

*The Alchemy
of Race and Rights*

PATRICIA J. WILLIAMS

HARVARD UNIVERSITY PRESS
Cambridge, Massachusetts, and London, England 1991

XX
KF4757
.W53B
1991
C.3

Copyright © 1991 by the President and Fellows of Harvard College
All rights reserved
Printed in the United States of America
10 9 8 7 6 5 4 3 2 1

This book is printed on acid-free paper, and its binding materials have been chosen for strength and durability.

Library of Congress Cataloging-in-Publication Data

Williams, Patricia J., 1951—

The alchemy of race and rights / Patricia J. Williams.

p. cm.

Includes bibliographical references and index.

ISBN 0-674-01470-7

1. Afro-Americans—Civil rights. 2. United States—Race relations.
3. Williams, Patricia J., 1951— 4. Law teachers—Wisconsin—Biography.
5. Critical legal studies—United States. 6. Women—Status, gender roles, etc.—United States.

I. Title.

KF4757.W53 1991

342.73'0873—dc20

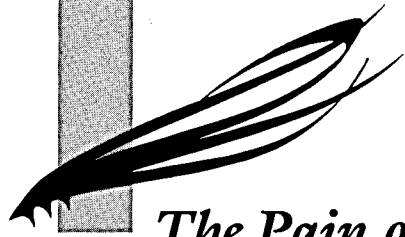
[347.302873]

90-48439
CIP

Designed by Gwen Frankfeldt



law



The Pain of Word Bondage

(a tale with two stories)

Some time ago, Peter Gabel and I taught a contracts class together. (He was one of the first to bring critical theory to legal analysis and so is considered a “founder” of Critical Legal Studies.) Both recent transplants from California to New York, each of us hunted for apartments in between preparing for class. Inevitably, I suppose, we got into a discussion of trust and distrust as factors in bargain relations. It turned out that Peter had handed over a \$900 deposit in cash, with no lease, no exchange of keys, and no receipt, to strangers with whom he had no ties other than a few moments of pleasant conversation. He said he didn’t need to sign a lease because it imposed too much formality. The handshake and the good vibes were for him indicators of trust more binding than a form contract. At the time I told Peter he was mad, but his faith paid off. His sublessors showed up at the appointed time, keys in hand, to welcome him in. There was absolutely nothing in my experience to prepare me for such a happy ending. (In fact I remain convinced that, even if I were of a mind to trust a lessor with this degree of informality, things would not have worked out so successfully for me: many Manhattan lessors would not have trusted a black person enough to let me in the door in

the first place, paperwork, references, and credit check notwithstanding.)

I, meanwhile, had friends who found me an apartment in a building they owned. In my rush to show good faith and trustworthiness, I signed a detailed, lengthily negotiated, finely printed lease firmly establishing me as the ideal arm's-length transactor.

As Peter and I discussed our experiences, I was struck by the similarity of what each of us was seeking, yet with such polar approaches. We both wanted to establish enduring relationships with the people in whose houses we would be living; we both wanted to enhance trust of ourselves and to allow whatever closeness was possible. This similarity of desire, however, could not reconcile our very different relations to the tonalities of law. Peter, for example, appeared to be extremely self-conscious of his power potential (either real or imagistic) as white or male or lawyer authority figure. He therefore seemed to go to some lengths to overcome the wall that image might impose. The logical ways of establishing some measure of trust between strangers were an avoidance of power and a preference for informal processes generally.¹

On the other hand, I was raised to be acutely conscious of the likelihood that no matter what degree of professional I am, people will greet and dismiss my black femaleness as unreliable, untrustworthy, hostile, angry, powerless, irrational, and probably destitute.² Futility and despair are very real parts of my response. So it helps me to clarify boundary; to show that I can speak the language of lease is my way of enhancing trust of me in my business affairs. As black, I have been given by this society a strong sense of myself as already too familiar, personal, subordinate to white people. I am still evolving from being treated as three-fifths of a human, a subpart of the white estate. I grew up in a neighborhood where landlords would not sign leases with their poor black tenants, and demanded that rent be paid in cash; although superfi-

cially resembling Peter's transaction, such informality in most white-on-black situations signals distrust, not trust. Unlike Peter, I am still engaged in a struggle to set up transactions at arm's length, as legitimately commercial, and to portray myself as a bargainer of separate worth, distinct power, sufficient *rights* to manipulate commerce.

Peter, I speculate, would say that a lease or any other formal mechanism would introduce distrust into his relationships and he would suffer alienation, leading to the commodification of his being and the degradation of his person to property.³ For me, in contrast, the lack of formal relation to the other would leave me estranged. It would risk a figurative isolation from that creative commerce by which I may be recognized as whole, by which I may feed and clothe and shelter myself, by which I may be seen as equal—even if I am stranger. For me, stranger-stranger relations are better than stranger-chattel.

The unifying theme of Peter's and my discussions is that one's sense of empowerment defines one's relation to the law, in terms of trust/distrust, formality/informality, or rights/no-rights ("needs"). In saying this I am acknowledging points that are central in most CLS literature—that rights may be unstable and indeterminate. Despite this recognition, however, and despite a mutual struggle to reconcile freedom with alienation, and solidarity with oppression, Peter and I found the expression of our social disillusionment lodged on opposite sides of the rights/needs dichotomy.

On a semantic level, Peter's language of circumstantially defined need, of informality, solidarity, overcoming distance, sounded dangerously like the language of oppression to someone like me who was looking for freedom through the establishment of identity, the formulation of an autonomous social self. To Peter, I am sure, my insistence on the protective distance that rights provide seemed abstract and alienated.

Similarly, while the goals of CLS and of the direct victims of racism may be much the same, what is too often missing is acknowledgment that our experiences of the same circumstances may be very different; the same symbol may mean different things to each of us. At this level, the insistence of certain scholars that the “needs” of the oppressed should be emphasized rather than their “rights” amounts to no more than a word game. The choice has merely been made to put needs in the mouth of a rights discourse—thus transforming need into a new form of right. “Need” then joins “right” in the pantheon of reified representations of what it is that you, I, and we want from ourselves and society.

Although rights may not be ends in themselves, rights rhetoric has been and continues to be an effective form of discourse for blacks. The vocabulary of rights speaks to an establishment that values the guise of stability, and from whom social change for the better must come (whether it is given, taken, or smuggled). Change argued for in the sheep’s clothing of stability (“rights”) can be effective, even as it destabilizes certain other establishment values (segregation). The subtlety of rights’ real instability thus does not render unusable their persona of stability.

What is needed, therefore, is not the abandonment of rights language for all purposes, but an attempt to become multilingual in the semantics of evaluating rights. One summer when I was about six, my family drove to Maine. The highway was straight and hot and shimmered darkly in the sun. My sister and I sat in the back seat of the Studebaker and argued about what color the road was. I said black, she said purple. After I had harangued her into admitting that it was indeed black, my father gently pointed out that my sister still saw it as purple. I was unimpressed with the relevance of that at the time; but with the passage of years, and much more observation, I have come to see endless overheated highways as slightly more purple than black. My sister and I will probably argue about the hue of life’s roads forever. But the lesson I learned from listening to her wild perceptions is that it

really is possible to see things—even the most concrete things—simultaneously yet differently; and that seeing simultaneously yet differently is more easily done by two people than one, but that one person can get the hang of it with time and effort.

In addition to our different word usage, Peter and I had qualitatively different experiences of rights. For me to understand fully the color my sister saw when she looked at a road involved more than my simply knowing that her “purple” meant my “black.” It required as well a certain slippage of perception that came from my finally experiencing how much her purple felt like my black:

Wittgenstein’s experiments in some of the passages of his *Zettel* teach us about multiple perception, ellipsis and hinging, as well as about seeing and saying. He speaks of “entering the picture” . . . and indeed his tricks try out our picture as our thought . . . Ambivalence is assumed. It is as if the imagination were suddenly to be stretched: “Suppose someone were to say: ‘Imagine this butterfly exactly as it is, but ugly instead of beautiful’?! . . . The transfer we are called upon to make includes a . . . stretching not just of the imagination, but of the transfer point . . . “It is as if I were told: here is a chair. Can you see it clearly?—Good—now translate it into French!”⁴

In Peter’s and my case, such a complete transliteration of each other’s experience is considerably harder to achieve. If it took years for me to understand my own sister, probably the best that Peter and I can do—as friends and colleagues, but very different people—is to listen intently to each other so that maybe our children can bridge the experiential distance. Bridging such gaps requires listening at a very deep level, to the uncensored voices of others. To me, therefore, one of the most troubling positions advanced by some in CLS is that of rights’ *disutility* in political advancement. The CLS disutility argument is premised on the assumption that rights’ rigid systematizing may keep one at a per-

manent distance from situations that could profit from closeness and informality: "It is not just that rights-talk does not do much good. In the contemporary United States it is positively harmful."⁵ Furthermore, any marginal utility to be derived from rights discourse is perceived as being had at the expense of larger issues, rights being pitted against, rather than asserted on behalf of, agendas of social reform. This line of reasoning underlies much of the rationale for CLS' abandonment of rights discourse and for its preference for informality—for restyling, for example, arguments about rights to shelter for the homeless into arguments about the needs of the homeless.⁶

Such statements, however, about the relative utility of needs over rights discourse overlook that blacks have been describing their needs for generations. They overlook a long history of legislation *against* the self-described needs of black people. While it is no longer against the law to teach black people to read, there is still within the national psyche a deep, self-replicating strain of denial of the urgent need for a literate black population. ("They're not intellectual," "They can't . . .") In housing, in employment, in public and private life, it is the same story: the undesired needs of black people transform them into those-without-desire. ("They're lazy," "They don't want to . . .")

For blacks, describing needs has been a dismal failure as political activity. It has succeeded only as a literary achievement. The history of our need is certainly moving enough to have been called poetry, oratory, epic entertainment—but it has never been treated by white institutions as the statement of a political priority. (I don't mean to undervalue the liberating power for blacks of such poetry, oratory, and epic; my concern is the degree to which it has been compartmentalized by the larger culture as something other than political expression.⁷) Some of our greatest politicians have been forced to become ministers or blues singers. Even white descriptions of "the blues" tend to remove the daily hunger and hurt

from need and abstract it into a mood. And whoever would legislate against depression? Particularly something as rich, soulful, and sonorously productive as black depression.

It may be different when someone white is describing need. Shorn of the hypnotic rhythmicity that blacks are said to bring to their woe, white statements of black needs suddenly acquire the sort of stark statistical authority that lawmakers can listen to and politicians hear. But from blacks, stark statistical statements of need are heard as strident, discordant, and unharmonious. Heard not as political but only against the backdrop of their erstwhile musicality, they are again abstracted to mood and angry sounds. (Mythologically speaking, black anger inspires white fear and fear is the one mood to which legislators have responded, but that story has nothing to do with black need.)

For blacks, then, the battle is not deconstructing rights, in a world of no rights; nor of constructing statements of need, in a world of abundantly apparent need. Rather the goal is to find a political mechanism that can confront the *denial* of need. The argument that rights are disutile, even harmful, trivializes this aspect of black experience specifically, as well as that of any person or group whose vulnerability has been truly protected by rights.

This difference of experience from whites is not, I think, solely attributable to such divisions as positive/negative, bourgeois/proletariat; given our history, it is a difference rooted in race and in the unconsciousness of racism. It is only in acknowledging this difference, however, that one can fully appreciate the underlying common ground of the radical left and the historically oppressed: the desire to heal a profound existential disillusionment. Wholesale rejection of rights does not allow for the expression of such difference.

The white left is perhaps in the position of King Lear, when he discovered in himself a "poor, bare, forked animal" who *needed* no silks, furs, or retinue, only food, water, and straw to sleep on.

The insight of this experience also freed him to see the weight, the constrictions, that his due as king had imposed on him. Similarly, the white left may feel that words and rights “have only the meaning that power wishes them to have.” In this context, relationships of trust (which require neither speech nor rights) are replaced by the kind of “sufferance with which force condescends to weakness.”⁸ From this perspective, the Olympus of rights discourse may indeed be an appropriate height from which those on the resourced end of inequality, those already rights-empowered, may wish to jump.

Blacks, however, may symbolize that King Lear who was pushed to the point of madness: who did not find his essential humanity while retaining some reference point to an identity as social being temporarily lost in the wilderness—and who ultimately lost everything including a sense of self. The black slave experience was that of lost languages, cultures, tribal ties, kinship bonds, even of the power to procreate in the image of oneself and not that of an alien master. That sort of confrontation with the utter powerlessness of status which is the true and full condition of the wilderness is what ultimately drove Lear from insight into madness. Reduced to the basic provisions of food, water, and a straw pallet, kings may gain new insight into those needs they share with all humankind. For others, however—slaves, sharecroppers, prisoners, mental patients—the experience of poverty and need is fraught with the terrible realization that they are dependent “on the uncertain and fitful protection of a world conscience,”⁹ which has forgotten them as individuals. For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity: rights imply a respect that places one in the referential range of self and others, that elevates one’s status from human body to social being. For blacks, then, the attainment of rights signifies the respectful behavior, the collective responsibility, properly owed by a society to one of its own.

Another way of describing the dissonance between blacks and CLS is in terms of the degree of moral utopianism with which blacks regard rights. For blacks, the prospect of attaining full rights under law has been a fiercely motivational, almost religious, source of hope ever since arrival on these shores. It is an oversimplification to describe that hope as merely a "compensation for . . . feelings of loss," rights being a way to "conceal those feelings."¹⁰ Black loss is not of the sort that can be compensated for or concealed by rights assertion. It must be remembered that *from the experiential perspective of blacks*, there was no such thing as "slave law."¹¹ The legal system did not provide blacks, even freed blacks, with structured expectations, promises, or reasonable reliances of any sort. If one views rights as emanating from either slave "legal" history or from that of modern bourgeois legal structures, then of course rights would mean nothing because blacks have had virtually nothing under either. And if one envisions rights as economic advantages over others, one might well conclude that "because this sense of illegitimacy [of incomplete social relations] is always threatening to erupt into awareness, there is a need for 'the law.'"¹²

But where one's experience is rooted not just in a sense of illegitimacy but in *being* illegitimate, in being raped, and in the fear of being murdered, then the black adherence to a scheme of both positive and negative rights—to the self, to the sanctity of one's own personal boundaries—makes sense.¹³

The individual unifying cultural memory of black people is the helplessness of living under slavery or in its shadow. I grew up living in the past: the future, some versions of which had only the vaguest possibility of happening, was treated with the respect of the already-happened, seen through the prismatic lenses of what had already occurred. Thus, when I decided to go to law school, my mother told me that "the Millers were lawyers so you have it in your blood." (Of course Mother did not mean that law was literally part of my genetic makeup; she meant that law was an

intimate part of the socially constructed reality into which I had been born. She meant that dealing with law and lawyers was something with which my ancestors were all too familiar.) Now the Millers were the slaveholders of my maternal grandmother's clan. The Millers were also my great-great-grandparents and great-aunts and who knows what else. My great-great-grandfather Austin Miller, a thirty-five-year-old lawyer, impregnated my eleven-year-old great-great-grandmother Sophie, making her the mother of Mary, my great-grandmother, by the time she was twelve.

In ironic, perverse obeisance to the rationalizations of this bitter ancestral mix, the image of this self-centered child molester became the fuel for my survival in the dispossessed limbo of my years at Harvard, the *Bakke* years, when everyone was running around telling black people that they were very happy to have us there but, after all, they did have to lower the standards and re-adjust the grading system. (I do not mean this as a criticism of affirmative action, but of those who tried to devalue the presence and contributions of us, the affirmatively active.) And it worked. I got through law school, quietly driven by the false idol of white-man-within-me, and absorbed much of the knowledge and values that had enslaved my foremothers.

I learned about images of power in the strong, sure-footed arm's-length transactor. I learned about unique power-enhancing lands called Whiteacre and Blackacre, and the mystical fairy rings encircling them, called restrictive covenants. I learned that excessive power overlaps generously with what is seen as successful, good, efficient, and desirable in our society.

I learned to undo images of power with images of powerlessness; to clothe the victims of excessive power in utter, bereft, naïveté; to cast them as defenseless supplicants pleading defenses of duress, undue influence, and fraud. A quick review of almost any contracts text will show that most successful defenses feature women, particularly if they are old and widowed; illiterates; blacks

and other minorities; the abjectly poor; and the old and infirm. A white male student of mine once remarked that he couldn't imagine "reconfiguring his manhood" to live up to the "publicly craven defenselessness" of defenses like duress and undue influence.¹⁴

I learned that the best way to give voice to those whose voice had been suppressed was to argue that they had no voice.¹⁵

Some time ago, I taught a property class in which we studied the old case of *Pierson v. Post*:

Post, being in possession of certain dogs and hounds under his command, did, "upon a certain wild and uninhabited, unpossessed and waste land, called the beach, find and start one of those noxious beasts called a fox," and whilst there hunting, chasing and pursuing the same with his dogs and hounds, and when in view thereof, Pierson, well knowing the fox was so hunted and pursued, did, in the sight of Post, to prevent his catching the same, kill and carry it off.¹⁶

One day a student gave me a version of the case as reinterpreted by her six-year-old, written from the perspective of the wild fox. In some ways it resembled Peter Rabbit with an unhappy ending; most important, it was a tale retold from the doomed prey's point of view, the hunted reviewing the hunter. It was about this time that I began studying something that may have been the contract of sale of my great-great-grandmother as well as a census accounting that does list her, along with other, inanimate evidence of wealth, as the "personal property" of Austin Miller.

In reviewing those powerfully impersonal documents, I realized that both she and the fox shared a common lot, were either owned or unowned, never the owner. And whether owned or unowned, rights over them never filtered down to them; rights to their persons were never vested in them. When owned, issues of physical, mental, and emotional abuse or cruelty were assigned by the law to the private tolerance, whimsy, or insanity of an external master. And when unowned—free, freed, or escaped—again their

situation was uncontrollably precarious, for as objects *to be* owned, they and the game of their conquest were seen only as potential enhancements to some other self. (In *Pierson*, for example, the dissent described the contest as between the “gentleman” in pursuit and the “saucy intruder.” The majority acknowledged that Pierson’s behavior was “uncourteous” and “unkind” but decided the case according to broader principles of “peace and order” in sportsmanship.) They were fair game from the perspective of those who had rights; but from their own point of view, they were objects of a murderous hunt.

This finding of something that could have been the contract of sale of my great-great-grandmother irretrievably personalized my analysis of the law of her exchange. Repeatedly since then, I have tried to analyze and undo her situation employing the tools of adequacy of valuable consideration—how much value, I wonder. Just how did the value break down? Did they haggle? Was it a poker game, a trade, a promissory note? How much was she *worth*? The New York Public Library’s Shomberg Center has in its archives a contract in which a young woman was sold for a dollar. In contrast, a review of the literature on the slave trade from Africa shows that the death of one fourth to two thirds of every cargo ship’s population still provided “a good return on their investment.” With what literalism must my philosophizing be alloyed: “There’s something in me which might have been great, but due to the unfavorable market, I’m only worth a little.”¹⁷

I have tried to rationalize and rescue her fate using defenses to formation, grounds for discharge and remedies (for whom?). That this was a dead-end undertaking is obvious, but it was interesting to see how the other part of my heritage, Austin Miller the lawyer and his confreres, had constructed their world so as to nip quests like mine in the bud.

The very best I could do for her was to throw myself upon the mercy of an imaginary, patriarchal court and appeal for an exercise of its extraordinary powers of conscionability and “hu-

manitarianism." I found that it helped to appeal to the court's humanity, not to stress the fullness of hers. I found that the best way to get anything for her, whose needs for rights were so overwhelmingly manifest, was to argue that she, poor thing, had no rights.¹⁸ It is this experience of having, for survival, to argue for our own invisibility in the passive, unthreatening rhetoric of "no-rights" which, juxtaposed with the CLS abandonment of rights theory, is both paradoxical and difficult for minorities to accept.

My discussion may prompt the argument that this last paradox is the direct product of rights discourse itself. So, in addition, I tried arguing my great-great-grandmother's fate in terms more direct, informal, descriptive, and substantive. I begged, pleaded, "acted out," and cried. I prayed loudly enough for all to hear, and became superstitious. But I didn't get any relief for Sophie's condition; my most silver-tongued informality got her nothing at all.

The problem, as I came to see it, is not really one of choosing rhetoric, of formal over informal, of structure and certainty over context, of right over need.¹⁹ Rather it is a problem of appropriately choosing signs within any system of rhetoric. From the object-property's point of view (that of my great-great grandmother and the nameless fox), the rhetoric of certainty (of rights, formal rules, and fixed entitlements) has been enforced at best as if it were the rhetoric of context (of fluidity, informal rules, and unpredictability). Yet the fullness of context, the trust that enhances the use of more fluid systems, is lost in the lawless influence of cultural insensitivity and taboo. So while it appears to jurisdictionally recognized and invested parties that rights designate outcomes with a clarity akin to wisdom, for the object-property the effect is one of existing in a morass of unbounded irresponsibility.

But this failure of rights discourse, much noted in CLS scholarship, does not logically mean that informal systems will lead to better outcomes. Some structures are the products of social forces and people who wanted them that way. If one assumes, as blacks must, not that the larger world wants to overcome alienation but

that many heartily embrace it, driven not just by fear but by hatred and taboo, then informal systems as well as formal systems will be run principally by unconscious or irrational forces: "Human nature has an invincible dread of becoming more conscious of itself."²⁰ (By this I do not mean to suggest a Hobbesian state of nature, but a crust of cultural habit and perception whose power shelters as it blinds.)

This underscores my sense of the importance of rights: rights are to law what conscious commitments are to the psyche. This country's worst historical moments have not been attributable to rights *assertion* but to a failure of rights commitment. From this perspective, the problem with rights discourse is not that the discourse is itself constricting but that it exists in a constricted referential universe. The body of private laws epitomized by contract, including slave contract, is problematic because it denies the object of contract any rights at all.

The quintessential rule of contract interpretation, the parol evidence rule, illustrates the mechanics by which such constriction is achieved. It says: "Terms with respect to which the confirmatory memoranda of the parties agree . . . may not be contradicted [by extrinsic evidence] . . . but may be explained or supplemented . . . by evidence of consistent additional terms."²¹ If this rule is understood as a form of social construction, the words could as well read: "Terms with respect to which the constructed reality (or governing narrative) of a given power structure agree, may not be contradicted, but only supplemented or explained."

Such a social construction applied to rights mythology suggests the way in which rights assertion has been limited by delimiting certain others as "extrinsic" to rights entitlement: "Europe during the Discovery era refused to recognize legal status or rights for indigenous tribal peoples because 'heathens' and 'infidels' were legally presumed to lack the rational capacity necessary to assume an equal status or exercise equal rights under the European's medievally-derived legal world-view."²² The possibility of a

broader referential range of considered types of rights may be found by at least adding to, even contradicting, traditional categories of rights recipients.

Imagine, for example, a world in which a broader range of inanimate objects (other than corporations) were given rights—as in cases of the looting of American Indian religious objects: spurred by a booming international art market and virtually no fear of prosecution, raiders have taken “ceremonial objects and ancient tools [as well as] the mummified remains of Anasazi children . . . the asking price for quality specimens starts at \$5000. The best of these are said to have been preserved by casting them into acrylic blocks, an expensive, high-tech procedure . . . ‘To us,’ says Marcus Sekayouma, a Hopi employee of the Bureau of Indian Affairs, ‘the removal of any old object from the ground is the equivalent of a sacrilege.’”²³

Such expanded reference—first made controversial by Christopher Stone’s famous article “Should Trees Have Standing?”—is premised on the degree to which rights do empower and make visible:

We are inclined to suppose the rightlessness of rightless “things” to be a decree of Nature, not a legal convention acting in support of some status quo. It is thus that we defer considering the choices involved in all their moral, social and economic dimensions . . . The fact is that each time there is a movement to confer rights onto some new “entity,” the proposal is bound to sound odd or frightening or laughable. This is partly because until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of “us”—those who are holding rights at the time.²⁴

One consequence of this broader reconfiguration of rights is to give voice to those people or things that, by virtue of their object relation to a contract, historically have had no voice. Allowing this sort of empowering opens up the *egoisme à deux* of traditional contract and increases the limited bipolarity of relationship that characterizes so much of western civilization.²⁵ Listening to

and looking for interests beyond the narrowest boundaries of linear, dualistically reciprocal encounters is characteristic of gift relationships, networks of encompassing expectation and support. As my colleague Dinesh Khosla describes it, "In the circularity of gift, the wealth of a community never loses its momentum. It passes from one hand to another; it does not gather in isolated pools. So all have it, even though they do not possess it and even though they do not own it."²⁶

Such an expanded frame of rights reference underlies a philosophy of more generously extending rights to all one's fellow creatures, whether human or beast. Think how differently might have been the outcome in the Tuskegee syphilis experiment, in which illiterate black men were deliberately allowed to go untreated from 1932 until 1972, observed by doctors from the U.S. Public Health Service. Approximately four hundred diseased men with two hundred more as controls were allowed to degenerate and die; doctors told them only that they had "bad blood."²⁷

Similarly, every year one reads in the newspapers about millions of cattle who are periodically destroyed for no other purpose than to drive up the price of milk or beef. One also reads about the few bleeding hearts who wage a mostly losing war to save the lives of the hapless animals. Yet before the Reformation, the bleeding heart was the Christian symbol of one who could "feel the spirit move inside all property. Everything on earth is a gift and God is the vessel. Our small bodies may be expanded; we need not confine the blood." Today, on the other hand, the "bleeding heart" is . . . the man of dubious mettle with an embarrassing inability to limit his compassion."²⁸

One lesson I never learned in school was the degree to which black history in this nation is that of fiercely interwoven patterns of family, as conceived by white men. Folklore notwithstanding, slaves were not treated "as though" they were part of the family (for that implies a drawing near, an overcoming of market-placed

distance); too often the unspoken power of white masters over slaves was the covert cohesion of family.²⁹ Those who were, in fact or for all purposes, family were held at a distance as strangers and commodities: strangers in the sense that they were excluded from the family circle at the hearth and in the heart, and commodities in the sense that they could be sold down the river with no more consideration than the bales of cotton they accompanied.

In the thicket of those relations, the insignificance of family connection was consistently achieved through the suppression of any image of blacks as capable either of being part of the family of white men or of having family of their own: in 1857 the Supreme Court decided the seminal case of *Dred Scott v. Sandford* in which blacks were adjudged "altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit."³⁰ A popular contemporary pamphlet likened blacks to "ourang outangs" and determined them to be the descendants of Canaan. (In the Bible, Noah condemns his son's son Canaan to be a "servant of servants.")

Moreover, "Since slaves, as chattels, could not make contracts, marriages between them were not legally binding . . . Their condition was compatible only with a form of concubinage, voluntary on the part of the slaves, and permissive on that of the master. In law there was no such thing as fornication or adultery between slaves; nor was there bastardy, for, as a Kentucky judge noted, the father of a slave was 'unknown' to the law. No state legislature ever seriously entertained the thought of encroaching upon the master's rights by legalizing slave marriages."³¹ Antimiscegenation laws also kept blacks outside the family of those favored with rights; and laws restricting the ability of slaveholders to will property or freedom to blacks suspended them in eternal illegitimacy.

The recognition of such a threshold is the key to understand-

ing slavery as a structure of denial—a denial of the generative independence of black people. A substitution occurred: instead of black motherhood as the generative source for black people, master-cloaked white manhood became the generative source for black people. Although the “bad black mother” is even today a stereotypical way of describing what ails the black race, the historical reality is that of careless white fatherhood. Blacks are thus, in full culturally imagistic terms, not merely unmothered but badly fathered, abused and disowned by whites. Certainly the companion myths to this woeful epic are to be found in brutalized archetypes of black males (so indiscriminately generative as to require repression by castration) and of white females (so discriminatingly virginal as to wither in idealized asexuality).³²

To say that blacks never fully believed in rights is true. Yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before; we held onto them, put the hope of them into our wombs, mothered them and not the notion of them. And this was not the dry process of reification, from which life is drained and reality fades as the cement of conceptual determinism hardens round—but its opposite. This was the resurrection of life from ashes four hundred years old.³³ The making of something out of nothing took immense alchemical fire—the fusion of a whole nation and the kindling of several generations. The illusion became real for only a few of us; it is still elusive for most. But if it took this long to breathe life into a form whose shape had already been forged by society, and which is therefore idealistically if not ideologically accessible, imagine how long the struggle would be without even that sense of definition, without the power of that familiar vision. What hope would there be if the assignment were to pour hope into a timeless, formless futurism? The desperate psychological and physical oppression suffered by black people in this society makes such a prospect

either unrealistic (experienced as unattainable) or other-worldly (as in the false hopes held out by many religions of the oppressed.)

It is true that the constitutional foreground of rights was shaped by whites, parceled out to blacks in pieces, ordained from on high in small favors, random insulting gratuities. Perhaps the predominance of that imbalance obscures the fact that the recursive insistence of those rights is also defined by black desire for them—desire fueled not by the sop of minor enforcement of major statutory schemes like the Civil Rights Act, but by knowledge of, and generations of existing in, a world without any meaningful boundaries—and ‘without boundary’ for blacks has meant not untrammelled vistas of possibility but the crushing weight of total—bodily and spiritual—*intrusion*. “Rights” feels new in the mouths of most black people. It is still deliciously empowering to say. It is the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no power. The concept of rights, both positive and negative, is the marker of our citizenship, our relation to others.

In many mythologies, the mask of the sorcerer is also the source of power. To unmask the sorcerer is to depower.³⁴ So CLS’s unmasking of rights mythology in liberal America is to reveal the source of much powerlessness masquerading as strength; it reveals a universalism of need and oppression among whites as well as blacks. In those ancient mythologies, however, unmasking the sorcerer was only part of the job. It was impossible to destroy the mask without destroying the balance of things, without destroying empowerment itself. The mask had to be donned by the acquiring shaman and put to good ends.

The task for Critical Legal Studies, then, is not to discard rights but to see through or past them so that they reflect a larger definition of privacy and property: so that privacy is turned from exclusion based on self-regard into regard for another’s fragile, mysterious autonomy; and so that property regains its ancient connotation of being a reflection of the universal self.³⁵ The task

is to expand private property rights into a conception of civil rights, into the right to expect civility from others. In discarding rights altogether, one discards a symbol too deeply enmeshed in the psyche of the oppressed to lose without trauma and much resistance. Instead, society must *give* them away. Unlock them from reification by giving them to slaves. Give them to trees. Give them to cows. Give them to history. Give them to rivers and rocks. Give to all of society's objects and untouchables the rights of privacy, integrity, and self-assertion; give them distance and respect. Flood them with the animating spirit that rights mythology fires in this country's most oppressed psyches, and wash away the shrouds of inanimate-object status, so that we may say not that we own gold but that a luminous golden spirit owns us.