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DISCOURSES OF ORDINARY JUSTICE: CONFIGURATIONS OF LEGAL AND  
LITERARY DISCOURSE IN LATE NINETEENTH AND EARLY TWENTIETH-  
CENTURY AMERICAN LITERATURE

by

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## ABSTRACT OF THE DISSERTATION

Discourses of Ordinary Justice: Configurations of Legal and Literary Discourse in Late  
Nineteenth and Early Twentieth-Century American Literature

By TRINYAN PAULSEN MARIANO

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In *Discourses of Ordinary Justice*, I read fiction by Charles Chesnutt, Edith Wharton, and Richard Wright as engaging with the most pressing legal issues of the early twentieth century: injury and compensation, the nature of privacy, and the legality of segregation. In my first chapter, I argue that *The Marrow of Tradition* by Charles Chesnutt represents a rare early twentieth-century attempt to think through the legal arguments surrounding tort-based reparations for slavery. In my second chapter, I argue that through her fiction's preoccupation with the sale of personal letters, Edith Wharton created a counter-discourse to the common law right to privacy that emerged at the beginning of the twentieth century. While the legal right to privacy claims to keep the public from accessing a protected sphere of domesticity, Wharton's fiction shows how privacy rights actually enable one to manage the circulation of one's own public image, converting domesticity

into valuable public currency and creating a lucrative market for blackmail. In my final chapter, I read *Native Son* alongside Legal Realism, a controversial jurisprudential movement of the 1930s, in order to recover Wright's critique of *de facto* segregation and the rhetoric of neutrality surrounding the production of American law. I argue that, using the interpretive strategies of the Legal Realists, Wright exposes laws protecting real property as a sublimated system of racial segregation.

*Discourses of Ordinary Justice* uses early twentieth-century American fiction to depict the shaping power of contexts and arguments weeded out of turn-of-the century legal discourse. These contexts and arguments, rendered invisible by formal legal discourse, subsist in literature that represents the multiple and conflicting legal arguments un-reconciled by formal decrees. Through analyzing fiction written by authors who theorize the limits of the law, I take literary texts seriously as documents of legal history that call attention to the mutability of law's conceptual boundaries and enable us to re-embed law in society.

## Dedication

This dissertation is dedicated to Tom and Landon Mariano, the beloved husband and son whose support and encouragement made it possible.

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## INTRODUCTION

*Legal interpretation takes place in a field of pain and death.* ~Robert Cover

Law, say the gardeners is the sun

Law, say the gardeners, is the sun,  
Law is the one  
All gardeners obey  
To-morrow, yesterday, to-day.

Law is the wisdom of the old,  
The impotent grandfathers shrilly scold;  
The grandchildren put out a treble  
tongue,  
Law is the senses of the young.

Law, says the priest with a priestly look,  
Expounding to an unpriestly people,  
Law is the words in my priestly book,  
Law is my pulpit and my steeple.

Law, says the judge as he looks down  
his nose,  
Speaking clearly and most severely,  
Law is as I've told you before,  
Law is as you know I suppose,  
Law is but let me explain it once more,  
Law is The Law.

Yet law-abiding scholars write:  
Law is neither wrong nor right,  
Law is only crimes  
Punished by places and by times,  
Law is the clothes men wear  
Anytime, anywhere,  
Law is Good morning and Good night.

Others say, Law is our Fate;  
Others say, Law is our State;  
Others say, others say  
Law is no more,

Law has gone away.  
And always the loud angry crowd,  
Very angry and very loud,  
Law is We,  
And always the soft idiot softly Me.

If we, dear, know we know no more  
Than they about the Law,  
If I no more than you  
Know what we should and should not do  
Except that all agree  
Gladly or miserably  
That the Law is  
And that all know this  
If therefore thinking it absurd  
To identify Law with some other word,  
Unlike so many men  
I cannot say Law is again,

No more than they can we suppress  
The universal wish to guess  
Or slip out of our own position  
Into an unconcerned condition.  
Although I can at least confine  
Your vanity and mine  
To stating timidly  
A timid similarity,  
Like love I say.

Like love we don't know where or why,  
Like love we can't compel or fly,  
Like love we often weep,  
Like love we seldom keep.

W.H. Auden



Robert Cover's reminder that the practice of legal meaning-making involves violence is often used to assert law's fundamental difference from literature. With rare exceptions, the coercive effect of literature on individuals is, at best, indirect, whereas the language of a formal legal text is performative; its conclusions are enacted and so play an integral role in "justif[ying] violence which has already occurred or which is about to occur" (*Violence and the Word* 144). As Cover has explained, "legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. [. . .] When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence" (144). Because of these stakes, legal rhetoric is tightly constrained and carefully policed. On the other hand, literature, as Jonathan Culler has written, is "based on the possibility of saying anything you can imagine . . . [F]or any orthodoxy, any belief, any value, a literary work can mock it, parody it, imagine some different and monstrous fiction" (40). Where literature is exploratory, hypothetical, and self-consciously creative, law is highly regulated and driven by the need for restraint, consistency, and reliability. The law's connection to the violence used to achieve social control renders it fundamentally different from literature.

While legal norms insist upon consistency and regularity, Auden's poem provides an alternative perspective on the rhetorical foundation and exercise of legal authority. I present the poem, along with my reading, to demonstrate the kind of insights that literature can offer our understanding of law. I read Auden's first six stanzas as constituting a catalogue of Western legal theory, representing the different grounds that

have historically been used to define and legitimate law—the very variety of which undercuts law’s claim to rigidly controlled borders.

The gardeners of the first stanza represent the theory of natural law in which authority is obtained from universal, unchanging principles of nature.<sup>1</sup> The second stanza depicts the tension between common-law theorists, who base authority on custom—the “wisdom of the old”<sup>2</sup>—versus those who originate authority in common “sense” and so claim the ability to tailor legal principles to fit contemporary times.<sup>3</sup> The priest of the third stanza centers law on religious authority, rooted in scripture and revelation. The tautological judge in the fourth stanza, explaining circularly “Law is The Law,” represents legal positivism, the theory that law conforms to no extrinsic moral standard, but is law purely by virtue of having been posited as such—i.e., law is what judges say it is.<sup>4</sup> The scholars in the fifth stanza depict the sociological approach in which law is a function of the broader social context, contingent on and emerging from “places” and “times”—the socio-historical moment. In the sixth stanza, Auden broadens his catalogue to include voices advocating anarchy (“law is no more”), democracy (“Law is We”), and liberalism (Law is “Me”).

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<sup>1</sup> Auden’s phrasing—law as the “one” all obey, the same “to-morrow, yesterday, to-day”—echoes William Blackstone, whose *Commentaries* had the status of law in the United States during the 18<sup>th</sup> century: “This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding all over the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original” (31).

<sup>2</sup> See, for example, Judge Learned Hand writing in 1922: “[Common law] stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built upon the relics which his predecessors left, and in his turn left a foundation upon which his successors might work” (479).

<sup>3</sup> Thomas Jefferson put the position succinctly in 1812: “Common sense [is] the foundation of all authorities, of the laws themselves, and of their construction” (ME 18:92). This is the argument that U.S. courts used throughout the Nineteenth Century to deviate from the inherited common law of England and establish uniquely American law.

<sup>4</sup> See, for example, John Austin who is credited with popularizing legal positivism. In 1832 he wrote: “The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry” (157).

Auden's portrayal of the range of theories grounding law incorporates three key insights. First, although the popularity of these different legal theories emerged at particular historical moments, and although the theories represented in the stanzas do appear roughly to follow that chronology, they do not represent an evolution or progression, but are a myriad of simultaneous voices insisting on what are mutually exclusive definitions of law. Though Auden's poem was published some four decades before Robert Cover's landmark essay "Nomos and Narrative," Auden prefigures Cover's insight into the pluralistic universe of American law, characterized by multiple systems of overlapping and sometimes conflicting law. The effect is a sense of clamoring confusion, heightened by the fact that Auden does not sift through these theories. He refrains from critiquing them—or, more correctly, the criticism he levels applies equally to all of them. Second, Auden demonstrates that each theoretical position is embodied. Law is, in each instance, *interested*—made in the image of those evoking it. It is then no surprise that the gardener defines law as natural, the priest defines law as scripture, and the crowd defines law as "We." By insisting on the self-interested figure standing behind each theory, Auden displays the contentious political battlefield out of which the purified, abstract legal doctrine is produced. Third, despite portraying law as unsettled and motivated by self-interest, Auden maintains the certainty of being subject to the law. Though "we know no more/Than they about the Law," the undeniable reality remains, simply that "law is/And that all know this." Law "is," not metaphysically, but empirically. Thus Auden insists on the irony of law's coercive ubiquity and simultaneous indeterminacy.

Confronting many equally (in)valid, equally self-interested, mutually exclusive claims to authority, the speaker in the final two stanzas does not reject all, does not choose one, and does not offer another theory, nor does s/he raise a lament about the terrible gap between the certainty implied by legal rhetoric and the messy indeterminacy of legal reality. Instead, s/he attempts to make sense of indeterminacy itself, of the fact that all know *that* “law is” while none finally know *what* law is. Choosing not “to identify Law with some other word,” in the penultimate stanza the speaker offers instead a “timid similarity”—a simile in place of what had been metaphor. In what constitutes a rejection of the deductive logic of equivalence, the final stanza abstains from the word “is” and all other forms of the verb “to be.” Instead, the word “like” replaces “is,” opening each of the five concluding lines, drawing our attention away from the content of the law and directing it towards the figurative language through which it is constructed and endowed with meaning. As metaphor, law asserts certainty, tight equivalences, and directional lines of logical entailment. As simile, law moves closer to that realm usually associated with literature, that of ambiguity and imaginative possibility.

Auden’s poem, then, embraces the fact that law happens on a “field of pain and death” but also offers insight into the nature and function of law, an insight that rests on the difference between two figures of speech. Unlike the metaphor which “identifies one object with another,” the simile compares “two things essentially unlike.” Thus it is no simile to say “my house is like your house” (Holman, *A Handbook to Literature*). A simile’s comparison is incomplete, ambiguous, and maintains difference even as it asserts a kind of similarity. My dissertation aims at a version of Auden’s simile “law like love.” Auden’s comparison represents the kind of challenge that literature offers law, a

challenge that cannot exist within law proper because law's rhetorical boundaries are designed to prevent it. My perspective on the connection between law and literature insists on a constructive similarity, possible only because it maintains difference. From this perspective, legal and literary discourse are able to critique and question each other. As Brook Thomas has explained, "it is precisely [the differences between law and literature] that make it productive to place legal and literary documents in relation to one another, not to merge them, but to interrogate and cross-examine one another" ("Reflections," 532).

In this dissertation, I turn to novels from the first half of the twentieth century to chart the potent legal discourse that circulates between legal and literary fields. Literature is especially relevant at this moment in legal history, which was marked by a confluence of doctrinal flux and discursive practices designed to deny the possibility of flux—legal instability in the midst of legal rhetoric that rejected change. This period encompasses two world wars and was a time during which American law strained to deal with the domestic challenges posed by industrialization, urbanization, and racial integration, while struggling to respond to growing international threats. Despite, and perhaps because of, the demands made on American law to respond to radical economic and social transformation, this was a period of conservative formalism in legal discourse. As lawmakers expanded the law to cover new challenges, they also adopted a very narrow set of reading and meaning-making practices. My dissertation shows how charting legal discourse as it appears in literature gives us a vantage point unavailable from within formal legal rhetoric, a vantage point that opens up a broader view of the actual processes of legal meaning-making and illustrates how the formal discourse of the

time both belies this broader operative context and serves as a protective counterbalance, providing a rhetorical semblance of stability in the midst of legal change.

With the goal of making law into a science, practitioners of the formalist legal rhetoric of the late nineteenth and early twentieth centuries deliberately weeded out historical context, and other outside aids, as guides to interpretation and application, preferring instead a standardized and deductive process of legal argumentation that many have since deemed mechanical. However, the context, sources, and arguments that were systematically squeezed out of formal legal discourse were not lost altogether. A foundational claim of my dissertation is that these outside contexts, sources, and arguments remained potent and are recoverable in the literature of the time. My dissertation takes three of the period's most problematic and unstable legal issues—the emergence of tort law as a model for assessing liability, the creation of a right to privacy, and the growth of legally sanctioned racial segregation— and locates legal discourses about these issues in the novels of Charles Chesnutt, Edith Wharton, and Richard Wright. In doing so, I offer new readings of the novels and insight into the law that is unavailable in the legal texts.

#### THE LAW AND LITERATURE MOVEMENT

The law and literature movement, defined in *West's Encyclopedia of American Law* as “an interdisciplinary study that examines the relationship between the fields of law and literature,” is typically seen as emerging in 1973 when James Boyd White published *The Legal Imagination*, but too little attention is given to the historical conditions facilitating that movement. Some scholars give a cursory nod to law and literature's “prehistory” that tends to include such scattered forerunners as Benjamin

Cardozo, John Henry Wigmore, and Ephraim London,<sup>5</sup> but as a school of thought, law and literature is seen as a field coalescing throughout the 1980's and 90's, spawning scholarly associations such as The Society for the Study of Law, Culture, and the Humanities, as well as several dedicated journals.<sup>6</sup>

Judge Richard Posner, a staunch critic of law and literature approaches, attributes the law and literature movement of the 80's and 90's to economic forces, primarily the shrinking job market for the humanities and the coinciding expansion of the size and enrollment in law schools. He argues that, faced with bleak employment options, many graduate students of literature turned to law school, bringing their literary acumen and interest with them. At the same time, under economic and professional pressures, more and more lawyers, law students, and judges were leaving the profession and exploring other fields.<sup>7</sup> The market for popular fiction about law was also expanding, drawing in some of these once-lawyers and creating the "breed of lawyers-turned-novelists" (Duong 5) such as Scott Turow, John Grisham, James Alan McPherson, Richard North Patterson, Louis Auchincloss, Lisa Scottoline, David Baldacci, Robert K. Tanenbaum, and others.

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<sup>5</sup> See, for example, Musante 856-857. Richard H. Weisberg gives more than a nod, tracing the roots of the law and literature movement to John Henry Wigmore (29). For a new and alternative view that has yet received little critical attention, see Kieren Dolin's *A Critical Introduction to Law and Literature*, in which he identifies a different set of intellectual precursors, namely Kenneth Burke and Wayne Booth, who, like James Boyd White, pursued humanistic approaches to reading and writing at the University of Chicago in the 1970's (22-23).

<sup>6</sup> A quick look at the three journals dedicated to law and literature illustrates just how broad and varied is the domain. The *Yale Journal of Law and the Humanities*, which started in 1988, covers topics ranging from a rhetorical examination of the use of metaphor and metonymy in the law of takings (Halper), to a sociological analysis of industrialization and the origins of the juvenile justice system (Greene), to a comparison of the legal philosophy of John Stuart Mill and Oliver Wendell Holmes (Cate). The *Cardozo Studies in Law and Literature*, which began a year later in 1989 and changed its name recently to simply *Law and Literature*, is the most traditionally "literary," but still spans from publishing a symposium dedicated to the legal relevance of Melville's *Billy Budd* (vol. 1 (1989)), to a study of the civic discourse on campaign finance reform (Eisenberg), to an analysis of the "Cinematics of Jurisprudence" (Mussawir). The relatively recent *Law, Culture, and the Humanities*, which began in 2005, is the broadest of all, ranging from topics such as the use of parables in Clint Eastwood's *Mystic River* (Berkowitz and Cornell), to a biopolitical investigation of why animals deserve human rights (Wolfe).

<sup>7</sup> See Posner, "Judges Writing Styles" and *Law and Literature: A Misunderstood Relation*.

Whatever the cause, there can be no doubt that, as Richard Weisberg puts it, “by 1995, the fledgling field [of law and literature] had emerged from decades of prophetic early work to become one of the major movements in twentieth-century legal thought” (134). The field continues to grow today.

While perhaps once considered a “movement,” law and literature has become a field. Work done under its banner draws from vast and varied intellectual ancestries, theoretical approaches, and practical commitments—thus making it impossible to define either a common methodology or a common goal. Consider that Robin West, writing in 1989, identified just three strands of law and literature (203-204),<sup>8</sup> while Kieran Dolin’s 2007 history distinguishes nine main approaches (10-11). Lenora Ledwon, in attempting a “typology,” identifies ten variants of law and narrative—itsself just one subset of law and literature.

Despite its diversity, scholarship on law and literature has suffered from the tendency to view one or the other field as a monolith—“literature” writ large or “law” as a single thing. Such an approach flattens one field in order to show the comparative richness of the other, and also often overlooks the historical specificity of legal and literary configurations. For example, Patricia Williams’s *The Alchemy of Race and Rights* (1991), a foundational text for the branch of law and literature focused on narrative, examines the ways that literary techniques of storytelling—her own and others—are incorporated into legal narrative. But the very estrangement of legal and literary narrative that Williams works to reunite reveals an underlying historical configuration, one that, in 1991, viewed legal and literary fields as separate. She takes no

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<sup>8</sup> West’s three: jurisprudential ideas in literature, the relation between literary criticism and legal criticism, and law and legal theory read as literature (203-204).



notice of the fact that this separation has historically not always been the case or of the historical conditions under which legal and literary approaches to narrative were separated.

The law and literature movement of the last thirty years is just the most recent attempt to reconfigure the relationship between law and literature after what has been only a comparatively recent separation. Kieran Dolin, in his 2007 study, breaks with critical tradition to document a centuries-long history of various relationships between law and literature. Beginning with Aristotle's study of legal language, Dolin defines these configurations as they existed in the Middle Ages and the Renaissance, through 17<sup>th</sup> and 18<sup>th</sup> Century England, Victorian England, British and American Modernism, Post-Colonial Africa, and finally, mid-to-late twentieth century United States. Dolin concludes that "[l]aw and literature are adjoining fields, divided by a boundary fence that keeps breaking down, despite regular maintenance. [. . .] The border between law and literature has sometimes functioned as a bridge, promoting dialogue, and at other times served as a barrier inhibiting it" (8-9). At each point in his history, law and literature have been configured with greater or lesser license for influence upon each other. Law has historically, according to Dolin, experienced periods both of relative openness and resistance to outside discourses. Although Dolin collects these patterns over centuries, for my project, I focus on the most recent separation between law and literature—the separation that explains the migration of legal arguments into early twentieth-century literary texts and also helps to contextualize the impetus in the late twentieth century to realign law with literature. My method takes novels as sites of legal discourse, places where the legal imaginary circulates, and recovers the thicker context of law that was

deliberately expelled from authorized forms of legal rhetoric during the reign of legal formalism.

This Introduction is divided into four sections. In the first, I give a more detailed account legal formalism—its historical emergence, its basic tenets, and its remarkable tenacity. But if legal formalism were an accurate characterization of the processes of legal reasoning, there would be no nexus between law and literature at all because the law would operate as a closed system, self-executing and self-referential. Thus, in the second section, I offer my critique of formalism. My aim here is not to supplant formalism with a new prescriptive model. My aim is to demonstrate that *within* formalist practice, there is room for logical maneuvering, and that *beneath* formalist practice, there are competing, political, self-interested worlds of law battling for discursive supremacy. This critique reveals the room that exists for legal and literary discourse to circulate. The third section looks at the generic conditions of the novel that render it such a productive place to study the nexus between law and literature. The fourth section provides a brief overview of the three chapters in my dissertation.

#### POST-CIVIL WAR FORMALISM AND THE NARROWING OF LEGAL DISCOURSE

Prior to the Civil War, American common law experienced a tremendous period of creativity and growth. Legal historian Morton Horwitz has claimed that “by 1820 the legal landscape in America bore only the faintest resemblance to what existed 40 years earlier” (*Transformations 1780-1860* 30). Judges and lawyers had come to regard the common law not merely as a repository of custom and national law, but as an “instrument of policy” (30) that was on equal footing with legislation “for governing society” (30). This emphasis encouraged judicial innovation and permitted judges open use of the

“legislator’s wisdom” (Cardozo, “Nature” 154) to formulate legal doctrine and self-consciously use the common law to effect social change (Horwitz, *Transformations 1780-1860* 30).

In his 1984 book, *Law and Letters in American Culture*, Robert Ferguson famously studied the configuration of law and literature leading up to and including that creative era of American history, from “Revolution to the 1840’s.” He found that lawyers, who were often also prominent men of letters, monopolized the role of spokesman for the young republic. Both the great legal documents of the day and the most important literary texts were written by lawyers—often the same lawyers. It was this productive nexus between legal and literary discourse that helped construct the meaning of the American Revolution both legally and for popular consumption. Ferguson sees this “formative configuration between law and literature” as ending in the mid-nineteenth century, for political and professional reasons.

It is my contention that although the goals of the configuration may have changed post-Civil War, the nexus between the two discourses did not dissolve, but became less visible, this because of the fundamental change in the authorized methods of legal rhetoric that were gaining traction at that time. Driven by forces of professionalization and by political and economic changes during the ante-bellum period, American jurisprudence entered into a period of formalism marked by a “narrower, deductive approach to decision-making” that eschewed the general policy-making role judges had taken on before the Civil War.

I see my work as picking up the configuration where Ferguson left off, analyzing the relation between law and literature during what was a tightly constrained and

regulated era of American legal rhetoric and jurisprudence. For scholars keen to identify productive places of circulation between legal and literary discourse, the formalism of the late-nineteenth and early twentieth-centuries presents a challenge since legal formalism prevents any such circulation from being explicitly acknowledged. But on the other hand, because the form of legal rhetoric was so constrained, novels of the time play an even more crucial role in recovering the fuller discursive, political, and narrative context from which the law of the time was produced.

The goal of the legal formalists was to transform the previously ad hoc archive of law into a doctrinal science. The basic idea was that “legal questions could be answered by inquiry into the relations between principles” and without reference to the “world of fact.” Formalism “asks not, ‘What works?,’ but instead, ‘what rules and outcomes have a proper pedigree in the form of a chain of logical links to an indisputably authoritative source of law?’” (Schwartz 374). This form of legal reasoning was based on the assumption that the law was a closed, logical system in which judges never made law, “they merely declare[d] the law which, in some Platonic sense, already exist[ed]” (Gilmore 62). This rhetorical stance demanded the complete removal of context and historical specificity from the decision-making process. In their place was erected a legal architecture framed with abstract legal principles that, once ascertained, were to be applied deductively, yielding the single possible correct outcome of any dispute.

Writing in 1927, Walter Cook, who was a critic of legal formalism, used the statement of an “eminent [though unnamed] member of the bar, a well-known student of legal history and jurisprudence” to illustrate the logical framework of formalist legal reasoning:

Every judicial act resulting in a judgment consists of a pure deduction. The figure of its reasoning is the stating of a rule applicable to certain facts, a finding that the facts of the particular case are those certain facts, and the application of the rule is a logical necessity. The old syllogism, ‘All men are mortal, Socrates is a man, therefore he is mortal,’ states the exact form of a legal judgment. (306-307)

The insular, internally consistent, deductive system of law here described prescribed a highly limited judicial role. Cook’s quotation continues, “It must be perfectly apparent to any one who is willing to admit the rules governing rational mental action that, unless the rule of the major premise exists as antecedent to the ascertainment of the fact or facts put into the minor premise, there is no judicial act in stating the judgment” (307). This formulation typifies a formalist approach. The judge first identifies the single dispositive rule, which rule becomes the major premise (“all men are mortal”). The judge then adds up the facts in the dispute to determine whether they fit the category (“this ‘Socrates’ is a man”). Once these steps are complete, the conclusion follows as a matter of logical entailment (“therefore he is mortal”).

There is little consensus on the reasons for the nineteenth-century formalist turn. Neil Duxbury attributes formalism to the Americanization of the common law and professionalization of the American bar. American lawyers, judges, and legislators, desiring to break away from the British common law that had been adopted as the standard for American jurisprudence after the Revolution, worked to develop a “uniquely American” archive of legal doctrine. As American law grew, so did the ranks of American lawyers. Up until this time, an American legal education had basically consisted of mastering the treatises of William Blackstone, the great expositor of English common law. But as ties to British common law were being eroded, the standards for a legal education could no longer be met by simply “grasp[ing] the basic principles of

English common law” (252). As the “indigenous body of American law” expanded, the American bar began to “achieve real prestige and power for the first time” (Horwitz, *Transformations 1780-1860* 259). Morton Horwitz sees the goals of formalism and the goals of the American Bar as one in the same and goes so far as to claim that “the rise of legal formalism” is “a rough measure of the rise in the power of the postrevolutionary legal profession and is a culmination of the Bar’s own separate and autonomous professional interest [in representing] the law as an objective, neutral, and apolitical system” (258). The creative and flexible avenues of pre-Civil War legal discourse had benefitted fledgling commercial and industrial interests. By the mid-nineteenth century, however, this “new distribution of economic and political power” had been accomplished; “the legal system had been reshaped to the advantage of men of commerce and industry at the expense of farmers, workers, consumers, and other less powerful groups within the society” (254-255). The “flexible, instrumental conception of law” that had once been necessary to promote these interests was no longer required. This power now needed to be consolidated and legitimated so that it could expand with fewer challenges. Commercial and entrepreneurial interests stood to gain from an intellectual system that erased the evidence of law’s role in this massive redistribution of wealth and political power and instead “gave common law rules the appearance of being self-contained, apolitical, and inexorable” (254).

N.E.H. Hull also gives an economic account of the rise of legal formalism, though she sees the consolidation of power as something less than accomplished and post-Civil War formalism as facilitating the massive growth and litigation that resulted from industrialization, urbanization, and the explosion of scientific and technological

discoveries. The capital investment necessary to bankroll such economic growth relies on regularity, uniformity, and predictability—the very qualities threatened by legal growth and change. For Hull, “the law and the legal profession [. . .] accommodate[d] themselves to a changing society” (26). It was the demands of the “new legal labor market” and the “new business environment” (27) that produced formalism with its conservative emphasis on efficiency and productivity. Duxbury, Horwitz, and Hull all agree that by the end of the century, academic jurisprudence and “the style of judicial reasoning of most courts” had become abstract, mathematical, and inflexible, reflecting the “iron laws of formalism” (Hull 33).

The high water mark of legal formalism was the 1920’s, about the time that a concerted movement within legal academia, namely the Legal Realist movement, began to materialize. Legal Realism, which I will treat at length in Chapter Three, drew attention to the differences between law as it was depicted in books and law as it was actually produced and experienced. The Realists called for jurisprudence to adopt broader meaning-making practices so that law could become more responsive to empirical reality.<sup>9</sup> For a time, formalism appeared to weaken, and Progressive political agendas, enlightened by the methods of empirical social science, were more openly pursued by judges. But the weakening was short lived. The ideological threats that accompanied the advent of World War II brought a new wave of support for formalism,

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<sup>9</sup> Legal historians date the origins of what has become known as the social scientific turn in legal discourse to *Muller v. Oregon*, 208 U.S. 412 (1908), where Louis Brandeis, who would later serve on the U.S. Supreme Court, submitted what is now known as the “Brandeis Brief,” that was not merely based on legal rules and theory, but included extensive data culled from hundreds of sources of social scientific research. The empirical bent of the brief is certainly disputable, as Brandeis contended that social science demonstrated that women were inferior workers whose bodies were weaker and incapable of keeping up with men. The brief also claimed that because of their role in having babies and so producing the future generation of laborers, women’s bodies and labor could be regulated by the State in ways that were not applicable to men.

spurred by the quintessential American fear<sup>10</sup> that judges would use more open and flexible forms of legal reasoning that would allow agendas of either “the radical left” or “the radical right” to infiltrate society (Hull 236-237).

Despite consistent scholarly objection to legal formalism over the last century, its basic tenets remain firmly entrenched both in popular belief and in legal rhetorical practice. The belief that judges should and can act as purely neutral “discoverers” and “appliers” of pre-existing law remains an article of faith in popular conceptions of American jurisprudence, and deductive logic, especially the syllogism, remains standard fare in legal argumentation. The rhetoric of objectivity and judicial restraint are a regular part of our judicial landscape, particularly visible during confirmation hearings where “most candidates for judicial office still profess fidelity to the classical vision of adjudication” (Fisher, Horwitz, and Reed xv). Sitting on the Supreme Court today is Justice Antonin Scalia, a vocal proponent of “New Formalism.”<sup>11</sup> Along with Scalia, judges and scholars routinely promote the position and possibility of the kind of neutrality and textual self-evidency mapped out by the classical formalists. For example, in 2007, Alberto Gonzales, while acting as the nation’s Attorney General, claimed that “a judge who humbly understands the role of the courts in our tripartite system of government decides cases based on neutral principles” (Gonzales). Senator Hatch, writing on the behalf of the Senate Committee on the Judiciary in 2001, maintained that the power of federal judges was justified only to the extent it is exercised “by interpreting the written, duly enacted law.” The role of the judge, says Hatch, is “quite simply, to

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<sup>10</sup> For history and analysis of America’s long-standing fear of “rule by judges,” see Miller, Book Two.

<sup>11</sup> See, for example, Scalia’s “The Rule of Law as a Law of Rules” and *A Matter of Interpretation*.



apply the written law, be it the Constitution or enacted legislation, to the case before them” (Hatch).

The focal point of Justice Sonia Sotomayor’s 2009 confirmation hearings was her claim that her experiences as a Latina woman who had grown up in a poor, urban environment contributed to the way she acted on the bench. This apparently outrageous claim caused such controversy she was compelled to forcefully and publicly retreat from it during the hearings.<sup>12</sup> Of course, Sotomayor was only acknowledging influences the Legal Realists, and most legal scholars, would admit have always played a role in judicial decision making, but the vehemence with which her comments were attacked demonstrate the vitality the myth of judicial neutrality has even today.

Contrast Sotomayor’s confirmation hearings with those of now Chief Justice John Roberts. As a middle-class white man, he had no suspect background from which he was forced to disassociate. In his opening statement, he emphasized the rule-based role of a judge, promising to remember that he was merely an “umpire” and, as such, didn’t make rules but merely applied them (Roberts). If confirmed as Chief Justice of the United States, he promised to limit himself to “call[ing] balls and strikes and not to pitch or bat” (Roberts). His statement was interpreted by the press and by members of the Senate Judiciary Committee as a formalist promise to play a highly limited judicial role. Senator Sessions, for example, reiterated the analogy, claiming that “what our legal system demands” is a judge who is uninfluenced by politics or personal opinion, serving only as an “unbiased umpire” who “calls the game according to the existing rules” (Sessions). Senator Brownback picked up the metaphor to emphasize the need for a “modest

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<sup>12</sup> For two articles analyzing the reaction to Sotomayor’s claims that her experience influenced her jurisprudence see Dworkin and Davis.

judiciary” that does not legislate but maintains ours “as a rule of law nation” by acting as an umpire. An umpire, Brownback explained, never “moves the law” and is never “actively involved as a player on the field” (Brownback). The analogy became a touchstone of the hearings. It was raised at least 11 times by 6 different senators and was repeated by Roberts in his closing statement.

Of course, if the law were actually the insular, deductive, internally consistent, and self-referential system that the late-nineteenth and early-twentieth-century (not to mention contemporary) formalists claimed it was, there would be no room for the kind of discursive circularity between law and literature that my dissertation is aimed at revealing—nor, in fact, would there be legal development and change at all, except as explicitly adopted by the legislature. In the next section, I’ll outline some of the methods through which such change is continually accomplished; however, beyond just critiquing the formalist model of the wholly objective and dispassionate judge, I am also interested in the tenacity of that model and the continual deployment of its methods, despite how frequently it has been shown to be faulty.

#### “TECHNIQUES FOR MANEUVERING:” THE NOT-SO IRON LAWS OF FORMALISM

The conventions of legal rhetoric, I will show, create legitimacy by maintaining the illusion of legal inexorability and predictability that belies the deeply social, creative, and political nature of legal decision-making. In his oft-cited study of legal discourse, Gerald Wetlaufer concludes that “law is, at its core, the practice of rhetoric” (1555). He defines “rhetoric” as the discipline “in which the objects of formal study are the conventions of discourse and argumentation” (1547). Wetlaufer concludes that the rhetoric of lawyers, judges, and legal scholars is “coercive in that it seeks to compel the

assent of its audience.” The “intended and actual effect” of legal argumentation, he claims, is closure achieved by finding the “one right answer to the question at hand” (1561-1562). According to Wetlaufer, legal rhetoric is impersonal; the vantage point is “neutral and objective.” The arguments are “highly rational,” oftentimes taking the form of “deductive syllogistic proofs.” Backed by copious citation to authority, legal rhetoric is one of “exclusivity, of judgment,” of “objective and ascertainable meaning” (1571). It is a rhetoric of “foundations and logical deductions” (1555) that “aspire[s] to the linearity of a geometric proof” (1571). But his most intriguing insight is that the coercive power of legal rhetoric relies, above all, “upon the denial that it is rhetoric that is being done” (1555). The rhetoric of law “operates through the systematic denial that it is rhetoric” (1555).

Judges, to maintain a claim to legitimacy, have little choice but to utilize the expected rhetorical conventions, but they have also evolved sophisticated tools for circumvention and mitigation, for deviating from their supposed duty to apply self-evident precedent to the extant case. The fact that legal change (and even mere expansion, for that matter) happens at all should signal that the view of the judge as one who merely applies law is misleading. Karl Llewellyn, a mid-century critic of formalism, claimed that he knew “of no phase of our law so misunderstood as our system of precedent. The basic false conception is that a precedent or the precedents will in fact (and in ‘a precedent-system’ ought to) simply dictate the decision in the current case” (*Common Law* 62). The truth instead, he wrote, is that “only in times of stagnation or decay does an appellate system even faintly resemble such a picture of detailed dictation by the precedents, and even in times of stagnation and deliberated determination to plant

feet flat ‘upon the ancient ways’ movement and change still creep up on the blind side of the stagnators” (*Common Law* 62-63). Creativity and change, Llewellyn insisted, was an inevitable part of even formalist decision-making. Concurring on this point is Justice Cardozo who, as a sitting judge, was quite bravely willing to acknowledge that judges do more than mechanically apply precedent. Legal decision-making, Cardozo wrote, “is anything but the fixed system posited by [early twentieth-century] jurists: jurisprudence is more plastic, more malleable, the moulds less definitively cast, the bounds of right and wrong less preordained and constant, than most of us [. . .] have been accustomed to believe” (*Nature* 161).

Room for malleability can be found within seemingly stagnant formalist rhetorical practices. To begin with, the judge exercises discretion in the manner by which they characterize facts, questions at issue, and applicable rules—constructing them broadly or narrowly depending on the desired outcome. A judge has great latitude to construct a legal narrative by selecting which facts are relevant and which are not, thus determining how to tell the never-neutral story of what happened. Hull has described this as “rigging precedent,” a method of remaining sensitive to politics, despite formalism’s proclaimed aversion to them (Hull 33-34). In *Justice Accused: Antislavery and the Judicial Process*, an important study of the legal response to slavery, Robert Cover culls formalist judicial opinions for instances of these kinds of strategic broadening and narrowing (as well as other rhetorical “tricks”) deployed under cover of formalist rhetoric but in the interest of mitigating what the judges believed were unjust outcomes or unjust laws.

Hans Georg Gadamer’s analysis of legal rhetoric in *Truth and Method* emphasizes the act of judicial discretion involved both in stating the law and in applying the law.

Both involve an act of interpretation and creation. The law, Gadamer claimed, only becomes concrete, only becomes law, in its application. The key insight here is that these discretionary acts are not only efficacious for the dispute at hand, but become built into the legal archive. According to Gadamer, law is continually re-concretized through the incremental build-up that results from the discretionary processes of interpreting legal authority and applying it to a set of facts. Each reiteration, each application, achieved via acts of human interpretation, become available to future judges as precedent, supplying both possibilities and limits for the next seeker who turns to the legal archive with a question. This means that while the formal text of the law may exist both prior and subsequent to the questioner's engagement with it, the meaning of that text is subject to continual shifting as meanings accrue. Each time the law is *used*, its future iteration and reiteration is altered.<sup>13</sup>

A less subtle tool for introducing change that formalist judges have at their disposal is the legal fiction. A legal fiction is a "proposition about the substance or procedure of the legal system, purporting to be a principle or rule material to the determination of cases, which rests in whole or in part on factual premises known to be inaccurate at the time of the fiction's invocation" (Moglen 1033-1034). By assuming or creating these false "factual" premises, courts are able to apply legal rules in ways beyond their purported scope. Legal fictions allow a court to alter the outcome of a legal rule without altering the formal text of the rule. Among the most (in)famous fictions in American law are the doctrines of corporate "personhood" and of "coverture" (the fiction that merged a wife's personality into that of her husband's). Though some have railed

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<sup>13</sup> See section entitled "The Exemplary Significance of Legal Hermeneutics," in Gadamer, 324-340.

against the use of legal fictions,<sup>14</sup> they are generally thought of a necessary tool and described without disapproval.<sup>15</sup> Henry Maine, for example, described them as “incremental” or “interstitial” legislation, and Lon Fuller depicts fictions as the “scaffolding” around the building of the law.<sup>16</sup>

The formalist principles of deductive certainty and judicial neutrality assume that for every dispute there is finally but one dispositive rule. In reality, however, there are for many disputes, an archive of various, equally valid, possible rules—a serious problem for doctrinal formalists. In a famous essay, Llewellyn gathered examples of the “forked tongue of legal authority” (“Remarks” 395). His goal was to demonstrate that even within the realm of explicitly articulated legal doctrine, there is rarely a single clear and unequivocal source or rule: a judge must select among logically equivalent alternatives. Where the law itself does not prescribe a rule for selection, the judge must deploy discretionary factors based on his own value judgments or other preferences that are not articulated in legal doctrine and so are not part of the authorized archive. Llewellyn illustrated this problem of rule indeterminacy by identifying 28 pairs of mutually exclusive rules within just one small area of law, the “canons of construction.” These are the rules of interpretation that a judge is to use when determining the meaning of statutory language. Llewellyn describes these options as the formalist judge’s “technical framework for maneuver.” They comprise sets of internally conflicting rules—“thrusts” and “parries”—both of which are justified by judicial precedent and given sanction in respected legal treatises. Here are but a few of his examples:

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<sup>14</sup> A particularly negative view of fictions was expressed by Jeremy Bentham who claimed legal fictions were “wicked lie[s]” and were related to justice as “swindling is to trade” (300).

<sup>15</sup> See, for example, Smith 150.

<sup>16</sup> For more on legal fictions, see Fuller, “Legal Fictions,” 25 *Illinois Law Review* (1930, 1931), 363-399, 513-546, and 877-910 (published in three parts).

Thrust: “A statute cannot go beyond its text.”

But parry: “To effect its purpose a statute may be implemented beyond its text.”

Thrust: “Statutes are to be read in the light of the common law and a statute affirming a common law rule is to be construed in accordance with the common law.”

But parry: “The common law gives way to a statute which is inconsistent with it and when a statute is designed as a revision of a whole body of law applicable to a given subject it supersedes the common law.”

Thrust: “Where a foreign statute which has received construction has been adopted, previous construction is adopted too.”

But parry: “[Previous construction] may be rejected where there is conflict with the obvious meaning of a statute or where the foreign decisions are unsatisfactory in reasoning or where the foreign interpretation is not in harmony with the spirit or policy of the laws of the adopting state.” (395-396)

Llewellyn’s catalogue dramatically illustrates is that it is simply not possible to “reason downward in a non-discretionary and apolitical manner from very general concepts to more particular rules or doctrines and then, finally, to specific applications of these rules to concrete sets of facts” (Horwitz, *Transformations 1780-1860* 200).<sup>17</sup> A few years later, in his book *The Common Law*, Llewellyn added 19 additional thrust and parry pairs to his list (521-535).

There are, of course, constraints on judicial reasoning, including legal doctrine, logical and rhetorical conventions, the record of the case below, the appellate review process, and others. “Techniques for maneuver” provide options, but not unlimited options. While not arbitrary, the selection of the one applicable rule among equally valid others is necessarily made on the basis of extra-legal (and often unstated) considerations.

#### THE EXCLUSIONARY RULE: A CASE OF THE UNEVEN LEGAL ARCHIVE

I offer a reading of the history of the exclusionary rule as an example of the creative and political processes of legal meaning-making obscured by the seeming inevitability of legal rhetoric. Over the past 60 years, the federal exclusionary rule has

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<sup>17</sup> For an important early twentieth-century critique of deductive reasoning in legal argumentation, see Dewey.

seen nothing short of a coup d'état, one the Supreme Court accomplished without explicitly acknowledging that an established course had been reversed. The doctrinal reversal demonstrates the reach that a judge has, within the legal archive, to access language, arguments, and techniques that can shift and direct the law in creative, policy-driven ways, exactly the kind of techniques that formalists want to put out of judicial reach.

Many people know that the exclusionary rule comes out of the Fourth Amendment's protection against "unreasonable searches and seizures." The rule removes the incentive for police to violate these rights by barring illegally obtained evidence from being used to convict a defendant in court. What many people do not know is that the exclusionary rule, which was once a constitutional right, inseparable from the Fourth Amendment, is now not considered an individual right at all. A violation of constitutional rights in the form of an illegal search and seizure no longer automatically triggers the exclusionary rule. In place of a constitutional right, the court has established a cost-benefit-analysis. Where suppressing illegally obtained evidence can be shown to result in "appreciable" deterrence, the evidence will be suppressed. Where the goal of deterrence is not "most efficaciously served," evidence will now not be suppressed—sometimes even if it was obtained without a valid warrant in clear violation of a defendant's Fourth Amendment rights.

Viewed from a formalist perspective, each Supreme Court decision on the exclusionary rule seems to follow the conventional two-step reasoning process designed to ensure uniformity and consistency—step one: what is the law? Step two: what result does that law prescribe as the outcome in this case? If the formalist assumptions are



correct, where these conventions are followed, the resulting decisions should be internally consistent. However, viewed over time, it is clear that there has been substantial doctrinal change in exclusionary rule jurisprudence, though this change is never registered explicitly in the majority judicial opinions.

Somehow, the Supreme Court accomplished a wholesale doctrinal reversal while insisting that no change was taking place. I cannot here give an adequate account of the political or social considerations that drove this shift. Instead I will detail how, over several decades, the subterranean circulation of legal discourse underneath the formal surface of legal reasoning facilitated a far-reaching transformation of constitutional doctrine. As the Supreme Court heard new cases, they tapped into pre-existing arguments that had been rejected or simply mentioned in passing by earlier courts, but which were nonetheless incorporated into and became potentially potent pieces of the legal archive. Because legal discourse builds rhetorically from pre-existing precedent, the court was able to obscure a radical reversal in their understanding of the exclusionary rule with the appearance of rhetorical and logical continuity.

In 1914, the Supreme Court ruled that an exclusionary rule was required by the Fourth Amendment. For a unanimous court, Justice Day wrote that, without the exclusionary rule, “the protection of the Fourth Amendment [ . . . ] is of no value, and [...] might as well be stricken from the Constitution” (Weeks 393). The use of illegally seized evidence, the court concluded, was “a denial of the constitutional rights of the accused” (398). This language establishing the exclusionary rule as a constitutional right

was reiterated in many subsequent cases from 1914 until 1949,<sup>18</sup> when it came under pressure in *Wolf v. Colorado*.

The Fourth Amendment was initially enforceable only against the Federal government,<sup>19</sup> and the Wolf court faced the issue of whether the Fourth Amendment prohibition against unreasonable searches and seizures also applied to the States. Beginning in the late 19<sup>th</sup> century, the Supreme Court began to use the Fourteenth Amendment to extend many of the rights enumerated in the Bill of Rights to the States, under what became known as the incorporation doctrine.<sup>20</sup> The Fourteenth Amendment does not extend all federal laws to the states, only “fundamental” rights enumerated in the Bill of Rights.<sup>21</sup> The Wolf court concluded that the Fourth Amendment was such a

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<sup>18</sup> In *Dodge v. United States* (1926), for example, Justice Holmes explained that “if the search and seizure are unlawful as invading personal rights secured by the Constitution those rights would be infringed yet further if the evidence were allowed to be used” (532). Just two years later, in *Olmstead v. United States*, the Supreme Court restated their understanding of the *Weeks* rule that the 4<sup>th</sup> Amendment “although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officials through a violation of the Amendment” (462). This understanding of the exclusionary rule was reiterated yet again in the 1943 case of *McNabb v. United States*, where the court wrote that the exclusionary rule was one of the “liberties deemed fundamental by the Constitution” (339).

<sup>19</sup> See *Barron v. Baltimore* (1833).

<sup>20</sup> The Fourteenth Amendment establishes dual citizenship for persons born or naturalized in the United States—National citizenship as well as citizenship of the State wherein the person resides. The Amendment provides further that no State shall “deprive any person of life, liberty, or protection, without due process of law.” Today, most of the protections guaranteed to citizens by the Federal Government are “vouchsafed against the States by the due process clause of the Fourteenth Amendment,” which is why it is known as the “second bill of rights” (Cortner). For further analysis on the history and significance of the incorporation doctrine, see Berger, Curtis, and Cord.

<sup>21</sup> Rights extended to the States include those from the 1st Amendment: right to free speech (*Gitlow v. New York* (1925)); freedom of the press (*Near v. Minnesota* (1931)); freedom of assembly (*DeJonge v. Oregon* (1937)); and protection against establishment of religion (*Everson v. Board of Education* (1947)). 2<sup>nd</sup> Amendment the right to arms (*McDonald v. Chicago* (2010)). 5<sup>th</sup> Amendment: rights to just compensation for property (*Chicago Railroad v. City of Chicago* (1897)); guarantee against double jeopardy (*Benton v. Maryland* (1969)); and protection against self incrimination (*Malloy v. Hogan* (1964)). 6<sup>th</sup> Amendment: right to trial by impartial jury (*Duncan v. Louisiana* (1968)), right to notice of accusations (*In re Oliver* (1948)), right to confront adverse witnesses (*Pointer v. Texas* (1965)). 8<sup>th</sup> Amendment: protection against cruel and unusual punishments (*Robinson v. California* (1962)). Rights that have not been incorporated: 8<sup>th</sup> Amendment prohibition against “excessive” bail and fines (*Murphy v. Hunt* (1982)), 7<sup>th</sup> Amendment right to a jury trial in civil cases (*Minneapolis & St. Louis R. Co. v. Bombolis* (1916)), and 5<sup>th</sup> Amendment right to indictment by a grand jury (*Hurtado v. California* (1884)).

fundamental right and so applied to the States, but they also ruled that the exclusionary rule was not “an essential element of [that] right” (27-29).

This law—that the exclusionary rule was not a personal constitutional right—remained on the books for a dozen years, until the issue was heard again and *Wolf* overruled in *United States v. Mapp* (1961). *Wolf* was overruled because it had mistakenly separated the exclusionary rule from the Fourth Amendment. The Mapp court “plain[ly] and unequivocal[ly]” (649) recognized the exclusionary rule as an individual constitutional right, inextricable from the Fourth Amendment.<sup>22</sup>

Twenty years later, however, the Supreme Court would not only reject the exclusionary rule as a constitutional right, they would also insist it never had been so regarded! In 1984, writing for a divided court, Justice White noted, “language in opinions of this court and of individual Justices *has sometimes implied* that the exclusionary rule is a necessary corollary of the Fourth Amendment” (*United States v. Leon*, 905-906 (1984)(emphasis mine)). From this almost off-hand rejection of half a century of doctrine and precedent, the *Leon* court rendered the exclusionary rule a mere rule of evidence, subject to judicial modification and limitation, and no longer a

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<sup>22</sup> Wrote the *Mapp* court:

“the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. [ . . . ]

“Since the Fourth Amendment’s right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be ‘a form of words,’ valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this court’s high regard as a freedom ‘implicit’ in the concept of ordered liberty.” (*Mapp* 655-656)

constitutional right—this though *Mapp*, which depended on the very opposite interpretation of the rule, remains in effect!

In what was rhetorically framed as an application of precedent, the *Leon* court decided that the exclusionary rule operates as “a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than as a personal constitutional right of the party aggrieved” (906). The court severed the question of whether an individual’s constitutional rights have been violated from the question of whether evidence seized as a result of that violation can be used in court, opening the door for a myriad of situations in which illegally obtained evidence is now admissible in court. Where the goal of deterrence is “most efficaciously served,” evidence will be excluded; otherwise evidence can be admitted, regardless of the underlying Fourth Amendment violation.<sup>23</sup>

Justice White’s characterization of 50 years of doctrine as “language that has *sometimes implied*” the exclusionary rule was a constitutional right was an obvious (and probably intentional) misrepresentation of doctrinal fact, but a misrepresentation made possible by a second strand of legal discourse that had been running parallel, though submerged, in exclusionary rule jurisprudence for years. The germ of the deterrence rationale was not concocted by the *Leon* court. It emerged in a submerged way in *Wolf*, and in other precedent, as courts discussed the need to remove incentives for law enforcement officials to violate Fourth Amendment rights.<sup>24</sup> *Mapp* itself gave unwitting

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<sup>23</sup> While this upending of constitutional rights got little press, it did not happen without judicial protest. *Leon* was decided by a margin of 6-3. Justices Brennan and Marshall’s impassioned dissent opinion accused the court of accomplishing a “gradual but determined strangulation” of constitutional rights, of “giv[ing] way to the seductive call of expediency” in order to achieve a “complete victory over the Fourth Amendment” (928-929).

<sup>24</sup> Just one year before *Mapp*, the Supreme Court expanded exclusionary rule protection in *United States v. Elkins* by ruling that federal agents could not violate Fourth Amendment rights and then turn the evidence

sanction to the deterrence argument. While stating that deterrence is “not basically relevant” (651), the *Mapp* court nonetheless addressed the viability of the exclusionary rule as a deterrent, concluding that all “other means [of] secur[ing] compliance with the constitutional provisions [have] completely failed” (651-652). So, although the *Mapp* decision was not premised on deterrence, it incorporated the discourse of deterrence, making that discourse available in the legal archive.

While deterrence may have been a “hoped-for effect” (*United States v. Calandra* 356), it had never been the ultimate purpose of the exclusionary rule. Nevertheless, during the years between *Mapp* and *Leon*, the Supreme Court increasingly deployed the deterrence rationale to carve out further and further limitations to the exclusionary rule, until finally, in *Evans*, the deterrence rationale became not a consideration, but the rule itself, pre-empting decades of jurisprudence viewing the exclusionary rule as a personal constitutional right. In this way, although *Mapp* claimed deterrence was not relevant, by addressing deterrence at all, even to dismiss it, the *Mapp* court helped open the door for the exclusionary rule to be severed from the Constitution.<sup>25</sup>

My point with this extended example is to illustrate how, underneath the seemingly deductive conventions of legal argumentation, different discourses battle for

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over for use by State officials, it also carried the discourse of deterrence forward, drawing from *Wolf* to conclude that “the [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it” (*Elkins v. United States*, 217 (1960)).

<sup>25</sup> Another example comes in *United States v. Calandra* (1974), where the court decided that the exclusionary rule did not apply to evidence introduced in Grand Jury proceedings. They reasoned that the exclusionary rule was “a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved” (348). Ironically, the *Calandra* court cited *Mapp* for the claim that deterrence is the exclusionary rule’s primary purpose (348)—precisely the opposite of what *Mapp* stood for. Brennan dissented in *Calandra*, once again sounding off about the alarming constitutional shift that was happening. He wrote, “this downgrading of the exclusionary rule to a determination of whether its application to a particular type of proceeding furthers deterrence of future police misconduct reflects a startling misconception, unless it is a purposeful rejection, of the historical objective and purpose of the rule” (356).

primacy. Legal conclusions and arguments do not appear suddenly and fully formed, created as it were *ex nihilo* from the minds of lawyers and judges, nor do they emerge as a process of downward deductive reasoning triggered by simply identifying the single clear and self-evident pre-existing rule. Rather, legal discourse is much looser and more discretionary than its rhetoric about itself acknowledges—an aspect of legal discourse that literary critics ignore at their peril! There is room for legal discourse to respond to outside interests and goals, and the vast archive of legal precedent aids judges in finding language that can be used to deck many different possible outcomes and arguments in conventional legal rhetorical fashion. To see this process requires a different reading practice than law and literature critics conventionally pursue, one that shifts attention away from concretized holdings and directs it towards the process by which these holdings are discursively established. This vantage point reveals law as a pluralistic field of discursive contest capable of reversing itself without disturbing its sense of its own consistency.

#### THE PLURALISTIC UNIVERSE OF LAW AND NARRATIVE

My dissertation is dedicated to the idea that literature provides a crucial source of potent legal discourse—an alternate archive where legal discourse is often lodged and from which formal law can be constituted. In this section, I will use the work of Robert Cover and Pierre Bourdieu to show how the room for creativity and discretion within the law allows it to be constructed from and guided by numerous sources, many of which receive no formal recognition. Their portrayals of the pluralistic worlds of law reveal the cooperation of legal and literary discourses, working together to transform reality.

According to Robert Cover, people do not observe laws, they *inhabit* them. In homes, families, schools, communities, churches, as well as in courts and congresses, human beings “constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void” (“Nomos” 95). We do create normative worlds through the “formal institutions of the law,” but that is but a small fraction of the legal world(s) in which we live. The legal universe we inhabit is full and overflowing with laws derived from formal and informal settings alike, a plurality that is closely linked to the narrative nature of the law.

Cover emphasizes law’s dependence on narrative. The formal legal tradition, he claims, includes narratives that supply law with “history and destiny, beginning and end, explanation and purpose” (“Nomos” 96). So while legal precepts have meaning, “they must necessarily borrow it from materials created by social activity that is not subject to the strictures of provenance that characterize what we call formal law making” (“Nomos” 112). Thus, “no set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each Decalogue a scripture” (“Nomos” 96-97).

It is narrative that endows action with significance. For example, as Cover argues, “there is a difference between sleeping late on Sunday and refusing the sacraments, between having a snack and desecrating the fast of Yom Kippur, between banking a check and refusing to pay your income taxes” (“Nomos” 99-100). We only make sense of these actions in reference to a norm. The narrative significance of an action need not be limited to obedience or disobedience. We can “submit, rejoice, struggle, pervert, mock, disgrace, humiliate, or dignify” (“Nomos” 100)—all patterns of

normative behavior that are make possible by our narrative, legal world. Narrative, then, supplies precept with meaning, endows action with significance, and creates patterns for living and for transforming reality (“Nomos” 102).

Giving narrative its due requires distinguishing between law and the mechanisms of social control used to enforce law. This is why, for Cover, law is radically non-statist (“Nomos” 103). The police power of the state—which is often mistaken for the law itself—is actually subsequent and apart from it. So, Cover maintains, while the state may have a monopoly over the legitimate exercise of coercive violence, the state has no monopoly on legal meaning, especially in a liberal society that disclaims control over narrative (“Nomos” 112). Focusing on the formal law backed by the state’s enforcement powers obscures the omnipresence of “jurisgenesis” (“Nomos” 103), the fact that individuals and communities create and endow law with significance as fully as does the state, though their acts may be “less clearly marked by force” (“Nomos” 121).

In Cover’s scheme, communities, be they religious, professional, racial, corporate, etc., have their own *nomos*—“narratives, experiences, and visions to which the norm articulated is the right response” (“Nomos” 141). The narratives of one community “resonate” with those of other communities, establishing “overlapping or conflicting normative worlds” (“Nomos” 130). Consequently, a legal dispute submitted to a state-sponsored court is characterized by a plurality of competing interpretations. The role of the court is to decide which will be backed by the police powers of the state. While courts do create law in their own right, patching together, amending, and building up normative worlds, their primary function is suppression. Thus, for Cover, “judges are people of violence. [. . .] Theirs is the jurispathic office. Confronting the luxuriant



growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest” (“Nomos” 155). In their jurispathetic mode, however, “judges are also people of peace. Among warring sects, each of which wraps itself in the mantle of a law of its own, they assert a regulative function that permits a life of law rather than violence” (“Nomos” 155).

Cover’s depiction of the judge’s work as jurispathic is somewhat misleading. True, some competing legal traditions are denied the force of law in the sense that they are not supported by the coercive power of the state. In this way, pluralistic alternatives are eliminated. However, the proposed alternate legal worlds, and the narratives and systems of meaning they contain, are not destroyed, but merely exiled. Cover recognizes that the moment of unity and resolution for which a judicial decision stands, is imaginary. But even that moment of imagined resolution is powerful. Cover compares it to a “seed, a legal DNA, a genetic code by which the imagined integration is the template for a thousand real integrations of corpus, discourse, and commitment” (“Nomos” 108). So, Cover argues, the shattering and exiling of law in the judicial act of unifying legal meaning creates patterns for acquiescence, resistance, contradiction, confusion, perversion, circumvention, parody, dissent, etc., as exiled law continues to provide the narrative base for the growth of alternative traditions and distinct, though subordinated, legal worlds.

From these “exiled narratives” and the “divergent social bases for their use,” Cover claims, a “multiplicity of legal meanings [are] created” (“Nomos” 113). While Cover does not consider the implications his theory of law and narrative has for literary critics, the heart of my argument is that literature supplies a rich stock of exiled, nascent,

and as yet untried law. My aim is to trace these legal narratives as they appear in literature, to demonstrate how, even there, they remain potent and available, yielding narrative materials from which new and altered legal meaning can be constituted.

In his analysis of disciplines, sociologist Pierre Bourdieu rejects the notion that law constitutes an autonomous field. Concluding that law is inextricable from social context, Bourdieu provocatively claims “[i]t would not be excessive to say that [law] *creates* the social world, but only if we remember that it is this world which first creates the law” (“The Force of Law” 839). The circular dependency between law and society renders legal texts dependent, historically and culturally limited documents—a claim that may seem obvious to literary critics, but as the trenchant nature of legal formalism illustrates, is a claim contested by a substantial contingent of legal scholars, practitioners, and much popular opinion. Furthermore, theory aside, literary critics have been largely unable or unwilling *in practice* to situate law within the kind of thick context they afford literary texts—to understand it as discursively complex, internally divided, and also as a site where alternate understandings of law conflict and battle in a state of continual alignment and realignment.

Bourdieu’s embedded, contingent understanding of law calls for a different configuration of the relationship between law and literature. Throughout this dissertation, I will assume that both law and literature are instrumental in constituting the social world, that they share the practice of structuring reality through language. Legal language, Bourdieu claims, is endowed with the “symbolic power” of “worldmaking.” The law “names,” and by so doing, “create[s] the thing named,” conferring “upon the reality which arises from its classificatory operations the maximum permanence that any

social entity has the power to confer upon another, the permanence we attribute to objects” (“The Force of Law” 838). Like law, literature structures reality through language, though its worldmaking powers are perhaps less direct. According to Bourdieu, through “showing things and making people believe in them,” literature has the power to “[reveal] in an explicit, objectified way the more or less confused, vague, unformulated, even unformulable experiences of the natural world and the social world, and [bring] them into existence” (The Intellectual Field” 146). Legal discourse has the power to create objects, objects that literature reflects, structures, and reveals. Legal and literary discourses circulate; they work together to craft the social world and to make it accessible and meaningful.

Bourdieu does recognize the imbalance of power between literary and legal fields, although by tying both to the process of legitimization and authority in the broader culture, he denies the capability of either law or literature alone to achieve social change, despite their symbolic “worldmaking.” He writes, “the will to transform the world by transforming the words for naming it, by producing new categories of perceptions and judgment . . . can only succeed if [...] they announce what is in the process of developing” (“The Force of Law” 839). Thus the fiat powers of both law and literature are limited to the time in and place from which they emerge; they create the world, but only to the extent that the existing world is amenable to their creations. In each chapter of my dissertation, I trace closely the interactivity between the worldmaking powers of both law and literature. I use fiction and the tools of the literary critic to access unacknowledged and underappreciated sources, alternatives, critiques, precursors, and inheritors of official law. I begin, though, by putting flesh on Bourdieu’s notion of the

circularity between law, literature, and the social world by analyzing the nature of the novel, a genre in which legal discourse is at home.

#### LEGAL AND LITERARY DISCOURSE: THE NOVEL NEXUS

As the Auden poem with which I opened this Introduction illustrates, other genres can engage legal topics and themes, but the novel is an ideal genre for studying the interrelation between law and literature. Literary critics have often used legal motifs to describe the novel, especially the American novel. Samuel Chase uses a legal model to link the romantic novel with constitutional narratives of nation making in *The American Novel and Its Tradition*. Ian Watt compares the novel's mode of imitating reality to a literal trial, with the writer functioning as a "lawyer" presenting evidence to a "jury" of readers, which "needs to know the particulars and expects witnesses to tell their story in their own words" (28-39). The novel, like "rules of evidence," Watt explains, is a "set of narrative procedures" designed to reveal truth (32). More recently, Wai Chee Dimock names the legal principle of commensurability as the most important concept underlying nineteenth-century American novels, Michael Davitt Bell aligns theories of the romance novel with the debate over codification of the common law, and Brook Thomas identifies contract law as the underlying principle structuring nineteenth and twentieth-century American realist novels (*American Literary Realism*).

Mikhail Bakhtin helps us understand why the novel is so conducive to these legal metaphors. In his essay, "Discourse in the Novel," Bakhtin identifies the "trial" as the novel's "central organizing motif" (213). The motif works on two levels. First, in the novel, the hero is "tried." There are trials of faith, of loyalty, of guilt, of strength, etc. Second, underlying these is the trial the novel stages between discourses, the struggle for

authority among different ways of being, which, for Bakhtin, means different ways of speaking. Thus, Bakhtin defines the novel as marked by dialogism, comprised of contradictory and conflicting discourses.<sup>26</sup>

These conflicting discourses enter the novel through the voice of the various characters and through the novel's sampling of extra-literary genres and documents. Because novels are so often preoccupied with legal characters, themes, and settings, they incorporate legal language spoken by characters representing the discourse of sheriffs, lawyers, judges, and other legal professionals, and incorporate documents such as court papers, evidence, confessions, testimony, contracts, and wills. All these appear in novels, not assimilated into a single narrative voice, but as variant legal discourse.

Although Bakhtin does not theorize a correlation between law and literature, his work explains the importance of the novel to understanding the discourses battling for acceptance in a legal decision. As Bakhtin describes it, the novel drags discourses "into a zone of contact with [polyglot] reality" (39). This makes the novel an unstable, developing, open-ended genre. As discourses are brought into contact with other

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<sup>26</sup> The historical emergence of the novel coincided with, and was facilitated by, the historical movement of people and power into zones of conflict, which created conditions of "polyglossia," or many co-existing languages. "Language" casts a broad net for Bakhtin. By it he means not only "linguistic dialects in the strict sense of the word," but also "socio-ideological" languages: "languages of social groups" (272). Under this definition, every person is multi-lingual. As Bakhtin explains,

[A]n illiterate peasant, miles away from any urban center, naively immersed in an unmoving and for him unshakable everyday world, nevertheless lived in several language systems: he prayed to God in one language (Church Slavonic), sang songs in another, spoke to his family in a third and, when he began to dictate petitions to the local authorities through a scribe, he tried speaking yet a fourth language (the official-literate language, "proper" language). All these are *different languages*, even from the point of view of abstract socio-dialectological markers. (295-96)

There are voices of profession, of class, of gender, race, religion, family, generation, etc., each constituting its own "language." Thus a language is not only a "system of abstract grammatical categories," but a way of speaking, a way of being, a "world view" (271), defined in part by its distance and conformity with the other languages in the society. These languages coexist in various relationships with each other—sometimes tenuous and stormy, more often tacit and unacknowledged—but the essential point is that no language is a "neutral medium," no language lives alone. Every language, even every word, "is populated—overpopulated—with the intentions of others" (294).

discourses, they jostle for position and priority, enacting an “argument with rejoinders” (76). If the univocal nature of legal discourse eliminates dialogism and prevents us from recognizing those many voices, the polyglot novel is a place where these interdependent yet diverse discourses are not assimilated, but gathered. Where formal legal discourse is designed to reduce the entire diversity and array of discourses in the legal archive to a single unambiguous rule, the novel contains rather than squelches such diversity. This makes the novel a productive site for studying the many conflicting discourses that play a role in legal meaning-making.

#### THE LEGAL AND LITERARY DISCOURSE OF CHARLES CHESNUTT,

#### EDITH WHARTON, AND RICHARD WRIGHT

I have not claimed that judges, faced with the task of deciding a particular dispute, open a novel and look for answers. Rather, I have tried to establish that the operative meanings of legal terms and concepts are not independent of other meanings that exist in the broader society. Legal discourse cannot and does not happen in a vacuum. Rule indeterminacy and techniques for judicial maneuvering keep legal discourse in constant contact with the “outside” world of politics and preferences. Because of these thicker interrelations, legal discourse, despite its claims to be neutral authority, is not neutral, nor does it always function authoritatively. In fact, literary analysis shows us that the authoritative voice of legal language can be co-opted by other, non-authorized sources of legal meaning. I map this phenomenon in all three of my chapters, beginning with “Corrective Justice, Collective Liability, and the Logic of Lynching,” which reads Charles Chesnutt’s 1901 novel, *The Marrow of Tradition*, alongside changing legal conceptions for defining duty and assessing liability.

In this chapter I argue that Chesnutt shows how the “higher law” of white supremacy, which really covers a range of interests, from pride of race to economic self-interest, is used to thwart and warp the application of laws designed to protect all citizens, regardless of race. I read *Marrow* as preoccupied with questions of liability and reparation for the crimes and other injustices of slavery and its aftermath. Diverging from the traditional law and literature approach, which reads *The Marrow of Tradition* within a contract paradigm, I argue that the key scenes in the novel about duty and liability are pitched towards tort law, the (relatively new) idea of socially imposed duties, universally applicable and not a matter of exchange.

Contract, whose duties are a matter of consent, was thought to represent “freedom, choice, open markets, and the exercise of individual rights” (Levin 156). Tort, on the other hand, which regulates “absent choice and consent, assessing liability and damages according to formulas on high” was seen as logically and ideologically inferior to contract, a kind of residual category. Thus Chesnutt’s representation of tort principles as a mechanism for addressing “crimes against humanity” came at a time when tort law was just coalescing into a discrete field of law, struggling with contract for jurisdictional ground.

While tort law revolutionized American common law’s categories of liability and recompense, it did so without reference to the issues of race discrimination. The insight Chesnutt achieves is made possible because he applies this legal discourse to systemic racial injustice—a context not found in the formal legal archive. I argue that he depicts the path to reparation as both necessary and dangerous: necessary because without recognition of and accountability for past injustice, the community cannot move forward;

dangerous because the process of holding the guilty accountable can itself threaten the community. Chesnutt's novel leaves little room for optimism. I trace his critique of corrective justice as he applies it to the problem of the color line, which throws off the balance corrective justice seeks to restore and so questions tort law's underlying assumptions about the nature of justice.

My second chapter, "Privacy and Proprietary Interests: Edith Wharton's *Anxieties of Ownership*," mines Edith Wharton's novel, *The House of Mirth*, and her novella, *Touchstone*, as sites for exiled legal discourses related to the emerging right to privacy that was first defined by legal scholars in the late nineteenth century and began to be accepted by courts during the first decades of the twentieth. From the standpoint of legal theory, the right to privacy was grounded in legal precedent protecting the "twin pillars" of the inviolability of the home and the inviolability of the person. The formal legal texts that created this common law right framed it as the right to be left alone: privacy is the right an individual has NOT to publish his or her personal business, and NOT to be the subject of public commentary. But what Wharton's literary treatment of the legal discourse shows is that this right, far from protecting one's ability to exclude oneself from publicity, is actually a tool allowing one to manage one's public image, a mechanism for doing business in the burgeoning market for private information.

Wharton creates a substantive counter-discourse to the formal legal discourse on privacy through the way her novels treat the ownership interests in letters. I will argue that this focus is cannily chosen, as letters and mail have a legal prehistory of their own, a prehistory seemingly related to the arguments that are used to create the right to privacy, but largely ignored as the legal doctrines justifying the new right to privacy were created.



Letters get excised from that discourse, I argue, because property rights associated with them are invariably social in nature, and so undercut the formal legal foundation of privacy.

The legal framework of privacy and ownership enables readers of Wharton to make sense of the recurring use of letters throughout her novels and short stories. Furthermore, the complexity of her depictions of the interests at stake in privacy rights brings greater context and insight into the formal legal arguments surrounding those rights and their usefulness for managing private personal information as a new category of commercial interest.

My first two chapters read novels together with newly emergent legal doctrines, showing how cast-off legal discourses and contexts can be restored through literary analysis directed towards the novels where such legal discourse is lodged. In my third and final chapter, I read Richard Wright's *Native Son* together with the debate over jurisprudence that was happening in the mid-twentieth century. The legal formalism that, through its very rigidity, rendered novels as productive explorations of and outside sources of legal meaning, came under fierce critique by the Legal Realists. While the Realists were a motley group, they shared a general focus in marking the gap between legal rhetoric and legal reality. They located the meaning of legal texts in lived experience, believing that the "felt [and often unstated] necessities of the time" played a larger role than *a priori* rules in determining how judges decide cases, and that the meaning of a law can only be assessed retroactively, based on its function and consequences.

Critics' focus on urban black pathology in *Native Son* has obscured Wright's argument about how law constructs entitlement and criminality, both inside and outside of the court system. I argue that Wright's novel is cut from the same cloth and rightly belongs to the archive of the Legal Realists. *Native Son* offers a critique of the rhetoric of neutrality surrounding the production of American law. Using the hermeneutics of the Legal Realists, I show how Wright exposes the laws protecting real property as a sublimated system of racial segregation, designed to consolidate commercial interests through perpetuating racial stereotypes of urban black men. By reading the legal discourse that animates *Native Son*, I offer a new interpretation of the oft-maligned courtroom scenes from Book Three and recover Wright's devastating critique of the American legal system in dealing with race.

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## CHAPTER ONE

CORRECTIVE JUSTICE, COLLECTIVE LIABILITY, AND THE LOGIC OF LYNCHING IN CHARLES  
CHESNUTT'S *THE MARROW OF TRADITION*

In 1850, George Brown and George Kendall's dogs got into a fight, and in the early 1870's, Lester Collins' startled horses ran into Albert Brown's lamp post—two utterly inauspicious incidents that became landmark legal cases, part of a sea change in the way the American legal system dealt with injuries and reparations. *Brown v. Kendall* is usually cited as the first case to adopt the “fault” standard for civil liability (White 15).<sup>27</sup> Kendall, trying to stop a dog fight, lifted a large stick up over his shoulder to strike the dogs and inadvertently hit Brown in the eye, injuring him. The Massachusetts Court of Common Pleas, following the common law rule, returned a verdict for Brown: if Kendall caused the accident, he was liable for the damages, whether or not his actions were blameworthy. Marking a shift in tort law, the Massachusetts Supreme Court disagreed, holding that so long as Kendall was engaged in a “lawful and proper act” and used “due care and all proper precautions necessary to the exigency of the case,” he was not liable for damages that were “the result of pure accident” (*Brown* 297).<sup>28</sup>

Nothing in the opinion indicated how sharply the standard in *Brown v. Kendall* diverged from English and existing American common law. This acknowledgement came from the New Hampshire Supreme Court two decades later in the similarly pedestrian case of *Brown v. Collins*. Lester Collins was taking a wagon load of grain to the grist mill when a train roared by, spooking his horses who ran onto Albert Brown's property and collided with a street lamp, destroying the lamp and the stone post into

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<sup>27</sup> White has identified three earlier cases in New York and Pennsylvania (15).

<sup>28</sup> The court remanded the case for a new trial to determine whether or not Kendall had exercised “due care.”

which it was set. Both parties agreed Collins did nothing wrong: “his horses broke from his control, ran away with him, went upon the plaintiff’s land, and did damage there, against [his] will, intent, and desire” (443). As in *Brown v. Kendall*, the *Brown v. Collins* case posed with newfound urgency the question whether Collins could be found liable in the absence of “actual fault” (443).

The Court recognized that according to existing law, he could and would.

American courts had long followed the English rule which prioritized the “loss and damage of the party suffering” over the culpability of the actor (443):

[I]f a man lop a tree, and the boughs fall upon another, *ipso invito* [against his will], yet an action lies. If a man shoot at the butts [target], and hurt another unawares, an action lies. I have land through which a river runs to your mill, and I lop the fallows growing upon the river side, which accidentally stop the water, so as your mill is hindered, an action lies. If I am building my own house, and a piece of timber falls upon my neighbor’s house, and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and, in lifting it up, hit another, an action lies by that person, and yet I did a lawful thing. (443, quoting Sir Thomas Raymond’s 1681 report of *Bessey v. Olliot & Lambert* (T. Raym. 467))

Under this rule, repairing the aggrieved party takes precedence over the moral innocence of the perpetrator, following the maxim of corrective justice: “he that is damaged ought to be recompensed” (443). *Fletcher v. Ryland* reaffirmed the principle in 1866, stating that the question “is not whether the defendant has acted with due care and caution, but whether his acts may have occasioned the damage” (444). By the 1870’s, however, a growing number of American courts had ruled otherwise (444). In *Brown v. Collins*, the New Hampshire Court cast their lot in with these, concluding that if “the conduct of the defendant was free from blame, he will not be liable,” even if he caused the damage (451), and so releasing Collins from liability.

This new “fault standard” of liability was actually the second installment of dramatic change leading to what is now known as “modern negligence” law.<sup>29</sup> The first installment universalized the scope of duty. Prior to the 1830’s, for there to be civil liability, the court had to first determine whether the defendant had a legally imposed duty to this particular plaintiff, to protect them from this particular injury (White 94). For example, a sheriff, by virtue of his position, had a legally imposed duty to maintain his prisoners in custody. If he were to be found liable, it would be for neglecting or omitting his duty, not for performing it in a careless way. Thus negligence rested on nonfeasance rather than misfeasance, and that nonfeasance required an underlying relationship between plaintiff and defendant (White 15). Absent a legal relationship of special obligation between plaintiff and defendant, there could be no recovery. The industrial movement strained this standard as new kinds of industry, and especially new kinds of machinery, brought new kinds of injuries, injuries often inflicted on distant strangers whom the defendant had no clearly defined duty to protect. Farmland, for example, was damaged by industrial waste dumped ten miles upstream; bystanders were injured when steam engines exploded; children were injured while playing on railroad tracks. Under pressure from these and other “stranger” cases, courts began articulating a theory of

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<sup>29</sup> Earlier historians disagree over how “new” these rules really were. In 1886, Oliver Wendell Holmes claimed the American tort system “started from the notion of actual intent and actual personal culpability,” though earlier common law held all actors responsible, culpable or not (Burdicks 11). But in 1894, John Wigmore traced the origins of requiring moral culpability for liability back to the 13<sup>th</sup> and 14<sup>th</sup> centuries. Nathan Isaacs, writing in 1918, argued that his study of 600 years of legal history showed two cyclical movements in the law, “both that to and that from the fault basis” (977-978). Even in 1926, Burdicks’s *Law of Torts* struggles to pin the law down on this historical point, identifying areas of the law where liability has historically been strict (without culpability) and areas where fault has long been required. His treatise provides an excellent catalogue of the historical uncertainty and dispute over this issue.

general liability, a universal duty owed by every person to all others not to do them harm (White 14).<sup>30</sup>

By 1900, the modern negligence rule—defined as “a fault based violation of a generalized duty of all to all” (White 18)—was established, and with it, tort emerged as a new branch of American law.<sup>31</sup> Writing in the 18<sup>th</sup> century, Blackstone had identified torts as a “residual category” of non-criminal wrongs that did not arise out of contracts (White 3). There were also recognized causes of action for personal injury, but they were haphazard, “a collection of unrelated writs” (White 11). The first American treatise on tort was written by Francis Hilliard and did not appear until 1859. The first course on torts was not taught until 1870, and the first casebook did not appear until 1874 (White 3). Torts became a discrete branch of law alongside the new and changing conceptions of liability that marked the development of modern negligence.

During this period, Americans came to view the nature of injury and corrective justice differently. As Edward White argues, from 1830 to 1920 and beyond, the “ethos of injury” changed, drastically altering the “place of injury in American life.” Where once injury was widely associated with “bad luck or deficiencies in character,” Americans gradually came to believe that “most injured persons are entitled to compensation” (xv). At the same time, there was the countervailing fear that requiring defendants who were engaged in economically productive activities to compensate for all collateral damage would impose a burden so broad and deep it would bring industry to a

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<sup>30</sup> As formulated by Sir Pollock in 1886, “all members of a civilized commonwealth are under a general duty towards their neighbors to do them no hurt without lawful cause or excuse” (qtd. in Burdick 2-3).

<sup>31</sup> See also Levin 21-22, Isaacs, and Wigmore.



halt.<sup>32</sup> The fault standard limited liability while the doctrine of universal duty enlarged it, and so two warring factions were born. From the mid 1800's to the mid 1900's, many legal battles were fought over these changing conceptions of liability, battles Joel Levin has labeled "tort wars."<sup>33</sup> On the one side, there was a push to limit liability using doctrines such as the Fellow Servant rule,<sup>34</sup> Assumption of Risk,<sup>35</sup> Proximate Cause,<sup>36</sup> Privity,<sup>37</sup> and Contributory Negligence.<sup>38</sup> On the other side, there was an attempt to expand liability, especially for (deep-pocketed) corporate defendants, through the use of Strict Liability,<sup>39</sup> Vicarious Liability,<sup>40</sup> and statutes such as the Workers Compensation Act of 1910.<sup>41</sup> Which injuries are compensable, which actors are liable, how compensation is to be measured, and how social interests are to be balanced with the compensation due to victims—these central tensions of corrective justice drove the disputes that dominated late 19<sup>th</sup> and early 20<sup>th</sup> century tort law.<sup>42</sup>

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<sup>32</sup> The high court in New York explained the interaction of these two principles: "We must have factories, machines, dams, canals, and railroads. [...] If I have any of these upon my lands, and they are not a nuisance and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do to my neighbor. He receives his compensation for such damage by the general good, in which he shares" (*Loosee v. Buchanan*, 51 N.Y. 476, 484-485 (1872)).

<sup>33</sup> Joel Levin has challenged Friedman's claim that the negligence standard evolved in response to increasingly dangerous industrial working conditions. Modern negligence, he argues, came about not because workers were more likely to be injured in a factory than on a farm—they weren't—but because factory owners had deep pockets and thus industry, unlike farming, provided injured people with someone to sue" (22).

<sup>34</sup> The Fellow Servant rule prohibited workers from recovering if their injury was caused by another worker.

<sup>35</sup> Assumption of the Risk stated that workers who knew their jobs were dangerous had "assumed" those risks and so could not recover damages for injury since the cost of such risks were supposedly built into their wages.

<sup>36</sup> Proximate Cause limited liability to near and "foreseeable" plaintiffs and injuries.

<sup>37</sup> Privity required a direct contractual link between the defendant and plaintiff. For example, only buyers who purchased a defective product directly from the manufacturer could recover.

<sup>38</sup> Contributory Negligence barred recovery if the plaintiff had played any part in the injury-producing incident.

<sup>39</sup> Strict Liability defined circumstances for which defendants were liable, regardless of fault.

<sup>40</sup> The doctrine of Vicarious Liability held employers responsible for the actions of their employees.

<sup>41</sup> Workers Compensation prescribed compensation for workers injured on the job, regardless of fault.

<sup>42</sup> By the 1920's and 30's, the courts gradually abandoned the universal duty standard and developed balancing tests that allowed judges to "compare the magnitude of the risks to which a plaintiff was

It is into this field of battle that I situate Charles Chesnutt's novel, *The Marrow of Tradition*. Although tort law was undergoing drastic change during this period, literary critics such as Brook Thomas, Greg Crane, William Modellmog, and others, have looked almost exclusively to contract law as the relevant underlying legal framework for understanding his fiction. Contract law, and the associated theories of the will, of legal personhood, of the grounding of duty, etc., are certainly crucial to the time period. The nineteenth century has been dubbed "the age of contract" (Horwitz, *Transformations 1780-1860* 209). Gone were the days when a contract was judged by an extrinsic, substantive standard of equity. In the nineteenth century, the law instead viewed the source of the obligation of a contract as "the convergence of the wills of the contracting parties" (Horwitz, *Transformations 1780-1860* 160). As consent was seen as primary to contract, contract was thought to represent "freedom, choice, open markets, and the exercise of individual rights" (Levin 156). At its height, this view understood contract as superseding all other sources of duty. An 1830 treatise, for example, claimed that only "an unnatural and artificial extension" of public institutions could create a power to overrule the express agreement of individuals, since "whatever men have consented to, that shall bind them, and nothing else" (qtd. in Horwitz, *Transformations 1780-1860* 203).

The ascendancy of contract thought can be seen in the changing legal landscapes of nineteenth-century relationships. For example: the ability to enter a contract was seen as constituting legal personhood, a conditional precedent to citizenship; citizenship itself was understood as "social contract;" marriage was seen as a species of contract;

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exposed, and the social worth of the class of persons a plaintiff represented, with the social utility of the defendant's conduct" (White 107).

relationships of business, commerce, employment, and, of course, slavery, all contributed to and reflected the supremacy of contract law. In its strongest phase, contract was seen as the sole source of duty, and even “legal duties imposed by the state could be modified or abrogated by contract” (Horwitz, *Transformations 1780-1860* 203). Express legal duties such as those of employer to employee, seller to buyer, manufacturer to consumer, could be contracted away, at times merely by giving written notice. Since non-contractual duties were understood as mere custom, binding only to the extent that the individual consented, and the state’s sovereignty was said to be a matter of social contract, derived from the consent of the people, as “all preexisting legal duties were inevitably subordinated to the contract relation” (Horwitz, *Transformations 1780-1860* 209). Any encroachment on personal freedom, any binding obligation, assumed prior consent, and without consent, contract law did not recognize duty.

On the other side of this dominant model, there was tort, described as contract’s “shoddy stepchild” (Levin 158). Where contract law dealt with the realm of assumed duties, tort dealt with the realm of socially imposed duties. Tort “regulates and dictates absent choice and consent, assessing liability and damages according to formulas on high [. . .] and gives little or no credit to the intentions of the parties” (Levin 158). Since tort duties are imposed by society, a breach of them triggers liability regardless of whether the parties have agreed to be bound by those duties or subject to that liability.

Thus contract and tort were seen as competing paradigms for understanding conceptions of duty, liability, and reparations. In this chapter, I will show how tort law, based on the notion of corrective justice, provides an alternate and better framework for understanding duty and liability as presented in Charles Chesnutt’s *The Marrow of*

*Tradition.* A tort paradigm allows us to see the argument *Marrow* presents about the possibilities and limits of reparations for crimes and injustices resulting from slavery and race segregation, arguments not well facilitated with a contract context.<sup>43</sup>

The issues and problems of industrialization involved high-profile institutions of capitalism—railroads, factories, and the like—and the common law and treatises of the time made them an important focus of tort law. My approach, however, does not adopt the legal framework so literally. Rather than focusing on a particular tort rules, I examine the way that Chesnutt uses the principles of duty and justice underlying tort law—principles developed alongside industrialization—to explore the issue of reparations for slavery and segregation. In Chesnutt’s novels, the reversal of civil rights that followed the collapse of Reconstruction emerges as a parallel context for the debates over the nature of race and liability.

While White may be correct that Americans came to believe those who had been injured were entitled to compensation, compensating ex-slaves was surely an exception. Efforts to compensate ex-slaves during Reconstruction were half-hearted,<sup>44</sup> and when

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<sup>43</sup> Two critics have used tort rather than contract as the underlying framework for their literary analyses. The first is Wai Chee Dimock who, in her study of the principle of commensurability, draws from tort principles that expand human responsibility. The second is Nan Goodman who has written on the relationship between tort liability and nineteenth-century literature of accidents. Both Dimock and Goodman focus on the doctrine of causality and neither analyze tort in context of reparations for race-based systemic injury.

<sup>44</sup> The much cited “forty acres and a mule” plan is commonly mistaken as a piece of Reconstruction legislation aimed at reparations. It was actually a Field Order issued by General Sherman in 1865 as a temporary response to the massive refugee problem caused by the newly emancipated slaves. The order set aside a large section of land in Georgia and South Carolina for African American families. Mules were not part of the order, though there is anecdotal evidence that the army had extra mules that it doled out. As a result of the Order, about 40,000 freed slaves settled on about 400,000 acres. But the Order was short-lived. Jackson revoked it after Lincoln was assassinated, and the land was returned to the original owners. In 1867 Thaddeus Stevens proposed a similar bill that would distribute the land of former slave owners to newly freed slaves, but the bill never passed. However, when Congress established the Freedmen’s Bureau in 1865, one provision allowed the bureau to divide land that had been abandoned or confiscated into 40 acre parcels that would be sold or rented to former slaves. The grants were ambiguous and ultimately most of the land was returned to the original owners (Foner, *Forever Free* 64-65).

Reconstruction was overthrown in 1877, the issue of corrective justice for slavery (not to mention its Jim Crow aftermath) all but disappeared until the 1960's when calls for reparations began again in earnest. Instead, the later decades of the 19<sup>th</sup> century saw a dramatic upswing in racial violence, the proliferation of lynching, and the legislative and judicial erosion of gains supposedly secured by the postwar civil rights amendments. These setbacks happened, in part, because racial justice was given a backseat to regional reconciliation as the repeal of Reconstructive measures assuaged the North-South rift at the cost of social, political, and economic justice for African Americans. Jim Crow regimes took hold and, stoked by the press and powerful politicians, reinforced white public perception of black crime, racial inferiority, and fear of “negro domination,” evidenced by the legally sanctioned system of racial segregation announced in 1896 by the Supreme Court in *Plessy v. Ferguson*.

Chesnutt is an important figure in the portrayal of post-Reconstruction politics and was a staunch critic of Jim Crow. Chesnutt's “ragged family tree,”<sup>45</sup> his experience as a light-skinned mulatto who chose not to “pass,” his career as a successful lawyer, and his friendship with Albion Tourgee—the lawyer who represented Homer Plessy in the infamous *Plessy v. Ferguson* case—equipped Chesnutt to write about the conflicts and contradictions of justice in the late nineteenth century. Referencing *The Marrow of Tradition*, Eric Sundquist has claimed, “no novel of the period provides a better anatomy of the racial politics of the nation in the aftermath of Reconstruction and its descent into harsh segregation” (xliii-xliv).

Readers of Chesnutt have often noticed the way his writing challenges black stereotypes, troubles racial identity, and catalogues civil rights abuses, and in more recent

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<sup>45</sup> The son of free blacks, Chesnutt claimed white grandfathers on both sides.

years, critics have begun to address the legal aspects of Chesnutt's writing in much more sophisticated ways, focusing especially on contract law as a framing context for his novels. Gregg Crane has written that contract law is central to *Marrow* where Chesnutt uses contract thought to "advance relations in which affect is tied to consent and reciprocity" instead of status (201).<sup>46</sup> Brook Thomas, in his analysis of the legal argument in *The Marrow of Tradition*, contends that by "challeng[ing] the boundary that orthodox legal thought established between the economic and social realms," *Marrow* critiques the assumptions underlying the then-dominant ideology of contract law. Thomas' essay argues that contract provides an overarching context for Chesnutt's literary work, and while I concur that Chesnutt erodes the boundaries between the social and the economic, especially through his portrayal of the marriage contract, the late 19<sup>th</sup> century "fascination with contract law" (Thomas 311) is not the only vehicle for understanding Chesnutt's engagement with law. Furthermore, the key scenes about liability in *Marrow* are not primarily contractual.

The other main approach to *The Marrow of Tradition* has been through Chesnutt's portrayal of racial identity. Critics who study Chesnutt's approach to law and justice focus on his representation of the mixed and muddled state of racial identity, using Chesnutt's depictions of identity to construct his position on social justice. Using this method, critics have drawn conclusions about Chesnutt's work that span a wild and contradictory range. Ross Posnock, for example, has claimed Chesnutt as a champion of cosmopolitanism. James Giles and Thomas Lally have concluded Chesnutt urges black

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<sup>46</sup> "Chesnutt's novel locates the figure and theme of liberty of contract in the marrow of American jurisprudence, as an innovative site where revision accompanies the invocation of tradition, and where citizenship rights and traditional norms of public association are reshaped through the flux of contract" (Crane 215).

separatism. Sandra Gunning has decided Chesnutt believes in racial harmony achieved through black/white middle-class cooperation.

I address the arguments these critics make throughout my chapter; however, my emphasis is different. By offering a tort rather than a contract framework, my reading allows access to the dominant scenes of injury and recompense in the novels, scenes that are non-contractual and so have been obscured by the critical attention on contract. I also reverse the typical methodology. Instead of deducing a program for social justice from Chesnutt's portrayal of racial identity, I argue that *Marrow* is better read as testing approaches to liability for racial injustice against the reality of racial identity—among other things. Thus, my approach sublimates the issue of racial identity to the problems of liability, allowing racial affiliation to be explored not only as a vehicle for but an obstacle to corrective justice.

Demands for formal legal reparations for slavery and/or segregation did not appear in earnest until the 1960's. Where the issue of formal legal reparations was raised in the nineteenth century, it surrounded the right that former slave owners might have to be financially compensated for the loss of their property interests in their slaves. In fact, all instances of monetary compensation for slavery have been instances of owners receiving compensation, not slaves or their descendants. Following the precedent set by England which paid such compensation to ex-slave owners in the British West Indies, before and at the beginning of the Civil War, the North paid monetary reparations to some slave owners (Barkan 5). For my purposes, I understand reparation as something more than monetary, formal legal reparations. I use reparation to also mean the "act or process of repairing," as "some thing done" to "make amends" (American Heritage

Dictionary of English Language). Thus, taking advantage of the flexibility allowed by fictional treatments of justice, I look at reparations in a broad sense, as ways in which the philosophical goals of corrective justice might be realized.

*Marrow* tries the limits of corrective justice, exploring what it means to hold someone liable for injuries to person, property, and reputation, when those injuries are the legacy of slavery and segregation. Though *Marrow* is often thought of as an optimistic, ameliorative novel, I argue that from a tort perspective the possibilities for justice in *Marrow* are bleak. In it Chesnutt deploys a compensatory calculus where both wrongdoers and victims weigh the need for justice against the cost of achieving it. The conclusion of the calculus is that justice simply comes at too high a price: first, because private justice triggers broader social injustice, setting in motion an infinite cycle of injury and liability; second, because the enormity of the liability for slavery and its aftermath eclipses anyone's ability to pay, leaving the injured black community with white guilt in the place of reparations; and third, because calibrating justice on the group level—necessary to address systemic injuries as such—is arrestingly linked not only to reparations but also to the logic underwriting segregation and lynch law. In the end, Chesnutt seems to abandon corrective justice altogether in *Marrow*, putting in its place a form of forgiveness that, much like the racial politics of his day, embraces a notion of reparations as social reconciliation divorced from any system of accountability for the past.

The southern descent into segregation forms the backbone of *The Marrow of Tradition*, a story set alongside the historical plot of politics and power leading to the Wilmington race riots of 1898 where a white mob murdered as many as 100 black



citizens, ousted democratically elected black leaders, ran black professionals out of town, seized black property, and redrew population maps and political districts.<sup>47</sup> The riots were essentially a racial pogrom with lasting consequences. A 2005 report commissioned by the North Carolina General Assembly found that, as a direct result of the riots, “blacks were not active participants in local government in Wilmington until the civil rights era, nearly 60 years later” (Ifill 175).<sup>48</sup> Set in “Wellington,” North Carolina, *Marrow* tells a fictionalized version of Wilmington’s historical narrative. The novel highlights the contrast between black contract workers, who exchange labor for wages, and black servants, vestiges of the old system who rely for protection and survival upon their perceived bond with their white employers. The city is heavily black, whites are a minority, and black citizens are increasingly upwardly mobile and educated. In the most recent elections new political alliances (namely the Fusion ticket) have put black officials in elected positions that once belonged to white men. Racial tensions are running high and, with no outside resistance, powerful white men with racist agendas have become bold. Their choices, driven by greed and supported by custom, undermine already weak legal frameworks and lead to murderous riots with disastrous consequences for the black community of Wellington/Wilmington.

At the heart of this deeply political novel is the tale of two families—one white, the other mulatto—whose lives are intricately woven into the larger social and political

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<sup>47</sup> Chesnutt’s investment was personal. His relatives lived through the Wilmington riots, and he personally visited Wilmington during the aftermath, assessing the damage first hand and loudly criticizing state and federal government for inexcusable inaction. For scholarly treatments of Chesnutt’s connection to and use of the Wilmington race riots, see Eric Sundquist’s excellent introduction to the Viking Penguin 1993 edition. See also: Sundquist, *To Wake the Nations: Race in the Making of American Literature and Culture*; Andrews; Ellison and Metcalf; Pettis; and Wideman.

<sup>48</sup> No legal justice was ever secured for the crimes committed during the Wilmington riots. Those responsible for killing 100 innocent people were never held accountable, the ousted elected officials were not reinstated, illegally seized property was not returned. The campaign for white racial dominance was a complete “success,” unfettered by outside legal or political interference.

scene. From Chesnutt's portrayal of their attempt to fulfill duty and to understand their own racial and familial identity, comes a clear rejection of the adequacy of law to protect black rights and a troubled criticism of corrective justice and its ability to redress historical wrongs. This critique develops as the novel wrestles through the legal and social assumptions leading to *Plessy v. Ferguson*, assumptions that condition Chesnutt's interrogation of group identity and group justice, both of which he sees as deceptively dangerous for the black community. Turning away from current systems of law and theories of group justice, *Marrow* examines the possibilities that mercy offers for reconstituting society, ending with a powerful call for forgiveness and reconciliation—a position that, despite its emotional pull, and despite *Marrow's* political and psychological complexity, has been found unsatisfying and simplistic.

But although *Marrow's* call for forgiveness has been roundly denounced by critics since the novel's publication, most have denounced a straw version. The novel's construction of forgiveness must be understood alongside Chesnutt's engagement with the regime of corrective justice, a regime bedded in tort principles that proves unable to meet the real world intricacies of injury and atonement. Read as an alternative to corrective justice, Chesnutt's formulation of forgiveness takes on a powerful, even subversive, role. However, forgiveness can never *on its own* constitute an alternative system of justice since forgiveness is a suspension, not a version, of justice, and logically requires a previous assessment of guilt. The outcome of that system is, in *Marrow*, problematic. In the end, it is, predictably, the innocent black family who forgives and the culpable white family who benefits. Though a kind of reconciliation is achieved, its

terms promise life for the white community as the black community, literally, goes up in smoke.

#### THE CORRECTIVE FRAMEWORK OF *THE MARROW OF TRADITION*

Tort law is grounded in the principle of corrective justice (Dobbs §8-9). In the classic definition from Book V of his *Nichomachean Ethics*, Aristotle defined corrective justice as equality. Injustice disturbs the equality between the doer and the sufferer of a wrong. “When suffering is measured,” Aristotle observed, “it is called a loss for one party and a gain for the other.” Corrective justice attempts to restore equality between the parties, “repairing the loss by returning the gain to the sufferer” (Weinrib 280). This is the model for both “voluntary transactions,” such as contracts, and “involuntary” transactions, such as crimes or torts: “when one man has inflicted and another received a wound, or when one man has killed and the other has been killed, the doing and the suffering are unequally divided; by inflicting a loss on the offender, the judge tries to take away his gain and restore the equilibrium” (Aristotle). Importantly, the inequality to which Aristotle refers is not only material, but moral. Whether by punishment or by restitution, the judge vindicates the equality between the doer and the sufferer of a wrong, restoring the “intermediate between loss and gain” (470).

Ernest Weinrib has called liability under corrective justice “the juridical manifestation of the logic of correlativity” (282). By this wieldy description, he means that the doer and the sufferer of injustice are linked together, both in the unjust transaction and in the judicial correction of it. The loss and gain are not “discrete phenomena that happen to coincide. The sufferer loses by virtue of the doer’s gain, and vice versa. Gain and loss are correlatives because each is constituted by the other”

(Weinrib 280). Similarly, “the judge’s reestablishment of the parties’ equality does not consist of two independent operations, one of which removes the gain and the other of which repairs the loss” (281), but the “doer is directly liable to the sufferer,” so that a single transaction repairs the loss by disgorging the gain (281).

Corrective justice, then, uses the concept of balance to explain why this particular victim is entitled to recover from this particular wrongdoer by rendering their losses and gains commensurate. Aristotle illustrates commensurability through the figure of a single line that represents the continuum of loss and gain between the two parties. Injustice divides the line unequally. In response, the judge “takes away the amount by which the larger part is greater than half the line and adds it to the smaller,” reestablishing the intermediate between loss and gain and making the segments of the line equal once again (NE 1132.a.25-30). The ability to align losses and gains depends on there being some common ground upon which to map them, a single line along which losses and gains can be rendered commensurate.

Given that corrective justice constituted the philosophical basis upon which 19<sup>th</sup> century American tort law was formulated, it is not surprising that Wai Chee Dimock would find commensurability to be *the* underlying grammar of justice in American realist literature of the time. Despite there being “many languages” for depicting the idea of justice, Dimock argues that they all draw from a framework of commensurability; they rest on the assumption that all things can be “conver[ted] to a common measure” (2), a conversion which is ontologically necessary for the operation of justice. As “an exercise in abstraction” (2) where reward and punishment are predicated upon the principles of “adequate repayment,” compensation’s “dream of objective adequation makes the

concept of justice intelligible in the first place” (6). To compute the amount “owed”—figuratively or literally—requires commensurability between the doer and the sufferer and between the gain and the loss. To rectify loss, to rebalance injustice, the loss must be measured in the same terms as the gain.

Just as this act of conversion renders justice meaningful, Dimock argues that it simultaneously triggers loss—loss that is never fully commuted into damages or punishment—a “residue,” she claims, conditioned by the very logic of equilibrium. Dimock turns to literature, as the realm of the “incommensurate,” to find justice’s internal contradictions. Literary portrayals provide access to the “densities and textures of human life” (9), portrayals that reveal how adequation, so “blandly maintained in law,” is not actually achieved. The scales are never balanced. Accompanying each ostensible balancing is an “abiding presence” of the “unredressed, unrecovered, noncorresponding” (6). I share Gregg Crane’s concern that Dimock overstates the role that the “dream of objective adequation” plays in law and understates the role that it plays in literary criticism (“Path” 768).<sup>49</sup> However, my critique of Dimock here is that, in reading all that is not commensurate as *residue*, she ignores ways in which the ostensibly non-

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<sup>49</sup> Her privileging of literature is extreme. She writes, in literature, “the problem of justice is given a face and a voice, a density of feature that plays havoc with any uniform scale of measurement and brings to every act of judicial weighing the shadow of an unweighable residue. In the persistence of that residue, in the sense of mismatch, the sense of shortfall, that burdens the endings of these texts, we have the most eloquent dissent from that canon of rational adequation so blandly maintained in philosophy and law” (10). While perhaps true of literature, her reading of law disappoints. There is no bland maintenance of adequation in law, but a tortured and always present sense of the distance between the ideal of justice and the actual operation of law. In law, much more so than in literature, the problems of justice are given a face and a voice because, in law, even though all are aware that the attempt to redress will never be fully commensurate, the law must nonetheless *decide*, must nonetheless *act* with serious consequences in the lives of real people, not merely in the lives of fictional characters. Even in her reference to “the law,” Dimock misses the ways in which “the law” is densely pluralistic, and she ignores the actual processes of law—the art of the judicial decision, building, diverging, constructing a holding from precedent, and the way that a judicial decision, to the extent that it provides any more than a one line holding, is supplementary to itself. Not to mention the unsettling function of the dissent. In ignoring the way law is actually made, Dimock also misses seeing the slippage within the language of precedent built explicitly into a common law system, but also present in positive law, that provides for methods of mitigation.

commensurate offers an alternative understanding of justice rather than a residue of it. By reading all that is non-commensurate as “residue,” she begs the question of her initial assumption—that all 19<sup>th</sup> century realist literature rests on [unchallenged] principles of commensurability.

There is no doubt that the reach of corrective justice in the nineteenth century was vast. Its central conflicts defined the development of tort as a discrete branch of American law and created vast systems of liability (and lack thereof) that shaped law and commerce in the 19<sup>th</sup> and 20<sup>th</sup> centuries. However, it not only the concept of corrective justice, but also the struggle to carve out an alternative to its logic of equilibrium that propels Chesnutt in *The Marrow of Tradition*. I read *Marrow* as grappling with the limits of corrective justice and rejecting its underlying assumptions of commensurability. The novel anticipates later shifts in tort law as it wrestles with the tensions between corrective justice for individual injuries and a broader scheme of social justice that may sacrifice the individual’s claim on justice to the larger community’s, and that looks for methods of redress that respond to injury without deploying what I will argue is a problematic logic of commensurability.

In *Marrow*, Chesnutt explores three ways of understanding justice: first, the sense of justice where justice is an instinct, as literal a physical need as food or water; second, the logic of justice, where justice is a matter of objective reasoning and measuring; and third, justice as redress, which makes room for mitigation, mercy, and forgiveness. The first two draw from a corrective framework, explicitly in the second which attempts to balance the scales by taking from the wrongdoer to compensate the victim, and implicitly in the first where, though the drive for justice be primal and physical, the justice sought is

defined in corrective, correlative terms, as, for example, in the narrator's words: "they who live by violence expect to die by violence." With the third, Chesnutt constructs an account of forgiveness that derives its power from being outside—though tenuously—the commensurate realm of corrective justice.

*Marrow's* engagement with corrective justice unfolds through two closely linked pairs of characters—the pair of Josh Green and Captain McBane and the pair of the Millers and the Carterets. Josh Green is a huge, black, dock worker known for his strength and fighting ability, and Captain McBane is a vulgar and cruel white man. He is the son of an overseer who has made a fortune off black convict labor. In Green, Chesnutt portrays a militant wage-laborer; in McBane, the black laborer's new "overseer," as much a "nigger driver" within the "free" contract labor system as his father was under slavery. The Millers represent the new, upwardly mobile black middle class—wealthy and educated—and the white Carterets the New South, anxious too for upward mobility in the new non-agrarian business economy, but holding on to traditional notions of white privilege. Dr. William Miller's grandfather was a slave, and his father a self-made man who became wealthy "in the flush turpentine days following a few years after the civil war" (50). With this money, he provided a European education for William who, feeling a responsibility to the black people of Wellington, returned to the town, purchased the old Carteret estate, and founded a thriving black school and hospital. His wife, Janet, is the daughter of a white man, Sam Merrell, and his one-time slave, Julia Brown. Janet looks just like Merrell's first daughter, her white half-sister Olivia—so much so, that they are often mistaken for one another. Olivia has married the influential, though now poor Major Carteret, the last male survivor of a prestigious family devastated

by the war. Using Olivia's inheritance, he now runs the town newspaper. With Green and McBane, Chesnutt investigates the complexities of full and adequate compensation, the profound, primal, and physical need for justice, and the difficulty of achieving it without causing further harm. With the Millers and the Carterets, he engages the objective, rational concept of "strict justice" and moves beyond it to test the reconciliation promised by sympathy and forgiveness.

Chesnutt places McBane and Green on a collision course. In the post-Reconstruction South, black labor was exploited by laws making unemployment, along with a bevy of other misdemeanor "crimes," punishable by conscripted work. The one-eyed McBane has become rich off of this system.<sup>50</sup> McBane's record of violence against the black community is long. As Jerry, Carteret's office boy, says of McBane, "his daddy wuz a' overseer befo' 'im, an' it come nachul fer him ter be a nigger-driver" (35). He has terrorized the black community as a Ku Klux Klan leader and was personally responsible for molesting Green's mother and murdering Green's father. As Green recounts to Dr. Miller, one night when he was ten years old, "a crowd er w'ite men come ter ou' house an' tuck my daddy out an' shot 'im ter death, an' skeered my mammy so she ain' be'n herse'f f'm dat day ter dis. [I]t was branded on my mem'ry, suh, like a red-hot iron bran's de skin" (111). Though the men were hooded, he saw the face of the "head man" and recognized McBane. From this moment on, the "job" Green lives for, the motivating factor in his life, is vengeance. He says "I swo' den, 'way down deep in my hea't, little ez I wuz, dat some day er 'nother I'd kill dat man. I ain't never had no

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<sup>50</sup> "Criminals" would be assessed fines which, if they couldn't pay immediately, were "purchased" by the likes of McBane who then owned the labor of the criminal until the fine was paid off. For an excellent analysis of the convict labor system, as well as other ways that contract rights entailed bondage, see Dru Stanley.



doubt erbout it; it's jus' w'at I'm livin' fer, an' I know I ain' gwine ter die till I've done it" (111). Green's single eyed obsession with vengeance mirrors McBane who lost an eye while beating a black worker.

Green's other eye has closed off the alternative of forgiveness, a closure that places Green in conflict with the reconciliatory Dr. Miller. It is Miller who cautions Green against vengeance, admonishing him to "put away these murderous fancies," for "the Bible says that we should 'forgive our enemies, bless them that curse us, and do good to them that despitefully use us" (113). It is better, Miller implores, to "be peaceable and endure a little injustice, rather than run the risk of a sudden and violent death" (110). Miller's platitudes about forgiveness seem just that—tired, banal repetitions, ill-matched to the visceral reality of Green's experience. Green describes the trauma of that night in highly physical terms, the crime having been "branded" into him like an iron brands the skin, his father's murder violently fused into his corporal being. Miller's minimalizing characterization of Green's feelings as "fancies" and the murder of his father as "a *little* injustice" [emphasis mine] demonstrate the inadequacy of his response. Not surprisingly, Green is prepared with a rebuttal:

Yas, suh, I've l'arnt all dat in Sunday-school, an' I've heared de preachers say it time an' time ag'in. But it 'pears ter me dat dis fergitfulniss an' fergivniss is mightly one-sided. De w'ite folks don' fergive nothin' de niggers does. . . . De niggers is be'n train' ter fergiveniss; an' fer fear day might fergit how to fergive, de w'ite folks gives 'em somethin' new ev'y now an' den, ter practice on. (113)

Miller's position, enduring injustice in the name of survival, is unpersuasive because Green fully "expec's ter die a vi'lent death in a quarrel wid a w'ite man" (110). His need for "justice" is stronger and more basic than even his instinct for life.

Green and Miller are often seen as embodying two alternate positions for black men in the struggle over racial power and injustice.<sup>51</sup> Green represents the “real possibility of a righteous male violence,” while Miller “repudiate[es] that violence in favor of racial harmony” (Gunning 72). Significantly, in the debate between Green and Miller, the force of both men’s arguments derives from a corrective model, not only in their constructions of justice, but also in their formations of forgiveness. Green rejects Miller’s New Testament plea to forgive your enemies, resting his “right” to kill Captain McBane on “the Mosaic law of revenge” (110), a famously corrective model that insists on an eye for an eye, an atonement that will return like for like. Dr. Miller, in his attempt to dissuade Green, similarly draws from a corrective paradigm. The difference is that Miller registers injuries and restitution on a group rather than individual level. His worry is the impact Green’s actions will have on the black community, for every crime committed by a black man “would be imputed to the race, which was already staggering under a load of obloquy because, in the eyes of a prejudiced and undiscriminating public, it must answer as a whole for the offenses of each separate individual” (114). The debt owed to Green may have been settled, but the act of collecting on it threatens to wreak further imbalance as the whole black community pays a price for Josh Green’s justice. Miller’s fear is later realized as the murder of a white woman falsely pinned on a black man, and thus on the entire black population of Wellington, helps spark the race riots.

Even Green’s stance on forgiveness is understood within a corrective framework. For Green, to be valid, forgiving and forgetting must be reciprocal. Since forgiveness is based on an exchange of equivalents, Green does not reject the notion of forgiveness altogether, only forgiving that is “one-sided.” Black forgiveness should be withheld so

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<sup>51</sup> See, for example, Sunquist et al. 22-41.

long as “de w’ite folks don’ fergive nothin’ de niggers does” (113). Likewise, Miller’s prescription of forgiveness also has a corrective aspect. He does not advocate wholesale forgiveness, but argues for temporary forgiving while deferring compensation to the jurisdiction of God. As Miller thinks, “to die in defense of the right was heroic. To kill another for revenge was pitifully human and weak: ‘Vengeance is mine, I will repay,’ saith the Lord” (114). That it is the Lord who will repay wrongdoing, along with the claim that men reap what they sow, are mottos of the novel. Miller’s justice is achieved through the workings of a higher law; full compensation will be made by divine intervention in this world or divine judgment in a world to come. In this view, justice may be deferred, but it is, above all, correlative, perfectly calibrated, and certain.

Miller’s ethic of forgiveness and corresponding belief in divine retribution aligns with the narrative commentary that, in the use of corrective catchphrases and digressions that occasionally interrupt the storyline, assert the existence of a moral universe. In this commentary, the universe itself operates on corrective principles—the natural order punishes wrongdoing, exacts payment, restores loss. Chapter twenty-eight, for example, breaks away from the story to offer narrative commentary criticizing the way the white establishment has been bending constitutional protections to fit white supremacist notions. “At the North,” the narrator proclaims, “a new Pharaoh had risen, who knew not Israel” (238), and whose “apathy” and “ignorance” allows the South to devise methods for “disfranchising the colored people” (240). The narrator, summing up the “great steal” of the rights of black people, warns that “sins, like chickens, come home to roost. The South paid a fearful price for the wrong of negro slavery; in some form or other it will doubtless reap the fruits of this later iniquity” (241).

The Biblically inflected view of justice as a system of balances is explicit. Because the scales of justice must be balanced, every crime has a corresponding cost; for each “wrong,” “a fearful price” is assessed. The warning, here to whites both North and South, echoes Miller’s warning to Green. Even if a complete realignment of costs assessed for wrongs committed must wait upon God, the operation of such justice is “doubtless” (241). That God is the executor of justice does not mean justice must await an afterlife. The use of the past tense, “the South *paid* a fearful price,” suggests the cost of Negro slavery has already been assessed. The devastation of the South, a fate shared by Major Carteret’s family,<sup>52</sup> was a direct result of the sin of slavery.

“AS YOU SOW, SO SHALL YOU REAP:”

#### THE COMPENSATORY CALCULUS AND THE FEARFUL PRICE OF JUSTICE

It is only occasionally that the logic of corrective justice is presented as so clean cut. More often, the difficulty of separating injuries and assessing costs is confusing and internally conflicting. The portrayal of these difficulties marginalizes the narrative commentary in the face of actual events, much like Miller’s rote repetition of Biblical platitudes to Green. The actual operations of injury and redress are messier and terrifying, especially when the injury to be atoned for is as massive and cruel as Negro slavery, the “wrong” so neatly referenced by the narrator. In the narrator’s commentary, this is a sin for which the South has already paid a price; the cycle of justice is complete. Chesnutt underscores the corrective framework by placing the Carterets and the Millers on a commensurate continuum. The Carteret family was financially decimated by the war while the Miller’s family because of it. The land and home that the Carteret’s once

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<sup>52</sup> Carteret is the only member of his family to survive the war. He returns home from the war physically wounded and financially bankrupt. His family line is threatened with extinction. His only son Dodie’s survival is key to the story and to the future of the Carterets.

owned now belong to the Millers. But a closer look at the lives of the characters in the novel belies the narrator's reference to slavery as a closed book. Instead, *Marrow* presents the processes of meeting the demands of justice are insistent and imperative at the same time they are incomplete, ongoing, and overwhelming. Giving up on justice's demands will have devastating consequences, as will meeting them. Abandon justice or undertake it—both alternatives threaten the continued existence of the South as well as possibilities for racial reconciliation.

The threat is related to the enormity of the wrong to be atoned for. The “fearful price” of slavery and racial oppression looms large, seeming infinite. Its calculations are anything but neat and balanced, and where the cost can be totaled, the price is itself a horror, one that undermines the process from the start. The reasoning of Olivia Carteret is in sharp tension with the narrator's earlier hasty and simplistic calculus, illustrating the problem of measuring and redressing catastrophic wrong as well as the risks attending the attempt. Olivia, whose role has been underappreciated even by critics keen to focus on the female characters, voices this dilemma when she is faced with the discovery that she herself has profited from injustice perpetrated against her half sister, Janet, and against Julia, Janet's mother. Olivia learns that Janet was not, as she had been led to believe, an illegitimate child. Julia was legally married to her father and, upon his death, Janet and Julia were run out of the Merrell home and defrauded of their inheritance, an inheritance Olivia now wrongfully enjoys entire. When Olivia discovers a marriage certificate legitimizing the union of Julia and her father and a will conveying part of his estate to Janet, Olivia panics and burns the will, then “accidentally” burns the marriage certificate.

Olivia is now in a “moral pocket,” torn between the social demands of custom and reputation on one side, the demands of legal and religious authority on another, and interests of self and family on yet another. Under the will, Janet is owed an inheritance, but if Olivia should “seek to make restitution,” she would be forced to disclose the marriage, an “unpardonable social sin” (266). The will left Janet only a “reasonable bequest,” and “had [Olivia] not destroyed the will, she might have compromised with her conscience by producing it and acting upon its terms” (267) without disclosing the marriage. However, she cannot mention the will at all without also admitting she destroyed it. Her other option is to acknowledge the marriage. But without the will to prove her father had only left a small bequest to Janet, the law would proceed as if there were no will and divide the estate equally between the sisters.

As Olivia debates, she confronts the capacity of corrective justice to address a “great crime against humanity” (266). Her question of what she owes to Janet leads her to ponder what society owes for slavery and the consequences of paying such a debt. She reasons thusly:

If the woman [Julia] had been white,—but the woman had *not* been white, and the same rule of moral conduct did not, *could* not, in the very nature of things, apply, as between white people! For, if this were not so, slavery had been, not merely an economic mistake, but a great crime against humanity. If it had been such a crime, as for a moment she dimly perceived it might have been, then through the long centuries there had been piled up a catalogue of wrong and outrage which, if the law of compensation be a law of nature, must some time, somewhere, in some way, be atoned for. She herself had not escaped the penalty, of which, she realized, this burden placed upon her conscience was but another installment.  
(266)

This astonishing passage presents in syllogistic form a series of hypothetical conditionals premised on the law of corrective justice. If (A) the same rules of moral conduct apply to black people as white, then (B) slavery would be wrong. If (B) slavery was wrong, then

(C) there is an enormous history of wrongs that must be atoned for. But faced with such an infinite catalogue of “wrong and outrage,” rather than accepting (C), Olivia rejects (A). It is the magnitude of the price of justice that causes Olivia to reject the moral equality of blacks and whites.

The convoluted reasoning in Olivia’s non sequitur uses the word “not” six times in four sentences, the first use embedding the entire syllogism within a digression from Olivia’s initial inquiry. The grammar of the passage is equally agonizing, making it as difficult for a reader as it is for Olivia to follow the argument to its logical end. In this way, Chesnutt reveals the extent to which moral reasoning about the common humanity of all races—the foundation of the very concept of a crime against humanity—in inextricable from personal and social expediencies. In order to evade the conclusion that would follow from her question “if the woman had been white—”, Olivia skews the reasoning, equivocating as she concludes that moral laws cannot apply equally to blacks and whites. Faced with the horror of atonement, she avoids paying the cost by rejecting the initial hypothetical. When applied in a particular case, the coolly logical, rational underpinning of corrective justice is tortured by the specter of repayment, not a specter of “unredressed” residue left over after scales have ostensibly been balanced, but one that throws off the logic of the scales itself—it cannot be atoned for; therefore, it cannot have been wrong. The horror of atonement undercuts the foundations of corrective justice by minimalizing, even erasing, the wrongness of slavery, leaving nothing to be atoned for. Corrective justice simply collapses under the weight of history.<sup>53</sup>

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<sup>53</sup> Chesnutt’s portrayal of this logic was prescient. Economists today, reckoning the current cost of reparations for slavery and segregation, agree that the amount would be “incalculably large” (155). Setting aside monetary reparations for pain and suffering, and for the economic value of lost freedom, and focusing only on the appropriation of labor during slavery, estimates put reparations between 2.1 and 4.7 trillion in

Though Olivia reaches this conclusion, she is not convinced by her own argument. Her rejection of the moral equality of blacks coincides with her “glimpse” of slavery as a “great crime against humanity”—an implicit recognition of moral equality. At the very moment she decides the same laws do not apply to black people, she also shoulders the burden of her conscience as an “installment” of the “penalty” to be paid for moral offense. In this striking analysis, the assumptions justifying private wrongs between Olivia and Julia are inseparably linked to general, widespread injustice, Olivia’s distress a payment on the staggering cost of atonement. This is hardly a triumphal moment for the doctrine of corrective justice, hardly a clear instance of measuring harm and assessing cost. When the abstract logic of compensation is applied in a particular instance, the logic reaches an operational limit and collapses upon itself. The feeling of guilt is all that survives Olivia’s painful logic. A poor substitute for reparations, this guilt does not yield legal (or moral or political) liability. In fact, it destroys the correlativity upon which corrective justice rests by leaving the victim out altogether. Olivia shoulders guilt, but that guilt cannot be “paid” to those who suffered from her actions. A purely internal process, guilt does nothing to correct the imbalance between doer and sufferer of injury.

When applied to institutional evil such as slavery, a corrective model fails, but it also breaks down in the singular instance. The need for reparation as well as the risks associated with achieving it, are registered in the supposedly neat exchange of Captain McBane’s life for the life of Josh Green’s father. Two corrective axioms of the novel—“sins come home to roost” and “as you sow, so shall you reap”—make death seem the

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today’s dollars (America 154-156) and concludes that it would “take more than the entire wealth of the United States to compensate blacks fully” (America 156).



natural and right consequence for McBane's actions, a consequence whose time comes during race riots instigated by "the Big Three"—Major Carteret, Captain McBane, and the politically ambitious General Belmont—in order to put down "Negro domination." Using the contrived threat of black men raping white women, the real purpose of the riots is to recapture economic and political power by destroying black property, running wealthy black families out of town, and forcing black elected officials to resign their offices, thereby reinstating "white supremacy" in Wellington. When the riots ignite, the long-awaited showdown between Green and McBane seems imminent. A group of black men led by Green arm themselves and take up defensive positions in Miller's hospital while white rioters led by McBane gather outside, intent on compelling submission violently. As the black men in the hospital are massacred, Green alone runs into the white mob, and "raising his powerful right arm, burie[s] his knife to the hilt in the heart of his enemy" (309). This moment marks the pinnacle of Green's existence; in it he accomplishes his life's work by avenging his father's murder. So satisfying is this revenge that, as "the crowd dash[es] forward to wreak vengeance upon his dead body, they [find] him with a smile still on his face" (309).

This moment has also been satisfying for critics who use it to endorse Josh Green as a heroic figure. For example, John M. Reilly writes,

Josh Green is the only character in *The Marrow of Tradition* who holds to principle without duplicity. He never reveals weakness, and his actions are bold and powerful. In short, Josh Green is heroic. . . . Within the novel he is the only Negro who resists deluding himself about the possibilities life in America offers a black man and the only one who devises a manly resistance. (36)

Eric Sunquist has argued that the heroic cast Chesnutt gives Green is evidence of Chesnutt's approval of Green's actions (*To Wake the Nations* 444-445). Green is a

sympathetic character, and certainly the circumstances of his death give him the trappings of a romantic hero. When he lunged into the white crowd, he was the only black resister still fighting. Though all the others had been “laid low” (308), Green “had not apparently been touched” (309). Immune to the “shower of lead” that “continued to pour at him,” Green moved through the mob with a superhuman quality. The white men “shrank back,” “instinctively” parting before him. Some paused “in involuntary admiration” of the “black giant” who was “sweeping down upon them, a smile upon his face, his eyes lit up with a rapt expression which seemed to take him out of mortal ken” (309). Josh is repeatedly shot, but cannot be stopped until he has killed his enemy. His life’s purpose fulfilled, he and McBane die together.

The circuit of corrective justice should, at this moment, have been fulfilled. Green has avenged his father and McBane has reaped what he has sown. But the novel simply does not offer the actions of Josh Green full confidence. Green’s father is dead; McBane is dead. But who will die to atone for Josh’s death? There is no final balancing, no completed exchange. Though Josh Green is dead, the cycle of violence and revenge continues unchecked as the white mob surges forward to “wreak vengeance” on his body (309). While Green may display the trappings of heroism, his actions raise again the issue of collateral consequences for individually calibrated corrective justice. McBane may have received his just deserts, but at what externalized cost? Even if justice is served by a rubric that balances the life of Josh Green *and* his father with that of McBane, focusing on private wrongs and private justice is shortsighted. While Green has achieved his life’s ambition in a willing exchange of his life for McBane’s, all the other black resisters who followed him also lost their lives. Though as between Green and McBane

the scales may be balanced, it is at great cost to the community. The result of Green's actions was predicted by Dr. Miller. It is a fight Green's militia cannot win, resulting in death for them and a heavy cost for the black people and institutions in Wellington. At the end of the day, white power prevails, and the work of generations of black men and women go up in smoke—quite literally as Dr. Miller's hospital is burned to the ground by the white mob.

As in Olivia's compensatory calculus, the narrator vacillates here, struggling to determine whether justice has been done but using a corrective model which is clearly unable to account for the situation. Underscoring the corrective complexities of Green and McBane's final scene, the narrator intrusively comments, "one of the two died as the fool dieth. Which was it, or was it both? 'Vengeance is mine,' saith the Lord, and it had not been left to Him. But they that do violence must expect to suffer violence" (309). Miller has insisted that justice should be left to God who can be counted on to restore equilibrium, compensating all losses, righting all wrongs. From this position, the narrator directs criticism at Green. The fool is the one who attempted to take justice into his own hands—vengeance is the Lord's (309). Having offered this rule, the narrator immediately retreats from it by remarking, "[b]ut they that do violence must expect to suffer violence." Unable to land confidently on this claim either, the narrator is compelled to justify it, pointing out that "McBane's death was merciful, compared with the nameless horrors he had heaped upon the hundreds of helpless mortals who had fallen into his hands during his career as a contractor of convict labor" (309-310).

The narrator's conflict is unmistakable. Though, on the one hand, vengeance is to be left in the hands of God, on the other hand, Bane's death was just and anticipated, a

tension even further complicated by the narrator's conclusion that, if anything, McBane was shown mercy. Mercy, a suspension of justice, the lack of a fully exacted price, is a breach of the proportion required by corrective justice. Thus McBane's quick death wasn't enough to pay for the "nameless horrors" inflicted upon his "hundreds" of victims. Though only hinted at by the narrator, readers are left to imagine what additional suffering would need to be extracted before killing McBane in order to make his pain balance the pain he has caused others.

Part of the difficulty in understanding the novel's assessment of Green rests on Chesnutt's tenuous conflation of justice and vengeance. Peter French's analysis of vengeance assigns it several characteristics. Seen as a version of "wild justice;" vengeance responds to intense personal injustice and is a "way of making things right" (French 3). It is usually accompanied by official helplessness, the avenger an agent of an "otherwise impotent morality" (French 86). Though a response to injustice, vengeance, especially blood revenge as in the case of Green and McBane, is not marked by reciprocity. "A death for a death is insufficient. Vengeance demands more" (French 9). Vengeance is not aimed at balancing scales—it is not rational (French 90-91). The principle of *lex talionis*, Latin for "the law of retaliation," is really the law of equal and direct retribution. Often seen today as barbaric, it was actually intended to soften the scope of vengeance, limiting the act of revenge to the scope of the original wrong. It is found as early as the Code of Hammurabi (ca. 1760 B.C.) and was explicitly incorporated into Hebrew scripture as "an eye for an eye, a tooth for a tooth, an arm for an arm, a life for a life" (Exodus 21:23-27).

Chesnutt characterizes Green as a vengeance seeker, but surrounds his actions with the same careful platitudes about measure, balance, and compensation that the novel uses to discuss each instance of justice in the novel, making it difficult to separate vengeance from ordinary justice. If anything, *Marrow* reverses the “more” demanded by vengeance, insisting McBane was shown mercy. Because of this conflation, we are left to wonder about the status of vengeance *as* justice. Certainly, we cannot simply dismiss Green as a moral misfit. He is superhuman, a hero, and, more importantly, morality in *The Marrow of Tradition* is not impotent. Justice is supposedly built into the very structure of the world. God executes vengeance; orders the moral universe so that compensation will somehow, some day, be made. Thus vengeance cannot be intrinsically wrong—it is the activity *Marrow* most associates God with. The morality of vengeance is simply one of jurisdiction. If we believe Miller and the narrator, because we can rely on a kind of karmic principle of moral order in the world, personal vengeance is simply unnecessary.

The lawless actions of the white mob serve as evidence for the narrator “that our boasted civilization is but a thin veneer, which cracks and scales off at the first impact of primal passions” (310). But these primal passions appear to include the need and drive for reparations. Green, the character who represents this need and drive is portrayed as animalistic. He appears in the novel as a “wet dog,”<sup>54</sup> and the verbs used to describe his

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<sup>54</sup> It is Dr. Miller who sees Josh’s animalism while riding the train to Wellington:

As the train came to a standstill, a huge negro, covered thickly with dust, crawled off one of the rear trucks unobserved, and ran round the rear end of the car to a watering-trough by a neighboring well. Moved either by extreme thirst or by the fear that his time might be too short to permit him to draw a bucket of water, he threw himself down by the trough, drank long and deep, and plunging his head into the water, shook himself like a wet dog, and crept furtively back to his dangerous perch” (59).

Reaching his final destination, Josh crawls off the rear car, “stretching and shaking himself with a free gesture” (62).

behaviors are simple and physical—crawling, running, creeping, throwing, shaking, plunging, stretching. In contrast to Dr. Miller who engages in a “life of the mind,” Green’s interests are physical—he is always hungry, thirsty, or in need of medical attention for wounds sustained while fighting. As he leaves the train, he says, “I jes’ want one mo’ look at dat man, an’ den I’ll haf ter get somethin’ ter eat; fer two raw turnips in twelve hours is slim pickin’s fer a man er my size!” (62). In this passage, Chesnutt aligns thirst for justice with need for food, both as base physical manifestations.

But here too the novel’s treatment is strained. Though Green may be described as animalistic and his justice “primal,” it is in killing McBane that he becomes a man. Green senses this shift himself, as he explains why he feels compelled to resist: “I’d rather be a dead nigger any day dan a live dog!” (284). If Green has been a “live dog,” it is in the act of defending his rights that he becomes a “man,” though problematically, a dead man. In the 19<sup>th</sup> century, as Amy Dru Stanley explains, the history of the transition from slavery to “freedom” occurred via the right to contract. To be “free,” to be a “person” under the law, meant to “own oneself,” which, in turn, meant the ability to make contracts, to trade labor for wages, to own and exchange property, to engage in the market.<sup>55</sup> Given the market language surrounding corrective justice, when Green enters into a justice transaction, the exchange itself demonstrates personhood. But the market metaphor used to define both 19<sup>th</sup> century justice and freedom is entirely unsustainable as the ironic cost of legal personhood for the black laborer is his life.

*Marrow* does not wholly endorse the heroism of Green, nor does it fully endorse Miller. Because of his refusal to fight, critics have seen Miller as an unconvincing

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<sup>55</sup> To own oneself meant, ironically, the ability to sell oneself—an irony that made the right to contract, taken to its logical extreme, another method of bondage.

hero.<sup>56</sup> Miller's refusal to join Green in battling the white rioters, however, and his general refusal to fight racial injustice in Wellington, is not motivated by cowardice, but comes from a sense of obligation to his family, his school, and his hospital, and from a belief that it will end badly for the black community. Miller's position insists that the individual's right to exact compensation be tempered by a larger sense of what would be in the best interest of the whole. Thus, justice in one case may be denied if demanding it would entail greater cost to the group. Considered on a group level, what compensation is due and from whom takes on a different tenor.

Though we think of theories of group compensation being used to create progressive social agendas, most notably Affirmative Action, in *Marrow* they are evoked to erase difference, reducing all subtleties of human personality to the single question of race, a consequence *Marrow* addressed through a critique of the separate but equal doctrine. As has been well-noted by Chesnutt scholars,<sup>57</sup> in the chapter entitled "A Journey Southward," Chesnutt recreates the story underlying *Plessy v. Ferguson*, borrowing language used in the decision to criticize the now infamous reasoning of the majority. In *Plessy*, the United States Supreme Court upheld the constitutionality of racially segregated railcars and rejected integration, finding that the "enforced commingling" of races was an illegitimate attempt to use state power to prescribe social equality. Social equality, they argued, was not legally required by either the Thirteenth<sup>58</sup>

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<sup>56</sup> For criticisms of the character of Dr. Miller, see Delmar, McFatter, De Santis, and Reilly.

<sup>57</sup> See Thomas 311-334 and Mathewson.

<sup>58</sup> The 13<sup>th</sup> Amendment abolished slavery and involuntary servitude. The plaintiff argued that segregated railway carriages constituted an impermissible "badge of slavery or servitude," violating the 13<sup>th</sup> Amendment. The majority in *Plessy* rejected this argument, holding that laws making legal distinctions based on race are not the equivalent of slavery or servitude (542).

or Fourteenth Amendment.<sup>59</sup> Social equality could not be legally mandated at all, but could only be the [unlikely] “result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals.”<sup>60</sup>

Chesnutt responds to the *Plessy* majority by writing the case's facts into an alternative narrative of social equality and racial separation. In *Criminal Conversations*, Laura Hanft Korobkin has argued that this is what literature can do for law. Literature supplies the available narratives within which the law functions. Chesnutt's version shows how it is racial segregation that illegitimately interferes with otherwise naturally and voluntarily occurring social equality and not the other way round. On a train ride home, Dr. Miller meets his white friend and former teacher, Dr. Burns, who “voluntarily” invites Miller to sit with him. Chesnutt emphasizes their equality: they are colleagues, “members of the same profession;” they are dressed similarly; their faces and manners are similar; and they speak easily with each other (*Marrow* 53). But once the train crosses into Virginia, Dr. Miller is ousted from the “white” car and forced into the “colored” car to join a “party of farm laborers” for whom he feels no affinity, even though they were, by court decree, “his people” (60). They were “just as offensive to him as to the whites in the other end of the train” (61).

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<sup>59</sup> The 14<sup>th</sup> Amendment forbids States from “making or enforcing any law which shall abridge the privileges and immunities of citizens of the United States, or shall deprive any person of life, liberty or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws.” The *Plessy* majority held that the purpose of the 14<sup>th</sup> Amendment was not intended to end racial distinctions. Its purpose is to protect political and legal equality, not social equality. Physical segregation in schools and other accommodations are issues of social equality and thus not within the scope of the 14<sup>th</sup> Amendment's guarantees (543).

<sup>60</sup> The *Plessy* court wrote “[w]hen the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed.” Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane” (552).



With this remark, Chesnutt evokes Justice Harlan's lone dissent.<sup>61</sup> Though Harlan accepted the majority's distinction between political and social equality, he found that forced segregation was a violation of equal rights and so prohibited by the Fourteenth Amendment's Equal Protection clause.<sup>62</sup> Harlan took a broad view of social equality, basing it on more than race. He wrote: "social equality no more exists between two races when traveling in a passenger coach or public highway than when two members of the same race sit by each other in a street car or in the jury box" (561).<sup>63</sup> Chesnutt, who was a great admirer of Harlan, illustrates Harlan's point. Ironically, it is segregation, rather than integration, that attempts to legislate a false social equality by forcing the refined Dr. Miller into the black car with the coarse farm workers. Natural affinities, mutual appreciation, and voluntary consent would have had Dr. Miller remain seated with Dr. Burns, would entail some better measure of social equality than race. Surely, Dr. Miller thinks, "if a classification of passengers on trains was at all desirable, it might be

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<sup>61</sup> The entire chapter evokes Justice Harlan's dissent. Where Chesnutt has taken liberties with the facts from *Plessy*, it is to enact the hypotheticals Harlan presents. Justice Harlan demonstrates the unequal application of supposedly neutral railway segregation laws by pointing out that black nurses and "Chinamen" are allowed in the "white" cars. Though the law may be facially neutral—it applies equally to black and white—in practice it is meant to exclude blacks from white cars, not whites from black. Chesnutt writes each of these points into the scene. A black nurse and a Chinese man are allowed in the white car (*Marrow* 59), and the white Captain McBane is allowed to sit (so he can smoke and spit tobacco) in the black car, Miller's objection notwithstanding (58).

<sup>62</sup> The majority argued the law in question does not discriminate against either race, but "prescribes a rule applicable alike to white and colored citizens" (557). The statute read: "no person or persons, shall be admitted to occupy seats in coaches, other than, the ones, assigned, to them on account of the race they belong to" (540). If the statute was seen as "stamp[ing] the colored race with a badge of inferiority, [...] it is not by reason of anything found in the at, but solely because the colored race chooses to put that construction upon it." If the shoe were on the other foot, the majority claimed, and a dominant colored race were to "enact a law in precisely similar terms," the white race would not assume it implied inferiority (551).

<sup>63</sup> In part, Harlan seems to be attempting to comfort his white readers with the thought that granting equality of rights will not entail social equality. He reassures white readers that they have nothing to fear: "the white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty" (559). A few paragraphs later he writes: "sixty millions of whites are in no danger from the presence here of eight millions of blacks" (560).

made upon some more logical and considerate basis than a mere arbitrary, tactless, and, by the very nature of things, brutal drawing of a color line” (61). The injustice of Jim Crow, then, is not the concept of segregation itself, but racial segregation, an arbitrary grouping that ignores all other, more meaningful, similarities and differences.

#### LYNCHING AND “THE VAGARIES OF THE HIGHER LAW”

Critiquing *Plessy* became a commonplace in late nineteenth and twentieth-century African-American literature, though few authors, black or white, had the legal acumen to parse the text of the written decision with the kind of precision that Chesnutt displays in *The Marrow of Tradition*. Because of the close nexus between *Marrow* and *Plessy*, law and literature critics have been drawn to these scenes. These analyses stop short, however, of recognizing the breadth of Chesnutt’s argument about the intricacies of justice and the color line. The inclusion of the color line requires corrective justice to be executed on a group rather than individual level, making race the deciding factor in which group is collectively liable and which group is collectively the beneficiary. Though this approach has been seen as a viable and necessary avenue for pursuing reparations for slavery and segregation, Chesnutt aligns it with the same arbitrary logic used to justify segregation and, even more frighteningly, the practice of lynching.

The equality secured by the operation of corrective justice is not to be understood in an absolute sense. Corrective justice recovers only the *pre-existing* ratio between the parties. Corrective justice is exercised *after* distributive justice has allocated resources; it restores previous proportions when they have been upset, restoring and maintaining the status quo ante. Chesnutt’s analysis of “higher law” reveals the conceit of equality as such. Higher law in *Marrow*, it turns out, is simply the custom of white racial

superiority, custom that, despite justice's language of equality, accounts for the pre-existing proportions between persons—proportions that the white establishment uses corrective justice to re-align, re-instate, and preserve. With the invocation of higher law, white society evokes something like a previous principle of distribution, the “higher law” resting on a preset ratio between black and white. White superiority, black inferiority—these are the proportions that higher law and corrective justice maintain. To demonstrate this “marrow” of racist tradition at the heart of the “higher law,” Chesnutt connects it, through the color line's flattening of individual difference, to the logic underlying 19<sup>th</sup> century lynch law.

Although, as I will show, current analyses tend to treat lynching as following a predictable pattern, *The Marrow of Tradition* was written when those patterns were just emerging. During the decades following the collapse of Reconstruction, the scattered and varied history of lynching began to coalesce, becoming ritualized and racially charged in recognizable ways.<sup>64</sup> *Marrow's* interest in lynching surrounds the “higher law” arguments justifying the practice as a legitimate exercise of popular sovereignty. Combined with the concept of a color line, the higher law argument legitimizes racially motivated lynching by dispensing with the individual guilt and replacing it with guilt that is a function of group affiliation. *Marrow's* critique of lynching, then, is also a critical assessment of higher law which, despite its lofty legal rhetoric, reduces to custom: custom steeped in racism; custom that, when couched in higher law terms, erases black personality, masks white greed, and trumps official law—circumventing hard won legal rights and the equality seemingly promised by corrective justice.

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<sup>64</sup> See Cutler and Harris.

Lynching has a long and diverse history in the United States. While the origins of the practice are ancient, historians trace the word back to 18<sup>th</sup> century Virginia, to a Captain William Lynch or a Colonel Charles Lynch,<sup>65</sup> both of whom organized bands of men during the Revolutionary War to protect each other's property and root out Tories. These were not unruly mobs or mere vigilantes but self-constituted community policing groups who ensured that suspected criminals were given "trials" where members of the community listened to the case and determined appropriate punishment—usually lashings.<sup>66</sup> "Lynching" was sometimes used to refer to the punishment itself, but more often to the method by which guilt and punishment were determined, i.e., without a court hearing or by a self-constituted court. "Lynching" was also broadly practiced in the West where settlers, tired of being preyed on by villains, organized "Vigilance Committees" that, in tracking down criminals, setting up hearings, and doling out punishment, often took the place of formal state institutions. Absent proper courts and law enforcement agencies, settlers insisted they "had no choice but to use 'the code of Judge Lynch' as 'their statute book'" (Waldrep 50). In this context, "lynching implied a killing carried out by a coherent community." Resorting to Judge Lynch "meant a town meeting and a communal trial followed by consensus and, often, an orderly execution" (Waldrep 68).

People respected the carefully measured and ordered nature of these lynchings, distinguishing them from mob justice or "crowd murder" and giving lynching a certain legitimacy (Waldrep 86). Francis J. Grund's 1837 book, *The Americans in Their Moral*,

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<sup>65</sup> For an excellent treatment of the history of the term and practice in the United States, see Waldrep, Chapter One.

<sup>66</sup> Only in the late nineteenth century did lynching come to mean mob justice and death by hanging or burning. Before then, "to be 'severely lynched' could mean an individual had received one hundred lashes. Or that he had been whipped, then tarred and feathered. A man could be lynched, then hanged. Or lynched, then run out of town" (Harris 6).

*Social, and Political Relations*, found Biblical support for lynching and approved of its use during the American Revolution which added a “patriotic” cause to its religious authority (Waldrep 13). More relevant to *Marrow* was Hubert Howe Bancroft’s *Popular Tribunals*,<sup>67</sup> a massive record of extralegal justice in the American West. Published in 1887, just four years before *Marrow*, *Popular Tribunals* saw lynching as a legitimate exercise of an Enlightenment conception of popular sovereignty, the right and duty of “the people.” Bancroft wrote:

Law is the voice of the people. [. . .] Law is the will of the community as a whole; it is therefore omnipotent. When law is not omnipotent, it is nothing. This is why, when law fails, that is to say, when a power rises in society antagonistic at once to statutory law and to the will of the people, the people must crush the enemy of their law or be crushed by it. A true vigilance committee is this expression of power on the part of the people in the absence or impotence of law. Omnipotence in rule being necessary, and law failing to be omnipotent, the element here denominated vigilance becomes omnipotent, not as a usurper, but as a friend in an emergency. Vigilance recognizes fully the supremacy of law, flies to its rescue when beaten down by its natural enemy, crime, and lifts it up, that it may always be supreme; and if the law must be broken to save the state, then it breaks it soberly, conscientiously, and under the formulas of law, not in a feeling of revenge, or in a manner usual to the disorderly rabble. (9-10)

By this thinking, lynching, undertaken by a Vigilance Committee or its equivalent, is wholly lawful, even, ironically, when breaking the “law.” Because the will of the people constitutes the law omnipotent, the people are responsible for putting down threats to the law. When statute and other formal laws or institutions do not suffice, lynching is necessary to preserve the state, the formulas of law, the sovereignty of the people.

A serious mainstream challenge to Bancroft’s logic did not appear until James Cutler’s 1905 book on lynch law. Even those who spoke out against lynching gave

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<sup>67</sup> I have uncovered no evidence that Chesnutt used *Popular Tribunals* directly as a source for *The Marrow of Tradition*; however, given the fact that several characters use not only arguments, but words, phrases, and sentences very similar to those used in Bancroft, it seems likely that, at a minimum, Chesnutt was familiar with the tenor of Bancroft’s arguments.

credence to the argument of popular sovereignty. Both Ida B. Wells and Frederick Douglass (whose biography Chesnutt wrote) claimed that the conditions for invoking popular sovereignty were not met in the South. Thus they took issue with the popular sovereignty argument *as applied*, but not with the argument itself.<sup>68</sup> As late as the second half of the 19<sup>th</sup> century, as protests grew louder, lynching was still widely seen as a legitimate “collective violent expression of popular sovereignty” (Waldrep 14), the right and duty of an injured people.

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<sup>68</sup> In 1892, Douglass wrote, “when all lawful remedies for the prevention of crime have been employed and have failed; when criminals administer the law in the interest of crime; when the government has become a foul and damning conspiracy against the welfare of society; when men guilty of the most infamous crimes are permitted to escape with impunity; when there is no longer any reasonable ground upon which to base a hope of reformation, there is at least an apology for the application of lynch law.” Douglass goes on to claim that these conditions do not prevail in the South and are a pretext upon which lynching of black men is undertaken. (Lynch Law in the South).

Well’s argument against lynching was considerably more nuanced than Douglass’s. Though she too is ready to excuse it when deployed by the “rough, rugged, and determined” men of the West who “naturally” did not tolerate criminals in their midst. “It was enough,” she wrote, “to fight enemies from without; woe to the foe within!” The West was “far removed from and entirely without protection of the courts of civilized life,” and so Westerners had to “ma[k]e laws to meet their varying emergencies.” She accepts Bancroft’s argument that lynching was lawful in the case of an emergency. Continuing her description of the West, she concludes:

Those were busy days of busy men. They had no time to give the prisoner a bill of exception or stay of execution. The only way a man had to secure a stay of execution was to behave himself. Judge Lynch was original in methods but exceedingly effective in procedure. He made the charge, impaneled the jurors, and directed the execution. When the court adjourned, the prisoner was dead. Thus lynch law held sway in the far West until civilization spread into the Territories and the orderly processes of law took its place. The emergency no longer existing, lynching gradually disappeared from the West.

Contrast her depiction of the Western use of lynching with the “lawless,” “defiant” use of it in the South, where there was “no emergency:”

But the spirit of mob procedure seemed to have fastened itself upon the lawless classes, and the grim process that at first was invoked to declare justice was made the excuse to wreak vengeance and cover crime. It next appeared in the South, where centuries of Anglo-Saxon civilization had made effective all the safeguards of court procedure. No emergency called for lynch law. It asserted its sway in defiance of law and in favor of anarchy. There it has flourished ever since, marking the thirty years of its existence with the inhuman butchery of more than ten thousand men, women, and children by shooting, drowning, hanging, and burning them alive. (“Lynch Law in America”)

Until the 1880's, most lynchings were not of black people and did not happen in the South, but by the 1890's a new pattern had been established.<sup>69</sup> Lynching now clearly meant extra legal killing in terms that were increasingly racial. According to Cutler, "between 1882 and 1927, an estimated 4,951 persons were lynched in the United States. Of that number 3513 were black" and nearly all were black men (Harris 7). This explosion in lynching directed towards black men was fueled by a highly charged sexual component, one that masked underlying fear and white male insecurity. As Trudier Harris, among many others, has noted, the ritual of post-Reconstruction lynching cast the victim as a "fragile, sweet-faced white girl or woman" and the offender as a "burly black brute" (Harris 26). This typecasting fed into the fetish that "white male southerners made [. . .] out of their duty to protect the flower of white womanhood" (Waldrep 89), a role that allowed white men to see themselves as "savior, father, keeper of the purity of [their] race," while "at a deeper level, [they were] acting out [their] fear of sexual competition from the black man" (Harris 20).

Lynching was driven by more than the threat of sexual competition. Protecting white womanhood stood in for a need to deny Blacks all things "white" —things economic, social, and political. Since, as Saidiya Hartman has argued, the nation itself was figured as a white woman, fear of miscegenation could be read on a national level. The national body was white, and the fear of black penetration an eroticized image mirroring the fear of miscegenation and growing black power that stirred lynching frenzies. Since it was aimed at sending a message to the entire black community,

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<sup>69</sup> During the period from 1880's to the 1890's, lynching was increasingly racialized and shifted from a primarily Western to a primarily Southern practice. Nonetheless, it was never solely a Southern, racial phenomenon. Lynchings were carried out in nearly every state in the Union, and white men were also lynched. Nearing the WWI era, the number of white men lynched relative to black accelerated (Waldrep 125).

lynching became an ever more public event, drawing huge crowds that traveled long distances to see the elaborately staged torture and killing. For the same reason, mutilated bodies of lynched victims were often left on display for many days—in some cases, with notes for passers-by attached to the remains.<sup>70</sup>

Southern advocates of lynching adopted the Western popular sovereignty argument, but without ever gaining the kind of legitimacy that Western lynching had. In part, this was because Southern lynching lacked the transparency, organization, and communal nature of the Western practice and because Southern lynchers could not claim there was a lack of courts and law enforcement. On the contrary, Southern lynch mobs were often either colluding with law enforcement or battling with them over access to a prisoner.<sup>71</sup> So rather than argue that there were no courts, Southern lynching advocates instead insisted the official legal process was too slow and ineffective, especially given the immediacy of the threat to white women, thus justifying lynching as a legitimate exercise of the will of “the people.”<sup>72</sup>

As the frequency of Southern lynching increased, a standard narrative appeared.

As formulated by Waldrep:

[First] newspapers discovered that a terrible crime, shocking to the community, had been committed. Next, the crime aroused the neighborhood to a frenzy of infuriated, uncontrollable hunger for vengeance. If this happened where the courts did not function effectively, and where the public unanimously supported mob action, then popular sovereignty justified lynching. (88)

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<sup>70</sup> For example, one such note, attached to the charred remains of a Georgia lynching victim read “Beware all darkies! You will be treated the same way” (Ifill 144).

<sup>71</sup> The Reconstruction Ku Klux Klan in particular made an effort to be seen as “lynchers” rather than mob actors precisely because of the legitimacy associated with Western lynchers as agents of the people. Though “they wanted to ‘emphatically [be] the *people*’”, they “never achieved that status” (Waldrep 68).

<sup>72</sup> Their argument was aided by a long popular law history of allowing a husband, brother, father, etc. to kill the seducer or rapist of their wife, sister, or daughter. Though never given official legal sanction, such killings were usually overlooked or excused—chalked up to the heat of the moment, intense emotional agitation, etc. that explained why the killer could not wait for the formal legal process to take place.



Waldrep's account of the standard Southern narrative, while abstractly accurate, strips lynching of its racial and gender resonance. The "terrible crime, shocking to the community," was rape or attempted rape of a white woman by a black man. The neighborhood "aroused to frenzy" was the white community, the community constituting the "unanimous public." It is into this context of misleading rhetorical neutrality that Chesnutt set the lynching plot in *Marrow*, using the narrative to reveal the racist undercurrents of the "higher law," undercurrents obscured by the popular sovereignty argument.

In *Marrow*, Tom Delemare, the pampered son of a prominent white family, murders his Aunt, Polly Ochiltree, for money to pay gambling debts and frames his Uncle's loyal black servant Sandy for the crime. The community, cunningly "roused" by Carteret, Belmont, and McBane, want a lynching.<sup>73</sup> Sandy has barely been arrested and yet Carteret's newspaper has already publicized his lynching while workers are building a stage on which the killing will take place and grandstands from which the public will watch. The white leadership of Wellington defends the proceedings with an appeal to popular sovereignty, using language that could have been lifted off a page from Bancroft. Says Carteret:

If an outraged people, justly infuriated, [. . .] should assert their inherent sovereignty, which the law after all was merely intended to embody, and should choose, *in obedience to the higher law*, to set aside, temporarily, the ordinary judicial procedure, it would serve as a warning and an example to the vicious elements of the community, of the swift and terrible punishment which would fall,

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<sup>73</sup> Part of the lead-up to the Wilmington, North Carolina race riots, upon which *Marrow* was based, was an argument played out in the press between black journalist Alexander Manly and Rebecca Latimer Felton. Felton had called for an increase in lynching to protect white women from rape at the hands of black men. Manly challenged Felton, suggesting that many white women were attracted to black men and that their relationships were often consensual. Chesnutt writes these facts into *Marrow*. Carteret has found an article like the one Manly wrote and saved it to publish at just the right moment when it will incite the white men of Wellington.

like the judgment of God, upon any one who laid sacrilegious hands upon white womanhood. (186)(emphasis original)

Incorporating the Southern element of protecting white womanhood, Carteret's higher law argument, like Bancroft's, makes the "people"—the white people, that is—omnipotent; they execute punishment "like the judgment of God." Within this higher law framework, setting aside "ordinary judicial procedure" does not circumvent law, but conforms to it at a more fundamental level. Chesnutt underscores this point by having Judge Everton repeat Bancroft's argument nearly verbatim. While admitting that lynching was, as a rule, unlawful, the Judge bolsters Carteret's claim with a legal construction. He explains that: "there [are] exceptions to all rules,—that laws were made, after all, to express the will of the people in regard to the ordinary administration of justice, but that in an emergency the sovereign people might assert itself and take the law into its own hands, -- the creature was not greater than the creator" (193).

By this reasoning, lynching is neither illegal nor extralegal. Leveraging the "higher law," lynch mobs become legal instruments of justice. Chesnutt's criticism is directed towards the methods of higher law reasoning, but also to its content that, in *Marrow*, is inevitably tainted by custom, custom that considers "whiteness" property and excludes blacks from the category of "the people." The popular sovereignty argument rests on the individual as the basic unit of society. It is the individual, not the family, tribe, clan, nation, etc., who cedes fundamental rights to the state, and when those rights have been systematically breached, it is the individual—and individuals en masse—who can recover those once alienated rights, reclaiming the ability to act as lawgiver. But since, in the era of segregation, the color line has done away with black individuality, blacks have no individual rights to assert or fall back upon when the state or the law fails.

Access to popular sovereignty is denied to black men and women as a further outcome of the logic of the color line.

This stripping of black individuality is not only the assumption underlying Jim Crow segregation law, but is also a crucial part of post-Reconstruction lynch law. In *Marrow*, lynching is justified by transferring focus away from the single individual and the single criminal to the group level, a generalized case of black against white. Carteret's argument demonstrates the logic. He defends the impending lynching of the wrongfully accused Sandy, reasoning that "this is something more than an ordinary crime . . . . It is a murderous and fatal assault upon a woman of our race, -- upon our race in the person of its womanhood . . . . If such crimes are not punished with swift and terrible directness, the whole white womanhood of the South is in danger" (182). Lynching, a ritual of communal violence, begins by defining a communal victim of crime—"our [white] race" and by implication, a communal criminal—the black race. The racial factor makes this crime "something more than ordinary," the group context triggering an exception to the usual procedural safeguards guaranteed by law.

In Harris' analysis of the stereotypes evoked by lynching, she claims "good negroes" were tolerated—the "mammy praising her white charges" or the emasculated "old black man" (31-32)—but any who "dared to violate the restrictions [outlined to black people by whites], were used as an example to reiterate to the entire race that the group would continually be held responsible for the actions of the individual" (Harris 19). Despite the white community's promises to protect "good negroes," in *Marrow* all such distinctions quickly evaporate. Significantly, Aunt Polly is anything but a "fragile, sweet-faced" young woman. Far from a sexual object, Polly is elderly and an aggressive

“man-hunter;” she is strong, outspoken, crass, even vicious. The white men fear and hate her. Sandy epitomizes the safe, “emasculated ‘old black man’” (31). He too is elderly. He has no family of his own, reminisces nostalgically about the days of slavery, and loyally dotes on his once master. Though there is no hint that Polly has been sexually assaulted, once a black man has been accused of a crime involving a white woman, rape is immediately inferred, and all black men, including the diminutive, aged Sandy, become “burly black brutes” while the victim becomes the innocent and frail paragon of white womanhood. Once the color line has been evoked, there is no such thing as a good negro—there are, in fact, no gradations at all. The victim is the white race, and the criminal, the black. Echoing the flattening of difference accomplished by segregation, all other distinctions that might be drawn amongst Negro men, and amongst white women for that matter, are obliterated, the denial of individuality necessary to justify lynching.

Since the criminal is the black race, the white community is thereby absolved of the need to find the particular black man responsible. As the vulgar McBane puts it:

We seem to have the right nigger, but whether we have or not, burn *a* nigger. It is an assault upon the white race, in the person of old Mrs. Ochiltree, committed by the black race, in the person of some nigger. It would justify the white people in burning *any* nigger. The example would be all the more powerful if we got the wrong one. It would serve notice on the niggers that we shall hold the whole race responsible for the misdeeds of each individual. (182)

The primary goal in lynching is not to secure justice for Polly Ochiltree. Lynching is aimed at the surviving black community,<sup>74</sup> reinforcing white racial superiority and reminding blacks of their “rightful position.” Christopher de Santis points out the group thinking evident in McBane’s argument. “The absence of the true criminal,” he argues, “allows the whites to supplant a human being with an idea, . . . In this manner,

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<sup>74</sup> For a fuller version of this argument, see Harris 70-72.

‘difference’ loses its possession of gradations: the dignified servant, the ‘happy ducky’ of the plantation tradition, the militant black worker, and the middle-class black professional—Chesnutt’s entire cast of black character types—emerge as one, a collective racial ‘Other’” (Santis 4). It is not, however, the absence of the true criminal that allows the whites to supplant a person with an idea. Sandy is not selected at random. A mountain of evidence points to him, including an eyewitness and stolen items from Polly’s home that are recovered in Sandy’s room. *Marrow’s* version of lynch law first divides the community into two, and only two, groups—those injured and those guilty. It is this division drawn along the color line, and the resulting formulation of group justice, that causes the true criminal to be missed in the first place and that sets white and black rather than criminal and victim on either end of justice’s scales.

The popular sovereignty argument is but one example of *Marrow’s* uneasy “higher law” reasoning. Readers are right to worry with the narrator about the “vagaries of the higher law” (222),<sup>75</sup> its susceptibility to manipulation. Dr. Miller’s sense of higher law expresses his willingness to sacrifice personal interests for “his people,” but higher law arguments in the mouths of the white leaders reveal its susceptibility to custom and corruption. So long as manmade laws coincide with custom, they are valid and binding. When they do not coincide, the law, be it common, statutory, or constitutional, gives way to the higher, supreme law of custom. Mired in tradition then, higher law, like segregation, may be facially neutral, but is racially discriminatory in purpose and effect. This is the nexus Chesnutt fleshes out, showing how prejudice provides the milieu within which theory is practiced. Carteret, for instance, uses an article printed in a black

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<sup>75</sup> “The Vagaries of the Higher Law” is the title of chapter twenty-seven. It treats the failures of and double standards in the operation of the justice system, both in criminal actions and in civil enforcement of contracts.

newspaper to foment white anger. The offending article suggests sexual relations between white women and black men are often freely chosen, and thus merely a pretext for lynching. In response, Carteret high-jacks social contract theory, explaining the article “violates an unwritten law of the South,” a contract between white and black. For their part, the white people agree to “tolerate this race of weaklings . . . until they are eliminated by the stress of competition.” In return, the black community agrees to live by the rules of the white race. By publishing this article, Carteret claims, “one of our conditions is violated . . . our wisdom is assailed, and our women made the subject of offensive comment” (86). The black community, in the person of this newspaper journalist, has breached the customs constituting the social contract; thus the white community is no longer bound by its terms. Released from their duty to “tolerate this race,” the murder and plunder occasioned by the riots are seen as within the rights of the white community. In baring Carteret’s logic, Chesnutt refuses the conceptual purity of the higher law. Here, with its terms explicitly laid out, social contract theory, *as applied*, loses all of its abstract legitimacy and is revealed as a thin screen for white supremacy.

Chesnutt takes pains to show how the higher law logic of lynching depends upon an underlying corrective framework. The creation of a collective guilty “Other” legitimizes burning *any* black man. The black lawyer Watson understands the power of this thinking. He explains it to Miller: “a negro has been arrested on suspicion,—the entire race is condemned on general principles” (190); the “color line [has been] drawn,” the crime against Aunt Polly “made a race issue” (191). Not even McBane advocates burning *all* or *many* “niggers.” “Burn *a* nigger”—one white life has been taken; one black life will compensate. Corrective principles are not questioned by this lynching,

only the level of specificity at which redress will take place. The white Dr. Price goes so far as to comfort Miller with the measured nature of lynching. He says, "If [Sandy] is innocent, his people can console themselves with the reflection that Mrs. Ochiltree was also innocent, and balance one crime against the other, the white against the black" (194). In *Marrow's* portrayal of group corrective justice, a loss sustained by any of the group is a loss to the group as a whole, and the countervailing cost is likewise imputed to the entire offending group. The equality that corrective justice is said to maintain weighs the entire white race against the entire black race, and so long as any Black pays for the crime, equality will have been reestablished. Importantly, though not explicitly acknowledged by any of the white lynching advocates, the reestablished "equality" is nothing like actual equality of white and black. Like Aristotle's corrective justice, *Marrow's* formulation of lynching is aimed at regaining white dominance, the proportions "unbalanced" by the political, social, and economic progress achieved by the black community.

In reality, of course, the carefully corrective and so balanced nature of lynching was only rhetorical. First, lynchings did not necessarily trade a black life for a white. In cases of rape, attempted rape, etc., no white life had been taken to begin with. Second, unlike the "orderly executions" carried out by Western Vigilance Committees, Southern lynchings were spectacles of great and violent "excess" where victims were regularly tortured, dismembered, and mutilated.<sup>76</sup> Third, frequently more than one black man (or

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<sup>76</sup> In one particularly lurid case, for example, both Luther Holbert *and* his wife were horribly tortured before being killed because Luther was suspected of murdering a young white man. "While one thousand white spectators watched, the Holbert's fingers and toes were cut off and large corkscrews were bored into their flesh. After a prolonged torture, the Holberts were burned alive." Earlier that day, three other black men who reportedly looked like Luther Holbert had also been killed (Ifill xii). Five people, in this case, were tortured and killed to compensate for one white death.

woman) was killed for a single offence. For example, in Mississippi, 50 armed white men rode into town, invaded the court room, and shot 13 black men, even though only one of them had been accused of a crime (Waldrep 104). And finally, lynching triggered racial pogroms as was the case in the historical Wilmington and in Chesnutt's fictional Wellington. The near-lynching of Sandy ignited riots, culminating in the murder of many black citizens, the expulsion of black professionals from the city, and the burning of black institutions—results that belie the measured exchange of one black life for one white.

Thus, despite its rhetorical power, the “higher law” is driven by racist, greedy motives, and devolves into violent, socially destructive ends. But the alternatives do not prove better. We may see the danger of allowing “higher law” to trump the written law of the constitution, common law, or statute, but those systems of law are also unreliable because their efficacy rests on the will of those charged with carrying them out. When the well-intentioned Mr. Delamere finds a scrap of paper implicating his grandson, Tom, in the murder of Polly Ochiltree and the framing of Sandy, he “close[s] his fingers spasmodically over this damning piece of evidence” (223), his closed fist prefiguring the action he takes. Though he is the most honorable white character in the novel, staking his reputation to save Sandy, his fist remains closed over the evidence that, if made public, would implicate his grandson. Because Delamere conceals Tom's guilt, “nothing further was ever done about the case” (233). Meanwhile, though “the crime went unpublished, it carried evil in its train” (233), evil that Tom and the white community escape at the expense of the black population as “[a]ll over the United States the Associated Press [. . .] flashed the report of another dastardly outrage by a burly black brute” (233).



The town's near-lynching of Sandy, Aunt Polly's theft of Sam Merrell's will and Sam and Julia's marriage certificate, Olivia's burning of these documents, Tom's free pass for murder, and the riots aimed at overturning democratic elections—all are instances where law is circumvented by the individuals with a duty to carry it out. Usually this is done with a mixture of interests that appeal to “higher law,” but higher law that conceals financial and social self-interest by mobilizing customary notions of white supremacy. For example, though the evidence of Samuel Merrell's marriage to Julia Brown is suppressed in the interest of “the higher law, which imperiously demanded that the purity and prestige of the white race be preserved at any cost” (259), suppression allows Olivia [and her husband] to keep Janet's share of their inheritance. Belmont, Carteret, and McBane each stand to gain financially from the riots they incite. Belmont, above all, who has no real ties to Wellington, uses higher law rhetoric to secure, and obscure, his pecuniary interests. Delamere, guilt-ridden by his part in covering Tom's crimes, attempts to set things right by making a new will, disinherit Tom and leaving his money to Sandy and to Dr. Miller's hospital. But in an act of astonishing naïveté, Delamere gives responsibility for the will to General Belmont. When Delamere dies, Belmont does not produce it, making the usual appeal to higher law: “Mr. Delamere's property belonged of right to the white race, and by the higher law should remain in the possession of white people” (235). Of course, Belmont's own financial interests happen to coincide with the suppression of the new will which Belmont does not destroy, but keeps to blackmail Tom, now heir to the Delamere estate, in case Tom “might wish to change his legal adviser” (235).

The failure of the law to protect the black community leaves them in a quandary—where can they look for protection? Not to democratic processes, not to an ostensibly free press, not to well-meaning white men, not to the black middle class, not to the militant black worker, not to Constitutional guarantees. If any people were justified in recouping sovereignty ceded to a state that has not protected their lives and property, it would be the black community. But the color line denies blacks the individuality necessary to evoke popular sovereignty—it is only individuals who can cede their individual rights, and only individuals who can reclaim them. The prevalence and ease of circumvention is at the heart of arguments such as the one John Reilly makes that the dilemma of *The Marrow of Tradition* is that of the “ironist who sees how the society has departed from its ideals but still values those ideals and unreasonably feels that they could yet be fulfilled” (32).

Critics who see Chesnutt as naïve in directing his criticism at the enforcement rather than the content of the law have missed the complexity of his argument. While Chesnutt criticizes enforcement, his most powerful critique is of the foundations of law—the unwritten content that informs each legal transaction, defining proportions and allocating value prior to the positive instantiations of the law. Reilly’s argument, like that of so many critics, focuses on the way the novel ends. After demonstrating the way that corrupt traditions have saturated every institution, the operation of every law, the application of every lofty ideal, Chesnutt nonetheless turns to the fortunes of the Millers and the Carterets to write an optimistic conclusion, one whose scenes are hopeful and suggestive of reconciliation. At the heart of this conclusion is an attempt to create an

alternative foundation for the failed system of corrective justice, some other grounds on which racial reconciliation can be built.

#### THE TERRIBLE QUESTION OF FORGIVENESS

In “On Forgiveness,” Derrida contends that much of what we understand as forgiveness is not worthy of the name. We tend to speak of forgiving *someone* because that someone has done something to *merit* forgiveness. Or, we speak of forgiving *something* because we wish to achieve a therapeutic purpose, and so the something *merits* forgiveness. But when forgiveness is merited, when it is conditioned on apology or repentance, or is done to effect reconciliation, redemption, normality, or to accomplish any other goal, it ceases to be forgiveness and becomes an economic transaction. For Derrida, forgiveness rightly understood is “aneconomical and unconditional” (38); it cannot be a matter of exchange. True forgiveness “forgive[s] the unforgivable, and without condition” (39). Since forgiveness must be “beyond the exchange” (38), it is only truly possible to forgive the unforgivable, the actors and actions that are so cruel, so massive, so evil, they escape “the measure of any human justice” (33).

In the closing pages of *The Marrow of Tradition*, the Carterets cause the death of the Miller’s son, and the Millers respond by setting aside their chance for justice in order to save the life of Dodie Carteret. In these scenes, Chesnutt creates the very dilemma Derrida outlines by testing the viability of forgiveness, after justice has broken down, as an alternative route to reparation. Thus far, I have argued that the breakdown of corrective justice has been, for 35 of 37 chapters, Chesnutt’s overriding theme in *The Marrow of Tradition*. In the final two chapters, I will argue, we see Chesnutt’s attempt to preserve some form of corrective justice even as he turns to forgiveness as the

mechanism for moving beyond the problematic logic of commensurability entailed by the use of a color line in assessing liability.

Over the decades, the conclusion to *Marrow* has given critics fits. Early critics discounted the conclusion as a disappointing fall into melodrama or, seeing *Marrow* as offering an either/or choice between the conservative Dr. Miller and the militant Josh Green, they dismissed the conclusion altogether, ignoring the substantive alternative presented by the final scenes between Olivia Carteret and Janet Miller.<sup>77</sup> More recently, critics have been willing to see Janet and Olivia as constituting a third option that has been defined across a wild range, from a call for sympathetic middleclass motherhood, to an endorsement of a color blind society,<sup>78</sup> black separatism,<sup>79</sup> or racial amalgamation.<sup>80</sup>

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<sup>77</sup> See, for example, Delmar who sees Miller and Green as two opposite reactions to racial hatred, neither of which is satisfactory (269). He criticizes Chesnutt for having “painted himself into an ‘either-or’ corner, concluding that “if Chesnutt had made even a tentative attempt to break down his either-or theme, [. . .] his novel would have been far more satisfactory thematically” (271). Delmar can only see Miller and Green as the novel’s “either-or” by ignoring the female characters and the decidedly third option they offer.

<sup>78</sup> Christopher De Santis sees the “benevolent actions” of the Millers as “the most socially and politically viable alternative for blacks.” Their actions signal hope for a “transition from a racist social order to a color-blind society” (11). While De Santis is right that Olivia appeals to Miller’s sense of common humanity, this is not the complete story. Miller would have rejected Olivia but for her nearly identical resemblance to his wife. This is a close, personal, blood based relation, not one relying solely on the abstraction of common humanity. De Santis reads the alternative to paternalism and militancy as a call for divine intervention; it is God who is called upon to “eradicate” the “concept of race” (11). Though Olivia has fallen to her knees, it is not God who answers her prayer, but a newly empowered Janet who refuses Olivia’s offer of commonality. If anything, the scene heightens the sense of difference between the two women with Janet standing tall, towering over the groveling Olivia at her feet, imperiously rejecting offers of wealth, name, and sisterhood.

<sup>79</sup> James R. Giles and Thomas P. Lally’s reading focuses on the change in Janet, a “transformation of such proportions that she must be recognized as something more than just a jilted sister or a fawning wife” (267). When Dr. Miller puts the decision of whether to perform surgery on Dodie in Janet’s hands, he “symbolically establish[es] her position as spokeswoman for the new separatist attitude of the black community toward the white,” an attitude that Janet immediately sets forth: “‘Listen!’ she cried, dashing her tears aside. ‘I have but one word for you,—one last word,—and then I hope never to see your face again!’” (267). While Giles and Lally are right to see the pivotal role Janet plays, the ending does not endorse black separatism. Dodie’s rescue points to an intensification of the connection, not a severing. Significantly, William Miller and Olivia Carteret “together . . . went out into the night,” Miller sustaining her with his arm as they walk to the Carteret home. The final scene is one of union, not separation.

<sup>80</sup> Michelle J. Wolkomir claims that the women’s ability to transcend racial barriers (255) leads us in the direction of an “amalgamated society” (252). The melodramatic ending, she writes, demonstrates the “disintegration of traditional social roles that act as a ‘barrier’” (252), bringing the two families and the two communities together for the first time. Consider: Carteret invites a black doctor into his home; Olivia offers sisterhood and a share of her fortune with her mulatto sister; Janet overcomes her fawning

These interpretations rightly recognize the importance of gender, but tend to conflate the approaches of the two women and only address the novel's struggle with the nature of liability in a submerged way. My reading situates the conclusion of *Marrow* within the tension between mercy that is truly aneconomical and mercy that is a transaction and so remains a version of the compensatory calculus rather than an alternative or supplement to it. This approach reads the ending as a continuation of the novel's tense engagement with corrective justice—the struggle to define its demands, the fear of exacting its price, *and* the fear of not exacting its price. Read in this way, the conclusion, far from being superfluous, represents Chesnutt's attempt to address the “terrible question of forgiveness” (Derrida 57) in a novel concerned with how to assess and access reparations for slavery and race discrimination in the South.

I begin by reading the figurative significance of Dodie Carteret as evidence of the centrality of the conclusion to Chesnutt's take on reparation. Next, I critique the dominant critical approach that mistakenly reads *Marrow's* treatment of forgiveness as an economic exchange. I further diverge from the critical tradition by challenging the contract paradigm within which law and literature critics have consistently placed *Marrow* and illustrating the comparative interpretive advantages of the tort paradigm which I have used. Finally, I conclude with a brief analysis of the notion of “redress.”

Theodore Felix Carteret, a.k.a. “Dodie,” is the key to understanding the significance of the conclusion to *Marrow*. His long-awaited birth signals the possibilities of racial reparation in the South, but the continuous threats to his life show how precarious those possibilities really are. Dodie's uncertain survival, measured by his

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subservience to the image of her white half-sister; and Dr. Miller finds himself inside a home from which he had previously been shut out, at the bottom of a staircase, invited by a white man to “come on up” (255).

ability to breathe, becomes a symbol for the uncertain future of the South, a future that depends on achieving some sort of justice.

Olivia has a disturbing dream that establishes Dodie's dependence on the connection between the Millers, who represent the new, upwardly mobile black middleclass, and the Carterets, who at least in the person of Dodie, represent the future for privileged southern white society. In the dream, Olivia is sailing with Dodie—a "fairy prince"—across a "sunlit sea" to his kingdom when "suddenly and without warning" a squall strikes their boat, capsizing them and leaving them "struggling in the sea" (268). Suddenly Janet Miller appears in a boat. Thinking they will be saved, Olivia calls out to her for help, but Janet, "after one mute, reproachful glance," ignores her desperate plea, and "row[s] on" (269). Olivia's life is not in danger. She floats easily in the swirling waters, "as though it were her native element." Dodie, however, is another matter. "[P]owerless to save [him] or accompany [him]," Olivia struggles to support Dodie, but to no avail. He sinks lower and lower in the water until "gasping wildly for breath, [he] threw up [his] little hands and sank, the cruel water gurgling over [his] head" (269). The meaning of the dream is clear. Olivia's generation may survive, even thrive, in the white supremacist South, but Dodie's generation cannot. The only hope for Dodie is the uncertain help of Janet Miller.

Olivia wakes from the dream to find Dodie laboring to breathe. This is not the first occasion we have to suspect the symbolic significance of Dodie's breath. As Dodie takes his first breath, "a refreshing breeze" moves through the room, replacing the "mortuary" odor of magnolias with "the scent of rose and lilac and honeysuckle" (9-10). The death and stagnation threatening the South give way to hope with the birth of this

precariously situated child. Mammy Jane discovers the significance of Dodie's breath when she finds a mole under his left ear, a sign she interprets as predicting he will die by "judicial strangulation" (10). Mammy Jane thinks this means he will be hung, but she does not correctly interpret the sign. The "judicial strangulation" that threatens Dodie's life is not hanging; it is the system of legalized racial segregation that threatens to literally choke the life out of Dodie, and symbolically choke the life out of his generation in the south. Amusingly, Dodie chokes whenever his father espouses white supremacy in his presence. For example, as Major Carteret rants about the end of slavery, complaining that "the old ties have been ruptured," that education is spoiling "self-assertive" negroes (43), little Dodie begins to "[gasp] for breath" (44). He nearly dies. A piece of silver rattle is discovered in his throat, but Dodie is really choking on his father's words. Dodie's breath is a yardstick upon which the fate of the two families, and indeed, that of race relations in general, is measured.

Dodie begins choking again during the race riots when he is "found . . . lying in a draught, before an open window, gasping for breath" (312). He deteriorates quickly as he "vainly endeavors [. . .] to cough up the obstruction" (313). Without a doctor, he will die. But because of the riots, no white doctors are available. The negro nurses have fled, and Mammy Jane, who trusted the Carterets to protect her, has been killed as she braved the riots to come to Dodie's aid. Miller, whose services the Carterets have previously refused on the basis of his race,<sup>81</sup> is the doctor of last resort. Faced with "the imminence

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<sup>81</sup> The first time Dodie chokes, Doctor Burns comes from Philadelphia to perform a tracheotomy. This course of events brings Dr. Miller into close contact with the Carterets. Burns asks Miller to assist in the surgery, along with a team of white doctors from Wellington. Pleased and willing to help, Miller comes to the Carteret home, only to be refused entrance because Carteret will not have his child touched by a black doctor's hands.

of his child's peril," Carteret puts aside "his lifelong beliefs" and "allows" the black doctor to save his child's life (317).

He has not anticipated that, like Janet in Olivia's dream, Miller would refuse to help.<sup>82</sup> He assumes the "honor" of being called to care for a white child would be "too great . . . for a negro to decline," unless, of course, Carteret considers, "some bitterness might have grown out of the proceedings of the afternoon." Even if Miller has "taken to heart the day's events," Carteret thinks "professional ethics [will] require him to respond" (317-318). But Carteret grossly minimizes the devastation unleashed by the afternoon's "proceedings" (317). The black community has been terrorized. Prominent black leaders and business men have been forced out of town and out of elected office. Black men, women, and children have been molested and murdered, their bodies left in the streets. Josh Green and the other black resisters are all dead. As Carteret rushes to fetch Miller, he is unaware that the Miller's son has been killed during the riots. Miller refuses to help, laying responsibility at Carteret's feet:

"There, Major Carteret!" [. . .] There lies *my* only child, laid low by a stray bullet in this riot which you and your paper have fomented; struck down as much by your hand as though you had held the weapon with which his life was taken!"

[. . .]

"[. . .] My duty calls me here, by the side of my dead child and my suffering wife! I cannot go with you. There is a just God in heaven!—as you have sown, so may you reap!" (320)

This most full assertion of corrective justice, using the same formulation the narrator used to refer to the death of McBane—"as you have sown, so may you reap"—returns to

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<sup>82</sup> De Santis has noticed the irony of how the lynching logic that erases racial difference is unavailable here, how the "amalgamation of all difference into a single, racially defined 'Other,' is shown to be utterly untenable" (4). It is not *any* black man as representative of the black race who can save Dodie, but this particular black man, who possesses specific medical training, has particular doctorly skills, and has a set of individual character traits.



Carteret his just deserts. He has killed the Miller's son, and commensurability calls for the life of his own.<sup>83</sup>

The most striking aspect of this interchange is that Carteret himself, with his "logical mind," recognizes Miller's verdict as correct and just:

[F]or a moment the veil of race prejudice was rent in twain, and he saw things as they were, in their correct proportions and relations [. . .]. Miller's refusal to go with him was pure, elemental justice; he could not blame the doctor for his stand. He was indeed conscious of a certain involuntary admiration for a man who held in his hands the power of life and death, and could use it, with strict justice, to avenge his own wrongs. In Dr. Miller's place he would have done the same thing. Miller had spoken the truth,—as he had sown, so must he reap! (321)<sup>84</sup>

Logically, reasonably, "pure and elemental justice" aligns the strict proportions of human injury and retribution. By dropping the "veil of race prejudice," Carteret is able to accurately judge "proportions and relations" and so can accept Dodie's death as the "right outcome" (321). Carteret returns home, resigned to paying the deserved price—"fiat justicia" (justice be done).

Chesnutt reinforces the just nature of this outcome by having the narrator tell us that the others gathered at the Carteret home also accept the outcome as just: the Northern white clerk "Evans felt the logic of the situation," and "to the [black] nurse it was even clearer" (322). Unlike the primal, instinctual justice epitomized by Green, this justice is presented as objective, rational, and measured. Chesnutt takes pains to ensure

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<sup>83</sup> The suffering of the Carterets confirms Miller in his non-violent approach, allowing him to maintain "clean hands" as corrective justice takes its seemingly inexorable course. As French observes, "if a penalty befalls a villain accidentally or inadvertently or mistakenly . . . no act of revenge has occurred," even though it may be a fitting penalty (80). While the penalty befalling Carteret is not accidental, inadvertent, or mistaken, it is not Miller who is doing the "avenging." It is the universe itself—a "just God"—that redresses Miller's wrongs. Unlike Josh Green, Miller is not required to take any action to restore moral order. The lack of need for overt action shields Miller from accusations of vengeance.

<sup>84</sup> A case of corrective justice is made by kindly, but naïve Mr. Delamere. Delamere pleads with Carteret to stop Sandy's lynching, laying responsibility for black crime on white people. Slavery, Delamere argues, was a wrong for which white society must suffer "the manstealer's curse" (211). This curse takes the form of cause and logically calibrated effect. "If we have made some of them brutes, we have only ourselves to blame, and if these prey on society, it is our just punishment" (211).

that we see it as a rare instance when there is, at least within these scenes, a “common measure,” an exchange of “like for like” that balances the scales. It is the clearest case of corrective justice in the novel.

The Miller’s son is dead. The Carterets are to blame. They must pay with the life of their child. It is “pure, elemental justice.” However, by following chapter 36, “Fiat Justicia,” that establishes the cost of justice, with the chapter 37, “The Sisters,” that circumvents it, Chesnutt turns to women—mothers and sisters—to reach beyond the demands of corrective justice for some other principle upon which reparation can be made and the South be allowed to move forward with hope. It is Olivia, once again, who attempts to sidestep the compensatory calculus. It is not that she rejects strict and logical justice. She simply does not “stop to reason.” As she rushes to the Miller’s home, her “mother’s heart usurps the place of intellect” (322), and she begs for forgiveness and mercy at Dr. Miller’s feet. Miller leaves the decision of whether he will save Dodie in Janet’s hands.<sup>85</sup>

In the scene that follows, the women take center stage as Olivia and Janet speak to each other for the first time. As Olivia entreats Janet, she finally acknowledges their blood relation and her own wrongdoing, telling Janet, “You *are* my lawful sister. My father was married to your mother. You are entitled to his name, and to half his estate” (327). The confession brings about a powerful change in Janet. From prostrate grief, she stands up to rebuff Olivia’s apology. “For twenty-five years I, poor, despicable fool, would have kissed your feet for a word, a nod, a smile. Now, when this tardy recognition

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<sup>85</sup> Initially Dr. Miller refuses Olivia’s pleas, resting his refusal on his sense of justice. “Madam,” he tells her, “my people lie dead upon the streets, at the hands of yours. The work of my life is in ashes,—and yonder, stretched out in death, lies my own child! [. . .] Love, duty, sorrow, *justice*, call me here. I cannot go!” (324, emphasis original).

comes, for which I have waited so long, it is tainted with fraud and crime and blood, and I must pay for it with my child's life!" (328). At last, Olivia joins her husband, the Millers, and the rest in recognizing and accepting the outcome of the compensatory calculus. She answers, "And I must forfeit that of mine, [. . .] *It is but just*" (328)(emphasis mine).

The power shifts to a now "imperious" Janet who acknowledges Olivia's broken down concession to justice but nonetheless allows her husband to save Dodie—though not on Olivia's terms. She tells Olivia, "I throw you back your father's name, your father's wealth, your sisterly recognition. I want none of them,—they are bought too dear! . . . But that you may know that a woman may be foully wronged, and yet may have a heart to feel, even for one who has injured her, you may have your child's life" (329). Janet's mercy is not given in exchange for the recognition that Olivia has offered or because of Olivia's remorse. Though Janet has been "foully wronged," she nonetheless "feels" for Olivia and her son. The novel's final line, "there's time enough, but none to spare" (329), spoken to Dr. Miller when he arrives to save Dodie, signals hopefulness, as "feeling" and "a mother's heart" upend "custom, reason, and instinct" and dodge the demands of strict corrective justice through the operation of mercy.

I have thus far been using the terms "forgiveness" and "mercy" as roughly synonymous. While they can occur together—forgiveness often leads to mercy—they are distinct concepts. Jeffrie Murphy in his well-known work on forgiveness explains that mercy means to "treat a person less harshly than [. . .] one has a right to treat that person" (20). Mercy entails leniency in the way that I act or forbear from acting. Forgiveness can have a similar meaning. For example, to forgive a debt means to

relinquish a claim to it. But when used in reference to a person, forgiveness is not a matter of how I treat her, but “a matter of how I *feel* about [her]” (21). It entails letting go of resentment. One might demand that justice be done and yet in his heart forgive. He might forgive later, after the guilty one is dead or has paid the judgment in full. In other words, he might forgive and yet not show mercy. The reverse is also true. One might show mercy, extend leniency, but without changing how she feels about the guilty one. Olivia’s request for forgiveness—for Janet and William to change the way they *feel* about her and her family—is a means to secure an end. It is mercy, leniency, she is truly after. She wants the Millers to save her son, to treat her and her family less harshly than justice entitles them. Her orientation towards both forgiveness and mercy is squarely within a system of exchange—she is willing to “trade” for them.

Critics keen to provide fuller readings of the novel’s conclusion have seen Chesnutt as giving motherhood a new place of prominence as the mechanism through which mercy and forgiveness are constituted.<sup>86</sup> While the appeal to sympathetic motherhood has its own critical tradition,<sup>87</sup> it is not one in which the questions of justice and liability are amply treated. Samini Namji, for example, focuses on *Marrow’s* dual mother-child relationship to notice how “Chesnutt’s final appeal is to the maternal instinct in his white female audience—that instinct which he, and Stowe before him, believed to be a powerful, life-affirming force, resonating across the color line” (7). It is maternal instinct then—a “mother’s heart” (*Marrow* 322)—that “hurls [Olivia] across the

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<sup>86</sup> While associating mercy with women is a commonplace in 19<sup>th</sup> and early 20<sup>th</sup> century literature, Martha Nussbaum has noticed that even in contemporary treatments of justice and mercy, mercy is associated with women. She points to Richard Posner’s highly influential book *Problems of Jurisprudence* published in 1993 in which he categorizes the “mercy tradition” in the criminal law NOT in the chapter on criminal law where he treats punishment and retribution, but in a separate chapter on “Literary and Feminist Perspectives!” (Nussbaum 113).

<sup>87</sup> For a cross-section of this critical tradition, see *The Culture of Sentiment: Race, Gender, and Sentimentality in 19<sup>th</sup> Century America*, edited by Samuels.

racial divide,” casting off pretensions of white supremacy, acknowledging Janet as her sister, and admitting her own culpability. In return, Janet, refusing all other appeals, “responds to Olivia’s desperate motherhood” (14). Namji’s reading rightly renders the women central to the novel’s hopeful resolution. Motherhood is the reason why Olivia is willing to confess, apologize, and offer restitution, and why Janet is willing to extend mercy, if not forgiveness. But Namji does not place these actions in the context of the novel’s overall approach to duty and liability, nor does she distinguish between the two mothers in their dramatically different orientations towards justice and mercy.<sup>88</sup> Both are women; both are mothers. Yet Olivia bargains for forgiveness while Janet refuses to.

The nature of Janet’s act of mercy represents a puzzle for *Marrow’s* corrective definition of justice. Is the act outside of corrective justice and so an alternative to what has been a strict, threatening logic of equilibrium? Or is the act an instance of the compensatory calculus that reasserts corrective principles by merely shifting the terms of the transaction, while retaining the underlying notion of a transaction itself? As a novel about corrective justice, *Marrow* has been preoccupied with the concept of balance, and the logic of equilibrium in the conclusion is strong. These aspects of the novel are perhaps what have led critics to place the mercy extended by the Millers within a corrective paradigm, as a transaction that rights the imbalance between them and establishes them as equals.

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<sup>88</sup> While the argument is outside my scope, some philosophers who study justice and forgiveness have argued that corrective justice, embodied in formulas such as an eye for an eye, etc., draws always from emotion, not rationality. Although a rational tool may measure the recompense due, the insistence on it, the desire for it, is inherently passionate and not rational. Murphy quotes Camus: “Whoever has done me harm must suffer harm; whoever has put out my eye must lose an eye; and whoever has killed must die. This is an emotion, and a particularly violent one, and not a principle. . . . Retaliation does no more than ratify and confer the status of law on [this] pure impulse of nature” (from “Reflections on the Guillotine,” qtd. in Murphy and Jeffries 1).

Todd McGowan sees Janet's response as pivotal precisely because it is removed from the realm of commensurability and exchange. He writes, "[Janet's] act has no exchange-value; it subverts the circuit of exchange. Miller has given something for nothing, and cannot be repaid (her son remains dead). . . . Because it is not a reaction and cannot be compensated for, Miller's act disrupts" (8). McGowan, however, misses the fact that the "circuit of exchange" that Janet "disrupts" has not yet actually functioned. Up until this point in the novel, Chesnutt has repeatedly demonstrated that there are no finally balanced transactions: debts cannot be repaid in kind,<sup>89</sup> and the logic of exchange has no end. Though we may question whether he succeeds, Chesnutt has tried to create conditions of equilibrium between the Millers and the Carterets in *Marrow's* closing scenes. We know that the record of the Carteret's injustices towards the Millers dates back decades, but in this chapter, Chesnutt presents the life of Dodie Carteret as a fair and measured trade for that of the Miller's son. Though Olivia cannot be literally compensated—her son cannot be restored—it is as close to commensurability as the novel gets. The pending death of Dodie has been characterized as an "even exchange," as "pure, elemental [...] strict justice" (321), an empirical instantiation of the novel's catchphrase—"as you have sown, so may you reap" (320, 321). Thus McGowan's account fails to give Janet's actions their due. In rejecting Olivia's offer, Janet gives up her claim to justice—the "even exchange" of Dodie's life for the life of her son. The point Chesnutt is making here is not that she can't be compensated; it is that justice is within her reach, and she willingly relinquishes it.

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<sup>89</sup> McGowan's claim that Janet cannot be repaid because her son remains dead, while literally true, actually misses the mark. Corrective justice never claims to restore the specific thing lost; instead, it measures the value of the thing and assessing a corresponding cost.

With Janet's act, Chesnutt creates an alternative to corrective justice that would avoid the complications and horrors of strict justice by stepping outside of the framework of equilibrium. But in *Marrow's* concluding scenes, we see how strong the pull towards corrective justice is as critics wanting to demonstrate the non-transactional nature of the conclusion simply reconstitute it on alternate grounds. Susan McFatter and Sandra Gunning's readings, for example, both unwittingly create a framework of equilibrium in the conclusion to *Marrow*, precisely the framework Chesnutt was trying to escape. McFatter substitutes morality as the commensurate term in her analysis of *Marrow*. For her, *Marrow* stages a conflict between paternal, "official" law, and maternal forgiveness. The paternal "spirit of *lex talionis*" animating the novel finally becomes untenable, resolving in the actions of Janet Miller who embodies a contrasting ethic of Christ-like forgiveness (McFatter 207).<sup>90</sup> Where maternalism is concerned with preserving or keeping and "reflects an attitude of 'holding,'" McFatter claims, strict paternal justice is concerned with getting or "acquiring," and so is "instrument[al] of capitalism" (207).<sup>91</sup> Accordingly, Olivia's offer of social recognition, a family name, and a shared inheritance is paternalistic. But to Janet, Olivia's offer is an "obscene trade-off in compensation for the life of her child" (McFatter 208). By offering mercy and rejecting the exchange, Janet constructs a maternal alternative to strict justice.

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<sup>90</sup> McFatter's characterization of Janet's position as "Christ-like forgiveness" is faulty. Her actions may be merciful, but she does not "forgive" Olivia in the Christian sense of the word, and in fact, rejects her apology and her offer of reconciliation. Furthermore, Janet is hardly a meek figure of humble submission. Through her rejection of Olivia, she becomes powerful, "imperious," and even haughty.

<sup>91</sup> Criticizing characterizations of "soft" maternalism, French argues "to teach morality is not just to teach kindness and a number of prohibitions; it is to teach when and how and at whom to be angry, who and when to retributively hate, and when and how to act because of one's moral anger and retributive hatred. [. . .] Care ethics typically makes the virtue of care sound like it has everything to do with forgiveness and mercy and nothing whatsoever to do with preserving the moral community by acting with hostility toward the evil people who invade it" (111).

So far, so good. However, McFatter is unable to sustain the distance between paternal justice and maternal mercy. She claims Janet transforms from resentful would-be sister to powerful woman by “wreak[ing] vengeance”<sup>92</sup> through “Christ-like forgiveness of her oppressor,” an act that establishes herself as morally superior to Olivia (209).<sup>93</sup> Wreaking vengeance through forgiveness?! If this is her objective, then Janet finds the specific terms of the proposed trade “obscene,” but not the concept of a trade itself. So despite her persuasive account of Janet’s transformation, McFatter places mercy within a framework of exchange—moral superiority is the price Janet asks for the life of Dodie, her method of demanding “retribution” (209). In reducing forgiveness to a form of vengeance, McFatter builds both forgiveness and justice on the same corrective ground. McFatter’s “domestic alternative” is ultimately just another version of reciprocal exchange—the selfsame “paternal” monolith upon which “official” legal precepts rest.

Sandra Gunning also deploys morality as the commensurate term, but for her, the two parties are ultimately the white community and the black. For Gunning, *Marrow* stages a series of reversals. The novel reverses the arguments for white moral superiority by placing those arguments in the mouths of characters whose actions belie the words, making “negative example[s] of white moral action” (73). Gunning sees Janet’s final morality, her “life-affirming feminine mercy” as an inversion of the injury done to her mother. Because Janet “stops short of punishing with an eye for an eye” (74), she

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<sup>92</sup> McFatter sees a theme throughout Chesnutt’s work of using female characters to enact female versions of revenge. Silence and suicide, for example, are “overt acts of vengeance.”

<sup>93</sup> McFatter distinguishes the behavior of Janet Miller from more oppressed characters. For example, Chesnutt’s female slave characters respond to “racist and patriarchal paradigms” through “overt acts of vengeance,” while “Victorian female characters” like Janet Miller “seek resolutions” which allow them to maintain a higher level of “moral integrity and dignity” than their oppressors (195). Even the “resolutions” of female characters remain within the circuit of exchange. Rena, for example, in *The House Behind the Cedars*, “chooses death,” not out of weakness, but “as a means of overcoming oppression and as an act of vengeance” (201).



assumes the moral high ground. As a result, while her mother was not allowed to stand in the presence of Polly Ochiltree, it is Olivia Merrell who is now on her knees begging Janet for mercy, thus “revers[ing] the initial degradation suffered by her mother” (74). Gunning renders Olivia’s humiliation commensurate with Julia’s, and by reading mercy extended by a black family as an inverting response to injuries inflicted by a white family, Gunning establishes morality as the commensurate term in what turns out to be a balancing line between the white and black communities—“in the person” of the Millers and the Carterets. Her argument echoes the erasure of difference and logic of lynching as each racially defined community constitutes countervailing sides of a scale that is re-balanced as the ending of *Marrow* effects a “moral shift from white to black middle-class values” (74).

William Modellmog and Brook Thomas have seen Marrow’s ending as Chesnutt’s attempt to escape the dominant contract paradigm that defined the nature of duty in the nineteenth century (and much of the twentieth). Both of their most prominent analyses of Chesnutt’s novels have read them as turning to motherhood and the family as ways of negotiating the tension between contractual and non-contractual grounds of duty. For example, William Modellmog in his analysis of contract and ownership in Chesnutt’s work, concludes that the domestic comes to have its own kind of law, the “law of love.” Thus, Chesnutt’s use of sentiment and domesticity broadens the scope of law. Chesnutt uses sentiment to “assert legal principles now hidden beneath seemingly authoritative interpretations” and so challenges the monolithic view of contract by revealing the legal sphere as a space of “competing cultural narratives” (60).<sup>94</sup> On this

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<sup>94</sup> Modellmog does not read *The Marrow of Tradition* or *Paul Marchand*, but focuses his study on the concepts of contract and ownership in Chesnutt’s short story “The Sway Back House” and his novel *House*

point at least, Modellmog's argument is cut from the same cloth as Brook Thomas's. Thomas also sees *Marrow* as presenting alternatives to contract ideology. He looks to Chesnutt's use of the family as evidence of Chesnutt's search for an alternate construction of duty that is non-contractual, non-negotiable, and not even voluntary. Familial duty exists prior to and as more fundamental than duty defined by social or private contract.<sup>95</sup>

I am not convinced by either Modellmog or Thomas's reading of family and the domestic as alternatives to contract. Though it may be maternal instinct and sympathy that hurl Olivia across the racial divide and that send Dr Miller across the threshold of the Carteret's home, motherhood and the family are hardly non-contractual. On the contrary, as Gregg Crane has argued, *Marrow* "rediscovers the contractual nature of ethical relations we tend to assume are status driven, such as marriage and family" (199). For Crane, in *Marrow's* closing scenes, family ties, blood relations—the supposedly non-contractual—become a matter of contract. They supply the contractual consideration Olivia offers up to Janet in exchange for Dr. Miller's help. Love, family, even profession,<sup>96</sup> are not constructed as alternatives but reduced to subordinates of contract.

What Crane, Thomas, and Modellmog all miss, however, is the parallel system of tort that supplies a non-contractual, non-consensual, non-negotiable framework of ethical

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*Behind the Cedars*. While *Marrow's* focus is not primarily the domestic, certainly not to the same extent as the works Modellmog treats, its ending falls into the pattern he identifies as an "alternative cultural space" of sentiment and domesticity.

<sup>95</sup> Duty that is familial rather than contractual helps salvage Chesnutt's turn to motherhood and also helps explain the diverging choices available to Miller and Green. Miller takes a different path in part because of binding obligations defined by familial and racial ties that constrain his passions and limit his options. Green waits to kill McBane until he no longer has a duty to his mother; so long as she is alive, he does not want to leave her with no one to care for her, and so family responsibility stays his hand. When she dies, conveniently just before the riots, Josh sees himself as completely free to collect the justice due him, though it will take his life.

<sup>96</sup> While not addressed by Crane, Miller's professional ethics are yet another non-contractual basis of duty, here made the object of contractual exchange.

relationships. This oversight rests in part on the mistaken conflation of all exchange with contract. People may exchange gifts, and so long as one gift is not given as an agreed consideration for the other, this is not a contract. Similarly, the state can calculate damages, can impose penalties, that are given in exchange for wrongdoing, but because these are not consensual exchanges, they are not contracts. Thus while there are contract elements to the closing scenes, Crane, Thomas, and Modellmog miss the tort elements there as well. First, although Olivia offers an exchange, Janet rejects the offer. More importantly, though the scene between Olivia and Janet does resonate with contract on some levels, it is clearly a response to the liability that Major Carteret has incurred for the death of the Miller's son and for the injuries that Olivia Carteret has inflicted upon Janet all these years. The Millers and the Carterets both, as we have seen, understand the situation in those terms. The Carterets are liable to the Millers, not based on breach of a contract between them, but based on tort, the breach of a socially imposed duty to do no harm.<sup>97</sup>

The larger reason why three leading law and literature critics would overlook the prominent tort elements in *The Marrow of Tradition* is due to the rhetorical dominance that contract law had in the late nineteenth and early twentieth centuries, a time when tort law was just coalescing as a discrete field of law. However, the omnipresence of contract on which Thomas, Modellmog, and Crane's analyses rely is overstated. As legal

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<sup>97</sup> While corrective justice is foundational to tort law, it is also relevant to contract law. Contract law in the 19<sup>th</sup> and 20<sup>th</sup> century did not employ the same notions of balance and equilibrium. That there was "consideration" for the contract—in other words, that there was a bargained-for exchange of value—was generally all that was required for a court to find a contract was valid. Notions of balance and equality came into play in the formation stage, not between the terms, but between the parties who were assumed to be equals, at least for the space of contracting. In cases of breach where the contract itself dictated damages, the agreed-on terms established the extent of liability. In other words, if the aggrieved party sued under the contract, the contract itself dictated recompense. However, if the aggrieved party sued, not on the terms of the contract, but to seek damages for the contract that was breached—it was a tort issue and considerations of corrective justice determined damages.

historians have also noted, contract's dominance was largely rhetorical. As Friedman explains, "the *idea* of contract" may have been fundamental, but the "concrete body of law *called* contract was another matter" (532). Judged not by legal rhetoric but by legal practice, "the law of contract, after 1850, was beginning a long slide into triviality" (533). This was partially attributable to the period's rapid growth of statutory regulation. Each "new law on the statute books [ . . . was] a cup of water drawn from the pool or puddle of contract" (534). Furthermore, the very growth of tort is evidence of the decline of contract. This is clear by the way that the field of tort was defined. Thomas McIntyre Cooley's 1880 treatise was entitled *A Treatise on the Law of Torts or the Wrongs which Arise Independent of Contract*. Joel Prentiss Bishop's 1889 treatise was entitled *Commentaries on the Non-Contract Law and Especially as to Common Affairs Not of Contract or the Every-Day Rights and Torts*.

Contract and tort together were seen as constituting the whole of civil liability. The relationship between the two was zero-sum—what was not contract, was tort, and vice-versa. Inversely related to contract, where tort flowed, contract ebbed. Thus critics reading *Marrow* in the search for duty that is non-contractual need look no further than tort whose duties are, by definition, non-contractual. Socially imposed, a breach of them triggers the calculus of injury and compensation regardless of whether the parties have agreed to be bound by those duties or subject to that liability.

It is true that tort was seen as logically (and ideologically) inferior to contract. But as tort law developed during the early 20<sup>th</sup> century, legal scholars began to recognize not only the substantial overlap between the two branches, but also the logical priority of tort

over contract. As Levin puts it, “the deep secret of contract is that, to a great extent and in a significant way, it is a subclass of tort law” (177).

Contract is, in practice if not in theory, a subclass of tort because contracts have to be interpreted and because courts only enforce some contracts in some situations and for some purposes—the methods of interpretation, the situations in and purposes for which contracts are enforced are themselves not consensual, not a matter of contract. In fact, despite the rhetoric lauding the supremacy of consent, in reality, courts often enforced contracts contrary to the subjective consent of the contracting parties. Courts could invalidate a contract entirely as being contrary to social policy, but more often they were forced to interpret the meaning of contractual language, frequently in ways that the contracting parties may never have intended. Courts would interpret the meaning of a contract based on objective, external standards that did not attempt to ascertain the private and subjective meaning intended by the contracting party.<sup>98</sup> Thus in a practical sense, the contract itself does not delimit the meaning of the contract. The court retained great discretion in choosing between what were often many legally plausible alternative interpretations. They did so on the basis of social understandings of words, duty, and liability which impacted the nature of contract law as much as the agreement between the parties did. Thus, socially prescribed duty—the non-consensual, non-negotiable

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<sup>98</sup> Not only are courts called upon to interpret the meaning of contractual provisions in ways that the parties may not subjectively have intended, but many contracts provisions are *imposed* by law and without consent. When one contracts with a professional, for example—a doctor, a lawyer, etc., the nature of the duty owed is a function of the profession and not a matter of contractual provision. The duty is owed whether or not it is promised. Most contract provisions are not truly voluntary anyway. Most are not understood; many are not even read. A contract to purchase insurance, for example, is the paradigmatic case. It defines “everything,” but to say every provision represents a “meeting of the minds” flies in the face of experience. Levin characterizes the non-consensual nature of most contracts as being “full of language referring to their own validity, with statements trumpeting that they are well-understood, voluntarily entered-into, and recognized as giving up certain rights. These statements are often interspersed between paragraphs indecipherable without years of extensive training and experience in the art of legal hieroglyphics” (Levin 169, fnnt 24).

foundation of tort law—was alive and well at the heart of contract law. Contract was delimited by tort, and not the other way round. Thus literary critics searching for an alternative to contract shortchange their search by failing to see tort, which not only exists “prior” to and “more fundamental than” contract, but constitutes a non-consensual, non-voluntary dimension of contract itself.<sup>99</sup>

The tension in the conclusion to *Marrow* is not in the search for the non-contractual. In my reading, the non-contractual, tort-based foundation of duty has been the operative framework from the beginning. The tension in the conclusion is to find a way beyond the implications that the color line has for corrective justice with its notions of balance and equilibrium. My reading of *Marrow* has constructed four criticisms of the color line and corrective justice:

1. Corrective justice, combined with the color line, is too easily made to serve custom.
2. Corrective justice annihilates difference, making race the only quality that matters.
3. Corrective justice, at best, only returns the two parties—blacks and whites—to the status quo ante, restoring a previous state of inequality rather than creating social, political, or economic parity.
4. The compensatory calculus of corrective justice is never final because the act of redress itself creates new injuries.

In the final few pages of my chapter, I gesture towards an alternative way of reading Chesnutt’s representation of forgiveness and mercy, one that maintains a version of corrective justice as a standard for measuring liability, but attempts to avoid the problems of corrective justice that derive from the compensatory calculus.

Jeffrie Murphy deepens our understanding of the injury the Miller’s have sustained. The Miller’s have not only been injured; they have been *degraded*. As

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<sup>99</sup> For a summary of the way this argument appeared historically, see Horwitz, *Transformations 1870-1960* 46-51.

Murphy explains, the resentment felt at an injury is not solely due to the injuries suffered, but also to what the injury communicates—“ ‘I count but you do not,’ ‘I can use you for my purposes,’ ‘I am up high and you are there down below’” (25). I will argue that, ironically, by evading the circuit of exchange, Janet insists on a more fundamental form of equality. In rejecting the operation of corrective justice through the extension of mercy, Janet also rejects the pre-existing inequality that corrective justice covers, thereby constructing a new relationship between the sisters and families.

Olivia’s compensatory calculus that gives up the possibility of justice because of the magnitude of the debt seems also to be Chesnutt’s conclusion, as the equality the novel ends with is moral and philosophical, but not political, social, or economic. The rescue of Dodie, and so the rescue of the future of the South, is achieved without making any provision for justice. The closing lines show Dr. Miller entering the Carteret’s home and, standing at the bottom of their stairs, being invited to “come up” and treat Dodie, for whom there is “time enough, but none to spare” (329). Reparation is made to seem possible WITHOUT securing justice for the killing of the Miller’s son, let alone for any of the crimes committed during the Wellington riots or resulting from the systemic injustice of slavery and segregation. The only costs borne directly by the white community are the sacrifice of racist principles, principles Carteret gives up in order to “allow” Miller to save Dodie. The black community pays the price of reparation while the white community reaps the benefits.<sup>100</sup>

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<sup>100</sup> I believe Chesnutt himself was unhappy with this aspect of the conclusion to *The Marrow of Tradition*. His final novel, *Paul Marchand, F.M.C.*, written in the early decades of the 20<sup>th</sup> century, but not published until 1999, 67 years after Chesnutt’s death, revisits the topics of liability and mercy, but in a much less conciliatory fashion. In *Marchand*, justice is exacted from the white community in a literal eye-for-an-eye way while the only mercy given is extended to a mulatto criminal.

A full analysis of the notion of redress is beyond the scope of this chapter, but I want to conclude by suggesting that the conclusion in *Marrow* does not entail a total relinquishing of justice. True, Chesnutt is attempting to articulate a version of mercy that cannot simply be subordinated to corrective justice. Because the mercy Janet extends is not a made a matter of economic transaction, the equality that Janet acquires is similarly not made a matter of exchange. But nor is it the *outgrowth* of mercy. Instead, and this distinction is important, the equality she asserts is *the reason for* her act of mercy, not the outcome of it. She severs her emotional dependence on Olivia, reconstituting their relationship on grounds of equality, grounds that are simply *taken*—asserted rather than traded for. By granting mercy without the need for anything Olivia has to offer, Janet refuses the degradation that has accompanied her injuries and asserts an *inherent* equality, one that is not bargained for and thus one that is not conditional. At the same time, while this new equality would be impossible within the confines of corrective justice (that at best can only restore pre-existing inequality), this new equality is made possible by the recognition by both parties of what the price of corrective justice would have been. This assessment, this reckoning, requires the logical framework of corrective justice, even if not is actual operation.

Although Chesnutt aligns Janet's actions with mercy, and although he sees mercy as outside of the realm of reciprocal exchange, it would be a mistake to conclude that he is therefore rejecting justice. The act of accounting (in Carteret's words, of recognizing the "correct proportions and relations") is essential. Mercy is impossible without it. Murphy sets out three criteria for mercy. First, there is the notion of a just or rightful authority. The one being merciful must be in a position to be or not to be lenient.



Second, the one in search of mercy has done something wrong, has violated some “rule,” whether they acknowledge the fact or not. Third, there is “a consideration of external action;” that is, there is a consideration of what course of action would be the just response to the violation. Without this consideration of justice, there is no standard from which leniency can be measured (20-21). Mercy operates only *after* the logical balancing. There is first at least a formal reckoning. More than a mere determination of guilt, there is an assessment and acknowledgement of the cost of expiation, a recognition given by Carteret when he concedes the death of his son is “pure, elemental justice,” a recognition publicly acknowledged in front of both Evans and the black nurse, and a recognition finally wrenched from Olivia when, defeated, she concedes the loss of Dodie is “but just” (328). At that moment, Chesnutt totals the balance sheet. Though the balance sheet is never actually brought flush, this acknowledgement and tabulation are necessary preconditions to mercy. The price of justice must be set before it can be sidestepped.

In general, the goals of corrective justice are achieved by either restitution or rectification. Restitution “simply unwind[s] a wrongful interaction,” restoring what has been lost in a literal sense. Where such restitution cannot be made, or where restitution is incomplete because it does not attend to “other injuries brought about by the wrong, such as loss of use value, loss of opportunity to sell at a profit, or emotional distress,” rectification can be used. Rectification restores “a state of affairs equivalent in moral value to the status quo ante” (60). But both restitution and rectification rest on a commodified conception of compensation, one that implies commensurability. Margaret Jane Radin has argued that we must find “some other way to restore moral balance

between the [victim and offender] than by putting [them] into the status quo ante, which may be irretrievable, or by putting them into a state equivalent in value to the status quo ante, which may be unachievable” (69). Her answer is to reject what she calls the “discourse of commodification” (57) that bases justice on an economic exchange. Instead, she posits “redress” as a “noncommodified conception of compensation” (61). “Redress is not restitution or rectification.” Rather than restoring a lost state of equilibrium, redress focuses on “showing the victim that her rights are taken seriously.” This is done by some outward action that symbolizes respect for the rights of the one who has been harmed and that publically recognizes the “transgressor’s fault in disrespecting those rights” (61). Redress can “symbolize public respect for rights and public recognition of the transgressor’s fault by requiring something important to be given up on one side and received on the other, even if there is no equivalence of value” (69). The wrongdoer gives up acknowledgement of the wrongdoing, a concession of guilt and responsibility. The wronged party receives this acknowledgement which recognizes her rights by conceding liability. Thus redress is a method of recognizing a wrong and “signifying its weightiness” (74). This is not a “quid pro quo.” It is a “symbolic action that reinforces our commitments about rights and wrongs” (85).

Thus the scenes of justice in the novel are not to be found in the acts of mercy and forgiveness, but nor do these acts vitiate justice. Chesnutt presents the scenes of justice in *Marrow* as happening in the act of accounting, in the acknowledgement wrung from every person, including Major Carteret and finally Olivia, that establishes the Carterets and the Millers as equals. Justice is in the joint recognition that Dodie’s life is not worth more than the life of the Miller’s son. This act of accounting requires the philosophical

framework of socially imposed duties, the logic of corrective justice if not the actual operation of it.

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## CHAPTER TWO

## THE SECRET OF SECRETS: BLACKMAIL, LETTERS, AND THE DISCOURSE OF PRIVACY

*You ain't going to be able any longer to monopolise any fact of general interest; and it ain't going to be right you should; it ain't going to continue to be possible to keep out anywhere the light of the Press. Now what I'm going to do is set up the biggest lamp yet made and then make it shine all over the place. We'll see who's private then, and whose hands are off, and who'll frustrate the People—the People that wants to know.*

--*"The Reverberator,"* by Henry James (1888)

*I know too much about a certain person now not to put it to you—excuse my being so lurid—that it's quite worth your while to buy me off. Come therefore: buy me!*

--*"In the Cage,"* by Henry James (1898)

In these two passages, Henry James captures the intrusive late nineteenth-century press and the hidden dangers and lucrative temptations it created in the market for personal information. The vulgar editor of a society newspaper, George P. Flack, is speaking in the first passage, about the power of the press, acting in the name of “the People,” to reach secrets wherever they hide. But what was not illuminated by the press—that “biggest lamp yet”—was its complicity in creating what became a huge and pernicious black market for personal information during the late nineteenth and early twentieth centuries. In the second passage, we see evidence of that market given in the voice of an unnamed, young telegraph clerk. With bits gleaned from the “private” telegram messages she takes and sends, she pieces together information about the lives of figures in high society and fantasizes about what it would be like to use the power of her inside knowledge as blackmail.

The antics of the sensational press during the end of the nineteenth century and the beginning of the twentieth are well known. This was the heyday of yellow journalism when newspapers competed for circulation by running salacious stories about people's private affairs, especially, but not exclusively, those of the upper class. Enabled by the

development of snapshot photography, listening devices, and other new technology, the unabashedly self-promoting newspapers relied heavily on gossip, racy pictures, scare tactics, and hyperbole. Newspapers sought after photographs of prominent citizens in private settings, printing them accompanied by ridicule or suggestive commentary. They ran titillating stories about adultery and scandals under the guise of “morality tales,” sharing sordid details of sexual encounters together with revealing photographs or drawings. When more “legitimate” news was reported, it relied on the use of horror and violence.<sup>101</sup> The more sensational, the better.

Photographs of both prominent and unknown people were published in stories and used in advertising without consent, and so were words and statements, with no attention to the reliability of the source. In fact, the papers often used unnamed sources and faked interviews.<sup>102</sup> Some people relished and sought after such publicity, but for those whose lives and reputations were damaged by it, the law provided no adequate remedy. Those whose private information had been falsely reported could sue for defamation, but it was difficult to prove and pursuing the lawsuit would result in further publicity, compounding

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<sup>101</sup> Consider, for example, this 1887 excerpt reporting on a hotel fire from *The San Francisco Chronicle*, a paper owned and managed at the time by William Randolph Hearst:

HUNGRY, FRANTIC FLAMES. They Leap Madly Upon the Splendid Pleasure Palace by the Bay of Monterey, Encircling Del Monte in Their Ravenous Embrace From Pinnacle to Foundation. Leaping Higher, Higher, Higher, With Desperate Desire. Running Madly Riotous Through Cornice, Archway and Facade. Rushing in Upon the Trembling Guests with Savage Fury. Appalled and Panic-Stricken the Breathless Fugitives Gaze Upon the Scene of Terror. The Magnificent Hotel and Its Rich Adornments Now a Smoldering heap of Ashes. (Nasaw 75)

The circulation for such papers was better than that for papers running more serious news, and they often appealed to the lower classes by running stories that dramatically favored the underclass against the government or upper classes. For example, during a heat wave in 1883, reporters from Joseph Pulitzer's *New York World* reported on deplorable conditions for New York City's indigent population, writing headlines that read: “How Babies Are Baked,” “Burning Babies Fall From the Roof,” and “Lines of Little Hearses” (Emory 257).

<sup>102</sup> For an early twentieth century source documenting “yellow” journalism, see Clark 238. For more recent analysis, see Campbell's book *Yellow Journalism* and his article “1897: American Journalism's Exceptional Year.”

the harm. For those whose private information had been accurately reported, there was no recourse at all.

Coming to the rescue were an outspoken newspaper man, Edwin Lawrence Godkin, who for a decade had been calling for a right to be left alone, and Samuel D. Warren and Louis D. Brandeis, two young lawyers whose hugely influential 1890 law review article is credited with making the case for judicial recognition of the new tort cause of action for trespass to privacy.<sup>103</sup> While today we think of privacy as a constitutional right that prohibits government intrusion into decisions related to reproduction, marriage, sexuality, and other lifestyle choices, that version of privacy did not formally emerge until 1965 when the Supreme Court decided *Griswold v. Connecticut*.<sup>104</sup> The turn-of-the-century right to privacy was something different altogether. It referred to a new cause of action in tort, a person's right to sue, not the government, but other individuals and corporations, for infringing upon the right to control the dissemination and publication of personal information.

Although Warren and Brandeis insisted that they had simply pieced together the right to privacy from extant principles of American common law, Roscoe Pound credited them with "adding a chapter to our law" and, according to legal historian Wayne McIntosh, the tort of privacy developed by Warren and Brandeis "set the nation on a legal trajectory of [...] profound magnitude" (24). Led in part by Brandeis's later work

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<sup>103</sup> David J. Seipp has traced the unusual attention that Warren and Brandeis' law review article received in the popular press. See his *The Right to Privacy in American History*. For some of the newspaper articles he references that reported and commented on Warren and Brandeis' piece, see *Boston Saturday Evening Gazette*, December 20, 1890, p. 4; *Nation*, 51 (December 25, 1890): 496-497; *Life*, 17 (January 1, 1891): 4; *Public Opinion*, 10 (January 10, 1891): 328; *Spectator*, 66 (February 7, 1891): 200-201; *New York Tribune*, March 8, 1892, p. 17, col. 3; *Atlantic Monthly*, 67 (March 1891): 428-429; "The Right to Privacy," *Green Bag*, 6 (November 1894): 501.

<sup>104</sup> See *Griswold v. Connecticut*. For a detailed analysis of the development of the constitutional right to privacy in American law, see "Rights to Privacy and Personhood," in Tribe.

as a Justice of the United States Supreme Court, the right to privacy formulated in 1890 played a key role in creating the constitutional right to privacy in the 1960's.<sup>105</sup> The legal right to privacy rested rhetorically on two notions—the inviolate person and the inviolate home. Warren and Brandeis argued that the law already recognized the individual's right to control his own personality and his own domestic space, and that judicial recognition of a right to privacy was necessary to protect home and person from being “invaded” by the press that was “overstepping in every direction the obvious bounds of propriety and decency” (Warren and Brandeis 196).

The press and the right to privacy are generally seen as doing battle, with the right to privacy serving as a defensive mechanism that could tamp down the voracious appetite of the popular press for personal information by forcing violators to pay damages. I argue, however, that the literature of Edith Wharton gives us access to a different story of the relationship between publicity and privacy. Rejecting legal constructs of both the inviolate person and the inviolate home, Wharton exploits the complicated ownership interests in letters—an inherently circulatory form of property about which an earlier strain of privacy discourse existed—to represent publicity and privacy not as opposing forces but as allies. The two work together. The essence of privacy rights as depicted in Wharton's fiction, is not the right to be let alone, but the right to capitalize on one's own secrets, to market them to the “people who wants to know.” It is a technique for negotiating the marketplace in personal information and managing a valuable public image. This version of property rights, I argue, formalizes blackmail, bringing it into existence and criminalizing it simultaneously. Blackmail is the reverse side of the right

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<sup>105</sup> See especially Brandeis' famous and influential dissenting opinion in *Olmstead v. U.S.* where he argued for expansion of the right to privacy from an individual to a constitutional right by claiming that the government, engaged in warrantless wiretapping, was a potential privacy invader. 227 U.S. 438 (1928).

to privacy. On one side, secrets are exchanged in the market. On the other, dark, side, withholding of secrets is exchanged on the black market. Both systems, I will show, rely on the capitalization of secrets perpetuated by the legal right to privacy.

In this chapter, I first establish the origins of the legal right to privacy, using the rhetoric of Godwin, Warren, and Brandeis. In tracing its history, I also reveal its flash points, tensions unrecognized by Godkin, Warren, and Brandeis, but exploited by later case law and laid bare by Wharton's literary critique. I then recover the lost strain of privacy discourse in the history and law surrounding property interests in letters, a strain that emphasizes circulation rather than inviolability and so runs counter to the formal legal discourse upon which the right to privacy was ostensibly grounded. In the next two sections I build Wharton's critique of the legal notions of inviolate homes and persons as it develops from *Touchstone* to *The House of Mirth*. In my final two sections, I look at the scathing portrayal in *The House of Mirth* of the corrupting and estranging role inside information plays on both Wall Street and Fifth Avenue. The capitalization of secrets, facilitated by the right to privacy, makes intimacy a form of currency ("buy me!") and establishes blackmail as a mode of social relations.

#### THE ORIGINS OF THE RIGHT TO PRIVACY

In the 1905 case of *Pavesich v. New York Life Insurance Company*, Georgia's Supreme Court became the first to recognize a right to privacy.<sup>106</sup> In the *Pavesich* case, Paulo Pavesich sued New York Life Insurance Company for \$25,000, claiming they trespassed on his privacy when, without his consent, they used a fictitious story about

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<sup>106</sup> While *Pavesich* was the first to establish a right to privacy by a court of last resort, the issue had been addressed in litigation since 1890, when Warren and Brandeis's article arguing for such a right was published. For other cases addressing such a right, see *Mackenzie v. Mineral Springs Company* (1891); *Marks v. Jaffe* (1893); *Corliss v. Walker* (1894); *Murray v. Lithographic Company* (1894); *Schuyler v. Curtis* (1895); *Atkinson v. Doherty* (1899); and *Roberson v. Rochester Folding Box Company* (1902).

him along with his picture for a newspaper advertisement.<sup>107</sup> Though a New York court had declined to recognize the violation of privacy as a lawful basis for a law suit in a nearly identical case just a few years earlier,<sup>108</sup> the *Pavesich* court validated the right, concluding that the principle of personal liberty protected individual privacy (69), including the right to choose whether to “exhibit [oneself] to the public” or to “withdraw from the public gaze” (70). As the *Pavesich* case demonstrates, turn-of-the-century debates over privacy largely centered around the ability to control public access to one’s likeness and to personal information.

Before *Pavesich* explicitly recognized the right as defined by Warren and Brandeis, lawyers and litigants had been testing the theory in court for over a decade, beginning with *Manola v. Stevens*, where a Broadway performer, who had been surreptitiously photographed in her revealing costume worn only during the show, petitioned the court for an injunction barring publication of the pictures. The court granted the injunction, though on what basis we do not know—it was granted *ex parte* in

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<sup>107</sup> His picture appeared next to that of an “ill-dressed and sickly looking person.” The caption read: “Do it now. The man who did.” The caption above the sickly man read: “Do it while you can. The man who didn’t” (68). Below the pictures, the company printed a fictitious story about how the “man who did,” who purchased insurance when he was healthy, provided for his family, and was now drawing an annual dividend. *Pavesich* took exception, not only because his picture was used without consent, but because the ad subjected him to “ridicule before the world, and especially with his friends and acquaintances, who [knew] he had no such policy” (*Pavesich* 69).

<sup>108</sup> The *Pavesich* case took the opposite position of a nearly identical case decided but a few years earlier. In 1902, in *Roberson v. Rochester Folding Box Company*, the court of final resort in New York ruled against a female plaintiff whose likeness had been used without her consent by a flour milling company as advertising for their product. She alleged that she had been humiliated and made sick by the incident. She felt her name and reputation had been damaged, and she asked the court for damages and for an injunction barring the company from further use of her image. She based her claim on her right to privacy and property in her own body. The court disagreed, denying the existence of a right to privacy. The New York court seemed at a loss to understand what she was upset about, explaining that the likeness was pleasing, and wondering why she was not flattered that the company found her attractive enough to use in their advertisement. No man has a right, the court claimed, “to pass through the world without having his picture published, his business enterprises discussed, or his eccentricities commented upon, whether the comment be favorable or otherwise.” Both her claim for damages and her prayer for injunctive relief were denied. At least one commentator has argued that the gender differences account for *Pavesich* and *Roberson*’s divergent holdings.



an unreported case. The right to privacy was rejected in case after case for the next ten years as state courts resisted recognizing the new cause of action, trying instead to stretch principles of property and contract broadly enough to cover repair of damaged reputations (Seipp 75). The legal issue of privacy gained some traction in the high profile case of *Schuyler v. Curtis* (1895) where the victim of unwanted publicity was Mary Hamilton Schuyler, a prominent philanthropist, whose relatives wanted to stop an unauthorized commemoration of her life from being displayed at the Chicago World's Fair. The court went so far as to acknowledge Mrs. Schuyler had a right to privacy, but determined it had expired upon her death and so allowed the display to go forward. Public outcry against the ruling in *Schuyler v. Curtis* marshaled momentum around the issue (Stewart 490),<sup>109</sup> and so the 1905 *Pavesich* case signaled what was just the beginning of a landslide movement toward nationwide recognition. Over the next decade, state courts all over the country cited Warren and Brandeis as they adopted the privacy tort, and dozens of state legislatures passed privacy statutes. By 1939, the *Restatement of Torts*<sup>110</sup> included the right to privacy.

Warren and Brandeis rested their notion of privacy on the foundational principle that the law protects persons and property. As technology and society changes, they argued, "it has been found necessary from time to time to define anew the exact nature and extent of such protection" (193). Current legal mechanisms were unable to redress, much less deter, the injuries people were sustaining. Newspapers, Warren and Brandeis said, were filled with "idle gossip" and with "details of sexual relations" that pandered to "a prurient taste" (196). Both men came from elite New York families and their friends

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<sup>109</sup> For treatments of the public response to *Schuyler v. Curtis*, see Stewart 490 and Hand 749.

<sup>110</sup> A secondary source that gathers and distills existing common law.

and relations included those whose lives had been brutally exposed on the gossip pages.<sup>111</sup> They saw this kind of journalism as “overstepping,” turning gossip into a “trade” (196). With no laws to stop them, newspapers “have invaded the sacred precincts of private and domestic life,” threatening to “make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops’” (195). The intrusive press and market for gossip not only damaged families, ruined careers, and hurt individuals, it degraded the “moral standards of society as a whole.”

Though generally given the credit for constructing the legal apparatus for privacy rights,<sup>112</sup> Warren and Brandeis were not the first to call for judicial action to stem the growing invasions of personal privacy.<sup>113</sup> “Privacy” as an abstract value had been recognized for centuries before 1890.<sup>114</sup> Furthermore, although Warren and Brandeis formulated the right in legal terms, for at least a decade before the lawyers wrote their game-changing article, *The Nation*’s Edwin Lawrence Godkin had written about the need for a new understanding of privacy, calling for legal recognition of the “right to be let

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<sup>111</sup> For years it was claimed that Warren and Brandeis’ article was written in response to Warren’s outrage over intrusive press coverage of his daughter’s wedding. This claim has now been debunked (Campbell, *Yellow Journalism*). However, a letter written by Brandeis to Warren shows that press coverage of Warren family affairs was a catalyst (See Louis D. Brandeis, Letter to Samuel D. Warren (8 Apr 1905), reprinted in Urofsky and Levy 303). (See also Mason 70, and Rosenberg 149). Edith Wharton herself, as somewhat of a celebrity, enjoyed and was stung by the attention of the sensational press. When her engagement to Harry Stevens was broken off, the Rhode Island *Daily News* reported the fact, writing, “the only reason assigned for the breaking of the engagement hitherto existing between Harry Stevens and Miss Edith Jones is an alleged preponderance of intellectuality on the part of the intended bride. Miss Jones is an ambitious authoress, and it is said that, in the eyes of Mr. Stevens, ambition is a grievous fault” (Lewis 45).

<sup>112</sup> See, e.g.: Miller 169; Prosser 802; Davis 1; Kalven 326; Posner 1; Friedman 548; *Flores v. Mosler Safe Co.* 280; *Nader v. General Motors Corp.* 397; *Billings v. Atkinson* 859.

<sup>113</sup> See Westin 330-38, and Flaherty 248.

<sup>114</sup> In “Privacy in Nineteenth Century America,” Prosser shows how the concern for privacy prior to Warren and Brandeis’s article was manifest, among other things, in laws prohibiting peeping toms and eavesdropping and in the 4<sup>th</sup> and 5<sup>th</sup> amendment protection against illegal searches and seizures and against revealing incriminating information about oneself.

alone.”<sup>115</sup> Warren and Brandeis cite Godkin’s article “The Rights of the Citizen to His Own Reputation,” which was published scant months before their piece. Godkin, in turn, wove Warren and Brandeis’ arguments into a December 1890 article, “The Right to Privacy.” Even though later scholars have acknowledged the wider concern for privacy before 1890,<sup>116</sup> scholarship on the history of privacy as well as the development of the legal doctrine of privacy relies largely on the archive contributed by Warren, Brandeis, and Godkin. I also rely on them as crucial sources for the arguments through which the right to privacy became formalized as law.

Warren and Brandeis’s reference to the “sacred precincts of private and domestic life” represents what were the intellectual and rhetorical pillars of early privacy, namely, the inviolate person and the inviolate home. David J. Seipp, in his still unparalleled 1978 study of the right to privacy in American history, argues that while privacy rights were in conflict across a wide range of contexts, “a common rhetoric forced these distinct controversies with their disparate arguments into a single historical event” (80). This remarkable “unity of language” in the rhetoric of the concern for privacy coalesced around three themes: “that of sanctity, that of the home or domesticity, and that of reputation or personality” (80). The recurrent theme of sanctity was used to describe all manner of privacy-related issues, from the sanctity of telegrams, to the sanctity of the census, to the sanctity of matters of debt and disease, to the “sacredness of epistolary communion,” and the sanctity of postal privacy (Seipp 80-81), but it was the “sanctity of

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<sup>115</sup> See “Libel and its Legal Remedy” (Dec. 1880); “Southern and Other Dueling” (Oct. 25, 1883); “The Rights of the Citizen to His Own Reputation” (July 1890); “The Right to Privacy” (Dec. 25, 1890). It should be noted that “The Rights of the Citizen to His Own Reputation” was published several months before Warren and Brandeis’s. Warren and Brandeis cite it, and Godkin’s 1880 article, in their piece. In turn, Godkin’s “The Right to Privacy” responds explicitly to Warren and Brandeis’ call for judicial recognition of a new privacy tort.

<sup>116</sup> See Keller 519-21; White 173.

the person” and the “sanctity of the home” that most animated turn-of-the-century privacy discourse.<sup>117</sup>

Warren and Brandeis culled the principle of the inviolate person from the field of intellectual property law. While European law rests intellectual property rights on moral grounds, Anglo-American law had long used traditional property law to conceptualize intellectual property as well. Thus Warren and Brandeis’s claim that the notion of the inviolate person and not property *per se* underwrites intellectual property was a ground shifting move. Readers of Warren and Brandeis such as Diana Klebanow and Franklin Jonas who see them as merely extending copyright law into a new field—as “another application of an existing rule” (61)—miss the substance of their work. Before Warren and Brandeis could extend copyright law, they had to reveal within it a “subterranean” right to privacy beyond the “narrow grounds of protection to property” upon which copyright decisions had so long rested (204). Their argument called for “recognition of a more liberal doctrine” hidden within the decisions (204). So privacy was not only an extension of an existing rule into a new context; it was an extension of a rule that was only lately being recognized—the “inviolable person.”

The lawyers began their unearthing of the inviolate person by acknowledging that the law of copyright already “secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others” (198). They drew notice to the fact that in spite of employing a property law

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<sup>117</sup> Herbert Spencer Hadley, in his law review article challenging Warren and Brandeis’s argument, encapsulated all three themes when he defined the values of privacy as “the sanctity of the home and the protection of private reputation” (145). A additional sampling of the late nineteenth century sources referring to the sanctity of the home, of the person, or both: David Dudley Field, “The Newspaper Press and the Law of Libel,” 481 (July-August 1876); Charles Emory Smith’s “The Press,” 1375 (June 11, 1903) and “The Confidence of the Dead,” 276 (March 1885); Ann S. Stephens 296-297 (1854).

paradigm, courts had begun to apply copyright protection regardless of whether the item had any value as property or not. “[T]he same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece” (199). Of course, traditional property rights explain why the law protects one’s right to control manuscripts or works of art that possess the “attributes of ordinary property”—they “are transferable,” they “have a value,” and “publication or reproduction is a use by which that value is realized” (200). Property rights cannot, however, explain why the law also protects a “casual letter,” a “botch or a daub” (199). Despite the language in the cases basing protection on property, the real reason for protecting these things, Warren and Brandeis argue, is not “the right to take profits arising from publication,” but to protect “the peace of mind or the relief afforded by the ability to prevent any publication at all” (200). The legal principle protecting the right NOT to publish an item that has no value is “difficult to regard [...] as one of property” (200). Since property rights cannot fully explain why the law protects an individual’s right to control not only publication of one’s letters, botches, and daubs, but also one’s “thoughts,” “sentiments,” and “means of expression” (99), the grounding principle must be sought elsewhere. For Warren and Brandeis, that grounding principle was the inviolate person.

The English case of *Prince Albert v. Strange* (1849) provided their most compelling evidence of an implicit right to one’s own inviolate person. This case involved Prince Albert’s attempt to enjoin the printing of a catalog that listed items in his collection of etchings. While copyright “would prevent a reproduction of the paintings as pictures,” there is no reason why copyright would “prevent a publication of a list or even

a description of them” (201). The list was not itself a valuable piece of property, nor did it infringe in any way on his value or use and enjoyment of the collection. Yet the judges held that common-law copyright prohibited the list from being published. Warren and Brandeis found this holding significant in that it could not be said to rest “upon the right to literary or artistic property” (204). A list of etchings were “certainly not intellectual property in the legal sense,” any more than would be a list of a household’s “collection of stoves or of chairs” (203).

Property rights, then, intellectual or other, cannot explain the common law rule because the rule protects things that were not considered property. Protection from unwonted publication is not a right of property because the things protected often “bear little resemblance to what is ordinarily comprehended under that term” (205). Instead, Warren and Brandeis concluded, the “protection afforded to thoughts, sentiments, and emotions [...] as far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone” (205). Thus, the legal principle that protects “personal writings and all other personal productions” against publication “is in reality not the principle of private property, but that of an inviolate personality” (205). Although Warren and Brandeis concede that the “right to an inviolate personality” is notoriously vague and circular,<sup>118</sup> from an acknowledgment that the person is inviolate, they distill the fundamental aspect of privacy—that “the individual is entitled to decide whether that which is his shall be given to the public” (199).

The inviolate person was closely associated with the notion of an inviolate domestic sphere. Jessica Bulman has written that privacy was motivated not only by the

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<sup>118</sup> In an example of the circularity they describe, Warren and Brandeis define the right to the inviolate person as the “right to the immunity of the person, the right to one’s personality” (207).

popular market for publicity, but by the “so-called cult of domesticity that celebrated the home as a refuge from the sordid marketplace” (“Edith Wharton” 52). The development of the individual was so closely tied to domestic space that late nineteenth and early twentieth century discussions of privacy often simply conflated the inviolate person with the inviolate home. Historians and other scholars today contest that relationship.

Literary critics like Milette Shamir, for example, trace the progression of privacy from the person to the home, claiming that the borders of privacy developed historically from the “head” to the “house” (Shamir 154). This view mistakes legal rhetoric for legal fact, for while the discourse surrounding the right to privacy may give cause for this reading, the broader context of the legal history of privacy does not support it. The progression moved in just the reverse order, with “the rhetoric of domesticity [retreating] before that of personality” (Adams 94).

House and home have long enjoyed a “peculiar immunity” (*State v. Patterson*, 320-321 (1873)). The notion of a “man’s house” being “his castle” was well established in Anglo-American law. Sometimes attributed to Sir Edward Coke, who used the phrase in deciding the 1604 *Semayne’s Case*, 77 Eng. Rep. 194, the reference is actually much, much older. Coke lifted it from the 6<sup>th</sup> century Justinian Pandects (lib. ii, tit. 4, “De in Jus Vocando”). The maxim was well-integrated into American law<sup>119</sup> long before the

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<sup>119</sup> A Westlaw search for the phrase revealed its use in at least 78 different reported cases between the years of 1850 and 1900. For the history of the maxim “a man’s home is his castle,” see *State v. Goode* (1902). The range of cases in which the maxim was used included repelling threats (*State v. Goode* (1902)) ; warrantless searches (*People v. Glennon* (1902), attractive nuisance (*Ryan v. Towar* (1901) (“A man’s home has always been considered his castle,—a domain where, secure from intrusion, he might lawfully do as he would, so long as he did not interfere with the legal rights of others” (649))); justifiable homicide (*State v. Bartmess* (1898) (“a man’s home is regarded as his castle, to which he may flee for safety and protection, and which affords him and his family a ‘city of refuge’” (173))); trespass (*Robinson v. Frost* (1881)); invalidating a law attempting to regulate hours of sale in merchant whose home was also his place of business (*People v. Krushaw* (1866) (holding a home owner can keep his home/store open “aslong as he

right to privacy was recognized.<sup>120</sup> Laws protecting access and publication rights to information gave special consideration to the home. For example, the crime of “eavesdropping” was a misdemeanor nuisance in the early American colonies (Blackstone, Book IV, 168). While today eavesdropping is commonly defined as “secretly listening to the private conversations of others without their consent” (Blacks Law Dictionary), Blackstone linked it to an intrusion of the physical space of the home, defining eavesdroppers as those who “listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales” (Book IV, 468). The home represented both personal property for which there was the right to “quiet and exclusive enjoyment” and familial privacy.

It is clear from the reliance on an intellectual property paradigm that Warren and Brandeis were attempting to establish privacy not as a property right in the traditional sense of a material, physical thing, but something more akin to Godkin’s “kingdom of the mind” (“Rights of the Citizen” 65). Their version of privacy was not a physical or material right, but an intangible, spiritual one (Seipp 74). As Katherine Adams puts it, in her recent study of U.S. privacy discourse, late nineteenth and early twentieth century privacy was an attempt to recognize a dimension of the self beyond the physical and so framed privacy “not as a site of physical enclosure, but as a relation to an “extracorporeal self” (Adams 4). But the metaphor of a home as a protected physical space was resilient.

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pleases and at all hours,” has right to “[keep] one’s premises open to public view”). Also see Taylor and Whiting 193; Apperson 316; and Smith 308.

<sup>120</sup> Though the maxim was well-established, it was not used in conjunction with the right to privacy until the early twentieth century, and then not without conflict. See *Marshall v. Wheeler* (1925) (in context of right to repel intruders: “the principle of law insuring privacy in one’s home [...] which is usually expressed in the familiar maxim, ‘Every man’s house is his castle,’ still remains in full force and vigor” (693)) *McSwane v. Foreman* (1906) (“the tenderness of the common law for the right of privacy and personal security [...] finds expression in the maxim ‘every man’s house is his castle’” (633)); but compare *Henry v. Cherry & Webb* (1909) (“The Rule, ‘every man’s house is his castle,’ does not rest on a right of personal privacy” (108)).



Not only did it migrate from other contexts in which the home is seen as a protected realm, but the legal language of privacy perpetuates the metaphor. Even in discourse claiming to ground privacy on personality, the home is referred to as a “sanctum of privacy,” and a man’s “private life” is described as a “threshold” over which no “intruder” may lawfully “put his foot” (Pallen 475). The metaphor surfaces in Warren and Brandeis as well, ironically at the very moment they distinguish the right of privacy from a physicalized sense of property. Warren and Brandeis cite the invasion of the press into the “sacred precincts of private and domestic life” (195) where the “acts and sayings of a man in his social and domestic relations [are to] be guarded from ruthless publicity” (213), decrying gossip that “can only be procured by intrusion upon the domestic circle” (197).

Though they attempt to leave behind the model of the home as a site of physical enclosure within which privacy is expected, they are unable to fully dissociate it from the “inviolable, psychospiritual self” (Adams 4). The language of the home as a protected, enclosed, physical space saturates their argument. Anxious to maintain the individual as the ground of privacy, Warren and Brandeis nevertheless make the home a necessary precondition for the inviolable person who is clearly gendered male. Man, they argue, “under the refining influence of culture” needs to have “some retreat from the world” (196). Industrialization and urbanization have made “solitude and privacy [...] more essential to the individual,” and the foundation of solitude and privacy, the place to which man “retreats,” is his home, a “sacred precinct” (196).

William Modellmog has drawn attention to the confluence between the inviolability of the home, the person, and property, arguing that the sanctified “domestic

circle” reveals the exclusive control of privacy by men (341). The home and persons in it become both an extension of and a condition for the inviolate person. Consider this example given by Warren and Brandeis:

A man records in a letter to his son, or in his diary, that he did not dine with his wife on a certain day. No one into whose hands those papers fall could publish them to the world, even if possession of the documents had been obtained rightfully; and the prohibition would not be confined to the publication of a copy of the letter itself, or of the diary entry; the restraint extends also to a publication of the contents. What is the thing which is protected? Surely, not the intellectual act of recording that the husband did not dine with his wife, but that fact itself. It is not the intellectual product, but the domestic occurrence. (201)

As privacy is an extension of the individual’s right to control his personality, part of what is possessed is the right to control dissemination of information relating to “domestic occurrences.” The lawyers do not consider any other person’s right to lawfully share this information, even that of the wife who may desire to share the information that her husband dined elsewhere. Surely this fact—and the possibility of male infidelity suggested by it—too is a “domestic occurrence”—but one not recognized by Warren and Brandeis.

The connection between male inviolate personality and the inviolate nature of the home is more explicit in Godkin. He writes, in “The Rights of the Citizen to His Own Reputation,”

The right to decide how much knowledge of his personal thought and feeling, and how much knowledge, therefore, of his tastes, and habits, of his own private doings and affairs, *and those of his family living under his roof*, the public at large shall have, is as much one of his natural rights as his right to decide how he shall eat and drink, what he shall wear, and in what manner he shall pass his leisure hours. (65)(emphasis mine)

From the man’s right to protect his personality comes the right to control access to information about “his family.” His ownership of the physical home translates into

ownership of the so-called inviolate personalities living within—their privacy is his to control.

Although legal discourse may have characterized inviolate persons as male and designated homes as their own protected and controlled space, the right to privacy was also invoked by women who were unhappy with the census and other attempts to gather personal and familial information, and was invoked even within the home by women seeking to use the right to prevent their husbands from reading personal letters.<sup>121</sup> But judging from the legal rhetoric, a man's right to his extracorporeal self gave him access to and control over the physical space of the home and the bodies and personal information of those within it, including the right to control and even put an end to the privacy of his wife and children. A man's "right to [his] personality" (207) implies that the personalities of others are violate, if those others are "living under his roof." His right includes not only the ability to refuse public access to his home, but also the right to open it, and the lives of those within it, to public view. Once published or otherwise opened for public access, privacy rights cease. As Warren and Brandeis explain, "to whatever degree and in whatever connection" one's life has ceased to be private, "to that extent the protection is to be withdrawn" (215). This rhetoric enabled those who sought after publicity to gain it, but also allowed male heads of household to eradicate the privacy of wives and children.

Critics looking at the male gender bias in the origins of privacy, tend to associate the private and the domestic with femininity. Locating the motivation for privacy in the

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<sup>121</sup> The "separation of spheres [doctrine] was always more prescriptive than descriptive—lower-class women, slaves, and immigrants certainly worked outside the home, and many upper-class women were active in voluntary associations (Bulman, "Edith Wharton" 52). The falseness of the doctrine, though rhetorically powerful, was brilliantly detailed in Minow's "'Forming Underneath Everything That Grows:' Toward a History of Family Law," 861-82.

Victorian doctrine of separate spheres has become a commonplace in the critique of privacy. Bulman is an excellent example of this tendency. She writes that Warren and Brandeis's article stemmed "from a broad ideology of the nineteenth century—the doctrine of separate spheres and the division between the public market, which was gendered male, and the private home, which was gendered female" (52)<sup>122</sup>. No doubt the doctrine of separate spheres exercised a powerful rhetorical pull and had an extraordinary influence in U.S. common law,<sup>123</sup> but the legal rhetoric and history of privacy shows that the domestic sphere is protected as an extension of and a necessary condition for male inviolate personality. As Shamir has noted, contrary to much recent feminist and American Studies thought that locates masculinity in outdoor spaces—wilderness, frontier, ocean—and femininity in indoor, enclosed spaces, domestic space is the space of men. Not only do men literally own domestic space, but it exists as a male retreat. Men escape from work, from outdoors, from market places, "into the privacy of the home" (Shamir 15), and the privacy of the home is maintained because male inviolate personality depends on having safe refuge there. This is why Adams has argued "rather than having privacy, women represent it for others" (14).<sup>124</sup> Within privacy discourse, the traditionally feminized home became a site for "masculine self-identity" (Adams 15).

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<sup>122</sup> See Meagher .

<sup>123</sup> See, for example, *Bradwell v. Illinois* (1872) upholding an Illinois law excluding women from the legal profession the basis of a woman's place being in the home. Justice Bradley's concurrence claims "the domestic sphere as that which properly belongs to the domain and functions of womanhood" and defines the "paramount destiny and mission of woman" as "fulfil[ling] the noble and benign offices of wife and mother" (141); and *Muller v. Oregon* (1908) upholding laws restricting employment of women out of the public interest in preserving their ability to fulfill their prescribed functions of childbearing and maintenance of homes.

<sup>124</sup> Husbands, for example, were exempt from state intervention on their privacy where protecting their property interest in their homes and families was at stake. This right included the ability to "recapture" a runaway wife, who had "unlawfully seized her own body" (Adams 14). As Nancy Isenberg explained in her study of the origins of the women's rights movement, "the common-law rule of reception assumed that the wife had unlawfully seized her own body and transported this possession against the law, making the

The legal discourse of privacy, at least in the first half of the twentieth century, does not appear cognizant either of the tensions between inviolate personality and inviolate domestic space, or of the possibility of the home as a space where conceivably more than one inviolate person, with conflicting interests, might dwell. These difficulties were fleshed out in Edith Wharton's fiction. Wharton's portrayal of the relationship between privacy, personality, and the home can be read in conjunction with the legal discourse on privacy consolidating at the turn of the century; however, rather than grounding privacy on the inviolate person and home, Wharton shows how both of these realms are violate. I train my focus in this section on her representation of privacy and especially her use of letters—quite literally the mail—to argue that Wharton's fiction shows the essentially public and relational nature of privacy. In doing so, I show how she taps into a strain of privacy discourse surrounding letters that predates Warren and Brandeis, but was not codified by their new privacy tort, and so challenges the confluence of legal rhetoric surrounding the inviolability of person and home.

#### PERSONAL LETTERS & PRIVACY PENUMBRAS—

#### EMANATIONS OF INVIOULATE PERSONS & HOMES

In *Touchstone*, Wharton tells the story of Stephen Glennard who, in order to get enough money to marry his beloved Alexa Trent, sells the personal letters written to him by Margaret Aubyn, a woman with whom he was once romantically involved. She became a famous novelist, and following her untimely death three years earlier, great demand has arisen for information about her life. Cash-strapped Glennard comes across a newspaper advertisement placed by a Professor Joslin soliciting information from

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fugitive wife a robber, thief, and outlaw. As Lucy Stone argued in 1852, the theory of marital custody divided the wife against her own person, for the husband 'has a right to her, even against herself'" (117).

Aubyn's "friends" for a biography he is writing (1). She had "so few intimate friends, and consequently so few regular correspondents," the ad continues, "that letters will be of special value" (1). As it turns out, Glennard was perhaps her only close friend. They were inseparable during college, and for a decade or longer, until her death, she wrote him love letters. He did not reciprocate her feelings, but did keep the letters. He has a "great many packets" of "thirty or forty" each, hundreds of letters altogether (6). The letters are both brilliantly written and intensely personal. In them she has "stored her rarest vintage" (7), and though the popular view of her is as a woman full of ideas at the expense of emotions, the letters contain her "essence" (7), a "hidden sacrament of tenderness" (11). Realizing they are worth a small fortune, Glennard decides not to lend them to Professor Joslin, but enlists the help of his shady friend and book collector, Mr. Flamel, to sell the letters for a hefty advance and promise of lucrative royalties.

Echoing the legal discourse of the inviolate home, Wharton uses domestic space in the novella to measure the repercussions of the market for personal information, tolling the damage done by Glennard's betrayal of Margaret Aubyn on the domestic front. Wharton continues the story a year later at the small summer home where Stephen and Alexa Glennard now live with their new baby. Wharton initially depicts their home in terms that explicitly evoke the rhetoric of the sanctified domestic sphere referenced in privacy discourse. Their home is cozily enclosed, barricaded against the rest of society by "a row of maples and a privet hedge [that] hid their neighbor's gables, giving them undivided possession of their leafy half-acre" (28). Their "plot of ground" is "shut off, hedged in from importunities, impenetrably his and hers" (28). Within this impenetrable

and circumscribed space, an idyllic scene unfolds. Wharton shows it to us through Glennard's eyes as he returns happily home in the evening after work:

The little house, as Glennard strolled up to it between the trees, seemed no more than a gay tent pitched against the sunshine. It had the crispness of a freshly starched summer gown, and the geraniums on the veranda bloomed as simultaneously as the flowers in a bonnet. The garden was prospering absurdly. Seed they had sown at random—amid laughing counter-charges of incompetence—had shot up in fragrant defiance of their blunders. He smiled to see the clematis unfolding its punctual wings about the porch. The tiny lawn was smooth as a shaven cheek, and a crimson Rambler mounted to the nursery-window of a baby who never cried. A breeze shook the awning above the tea-table, and his wife, as he drew near could be seen bending above a kettle that was just about to boil. So vividly did the whole scene suggest the painted bliss of a stage setting, that it would have been hardly surprising to see her step forward among the flowers and trill out her virtuous happiness from the veranda-rail. (26)

Wharton's tongue-in-cheek portrayal of the spontaneously blooming flowers, the wife whose tea pot boils just as her husband arrives, and the perfect baby who never cries, sets Glennard's view of domesticity up for a fall. Home and family are depicted as, on the one hand, secure and protected—at least to all appearances—but on the other hand, as fragile and transient. The safety and inviolability of the home is in contrast with Glennard's impression that he and Alexa are merely camping in a "gay tent." The very perfection of the scene belies its solidity, the vivid and "painted" "stage setting" contributing to a sense of artificiality and impermanence.

The hinted-at challenge to such an idyllic vision of home and family is triggered just a few hours later when Glennard sees a newspaper article announcing publication of the two volume Aubyn *Letters*. They are already a run-away success. The first edition has sold out "before leaving the press," the second edition will be released the following week, and the volumes have been named "THE BOOK OF THE YEAR" (28). Jean Blackall has concluded that "Wharton's fictional deployment of letters and telegrams is

associated [...] with her device of emphatic interruption” (164). Letters are “intrusions.” Blackall is referring to personal letters and telegrams that arrive at a home from somewhere else, but in *Touchstone* the “emphatic interruption” is triggered not by the arrival of the letters from Aubyn to Glennard, but by the publication of those letters in book form. Letters are not the intruding force, but the market for them is, the commercialization of what was private communication.

Wharton takes stock of the impact that the newspaper announcement has on Glennard by registering the abrupt alteration of his sense of domestic space. Glennard looks up to see “the prospect [the newspaper announcement] had opened,” and sees his wife’s head framed by a window where the once cheery omnipresent sunshine is now shot through with shadow. “[B]ehind her head” he sees “slivers of sun and shade” running across his vista. The hedges that lately kept out the neighbors have been reversed so that “now it seemed to him that every maple-leaf, every privet bud, was a relentless human gaze, pressing close upon their privacy. It was as though they sat in a brightly lit room, uncurtained from a darkness full of hostile watchers” (28). The protective border of the home has turned inwards, destroying the sense of its being a sheltered space. The very mechanisms of domestic privacy that once protected and shielded the family have become ominous, dividing and penetrating what was once seen as “undivided” and “impenetrable.”

Modern legal discourse associates privacy with metaphors of shadow and shade, as the rhetoric justifying constitutional privacy rights has been couched in terms of “penumbras” of and “emanations” from other, explicitly enumerated, constitutional



rights.<sup>125</sup> Prefiguring this rhetoric, Wharton characterizes threats to privacy in terms of shadow. As Glennard notes the changes in his domestic surroundings following publication of the letters, he realizes that their little plot of land is too small “at this hour for the shadow of the elm-tree in the angle of the hedge.” Unable to be contained in the space of the once cozily cordoned-off yard and home, the shadow “crossed the lawn, cut the flower-border in two, and ran up the side of the house to the nursery window (30). The violation of privacy engendered by Glennard’s publication of Margaret Aubyn’s personal letters appears as a shadow, a weapon that “crosses,” “cuts,” and divides, menacing the innocent baby in the nursery.

This shadowy threat is concretized as publication of the letters interrupts and mediates Glennard’s once direct access to his wife Alexa. Echoing the description of the once undisturbed and blissful domestic environment, the Glennards’ marriage is described as once having been a “magic circle of prosperity” (29), with Alexa enclosed “into the circle of conjugal protection” (29). Publication of the letters rends the closed

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<sup>125</sup> A penumbra, according to the Merriam Webster’s Collegiate Dictionary is “a space of partial illumination between the perfect shadow . . . on all sides and the full light” (10<sup>th</sup> ed., 1996), referring most literally to the fringe region of half shadow that results from the partial obstruction of light by an opaque object, for example, the region of lighter shadow that rings a darker shadow cast by an astral body during an eclipse. In legal terms it is a metaphor referring to implied rights that emerge out of enumerated powers and rights.

The Supreme Court, announcing the modern right to privacy in the 1965 landmark ruling of *Griswold v. Connecticut*, determined that while privacy was not explicitly guaranteed by the Constitution, its existence could be inferred from the “emanations” and “penumbras” of other rights, including the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 9<sup>th</sup> amendments. Justice William O. Douglas, writing for the majority stated that the enumerated constitutional guarantees have penumbras “formed by emanations from those guarantees that help give them life and substance.”

While made famous and controversial in modern privacy law, the metaphor of legal penumbras had been used long before. West’s Encyclopedia of American Law reports that “the history of the legal use of the penumbra metaphor can be traced to a federal decision written by Justice Stephen J. Field in the 1871 decision of *Montgomery v. Bevens*.” At least four very prominent judges and justices employed the term, including Oliver Wendell Holmes, Jr., Learned Hand, Benjamin Cardozo, and William O. Douglas. Holmes used “penumbra” to refer to the “gray area where logic and principle falter” and later developed the penumbra doctrine to describe the “outer bounds of authority emanating from a law.” Judge Hand used the term to describe “vague borders of words or concepts” that made interpreting legal language difficult. Cardozo used the metaphor in a manner similar to that of Holmes.

shape, leaving the marriage “off balanced” (30). Not only has Glennard violated Aubyn’s trust in him, but he has kept it a secret from Alexa and the rest of the world, insisting the publisher remove all references to him from the letters. Simultaneously exploiting the market for personal information and harboring his own secrets causes Glennard to question for the first time what secrets others may be hiding from him. He now doubts whether he is seeing the real Alexa. A year ago he had taken her for “a sheet of clear glass,” but now he wonders whether her outward manner may be “a mirror reflecting merely his own conception of what lay behind it” (27). As the public enters his own private space, the image of the domestic scene as a play is heightened. He begins to feel artificial himself, as though he were playing a part. He struggles to “think of the most natural and inartificial thing to say,” but his “voice seemed to come from the outside, as though he were speaking behind a marionette” (27). The public has penetrated the once inviolate domestic space, estranging and alienating the relationships of those within.

Wharton cannily uses letters to access issues of privacy, property, personality, and domesticity. Letters were uniquely situated in legal debates over privacy and intellectual property, and by mobilizing their vexed status, Wharton tapped into a long history of privacy discourse that was not codified by Warren and Brandeis. In their emphasis on inviolate personality and domesticity, they obscured a long history in American culture that connected privacy with the inviolability of the mail. Shamir goes so far as to claim that it was out of the mid-nineteenth century legal disputes over the ownership of letters that the “right to privacy was invented” (8-9). Shamir’s claim ignores the many contexts out of which privacy concerns emerged, though I share his belief in the importance of

that strain of legal discourse. Courts and critics quick to date the origin of privacy rights to Warren and Brandeis's article have limited their focus to privacy as Warren and Brandeis defined it and so have contributed to effacing what had been a vibrant strain of privacy discourse associated with letters. Wharton's treatment of the place of letters helps recover the robust role personal correspondence played in the history of privacy, a role that I argue is at odds with the notions of inviolate home and person.

In colonial times, references to the "sanctity" and "inviolability" of mail abounded, making protection of the privacy of the mail a forerunner to the protection of the privacy of the home and person. Though postal services were set up in the American colonies by the British government in the late 1600's, postage rates were high and tampering with the mail was commonplace. Citizens often relied instead on informal mail service, entrusting letters to friends who carried them on their journeys and delivered them personally to their recipients. But for much correspondence between the colonies and the continent, citizens had little choice but to entrust letters with strangers, often for a fee. Ship captains were paid to carry letters to and from the colonies and the continent, and any mail not claimed on the ship captain's arrival would be left in the local tavern or coffeehouse until it could be picked up. Letters to be taken aboard ships were also left there until the ship sailed. When towns began to crop up all over, this practice of collecting letters eventually became standard not just for mail delivered overseas, but for mail delivered amongst the colonies (Flaherty 116-117).

As mail delivery increasingly came to develop an impersonal quality, it also suffered from lack of regularity and lack of confidentiality. Open and unguarded letter bags left in taverns and coffeehouses were easily ransacked by local gossips hungry for

news and by those looking to intercept letters containing sensitive and volatile political information. The British government, in response to pressure from colonists fed up with these intrusions, passed a Post Office Act in 1710 that prohibited persons from opening letters. It was largely ineffective though and did not outlaw official tampering, a practice that was authorized (Seipp 8) and regularly practiced (Hubbard 35). British and colonial postmasters engaged in “extensive covert opening and copying” of correspondence (Ellis 63), and “complaints against local postmasters were numerous” (Seipp 10).<sup>126</sup>

The first United States Post Office was established in 1775 by the Second Continental Congress, but abuses continued. As a biographer of John Marshall remarked, “[letters] as went through the post-offices were opened by the postmasters as a matter of course, if these officials imagined that the missives contained information, or especially if they revealed the secret or familiar correspondence of well-known public men” (Beveridge 266-267). George Washington complained that even his supposedly private sentiments about the new constitution were not truly private, for “by passing through the post-office,” he wrote to Lafayette, “they should become known to all the world” (qtd. in Seipp 11). Thomas Jefferson similarly railed against “the curiosity of the post-offices” which opened, read, and sometimes published his letters during his own presidency (qtd. in Seipp 11).

Political figures were not the only ones who suffered. No one’s correspondence was safe. Post cards were especially vulnerable, mainly for those who were “not fortunate to enjoy the safe privacy of private residences” (New York Times, July 10,

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<sup>126</sup> An early case of official tampering that demonstrates not only the practice of tampering but the public reaction against it and in favor of an underlying notion of privacy—Governor Bradford recorded that he seized and opened letters of emigrants headed back to England on the grounds that the letters were “full of slanders, and false accusations” (qtd. in Seipp 23).

1872, p. 4, col. 5).<sup>127</sup> The problems worsened with the advent and growth of telegrams which were unavoidably disclosed to a third party, the telegraph clerk. Letter writers did their best to circumvent intrusion by local gossips, nosy postmasters, and other government officials. Some writers continued to commend letters only into the hands of trusted private individuals, circumventing the post office altogether, while others developed methods to make tampering with the mail more difficult to do, at least without leaving evidence of the tampering. They used wax to seal letters (a seal that was easily broken), wrapped blank sheets around letters to prevent reading through the paper, and deployed all manner of code, shorthand, and nicknames, especially when writing on political topics (Seipp 9). Exacerbation with the “prying eyes of the village postmistress” led to the invention of the adhesive envelope which was advertised as “secur[ing] the inviolability of the contents from all eyes but those for which they were intended” (qtd. in Seipp 43). The sanctity of the mail was as important a source for the development of the American ethos of privacy as was the sanctity of the home or person.

Though Warren and Brandeis reference letters in the famous example from their article about “a man [who] records in a letter to his son, or in his diary—that he did not dine with his wife,” they gloss over the important distinctions between a letter and a diary entry. Leaving aside the genre of the unsent letter, a letter is intrinsically circulatory in a way that a diary is not. While a diary (and for that matter, all the other items Warren and Brandeis use as examples—an etching, a sculpture, a painting, a collection of gems or stoves or chairs) can be kept completely private by the owner, a letter by its very nature is

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<sup>127</sup> “[O]pen to the inspection of all curious eyes,” boarding houses and summer resorts thrived on gossip generated by post cards “on which the writer has taken occasion to allude to private affairs in a manner which has just obscurity enough to stimulate curiosity, and not enough to preserve secrecy” (“Postal Cards and Our Privacy,” NY Times, June 17, p. 4, cols. 4-5).

shared with at least one other individual. Although this exchange does not mean the letter has been legally “published,” circulation makes letters singularly troublesome when considered in context of both property and Warren and Brandeis’s version of privacy.

The law has attempted to handle the circulatory nature of a letter by deeming property interests as circulating along with it. As a writer for the *New York Times* put it in 1906, “a letter is the property of the writer until it passes out of his hands, of the Post Office while it is traveling to its destination, and of the person to whom it is addressed when it arrives” (“Topics of the Week”). This statement, however, only begins to define the complexity of the property issues involved, for it describes ownership, in the case of the writer and the receiver, and mere possession in the case of the post office, of “only [. . .] the mere paper” upon which the letter is written and not of either the written words and ideas or the personal information contained therein. A letter not only embodies multiple property interests consecutively, but also simultaneously. While “physical and material elements” of a letter—the paper and ink—are considered a gift to and thus the property of the recipient, the recipient does not thereby acquire any interest in “the tangible and impalpable thought and the particular verbal garments in which [the correspondence] has been clothed” (*Baker v. Libbie* 5). Thoughts, sentiments, feelings, and the words used to convey them, remain the sole property of the letter writer.

The landmark case in the U.S. was *Woolsey v. Judd* (1855), which expanded property rights to all letters instead of just protecting those that had market value as “literary compositions.”<sup>128</sup> The *Woolsey* court held that “the writer of letters, whether

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<sup>128</sup> See, e.g. the case of *Hoyt v. McKenzie* (1848) (Defendant attempts to publish letters he obtained by breaking into locked chest of the plaintiff. The plaintiff sues, claiming only he has the right to publish the letters. The court disagrees. Since the letter had no literary value, they were not property and so were not protected). See also *Pope v. Curl* (1741) (Lord Hardwick enjoins publication of letters written by

they are literary compositions, or familiar letters, or letters of business, possesses the sole and exclusive right of publishing the same; and that, without his consent, they cannot be published either by the person to whom they are addressed, or by any other.” Thus regardless of the property value of the letter, publication by any but the writer, or those to whom the writer has given consent, “is an invasion of an exclusive right of property which remains in the writer, even when the letters have been sent to and are still in possession of his correspondent.” As Eaton Drone explained the ruling, in sending a letter, the writer “does not consent to part with any right of property therein,” aside, of course, from the piece of paper, envelope, and ink (Drone 127). Though it may seem counterintuitive, the writer still owns the content of a letter that has been sent, despite the fact that he or she appears to have willingly given it to another.

The legal rules apportioning property interests in a letter become more intricate still when those interests are transferred. The recipient may give or sell a letter to another, but cannot thereby give the new owner any right to publish the letter. Similarly, a writer might send a letter to one person and transfer the publication rights to another. This though a writer who wants to publish a sent letter is at the mercy of the receiver. Although the writer retains ownership of the thoughts, ideas, sentiments, and words of a letter, the writer may not be able to recoup them once the letter has been sent, for the writer has “no legal remedy for recovering his letters after they have passed into the

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Alexander Pope, Jonathon Swift, and others, ruling that while gifting the letters, the writers did not consent to part with the property in their compositions. The case turned not on the inviolability of the person, but on the “substantial property value” that the letters had as “literary works” ); but see *Percival v. Phipps* (1813) (Vice-Chancellor Sir Thomas Plumer rejects Lady Percival’s attempt to block the publication of her private letters written to Milford on the grounds that, since the letters had no literary properties, they were not protected from publication by a third party, despite the fact that Lady Percival had not given her consent.); and *Wetmore v. Scovell* (1842) (holding that “private” letters on “affairs of business or domestic concerns” are “not entitled to the same protection” as letters that have “all the characteristics of a literary composition”).

possession of the receiver” (Drone 135-6). What’s more, while receivers cannot publish letters, they have no duty to preserve them. A letter receiver can burn, throw away, or otherwise destroy a letter with no legal consequence.

While the writer can enjoin a letter from being widely reproduced in print, from being read in “public,” and from manuscript copies of it being circulated, the receiver has “the privilege of reading the letter for his own benefit” and is entitled to share its contents to “a more or less limited circle of friends and relatives” (*Baker v. Libbie* 606). How many people must be present before such sharing becomes a prohibited “reading in public” remains vague. In fact, some courts held that even the privilege of sharing a letter with friends and relatives is questionable if the letter is one of “extreme affection,” or if a “confidential relation” otherwise exists between the writer and receiver (*Baker v. Libbie* 606). Obviously such concerns and limitations cannot be traced to the writer’s proprietary interests. There is no more copyright protection for a letter of “extreme affection” than for any other letter. Similarly, disagreements arose over whether a writer continued to have a recognizable property interest in a letter after their death (so that their heirs could inherit it). The *Baker* court found that, contrary to copyright interests, property rights in letters die with the writer. They based their conclusion on the claim that a dead writer no longer has an interest in protecting their reputation. In these and other legal battles over letters, close reading of the legal arguments reveals that the underlying concerns were not only with property but also with privacy.

The complexity in allocating interests in a letter followed on the heels of a paradigm shift in the understanding of property. For more than a century, the concept of property had been constructed on a physical, land-based model—basically John Locke’s



definition of property as land improved by labor. Individuals owned themselves and appropriated other physical objects to themselves through their work. But with the growth of the market and the rise of industrial capitalism, new mechanisms for contract and exchange drove the need for a more abstract, non-land-based definition of property. The law, keeping pace with the new economy, came to understand property not as a physical object, but as a “bundle of rights” that included the right of ownership, the right of possession, and the ability to buy, sell, divide, and leverage property in new and various ways.<sup>129</sup>

Walter Benn Michaels, Brook Thomas, and others, have argued that this shift, marked by the ascendancy of contract thought, made value purely subject to the will of

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<sup>129</sup> The confusion insuring during this shift in the understanding of property is evidenced throughout Warren and Brandeis’s article. Explicitly, Warren and Brandeis are keen to demonstrate that the inviolability of the self is a residual category that cannot be appropriated to a property model. They need this distinction; otherwise, laws protecting property already protect privacy and there is no need to devise a new right to do so. But despite their efforts to disentangle them, their own rhetoric and logic continually align the two. Their article opens with the claim “that the individual shall have full protection in person and property is a principle as old as the common law” (193), and elsewhere write that “the right of property in its widest sense, including all possession, including all rights and privileges, and hence embracing the right to an inviolate personality, affords alone that broad basis upon which the protection which the individual demands can be rested” (211). These passages, aimed at distinguishing privacy from the commonly understood right to property, end up subjugating privacy to property in the broader sense, a subjugation that is furthered as they treat privacy rights as interests that can be bought, sold, traded, and otherwise leveraged in the market.

The discourse of the inviolate person compounded the confusion. Adams explains that “the promise of free and originary selfhood requires articulation both with and against property” (12). “[T]he discourse on privacy keeps tropes of property in play,” “nervously maintaining” a connection to the traditional Lockean concept of “property-in-self,” the “self-possessed individual” that cannot be alienated yet relies for that status of being unalienable on the very concept of property-in-self implied by the notion of “self-possession” (13). When Warren and Brandeis characterize the inviolate self, they characterize it in terms of ownership—i.e., all [male] people own their own thoughts and their own bodies. Thus the property paradigm is difficult for them to escape. It is also an important part of what will become the constitutional right to privacy much later in the twentieth century. This right to privacy recognizes private “zones,” something alluded to in John Stuart Mill’s work on government that identified a private sphere over which the individual is sovereign versus the public sphere over which the government has authority. These zones of privacy become, in Mill, linked closely to the nature of property. As he argues in the *Second Treatise on Government*, the individual owns inalienably and initially only his own mind and his own body. The rest of the property belongs to the world in common, is publicly owned. By his work and labor of his mind and body, he mixes his labor with that property, making it his. From Mill’s conception of the inviolate person comes the origin of personal property—property that, by being mixed with one’s person through their labor—is appropriated to that private sphere over which the individual exercises sovereignty.

contracting parties rather than a matter of objective measurement and so rendered personhood dangerously alienable. Both Michaels and Thomas argue that the concept of the inviolate person emerged historically as a means of resisting the market. They identify in nineteenth century literature an attempt to create an inalienable foundation for the person that would no longer rely on property and so be “free from the risk of appropriation” (Michaels 92).<sup>130</sup> While this may have been the case in the early nineteenth-century literature that they examine, and may even be the case in the legal rhetoric surrounding the right to privacy, my reading of Wharton will demonstrate that, by the time *The House of Mirth* was published, inviolate personality was no longer a concept aimed at “resisting” the market, but a sophisticated tool for doing business in it—a mechanism, in fact, by which personhood is alienated.

Throughout the second half of the nineteenth century and into the twentieth, the ownership interests in personal letters defined an intellectual battleground on which the debate over changing notions of property was fought. The 1867 case of *Grisby v. Breckinridge* provides a truly fascinating example of the complicated issues of property (and ultimately privacy) that surrounded personal letters. The case involved a dispute between a deceased woman’s surviving second husband and the daughter of her first husband. On her deathbed, the woman gave a collection of personal letters, carefully preserved throughout her lifetime, to her daughter from her first marriage. The collection included letters written to her by many different people, including her first husband and her second husband who wants his and all the other letters back. He petitioned the court for an order compelling the surrender of all the letters to him, claiming that, either as

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<sup>130</sup> On the transition from property to contract, see Chapter 6, “The Triumph of Contract,” in Horwitz, *Transformation: 1780-1860*. See also Friedman 230-245. For analysis of the literary response to this paradigm shift, see Thomas, *Cross-Examinations*; Benn Michaels; and Brown.

administrator of her estate or as surviving husband, he had the sole right to control the letters. Quoting from his petition:

The plaintiff is advised that said papers, at the time of removal, being in the actual custody of his wife, were legally in his possession, and were legally HIS property. That if he is not, as husband, the owner of them, still, as survivor of his wife and as administrator of her estate, he is entitled to them. That, as the writer of those letters addressed to his wife, he is interested in their contents, and is entitled to be guarded against any improper use or exposure of those confidential communications. (1142-1143)

The court here had to contend with the legal rules apportioning property interests in a letter, along with the still undefined right to protect one's reputation from the potential exposure of personal information. The letters had been gifted to the wife by the many interlocutors with whom she had corresponded in her lifetime, and these interlocutors each retained the right to control publication of their letters. However, the court found that while the authors of the letters retained the ability to enjoin publication (or sue for damages if their reputations were injured by such publication), they had no right to retrieve the letters on the grounds that they owned them. Furthermore, unlike traditional forms of property which were controlled by the husband under the doctrine of coverture,<sup>131</sup> the court found that letters were "specially connected" to the wife, similar to, say, personal jewelry, and so she could dispose of them as she would, regardless of the will of her husband which would otherwise control disposition of her property.

In a vehement dissenting opinion, Judge Williams insisted the law required just the opposite outcome. Since a letter writer only parts with the physical letter, he retains

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<sup>131</sup> Coverture refers to the legal doctrine whereby the woman's right to contract is subsumed by her husband's. "*Coverture* is by law applied to the state and condition of a married woman, who is *sub potestati viri*, (under the power of her husband) and therefore unable to contract with any to the damage of herself or husband, without his consent and privity, or his allowance and confirmation thereof. When a woman is married she is called a *Femme couverte*, and whatever is done concerning her during marriage is said to be done during coverture." *The Pocket Lawyer and Family Conveyancer* 96 (1833).

the general property rights, ceding only special property rights to the recipient. Resting on this distinction drawn from the law of real property, Williams concluded that the special property given to the recipient of a letter is the equivalent of a “life estate.” This would mean that, upon the death of the recipient, “the whole special property in him is extinguished, and then, not only the general, but the entire property, is in the author” (1155). In the *Grigsby* case, Williams’s reasoning would mean that, upon his wife’s death, her special property rights in the letters she had received would end and ownership of the physical letters (paper and ink) would revert back to their original authors. The surviving husband, then, would be entitled to reclaim any letters he had authored.

Although Williams based his opinion on the law of property, it was the yet undefined right of privacy that animated his logic. In melodramatic fashion, he concluded,

[I]n the name of every husband and wife of the Commonwealth, and as I regard the sacred, secret privacy of the family relation, and its security against the prying eye of the curious, I dissent from the recognition of any legal rule which will expose these sacred relations and private affairs to the gaze of the world or outside community through the agency of either husband or wife. (1159)

The law of property was merely the mechanism Williams turned to in order to rhetorically justify a desired outcome that rested on entirely different grounds. But the rhetorical flourishes in his dissenting opinion show how the difficulty of formulating adequate rules controlling the circulating ownership of letters is due in large part to the current of privacy running powerfully just underneath the legal discussion of property rights. The husband was not motivated by a desire to reclaim paper and ink. He was only interested in the physical letters because access to them will give him access to the words, sentiments, and ideas expressed in them—and these are not things that the wife

owns even as special property. In fact, the husband has always retained ownership of the content of the letters he wrote to his wife. He has no way of accessing them, even though his wife's right to control the disposition of the physical letter will enable a third person to have unwonted access to his property (ironically, this is exactly the kind of access he is seeking to the letters written to his wife from other interlocutors).

In 1879 (eleven years before Warren and Brandeis's article), Eaton Drone, in his landmark treatise *The Law of Intellectual Property*, similarly failed to recognize the submerged concern with privacy in the law surrounding personal letters. He wrote that "the right of the author to restrain the unlicensed publication of his letters" is solely based "on the principle of property." The light in which a letter might place another, he claimed, was irrelevant.

[P]ublication may cause broken friendship, wounded feelings, humiliation, or distress; [...] may be for dishonorable purposes, and indicate on the part of the wrong-doer a baseness that should be held up to universal scorn; but these are matters of which no judicial cognizance has been taken. [...] Where the right has been recognized, it has been on the principle of property. (Drone 128)

The existence of a proprietary title was supposedly the only ground on which publication could be enjoined, but as *Grisby* illustrated, privacy considerations were most certainly in play and added another layer of analysis to the rights bound up in personal correspondence. If individuals have the legal ability to control dissemination of personal information, then the publication of a letter might be enjoined not only by the writer, but by any person whose private affairs are discussed therein.

Exceptions to the letter writer's sole right to publication began to repeatedly arise in cases where personal reputation was at stake. In *Woolsey*, for example, the decision to enjoin publication of letters rested on concern that publication would damage the

reputation of persons and families. Disputes arose over the use of letters to prove or disprove slander and other crimes. Although a letter could not be published even by the receiver to rebut defamatory and untrue claims made against the receiver by the writer (Drone 138-9), courts could compel such letters to be published in court as evidence. Even in court, however, letters were treated with special regard. Letters were not produced for the entire court, but were “handed quietly to the judge” who read them “privately.” Except in limited circumstances, the judge did “not disclose them to the other side,” to the jury, or to the public (Conkling 444). Undermining Eaton’s claim that only property concerns were given “judicial cognizance,” whatever was deemed irrelevant to the case was left unrevealed, not based on worry over violating copyright or other property interests, but based on whether the information might be “injurious to the feelings or interest of third persons” (Greenleaf §253).

Wharton’s focus on letters reveals her sophisticated sense of their defining place in the legal landscape of her time. Her fiction largely centers on New York society and its obsession with property, domesticity, publicity, and reputation, and laws controlling personal correspondence were positioned at the complicated intersection of all of these. Nearly ubiquitous in Wharton’s body of work, letters figure prominently not only in *The House of Mirth* and *Touchstone*, but also in novels and short stories such as “Copy,” “Pomegranate Seed,” “The Letters,” “Roman Fever,” “Full Circle,” “The Day of the Funeral,” and “Her Son.”<sup>132</sup> Although critics have done important work interpreting Wharton’s personal correspondence, much less critical attention has been paid to the role

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<sup>132</sup> Additionally, Wharton treats the issue of ownership of personal information and the rights attending publication and reputation in *Summer*, *The Age of Innocence*, *The Custom of the Country*, *Twilight Sleep*.

letters play in her fiction,<sup>133</sup> and still less to the legal milieu from which her fictional deployment of letters draws considerable meaning.

Of many hundreds of articles on Wharton's fiction, only two treat the legal context relevant to her use of letters. Deborah Hecht's "Private Letters and the Law" (2004) traces the legal questions surrounding ownership of letters through Wharton's fiction. Hecht's aim is twofold: to show that Wharton's fictional concerns about who owns letters are "predictive of events in her personal life" and that they are "reflective of late nineteenth century concerns about ownership and the right to publish private letters" (575). While these are useful and insightful conclusions, by viewing fiction as a mirror that merely reflects the law, Hecht's arguments don't do justice to what Wharton's fiction offers. Seeing the law as a set of rules, Hecht simply identifies those rules when they make an appearance in fictional narrative.

Jessica Bulman, in her essay "Edith Wharton, Privacy, and Publicity," addresses the place of letters only peripherally, but she does take a broader look at the relationship between Wharton's fiction and legal discourse, arguing that through her fiction Wharton "enters a raging legal debate" over the nature of privacy. In Bulman's estimation, the conception of privacy that emerges from Wharton's fiction does not mirror legal discourse but counters and critiques it. She concludes that Wharton "exploit[s] the tension between property and personality [and] reverses Warren and Brandeis's logic," showing how untenable is the notion of the inviolate person (43). Like Bulman, I read Wharton's fiction as constituting an alternative to formal legal discourse. But by

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<sup>133</sup> For two articles examining the narrative functions of letters in Wharton's fiction, see Blackall, and Witzig. There is also Candace Waid's excellent *Edith Wharton's Letters from the Underworld: Fictions of Women and Writing*. As the subtitle indicates, Waid's attention is not on mail, but on Wharton's fictional portrayal of the character of the female writer in Wharton's fiction, who is often seen writing letters.

recognizing Wharton's use of epistolary privacy, an important strain of legal privacy discourse cut off by Warren and Brandeis, I argue that we are able to see not only her critique of the inviolable person, but her critique of the inviolable home and, ultimately, her critique of the marketplace for intimacy in general, a marketplace which depends on privacy as its primary economic instrument of exchange.

Wharton herself was a prolific letter writer. As the Lewis's introduction to *The Letters of Edith Wharton* notes, "scarcely a day passed [...] when [Wharton] did not compose and dispatch half a dozen letters, many of them carrying forth ongoing conversations" (Lewis and Lewis 3). Wharton enjoyed robust epistolary relationships with many prominent thinkers and writers, including Henry James, Bernard Berenson, Scott Fitzgerald, Sinclair Lewis, and Walter Berry. Four thousand or so of her letters still exist, though most of her exchanges with Henry James do not. James burned over 400 of Wharton's letters, in part because of their shared fear that the letters would become public after their deaths. Such fears were not unfounded. Wharton struggled in her lifetime with control over letters she wrote to Morton Fullerton, a disreputable and promiscuous though apparently charming man with whom she had an affair in her forties. When their affair ended, Wharton repeatedly pled with him to return her letters. He refused.<sup>134</sup>

I mention her personal experience as evidence of how well versed Wharton was in the legal issues of property and privacy that surrounded personal letters. Further evidence of her legal knowledge comes in the fact that she builds references to precise legal doctrines into her narratives. Her short story "Copy," for example, features two

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<sup>134</sup> These intimate letters "turned up for sale" under suspicious circumstances and were bought by the University of Texas at Austin in 1980 (Gray). Disturbingly, the Lewis's collection includes some of the letters Wharton wrote to Fullerton.



well known authors and former lovers arguing over who has the right to control the letters they have written one another. To win the upper hand, they hurl both legal rules and social mores at each other in dialogue that makes Wharton's familiarity with the legal disputes patently clear.<sup>135</sup> In *Touchstone* she references specific rules about the impact celebrity status has on privacy rights,<sup>136</sup> the property interests of those who buy letters as a means of collecting autographs, and the property issues involved when a letter is found to have "literary merit" as opposed to being merely a record of mundane, ordinary events, recorded without literary skill.<sup>137</sup> In short, *Touchstone* directly responds to the legal discourse of the newly codified right to privacy and uses laws related to ownership of personal letters to flesh out the meaning and import of privacy and to reveal the stakes involved in protecting privacy rights.

#### RELATIONAL RIGHTS: THE VIOLATE PERSON

As Katherine Adams notes, the right to privacy was constituted only after privacy had been taken away. So while privacy "represents a utopian democratic ideal—the freedom and equality of the autonomous individual," it does so "only retroactively, in the wake of loss" (4). Thus Warren and Brandeis write, not to protect or mourn privacy, but to "produce it" (6). Adam's insight dates the right to privacy to the late nineteenth-century tort cause of action formulated by Warren and Brandeis, an emphasis that I have

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<sup>135</sup> Echoing the understanding Wharton came to with Henry James, the two authors in "Copy" finally decide to sidestep the issue and burn the letters to prevent either one of them from profiting from their publication.

<sup>136</sup> Because Margaret Aubyn is a celebrity, Flamel and others refer to her as "public property" (2), claiming that where her reputation and personal information are concerned, she no longer owns anything—all belongs to the public (24). By this they mean that her fame and status as a public figure negates her privacy rights. Of course, the only reason the letters are published is because her celebrity status makes the once worthless pieces of paper valuable—that and the fact that they are sensational, revealing the intimate, tragic, unrequited love affair between a famous woman and a common man.

<sup>137</sup> *Woolsey v. Judd* (1855) reverses previous precedent in holding that a writer of a letter possesses the sole right to publish the letters, regardless of whether the letter is a literary composition or a "familiar or business letter." Exclusive right to publish does not merely apply when the letters have "pecuniary value or intrinsic merit as a literary composition."

argued effaces a long history of privacy rights in the Anglo-American tradition. But the appearance of the legal discourse that produced the right to privacy in the wake of its loss helps explain the strange dialectic of presence and loss that accompanies Wharton's fiction on letters. In *Touchstone*, Margaret Aubyn becomes a stand-in for privacy. Just as publication gives rise to the shadow that appears and pierces the Glennard's magical circle, when Aubyn's private letters are made ghastly public, she becomes a ghostly presence in the story, evoked by and cognizable through her absence that is created by her letters. They create her absence as a meaningful presence.

Letters and the "presences" they represent are recurrent themes in Wharton's fiction, especially in her short stories. "Pomegranate Seed," for example, is the story of a newlywed couple haunted by the presence of the husband's deceased first wife. She does not haunt the halls as the traditional ghost, but instead sends letters, addressed to and readable only by the husband. Her palpable presence, through her letters, ultimately destroys her husband and his new marriage. The pomegranate seed is a reference to Persephone. In Greek mythology, she is the queen of the underworld, doomed to remain there a third of every year because she ate pomegranate seeds given her by Hades. While she sojourns in the underworld, nothing on earth grows and the world is in winter. Her name translates something like "she who destroys the light."<sup>138</sup> Intriguingly, like Wharton herself, both Margaret Aubyn in *Touchstone* and the female author in "Copy" have gained fame as writers by publishing a story named "Pomegranate Seed."

Often in Wharton's fiction, as in *Touchstone*, a letter reincarnates a person who has died, giving the letter a ghostly and ominous quality, but Wharton also uses letters to

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<sup>138</sup> See "The American Persephone" in Waid. See also R. W. B. Lewis, whose biography of Wharton documents her "lifelong obsession" with Persephone.

represent the presence of the writer even when the correspondents are alive and well.

The absent writer is contained in and produced by the letter, but the intimacy created between author and receiver is not to be trusted. In contrast to the commonplace view of “epistolary revelation” as “the soul-baring, clear-eyed direct address, the transmission of truth” (Witzig 169), in Wharton’s fiction, letters create a powerful but ultimately false and dangerous sense of intimacy. They are intrusive and misleading, not trustworthy transmissions of truth.

To the extent that a letter writer can be said to be present in a letter, circulation and possession of a letter equals circulation and possession of the writer—a partial possession, like that of a receiver of a letter, or like that of Hades and Persephone. It is a possession that divides the person, rendering them both present and absent. Thus, in foregrounding the way that people are present in their letters, Wharton underlines Warren and Brandeis’s claim that a person’s words, thoughts, ideas, sentiments, etc., are protected not because they are pieces of property owned by a person, but because they are themselves part of the person. However, while this leads Warren and Brandeis to establish the inviolate person as the ground for privacy rights, by using letters to interrogate the question of presence, Wharton’s work offers a critique of this ground. In this section I set out my reading of the presence produced by loss in *Touchstone* in order to argue that Wharton’s version of privacy does not rest solely on the notions of either inviolate personality or inviolate homes, but is constituted only under conditions of circulation. As a letter is by nature circulatory, the person constituted by a letter is only possible relationally.

Glennard is both pulled to and driven from Margaret Aubyn through her letters. Though he has never fully reciprocated her love, and is unable in her physical presence to be attracted to her, though her letters she maintains a potent connection to him in her absence. He is “filled with inarticulate misery” whenever his hands merely and inadvertently “lit on her letters” (2). They remind him of the “strange and dual impulse” that, through her written words, “drew him to her voice” at the same time it “drove him from her hand” (3). The letters have a palpable physical presence and influence. For years he found her letters unwanted and intrusive. Dread at finding yet another letter that would make emotional and intellectual demands on him caused him to “avoid looking in his letter-box,” as “her writing seemed to spring out at him as he put his key in the door” (3). He is relieved at her celebrity, thinking that since the public would now have access to her words, they would “tak[e] possession of Mrs. Aubyn,” and “[ease] his shoulders of their burden” (3). The equivocation in that passage between Aubyn and Aubyn’s words, signaled by the change from singular proper noun to plural pronoun, demonstrates how her words are a substitute for and improved version of her. This helps to explain Glennard’s “strange and dual impulse.” While he feels estranged from her in person, “her letters [brought] her nearer than her [physical] presence” (9).<sup>139</sup>

It is the publication of what was once private that constitutes Glennard’s special relationship to Aubyn. He once remarks that he only comes “face to face” with her in print (59). The narrative bears this claim out. When he publishes her letters, Aubyn’s

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<sup>139</sup> The new nature of property that facilely splits ownership from possession facilitates Aubyn herself being possessed by many through her words, and through her now-published letters. Like the recipient of a letter who is granted the privilege of reading it, the thoughts, sentiments, ideas, and words of her letters are possessed by many. The “public” only possesses Margaret Aubyn, but does not own her. The shadowy, fluid nature of property and the division between ownership and possession makes it possible for many to possess the same thing simultaneously without ever owning it.

presence is renewed in force and the dispossession of her he once experienced with relief disappears. In fact, the publicity surrounding the publication of the letters “bring[s] her nearer than she had ever been in life” (59). We have reason to believe this is a calculated effect Aubyn had planned before she died. When she leaves him for Europe, she tells him, “I shall see you always-always” (10). Puzzled, he asks “[then] why go?” “To be nearer you,” is her answer (10). Her cryptic claim is realized initially through their correspondence which he says “oddly enough, seemed at first to bring her nearer than her presence” (9), a phenomenon that is re-created and heightened when her book of letters is published. Seeing the letters in print drastically shifts his assessment of and feelings for her. While he once felt stalked and harassed by her letters, he now believes he is in love with [the dead] Aubyn.

Publication of the Aubyn letters results in two dramatic consequences for the Glennard’s. First, is the interiority of Alexa Trent, created by the loss of privacy. Second, is the breach of the Glennard’s domestic circle. The places of dead Margaret Aubyn and flesh-and-blood wife Alexa Trent are reversed as Aubyn becomes more and more real, while Alexa fades away, until Glennard is “hardly conscious of her presence” (59). He forgets that she is there as her once “full bright presence” becomes “as tenuous as a shadow” (60). As Glennard begins to see Margaret Aubyn in a new light, Alexa becomes inaccessible. Glennard’s recognition of her privacy, her interiority, is triggered by the loss of Aubyn’s privacy. In this way, the inviolate individual, to the extent that one exists, is produced from privacy, which is the story of its loss. The market for personal information, for secrets, estranges the marriage by bringing the public into the realm of the supposedly private. Thus publication of the letters de-centers domestic space and

breaches the Glennards' s "conjugal circle" (30). The presence of Aubyn via publication of her letters adds a third party to the marriage. Glennard feels as if he had married Margaret Aubyn instead of Alexa (29). Aubyn has become a figure in their relationship, a presence that Glennard cannot shut out. Just as Aubyn promised, her absence, through her letters, keeps her "near" (59).

Though the presence of the person created by the letters feels real to the receiver, Wharton makes it clear that this is a deception. Letters in her fiction function generally as both a corrosive force, destroying marriages and relationships built on physical proximity, and as an enslaving force, binding people unwittingly, and so creating potent but unwanted intimacy. In Wharton's short story "The Letters," for instance, the young female protagonist falls in love with a man based on his letters which give her "sensations more complex and delicate than [his] actual presence had ever produced" (99). She pours out her heart in letters sent in return. The letters create an intimate "sense of something tacit and established between them" (97). After a long period of absence, during which she does not hear from him, she inherits a small fortune and is about to marry another, when he returns to claim her love. They live a happy life together, until, that is, she discovers the letters she wrote to him, unopened and unread, "among the rubbish" (112). The loving connection to each other supposedly established by their letters was a sham. Their letters, as in *Touchstone*, create a counterfeit version of intimacy.

Wharton used a garden scene in the opening of *Touchstone* to depict domestic tranquility and the shadowy threat to privacy, and she uses a garden scene again to draw the distinction between the physical presence of Alexa and the deceptive presence of

Aubyn created by the publication of her letters. Glennard's obsession with the absent Aubyn lures him to her gravesite where he encounters an alternate garden, one that is stark in contrast to the garden he planted with Alexa. Stephen and Alexa's garden is featured in summertime and is vibrantly colorful, fragrant, and flourishing, with live things growing wherever they happen to have tossed seeds. The garden in the cemetery, however, features beautiful but colorless and odorless white flowers, contained in and sustained only by means of a hothouse. Real flowers grow profusely there as well, but they are ghostly and unnatural, kept alive artificially. The white flowers he brings to Aubyn's grave wilt and die the moment they are exposed to the air outside the hothouse (62). The intimacy Glennard feels with Aubyn's presence, propped up as it is by the filter of publicity through which Aubyn has returned to him, is portrayed as corrupting and unnatural.

In *Touchstone*, Wharton's interpretation of the threat posed by the market in personal information puts flesh on the assertions made by Warren and Brandeis about the need to protect home and person from breaches of privacy. However, the story also portrays the fallacy of the inviolate person. In a narrative that is about the injury done by treading on the privacy of intimate relationships, Wharton gives no attention at all to the damage to Margaret Aubyn or her posthumous reputation. Although Aubyn's privacy has been violated, the consequences of the breach are drawn only as they relate to Glennard—a strange emphasis, especially considering the fact that he has remained anonymous; his name and reputation have not been damaged. On the contrary, the money he has earned from publishing her letters has raised his status in the community and compounded his personal success. By drawing attention to the nature of the market

for privacy, Wharton also demonstrates that privacy is inherently relational, not individual. Basing its protection on the concept of the inviolate person is a contradiction at the very foundation of privacy. Parties who have shared intimacy—as friends, family, or lovers—are at the mercy of the other for maintaining what has been shared between them as private. She establishes a fundamentally relational basis for privacy, as opposed to the legal concept of the single, “inviolate” person.

By ignoring the ramifications of the breach of privacy on the person whose privacy has been breached, Wharton trains our focus on the market, on the way that publicity and intimacy are exchanged as currency. The damage done to persons in the market for personal information, unlike that for trespass to traditional forms of property, is irreversible. There is no remedy. In *Touchstone*, publication is regarded as putting personal information “in the air;” once there, it spreads like a virus—one “breathes it in like the influenza” (67). Once lost, privacy cannot be restored, nor can the money that is taken in exchange. When Alexa finally learns what Glennard has done, she insists the money must be paid back. But while Alexa takes “temporary refuge in the purpose of renouncing the money,” living “as frugally as possible till what she deemed their debt was discharged” (78), Glennard recognizes the “impossibility” of all “reparations” (75). He cannot now limit publication, recall the letters, or confess his role. Glennard has sold the publication rights; he is helpless to recall or retract. Confessing his role would only add to the net loss of privacy by providing additional fodder for the gossip market. Stephen and Alexa attempt to atone by purging themselves of the financial gains realized from publication, but Wharton shows how impossible divestment really is. Though Glennard can return the amount of the initial advance and the royalties received, the



money would only be returned to the same publishing company that has already been complicit with Glennard in capitalizing on the publication of private information.

The profit from the letters is untraceable. Glennard “pray[s] [Alexa] might not discover how far-reaching, in its merely material sense, was the obligation he thus hoped to acquit” (78). It has changed him, his material affairs, enabled investments, altered and improved his salary and clientele. He invested the advance into a friend’s patent—a venture which has been wildly successful, quickly “yield[ing] a return which, combined with Glennard’s professional earnings, took the edge of compulsion from their way of living, making it appear the expression of a graceful preference for simplicity” (28). The easing of material pressures that had once so dogged Glennard, making him sullen, sorry-for-himself, and generally poor company, have now triggered psychological changes as he begins “to feel the magnetic quality of prosperity. Clients who had passed his door in the hungry days sought it out now that it bore the name of a successful man. It was understood that a small inheritance, cleverly invested, was the source of his fortune; and there was a feeling that a man who could do so well for himself was likely to know how to turn over other people’s money” (29). The sum Glennard received from trading on his intimate relations with Margaret Aubyn is, in this broader sense, unrecoverable. In Glennard’s words, it is impossible to “do penance naked in the market-place” (80). No one involved in the market for personal information can be shorn of all traces of this traffic.

Just as her private letters created two Aubyn’s—one physical, the other present in her absence through her letters, so it created two Alexas—where once she was only a surface, now she has both surface and interiority. Glennard too has been reconstituted in

(at least) two places. There is the “real” Glennard and the Glennard now known to the public—the professional and competent Glennard that has been created as a result of profiting secretly from Aubyn’s letters. *Touchstone* is a cautionary tale, warning of the deceptive intimacy created when one encounters another through the mediated publicity of the market for personal information. The closing scenes are dedicated to the idea that the market’s viral power of diffusing information, profits, and reputation, has fractured what was imagined to be whole. The remainder of this chapter looks at Wharton’s masterpiece, *The House of Mirth*. Written just five years after *Touchstone*, in it Wharton no longer nostalgically laments the loss of an even imaginary whole. Instead, *The House of Mirth* is a study of the tacit rules and hidden damage posed by a society where privacy has become a thoroughly marketable commodity. If *Touchstone* was a chronicle of its loss, *The House of Mirth* is a guide to the world left in its wake.

#### REPUTATION AND DOMESTICITY: THE VIOLATE HOME

*The House of Mirth*, published in 1905, was an immediate bestseller, in part because the curious public was hungry for the kind of insider’s view of elite New York society that Edith Wharton promised to provide. The heroine is Lily Bart, a soon-to-be-thirty society woman living in turn-of-the-century New York City. This is the gilded age, where Old New York society has been forced to accept the newly rich, however lacking in manners and taste. The story alternates between New York City and the palatial “cottages” in Newport, Rhode Island, where the rich and the famous migrated for the summer. Lily is completely dependent upon her elderly Aunt Peniston, who provides her a small allowance, but she is valued for her beauty, charm, and taste, qualities that in this society entitle her to marry a rich man. Something in her rebels against this prescribed

path though, and every time it seems she has landed such a catch, she is unable to go through it. Years have passed now and, facing thirty with hints of lines on her famous face, Lily resolves to marry the fabulously rich but boring Percy Gryce. In spite of her good intentions, however, she instead finds herself drawn to a romance with Lawrence Seldon who, while appreciated by elite society for his wit, is hardly rich enough for Lily to marry. With him, she catches a glance of what it might mean to embrace personal freedom and live without enslaving attachments to social demands. It is just a glimpse though and neither of them have the fortitude to act on their feelings. Meanwhile, Lily, who is in need of money, flirts with Gus Trenor, the husband of her best friend, and convinces him to make what she wants to believe is purely a business deal—he will invest her money for her, and she will make an easy profit from the dividends. Gus, however, comes away with a decidedly different understanding of their arrangement. Lacking the financial means to control the rumors when they begin to fly, Lily becomes easy prey for the wealthy but unhappily married Bertha Dorset who makes her a scapegoat for her own infidelities. Lily never recovers from that blow. Disinherited by her wealthy aunt, misunderstood by Seldon, and ostracized by her one time friends, Lily ends up an outcast. Finally, living in a ramshackle boarding home and desperate for sleep, the penniless Lily dies of an overdose of chloral.

The plot in *The House of Mirth* circles around the market for “inside” information, whether it be stock tips or gossip. Adams writes that nineteenth century privacy is defined as “that which modern man has lost to a world where anything and everything might become a commodity” (4). In *The House of Mirth*, Wharton shows us a thoroughly commodified and violable domestic sphere. The home in *The House of Mirth*

is a locus for the lucrative trade in reputation and privacy. In the remainder of this chapter, I use the market analysis that I glean from *The House of Mirth* to expand on what I have identified as Wharton's counter-discourse of privacy. My claim is that, while the right to privacy may emerge from the context of its loss, it becomes an economic tool designed to mobilize the commodification of private information and strengthen that power in the upper-classes. Thus the right to privacy is not a defense against the market, but an instrument that facilitates the trade in and market for information and reputation, consolidating the individual's ability to manage and capitalize on their public image.

Domestic space in *The House of Mirth* is neither sanctified nor inviolate. Lily enjoys little protection there. Her "rootless" and "turbulent" (338) childhood home was designed around outward appearances but was inwardly ruled by chaos. "No one ever dined at home unless there was company," and life was marked by periods of "gorging" followed by "grey interludes of economy" (28). Her childhood is described as a "zig-zag broken course." Reflecting on her lack of a stable home, Lily concludes she "had grown up without any one spot of earth being dearer to her than any other" (339). She sees her pitiable and irrelevant father "through a blur." He dies when she is a young woman, shortly after being financially "ruined" (32), in part because of the spending habits of her mother, who "heroically" lives "as though [they] were much richer than [their] bank book denoted" (30). Lily's mother uses her as an economic resource, treating her as an asset, a "weapon" in her mother's planned social "revenge" (34). Orphaned as a young adult, Lily moves to the grudging home of her Aunt Peniston where she is ill at ease. Her Aunt gives her an allowance, but Lily never has enough to feel secure or independent. She "revolted from the complacent ugliness" of her surroundings (103), but is powerless to

make any but the smallest, surface level adjustments to them. Peniston's "love" for Lily is far from unconditional and, upon her death, Peniston, like Lily's parents before her, effectively abandons her. Choosing to believe rumors about Lily, Aunt Peniston disinherits her, leaving her desperately poor with no resources and no marketable skills.

Because Lily avoids being at home as much as possible, many of the novel's scenes take place in the homes of others, but these homes are not safe spaces for her either. She pays a dear social price for the respite she takes from the heat in Lawrence Seldon's flat. The newly rich but socially despised Rosedale sees her there, as does the washerwoman, Mrs. Haffen, leaving Lily in both of their debts. In the Trenor's home in the city, Lily is assaulted and nearly raped. Even in the Trenor's country home where Lily is surrounded by luxury, she is expected to pay her way through playing bridge more than she can afford and acting as a kind of social secretary for Judy Trenor. As Lily begins her social decline, her "homes" become increasingly fragile and temporary. She lives on the Dorset's yacht where she is made the scapegoat for Bertha Dorset's marital indiscretions. She lives in the Emporium Hotel with Mrs. Norma Hatch, a place described as being the immoral underside of "the social tapestry" (291). She finally ends up in a "blistered, "discoloured," "muddy" boarding house in a run-down part of the city where she dies.

The only two homes in the novel that represent safe environments are not real possibilities for Lily. There is Gerty's flat where Lily finds acceptance and comfort, but the unmarried and dumpy Gerty works for a living, something for which Lily is simply too ill-equipped. There is the humble, but warm and inviting home of Nettie Crane. Nettie was one of the young women Lily helped when her pockets were full of Gus

Trenor's money, and she was basking in the flush of self-importance she felt from donating to charity. Nettie had been suffering from "lung trouble," and Lily had "furnished the girl with the means to go to a sanatorium in the mountains" (331). Nettie later hints that she may also have been pregnant at the time. In the closing pages of the novel, Nettie finds a weak and defeated Lily sitting in Bryant Park. Lily takes a few minutes of rest in Nettie's home where she holds Nettie's baby. The baby "[sank] trustfully against her breast," and Lily "thrilled [...] with a sense of warmth and returning life" (335). Though she returns the baby to Nettie and leaves shortly thereafter, the experience was so compelling that Lily hallucinates she is holding the baby once again as she dies, the sensation of having the baby in her arms giving her a "gentle penetrating thrill of warmth and pleasure" (343). But Nettie's home and family are possible because she met a man who loved her regardless of her past, who "knew about [her]" and "cared for [her] enough to have [her] as [she] was" (334). This is as much an impossibility for Lily as working for a living is. Seldon is unwilling or unable to give Lily the benefit of the doubt, much less overlook public suspicions of indiscretions, despite his own questionable past.

When the nature of property changed from an agrarian, land-based model to the "volatile and contingent dynamics of capital, commodity, and exchange," Katherine Adams argues that privacy emerged as belonging to the "inside" of the home, as "interior" (11). As property and production were increasingly located outside the home, home and family came to be "natural locations of autonomous and authoritative selfhood, imagined both as separate from and prior to economic and political activity" (Adams 11). The very separate and protected space of the home in the rhetoric of privacy implies an

outside, a public and market driven exterior (Moddelmog 339). Wharton's portrayal of domestic life in *The House of Mirth*, however, features homes as sites of economic life that ironically depend on maintaining the sense that they are separate from the economy. This phenomenon, I argue, is enabled by privacy rights and the market for reputation. In *The House of Mirth*, domestic space, at least for the New York elite, is a violate space that fosters a sense of interiority largely as a means for creating the kinds of exteriorized public effects necessary to maintain economic status and class.

Far from being "involute," many of the domestic spaces Lily enters depend for their status as "private" on an ever-curious public whose interest must be constantly piqued even as access is continually denied. July Trenor's Bellomont, for example, is ground zero for a bustling social scene meticulously designed for public effect. As Amy Kaplan has argued, the upper crust of New York society worked hard to maintain the interest of the very public they exclude in order to keep their exclusivity and elite rank (92). The Van Osburgh wedding, for instance, is both highly exclusive and deliberately conspicuous, a counter-intuitive pairing ironically made possible by privacy rights. The event is highly staged—the kind of "'simple country wedding' to which guests are convoyed in special trains, and from which the hordes of the uninvited have to be fended off by the intervention of the police" (Kaplan 90). While "uninvited" in one sense, the wedding has clearly been staged precisely for the "hordes." Among the invited are "representatives of the press," who are reporting on the "labyrinth of wedding presents," and "the agent of a cinematograph syndicate," who is "setting up his apparatus" to film "at the church door" (Kaplan 90-91). Trains, police, photographers, reporters—all

combine to ensure there is both ample publicity for, and limited access to, the “private” event.

So too with the Bry’s *Tableaux Vivant*. In Kaplan’s reading, this event is a paradigm of conspicuous consumption, designed for the very public it excludes. Rather than commissioning or collecting art objects, like oil paintings, that become investments, permanent facets of future wealth, the newly rich Brys create art solely for effect. They convert oil paintings into transient, impermanent “effects” that disappear entirely once the scene has ended. Thus the conspicuousness of wealth, prestige, and privilege renders the domestic space of the New York rich imminently public and violate, a condition necessary to maintaining a sense of exclusivity.

The connection between privacy rights and elite society’s need for publicity is entirely overlooked in legal discussions of privacy. It is from Wharton’s archive, and not legal cases or treatises, that literary critics have been able to reconstruct the way “experiences of privacy and interiority are always accessed via public meditation and subject to public negotiation” (Adams 8). Wharton reveals how the exclusivity and conspicuousness of New York’s upper class require a mechanism for publicity. The right to privacy can be seen, then, not as protecting an inviolate domestic sphere from unwanted eyes of a curious public, but as consolidating in the upper-class the means for controlling access to publicity by maintaining the image of exclusivity that depends on being seen *and* on being seen as inaccessible.

#### “GETTING ONTO THINGS:” LETTERS AND OTHER INSIDE INFORMATION

*The House of Mirth* is littered with letters. In Lily’s childhood home, letters were markers of both social status and material want. Lily learned “square envelopes”



containing invitations were to be opened “in haste” while “oblong envelopes” containing bills were “allowed to gather dust” (28). Throughout the novel, letters arrive and are sent to suitors, friends, and acquaintances. When Seldon abandons Lily, a letter from Bertha Dorset arrives in the nick of time inviting her to their Mediterranean cruise and rescuing her from despair. Lily works as a letter writer, both in her own capacity and on behalf of others. She writes letters as the unofficial secretary to Judy Trenor. She later becomes the official social secretary for Norma Hatch, a position that involves handling her correspondence. A letter from Seldon is one of the few treasured possessions Lily keeps with her as she moves down the social ladder. In a dramatic moment from the novel’s final scene, he discovers it carefully preserved in her writing desk. In *The House of Mirth*, as in *Touchstone*, personal letters play a pivotal role in the way Wharton constructs and critiques privacy. But unlike *Touchstone*, letters here do not embody persons and are not objects threatening an inviolate domestic space. Enabled by laws of property and privacy, letters in *The House of Mirth* circulate in the market as a source of inside information and thus as both valuable objects of speculation and unreliable purveyors of risk.

Letters mark both the key turning point and the closing scene of the novel. Lily’s spectacular performance at the *vivant tableaux* gains her the attention and envy of the New York public and rekindles Seldon’s interest, but it also stirs the desire and resentment of Gus Trenor who believes Lily has been avoiding the strings attached to the \$9,000 he has given her. Since taking the money, in the mistaken belief that it represents dividends Gus made investing her own money for her, she has deferred him and ignored him, and Gus has grown increasingly agitated by her behavior, feeling he has “reaped no

return beyond that of gazing at her in company with several hundred other pairs of eyes” (122). What Gus wants is special access to something publicly seen as desirable and out-of-reach. The next day, two letters arrive for Lily. One is from Seldon asking for a meeting and implying the promise of a happily-ever-after life together. The other appears to be a dinner invitation from Judy Trenor, but has really been sent by Gus.

Lily is undone by events set in motion by these two letters. Both are deceptive, and Lily relies on the information in them to her own detriment. Seldon’s promise to begin a new life with Lily is ultimately a false one. Meanwhile, Gus’s letter induces the dangerously un-chaperoned Lily to his home under false pretences. She arrives late at night to discover she is alone in the house with a drunken Gus who makes aggressive sexual advances. Gus accuses Lily of making “an ass” of him. “I know now what you wanted,” he tells her. “It wasn’t my beautiful eyes you were after—but I tell you what, Miss Lily, you’ve got to pay for making me think so. [...] There’s such a thing as [...] interest on one’s money—and hang me if I’ve had as much as a look from you” (153). She manages to escape his home without being raped, but any possible future with Seldon is destroyed and her reputation tarnished. Van Alstyne and Seldon see her leave the Trenor home, and they know Gus is there without Judy. Both men jump to the worst possible conclusion. Disappointed, Seldon immediately abandons his plans to save Lily and sails for Europe, without so much as a word of explanation to her.

Two additional letters laid “side by side” mark the closing scene of the novel as well. These are not letters Lily receives, but letters she writes and leaves on her desk before dying. She leaves no suicide note, only these letters, her last deliberate actions before her fatal overdose. One is addressed to the bank and encloses for deposit her

small, finally-received inheritance of \$10,000. The other is addressed to Gus Trenor and contains a check for \$9,000, repaying the money he gave her (341).

If the two letters Lily received from Seldon and Gus were deceits, the two letters she writes are aimed at rectification, not in the eyes of a watchful public, but for her own satisfaction. She is concerned here with her character, not her reputation, an important distinction for privacy law. As Lawrence Friedman explains, character is what you *are*, not what people say you are;<sup>140</sup> it is “not determined by the opinion of others.”

Reputation, by contrast, is “at the core [a] social fact;” it is the “estimate in which others hold a person” (46).<sup>140</sup> Bulman has argued that these letters represent Lily’s attempt to control the discourse about her life. Up until the end, Bulman argues, Lily has accepted her powerlessness to alter the public’s perception of her. This reading is only partially correct. It is true that when Gerty urges her to tell “the whole truth” and correct the damaging rumors that Bertha Dorset started, Lily dismisses the idea of the “whole truth” as having no inherent meaning. “The whole truth,” she laughed, “what is the truth?

Where a woman is concerned, it’s the story that’s easiest to believe. In this case it’s a great deal easier to believe Bertha Dorset’s story than mine, because she has a big house and an opera box, and it’s convenient to be on good terms with her” (237). This attitude seems to position Lily as helpless when it comes to controlling what is said and believed about her. In the same vein, she makes no attempt to explain Gus’s treachery to Seldon,

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<sup>140</sup> By distinguishing the two I certainly do not intend to imply they are not connected. Public perception plays a role in how one “really is,” and an attack on one’s reputation is also an attack on one’s character, and vice versa. But while I am aware of the arguments made that conflate the two, Wharton clearly treats them as separate. Lily is above all misunderstood. Her reputation does not provide accurate knowledge of her character. Wharton’s portrayal of the market for personal information is a critique of the distance that that market has the power to create between character and reputation and the damage that such a gap can do in people’s lives.

to tell him the truth about herself and George Dorset when those rumors begin to fly, or to explain herself when Seldon attempts to rescue her from the Emporium Hotel.

Lily's resignation to the greater "truth" of Bertha's story does not mean she registers no difference between character and reputation. Only that she recognizes her loss of ability to control her own reputation. By distinguishing between character and reputation, I do not suggest they are unrelated, nor do I mean to enter a metaphysical debate about the nature of the self-image versus public-image. What I do argue is that, in *The House of Mirth*, Wharton treats character and reputation as separate things. Lily is above all, misunderstood—a condition defined as the gap between character and reputation. Her reputation does not provide accurate knowledge of her character. Wharton's portrayal of the market for personal information includes a critique of the distance that the market has the power to create between character and reputation, and the damage that such a gap can do in people's lives.

Part of Lily's reticence to correct her reputation is attributable to her own complicity. She knew she had been invited on the cruise "to distract" George Dorset while his wife had an affair (239). "It was the price she had chosen to pay for three months of luxury and freedom from care" (239). I read her reticence as due to her apt sense that telling the truth will not get her what she wants. The narrator explains, "[s]he knew it was not by explanations and counter-arguments that she could ever hope to recover her lost standing" (239). Until the rumors become more than she can manage, Lily has been a master at manipulating public perception. She studiously arranges herself, her conversation, her pose, even the lighting, to control the impressions others will have of her, leading Seldon to remark that "her simplest acts seemed the result of far-

reaching intentions” (1), and that her “discretions” and “imprudences” alike were all “part of the same carefully elaborated plan” (3). But when the rumor mill begins to spin, backed by Bertha Dorset, Lily’s actions are much like the insignificant and futile adjustments Lily makes to her living space. She adds a doily here, a piece of lace there, but is finally powerless to exert any meaningful control.

In a manner inversely related to her fall from society, Lily begins to be gripped by the need to tell her story, to make someone know the truth. Modellmog has argued that Lily maintains her subjectivity via the “control she exerts over her public image” (345). When she loses control of that image, she loses subjectivity—she “becomes her reputation rather than owning it” (345). I argue just the reverse. As Lily loses control of her public image, she separates herself from her reputation, a fact that evidences the consolidation of publicity rights in the elite class—it is much less a tool used by the “common people.” The strongest evidence for my reading is the fact that neither Lily’s final trip to visit Seldon, nor her last letters, are aimed at reputation management, but they are aimed at communicating truth, if only privately. She *is* worried about her reputation and wants to set the public record straight, but that explanation does not adequately account for her actions. She is also driven to tell the truth about herself, regardless of what impact it will have on “the record.”

To rectify reputation, she entrusts Rosedale with her version of events. He maintains a confusingly caring connection with her even as she is hitting rock bottom, but she reaches out to him because she is canny enough to realize he is the best person with whom to entrust her story. Rosedale’s stock and trade is in the circulation of information, exactly the trade Lily must tap into to have an impact on her reputation. But to rectify

character, she goes to Seldon. Wharton makes this an awkward and uncomfortable scene, as Lily's determination to share honest feelings requires her to violate the expectations of "well-bred reciprocity," where there is a measured give and take of revelations of intimate feelings, where "every demonstration must be scrupulously proportioned to the emotion it elicits" (325). Her words to Seldon are not a moment of careful exchange like Seldon's weak "perhaps I should, if you did" (75). In fact, her self-effacing act of burning Bertha's letters—letters that represent her only chance at social rehabilitation—goes unnoticed and unappreciated. "He fancied that he saw her draw something from her dress and drop it into the fire; but he hardly noticed the gesture at the time" (329).

Furthermore, the two final letters she writes and leaves on her desk are not aimed at managing public perception, but at correcting the mistake she made in taking money from Trenor. She sets the record straight, but not in any public sense. Lily leaves no letter of explanation for Gus or for Judy; she leaves no letter for Seldon, no letter for the press, no letter for any of her family or friends. In fact, the letter she leaves to Gus runs the risk of yielding yet another mistaken impression from Seldon who sees it and immediately assumes it is evidence of an illicit affair. So Modellmog's claim that Lily's final letters represent her attempt to control the discourse circulating about herself misses the difference that Wharton insists on between reputation and character, between controlling perception and speaking truth.

Despite the unreliability of letters as sources of information about people's private feelings and intentions, the most prominent letters in the novel are ironically desired precisely for their status as evidence. I refer, of course, to the packet of letters from Bertha Dorset to Lawrence Seldon, letters that the novel treats as evidence of adultery.

Bertha and Seldon have been lovers. Their affair is over and Seldon has carelessly torn her letters in half and thrown them in the trash where they are recovered by Mrs. Haffen, the washerwoman who works at Seldon's apartment building. She can't read, but knows the letters have market value and, thinking they were written by Lily, she blackmails her with them. Lily lets her think so and buys the letters, but instead of destroying them as she originally intended, Lily keeps them and is then tempted repeatedly to leverage the information they contain to regain her lost social position.

Candace Waid has noted that Lily "appears as a stand-in, rival, and double for Bertha throughout the novel." She is "mistaken for" Bertha, "put in Bertha's place," and "pursued" by Bertha, an identification from which Lily "flees" (46). The letters in the hands of George Dorset could quite literally reverse Lily and Bertha's social positions, standing Lily in Bertha's place as George Dorset's wife. George longs to marry Lily, if he could only escape from Bertha. If George's home is his "castle," it is one from which he seeks to be "set free" (256). George may have been initially naïve about his wife's fidelity (45), but by the end of the cruise, he knows Bertha has cheated. This is important because it underscores why George wants the letters. They may contain intimate details and expressions, but they hold no secret. The letters are valuable to George as evidence of what he already knows. Possessing them would provide the "positive proof" (252) that he is desperate for, evidence that would enable him to get a divorce.

As in *Touchstone*, the letters Lily possesses threaten marriage, but not in the same way that the marriage of Glennard and Alexa is threatened. As evidence of adultery, Lily's letters threaten the flimsy public perception of the Dorset marriage. The domestic circle has been violated, so to speak, by Bertha's ongoing adulterous affairs. The letters

do not jeopardize a pre-existing inviolate domestic circle, but threaten to expose how violate that circle already is. By protecting Bertha's letters, Lily protects the public sham of that domestic circle. She protects the appearance of the marriage against all private evidence that the marriage is a fraud.

Modellmog's analysis of letters in *The House of Mirth* centers on their status as knowledge and Lily's subjectivity relative to that knowledge. He argues that to the extent Lily possesses the letters, she possesses knowledge. Keeping the letters and using them would make her a "knower, instead of just one who is known." By "renouncing" the letters, he writes, Lily "renounces her rights" and, in so doing, renounces her very subjectivity. Not knowing, Modellmog argues, is equivalent to "not possessing," which is equivalent to "not being." Thus by "disavowing" the letters, Lily "disavows her own title to self" (353). I disagree. In possessing the letters, Lily does not add anything to what she knows. First, because the affair between Bertha and Seldon is common knowledge in their social set. Second, and most significantly, because Lily never reads them! The narrator tells us Lily understood that the letters were repeated appeals for "the renewal of a tie which time had evidently relaxed" (110), but because of her respect for privacy, she recoils from reading them. She does not possess knowledge of them any more than does Mrs. Haffen, and Mrs. Haffen was entirely wrong in her suppositions. Even if Lily were to read the letters, she already knows about Bertha and Seldon's affair. The facts the letters are supposed to contain are facts Lily already possesses, facts that she continues to possess after she burns the letters. Wharton keeps the content of the letters a secret from her readers too. We never learn what the letters actually contain.



As unread objects of speculation the letters have much more power. Their value for Lily and for the narrative is not as a source of information, but as a source of speculation. They are much like Lily, who herself has been largely unknown but speculated about. What people know about her comes from a patchwork of rumor, public opinion, and misdirection. She is misunderstood, misjudged, and misread. Though the rumors and misleading information about Lily are influential, they are also fundamentally false. The power of information as an object of speculation does not depend on being knowable, readable, or even accessible.

Letters have more power as objects of speculation than they do as published “possessed” information. Their secrecy is the key to their value. By remaining secret, they can be traded on, leveraged as inside information. Once inside market information becomes generally known, the advantage the information provides disappears. If Bertha’s letters were to be published, their power would be spent. In this way, the letters align with the workings of the late nineteenth-century, little-regulated stock market, where the working men of the novel (with the exception of Seldon, who is a lawyer) make and maintain their fortunes. Their money is not made by appropriating land through labor or through producing anything, but from placing bets on which way the market will move. In this world, secrets are enormously valuable—but only because of a close connection between inside information and publicity. Inside information allows one to stake out a position in advance of the rest of the market, but it only pays off once the information becomes public. In other words, inside information allows you to buy low, but you can only sell high once that information gets out. Without the rise or fall triggered by public release, the market position taken based on inside information is

worth nothing. Leveraging secrets, tips, and inside information, then, is a system expressly linked to the relationship between secrecy and publicity and is a valuable dark-market operating at the very heart of the broader market.

THE “LATENT MENACE”—BLACKMAIL AND THE CURRENCY OF PUBLIC INTIMACY

Of the many critics who have analyzed the modes of commodification and exchange in *The House of Mirth*, none have recognized the pre-eminence of blackmail among these modes.<sup>141</sup> Secrets, tips, inside information of all kinds, are the most important kind of currency in *The House of Mirth* where a “tip” is a “precious commodity” (85). Secrets have enormous power in *The House of Mirth*. As the narrator comments—“the possessor of [Bertha’s] letters could overthrow with a touch the whole structure of her existence” (109). Secrets do, in fact, overthrow existences. Grace Stepney supplants Lily as Aunt Peniston’s heir by sharing secrets about Lily with Peniston. True or not, Peniston believes the rumors at a crucial time and remakes her will in Grace’s favor. We’ve already seen how Rosedale and the Wellington Bry make a fortune on the market using “secrets.” As a result they amass enormous wealth at the expense of others who are financially ruined. Rosedale takes up residence in the home of just such a ruined man.

Finessing this system of inside information is Rosedale’s genius; his wealth has come from “getting onto things” (272). His nose for secrets give him power both in the stock market and in the social realm where he uses inside information to gain social and financial position. He “gives away a half-a-million [dollar] tip for a dinner” (85), using his secrets to “place Wall Street under obligations which only Fifth Avenue could repay” (253). Rosedale’s methods align him with the blackmailer—both learn the secrets of

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<sup>141</sup> See, for example, Benn Michaels; Thomas; Dimock; and Merish.

others and use that knowledge to profit, in ways that are only possible so long as the information remains secretive. Once generally known, the information no longer has a market value. Rosedale employs the same acumen for leveraging secrets in his personal relationships. Referring to his ability to learn and use secret information, he tells Lily, “[g]etting onto things is a mighty useful accomplishment in business, and I’ve simply extended it to my private affairs” (272). His *modus operandi*, on Wall Street and 5<sup>th</sup> Avenue, is blackmail.

This is why Rosedale so quickly sees the possibilities that Lily’s possession of Bertha’s letters offer. “The wonder,” he argues to her, “is why you’ve waited so long to get square with that woman, when you’ve had the power in your hands. [...] I know how completely she is in your power” (271, 272). All of Lily’s options for social rehabilitation involve doing as Rosedale urges and using the letters. She can “tell [George Dorset] all [she] knows,” give him the information he needs to “show the lady the door,” and marry George herself, or she can collude with Rosedale and “get Bertha Dorset to back [her] up instead of trying to fight her” (272). Taking this route, Lily would not publish the letters, but hold them over Bertha’s head to “get [her] in line” (274) and marry Rosedale to provide the “big backing” needed to “keep her frightened” (274). To carry out Rosedale’s plan, Lily must use the letters as a “latent menace” (273), in other words, as blackmail.

The crime of blackmail and the prevalent appearance in literature of the “blackmail story” emerged in the United States during the late nineteenth century and “peaked” during the first decades of the twentieth (Friedman 93, McLaren 3-4). The targets of blackmail were usually members of the wealthier upper-classes, not because

their lives conformed less to social mores, but because they had more to lose and more dollars in their bank accounts with which to control their reputations. Blackmail originally referred to extortion combined with a threat of violence. Only in the nineteenth century did it come to mean a threat to expose secrets with or without threatening violence (Friedman 85). By the late nineteenth century, blackmail had become more generally “buying silence about some guilty secret” (Friedman 86).<sup>142</sup>

Blackmail is difficult to study because, where successful, it “leaves no trace” (Friedman 87). Furthermore, to prosecute an offender for blackmail “would paradoxically defeat the purpose of the laws, because the whole world would know the guilty secret,” and so, not surprisingly, blackmail laws were infrequently enforced (Friedman 87). In *The House of Mirth*, the blackmail plot centers on the role of Bertha Dorset’s letters. Though I will argue that blackmail is perhaps the pivotal activity in *The House of Mirth*, its importance has been all but ignored by the extensive critical history on Wharton’s fiction. Candace Waid has written about Bertha Dorset and Lily as doubles, but I argue that Lily’s other double is Mrs. Haffen, the washerwoman. Contrary to Wai Chee Dimock, who claims that Lily and the washerwoman Mrs Haffen are connected because of Lily’s eventual working class fate, I claim it is blackmail that connects them. Mrs. Haffen is the first of many characters in the novel who blackmail Lily, and Lily very nearly becomes a blackmailer herself. Not only is it the key term in

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<sup>142</sup> Though the origins of the term “blackmail” are unrelated to “mail” in the sense of post, laws against the modern sense of blackmail were closely associated with the regulation of the mail, as the potential impersonality of the mail made it a preferred avenue by which the threat of exposure was delivered. Alexander Welsh, in a fascinating study of blackmail in the fiction of George Eliot, finds that “[a] confusion arises because of two meanings of ‘mail’ that stem from two different roots altogether. The commoner word of the two refers to the post or to letters and derives from old French *male*, or the bag in which letters were posted. The less common and now obsolete “mail” means payment, rent, or tribute. This word, which is the root of “blackmail,” derives from Anglo-Saxon *māl* and from old Norse *māl*, a word that meant speech or argument. A reverse etymology, nevertheless, has continued to play about the word “blackmail” and to associate the crime with letters” (6-7).

the relationship between Mrs. Haffen and Lily, but it is also the bridge between Lily and Bertha. Lily's plan for social rehabilitation requires her to "sell her silence" about Bertha's letters, in exchange for getting Bertha on her side. Lily ultimately maintains moral distance from Mrs. Haffen by refusing to trade on the secrets she possesses, but I will argue that Lily is blackmailed continually. Taking the argument a step further, I contend that blackmail—an act that exchanges the withholding of silence and secrets as currency—is emblematic both of the social and financial culture of the New York elite that Wharton depicts and of the black market that is created by the right to privacy.

As Rosedale's financial triumph proves, success on Wall Street at this time depended on getting and leveraging secret information as a mode of exchange. Though he urges Lily to use the letters in this manner, he also correctly divines the reason for her refusal. Lily buys them because she thinks Seldon would want them rescued (110), and she finally refuses to use them "because the letters are *his*" (275). In fact, the letters are not legally Seldon's at all. His only property interest was in the physical pieces of paper, which he discarded. Mrs. Haffen became the owner when she picked them up out of "the rubbish heap," and they now lawfully belong to Lily, though the publication rights belong to Bertha. As the writer, she did not give those rights to Seldon, nor are they destroyed when he throws the letters away. Warren and Brandeis's privacy tort might allow Seldon, Bertha, and perhaps George, to enjoin publication since the letters supposedly contain personal information. Laws against blackmail were, on the one hand, another mechanism the rich could use to manage a public reputation that was unfettered to character, and on the other hand, those with the financial backing to manage the press

could use the blackmailer's methods to gain intimacy, social standing, or other items they desired by leveraging their ability to control the public image of others.

Lily finds the suggestion that she trade on Bertha's secrets abominable. Her abhorrence at gaining social ground from blackmail recalls Wai Chee Dimock's argument that Lily is, by an "ironic doublethink," the most rebellious of the lot because she plays by the market's explicit rules while the rest do not. The law of the market is that you must pay for what you get, that there is always an exchange of values. While those are the explicit rules, Dimock argues that Lily pays where others do not and pays what others owe, while they externalize their debts onto her. Lily herself attributes the "baseness" of the traffic in letters as its "freedom from risk" (274), echoing the narrator in *Touchstone* who claims the vile nature of the profit from publication of someone else's personal letters is linked to its being "a sure thing" (15). Like the inside information for which Rosedale is prized, the absence of risk makes the traffic in personal information a violation of the market's explicit rules.

As in violations of privacy rights in general, blackmailers enjoy property of others without cost. The "property" enjoyed or taken without cost is reputation. Since the emergence of privacy coincides with the formal recognition that reputation has "social and economic value" (Friedman 6), secrets are newly endowed with a corresponding market value. Reputation is, after all, "a matter of surfaces" (Friedman 14). The most obvious example of this from the novel is chastity. Reputation at the time of *The House of Mirth* was a "private possession," and much more important than one's actual virginity was one's reputation for virginity. For upper class women the reputation for being chaste was a valuable commodity (Friedman 49). For Lily, being thought of as unchaste could

(and does) render her unmarriageable—not primarily because of her condition of being a virgin or not, but because of her reputation for being a virgin or not. As Lily says, “once a girl is talked about, she is done for.”

While Wharton seems to treat blackmail as instinctively immoral, it is not obvious why it should be singled out for special condemnation. Lily acknowledges feeling “personally contaminated” as she is blackmailed by Mrs. Haffen. She feels bargaining for Bertha’s letters is “vile” (106), “intolerable” (111), a moral “abyss” (110). Friedman’s study concludes that blackmail was illegal in many states and generally considered “despicable” (81). It was condemned by society as “low, loathsome, and unscrupulous” (Friedman 81). Keeping a secret, it would seem, is one of but very few things that in turn-of-the-century United States could not lawfully be made a matter of contractual exchange. But of course, the prevalence of blackmail in the society reveals that the black market for keeping secrets was thriving. That is the secret of secrets—that by negotiating the commodified space between publicity and privacy, aided by the legal right to privacy, both the selling and the keeping of secrets are capitalized.

But why should threatening to tell the truth about a person be against the law? Why blackmail should be regarded as a crime at all is a persistent paradox. It is not a crime to ask for money, nor is it a crime to tell the truth about a person’s past. But asking for money in exchange for refraining from doing what would otherwise be perfectly legal behavior is, somehow, the vilest of crimes. Moreover, within a society where all things seem to have an exchange value, why should silence be an exception? How is blackmail different from an ordinary bargain? In Friedman’s words, “why isn’t my silence a commodity you can legally buy?” (81). The taint associated with blackmail is perplexing

in the context of Wharton's work. A commonplace of criticism on Wharton is her portrayal of the universality of commodification that includes social and intimate relations. The irony is that in *The House of Mirth*, silence about Bertha Dorset's infidelity seems to be the only thing that is not readily exchangeable.

Laws against blackmail are unconcerned with the truth. Unlike laws against defamation, the truth of the accusations is no defense for a blackmailer (Friedman 84). So why should laws against blackmail protect those who are immoral and those who are lawbreakers by keeping their exploits secret? The answer reveals much about the nature of privacy rights. Late nineteenth century laws and norms drew a "sharp distinction between the surface of the law and its dark underbelly" (Friedman 68). It was important to maintain purity in the "external, visible sphere, the *public* and official sphere;" meanwhile, "the dark underbelly was meant to be kept invisible. Its secrets should never be leached out into daylight." To accomplish this, society "had to police its surfaces and outer appearances rigorously" (Friedman 68). Just as privacy is not concerned with protecting the home, but protecting the public image of the home, not concerned with protecting character, but protecting reputation, the public image of character, so laws against blackmail were aimed at protecting secret wrongdoers. Friedman claims that blackmail was a crime because of the "enormous emphasis on surface behavior." Reputation, that was increasingly seen as having "social and economic value" (6), is a "matter of surfaces" (4), and a market that protects surfaces, depends on privacy and secrets.

In the late nineteenth century U.S., the official rules that prohibited behavior that would otherwise be revealed via blackmail were not often enforced. So, for example,



libel and slander laws did not protect against lies being written or spoken, but only against lies being published. A letter with libelous claims that is sent but never opened is not actionable (Friedman 42). The lie itself is legally insignificant unless or until published to others. This represents a shift from earlier law when the insult itself was actionable as defamation, if it was bad enough, even without demonstrable harm to reputation (and thus quantifiable economic damages). But as legal rhetoric became more concerned with protecting privacy, the law began punishing only “open, notorious, flagrant violations” of social and legal rules, and not “private, discrete, secret” violations (Friedman 69). For example, throughout the later nineteenth century, many states changed the definition of adultery so that the crime was no longer adultery *per se* but “open and notorious” adultery (77). “Flagrant fornication” carried stronger penalties than “ordinary fornication,” and in some states, “secret adultery” was no longer against the law (78). The mechanisms of social appearance were enforced—the outward manifestation of morality and obedience to law, not the actual existence of those qualities. This is why Lily says there is “nothing society resents so much as having given its protection to those who have not known how to profit by it: it is for having betrayed its connivance that the body social punishes the offender who is found out” (109). In Friedman’s estimation, “it was not a person’s ‘private’ life as such that mattered, but the way he or she *managed* this private life” (11).

Friedman’s conclusion is that blackmail was part of privacy law which protected above all the ethos of the “second chance.” Blackmail developed alongside bankruptcy and insolvency laws that similarly contributed to “the right and the power to begin a new life, to wipe out the past and start over” (Friedman 27). Society in general was eager to

protect “mobility and second chances” and the right of people “in respectable society” to “cover up certain of their sins” (55). Thus, contrary to Adams who downplays the significance of class in her study of nineteenth century privacy,<sup>143</sup> Friedman argues that the development of privacy was a staunchly upper class phenomenon, and that, regardless of legal rhetoric to the contrary, it was only in the twentieth century that the law began to “protect reputation generally, “and not just that of “people of high station” (61). The development of late nineteenth century law was aimed at “caution, moderation, and a screen of privacy” (65), a screen that was deemed necessary for social stability and that required turning a “blind eye for people in authority” (65). Connected to the idea of managing one’s public image, preserving the right to leave the past behind means preserving the right to develop one’s reputation independently of one’s character.

Laws against blackmail are “meant to keep the past safely buried” (Friedman 98). Lily recognizes this, and it is also part of why she refuses to use the letters. She won’t “trade on Seldon’s name,” does not want to profit from “a secret of his past” (322), and Seldon and Bertha both know how to “profit” (109) from society’s protection of such secrets. So it is Seldon’s “democracy of the spirit” at stake in Lily’s decision. Seldon’s mantra is “personal freedom,” “freedom [...] from everything” (70). His notion of freedom relies on the selfsame discourse of the self-possessed, inviolate self that grounds legal privacy. He claims to own himself and be beholden to no other person or thing. For Lily to protect Seldon’s ability to remain “objective,” to allow him to maintain his spectator’s role with no entanglements, she must keep the letters a secret. The letters

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<sup>143</sup> Adams asserts that class, while “always at stake in privacy relations” is not of the same “constitutive importance” as race and gender. Her study is focused on the confluence of privacy and property rights in nineteenth-century women’s autobiographical writing. While I make no criticism of her claim for that archive, in Wharton’s fiction, class and gender, rather than race and gender, assume the foreground.

would entangle him in his past. His notion of freedom, of self possession, cannot function without the corresponding right to privacy that allows him to move on from his past and move forward without such entanglements. Blackmailing Bertha or otherwise using the private letters would prevent Bertha and Seldon from getting a second chance, from “resetting his or her new life and independence” (Friedman 83). Thus when Lily keeps Bertha and Seldon’s secrets, she not only preserves the public façade of the Dorset marriage, she makes Seldon’s past unrecoverable, a sacrifice to his “republic of the spirit.”

While Lily helps Seldon remain untainted by the market in secrets, she herself is immersed in it, despite the fact that she destroys the letters. Critics keen to notice the commodification of social intercourse in the novel tend to note Lily’s beauty and grace as her “stock and trade,” in contrast to Bertha Dorset and Judy Trenor whose “social credit was based on [...] impregnable bank-account[s]” (276). Through a closer examination of blackmail in the novel, I argue that while no doubt Lily trades on her beauty, grace, and personality, her currency is something more complex. I will show that Lily is continually blackmailed and that she only maintains her position in society as long as she pays and pays again the price of the blackmailers. That price, and the currency in which she specializes, is what I call public intimacy. This is a mode of currency that offers limited access to exclusivity that can only be created by deliberate conspicuousness. The value of her intimacy as a commodity relies on the social creation of privacy as an imminently public phenomenon. Like the Osburgh wedding, her value depends on creating an air of exclusivity that can only be maintained by the public display of herself as out of reach.

Within this niche, her actions of public intimacy have market value—they promise access to what has been constructed as inaccessible.

Lily's relationships with Rosedale and with Gus Trenor, provide the most thorough opportunities to analyze the way Lily buys silence. Rosedale and Gus will only keep her secrets as long as she pays with public intimacy. Though Rosedale's money and stock market "tips" give him a place in elite New York society, his lack of social grace (along with the novel's overt anti-Semitism) makes him unpleasant to the women of 5<sup>th</sup> Avenue. Rosedale, the consummate collector, desires Lily, having "his race's accuracy in the appraisal of values" (14). His appraisal of her value extends to more than her beauty and grace. He knows that being associated with Lily Bart is itself is a kind of valuable commodity. Lily knows it too, knows that to be seen walking in public "in the company of Miss Lily Bart would have been money in [Rosedale's] pocket" (14). Her awareness of the value such public display of intimacy carries is the reason why she is so upset with herself for not using it to buy his silence after Rosedale sees her leaving Seldon's apartment. Instead, given her "intuitive repugnance" (15) towards Rosedale, she balks, is unable to think quickly enough, and stammers out an obvious lie about having been to her dressmaker (13).

This misstep gives Rosedale clout because he now possesses inside information about Lily that could, if revealed, do serious damage to Lily's public image—an image she must maintain to remain marriageable. I have shown how inside information is only valuable because it allows one to stake out a position ahead of the market. The threat of or and eventual revelation is what makes this information valuable. It is the currency of the blackmailer. The missed payoff to Rosedale is one that triangulates intimacy with

privacy and publicity. It would not be enough to share a purely private moment with Rosedale. In the same fashion as both the private domestic displays of conspicuous consumption and the secret market information that relies on publication for its value, Lily's private moment with Rosedale must be one that can be viewed publically. It is privacy leveraged to produce a valuable public effect, a moment of public intimacy. Public intimacy with Lily is valuable to Rosedale. It would not merely meet a subjective desire for closeness, but possesses social and economic value, as Rosedale, for all his money, was "still at a stage in his social ascent when it was of importance to produce such impressions" (14). Lily's lie lets Rosedale know "she had something to conceal," and by failing to satisfy Rosedale with a moment of public intimacy, she has "put [herself] in his power" (16). Possessing her secret gives him a "latent menace" that makes her beholden to him.

Lily owes Gus a much more literal debt, but the power he holds over her is the secret of their financial arrangement—the information that she, a single woman, has been taking money from him, a married man, and all the insinuations the arrangement implies. This information, and the damage it could do to Lily's reputation, is something Gus can, and does, leverage. Furthermore, Gus shares the information with Rosedale, giving him yet another secret he can barter with. The underlying nature of both Rosedale and Gus's power over Lily is equivalent to blackmail. Both men threaten to spread the sensitive information about her that they possess, unless she pays up, and she does pay up, using public intimacy as her currency.

A meeting between Rosedale and Lily demonstrates the way that silence about guilty secrets is bought. Rosedale pays a surprise visit to Lily one evening, a visit she

finds “unpleasant” (118). She is initially untouchable. His “geniality” and his “readiness to adapt [himself] to the intimacy of the occasion” (118), “chill” her own manner, keep her in “frozen erectness,” and she “hold[s] herself aloof” (119). As the conversation is going poorly for Rosedale, he decides to switch directions, confronting Lily with the private information he knows about her. Rosedale says, “I hear Gus pulled off a nice little pile for you last month” (119). Lily’s response evidences the seriousness of Rosedale’s seemingly casual comment:

Lily put down the tea-caddy with an abrupt gesture. She felt that her hands were trembling and clasped them on her knee to steady them; but her lip trembled too, and for a moment she was afraid the tremor might communicate itself to her voice. (119)

She immediately recognizes his comment as a threatening attempt to remind her that he knows a secret about her that can destroy her reputation. Rosedale sees that Lily is “evidently nervous,” a condition he is “not above taking advantage of” (120). He possesses information about her and is willing to use it unless Lily gives him what he wants. Lily neutralizes the threat the only way she can, by giving him the intimacy he desires. In a drastic reversal of her initially cold and distance demeanor, she “smile[s] back at him,” “relaxing the tension of her attitude and admitting him, by imperceptible gradations of glance and manner, a step further toward intimacy” (120).

The narrator describes Lily in this scene as using “her beauty” to “divert” Rosedale “from an inconvenient topic” (120), but that description is inadequate to describe what has just happened. The topic is “inconvenient” because of Rosedale’s implied threat of publicity and the potential damage such publicity would do to Lily. Rosedale does not believe Lily is guilty of the things she is accused of—he recognizes the disconnect between rumor and reality—but he is not above capitalizing on the

information. Though no doubt Lily's beauty is part of what diverts Rosedale from the topic, her beauty does not trigger the dramatic change in this scene. Her looks have not changed between the beginning and end of the scene. Rosedale's access to it, however, has. The difference, the essential aspect that alters the dynamic in the room is the way that she trades on intimacy to buy Rosedale's silence, offering him something he deems valuable if he will keep silent about the damaging information he possesses. Lily has been blackmailed and has paid the price in her currency, that of intimacy.

Lily is, in fact, blackmailed all the time. At the Osburgh wedding, Gus, because of their new financial arrangement, takes the liberty of assuming a public display of intimacy with Lily. He greets her in public with "By Jove, Lily, you look a stunner!" (95). The implied familiarity of this address puts Lily off, the "use of her Christian name" offends her, the "familiar address had an unpleasant significance" (95). Lily has here again been confronted with the terms of her business dealings—intimacy is the currency in which she deals. Her displeasure is compacted as Gus, in a voice that is "louder than usual," and in a room that "was beginning to fill with people," exclaims "I've got a cheque for you in my pocket" (95). Lily stops him from sharing any more information by proffering intimacy. She lets "her eyes shine into his" as she tells him "I can't thank you properly now" (96). Over the months, as Gus has tried to collect on what he feels she owes him, Lily has used stop-gap measures—the promise of a "nice, quiet talk" or a long walk in the park (97)—as efforts at trading on intimacy in exchange for Gus's silence about their arrangement. Her whispered comment that she can't thank him properly now implies that she will thank him properly later. The promise of intimacy—here sexual intimacy—buys Gus's silence, and he shuts up about the check in his pocket.

This is the first of two blackmailings that occur at the wedding. Gus brings Rosedale over to Lily, implying that Lily owes him the favor of being nice to Rosedale—something the 5<sup>th</sup> Avenue husbands have been imploring of their resisting wives. Lily recognizes the moment as an “expectedly easy way of acquitting her debt” (97). The debt is, of course, to Gus (though Lily has “reasons of her own for wishing to be civil to Mr. Rosedale” (97)). Gus has reminded her that Rosedale is “a chap it pays to be decent to” (97). Decency, civility, are code for public displays of intimacy, for allowing Rosedale to show himself in public as having a private connection to Lily Bart.

The blackmail moment—the demand for intimacy in exchange for silence—becomes more clear as Gus arrives with Rosedale, saying “Hang it, Lily, I thought you’d given me the slip; Rosedale and I have been hunting all over for you” (99). The “note of conjugal familiarity” in Gus’s voice is odious to Lily, especially since she is, at this moment, talking earnestly with Seldon. Rosedale picks up on and “appraises” Gus’s familiarity—a fact not lost on Lily. Rosedale stands before Lily expectantly. He waits “alert and expectant, his lips parted in a smile at whatever she might be about to say, and his very back conscious of the privilege of being seen with her” (99). This uncomfortable moment is a chance for Lily to buy back her secrets, to loosen Rosedale’s power over her, to redeem her misstep at Seldon’s apartment when she could have squelched his power by a small public display of intimacy. But she is trapped. Seldon is watching, and by giving Rosedale the act of public intimacy that he has stepped up to collect, Seldon will suspect “that there was [a] need for her to propitiate such a man as Rosedale” (100). Fully understanding the nature of the currency being exchanged here, Lily is paralyzed



while Rosedale stands “frozen” in front of her, until he “reddens,” embarrassed by the public awkwardness of unreturned familiarity.

The terms of the bargain proposed here are crystal clear, made so by Rosedale’s next comment. Left standing awkwardly, his expectations for a public moment of intimacy with Lily unmet, he unleashes his power, his unspoken pact of silence broken by Lily’s seeming unwillingness to pay the demanded price. He fires at her:

“Upon my soul, I never saw a more ripping get-up. Is that the last creation of the dress-maker you go to see at the Benedick? If so, I wonder all the other women don’t go to her too!”

If the nature of the comment as blackmail is not apparent, let me make it so. While ostensibly couched in a complement, this is a none-too-subtle reminder of the information that Rosedale possesses about Lily—they both know the Benedick where Lily went to visit Seldon is a bachelor apartment (Rosedale owns the place!) and not Lily’s dressmakers, as she claimed. They both know that the other knows this as well. So Rosedale’s comment about Lily’s trip to the “dressmaker” is a reminder that he saw her leaving a man’s apartment without a chaperone. Rosedale’s reference to “all the other women” is a threat to inform them of the “dressmaker’s existence,” in other words, to spread this sensitive information about Lily’s private life and actions to the broader social circle. Mentioning her presence at the Benedick in public makes this threat clear, as does the added reference to the fact that the other women do not apparently know of the talented “dressmaker” there, a lack of knowledge Rosedale is prepared to remedy.

Lily’s response barter for Rosedale’s silence with public intimacy. Rosedale’s imminent threat stirs Lily to action. Though frozen a moment earlier by the fear of what

Seldon will think, she now kicks into action. She retorts, loudly enough for those in earshot to hear,

“How do you know the other women don’t go to my dressmaker? [...] You see, I’m not afraid to give her address to my friends!”

Her glance and accent so plainly included Rosedale in this privileged circle that his small eyes puckered with gratification and a knowing smile drew up his moustache. (100)

By publicly including Rosedale in her “privileged circle” of friends, Rosedale’s silence has been acquired by Lily’s act of public intimacy. Lily follows up on her exchange, expanding her willingness to be displayed in public. She answers Rosedale,

“[I]t would be nicer still if you would carry me off to a quiet corner and get me a glass of lemonade or some innocent drink before we all have to rush for the train.” She turned away as she spoke, letting him strut at her side through the gathering groups on the terrace. (100-101)

The terms of this exchange are clear—Rosedale’s silence, his willingness to keep Lily’s private matters silent, is traded for Lily’s public display of intimacy with Rosedale.

Judged from Wharton’s fiction rather than the formal legal construction, blackmail is the paradigm upon which the right to privacy was based. Rather than a means of shielding persons from the searing light of the press and the market for publicity, privacy commercializes secrets and thus commercializes intimacy.

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## CHAPTER THREE

## LEGAL REALISM AND THE RHETORIC OF JUDICIAL NEUTRALITY IN RICHARD WRIGHT'S

*NATIVE SON*

*The great tragedy of the law—the slaying of a beautiful concept by an ugly fact.*  
*--Joseph C. Hutcheson, Jr.*

In his classic 1921 book on jurisprudence, *The Spirit of the Common Law*, Roscoe Pound begins the chapter on Judicial Empiricism by recounting an episode from Mark Twain's *Huckleberry Finn*:

When Tom Sawyer and Huck Finn had determined to rescue Jim by digging under the cabin where he was confined, it seemed to the uninformed lay mind of Huck Finn that some old picks the boys had found were the proper implements to use. But Tom knew better. From reading he knew what was the right course in such cases, and he called for case-knives. "It doesn't make no difference," said Tom, "how foolish it is, it's the *right* way and it's the regular way. And there ain't no other way I ever heard of, and I've read all the books that gives any information about these things. They always dig out with a case-knife." So in deference to the books and to the proprieties the boys set to work with case-knives. But after they had dug till nearly midnight and they were tired and their hands were blistered and they had made little progress, a light came to Tom's legal mind. He dropped his knife and, turning to Huck, said firmly, "Gimme a case-knife." Let Huck tell the rest:

"He had his own by him, but I handed him mine. He flung it down and says, 'Gimme a *case-knife*.'

"I didn't know just what to do—but then I thought. I scratched around amongst the old tools and got a pickax and give it to him, and he took it and went to work and never said a word.

"He was always just that particular. Full of principle." (166-167)

Pound offers the anecdote to illustrate the way legal fictions work. Legal fictions are strategic linguistic workarounds, "untruths" used by judges to circumvent the strict application of the law. The judge creates a fiction that alters the operation of the law while leaving the formal text of legal doctrine unchanged.<sup>144</sup> As Pound writes, "when

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<sup>144</sup> Legal fictions have been characterized as a method of reaching justice by "devious means" (*Ballentine's Law Dictionary*). For a classic analysis of legal fictions, see Maine 26 (1888). One excellent study of the

legislation or tradition prescribed case-knives for tasks for which pickaxes were better adapted [. . .] the law has always managed to get a pickax in its hands, though it steadfastly demanded a case-knife and to wield it in the virtuous belief that it was using the approved instrument” (167). Because formally the law is unchanged—case-knives remain the “right course in such cases”—legal fictions conceal the fact that the law has been altered, that the traditional separation of judicial and legislative powers has been breached.

Pound’s critique of legal fictions was just one part of his broader attack on the mismatch between judicial doctrine and practice, a mismatch he believed was obscured by the traditional approach to jurisprudence. But rather than urging judges to ensure their decisions conformed strictly to the formal legal text, Pound pushed for a new jurisprudence that would legitimize the judiciary’s role in “social engineering.”<sup>145</sup> His work played a foundational role in the development of the Legal Realist movement that will be a focus of this chapter.<sup>146</sup> Inspired by Pound, the Legal Realist movement began to coalesce around a growing dissatisfaction with the intensely formalistic period of American jurisprudence that followed the Civil War and became dominant in the later decades of the nineteenth and early part of the twentieth century. Legal Formalism refers

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strategies judges use to avert the strict application of the law is Robert Cover’s 1975 book *Justice Accused: Antislavery and the Judicial Process*. The book analyzes the way that antislavery judges mobilized uncertainties, gaps, and ambiguities in formal legal doctrine to mitigate the effects that would have followed from a strict application of slave laws.

<sup>145</sup> See the chapter on “Legal Reason” in Pound for his “new theory of lawmaking as a social function” (213). Pound’s account of the “the spirit of twentieth-century jurisprudence” is one in which judges and jurists are enabled to take account of “social facts,” to “insist on sociological study” of the impact of laws, to consider laws together with “the economic and social history of their time,” etc. He wanted the jurist to “keep in touch with life,” and to use the law in a utilitarian way, allowing social ends to take precedence over the strict application of abstract legal doctrines (205).

<sup>146</sup> Pound is regarded as the “father” of Legal Realism by legal historians such as Fisher, Horwitz, and Schwartz. The debt of influence is undeniable, even though the self-proclaimed spokesperson for the Legal Realists, Karl Llewellyn, made Roscoe Pound the object of ridicule and critique as the Realist movement became increasingly radical and Pound increasingly conservative. For a detailed account of the battles between Pound and Llewellyn, see Hull.

to the attempt to scientifically reorganize the law by defining a few key concepts under which previously ad hoc rules could be simplified and categorized.<sup>147</sup> Once this reorganization was complete, Formalists believed the law could function as a closed system—self-executing, internally consistent, and self-referential.<sup>148</sup> A judge need only determine to which category a case belonged; the outcome would then follow as a matter of deductive logic. When resolving disputes becomes a matter of deducing result from rule, judicial discretion and legal uncertainty are ostensibly eliminated.

In the mid-twentieth century, the Legal Realists<sup>149</sup> sustained, at least for two or three decades, a ground-shaking critique of formalism and the production of American law. The Realists rejected the Formalist's closed legal world, insisting the claim that law could be wholly embodied in neutral and predictable written rules obscured the tension between the text of the law and the lived experience of it, between what judges *said* they were doing and what they *were* doing. Rules, said the Realists, do not govern legal decision making. Instead, in the words of one of their prophets, Oliver Wendell Holmes,

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy,

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<sup>147</sup> The system of Legal Formalism of the late 19<sup>th</sup> and early 20<sup>th</sup> centuries is also referred to as “Classical Legal Thought” (see Horwitz, *Transformations 1870-1960*) or, more derogatively, as “mechanical jurisprudence.”

<sup>148</sup> While Formalism has been dominant in the law at other times and continues as an important approach to jurisprudence today, the general “scientific” reorganization of “the architecture of law” referred to here happened between 1870 and 1900. For the definitive history of post-Civil War Formalism, see Horwitz, *Transformations 1870-1960*. See also Wiecek's *The Lost World of Classical Legal Thought*.

<sup>149</sup> The history of Legal Realism is disputed. Neil Duxbury portrays the difficulty in defining Realism as “one of the great paradoxes of modern jurisprudence”—“no other jurisprudential tendency of the 20<sup>th</sup> century has exerted such a powerful influence on legal thinking while remaining so ambiguous, unsettled and undefined” (65). It is safe to say that the Realists were a motley group, and their archive is haphazard. Any attempt to reduce it to a set of mantras is doomed to be both partial and reductive. As John Henry Schlegel notes, these attempts have been part of the problem, since attempting to make a jurisprudence out of their work violates one underlying tenet of Realism, which is that rules and principles belie the meaning of law—law is as law does. However, as Schlegel reminds us, before we know what the Legal Realists did, we have to name them. And we can only name them by distinguishing them from, say, the Formalists, which is a matter of determining themes and approaches that are Realist to begin with (Schlegel, *American Legal Realism and Empirical Social Science* 460).



avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. (Holmes, *The Common Law* 173)

For evidence of the “felt necessities of the time,” the Realists turned to social science—the “empirical side of law”—beginning with attending to how courts actually decide cases rather than what courts say about why they decide as they do (Herman Oliphant, qtd. in Duxbury 96).

But stunningly, despite the fact that the Realists sought social context for legal decisions, and despite the fact that they were working during an era when lynching, government sponsored segregation, and legally protected private discrimination were at the forefront, the Realists all but ignored the legal issues involved with race. A study published by the Harvard Law Review Association found that, of the many hundreds of published works by the Legal Realists, only three authors—Karl Llewellyn,<sup>150</sup> Felix Cohen,<sup>151</sup> and Robert Hale<sup>152</sup>--addressed African-American race issues at all, and none of their work on race has been included in the Realist canon (Harvard Law Review 1608, 1620). Today, Legal Realism is recognized as being the intellectual ancestor of the Critical Legal Studies movement of the 1970's and 80's, which rigorously addressed race issues, and of the Critical Race Theory of the 1990's and today. So strangely, the

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<sup>150</sup> Llewellyn supported the NAACP in the 20's and 30's, but his writing on race didn't emerge until his 1954 article “Group Prejudice and Social Education.” It's easy to see why the article was never canonized. In it he argues that race problems are caused by people living in “In-Groups.” From infancy, human beings channel infants into group ways that generate “Us-oriented” ideals. Llewellyn calls for social education as a means of teaching people to abandon “Us-group” ways and adopt a “Total Team” approach to unity. The argument is simplistic and falls far short of the level of critical analysis typical of Llewellyn.

<sup>151</sup> Felix Cohen's writings on race focus almost exclusively on Native Americans. When he makes reference to Blacks in America, it is typically a side note by way of comparison or contrast. His most generally applicable work on race is his article entitled “The Vocabulary of Prejudice” which is a study of the way in which the “language of prejudice” translates into prejudicial attitudes and behavior.

<sup>152</sup> Robert Hale, whose work on race is discussed later in this chapter, critiqued the way in which American political and legal institutions fail to provide the rights promised under the 14<sup>th</sup> and 15<sup>th</sup> amendments and the way states have eroded those amendments through their disingenuous separation of private from public action. While Hale is included in Realist canon by most later scholars, in his day he was seen more as a Realist ally working in a non-legal field rather than a Legal Realist proper.

movement that supplied such a potent theoretical framework for critiquing race relations was never really put to such a use in its day—at least not in the legal archive.

Recent legal historians have expanded Legal Realism's canon by including a broader range of texts and thinkers and by characterizing it as both a continuation of Pre-World War I Progressivism as well as a precursor to the Pragmatic Instrumentalism of the Warren Court in the 1960's (Fisher, Horwitz, and Reed; Schwartz; Coquillette).<sup>153</sup> The Harvard Law Review's article on "Realism and the Race Question" explains how traditional accounts of Legal Realism "reflect the racial stratification of social and intellectual life during the Realist period," and advocates adoption of a wider view of Legal Realism that includes "non-white scholars [...] who were equally moved by the set of Realist ideas and inclinations" (1608).<sup>154</sup> In this chapter I continue the object of expansion, suggesting another broadening of the archive to the literary context by analyzing the way the concerns of Legal Realism were addressed by Richard Wright in his novel, *Native Son*.

Emerging at the end of the Legal Realist era, *Native Son* is set in the densely populated and harshly segregated Black Belt of 1930's Chicago. The novel tells the story of the struggle between Bigger Thomas, a young black man drawn into a tragic series of acts that include murder and rape, and the legal system that tracks him down and brings him to justice. Bigger and his friends are petty thieves; they spend their days drinking,

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<sup>153</sup> Fisher, Horwitz, and Reed lay blame for the narrow construction of the Realist canon at the feet of Karl Llewellyn, who, as the self-proclaimed spokesperson for the Realists, allowed ignorance, error, and a personal battle with Roscoe Pound to influence the lists he published of Realist texts and thinkers, lists that historians have often simply taken for granted rather than doing their own search of the Realist terrain. See "The Struggle over the Meaning of Realism" in *American Legal Realism* (Fisher, Horwitz, and Reed).

<sup>154</sup> The Harvard Law Review Association identifies Charles Hamilton Houston as a black man whose work on ending segregation "exemplified the Realist approach to achieving progress in American race relations" (1608). Houston, however, has been omitted from every formal treatment of Legal Realism.

fighting, playing pool, and talking about their next heist. Meanwhile, his family is desperately poor and going under; their allotted time “on the dole” is about to expire.

In *Book One* Bigger, just out of jail, is offered work as a chauffeur for the famously rich Dalton family. His first task is to drive the Dalton daughter, Mary, to classes one evening. Instead, Mary insists Bigger pick up her communist boyfriend Jan and take them to the South Side so they can see what life is like for black people. Their clumsy endeavors to demonstrate racial sympathy and understanding make Bigger angry and uncomfortable. Mary gets drunk, and upon returning home, Bigger must carry her to her bedroom. He is with her there when Mrs. Dalton, who is blind, enters the room. Terrified of being discovered in such a compromising situation, Bigger holds a pillow over Mary’s face to keep her quiet, accidentally killing her. Panicking then, he chops her body up and burns it in the furnace.

When Mary’s bones are discovered in *Book Two*, Bigger becomes the target of a massive manhunt, spurred by the newspapers which portray the killing as a sex crime. While on the lam, Bigger lures his girlfriend Bessie—to whom he has confessed all—to an empty building, rapes her, and bludgeons her with a brick, dumping what he thinks is her dead body down an airshaft. Meanwhile, the black community on the South Side is brutalized by violence and inundated with illegal searches until Bigger is finally captured and indicted on charges of rape and murder. *Book Three* details his “trial.”

In what I will show is a profound engagement with the American legal system, *Native Son* echoes Legal Realism. My argument is not that Wright studied the Realists and explicitly responded to their agenda in *Native Son*, though, given some of the

materials Wright drew from, that is certainly plausible.<sup>155</sup> My argument instead is that Legal Realism is an overlooked context for *Native Son*. Reading *Native Son* alongside the preoccupations of Realist jurisprudence yields a new way of interpreting the novel, particularly the oft-maligned Book Three, and allows us to see the full power of Wright's devastating critique of de facto segregation and American law. At the same time, because Wright brings the Realist arguments to bear on racism and racial segregation—something none of the canonical Realists were able to effectively do—Wright offers a constructive revision of Legal Realism and the way its implications are altered when confronted with race issues in the United States.

After providing further guidance on the differences between a Formalist and a Realist approach to jurisprudence, this chapter trains its focus on three tenets of Legal Realism that are interrogated by Wright in *Native Son*. I begin by considering Wright's critique of the rhetoric of judicial insularity. Through his depiction of the actual operation of judicial process, he insists on an open rather than closed world of judicial analysis. Then, I explain the implications of the way Wright redefines legally significant terms using the functional approach of the Realists that bases meaning on experience

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<sup>155</sup> Wright scholar and biographer Keneth Kinnamon has assembled an impressive list of the sources Wright consulted while writing *Native Son*. Wright closely followed high profile legal cases, including the Scottsboro case, the Leopold and Loeb case, and Robert Nixon and Earl Hick's cases. He kept files of newspaper clippings and generously sampled language, characters, and facts from the cases into *Native Son*. See Kinnamon, "*Native Son*: The Personal, Social, and Political Background," and Butler, "The Loeb and Leopold Case: A Neglected Source for Richard Wright's *Native Son*." Though neither Kinnamon nor Butler note the connection, the outspoken Realist lawyer Clarence Darrow served as the attorney for the defendants in the Scottsboro case and in the case of Leopold and Loeb. In a later segment of this chapter I show how Wright incorporated Darrow's version of Realism by reproducing passages from Darrow's courtroom arguments in Book Three of *Native Son*.

Wright also studied sociology, giving him yet another intersection with Realist issues. He worked with the Wirth family in Chicago who were studying the "urban ecology of the city" and was extensively involved with Horace R. Clayton, a prominent social scientist. Wright tried his own hand at sociology during the late 1930's, working for the Federal Writer's Project and writing on conditions in Chicago and in Harlem, NY. For more on Wright's immersion in sociology and the Chicago School of Urban Sociology see Capetti.

rather than on denotation. Finally, I build on Wright's engagement with the functional approach by analyzing his Realist revision of the meaning of property and its connection to segregation, rape, and guilt.

Wright's construction of the legal framework of segregation underlies the entirety of *Native Son*. Recognizing the jurisprudential stance implicit in this framework allows for new readings of the novel, including a reconstruction of the meaning of residential segregation in Chicago. At the same time, this recognition gives Wright's critique of the American legal system its due. I show how Wright uses the methods of the Legal Realists to reveal the power of legal rhetoric to obscure the manipulability of legal rules. The resulting doctrinal "emptiness" of rules enables legal complicity in the *de facto* segregation of the North and in the crimes dramatized by the novel, while simultaneously permitting the law to remain rhetorically objective and neutral. This approach shifts the critical ground on which *Native Son* has been discussed for over 50 years, complicating the short-sighted debate over Wright's engagement with Naturalism. Finally, in the concluding section of this chapter, I show how taking account of *Native Son* as a Realist literary text provides some realism about Realism—offering a challenge and critique to Legal Realism itself, one that may help explain why the Realists were no-shows on the issues of race, segregation, and discrimination that so occupied the political landscape during their tenure.

#### LAW IN BOOKS VERSUS LAW IN ACTION—TWO APPROACHES TO JURISPRUDENCE

*Law, says the judge as he looks down his nose,  
Speaking clearly and most severely,  
Law is as I've told you before,  
Law is as you know I suppose,  
Law is but let me explain it once more,  
Law is The Law.*

--W.H. Auden

While Legal Realism cannot rightly be reduced to a reaction against Legal Formalism, the priorities of the Realists can be appreciated by understanding the formalism against which they were positioned. Legal historians have offered vastly different narratives of the rise of Legal Formalism in the United States. In the early 1930's, legal philosopher Huntington Cairns saw formalism as a continuation of the Renaissance process of specialization that "mapped" knowledge "between ever narrower boundaries" (2). More recently, Morton Horwitz and Neil Duxbury have developed two contrasting explanations. For Horwitz, Formalism arose out of a growing corporate economy's need for the kind of predictability and uniformity that facilitates credit and investment. This process of standardization included setting drastic limits on the interpretive discretion of judges as a way for property owners to guard against the law being used "politically" to redistribute their wealth (*Transformations 1780-1860*). Duxbury, on the other hand, traces Formalism to the course of American law breaking away from British common law and becoming "uniquely American," a process that rewrote legal education and standards for admission to the bar to emphasize expertise in an "indigenous body of American law" (19).

N.E.H. Hull's account of the emergence of Legal Formalism is the most comprehensive and instructive for my purposes. While the new business economy plays a key role in Hull's version, she focuses on a broader range of influences, especially the impact of the Civil War and its aftermath, a time during which American law was severely tested. Lawmakers were under pressure to respond to constant crises and to keep pace with the velocity of the social, economic, and scientific upheavals that

followed the War.<sup>156</sup> As a result, laws proliferated while jurisprudence contracted. The legal theory of the day was largely positivism—the view that law is whatever the state commands. Indeed positivism placed yet another burden on the nation’s legal system as “the old certitudes of natural law on which the first federal and state constitutions rested were blown away,” leaving a “newer, more tough-minded law” in their wake (18).

This tough-minded law coincided with the “industrialization, urbanization, and scientific and technological advancement” that marked the closing decades of the 19<sup>th</sup> century and stressed the legal system as the congress and the courts were kept busy “churn[ing] out regulatory statutes” and “manufactur[ing] opinions on a vast array of subjects” (Hull 24, 27).<sup>157</sup> Aided by the positivism that emerged during the Civil War, the body of law produced during this period “bent to the will of the avid and the daring,” served the “speculator and the developer,” and bowed to both racial prejudice and industrialization (19).

The resulting laws relied largely on outmoded economic concepts of fair and free markets filled with small entrepreneurs, but also assimilated a new conservatism emphasizing “efficiency and productivity” (27). The needs of this new business environment “transform[ed] the university law schools” so as to produce a legal corps prepared “to service the expanding economy’s business clientele and represent the

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<sup>156</sup> Southern secession and battles over slave law “challenged the viability of the federal Constitution” and strained American law (Hull 17). The hostilities tested federal police powers and forced lawmakers to quickly frame rules governing situations that arose out of the conflict, including “rules for freeing former bondsmen and bondswomen, confiscating private property, and repatriating former rebels” (17).

<sup>157</sup> Formalism facilitated the emergence of a “truly national economy and culture” (Hull 24). Corporations were growing, capital rising, industry booming, railroads expanding. Modern industrialization “altered the nature of the workplace” and exacerbated economic disparity and poverty, creating ever-larger urban centers in “cities dark and dirty” (23). These changes were attended by scientific and technological discoveries that pointed towards a new, more sophisticated world (21). In addition to the impact of Charles Darwin, Hull also cites advancements in chemistry and the discovery of the typewriter, the light bulb, and the cash register, among many others. Patents “rose exponentially” during this time, as did “the litigation over patent infringement,” adding yet another area in which the federal courts were kept busy (Hull 22).

corporations in federal courts” (27). As the legal system moved to accommodate the new business classes, the style of legal reasoning in “most [American] courts became more abstract, formal, and inflexible.” Though some trial judges “appl[ied] what Karl Llewellyn would later call a ‘situational sense’ to cases, academic jurisprudence reflected the iron laws of ‘Formalism’” (Hull 33).<sup>158</sup>

While scholars disagree about why Formalism developed, their depictions of what Formalism is are fairly consistent. In the courts, there was “the entrenched faith in *laissez-faire*” and in the universities, there was the Langdellian science of law (Duxbury 11). *Laissez-faire* principles, primarily freedom of contract, were zealously guarded by the courts during the Formalist period (Horwitz 27, Schwartz 374). This conflation of *laissez-faire* and Formalism was a significant component of the Realist critique and will be treated in the final section of this chapter. Here, I’ll first outline Langdell’s key tenets in order to explain Legal Formalism before turning to some cases that demonstrate the contrast between the Formalist approach and the Realist critique and worldview.

Christopher Columbus Langdell, as the dean of Harvard Law School from 1870 to 1895, revolutionized legal education by instituting the case system. According to Duxbury, Langdellian legal science can be reduced to four interrelated elements:

First, there is the intense respect for *stare decisis*. For Langdell, to be able to discern the precedential status of any case is to have found the key to the science of law. Secondly, anyone gifted with the ability to discern in this fashion will of necessity realize that most reported cases are in fact unhelpful repetitions of extant principles and precedents. Thirdly, anyone who has realized that only a handful of cases are truly relevant to the science of law must also recognize that the number of fundamental legal doctrines is similarly limited. Fourthly, the task

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<sup>158</sup>Hull finds Formalism to be a surprising response to the historical moment: “so much had changed in society and in the law that today one would assume someone would put two and two together and arrive at a ‘law and society’ jurisprudence” (32). There were outspoken critics of Formalism (32), and in Europe, similar changes had yielded a more explicit “law and society” jurisprudence where a much franker view of the state’s role was adopted.



of the legal scientist is to classify these fundamental doctrines so as to demonstrate their logical interconnection, as well as to dispel the myth of their formidable number. (15)

Duxbury gives too much credit to Langdell for Formalism, though he serves as an excellent depiction of the Formalist approach. In its most simple terms: the legal scientist—in the university and on the bench—extracts a few key principles from the hodge-podge of published legal cases and classifies them in a way that establishes their logical order and streamlines their application. The judge then accesses this system of classification to deduce rules and resolve disputes.

Formalism's configuration of the law attempts to remove the human element altogether: since decisions are entailed by rules, and rules are derived ontologically from concepts, the law operates as a self-executing system. In the words of an "eminent" member of the early twentieth-century Bar, "every judicial act resulting in a judgment consists of a pure deduction. The figure of its reasoning is the stating of a rule applicable to certain facts, a finding that the facts of the particular case are those certain facts, and the application of the rule is a logical necessity" (qtd. in Cook 248). Because of Langdell's belief that all of the rules and all of the concepts needed to organize and implement this system are found in a small collection of common law cases, Harvard President Charles Eliot characterized Langdell's approach as the laboratory method, where the only laboratory needed was printed books (Duxbury 15). Formal jurisprudence had nothing to do with the "adaptation of rules to changing conditions;" it was a logical exercise in discovering what those rules were. Where "social or economic facts conflicted," the facts gave way to the rules (Schwartz 461).

The best way to understand the difference between Formalism and Realism is to consider the Realist critique of some key judicial decisions that illustrate Formalist techniques. The 1906 case, *Lochner v. New York*, is a hallmark of Formalist legal thought. In it the Supreme Court struck down a New York law that limited bakers to 60 working hours per week. *Lochner*, a bakery owner, challenged the law, claiming it interfered with the bakers' right to contract. The court sided with *Lochner* 5 to 4, holding that freedom of contract was a substantive right guaranteed by the Fourteenth Amendment's due process clause.<sup>159</sup> The court invalidated the New York law as an unreasonable exercise of the State's police powers, citing the "right of the individual" to be free to "enter into those contracts in relation to labor which may seem to him appropriate" without "unreasonable, unnecessary and arbitrary interference" (56). In lauding the individual's right to contract, however, the court not only invalidated the societal interest in protecting health and safety, but also ignored the factual context surrounding the labor contracts. Bakers were working 80+ hours per week in highly unsafe conditions for less than a living wage in a time of job scarcity. The overworked bakers had little choice but to agree to the company's terms. They were in no position to bargain. But this context was not relevant to the decision. The substantive right to contract *in the abstract* was dispositive.

The case of *Tauza v. Susquehanna Coal Company*, decided by New York's highest court in 1917, provides another helpful example of Formalist reasoning.<sup>160</sup> Here, a corporation chartered in Pennsylvania was being sued in New York and a dispute

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<sup>159</sup> Oliver Wendell Holmes authored the famous dissent.

<sup>160</sup> *Tauza* was one of several cases mined from the law of corporations whose formalist approach is critiqued by Felix Cohen in his 1935 essay, "Transcendental Nonsense and the Functional Approach." Corporate law was a natural place to turn for such examples, since the existence of the corporation itself rested on the fantastic legal fiction that a corporation is a person.

erupted over *where* the corporation was. State jurisdiction was a matter of that person's "presence" in the state, and in the later decades of the nineteenth century, corporations came to be considered "persons."<sup>161</sup> But, of course, unlike a human person, a corporation has no spatial extension; it is not physically "present" anywhere. Contrary to its frequent use in common parlance, the term does not refer to the location of an office, factory, store front, workers, etc. In the legal sense, "corporation" references only a certain method of organizing a business.<sup>162</sup> Realist Felix Cohen's critique of the *Tauza* decision demonstrates the difference between a Realist and a Formalist approach to the question of corporate "presence." He wrote:

[The court might have] made some factual inquiry into the practice of modern corporations in choosing their sovereigns and into the actual significance of the relationship between a corporation and the state of its incorporation. It might have considered the difficulties that injured plaintiffs may encounter if they have to bring suit against corporate defendants in the state of incorporation. It might have balanced, against such difficulties, the possible hardship to corporations of having to defend actions in many states, considering the legal facilities available to corporate defendants. (34-35)

But the court did not take up these "economic, sociological, political, or ethical questions," and instead addressed itself to the formal metaphysical question: "where is a corporation?" Was this corporation *really* in Pennsylvania or in New York, or could it be in two places at once?" (35).

Because the questions as framed by the court could not be decided by empirical investigation, Cohen claims they are identical in "metaphysical status" to the question of

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<sup>161</sup> See *Santa Clara County v. Southern Pacific Railroad* (1886), often cited as the source of the legal fiction granting corporations status as legal persons.

<sup>162</sup> A corporation is a legal entity consisting of shareholders but whose existence is considered separate and distinct from that of its members. Like a "real" person, corporations can make contracts, sue and be sued, owe and pay taxes, etc., and like a real person, a corporation is liable for its own debts. Shareholders are generally shielded from the corporation's liabilities and debts. The existence of a corporation is a matter of state law; its existence continues as a legal entity even when its shareholders die or sell their shares.

how many angels can balance on the point of a needle. “Nobody has ever seen a corporation,” he writes, so “[w]hat right do we have to believe in corporations if we don’t believe in angels? To be sure, some of us have seen corporate funds, corporate transactions, etc. (just as some of us have seen angelic deeds, angelic countenances, etc). But this does not give us the right to hypostatize, to “thingify,” the corporation, and to assume that it travels about from State to State as mortal men travel” (35). The Tauza court’s self-contained Formalist approach justifies the law tautologically by recourse to the law itself rather than by recourse to any factual or empirical inquiry into what the dispute meant for the corporation, for the plaintiff, or for society at large.

While Formalism facilitated the expansion of American business interests and the emergence of a national economy, Formalism’s narrow reading practices were also regularly employed to counteract attempts to enforce the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> amendments and their promises of equality. As James Anthony Whitson has explained, “so long as [blacks and whites] were equal *formally*, according to the law, the courts [...] would not look past the Legal Formalism to acknowledge the inequality that continued to exist” (25). The constricting approach to interpretation, focusing solely on the supposedly straightforward and incontrovertible meaning of the words, allowed the court to refuse to consider evidence of the subjective intent of laws or either actual or perceived results of their enforcement, echoing Anatole France’s famous formulation of legal neutrality: “The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.”<sup>163</sup>

The case most recognizable today for embodying a disconnect between the law and empirical reality is *Plessy v. Ferguson*, the 1896 Supreme Court decision that

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<sup>163</sup> From France’s novel, *The Red Lily*, 1894.

validated segregation and helped ensconce the “separate but equal” doctrine. *Plessy* upheld the constitutionality of a Louisiana law that required railways to provide separate railcars for blacks and whites. Seven of eight justices insisted that since the act required both white and colored people to ride in their own racially designated and supposedly equally maintained railroad cars, the law was “neutral” and so did not run afoul of the equal protection clause.<sup>164</sup> The majority concluded that the fallacy of *Plessy*’s argument was “the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it” (551). Since the act did not *explicitly* assign a “badge of inferiority,” any such perception could only be the result of an interpretation added onto otherwise straightforward and neutral words, a supplement to denotation and thus not legally relevant to the meaning of the law. To reach the conclusion that segregation laws were neutral, the Court exploited the Formalist strategy of narrow reading in a way that boxed out context, history, and empirical fact as aids in interpretation.

In 1954, when *Plessy* was finally overturned by *Brown v. Board of Education*, the court was seen as finally admitting what people already knew—that “the ‘equality’ provided under segregation was nothing but a legal fiction” (Whitson 24). What has become increasingly clear is that even in 1896 there was widespread recognition that the *Plessy* court’s reliance on the “facial neutrality” of segregation statutes was disingenuous. Many Northern states responded to *Plessy* by passing legislation prohibiting racial

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<sup>164</sup> Critiquing the flimsy legal argument used to decide *Plessy* became a commonplace in African-American literature during the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. One of the most compelling and complex responses to *Plessy v. Ferguson* came in Charles Chesnutt’s 1901 novel, *The Marrow of Tradition*. I treat the critique of *Plessy* contained in *The Marrow of Tradition* in Chapter One of this dissertation.

segregation in schools and public accommodations. Though these statutes did not prevent *de facto* segregation in the North, their enactment in response to *Plessy* demonstrates how clearly people realized government sponsored segregation was not racially neutral, despite what seven Supreme Court justices claimed.

In “The Secret History of Race in the United States,” Daniel J. Sharfstein studies the records in legal cases that required a determination of racial identity, records that “provide rare glimpses into the private lives and worldviews of real people” and their self-consciousness about race (1475). Sharfstein concludes: “[i]t is no exaggeration to say that at the height of Jim Crow, people—even and perhaps especially the most rabid of racists—understood what a legal fiction [race] was” (1476). Even as *Plessy* was handed down, many people recognized that race was a social construction, that the color line was artificial and arbitrary, and that the legal system strategically employed the concept of race to perpetuate inequality.

Although judges clearly leveraged Formalist tactics to reach highly political decisions aimed at thwarting attempts to secure racial and social justice, the rhetoric of Formalism doggedly insists on judicial neutrality. While Americans have a long record of distrusting judges,<sup>165</sup> the Formal judicial role was (at least rhetorically) restricted to mechanically placing the case at hand into the proper category.<sup>166</sup> Concepts and rules generated outcomes, not judges. Cook’s depiction of the Formalist version of judging makes this vividly apparent. He writes:

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<sup>165</sup> See Miller.

<sup>166</sup> With context and historical specificity removed, judges decided cases without having to “resort to the substantive merits” (Horwitz, *Transformations II* 16). The judge’s resort was solely to the nature of the relevant concept—a contract case to rules generated from the concept of “will,” a tort case to rules generated from the concept of “duty,” etc. (13-14).

The old syllogism, ‘All men are mortal, Socrates is a man, therefore he is mortal,’ states the exact form of a judicial judgment. . . . It must be perfectly apparent to any one who is willing to admit the rules governing rational mental action that unless the rule of the major premise exists as antecedent to the ascertainment of the fact or facts put into the minor premise, there is no judicial act in stating the judgment. (Cook 248)

The work of the judge is to identify the single major premise into which the case before him properly fits. The conclusion follows as a matter of deduction. Since there is no “judicial act” in rendering a decision, the judge’s role is closer to a reporter who explains an event after the fact rather than a responsible decider. In this self-referential legal world, the work of a judge should never be creative or legislative, but always rule-centered, mathematical, and mechanistic.

The early period of Formalism was full of activity as the massive accumulation of legal precedents were sorted and categorized, fundamental principles were discovered, and legal rules were deduced from them, but in Schwartz’s estimation, by 1900 this innovative work had been completed and the model became “frozen” (461). What started as “scientific jurisprudence had become mechanical jurisprudence. Conceptions were fixed. The premises were no longer to be examined. Everything was reduced to simply deduction from them. Principles ceased to have importance. The law became a body of rules, and it is in the nature of rules to operate mechanically” (Schwartz 461).

Legal Formalism reached its high water-mark in the early 1920’s, though cracks were appearing in the edifice all along, cracks that Pound helped to widen in the 1910’s. In his critique of the difference between the rhetoric and the practice of law, Pound argued that the rhetoric of neutrality and mechanical deduction provided a guise under which judges did their inevitably political, creative, and legislative work. To demonstrate, Pound cited methods judges had found to limit freedom of contract, restrict owner’s

rights to property, limit the rights of creditors to seek satisfaction from debtors, impose liability in the absence of fault, etc.—all using the rhetoric of neutrality. These “gaps” between legal doctrine (“law in books”) and socio-empirical realities (“law in action”) mark the extent to which judges do not merely apply law, but create law—something forbidden by the very rhetoric of neutrality they employ. Pound wanted to open what was viewed as a self-contained system; he wanted historical context and social considerations to *explicitly* replace Formalism’s abstract conceptual reasoning and to legitimize the role the judiciary inevitably plays in social engineering.<sup>167</sup>

If Pound was the father of Legal Realism, Oliver Wendell Holmes was the prophet. Holmes served on the Supreme Court from 1902 until 1932 and authored some of the Court’s best known decisions and dissenting opinions.<sup>168</sup> Though an advocate of strict judicial restraint, his understanding of the place of law within the larger context of society “[broke] down the walls of Formalism” (Francis Biddle, qtd. in Schwartz 379). As early as 1881, Holmes dubbed “all theories which consider the law only from its formal side” failures (*The Common Law* 26). Formalism just did not accurately describe the way legal rules were generated, and thus the consistency and neutrality that Formalists promised would result from a rule-based jurisprudence were illusory. Holmes wrote, “the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off” (*Common Law* 36).

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<sup>167</sup> While Pound’s “sociological jurisprudence” was enormously influential for Realist thinkers, Pound later became a vocal critic of the movement, documented in a series of cantankerous written exchanges between Pound and the self-appointed spokesperson for the Legal Realists, Karl Llewellyn.

<sup>168</sup> Holmes was deeply involved with the development of the “sociological” school of jurisprudence in Great Britain and his positivistic view of law was revered by the American Legal Realists. See *The Common Law* and his later essay on jurisprudence “The Path of the Law.”



Holmes' organic model of judicial evolution emphasized the way that "new principles from life" are absorbed into the law, an outward looking process that limits the place of logic in favor of an acknowledged connection between the law and the rest of the world.

Following Holmes, the Realists wanted to de-emphasize the law's "elaborate structures of autonomous thought" (Oliphant, qtd. in Duxbury 96). The plurality of rules allows judges to decide cases on any number of possible grounds—including their own prejudices, instincts, and "hunches"—and then to justify the decision using the ritualized language and constrained logic of a formal written legal opinion. The Realists wanted to relinquish what they saw as Formalism's lure of certainty and ruse of neutrality in exchange for historically and socially contingent strategies of legal meaning making drawn from an irreducible plurality of politically charged choices. Where the Formalists systematically excluded context, historical specificity, and factual inquiry in the interest of predictability and efficiency, the Realists looked to the personal, social, economic, and cultural factors constituting the "life of the law" in the interest of yielding a more accurate account of what judges actually *do* and with the goal of making law more responsive to empirical social realities.

Critics, historians, theorists—all have struggled to accurately judge the contributions of the Realists.<sup>169</sup> Initially Realism was seen as a short-lived movement that did not survive its historical moment, dying out with the advent of WWII. More recently, Realism has been regarded as having left a lasting impression on every school of jurisprudence since, evidenced by Joseph Singer's glib but oft-repeated 1988 claim

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<sup>169</sup> Edward A. Purcell, writing in the seventies, expressed doubt that scholars then were in a position to judge Legal Realism accurately: "Certainly distance is essential for any adequate evaluation of 'Legal Realism,' that diffuse, exciting, infuriating, pretentious, perceptive, and incomplete 'movement' which was born at the turn of the century, matured in the twenties, dominated much of the thirties, and then . . . what? Perhaps even in the seventies our perspective is not yet quite long enough" (qtd. in Duxbury 65).

that “we are all Realists now” (467).<sup>170</sup> Both of these views undervalue the movement. Either Legal Realism isn’t taken seriously because no one is a Realist anymore or because everyone already is. The Realist lessons are either irrelevant or have been fully absorbed—in either case, further study is rendered moot.

True, many of the lessons of the Realists have become commonplace—the critique of Formalism, the insistence on the role of the social in the production of law, the rejection of neutral principles, the critique of the public/private dichotomy, etc. While the now familiar nature of many of their ideas is a tribute to the power of their work (Schwartz 471), we surely are not “all Realists.” Outside of legal academia, the insistence on the rhetoric of legal neutrality has remained a staple—perhaps *the* staple—in conversations on the role of judging in the United States.<sup>171</sup> But even inside the academy, “we” are not all Realists. While many contemporary thinkers may share with the Realists a belief in the indeterminacy of language, the need for a contextual theory of meaning, and recognition that so-called neutral language masks political agendas and hides power, there are key differences. In John Hasnas’s study of the correlation between Legal Realism and popular schools of jurisprudence today, he concludes that the Realists would likely see many of them as espousing “transcendental nonsense.” For example, while theorists associated with Critical Legal Studies [CLS] may have stripped off further layers of Formalism in their continuing critique of neutrality and claims of determinacy,

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<sup>170</sup> “All major current schools of thought are, in significant ways, products of legal realism. To some extent, we are all realists now.” Singer’s phrase has become a commonplace. For other scholars asserting the same, see Alexander 31; Leiter, “Rethinking Legal Realism” 267, 267-68; Bix 165; Weinberg 834.

<sup>171</sup> While meeting the challenges to legal scholarship posed by the Realists has been the “aspiration of most of the schools of American legal theory [. . .] since World War II,” the rhetoric of objectivity and judicial restraint remains a regular part of our judicial landscape, particularly visible during confirmation hearings where “most candidates for judicial office still profess fidelity to the classical vision of adjudication” (Fisher, Horwitz, and Reed xv). For analysis of the way that adherence to Formalism operates during confirmation hearings, see the Introduction to this Dissertation.

CLS makes no empirical turn. They turn to linguistics, to philosophy, to metaphysics, but not to anything that can be validated or invalidated empirically. In fact, Hasnas argues, the empirical turn of the pragmatism and social behaviorism of the 1960's—heirs too of Legal Realism—was eschewed by the CLS movement. So for Hasnas, those who claim we are “all Realists now” miss the point of many of the Realist's most important arguments.<sup>172</sup>

The ease with which we gloss over the important distinctions between Realism and contemporary legal theories not only leads to misunderstandings of Realism, it also leads historians and critics to overlook the revolutionary nature of the Realist agenda and the fervor of contempt with which the Realists were met. The emergence of Realism threatened legal institutions, a threat whose stakes were raised considerably by the onset of World War II as the law was shaped dramatically in response to Nazism and Stalinism. There was a national desire for law to have a stronger hold, and there was an increased fear of uncertainty, flexibility, and discretion<sup>173</sup> that led to a “storm of criticism [falling] on Legal Realism” (Hull 239).

Realism was seen as an attack on American law that endangered national security. Ignatius Wilkinson, then Fordham Law School's influential Dean, dubbed Legal Realism the single most pressing danger present in America, ranking its threat as more serious

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<sup>172</sup> For example, Hasnas argues CLS misses the point of the Realist's indeterminacy argument. The argument did not reject all grounds of certainty; it demonstrated that the application of deductive reasoning to a set of legal materials “did not and could not uniquely determine the outcome of a particular case” (88). Because the law contains contradictory rules, a judge always has a choice of which rules to apply. These choices are not constrained by rules, but are based on the judge's own (conscious or unconscious) beliefs about what is right. Because the law is logically indeterminate, the Realists wanted legal studies to pay more attention to the “social factors that influenced a judicial decision rather than the syllogisms the judges offered in support of their decisions” (89).

<sup>173</sup> Hull writes, “[M]odernism, with its inherent distrust of tradition, became ominous in the 1930s because other, more violent ideologies were hammering at the door [Stalinism, Nazism, Fascism, American communism, extreme right-wing groups, etc.]. The arrival of such angry, greedy players at the table raised the stakes of the ideological game, and Legal Realism was elevated, willy nilly, from a semiprivate, elite, academic subject to a matter of national concern” (236-237).

than that of communism or fascism (Hull 238).<sup>174</sup> Realism was accused of undermining religion, “dispens[ing] with the tried and true common law,” “encourage[ing] disrespect for the country,” and “open[ing] the door to European absolutism” (Hull 239). Even the much-loved Justice Cardozo, after suggesting that judging involves more than a rote application of deductive logic, was accused of “undermin[ing] that faith in the place of inescapable logic in the law which was fundamental to security” (Schwartz 477).<sup>175</sup> In fact, with the arrival of World War II, the enemies of Legal Realism ushered in a new era of Formalism. Walter Lippmann’s assessment of the role that law should play in the post WWII legal system evidences how far the Realist’s influence had slipped when he wrote, “law . . . [is] not someone’s fancy, someone’s prejudice, someone’s wish or rationalization. . . . It is there objectively, not subjectively. It can be discovered. It has to be obeyed” (qtd. in Horwitz, Fisher, and Reed 249).

#### BORDER BREACHING AND THE RHETORIC OF LEGAL INSULARITY

*The words a judge must construe are empty vessels  
into which he can pour nearly anything he will.  
--Judge Learned Hand*

In many ways, the debate between Realism and Formalism was a dispute over sources—over which factors are allowed “in” to the space of the courtroom and so are allowed to play a role in judicial decision making. Formalists believed the written law

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<sup>174</sup> Wilkinson claimed that “[t]he danger present in our country today is not that the proletariat [...], led by some bewhiskered revolutionary, [...] will seize the government, nor yet that a man on horseback will appear and suddenly and violently impose on us a dictatorship of the fascist type. It is rather that while preserving the *forms* of constitutional democracy we shall have the substance sucked out of them and in fact see our great heritage of freedom destroyed by those to whom the Constitution is nothing but a totem pole and its language immaterial” (qtd. in Hull 238).

<sup>175</sup> Schlegel summarized a few more of Realism’s critics: “Philip Mechem complained that Realists viewed ‘society and its more important institutions’ as a ‘great joke.’ Walter B. Kennedy saw and objected to the ‘cumulative effect of the constantly widening attack upon law, order [...], principles and rules.’ Father Lucey saw Realism as leading ‘from the thesis of Democracy and reason to the antithesis’ of the ‘Absolute State’” (*American Legal Realism and Empirical Social Science* 3).

itself—statute, constitution, and precedent—constituted the entire world of legal sources, and that a judge’s work was to find the dispositive rule within the written canon that resolves the case before her. Since the Formalist standard for the correctness of a legal decision was internal logical validity, the legal world was seen as operating independently of politics, personal preference, and empirical fact, not to mention case-specific claims for justice, fitness, or morality. Formalist judges “need not—indeed, should not—address social goals or human values” (Dagan 612). The Realists, by contrast, insisted that law has multiple sources—some explicit, “legitimate,” and doctrinal; others implicit and without formal legitimacy. Since, except in the simplest of matters, there are always multiple sources, deciding a dispute involves making value choices. The judge must select among alternatives where neither legal doctrine nor logical entailment are determinate.<sup>176</sup>

This is not to say that judicial decision-making is capricious. Most Realists believed the law was “significantly predictable and uniform,” in part because the behavior of judges is circumscribed by legal tradition, by legal form, and by canons of professional responsibility<sup>177</sup> (F. Cohen, “Transcendental” 833). But even within these constraints, the judge has room to choose. As Judge Benjamin Cardozo explained in 1921, “we do not pick our rules of law full-blossomed from the trees” (103). Though the judge uses traditional standards, these do not “automatically shape rules which, full grown and ready made, are handed to the judge” (Cardozo 104). To be sure, “tradition,

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<sup>176</sup> This has become an important legacy of Legal Realism—the challenge to the “orthodox claim that legal thought is separate and autonomous from moral and political discourse” (Horwitz 193). Presenting jurisprudence as a mathematical application of syllogism and deductive logic obscures choice, masking, the Realists claimed, the essentially political nature of law (Dagan, 617, 618, 619).

<sup>177</sup> Felix Cohen: “ignoring context obscures legal meaning, but attributing too much to judicial personality and ‘hunch’ theory over-magnifies ‘personal and accidental’ factors and denies the relevance of ‘significant, predictable, social determinants that govern the course of judicial decision’, decisions that are significantly predictable and uniform” (“Transcendental” 833).

example, profession, duty to adhere to the spirit of the law, etc.” all provide restrictions, all “hedge and circumscribe” the action of every judge and every lawyer. But these restrictions are not complete. There are “open spaces” where “[judicial] choice moves with a freedom which stamps its action as creative.” The law emerging from this process is “not found but made” and “the process, being legislative, demands the legislator’s wisdom” (Cardozo 177).

In addition to the formal and professional restraints that shape a judge’s actions, the behavior of the judge is also shaped by the culture to which the judge belongs and the judge’s own temperament, beliefs, and prejudices—all “illegitimate” factors that the Formalists believed could be eliminated. The Realists’ turn to empirical social science was motivated, in part, by the desire to be better informed about the reasons why judges decide as they do, reasons that cannot be accounted for in the Formalist model. Thus the Realists insisted that Formalism was both empirically and normatively flawed. It did not accurately describe the way judges functioned, nor did it describe the way judges should function. Judges *do*, *must*, and *should* reach outside the insular world of concepts and logic to resolve legal disputes.

Early critics of *Native Son* tend to dismiss the courtroom scenes—particularly Max’s long speech in defense of Bigger—as an unfortunate and overwrought recitation of the communist party line.<sup>178</sup> Recent critics have offered more nuanced readings of the politics of Book Three, questioning the extent to which Max truly speaks for either

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<sup>178</sup>The introduction to Hakutani’s *Critical Essays on Richard Wright* provides a comprehensive and concise overview of Wright scholarship through 1982 and catalogues the critical responses to Book Three of *Native Son*. In Irving Howe’s otherwise complementary review of *Native Son*, he claims that Max’s speech is “ill-related to the book itself,” and calls it a “party-line oration.” Alfred Kazin claimed Max’s ideas were “crude Stalinist homilies.” Other critics who have responded to the courtroom scene “with a conditioned reflex” include Bone, McCall, Margolies, and Brignano (Hakutani 9-12).

Bigger or Wright.<sup>179</sup> But these approaches continue to place the Book within the context of the ongoing debate over Wright (and Bigger's) political affiliations and commitments.<sup>180</sup> I suggest, however, that Legal Realism provides an alternate framework for understanding Book Three. When we shift our focus away from Max's arguments and onto prosecutor Buckley and the language and rituals of the court itself, the courtroom scenes stage a jurisprudential battle, pitting the conflict between Formalism's claim that law can and should be applied neutrally versus Realism's claim that law is a social event, an imposition of societal and judicial desire. Wright's dramatization of these competing approaches to law bears out the Realist position and identifies the social and political interests underwriting the legal framework facilitating racial segregation.

The tenacity of the Formalist account of judging, its resilience in the face of evidence to the contrary, is, in fact, an important part of the way the law functions, according to the Realists. The legislative function of judges, they argue, has always been accompanied by rhetoric claiming otherwise. As Brian Leiter explains, regardless of our sophistication in understanding how judges make law, there is a "persistent and apparent need for [Americans] to reassure ourselves [that judges do not legislate], to insist that ours is a country ruled by law, not by men—a sacred but false mantra." An analysis of

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<sup>179</sup> Writing in 1974, Paul Siegel, for example, argued that Book Three is integral the novel as a whole, representing Bigger's final achievement of a "belief in himself and in his people that could propel the ghetto millions toward a goal" of a "different and better form of society" (522). See also Kinnamon's "Introduction" to *New Essays on Native Son by Richard Wright* for an account of Wright's own awareness of the aesthetic and political problems of Book Three (14-18).

<sup>180</sup> According to Wright biographer Blyden Jackson, Wright's own commitment to the Communist party and communist ideals was on shaky ground during the time that he wrote *Native Son*. He enthusiastically joined the party in 1932, but quickly became disillusioned. Wright respected the efforts the party made to gain "knowledge-in-detail of the lives of the workers of the world" (Jackson 9), but while he appreciated "communist social science" and ideals, he rejected the party and its practices. He became inactive long before 1936 and formally severed ties with the party in 1944 (Jackson 8-9). For a more detailed account of Wright's involvement with and split from the Communist party, see Aaron.

Wright's portrayal of the courtroom demonstrates this complicated distance between rhetorical constructions of jurisprudence and the actual process of judging. The beginning and end of Bigger's trial is set off by the ritual language of legal authority that insists the impersonal law, not men, is in control. What happens in between these brackets, however, is another story. The language of legal authority masks the extent to which law is susceptible to manipulation. The rhetoric of insularity and neutrality hides doctrinal pretense, "mask[s] normative choices and fabricate[s] professional authority" (Dagan 613).

The technically driven, mechanical nature of Formalist legal language gives it the trappings of authority while concealing the manipulability of legal doctrine.<sup>181</sup> For the Realists, legal rituals, legal procedure, and specialized legal language are all methods used to conceal the "emptiness" of Formalism's doctrinal reasoning. Fred Rodell, a Realist, portrayed the law as an arena full of "a maze of confusing gestures and formalities," and a "hodgepodge of long words and sonorous phrases with ambiguous or empty meanings" (*Woe* 130). The language and procedures of law, experienced by non-lawyers as "a foreign tongue" and an alien nation, creates the pretense that law "is, in the main, an exact science" (*Woe* 125).

Wright's portrayal of Bigger's experience with the legal system exposes the human and social motivation behind law's ostensibly mechanical operation. When Bigger is brought into court, the language of the courtroom is alienating. Bigger can only snatch bits and pieces of it. Wright's use of ellipses and long, attenuated clauses force readers to splice fragments together into a coherent narrative. Meanwhile, the ritualized,

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<sup>181</sup> See also Bourdieu, "Force" 819-21, 841-3.



formal nature of the language makes the trial appear to be governed by impartial procedures insuring regularity, objectivity, and fairness.

“Hear ye, hear ye . . . this Honorable Branch of the Cook County Criminal Court . . . now in session . . . pursuant to adjournment . . . the Honorable Chief Justice Alvin C. Handley, presiding. . .” [. . .] “. . . indictment number 666-983 . . . the People of the State of Illinois vs. Bigger Thomas. . . The Grand Jurors chosen, selected and sworn in and for the said County of Cook, present that Bigger Thomas did rape and inflict sexual injury upon the body . . . strangulation by hand . . . smother to death and dispose of body by burning same in furnace . . . did with knife and hatchet sever head from body . . . said acts committed upon one Mary Dalton, and contrary to the statute in such case made and provided, against the peace and dignity of the People of the State of Illinois. . .”

The story of the alleged crime is here forced into a tightly constrained legal format. The specialized legal language is impersonal and administrative, stripping away all context that would explain Bigger’s actions and transposing even the extraordinary violence of Mary’s body being dismembered and burned away from the inflammatory characterizations of the popular press and into the objective discourse of official legal process.

When the hearing has concluded, the voice of the court is heard again, detached, impartial, mechanistic: “In view of the unprecedented disturbance of the public mind, the duty of this Court is clear [. . .] In Number 666-983, indictment for murder, the sentence of this Court is that you, Bigger Thomas, shall die on or before midnight of Friday, March third, in a manner prescribed by the laws of this State.” The judge finishes with “This Court finds your age to be twenty” (417). In the course of the proceedings, there is nothing marking this final statement as a different kind of pronouncement than the death sentence just uttered. The language of the court creates the sense that everything said is neutral, the routine course of judicial business.

Wright emphasizes the mechanistic feel of the law when he describes Bigger's experience of the courtroom like being "caught up in a vast but delicate machine whose wheels would whir no matter what was pitted against them" (370). In fact, this experience is a calculated part of the rhetoric that reassures us in our faith that we are governed by laws and not by men. The official legal language casts the proceedings as though they were regular—the inevitable operation of objective law. Judicial agency is removed so it is the impersonal "court"—a standardized process and not a person—that, on an even keel, pronounces Bigger's age along with a death sentence. However, the actual proceedings that take place in between these formal pronouncements are not deductive, impartial applications of rules. I show how Wright exposes the legal machine as thoroughly human. Buckley's argument and the judge's response, though embedded in formal, objective process, are shown to be driven by fear, politics, and self-interest, the result of deliberate choices among legally significant alternatives.

Importantly, in *Native Son*, it is the very language of judicial neutrality that facilitates the mismatch between what the court avers it is doing and what it actually does, much like the facial neutrality of the statute in *Plessy* allowed Louisiana to accomplish ends that were, when put in context, clearly motivated by malice and prejudice. In similar fashion, Buckley ironically appeals to the judge's fear of the mob *through* the language of judicial neutrality. Thus the behavior of the court in *Native Son* gives credence to the Realist argument that the raw legislating power of the judge is accompanied by a rhetorical move denying that power. Buckley's argument begins with a Formalist posture, asserting that the law is "clean-cut," "holy," "dispassionate," the "foundation of all our cherished values." From these principles, he claims the required

response to Bigger's crime is "unassailably certain" (408). As a corollary, his strategy to discredit Max's [Bigger's lawyer] argument is to portray it as motivated by factors that have no proper place inside the objective discourse of law. Because Max will raise issues of race and class injustice, Buckley effectively brands him a Realist, accusing him of dirtying the otherwise autonomic operation of the law by raising the "viperous issue of race and class hate." Such "evasive, theoretical, or fanciful interpretations" are outside the letter of the law and thus outside the proper scope of the court (373).

Buckley's hyperbolic depiction prepares us to expect that Max's arguments will be shockingly out of place. Says Buckley: "Never in my life have I heard such sheer legal cynicism, such a cold-blooded and calculated attempt to evade the law in my life!" (374). But when Buckley makes this accusation, Max hasn't even spoken yet, and, when he does, he carefully incorporates his socio-empirical evidence into traditional legal argumentation, framing his argument with an appeal to the statutory law of Illinois that allows the Court "regarding a plea of murder [. . .] to hear evidence as to the aggravation or mitigation of the offense," and buttressing this claim by evoking the recent case of *Leopold and Loeb* as precedent (376). To what is initially a classically formed argument, Max attempts to link the findings of social science. He looks for room within the accepted methods of legal argumentation for entering evidence on the social and psychological ramifications of segregation. Ironically, then, it is Max, the leftist lawyer for the communist party, who conserves the traditional methods of classical legal reasoning.<sup>182</sup>

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<sup>182</sup> Wright likely drew Max's approach from the Brandeis Brief submitted in *Muller v. Oregon* (1908), the first case to introduce sociological data and research as evidence. The approach opened a new avenue of analysis for lawyers and submitting sociological data came to be known as submitting a Brandeis Brief.

It is Buckley, on the other hand, who presents a reactionary and racist argument, though framed with an appeal to judicial neutrality. Buckley explicitly appeals to judicial autonomy, while implicitly appealing, *in the very name of objectivity*, to public and political pressures. “Dressed in a black suit [with] a tiny pink flower in the lapel of his coat,” Buckley licks his lips, looks out over the crowd, turns toward the judge, and as a self-proclaimed “agent and servant of the law,” summons the “law of the land” (407), rhetoric understood as referring to a duty to carry out pre-existing law regardless of outside pressures and oblivious to personal prejudice. Though his re-election rides on the outcome, Buckley claims to have “no interest or feeling in this case beyond the performance of this sworn duty [to uphold the law];” he wants only for the “administration of law” to be allowed to “take its course” (407). In this way, Buckley dresses the argument he will make in a (threadbare) cloak of disinterest, attempting to cover the fact that he is actually an agent, not of “the law,” but of the howling mob that he has helped incite and that is now gathered en masse outside the courtroom.

He tells the court that “man stepped forth from the kingdom of the beast the moment he felt that he could think and feel in security, knowing that sacred law had taken the place of his gun and knife” (408). Even as his words are evoking an autonomous, self-referential legal world, he strides to the window and lifts it up so that the court can hear the “rumbling mutter of the vast mob” crying “kill ‘im now!” “Lynch ‘im!” (373). Buckley demands the borders of the legal world be closed while he breaches them with his actions, letting the “outside,” the “gun and knife” from a supposedly irrelevant beyond, into the courtroom through the window—an outrageously inappropriate attempt at intimidation draped in Legal Formalisms and niceties.

In a speech that dramatically demonstrates the way that the objective rhetoric of law can be manipulated to serve a calculated strategy of fear-mongering, Buckley argues “the law is strong and gracious enough to allow all of us to sit here in this court room today and try this case with dispassionate interest, and not tremble with fear that at this very moment some half-human black ape may be climbing through the windows of our homes to rape, murder, and burn our daughters!” (408).<sup>183</sup> This astounding passage encapsulates a core tenant of the Legal Realist argument: on the one hand, the law gains legitimacy from being dispassionate and grand, strong and certain, while on the other hand, fear is revealed as the real commanding power behind legal decision making. The strength and grace of the law is derived from its ability to rhetorically banish fear, racism, class oppression, and other “private” interests and desires from its objective operation, *no matter how clearly they constitute the moving force*. The law’s legitimacy comes from its status as objective and impervious to outside considerations, but through the window—a central trope in *Native Son*’s Book Three—the outside is continually let in.<sup>184</sup>

The window, while defining a border between an inside and an outside, is unstable. It creates separation, but because it can be both seen through and opened, it also lets in. Once Bigger is captured, the ensuing scenes take place mainly within the courtroom and the jail—both sequestered spaces. But Buckley uses the windows in both places to destroy the sense of safety and remove, yielding instead a sense of pressure and imminent violence, of the mob crowding in on the legal proceedings. Buckley has

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<sup>183</sup> This is, in fact, a crime of which Bigger is accused. The State Attorney attempts to pin a number of unsolved rapes and murders on Bigger, including Miss Ashton who, Buckley claims, “says [Bigger] attacked her last summer by climbing through the window of her bedroom” (305).

<sup>184</sup> At times Buckley appeals to the dispassionate rule of law; at other times he leaves all pretense to objectivity behind, openly stoking the fires of fear in and out of the courtroom. For example, Buckley claims only killing Bigger will “enable millions of honest men and women to sleep in peace tonight,” will shield “the infant, the aging, the helpless, the blind and the sensitive from the ravishing of men who know no law.”

referred to windows as the border breached by black rapists as they enter white homes to despoil white daughters, a border maintained out of fear that black men will not stay in “their prescribed corner.” This border is protected by the relationship between the mob and the law—a relationship Buckley reminds the judge of frequently by drawing attention on at least three separate occasions to the window in the courtroom (373, 411, 414).

Buckley closes his argument with one such a reminder, saying “Your Honor, millions are waiting for your word! They are waiting for you to tell them that jungle law does not prevail in this city! They want you to tell them that they need not sharpen their knives and load their guns to protect themselves. They are waiting, Your Honor, beyond that window!” (414). By continually pointing to the literal mob “beyond that window,” Buckley moves it into the supposedly protected judicial arena. What might have been an abstract appeal to “the people” becomes a thinly veiled threat of violence ready to erupt should the judge not answer the demands of popular opinion, though, to be sure, he must—and does—answer in the official language of the insulated court. The window here represents the permeable border between what the law *claims* is relevant and what *functions* as relevant in deciding Bigger’s fate.

The window plays a role in court, in jail, and each time Bigger is led to the courtroom, serving as a constant reminder of the circulation between the law and the mob. Each time he is escorted to and from the courtroom, he is led past a window where he sees a “vast crowd of people standing behind closely formed lines of khaki-clad troops” (367), “a sprawling mob held at bay by troops” (377, *see also* 381). As Bigger waits in his cell for the judge’s sentence, the mob is ever present. Bigger hears their “rumbling voice” “through a partly opened window” (406). In much the same way as he

opened the window to intimidate the court, Buckley uses the window to coerce Bigger into making an illegal confession.<sup>185</sup> Buckley “[leads] Bigger to a window through which [Bigger] looked and saw the streets below crowded with masses of people in all directions” (303). These people want to lynch him, Buckley says, and they can’t be held back much longer. Buckley “let[s] go of Bigger’s arm and hoist[s] the window” open so that Bigger can hear the roar of voices calling for his death. Only a quick confession, Buckley urges, will ensure the law’s ability to insulate Bigger from a mob lynching (303).<sup>186</sup> The underlying and internally inconsistent claim here is that the mob must be capitulated to if the “rule of law and not of men” is to remain intact.

The omnipresence of this outside force is underscored each time Bigger is moved out of the relatively quiet and sequestered jail. To shield defendants, there is an underground passage leading from the jail to the courtroom, but until he reaches the courtroom, Bigger must dangerously push through a violent throng of angry people filling the hallways of the courthouse as he is battered, spit on, and subjected to threats and dehumanizing “shouts and screams:” “That *sonofabitch!*”, “Gee, isn’t he *black!*”, “Kill ‘im!,” “turn ‘im loose”, “give ‘im what he gave that girl”, “let us take care of ‘im”, “burn that black ape” (312, 333-34, *see also* 381). Max explains the significance of this mob to Bigger’s trial when he tells the court “every time I thought I had discovered a vital piece of evidence bearing on [Bigger’s] fate, I could hear in my minds’ ear the low, angry muttering of that mob which the state troops are holding at bay beyond that

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<sup>185</sup> Aside from the coercion involved, Bigger’s confession is made without counsel present and after Max has instructed the State that Bigger is not to be questioned and will not sign any confessions.

<sup>186</sup> Buckley says: “See that, boy? Those people would like to lynch you. That’s why I’m asking you to trust me and talk to me. The quicker we get this thing over, the better for you. We’re going to try to keep ‘em from bothering you. But can’t you see the longer they stay around here, the harder it’ll be for us to handle them?” (303).

window” (383). Max does not deny the power that such outside forces have on the judicial proceedings. He explicitly recognizes that the mob—let in through the window—trumps all, undermines due process at every turn, renders “vital” evidence useless. The mob metaphorically surrounding the law controls its disposition, though law’s status as law depends on its ability to insist otherwise. The official proceedings are encircled by an ever-present, ever-threatening extra-legal “outside” that regulates and determines the official legal “inside,” seeping into what is supposed to be a closed system.

Though both Buckley and the judge play a key role in the outcome of the court case, the mechanisms of the court are human on another level—they reflect the broader cultural thinking and general prejudice. Prosecutor and judge play their roles as participants in a larger social dynamic. The Realists conceived of law as a “social institution” and legal results as “large-scale social facts” that “cannot be explained in terms of the atomic idiosyncrasies of personal prejudices of individuals” (F. Cohen, *The Legal Conscience* 125). “A truly Realistic theory of judicial decisions,” Felix Cohen writes, “must conceive of every decision as something more than an expression of individual personality, as concomitantly and even more importantly a function of social forces” (“Transcendental Nonsense” 843). The judge cannot escape the limits of his own culture in the exercise of his discretion.

Because of the social pressures surrounding the issues of black crime, the color line, and the rape of white women, Bigger’s death sentence is wholly predictable. The inevitability is emphasized when the judge takes but “one hour” to make his decision, in spite of Max’s plea to “[carefully consider] the evidence and discussion submitted” (415).



The foregone conclusion makes the whole apparatus of the judicial process seem just for show. This sense is heightened when, although Bigger has pled guilty, the court allows the State to put on its entire case. Over Max's objection—"there is a plea of guilty here!" (379)—Buckley presents evidence supporting every element of the crimes, a dramatic case of overkill where the legal proceedings are out of kilter with the situation presented. Wright makes it clear that something other than the objective execution of neutral law is going on here. A *partial* list of the witnesses the State calls includes:

1. Mrs. Rawlson, to authenticate Mary's earring found in the furnace.
2. Peggy, the housekeeper, to identify Bigger as the boy hired by the Daltons.
3. Britten, a private investigator, to tell how he suspected Bigger.
4. A newspaperman, to explain how Mary's bones were discovered in the furnace.
5. Fourteen additional newspapermen, to corroborate the first newsman's testimony.
6. Five experts, to authenticate Bigger's handwriting on a fake ransom note.
7. A fingerprint expert, to prove Bigger touched Mary's bedroom door.
8. Six doctors, to prove Bessie had been raped.
9. Four waitresses, to testify Bigger was seen eating with Mary Dalton.
10. Two white women, Bigger's former teachers, to testify he was "dull" but "sane."
11. Jan, Mary's communist boyfriend, to explain the evening spent with Bigger.
12. Bigger's friends, G.H., Gus, and Jack, to testify of their past criminal exploits.
13. Doc, the poolroom owner, to tell how Bigger was "mean and bad, but sane."
14. Sixteen policemen, to identify Bigger as the man they captured.
15. The manager of the movie theater, to testify Bigger masturbated during movies.
16. A man from juvenile court, to testify Bigger spent three months in reform school.
17. Five doctors, to testify Bigger was sane. (378-380).

Buckley puts on the state's entire case, as if Bigger had not pled guilty. In addition to more than 63 witnesses, Buckley presents every scrap of physical evidence, including, among many other items, Mary's burnt earring, the hatchet blade Bigger used to cut off her head, and a rum bottle Bigger drank from and discarded in the snow (380). Buckley displays Mary's charred bones, and then, using twelve workmen, brings "in the furnace, piece by piece, from the Dalton basement" and rebuilds it on a platform in the courtroom. The court allows him to have a white girl, just Mary's size, crawl inside the furnace in

front of the courtroom full of reporters and spectators to “prove beyond doubt that it could and did hold and burn the ravished body of innocent Mary Dalton” (380).

Through the parade of witnesses and physical evidence, Wright shows how the record in the case offers the form of legal validity without substance. All evidence aimed at proving Bigger’s guilt is irrelevant since Bigger has already pled guilty. Max is correct—“something more than revenge is being sought upon a man who has committed a crime” (383). The court is not intent on “soberly [. . .] seeing that the law is executed,” or on seeing “that retribution is dealt out in measure with the offense,” or even at insuring “that the guilty and only the guilty is caught and punished” (385). The trial is being used to further political and economic ends, ends which rely on the methods for establishing legal authority and judicial neutrality. What appears to be being decided masks an alternative purpose, one that works through the twin aspects of rhetorical neutrality and actual manipulability of the judicial process. Max condemns it as a farce: “An outright lynching would be more honest than a ‘mock trial’!” (384). The mock trial, staged with the forms of official legal procedure, lends an air of legitimacy to a process that would otherwise be criminal, a disturbing complicity between official legal process and mob violence that calls into question the validity of the procedures supposedly designed to ensure impartiality, fairness, and guide the court to truth.

Rather than discovering that the Emperor *has no* clothes, the courtroom scenes in *Native Son* reveal that the Emperor *is only* clothes. When they are stripped away, we discover there is no Emperor inside or, more correctly, we discover the Emperor is any form that fits the shape of the clothing. And in *Native Son*, many [white] forms can be made to fit. As Bennett Capers has observed, “the law” is metonymically represented in

*Native Son* by a series of white figures—“by the white police force, by Buckley, the white State Attorney, by the white judge, and perhaps most figuratively by the white Mrs. Dalton, the sole witness to Mary Dalton’s death, her blindness suggesting Lady Justice itself” (127-128). I add, above all these, the “white blur” of the lynch mob that shadows Bigger’s legal proceedings. But while these stand in for the law—some explicitly and others as a matter of practice—the law cannot be filled with just any shape. The conservative compulsion to articulate legal meaning that is logically consistent with precedent functions as a strong constraining force, along with the social morality within which a judge consciously or unconsciously functions. As Karl Llewellyn explained, the law is not the exercise of pure brute power. A reflection of conventional morality, the law’s need for recognition that will give it legitimacy leads it to be exercised with reference to the “*recognized going order of the Entirety concerned*” (Llewellyn, *The Normative*, 167, 170). While law monopolizes legitimate force, Wright’s focus is on how it also wields power in less transparent ways—law works for “entrenched interests,” legitimizes them, even when, as in the case of Bigger’s trial, those entrenched interests cannot be given explicit legal sanction.

#### SEGREGATION AS OCCUPATION:

##### A FUNCTIONAL APPROACH TO LEGAL MEANING MAKING, PART I

*“[Judicial] decisions themselves are not products of logical parthenogenesis born of pre-existing legal principles but are social events with social causes and consequences.”*

*--Felix Cohen*

Cheryl Wall has called attention to the need for scholars to study the “segregation narrative,” attending to the way that “segregation’s legacy informs the work of most 20<sup>th</sup> century black writers” (163). Too often, critics have treated segregation as merely a

setting or noted it to make a historical and biographical connection, approaches that fail to “register the psychological as well as physical terror that polices the borders of segregation” (Wall 164). Segregation in *Native Son* provides much more than a background milieu. In this section I argue segregation is not only *Native Son*’s central theme, it is a governing condition of the novel’s narrative. While Wright’s “strategy of representation” is no doubt produced by the historical condition of segregation (Wall 164), this strategy depends crucially on recognizing how law creates those historical conditions—a task that is especially daunting in the North where segregation was seen as a matter of practice and *not* of law and where law, when taken at face-value, repudiates any formal role in segregation. Utilizing the meaning-making methods of the Legal Realists allows Wright to expose the emptiness of the Formalist account and to replace it with one drawn from the “life” rather than the black-letter law of segregation. His approach fleshes out the extant though explicitly denied long-arm of the law, not only as it prescribes the distribution of geographic space, but also as it structures the meaning of experience within that space. The law, then, cannot be excluded from any thorough treatment of the segregation narrative.

The Realists redefined the Formalists’ “pure” concepts in empirical terms, insisting that the meaning of a concept cannot be determined ontologically, but must be understood functionally, its meaning made contingent on its consequences. As Felix Cohen explains, the meaning of a law cannot be rightly determined when isolated in the moment it is rendered. Ascertaining legal meaning requires consideration of the *behind* and the *beyond*: “probing behind the decision to the forces which it reflects” and “projecting beyond the decision the lines of its force upon the future” (“Transcendental

Nonsense” 843). This “functional” method fundamentally shifts the way legal meaning is made,<sup>187</sup> leading Hanoch Dagan to characterize it as a “jurisprudence of ends rather than rules” (631). Functional legal meaning cannot be deduced; it can only be established *ex post facto* from an interpretation of motive, context, outcome, and a projection of future impact.

In *Native Son*, the meanings of Bigger’s actions are inseparable from the dense, segregated conditions in which he lived, conditions representative of the three decades following 1910 when Chicago became a key destination in the mass migration of black Americans out of the South. Prior to 1900, African Americans were scattered throughout white neighborhoods in the North. Northern segregation began to develop during the first half of the twentieth century alongside the migration of Southern blacks into the industrial communities of the North (Seitles).<sup>188</sup> At one point, black Americans were moving to Chicago at a rate of 5,000 per week. Each decade, the city’s black population more than doubled, exploding from 44,000 in 1910, to 278,000 by 1940 when *Native Son* was published.

Racial segregation in urban Chicago presented a different landscape and experience than racial segregation in the South. In the South, even when public places were segregated during the Jim Crow era, blacks and whites frequently lived side-by-

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<sup>187</sup> This shift is missed by many students of the Realists. Looking for doctrines and bodies of law that were changed by the Realist movement, they come up short-handed and conclude that the Realists’ impact was short-lived, a conclusion that is difficult to reconcile with others who insist the Realists’ impact was permanent and touched the very grounding assumptions of American law. Those who look for the impact of Realism in revolutionary and immediate doctrinal change are looking in the wrong place. The most fundamental changes occurred at the level of judicial reasoning. The *methods* of judicial thought changed. Thus, even if the same decision was reached that would have been reached by a Formalist, the route taken to reach that decision was altered. This resulted in changes in some areas of law, but in others, the change was only apparent over time.

<sup>188</sup> White landowners responded to the “threat” of new black workers by segregating cities by streets, locking black families into the least desirable segments of the city. As the black workers moved into the city, industry moved out, relocating from the city to the suburb where land was cheap and taxes were low.

side. The most famous study of segregation in the United States by Massey and Denton has concluded that blacks and whites in the early twentieth-century “regularly interacted in a common social world, sharing cultural traits and values through personal and frequent interaction” (qtd. in Seitles). Where there was residential segregation in the South, the black communities tended to be located on the peripheries of towns rather than in centers. This, combined with the amount of open, rural space, made southern blacks more mobile and less crowded.

While the North did not experience the same kind of segregation in public spaces, the division between white and black living spaces was, in some ways, more thorough in the North, as separation, where accomplished, was often accomplished completely. Additionally, rather than white neighborhoods occupying the centers of town with black neighborhoods on the outside, black neighborhoods in the urban North were often completely enclosed, creating cramped conditions and a maddening lack of privacy. Wright highlights these conditions in the novel’s opening scenes that depict the lack of space and privacy facing black families as the four members of the Thomas family struggle to get dressed and fed in their “tiny, one-room apartment” (4).

Chicago was segregated *de facto*, not *de jure*—as a matter of fact, not a matter of law, at least not as a matter of public law. But though there were no laws explicitly mandating residential segregation in Chicago, as well as most of the North, the emergence of the Northern black ghetto “was the result of the deliberate housing policies of the federal, state, and local governments and the intentional actions of individual American citizens,” actions that were given judicial sanction at the very highest level

(Seitles).<sup>189</sup> Chicago's segregation was more complete than any *de jure* segregated Southern city, largely accomplished through racially restrictive housing covenants that became commonplace throughout the country after 1926 when the Supreme Court validated their use.<sup>190</sup> Included in leases and deeds, the covenants prohibited the property from being sold to or occupied by black persons. White property owners would band together into neighborhood associations to create entire neighborhoods bound by the restrictive covenants. Not only were the covenants regarded as binding upon owners and renters who included or agreed to such a provision in their deed or lease, but also on owners and renters whose property fell within a neighborhood where such covenants were widespread—even when their contract included no such clause. Once in place, the restrictions were difficult to overcome. The covenants became an enforceable part of the

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<sup>189</sup> These policies included the placement of Interstate Highways, urban renewal projects that designated black areas as “blighted” (and thus subject to redevelopment causing black inhabitants to relocate) and the FHA’s discriminatory ratings systems used to evaluate the risks of mortgage loans. From 1930 until 1950, 3 of every 5 loans in the United States were purchased with funds from an FHA loan. Less than 2% of those loans were made to non-white people. The FHA designated itself the “protector of all-white neighborhoods” and sent field agents to ensure blacks were kept from buying in white communities. State and local governments used facially neutral zoning ordinances and land use controls such as minimum lot and floor space regulations to maintain a color line. Today, public housing for elderly black people tends to be exclusively in poor areas, while public housing for elderly whites is typically not located in poor neighborhoods. HUD has repeatedly been found liable for racial discrimination. Massey and Denton concluded in their study of Apartheid in America that African Americans in 1993 were still “unambiguously among the nation’s most spatially isolated and geographically secluded people, suffering extreme segregation across multiple dimensions simultaneously” (103).

<sup>190</sup> A typical covenant included in a lease read: “No person or persons of African or Negro blood, lineage, or extraction shall be permitted to occupy a portion of said property.” A typical covenant included in a deed read: “The lot, nor any part thereof, shall not be sold to any person either of whole or part blood, of the Mongolian, Malay, or Ethiopian races, nor shall the same nor any part thereof be rented to persons of such races.” Many of the racially restrictive covenants remain on the books even today. See <<http://depts.washington.edu/civl/covenants.htm>> for an extensive database collecting the racially restrictive covenants used in Seattle, Washington. These restrictions became enforceable parts of the contract. The court reversed itself in 1948 by holding that it would no longer enforce these covenants. But that did little to prevent private discrimination in housing, a practice that continued unfettered until the Housing Rights Act of 1968.

contract and “ran” with the property, meaning they were transferred with the home so that the contractual obligation to exclude blacks was passed from owner to owner.<sup>191</sup>

Northern landlords, through these private actions, enclosed Chicago’s massive population growth within a rigorously contained geographical area, establishing a “color line” in Chicago that was every bit as strict as—and ultimately more difficult to combat than—the government sponsored color lines of the South.<sup>192</sup> By 1940, almost ¼ of Chicago’s population was black, but, prevented from assimilating into the city at large, the new Chicagoans had no choice but to crowd into the Black Belt, a narrow (7 blocks wide) strip of land on the south side of the city, extending about 7 miles (Jackson 7).<sup>193</sup> At the time Wright was living in the Black Belt and working on *Native Son*, over 75 percent of Chicago’s black population lived in the Black Belt.<sup>194</sup> This huge population

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<sup>191</sup> In the Spring 2008 edition of *African American Review*, GerShun Avilez analyzes the impact that racially restrictive covenants and neighborhood associations have had on the devaluation of black homes and black families.

<sup>192</sup> The officially sanctioned regime of government sponsored segregation could be constitutionally undone, and in fact, was undone. But segregation accomplished by private action, by racial groupings in neighborhoods, has been much more difficult to address—especially in a constitutional system that distinguishes between private and public action to determine whether rights have been breached. This was a distinction that the Legal Realists spent a lot of time critiquing. Today, segregation as a matter of governmental action is constitutionally prohibited and racially restrictive housing covenants are likewise unconstitutional. But the North remains more segregated along racial lines than the South. For example, if we focus on one aspect of segregation—segregated schools—we find that in the South, segregation was mandated by law and universally complied with. Every southern state had laws prohibiting racial mixing in schools. But in the North, the official story was much different. In fact, only one northern state mandated school segregation (Indiana, until 1949) and many northern states had laws prohibiting racial segregation in schools. But despite the formal legal system, schools in the North were nonetheless largely segregated. Using racially restrictive housing covenants, owners penned black citizens into designated areas. Even where there were no such covenants at work, neighborhoods tended to be racially divided for custom, convenience, and because black families often wanted to send their children to predominantly black schools. In Chicago, as with many of the northern urban areas, it was racially restrictive housing covenants that accomplished much of the segregation by neighborhood.

<sup>193</sup> “[The] Black Belt of Chicago in the 1920’s [...] was] a teeming wedge within Chicago’s South Side, extending 7 miles south from Chicago’s Loop, almost uniformly more than a mile wide, and growing like any good American boom town in everything except, significantly, its geographical boundaries, its 44,000 Negro inhabitants in 1910 having become 109,000 in 1920 and moving on to become the 237,000 of 1930” (Jackson 7).

<sup>194</sup> In July of 1940, while Wright was serving as editor, *The Crisis* published “Iron Ring in Housing,” an expose on the impact of racially restrictive housing covenants on the living conditions of black citizens of Chicago. The article claims “the iron ring of restrictive covenants which surrounds the Negro community



boom, contained within nearly unchanging geographical boundaries, gave the Black Belt in 1940 a population density of 90,000 per square mile (by comparison, in 2010, Mumbai had a population density of 59,406). The consolidation of black Chicagoans resulted in a teeming and productive black culture. But it also fostered extreme crime rates and crippling poverty, both exacerbated by rampant unemployment, sky-high inflation, and exorbitant housing costs caused by the scarcity borne of segregation.

In an early scene in *Native Son*, Wright places Bigger and his friend Gus on a street corner in the Black Belt, where they complain about the restrictions on them created by racial segregation. Through this conversation, we are able to trace Bigger's thinking through three versions of the meaning of segregation. The first is a Formalist definition, the second critiques the Formalist definition by confronting it with projections of its own future consequences, and the third replaces the Formalist definition with a functionalist version of the lived meaning of segregation. Through this portrayal of the process of meaning making, Wright rejects the Supreme Court's Formalist reasoning that any "badge of inferiority" accompanying segregation was the result of a "construction" placed onto neutral words. Instead, Wright offers a Realist basis for an experiential construction of the lived meaning of segregation, meaning derived from the lives of the people suffering (and those benefiting) from it.

Bigger complains to Gus: "We live here and they live there. We black and they white" (20). This initial expression is starkly Formalistic, isolating the simplest fact of segregation from both antecedent and consequent, reducing segregation to its most austere tautological terms. The second definition is offered some lines later when Bigger

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has prevented its normal expansion in spite of the fact that the colored population has more than doubled in the last two decades. Within the community practically no living units have been built and few new residences have been made available during the past twelve years."

returns to the Formalistic rendering, but this time refuses to isolate the definition of segregation from its consequences. He says: “Every time I get to thinking about me being black and they being white, me being here and they being there, I feel like something awful’s going to happen to me. . .” (20). Here Bigger confronts the formal meaning with its projected consequences and so ties the formal version of segregation to the destructive violence of the novel, violence belied by the formal “we live here, they live there.”

In the third and final definition, Bigger again reformulates the meaning of segregation, this time directly reversing the initial Formalist construction. Bigger, who has just told Gus that “we live here, they live there,” now says:

“Gus?”  
 “Hunh?”  
 “You know where the white folks live?”  
 “Yeah,” Gus said, pointing eastward. “Over across the ‘line’; over there on Cottage Grove Avenue.”  
 “Naw; they don’t,” Bigger said.  
 “What you mean?” Gus asked, puzzled. “Then, where do they live?”  
 Bigger doubled his fist and struck his solar plexus.  
 “Right down here in my stomach,” he said.  
 [. . .]  
 “Every time I think of ‘em, I feel ‘em,” Bigger said.  
 [. . .]  
 “That’s when I feel like something awful’s going to happen to me. . . .”  
 Bigger paused, narrowed his eyes. “Naw; it ain’t like something going to happen to me. It’s. . . . It’s like I was going to do something I can’t help. . . .” (21)

Literally, segregation means a physical division between black and white; it can be represented neutrally and formally; it means white folks live “over across the line”—a matter of geographical separation. But as a matter of *lived experience*, segregation means the *absence* of a color line, the *lack* of physical and psychological separation between black and white. As a matter of lived experience, segregation means the actual

population of Bigger by the whites—they live inside him, “right down here in [his] stomach.”

Wright repeatedly emphasizes this reversed account of the meaning of segregation. For example, when Bigger is on the lam and is desperate for food and drink, he fantasizes about quenching his thirst using language and imagery that recalls Bigger’s description of whites living inside of him. Bigger imagines warming a bottle of milk, seeing the white milk spill over his black fingers, and then, lifting the bottle to his mouth to drink, finishing with a description of the white milk pouring down his throat, coating his insides (247).

As Bigger and Gus talk, vehicles pass by in front of them, stirring up little bits of white paper littering the road. The bits of white paper portend the dormant presence of whiteness in what is supposedly black space. Bigger’s claim that segregation means occupation is borne out as, through the ironic mechanism of separation, whites occupy every corner of the Black Belt, first figuratively as an omnipresent force and then literally as white mobs invade the Black Belt searching for Bigger. Thus segregation converts whites into a faceless aggregate; Bigger sees them not as people, but as a “great natural force” like a “stormy sky looming overhead, or like a deep swirling river stretching suddenly at one’s feet in the dark,” life-threatening to any who “go beyond certain limits” (114). Wright characterizes this white force as controlling Bigger from the outside-in, as “ruling” over him, constituting his “fear and shame” (114), and “conditioning him in his relations to his own people” (115). Segregation permeates black folk’s relations to the white world and to other black people—their families, their friends, their selves—despite, Wright emphasizes, the lack of positive law putting the reality into words: “Each and

every day of their lives they lived with it; *even when words did not sound its name, they acknowledged its reality*. As long as they lived here in this prescribed corner of the city, they paid mute tribute to it” (114)(emphasis mine).

Even in his supposedly supreme act of rebellion, Bigger continues to pay mute tribute as he learns later that killing the rich, white Mary Dalton in her own bed is really well within his “prescribed corner.” Despite the surge of power Bigger feels from killing and, for a time, getting away with it, the great white force of the law closes rank figuratively as Chicago is inundated with snow, turning the city white. Reveling for a moment in his short-lived power, Bigger experiences a flash of fright when a sudden blast of sun makes the snow “leap and glitter and sparkle about him in a world of magic whiteness without sound” (119). This magic mute whiteness covers everything, inside the Black Belt and out (149).

During the tense scenes when Bigger is on the run, the setting becomes increasingly black and white, as things that were once black become covered in whiteness. The ever-present threat hinted at by the swirling and settling bits of white paper becomes a literal threat as the snow storm becomes a blizzard, the weather mirroring the mobilization of the white forces of the law to track and capture Bigger. Retreating to the Black Belt to hide, the falling snow impairs his vision and is so deep Bigger struggles to walk through it. As investigators close in, the silent, heavy snow becomes more and more hostile, “fill[ing] the world with a vast white storm” (194) that respects no boundary between white and black space. The hunt for Bigger ends on what was once a black rooftop, now made white with snow, on top of a water storage tank described in the same terms as Bigger has used to describe white people generally—

“something huge and round and white looming up in the dark” (265), a “white looming bulk” (266).

White men organize vigilante groups with the full backing of the Chief of Police. “[R]ecurring waves of Negro crime,” the papers report, “made such a procedure necessary” (244). As a result, the figurative omnipresence of whiteness becomes a literal omnipresence as a “blanket” warrant allows mobs of white men to invade the Black Belt, pushing their way into room after room until nearly the entire zone has been penetrated. Meanwhile the rights of black people living there are of absolutely no account: “several hundred Negro employees” lose their jobs; the schools are closed; doors are kicked down; people and homes are searched by mobs with guns; black men are beaten in their own neighborhoods; and in one night alone “several hundred [!] men matching Bigger’s description” are arrested (244).

Like the Northern system of *de facto* segregation, the mute character of this gathering of white power is a key component of Wright’s critique. Part of the functional difference between segregation in Chicago and its Southern cousin is the absence of positive law establishing segregation and white power in the North. Without such laws, white power in the North appears to be created *sui genesis*—a natural fact rather than a man-made condition. This obscures the human actors and motives driving the legal mechanisms that consolidate white power and set at naught hard-won rights.

#### THE GEOGRAPHY OF RAPE:

##### A FUNCTIONAL APPROACH TO LEGAL MEANING MAKING, PART II

The language Wright uses to present the experience of segregation mirrors the language of rape in the novel. Like segregation, rape—described by prosecutor Buckley

as the “central crime” in Bigger’s trial—changes meaning when considered functionally. As I read *Native Son*, rape is not only a physical act of sexual violence, but a figure for the violence of segregation in general, a figure that positions Bigger as both a rapist and a victim of rape. For Bigger, rape, in this figurative sense, is not an action but a way of being, a condition that has been mapped onto his existence along with the spatial and racial mapping of the Black Belt.

Formally, Bigger is innocent of the charge of raping Mary Dalton. His conviction for that crime is unjust. And yet, while Wright is clearly critical of the proceedings that bring Bigger to “justice,” the novel’s model of guilt and innocence is much more sophisticated than simply decrying the role that race discrimination plays in the judicial process. Although the novel exposes the hypocrisy of the legal system, *Native Son* should not be read as a text that straightforwardly advocates insulating the law from outside pressures such as race prejudice. Taking a much more radical stance, Wright reconfigures the concept of “guilt,” explicitly incorporating social and economic considerations into the realm of the legally relevant. He uses these considerations to supplement formal legal definitions, creating plural constructions of guilt that are in irreducible tension with the formal definitions. Bigger’s supreme act of power is not murder, but acceptance of responsibility, of guilt—guilt that is simultaneously assigned to the white world and the institutions of racial segregation. Understanding the way that Wright adopts the Realist’s functional approach allows us to see the multiple levels at which guilt is constructed, levels that rest on alternate sources for construing legal meaning. When *Native Son* is read for its Realist jurisprudential standpoint, we are

forced to consider the sense in which Bigger is guilty—not only of killing Mary Dalton, but of raping her too.

Bigger is simultaneously a rapist and a murderer, legally innocent of the charges of rape and murder, and sentenced to die for a rape and a murder that he did not commit. Though seemingly inconsistent, all three are true and create a key irony of Bigger's trial. Bigger neither rapes nor murders white Mary Dalton (her death is accidental), though he is held criminally liable for these crimes. He has, in fact, raped and murdered his black girlfriend Bessie and the prosecution knows it. Bessie's dead body is displayed in the courtroom along with the bloody brick Bigger bashed her head in with. Her body offers compelling evidence of murder and rape, but is NOT offered to prove Bigger's crimes against Bessie, but Bigger's crimes against Mary—crimes that did not occur. The court might have held him responsible for Bessie's rape and murder, but the prosecution does not even proffer charges. Wright could have written the much more standard story in which the rule of law fails when an innocent black man is falsely accused of rape and lynched for it.<sup>195</sup> But in making Bigger both guilty of rape and murder AND falsely accused, Wright shows how the rule of law itself, as well as the application of it, falter when confronted by race. Bigger's simultaneous guilt and innocence shifts the focus onto the way that these terms are construed and onto the (in)ability of the legal rules and procedures to arrive at truth in any complete sense.

Bigger's guilty plea contributes to the incongruity between the crimes he is charged with and the crimes he committed. But he only pleads guilty because it is clear

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<sup>195</sup> Wright did, in fact, write this more standard narrative. See *Uncle Tom's Children*, published in 1938. After writing it, Wright lamented that "he had written 'a book which even bankers' daughters could read and feel good about.' He then swore that the one that followed would be different. The one that followed was *Native Son*, and he determined to make sure that 'no one would weep over it; that it would be so hard and deep that they would have to face it without the consolation of tears'" (Rampersad xv).

he will be convicted, and his lawyer, Max, believes it is his only chance to avoid a death sentence. Entering a guilty plea will remove the jury from the process, and, mirroring Clarence Darrow's strategy in the Leopold and Loeb case, Max thinks it may be possible to convince a single judge to spare Bigger's life. But the larger explanation for the disjunction between legal and "actual" versions of guilt and innocence is rooted in the rhetoric of race, segregation, and sexual violence, rhetoric that prefigures both Bigger's violent actions and the legal response. When law enforcement is focused on Jan, the white communist who Bigger attempts to frame for Mary's death, the possibility of rape is not even raised, even though there is evidence of sexual intercourse (albeit consensual) between Jan and Mary on the night Mary was killed. The moment Bigger becomes a suspect in her death, however, rape rather than murder becomes the governing term in the panic that ensues, evident in the three day progression of newspaper characterizations of Bigger and his crime, characterizations that shift dramatically, despite (and perhaps because of) there being no new facts about the crime to report.

On day one the headline announces: "AUTHORITIES HINT SEX CRIME," and the article claims the police believe "Miss Dalton met her death at the hands of the Negro, perhaps in a sex crime" (243). On day two, what was qualified supposition has become fact: "24-HOUR SEARCH FAILS TO UNEARTH RAPIST" (255). In 24 hours, "the Negro" has become the "RAPIST." On day three, all pretense to factual objectivity has vanished: the newspaper calls Bigger "Negro sex-slayer," "black killer," "jungle beast," and invites the readers to imagine how easily "this man, in the grip of a brain-numbing sex passion, overpowered little Mary Dalton, and raped her" (279).



Bigger understands what even rumors of rape mean. The moment he reads that first day's headline, he knows his life is lost:

[Bigger] paused and reread the line, AUTHORITIES HINT SEX CRIME. Those words excluded him utterly from the world. To hint that he had committed a sex crime was to pronounce the death sentence; it meant a wiping out of his life even before he was captured; it meant death before death came, for the white men who read those words would at once kill him in their hearts. (243)

Capture, interrogation, arraignment, sentencing—all are redundant. Viewed functionally, Bigger is dead the moment the rumor of rape begins to circulate. So while Bennett Capers, who writes on law in *Native Son*, is correct to worry about the judge exercising “law’s ultimate violence” by imposing “a sentence of death” (4), that sentence comes long before the court room and is not handed down by the judge. Bigger is “excluded” from the world by those who *hint* at a sex crime, and by the generations of those who have contributed to the significance of that rhetoric. As David Guest writes, “Bigger’s fate is determined less by the reality of his life than by the stories told about him” (84). Importantly, Bigger’s death sentence comes before Bigger has, in fact, committed a sex crime at all in raping Bessie. The *allegation of rape* kills him. Viewed functionally rather than conceptually, guilt prefigures the legal proceedings, exists before it, and controls the disposition of it.

Max tells the court that Bigger’s crime existed long before he met Mary Dalton (400). As Sabine Sielke interprets this claim, Bigger’s crime existed before it happened because “what exists is a rhetoric that results in a crime,” a rhetoric in which the “signifying power of the *STORY* of Mary Dalton’s ‘rape’ constructs and partly cancels the meaning of Bessie Mear’s violation” (104). In a crucial way, the rhetoric of rape *causes* the death of Mary Dalton and the rape and murder of Bessie Mears. When the

blind Mrs. Dalton enters the room, it is because Bigger knows how the scene of a black man kissing a rich white girl in her bedroom will be interpreted that he responds with panic. Upon seeing Mrs. Dalton, “frenzy dominated him,” frenzy that leads him to silence Mary, oblivious to her attempts to struggle against the pillow he places over her face (85). The killing happens and the death sentence follows because of the strength of the rhetoric of race and rape—the myths of virginal white womanhood, black rapist manhood, and sexually available and hence “un-rape-able” black womanhood. These myths grant “great signifying power to black-on-white rape (even if the act never occurred), yet hardly any to black-on-black rape (even when it is blatantly obvious)” (Sielke 107).

We know that Bigger understands the power of this damning rhetoric because of the way he tries to explain his actions to Max:

I reckon it was because they say we black men do that anyway. . . . When folks says things like that about you, you whipped before you born. [...] They say we do things like that and they say it to kill us. [...] I’m black. I don’t have to do nothing for ‘em to get me. The first white finger they point at me, I’m a goner, see? (351)

Mary’s death and the total insignificance of Bessie’s rape and murder are the result of the rhetoric surrounding black men and their interactions with white women, rhetoric that over-determines the official legal process and renders it redundant.

Rape is not only the “central crime” in Bigger’s trial; it is the central crime of the novel and a corollary of the system of racial segregation. Within this system, rape takes on new meaning. When Bessie tells Bigger “they’ll say you raped her” (227), Bigger does not deny it. Instead, he redefines rape in a way that acknowledges his guilt much more comprehensively than the legal system will allege:

Had he raped her [Mary Dalton]? Yes, he had raped her. Every time he felt as he had felt that night, he raped. *But rape was not what one did to women. Rape was what one felt when one's back was against the wall and one had to strike out.* Whether one wanted to or not, to keep the pack from killing one. He committed rape every time he looked into a white face. He was a long, taut piece of rubber which a thousand white hands had stretched to the snapping point, and when he snapped it was rape. But it was rape when he cried out in hate deep in his heart as he felt the strain of living day by day. That, too, was rape. (227)(emphasis mine)

In this passage, Bigger accepts guilt—"yes, he had raped her"—but his definition turns not on a particular action, but on an experience. Rape is not something one *does*; rape is something one *feels*, a feeling that results from being surrounded and having the threatening outside force move in on him, while he lashes out into it. This experience describes the physical and psychological conditions of segregation in the Black Belt. The redefinition also fundamentally shifts the meaning of rape and rapist, a shift that signals an acceptance of responsibility for his actions, but that also indicts the system of white power for creating and maintaining the conditions that structure the experience of raping and being raped.

By Bigger's definition, rape is a condition of segregated existence and occurs over and over again in the novel, beginning with the famous opening scene of a rat turning to attack Bigger because it has been trapped in a corner and so has no other option. Bigger's experiences with the white world in general are experiences of rape, experiences in which Bigger is not only a rapist, but also a victim of rape. His definition emerges out of the segregated conditions in which he lives—white suburbs surrounding a closed and densely crowded urban center where Bigger's back—and the back of every other black man and woman living there—is, geographically and psychically, always against the wall. It is the white world that he believes has put him in a corner, stretched him to the snapping point, planted the hate "deep in his heart,"—and "that, too, was

rape.” In Bigger’s words, “they after you so hot and hard you can only feel what they are doing to you” (353). His experience with the white world is one of violent and relentless violation.

Wright maps Bigger’s definition of rape onto the geography of the city, suggesting that geographical segregation based on race makes rape inevitable, makes it a primary mode of relation between white and black. Contained on all sides by the white world, any attempt to move outside of this strictly defined racial boundary is a violent, unwanted penetration into white space. Thus rape is not (only) something done to women; it is what Bigger does any time he moves out of his own “black” space. Sielke has observed that Bigger’s tense psychological condition on the night Mary is killed begins with insecurity about how to enter white space. He worries over how to enter a white neighborhood, knowing his presence there will be interpreted by observers as criminal. He is unsure then how to enter a white house, wondering whether to come in the front or go around to the back. And finally he is unsure how to enter the bedroom of a white girl (104). In each case his hand is forced—the circumstances into which he is placed demand that he enter white spaces where he has been conditioned to understand that his presence will be unwanted and regarded as dangerous. The tension is heightened by Mary and Jan’s unwanted familiarity with him; they sit with him, talk with him, insist on eating and drinking with him, have sex in the back seat of the car while he drives—all of which Bigger experiences as violations.

Sielke has noted that the language in the scene where Bigger rapes Bessie places him in the victim position (108)—he is “raped” even as he is raping, a conflation that matches Bigger’s own definition of rape that places him both in the position of rapist and

rape victim. Bigger smothers Mary in an attempt to silence her because her mother has come close enough to hear and discover Bigger standing by the bed. As many critics have noted, the scene is saturated in sexual terms. As Bigger holds the pillow over her head, he is described as “[growing] tight and full, as though about to explode” while “Mary’s body surged upward and he pushed downward” (85). When Bigger feels the coast is clear and removes the pillow, he hears Mary’s “long slow sigh” (86). This figurative rape of Mary occurs because the entire evening Bigger has felt violated, as though “his back was against the wall.” By Bigger’s definition, he is raped and responds as a rapist.

Though it has received little critical attention relative to the rape scenes involving Mary and Bessie, the confluence of rape/raping also explains Bigger’s violence towards his friend Gus. The violence is triggered when Gus begins to reveal Bigger’s fears, revelations that threaten the walls Bigger has erected for self-preservation. Bigger responds to this threat by attacking Gus in a scene that is figured as rape. Lying with his body on top of Gus, Bigger puts his knife up to Gus’s mouth and, “tingling with elation,” orders Gus to “lick it” (39). Crying, Gus licks Bigger’s knife. Then, Bigger forces Gus to lift his hands above his head while Bigger draws the knife down Gus’s body, pushing it inside his shirt and circling it around his belly. Despite the intensity of this sexually loaded scene, Bigger’s feelings are removed from his own actions. He feels the violence boil up in him, and when he does explode, he is not fully in control: “he [sees] his fist come down on the side of Gus’s head” (38), he “feels his muscles tighten” (38), etc. The language removes him as an actor, describing the situation as though Bigger were simply acted upon. He is the recipient of the action, along with Gus, and an observer of his own

behavior. The disembodied descriptions of Bigger's actions, repeated in the scene when he kills Mary, demonstrate the extent to which his behavior is not his own, but a function of forces outside his control. Rape is, simply and tragically, Bigger's mode of relation to humanity, the result of the white world's rapist mode of relation to him.

Bigger, at least initially, has one other alternative. Since the experience of segregation is one of, paradoxically, partition *and* occupation—both unstable conditions in the novel—Bigger has two possible modes of relation to others: masturbation or rape, absolute separation or violent penetration. In an early incident that was cut from the first edition because of its graphic nature, Bigger and Gus masturbate in a movie theater while watching suggestive scenes of rich, white girls vacationing on the beach (including a scene of Mary Dalton with Jan)(30). Bigger's sexual energy is a metaphor for his desire to “connect” (401), to “merge” (425), to “fuse” (419) with others. His pain and anger is caused by his inability to form meaningful connections with other human beings, inability represented by both rape on one hand and masturbation on the other.

As we have seen, the geographical segregation of the city is mapped onto Bigger's psyche, defining his relations to the outside white world from which he is both separated from and occupied by. That same mapping also defines his relations to the black world in which he lives, but from which he is also separated, emotionally, if not physically. As Max explains to the court, Bigger's life is one of absolute separation from other people. Love is not possible for him; he is “confoundingly alone” (401). Bigger Thomas, Max says, “is part of a furious blaze of liquid life-energy [. . .]. He is a hot jet of life that spattered itself in futility against a cold wall” (399). His relation to Mary, to Bessie, to the world is “masturbatory” (402). Bigger's desire for connection cannot be

met short of violence. Where violence does erupt, Bigger is in the rapist mode that “excludes him utterly from the world” (243). Where violence does not erupt, Bigger’s attempt at meaningful connection is left fruitless and wasted.

Max’s closing argument in Book Three is aimed at getting the court to see Bigger’s modes of being as the logical outcome of a system of racial segregation that hems him in on all sides. Segregation has made his people “a separate and alien nation” and has ensured that black and white people remain utter “strangers.” His primary survival mechanism is to erect walls between himself and all others, even between himself and his own consciousness. He must live in complete isolation and self-denial—the alternative is too threatening. But he is given no space for such isolation. He is crowded, moved in on; his “space” is endangered at every turn. This is why his experience with the Daltons is so threatening and why he feels so vulnerable there. In each interaction with the Daltons, Bigger struggles to decipher what the other person expects and then to provide it; his consciousness is shot through, mediated via the white person, an indirect rather than a direct way of being. Mary exacerbates the situation in her attempt to befriend Bigger, outreach that he experiences as violent, as being “hit between the eyes” (59). Her death is the result of the physical proximity and intimacy she forces on Bigger. But at the same time, the very conditions under which Bigger lives are experienced as masturbation and as rape, since the experience of segregation includes not only being absolutely separate from, but also being completely inhabited by, whites.

Wright’s nuanced and layered analysis of the meaning of rape once again widens the gap between the doctrine and the holding of the court. Guilt and innocence, fact and fiction, are constituted long before the courtroom and the legal machine takes over—but

in ways that are not acknowledged by the actions or rhetoric of the court. The closed nature of the law—an assumption crucial to its appearing fair and impartial—is revealed as pretence. This does not yield unpredictability, however. On the contrary, the same forces that condition the guilt and innocence of Bigger condition the behavior of the court—human beings and social forces are the moving factors in legal decision making. The rhetoric of impartiality, rule of law, precedent and constraint maintain the appearance that these principles are what create consistency and predictability when, in fact, it is the persistence of racial myth and racial segregation that create consistency and predictability.

*IMPERIUM AND DOMINIUM—PROPERTY AND TAKING*

*We have no system for doing justice, not the slightest in the world.*  
*--Clarence Darrow*

A functional inquiry into the role that property plays in *Native Son* reveals a contradiction in the nature of property that the Realists did not identify, although their methods make it visible. In *Native Son*, property rights are inseparable from the practice of segregation. Functionally, residential segregation provides both a figurative and literal structure for property rights, from which several consequences flow. First, a Realist context for *Native Son's* approach to segregation helps rebut the decades of criticism indicting Wright for adopting a model of naturalism that effaces the human in favor of the social. Second, a Realist understanding of segregation and property in *Native Son* provides alternate grounds upon which individual guilt can be constituted, grounds that implicate Mr. Dalton in the killing of his own daughter and that revise our understanding of Bigger's guilt. Third, the racialized sexual violence associated with segregation is shown to be intrinsic to the functional maintenance of property. In the process, by



bringing the Realist concerns into the realm of race discrimination—a realm overlooked by the Realists—*Native Son* offers a supplement to and functional critique of Legal Realism itself.

Legal Formalism rested on laissez-faire, the notion of a “self-executing, decentralized, competitive market economy” (Horwitz, *Transformations 1870-1960* 194). Laissez-faire included the belief that the regulation of property rights belonged to the “private” realm of the market, not the “public” realm of the government (Duxbury 30). Relations between economic actors were not to be governed by public law, but by private contracts. The market served as the foundation of social justice, justice determined by equality of “opportunity.” The neutrality of the process was what mattered, not the neutrality or fairness of the outcome. So long as a contract met established procedures regarding offer, acceptance, and consideration, whatever outcome resulted from that process was a “just” outcome as a matter of law. Any infringement by judge or legislator on the right to make contracts was seen as a violation of the law of the free market. Of course, freedom of contract was mostly conceptual because, in reality, gender, race, class, marriage status, and many other factors, altered the extent to which a contracting party was “free,” and courts did not inquire into whether or not there was an actual “meeting of the minds” between parties, much less into whether the transaction was at arms length, the parties had equal bargaining power, etc. The concept of contract as supreme, and not the practice, was controlling.

The legal historian Lawrence Friedman has argued that the rhetoric of supremacy surrounding contract rights has always exaggerated the actual hold that contract had on the law, but the hold and the rhetoric of contract diminished considerably in the opening

decades of the twentieth century, partly because of the new kinds of property that emerged alongside the rise of the business corporation. The concepts of corporate property, of shareholder's property in a corporation, as well as the growth in intangible forms of wealth such as business goodwill, copyright, and patent rights, forced the law away from the traditional view of property as a physical "thing," an "object of sense," and towards an increasingly abstract model of property (Horwitz, *Transformations 1870-1960*, 145).<sup>196</sup> This shift revealed vulnerabilities in the traditional understanding of property. As the legal idea of property became ever more abstract, the concept of property itself "became more and more vulnerable to certain fundamental contradictions that the earlier, more modest, physicalist understanding of property had been able to conceal or suppress" (*Transformations 1870-1960* 145).

These difficulties were particularly pronounced in the law of eminent domain. The right of eminent domain allows the state to seize private property without the owner's consent so long as the property is taken for public use and the owner is justly compensated. Private property can be taken for public use only," which the Supreme Court has construed as meaning a use *by* the public or a use *benefiting* the public. Expropriating property without pay or for private use is "taking," a practice prohibited by the 5<sup>th</sup> amendment.<sup>197</sup> The Realist's analysis of the nature and function of the laws

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<sup>196</sup> See for example Supreme Court Justice Noah Swayne in his 1873 *Slaughterhouse Cases* dissent where he made the fairly radical claim that "property is everything which has exchangeable value." According to Horwitz, the Swayne dissent in the *Slaughterhouse Cases* was an early attempt to create an abstract definition of property, an attempt that thereafter "began to creep into constitutional definitions given by state and federal courts" (*Transformations 1870-1960* 146). In the first *Minnesota Rate Case*, decided in 1890, nearly twenty years after *Slaughterhouse*, "the Supreme Court itself made the transition and changed the definition of property from physical things having only use-value to the exchange-value of anything" (*Transformations 1870-1960* 146).

<sup>197</sup> In relevant part: "nor shall private property be taken for public use without just compensation." The state's power of eminent domain was recognized long before the 5<sup>th</sup> amendment, but the 5<sup>th</sup> amendment, ratified in 1791, imposed the limitations of public use and compensation on the federal government. While

protecting private property amounted to a powerful critique of the division between public and private use, the very distinction relied on in discriminating between a lawful exercise of eminent domain and an unlawful “taking.”

When property was defined as a physical object, to determine if a taking had occurred, courts had to determine whether the object had been physically appropriated, had been “actually taken, in the physical sense of the word” (Horwitz, *Transformations 1870-1960* 147).<sup>198</sup> But as property became increasingly intangible and incorporeal, “judges were pressed to redefine the nature of interference with property rights more abstractly, not as an invasion of some physical boundary but as any action that reduced the market value of property” (Horwitz, *Transformations 1870-1960* 147). This more abstract definition of property forced the bench to make functional inquiries into the market consequences of actions that impinged on property.

John Lewis’s *Treatise on the Law of Eminent Domain* in 1888 was an early attempt to shape the new understanding of property that would take hold in American legal culture. Lewis argued that legal doctrine on what constituted a taking “attacked the question wrong end first, so to speak, through the word *taken* instead of through the word *property*.”

We must . . . look beyond the thing itself, beyond the mere corporeal object, for the true idea of property. . . . The dullest individual among the *people* knows and understands that his *property* in anything is a bundle of rights. [...] If property, then, consists, not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that, when a person is deprived of any of

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the 5<sup>th</sup> amendment does not apply to the states, federal courts have since concurred that the limitations on eminent domain were extended to the states through the 14<sup>th</sup> amendment’s due process clause.

<sup>198</sup> The distinction was drawn between “direct” and “consequential” injuries to property. While consequential injuries may reduce the value of land, they did not amount to a physical trespass and thus were non-compensable. The law of eminent domain, even as late as the 1870’s, “turned on various judicial definitions of what sorts of physical intrusions constituted a taking,” the key being whether the activity “physically appropriate[d] the land” (Horwitz, *Transformations 1870-1960*, 146).

those rights, he is to that extent deprived of his property . . . though his title and possession remain undisturbed. . . . (45)

This passage shows the transformation of property from tangible object to a set of severable rights that included ownership, possession, and use, among other things, and the corresponding broadening of what infringement of property rights can mean.

A key concept that the physicalist notion of property had obscured, and that the Realists brought to the foreground, was that the set of rights constituting property does not create a relationship between an owner and an object, but between an owner and other people. As Legal Realist Morris Cohen explains, “a property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things. A right is always against one or more individuals” (12-13). Thus, the essence of property, said the Realists, is “always the right to exclude others” (12).

Traditional legal thought uses the concept of “sovereignty” or “*imperium*” to describe public law—the rule over individuals—and that of “property” or “*dominium*” to describe private law—the rule by individuals over things. The shift in focus from owners and objects to owners and others reveals what the Realists saw as a faulty distinction between these public and private spheres of law. This is because the functional redefinition of property collapses the distinction between *imperium* and *dominium*.<sup>199</sup>

Morris Cohen again:

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<sup>199</sup> While the distinction between public and private law is a bedrock principle of American law, often attributed to Montesquieu and picked up by Blackstone in the earliest codifications of American common law, during the nineteenth century, the separation of private from public spheres grew ever more fixed. Fisher, Horwitz, and Reed identify many important doctrinal developments resulting from this separation, along with a slew of “attitudes” that accompanied the new doctrines. Among the attitudes: “Private parties should be enabled and encouraged to enter into whatever voluntary contractual relations they please in order to advance their own conceptions of their best interests. Whereas government officials are obliged when making decisions to strive to advance the public good, private parties have no legal or moral duty to take into account the impact of their choices and actions on the common weal. The state has a responsibility to ensure that private parties are not forced into contractual relations they do not desire [. . .],

the law of property helps me directly only to exclude others from using the things which it assigns to me. . . . to the extent that those things are necessary to the life of my neighbor, the law thus confers on me a power limited but real, to make him do what I want. [¶] [W]e must not overlook the actual fact that dominion over things is also imperium over our fellow human beings. (12-13).

For the Realists, property rights, far from being a neutral framework outside of the coercive and political power of the state, are actually just another instantiation of it.

Since property *is* what it allows an owner to *do*—property rights confer upon owners coercive power over non-owners, particularly when the thing in question is necessary to the life or well-being of the non-owners.

Robert Hale’s groundbreaking 1923 essay, “Coercion and Distribution in a Supposedly Non-Coercive State” fueled the Realist’s critique of the classical view. Hale argued that the premises behind the market economy were debatable social choices that depend upon political preference and social purpose. Property, then, is not an innate or “natural” right, but a man-made right, the result of law, not the basis for it. Hale re-conceptualized “freedom” of contract, the hallmark of the belief in a neutral market system, insisting that contracts are neither neutral nor self-executing, but are creations of law. Within this de-naturalized view of contract, the non-owner can refuse to yield to the owner’s terms, can withhold consent from the contract, but such a refusal is always done within a system of coercion. A labor contract provides an example: “[the worker] must eat. While there is no law against eating in the abstract, there is a law which forbids him to eat any of the food which actually exists in the community—and that law is the law of property” (472). Property rights represent a political choice to cede the sovereign

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but should not seek to impose on private parties substantive conceptions of what kinds of exchanges are fair or unfair. If it respects these limits on its legitimate power, the state cannot fairly be held responsible for the distribution of wealth and power in the society—that is for the outcomes of the voluntary transactions of private parties.” (98-99)

power of the state to certain individuals—owners—a choice that vests in them coercive power, a choice that is neither neutral nor inevitable, but political, the result of human decision making.<sup>200</sup>

Hale's insights on property gestured toward a new way of understanding racial segregation, picked up on by Louis Jaffe in a rare comment on race relations by a

Realist:

[P]roperty [...] equips the possessor with great powers of exclusion—enforced or sanctioned by the law—not in any way depending on consent, and this power to exclude is a source of regulating others' conduct, either as it prescribes complete exclusion or partial [...] Professor Robert Hale [...] has pointed out that the exclusion of the negro in the south from inns, theatres, public places is a full-fledged regime of law with the private owners of property laying down the terms and the courts providing the sanctions, the principle one of which is the action of trespass. By this method these states have eluded the prohibition of the fourteenth amendment against the passage of discriminatory laws. (Jaffe 217)<sup>201</sup>

Hale's depiction of segregation as a "full-fledged regime of law" refers to the way that the traditional view of private property as control over objects and not over people allows the state to use private property to accomplish political goals, while relying on the rhetoric of neutrality and the "private" nature of property to mask the political and social interests underlying state action.

Hale is referring to *de jure* segregation in the South, but I extend his analysis to the North where the legal instruments enabling *de facto* segregation created a regime of law as fully as did the *de jure* segregation in the South. In fact, given Hale's analysis, the distinction between *de facto* and *de jure* disappears—in both cases segregation is

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<sup>200</sup> Hale helped the Realists reverse the Classical view of marketplace justice. Rather than process, they looked to outcomes: if the outcome was unfair, then the process must have been (Horwitz, *Transformation* 1870-1960 194).

<sup>201</sup> At the time of the Realists, the action of "Trespass" applied to any unlawful interference with one's person or property. Now it only refers to the unauthorized entry on land.  
<<http://law.jrank.org/pages/10904/Trespass.html>>

accomplished by law. In cases of *de facto* segregation, the role of the law is simply less visible—and that, in itself, serves political ends. We see this when we look at how, in *Native Son*, the bundle of abstract rights that constitute property can be mapped spatially onto the city of Chicago, rematerializing property to reveal its contradictions and so showing how the substance of a right to property is, figuratively and literally, the right to segregate. It is the power to erect a partition marking off space and to prohibit the uninvited intrusion into it by others. In this way, the nature of property rights implies the spatial partitioning that is the hallmark of residential segregation.

To flesh out this argument, I turn to some of the speeches and writing of Clarence Darrow, the Realist most closely tied to Wright and to *Native Son*.<sup>202</sup> Bigger's lawyer Max is modeled after Darrow, a renowned Chicago lawyer known for defending unpopular causes and controversial defendants. Wright followed his work as a defense lawyer in the Scottsboro case where nine black teenagers were falsely accused of gang raping two white girls and in the Leopold and Loeb "thrill murders" case, upon which the legal narrative of *Native Son* is extensively based.<sup>203</sup> The argument Max makes to the

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<sup>202</sup> Clarence Darrow began his career as counsel for the railroads, but resigned during the Pullman Strike of 1894 in order to represent the union officials who had been enjoined from striking. He was known for representing John Scopes in the Scopes Monkey Trial in 1925; for securing pardons for three of the Haymarket rioters in 1893; for his defense of the dynamiters of the *Los Angeles Times* in 1911; and for his defense of the 'thrill' murders in the Loeb-Leopold trial in 1924" (Schwartz 434). He became known as "the attorney for the damned," and his clients were often "labor organizers, Socialists, Communists, and others on the leftist fringe" (Schwartz 434).

<sup>203</sup> Darrow defended 19-year old Nathan Leopold and Richard Loeb in 1924. The two rich, white boys, who lived in the same area as the fictional Daltons, murdered 11 year old Bobby Frank, apparently because they wanted to experience taking a life and believed they were intelligent enough to commit the perfect crime. Darrow's defense strategy was to admit guilt in order to avoid a jury trial and then make a plea to the judge for their lives. In one of the most famous arguments in American legal history, Darrow argued that the boys' lives of privilege caused them to kill. The strategy was successful. Despite massive outcry and strenuous efforts on the part of the State, Leopold and Loeb were both given life in prison. Robert Butler has outlined some of the important similarities between the Leopold and Loeb case and *Native Son*, but much more work needs to be done on the significance of the connection between Clarence Darrow and *Native Son*.

judge in defense of Bigger is largely drawn—nearly word-for-word in many places—from Darrow’s argument in defense of Leopold and Loeb.

In his notorious 1902 “Address to the Prisoners in the Cook County Jail,” Darrow uses the language of spatial partition to describe law:

[Fellows who have control of the earth] fix up a sort of fence or pen around what they have, and they fix the law so the fellow on the outside cannot get in. The laws are really organized for the protection of the men who rule the world. They were never organized or enforced to do justice. We have no system for doing justice, not the slightest in the world.

Law is not used to do justice, but to consolidate property by fencing off access to things and places; thus segregating things is inseparable from segregating people—*imperium* is *dominium*.

Darrow’s belief that law exists to consolidate property had radical implications for his views on criminal law, views that Wright incorporated into *Native Son* through Max. Max tells the judge that Bigger’s actions are the wholly predictable result of the socio-economic conditions under which he lived. In response to centuries of oppression, Max argues, black Americans have had to “adjust,” to create their “own laws of being; their own notions of right and wrong,” a “new form of life,” that “expresses itself, like a weed growing from under a stone, in terms we call crime” (391). “Crime,” as a way of being, is created by the same people who designate that way of being as unlawful. Max’s words coincide with Darrow’s when Darrow argued that prisoners in jail are not responsible for their crimes.<sup>204</sup>

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<sup>204</sup> Darrow’s entertaining but biting preface: “Some of my good friends have insisted that while my theories are true, I should not have given them to the inmates of a jail. Realizing the force of the suggestion that the truth should not be spoken to all people, I have caused these remarks to be printed on rather good paper and in a somewhat expensive form. In this way the truth does not become cheap and vulgar, and is only placed before those whose intelligence and affluence will prevent their being influenced by it.”



There is no such thing as a crime as the word is generally understood. I do not believe there is any sort of distinction between the real moral condition of the people in and out of jail. [...] I do not believe that people are in jail because they deserve to be. They are in jail simply because they cannot avoid it on account of circumstances which are entirely beyond their control and for which they are in no way responsible.

The act of punishing, Darrow argued, has no relation to guilt and only exacerbates the underlying social causes of crime, preeminent among which are the property laws that segregate and perpetuate poverty in order to consolidate profit. Max, echoing Darrow, makes a similar argument for systemic responsibility:

We marked up the earth and said, 'Stay there!' [¶] We planned the murder of Mary Dalton, and today we come to court and say: 'We had nothing to do with it!' But every school teacher knows this is not so, for every school teacher knows the restrictions which have been placed upon Negro education. The authorities know that it is not so, for they have made it plain in their every act that they mean to keep Bigger Thomas and his kind within rigid limits. All real estate operators know that it is not so, for they have agreed among themselves to keep Negroes within the ghetto-areas of cities. (394-395)

Marking up the earth, segregating it based on race, is the underlying cause of Bigger's "crimes," made possible by the legal apparatus protecting property rights.

It is on this point of how to apportion blame between society and the individual that Max's voice clearly separates from Bigger's. *After* Max has indicted the white world, and the white world alone, for Bigger's actions, Bigger nonetheless takes responsibility for them, claiming, in an (in)famous line "what I killed for, I am" (429). Some critics, like Wright scholar Keneth Kinnamon, make no distinction between Max's point of view and Bigger's.<sup>205</sup> On the other hand, Donald Gibson has insisted that critics who equate Max with Bigger do not "see" Bigger. The "degree to which the reader

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<sup>205</sup> In Kinnamon's *Native Son: The Personal, Social, and Political Background* he argues that the novel maintains a "thoroughly communistic point of view," an argument he bases partly on the courtroom scenes which, referencing Max's positions only, he concludes are "decidedly 'leftist'" and a repetition of the "communist party line" (18).

focuses upon Max and Max's speech determines the degree to which Bigger is invisible to him" (36). For Gibson, the third book of the novel is the story of "Bigger Thomas the private person," the "isolated, solitary human" (36). From this perspective, Max's account of Bigger Thomas is one more discourse that effaces him.<sup>206</sup>

While Gibson is right to separate Bigger from Max, viewing the third book as the story of the isolated, solitary individual misses the point of the two perspectives contained in the novel. The constitutive tension between the social and the individual produces a basic philosophical question at the heart of the novel's treatment of guilt—once a social context for an action has been sought and a social or systemic answer given, what meaning does individual guilt have? If Bigger is a "product" of his environment, how can he also remain personally responsible for his actions? And if his actions are the logical consequence of forces beyond his control, does this erase his agency, making the individual—at least the poor, urban, black man—the helpless product of his environment?

If the question appears passé to some, it is certainly not because it has been conclusively answered. In 1940, when *Native Son* was published, to be realistic meant to "adopt the techniques of naturalism" characterized by distance or separation between the narrator and the subject matter of the text (Bell 191). Narrative detachment enables the "objective" presentation of material drawn from the lower classes. As June Howard explains, the hallmark of naturalism is a hierarchical division between the 'brute' other and the omniscient, 'scientific' narrator" (qtd. in Bell 194).<sup>207</sup> Determinism governs

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<sup>206</sup> As Gibson has observed, although Bigger is constituted as a victim in Max's speech to the court, "we are not allowed [...] to see Bigger as a victim. We *know* it, but we do not *see* it" (83).

<sup>207</sup> Compare John Reilly who identifies distance as the hallmark of *Native Son*, but traces that distance not to social scientific methods, but to dominant versus subordinate discourse. In Reilly's formulation, social

lower class characters whose conditions provide the subject matter for naturalism while the articulate, middle-class narrators, unlike the objects of their investigation, *understand* the forces at work, stand outside of them, and are exempt from their control (Bell 194). Thus while naturalism offers up new forms of life as literary matter, they are only available as spectacle, controlled and contained by the voice of the narrator and by deterministic forces that render them ever victims, never actors—objects of investigation. I argue the theory of inexorable non-human forces, whether in legal or sociological discourse, is precisely the position that Wright is mobilizing the insights of Legal Realism to combat.

The success and critical reception for *Native Son* rested heavily on Wright's engagement with naturalism and social science.<sup>208</sup> Early reviews pointed to the novel's realism, its objectivity, its social scientific validity, and named it the successor to Dreiser's *American Tragedy* and Steinbeck's *Grapes of Wrath*, both naturalist landmarks.<sup>209</sup> Dorothy Canfield Fisher wrote the initial Introduction to *Native Son* which claimed "the story of Bigger Thomas bears out the studies in racial barriers carried out by the American Youth Commission," a social scientific study of black youth and crime in 1930's Chicago. Fisher's introduction refers to *Native Son* as a "report in fiction" and describes Bigger as one "whose behavior-patterns give evidence of the same bewildered,

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science has the potential to change reader's minds about black people but because of the hold that the racist dominant discourse has on meaning, they are unable to accept the conclusions of social science as true. Instead they "resist" social scientific evidence because the anecdotes, cultural knowledge, prejudice, etc that make up the dominant discourse on race all seem "truer" than the conclusions of science (Reilly, "Giving Bigger a Voice" 41).

<sup>208</sup> Upon publication, *Native Son* was immediately deemed naturalistic. When critics saw deviations from the accepted practices of naturalism, they identified them as mistakes rather than evidence Wright was attempting to differentiate his work. For example, critics saw the fact that Bigger had thoughts his character would not realistically be able to articulate as a flaw rather than attempting to interpret that fact's meaning in the novel.

<sup>209</sup> See Reilly's book *Richard Wright: The Critical Reception* in which Reilly has gathered and analyzed dozens of reviews of *Native Son*.

senseless tangle of abnormal nerve-reactions studied in animals by psychologists in lab experiments.”

The naturalism and objectivity that initially gave *Native Son* such positive critical reception became the flash point for later critics, most famously James Baldwin and Ralph Ellison who both publicly castigated the novel for portraying Bigger Thomas as a social creation, without agency.<sup>210</sup> In his 1951 essay “Many Thousands Gone,” Baldwin claimed that *Native Son* reinforced the white “myth” of the Negro, erased black personality, and devalued the sense of black community. Baldwin’s criticism stemmed from what he saw as Wright’s use of the distancing inherent in naturalism, a technique that made Bigger into a “social and not a personal or human problem,” insuring that when he is thought of it will be in terms of “statistics, slums, rapes, injustices, [and] remote violence” (107). On the one hand, by portraying Bigger as a product of social forces, but as completely alienated from his own community and people, Baldwin believed that Wright had obliterated Bigger’s humanity and cut away the important dimension which black people bear to each other. Thinking of Bigger in strictly social terms obscured what is a “dense, many-sided and shifting reality” (118). On the other hand, Baldwin felt Wright had created Bigger in the image of the white man’s myth of the dangerous,

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<sup>210</sup>In 1945, Baldwin published “Everybody’s Protest Novel,” in which he accused Richard Wright of advocating that blacks obliterate their own personality and become “white” in order to realize the white liberal dream of assimilation. The essay set off a firestorm of controversy. In 1951 Baldwin wrote “Many Thousands Gone” praising Wright, but also accusing him of erasing black individualism and reinforcing the white image of the black “monster” in the character of Bigger Thomas. In 1963, Ralph Ellison critiqued Wright’s “sociological vision of society” and the view that suffering is the only “real” Negro experience. The debate that included not only Baldwin, Ellison, and Wright, but also Chester Himes, Horace Clayton, Eldridge Cleaver, Irving Howe, and many others, continued unabated through the 1960’s and into the 70’s. For an excellent analysis of the history and points of contention triggered by *Native Son*, see Yoshinobu Hakutani, *Critical Essays on Richard Wright* (1982), especially “. . . Farther and Farther Apart: Richard Wright and James Baldwin,” by Fred L. Stanley, which provides a chronology of Wright and Baldwin’s relationship.

angry, ignorant, and self-destructive black man, incarnating and thus perpetuating the stereotype.

Baldwin's reading has had its share of critics, among them Donald Gibson who claims it is Baldwin and not Wright that is "most responsible for the perception of Bigger Thomas as a social entity and that alone" (37). I agree with Gibson. Baldwin's argument fails to account for Bigger's own position as both victim and actor, and for the critical stance taken by Wright towards Jan and Mary, who are both portrayed as representing the social scientific perspective. Baldwin's criticism also rests in part on the faulty conflation of Wright's voice with Max's. For example, regarding the novel's court scenes, Baldwin writes, "it is useless to say to the court where a heathen sits on trial that *they* are responsible for him and his crimes, therefore let him live to articulate this meaning. [...] The court, judge, jury, witnesses, spectators already know this and that is why they will kill him" (118). The argument Baldwin references is Max's, not Bigger's, and not Wright's.

The best analyses of the novel have been those that are able to see Wright's engagement with naturalism as complex. Samuel Stillen was the first, and remains one of the best, to see Wright as attempting something more than maximally embodying a pre-existing naturalist framework. In 1940, Stillen noted the psychological aspects of the novel that are not in line with traditional naturalism, going so far as to place *Native Son* into a new genre of "dramatic realism." Bigger is a complex character comprised both of elements of his environment as well as elements of freedom and free will. Critics who overlook this, Stillen wrote, reflect their own failure to read dialectically, a necessary skill for encountering Wright (83).

I would add that recognizing Wright's critique of the naturalized, deterministic rhetoric of the law makes it even more difficult to believe that, in the same novel, Wright would be adopting that very rhetoric as it relates to social science in any kind of non-critical way. In fact, to see Wright's critique of the rhetoric of law is to see how that critique also applies to the rhetoric of social science. Both, my reading of Wright insists, are rhetorics that obscure reality while serving the interests of those in power.

While the issue of Bigger's agency has been hashed and rehashed in the decades following Baldwin's critique, what hasn't been examined is the culpability of the individual white man, an issue that has important ramifications for understanding the grounds upon which individual versus societal guilt is constituted. Of the four white male characters, Mr. Dalton is the most interesting and difficult case because while he is clearly victimized by Bigger's actions, he is also implicated in the system that gave rise to Max's condemnation.<sup>211</sup>

Dalton is a philanthropist, a "supporter of the NAACP" (50) who has given "over five million dollars to colored schools" (56). Max belittles Dalton's financial contributions, accusing him of "try[ing] to undo this thing in a manner so naïve as dropping a penny in a blind man's cup" (393), but Max does not give Dalton's dedication its due. At some risk to his own person and property, Dalton actively seeks out and employs young black men who have been in trouble with the law. When he offers Bigger a job living and working in his home, Bigger already has a long criminal record that

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<sup>211</sup> There is little nuance when it comes to Buckley. He's a "bad" man. Max and Jan are more complicated. While they are both portrayed as "good," Jan unwittingly plays a causal role in Mary's killing through his misguided attempts at unwonted familiarity with Bigger. But for his actions, Mary would not have died. Altruistic Max, while true friend to Bigger and his only mouthpiece, sees the world very differently than Bigger in the end. They, as this chapter argues, fundamentally part ways over the issue of the source and meaning of Bigger's violence.

includes a pattern of violence and has just returned from Juvenile Detention where he was sent for stealing tires. In addition to room and board, Dalton provides Bigger the opportunity for an education and pays him 25% more than the “pay calls” (50). Most significantly, when Dalton learns that the Thomas family is about to lose their apartment, he comes to their aid, interceding in the midst of the trial to prevent the eviction of the family of the man who killed and brutally mutilated his daughter (302).

But Dalton is able to help them because he owns the building in which they live (173). That is the rub. Housing costs in the Black Belt are *double* that of White communities, despite the dilapidated condition of the Black neighborhoods and the paucity of well-paying jobs. *Native Son* shows how the disparity is maintained by segregation practices, not by any supposedly neutral market fluctuations. In fact, Bigger eludes the police by hiding in the many vacant and abandoned apartment buildings in the Black Belt. However, when the police are closing in, Bigger looks for an un-rented flat in an occupied building but can’t find one (248). The scarcity that has supposedly sent prices sky-high is not natural; it has been fabricated by the white landowners who have privately agreed to fix housing prices while leaving large areas unoccupied to ratchet up demand for the remaining space. Black Chicagoans can do nothing but pay. The widespread use of racially restrictive housing covenants mean there are no options for living outside that narrow strip of the city (249).<sup>212</sup> So while Dalton may be altruistically motivated by a desire to help the black people of Chicago, as a white landowner who participates in maintaining the system of artificial scarcity, he creates the conditions for

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<sup>212</sup> In Bigger’s words, “[n]o white real estate man would rent a flat to a black man other than in the sections where it had been decided that black people might live” (249).

and then benefits financially from their exploitation. As Max puts it, guilt trails white actions, but self interest keeps [white people] from atoning for their wrongs (387).

Clarence Darrow's statement that there is no such thing as "crime" really means that there is no such thing as personal guilt for crimes that are the result of social forces. The jails are filled with people who commit "crime" out of financial necessity or psychological compulsion—neither of which are culpable states. But while the people "in" jail have no personal accountability, the "rich men" and "property owners" like Dalton seem to. Darrow writes,

Whenever the Standard Oil Company raises the price of oil, I know that a certain number of girls who are seamstresses, and who work after night long hours for somebody else, will be compelled to go out on the streets and ply another trade, and I know that Mr. Rockefeller and his associates are responsible and not the poor girls in the jails.

Here Darrow's notion of systemic responsibility gives way to personal responsibility, but personal responsibility in relation to the property owners, not the prostitutes. The owners seemingly have the ability to be guilty in a way that the poor do not. Darrow continues:

[T]o take all the coal in the United States and raise the price two dollars or three dollars when there is no need of it, and thus kill thousands of babies and send thousands of people to the poorhouse and tens of thousands to jail, as is done every year in the United States — this is a greater crime than all the people in our jails ever committed, but the law does not punish it. Why? Because the fellows who control the earth make the laws. If you and I had the making of the laws, the first thing we would do would be to punish the fellow who gets control of the earth.

Crime as defined by the law is, for Darrow, no measure of guilt. Agency here is given to the owners while it is denied to the "criminals." Access to property is access to agency.



As in the case of the seamstress turned prostitute,<sup>213</sup> property law and the resulting system of segregation create the conditions that lead to Mary and Bessies' deaths, making those crimes both predictable and inevitable. "Inevitable" because the violence portrayed in *Native Son*—both rape and murder—is *necessary*. The continued justification of property depends upon violence committed by black men, or at least on the shared *belief* in the reality of that violence. Segregation, and the economic booty that results from it, is maintained by fear, fear that both causes and is stoked by racial violence. Fear is omnipresent in Bigger's life. Although to Bigger fear seems to be a natural fact, fear mongering is a deliberate ploy used by those in power to keep both white and black people "in their place." The spectacle of Bigger's trial and death, then, becomes a "bloody symbol of *fear* to wave before the eyes of [the] black world" (276), fear used to further the segregation agenda and generate profits.

Evidence of the link between violence and the segregation agenda is found in a newspaper article that capitalizes on Mary's death to insist that "residential segregation is imperative" and to push for *de jure* racial segregation of "parks, playgrounds, cafes, theatres, [...], street cars," and schools (281). Segregation, the article claims, is necessary for the purpose of minimizing black men's "direct contact with white women" (281). But if "the injection of an element of constant fear" is used to control the black population, fear plays a similar role in manipulating the white population. The white citizens of Chicago are dupes. They are goaded into action and belief on the theory that they are preserving the safety of their homes and families. Max characterizes Bigger and

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<sup>213</sup> While Bigger's violence may not be the immediate result of poverty, the connection exists. His family's time on the dole is about to expire, leaving them to face hunger and homelessness. The job offered by the Dalton's—a job taken in order to hold off the threat of the total poverty born of segregation—makes Bigger uncomfortable and creates the conditions that lead to Mary's death and then to Bessie's.

the mob in the same terms—both as strangers who instinctively hate each other out of fear. Manipulated by strategies of fear mongering, both groups are portrayed as “powerless pawns in a blind play of social forces” (390).

I resist any simplistic model of the powerless person tossed about by irresistible social forces; instead, my emphasis is on the way that this simplistic model itself contributes to the longevity of the color line in Chicago. Yes, the physical distance prescribed by segregation perpetuates social distance and causes people to be divided into two masses—white and black, between which there is a gulf that extends on both sides. As Bigger puts it, “white folks and black folks is strangers, we don’t know what each other is thinking” (351). But the problem is deepened when instead of individual white people, there is a white “world,” the aggregation and naturalization that is a phenomenon of segregation and which maps whiteness and blackness spatially. For Bigger, whites are not human; they are a natural force, and he regards them as a singular, monolithic thing. The same is true of white attitudes towards blacks. The dehumanizing language used by the papers and the mob to describe him, along with the fact that several *hundred* men are mistaken for Bigger, is evidence of how little his individuality or personhood is recognized. Thus Bigger feels he is facing the white world as a component of the “natural world” (395-6), a world in which Dalton exists “high up, distant, like a god” (174). This transition from people to “world” is a useful abstraction that allows segregation to be used to create financial windfall and political advantage for a select few.

The spatial mapping of black and white worlds makes people feel they are facing inexorable, unalterable natural forces rather than other individuals or institutions with

human origins. Max explains how this conflation of people and forces arises in the urban context:

We must deal here, on both sides of the fence, among whites as well as blacks, among workers as well as employers, with men and women in whose minds there loom good and bad of such height and weight that they assume proportions of abnormal aspect and construction. When situations like this arise, instead of men feeling that they are facing other men, they feel that they are facing mountains, floods, seas: forces of nature whose size and strength focus the minds and emotions to a degree of tension unusual in the quiet routine of urban life. Yet this tension exists within the limits of urban life, *undermining* it and *supporting* it in the same gesture of being. (387)

People become part of the natural environment, mapped onto the city itself, becoming part of either the Black Belt or the white world and so erasing human individuality.

When Bigger met Jan and Mary, they were not “real” to him, but were part of a “great white mountain” (423). To the white people of Chicago, Bigger is not an individual human being, he is a natural phenomenon—a representative of “blackness” incarnate.

The conflation of human agency with forces of nature undermines urban life because it estranges blacks and whites, threatening their ability to live together peaceably in close urban proximity and triggering racial violence. But it also supports the “limits of urban life” by creating the conditions that prop up segregation. Because black and white people are strangers, they must be kept separate. So while segregation sets limits, it also depends on the regular breach of them. Without those frequent and bloody breaches, the fear that sustains the color line could not be generated. The violence of segregation, then, rests on a process of abstraction that transforms individuals into racially and geographically separated worlds maintained by the periodic violent infringement on that separation.

Though Darrow offered a compelling critique of the systemic causes of criminal behavior, any construction of law that erased human agency was subject to the Legal Realist's critique—when law is isolated from “reality,” its outcomes, its workings are seen as inevitable, inexorable forces of logic, impersonal outcomes of the “system” rather than the result of human choice and preference. If Dalton is guilty, it must be through the way he exercises power over property. But if property rights are innate, part of the natural make up of the world, then it makes as little sense to hold him accountable for the use of them within his world than it does to hold Bigger accountable for actions determined by the make up of his.

It is on the point of systemic versus individual culpability that, in the penultimate scenes of the closing pages of the novel, Max and Bigger part ways. Max gives Bigger a final speech on class solidarity and believing in himself. Bigger responds by saying that Max's speech “makes me feel I was kind of right” (428). Bigger's voice, silent through the entire court proceedings, now “drowns out [Max's] voice,” as Bigger insists on his own culpability alongside that of the system within which he operated. Bigger places himself and the social forces to which Max has alluded on the same plane, making his actions equal and reciprocal to the social forces. The reciprocal formulation is repeated twice. First: “I ain't trying to forgive nobody and I ain't asking for nobody to forgive me” (428). And then: “They wouldn't let me live and I killed” (428). Both actors—the individual and the corporate—have taken life, or will take life, on a reciprocal plane. It is only when Bigger has asserted his own self as a responsible agent, but responsible alongside the also culpable system of segregation, that Bigger, by claiming his agency, is able to claim the full measure of his existence.

## CONCLUSION—SECRET ROOTS AND THE SURRENDER OF LAW TO LIFE

Wright, who mobilized the methods of Legal Realism to create a functional critique of segregation and expose the extra-legal forces controlling the rule of law, closes the novel with some realism about Legal Realism. Bigger's self assertion, made using a Realist interpretation of his own actions, renders our Realist Max bewildered and terrified. As Bigger confesses "what I killed for, I *am*!," Max responds "no; no; no. . . . Bigger, not that. . . ." (429). But Bigger continues, his conviction growing in intensity: "It must have been good! When a man kills, it's for something. . . . I didn't know I was really alive in this world until I felt things hard enough to kill for 'em. [. . .] I know what I'm saying real good and I know how it sounds. But I'm all right. I feel all right when I look at it that way . . . ." (429). Bigger's logic is simple: "What I killed for I am," "what I am must be good," thus, what I killed for must be good. The value of his own life is a function of his being willing to kill to preserve it, a value that depends on Bigger's willingness to assert agency for his actions.

Bigger's logic creates distance between himself and Max who "back[s] away" from Bigger, and "plead[s] despairingly" with him, with eyes "full of terror." Wright underscores the separation between them. Max wants to "go to" Bigger, but is unable (429), until finally, a crying Max leaves, "grop[ing] in the dark for his hat," "feel[ing] for the door, keeping his face averted" (429). Staggering, nervous, discomforted, Max is wholly out of his element; meanwhile, Bigger is at ease, reassuring Max that he is "all right," calling out goodbyes, and asking him to "tell Jan hello" (430). Throughout these concluding passages, Bigger rejects his status as a victim of the "blind play of social

forces” and Max, not understanding the transformation Bigger has undergone, leaves the blind one.

The Realists were enthusiastic, brash, and buoyant. Consider the words of Realist Henry Steele Commager who described sociological jurisprudence as a “new way of thinking about law and applying it. It was a shift from absolutes to relatives, from doctrines to practices, from passive—and therefore pessimistic-determinism to creative—and therefore optimistic-freedom” (qtd. in Coquillette 559). It’s difficult to reconcile the confidence they displayed in the scope of their own accomplishments with the critical estimation of their own record. Some, like Brian Leiter, see that record as dismal (19-24). While in my estimation, Leiter overlooks important ways in which Legal Realism changed the face of American law,<sup>214</sup> even Horwitz, whose judgment of the Realist’s lasting impact is much kinder, nonetheless claims that Legal Realism, as a constructive movement, was a failure (210). It was a failure because it encouraged a methodology that privileged the status quo.

Lon Fuller understood the nature of this failure even during the Realist’s heady and optimistic climb to power. He wrote, “social reality—the Is—[has become] the source of the Ought” (qtd. in Fisher, Horwitz, Reed 211). By this he meant that the Realist agenda had become descriptive. Rather than realizing Pound’s dream of law

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<sup>214</sup> Leiter, in my estimation, underestimates the impact of the Realists, perhaps because, by his definition of Realism, those who qualify to be in their ranks are far fewer than, say, Horwitz, Reid, and Fisher’s net. Leiter focuses too much on hunch theory and assesses the Realist contribution shallowly, claiming that judges continue to do what they already do, becoming more explicit about legislative aspects of judging and addressing policy alongside tradition (“American Legal Realism” 19-24). Of course, his assessment reveals his own blind spot. He underestimates the Realists because he does not take adequate account of consequentialism. He claims the Realists were ineffective at changing the law, but they rewrote the commercial code, altered the law that law was taught, made room for a new kind of acceptable legal analysis. Although the rhetoric of judicial conservatism remains, the process of legal analysis has been altered. If Leiter is correct that the influence of Legal Realism is no longer seen, it is because their methods have become self-evident, part of the fabric of our jurisprudence rather than an isolated historical moment. For more on the lasting impact of Legal Realism, see Schwartz.

mobilized in the interest of social reform, the Realists focused on revealing the hidden anomalies (and regularities) between legal rhetoric and practice, exposing the constructive but unacknowledged forces acting on and reflected in law. But Realism provided little guidance on what normative goals the law should embody, other than the rule that law should transparently reflect reality. Without a normative social agenda, the Realists could do little more than reveal the social reality behind the law, rather than using law to engineer an alternative and more just social reality. The exposure of the interests behind a legal decision did not itself make much substantive difference. In fact, Fuller wrote, by having law mirror social reality more completely and more transparently, Realism “ended up endowing the Is with normative content. Letting the Ought acquiesce in the Is, is to let the law surrender to life” (qtd. in Fisher, Horwitz, Reed 211).

While only a few of the Realists recognized this as a weakness of their own method, where they saw acquiescence, Wright saw violent subjugation. His critique of Bigger’s legal proceedings makes this argument clear. To make the law acquiesce in the existing system is to allow the law to be embodied by the mob, driven and mobilized by the wealthy and the powerful. In this insight Wright mirrors Oliver Wendell Holmes whose early optimism about the role of the law in social engineering gave way to a pragmatic recognition that it is the mob that shadows such a jurisprudence. Writing in 1881, Holmes penned, “[t]he very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all of the juices of life. [. . .] Every important [legal] principle . . . is in fact and at bottom the result of more or less definitely understood views of public policy” (*Common Law* 35). But a few decades later, he had glimpsed the true source and dangers of that secret root. In 1910 he

wrote in a letter to Sir Frederick Pollock, “I am so skeptical as to our knowledge about the goodness or badness of laws that I have no practical criterion except what the crowd wants. Personally, I bet that the crowd if it knew more wouldn’t want what it does—but that is immaterial” (Howe 163). By 1926, he knew the secret root of law was the mob.

In a letter to John C. H. Wu, Holmes wrote that when it comes to “the development of a *corpus juris*, the ultimate question is what do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions may stand in the way?” (Lerner 432).



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