This essay is about the United States Supreme Court decision in *Buck v. Davis*, in which a Texas jury sentenced Mr. Duane Buck to death after his own counsel introduced during the punishment phase of his trial the report and testimony of an expert witness that Mr. Buck was more likely to be violent because he is black. If you will bear with me for a moment I intend to get to the facts of the case and the Court’s holding, but first a thought experiment:

Try to recall from memory or identify through a word search a majority opinion from the United States Supreme Court in which the justices speak plainly about white supremacy: its text; its subtext; its embodiments in civic and political institutions; its incarnations over time; the remains of its tenets in daily life; the leavings of its creed in the national identity. For purposes of this experiment, let us start from a stripped down definition of white supremacy, according to which standing, human agency, and moral worth.

Your initial instinct might be to think of *Brown v. Board of Education*, “perhaps the most important judgment ever handed down by an American Supreme Court,”” and “nothing short of a reconsecration of American ideals.” But, truth
be told “Brown is of continuing significance mostly as a triumphal narrative that, ironically, serves as rhetorical support for the racial status quo and, only occasionally, as a dim reminder of a constitutional world that might have been.”

In an opinion ostensibly about race and education, nowhere does the Court mention that one of the central tenets of American slavery was the legal ban on black education, or that a remarkable number of American educational institutions, including our most prestigious Ivy League universities, used slavery to fund their endowments and indeed kept slaves on their campuses, or that the first statutory attempts to provide for education of emancipated men and women through the Freedmen’s Bureau were met with fierce resistance, or that in the Jim Crow era influential social scientists argued that the “black mind” was receptive not to education but rather to criminality and that, as such, educating blacks might turn them into more cunning criminals. In short, nowhere in the opinion does the Court acknowledge that education had been used as a tool of white supremacy, and that the constitutional harm to blacks was not mere feelings of inferiority but longstanding and systemic inequality that could never be remedied by symbolic—or even real—integration.

So, if not Brown perhaps you might turn to any number of decisions during the era of Chief Justice Earl Warren that in meaningful ways wrought—at least for a while—a minor Reconstruction by upholding in ways that the original Reconstruction-era court never did Congress’s most significant civil rights legislation: Jones v. Alfred H. Mayer Co., the only modern-era case to rely on the Thirteenth Amendment as a tool against racial subordination; South Carolina v. Katzenbach, which upheld the Voting Rights Act of 1965; or Heart of Atlanta Motel v. United States, and Katzenbach v. McClung, which upheld Congress’s

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7 See generally HEATHER ANDREA WILLIAMS, SELF-TAUGHT: AFRICAN AMERICAN EDUCATION IN SLAVERY AND FREEDOM (Waldo E. Martin Jr. & Patricia Sullivan eds., 2005).
power under the Commerce Clause to outlaw racial discrimination in privately-owned places of public accommodation. But even a cursory reading of these opinions shows that, however much they tried to repair some of the damage of white supremacy, their overriding rationale and organizing narrative centered on questions of Article I and Reconstruction Amendments on congressional power.

So finally, you might step back and wonder whether, faced with the carnage of the Civil War, the first Reconstruction Court might have been moved to engage in an honest reckoning of white supremacy in ways—and to an extent—that later courts with the luxury of looking back on the war from a distant remove were never compelled to do: perhaps *Virginia v. Rives*, *Strauder v. West Virginia*, *Ex parte Virginia*, or even *Neal v. Delaware*, in which the Court held that the Fourteenth Amendment prohibited the exclusion of blacks from jury service and the voting booth. But these cases, taken individually or as a group, rest on a narrow reading of the Reconstruction Amendments that it constituted racially discriminatory state action in violation of the Equal Protection Clause of the Fourteenth Amendment for government entities to deny black jurors and black voters access to what was then referred to as political rights.20

Of course, if I modify the experiment to include dissents and concurring opinions, the task becomes immeasurably easier: assuming you avoid the temptation of reading Justice Harlan’s *Plessy v. Ferguson* dissent as more of a challenge to white supremacy than it actually was, you might think of Justice Thurgood Marshall in his exile-in-dissent years. In his case, the difficulty would be less in finding such opinions than in choosing which one among the many spoke most plainly of the black experience in America: perhaps his dissent in *Regents of the University of California v. Bakke*, in which he used four short sentences to say what no other justice managed to say in hundreds of pages of separate opinions:

> Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his

16 100 U.S. 313 (1880).
17 100 U.S. 303 (1880).
18 100 U.S. 339 (1880).
19 103 U.S. 370 (1881).
20 Id. at 397; *Rives*, 100 U.S. at 320–21; *Strauder*, 100 U.S. at 312; *Ex parte Virginia*, 100 U.S. at 348.
21 Far more than *Plessy*, Justice John Harlan’s dissents in the *Civil Rights Cases* and *Hodges v. United States*, pose a greater challenge to white supremacy by describing the 1787 constitutional order as resting on a racial caste system. *Compare* *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) *with* *Civil Rights Cases*, 109 U.S. 3, 26 (1883) (Harlan, J., dissenting); *Hodges v. United States*, 203 U.S. 1, 20 (1906) (Harlan, J., dissenting).
family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave.\(^\text{22}\)

Or perhaps his dissent in *City of Memphis v. Greene*, in which Memphis, acting at the behest of white property owners, closed the main thoroughfare between an all-white enclave and a predominantly Negro area of the city. To Justice Marshall “[t]he picture that emerge[d] . . . is one of a white community, disgruntled over sharing its street with Negroes, taking legal measures to keep out the ‘undesirable traffic,’ and of a city, heedless of the harm to its Negro citizens, acquiescing in the plan.”\(^\text{23}\)

If you wanted to be an intellectually honest contrarian you might suggest that Justice Clarence Thomas, from an altogether opposite perspective and for entirely different motives, has at times been no less frank than Justice Marshall on the subject of white supremacy. His partial concurrence and dissent in *Grutter v. Bollinger* not only lays out his theory that there is no such thing as benign racial classifications,\(^\text{24}\) but also his writing in that case, impatient, cutting, almost bitter, reveals a Black man with no illusions about white supremacy but a raw and prideful conviction that “blacks can achieve in every avenue of American life without the meddling of” white people.\(^\text{25}\)

Lastly, you might propose Justice Sotomayor’s dissent in *Utah v. Strieff*, in which, writing about the impact of racial profiling, she gave voice to the sort of lived experience of millions of people that rarely make it to the pages of Supreme Court opinions: “For generations, black and brown parents have given their children ‘the talk’—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.”\(^\text{26}\)

But what about a majority opinion?

For me, only one comes to mind, and even then it does not quite fit the bill: *Loving v. Virginia*, in which the Court invalidated state bans against interracial marriages as both Substantive Due Process and Equal Protection Clause violations. I raise it as a candidate, not because the Court discussed at any length or in any substance the topic of white supremacy, but because to my knowledge it is the only case where a majority opinion uses the actual phrase white supremacy. In taking to task the Virginia Supreme Court for upholding the ban, the Supreme Court explained that “the state court concluded that the State’s legitimate purposes were ‘to preserve the racial integrity of its citizens,’ and to prevent ‘the corruption of


\(^\text{25}\) Id. at 350.

blood,’ ‘a mongrel breed of citizens,’ and ‘the obliteration of racial pride,’ obviously an endorsement of the doctrine of White Supremacy.”

Other than *Loving*, there is no other opinion; not even in that brief moment after the war, with still fresh memories of dead bodies decaying in the fields, with whole towns and cities stripped of an entire generation of young men, and with black people placing newspaper advertisements all over the country, searching for family sold away years ago to distant plantations— not even then. To the extent the Reconstruction Court did engage in a measure of racial reflection, it was less about reckoning with the legacy of white supremacy than with writing in the court’s jurisprudence, barely twenty years after the war ended, a story about how attempts to question white supremacy amounted to nothing more than a refusal on the part of Black people to recognize when the time has come to just move on. The Court said at much in *The Civil Rights Cases* when it lectured black plaintiffs who had been denied access to public accommodations not to come pleading to the federal government to vindicate their civil rights because “[w]hen a man has emerged from slavery . . . there must be some stage in the progress of his elevation when he . . . ceases to be the special favorite of the laws . . . .”

And the Court reiterated the point a few years later in *Hodges v. United States* when it explained that it was not within the power of Congress to make lynching a federal crime because, whether or not it was wise for the country to have given blacks citizenship, now that they had it they had to “tak[e] their chances with other citizens in the States where they should make their homes.”

II. THE GNOMIC RACE MUSINGS OF CHIEF JUSTICE ROBERTS

I raise this thought experiment because one imagines that, confronted with a case in which jurors sentenced a man to death after they were told he was more likely to be violent because he is black, the Court in its reasoning might have taken the opportunity to explain how this stereotype came about, what purpose it served, and the hold it continues to have on the American imagination. The Court did none of that. Chief Justice Roberts, a man given to gnomic pronouncements on matters of race, offered yet one more in *Buck*, writing that even though Mr. Buck did in fact raise the argument on direct appeal and collateral review, he

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27 388 U.S. 1, 7 (1967) (internal citations omitted). There are a number of majority decisions in which the term “white supremacy” appears but these decisions either quote *Loving* or attribute the concept to a source such as post-Reconstruction state conventions. Also, numerous decisions—mostly in the criminal context—describe defendants as white supremacists or as followers of white supremacy.

28 HEATHER ANDREA WILLIAMS, HELP ME TO FIND MY PEOPLE: THE AFRICAN AMERICAN SEARCH FOR FAMILY LOST IN SLAVERY 120–38 (2012).


30 203 U.S. 1, 20 (1906).

31 On direct appeal and collateral review, Mr. Buck failed to raise a claim that the proffer of the expert witness amounted to ineffective assistance of counsel. While Mr. Buck’s state habeas
was nonetheless entitled to pursue a claim of ineffective assistance of counsel because “[s]ome toxins can be deadly in small doses.”

Since Justice Roberts does not once explain what exactly made the Buck statement so toxic, one is left to conclude that the utterance of the statement itself is the poison. There is a certain logic to the idea; after all, it is a very small jurisprudential leap from “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” to the way to stop discriminating on the basis of race is to stop talking about discriminating on the basis of race.

Ordinarily, one would not take too seriously reasoning-by-aphorism, but what is one to do when those words come from the Chief Justice of the United States Supreme Court? Justice Robert Jackson is famous for his own aphorism that as justices “[w]e are not final because we are infallible, but we are infallible only because we are final.” Like much of Chief Justice Roberts’s race musings, the phrase “some toxins are deadly in small doses” is not important because it is deep, but it is deep because, coming from the Chief Justice, it is important.

So, if we are to take it seriously, why is it exactly that telling the jury Mr. Buck is more likely to be violent because he is black a toxin so dangerous that no jury could have fairly sentenced him to death? Either the statement is true or it is not. If the statement is not true—an obvious calumny, the false curse of Ham—

petition was pending, Texas identified at least six death penalty cases, including Mr. Buck’s case, in which the same expert had made similar statements, tying the defendant’s race to future propensity for violence. In six of the five cases, Texas notified defense counsel it would withdraw any claims of procedural defaults and would agree to resentence the defendants. However, Texas refused to do so for Mr. Buck, arguing that, unlike the other five cases where the state introduced the expert testimony, in Mr. Buck’s case it was his own counsel who did so. In the district and circuit courts, Mr. Buck sought a certificate of appealability (COA) to reopen his death sentence pursuant to Federal Rule of Civil Procedure 60(b)(6). The precise question before the Court was whether the United States Court of Appeals for the Fifth Circuit erred in denying Mr. Buck the COA. The majority opinion concluded that Mr. Buck had demonstrated ineffective assistance of counsel and that the Fifth Circuit erred in denying him the COA required to pursue the claim on appeal. On remand, the District Attorney for Harris County, Texas, reached a plea with Mr. Buck. Under the terms of the deal, Mr. Buck pled guilty to two new charges of attempted murder and accepted a life sentence plus two sixty-year terms and the District Attorney agreed not to pursue the death penalty.

34 Perhaps one day, when Chief Justice Roberts’s no-doubt illustrious career on the bench has come to an end, an enterprising scholar will catalogue in one place all of his race musings. Buck may have been his latest and Parents Involved in Community Schools may have been his first, but there have been others in between, including none as unforgettable as his reasoning for gutting the pre-clearance provisions of the Voting Rights Act of 1965 in Shelby County v. Holder that “history did not end in 1965.” See 133 S. Ct. 2612, 2628 (2013). So there is every reason to believe he will not stop and there will be more. And while I am not certain that even if Chief Justice Roberts were to remain on the Court for another thirty years his race ruminations would amount to enough material for an entire book, I remain confident (if not hopeful) that they will at the very least provide enough grist for an essay.
should not jurors be expected to see through and disregard it such that in the fullness of trial the statement amounts to nothing more than the equivalent of harmless error? If it is true—a tragic reality, the nation’s cross to bear—then is it that we do not want it to be introduced at trial because we are engaging in a species of an evidentiary balancing test, pursuant to which the probativeness of black propensity for violence is outweighed by its prejudicial effect? If it is not true, do we exclude it because, lie though it may be, we are resigned to the reality that it has become so deeply ingrained in the national psyche that otherwise reasonable people are unable to let go of an article of faith that the evidence of their daily lives tells them is untrue? If it is true, is the seemingly unbreakable rule to keep it out of the courtroom an expression of a constitutional commitment to racial equality so unwavering that in noblesse oblige fashion we abide by it even when the chief beneficiaries of the rule are unworthy of it?

III. BLACK BRUTES AND BLACK THUGS

The narrative of black dangerousness reaches back to slavery when Black people were believed to be not just inferior, but also savage brutes prone to violence and criminality unless domesticated and made docile. Conceived as a popular philosophy, the narrative evolved into a respected scientific doctrine, positing that the very physical attributes of Black people—from the darkness of their skin, to the broadness of their nose, to the coarseness of their hair—were biological manifestations of a lesser-evolved human form. When the Civil War ended, in both the North and South, conventional wisdom held that freedom made evident in Blacks what slavery had kept hidden by giving “loose [the] reins to the animal.” During Reconstruction and through Jim Crow, as Black Codes in the South and discriminatory policing in the North literally criminalized blackness, sociology and statistics replaced Darwinism and eugenics in arguing for innate Black criminality. In the so-called Progressive Era, well-meaning reformers advocated for more humane treatments of criminals but still warned that the black criminal was a breed apart because the propensity for crimes revealed the faults of an immature race. Today, the narrative is not some vestigial relic of a long dead past. The most rigorous cognitive and psychological scientific research of the last sixty years has shown without fail that even in our own enlightened modern times vast segments of society hold on to belief that Blacks and Whites occupy different moral universes and that Blacks are more prone to criminality than Whites.

Thomas Jefferson believed that “the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of body and mind.” Though he conceded he did not have

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37 THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 150 (Boston, Lilly & Wait 1832).
much evidence to back up his opinion, he nonetheless maintained that “[i]n
general, their existence appears to participate more of sensation than reflection.”38
In Jefferson’s time, the racial prejudice that would eventually lead White
Americans to conclude that “black men were not really men but cattle,”39 had not
yet quite hardened into an ideology of Black people as a lower life form.
However, in both North and South, among both slaveholders and abolitionists, the
belief that Black people were an alien and dangerous presence gained wide
currency in early 19th Century America.

After Virginia briefly considered but ultimately rejected legislative proposals
that would have led to emancipation, Professor Thomas R. Dew of William and
Mary College explained that Black people were unfit for emancipation because
they were “differing from us in color and habits and vastly inferior in the scale of
civilization.”40 Like Jefferson, Drew concluded that the supposed indolent and
violent nature of Black people resulted from “an inherent and intrinsic cause.”41
Defending slavery from abolitionist argument, William Drayton, a Charleston
lawyer, argued that:

Personal observation must convince every candid man, that the negro is
constitutionally indolent, voluptuous, and prone to vice; that his mind is
heavy, dull, and unambitious; that the doom that has made the African in
all ages and countries, a slave—is the natural consequence of the
inferiority of his character.42

Northern abolitionists were not altogether free of the idea of Black
criminality. A group of New Jersey abolitionists cautioned that free Blacks were
“given to Idleness, Frolicking, Drunkenness, and in some few cases Dishonesty.”43
A Philadelphia abolitionist “described most Philadelphia negroes as degraded and
vicious.”44 A New York abolitionist society bemoaned “the looseness of manners &
depravity of conduct in many of the Persons of Colour in this city.”45 Alarmed

38 Id. at 146.
39 JAMES BALDWIN, Stranger in the Village, in NOTES OF A NATIVE SON 143, 152 (4th ed.
1972).
40 GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-
41 Thomas R. Dew, Professor Dew on Slavery, in THE PRO-SLAVERY ARGUMENT 289, 429
(Philadelphia, Lippincott, Grambo, & Co. 1853).
42 FREDRICKSON, supra note 40, at 47 (quoting WILLIAM DRAYTON, THE SOUTH VINDICATED
FROM THE TREASON AND FANATICISM OF NORTHERN ABOLITIONISTS 232–33 (Philadelphia, H. Manly, 1836)).
43 TALI MENDELBERG, THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE
44 FREDRICKSON, supra note 40, at 4 (internal quotations omitted).
45 ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH
223–24 (1967).
by what it perceived as a threat and concerned about Blacks becoming “both injurious and burdensome,” the Massachusetts legislature appointed a committee to study restricting Black immigration to the state.\textsuperscript{46}

Central to the worldview was the notion that Black people were not just inferior, but also and more importantly that they were by their very nature savage brutes prone to violence unless domesticated and made docile in slavery.\textsuperscript{47} In order to reconcile the notion of Blacks as “naturally mendacious” and “thievish,”\textsuperscript{48} with the Southern claim of slaves as “contented, peaceful and harmless,”\textsuperscript{49} proslavery propagandists conjured up the concept of the duality of negro character, according to which “[a]s long as the control of the master was firm and assured, the slave would be happy, loyal, and affectionate; but remove or weaken the authority of the master, and he would revert to type as a bloodthirsty savage.”\textsuperscript{50}

In the decades preceding the Civil War, the popular philosophy of the dual Black character evolved into a respected scientific doctrine. In 1839, Dr. Samuel George Morton published\textit{ Crania Americana}, or what he called an empirical study of racial differences. According to Morton, careful examination of the size and shapes of different types of men led to the inevitable conclusion that Blacks represented an altogether different species.\textsuperscript{51} Dr. Josiah Nott, an ethnologist from Mobile, Alabama who would later become the dean of the school of science at Harvard University, declared that Africa was the homeland of “a succession of human beings with intellects as dark as their skins,”\textsuperscript{52} and “attempted to convince educated Americans that the Negro was not a blood brother to the whites.”\textsuperscript{53} Relying in part on measurements of skull capacities, facial features, and even hair textures of Black and White cadavers, Nott concluded that the anatomical differences between Whites and Blacks were “greater than the difference[s] in the skeletons of the Wolf, Dog and Hyena, which are allowed to be distinct species.”\textsuperscript{54} In 1851, John Campbell, a prominent scholar, used Nott’s work to publish a remarkable volume titled\textit{ Negro-Mania}, in which he summarized the scientific consensus on Black savagery that:

\begin{itemize}
\item \textit{Id.} at 225.
\item \textit{Fredrickson, supra} note 40, at 47.
\item \textit{Fredrickson, supra} note 40 at 52.
\item \textit{Id.} at 54.
\item \textit{Id.} at 74–75.
\item MARLI F. WEINER & MAIZE HOUGH, \textit{SEX, SICKNESS, AND SLAVERY: ILLNESS IN THE ANTEBELLUM SOUTH} 18 (2012).
\item \textit{Fredrickson, supra} note 40, at 75.
\item JOHISIAH C. NOTT, \textit{TWO LECTURES ON THE NATURAL HISTORY OF THE CAUCASIAN AND NEGRO RACES} 25 (Mobile, Dade & Thompson, 1844).
\end{itemize}
We everywhere find proofs of . . . inflexible cruelty, selfishness and disposition to cheat, a want of all sympathetic impulses and feelings, the most brutal apathy and indolence, unless roused by the pressure of actual physical want, or stimulated by the desire of revenge and the thirst of blood.55

The Civil War brought former slaves “suddenly, violently . . . into a new birthright, at a time of war and passion, in the midst of the stricken, embittered population of their former masters.”56 Post-bellum scientists took stock of these new birthright citizens and concluded that “[d]uring slavery . . . so far as the merely physical man was concerned they were better off. . . . But since the war and emancipation things have reversed. . . . [F]reedom gave loose reins to the animal.”57 Chief among scientists warning about Black criminality was N.S. Shaler. In an influential article titled The Negro Problem, he explained that Blacks were “bred first in a savagery that had never been broken by the least effort towards a higher state.”58 He insisted that “judged by the light of all experience, these people are a danger to America greater and more insuperable than any of those that menace the other great civilized states of the world,” and that no challenge facing the country was as great as “compared with this load of African negro blood that an evil past has imposed upon us.”59

While Shaler harbored no doubt about the inherent criminality of Black people, he cautioned that more research was needed to fully understand its origins. The American ethnographers, anthropologists, physicians, penologists, and statisticians who took up the call for more research almost uniformly concluded, as did leading penologist Henry Martin Boies, that Blacks were prone to criminality because they had “strong animalism by nature and cultivation,” which resulted in a lack of “virtue and continence, and little moral restraint.”60

Greatly influenced by social Darwinism, eugenics, and other European theories of hereditary criminality, post-bellum social scientists “largely understood criminals as falling into one of two categories: occasional and habitual. Most crime stemmed from poverty, poor environment, and poor moral training, typical motivating factors for occasional criminality. Habitual criminals, however, were

57 Corson, supra note 36, at 149.
58 N.S. Shaler, The Negro Problem, ATLANTIC MONTHLY, Nov. 1884, at 697.
59 Id. at 699.
biologically deficient and morally bankrupt individuals.” To these scientists, “habitual criminals possessed common atavistic traits—physical and mental characteristics that distinguished them from otherwise normal human beings.”

Superimposed upon what Charles Sumner called the “oligarchy of the skin,” eugenist theories of criminality as being hereditary effectively equated Black skin with criminal traits. The irony is that many of these post-bellum scientists and reformers were in fact able to offer what seemed to be irrefutable data of a wave of black crime because Black Codes enacted by every single Southern state had succeeded in essentially criminalizing Blackness.

The notion of Blacks as inherently criminal gained wide purchase in the post-bellum years in part because most of the scientists advancing that theory claimed to be dispassionate truth seekers free of irrational racial prejudice. Thus, in 1896, the same year this Court validated American racial apartheid in *Plessy v. Ferguson*, Frederick Ludwig Hoffman, an actuary and statistician from Prudential Insurance Company, published a study warning that freedom had made evident an aspect of the Black character that slavery had managed to keep hidden: a propensity for criminality. Specifically, Hoffman observed that in slavery it was a “well-known fact that neither crime nor pauperism prevailed.” But, using data from the 1890 census, Hoffman showed that, while Blacks were less than twelve percent of the population, they represented thirty percent of all prisoners, thirty percent of those imprisoned for violent crimes, forty-one percent of those imprisoned for rape, and nearly fifty percent of those imprisoned for arson. Hoffman’s own data showed crime statistics for Blacks were no different than those of immigrants and poor Whites. But, whereas Hoffman explained crime among poor White immigrants as a function of economic deprivation and societal discrimination, he insisted that Black crime was a function of innate characteristics. In truth, Hoffman’s use of data was revolutionary because he “combined crime statistics with a well-crafted white supremacist narrative to shape the reading of black criminality while trying to minimize the appearance of doing so.” Indeed, by carefully reporting not just

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62 *Id.*
64 Gross, *supra* note 61, at 133.
67 *Id.* at 217.
68 *Id.* at 218–20.
69 Muhammad, *supra* note 10, at 51.
crime statics but also data showing increase in education among Blacks, Hoffman was able to argue that beneficial social institutions such as schools and churches that would normally have civilizing effects on White criminals had no impact on Blacks and that “[w]hatever benefit the individual colored man may have gained from the extension of religious worship and educational processes, the race as a whole has gone backwards rather than forwards.”

The Progressive Era substituted the biological determinism of Black people being innately violent for the cultural determinism of Black communities being peculiarly tolerant of criminality: crime was unique to Blacks not by reason of their biology but by reason of their culture. Reformers explained White criminal behavior as a function of general socio-economic forces, but described Black criminal behavior as a function of particular Black culture.

For example, Frances Kellor, a White female criminologist, traveled the South measuring body sizes and shapes of Black female prisoners to show that there were no inherent biological differences between Black and White criminals. However, looking at crime statistics, Kellor nonetheless drew an essentialist distinction between White and Black criminals: “The Negroes’ criminality is that of an undeveloped race. . . . The negroes’ crimes show an absence of social and personal responsibility, and are an outgrowth of impulse rather than of well-laid plans and complicated schemings.”

Frederick Bushee, a leading Boston reformer and author of immigrant life, noted the high crime rate in Irish and Italian communities while also concluding that they brought “many valuable traits to the American people,” and that “it is fortunate that they possess the characteristics which make them easily assimilable.” But for reformers like Bushee, Blacks were culturally different, had “the faults of an immature race,” and for them assimilation into American society was “not at present desirable.”

Between the two world wars and up until the modern civil rights movement, the “bad classes of Negroes seemed to grow larger each year; their criminal appetites and deviant sexual desires less easily sated than ever before.” In those years, the narrative of Black violence acquired explicit sexual overtones, in which “two legged monster[s],” consumed by lust and rotten with venereal diseases posed a constant threat to White women. With the advent of the civil rights movement, overt expressions of Blacks as racial villains fell out of fashion, to be replaced with

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70 Id. at 52 (internal citation omitted).
71 Id. at 88.
73 FREDERICK A. BUSHEE, ETHNIC FACTORS IN THE POPULATION OF BOSTON 151–52, 158–59 (1903).
74 Id. at 115, 160.
more coded but no less potent language. Black civil rights activists were said to be engaging in “marauding” and “guerilla warfare.” The racially charged word “thug” functions much in this manner. A contemporary incarnation of the “Black brute” and “Negro savage” archetypes, it connotes violence and brutishness. The word has been used in media coverage to describe black male victims of vigilante and police violence, black athletes, black entertainers, even a black president.

Today, the most common negative stereotypes of Black people are “impressions of laziness, murderous violence, and sexual intemperance.” In that way, all manners of national debates about race—from parenting to education to housing—are driven by and even resolved with this idea of the excessive criminality of Black people—an idea encapsulated in a single racially coded phrase: Black-on-Black crime. This absurd phrase, which is rarely explained but often repeated even by supposedly well-meaning people, is meant to imply that Blacks are so violent that they even kill “their own kind.” Intra-racial crime is not unique to Black people; the vast majority of violent crimes are intra rather than interracial, and this is particularly true in a society that remains as racially segregated as ours. Yet, the fact that the equivalent phrase White-on-White-crime never seems to register as a real phenomenon perhaps only goes to show how we have so thoroughly made “villains black and blacks villains.”

“Ideas about color, like ideas about anything else, derive their importance, indeed their very definition, from their context.” In the American context, not only is the association between Blacks and crime strong, it also appears to be

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77 VAN DEBURG, supra note 75, at 152–53.
79 When Richard Sherman, a Black professional football player gave an interview in which he asserted that he was the best at his position, the word “thug” was used 625 times the day after the interview. See Kyle Wagner, The Word “Thug” Was Uttered 625 Time on TV on Monday. That’s a Lot, DEADSPIN (Jan. 21, 2014, 6:28 PM), http://regressing.deadspin.com/the-word-thug-was-uttered-625-times-on-tv-yesterday-1506098319 [https://perma.cc/BS5B-EYZT].
83 VAN DEBURG, supra note 75, at 217.
The Implicit Aptitude Test ("IAT"), the most rigorous study on implicit racial bias, shows without fail that the majority of takers are slower to associate Black faces with "good" words. Even when people are supposedly unaware of historical stereotypes associated with Black people, they associate Blacks with qualities that fit these historical biases. Thus, an IAT using Black and White faces and pictures of apes and non-ape animals showed that individuals associate Black people with apes even though the majority of participants indicated that they had never heard of the Blacks as apes stereotype.

In 2004, scientists from Yale University, Sanford University, Pennsylvania State University, and the University of California, Los Angeles collaborated on a groundbreaking paper titled Seeing Black: Race, Crime, and Visual Processing. According to their findings, "[w]hen officers were given no information other than a face and when they were explicitly directed to make judgments of criminality, race played a significant role in how those judgments were made. Black faces looked more criminal to police officers; the more Black, the more criminal." Their findings also showed that stereotyping Blacks as inherently dangerous has a perverse looping effect, in which Blackness not only triggers association with criminality but also magnifies it; when shown a Black face people who associate Blackness with criminality turn around and misremember the Black face as even more stereotypically Black. One study, which tracked the 2014 news coverage of every major New York network affiliate, found that while 51 percent of the people arrested by the NYPD for violent crime are Black, in evening news coverage Blacks were represented as the suspects 75 percent of the time. A national survey conducted in 2010 asked White respondents to estimate the percentage of burglaries, illegal drug sales, and juvenile crime committed by Blacks. The researchers found that the respondents overestimated actual Black participation in these crimes—measured by arrests—by approximately 20 to 30 percent.

When a narrative is so widely circulated, it comes to bear on every aspect of life, from education to housing to employment. For instance, a 2015 study found that starting at age ten, Blacks were viewed as less innocent than other children. Researchers showed a group of female K-12 teachers identical school records of a fictitious middle school student who had misbehaved. Some teachers received the

87 Eberhardt et al., supra note 85, at 889.
88 Id. at 889–91.
89 THE COLOROFCHANGE, NOT TO BE TRUSTED, DANGEROUS LEVELS OF INACCURACY IN TV CRIME REPORTING IN NYC 4 (2015).
records labeled with a stereotypically Black name, while others reviewed records labeled with a stereotypically White name. When asked how they would respond to the infractions, teachers were more likely to escalate the response when the student was believed to be Black. The study also found that when a student was believed to be Black, teachers were more likely to attribute the behavior to a larger pattern, rate the incidents as more troubling and warranting of discipline, and were more likely to predict future suspensions.91

Research also shows that the presence of Blacks in a neighborhood correlates to the level of perceived crime in that neighborhood. A 2001 study of residential surveys and police data from Seattle, Chicago, and Baltimore found a positive association between how residents perceived the level of crime in their neighborhood and the percentage of young Black men, even when controlling for a variety of neighborhood characteristics.92 A 2004 study by researchers from Harvard and the University of Michigan found that as the concentration of minority groups in a neighborhood increases, residents of all races perceived more “disorder,” even after accounting for personal characteristics of the respondents and neighborhood conditions.93 As recently as June 2016, a Reuters/Ipsos public opinion poll revealed that a high percentage of people of all political stripes described Blacks as unintelligent, lazy, violent, and criminal.94

IV. ET IN ARCADIA EGO

I wrote at the outset that I could think of only Loving as the one majority opinion in which the Court spoke openly of white supremacy; that was not entirely true; I can think of at least one other: Justice Scalia’s majority opinion in District of Columbia v. Heller, reasoning that at the heart of the Second Amendment is a natural human right to self-defense no less fundamental than the right to conscience.95 Inasmuch as a central tenet of white supremacy is that the place one occupies in the hierarchy of skin color is a measure of the respect society accords to one’s humanity, Justice Scalia rather thoughtfully explained that one way in which American society had long denied black humanity was to refuse to extend to black people the same right to armed self-defense whites enjoyed.96 Perhaps for

96 Id. at 600, 611, 614–15.
selfish reasons, I have always found that portion of Justice Scalia’s opinion far more interesting than the debate over whether, in light of Justice Stevens’ dissent, *Heller* proves that we are all originalists now.\(^{97}\) That passage, though less than thorough,\(^{98}\) shows, if nothing else, that none other than the justice who once called the pre-clearance provisions of the Voting Rights Act of 1965 “racial entitlements,”\(^{99}\) knew how talk about white supremacy when it suited his purposes to do so. Why it suited his purposes in *Heller* and not in other cases where the issue seemed to be even more apt is a discussion for another day.

It is the province of the Court to “say what the law is,”\(^{100}\) but, of course, the Court does much more than that: it also summons communal narratives, it creates collective memory—the sort of “knowledge about that past that is shared, mutually acknowledged and reinforced by a collectivity.”\(^{101}\) The Supreme Court is remarkably good at telling these narratives, at creating these memories; this is not just because of the moral authority the Court brings to the task or the rituals of its decision-making, but also because, like sandy water flowing over sedimentary rock, the very act of telling and retelling in opinion-writing results in layers of these stories being deposited on and shaping constitutional doctrine. In time and with each iteration, these sedimentary narrative layers settle, gather together, harden, and become part of constitutional topography—sheer repetition makes them reified.

These stories, a mix of fact and aspiration, a mingling of doctrine and metaphors, rubbed smooth of contradictions, translated for public consumption, yet still contested at the margins, keep us bound to a “conscious community of memory,”\(^{102}\) a pact about the larger lessons to be derived from our past: there is a federalism story about how the founders’ experience with a distant indifferent king led them to set up a government with defined limited federal power; a free speech story about how our collective ability to think and speak freely contributes to an open marketplace of ideas; a right to bear arms story about how the Second Amendment serves as bulwark against government tyranny. There is no equivalent


\(^{98}\) Had Justice Scalia wished to be thorough in his recounting of the history of African Americans and the right to bear arms, he might have discussed the Black Panther Party and the backlash it faced when it claimed as part of its political platform the right to armed self defense. He might have cited *Negros with Guns*, by Robert F. Williams, which anticipated the Black Panther Party and provided the intellectual underpinning for part of its platform. But again, a discussion of why Justice Scalia omitted that history, though perhaps obvious to some, is one for another day.


\(^{100}\) Marbury v. Madison, 5 U.S. 137, 177 (1803).


\(^{102}\) ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 5 (1982).
story about how white supremacy conjured up the archetypal black criminal of our collective imagination—at least not an intellectually honest one I can discern from the Court’s jurisprudence. That fearsome monster—yesterday’s savage, today’s thug—continues to haunt the communal imagination like “some marauding creature still alive, some fleeting, nightmarish beast running up behind [us] . . . spinning one way and then the other.”103 And yet, judging from the Buck majority’s silence, we do not know how it got there and it is best we speak of it as little as possible.104

Perhaps I will be proven wrong by the passage of time or the work of wiser scholars but my sense is that Buck is unlikely to make a significant contribution to habeas corpus jurisprudence; its facts and procedural history are if not unique at least too unusual to be the sort of decision habeas litigants will be citing five years from now. If Buck matters, it is for everything it does not say. In matters of race, since at least Brown v. Board of Education, the Court has acknowledged the truth of the dictum etched in the caption of the famous Nicolas Poussin painting Les bergers d’arcadie: Et in Arcadia ego—I too am in paradise; even in paradise, evil is present. To Chief Justice Roberts and many of his colleagues, race in general, not white supremacy in particular, has been and is the evil in the constitutional Eden. Edith Wharton described 19th Century New York high society as a “hieroglyphic world, where the real thing was never said or done or even thought, but only represented by a set of arbitrary signs.”105 In that world, silence over difficult subjects was not just a way of upholding social conventions and maintaining personal relationships but also an instrument of grace like “compassion holding its breath.”106 There are many institutions in this country with perfectly obvious reasons for keeping silent over white supremacy; none of these reasons involves compassion holding its breath; and none of these reasons provides a legitimate explanation for the silence the Supreme Court of the United States.


104 In the same term as the Buck decision, in Pena-Rodriguez v. Colorado, the Court overturned the defendant’s conviction for sexual assault after defense counsel learned that during deliberations a juror, a former law enforcement officer, declared: “I think he did it because he’s Mexican and Mexican men take whatever they want.” Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 862 (2017). Ordinarily, under the non-impeachment rule, “once their final verdict has been entered, it will not later be called into question based on comments or conclusions [jurors] expressed during deliberations.” ERWIN CHEREMINSKY & LAURIE L. LEVENSON, 2017 CRIMINAL PROCEDURE: CASE AND STATUTORY SUPPLEMENT (2017). The question before the Court in Pena-Rodriguez was whether there ought to be an exception to the rule when there is compelling evidence indicating that racial animus was a significant motivating factor in a juror’s vote to convict. The first two paragraphs of the introduction to the opinion (and numerous additional paragraphs in the body of the opinion) tell a familiar story going back to the Nation’s founding about the jury being “a central foundation of our justice system and our democracy.” Pena-Rodriguez, 137 S. Ct. at 860. But as in Buck, the Court in Pena-Rodriguez the story that remains untold is how tenets of white supremacy fits in a seemingly reasonable juror’s declaration that Mexican men are simply more likely to be sexually violent.


States has kept on the subject for all these years past and will likely continue to keep for all the years to come, even at the risk that its race jurisprudence will always be read by some of us as sheer intellectual dishonesty and utter moral nonsense.