# the ALCHEMY of RACE and RIGHTS

diary of a law professor

PATRICIA J. WILLIAMS

# *The Alchemy of Race and Rights*

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*Designed by Gwen Frankfeldt*

# *The Alchemy of Race and Rights*

*For Sophie, Marjorie, and the three bears*

*Once upon a time there was a society of priests who built a Celestial City with gates secured by word-combination locks. The priests were masters of the Word and, within the City, ascending levels of power and treasure became accessible to those who could learn ascendingly intricate levels of Word Magic. At the very top level, the priests became gods; and because they then had nothing left to seek, they engaged in games with which to pass the long hours of eternity. In particular, they liked to ride their strong, sure-footed steeds around and around the perimeter of heaven: now jumping word hurdles, now playing polo with concepts of the moon and the stars, now reaching up to touch that pinnacle, that splinter of Refined Understanding called Superstanding, which was the brass ring of their merry-go-round.*

*In time, some of the priests-turned-gods tired of this sport, denounced it as meaningless. They donned the garb of pilgrims, seekers once more, and passed beyond the gates of the Celestial City. In this recursive passage they acquired the knowledge of Undoing Words.*

*Beyond the walls of the City lay a Deep Blue Sea. The priests built small boats and set sail, determined to explore the uncharted courses and open vistas of this new terrain. They wandered for many years in this manner, until at last they reached a place that was half a circumference away from the Celestial City. From this point the City appeared as a mere shimmering illusion; and the priests knew that they had finally reached a place Beyond the Power of Words. They let down their anchors, the plumb lines of their reality, and experienced godhood once more.*

*Under the Celestial City, dying mortals cried out their rage and suffering, battered by a steady rain of sharp hooves whose thundering, sound-drowning path described the wheel of their misfortune.*

*At the bottom of the Deep Blue Sea, drowning mortals reached silently and desperately for drifting anchors dangling from short chains far, far overhead, which they thought were lifelines meant for them.*

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# *Excluding Voices*

## A Necklace of Thoughts on the Ideology of Style

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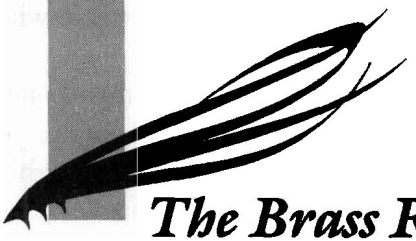

# *The Brass Ring and the Deep Blue Sea*

(some parables about learning to think like a lawyer)

Since subject position is everything in my analysis of the law, you deserve to know that it's a bad morning. I am very depressed. It always takes a while to sort out what's wrong, but it usually starts with some kind of perfectly irrational thought such as: I *hate* being a lawyer. This particular morning I'm sitting up in bed reading about redhibitory vices. A redhibitory vice is a defect in merchandise which, if existing at the time of purchase, gives rise to a claim allowing the buyer to return the thing and to get back part or all of the purchase price. The case I'm reading is an 1835 decision from Louisiana, involving the redhibitory vice of craziness:

> The plaintiff alleged that he purchased of the defendant a slave named Kate, for which he paid $500, and in two or three days after it was discovered the slave was crazy, and run away, and that the vices were known to the defendant . . .
>
> It was contended [by the seller] that Kate was not crazy but only stupid, and stupidity is not madness; but on the contrary, an apparent defect, against which the defendant did not warrant . . .
>
> The code has declared, that a sale may be avoided on account of any vice or defect, which renders the thing either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed the buyer would not have purchased with a knowledge of the vice. We are satisfied that the slave in question was wholly, and perhaps worse than, useless.[1]

As I said, this is the sort of morning when I hate being a lawyer, a teacher, and just about everything else in my life. It's all I can do to feed the cats. I let my hair stream wildly and the eyes roll back in my head.

So you should know that this is one of those mornings when I refuse to compose myself properly; you should know you are dealing with someone who is writing this in an old terry bathrobe with a little fringe of blue and white tassles dangling from the hem, trying to decide if she is stupid or crazy.

Whenever I'm in a mood like this, it helps to get it out on paper, so I sit down to write even when I'm afraid I may produce a death-poem. Sometimes I can just write fast from the heart until I'm healed. Sometimes I look at my computer keyboard and I am paralyzed, inadequate—all those letters of the alphabet, full of random signification. I feel like a monkey. Those mornings, and this is one, I need a little extra push to get me started, and if I turn on the television, almost any story will do. I switch channels through a sea of news programs with the coopting, carnivorous eagerness of catharisis.

Conditions are bad, very bad, all over the world. The newscasters tell me that everyone is afraid of black men these days, even black women. Black people are being jailed in huge numbers, and the infant-mortality rate is staggering. Courts have authorized the custody removal of children at birth from mothers who are drug-addicted. Drugs bring pleasure to the biological catastrophe of having been born in the fearsome, loathesome packaging of an "other" body. Editorials talk about the efficiency of apartheid. Bigger better prisons. Spy satellites. Personnel carriers in Harlem. Door-to-door searches. State-sanctioned castration. Some neutral market thing devouring the resources of the earth at a terminally reckless rate. The Ku Klux Klan and the Aryan Brotherhood are the major unions among prison guards. Eastern Europe wants more freedom in the form of telephone-answering machines and video cassettes. AIDS spreads and spreads and spreads, among

black and brown communities in particular. Subsistence farmers and indigenous people are dying all over the world, their ways and knowledge devoured and lost forever. According to the most authoritative scientists, the greenhouse effect is supposed to raise the temperature of the earth by two or three degrees over the next millennium. The winter of 1989 was five, ten, sometimes fifteen degrees above normal, all over the earth. It is the spring of 1990, and we are all worried about the summer to come.

I don't know how to find something to write about in the panic of this deadly world. There is more in the news than even my depression can consume.

Then I see it. A concise, modular, yet totally engaging item on the "MacNeil/Lehrer News Hour": Harvard Law School cannot find one black woman on the entire planet who is good enough to teach there, because we're all too stupid. (Well, that's not precisely what was said. It was more like they couldn't find anyone smart enough. To be fair, what Associate Dean Louis Kaplow actually said was that Harvard would have to "lower its standards," which of course Harvard simply cannot do.[2])

So now you know: it is this news item, as I sit propped up in bed with my laptop computer balanced on my knees, clad in my robe with the torn fringe of terry bluebells, that finally pushes me over the edge and into the deep rabbit hole of this book.

When I dust myself off, I am sitting with my sister at my parents' kitchen table. Grown now, she and I are at home for Christmas. We chat, catching up on each other's lives. My sister tells me how her house is haunted by rabbits. I tell her how I'm trying to write a book on law and liberation.

"The previous owner had hundreds of them," she says. "You can hear them dancing in the dining room after midnight."

"It will be a book about the jurisprudence of rights," I respond. "I will attempt to apply so-called critical thought to legal studies. I believe that critical theory has valuable insights to con-

tribute to debates about the ethics of law and the meaning of rights; yet many of those insights have been buried in relatively arcane vocabulary and abstraction. My book will concern itself with the interplay of commerce and constitutional protections and will be organized around discussion of three basic jurisprudential forces: autonomy, community, and order. My chapters will address such issues as surrogate motherhood and ownership; neighborhood and homelessness; racially motivated violence and disownedness. I will try to write, moreover, in a way that bridges the traditional gap between theory and praxis. It is not my goal merely to simplify; I hope that the result will be a text that is multilayered—that encompasses the straightforwardness of real life *and* reveals complexity of meaning."

"But what's the book *about?*" my sister asks, thumping her leg against the chair impatiently.

"Howard Beach, polar bears, and food stamps," I snap back. "I am interested in the way in which legal language flattens and confines in absolutes the complexity of meaning inherent in any given problem; I am trying to challenge the usual limits of commercial discourse by using an intentionally double-voiced and relational, rather than a traditionally legal black-letter, vocabulary. For example, I am a commercial lawyer as well as a teacher of contract and property law. I am also black and female, a status that one of my former employers described as being 'at oxymoronic odds' with that of commercial lawyer. While I certainly took issue with that particular characterization, it is true that my attempts to write in my own voice have placed me in the center of a snarl of social tensions and crossed boundaries. On the one hand, my writing has been staked out as the exclusive interdisciplinary property of constitutional law, contract, African-American history, feminist jurisprudence, political science, and rhetoric. At the same time, my work has been described as a 'sophisticated frontal assault' on laissez-faire's most sacred sanctums, as 'new-age performance art,' and as 'anecdotal individualism.' In other words, to speak as black,

female, *and* commercial lawyer has rendered me simultaneously universal, trendy, and marginal. I think, moreover, that there is a paradigm at work, in the persistent perceptions of me as inherent contradiction: a paradigm of larger social perceptions that divide public from private, black from white, dispossessed from legitimate. This realization, while extremely personal, inevitably informs my writing on a professional level."

"What's so new," asks my sister, losing interest rapidly, "about a schizophrenic black lady pouring her heart out about food stamps and polar bears?"

I lean closer to her. "Floating signifiers," I whisper.

I continue: "Legal writing presumes a methodology that is highly stylized, precedential, and based on deductive reasoning. Most scholarship in law is rather like the 'old math': static, stable, formal—rationalism walled against chaos. My writing is an intentional departure from that. I use a model of inductive empiricism, borrowed from—and parodying—systems analysis, in order to enliven thought about complex social problems. I want to look at legal issues within a framework inscribed not just within the four corners of a document—be it contract or the Constitution—but by the disciplines of psychology, sociology, history, criticism, and philosophy. The advantage of this approach is that it highlights factors that would otherwise go unremarked. For example, *stare decisis* (the judicial practice of deciding cases in a manner limited by prior court decisions in factually analogous situations), rather than remaining a silent, unquestioned 'given,' may be analyzed as a filter to certain types of systemic input. Another advantage is that this sort of analytic technique can serve to describe a community of context for those social actors whose traditional legal status has been the isolation of oxymoron, of oddity, of outsider. I am trying to create a genre of legal writing to fill the gaps of traditional legal scholarship. I would like to write in a way that reveals the intersubjectivity of legal constructions, that forces the reader both to participate in the construction of meaning and to

be conscious of that process. Thus, in attempting to fill the gaps in the discourse of commercial exchange, I hope that the gaps in my own writing will be self-consciously filled by the reader, as an act of forced mirroring of meaning-invention. To this end, I exploit all sorts of literary devices, including parody, parable, and poetry."

". . . as in polar bears?" my sister asks eagerly, alert now, ears pricked, nose quivering, hair bristling.

"My, what big teeth you have!" I exclaim, just before the darkness closes over me.

It is my deep belief that theoretical legal understanding and social transformation need not be oxymoronic. I want this book to occupy the gaps between those ends that the sensation of oxymoron marks. What I hope will be filled in is connection; connection between my psyche and the readers', between lived experience and social perception, and between an encompassing historicity and a jurisprudence of generosity.

"Theoretical legal understanding" is characterized, in Anglo-American jurisprudence, by at least three features of thought and rhetoric:

(1) The hypostatization of exclusive categories and definitional polarities, the drawing of bright lines and clear taxonomies that purport to make life simpler in the face of life's complication: rights/needs, moral/immoral, public/private, white/black.

(2) The existence of transcendent, acontextual, universal legal truths or pure procedures. For example, some conservative theorists might insist that the tort of fraud has always existed and that it is part of a universal system of right and wrong. A friend of mine demanded of a professor who made just such an assertion: "Do you mean to say that when the first white settlers landed on Fiji, they found tortfeasors waiting to be discovered?" Yes, in a manner of speaking, was the professor's response. This habit of universalizing legal taxonomies is very much like a cartoon I once

saw, in which a group of prehistoric fish swam glumly underwater, carrying baseball bats tucked beneath their fins, waiting to evolve, looking longingly toward dry land, where a baseball was lying in wait on the shore. The more serious side of this essentialized world view is a worrisome tendency to disparage anything that is nontranscendent (temporal, historical), or contextual (socially constructed), or nonuniversal (specific) as "emotional," "literary," "personal," or just Not True.

(3) The existence of objective, "unmediated" voices by which those transcendent, universal truths find their expression. Judges, lawyers, logicians, and practitioners of empirical methodologies are obvious examples, but the supposed existence of such voices is also given power in romanticized notions of "real people" having "real" experiences—not because real people have experienced what they really experienced, but because their experiences are somehow *made* legitimate—either because they are viewed as empirically legitimate (directly corroborated by consensus, by a community of outsiders) or, more frequently, because those experiences are corroborated by hidden or unspoken models of legitimacy. The Noble Savage as well as the Great White Father, the Good-Hearted Masses, the Real American, the Rational Consumer, and the Arm's-Length Transactor are all versions of this Idealized Other whose gaze provides us either with internalized censure or externalized approval; internalized paralysis or externalized legitimacy; internalized false consciousness or externalized claims of exaggerated authenticity.

The degree to which these three features of legal thought are a force in laws ranging from contracts to crimes, from property to civil liberties, will be a theme throughout the rest of this book. For the moment, however, a smaller example might serve to illustrate the interpretive dynamic of which I am speaking.

A man with whom I used to work once told me that I made too much of my race. "After all," he said, "I don't even think of you as black." Yet sometime later, when another black woman be-

came engaged in an ultimately unsuccessful tenure battle, he confided to me that he wished the school could find more blacks like me. I felt myself slip in and out of shadow, as I became nonblack for purposes of inclusion and black for purposes of exclusion; I felt the boundaries of my very body manipulated, casually inscribed by definitional demarcations that did not refer to me.

The paradox of my being black yet notblack visited me again when, back to back, the same (white) man and then a (black) woman wondered aloud if I "really identified as black." When the white man said this, I was acutely aware that the choice of identifying as black (as opposed to white?) was hardly mine; that as long as I am identified as black by the majority of others, my own identifying as black will almost surely follow as a simple fact of human interdependency. When the black woman told me the very same thing, I took it to heart as a signpost of self-denial; as possible evidence within myself of that brand of social distress and alienation to which blacks and oppressed people are so peculiarly subject; and as a call for unity in a society that too often helps us turn against ourselves.

I heard the same words from each, and it made no difference to me. I heard the same words from each, but differently: one characterized me as more of something I am not, white; the other called for me to be more conscious of something I am, black. I heard the same-different words addressed to me, a perceived white-male-socialized black woman, as a challenge to mutually exclusive categorization, as an overlapping of black and female and right and male and private and wrong and white and public, and so on and so forth.

That life is complicated is a fact of great analytic importance. Law too often seeks to avoid this truth by making up its own breed of narrower, simpler, but hypnotically powerful rhetorical truths. Acknowledging, challenging, playing with these *as* rhetorical gestures is, it seems to me, necessary for any conception of justice. Such acknowledgment complicates the supposed purity of