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# RACE CONSCIOUSNESS: CAN THICK, LEGAL CONTEXTUAL ANALYSIS ASSIST POOR, LOW-STATUS WORKERS OVERCOME DISCRIMINATORY HURDLES IN THE FAST FOOD INDUSTRY?

## A REPLY TO REGINA AUSTIN

REGINALD LEAMON ROBINSON\*

*Racists are people who are afraid.*<sup>1</sup>

*[T]he general effect of the dominance-subjection relation is to destroy both parties, each by the other, and each in a specific manner. Though the corrosive suffering of the victim is wholly incommensurate with and overshadows the psychic deformation of the victimizer, one nevertheless does not transform oneself into an executioner without great cost.*<sup>2</sup>

*While whites need a better understanding of race and ethnicity, blacks are most in need of racial healing. How can blacks become*

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1. ALBERT MEMMI, *RACISM 97* (Steve Martinot trans., Univ. of Minn. Press 2000). See also Kenneth L. Taylor-Butler, *Unfair Suspicion and Contempt Create "Black Rage"; Our Diversity Should be Respected, not Merely Tolerated*, KAN. CITY STAR, Mar. 1, 1999, at B4, available at 1999 WL 2405849 (describing events in which fear led whites to rely on racist attitudes, thus treating differences in blacks as inferior, by telling the story of his executive wife who after showing her driver's license, employment badge, and a business card was told by the manager that he would "approve your check, but don't come back without additional ID.").

2. MEMMI, *supra* note 1, at 57.

racially healed? By allowing themselves to believe that all things in life are not determined by race and letting go of race as a defining concept . . . . [I]t will liberate blacks because it will force them to respond to people as individuals and not as representatives of a race . . . . [T]he problem with black attitudes about whites is that blacks see whites as some 'giant omnipotent' race of people against whom blacks, like David in the Bible, must fight.<sup>3</sup>

#### INTRODUCTION

Can we explain why poor, low-status workers like low wage-earning blacks cannot successfully compete for fast-food jobs? Why do managers, especially minority ones, reluctantly hire minorities? Why are immigrant minorities preferred over domestic ones? If poor, low-status workers get these jobs, will customers, regardless of their race or ethnicity, treat them with respect? Are these customers white or black or Latino or Asian? And if they get these jobs, can they ever advance to managerial positions? When blacks patronize fast food restaurants like McDonalds, will they get good or poor service? Who gives them poor services? Are the workers white, black, Latino, Asian or immigrants?

If white fast food owners refuse to hire poor, low-status workers like low wage-earning blacks, what persuasively explains this problem? If blacks or other minorities own these restaurants, what explains the reluctance to hire blacks? If blacks or other minorities have bad attitudes when they work for fast food restaurants or if they as customers disrespect employees of fast food restaurants, what explains this experience? Given the foregoing, what happens when injured parties sue, seeking tort redress for their so-called impermissible racialized experiences? Are these experiences a function of structural oppression (i.e., white supremacy or institutional racism) and racial discrimination? Or are they a function of poor service and bad managerial policies?

Professor Regina Austin, in *Contextual Analysis, Race Discrimination, and Fast Food*,<sup>4</sup> answers these questions by relying on ethnographies. Ethnographies proffer thick contextual footings by which we can perhaps better understand why judges grant or deny redress to injured blacks who work for or who patronize fast food restaurants. By so relying, Austin has tools that allow her to analyze critically different structural factors at play within the fast food industry. With these factors exposed to

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3. JAMES L. ROBINSON, RACISM OR ATTITUDE? THE ONGOING STRUGGLE FOR BLACK LIBERATION AND SELF ESTEEM 233 (1995).

4. Regina Austin, *Contextual Analysis, Race Discrimination, and Fast Food*, 341 J. MARSHALL L. REV. 207 (2000).

the light of critical reading, Austin reveals how white supremacy, racial stereotypes, and racial discrimination work intimately with the fast food industry's profit maximizing goals. As such, the fast food industry generally works best when domestic blacks are marginal workers. For Austin, courts render legal decisions without appreciating the inextricable link between racism and profit taking. By exposing this link, Austin uses ethnographies, providing us with a different jurisprudential approach, one that can revive the early call by the sociological jurists.<sup>5</sup>

In this reply essay, I will first discuss Professor Austin's jurisprudential approach, one grounded in structural factors which explain how and why blacks or poor, low-status minorities experience the fast food industry. Second, I look at ethnographies, and the manner in which Professor Austin uses them. Part III focuses on bad attitudes, employment discrimination, bad customers, and poor service. In so doing, I argue that Austin's approach, while critically and analytically important, has limits especially if Austin intends us to view poor, low-status workers as simply structural victims of white oppression and racial discrimination. In addressing this point, I posit that we must blend structural analysis with social psychological perspectives, in which the individual plays a critical role in the manner in which she experiences her interpersonal space. In taking this approach, I reject the idea that blacks must always be viewed as victims. Rather, I assert that poor, low-status workers like low wage-earning blacks must be central players who co-create racialized experiences with whites. As such, poor, low-status minorities and others (e.g., whites) must work together to create racial oppression. As I have argued recently, I believe that race consciousness must be a key factor in these racialized experiences.<sup>6</sup> If not, structural factor analysis robs poor, low-status minorities of responsible agency. In the last section, I conclude.

#### I. WRITING WITHIN A PROGRESSIVE JURISPRUDENTIAL TRADITION

How can we, as attorneys and race scholars, explain what motivates people, regardless of race and color, to undertake acts that directly discriminate or that implicitly recriminate, especially acts that could bear ultimately on their life chances?<sup>7</sup> None of us

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5. See, e.g., Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 57 (1897); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489 (1912).

6. See generally Reginald Leamon Robinson, "Expert" Knowledge: *Introductory Comments on Race Consciousness*, 20 B.C. THIRD WORLD L.J. 145 (2000).

7. See, e.g., A. Dahleen Glanton, *Shades of Prejudice in Black Society*, CHI. TRIBUNE, Aug. 20, 1989, at C1 (discussing a federal lawsuit in which plaintiff,

knows the answer. Nevertheless, we must ask. In addressing many aspects of this question, legal scholars have taken different approaches, all contributing to the law's jurisprudential development. The tools on which legal scholars have relied vary, and with these variations, they have styled themselves as positivists,<sup>8</sup> realists,<sup>9</sup> literary critics,<sup>10</sup> critical theorists,<sup>11</sup> feminists,<sup>12</sup> philosophers,<sup>13</sup> Race Critics,<sup>14</sup> etc. For example, Race Critics blend academic disciplines with legal analysis, *viz.*, geography,<sup>15</sup> psychology,<sup>16</sup> religion,<sup>17</sup> and culture.<sup>18</sup> Regardless, these legal scholars intellectually sojourn to find hardened concepts within a judge's reasoning. Ultimately, these scholars reveal an opinion's difficulties and provide willing judges with substantive and analytical means by which they could broaden or narrow a holding, expand or contract a legal standard.<sup>19</sup> In the

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Tracy Lynn Marrow, a light-skinned black typist, filed a claim against her supervisor, a dark-skinned black woman, alleging that she suffered discrimination and termination based on her skin color).

8. See, e.g., H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); JOHN AUSTIN, *LECTURES ON JURISPRUDENCE* (R. Campbell ed., 5th ed. 1888).

9. See, e.g., Karl N. Llewellyn, *A Realistic Jurisprudence - The Next Step*, 30 COLUM. L. REV. 431 (1930).

10. See, e.g., JAMES BOYD WHITE, *THE LEGAL IMAGINATION* (1973); Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984).

11. See, e.g., Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

12. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

13. See, e.g., Drucilla Cornell, *From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation*, 11 CARDOZO L. REV. 1687 (1990).

14. See generally CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 1999); KIMBERLÉ CRENSHAW ET AL., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (1995).

15. See, e.g., Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994).

16. See, e.g., Charles R. Lawrence III, *Id, Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993).

17. See, e.g., Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990).

18. See, e.g., John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129 (1992).

19. See Richard Delgado, *Critical Race Theory*, in SAGE RACE RELATIONS ABSTRACTS no. 2 at 3 (Louis Kushnick ed., 1994). Delgado aptly states:

Critical thought first gained a foothold in philosophy, literature,

end, by attempting to address her article's goals, Austin urges legal scholars to reach beyond the constraining boundaries of traditional legal analysis so that they can free the law from its historical pinions.<sup>20</sup>

By writing within a progressive jurisprudential tradition, race scholars like Charles R. Lawrence provide an excellent example of this "law and" approach that Austin undertakes. After the United States Supreme Court decided *Washington v. Davis*,<sup>21</sup> Lawrence asked the Court to rethink its holding, in which the highest court required plaintiffs who constitutionally challenged a facially neutral law to prove that the actors or authors were motivated by a racially discriminatory purpose.<sup>22</sup> In this writing, Lawrence relied upon modern psychoanalytical theory to account for unconscious motives by private and state actors. According to Freud, the mind refuses discomfiting guilt by ignoring ideas that work against what it knows to be right.<sup>23</sup> According to cognitive theory, culture, by means of authority figures, teaches beliefs and values.<sup>24</sup> Today we know racism injures others, and most of us believe that we are not racists. Unfortunately, "[w]e cannot be individually blamed," as Lawrence argues, "for unconsciously harboring attitudes that are inescapable in a culture permeated with racism."<sup>25</sup> Thus, Lawrence's account proves especially illuminating if these actors produce policies that, while facially neutral, nevertheless discriminatorily impact racial minorities. Yet, with an inescapable intent element, the Court placed a governmental actor's unconscious racism beyond the equal

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sociology and anthropology, where Criticalists challenged ideas such as the universality of truth, the neutrality of law and the notion that every text had a single or determinate meaning . . . . They also borrowed the idea of indeterminacy, insisting that legal reasoning rarely, if ever, has exactly "one right answer." Instead, there will be multiple precedents and competing interpretations of those precedents from which judges may choose.

*Id.*

20. See DAVID BOHM, WHOLENESS AND THE IMPLICATE ORDER 1 (1988) ("Becoming dissatisfied with this state of affairs [*i.e.*, fragmenting the whole into separate parts], men have set up further interdisciplinary subjects, which were intended to unite these specialties, but these new subjects have ultimately served mainly to add further separate fragments.").

21. 426 U.S. 229 (1976).

22. *Id.* at 245-51.

23. See Lawrence, *supra* note 16, at 322 ("Freudian theory states that the human mind defends itself against the discomfort of guilt by denying or refusing to recognize those ideas, wishes, and beliefs that conflict with what the individual has learned is good or right.").

24. *Id.* at 323 ("[T]he theory of cognitive psychology states that the culture – including, for example, the media and an individual's parents, peers, and authority figures – transmits certain beliefs and preferences.").

25. *Id.* at 326.

protection doctrine.<sup>26</sup> Lawrence writes against this result by attempting through psychoanalytic theory to deepen the Court's contextual analysis so that, if the court were willing, it would recognize that most whites would not act intentionally racist or self-consciously discriminatory. Thus it could more effectively advance the constitutional goals of the equal protection doctrine.<sup>27</sup>

By relying on a "law and" approach to legal scholarship, Professor Lawrence writes within a progressive jurisprudential tradition that ultimately deepens our reading of the legal text, an arbitrary construction that preserves liberal legalisms like *stare decisis*. Like Lawrence's radical, seminal critique of *Davis*, Professor Regina Austin jurisprudentially and critically moves her analytical insights beyond traditional legal analysis, and in so doing, she too urges us to think differently through a "law and" approach to her legal scholarship. In short, Professor Austin invites us to consider "law and anthropology," a different methodological tool that can reveal broader, more complex ways of unearthing contextual understandings, that can effectively work to better us as attorneys, and that can efficiently aid us in serving our clients, the bar, and society. In so doing Austin, like Lawrence, writes powerfully within this tradition, inviting race scholars to conjoin ethnographic studies and legal analysis.

As Lawrence effectively did in his critique of *Davis* and *Arlington Heights*,<sup>28</sup> Professor Austin also does when she examines the crucibles of *Shirley v. Vicnat*,<sup>29</sup> *Alexis v. McDonalds Restaurant*,<sup>30</sup> *McCaleb v. Pizza Hut of America, Inc.*,<sup>31</sup> and *Wells v. Burger King Corporation*.<sup>32</sup> Each case involves discriminatory practices within the fast food industry, and each case exposes a particular aspect of this practice. Regardless of the cases' outcomes, Austin provides a richer, thicker, more complete context out of which both facts and legal reasoning come. In examining this context, Austin merges sociology and anthropology (i.e., ethnographies) with legal analysis. As in the case of those legal scholars who preceded her and her contemporaries like Professor Lawrence, Austin asserts that ethnographies guide us past the wooden thicket that serves as traditional legal analysis to the fount, the wellspring out of which structural oppression, like institutional racism, flows. For Austin, these structural factors

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26. *Id.* at 323 ("The equal protection clause requires the elimination of governmental decisions that take race into account without good and important reasons. Therefore, equal protection doctrine must find a way to come to grips with unconscious racism.").

27. See Lawrence, *supra* note 16.

28. *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977).

29. Austin, *supra* note 4, at 211-14.

30. 67 F.3d 341 (5th Cir. 1995).

31. 28 F. Supp. 2d 1043 (N.D. Ill. 1998).

32. 40 F. Supp. 2d 1366 (N.D. Fl. 1998).

provide a better, thicker, complete context to explain not only discriminatory practice but also its inescapable persistence. I call her approach: thick, legal contextual analysis.

## II. CAN ETHNOGRAPHIES HELP?

At the outset, Professor Austin indicts courts that advance law as science and as relatively autonomous. Not only is the law a contested site for conflicting interests and politics, but it also depends on facts, pleadings, and evidence to resolve disputes. What is a fact? Is it legal or sociological? Do the pleadings arise out of institutionally accepted legal frameworks? What is evidence? How does evidence inform, influence, and determine what must be properly admitted as a legal fact?<sup>33</sup> In effect, legal technology (e.g., doctrine and its language) must depend on exogenous variables (i.e., sociological data). Yet, if courts ignore the interdependence of these internal and external forces, then they also disregard the social context out of which the dispute arose and in which it must be resolved. For Austin, non-contextual decisions remain "unintelligible even to persons trained in the law."<sup>34</sup> Equally important, by disregarding context, can courts appreciate how their legal renderings will impact on plaintiffs, especially if courts disregard race, ethnicity, class, gender, or age? Austin answers in the negative. Without this context, market-generated, socially sanctioned discrimination, which represents only a patina, never gets appropriately and legally redressed. More fundamentally, the social structure that naturalizes racial prejudice and diminished economic opportunities remains socially invisible and legally uncontested.<sup>35</sup>

How do we expose deeply embedded, socially normalized structures that expose poor, low-status minorities to racial discrimination, or legally injurious prejudices, that rests beyond the reach of traditional legal analysis? For Austin, we expose structural stereotypes and institutional racism by destabilizing the relative autonomy of the law.<sup>36</sup> Second, we achieve this goal by

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33. See, e.g., *Alexis*, 67 F.3d at 347 (1st Cir. 1995). Judge Bownes wrote that:

Opinion testimony from lay witnesses is admissible only if it is "rationally based on the perception of the witness and . . . helpful to a clear understanding of the witness' testimony or the determination of the fact in issue." Rulings on the admissibility of lay opinion testimony are reviewed only for "manifest abuse of discretion." The exclusionary ruling was well within the district court's broad discretion.

*Id.*

34. Austin, *supra* note 4, at 207.

35. *Id.*

36. *Id.* See RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 21 (1989) (discussing language as a vehicle not for expressing reality or certainty but for revealing not true objectivity but human truths).



placing legal disputes back into their material and social history.<sup>37</sup> Not the first to issue this injunction,<sup>38</sup> Austin, in *"The Black Community"*,<sup>39</sup> urged blacks to engage in legal praxis to achieve at least two goals. First, if blacks return "Home" to the black community,<sup>40</sup> they could effectively bridge the gap between the "street and straight worlds."<sup>41</sup> Second, if blacks invested themselves in the black community, we could develop a jurisprudence that not only saves deserving lawbreakers, but also destroys the fluid lines between legal and extra-legal economic conduct.<sup>42</sup> As in the past, Austin again invites us to move beyond traditional legal analysis by engaging in potent contextual analysis. One can effectively accept this invitation by relying, as does Austin, on ethnographies.

In unearthing the hidden structures that make racial oppression likely, ethnographies become vital tools. Ethnographers directly observe their subjects. They describe and evaluate a group's activities. They gather data by living and working within their quasi-scientific laboratories. Even though they get closer to their subjects, ethnographers carefully record their subjects' activities. In addition, these cultural anthropologists appreciate that human organizations stand on seamless webs between the culture, the material, the behavior, and the cosmology.<sup>43</sup> As a result, they focus on local levels, where "people struggle, compete, collaborate, and adapt to accomplish their cultural goals."<sup>44</sup> By so focusing, ethnographers expose life choices that critique universal concepts and status quo norms. When properly deployed, ethnographies can explain how law directly and literally works in a person's life,<sup>45</sup> especially if legal

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37. *Id.* at 2.

38. See, e.g., Richard Delgado, *Critical Legal Studies and the Realities of Race: Does the Fundamental Contradiction Have a Corollary?*, 23 HARV. C.R.-C.L. L. REV. 407 (1988); Martha Minow & Elizabeth Spelman, *In Context*, 63 S. CAL. L. REV. (1990).

39. Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769 (1992).

40. *Id.* at 1817.

Only blacks who are bound by shared economic, social, and political constraints, and who pursue their freedom through affective engagement with each other, live in real black communities. To be part of a real black community requires that one go Home every once in a while and interact with the folks.

*Id.*

41. *Id.* at 1814.

42. *Id.* at 1816. ("The jurisprudential component of a politics of identification would make an issue of the fact that the boundary between legal economic conduct and illegal economic conduct is contingent.")

43. Austin, *supra* note 4, at 209-11.

44. *Id.*

45. *Id.* at 6.

doctrines function as one of the operative structures in the lives of poor, low-status minorities who work in the fast food industry.

In this way, ethnographies hold promise for those like Austin who wish sincerely to deconstruct and reconstitute the law so that it truly liberates poor, low-status minorities. Without telling us specifically how ethnographies will effect this new arrangement, Austin asserts that race ethnographies provide fresh approaches to those trapped in society's basement and to those struggling to advance themselves out of it. Austin fails to address other questions about ethnographies. For example, what we must ask is: can ethnographers observe, whatever direct or indirect might mean, their subjects without biasing the outcome? When one describes, does she change whatever she observes?<sup>46</sup> Likewise, when one evaluates, does she impose values, judgments or prejudices that affect what she observes? Furthermore, have not anthropologists been for and against the causes of white supremacy and Jim Crow politics?<sup>47</sup> Do scholars trained in scientific methods of investigation, an approach deeply committed to contextual analysis, have an irrational loyalty to white supremacy and eugenics?<sup>48</sup> Throughout her article, Austin ignores

46. See MICHAEL TALBOT, *MYSTICISM AND THE NEW PHYSICS* 3 (1983) (Heisenberg's Uncertainty Principle: "the observer alters the observed by the mere act of observation.").

47. See, e.g., Donald Braman, *Of Race and Immutability*, 46 *UCLA L. REV.* 1375 (1999) (discussing how the father of modern anthropology, Franz Boas, of Columbia University, and his students were instrumental in challenging the pseudo scientific data on which eugenicists rely to claim racial distinctions and higher intelligence).

48. See generally ROBERT V. GUTHRIE, *EVEN THE RAT RACE WAS WHITE: A HISTORICAL VIEW OF PSYCHOLOGY* (1976). Guthrie writes:

Psychology courses often became vehicles for eugenic propaganda . . . Harvard, Columbia, Brown, Cornell, Wisconsin, and Northwestern were among the leading academic institutions teaching eugenics in psychology courses. But psychology served the eugenicists' cause in a far more important way than merely being an outlet for its propaganda. Psychology made its chief contribution by providing much of the philosophical discussion purporting to validate the existence of "fine-lined" individual differences. While psychology's measuring devices conveniently labeled these mental variations, its developmental theories helped guide the eugenicists from theoretical positions to applied programs.

*Id.* at 81.

In addition, the Research Committee of the Eugenics Section of the American Breeders Association unanimously resolved to create a committee of scholars to "study the best practical means of purging the blood [of Americans who had] deteriorating influences of anti-social classes" because it feared that natural selection alone would not achieve the "survival of the fittest". *Id.* at 85. Psychologists, sociologists, anthropologists, medical doctors, and attorneys were enlisted. *Id.* Psychologists would devise standards and tests for identifying mental defectives. Sociologists would create methods for "reaching defectives and potential parents of defectives." *Id.*

these questions. Perhaps, given her strong convictions about ethnographies and what she intends by structural analysis,<sup>49</sup> she leaves this methodological bramble bush to other inquiring minds.

Although Austin faithfully accepts that ethnographies present thicker, more diverse milieus out of which legal contests might arise, we must take seriously the following question: How may ethnography's methodological problems confound race ethnographies?<sup>50</sup> At present, legal scholars who call themselves Race Critics engage in a quasi-form of race ethnography, and from the advent of this progressive legal scholarship, they have questioned legal autonomy, rationality, neutrality, and decontextualized critiques.<sup>51</sup> They too have faced stringent, almost strident, calls for methodological clarity.<sup>52</sup> Ethnography analyzes culture along qualitative methodologies.<sup>53</sup> Yet, culture takes many forms. In its manifold ways, culture has many meanings. If culture means "the acquired knowledge that people use to interpret experience and generate social behavior," and if this knowledge governs how people, individuals and groups, may see their world,<sup>54</sup> then it must follow that cultural and sub-cultural norms operate within a given community. Equally important, dominant or subaltern culture "category[z]es, encodes, and otherwise defines the world in which they live."<sup>55</sup> If so, then on which cultural norms will a given ethnographer rely?<sup>56</sup> How does

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49. See Regina Austin, *Of False Teeth and Biting Critiques: Jones v. Fisher in Context*, 15 *TOURO L. REV.* 389, 389-90 (1999) (outlining her nine-factor structural analysis).

50. See Robert Dingwall, *A Model for Challenging Sociology or Just Microsociology?*, 27 *J. OF CONTEMP. ETHNOGRAPHY* 399 (1998).

51. See, e.g., Reginald Leamon Robinson, *Race, Myth, and Narrative in the Social Construction of the Black Self*, 40 *HOW. L.J.* 1 (1996).

52. See, e.g., Richard Delgado, *The Inward Turn in Outsider Jurisprudence*, 34 *WM. & MARY L. REV.* 741 (1993); Daniel Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 *STAN. L. REV.* 807 (1993); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 *HARV. L. REV.* 1745 (1989); Jeffrey Rosen, *The Bloods and the Crits: O.J. Simpson, Critical Race Theory, the Law, and the Triumph of Color in America*, *THE NEW REPUBLIC* Dec. 9, 1996, at 27.

53. See Norman K. Denzin, *The New Ethnography*, 27 *J. OF CONTEMP. ETHNOGRAPHY* 405, 406 (1998) (discussing four qualitative methodologies: naturalism (being there, using the native's own words); ethnomethodology (bracketing, description, the talk of how); emotionalism (creative interviewing, performance texts, first-person accounts); and postmodernism (cinematic society, psychoanalytic readings, poetic representations)).

54. Gillian M. McCombs, *The Keys to the Kingdom Have Been Distributed: An Organizational Analysis of an Academic Computer Center*, 46 *LIBR. TRENDS* 681 (Spring 1998).

55. *Id.*

56. See Denzin, *supra* note 53, at 405-06. Denzin writes:

[A] theory of the social is also a theory of writing. There is nothing outside the text; that is, a thing is only understood through its representations. Representations are gendered constructions. Hence, a

an ethnographer's sociological method and psychoanalytical theory bias her interpretations, note taking, descriptions, and intuitive insights?<sup>57</sup> This question bears directly on observing and interpreting.<sup>58</sup> According to Gillien McCombs:

Culture, the cognitive map to which we refer on a daily basis, cannot be observed directly. It needs to be inferred and is predicated on being able to get inside people's heads. This emphasis is thus shifted from observation of behavior to the meaning of behavior, from observation of phenomena such as customs, objects, and emotions, to their meaning. An ethnographer "inscribes" social discourse.<sup>59</sup>

Without taking up these methodological conundra, Austin assumes that ethnographies can survive academic questions of reliability, and she instead focuses her analytical foray not simply on legal doctrine, but inclusively on cultural factors. At base, ethnography, or cultural analysis, asks: "Before you impose your theories on the people you study, find out how those people define their world."<sup>60</sup> Austin takes this injunction seriously. Her challenge remains obvious: discovering how the subjects of her paper define their world. By discovering these defining narratives, these cultural myths, she provides an argument against imposing standard legal theories on employment discrimination, an

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theory of writing is also a theory of interpretive (ethnographic) work. Theory, writing, and ethnography are inseparable material practices. Together they create the conditions that locate the social inside the text. Those who write about methods of knowing also write about theory, culture, and society. Those who write culture also write theory. And those who write theory write culture.

*Id.*

57. McCombs, *supra* note 54, at 682 (A professor of sociology described herself as an ethnologist "who 'lived within worlds new to me, tried to understand what they were about, and tried to write about my understandings so that the worlds I studied come alive for others,'" . . . describing "her work as 'sociology as narrative, story, text, language' rather than that of numbers, while being firmly undergirded by sociological method and psychoanalytical theory.").

58. See R.D. LAING, *THE POLITICS OF EXPERIENCE* (1967). See also R.D. LAING, *THE DIVIDED SHELF* (1971); Robinson, *supra* note 6, at 172-79 (discussing Laing's theory in the context of race and its consciousness).

59. McCombs, *supra* note 54, at 684 (citing CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* (1973)).

60. *Id.* at 682. McCombs states that:

The study of culture, known as ethnography, provides observations that say "Before you impose your theories on the people you study, find out how those people define their world." Ethnography has its origins in field work expeditions to places like Samoa and the Kalahari desert and has now become a fundamental tool for understanding ourselves and the multicultural environment of which we are a part.

*Id.* (citation omitted).

imposition that ratifies extant discriminatory practices.<sup>61</sup> For Austin, standard legal theories and their analyses ignore these narratives and myths, a claim long embraced and demonstrated by Race Critics and critical theorists.<sup>62</sup> By exposing yet again the limits of the liberal legal imagination, Austin not only moves beyond the manner in which courts apply doctrinal principles, but also reveals the structural factors through which poor, low-status minorities experience themselves, customers, and employers in the fast food industry.<sup>63</sup>

To the extent that ethnographies can expose otherwise the etiology of structural oppression, I agree with Professor Austin's approach. By relying on ethnographies, she reveals structural factors that bear directly on poor, low-status minorities' day-to-day efforts to live, to liberate themselves, and to advance socially, politically, and economically.<sup>64</sup> Likewise, her approach exposes the structural factors that influence a court's reasoning, factors that bind and delimit a judge's rationality.<sup>65</sup> For many judges, legal decision-making must function within evidentiary constraints, rulings that embrace not sociological but legal facts.<sup>66</sup> For Austin,

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61. Cf. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

62. See, e.g., Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

63. See, e.g., ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICTS AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 98, 113-14 (1999). On this point, Yamamoto argues that:

[R]elational positionality significantly complicates fixed categories of good and evil, of victims and victimizers. Relational positionality acknowledges that "the flow of power in multiple systems of domination is not always unidirectional. Indeed, "victims can also be victimizers; agents of change can also be complicitous, depending on the particular axis of power one considers." A women's [sic] potential for both victimization and domination thus depends on her relational position with other social actors. She may be oppressed under one system of domination (patriarchy) and oppressive through others (race and class). In terms of social agency, women (like racial groups) can be simultaneously privileged and subordinated, empowered and disempowered.

*Id.*

64. See KATHERINE S. NEWMAN, *NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY* (1999).

65. By rationality, I simply mean that an actor like a judge constructs an objective, and she pursues that objective by choosing among various alternatives, given the limited (or bounded) information before her, that she believes attains the final objective. See HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATION ORGANIZATIONS* 62 (3d ed. 1976).

66. Austin, *supra* note 4 at 207. Austin argues:

Not being particularly interested in the material/social interactions and positioning of the parties that lead up to lawsuits or the material/social

without sociological facts or structural factors which surface when one considers ethnographies, legal rulings become enigmas. Yet, for judges who seek more ways to explain how structural factors or structural oppression might work against poor, low-status minorities and how legal precedent cannot seriously redress these "built-in headwinds," Professor Austin's use of ethnographies proffers an analysis that remains at once insightful, probative, and provocative.

Yet, Austin's ethnographic approach stops quite short of drawing for us a complete sociological picture. Quite rightly, Austin reminds judges that they analyze legal questions within a specific structural context (i.e., white supremacy and employment discrimination). Unfortunately, she ignores interpersonal (and interactional) dynamics, and how these dynamics contribute powerful energy to personal experiences.<sup>67</sup> For me, concepts like structural oppression and employment discrimination have no living value without human, mental energy. In the abstract, this oppression and discrimination exist like bullets, which without human intervention, cannot maim or kill. If we combine bullets and guns, we still live in relative safety. By loading bullets into guns, by fearing differences, by using differences to justify imposing violence and brutality on others,<sup>68</sup> and by using guns to enforce feared differences, we have added human, mental energy to structural factors. Thus, the structural framework out of which guns and bullets come must be infinitely valuable, but alone this framework has severe limitations.<sup>69</sup> And while I do not intend to trivialize the ravages of slave violence and Jim Crow segregation, I

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consequences of decisions after they have been rendered, legal analysis as it is reflected in curt opinions often leaves out much that lay people would consider crucial to an assessment of whether justice has been done.

*Id.*

67. Cf. Thomas M. Vander Ven, *Fear or Victimization and the Interactional Construction of Harassment in a Latino Neighborhood*, 27 J. OF CONTEMP. ETHNOGRAPHY 374 (1998) (arguing that people who are victimized identify themselves by their behavior toward those who they fear in their neighborhood).

68. See MEMMI, *supra* note 1, at 52-53 ("Racism is a mode of behavior, but it is also a discourse, the presentation of a case, both as an accusation and a self-exoneration. The meaning of the argument is hardly in doubt, however; it is always a justification of aggressive hostility.").

69. Cf. M. Tina Dacin et al., *The Embeddedness of Organizations: Dialogue and Directions*, 25 J. OF MGMT. 317 (May-June 1999). These authors argue:

There emerged dissatisfaction with organizational theory conceptions of context as primarily resource environments or as a set of constraints or opportunities that regulate, as well as provide resources (tangible and intangible) and transaction opportunities. This resource focus tends to overlook or downplay the constitutive or "productive" effects on action possibilities of an organization's internal and external context.

*Id.* (citations omitted).

think that race consciousness, albeit a concept, perhaps explains the negative racial experiences poor, low-status minorities have in the fast food industry. Under an approach that perforce takes stock of how poor, low-status minorities think about themselves and others, we ought to hesitate when it comes to blaming structural oppression completely and exclusively, treating oppression as if it were a powerful explanatory variable. Under a race consciousness approach, we could, without ignoring racial discrimination, assess the personal responsibility of blacks, whites, and others.<sup>70</sup> Although Austin knows of personality factors, her article ignores them completely. By focusing only on structural factors and by failing to combine structural factors and interpersonal dynamics, Austin's analysis by necessity has limited efficacy.

Recall that ethnologists must learn how people construct their world. How does a purely structuralist approach account for how individuals think? It cannot. Rather, structuralism presumes that white supremacy, albeit invisible, has real and concrete effects on black people's lives, and the cultural expression of structural oppression limits and constrains how black people think, feel, and act.<sup>71</sup> If so, what we have learned is that black people think, feel, and act as structural oppression (e.g., white supremacy) and racial discrimination necessarily dictate. Where is human agency? Equally important, where is personal responsibility, especially for how different people, including blacks, construct their personal worlds by their individual (or collective) thinking? At base, not withstanding a structural framework, everyone thinks and creates his or her own social reality!<sup>72</sup> For example, how do we explain why some blacks succeed, even those who came from "broken" homes, who grew up in dank ghettos, who lived under the financial rigors of public welfare? By not looking critically to interpersonal dynamics and epistemology, structural oppression can become an analytical blinder, and we simply have found a much more powerful tool like ethnographic data to utter yet again that white supremacy and racial discrimination victimize blacks.<sup>73</sup> And while the fast food industry offers us a

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70. See generally PAUL L. WACHTEL, *RACE IN THE MIND OF AMERICA: BREAKING THE VICIOUS CIRCLE BETWEEN BLACKS AND WHITES* (1999).

71. See ALLAN G. JOHNSON, *THE BLACKWELL DICTIONARY OF SOCIOLOGY* 315 (1999) (defining structuralism).

72. See TALBOT, *supra* note 46, at 37-39 (based on western physicists and eastern mystics, arguing that people create their own realities because what they experience correlates or is caused by their thoughts).

73. Cf. MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995) (arguing that racialized state policy (e.g., black slavery and Jim Crow segregation) and the concomitant sedimentation of inequality explain the current material and asset difference between whites and blacks).

specialized case study for the manner and form in which racial discrimination gets expressed, it still leads to the same old saw: *blacks are victims*.

In effect, a structural factor analysis of the fast food industry denies that blacks have been influenced, principally by their primary (family) and secondary (school) environs, to embrace a life philosophy that recruits them into an army of similarly thinking nay sayers, a meditation that in mantra-like fashion preaches: blacks cannot succeed unless whites stop discriminating against them. Let us assume that society lies to black children by programming them to believe the cultural myths told to them: blacks are ugly, violent, lazy, welfare-sucking people who will never amount to anything.<sup>74</sup> How did that child first come to the lie and to believe in it? Psychiatrist Price Cobbs, of *Black Rage*,<sup>75</sup> states: "I fear that people like Tim – and I certainly hear him – will begin to believe the lies that are told about him. I hear 'A lot of people like me will never make anything of themselves. Once I believe that lie, they got me.'"<sup>76</sup> Is the source of this oppressive, marginalizing narrative an invisible structural technology that sows self-destructive seeds in the minds of poor, low-status minorities? Who then are the astute "farmers"? Are they parents, friends, teachers, media, etc? If so, then the gun that first fired the oppressive bullet into the child's forehead must have been a parent or a close family relative!<sup>77</sup> Just as writing, theory, and culture have inextricable links, macro-structure works interdependently with micro-structures. Just as macro and micro-structures of racial oppression must be immutably conjoined, race discrimination as a daily phenomenon depends fundamentally on infecting blacks, whites, and others.<sup>78</sup>

Finally, by not accounting for individual narratives and how

74. See ROBERT E. ORNSTEIN, *THE PSYCHOLOGY OF CONSCIOUSNESS* 47-8 (1975). Ornstein correctly writes that:

Previous experience with objects and events strengthens personal category system as it does a scientific paradigm. We expect cars to make a certain noise, traffic lights to be a certain color, food to smell a certain way, and certain people to say certain things. But what we actually experience . . . is the *category* which is evoked by a particular stimulus, *not* the occurrence in the external world.

*Id.*

75. See WILLIAM H. GRIER & PRICE M. COBBS, *BLACK RAGE* (1966).

76. IN THEIR OWN WORDS, S.F. EXAMINER, Feb. 19, 1995, at D4, *available in* 1995 WL 4908685.

77. See PATRICIA RAYBON, *MY FIRST WHITE FRIEND: CONFESSIONS ON RACE, LOVE, AND FORGIVENESS* 3 (1996) ("I knew the stories [of whites murdering blacks with impunity]. I had heard them in childhood, at the knees of people I loved, in the presence of people I trusted. Terrible stories. Horror stories.")

78. See Lawrence, *supra* note 16, at 326 (arguing that we, blacks, whites, and others are infected with racism).



such constructs strongly influence our experiences, a structural analysis assumes that racial oppression runs from oppressors to the oppressed, from white to black (or poor, low-status minorities), a self-destroying process in which the disempowered play no meaningful part. While ethnographies certainly help by exposing how structural oppression deeply contextualizes the ways poor, low-status minorities experience themselves and others in the fast food industry, we still cannot know why some minorities succeed and others fail. Without psychoanalytic and cognitive theories, we cannot appreciate how existential and epistemological factors make us central players in our personal experiences of success or failure. Furthermore, by not addressing underlying methodological difficulties with ethnographic studies, Austin fails to tell us to what extent sociologists or ethnologists have found ways to reframe dominant narratives, ultimately leaving the reader with a sympathetic accounting of subjects, one that reveals an intuitive epiphany that potentially weakens an oppressive thought system.<sup>79</sup> In the end, I would argue that ethnographies help, but without an incisive critique that takes the courts, race scholars, and readers beyond the historic boogey man of white structural oppression as a super explanatory variable, ethnographies have limited efficacy. Without more, we find ourselves once again positioned to think in dichotomous terms: *white oppressors, black victims; white guilt, black rage.*

### III. STRUCTURAL OPPRESSION, INDIVIDUAL PERSONALITY, OR BOTH?

#### A. *Bad Attitudes and Employment Discrimination*

What explains employment discrimination in the fast food industry? To what extent is this discrimination related to the manner in which our society has constructed poor, low-status minorities? To what extent is this discrimination co-determinant with the specific ways in which poor, low-status minorities actually behave in the workplace? Are these discriminatory practices driven by structural oppression or by organizational efficiency? Even if efficiency proves to be the overwhelming motive, can practices based on rationalizing the bottom line operate independent of biases, prejudices, ignorance, and racism? Are discriminatory practices specifically related to a manager's or an owner's aggregate experiences with black employees? Did these employees have bad attitudes? Did they provide erstwhile customers with poor service? Did they react negatively to white or minority managers in a way that disrupted the workplace?

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79. See generally DAVID BOHM, THOUGHT AS A SYSTEM 18 (1993) (By thought system, Bohm means one process, a "whole society sharing thoughts - it's all one process.").

Nevertheless, when black injured applicants, employees, or customers seek civil redress, do courts look beyond legal doctrine and traditional evidentiary indicia for a context that accounts for the perhaps unique perspective of poor, low-status minorities like blacks?

As I have already pointed out, Austin's ethnographic approach and critical analysis answer these questions in the negative. What is most important about Austin's work is not the legal analysis but the ethnographic studies that expose institutional or cultural practices that appear to disadvantage poor, low-status minorities. Why then are poor, low-status minorities advantaged? Preliminarily, it appears that fast food employers ordinarily rank potential employees: Latino immigrants over indigenous blacks; immigrant blacks over indigenous blacks; distant neighborhood minorities over immediate neighborhood minorities.<sup>80</sup> Furthermore, these minorities do not speak Spanish, Tagalog, or Korean. Moreover, given the discipline and organizing structure of the fast food industry, minority or white owners may wrongly assume that poor, low-status minorities like wage-earning blacks will not willingly conform to workplace rules, especially norms governing politeness to customers, at any cost.<sup>81</sup> To overcome these experienced or perceived difficulties with blacks, these owners rely on informal networks to find and hire new workers.<sup>82</sup> And by so relying, poor, low-status minorities like wage-earning blacks have correspondingly fewer opportunities for management positions.<sup>83</sup>

Fortunately, these problems can be redressed to some degree by traditional disparate impact analysis, especially where testers can effectively document discriminatory hiring patterns.<sup>84</sup> Yet, what of the tension between bad attitudes and poor service? How does structural oppression account for or explain these workplace difficulties? Is it simply that fast food owners prefer Latino immigrants over native-born blacks or whites? Do these employees have a greater propensity for hard work? Do they have

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80. Austin, *supra* note 4, at 216.

81. *Id.* at 218.

82. See *id.*; Cf. MARY C. WATERS, BLACK IDENTITIES: WEST INDIAN IMMIGRANT DREAMS AND AMERICAN REALITIES 102 (1999). Waters writes:

Immigrants are also embedded in networks that can provide information and referrals to job opportunities in a way that natives often are not . . . . [T]he ready-made networks and the absence of an aversion to low-status jobs . . . could explain the much higher labor force participation rates among unskilled, poorly educated West Indians relative to unskilled, poorly educated native-born blacks.

*Id.*

83. Austin, *supra* note 4, at 217-19.

84. *Id.* at 211-13 (discussing *Shirley v. Vicnat* in which a class action suit against the fast food restaurant owner included mostly testers).

better, owner-oriented attitudes?<sup>85</sup> Katherine Newman pointed out that Burger Barn, a fast food restaurant in Harlem, New York City, imposes an ethic of customer deference on its employees.<sup>86</sup> Without regard to ethnographies, the fast food industry prefers employees who relate effectively (displaying patient politeness) with the other workers and customers,<sup>87</sup> even if a customer acts rudely.<sup>88</sup> Positive, cooperative attitudes, perhaps even deference to authority, benefit all players, especially an owner's profit margin.<sup>89</sup> An employee with these personality attributes more than likely will proffer good services to customers, thereby aiding an owner's profit taking. By contrast, owners disprefer blacks who have bad attitudes, chips on their shoulders, distrust toward supervisors, and remedy-seeking or litigious-oriented coping skills.<sup>90</sup> A worker with these personality attributes will more than likely contribute to, if not cause, workplace conflicts with co-workers and with the public. In the end, can we simply say that fast food owners, regardless of their race or ethnicity, prefer good workers, leaving the irate do-nothing to her own whims? What do ethnographic studies contribute to understanding how bad attitudes flow from structural oppression?

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85. *Id.* at 218.

86. NEWMAN, *supra* note 64, at 89. According to Newman:

Burger Barn workers are told that they must, at whatever costs to their own dignity, defer to the public. Customers can be unreasonably demanding, rude, even insulting, and workers must count backwards from a hundred in an effort to stifle their outrage. Servicing the customer with a smile pleases management because making money depends on keeping the clientele happy, but it can be an exercise in humiliation for teenagers. It is hard for them to refrain from reading this public nastiness as another instance of society's low estimation of their worth. But they soon realize that if they want to hold on to their minimum-wage jobs, they have to tolerate comments that would almost certainly provoke a fistfight outside the workplace.

*Id.*

87. Austin, *supra* note 4, at 217-19.

88. NEWMAN, *supra* note 64, at 92-93. Consider the perspective of a worker on why non-working customers may give her a hard time, especially when they know that these fast food employees must tolerate "whatever verbal abuse comes across the counter." *Id.* at 89. The worker states:

What you will find in any situation, more so in the black community, is that if you are in the community and you try to excel, you will get ridicule from your own peers. It's like the "crabs down" syndrome . . . According to my thinking, they should pull 'em up or push 'em or help 'em get out. But the crabs pull him back in the barrel. That's just an analogy for what happens in the community a lot.

*Id.* at 92-93 (alteration in original).

89. *Id.* at 92. ("The problem [of customer antagonism] is constant enough to warrant official company policies on how crew members should respond to insults, on what managers should do to help, on the evasive tactics that will work best to quell an ugly situation without losing the business.")

90. Austin, *supra* note 4, at 216-19.

Given that Austin argues in favor of race ethnographies, it is vital that we know if bad workplace attitudes correlate strongly with structural oppression. Basically, does structural oppression dictate the relatively precise manner in which poor, low-class minorities like wage-earning blacks will react to authoritative or racist managers, nasty customers, or "dissing" co-workers?<sup>91</sup> By asking these questions, I seek the specific relevance of ethnographies to bring forth structural data or perhaps in the best case admissible evidentiary material on which courts can sufficiently rely to render a plaintiff-oriented verdict, where bad attitudes lead to civil suits, to damage-seeking harangues.<sup>92</sup>

By looking to ethnographic studies, Austin suggests that ethnologists can provide courts with admissible evidentiary data that could better contextualizes employment discrimination in the fast food industry. For example, Katherine Newman, a sociologist and ethnologist, offers several reasons why bad attitudes, which may contribute to poor service, may typify poor, low-status minorities in the fast food industry. First, blacks must cope with America's moral maxim that work defines the person.<sup>93</sup> On this point, Newman writes,

We inhabit an unforgiving culture that is blind to the many reasons why some people cross that employment barrier and others are left behind. While we may remember, for a time, that unemployment rates are high, or that particular industries have downsized millions

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91. See NEWMAN, *supra* note 64, at 145. Newman writes:

In a world where residential segregation is sharp and racial antagonism no laughing matter, it is striking how well workers get along with one another. Friendships develop across lines that have hardened in the streets. Romances are born between African-Americans and Puerto Ricans, legendary antagonists in the neighborhoods beyond the workplace. This is even more remarkable when one considers the competition that these groups are locked into in a declining labor market. They know very well that employers are using race- and class-based preferences to decide who gets a job, and that their ability to foster the employment chances of friends and family members may well be compromised by a manager's racial biases. One can hear in their conversations behind the counter complaints about how they cannot get their friends jobs because – they believe – the manager wants to pick immigrants first and leave the native-born jobless. In this context, resentment builds against unfair barriers. Even so, workers of different ethnic backgrounds are able to reach across the walls of competition and cultural difference.

*Id.*

92. See Austin, *supra* note 4, at 228 n. 86 (discussing *Robertson v. Burger King*, 848 F. Supp. 78 (E.D. La. 1994), in which black customer sued because white customers, who were standing behind him, were served before him. Both the manager and employee were black, and given *Shirley v. Vicnat* case, it appears irrelevant whether a minority or white person owned this fast food restaurant).

93. See NEWMAN, *supra* note 64, at 86-89.

of workers right out of a job, or that racial barriers or negative attitudes toward teenagers make it harder to get a job at some times and for some people, in the end American culture wipes these background truths out in favor of a simpler dichotomy: the worthy and the unworthy, the working stiff and the lazy sloth.<sup>94</sup>

Second, given this puritanical maxim, a “McJob” does not uplift but denigrates poor, low-status minorities. Fast food jobs like a “Mc Job” stigmatize a worker, challenge her self-esteem, and lack redemptive value.<sup>95</sup> Another factor is that these jobs falsely appear routinized and unskilled<sup>96</sup> (i.e., “Any fool could do this job. Are you kidding?”),<sup>97</sup> robbing workers of creative, individual ways to express themselves and to find their identities. By feeling forced to become a shift worker, poor, low-status minorities may feel preordained to remain trapped in urban ghettos.<sup>98</sup> Furthermore, another factor is poor, low-status minorities may lack personal discipline, especially when they feel confronted by rude customers (black, white, Latino, Asian, or recent immigrants) to whom they must defer.<sup>99</sup> Consider Ianna, managing to react to customer rudeness in ways perhaps just shy of violating a restaurant’s ethic of deference, who states: “And no matter what you do you cannot please them. I’m not supposed to say anything to the customer, but that’s not like me. I have a mouth and I don’t take no short from nobody. I don’t care who it is, don’t take anybody’s crap.”<sup>100</sup> Notwithstanding these factors, how do ethnographic studies lead to the thick, legal contextual analysis upon which courts can rely to better understand how structural oppression correlates with bad attitudes and poor service?

Although Austin does not use ethnographic data to answer this question directly, she does proffer another way to explain bad

94. *Id.* at 86.

95. *Id.* at 89.

96. *Id.* at 148 (“[Her experience] reveals the hidden knowledge locked up inside what appears to surface observers (and to many employees themselves) as a job that requires no thinking, no planning, and no skill.”).

97. *Id.* at 149.

98. NEWMAN, *supra* note 64, at 88.

The creation of an identity as a worker is never achieved by individuals moving along some preordained path . . . . This is a particularly dramatic transformation for ghetto youth and adults, for they face a difficult job market, high hurdles in convincing employers to take a chance on them, and relatively poor rewards – from a financial point of view – for their successes.

*Id.* at 96-97 (describing how William who, after taking a job at Burger Barn, used every conceivable subterfuge to conceal his job from his friends: “It’s not something I personally proclaim with pride and stuff . . . . If you are a crew member, you really aren’t shit there . . . . You got nothing there, no benefits, nothing. It was like that [when I was younger] and it’s like that now.”).

99. *Id.* at 86, 91-92.

100. *Id.* at 91.

attitudes of poor, low-status minorities in the fast food industry. Austin, looking to Jennifer Anne Parker, a sociologist, writes that “blacks’ bad attitudes are not simply a matter of individual psychology or a response to conditions external to the workplace. They may be the product of blacks’ resistance, not to work in general, but to the conditions of the particular workplace.”<sup>101</sup> In effect, blacks, who have bad attitudes, are akin to Austin’s lawbreakers who engage in deviate-oriented or extra-legal praxis, all designed to expose society’s material oppression and to redeem themselves by acting “outside the law, against the law, and around the law.”<sup>102</sup> It would appear that when we read Austin’s “*The Black Community*,” together with Parker’s position, we can arrive at the following critique of structural oppression. Blacks engage in bad attitudes, often leading to poor service if they are employees as an indictment of their racialized context, because structural oppression has nuanced levels. First, structural oppression has a specific historical origin, *viz.*, slavery and Jim Crow politics.<sup>103</sup> Second, the fast food industry serves as a site for macro-micro oppression. On a macro level, the industry privileges social norms that work stereotypically against poor, low-status minorities. On a micro level, a specific fast food restaurant like McDonald’s articulates these shared meanings of values when owners refuse to hire blacks, when managers treat workers with racialized disdain, and when employees or managers disrespect black customers by either refusing to serve them or by treating them as criminal trespassers.<sup>104</sup> To this extent, I would imagine that Austin would agree that blacks should engage in some form of praxis-oriented resistance, a protest designed to draw society’s attention to hidden problems within the fast food industry. Likewise, I would suspect that Austin would agree with Parker’s theoretical treatment of the complex nature of structural oppression. Yet, does this ethnographic critique of structural oppression broaden how a court might determine what facts necessarily constitute actionable discrimination or public accommodation violations?<sup>105</sup>

Parker proffers additional ethnographic data that bear on bad attitudes in the fast food industry by poor, low-status minorities like wage-earning blacks. Parker focuses on structural markers like “disempowerment,” and although Austin disagrees with Parker when she dichotomizes racial bigotry and the fast food industry’s organizational structure (*i.e.*, service orientation),

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101. Austin, *supra* note 4, at 219 (italics in original text).

102. Austin, *supra* note 39, at 1816.

103. Austin, *supra* note 4, at 222.

104. *Id.*, at 229-31 (citing *Alexis v. McDonald’s Restaurants of Mass., Inc.*, 67 F.3d 341 (1st Cir. 1995)).

105. *Id.* at 231 (citing *Wells v. Burger King Corp.*, 40 F. Supp.2d 1366 (N.D. Fl. 1998)).

technological advances, and competition among individual fast food restaurants,<sup>106</sup> she does not critically deconstruct Parker's facile reliance on "disempowerment" as an explanatory variable. According to Parker,

"[T]he lack of motivation," "the lack of enthusiasm" managers speak of and which they claim to be manifestations of "bad attitude" may simply represent disempowerment due to their social conditions and the feeling – both physical and psychological – that stems from . . . "the cycle that never ends." Disempowerment is expressed through tiredness, lack of energy . . . and lack of desire to work in a way that expresses enthusiasm. But this manifestation of disempowerment is interpreted by managers as a lack of motivation to work, a lack of a "positive attitude," rather than as rooted in disempowerment itself. It becomes a vicious circle. "Bad attitude" is caused by over work, and unfulfilled expectations regarding work. Bad attitude is reinforced by oppressive conditions including low wages and lack of promotion opportunities.<sup>107</sup>

At this juncture, Parker's language and theory should invite Austin's critical interpretations. Yet, Austin refuses this invitation. For me, Parker's language and theory suffer from unexpressed assumptions, a theoretical framework that confirms that ethnologists observe, write, and theorize through socially constructed lenses that inform and influence how they re-present what is real.<sup>108</sup> First, what does motivate mean? What does motivation look like? Second, what does enthusiasm mean? Who determines its content and substantive borders? Third, and most important, what does disempowered mean?

Specifically, does disempowerment affect all poor, low-status workers like wage-earning blacks equally and similarly? If not,

106. Austin, *supra* note 4, at 211-12.

107. *Id.* at 210 (citing Jennifer Anne Parker, *Labor, Culture, and Capital in Corporate Fast Food Restaurant Franchises: Global and Local Interactions Among an Immigrant Workforce in New York City* (1996) (unpublished dissertation)). See NEWMAN, *supra* note 64, at 94. Newman writes:

The fast food industry is actually very good about internal promotion. Workplace management is nearly always recruited from the ranks of entry-level workers. Carefully planned training programs make it possible for employees to move up, to acquire transferable skills, and to at least take a shot at entrepreneurial ownership. McDonald's, for example, is proud of the fact that half of its board of directors started out as crew members. One couldn't say as much for the rest of the nation's Fortune 500 firms.

*Id.*; Austin, *supra* note 4, at 217 ("Managers are drawn from among the ranks of the workers; given the preference for non-black workers there were accordingly few blacks in the management track. Since the managers hire the workers and the Latino and Asian managers sometimes had very limited English skills, they tended to hire their own group.").

108. See Denzin, *supra* note 53, at 408 ("By reality, they reference 'a world of possible things . . . [that] exists prior to its mediation by signs and signs of signs.'").

then why are certain groups of blacks affected? If affected, how do these blacks perceive the world? Does this perception partially explain why they refuse to take personal responsibility for their behavior in the fast food workplace? If so, then how does this mechanism work? How do blacks, hailing from different socio-economic settings, receive this message? If they all receive this message by unique or varied delivery systems, how is it that people like Bill Cosby or Reginald Lewis or Lena Horne or Maxine Waters, all of whom come from different communities and were exposed to different family values, have succeeded? If all blacks directly or indirectly receive this message of disempowerment, can we presume that different existential philosophies or epistemological processes have marginal influence over how blacks make choices in their day-to-day lives? In the end, can we conclude that structural oppression, which exists invisibly within normalized cultural values, expresses itself in part as disempowerment, and therefore white society should not hold blacks morally culpable or ethically responsible for their day-to-day choices, even if they engage in extra-legal praxis as protest against white supremacy?

Equally important, how does Parker's facile use of disempowerment explain the manner in which many African, Caribbean, Asian, and Latino immigrants have succeeded in this country? I do not presuppose by this question that these immigrants do not face racial discrimination.<sup>109</sup> They too suffer unnecessarily under the same racially discriminatory practices that have plagued this country's black, Asian, and Latino citizens.<sup>110</sup> Nevertheless, immigrants (e.g., Dominicans, Haitians, Jamaicans, West Africans, and South Americans) who chain migrate into New York work extremely long hours to meet family needs, especially because they remain ineligible for government benefits that native-born families receive.<sup>111</sup> In addition, legislative assaults against immigrants limit supplemental income streams to the working poor, and as a consequence, Dominican families "have responded to the high cost of living by putting as many of their members into the labor market as they can spare."<sup>112</sup> Not only does Parker's use of disempowerment fail to account for immigrant success, she also fails, as does Austin, to look critically at the different race consciousness attitudes of immigrants.<sup>113</sup>

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109. See Mari Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991).

110. See Reginald Leamon Robinson, "The Other Against Itself": *Deconstructing the Violent Discourse Between Korean and African Americans*, 67 S. CAL. L. REV. 15 (1993).

111. NEWMAN, *supra* note 64, at 192-93.

112. *Id.* at 60.

113. See WATERS, *supra* note 82, at 101 ("Immigrants are more likely than



According to Mary C. Waters,

[T]he immigrants' unique understanding and expectations of race relations allow them to interact with American racial structures in a successful way. Specifically, their low anticipation of sour race relations allows them to have better interpersonal interactions with white Americans than many native African Americans. Because they come from a society with a majority of blacks and with many blacks in high positions, the immigrants have high ambitions and expectations. Yet their experience with blocked economic mobility due to race and their strong racial identities lead them to challenge blocked mobility in a very militant fashion when they encounter it. This combination of high ambitions, friendly relations with whites on an interpersonal level, and strong militance in encountering any perceived discrimination leads to some better outcomes in the labor market for West Indians than for black Americans.<sup>114</sup>

By not critically reading what Parker might have meant by disempowerment, Austin implicitly suggests that this construct operates as an explanatory variable that follows necessarily from structural oppression. At the same time, Austin lets pass the opportunity to look critically at individual attitudes and racial consciousness among native-born blacks and immigrant communities. Equally important, she fails to disaggregate the immigrant community's work ethic, treating them all for purposes of her critique of the fast food industry as monolithic. By ignoring attitudinal differences between immigrants and native-born blacks and by suggesting a unitary work ethics among immigrant communities, Parker's disempowerment provides poor, low-status minorities like wage-earning blacks not only with a vehicle to perceive racial discrimination where perhaps it does not exist, but also with a basis to blame their personality issues on structural oppression. But if disempowerment becomes the causative variable that explains why blacks have bad attitudes and weaken, if not disturbed, states of mind, then how do welfare or better employment opportunities make a difference? Public welfare can help, and yet it can demoralize recipients, leaving the poor temporarily buoyed, perennially and psychologically injured, or both. Equally important, in order to acquire better employment opportunities, poor, low-status workers like wage-earning blacks should think not about the vagaries of structural oppression, but about building marketable talents such as enhanced memories, inventory control, positive interpersonal relations with diverse people, etc. By focusing on these talents and by transferring them to different work settings, blacks could "parlay their 'human

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natives to accept low-wage, low-status jobs because the immigrant's sense of self is not as bound up with the job. Immigrants will judge jobs based on comparisons with the opportunities available to them in their own country.").

114. *Id.* at 7.

capital' into jobs."<sup>115</sup> Yet, by suggesting that disempowerment justifies bad attitudes, then poor, low-status workers may find it easier to think of fast food jobs as de-skilling, bottom rung, and stigmatized work experiences. In so doing, these workers refuse to look at themselves, their thinking, their personality, and their day-to-day choices, even if they know full well that structural oppression may still remain a social "reality."

### B. *Bad Black Customers and Poor Service*

How do ethnographic data aid courts and race scholars in drawing a causal or correlative link between how blacks experience fast food dining and the quality of service that they receive? For Austin, these data provide a complex context, so that we can understand a black person's expectation when she takes her family, rather infrequently, to a fast food restaurant. Given these data, Austin reveals how nuanced and complex that experience might be, especially because social, economic, race, and personality variables all come into contact. Yet, it is still unclear exactly how a court might use these data so that legal analyses and holdings move beyond traditional doctrinal application. As Austin certainly points out, ethnographic data problematize any hard conclusion that race may not factor into how fast food restaurants treat black customers.<sup>116</sup>

By relying on ethnographies, Austin recreates the complex context out of which tensions arise between black customers and fast food restaurants. Given their socio-economic circumstances, blacks infrequently patronize fast food restaurants. When they do, it is a very special family moment, which they hope will be devoid of the problems they might face at a full-service restaurant. Moreover, blacks seek an egalitarian experience, perhaps where they do not have to wonder unnecessarily about how a server might treat them, seat them, respond to their needs, or relate to them generally. Like most others, blacks would prefer to eat in relative safety, treating fast food restaurants near and far as oasis.<sup>117</sup>

In some cases, however, they co-created what they considered poor service, attributing some if not all of it to racially discriminatory practices. Therefore when they were displeased, having gone to such expense or having traveled very far, they took legal action or openly expressed their ire.<sup>118</sup> Not all such instances were racially motivated. Some fast food restaurants had policies against too many orders at the drive-through window,<sup>119</sup> and in one

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115. NEWMAN, *supra* note 64, at 148.

116. Austin, *supra* note 4, at 239.

117. *Id.* at 224-227.

118. *Id.* at 227-33.

119. *Id.* at 231-32 (citing *Wells v. Burger King*, 40 F. Supp.2d 1366 (N.D.

of Austin's examples a fast food restaurant denied a black customer use of its bathroom because it was broken.<sup>120</sup> Apart from the obvious cases of racially discriminatory practices, black customers truly believed that they had suffered not just poor service but illegal treatment. The ethnographic data contextualize why blacks may react with such animus if they feel that they suffered this illegal treatment. This context bears directly on structural oppression, on racial discrimination, and on perceptions held by both blacks and whites. What Austin does not tell us is how ethnographies, especially in cases where blacks may have misperceived their experiences, could better correlate thinking, acts, and experiences. We do not know how courts and race scholars can use instances where blacks suffered needless discriminatory practices and where blacks perhaps misperceived their experiences to move toward racial healing. Instead, Austin leaves it to us to wonder how better to prove that poor service could be racially discriminatory.

In writing race ethnography, it is vitally important that we look critically and analytically at blacks, whites, and others. Given the work of race scholars, we have learned the many intimate and subtle ways in which structural oppression and racial discrimination might work. Nevertheless, we must continue to study the manifold ways in which industries like fast food might engage in such practices, especially where this industry might work to discourage the patronage of black customers who might frighten white customers elsewhere.<sup>121</sup> However, as I argued earlier, by focusing only on structural oppression as if it causally injures historically marginalized people like blacks, we simply miss the larger point. As Austin's work clearly shows, corporate structure has recruited immigrant workers, and by organizing their workplace along informal networks, even if for efficiency purposes, the fast food industry diminishes employment opportunities for poor, low-status workers like blacks. I would argue that the larger point includes a critical, analytical inspection of how such workers participate in their own oppression, principally by looking at how they think, use, and act on race.<sup>122</sup> Race scholars should also study how these factors inform workers' racial identity and influence how they interpret their day-to-day

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Fla. 1998)).

120. *Id.* at 228-29 (citing *Perry v. S.Z. Restaurant Corp.*, 45 F. Supp.2d 272 (S.D. N.Y. 1999))

121. *Id.* at 239.

122. See Reginald Leamon Robinson, *The Shifting Race-Consciousness Matrix and the Multiracial Category Movement: A Critical Reply to Professor Hernandez*, 20 B.C. Third World L.J. 231, 236 (2000) ("[D]oes race necessarily have an essential meaning outside of how we think, use and talk about race? I think not! Thinking, talking, and using give race its life force, content, and meaning (e.g., racism)").

reality.<sup>123</sup> By relying on ethnographies to understand this thinking by blacks, whites, and others, race scholars can develop a much more complex and highly nuanced understanding of racial oppression. Despite the article's great work, Austin leaves us only with a traditional approach to racial oppression—that which runs from whites to blacks, from the oppressors to oppressed.

When I argue that ethnographies could help us better understand the phenomenon of the "bad black customer," I mean that these sociological and anthropological studies could develop models for critically understanding race consciousness. By race consciousness, I mean that America conditions its citizens to identify with a racial group, and by so identifying, a black person, for example, can be influenced to think of herself as inferior. And this negative self-esteem can affect how she relates not only to herself and to other minorities but also whites. Sometimes a person may be unaware that she thinks poorly of herself, and sometimes a person may openly assert a positive or negative idea of herself. She may at times hold positive, negative, and neutral images of herself.<sup>124</sup> What is most important is that a race consciousness originates in a specific social context like slavery, Jim Crow politics, and racial discrimination.<sup>125</sup> Ultimately, lynching, ghettos, poor education, black-on-black crime, broken families, and self-hatred must have spawned a quality of race consciousness quietly harbored and openly hawked by blacks too.<sup>126</sup>

How does this race consciousness by blacks work with ethnographies about the fast food industry? It would appear that they could help courts and legal scholars understand how such thinking about racial identity influences particularized

123. Cf. MICHAEL A. GOMEZ, *EXCHANGING OUR COUNTRY MARKS: THE TRANSFORMATION OF AFRICAN IDENTITIES IN THE COLONIAL AND ANTEBELLUM SOUTH* (1998) (looking at history to 1830, the author examines the transformation of slaves from an African cosmology to an identity forged out of their slave experiences; how this new identity influenced how they interpreted their reality; and how this new interpretation was passed on to their descendants).

124. Janet E. Helms, *Introduction: Review of Racial Identity Terminology*, in *BLACK AND WHITE RACIAL IDENTITY* 3, 7 (Janet E. Helms ed., 1990).

125. See generally F. JAMES DAVIS, *WHO IS BLACK? ONE NATION'S DEFINITION* (1991).

Anyway, black people are all colors. White people don't look all the same way, but there are more different kinds of us than there are of them. . . . Many of the white people I see are black as far as I can tell by the way they look. Now, that's it for looks. Looks don't mean much. The things that makes [sic] us different is how we think. What we believe is important, the ways we look at life.

*Id.* at 1.

126. See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

experiences.<sup>127</sup> Consider Michael Talbot's point that we impose our preconceived notions on an event or thing, thus never experiencing anything but our prejudices.<sup>128</sup> Although she examines structural oppression of and racial discriminatory practices against poor, low-status workers like blacks and black customers, Austin leaves this vitally important, but integral, inquiry outside of her article's scope. Nevertheless, we must look askance at easy moves, undoubtedly governed by a race consciousness, that lead black customers to conclude that racism determines experiences and justifies their righteous indignation. It must be the case that due to the ubiquity of race in our culture, fast food employees may hold unconscious, even unintentional, racist motivations.<sup>129</sup> At this level of the unconscious, the behavior that leads to poor service or that constructs them as "bad customer" might not be actionable. If true, then why are black customers much more willing to see racism as a better explanatory variable?

As Austin correctly points out, we may have real difficulty discerning between misunderstandings about and overreactions to poor service.<sup>130</sup> What then is a bad black customer? Equally important, what is poor service? These questions mimic earlier questions: what is motivation or enthusiasm or bad attitude? As such, if we cannot easily distinguish between bad service that moves from a racial animus, then should we be equally interested in why blacks wish to see racism and discriminatory service where it may not at the very least consciously operate? As Charles Lawrence aptly argues, racism affects us all, and if true, then it would certainly appear that blacks carry this social toxin.<sup>131</sup> Equally important, it could color their perspective so that by thinking that a thing is present, then it is present.

As such, can we properly ask: is that which is like unto itself drawn?<sup>132</sup> Do thoughts create reality?<sup>133</sup> Are highly emotional thoughts, whether positive or negative, responsible for our experiences?<sup>134</sup> In modern physics, based on Carl Jung's

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127. See generally THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTION (1972).

128. See TALBOT, *supra* note 46, at 3.

129. See generally Oppenheimer, *supra* note 16.

130. Austin, *supra* note 4, at 232.

131. Lawrence, *supra* note 16, at 326 ("We cannot be individually blamed for unconsciously harboring attitudes that are inescapable in a culture permeated with racism.").

132. See generally JERRY HICKS & ESTHER HICKS, ABRAHAM SPEAKS: A NEW BEGINNING I, 18 (1996) ("That which is like unto itself is drawn.").

133. See FRITJOF CAPRA, THE TAO OF PHYSICS 28-9 (1975) ("Because one representation of reality is so much easier to grasp than reality itself, we tend to confuse the two and to take our concepts and symbols for reality.").

134. See *id.* According to the text,

It is of great value for you to understand the *Law of Attraction*, for it is not your friend, or your enemy, it just is. It will attract more of

proposition,<sup>135</sup> this phenomenon by which we link or correlate apparently external reality with distinctly internal thought is called “non-local phase-lock over space-like intervals.”<sup>136</sup> For some, this principle of creation is called the “Law of Attraction.”<sup>137</sup> Carl Jung called this phenomenon “synchronicity.”<sup>138</sup> In any event, how are blacks, who fear that they will be maltreated, and whites, who expect blacks to act uncivilized and rudely, creating experiences in which they import these fears and expectations? Can we ask whether blacks and whites, at the very least, believe a priori that an experience will occur and, in so doing, create (or see) it?<sup>139</sup> If I have asked a proper theoretically testable question, then it would appear that ethnography can assist us in understanding how structural oppression like white supremacy and day-to-day experiences like racially discriminatory practices conjoin naturally with a racialized consciousness? By addressing this question seriously, we might learn that structural oppression depends on manifold forces in order for it to have any significant meaning in our lives. In the end, we might conclude, however disconcertedly, that white supremacy and black inferiority, that white racism and black victimization, require an intimate, interdependent

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whatever you are thinking to you. As you are thinking in the direction of that which is wanted, or that which you may term a positive thought—the *Law of Attraction* will bring to you more thoughts that are in harmony with that. And as you are considering or pondering that which you do not want—the *Law of Attraction* will, in the same way, bring to you other negative thoughts that will enhance the original thought.

*Id.* at 17-18.

135. CARL G. JUNG, *ANALYTICAL PSYCHOLOGY: ITS THEORY AND PRACTICE* 36 (1968) (citing Carl G. Jung, *Synchronicity: An Acausal Connecting Principle*, in *COLLECTED WORKS OF CARL G. JUNG*).

136. GARY ZUKAV, *THE DANCING WU LI MASTERS: AN OVERVIEW OF THE NEW PHYSICS* 298 n.† (1979)

When separate parts at one level of reality interact with each other by the exchange of signals, i.e., forces, they (their separate wave functions) become correlated at the next higher level of reality. In this way, they are no longer really ‘separate part,’ appearances on the lower level to the contrary.

137. See Hicks & Hicks, *supra* note 132. According to the text:

*Once one of your beliefs has surfaced, that belief, or thought – for a belief is nothing more than a thought that you have thought before, that you continue to think – that thought will attract other thoughts that are like it. It is what we call the ‘Law of Attraction.’*

*Id.* at 17 (italics in the original text).

138. See ROBERT H. HOPCKE, *THERE ARE NO ACCIDENTS: SYNCHRONICITY AND THE STORIES OF OUR LIVES* 26 (1997) (synchronicity means “the simultaneous occurrence of two meaningful but not causally connected events.”).

139. See ORNSTEIN, *supra* note 74. at 18 (“Once a friend unwittingly emphasized this [process of limiting our ordinary consciousness] to me by saying: ‘I’ll see it when I believe it.’”).

relationship between at the very least blacks and whites.<sup>140</sup>

Given that minorities do succeed in a nation rife with racial prejudice, it must follow that structural oppression, albeit injurious, cannot explain the day-to-day choices that blacks and other minorities make. It equally cannot guarantee whites economic success. After all, white citizens occupy lower socio-economic status too. By looking to ethnographies, legal scholars can learn the manner in which structural oppression and race discrimination work in our daily lives, but a structural analysis alone simply encourages us to continue the cause-effect thinking of racial oppression. Whether we rely on ethnographies or other social science data, what do we get, especially race scholars, by holding on to the notion that structural oppression (cause) victimizes blacks (effect)? How does this cause-effect logic of structural oppression enable legal scholars, especially Race Critics, to think beyond the current paradigm that white racism singularly oppresses and violates blacks and other minorities? According to Robert H. Hopcke,

[C]ausal thinking seduces us into an illusion of complete power over our surroundings and enhances our sense that we are in control of our destiny, a vision quite flattering to our own egos. Cause-and-effect thinking enables us to feel in control, to split ourselves off from the world "outside" and operate upon it. In this causal worldview, we are limited only by the consequences of our actions, but if we accept the consequences of our actions, then act we may, and freely.<sup>141</sup>

As Hopcke more than suggest, the cause-effect dichotomy does not actually exist. Yet, let us hypothesize for this analysis that it does. Why then, we must ask, in the case of structural oppression, does cause-effect thinking empower whites? Why not for blacks too? This cause-effect thinking suggests that whites have a greater ability to determine their life's fortunes by organizing a society that damages the life chances of others. How are blacks or other minorities served by cause-effect thinking? Are they flattering or failing their egos? Hopcke makes a perhaps indisputable point when he argues that cause-effect thinking allows people, especially in the West, to split themselves off from the world and to operate on it. In the context of structural oppression, do blacks wish to state that their reality remains at an arms-length distance from us, and to this extent blacks have no control over it.<sup>142</sup> If they adhere to this Neo-Cartesian proposition,

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140. Cf. CAPRA, *supra* note 133, at 141 ("In atomic physics, then, the scientist cannot play the role of a detached objective observer, but becomes involved in the world he observes to the extent that he influences the properties of the observed objects.").

141. *Id.* at 27.

142. See CAPRA, *supra* note 133, at 141. Capra writes that:

blacks must also assert that they cannot change a structurally oppressive environment because social reality acts upon them. Thus reality exists objectively, externally. Yet, if the world depends on cause-effect logic, why not act with the force to alter how race functions in our society? Why not act without regard to race, so that it has no force in a given individual's life?<sup>143</sup>

Given Hopcke's argument and Austin's project, it would be difficult to use ethnographies effectively, especially in light of her hypothetical discussion,<sup>144</sup> if we simply assert that the fast food industry engages in policies that shield structural oppression from legal redress by the manner in which this industry hires workers, promotes workers, and deals with black consumers. Fortunately, many race scholars like Kimberlé Crenshaw have already taken up this theoretical proposition.<sup>145</sup> By taking this ethnographic approach, legal race scholars will certainly learn a great deal from Austin's article. However, she did not equip us to use ethnographic data to ask critical, testable questions that take us beyond simple constructs: white racism oppresses blacks and other minorities. Structural oppression violates historically marginalized citizens like blacks.

Without this equipment, I must wonder how much more will race scholars learn. As such, research questions that arise within this construct may reveal subtle ways in which structural oppression might work. Many race scholars already live within this construct, and perhaps as a consequence we cannot effectively get beyond it.<sup>146</sup> We have become quite adept at asking questions that have not yet convincingly breached its outer shell. Although race scholars have researched within this construct, will they get beyond the cause-effect logic of structural oppression? Do they

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Mystical knowledge can never be obtained just by observation, but only by full participation with one's whole being. The nation of the participator is thus crucial to the Eastern world view, and the Eastern [mystics] have pushed this nation to the extreme, to a point where observer and observed, subject and object, are not only inseparable but also become indistinguishable.

*Id.*

143. Cf. TALBOT, *supra* note 46, at 3 (“[A]s Princeton physicist John A. Wheeler suggests, we must replace the term ‘observer’ with the term ‘participator.’ We cannot *observe* the physical world, for as the new physics tell us, there is no one physical world. We participate within a spectrum of all possible realities.”) (citation omitted) (italics in original text).

144. See Austin, *supra* note 4, at 238-39.

145. See Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

146. ORNSTEIN, *supra* note 74, at 39-40 (“Our ‘agreement’ on reality is subject to common shared limitations that evolved to ensure the biological survival of the race. All humans may agree on certain events only because we are all similarly limited in our very structure as well as limited in our culture.”).



wish to take this courageous step? Are race scholars simply interested in finding very complex, but reliable, tools on which they can base their claims that white racism *explains* black oppression and *causes* the day-to-day life choices of historically oppressed minorities? Or will we bravely ask how do poor, low-status workers like wage-earning blacks contribute to their racialized experiences by holding onto beliefs even if they produce ill effects?<sup>147</sup> I think not!

#### CONCLUSION

In *Contextual Analysis*, Austin pursues several goals in relying on ethnographic studies: to glean an understanding of racial discrimination that black workers and customer face in fast food restaurants; to examine legal actions brought by these blacks, by use of ethnographies to deconstruct legal decisions, and show how cases problematize ethnographies; to conjoin legal decisions and ethnographies as a way to provide thick, legal contextual analysis of how blacks get constructed as “bad for business”; and to explore how ethnographies and legal decisions serve as gateways for exploring the impact of racial stereotypes in economic transactions.<sup>148</sup> Regardless of whether Austin specifically addresses the issues that I raised in this reply, she writes within a progressive jurisprudential tradition that consistently deconstructs text, so that we can better appreciate the meta- and subtext of legal rulings. As a result, Austin’s article should broaden our thinking and analysis not only of legal decisions but also institutional practices within the fast food industry. And to the extent that we can draw inferences from her work, we can then look at other institutional practices. In this way, Austin’s work invites us to study ethnographic works so that we can perhaps better understand legal decisions, and so that we can pursue rigorously “law and” scholarship in meaningful ways.

Yet, did Austin draw a very clear nexus between ethnographic data and how courts can effectively use these data on which to rely to grant credence to black perspectives, ones perhaps driven by their special ability to detect racially discriminatory behavior?<sup>149</sup> Sadly, she did not. Keep in mind that, in reaching this conclusion, I do not embrace what would be Daniel Farber and Suzanna

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147. See BOHM, *supra* note 79, at 10-11 (Bohm means that: “*thought doesn’t know it is doing something and then it struggles against what it is doing*. It doesn’t want to know that it is doing it. And it struggles against the results, trying to avoid those unpleasant results while keeping on with that way of thinking. That is what I call *sustained incoherence*.”).

148. Austin, *supra* note 4, at 209-11.

149. *Id.* at 238-39 (“Yet many blacks believe that they can detect racially discriminatory behavior when they experience it, though convincing a court or jury of this is quite difficult.”).

Sherry's position: Austin argues for legal recognition of a minority person's positionality, one that turns not on legal fact but on personal subjectivity.<sup>150</sup> Rather, I ask this question and reach this conclusion because given her project, Austin should have taken up this task much more explicitly as she sought to guide both the general reader, the race scholar, and the courts toward the justifiable and legally relevant use of ethnographic data. After all, Austin argues that a fast food restaurant's doubtful "conduct should be viewed in the context of the competitive or economic position of the particular restaurant, the entire chain, or the industry in general in order to determine if racism of an institutional nature was operating."<sup>151</sup> If structural oppression leaves discernible, direct or circumstantial footprints,<sup>152</sup> Austin could have better served courts and legal scholars by using ethnographies to guide us critically, analytically, and methodologically toward an evidentiary admissible nexus so that we can causatively or correlatively link these footprints to illegal behavior or to discriminatory impact.

Equally important, Austin did not move us beyond the cause-effect logic of structural oppression, although it was perhaps her goal to expose the manner in which such oppression operates invisibly before courts. As Austin points out, fast food restaurants directly defeat a black customer's claim of racism, and they advance arguments that render such claims debatable.<sup>153</sup> Does the claim prove the underlying substantive violation? No. Who then should the courts believe? Do blacks have a special sense for knowing when they have suffered not bad service but discriminatory practices? If past experiences condition people to view a world through categories that limit awareness, then blacks may overreact, misunderstand, and misinterpret.<sup>154</sup>

Accordingly, I take the position that blacks may experience racism because they expected it.<sup>155</sup> My position does not negate

150. See Farber & Sherry, *supra* note 52; Robinson, *supra* note 51 (critiquing Farber and Sherry's methodological attack on Critical Race Theory).

151. Austin, *supra* note 4, at 235-36.

152. *Id.*

153. *Id.* at 228.

154. ORNSTEIN, *supra* note 74, at 52. Based on the Jerome Bruner, Roger Sperry, and Leon Festinger proposition that awareness depends solely on output regardless of input, Ornstein writes:

[I]f you are "ready" to see a black ace of spades or a red ace of hearts when a red ace of spades is shown, you will see one of the two choices you have set for yourself. Or, if you are "ready" to make a straight eye movement in response to a curved line, you will see the curved line as a straight line.

*Id.*

155. See *id.* at 54 ("Our thoughts are transitory, fleeting, moving from one idea, object, image to another; yet it is always the same consciousness that flows from experience to experience. More than any other factor, thoughts are

racism. It also does not justify racism or discriminatory practice.<sup>156</sup> Nevertheless, institutional racism within an industry should not create the idea that a fast food restaurant's bad service must perforce be racially motivated. To do so, would be to embrace an ecological fallacy.<sup>157</sup> Austin acknowledges this point when she argues that discriminatory practices get expressed with subtlety.<sup>158</sup> If we grant that such racism arrives quietly and injures subtly, then we should also ask whether blacks contribute to their experiences by expecting whites to act discriminatorily. We do comfortably assert that whites categorize blacks as aggressive and as hostile actors.<sup>159</sup> If whites can operate on expectations, however unconscious, can blacks suffer from the same disability? Given her writings within a progressive jurisprudential tradition, Austin's work would have violated traditional race scholarship if she had demanded that race scholars take up this critical inquiry. In so doing, she would have explored a naggingly stubborn paradigm in grand Galilean fashion.

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the foundation of normal consciousness.") See also BOHM, THOUGHT AS SYSTEM, *supra* note 20, at 8 (By thought, Bohm, refers to how we think, and how such thinking becomes recorded in our brains. Thought influences our perception, even though we cannot detect its present impact. "Thought is active.")

156. Robinson, *supra* note 6, at 182. On this point, I have argued that:

At present, blacks place responsibility for their day-to-day experiences on whites and racial oppression. What if the source of how they experience whites and America's policies rests with their expert knowledge of race and its consciousness? This question does not absolve white Americans of their willful ignorance of how their choices and policies affect minorities, women, and the poor. How long will blacks wait for whites to take personal responsibility for their [choices]...before they place their under erasure? How long will blacks force their children to experience the limits of a racialized expert knowledge, thus requiring them to revive the impotence of their parents?

*Id.*

157. BLACKWELL DICTIONARY OF SOCIOLOGY, *supra* note 70, at 174 (The ecological fallacy "occurs if differences observed among aggregates such as communities are used to infer that comparable differences exist among individuals.")

158. Austin, *supra* note 4, at 235-36.

159. ORNSTEIN, *supra* note 74, at 47. According to Jerome Bruner:

We develop stereotyped systems, or *categories*, for sorting input. The set of categories we developed is limited, much more limited than the input.... In social situations, the categories may be personality traits. If we categorize a person as "aggressive," we then consistently tend to sort all his actions in terms of this category.

*Id.*



