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The Strict Scrutiny of Black and BlaQueer Life

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Abstract

Furtive Blackness: On Blackness and Being ("Furtive Blackness") and The Strict Scrutiny of Black and BlaQueer Life ("Strict Scrutiny") take a fresh approach to both criminal law and constitutional law; particularly as they apply to African descended peoples in the United States. This is an intervention as to the description of the terms of Blackness in light of the social order but, also, an exposure of the failures and gaps of law. This is why the categories as we have them are inefficient to account for Black life. The way legal scholars have encountered and understood the language of law has been wholly insufficient to understand how law encounters human life. These articles are about the hermeneutics of law. While I center case history and Black letter law, I am also arguing explicitly that the law has a dynamic life beyond the courtroom, a life of constructing and dissembling Black life. Together, these essays and exercises in legal philosophy are pointing toward a new method of thinking about law, a method that makes central the material reality of the Black in black letter law.

They examine the semiotic relationships between race, gender, sexuality, and the law. While Furtive Blackness is primarily concerned with regimes of policing—both by badged officers and deputized citizens—Strict Scrutiny examines how the reconstruction amendments have been deployed and redeployed to strictly scrutinize Black presence and appeals to justice and make them unintelligible, irrelevant claims without justiciable and therefore outside of law the concern of law. Strict Scrutiny is a riff on the phrase of judicial review that is primarily concerned with the Court's inversion of the term to tightly regulate and foreclose Black access to legal redress, as well as the police practice of strictly scrutinizing Black presence and movement in public and private places. In essence, the ascription of furtivity makes way for strict scrutinization; while the Black interior strategy of furtivity and refusal creates a survival praxis that allows for a reprieve in the wake of these indignities.

These articles are an interpretation of the law as a tool of anti-blackness and an exposition of Black thought and deed in response to anti Blackness, both in black letter law and day to day life. Both articles are descriptive, interdisciplinary and rooted in traditional law and accented by Black queer and feminist theory, critical race studies, performance studies and literary analysis.

Keywords

criminal law, lgbt, lgbtq, civil rights, constitutional law, racial justice, discrimination, anti discrimination, privacy, law, queer theory, black studies, african american, gender, sexuality, class, racism, white supremacy, legal theory, political theory, legal philosophy, critical race theory

Disciplines

Constitutional Law | Law and Gender | Law and Race | Sexuality and the Law

The Strict Scrutiny of Black and BlaQueer Life

by T. ANANSI WILSON[1]*

Introduction and Reframe

This article builds upon the foundation laid in *Furtive Blackness: On Blackness and Being* and is a direct continuation of that project. I want to re-posit furtivity as not merely a subject status but also an interiority and a practice of looking back, a practice of suspicion—a knowing to be suspicious of police, law and white people—and how to be ready and prepared to evade and bend and blend and make the right noise or silence. Furtivity then, is the strategic embrace of both fungibility and individuality and the ocular anticipation of how one is being seen and unseen. This is the strict scrutiny of Black life: it is simultaneously the strict scrutinization of self—in order to anticipate the fact of surveillance and discipline or reward—but also the interpersonal and structural strict scrutiny that provides the formal logic for quotidian contacts and violences by the state and citizens who claim the right to operate "under the cover of law" on its behalf (George Zimmerman, BBQ Becky, etc).

If furtivity describes the conditions of Black life, then strict scrutiny marks the level of review, in and outside the auspices of law, in and outside of Black bodies. In thinking about "Furtive Blackness" as a predicament, an imposition and an instance of Black reimagination and way-making, I want

1. T. Anansi Wilson is an Affiliated Scholar of Law at the Center for Racial & Economic Justice and Adjunct Professor of Law at UC Hastings College of the Law. They are also a PhD Candidate in African & African Diaspora Studies at the University of Texas at Austin and received their JD from Howard Law School. These articles originated in material form as draft dissertation chapters, yet their style, concerns and politics originate in the work and living practices of earlier Black and BlaQueer scholar-creator activists such as Toni Morrison, Pauli Murray, James Baldwin, Ida B Wells Barnett, Frederick Douglass, W.E.B Du Bois, Audre Lorde, Essex Hemphill and other Ancestors unnamed. A great deal of gratitude is owed to my dissertation Chair Stephen Marshall, as well as advisors and early lookers Imani Perry, Hortense Spillers, Xavier Livermon, Saru Matambanadzo, Michele Alexandre, Christina Sharpe, Anthony Farley, Amber Rose Johnson, La Marr Jurelle Bruce, Saidiya Hartman, Julian Kevon Glover, Eric Johnson, Jossianna Arroyo, Simone Browne, Devon Carbado, Lisa Crooms Robinson, Harold McDougall, Marlon Bailey, Alex Cunningham, Khyree Davis, Alina Ball, Shauna Marshall, Gabriele Lara, Rory Little.

to also think about the rigidity of the process of review. Black people do not have standing—in court or commons—to define the scope of review nor its level of inquiry. Much like Margaret Morgan, discussed in the previous article reviewing the Fugitive Slave Law (and Act), Black people—and Blackness itself—goes unrecognized as possessing a subject position of citizenship; thereby, dispossessed and subordinated in the workings of law practice, both in court and commons.

Black people live under the conditions of strict scrutiny. This is to say that Black people are always under the highest level of review, being looked at—and imagined—again and again, strictly. In this instance, I'm not speaking of the Court's usage of strict scrutiny but instead interrogating legal language to reveal and turn this logic on its head. We live our lives on a razor's edge: standing on a blade that cuts us when being still, when moving, when at work, when styling our hair, when covering our bodies, when expressing our joy or registering our pain. Though there are formal limits on this review, particularly in Fourth Amendment law, they provide little material protection—generally only on police and formally sanctioned state actors—and often function as logics for quotidian contact and invasions of Black privacy and bodily autonomy.

I. A Riff on Strict Scrutiny, From Protection to Prison

In articulating "the strict scrutiny of Black life" I am again placing myself in conversation with Devon Carbado. Carbado was speaking on a panel with Imani Perry, Kimberle Crenshaw and Mari Matsudah, celebrating the 25th anniversary of "intersectionality." To reground Kimberle Crenshaw's concept of "intersectionality" within law, Marxism, materiality, critical legal studies, and especially critical race studies, Carbado began to riff on what he roughly titled "the strict scrutiny of Black life."[2] Here, I seek to expand on this profound utterance. The concept is versatile and ironic. It plays on "strict scrutiny" both as a form of legal review, meant to safeguard "equal protection under the laws" via the Fourteenth Amendment and the logics and function of permissible legal suspicion that allows and comingles with what I have titled "Furtive Blackness." We can think about "strict scrutiny" as both the legally permissible level of suspicion applied to Black rights and legal claims to "justice" and equity, that—through the inability of Black access to Fourteenth Amendment protections—allows for unbridled violence, disenfranchisement and terror manifesting through contact with police and white citizens embodying ancestral, deputized policing powers.

2. American Studies Association Official, *Presidential Session: Intersectionality and Critical Race Theory*, YOUTUBE (Jan. 17, 2020), https://www.youtube.com/watch?v=elaIUgX-zZE&ab_channel=AmericanStudiesAssociationOfficial.

Strict scrutiny acts as a bulwark against the ability of Black harm to be legally cognizable and provides a legally permissible logic to "Furtive Blackness" as the signifier proving these quotidian contacts necessary and renders Black flesh as available for discipline. Put differently, "strict scrutiny" allows for the weakening of Black rights, marking them to be presumptively either illegal, or legally incognizable, while "Furtive Blackness" describes the ascription of the Black body/person itself as always, already suspicious, sly and calling for preemptive discipline. The chronological relationship between the two is unclear. Perhaps it is because the fugitive, furtive Black body conspires to "steal away to freedom": outside of the status of property, coercive servitude, and debt, that its pleas for equity and protection under the law are strictly scrutinized both in the courtroom and in the classroom. The strict scrutiny of Black life, as a metaphor, attempts to encapsulate the heightened level of legal—both jurisprudential and policing—suspicion or review, of Black living that irreparably hinders Black access to judicial relief and civil rights. On the other hand, "Furtive Blackness" is concerned with suspicion of Black presence. In Carbado's estimation, Black people are strictly scrutinized on foot, in our cars, at work, at the polls, in our homes and in hospital beds.[3] This level of suspicion enables a level of hyper visibility and disregard. To explicate these two predicaments, we will turn to the cases of *Bakke v. Regents of the University of California* and *Rogers v. American Airlines* and the corollary cases of Lolade Siyonbolaa and Andrew Johnson. In the previous article, *Furtive Blackness: On Blackness and Being,* we turned to the cases of BlaQueer people like Gemmel Moore and various criminal statutes that target racial-sexual minorities. Though we are not explicitly dealing with cases concerning BlaQueer life, my position as a BlaQueer person makes these concerns central and this essay is a BlaQueer reading of the failures, gaps, and horrors of anti-discrimination law and the practice of intramural targetability.

II. Defining Strict Scrutiny

In this section, I turn to several stories and a case that illustrate what I am calling "the strict scrutiny of Black and BlaQueer life." This metaphor is meant to communicate the legal and cultural review, as well as the surveillance and scrutiny visited upon Black and BlaQueer people. The language is crafted in such a way that it should have clear meaning to legal practitioners and scholars, humanities scholars, activists and laypeople alike. "Strict scrutiny" is the highest level of judicial review over state action. It is used to ascertain whether a certain law or action is constitutional.

3. American Studies Association Official, *supra* note 2.

Specifically, it is a level of review applied to legislation and government actions—most often when a plaintiff sues the government for discrimination—that presupposes those actions are facially unconstitutional. When a law or action is subject to strict scrutiny, the government can only overcome the presumption of unconstitutionality by supplying evidence that there is 1) a "compelling state interest" and 2) that the law or action was "narrowly tailored" to achieve that interest.[4] This level of scrutiny is often raised in equal protection claims and, when raised, the law in question must have infringed upon a fundamental right or involve a suspect classification.

Fundamental rights are not only rights conferred by the constitution—particularly the Bill of Rights—but also those found under the Due Process Clause. These are typically rights so ingrained that they are integral to the American experience. Other rights noted as fundamental—that are not in the constitution—include the rights to: privacy[5], contraception,[6] interstate travel,[7] marriage,[8] procreation,[9] custody of one's children,[10] and voting.[11] While largely understood as fundamental—and therefore unchanging—the statuses of these rights are not immovable. For example, in *Lochner v. New York*, the Court ruled that the Due Process Clause of the Fourteenth Amendment protects the individual right to contract freely. However, just thirty years later, the Court reversed itself in *West Coast Hotel v. Parrish*, declaring that:

> In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.[12]

4. Grutter v. Bollinger, 539 U.S. 306, 326 (2003).
5. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).
6. Eisenstadt v. Baird, 405 U.S. 438, 440 (1972).
7. United States v. Guest, 383 U.S. 745, 757 (1966).
8. Obergefell v. Hodges, 576 U.S. 644, 664 (2015).
9. Carey v. Population Servs. Int'l, 431 U.S. 678,684 (1977).
10. Meltzer v. C. Buck Lecraw & Co., 402 U.S. 954, 960 (1971).
11. Purcell v. Gonzales, 549 U.S. 1, 2 (2006).
12. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).

Classification of a right as fundamental, as we can see above, is not immoveable. Notions of liberty and due process are malleable and change with time and place. Further, a close reading of the historical moment will note the rising tensions between President Franklin Roosevelt—with his eye toward a more labor friendly agenda—and the Supreme Court. It was not long after this decision that he announced his famous "court packing" plan. In addition, the right to marry is only recently fundamental, as applied to non-heterosexual Americans. On June 26, 2015 in *Obergefell v. Hodges*, a combination of four cases challenging bans on same-sex marriage, the Court ruled that the right to marry is a fundamental right under the Due Process Clause of the Fourteenth Amendment.[13]

III. Defining Suspect Categories

Suspect classifications are the instrument for interpreting invidious discrimination. However, the gaps in what are considered suspect classifications are also informative. They tell us who exists outside of legal protection and thereby signal targetability. The language of suspect categories lends itself well to the question of who is suspect or who is suspicious in the eyes of the law. The language we have crafted here—the metaphor and reality of furtivity—and the question of suspicion—reasonable, permissible or otherwise—is most prevalent in law in this instance. The large, agreed upon "suspect classifications" are race, religion, national origin and alienage.[14] Suspect categories are generally categories of identity markers, cognizable by law, that have historically been exposed to legal and extrajudicial forms of violence, discrimination or exclusion from full participation in polity. Specifically, an individual is determined to be part of a "suspect classification" or category if they are part of "discrete and insular minority."[15] In order to determine whether a person is a discrete and insular minority, the court applies a test with a variety of factors. However, it is generally concerned with whether the person is: 1) part of a class that has been historically disadvantaged, 2) part of class that has historically lacked effective representation or access to the political process, 3) whether the person has an inherent or immutable trait and 4) whether that trait is highly visible.[16] When a statute discriminates against a person based on these traits—based on being a "discrete and insular minority" or a member of a suspect classification—then the statute is presumed to be unconstitutional and is subject to "strict scrutiny."

13. *Obergefell*, 576 U.S. at 664.
14. Ortwein v. Schwab, 410 U.S., 656, 660 (1973).
15. United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938).
16. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

Missing here, curiously, are sex, gender, and sexuality. None of these identities or communities have yet to be included as "suspect classifications" or "insular and discrete minorities." However, sex—determined as the sex one is assigned at birth due to genitalia and cultural norms—is a "protected class."[17] Protected classes are those deemed by Congress or states to be protected from retaliatory state or private action or discrimination. Protected classes are not protected via "strict scrutiny" but instead, intermediate scrutiny.[18] Intermediate scrutiny review is triggered when a statute negatively affects a protected class. To pass muster, the law must further an important government interest and do so in a way that is substantially related to that interest.[19]

Ironically, the protection against sex-based discrimination came from discrimination against men. In *Craig v. Boren*, an Oklahoma law prohibited the sale of "non-intoxicating," or 3.2% alcohol beer, to women under the age of 18 and men under the age of 21.[20] Craig Boren, a male in that age range, challenged the law and argued that the ban on sales violated his right to equal protection under the laws, as guaranteed under the Fourteenth Amendment, by establishing different drinking ages for men and women.[21] While it is ironic that the establishing of gender as a protected class sprouts from an apparent curtailing of the rights of white men—to drink alcohol at that—is even more ironic when we recall that the Fourteenth Amendment was established to ensure the formal, complete citizenship of Black people and the formerly enslaved. This is particularly prescient in the wake of a myriad of bombings of churches, police killings of Black citizens and the assassination of Martin Luther King, less than a decade earlier. The Fourteenth Amendment had yet to finish its promise of guaranteeing equal protection under the law—building upon the Thirteenth Amendment's promise to end the badges and incidents of slavery—yet it somehow found a way to create a right for white men to drink without undue burdens.

IV. *Regents of the University of California v. Bakke* on Strict Scrutiny

It is generally understood that the Fourteenth Amendment was intended, as one of the Reconstruction Amendments, to grant "equal protection under the laws" and "due process" to African descended people in the United States. However, the history of the Reconstruction Amendments is fraught and uneven. They were infamously gutted shortly after their adaptation. The *Slaughter-House Cases* resulted in a holding that

17. United States v. Virginia, 518 U.S. 515, 524 (1996).
18. *Virginia*, 518 U.S. at 524.
19. *Id*. at 524.
20. Craig v. Boren, 429 U.S. 190, 192 (1976).
21. *Id.* at 192.

the Fourteenth Amendment only applied to former slaves. Yet, crucially, the Privileges & Immunities Clause only applied to federally held lands.[22] The promise of the Fourteenth Amendment was further curtailed in the *Civil Rights Cases* of 1883, when the Court struck down the Civil Rights Act of 1875, holding that it was unconstitutional because Congress did not possess the power to regulate private activity.[23] It is important to note that *Civil Rights Cases* concerned at least five instances where Black people were not given equal access to private businesses that performed public goods—such as hotels, inns, transportation services and movie theaters—as white citizens.[24] It further held that Congress exceeded its Thirteenth Amendment powers—in an attempt to cure the badges and incidents of slavery—strictly reading the amendment as banning slavery, not private racial discrimination or acts of subordination.[25] This logic was cited and breathed new life in the similarly infamous *Plessy v. Ferguson*, with the Court blessing "separate but equal" as the law of the land.[26] Black claims to actual citizenship and equal protection under the law continued to remain uniquely suspect—if not all out assaults on society—until the passage of the Civil Rights Acts of 1964 and 1968. Soon after, the Court would again intervene, placing unique burdens on Black requests for relief and protection, as evidenced by *Bakke*.[27]

As noted above, Black people constitute a "suspect classification," as we are historically oppressed and distinctly identifiable with immutable characteristics (i.e., our flesh). Therefore, laws and policies that restrict the freedoms of—or engage in discrimination against—Black people are subject to strict scrutiny. However, in 1978, the Court began exploring a different reading of the use of "strict scrutiny," as well as the role of the Fourteenth Amendment.[28] This novel interpretation of the Fourteenth Amendment, as well as strict scrutiny as a standard of review, essentially undid a generation of formal precedent. The law as explicitly articulated through the judiciary: in favor of a new modality that strictly scrutinized Black life, particularly when attempting to equitably access the laws or gain redress from interpersonal and systemic discrimination. Indeed, Black living—and the understanding of the practice of Black life and living as furtive—becomes simultaneously legible and illegible for the Court, depending on its needs.

In particular, the history of anti-Black oppression and oppression schema become evidence, not for the need of specific, particularized policies or legislation to combat the afterlives of slavery or Jim Crow, but instead as

22. Slaughter-House Cases, 83 U.S. 16 (1873).
23. United States v. Stanley, 109 U.S. 3, 18 (1883).
24. *Stanley*, 109 U.S. at 19.
25. *Id.* at 21.
26. Plessy v. Ferguson, 163 U.S. 537, 548 (1896).
27. *Bakke*, 438 U.S. at 270.
28. *Id.*

a new type of precedent: damning policies or legislation that are meant to affect one race over another. Of course, this has the effect of freezing the status quo—and at best—creating a floor for and maintaining the current material reality of Black (un)citizenship and allowing the costs and fruits of whiteness to be born and enjoyed at their current levels of production. In this way, the current value of one's interest in whiteness as property[29], is protected by law; in fact, uniquely protected by laws that were *meant* to articulate a complete Black citizenship. Yet, even in the face of reconstruction and intentional formal equality, the power relationship between Black and white, slave and master, fugitive and plaintiff, criminal and publics, furtive being and citizenship remain intact.

In *Regents of the University of California v. Bakke* the Court ruled in favor of Allan Bakke, a white man who had twice been denied admission to the University of California at Davis Medical School.[30] Bakke argued that he was unlawfully discriminated against—in violation of Title VI of the 1964 Civil Rights Act, as well as the Due Process Clause of the Fourteenth Amendment—because the school used an affirmative action program that included strict racial quotas.[31] The school reserved sixteen out of one hundred slots for racial minorities.[32] To buttress the argument of unlawful racial discrimination against him, Bakke offered that the admitted students had "significantly low" benchmark scores, including MCAT and GPA results.[33]

In a 5–4 decision, the Court agreed with Bakke. It held that race can permissibly be used to further school diversity, but only on a case by case basis and so long as when race is used, it must be among other factors considered for admittance. The Court held that California had run afoul of the Fourteenth Amendment's mandate to refrain from denying "to any person within its jurisdiction the equal protection of the laws" by denying white students sixteen out of the one hundred seats solely due to their race.[34] The Court rendered the historical discrimination against Black people as wholly irrelevant and instead marked its ruling as race neutral, noting that quota systems that preferred one race over the other was "odious to a free people whose institutions are founded upon the doctrine of equality."[35] Further, the Court noted, because California's program had intended to right

29. Harris, Cheryl I., *Whiteness as Property*, #? HARV. L. REV. 1707 (1993); *see also* UCLA School of Law Research Paper No. 06-35, https://ssrn.com/abstract=927850. Harris shows how whiteness evolved from a racial identity into a form of property. She argues that whiteness became the basis for racialized privilege and power; from slavery and colonial conquest to the present.

30. *Bakke*, 438 U.S. at 278.

31. *Id.* at 279.

32. *Id.* at 289.

33. *Id.* at 277.

34. *Id.* at 289.

35. *Bakke*, 438 U.S. at 291.

past racial discrimination, it had discriminated against "one group for no other reason other than race or ethnic origin" and held that the program was unconstitutional and, therefore, invalid under the Equal Protection Clause.[36] The Court did, however, note that the state had a "legitimate and substantial interest in" eliminating the effects of "identified discrimination."[37] However, to tend to the remedying of these injuries, the states must engage in legislative, administrative or judicial efforts that document and prove specific and illegal racial discrimination; a much higher standard than what the Court marked as "more focused than the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past."[38] This had the obvious effect of both limiting the formal identification of complex, systemic injuries while also marking claims of harm—and appeals to redress—as suspect, in effect, as the original sins that necessitated the Thirteenth and Fourteenth Amendments.

V. Suspicion, Standing, and Malleable Rights

In its review of *Bakke*, the Court utilizes the Fourteenth Amendment, as well as the Civil Rights Act of 1964, to not only create a pro-White jurisprudence of *ceteris paribus*, but to weaponize the tool of high judicial review to strictly scrutinize both Black life and living, as well as Black attempts to use law as a mechanism to ensure formal and social equity. In other words, Black quests for complete and fully realized citizenships are suspicious "legal" gestures that are presumed unconstitutional as violations of (white people's) due process and equal protections right. That is to say, the Court has transformed the Fourteenth Amendment into a tool to preserve "whiteness as property"[39] and Black attempts at fully realized citizenship are strictly scrutinized, furtive gestures presumed to run afoul of law and order. This is not dissimilar from what Black folks once sang as "stealing away to freedom/Jesus." In the lyrics from the negro spiritual "Steal Away" we not only see a desire to attain freedom or citizenship, but the recognition that Black freedom then— and perhaps now— is considered a type of theft of property and power. During enslavement, property was unfettered access to Black flesh and labor and can be broadly understood as the power to subjugate Black people as a matter of law and practice. In *Bakke*, the Court is not talking about reinstituting slavery but, instead, the logics of the power differential that makes manifest the legal difference between Black and white, between (un)citizen and citizen. It attempts to freeze in time—

36. *Bakke*, 438 U.S. at 287–320.
37. *Id.* at 307.
38. *Id.*
39. Harris, *supra* note 29.

through legal review—a power differential that maintains the central logic of slavery. It does so by rendering Black people as furtive beings—those inherently sly, suspect and untrustworthy—and strictly scrutinizing our (in)actions as either punishable by law or outside of the law's realm of protection.

First, the Court accepts and leans into Bakke's alleged harm. He was twice denied entry to a particular medical school. In Bakke's telling—and the Courts presumption—he deserved to be admitted (or at least more so than the Black and other applicants of color) because his "benchmark" numbers were "substantially higher" than those of admitted non-White students.[40] To the Court, Bakke's harm and his evidence are legible and logical; not suspect or audacious. Here, the Court supplants the decision-making process of the school, and leans into Bakke's narrative of harm; transforming the facts of the case from being about remedying systemic anti-Black oppression to being chiefly concerned with Bakke's white right to equal protection. In this way, the Court creates a scenario in which attempts to remedy past racial oppression and discrimination against Black people and other racial minorities are strictly scrutinized, and, even then, those same efforts or avenues to reparation must be equally accessible to white people. That is to say, to remedy present and past histories of white supremacist privilege, terror, and power; one must also be sure that these remedies provide some unencumbered pathway to benefit those privileged and empowered by the current system of racial power. To do otherwise renders the law and policies in question unconstitutional under the gaze of strict scrutiny, and in the name of the "equal protection under the laws," denies the promise given to the newly unenslaved.

In the Courts decision to supplant the stated goal of the university—as well as the harms, rights, and desires of the sixteen admitted students—it begins to strictly scrutinize the presence of Black and non-white students by casting suspicion on their presence and marking the mechanisms permitting their presence as dangerous and outside the law. They are placed both in and outside of law; their presence—or access to educational resources—is reviewable by law via its purported effect on Bakke's rights, yet the systemic and interpersonal harms (i.e., racism) that makes this particular pathway for their presence necessary are unintelligible to the Court. Their desires to gain a medical education—no different than Mr. Bakke's—are illegible to the Court. These desires lack standing, meaning they are unable to be seen or heard in a court of law. The court dislodges and discards these desires by creating a scenario that posits a "deserving" white male and his hard earned rights against an unnamed, unthought racial minority—instead of comparing his credentials to those admitted white students—but also by calling for and

40. *Bakke*, 438 US at 274.

demanding state sponsored proof of racial discrimination that is both documented and endorsed by the state government and illegal. This process of disembodying Black people from personhood and standing, in favor of the protection of white rights, is not dissimilar from what happened to Margaret Ashmore in *Prigg v. Pennsylvania*; in fact, this is a doubling down on the precedent of strictly scrutinizing Black life.[41] Margaret Ashmore went from being a free citizen of Pennsylvania, wrongly kidnapped and held against her will, to a lifeless, fleshy, vessel of property through which the Court established the rights of states, the federal government, and individual slave owners.[42] In that case neither Margaret Ashmore, nor her children, were mentioned as parties, instead her kidnapper and those with whom he worked were given standing and the gaze of the Court. In both *Bakke* and *Prigg*, harms against Black people become recognizable if, and only if, those harms can be rerouted into rights and powers for white citizens; or, alternatively, when the remedies for those harms can be reformed as bulwarks against further eradication of white rights and power under law.

The Court has inverted the purpose of the Fourteenth Amendment. In deciding *Bakke*, the Court is not so cavalier as to ignore the realities of historical— and certainly not present—racism and discrimination. To the contrary, the Court successfully utilizes the historical and present reality of anti-Black racial terrorism and discrimination to create a formal logic of universal "non-discrimination." The Court does so by using the history of anti-Black terrorism and formal discrimination as a cautionary tale of what happens when race is taken into account. The craven, terrorist, discriminatory nature of the Black Codes, Jim Crow, and other laws are used to foreshadow the dangers of considering Black and non-white races—and histories of discrimination—as legally valid. While some might argue this is a type of color-blind jurisprudence, to the contrary, this is jurisprudence that functionally freezes current racial power differentials in place. The Court transforms the Fourteenth Amendment from a corrective measure, into a preventative one. Where it was often used to correct and strike down laws that maintain or demand the inferior legal status of Black people, it has instead become a measure to strike down laws that attempt to create and demand racial equity under the law because, in their logic, these laws affect and target the rights and privileges of white people. The history of anti-Black racial discrimination and terror becomes the logic for anti-Black jurisprudence: acknowledging race, namely Blackness, becomes the issue because to do so, would require a reworking of how power and citizenship are distributed.

41. Prigg v. Pennsylvania, 41 U.S. 538, 608 (1842).
42. *Id.*

VI. Brief Explanation of Title VII of The Civil Rights Act of 1964

> *It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.*
>
> — Title VII, Civil Rights Act of 1964[43]

Title VII of the Civil Rights Act of 1964 broadly prohibits discrimination based on categories similar to those prohibited by the Fourteenth Amendment. Specifically, Title VII prohibits employment discrimination based on color, race, religion, sex and national origin. Employers—including governments, colleges and universities, employment agencies and labor organizations—with more than 15 employees are bound by Title VII. Discrimination is prohibited in any aspect of employment including, but not limited to: hiring and firing; compensation, assignment or classification of employees; transfer, promotion, layoff or recall; job advertisements; recruitment; testing; use of company facilities; training and apprenticeship programs; fringe benefits; pay, retirement plans and disability leave; assertion of rights under Title VII; and other terms and conditions of employment.

Title VII grants the harmed party 180 calendar days from the instance of discrimination to file a complaint with the Equal Employment Opportunity Commission. However, if the violation of Title VII is also a violation of a law enforced by a state or local agency, then the harmed party has 300 days to file a complaint.[44]

A. Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981)

Rogers is jurisprudentially distinct from *Bakke* because it concerns claims under Title VII of the Civil Rights Act of 1964, rather than the Fourteenth Amendment or its Equal Protection Clause.[45] While the courts have long acknowledged that the Fourteenth Amendment prohibits the various forms of discrimination previously mentioned, it is not often used in employment scenarios. This difference is important and legally substantial, because the Fourteenth Amendment addresses state or government action or policy, while the Civil Rights Act of 1964 reaches the activity and policies of private actors and most Americans are employed by private actors, rather

43. Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e-2.
44. Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e-5.
45. Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1981).

than government agencies. I bring *Bakke* and *Prigg* together to further explore the concept of the "strict scrutiny of Black life" and how this jurisprudential method of scrutinization and suspicion operates in quotidian Black life as a disciplining regime, under the guise of protection, further marking Black bodies, Black life and Black movement as inherently outside of the protection of law, and, when encountered by law, readily available for discipline.

In *Rogers v. Am. Airlines, Inc,* Renee Rogers—an African American flight attendant, employed by the company for eleven years—sued for sex and racial discrimination pursuant to Title VII, after the company demanded that she stopped wearing cornrows and placed her hair in a bun.[46] The company allegedly based this decision on a change in their employee grooming policy.[47] Ms. Rogers then sued, arguing that the ban on wearing cornrows constituted both sex and racial discrimination.[48] The trial court dismissed the sex discrimination claims arguing that the claims were unfounded because both men and women were banned from wearing cornrows.[49] Ms. Rogers, in her opposition to a motion to dismiss her racial discrimination claim, explains that cornrows are:

> Historically, a fashion and style adopted by Black American women, reflective of cultural, historical essence of the Black women in American society . . . The style was "popularized" so to speak, within the larger society, when Cicely Tyson adopted the same for an appearance on nationally viewed Academy Awards presentation several years ago . . . It was and is analogous to the public statement by the late Malcolm X regarding the Afro hair style . . . At the bottom line, the completely braided hair style, sometimes referred to as corn rows, has been and continues to be part of the cultural and historical essence of Black American women . . . There can be little doubt that, if American adopted a policy which foreclosed Black women/all women from wearing hair styled as an "Afro/bush," that policy would have very pointedly racial dynamics and consequences reflecting a vestige of slavery unwilling to die (that is, a master mandate that one wear hair divorced from ones historical and cultural perspective and otherwise consistent with the "white master" dominated society and preference thereof).[50]

46. *Rogers*, 527 F. Supp. at 231.
47. *Id*. at 231.
48. *Id*.
49. *Id*.
50. Brief for Plaintiff in Opp'n to Mot. to Dismiss at 4–6, 14–5, 527, Roger, F. Supp. at 232.

Predictably, the trial court disagreed with her argument that she was being uniquely discriminated against as a Black woman because her hair is an "'easily changed characteristic,' and even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer."[51] The court goes on to say that:

> Moreover, the airline did not require plaintiff to restyle her hair. It suggested that she could wear her hair as she liked while off duty, and permitted her to pull her hair into a bun and wrap a hairpiece around the bun during working hours. A similar policy was approved in *Carswell v. Peachford Hospital* . . . Plaintiff has done this, but alleges that the hairpiece has caused her severe headaches. A larger hairpiece would seem in order. But even if any hairpiece would cause such discomfort, the policy does not offend a substantial interest.[52]

At first brush, *Rogers* might be read as having little importance, in comparison to the weighty Fourth and Thirteenth Amendment arguments raised in the previous essay, as well as the Fourteenth Amendment concerns raised in *Bakke*. However, that would be a grave mistake. While the Fourth Amendment raises serious concerns about state and police encounters, contact and engagement with Black bodily integrity, privacy and the logic that precedes it, *Bakke* largely concerns itself with the ability of state, local and federal governments to engage in Black conscious reparatory measures. *Rogers*, on the other hand, via the Civil Rights Act of 1964, reaches into the private sphere and forces us to reckon with the way the law continues to permit or encourage the regulation of the Black body and compromise claims to personhood and indeed, equal protection under the law.

In *Rogers*, we are not confronted with the activity of police officers or furtivity per se, but instead with how Black people are allowed to be present and exist in the workplace. Put differently, this case moves the context of subordination on the street, or in one's car, to the place of employment, where one makes their living. Instead of regulating Black living, the Court instead opts to allow for de facto and formal regulation of how that living is supported, sustained and made possible. In *Rogers,* the Court moves from marking her/us merely furtive in nature and instead—at least in this terrain—opts to strictly scrutinize Black presence and one's method of being present.

51. *Rogers*, 527 F. Supp. at 232

52. *Id.* at 233. *Cf. EEOC v. Greyhound Lines, Inc.,* 635 F.2d 188 (3d Cir. 1980) (upholding no-beard policy despite showing that some Black men had difficulty complying due to racially linked skin disease).

In other words, this is not dissimilar from the logics that enabled the poll tax. The Court would not dare say that Black people are categorically unable to vote under the law, but instead narrows the opportunity to do so and creates unique burdens for the franchise to be operated. Therefore, allowing and encouraging the poll worker, the election official, and the public at large to strictly scrutinize the act of voting and the concept of Black enfranchisement. Here, similarly, the Court smartly opts against saying Black women cannot work or are unfit to be flight attendants, but strictly scrutinizes how the Black woman before it can do such work, on a basis that has no effect on the quality of her labor and generally without regard for it. The concern for the court, as well as American Airlines, is not Ms. Rogers performance of employee duties—she had been employed for 11 years—but instead on what Thomas Jefferson has called "manners,"[53] the method of performance, or embodiment of servitude, that bends Black appearance, self-styling, and personhood to the will and desires of the white gaze. That Ms. Rogers would attempt to assume personhood, if not citizenship, by appearing with hair that was not only natural, but styled in a way that celebrates and asserts a level of Black individuality—and therefore autonomy—is an affront to embedded power dynamics and implied duties. By styling her hair in a way that differentiated her from her white colleagues —making her Black selfhood central—Ms. Rogers engaged in a fugitive practice that marked in her flight or defiance from centuries of bending to conscripted desires of pleasure and being to a white owner, and later a white supremacist gaze.

There is no doubt—as Kimberle Crenshaw has argued before—that the Court's scrutiny of Ms. Rogers operates on an intersectional axis, namely sex and race. And, as I have argued in other writings, as well as the previous article, and explained the notion of "BlaQueerness," there is no separating race, gender and sexuality from each other, even if and when gender is fleetingly (un)attainable. In *Demarginalizing the Intersection of Race & Sex*, Crenshaw analyzes several cases that show the Court marking multiple, simultaneous oppressions, or discriminations, as outside of the framework of law. In one case, *Mosley v. General Motors,* the Court is confronted with Black women bringing a claim against General Motors for sex and racial discrimination—not dissimilar form this case—where the Court reaches a similar conclusion.[54] In this case, the women had been previously employed as clerks or phone attendants due to a wartime shortage of male labor. The white women who previously held those positions had taken up positions in the factory, as the men—both Black and white—had been deployed. When the men returned, the Black women were fired and denied employment as both clerks and factory workers. They sued, arguing they had been

53. Thomas Jefferson, *Notes on the state of Virginia*, https://www.loc.gov/item/03004902/.
54. Mosley v. General Motors, 497 F. Supp. 583, 591 (1980).

discriminated against for their race, in the case of clerical jobs, and for their gender, in respect to the factory jobs. The Court denied their claim, reasoning that they were both moot because Black men were employed at the factory, hence no racial discrimination, and that (white) women were employed as clerks, hence no gender discrimination. Therefore, the employer had neither discriminated solely on race nor gender. The Court declined to understand their intersectional argument, in that they faced a unique, compounded experience as Black women.

For Ms. Rogers, the appellate court slightly modified this argument—as Ms. Rogers did not claim she was being treated differently than Black men, or that white women were similarly allowed to wear cornrows—and instead held that the claim here was beyond the scope of law, due to her "mutable" characteristics.[55] That is to say, the company's regulation of her personhood was permissible—and within the protection of the law—because there were measures she could take to make the case moot, such as make illegible or undetectable her hair. The burden of her hair then, was not the company's to bear.[56] It was hers and hers alone. The Court agreed that she would have a strong claim for racial and speech based discrimination if she were to have worn an "Afro/Bush" style because of its political association and because it was natural.[57] While this is true, and perhaps facially "fair," it is nefarious in effect. In strictly scrutinizing her hair and appearance, the Court affirms and mandates a singular natural hairstyle as permissible and within lawfulness—while refusing to do the same for white employees—an invasion of personhood, privacy, and dignity by fiat. Further, the Court shows little regard—with an acidic humor—for the harm caused by the remedy. In responding to her concern about the damage and pain of folding her hair into a bun, the Court encourages her to merely "add a hairpiece."[58] Finally, in remarking that she is "free" to wear her hair as she feels outside of the workplace, the Court again reminds Ms. Rogers of her unfree status within the workplace, a "badge" and "incident of slavery" under any serious reading of the Thirteenth Amendment, abolishing the aforementioned.[59] This differs significantly from the work of Kenji Yoshino and his theorization of "covering."[60] While Yoshino speaks to problem of muting oneself due to racism—particularly its social and cultural pressures—I'm speaking to a badge and incidence of slavery which is reenacted as invidious discrimination and retaliation against Blackness that is legally protected.[61]

55. *Rogers,* 527 F. Supp. at 232.
56. *Id.* at 233.
57. *Id.* at 232.
58. *Rogers,* 527 F. Supp. at 233.
59. *Id*. at 231.
60. Kenji Yoshino, Covering, YALE L.J. 111 (2001).
61. Yoshino, *supra* note 60, at 781.

VIII. Precedent as Prologue

Precedence is perhaps the most hallowed concept in law and law making. It allows the citizen, practitioner, and state to craft laws and policies that are likely to withstand jurisprudential scrutiny. Beyond the land of lawmaking and policy procuring, however, precedent and judicial rulings—even those that are nonbinding—signal to the aforementioned groups a method, and standard, of regard and disregard. Law and lawfulness are dichotomous to illegality and criminality; signaling what is to be done, encouraged and celebrated and what is to be scorned, disciplined and brought to heal, all quotidian, necessary community labors and duties of good citizenship. It should come as no surprise then, that jurisprudential decisions and logic find themselves mirrored, remade, solidified, and acted out in quotidian culture and practices. For Black people, even those attempting to "live otherwise," law itself becomes an anticipatory manual for how we will be (dis)regarded by non-white people, particularly those operating "under the cover of law" or, in the case of those like BBQ Becky, those who see themselves as the extension, beneficiary or embodiment of the states policing power. Two recent cases make this extremely clear. "I fought to get here," Jean-Louis told CNN in an interview Friday. "I'm not here to qualify my existence. You don't come to the Ivies for that."[62]

On May 11, 2018 Lolade Siyonbola—a Yale African Studies graduate student—fell asleep while studying in her dorm's common room.[63] Another student, a white woman, Sarah Braasch, later walked in, turned on the lights and exclaimed that she was "calling the police."[64] Siyonbola, irritated, then went to Braasch's room, with a camera recording to Facebook Live, to ask why she was calling the police. "I have every right to call the police," Braasch said after snapping a photo of Siyonbola. "You cannot sleep in that room." "Continue," Siyonbola said, then taunted her, "Get my good side."[65]

Braasch had already called the police, telling them that "a woman she did not know" was sleeping in the common room.[66] When the officers arrived, they took Lolade aside and repeatedly asked her for identification, which she initially resisted stating, "I deserve to be here. I pay tuition like

62. Dakin Andone, *This Allegedly Wasn't the First Time This White Yale Student Called the Cops on a Person of Color*, CNN (May 12, 2018), https://www.cnn.com/2018/05/11/us/yale-second-black-student-sarah-braasch/index.html.

63. *Id.*

64. *Id.*

65. Cleave R. Wootson Jr., *A Black Yale Student Fell Asleep in Her Dorm's Common Room. A White Student Called Police*, WASH. POST (May 11, 2018), https://www.washingtonpost.com/news/grade-point/wp/2018/05/10/a-black-yale-student-fell-asleep-in-her-dorms-common-room-a-white-student-called-police/.

66. Andone*, supra* note 62.

everybody else . . . I'm not going to justify my existence here."[67] After she relented, showing the officer's her ID, the officers told her that she was not harassed by them and that "every time there's an interaction with police officers doesn't mean there's harassment." She responded, "You have a good night. . . I'm not going to have a good night after this."[68] The police eventually told Braasch that Lolade was "authorized to be here" and that it was not "a police matter."[69]

In the above instance, we witness the quotidian manifestation of the jurisprudential strict scrutiny articulated in *Bakke.* In that case, the Court was suspicious of, and strictly scrutinized the presence of the unnamed Black and people of color students. It was suspicious of, and strictly scrutinized their presence, as well as the state's logic for allowing and creating a mechanism for their presence. When the state positioned the affirmative action—or what I would call corrective action—program as one of racial redress, the Court was suspicious of not only the ends, but the means and the very facts of history that make the case for redress (i.e., mandating state studies, various data, legislative and administrative action.) This facially functioned as a burden on the state but in effect, it was a burden of a presumption of suspicion—articulated through an inverted theory of strict scrutiny—that would legally and socially mark Black presence in colleges as always, already curious, suspicious and deserving of inquiry. The corollary to this, of course, is the marking of the presence of white students as normative, routine and a phenomenon—if not a privilege—to be protected.

In the scene above, Lolade is doing what most graduate students do: fall asleep after a long period of studying and writing. Her books and papers are clearly distributed around her.[70] These badges of a typical college student should indicate her belonging. When Braasch sees her, she announced she was "calling the police." The books and papers indicated nothing, or, were subsumed by the presence of a Black person lounging in the lounge. If Lolade's study materials did nothing to indicate her privilege to be present, then her flesh, the color of her skin operated as a fire star alarm noting her invasion into a space not meant to her. The calling of the police, as a first response—not unlike that of BBQ Becky beforehand—marks Lolade's transmutation from Yale graduate student to Black trespasser, into a space,

67. Katherine Mangan, *A White Student Called the Police on a Black Student who was Napping*, THE CHRON. OF HIGHER EDUCATION (May 10, 2018), https://www.chronicle.com/article/a-white-student-called-the-police-on-a-black-student-who-was-napping-yale-says-its-deeply-troubled/#:~:text=A%20female%20police%20officer%20said,make%20sure%20you%20belong%20here.%E2%80%9D&text=Lolade%20Siyonbola%2C%20a%20master's%20student,to%20justify%20my%20existence%20here.%E2%80%9D.

68. *Id*.

69. *Id*.

70. Mangan, *supra* note 67.

a lounge, not meant for entry. Her crime—not one of actual threats or endangerment—was her presence. Braasch, in her performance of an internalized and sociocultural duty to strictly scrutinize Black people—as well as her clear marking of Lolade as furtive, even when at rest—appeals to the power of the state to discipline and remove Lolade.

The desire to discipline—and invoke state and personal power—becomes more evident in her declaration to Lolade that she "cannot sleep here," her invocation of a "right to call the police," and ominous warning "not to get on my bad side." Unsaid here, is her prior instance of calling the police on Black students on campus for merely being Black and present. Lolade is not only being disciplined and chastised for sleeping in the common room, but for being present —and resting—without leave or permission from Braasch. In calling the police she exclaims that Lolade is "a woman I don't know." This marking of Lolade as furtive and outside of the rights given to students is further made clear in her interactions with the police. The police demand, repeatedly, that she produces an ID; while she protests and insists on her "right to be here," specifically noting that she "pays tuition like everyone else." The mechanism of strict scrutiny, and its practice in policing, is clear here. Lolade's presence is assumed to be invalid until, and unless, she can meet the burden of proof to overcome the suspicion—that of the summoned officers and the white hallmate—that could very well have her in a life or death situation. It is important to note here that the arrival and decision of the police to engage Lolade is a result of their belief in the feelings of Braasch. Braasch's fear, annoyance, and suspicion is proof enough to marshal police resources to interrogate Lolade's presence, while taking Braasch's reaction as normal, expected, and beyond reasonable investigation. In this scenario, much like in *Bakke*, Lolade is made to justify her presence, in other words, to make legible to law enforcement that presence is "authorized" by overcoming the presumption of trespass visited upon her via a legal and cultural practice of strict scrutiny of Black presence, bodies, and quotidian life.

On December 18, 2018 Andrew Johnson, a Black high school wrestler in New Jersey, was faced with a level of scrutiny not dissimilar from that of Ms. Rogers; he could cut his hair or change his "profession."[71] Just before his match began, standing in front of a full auditorium, Johnson was informed that he could either have his locs cut immediately or forfeit his match (video).[72] Forced to choose between upending his wrestling career

71. Staff Reports, *Wrestling Haircut Rule Confusion Prompted Buena to Cancel Match*, COURIER POST (Jan. 11, 2019), https://www.courierpostonline.com/story/sports/high-school/wrestling/2019/01/11/nj-wrestler-haircut-rule-confusion-prompts-buena-regional-cancel-match-andrew-johnson-alan-maloney/2546251002/.

72. Mike Frankel (@MikeFrankleJSZ), TWITTER (Dec 20, 2018 9:54 AM), https://twitter.com/MikeFrankelJSZ/status/1075811774954463235.

and maintaining his bodily integrity and racial identity, he allowed his hair to be cut.[73] It was done haphazardly, by a random white female employee, with a pair of scissors usually used for arts and crafts.[74] In the video, we can hear loud sounds from the audience that seem to be a mix between roaring applause and shock.[75] While there was widespread condemnation after the fact—particularly after it had been revealed that the presiding referee had referred to a peer as "nigger"—no one moved to intervene in the moment.[76]

It made no difference that Johnson had a haircap, that he had been using all season, and had attempted to use it.[77] Instead, the referee applied and interpreted the hair length rule, with the interpersonal equivalence of jurisprudential strict scrutiny, policing not only Johnson's hair—and by proxy his Blackness—but also the style of haircap he used. His review of Jackson's hair acted as a stand-in for his review of Jackson's presence as a whole. His ability to wrestle—as any public-school student who had made the team—was called into question due to the style and length of his hair. In order to wrestle—he would later go on to win—he would not only have to pay a social tax of deference and subordination, but he would also pay the price of the forfeiture of bodily autonomy and integrity. The price of entry, the price of presence, is understated here because most do not understand the hours and years of maintenance to attain locs of that length; nor the time it will take to create and maintain a similar hairstyle. The video shows his locs being cut down to the root on the sides, and randomly cut on the top. In order to achieve his initial style again, he will have to surrender his current length and wait years for his hair to even out, or purchase extensions and pay several hundred dollars for their installation. Put differently, what was stolen here was labor, time, dignity, bodily autonomy, and integrity. The spectacle, one of public and cultural lashing and disciplining, is similar and of the same vein of performance as the lynching, public lashing, routine police contact, questioning and harassment; a sociolegal politics of discipline, displacement and divesture from the commons visited on Black people, Black citizens, and their bodies.

Conclusion

In conclusion, I want to meditate on and with the words of Maria Grahn-Farley and Anthony Farley. First, Grahn-Farley writes:

73. *Id*.
74. *Id*.
75. *Id*.
76. Julia Reinstein, *A Black High School Wrestler Was Reportedly Forced by A Ref to Cut Off His Dreadlocks*, BUZZFEED NEWS, (Dec. 21, 2018 3:42 P.M.), https://www.buzzfeednews.com/article/juliareinstein/black-high-school-wrestler-forced-haircut-dreadlocks-referee.
77. *Id*.

> The law of slavery has not been forgotten by the law of segregation; the law of segregation has not been forgotten by the law of neosegregation. The law guarding the gates of slavery, segregation, and neosegregation has not forgotten its origin; it remembers its father and its grandfather before that. It knows what master it serves; it knows what color to count.[78]

In this short passage Grahn-Farley argues that the law of slavery has not disappeared, despite being formally overturned, and instead operates as a type of master precedent. The law of slavery itself may have passed away formally, but its logics, culture, interests, and silent understandings are born again—almost as a type of genetic makeup—in the laws of segregation and neosegregation, which is the current moment. The precedent of law and lawfulness then, is a precedent and modus operandi to serve White interests and count those interests as wholly intelligible and valid under law. This jurisprudential, genetic makeup then provides the backdrop for what this chapter is calling the strict scrutiny of Black life. The term scrutiny comes from the word scrutator:

> One who examines or investigates or spec. One whose office it is to examine or investigate closely, esp. one who acts as an examiner of votes at an election, etc.; a scrutineer.[79] Whereas scrutiny is defined as: Investigation, critical inquiry; an instance of this. Formerly often (now rarely) const. into, †of.

From these two definitions it is clear that scrutiny itself—even when outside of the formal legal theater—is an act of extra legal review, to determine, via close examination, investigation and critical inquiry, whether one's presence, access to the polity and goods and services is warranted, proper and beyond reproach.[80] Put differently, strict scrutiny acts as a sort of TSA checkpoint for access to the fruits of whiteness as property and/or full citizenship. The law of slavery, the laws of segregation, and the laws of neosegregation function as the gatekeepers and formal borderlands that bind Black people and Blackness to servitude and subordination while simultaneously marking, remarking and regarding whiteness and white people as citizens worthy of the birthright of the manners Jefferson speaks

78. Maria Grahn-Farley, *The Master Norm*, 53 DEPAUL L. REV. 1215, 1227 (2004).

79. SCRUTATOR, OXFORD UNIV. PRESS, https://www-oed-com.ezproxy.lib.utexas.edu:2444/view/Entry/173762 (last visited Dec. 27, 2019).

80. SCRUTINY, OXFORD UNIV. PRESS. https://www-oed-com.ezproxy.lib.utexas.edu:2444/view/Entry/173778?rskey=h3Dt1b&result=1&isAdvanced=false (last visited Dec. 27, 2019).

of. These laws mark Black people as both fungible and fugitive; always, already slaves on the run or on reprieve, whereas strict scrutiny is the mechanism for this branding. It detects what Spillers has called the hieroglyphics of race and reinstitutes, articulates and mandates the politics of the plantation in the present. To attain a modicum of safe passage—similar to that of the slave pass—the Black body must be made subservient and perform the acts of "servitude or bondage for life." In Supreme Court jurisprudence this looks like remaking oneself in the ocular desires of white supremacy, specifically, masking those "immutable characteristics" for safe-ish "passing." The masking functions as a type of "voluntary" transmutation that reifies Black people and Blackness as naturally outside of law's protections, while also validating the current racial power structure. Whiteness's supremacy is remade in the quotidian bowing and transmutation of Black citizenship to one of servitude; thus, is the cost of "equal protection under the law."

> Requests for equality and freedom will always fail. Why? Because the fact of need itself means that the request will fail. The request for equality and freedom, for rights, will fail whether the request is granted or denied. The request is produced through an injury. The initial injury is the marking of bodies for less—less respect, less land, less freedom, less education, less. The mark must be made on the flesh because that is where we start from. Childhood is where we begin and, under conditions of hierarchy, that childhood is already marked. The mark organizes, orients, and differentiates our otherwise common flesh. The mark is race, the mark is gender, the mark is class, the mark is. The mark is all there is to the reality of those essences—race, gender, class, and so on—that are said to precede existence. The mark is a system. Property and law follow the mark. And so it goes.[81]

In the excerpt above Anthony Farley provides a critical review of the law's inability to provide equality, freedom, and justice. He argues, not dissimilar from Derrick Bell in *Racial Realism*, that racism (i.e., classism, patriarchy, etc.) are not only here to stay but are irreparable by calls and requests for equality and freedom.[82] Further, he argues, that the fact of harm is proof of the failure, regardless of whether requests for redress are heeded or denied. This is because these failures are not mere failures of law, but markings of law and culture. Like Spillers, Farley points to these structural and interpersonal harms as markings on the flesh; brandings that are seared

81. Anthony P. Farley, *Perfecting Slavery*, 36 LOY. U. CHI. L.J. 225, 256 (2005).
82. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992).

and recalled upon sight. This marking, branding, hieroglyph "organizes, orients and differentiates." In his estimation, law is incapable of remedy because law is a precedent of a system of othering, dehumanizing, and flagging for hierarchy and natural proximity to social death. These markings signal the marked excess to humanity and to citizenship, not as part and parcel of the commons. The mark itself may be inarticulable, because it predates what is considered necessary to be said and remarked upon. Property and law maintain these marks via metalanguages of race, class, sex etc. but cannot undo them because their purpose to maintain the precedence of their existence. Put differently, law cannot undo its own very foundations, its central logic is respect for precedence, for the nature of property and both the nature of property and the function of precedence is to maintain what was before.

This precedence, regardless of seemingly progressive intervention, mandates the strict scrutinization of Black life and presence; Black furtivity is baked into it. It is a central feature of law, as a part of its genetic makeup. Therefore, all laws, even those seen as most "pro-Black" contain a preceding logic of Blackness as less, as other, and as a slave to a master. Strict scrutiny then, is the mechanism of maintenance. It narrows the reach of Blackness as inside of law and lawfulness—access to certain protections and curtailing of certain violence—while simultaneously expanding the methods by which Black people can be rendered outside of law ("non-immutable characteristics," furtive gestures, insurmountable burdens of proof and broad notions of "reasonable suspicion" and "probable cause").

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