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INTRODUCTION | LAST NIGHT IN THE CITY

Cities, like dreams, are made of desires and fears, even if the thread of their discourse is secret, their rules are absurd, their perspective deceitful, and everything conceals something else.

Italo Calvino, *Invisible Cities* (1974)

Even the just decision thinks itself in the night of nonknowledge.

Gayatri Chakravorty Spivak,
A Critique of Postcolonial Reason (1999)

Schiavo/Borns: Law and Popular Culture – an example

It was Sunday again: the end of the weekend, the beginning of the week. It is a perpetual question: does, on a Sunday, one work at home, or at the office? On this particular night in the city, I did neither. As Donatella Mazzoleni would have it, between the city's labors and the city's imaginary, there was the chance of "confronting collective living."¹

¹ Donatella Mazzoleni argues in her article, "The City and the Imaginary," that the "urgency of confronting collective living [is] right where its most radical possibility of crisis exists: that is, in its imaginative roots." *New Formations: A Journal of Theory/Culture/Politics*, vol. 2 (Summer 1990) 91. She then suggests that positing the possibility of a new imaginary would require that we "think in terms of multiple and heterogeneous fragments, organized *around* the city experience...a careful, ordered and patient collection, of rejects and clues...all around an empty epicenter." Mazzoleni 103.

I switched on the TV and immediately got caught up in an episode of ABC's *Boston Legal*, "Death Be Not Proud." In this episode, Alan Shore, the sitcom's coldest and most cutthroat attorney travels to Texas with a newly hired attorney, Chelina Hall, to launch a last-minute defense on behalf of a death row prisoner, Zeke Borns. The episode's dramatic appeal reaches a climax when Shore and Hall go to what seem to be extreme – indeed, desperate and ridiculous – ends to protect Borns, he himself having given up his will and desire to live. Shore calls upon a personal friend, who will be hula dancing at the governor's vacation spot, to entice the governor to issue an executive stay. Even this does not prevail, and Borns, in an ambivalent moment of accepting gratitude and raging despair, asks Shore and Hall to witness his execution.

Witnesses to Borns's humanity: the prosecutor, one journalist, and his two Northern defense attorneys. Amidst the now popular litany of criminal defense arguments couched in terms of innocence, moral righteousness, and racial discrimination, the episode closes with an exposé of "human-ness": Borns's straining and gasping, as five prison guards strap him to the execution table. The humanity of the scene is unbearable – the guilt of taking human life is absolutely singular. Thus, the witness cannot see.

All but Shore and myself – he blankly staring through the glass window separating him from the execution chamber, and I blankly staring at the flat screen of the TV – look away from this last scene. The shot goes pitch black, and I hear only the strain and gasp of Borns's breathing. I wonder if Shore is still looking. I wait for the horror of hearing his last breath. I wonder if ABC is really going to do it, really going to let us hear Borns's last breath. *Boston Legal* runs its primetime slot, and the last breath I hear, I

think (but am not sure), was not because Borns had died. The perversity of the scene I had just walked in on takes over. I almost had become witness to an execution.

Following this televisual execution, ABC cuts straight to the latest breaking news on the legal case of Terri Schiavo. I stumble upon another scene of death, but this time the most controversial and exceptional legal battle over the stakes involved in the legal right to die, and the question of the state's implication in it.² Yet, through the emotional wrangle of ABC's reportage comes, clear and convincing, the appeal of Schiavo's right to live. I see photographs of her vegetative life, a breathing and metabolizing body. It, she, has life, according to her parents. ABC news reports that the US Senate, Congress and President have all flown into the Capitol from their pre-Easter vacationing, not to oppose Schiavo's right to die under order by the local court, but to support her right to life. Our national officials and representatives recognize the imperatives and potentials of life – the possibilities of recovery exceeding medical definitions of the vegetative state, the imaginings of emotion imprisoned by a body reduced to pure biology.

Of course, these federal lawmakers are nothing like the Texas governor lounging in the luxuries of *Boston Legal's* paradise. Or so it seemed. The mix of televisual programming – of news and drama, real time and fiction time, bi-partisan debate and legal evidence, objective history and history in the making – makes it hard to know the difference. Television's "realist imbecility,"³ its complete neglect of the space of signification, makes the two scenes seem freestanding. One scene does not comment on

² This controversy is specifically articulated in the law as the "right to die." See *Bush v. Schiavo*, 885 So. 2d 321 (2004); *Schiavo v. Bush*, 2004 WL 980028 (Fla.Cir.Ct. 2004); *Washington v. Glucksberg*, 521 U.S. 702 (1997); and *Vacco v. Quill*, 521 U.S. 793 (1997).

the other, they are either/or, we can only be in one place at a time. And yet, something – the emotion of the law – resonates between the two scenes. There is a remarkable resemblance in television's representation of the rule of law, whether it is the law's passionate attachment to mechanistic procedure or the singularity of human life. Legality appears fundamentally through culture.

What exactly impassions the law? What could possibly stir the stony face of the law? What finally lifts the sculpted blindness of the law? In other words, from where and how does the emotive force of legality come forth in our political culture? These are the questions that propel the various chapters of this dissertation.

Writing about the televisual medium, Avital Ronell argues, “television has always been related to the law, which it locates at the site of crucial trauma. Even when it is not performing metonymies of law it is producing some cognition around its traumatic diffusions....”⁴ Ronell's observations here stem from her return to the televisual staging of the rogue video and legal trial which both attempted to capture the historical event of the 1992 beating of Rodney King by Los Angeles police. Here we see the traumatic diffusion of an image of life under a police state.

This relationship between television and law, however, is still more complicated according to Ronell. That is, even if we come to know the force of law through television's representations of legality, there is still a more insidious and direct relationship between the two forms. “Television is summoned before the law, but every

³ Joan Copjec, *Read My Desire: Lacan Against the Historicists* (Cambridge, Mass.: MIT Press, 1994) 141 (quoting Lacan).

⁴ Avital Ronell, “Video/Television/Rodney King: Twelve Steps beyond *The Pleasure Principle*,” *differences: A Journal of Feminist Cultural Studies*, vol., 4. no. 2 (1992) 1.

attempt to produce the relation to law on a merely thematic level produces instead a narrative which is itself metonymic; the narrative is metonymic not because it is narrative, but because it depends on metonymic substitution from the start.”⁵ Television, in other words, substitutes the name of one of its particular features – in this case, its legality – for the thing itself – television. Ronell writes further, “Television cannot say the continuity of its relation to itself or its premier ‘object’ which I am calling force.”⁶

Despite, or perhaps because of this fact, television is “a figure of order that tries to find the language with which to measure out an ethical dosage of force.”⁷ The “force” Ronell is thinking of here is Derrida qua Benjamin’s force, as in the force of law, or the foundational violence of the modern state and its instantiation of the rule of law in history. Television, like modern law, distributes the force of law across the social domain. And it is this distributive representational character common to television and modern law – television’s distribution of information and law’s distribution of justice – that both conceals and contains a collective social trauma. Indeed, as Gayatri Spivak reminds us in the epigraph above, “[e]ven the just decision thinks itself in the night of nonknowledge.”

⁵ Ronell 2. Metonymy as a linguistic concept has multiple derivations: semantic, sociological and psychoanalytic. Semantic metonymy is the substitution of the name of an attribute or feature for the name of thing itself. Sociological metonymy is the production of “figures of speech” where one word substitutes for another closely associated word. And psychoanalytic metonymy is the disturbance in a schizophrenic’s speech where an inappropriate but related word is used in place of the correct word. We might understand that this direct metonymic relationship between television and law described by Ronell occurs at these three registers of language.

⁶ Ronell 2.

⁷ Ronell 2.

I was witness to a double scene of death that Sunday – one in the execution capital of the world,⁸ and the other in a state figured as the new Old South⁹; one of the sound of black flesh, and the other of a pictured (and picturesque) white life; one of the grotesque face of the state, and the other of its intimate sense of care. Crosshatched by this televisual geography between Texas and Florida, this last night in the city, I located the imaginary – a political playground of sorts – dwelling at the surface of these “scenes of subjection.”¹⁰ And I wondered where in the world I was as I, part of the national audience, watched life unfold, in plain sight.

The History of Colorblindness: The Law-and-Order Aesthetic and Catch-22 of Racial Jurisprudence

That one could, on any given night, witness such a double scene of death in the comforts of one's own living room attests to the disturbing peculiarity of the current moment. In our world, systematic relations of punishment are no longer unique to institutions of criminal justice, but characterize the global *milieu*. An extraordinary group of scholars has documented and analyzed the long reach and immense scale of a global restructuring under late capitalism that has necessitated the racialized warehousing of millions of people behind prison walls. Designating these various forms of political

⁸ By the end of 2003, Texas executed nearly half of the 65 people executed in the US. See “Capital Punishment 2003,” U.S. Department of Justice, Bureau of Justice Statistics, NCJ206627 (November 2004).

⁹ “The Long Shadow of Jim Crow: Voter Intimidation and Suppression in America Today,” Report by People for the American Way Foundation and the National Association for the Advancement of Colored People (2004), <http://www.pfaw.org/pfaw/dfiles/file_462.pdf>.

¹⁰ Saidiya V. Hartman, *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America* (New York: Oxford University Press, 1997).

economic restructuring the prison industrial complex,¹¹ the most compelling feature of this scholarship is the argument that building a social movement to abolish punitive institutions and replace them with democratic ones – working towards “abolition democracy,”¹² a vision popularized by Angela Y. Davis’s research on the work of W.E.B. DuBois – is absolutely critical to challenging the ruinous triumph of global capitalism over the last half of the twentieth century.

Further, if in Marxist cultural theory and criticism, ideological mediation veils the historical trauma of an economic system based on human exploitation,¹³ the ideological dimension of the prison industrial complex veils a double vanishing act – of people and

¹¹ Angela Y. Davis & Cassandra Shaylor, “Race, Gender and the Prison Industrial Complex: California and Beyond,” *Meridians*, vol. 2, no. 1 (2001); Joy James (ed.), *States of Confinement: Policing, Detention and Prisons* (New York: St. Martin’s Press, 2000); George Winslow, “Capital Crimes: The Political Economy of Crime in America,” *Monthly Review*, vol. 52, no. 6 (Nov. 2000); Christian Perenti, “The Prison Industrial Complex: Crisis and Control,” *CorpWatch* (Sept. 1999); Linda Evans, Chrystos, Eve Goldberg, and Nick Jehlen, *The Prison Industrial Complex and the Global Economy* (Kersplebedeb Press, 1998); Ruth Wilson Gilmore, “Globalization and U.S. Prison Growth,” *Race & Class*, vol. 40, no. 2-3 (1998); Avery Gordon, “Globalism and the Prison Industrial Complex: An Interview with Angela Davis,” *Race & Class*, vol. 40, no. 2-3 (1998); Eric Schlosser, “The Prison-Industrial Complex,” *The Atlantic Monthly*, vol. 282, no. 6 (Dec. 1998); Mike Davis, “Hell Factories in the Field: A Prison-Industrial Complex,” *The Nation*, vol. 260, no. 7 (Feb. 1995).

¹² Angela Y. Davis, *Abolition Democracy: Beyond Empire, Prisons, and Torture* (New York: Seven Stories Press, 2005) 95-97 (referencing W.E. B. DuBois, *Black Reconstruction in America 1860-1880* (1933)).

¹³ One of Louis Althusser’s primary contributions to revising the idea of ideology as a type of deception (implying the possibility of an undeceived state) is his identification of the work of desire in systems of structural domination. This desire is produced between scales of repression and ideology as the subject moves between various state institutions, as the subject negotiates the “the imaginary relationship of individuals to their real conditions of existence” within a social structure. Louis Althusser, “Ideology and Ideological State Apparatuses (Notes Towards and Investigation)” in *Subjectivity and Social Relations*, eds. V. Beechey and J. Donald (Milton Keynes, Buckinghamshire; Philadelphia: Open University Press, 1988) 75. Gayatri Spivak offers a critical approach to the desiring subject by focusing on Althusser’s concept of ideology, which works through, in her words, the “constitutive contradiction” of political economy, as well as language. Gayatri Spivak, “Can the Subaltern Speak?,” in *Marxism and the Interpretation of Culture*, eds. C. Nelson and L. Grossberg (Urbana and Chicago: University of Illinois Press, 1988) 274. Thus, it becomes possible that the cultural representations produced by this desiring subject contradict the way in which relations of structural domination work. See also, Judith Butler, “Conscience Doth Make Subjects of Us All,” *The Psychic Life of Power: Theories in Subjection* (Stanford: Stanford University Press, 1997); and Raymond Williams, *Marxism and Literature* (Oxford, England: Oxford University Press, 1977).

“racialized capitalism.”¹⁴ According to Avery Gordon’s aphorism of Davis’s analysis of the cultural relationship between race and prisons, “[p]risons thus perform a feat of magic.”¹⁵ The magic of prisons – that it does not appear rational, logical or responsible in our political culture to abolish what is essentially a massive human cage – is indicative not of collective passivity, apathy, or evil, but rather a collective psychological condition predicated on a relentless drive towards ‘law and order.’

In fact, Franz Fanon, researching and writing during a moment of world-scale popular struggle for decolonization during the mid-twentieth century, made an observation in his *Wretched of the Earth* (1963) that we might think of as a precursor to this current ‘law and order’ condition.

In capitalist societies, the educational system, whether lay or clerical, the structure of moral reflexes handed down from father to son, the exemplary honesty of workers who are given a medal after fifty years of good and loyal service, and the affection which springs from harmonious relations and good behavior – all these *aesthetic expressions of respect for the established order* serve to create around the exploited person an *atmosphere of submission and of inhibition* which lightens the task of policing considerably.¹⁶

Fanon seems to have identified something of an emergent prison industrial complex, which at its core is about policing the racial subject at the critical site of aesthetic expression. To a world in the throes of decolonization, the formal institution was not only a state-sponsored form of social organization. It was also, at a fundamental level, an aesthetic of ‘law and order’ that functioned inversely to the institution of policing.

¹⁴ Gordon 147 (interviewing Davis).

¹⁵ Gordon 147 (interviewing Davis).

¹⁶ Franz Fanon, *Wretched of the Earth* (New York: Grove Press 1963) 38 (my emphasis).

Put another way, the aesthetic dimension of the institution identified by Fanon is that cultural space through which the force of law – the problematic of the “unpresentability”¹⁷ of justice in history – is collectively denied. This bears particular significance in our post-civil rights world as we witness the steady elaboration of this “atmosphere of submission and of inhibition” in all corners of American life, not only because of the general erosion of basic civil liberties such as due process, but more importantly because the rollback of civil rights protecting racial minorities from racial exclusion. In the post-civil rights United States, the substance of the rule of law matters less than its ability to proliferate the semblance of legality, speak to a ‘law and order’ aesthetic, and, essentially, to perform cultural work. All the while, the rule of law, as an aesthetic, or as the cultural, “lightens the task of policing considerably.” In the current historical context, the foundational violence of the rule of law appears, fleetingly, in its articulations.¹⁸

The history that Davis and Fanon reference directs our vision towards the current political convergence between a law-and-order aesthetic and the post-civil rights colorline. Coupling mass-scale criminalization of racial inequality and the rollback of civil rights protecting against racial segregation, this political convergence drastically constrains the liberatory potential of the rule of law and veils the deadly effects of the

¹⁷ “Justice as the experience of absolute alterity is unrepresentable, but it is the chance of the event and the condition of history. No doubt an unrecognizable history, of course, for those who believe they know what they’re talking about when they use the word, whether it’s a matter of social, ideological, political, juridical or some other history.” Jacques Derrida, “Force of Law and the ‘Mystical Foundations of Authority’” in *Deconstruction and the Possibility of Justice*, eds. D. Cornell, M. Rosenfeld, and D. G. Carlson (New York: Routledge, 1992) 27-28.

force of law. Legal challenges to racial inequality at this historical moment must struggle against the fact that such challenges are culturally underwritten, always already, by what Kimberlé Crenshaw has artfully called the “catch-22” of racial jurisprudence. In her chapter, “Color Blindness, History, and the Law,” Crenshaw invokes the literary scene of the catch-22 to describe how colorblind political culture produces legal and cultural illogics by imprisoning race-based legal claims against discrimination within the futile confines of procedural formalism.¹⁹ Under the catch-22 of racial jurisprudence, doing the very thing the law permits you to do in order to seek redress against racial exclusion negates any possibility of your success. The catch-22 of race here is not the same thing as being “stuck between a rock and a hard place”; or being “damned if you do, and damned if you don’t.” Rather, if caught in a racial catch-22, you have one option for redress, but taking the option proves the very opposite of what you are trying to prove by taking the action.²⁰ This apposite description of the legal psychosis produced by civil rights challenges to racial inequality – entrapping the racial subject of the law in a position from which there is only either limitless social disenfranchisement or death – is particular, in fact, to the state of constitutional law after the historic Supreme Court decision, *Brown v. Board of Education* (1954).²¹ If the law-and-order aesthetic identified by Fanon is the permanent repressive feature of postcolonial racist culture, then the catch-

¹⁸ As Joan Copjec argues through a critique of Foucault’s disciplinary subject, “[t]he law comports the affirmative, positive force of the symbolic; it causes the world to come into being by naming it.” Copjec 155.

¹⁹ Kimberlé Crenshaw, “Color Blindness, History, and the Law” in *The House that Race Built*, ed. W. Lubiano (New York: Vintage Books, 1997) 287.

²⁰ See generally, Joseph Heller, *Catch-22*, originally published in 1961 (New York: Scribner Paperback Fiction, 1996).

²¹ 347 U.S. 483.

22 of racial jurisprudence identified by Crenshaw is the permanent repressive feature of post-civil rights America.

Indeed, in American post-civil rights political culture, the question of national failure to address the colorline of slavery and segregation almost always involves the remembering of *Brown*. The most controversial issue the case presents for constitutional law has been, and continues to be, the significance of the “doll tests” specifically, and the psychology of racist culture generally, for justifying the extended reach of constitutional law into state jurisdiction in the face of persisting racial inequality. The coincidence between Crenshaw’s description of racial jurisprudence and the legal significance of *Brown*’s reliance on the doll tests seen in their tacit acknowledgement of the effects of racist culture on the psyche is curious and striking. From a Lacanian perspective, this particular point in *Brown*’s reasoning opens up a discussion of the Real, the unsymbolized kernel around which the symbolic forms itself. The question of the psychological effects of racist culture, and its presence in the arguably most important twentieth century Supreme Court case, indicates constitutional law’s failure of symbolization. The hackneyed way in which the Court takes up the doll test study to carry the weight of its rightfully aggressive resolution to one of the most controversial legal disputes in American history stands in for that thing which must be left out (and left behind, as subsequent cases would show) for the Constitution to achieve its symbolic form as law. In the case of *Brown*, Jim Crow is both that thing which incites constitutional legal forms for negotiating racial inequality, and, as its remainder, that thing which cannot be legally recounted.

But why *these* particular psycho-social studies of black children at play? Why are they today the focal point of all major legal questions raised by the *Brown* decision? Of course, the merits of the doll tests in proving injury in a system of racial segregation, as well as the larger theoretical question of the status of social scientific data in judicial processes, have all been debated in the legal academic literature. However, what this legal literature fails to come to terms with is the apparent evidential weakness and logical irrelevance of the psychological studies in this moment of national political upheaval, and their curious relationship to constitutional law's attempt to acknowledge and reach the realm of American racist culture. We will remember that in *Plessy v. Ferguson* (1896),²² Justice Harlan's dissent and comments against formal segregation involved a theory of a law that could enforce the political equality of the races, but not social or cultural equality. Thus, his legal theory against segregation rested on an assurance that blacks, by nature, were socially and culturally inferior to whites.²³ *Brown*, situated in this historical trajectory, can be read as the Court's attempt to extend the reach of constitutional law to a domain of society that Harlan had closed off to legal reform, and yet, the doll tests seem peculiar – which is not to say that *Brown* is not law, or for that matter, good law – as support for this attempt.

If legal scholarship has not provided us with any definitive answer as to the significance of the doll tests, at the very least, it appears that the tests are a *representation* of fantasy in constitutional law. Through these, indeed specious studies, what the Court

²² 163 U.S. 537.

²³ *Plessy* also involved issues of the psychological damage of racial culture when Homer Plessy unsuccessfully claimed that segregation deprived him of his property right to enjoy the benefits of whiteness.

actually did was carve out a space for fantasy in racial jurisprudence. Whether or how seriously the Court actually interpreted and judged the black child's fantasy and its substance is not of concern here. Rather, it is the fact that through the Court's imaginary of a nation divided by the racist culture of Jim Crow, it gestured toward the necessary relationship between racial inequality and fantasy *per se*. This particular memory of *Brown* as a representation of the psychology of racist culture – alluded to by Crenshaw's identification of the catch-22 of racial jurisprudence – focuses on fantasy itself, indelibly stamps the rule of law with the force of fantasy. This is no small legal gesture, given that the law is otherwise generally accepted to be the rational and blind face of justice.

In fact, the doll tests function like what Freud called a “screen memory.”²⁴ In *Brown*, the national legal subject produces a displaced memory (the doll tests) in order to avoid the trauma of another memory (*de jure* and *de facto* Jim Crow); at the same time, the screen memory must not shatter the coherence of the story that the legal subject tells (would tell) itself. This story is about the ultimate triumph of American colorblindness: *Brown*'s overruling of *Plessy*'s majority rule, its implicit affirmation of *Plessy*'s dissenting rule, and underwriting this double movement of the law, the trace of a constitutive lack marking the black experience of justice.

Thus, there is a way in which the popular issue of official recognition of the nation's racist past somewhat misses a crucial point. When there *is* national (mis)recognition of that past, then it is always already one mediated by a “screen memory” that obscures the trauma of national guilt. This is not a feature particular to

Brown, but rather is a general characteristic of American constitutional law. The glaring omission of the word “slave” in the original constitution; the aporia of civil rights in the aftermath of chattel slavery; the lynch mob below the surface of liberal equal protection and due process jurisprudence – all such legal obscurities are symptoms of a national resistance to racial justice.

The more important point, and the one addressed by this dissertation, is that the racial trauma of slavery and segregation is what structures forms of legal subjectivity, but only for those who are not the requisite “flesh”²⁵ founding the nation. For that non-class of being flesh, the question of subjectivity remains *a question*. The historical development of the national legal subject in American constitutional law illuminates changing perceptions of racial difference, and how this difference cuts into forms of desire and fantasy.²⁶ The cut of racial difference in American law – culminating in the current coupling of the law-and-order aesthetic and catch-22 of racial jurisprudence – is the historical context motivating this dissertation’s various analyses of how legal, cultural, and political representations remain bonded to this cut.

Furthermore, the historical coincidence between the catch-22 of the ‘post-civil rights colorline’ and the law-and-order aesthetic of the prison industrial complex demands interdisciplinary analyses of law and culture. To be clear, the interdisciplinarity

²⁴ See Sigmund Freud, “Childhood Memories and Screen Memories (1901),” *The Psychopathologies of Everyday Life* (New York: W. W. Norton, 1971) 62-73.

²⁵ This particular usage of the word comes from Hortense J. Spillers, “Mama’s Baby, Papa’s Maybe: An American Grammar Book,” *Diacritics*, vol. 17, no. 2 (Summer 1987) 80. I will elaborate on this point later in the chapter.

²⁶ There is a necessary question about what subjectivity remains, if at all, for the racial figure of the Real around which the national legal subject constitutes herself? However, this dissertation’s scope does not reach it, even as it recognizes its importance – historically and politically.

found in this dissertation is necessitated by the history of race, the ethical demands of the current moment, the desire to know it better.²⁷ As the scholars of critical prison studies above have found, all disciplinary knowledges – from literature to anthropology, philosophy to economics, and history to psychology – are implicated in the discursive articulation between race and crime, crime and punishment, and punishment and imprisonment.²⁸ This suggests, then, that an analysis of racial knowledge that crosses disciplinary boundaries is perhaps one way to vitiate the normalcy of criminalizing racial inequality. Of course, this suggestion assumes that an anti-racist analysis of race is still possible within the given historical context, and in this regard, the analytical framework outlined below takes *how* this anti-racist analysis of race is articulated as *the* critical historical question.

Approaching the law-and-order aesthetic and catch-22 of racial jurisprudence simultaneously from multiple angles potentially creates the foundation for more complex and nuanced understandings of how to read the various symptoms of our current political culture. First, an interdisciplinary approach prioritizes the material reality of cultural practices through which a national political culture is staged. Here we might understand political culture as the net effect of various power/knowledges, and an interdisciplinary approach to political culture would provide a more comprehensive way of examining a political culture's conditions of possibility. Second, by focusing on the various tensions

²⁷ Because interdisciplinarity is so intimately tied to the historical present, my comments about interdisciplinary are located in the current section on history, as opposed to the previous section on method.

²⁸ The most productive articulation of the stakes involved in pursuing an interdisciplinary approach to studying the prison industrial complex – particularly one which brings together both scientific and humanistic approaches – can be found in the published conversation between Angela Y. Davis and Gina

disciplines exert on each other in the production of their objects of knowledge, interdisciplinarity allows theoretical analysis to intervene as both corrective knowledge and rhetorical interruption of the given state of epistemological affairs. Interdisciplinary tensions are taken as conflicts of theoretical assumptions underlying singular disciplines, and interdisciplinary theory that interrogates the political implications of such assumptions must draw on a more nuanced historical archive and make socially relevant arguments.²⁹

Finally, to use a critical interdisciplinary analysis of American racial jurisprudence as a way to read and speak to the psychical condition of American political culture accesses the eventfulness of mass imprisonment and facilitates what Teresa Brennan has called “historical consciousness.”³⁰ As such, history – whether substantiated from legal, popular, or official archives – is constructed less according to logics of telos or causation, and more according to the political imperatives of making an abolition democracy more real, making sense out of the vertigo of legal catch-22 reasoning.

Dent, “Prison as Border: A Conversation on Gender, Globalization, and Punishment” *Signs*, vol. 26, no. 4 (Summer 2001) 1235-1241.

²⁹ Stanley Fish, one of the pioneering scholars of postmodern legal studies, argues that theory is first and foremost a rhetorical form. *Doing What Comes Naturally* (Durham: Duke University Press, 1989) 27-29.

³⁰ Teresa Brennan addresses the state of intellectual affairs wherein it is nearly impossible to make general statements about ‘history’ in order to discern programs for political action. The intellectuals Brennan identifies as those who have attempted this particular impossible include, Fredric Jameson, Gayatri Spivak, Terry Eagleton, Ernesto Laclau and Chantal Mouffe. She suggests, alongside Max Horkheimer and Theodor Adorno and their observations in *Dialectic of Enlightenment* (1944), that what these intellectuals have been writing against is a social psychosis attempting to obliterate historical consciousness. *History After Lacan* (New York: Routledge, 1993) 4-7.

Reading the Ideological Grammar of Punishment: Law, Image, and the Feminine

It remains uncertain still, as to what I saw that last night in the city. This is the preeminent colorblind feature of post-civil rights political culture in the United States – both blatant and subtle forms of racism are visually obscure, even as they are all too present in legal and popular forms. Joan Copjec explains how this might be so, for myself, as well as for the national audience. In her chapter, “The *Unvermögender* Others: Hysteria and Democracy in America,” she argues, “[t]he only time something can be hidden in plain sight...is when its invisibility is a psychical condition and not merely a physical one.”³¹ She suggests that colorblindness is as much a psychical phenomenon as it is legal or historical. Building from this suggestion, this dissertation provides a critical examination of American racial jurisprudence by combining legal analysis, cultural critique, and psychoanalysis. Bringing the peculiar doubling relationship between Schiavo and Borns into relief is merely one example of what becomes possible when methodologically combining such fields.

Because this dissertation’s method is primarily designed to enable readings of the current moment – the following chapters together sketching an ideological grammar of punishment broaching the various periods of our national history – it broadly conceptualizes racial jurisprudence as a screen of national memory, as briefly stated above. For Lacan, memory has to do with *not remembering* a particular traumatic event, circumventing an encounter with the Real. In our case, racial jurisprudence as a screen of national memories indicates a *not remembering* of a particular traumatic event around

³¹ Copjec 141-142.

which the national legal subject is constructed. Furthermore, because this subject senses she cannot escape this encounter with the Real, her remembering involves a constant negotiation of *how* a new national regime should “erase” the historic memory of an old national regime. In short, there is both an affirmation and a negation to the act of remembering. There are both positive and negative images to a memory. Schiavo: affirmation, something. Borns: negation, (no)thing.

It is the rich cultural intersection between popular culture and the legal that provides this dissertation’s critical methodological impulse. By examining the diverse devices of representation by which the force of law is bonded to culture, social meanings reformed, and national trauma diffused, this dissertation will have met its goals if it methodologically reintroduces old questions or opens up new ones which illuminate and clarify the irrepressible question about the role of legal reform in the continuing struggle for racial justice.

The idea of analyzing racial jurisprudence as a screen of national memory comes from, as well, my engagement with Critical Race Theory, its political spirit, and its continuing legacy as an expression of black freedom struggle in and against various sites of liberal legal practice. Critical Race Theory is distinguishable from the emergence of literary criticism and contemporary political theory in the modern legal academy as a way to test the rule of law, contest methodologies that approach the law as a scientific object of

study, and reform legal strategy and public policy. These bodies of legal scholarship generally come under headings such as postmodern legal theory, feminist legal theory, or studies of law and literature. While such fields are generally new to legal scholarship, and have yet to be explicitly related to each other, it is my sense that the field of Critical Race Theory foreshadows the relationship between these intellectual developments in the way that it implicitly brought black feminist literary criticism to bear on legal analysis and reform in the post-civil rights era. This dissertation's methodology is only possible because the time that has passed – since the late-1980s when the idea of Critical Race Theory first fully emerged in legal academia – provides a certain amount of distance necessary to see this intellectual relationship with black feminist literary criticism. Through a gesture of return, this dissertation foregrounds these embedded spaces of conversation between black feminist literary criticism and Critical Race Theory – Saidiya Hartman, Toni Morrison, and Hortense Spillers; with Kimberlé Crenshaw, Cheryl Harris and Patricia Williams.

One of Critical Race Theory's key principles is the idea that the law depends on ideological processes of social control in a world of racial and cultural heterogeneity.³² According to this principle, we should interrogate the limit of the rule of law's "social

³² Interestingly, his principle is mirrored in Gilles Deleuze's work on the role of institutions in a post-disciplinary society, and what he calls the "society of control." "Postscript on the Societies of Control," *OCTOBER*, vol.59 (Winter 1992) 3-7. For the post-disciplinary legal institution, the law depends on the repression of subjective embodiments of the differential logic that produces absolute singularities constituting cultural heterogeneity in the first place. Thus, we see various paradoxes of the rational subject erupting from legalistic renderings of justice – including, for example, the negotiation of gap between the national subject and the democratic citizen.

reality”³³ as an empirical object of study, and thereby reveal the law’s cultural dimension. In other words, if the law’s form is that of rules, and these rules on their face appear fundamentally irrational and coercive, then we might call that veneer of the law containing this irrationality and coercion *legality*. To the extent that failures in the law set in motion its mechanisms for reform, the law represents the lasting influence of Enlightenment ideals through the successful marriage between scientific reason and political rationality. This idea of legality would be what Habermas identified as the ‘proceduralist conception of reflexive law,’ and it the historical ingenuity (not coincidentally similar to the logic of capitalist accumulation) of the rule of law. Thus, if we find that this legal logic of reform as a mode of legitimization consistently underwrites modern history, then we must also accept that the rule of law has been one of the West’s deepest cultural commitments. There is both the social reality of the law, and the cultural dimension of legality, and Critical Race Theory interrogates the legal reproduction of racial inequality at both levels.

What is more interesting, then, is not how the rule of law works in the service of dominant social structure, but instead, how and where we might locate the cultural significance of the law at various sites of ideological productivity. Through a critique of civil rights discourse, Critical Race Theory articulated this particular framework for conceptualizing the law in the first anthology organized under the now well-known

³³ “The *social reality* (subject to empirical investigation) makes hierarchical dosages appear, respective statuses for each social “category.” But the *social logic* (subject to a theoretical analysis of the cultural system) makes two opposed terms appear, not the two ‘poles’ of an evolution, but the two exclusive terms of an opposition; and these are not only the two distinct terms of a formal opposition, but the two distinctive-exclusive terms of a social opposition.” Jean Baudrillard, *For a Critique of the Political Economy of the Sign*, trans. C. Levin (St. Louis: Telos Press, 1981) 57.

heading, *Critical Race Theory: The Key Writings that Formed the Movement* (1996).³⁴

The authors' engagement with the law's failures to deliver racial equality attempted to reconceptualize the relationship between law, race, and social change. In doing so, the authors' reconceptualizations border and draw upon the various methods of psychoanalysis, historical materialism, postmodernism, discourse analysis, cultural criticism, and political philosophy. More importantly, they fall squarely within the trajectory of a black feminist theory, which successfully began to synthesize the above methods, especially in relationship to literary criticism, in the late 1970's and early 1980's.

Thus, Critical Race Theory's black feminist sensibility is what this dissertation takes as a critical point of entry into the study of law, even as it focuses on the broader concern for theorizing the historical convergence of the law-and-order aesthetic with colorblindness. The black feminist sensibility motivating Critical Race Theory teaches legal studies that to take up a committed study of law requires a momentary break from the hermeneutic character of the rule of law, its narcissistic logic of reform in history. It demonstrates and suggests that innovative studies of law need not, and should not, lead to legalistic reform.³⁵

³⁴ K. Crenshaw, N. Gotanda, G. Peller, and K. Thomas (eds.), "Introduction," *Critical Race Theory: The Key Writings That Formed the Movement* (New York: New Press, 1996) xiii-xxxiii.

³⁵ This black feminist sensibility is most certainly evident in two anthologies compiled by Adrien Katherine Wing (ed.), *Critical Race Feminism: A Reader*, 2nd edition (New York: New York University Press, 2003); and *Global Critical Race Feminism: An International Reader* (New York: New York University Press, 2000). Along side the first Critical Race Theory anthology, these two readers are useful for mapping how this black feminist sensibility has expanded the range of issues critical race theory is able to analyze and address.

If the law is a racial system of representation, it reminds us of the press of the past on the present, and the force of this press opens up the present through the *performative* act of law's self-making, the subject-effects produced by the textuality of law. By "representation"³⁶ I mean to emphasize its double semantic definition most clearly discussed by Gayatri Spivak, who reminds us that representation denotes both 'speaking for' as in politics (*vertretung*), and 're-presentation' as in art or philosophy (*darstellung*). Although Critical Race Theory has focused on the failures of representation in the former sense, it also has alluded to the latter, most significantly in the work of Kimberlé Crenshaw, Cheryl Harris, and Patricia Williams. These authors taken together suggest that the law is not only a social system of modern rule always in a process of reform, but it is also a psycho-social restaging of a will. Fantasy and desire constitute the cultural order of legality.³⁷ In this sense, the black feminist sensibility informing Critical Race Theory is in agreement with how Drucilla Cornell has described the law as "the space of the limit" – that which produces being and non-being, life and non-life, in each necessarily failed articulation of justice. According to Cornell, such failure compels us to

³⁶ Gayatri Spivak offers a useful critique of Foucault's, and Deleuze and Guattari's, substitution of ideology critique with discourse and desire, respectively, by returning to the double semantic definition of 'representation.' She insists on the primacy of textuality, and the inescapable fact that theory as text requires intellectuals to attend to both types of representation at work in any cultural production. I would extend Spivak's critical gesture to studies of law when she writes, "Radical practice should attend to this double session of representations rather than reintroduce the individual subject through totalizing concepts of power and desire." Taking this into account, the law would be analyzed for both its textuality, as well as its public policy implications. Spivak, "Can the Subaltern Speak?" 275-279.

³⁷ This approach to law underlies, for example, Devon Carbado's discussion of the ACLU's 'Driving While Black' campaign, which relied on a rhetoric, both legal and visual, that staged clear demarcations between 'good cop' and 'bad cop,' and 'good black' and 'bad black,' in order to reform policies around racial profiling. The point taken here is less the ACLU's desire for reform, and more the specific language through which the ACLU pursued reform. That the ACLU's campaign, then, used the particular veneer of "respectability" would be taken as a psycho-social restaging of will, fantasy and desire constituting the general cultural order in which the ACLU attempted to wage their campaign. Devon Carbado, "(E)Racing the Fourth Amendment," *100 Michigan Law Review* 946 (2002) 1034-1044.

vigilantly imagine new ways of producing knowledge (and subjectivities that emerge from that production) about a world in which events of human suffering remain illegible. At the intersection of race, law and psychoanalysis, Critical Race Theory implicitly sets the stage for us to ask: If law is the process of reform that rational thinking undergoes through acts of (mis)representation and (mis)interpretation, then where do we locate the significance of desire in the history of law? This dissertation answers this question by bringing the concepts of the image and the feminine – and their glaring absence from the law – into the foreground of analyzing racial jurisprudence.

As a matter of the history of the rule of law, both the image and the feminine are necessarily barred in order to reproduce the sense of the rule of law's legality. According to the editors of the first collection of essays on the relationship between law and the image, "[j]udgment is at the heart of the relationship between art and law; indeed, the question of representation is itself a question of the adjudication of regimes of images."³⁸ Across the range of types of judgments – from juridical to artistic – comprising the social field, there appears a social form of judgment that hides the authoritative dimensions of art and the aesthetic dimensions of law. Judgment in art is not said to come with the force of law; judgment in law is not said to come with the gloss of aesthetics. Neither popular propositions are entirely true according to the history of law and the image, and this degree of falsity – indeed, the type of falsity that accompanies any representation – is the critical point of departure for what the authors call a “legal iconology,” or the study of law and the image in modernity.

I take their “legal iconology” as a critical point of departure for the methodological aspirations of the present dissertation because it outlines the general cultural interaction between law and imagery in the social practice of judgment. The idea that the trace of the image is found in the law’s textual absences – that images can be read in and from the written textuality of law – intervenes on the current historical context by articulating today’s diffuse juridical system of punishment as a mode of judgment in the most expansive sense. Then to read instead of systematize, judge instead of administrate the law, is to pursue the hidden imagistic dimensions of racial jurisprudence, outline how the law remembers its relationship with the cut of racial difference, bring out the absences constitutive of what we popularly know as the letter of the law.

The notion that the modern rule of law is found in word, and not in image, is a split endemic to Western philosophy. W. J. T. Mitchell, in his article, “What is an Image?,”³⁹ documents how the word-image split underwrites and universalizes Western dualities between philosophy and science, nature and culture, and space and time. He argues that instead of reifying these universalities by simply reversing the split (e.g., the growing popularity of visual aids in litigation is thought to compensate for the persuasive limitations of oral and written argumentation), cultural critics should historicize it, and illuminate how such resolutions through reversal serve particular interests and powers.⁴⁰ He suggests such “historical criticism”⁴¹ of the word-image difference would reveal that the split in law posits word and image less as contradiction or two types among an “abyss

³⁸ Costas Douzinas and Lynda Nead (eds.), *Law and the Image: The Authority of Art and the Aesthetics of Law* (Chicago: University of Chicago Press, 1999) 12.

³⁹ W. J. T. Mitchell, “What is an Image?” *New Literary History*, vol. 15, no. 3 (Spring 1989) 503-537.

⁴⁰ Mitchell 529-530.

of infinitely regressive signifiers.”⁴² The split in law posits a relationship between word and image – much like the way mathematics posits a relationship between algebra and geometry, or psychoanalysis posits a relationship between the unconscious and analysis of speech.⁴³

This dissertation is inspired by this latter analogy for reconceptualizing the relationship between word and image in law. Imagistic representations are both internalized in the written text of the law – that which cannot be said, or is overstated, or circumlocutory – and projected out from the word of law – popular representations in television, film, print media, and the like, of rules, their history, and their enforcement. In the following chapters, these various techniques by which word and image are related in the law are used, then, to read the unconscious of racial jurisprudence.

With respect to the feminine and the law, Jeanne Schroeder argues in her book-length study, *The Vestal and the Fasces: Property and the Feminine in Law and Psychoanalysis* (1998),⁴⁴ that feminine sexuality is the repressed,⁴⁴ but present condition of possibility for the phallic metaphors of property law (e.g., the fasces in ancient Roman law, or the modern Anglo metaphor of the arbitrary combination of various and disaggregated property rights as a “bundle of sticks”), and more generally, the law as symbolic order.⁴⁵ Examining Hegel’s theory of property and Lacan’s theory of the

⁴¹ Mitchell 530.

⁴² Mitchell 529.

⁴³ Mitchell 530-532.

⁴⁴ Jeanne L. Schroeder, *The Vestal and the Fasces: Hegel, Lacan, Property, and the Feminine* (Berkeley: University of California Press, 1998).

⁴⁵ For Lacan, the law is the symbolic order, a system regulating all forms of social exchange. Because communication is a form of exchange, the law at its most basic level is linguistic – thus, “law of the signifier.” Jacques Lacan, *Écrits: A Selection*, trans. A. Sheridan (New York: Norton, 1977) 66.

unconscious, Schroeder argues that both property and the feminine are “fictions we write to serve as the defining external objects enabling us to constitute ourselves as subjects.”⁴⁶ The feminine differs from the “necessary fictions” of the speaking subject in that it represents the negative of such necessary fictions. Following Lacan, Schroeder writes that “The Feminine is the negative of the Masculine in the sense of a denial of the hegemony of the symbolic order and its limits. She is the ‘not-all’ (*pas tout*) in the sense of ‘not all things are phallic.’ This is why she cannot be described in the symbolic or captured in the masculinist fantasies of the imaginary.”⁴⁷

As the negative of the Masculine, or the law, the feminine not only designates the excluded and prohibited fiction underwriting the various rationalities and pleasures available to the national subject in and by legal texts. The feminine also designates a social position that can never be falsified because, as the ‘not-all’, she presents the potential of an elsewhere to the purported rational universality of the law.⁴⁸ In this sense, the feminine is an analytical category that challenges legal fantasies of male and female, masculinity and femininity, men and women, as complementary couplings of a natural whole. In the quest to define what sexual difference is, the feminine is, according to Renata Salecl, the “name of a deadlock, of a trauma, of an open question, of something that *resists* every attempt at its symbolization.”⁴⁹

To the extent the textual production of law works through sexual difference, and this sexual difference characterizes the feminine as lack, this dissertation tries to bring

⁴⁶ Jeanne L. Schroeder, “The Vestal and the Fasces: Property and the Feminine in Law and Psychoanalysis,” *16 Cardozo Law Review* 805 (1995) 816.

⁴⁷ Schroeder, *Vestal* 323.

⁴⁸ Schroeder, *Vestal* 326-328.

this lack into view. This lack is the origin of the concept of justice understood here in the deconstructive sense. Justice is the pressure of the feminine on the law, the intrusion of the exception on the rule of law, the radical limitless nature of human being in tension with the legal subject. The feminine's limitlessness – of not having, or being “not-all” – brings into relief the boundaries and thus, the beyond, of legality.

Notably, this sense of the feminine as the “not-all” negating symbolic order coincides with the black feminist sensibility in critical race theory. The development of a black feminist sensibility in theoretical analyses of political discourse from the material history of black women's critical participation in radical social movements not only argues for the necessity to deconstruct the exclusive terms of identity-based politics. It also fundamentally challenges the space and mode of political engagement social movements assume as the norm for imagining radical transformation. These two types of critical historical relationships black women have had with radical social movements inform a black feminist sensibility which treats cultural forms and cultural production, along side political economic structures, as structures of racial inequality in an of themselves. This sensibility has had and has the effect of the feminine “not-all” in political discourse because it negates the political rationalities and symbolic orders underwriting and containing radical social movements.

I take this relationship between the feminine, the law, and the black feminist sensibility in critical race theory as a critical foundation for this dissertation's methodology because it opens up readings of the legal text – it reveals how the ideal of

⁴⁹ Renata Salecl, “Introduction,” *Sexuation*, ed. R. Salecl (Durham: Duke University Press, 2000) 2.

the law as a self-contained and self-reflexive text actually depends on both prohibition and transgression. The law contains the trace of its own transgression, in the sense not only of real acts of dissidence by subjects in history, but as well of logical, aesthetic, and conceptual transgressions. To read these sorts of transgressions contained within the legal text intervenes on the historical present by pointing towards forms of political expression that exceed the symbolic order, actualize the subjected realities of what the law assumes to be impossible. The act of reading the feminine in the law demands that judicial proceduralism be put at bay, and hopefully, opens up the law to radical reinterpretation.⁵⁰

To a certain extent, bringing the feminine into view is not the same act as reading the image out of the law. Feminine lack and embedded image put pressure on the law in very different ways – even if they generally have the same radically subversive effect. The embedded image is that figure in the law whose movement and presence in the written text is repressed in order to protect the rational and procedural neutrality of legal adjudication. It is the space of fantasy motivating legal decision-making – fantasmatic images erupting through the textual absences and logical irrationalities of the law. Feminine lack is that figure in the law that has too much or too little desire – it can sometimes appear in the law as an image, although it can also be a word, a phrase, or

⁵⁰ The feminist psychoanalytic project – elaborated most thoroughly through its engagement with cinema studies – is notably divided on the question of whether the ‘not-all’ position of the feminine empowers women as a social class. However, French feminist readings of Lacanian psychoanalysis answer in the affirmative. Luce Irigaray argues that “The fact that women are ‘weaker in their social interests’ is obvious...[in] a society in which they have no stake.” Luce Irigaray, “Any Theory of the ‘Subject’ Has Always Been Appropriated by the ‘Masculine’,” *Speculum of the Other Woman* (Ithaca: Cornell University Press, 1985) 119.

subjectivity. They are related, however, in the sense that racial jurisprudence heavily relies on both forms of textual pressure.

Still, the image and the feminine need to be better situated in relationship to the current historical moment defined by the law-and-order aesthetic and catch-22 of racial jurisprudence. In this regard, the work of Hortense Spillers is the keystone of this dissertation's methodology. The American grammar outlined by Spillers in her article, "Mama's Baby, Papa's Maybe: An American Grammar Book," is a reconfiguration of a "female social subject"⁵¹ in the history of American culture. Taking the "vestibular cultural formation"⁵² of the Atlantic slave trade as the founding event of racial difference in American society, Spillers undoes and reconstructs common understandings of gender and sexuality around the figure of the "captive female body" or "flesh."

American grammar for Spillers designates the symbolic order instantiated by the violent rupture of slavery, and not the Oedipal family, in Culture.⁵³ The literal existence in history of a person made "property/kinless" by the legal and economic mandates of "a dominant symbolic order, pledged to maintain the supremacy of race"⁵⁴ reconfigures gender and sexuality at the more profound level of the symbolic. Of particular interest for this dissertation is Spillers's approach to reading law at this symbolic register. For example, writing about the various slave codes in Southern states, Spillers analyzes them

⁵¹ Spillers 80.

⁵² Spillers 74.

⁵³ Spillers 68. Spivak also recognizes the stark difference in thinking about the captive body, as opposed to the laboring body, within political economy. "It should at least be obvious that the abusive constitution of the body in chattel slavery is not the socialization of the body in exploitation." Gayatri Spivak, *A Critique of Postcolonial Reason: Toward a History of a Vanishing Present* (Cambridge: Harvard University Press, 1999) 389.

⁵⁴ Spillers 75.

as “*peak points*... themselves an instance of the counter and isolated text that seeks to silence the contradictions and antitheses engendered by it...[They] call attention to just the sort of uneasy oxymoronic character that the ‘peculiar institution’ attempts to sustain in transforming *personality* into *property*.”⁵⁵ The *symbolics of law* reveal the inescapable and irreducible racial split of American democracy, the split of the “color line,” and the split racial subject of psychoanalytic theory.

In all, Spillers is concerned about the organizing principle of gender and sexuality around a certain image of the ‘law of the Father’ and ‘the Family’ of psychoanalysis, and how it cannot hold up in the face of the non-family of captive bodies in American history. Focusing on the relationship between women – both white and black – Spillers argues that the context of American slavery provides “one of the richest displays of the psychoanalytic dimensions of culture before the science of European psychoanalysis takes hold.”⁵⁶ Beyond “gendered femaleness”⁵⁷ at the sociological level, there is the reconfiguration of how sexual difference under race is registered in the symbolic. Spillers summarizes how race produces something more than female genderedness this way:

This different cultural text actually reconfigures, in historically ordained discourse, certain *representational* potentialities for African-Americans: 1) motherhood as female bloodrite is outraged, is denied, at the *very same time* that it becomes the founding term of a human and social enactment; 2) fatherhood is set in motion, comprised of the African father’s *banished* name and body and the

⁵⁵ Spillers 78.

⁵⁶ Spillers 77. Here, Spillers reads Linda Brent/Harriet Jacob’s testimony, and the relationship posed therein between Brent and Mrs. Flint. From this reading Spillers argues that neither could claim their bodies: Brent because she is property/kinless; Mrs. Flint because she desires to enter into someone else’s. These narratives are fundamentally intertwined, and are paradigmatic for thinking interraciality in American culture.

⁵⁷ Spillers 80.

captor father's mocking presence. In this play of paradox, only the female stands *in the flesh*, both mother and mother-dispossessed. This problematizing of gender places her, in my view, *out* of the traditional symbolics of female gender, and it is our task to make a place for this different social subject.⁵⁸

From this summary, this dissertation appropriates the following idea for the purposes of outlining an ideological grammar of punishment: if the traumatic split of the colorline in American law persists at the symbolic register, then this inaugurates a reconfiguration of sexuality (perhaps unintelligible at this point) according to forms of "horizontal" relatedness. These horizontal forms of relations – forged through language, discourse, mythical bloodlines, names, and properties – are neither the patriarchal nor matriarchal forms of "vertical kinship" of the Oedipal family, but rather, those relations which have no human or social claim against the dominant symbolic order.⁵⁹ Crenshaw's catch-22 of racial jurisprudence, read along side Spiller's point here, can be recast as a description of the particularly feminine position of racial exclusion. Thus, such relations as seen by Spillers emerge through various racial catch-22's that underwrite the psycho-social fact that "only the female stands *in the flesh*."

Looking for those relations of sexual difference that have no claim against the dominant symbolic order, or those catch-22's of political culture which hold an "in the flesh"-ness, is Spiller's crucial addendum to critical race theory. That is, it is fine and well that we conceptualize the feminine at the intersection of the unconscious and language – but only after we understand the way political culture has been shaped by the symbolic dominance of race. It is also fine and well that we conceptualize grammar at

⁵⁸ Spillers 80.

⁵⁹ Spillers 75.

the intersection of ideology and culture – but only after we understand that this culture is fundamentally underwritten by the trauma of slavery, described by Spillers as an “inveterate obscene blindness.”⁶⁰

Here, we find Spillers’s work at the border of feminist theories of the visual. As Jacqueline Rose reminds us, for Freud and Lacan, the relationship between sexuality to vision is stressed as “a problem of seeing”⁶¹ rather than what is seen.⁶² How and whether we see images is a site for the production of sexual difference. The particular reproduction of sexual difference through the visual image – and the fantasy women must come to stand as in order to prevent the image from producing a sense of lack in the speaking subject – has then been of central concern for feminist theory. However, for Spillers, the disavowal of the burden placed on women in the visual economy of images comprising various cultural forms is only part of the story. In addition to the burden of imposed visibility Rose speaks of, there is the blindness underwriting American culture towards that which stands in the flesh, bears the mark of dispossession, echoes the captive female body. Where Spillers speaks of the problem of blindness, Rose speaks of a compulsion to see.⁶³ And between these two modes of reading, they both speak of

⁶⁰ Spillers 70.

⁶¹ Jacqueline Rose, *Sexuality in the Field of Vision* (London: Verso, 1986) 227.

⁶² This burden of various forms of violence attending the arbitrary law of language and sexual difference is most prominently developed by Lacan. Rose summarizes this Lacanian insight in the following way: “Lacan immediately read in this the chain of language which slides from unit to unit, producing meaning out of the relationship between terms; its truth belongs to that movement and not to some prior reference existing outside its domain. The divisions of language are in themselves arbitrary and shifting: language rests on a continuum that gets locked into discrete units of which sexual difference is only the most strongly marked. The fixing of language and the fixing of sexual identity go hand in hand; they rely on each other and share the same forms of instability and risk” (228).

⁶³ Extrapolating from Rose, then, we might conclude that to see is to have sexuality, and to be seen is to be made Woman. Thus, it becomes, in a way, difficult to speak of ‘sexual identity’ at this particular level of sociality (e.g., within this matrix, women would both want a stable sexual identity, but at the same time,

disfigurements. Spillers's "monstrosity."⁶⁴ Rose's "constant pressure of something hidden but not forgotten."⁶⁵

Ultimately, a method of reading the current historical moment centralizes this general tendency towards "disfigurement" in political culture – and more specifically racial jurisprudence – as a primary site of investigation. There are certain markers we have already been able to discern through Spillers: "in-the-flesh"-ness, the oxymoronic of racial symbolics, the repetition of images, the excesses of internal splits. To tie these cultural eruptions into a grammar, and then to understand the way this grammar constructs a certain post-civil rights imaginary would be an initial step towards intervening on the ideological bonds – the "magic" – of the prison industrial complex.

The psychoanalytics of this dissertation are meant to disclose what I am generally calling the ideological grammar of punishment subsidizing today's colorline segregating the imprisoned from the free.⁶⁶ It is Spillers who, in establishing the critical possibilities of outlining such a grammar, has best argued that comprehending the intersection of race

resist being made 'Woman'). To compound this problem, Rose writes further, "our sexual identities as male or female, our confidence in language as true or false, and our security in the image we judge as perfect or flawed, are fantasies" (227). However, against this, Rose proposes that to the extent that feminists do speak of sexual identities, we would be required to recognize the contingency as well as violent repetition of these fantasies. Fantasies are specific to the individual and the way in which she perceives objects and her relation to them, and yet they are social as narratives across time and space.

⁶⁴ Spillers 80.

⁶⁵ Rose 227-228.

⁶⁶ In this way, my work on the ideological grammar of punishment is *not* John Sloop's "cultural prison." John M. Sloop, *The Cultural Prison: Discourse, Prisoners and Punishment* (Tuscaloosa: University of Alabama Press, 1996). This book generally examines popular cultural representations of prisoners in film and newsprint from the 1950 to the mid-1990s. He traces the "discipline of discipline" through popular culture. His examination is of the rather stock variety of cultural studies that tend to take their cultural object of study for granted. As well, to the extent that Foucault's work influences both our theoretical leanings, we fundamentally differ where I am primarily interested in Foucault for the double scene of modernity he suggests – indeed, culture as both disciplinary and punitive. Furthermore, Sloop apparently displays no interest in the political economy of punishment as his work fails to cite with any significance the authors of critical prison studies I reference above.

and gender requires analytical attention to the psychical register of national formations and cultural productions. In this sense, she would agree with Joan Copjec, who urges analysts of culture “to become literate in desire, to learn how to read what is inarticulable in cultural statements.”⁶⁷ That is why the preceding presentation of history and method at the heart of this dissertation converge around the question of the unconscious – and how it oftentimes linguistically beguiles our best intentions at ideology critique, culturally circumvents our will to read what lays in plain sight.

Dissertation Chapter Outline

This dissertation is divided into two sections: the first containing two chapters which attempt to read history out of the colorblind present; the second containing two chapters which then attempt to bring this history to bear on reading a future present. The different ways in which the two sections locate the place of history in legal analysis then explains why the chapters’ readings of the ideological grammar of punishment pose various types of relationships between law, image, and the feminine; legal analysis and culture; and theory and cultural criticism. The various temporalities of the chapters are not determined by a teleological or causal theory of the past’s relationship to the present, but by a desire to read the unconscious of the historical present. History disappears, lurks, and evades the present in the first section; history erupts, creeps up, and flashes

⁶⁷ Copjec 14. Lacan’s approach to the irretrievability of history is a problem of language where appearance is always taken to supplant being, and desire erupts in the gap between the two. Foucault’s approach to the irretrievability of history is a problem of Knowledge where being is grounded in discourses and knowledges, and a genealogy of this relationship deconstructs the dominance of Knowledge.

before the present in the second. The first section addresses the “essential ghost”⁶⁸ of history already haunting the present by examining the press of history on the twin pillars of logic in racial jurisprudence – strict scrutiny and reverse discrimination. The second imagines the transformation of the present through history’s reply by offering readings of two of the most pressing political issues today – racial profiling and executive power.

Chapter One, “Strict Scrutiny,” is a reading of the sexual politics of constitutional adjudication of and protection against racial discrimination. Bringing together the recent film, *Snow Falling on Cedars* (1999), and the Supreme Court case, *Korematsu v. United States* (1944), this chapter argues that the legal failures of anti-discrimination law to provide for racial justice can be explained by the strict scrutiny logic’s inability to justify the singular injury of racism – the “ugly abyss” of racism.

By posing a conditional relationship between racial discrimination and national security, strict scrutiny provides a way for legal adjudication to avoid dealing with the ugly face of racism in constitutional law. However, the relationship between the impossibility of justifying this singular injury and constitutional adjudication becomes apparent by attending to the feminine. It is the feminine, and its relationship to the law posed by the filmic representation of Japanese American internment in *Snow*, that reintroduces the critical question of beauty and tragedy to the realm of constitutional judgment.

Chapter Two, “Civil Rights,” is a reading of the racial politics of representability in post-civil rights culture. Bringing together the recent affirmative action cases and their

⁶⁸ Derrida 24.

legal precedent, and Harriet Jacobs's autobiography, *Incidents in the Life of a Slave Girl* (1861), this chapter argues that racial exclusion from citizenship is less the withholding of formal rights or national cultural inclusion from the foreigner, but more being cast away into a space of unredressible injury – being a racial subject whose desire is always evidence of criminal guilt.

The racial history of civil rights does not hinge on degrees of formal or political representation in the national culture, but rather, the capacity to represent racial injury. This historical division is apparent between the discrepant images of the transnational foreigner and the non-national slave in the legal genealogy of today's affirmative action cases, and becomes even starker when reading this legal history alongside Jacobs's literary images of the captive woman. If the desire to represent racial injury is always legal evidence of criminal transgression, then those whose desire appears in the law in this way are those who are denied civil rights. This tautology between desire and criminal transgression underwriting the capacity to represent racial injury is a particular feature of the feminine in civil rights jurisprudence.

Chapter Three, "Racial Profiling," is a reading of the sexual politics of constitutional interpretation. Examining the relationship between textual silence, image, and racial fantasy in the of structure constitutional interpretation in the case, *Prigg v. Pennsylvania* (1842), this chapter argues that constitutional interpretation is a type of racial profiling. As an interpretive technique founded on the literary imagination of the law, racial profiling is not neutral or outside relations of power.

The racial profile both has value and produces value in legal interpretation – working at both textual and visual levels. The racial profile has value because it is the image of blackness motivating constitutional interpretation. At the same time, the racial profile produces value because it creates textual meaning and expands the representational possibilities of whiteness. Informed by the concept of whiteness as property, the racial profile is then further elaborated as an ocular property of constitutional law. The chapter closes with a reading of Patricia Williams's *The Alchemy of Race and Rights: Diary of a Law Professor* (1991). *Alchemy* is treated as a literary text that successfully brings the interpretive work of racial profiling to view by featuring the Law's daughter.

Chapter Four, "Veiled Threats," is a reading of the racial politics of representability in the War on Terror. Building from the argument presented in the previous chapter about the racial profile as the core principle of constitutional interpretation, this chapter argues that the War on Terror is not a result of excessive exercises of executive power or American jurisdiction, but is constitutionally sanctioned as a matter of law and fantasy. Starting here, the chapter presents a legal history of the use of military force in the domestic sphere as an example of how military excessiveness is accommodated by the literary imagination of constitutional law.

Given this history, the chapter then interrogates the centrality of the image of unveiling and the metaphor of imprisonment in the visual economy of America at war. Analyzing the relationship between text and image in this visual economy, similar to the way in which word and image in racial jurisprudence were analyzed in previous chapters,

it appears that visual culture is motivated by the same racial imaginary motivating the law. More importantly, by mapping the relationship between image and text onto the relationship between the sexual and political domains of visual culture, the image of unveiling points to the space of the feminine as a critical site for undoing the troubling identifications and metaphorizations through which legal interpretations of the War on Terror work. Cheryl Dunye's television movie, *Stranger Inside* (2001), and how it represents the relationship between the feminine, freedom, and fantasy, is a compelling example of how the War on Terror and its organizing terms of debate might be challenged.

Finally, the dissertation closes with an epilogue, "An Offering." In an effort to bring together the total effect of the various readings provided in the previous chapters, and highlight the force of my own desire in producing those readings, the epilogue asks how such a desire can or should be traced to any origin, location, or intent. Rendering a photograph of my parents, their friends, and myself at an anti-Bakke protest into writing, the epilogue offers – not quite revealing – the feminine of the discourse of my life. In doing so, it is hoped that a piece of the Asian American archive might be read otherwise – not because it is inaccurate or false, but because its richness is in the history we must crop out in order to covet things that belong to others, claim events to which we were only invited, and give our name to memories that were never ours to name. Colorblindness is, after all, our moment, the thing that both calls for and contains the meaning of the photograph.