanding of "imagination" that lay at the heart of nationalism, especially as imagination contributed to the romantic fulfillment of a sense of "belonging" and to the romantic valorization of "local autonomy" in the moral lives of most nineteenth-century white Americans. A fundamental romantic premise finds imagination to be both responsive and creative; our sense of reality (our response to an external condition) is felt to be inseparable from our creative capacity/impulse. Consequently, imagination and reality do not confront one another but together constitute what we experience and how we do so. This simple dialectic relationship lies beneath at least some of the issues that follow. In essence, whites could not imagine that African Americans could ever share with them a specifically romantic, and imaginary, citizenship in a "real" world. At the same time, black Americans not only could but did imagine just that and suffered greatly

from the public denial by whites of their capacity to both imagine and belong.

If you cannot, or will not, imagine any or all of these relationships and characteristics of a person, he cannot be a part of your imagined political community — as blacks have not been imagined by whites in America from the seventeenth through the twentieth centuries. Further, if blacks are prevented from participating in the reading and writing of the texts of record of the culture in which they are held, by law, history, or desire, prevented from constructing its literature, history, or laws, then they can never be of that nation, being unable to imagine it or to participate in the constant imagining of it. The vital debates in the early nineteenth century over the very possibility of an American literature distinct from its European origins were crucial to the public sense of the nation as an imagined white community. At the same time, we must realize, Americans were building an American law. New texts of literature and law, not European, would emerge in both. Therefore, to legislate black illiteracy was to legislate black exclusion from the emerging nation, from the imagined community, by preventing the not-imagined (by whites) black American from imagining him/herself in or of the nation, from imagining the nation at all. And by being held illiterate, one is excluded from the acting civic/cultural community (unable to read law, write history, keep accounts, etc.) as well as from the imagining one. In this way we realize that laws against literacy for slaves were economically instrumental as mechanisms for social control not only because they prevented blacks from having ideas of and capacities for economic and political agency, but also because they functioned to prevent blacks, free and enslaved, from imagining an America with themselves in it as imagining subjects, rather than as imagined property objects. Slaves were to know themselves as property belonging to a white American, not as citizens belonging in America.

In the "romantic agon, the life-and-death contest of the spirit of revision against all that represses it," as William Andrews describes the slave experience that is depicted at the heart of the antebellum slave narrative, literacy is "the ultimate form of power [...] for at least two reasons. First, language is assumed to signify the subject and hence to ratify the slave's humanity as well as his authority. Second, white bigotry and fear presumably cannot withstand the onslaught of the truth feelingly represented in the simple personal history of a former slave."[9]

9 William L. Andrews, "The Representation of Slavery and the Rise of Afro-American Literary Realism, 1865-1920", in *Slavery and the Literary Imagination*, ed. by Deborah E. McDowell and Arnold Rampersad (Baltimore: Johns Hopkins University Press, 1989), pp. 64 and 65–66.

But even language has its limits as an engine of liberation. The gothic romance of language and identity that best exposes those limits is Mary Shelley's *Frankenstein*. Her monster's story is like nothing so much as a slave narrative, an account of finding oneself in bondage and liberating oneself from it through language and action. It is tempting to read Shelley's entire romance as though it were about slavery, but it is enough to point out that the monster's narrative describes the hard-won acquisition of first a representative and then a symbolizing performative language which both sets him free of a too-literal world and provides him with the capacities to exhibit both imagination and irony. Even so, the narrative is about the failure of language to save him from exclusion or to make a place for him in any society. Whomever he has become, whomever he can imagine himself to be, he never overcomes the physical differences between himself and his creator, nor can he even share that hated difference with another, since the doctor who made him refuses to make another with whom he might find companionship. He is denied even the "whispered consolations" of the community of sufferers. Ultimately, action alone can serve him and he both pursues and flees his master, vanishing into the whiteness of the far north.

As does Shelley's romance, the romance of the slave narrative represents the failure of the word when Frederick Douglass finds that it is his fight with white Covey, not his ability to read, that liberates his manhood. To violate the laws against slave literacy is a proto-emancipatory act, it seems, but however free the mind, the body remains trapped in a difference that is untouched by the ability to read or write about it. The "liberating subjectivity" of literacy (Andrews, p. 65) did not extend to the body of the slave. It is true that literacy does allow Douglass to imagine freedom, but in his narrative Douglass makes it clear that his imaginative horizon was expanded by his awareness of his ability to fight and to prevail physically. So the combination of the ability to construct a world that contains the subject Frederick Douglass and the ability to fight leads ultimately to flight, to the north where there are other laws and where language alone can become a part of the reconfiguration of self. Just as it is the monster's narrative told in the frozen north, not his creator's, that makes him come alive for us, so the telling of one's story itself becomes a liberating subjectivity in the life of the escaped slave, so much so that many, Andrews would claim, "treat their arrival on the abolitionist lecture platform or their acceptance of the anti-slavery pen as the fulfillment of their destiny" (p. 65). Nevertheless, the slave must first make himself free of the world that made him a slave.

Another impact of romantic imagination on American development, the construction of private productive property as an index of identity, complicated African-American claims on American citizenship. This notion, of private productive property, itself is an

imagined thing; that is, no such thing exists in nature. Rather "property" is the creation of the application of human imagination to the assumption of identity (the property of a thing) in things. Prior to the early Modern period, "property" as we understand the term did not appear in English common law. Over time, the law came to "imagine" that one could have stewardship of the property of things.[10] By the dawn of the period we are considering, human imagination applied to property, which was no longer a characteristic of the thing but had become the thing itself, was believed to create new value, new reality — property became real in a new way by being owned. That is, property cannot be owned by another or others without becoming something newly else, something rooted not in community or belonging, but in individuality, in this case the individuality of ownership by this person and not by that person.

That this is a difficult construct to overcome when a slaveholding culture ceases to be so should be clear. The question for whites generally and white Southerners particularly after the Civil War concerned whether they could suddenly stop seeing blacks as property and recognize in them the "property" of being able to own property. The imagined community of Americans would have to be expanded to include those Americans who were moved by events from the status of property to that of the propertied. Nothing in the romantic paradigm suggests the possibility of such a shift. The shadow of that inhibition still obscures African American participation in American life.[11]

Given these observations and others, on family and racial identity itself, that the investigation of Romanticism prompts, I would argue that the inability of nineteenth-century white Americans to imagine the African American at the center of narratives of romantic development, because of his/her predetermined role as the "other" against which the self-realization of the romantic hero must work, parallels and reinforces the unwillingness of white Americans to accept the African American at the center of legal, political, and economic texts, that is, within the circle of citizenship. If the African American could never be situated as the self-realizing romantic subject, how could he or she ever truly be

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10 See David J. Seipp, "The Concept of Property in the Early Common Law", *Law and History Review*, 12, 1 (Spring 1994), pp. 31–34.

11 See Patricia J. Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991); Susan Staves, "Chattel Property Rules and the Construction of Englishness, 1660-1800", *Law and History Review*,12, 1(Spring 1994), pp. 123–153; Margaret Jane Radin, "Property and Personhood", *Stanford Law Review*, 34 (1982), pp. 957–1015; Cheryl I. Harris, "Whiteness as Property", *Harvard Law Review*, 106 (June 1993), pp. 1707–1791.

"American"?[12] Such attitudes prevailed at the end of the century despite black American efforts to construct themselves as fellow citizens to the white populace and inform white attitudes toward people of color today. All the bourgeois novels of the African American "Talented Tenth" could not reverse the tide of white disdain for black claims to citizenship at the turn of the century.

Other romantic issues, such as those of authenticity and irony in the legal circumscription of the African-American romantic subject can and must be applied to the rewriting of the cultural history of the nineteenth century. Since T. Jackson Lears has obviated the kind of innocent periodization that used to stop our discussion of American Romanticism with Melville, we need to understand that Romanticism, like capital, is one of the "default" settings from which the cultural work of America still proceeds. America is yet a romantic republic, by most measures, and the threat that Romanticism poses to the still-unfulfilled promise of true citizenship for African Americans ought not be underestimated. At the same time, the degree to which Romanticism and the law provide the paradigmatic structures that frame African-American responses to the statutory denial of desire within and for citizenship in America's romantic republic needs more study.

I end this essay more or less where the four books nominally under consideration here most seriously engage their issues, with the onset of the "real" American twentieth century after the First World War. The current condition is both romantic and ironic. Race is more easily seen now as a mask for class, as we racialize poverty and crime statistically. But racial identity as a marker is also hotly contested, not as a marker of Americanism but of privilege. The debate over Affirmative Action suggests that Americans are finally wise to the romantic game they are playing and realize at least in part that all of this struggle is about racial identity as property, about the right to own it, use it, and dispose of it.

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12 That even the wisest reader can misconstrue the implications of American legal and social history where these terms are employed can be seen in Cornel West's *New York Times Magazine* essay on race relations, "Learning to Talk of Race" (*NYTM* [2 August 1992]). West observes the situation of black Americans defined as "other" and describes that condition as having been "somehow" left out of the weave of what he calls America's "one garment of destiny." But his "somehow" misjudges how deeply ingrained in American self-definition has been the historical rejection of blacks by Eurocentric Romanticism's obsession with the "other" as an agent in the white male quest for self. This "Eu / romantic" privileging of self-creation in American cultural narratives deliberately places all African Americans at the margins of the imagined community, never at the center as subject-citizen. The "weave of the garment" which West believes need only be adjusted to create destiny's true pattern, was not, we should argue, designed to show any black thread.

All of the authors of these recent studies respect the past and each begins by reaching back to the brief record as they see it for a prolegomenum to their own studies. Bailey/Green and Russell approach the record with the intent of making some correlations between cultural representations of black Americans and crime; Kennedy summarizes the clinical record of the law; O'Brien recreates a moment in recent history. The cultural range of Bailey/Green is the most expansive, but has, as I suggested, peculiar limitations and Russell, even in her inherently intriguing list of racial hoaxes, seems not to realize that African American narrative, particularly fiction, provides point and counter-point for her discussion. Kennedy's idea of culture is of the culture of the law and reading him is to get a master's evocation of the law as a narrative system, but from his explication of black experience within that narrative you would never guess that black writers had created a parallel and countervalent narrative of the same issues he examines. O'Brien layers economic, political, and social history over her speculations about the micro evolution of the law in one Tennessee county, but she ignores any larger conceptualization of culture than that of the law or commerce. Thus we have no idea how her protagonists were shaped by language, image, or idea that does not derive from one or both of those paradigms.

In none of these books is there a successful attempt to understand the evidence, as even these limited investigations can uncover it, as part of a cultural record of great complexity and such diversity that all the participants are yet to be named. In these works, events happen along a line of march read as an aerial photograph or as the simple melody line of a music score. But we need to read these relationships synchronically as well as diachonically. Even if we are irrevocably post-structural in our contemporary cultural construction, we should perhaps try to construct cultural history structurally. When I read these four books synchronically, however, I notice once again what is missing from the "score." There are so few harmonics, let's say. Occasionally one text picks up a theme, even a key, from one of the others, as when Kennedy comments on O'Brien's theme of the law's inadequate protection of black Americans or when Russell and Kennedy each formulate definitions of black "protectionism" as a cultural attitude toward the African American with a high public "profile" or when Bailey/Green and Russell both discuss the Emmett Till case or when all of them address the "politics of respectability" in black life. But none of them singly nor all of them read as an intertextual investigation of race, crime, and the law place the object of their scrutiny in as complex a structure as a well-considered reading of American intellectual history and African American literature would provide.

As valuable as Kennedy's and O'Brien's books are, and even taking from Bailey/Green and Russell the strengths of their less than comprehensive tours of some aspects of the cultural record, missing from all of these attempts to understand the terrain at the intersection of black life and American law are the names and works of the majority of black men and women of the nineteenth and twentieth centuries whose novels, stories, autobiographies, films, and songs limn the confusion, concern, anger, carnage, and yet deep and even desperate Americanism that mark that intersection for the traveler. I hope I have suggested that the real record has yet to be adequately read. If we are to truly understand the anomalous condition of black Americans under the ironic weight of American law, we need another kind of scholarship, a cultural reading. My proposition is that by trying to understand the romantic underpinnings of American legal imagination about race, property, and identity in the long nineteenth century and the narrative responses to that imagination by African American writers then and to this moment, we may change the histories of our common past and the prospects for our common future.