Black Rage Confronts the Law

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Chapter 3

The Law: Its Myths and Rituals

The black rage claim is a political defense because it confronts the myths of the law. It is a political defense because it injects race and class into a legal system that steadfastly avoids an honest and true discussion of these issues. Before we can fully understand the problems of raising and winning a black rage defense, it is helpful to analyze the legal culture in which we are immersed. This chapter examines the role of the law and three of the major underpinnings of the legal system: courtroom rituals, legal reasoning, and the pretense of colorblindness.

The law is the most powerful expression of a society’s rules. The dominant purpose of the law in every country is to preserve the status quo, to protect people and institutions who have privilege and power, whether in government or in civil society. The law fulfills this purpose by the peaceful resolution of conflicts, but also by coercion. An example of the resolution of conflict through the legal system is the immense amount of time, money, and energy used in dealing with business arrangements. Politicians complain about criminal cases clogging up the courts, but in reality most lawyers’ time and a large amount of litigation concern capitalist business deals and conflicts. A 1995 University of Wisconsin survey reported that
only 3 percent of lawyers focus on criminal law. In San Francisco in 1995, the public defender’s office had sixty-eight lawyers, eleven investigators, and thirty staff personnel. In contrast, one of the largest corporate law firms, Pillsbury, Madison, and Sutro, had 294 lawyers and 335 staff personnel in their San Francisco office alone. They also have ten other offices, including one in Hong Kong and one in Tokyo.

Criminal law gets most of the media attention, but corporate law is where billions of dollars are negotiated and litigated, and where decisions are being made which control our environment, our jobs, and the very quality of our lives. The law is necessary to facilitate and mediate these decisions, thereby avoiding an anarchy that would severely disrupt the free market and societal relations.

The law also mediates thousands of other conflicts in civil society, from landlord-tenant conflicts to consumer-related product liability suits; from simple car accident cases to major constitutional issues; from divorces to bankruptcy proceedings. In the United States in particular, law seems to surround us.

Peaceful resolution of conflict through the mutual acceptance of a judicial forum is one method of keeping society on an even keel. Another method is coercion—using the force of the state, or the threat of that force, on individuals in order to secure their obedience. And when they fail to obey, the state uses that force to inflict punishment. Robert Cover gets to the heart of the matter when he writes, “The Judges deal pain and death. That is not all they do. Perhaps that is not what they usually do. But they do deal death, and pain.”

If law’s primary purpose is to protect the powerful and keep things as they are, in America its secondary purpose is to protect individual rights. The Bill of Rights is the cornerstone of these protections. Of course, the rights of free speech, the right not to be tortured into confessing, the right to abortion, the right not to be forced to go to a segregated school, the right to a jury trial—these, and all of our liberties, did not come to us as self-executing protections leaping off the parchment of the Constitution into our lives. People fought for these rights, in the courts and in the streets. It is because of the right of due process for people who are arrested that the black rage defense can be raised and developed. It is because the law is more than stark, brutal coercion that the black rage defense can exist and be used to free persons charged with crimes.
If human history teaches us anything, it is that governments cannot rule by force alone. In every period of history people have fought against tyranny. Whether in the form of men shooting rifles on Bunker Hill in colonial America, or women marching with signs protesting the disappearance of family members at the Plaza de Mayo in Buenos Aires, Argentina, or schoolchildren with their voices raised in song in the streets of Soweto, South Africa, people ultimately will attempt to organize and rebel against arbitrary and unjust state power. Therefore, for a government to continue to hold power it must create a legal system that has an image of justice and some sense of fairness. It must also win the psychological acceptance of the majority of its citizens. How it does this has been the subject of increasing academic scrutiny. One of more prevalent theories of this process is put forward by Peter Gabel, a founder of the Conference on Critical Legal Studies and the president of New College and New College School of Law:

The principal role of the legal system within these societies is to create a political culture that can persuade people to accept both the legitimacy and the apparent inevitability of the existing hierarchical arrangement. The need for this legitimation arises because people will not accede to the subjugation of their souls through the deployment of force alone. They must be persuaded, even if it is only a “pseudo-persuasion,” that the existing order is both just and fair, and that they themselves desire it. In particular, there must be a way of managing the intense interpersonal and intrapsychic conflict that a social order founded upon alienation and collective powerlessness repeatedly produces. “Democratic consent” to an inhumane social order can be fashioned only by finding ways to keep people in a state of passive compliance with the status quo, and this requires both the pacification of conflict and the provision of fantasy images of community that can compensate for the lack of real community that people experience in their everyday lives.2

Society fashions this “democratic consent” through what has begun to be referred to as legal culture. Law has a culture of its own, including education, training, rules of behavior, philosophy, folkways, habits, language, economics, tradition, and stories. The courtroom is one of the key elements of this culture. The structure and rituals of the courtroom are intended to communicate the “three M’s” of the law: majesty, mystique, and might. The architecture of the courtroom divides the lawyers and the
judge and his staff from the lay people. The judge's seat is elevated above everyone else. There is an American flag near the judge, who wears a large black robe. There is a bailiff, usually a law enforcement officer in uniform, who enforces the judge's rules for the courtroom. Sometimes these rules have no relationship to the process of justice. For example, some judges won't allow members of the public to chew gum. When I was a law student observing a regular trial in Oakland Superior Court, I was told to leave the courtroom for chewing an antacid tablet. In the O. J. Simpson trial, Judge Lance Ito called a reporter into chambers for sucking on a cough drop. A number of years ago, in the United States District Court in San Francisco, the chief judge had a standing order that children were not allowed in the courtroom. My client's wife was told by the bailiff to take her two children, aged ten and seven, out of the courtroom on the day their father was being sentenced to prison for five years. I refused to allow this clear violation of the Sixth Amendment's right to a public trial, the First Amendment's right of association, and the general constitutional right of privacy, which protects family relationships. Although the judge allowed the children to stay in my case, the standing order continued in force and lawyers continued to obey it.

Lawyers are coconspirators in perpetuating the alienation and symbolism of the legal culture and its message of power and authority. Let us travel through a typical proceeding with a criminal defendant and her lawyer. The defendant enters the courtroom through two large doors, stepping into a narrow aisle that leads to a half-sized pair of swinging doors through which she cannot walk unless accompanied by an officer of the court. She takes a seat in the pew-like benches behind the swinging doors. On the other side are large tables and fancy chairs. A podium stands in the center facing an impressive and elevated dais, and behind the dais is a marble wall covered in part by an immense American flag. A man in a uniform approaches those sitting in the pews, telling them to stop talking and reading newspapers. Then the lawyers, brandishing briefcases, enter the courtroom and take their places at the large tables. One of the attorneys nods at the defendant and she comes through the swinging doors to sit at the same table.

A man raps a gavel, crying "Hear ye, hear ye, all rise!" Another man wrapped in a flowing black robe enters through a door in the back of the
courtroom and takes his place behind the podium in the dais. Only after he sits may the others be seated.

Names and numbers are called, passed, and continued for an interminable amount of time until the defendant finally hears her name. Her lawyer says he is filing a motion under section 1538.5. The district attorney says the charge is only a 415 and requests a conference in chambers. Court is then recessed for a discussion in the judge's chambers. Afterwards the lawyers return to court and the man in the robe, continually addressed as “Your Honor,” asks the defendant a question. The defendant, finally part of the proceedings, succumbs to her attorney's coaching and quietly answers “nolo contendre.” His Honor asks the attorney a question. The lawyer assures him of the repentance and good works of the defendant, which will be reflected in the presentencing report. Then the man in the robe dismisses all until the afternoon service.

As the defendant leaves the House of the Law she realizes that her case has been dependent on her attorney's ability to translate human experience into legal dogma. She also understands that her future will depend on the judge's acceptance of the defendant's confessional as translated by her probation officer and attorney.

The lawyer, like the priest, is the middleperson between life and judgment. He suffers the initiation rites of his calling, wears its vestments, legitimizes its authority, speaks its language, partakes of its rituals, and maintains a monopoly on its mystery.

For the client, the lawyer, and the public, the result of this courtroom process is an acceptance of authority and a conditioned submission to its philosophy and rules. People enjoy rituals and symbols. Watching the court process is frightening, but it can also be exciting for the public. They feel secure observing authority in action. They admire and identify with the judges and the people in power, while at the same time accepting their own position as lower in the hierarchy of societal relationships. Just as a formal church service legitimates established religion, the traditional courtroom ritual legitimates the legal system.

Another major structural support of the existing legal culture is legal reasoning. This is a form of thought that presupposes existing societal relations. It does not allow for questioning of the political decisions that have led to our institutions. It makes it seem as though our laws are the
inevitable result of human nature. The assumptions of the status quo can be found in every area of the law. Torts and real property law provide us with examples.

"Torts" is a required first-year class in every law school. It is also a word that those wide-eyed students can never adequately explain to their parents and friends. Basically, a tort is a harmful act committed by a person or a legal entity for which you can sue them. It is a civil case, as opposed to a criminal case. For example, if a person gets in his car and runs into your car on purpose, that is a criminal case for which he can go to jail. If a person gets in his car and runs into your car by accident, that is a civil case for which you can sue him for money damages.

In American law you cannot sue anyone unless they owe you what the law calls "a duty." Drivers on the highway owe a duty to other people to drive safely. But in our country, an individual owes no legal duty to another individual solely because the two people live in a society together. Therefore, if you are at a public swimming pool and see a child drowning, you do not have to jump in to try to save him. Since you do not have a legal duty to this child, you do not even have to pick up the life preserver lying at your feet and throw it in the pool. You may have a moral obligation, but in America you have no legal obligation. If a lawyer brought a suit against someone at the pool for not throwing a life preserver to the child, the suit would be dismissed, probably without even a hearing in court. The law doesn't have to be that way. We could have a society where people do not see themselves as atomized, isolated individuals. In many countries a person would have a legal duty to try to save the child.

In China there can be actual criminal penalties for failure to help a fellow citizen in a life-threatening situation. In 1995, a motorist was sentenced to two years in jail when he refused the pleas of a man whose wife was dying. The motorist was flagged down by the woman's husband, who said she was gravely ill and pleaded with the driver to take her to the hospital. The motorist rejected the request and drove away. Under American tort law the motorist could not be sued, nor could he be prosecuted. In most law schools this example would not be discussed because our legal reasoning equates the isolated, nonresponsible human being with human nature.

Real property law affords another example of how legal reasoning pre-
supposes the justice of existing societal relations. This area of law presupposes the unequal distribution of property, which is justified by the philosophical notions that in America everyone is free and that if a person has enough talent he or she can acquire property. If an individual fails to "make good," it is his or her own failure based on lack of merit. What is fascinating about the law is that it incorporates the existing system of inequality, but then the law itself is used as a rationale for legitimating the very system that is imbedded within it. In other words, the law enforces rules as the natural order, when in fact those rules have already assumed one set of philosophical tenets and rejected any alternatives.

The term real property refers to houses, buildings, and land, as contrasted to personal property, which includes most other things one owns. Real property law in the United States allows one to own all the houses, buildings, and land one can afford. A person can make a living sitting in his home and collecting money from other people living in their homes, which he owns. An individual can own a tree or a beach. This arrangement is called capitalism. If a lawyer brought a lawsuit in an American court on behalf of neighbors who wanted occasional access to a "private" beach, the lawsuit would be dismissed immediately. A judge would not allow legal arguments regarding the public nature of a beach and whether it should or should not be owned by an individual.

This legal result is not common to all societies. Historically, among many Native American tribes land could not be owned by an individual. There was no proprietary interest in the environment. One could no more own a beach than one could own the ocean. People made fun of the Indians for allegedly selling the island of Manhattan for a few beads. But in Native American legal thought people could not own Manhattan Island, and therefore they could not sell it.

In modern-day America a tenant cannot refuse to pay rent on the grounds that the landlord owns more homes than she needs. But in Cuba one could raise such an argument and win. The Cuban General Law on Housing adopted in 1988 provides as follows: "Personal property in housing must be understood ... essentially as a right to enjoyment of the house by the owner and his/her family, without having to pay anything after paying its price, but in no case can this right of personal property in the house become a mechanism of enrichment or exploitation." In her 1994
book on Cuban law and society, *Revolution in the Balance*, Debra Evenson notes that the official interpretation of the Housing Law is that a person's home is to live in, not to make a living from. Cuban citizens may own a primary residence and a vacation home, but no more.

In the United States you have a Fourth Amendment constitutional right to have your home free from searches without a warrant. But you have no right to a home. Which right would the man sleeping under a Los Angeles freeway prefer? In Cuba, the Constitution states that the “socialist state strives to provide each family a comfortable place to live.” Decent housing for all is a goal of the society, and that goal is expressed in the Constitution as a legal obligation of the government. This would raise an interesting legal question if the Cuban state tried to prosecute a homeless person for sleeping in a park. That person's lawyer should be able to defend the case on the grounds that the state failed to strive to provide a decent place to live according to Article 8(c) of the Constitution. Actually, the parks and streets of Cuba are not filled with homeless people, even under its present economic crisis. But if they were, the legal system would provide a possible defense for the homeless.

The result in America is totally different, because our legal reasoning presupposes that there is no legal obligation for a government to provide housing for its people. In fact, what is taking place in America is the *criminalization* of homelessness.

There are many cases around the country dealing with homelessness. In 1995 the California Supreme Court ruled in *Tobe v. City of Santa Ana* that the city could prosecute and send to jail for six months any person who camps out or stores their personal belongings (a shopping cart for example) in a public park, street, or area. Justice Stanley Mosk, in dissent, angrily criticized the city for arresting persons “whose sole ‘crime’ was to cover themselves with a blanket and rest in a public area.” The decision noted the fact that the city provided shelters, but on any given night there were 2,500 more homeless people than there were beds in shelters. In Cuba, such a fact might be used as a defense, arguing that the government was failing to attempt in good faith to provide housing. But in the United States, this fact was considered *legally irrelevant* to the decision of the court. Is being poor legally irrelevant to a criminal defense? Is being black and suffering actual discrimination legally irrelevant to a criminal defense?
These are the questions with which the black rage defense confronts the law. (This confrontation will be explored in following chapters).

Another major factor in legal reasoning is the myth that the law is made up of neutral, fair rules. Rules are supposed to become evident to any educated and legally trained judge or lawyer who objectively analyzes the facts and the previous legal decisions. This myth was articulated perfectly by California Court of Appeals Judge Edward Wallin: “I am never troubled by making a decision. I just decide the way the law dictates.”

The judge’s statement assumes that reason and logic determine judicial results. It denies the influence of the judge’s personal political views. The statement also carries the message that the “law” is just floating out there in space, majestically dictating the correct (fair and just) result. This denies the fact that judges must interpret conflicting arguments to arrive at a result, and that their interpretation is based on a myriad of factors that are rooted in present-day political conditions.

Anyone who does not believe that judges are influenced by public pressure, social movements, and their own prejudices and opinions should read The Brethren by Scott Armstrong and Bob Woodward, the journalist who helped uncover the Watergate story. This was the first popular book to go behind the black-robbed mystique of the United States Supreme Court and expose the myth that judges interpret the law based on objective, neutral principles untainted by politics and predisposition.

One key legal concept supporting this myth is stare decisis, which says that judicial decisions flow from previous decisions, going back centuries to the beginning of English Common Law. Every lawyer searches musty old law books, or, these days, computer data bases, for “precedent”—that is, for judicial opinions that support her argument. Indeed, much of the skill of legal practice is taking those previous opinions and expanding or shrinking them to fit the facts of one’s present case. We spend an enormous amount of time in law school learning how to distinguish cases from each other, and how to analogize the facts or law of previous decisions to the facts of the case at hand. This prompts our friends and spouses to remark irritably that law students can only speak in analogies.

Precedent is not just a concept, it has a real role in day-to-day litigation. I once appeared in front of a conservative federal judge on behalf of a radical union caucus. My clients had refused to stand and pledge alle-
giance to the flag at the beginning of union meetings. Their refusal was used as a ruse by the union officials to kick them out of meetings. I brought a claim under the civil rights section of the Landrum-Griffin Act. The judge had no sympathy for my clients—indeed, he was clearly hostile to their politics and their actions—but he felt he was bound by precedent. Therefore, he ruled in our favor, and then wished the other side success on appeal. We won the appeal and returned to the same lower court judge to receive attorney fees. However, he refused to authorize me the full amount of attorney fees I was due under the statute’s provision for a successful outcome. In the area of attorney fees the judge has discretion, and though he liked me personally, he was so opposed to my clients’ politics that he exercised his discretion against my reasonable claim for fees. It is typical for judges to find ways to exercise their discretion as their politics dictate. It is rare that precedent completely binds a judge. It would be foolish to deny the effect of precedent in determining outcomes, but it would be a bigger mistake to fall into the trap of believing that our legal system is controlled by this seemingly objective rule.

Critical legal theory writers have attempted to explain and expose the concepts of stare decisis and precedent. In his essay “Freedom of Speech,” David Kairys looks at the history of the right to speak in a public park, a right we now take for granted. However, in 1894 there was no such right, in spite of the First Amendment. Reverend William F. Davis, an opponent of slavery and discrimination, attempted to preach the Social Gospel, a religious doctrine that stressed social responsibility and criticized the corruption of local government. Davis was jailed the first time he attempted to preach on the Boston Commons and fined the second time. The case was eventually heard by the Massachusetts Supreme Court. In an opinion by the man who was later to become one of America’s most famous Supreme Court Justices, Oliver Wendell Holmes, the court upheld the conviction. It said that a city ordinance prohibiting a public address on public grounds without a Mayor’s permit was constitutional:

That such an ordinance is constitutional . . . does not appear to us open to doubt. . . . For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.
The U.S. Supreme Court unanimously affirmed, quoting Holmes's analogy to a private house.\textsuperscript{5} The Court said that the government had a "right to absolutely exclude all right to use."

Forty years later, a case arose with similar circumstances. Labor organizers with the Congress of Industrial Organizations (CIO) wanted to speak and pass out leaflets in a public park in Jersey City. But Mayor Frank Hague, adamantly opposed to CIO labor organizers, refused any permits. One would think that precedent would win the day, and that the CIO would lose its case under the rule and rationale of \textit{Davis}. But a completely different result occurred. In \textit{Hague v. CIO} the Supreme Court ruled that the right to speak and hold assemblies in parks is protected by the First Amendment.

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

The Court's assertion that streets and parks have been held for the public "from ancient times" and from "time out of mind" is in direct contradiction to its own history, as just forty years earlier it had stated that the right to use public areas was dependent on the absolute will of the government. The Supreme Court made a political judgment based on changing social conditions—namely, the rise of a powerful labor movement that was organizing in streets and parks throughout the country. By the time the \textit{Hague} decision was written, it was 1939 and the New Deal had been implemented. Labor had a legitimate place in America. Allowing old-time city political bosses like Frank Hague to boast "I am the Law" and to forbid labor organizing would eventually result in violent confrontations. The \textit{Hague} decision fulfilled one of the more important functions of the Court: to make decisions that lead to the peaceful transition of power relations and promote social reform, not social revolution.

One method the courts use to engender social harmony is ideological storytelling. Instead of specifically overruling their prior decision in \textit{Davis} and admitting they had rejected precedent, the Supreme Court distinguished the two cases from each other through tortured reasoning. In this
way it did not have to repudiate the idea of the primacy of private property inherent in its rationale for the *Davis* decision. Therefore, it did not have to confess to the influence of social movements on the Court. By distinguishing the cases and telling a story about the liberty of the people to use the streets and parks from time immemorial, the Court maintained the legend that judicial decision-making is based on neutral, eternal, time-honored principles. The role of the people engaged in political struggle is masked by the myth of freedom of speech as extant in natural law. Therefore, there is no social context to the ruling. The impression given is that the Justices merely looked to existing principles of law and followed that path as any educated, objective, politically nonpartisan decision-maker would.

Throughout the history of American jurisprudence, judges have rejected precedent when it has served their politics to do so. This trend has become so obnoxious under the Rehnquist Supreme Court that even Justice Byron White, a conservative in the area of criminal law, has been outraged. In *Arizona v. Fulminante*, a case that shocked the criminal defense bar and the academic community, the Court changed the law of harmless error that had been in effect for twenty-four years. The previous decision was *Chapman v. California*, which held that in some instances errors of law made in a trial could be considered "harmless" and were not to be used as a basis to reverse a conviction. However, some constitutional protections were considered "so basic to a fair trial that their infraction can never be treated as harmless error." One example the Court gave in its *Chapman* decision was the admission into evidence of a coerced confession. But in *Fulminante*, in a five-to-four decision by Chief Justice William Rehnquist, the Court held exactly the opposite—that the use of a coerced confession could be considered harmless error. In his dissenting opinion, Justice White wrote, "Today, a majority of the Court, without any justification . . . overrules this vast body of precedent without a word, and in so doing dislodges one of the fundamental tenets of our criminal justice system" (emphasis mine).

Justices Harry Blackmun, William Brennan, Thurgood Marshall, Stephen Breyer, David Souter, and John Paul Stevens have also unhappily noted the Rehnquist Court's disregard for precedent. Justice Marshall described the process best when he wrote, "The majority chooses to pretend
that it writes on a blank slate, ignoring precedent after precedent.” ⁷ Although the false image of judges objectively following precedent does not have the strength it did in previous years, it still confuses the public discourse and enchants the public mind. The idea that judges are restricted by, and defer to, precedent continues to be a controlling notion in our legal system because it fits in with the ultimate myth of democracy—that we are “a country of laws, not men.”

Proponents of traditional jurisprudence want us to believe that judges are bound by law, not politics. Rituals that condition the public to authority, legal reasoning that justifies existing inequality, and the myth that law is neutral all result in a legal culture that masks the existence of economic and racial conflict. But such conflict does exist. In fact, it has become so intense that it tears at the social fabric.

In opposition to these myths, the black rage defense attempts to discuss the reality of race. But it runs headfirst into a legal system that continually regurgitates the idea that the United States is a meritocracy, a country where any person can rise above his circumstances by hard work and merit. Certainly some individual members of minority groups have been able to rise above their initial circumstances, both economically and socially. But African Americans as a group are still drowning in a quagmire of poverty, and the law will not act as a life preserver.

Judicial decisions in the last fifteen years have made it increasingly difficult to win claims of racial discrimination. Current law focuses on the individual as a perpetrator of racial discrimination and rejects an analysis that would factor in societal patterns of racism or institutional practices that result in discrimination. Court decisions now require proof of intent to discriminate. ⁸

This burden of proving a racist motive, purpose, and intent is almost impossible to meet. A good example is the 1981 U.S. Supreme Court opinion in City of Memphis v. Greene. ⁹ That case involved two neighborhoods—Hein Park, in which all the homes were owned by whites, and an adjacent community that was predominantly black. West Drive, a street about a half mile long, went through the center of Hein Park. The city, acting at the request of the white property owners, closed West Drive, which was the main thoroughfare for black residents, thereby forcing them to drive out of their way in order to get to their homes. The city actually
put up a physical barrier at the point where the two neighborhoods intersected, at West Drive and Springdale Street. The Court of Appeals found a discriminatory intent in the erection of the barrier. But the U.S. Supreme Court reversed, holding that the city’s justifications for traffic safety and tranquility were adequate to support a finding of no racist purpose. The residents of the all-white enclave wanted to stop “undesirable traffic.” As Justice Marshall stated, “Too often in our Nation’s history, statements such as these [‘undesirable traffic’] have been little more than code phrases for racial discrimination.” Yet the Court accepted this obvious subterfuge.

The Court’s opinion also shows how the law interprets social reality in a manner that avoids recognizing racial discrimination.

But the inconvenience of the drivers is a function of where they live and where they regularly drive—not a function of their race; the hazards and the inconvenience that the closing is intended to minimize are a function of the number of vehicles involved, not the race of their drivers or of the local residents.

Here, the Court closes its eyes and ears to segregated housing patterns, racial hostility, and the power of the white property owners to get the City of Memphis to do its racist bidding. Then, adding insult to injury, the Court tells the African American community to accept this racial oppression because it is their duty as citizens. Speaking of the burden of having to drive around Hein Park in order to get home, the Court says, “Proper respect for the dignity of the residents of any neighborhood requires that they accept the same burdens as well as the same benefits of citizenship regardless of their racial or ethnic origin.”

A cogent and powerful attack on the racist nature of legal culture has come from men and women of color in the legal profession who make up an intellectual movement called critical race theory. An excellent description of the defining elements of this movement is found in the book Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment. The criticisms the authors list go to the heart of the prevailing legal culture:

Critical race theory expresses skepticism toward dominant legal claims of neutrality, objectivity, color blindness, and meritocracy. These claims are central to an ideology of equal opportunity that presents race as an immu-
table characteristic devoid of social meaning and tells an ahistorical, ab-
stracted story of racial inequality as a series of randomly occurring, inten-
tional, and individualized acts.

Critical race theory challenges ahistoricism and insists on a contextual historical analysis of the law. Current inequalities and social/institutional practices are linked to earlier periods in which the intent and cultural meaning of such practices were clear. More important, as critical race theorists we adopt a stance that presumes that racism has contributed to all contemporary manifestations of group advantage and disadvantage along racial lines, including differences in income, imprisonment, health, housing, education, political representation, and military service. Our history calls for this presumption.

The black rage defense, like critical race theory, rejects the ahistorical interpretation of behavior in society. It puts criminal actions into a context that infuses those actions with the racial reality of culture, economics, and politics. Since black rage is a defense that is used at the trial stage, it must confront the assumption of the "colorblind courtroom." American law promotes the idea that every person, regardless of race, is treated fairly and equally once he or she steps inside the sacrosanct walls of the court-
room. The California Court of Appeals states this concept quite explicitly: "One of our guiding principles in this courtroom, indeed in every court-
room, is that race, creed, color, religion, national origin, none of these things counts for or against anybody. These are neutral factors."11

In chapter 1, we saw how the prosecutor and the judge in the William Freeman trial relied on this myth of equal treatment when arguing to the jury and when sentencing the defendant to death. In many ways the courtroom process has become more conducive to equal treatment than it was in 1846. Black, Chinese, and Native Americans are now allowed to testify against white people.12 African Americans are no longer systematically and intentionally excluded from jury panels. There are many African American lawyers and judges. But for all these advances, the acceptance of the notion of a colorblind courtroom still impedes the abolition of racial inequality and makes it more difficult for a minority defendant to get a fair trial. Two areas that deserve further analysis are voir dire (the questioning of the jurors for bias) and the use of peremptory challenges to knock people off the jury.
In 1931 the Supreme Court ruled that lawyers could ask jurors questions about racial prejudice. But in actual practice, very few lawyers would ask white jurors about their possible prejudice because they were afraid it would stir up racial animosity. Most lawyers and judges accepted the assumption of the colorblind courtroom and held the mistaken belief that once people were seated in the courtroom they would be colorblind. Even as late as 1971 judges and lawyers would advise me not to ask racial questions because, they said, it called attention to my client's race, which would make race an issue in the trial and would result in an unfavorable verdict for the black or Latino defendant.

Such a strategy flies in the face of reality. People do notice the color of other people's skin and attach certain characteristics to those people. Often these perceptions are filled with negative stereotypes of people of color. These stereotypes become filters through which jurors will see and evaluate the evidence and the witnesses. It is essential to root out negative preconceptions and prejudices. Many of these prejudices are subconscious. Charles Lawrence suggests two basic reasons for this. The first is the conflict between the stated principle that race prejudice is unacceptable, and the simultaneous existence in the national psyche of negative beliefs about other ethnic groups. When an individual experiences that conflict he feels the discomfort of guilt for his socially unacceptable ideas, and therefore the mind excludes his racism from his consciousness. In psychological language, the individual is in "denial" regarding his own racial prejudice.

The second aspect of Lawrence's analysis posits that we are often unaware of many of the stereotypes we have internalized because these beliefs are an integral part of our mass culture and the unspoken lessons we learn from interacting with the world around us. For example, the belief that blacks are not as intelligent as whites may not result from the indoctrination of racist ideology, but rather from the individual's observation of how the society, including his peers and his parents, treats black people. The "tacit understanding" in the culture that black people are not as intelligent or as qualified as white people is transmitted to the individual as a rational, believable concept. This belief becomes part of the person's world view, and he is never conscious that it is a racial stereotype borne of power relations, not a result of nature.
Voir dire can be a tool for uncovering preconceptions and subconscious stereotypes. However, judges interpreted the case that allowed racial questioning to mean that only one question was necessary, and, worst of all, the form of the question was so restricted as to make it almost useless. The courts allowed defense lawyers to phrase a question something like the following: “Do you have any prejudice against the defendant’s race that would make you unable to give him a fair trial?” Now, what juror would answer yes to such an inquiry in a public courtroom?

The image of the colorblind courtroom was exploded by defense lawyer Charles Garry when he defended Black Panther leader Huey Newton for allegedly killing a policeman. The year was 1968, and historical events had created an opportunity for Garry, known as one of America’s greatest criminal defense lawyers, to create a new, antiracist voir dire. The civil rights movement had awakened the country to the reality of racial oppression and had affected the consciousness of many white people, who now accepted the fact that the courtroom was not a place where blacks could expect equal justice. Combined with this new awareness was the fact that the Black Panther Party for Self Defense had made a powerful impact in the Bay Area. The black community of Oakland was closely watching Newton’s trial. In this atmosphere, Garry was able to spend days probing and pushing prospective jurors to come to grips with their racial prejudices. His voir dire was compiled in a manual by long-time legal activist and scholar Ann Ginger of the Alexander Meiklejohn Civil Liberties Institute. The manual, entitled *Minimizing Racism in Jury Trials*, was distributed by the National Lawyers Guild to attorneys throughout the country. But when lawyers tried to use it they ran into the fear and conservatism of trial judges as they attempted to ask race-related questions. As I began my practice in 1970, I found that judges could be persuaded to allow a limited amount of questioning about race. In order to win the right to voir dire on race I would file a legal brief citing case law and would tell the judge in our very first meeting that I intended to ask the jurors about their racial preconceptions. I had to assure each judge I was not going to spend days doing voir dire. After all, I did not have the stature of Garry and my trials were not receiving national attention.

Although prosecutors usually objected to my brief, the state court judges would allow me to ask each juror a few open-ended questions
regarding race, such as, "Have you ever had an unfortunate experience with a black person? How has that experience affected your view of black people? Would you feel uncomfortable listening to a witness in this case who speaks with a heavy accent? Would you feel anger at a person living in the United States who will testify in this case through a translator?"

After I gained some experience, I was even able to ask the following questions: "Did you read the statement by J. Edgar Hoover, Director of the FBI, that he wasn't worried about a Mexican shooting the President, because 'they don't shoot straight, but if they come at you with a knife, beware.' Do you think this reinforces the stereotype of the knife-fighting Mexican, too stupid to shoot straight, but still violent?"

In federal court, the judge, not the lawyers, usually conducts the voir dire. However, twice I had the experience of judges admitting that they were uncomfortable asking jurors about race. This emphasized to me how much judges have internalized the idea of a colorblind courtroom. In those trials, one of which involved a Black Muslim defendant, the judges allowed me to ask the jurors a few open-ended questions about race, instead of asking the questions themselves.

Great progress has been made since Charles Garry's stunning voir dire in Huey Newton's trial, but it is disheartening to see so many judges still opposing an antiracist voir dire and restricting defense lawyers to a minimal amount of questions. Also, conservative politicians have led campaigns to have judges, instead of lawyers, do voir dire. They say that lawyers waste time and money, thereby impeding the efficiency of the administration of justice. They also blame voir dire as one of the reasons criminal defendants get acquitted. These arguments found a receptive ear among the California electorate, who voted to have judges in criminal cases conduct the voir dire. The result has been a limited, usually pro forma type of questioning regarding racial stereotyping. This type of superficial voir dire is an obstacle that must be combatted in a black rage defense.

Voir dire is obviously essential in a black rage case. Since this defense puts race on the table and confronts racist images, it is necessary to ask jurors questions that probe their racial unconscious. One purpose is to ferret out people whose prejudices make it unlikely that they can give the defendant a fair trial. An example of this is the juror in People v. Ortiz
who proudly stated, "They better not take me on that jury, or I will hang that Mexican," or the juror in *State v. Russell* who said, "I don’t like the Mexican race." Those cases were in the 1920s. One result of the civil rights gains of the last thirty years is that overt racist comments are less socially acceptable in public. Today, therefore, it is harder to weed out racially prejudiced jurors. But an antiracist voir dire is also valuable in bringing stereotypes into the open and encouraging jurors to reflect on their private feelings. Once the jurors begin to recognize their own preconceptions, the defense has taken a significant step in combatting the racism engendered by those feelings. This is because most jurors want to be fair and want to feel that they are not acting in a prejudiced manner. Once they become *conscious* of their negative racial ideas, they will make a good faith effort either to overcome those beliefs or not to let them dominate their deliberations. An antiracist voir dire also strengthens the collective consciousness of the jurors to be sensitive to the perversion of ascribing negative qualities to blacks. This results in an atmosphere in the jury room conducive to the black rage defense.

The black rage defense attempts to interpret and explain the life experiences of African Americans so that a jury can understand the link between those experiences and the criminal act the defendant has committed. There should be black people on any jury that is judging a black man or woman. This is not because those jurors will be sure to acquit. In fact, most crimes committed by blacks are perpetrated on other black people. Karen Jo Koonan of the National Jury Project reported that in a recent voir dire in a murder case in the predominantly African American community of Compton, California, more than 50 percent of the jury pool of about sixty people either knew someone who was murdered or knew someone who had murdered someone else.

The issue is not who will acquit; the issue is how to obtain a group of jurors who will go into the jury room and conduct deliberations that evaluate the evidence from different points of view. My experience leads me to conclude that white jurors can empathize with the life and motivations of a black person. But it is also true that a jury diverse in race and class is more likely to have discussions that are open to the black rage defense. It is an unusual defense, and one that depends on the jurors rising above their stereotypes and expanding beyond their individual worlds. A
multiracial jury can provide the context for the broadening of each person's world view and, in so doing, come closer to understanding the life of the defendant.

Unfortunately, the law regarding peremptory challenges does not adequately protect the defendant's right to a jury chosen from a cross-section of the community. There are two ways a lawyer is allowed to challenge a juror for bias. One is called a challenge for cause, the other is called a peremptory challenge. A challenge for cause takes place when the lawyer feels the juror has said something that indicates prejudgment of the case or some sort of bias against the defendant that would make it likely that she could not be fair in determining guilt or innocence. The lawyer makes a challenge either verbally or, in some situations, in writing, and the judge rules on the challenge, either dismissing the juror or allowing her to stay on the panel. Challenges for cause are unlimited in number. Peremptories are limited by statute—often ten each for the district attorney and defense, or twenty each in a capital case. Historically, a peremptory challenge could be made for any reason at all. The lawyer would not have to state the reason, and the juror was automatically discharged. It is beyond dispute that district attorneys used peremptories to knock black people off of juries. The Supreme Court noted this widespread and flagrant practice and in a 1986 case called *Batson v. Kentucky* ruled that peremptories could not be used for racial purposes.

However, the Court put forth a formula that left a huge loophole for prosecutors to continue their racist practices. The Court set up three steps: First, if it seems that there is a pattern of striking black jurors, the defense lawyer can object. If the judge feels a prima facie case of discrimination has taken place, he shifts the burden to the prosecutor. In the second step, the prosecutor must be able to explain adequately, in race-neutral terms, why he is kicking black people off the jury. In the third stage, the judge decides if there has been purposeful discrimination. If there is such a finding, the prosecutor's challenge is disallowed.

The problem is that it is very difficult to find purposeful discrimination. Judges do not like to interpret the prosecutor's state of mind as racist. And since judges believe in the colorblind courtroom, they end up accepting the most absurd explanations, for instance that a black juror wore his hair in a ponytail, that a black man was effeminate, or that a minority
juror was a loner.\textsuperscript{15} I was cocounsel in a high-profile first-degree murder case in which the defendant was African American. There were very few African Americans in the jury venire (the entire group of potential jurors that sit in the courtroom). The district attorney used his peremptory challenges to knock off two black jurors. He then challenged the only black male on the panel—in fact, the only black male under thirty in the entire venire. When chief counsel, Petra de Jesus, objected under the \textit{Batson} rule, we went into chambers. The district attorney gave as his reason the fact that the young man had not voted in the last election and therefore did not take his obligations as a citizen seriously. The judge disregarded the fact that 60 percent of eligible voters chose not to vote, and that the district attorney asked only this black male juror if he voted. The judge ruled that the explanation was race-neutral and adequate. Because the defendant was acquitted, there was no appeal and therefore no decision of an appellate court. However, as we saw earlier in \textit{City of Memphis v. Greene}, judges are willing to close their eyes to racism and allow subterfuge and mendacity.

Jeff Brand, a former public defender and current professor of law at the University of San Francisco, has persuasively traced the history of racism in jury selection, showing through both statistics and case analyses that \textit{Batson} has basically been a failure.\textsuperscript{16} Brand was not surprised when, shortly after his article was published, the Supreme Court further watered down \textit{Batson}. In \textit{Purkett v. Elem}, the court allowed the prosecutor to strike two black men for the following reasons:

\begin{quote}
I struck number twenty-two because of his long hair. He had long curly hair. He had the longest hair than anybody on the panel by far. . . . Also, he had a mustache and a goatee-type beard. And juror number twenty-four also has a mustache and a goatee-type beard. Those are the only two people on the jury, numbers twenty-two and twenty-four, with facial hair of any kind of all the men and, of course, the women, those are the only two with the facial hair. And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me.
\end{quote}

Two Justices dissented, with Justice Stevens saying that the majority opinion now allows trial judges to accept "silly, fantastic and implausible explanations," and that the decision demeaned the equal protection values of their earlier opinions.
Lawyers employing the black rage defense must use all their skill and determination in obtaining a multiracial jury. For all its weaknesses, raising Batson objections is still one available tool. An antiracist voir dire is another. Most importantly, in all our strategy we must confront racism and not fall victim to the myth of equality and fairness represented by the statue of the Goddess of Justice.

People commit crimes at a fearful rate in America. Some of those crimes are direct results of racial and economic inequality. As long as the law is seen as something eternal, value-neutral, and objective, society will never come to terms with the consequences of the racial discrimination and economic oppression that can erupt in our streets, our banks, our auto plants, and even in the most frightening place—our homes.

The black rage defense tries to rip the blindfold off the eyes of the Goddess of Justice. It shouts out to Americans that their society's gross inequalities cause hopelessness and pain, which in turn cause some individuals to strike out. When the law defines that striking out as a criminal act and the legal system brings its awesome force down upon that individual, he should be able to defend himself by explaining the role of society in causing that explosion.