A Fraught Inheritance: Legal Realism, Literary Realism, and the Forging of American Democracy

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Abstract

A Fraught Inheritance: Legal Realism, Literary Realism, and the Forging of American Democracy is the first extensive conceptualization of two seminal, contemporaneous movements in American law and letters. The project literarily and legally cross-examines the Reconstruction Amendments, which formally cemented equal citizenship rights in the Civil War's wake, from the Amendments' ratification through World War II. I construe the Amendments through the lenses of literary realism and legal realism, which are framed as dissenting intellectual movements. Both realisms emerged largely in response to statutes and judicial decisions that belied the Reconstruction Amendments' egalitarian promise by intentionally or effectively subordinating people of color and the working class. My analysis couples legal texts that critiqued these laws with kindred literary works by Charles Chesnutt, Upton Sinclair, Theodore Dreiser, and Richard Wright. Despite criticisms of literary realism and legal realism's overall complicity with an unjust status quo, a reading of the movements against the disciplinary grain demonstrates their social justice resiliency during the modern period as well as their formidable influence on equitable literary and legal developments into today.

Table of Contents

Acknowledgements – Lodestars Along the Odyssey 1

Prelude – The USS Constitution as Metaphor 4

Introduction – Literary Realism, Legal Realism, and the Praxis of Equitable Dissent 7

Chapter One – Spectacles of Race and the Realities of Jim Crow 52

Chapter Two – Illusions and Actualities Underlying "Liberty of Contract" 123

Chapter Three – The American Dream and Its Socio-Legal Discontents 180

Coda – Realist Imaginaries and the Specter of Race 251

Works Cited 287

Acknowledgements – Lodestars Along the Odyssey

"(I am large, I contain multitudes.)"

–Walt Whitman, "Song of Myself," 1855-92

Analyzing the origins of and interconnections between complex literary and legal phenomena is no small undertaking, and discerning the genealogy of such an intellectual project is no less daunting an endeavor. *A Fraught Inheritance* is the culmination of a twenty-year scholarly odyssey across ten academic institutions that collectively inculcated my passion for research within the heart of a disciplinary venn diagram comprised of literature, law, and history. My Ithaca, in 1997, was a high school United States history course, and Odysseus-like I journeyed far from the land of my scholarly genesis only to return to a vitalized home in which historical narratives could be gleaned from an exacting dissection of literary and legal texts. This methodological discovery is reflected in my project's story of how legal realism and literary realism – two seminal dissident movements in American law and letters – confronted the seemingly intractable problem of reconciling egalitarian constitutional rhetoric with reality. I hope this perennial theme is rejuvenated through my opus, and that it is as gratifying to read as it was to write. To the extent I succeed on both counts, I am beholden to a constellation of family, friends, colleagues, and educators who provided personal and professional succor.

Nethermost in time, my parents and brother have been unwavering in their support, even as I wavered in my decisions to decline prudent professional opportunities to sail upon uncharted scholarly waters. Fasiha Zaman, Lin Duong, and Randa Serag have been equally steadfast confidants over the decades, perhaps baffled by my intellectual restlessness but always enthused to hear about my latest academic pursuits. Colette Dabney, the English Department administrator at the University of Virginia, also buoyed me personally as I navigated Scylla and Charybdis

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Professional guidance on the project dates from my secondary school days; a coalition of literary and legal scholars and historians has cardinally informed my scholarship. My dissertation committee at the University of Virginia – Professors Marlon Ross (director and co-visionary), Victoria Olwell, and Sandhya Shukla of the English Department and Professor Frederick Schauer of the School of Law – reposed trust in my ambitious venture, which may have taken all of us outside our disciplinary comfort zones, and were invaluable Athenas. Professors Jennifer Wicke and Cindy Wall, also at the University of Virginia, provided trenchant insights during this project's early stages. Before then, Professor Helen Oesterheld at the University of California, Irvine, and Professors Mrinalini Chakravorty and Jahan Ramazani at the University of Virginia nursed my literary analytical skills. My enamorment with literary realism and legal realism predates my time at Virginia, however, with Joanna Levin, then a postdoctoral fellow at Stanford University, and Professor Kay Ryals at the University of California, Irvine, spiritedly introducing me to literary realism. Professors David Strauss and Geoffrey Stone at the University of Chicago Law School and Professor Irwin Stotzky at the University of Miami School of Law kindled my

interest in legal realism and constitutional law, and Professor Strauss's conception of the "living Constitution" imbues this project.

Life's precarity is a leitmotif of my scholarship, and I may never have aspired to earn a doctorate without Wei-En Tan at Stanford (then a teaching assistant there) implanting the idea in my mind as an undergraduate, though I propitiously detoured to law school before English lured me (partially) back. Another major early influence was Professor Jack Rakove at Stanford, whose charismatic lectures on United States history nearly persuaded me to change majors. Earliest in time, Patrick Collins of Walnut High School instigated my ardor for American history and expressed an inkling of surprise at my apparent future occupation when we met before I began law school. The glimmerings of my interdisciplinary ferment could be traced to that day, and the fourteen years since have affirmed a passage from James Baldwin's *Giovanni's Room* that suggests the impetus for my scholarly meanderings leading up to *A Fraught Inheritance*: "Perhaps, as we say in America, I wanted to find myself. This is an interesting phrase, not current as far as I know in the language of other people, which certainly does not mean what it says but betrays a nagging suspicion that something has been misplaced. I think now that if I had any intimation that the self I was going to find would turn out to be only the same self from which I had spent so much time in flight, I would have stayed at home. But again, I think I knew, at the very bottom of my heart, exactly what I was doing when I took the boat to France."

Prelude – The USS Constitution as Metaphor

"She embodies the national story and tells a thousand stories within that story."

–USS Constitution Museum, on the eponymous frigate

Named by President George Washington, and launched a decade after the Constitution's signing in 1787, the USS Constitution is a living symbol of the United States and of the legal document encapsulating the nation's paramount ideals. The ship was nicknamed "Old Ironsides" during the War of 1812, when it endured grievous blows yet refused to sink, not unlike America itself half a century later during the Civil War. More salient than the frigate of state's numerous victories, though, may be its more hidden history. Almost from the moment of its birth, the USS Constitution has required perpetual restoration; indeed, the ship was under long-term reconstruction when I visited Charlestown in the summer of 2016. Four years before the Great Depression, the vessel faced imminent demise, yet since then into today, ordinary workers and citizens have striven to keep the ship afloat, not unlike their faithful efforts to sustain democratic values they perceive in the USS Constitution's namesake.[1] For Herman Melville, veneration for the vessel concretizing the Constitution fringed upon religious devotion; in *White-Jacket* (1850), Melville observed that naval veterans "carr[ied] about their persons bits of 'Old Ironsides' as Catholics do the wood of the true cross" (12). With diversity and secularity rising in America from Melville's time, "the law, especially the constitution, has been a symbol of national unity as well as of social order" (Morris Cohen, "Justice Holmes and the Nature of Law" 355).

Yet paradoxes abound when considering the original language and subsequent history of the Constitution, beginning with the preamble's declaration by "We the People of the United States." This phrase in theory seems capacious, but in actuality the majority of the population

[1] This historical account of the ship is summarized from David Fitz-Enz's *Old Ironsides – Eagle of the Sea: The Story of the USS Constitution* (2005) and USS Constitution Museum films and placards.

was excluded from full citizenship rights well into the twentieth century, belying the Declaration of Independence's "self-evident" conception of equality.[2] The "Justice," "Liberty," and "domestic Tranquility" aspired for in the preamble have since the Constitution's ratification largely materialized after acute domestic strife. In 1944, at the cusp of the national civil rights revolution and the United States's ascendancy as an international beacon, Gunnar Myrdal famously deemed this tension between lofty democratic principles and practices[3] in the context of "[t]he American Negro problem" as a moral "American Dilemma," which he defined as:

> *[T]he ever-raging conflict between, on the one hand, the valuations preserved on the general plane which we shall call the 'American Creed,' where the American thinks, talks, and acts under the influence of high national and Christian precepts, and, on the other hand, the valuations on specific planes of individual and group living, where personal and local interests; economic, social, and sexual jealousies; considerations of community prestige and conformity; group prejudice against particular persons or types of people; and all sorts of miscellaneous wants, impulses, and habits dominate his outlook.* (xliii)

Starting over half a century before Myrdal and continuing through World War II, writers in two intellectual movements – literary realism and legal realism – forthrightly confronted this dilemma in the wake of Reconstruction's demise (and second rise) and Gilded Age depravities, which were replicated in the Jazz Age.

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[2] Most notoriously, as Herbert Croly related in *The Promise of American Life* (1909), slave codes sanctioned the "legal existence in the United States of an essentially undemocratic institution. The United States was a democracy, and however much or little this phrase means, it certainly excludes any ownership of one man by another. Yet this was just what the Constitution sanctioned" (89).

[3] Myrdal defined "[t]he American democratic faith" as "a pattern of ideals providing standards of value with which the accomplishment of realistic democracy may be judged" (23, qtg. Ralph H. Gabriel's *The Course of American Democratic Thought* (1940) 418).

A Fraught Inheritance narrates these authors' stories, revealing fresh connections between contemporaneous American literary and legal developments while reaffirming the value of principled dissent to preserve the best of what "Old Ironsides" embodies today. Walt Whitman's *Democratic Vistas* (1871) alludes to the project's stakes; he may, characteristically, have been exaggerating when he proclaimed there that "America is really the great test or trial case for all the great problems and promises and speculations of humanity, and of the past and present" (iii). However, the following analysis of modern U.S. literary and legal responses to racial and socioeconomic injustices, which persist in varying forms globally, suggests at least a gossamer of truth underlying Whitman's assertion. As Myrdal memorably mirrored Whitman in describing African Americans' historical plight, it "is but one local and temporary facet of that eternal problem of world dimension – how to regulate the conflicting interests of groups in the best interest of justice and fairness" (67).

Introduction – Literary Realism, Legal Realism, and the Praxis of Equitable Dissent

"When our laws, our leaders, or our government are out of alignment with our ideals, then the dissent of ordinary Americans may prove to be one of the truest expressions of patriotism."

–Barack Obama, Independence, Missouri, June 2008[4]

"[I]t is the writer's function precisely to yell 'fire' in crowded theaters, and we do so, of course, through the form in which we work, and the forms of literature are social forms."

–Ralph Ellison, "Perspective of Literature," 1986

The right to dissent – indeed, the obligation to do so when grave injustices affront the conscience – is ingrained in the American democratic mythos. From the Declaration of Independence and the first reported Supreme Court opinion at the nation's founding (Palmer 677), to Henry David Thoreau's *Civil Disobedience* (1849), Harriet Beecher Stowe's *Uncle Tom's Cabin* (1852), and Justice Benjamin Curtis's dissent in *Dred Scott v. Sandford* (1857)[5] during the years leading to the Civil War, literature of dissent (capaciously defined) has intervened at historical inflection points when the country's existence, and the principles of liberty and equality seen as its touchstone values, have been imperiled. Amidst the Great Recession, then-Senator Obama alluded to a maxim apocryphally attributed to the Declaration's author,[6] notably while in the text's namesake city, to ennoble his presidential candidacy.

Almost a century earlier, during the First Red Scare (1917-21) in the modern epoch this project analyzes, Susan Glaspell's *Inheritors* (1921)[7] portrayed academia as a wellspring of

[4] Quoted in "Fear of a Black President" (Coates 87).
[5] Justice John McLean also dissented, but Justice Curtis's dissent is seen as more cogently refuting the majority's holding that the Constitution categorically excluded African Americans from citizenship (Lively 33).
[6] Thomas Jefferson allegedly avowed that "dissent is the highest form of patriotism" ("Spurious Quotations").
[7] As in this project, inheritance in the drama has multiple, potentially antagonistic valences: first, familial (the protagonist descends from Hungarian immigrants who fled political oppression); second, territorial (the terrain of the nation, with private property ownership entailing public obligations – such as the founding of a public college – in the play); third, intellectual (American Renaissance authors Walt Whitman and Ralph Waldo Emerson are cited as inspirations for the characters); fourth, political (the legacies of President Abraham Lincoln and the Civil War);

principled dissent. In the play, Professor Holden is tarred by a senator as a "radical" un-American for abjuring "fine note[s] of optimism" about the nation in lieu of "a gleam from reality" (94, 107). One of the professor's "peculiar" students (96), Madeline Fejevary Morton, faces imprisonment for defending her fellow Indian students' rights to protest British colonialism, which they glean support for in President Abraham Lincoln's first inaugural address to Congress on the eve of the Civil War.[8] After her uncle denounces her activism, Madeline rejoins: "Well, I'm going to pretend—just for fun—that the things we say about ourselves are true" (117). These "things," "the heritage of us all," include in Richard Wright's words, "that the Constitution is a good document of government, that the Bill of Rights is a good legal and humane principle to safeguard our civil liberties, that every man and woman should have the opportunity to realize himself, to seek his own individual fate and goal, his own peculiar and untranslatable destiny" ("How 'Bigger' Was Born" 451).[9]

Literary realism and legal realism, two roughly contemporaneous dissenting intellectual movements spanning from circa Reconstruction through World War II, can be conceived of as beginning from Madeline's and Holden's premises, explicating the extent of deviation from the American Dream ideals that Wright identified, and recommending how to forge these visions

fifth, legal (hysteria about communist infiltration threatening First Amendment rights); and sixth, ideological (the American Dream, which in Glaspell's text couples individual freedom with the duty to pursue justice for marginalized populations).

[8] The President there presented more moderate and acute methods for political reform: "This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing Government, they can exercise their constitutional right of amending it or their revolutionary right to dismember or overthrow it" (6).

[9] Political philosopher Herbert Croly at the twentieth century's turn conceptualized American democracy not as a mere "piece of political machinery" but, at least practically among citizens at-large, a means for "popular economic, social, and moral emancipation" through the provision of equal rights and opportunities (255, 332). This project adopts Croly's colloquial, expansive understanding of democracy in the United States. Robert Post's more recent article "Democracy and Equality" similarly defines democracy as an autonomous form of government promoting self-determination but theorizes tensions between democracy and substantive equality, given that inequalities may only be rectified to the extent "necessary to maintain democratic legitimacy" (142-43, 153).

into realities.[10] Intellectual movements may be posited as harbingers for a more concrete array of reforms; as political philosopher Herbert Croly proclaimed in *The Promise of American Life* (1909): "Reform must necessarily mean an intellectual as well as a moral challenge; and its higher purposes will never be accomplished unless it is accompanied by a masterful and jubilant intellectual awakening" (185). Both realisms arose from the Civil War's embers with the founding of the "Club" in Cambridge, Massachusetts, during the late 1860s. William Dean Howells, often recognized as the "dean" of American literary realism; Henry James, another seminal figure in the movement; and future Supreme Court Justice Oliver Wendell Holmes, Jr., a progenitor of the legal realist movement that would peak in the twentieth century, were among the attendees at the Club's interdisciplinary monthly soirées (Goodman and Dawson 133).[11]

The Club's emergence occurred not only in the shadow of an existential national crisis, but coincided with philosophical, educational, and legal revolutions. William James (Henry James's brother) and Charles Sanders Peirce inaugurated pragmatism, which emphasizes the practical consequences of hypotheses, at a "metaphysical club" in Harvard during the early 1870s (Hookway). Meanwhile, the Morrill Acts of 1862 and 1890 established nearly ninety land-grant colleges devoted to practical training, increasingly democratizing higher education at a time when access to information was also being democratized with the mass circulation of books

[10] I refer to the word "forging" primarily in the senses of making, framing, or constructing, as well as, more figuratively, "to shape by heating in a forge and hammering; to beat into shape." The term also has the denotation of counterfeiting or fraudulent imitation, i.e., "to make or devise (something spurious) in order to pass it off as genuine" ("Forging"). Linking the idea of forging with national formation, lawyer-author Albion Tourgée in 1879 averred about the Civil War's legacy: "[D]ifferences which have outlasted generations, and finally ripened into war, are never healed by simple victory, . . . the broken link can not be securely fastened by mere juxtaposition of the fragments, but must be fused and hammered before its fibers will really unite" (*A Fool's Errand* 25).

[11] Individual club members were also interdisciplinarians. Holmes was named Class Poet at Harvard (Mendenhall 14), and his namesake father, a physician and poet, had published a proto-realist novel, *Elsie Venner*, in 1861. Like Holmes, Henry James attended Harvard Law School, but for barely a year in 1862-63 before embarking on his literary career (Hazel Hutchison 36). While Howells had no legal training, his novels – including *A Modern Instance* (1882), about divorce, and *An Imperative Duty* (1891), about racial passing – often foreground legal themes.

and periodicals ("Land-grant universities"; Shi 109). The Reconstruction Amendments, which were ratified between 1865 and 1870 and expanded citizenship rights, contemporaneously marked a "constitutional moment" (Ackerman).[12] For trailblazing African American civil rights attorney Charles Hamilton Houston, the amendments "formalize[d] the great moral issues underlying the Civil War" (qtd. in Andrews 107). Sociologist Gunnar Myrdal in *An American Dilemma* (1944) recognized the idealistic and realistic import of such legal transformations in averring that Americans have historically invested in "their institutions . . . more than their everyday ideas which parallel their actual behavior. They have placed in them their ideals of how the world rightly ought to be. The ideals thereby gain fortifications of power and influence in society. This is a theory of self-healing that applies to that type of society we call a democracy" (80).

Democracy's legal reconfiguration had ripple effects on discursive practices; "[t]he Constitutional text is the catalyst for our construction of a wider complex of vocabularies and rhetorics through which we carry on our political battles" (Robert Weisberg, "Law and Literature Enterprise" 66). Howells and other intellectuals in this regenerated legal and cultural milieu composed texts expressing views that would later come to be associated with literary realism and legal realism, a form of legal modernism.[13] These thinkers distrusted "received ideas or absolute

[12] Ackerman has hypothesized that Reconstruction was the second major "constitutional moment" after the founding (to be followed by the New Deal era and the civil rights movement); his trilogy *We the People* dissects each of these cardinal legal moments. The Thirteenth, Fourteenth, and Fifteenth Amendments in theory dramatically expanded Americans' civil and political rights by abolishing slavery, extending citizenship rights and privileges (under the equal protection, due process, and privileges and immunities clauses), and enfranchising men of color.

[13] Based on this understanding of legal realism as a modernist approach to law, Daniel Kornstein argues that literary modernism, and not literary realism, is the aesthetic movement most analogous to legal realism (*Unlikely Muse* 135). While this project does not scrutinize literary texts typically classified as modernist in depth, it questions Kornstein's conclusion that literary realists' seemingly conventional use of language signaled their traditionalism relative to literary modernists. That noted, literary modernists shared certain assumptions with legal realists, including a loss of confidence in disciplinary orthodoxy and "a heightened awareness that all our beliefs and routines are conditioned by background presuppositions, coupled with a dismaying realization that those presuppositions may well be arbitrary" (see Luban 11). The social sciences particularly contributed to this sense of ontological and epistemological destabilization for both groups (see Katharina Schmidt 134). Literary modernists and legal realists

standards," particularly when such avowals conflicted with how they perceived dynamic legal and social realities. Legal realism's credo, assuming it had one, came from Holmes's 1881 declaration: "The life of the law has not been logic: it has been experience" (*The Common Law* 1).[14] Literary realists professed equal fidelity to experiential facts; Howells defined literary realism as "nothing more and nothing less than the truthful treatment of material," and he enjoined authors to "[l]et fiction cease to lie about life; let it portray men and women as they are" (*Criticism and Fiction* 73, 104). Many realists also believed "in practical social engineering" to engender social inclusion (see Goodman and Dawson 134).[15] Numerous literary realists directly linked their aesthetic practices to democracy, with Howells limning literary realism as "[d]emocracy in literature" (*Criticism and Fiction* 187).[16] Later, in "The Living Law" (1916), Supreme Court Justice Louis Brandeis heralded "'[d]emocracy and social justice'" as the new "American ideal of government" but bemoaned the rupture he discerned between progressive "social justice" movements and a lagging "legal justice" (461, 463).

Economic and racial oppressions were among the foremost derogations from democratic ideals that legal and literary realists underscored at the movements' inceptions, affirming Robert Cover's theory that "the subject matter of constitutional interpretation is violence" ("Bonds of

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also used "the characteristic methods of a discipline to criticize the discipline itself" (Clement Greenberg, qtd. in Luban 11).

[14] While frequently cited to the textbook, this acclaimed line was originally published in an 1880 book review Holmes penned that critiqued a legal casebook's emphasis on logic ("Book Notices" 234).

[15] David Shi argues that "'[t]he most conspicuous social ideal promoted by American realists was the creation of a more democratic culture" by "secur[ing] a common cultural ground uniting an increasingly diverse and fractious public" (7). In a passage evocative of the inclusionary social vision in Dr. Martin Luther King, Jr.'s "I Have a Dream" speech (1963), Howells wrote of his hope for a society where a man "is valued simply and solely for what he is in himself, and where color, wealth, family, occupation, and other vulgar and meretricious distinctions are wholly lost sight of in the consideration of individual excellence" (qtd. in Shi 105-06); Dr. King aspired "that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character" (5).

[16] Future President Theodore Roosevelt was among those emboldened to champion democratic ideals upon reading Howells's fiction. Roosevelt described himself as part of "the generation whose youth was profoundly influenced by Howells's books," which "helped us toward a spirit of kindliness and justice in dealing with our fellows, and stirred our souls to the strife for national ideals" (qtd. in Shi 125).

Constitutional Interpretation" 819). Combating these injustices then became the "cultural work"[17] of the narratives composed by the authors this project focuses on, who may be termed second or third generation literary realists. Both realisms had patrician roots, and Howells's and James's fiction has been criticized for its absorption with bourgeois lives and concentration on individual versus structural critiques (Shi 123-25). By the turn of the twentieth century, however, literary realism started to reflect the reading public in becoming more democratized;[18] authors increasingly began to depict underclass Americans living at the nexus of the Gilded Age (circa 1873 to 1900) and the Jim Crow era (from the 1880s to the 1960s),[19] with characters' subjection attributed to corrupt systems. Law loomed largely in many of these and later realists' novels, which rendered legal travesties ranging from criminal trials to Supreme Court cases. Meanwhile, restiveness about the legal system's democratic shortcomings catalyzed the legal realist movement, which Grant Gilmore described as "the academic formulation of a crisis through which our legal system passed during the first half of this century" ("Legal Realism" 1037).

[17] Jane Tompkins's *Sensational Designs: The Cultural Work of American Fiction, 1790–1860*, endorses a context-specific assessment of literary texts, "see[ing] them as doing a certain kind of cultural work within a specific historical situation, and valu[ing] them for that reason" as opposed to for their conformance with (modernist) aesthetic criteria that privilege texts "attempt[ing] to achieve a timeless, universal ideal of truth and formal coherence." The texts Tompkins's monograph analyzes, much as the ones this project concentrates on, provided American society at the time "with a means of thinking about itself, defining certain aspects of a social reality which the authors and their readers shared, dramatizing its conflicts, and recommending solutions" (200). These literary texts should be conceived of as interacting dialectically with their context as opposed to exclusively reacting to it; the texts respond to but also constitute their milieu (see Michael Davitt Bell 2-3).

[18] More democratized does not entail absolute democratization, however. Many literary realists still occupied a relatively privileged position in relation to the underclass characters their texts depicted, with the works "elaborat[ing] new forms of intellectual prestige" (Barrish, *American Literary Realism* 3). Additionally, publishing demands constricted literary realists. In 1901, Mark Twain wrote about living in "The United States of Lyncherdom," but his essay remained unpublished until 1923 and did not appear unedited until 2000 because of its explosive content (Blount 53). Literary realists were thus positioned and constrained in similar ways as legal realists, most of whom held prominent positions in academia or the judiciary and were also bound by professional norms.

[19] Mark Twain, another literary realist, introduced the term "gilded age" in the title of his 1873 novel (co-authored with Charles Dudley Warner) *The Gilded Age: A Tale of Today*. The phrase is derived from a passage in William Shakespeare's *King John*: "To gild refinèd gold, to paint the lily, / . . . / Is wasteful and ridiculous excess" (137). Jim Crow was a highly exaggerated black character serving as shorthand for a collective racial epithet in the antebellum period, particularly with the rise of minstrel shows in the 1820s, but the phrase was subsequently associated with laws constricting African American rights ("Jim Crow Laws").

Although not always in intentional or explicit dialogue with legal realist texts,[20] the texts of the literary realists assayed in this project are suffused with legal realist understandings of law as a tool of social control, as opposed to a set of longstanding precepts. From this perspective, unjust laws assuming forms like Jim Crow legislation, judicial decisions buttressing laissez-faire capitalism, and capricious criminal justice system practices could be deemed ripe for reform, along with the society in whose stead the laws were decreed.[21] Intersections of literary realism and legal realism in these legal fields, which frequently involve interpreting the Fourteenth Amendment's equal protection or due process clauses, constitute this project's core. Through the ray of this Amendment, *A Fraught Inheritance* illuminates literary and legal realism's largely unrecognized intertwinings beginning from Howells's salon in the Civil War's wake up to the Supreme Court's decision in *Brown v. Board of Education* (1954), which legally desegregated public education, before reflecting on the movements' contemporary resonances.[22]

The proceeding section will discuss the project's convergences with and divergences from literary and legal scholarship evaluating the realisms as well as kindred law and literature criticism. Subsequently, I will conceptualize the terms "dissent" and "spectacle," the latter being an oft-critiqued popular cultural phenomenon that also implicated a perfunctory mode of

[20] This project does not always posit direct causal connections between the realisms; as Mitchell Meltzer judiciously concedes in his study of the links between the Constitution and classic American literature: "Unfortunately, as is so often the case when attempting to find a nexus between complex social conditions and any activity – literary or otherwise – demonstrating such correlations and suggesting the likelihood of possible linkages is often the closest we can get to such a mechanism" (95).

[21] The fiction accordingly reflects an integration of the "'is,'" "'ought,'" and "'what might be,'" to quote Robert Cover in "*Nomos* and Narrative," which theorizes narrative's function in constructing a normative universe (10).

[22] As Wai Chee Dimock suggests in *Residues of Justice* about the cultural work of historical texts in the present:

> Engaging the text not as part of a *concluded* whole – not as a piece of cultural work that has already served its purpose, that has meaning only in reference to the past – we might instead want to think of it as an evolving cluster of resonances, its semantic universe unfolding in time rather than in space, unfolding in response to the new perceptual horizons that we continue to bring to bear upon it that never cease to extend to it new possibilities of meaning. The accumulating resonances of a text, its subtle but non-trivial shifts in nuance and accent, are a tribute, then, to the socialness of language, to the unending conversations of humanity over time. (78-79)

comprehension for literary and legal realists. A theorization of literary realism, literary naturalism,[23] and legal realism will follow, providing the bedrock for my analysis of the synergies and tensions between literary and legal realism as well as my appraisal of the movements' respective deficiencies. The project's main body will then be presented as a series of case studies of complementary literary realist and legal realist texts that exemplify and nuance my conceptual framework. Ralph Ellison's observation of forms of literature (and here I include legal texts manifesting literary qualities[24]) as "social forms" with vital warning functions will be evidenced across these diverse works, and it is befitting for this project that Ellison's assertion nods – albeit with a crucial omitted qualifier[25] – to forefather legal realist Justice Holmes.

Fostering a Democratic Disciplinary Conversation

As an interdisciplinary undertaking, *A Fraught Inheritance* intervenes in several debates across literary studies, law, and law and literature. The project most directly dialogues with scholarship about the relationships between the realisms, conceptualizing the movements' conjunctions and disjunctions in greater depth than prior treatments. Moreover, the project intercedes in lines of scholarship assessing the realisms' ostensible infirmities and virtues; I acknowledge the intellectual movements' deficiencies but side with critics who have sought to recuperate the movements since their respective apogees. The project additionally advances novel claims in the law and literature subfield analyzing how citizenship has been figured in the

[23] Which, as discussed below, has been contrastingly postulated as a subset of literary realism and as a distinctive, rawer literary movement in reaction to literary realism's perceived fastidiousness.

[24] For example, judicial opinions can be envisaged as narratives presenting "a social conflict and its resolution" (Mertz 370), with canonical court decisions proclaiming governing stories about the nation's history (Balkin 688). Lewis LaRue's *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority* analyzes the rhetoric in several landmark Supreme Court opinions to support the claim in his monograph's title.

[25] Writing for a Supreme Court majority in *Schenck v. United States* (1919), which upheld several socialist defendants' convictions under the Espionage Act of 1917, Justice Holmes pronounced: "The most stringent protection of free speech would not protect a man in *falsely* shouting fire in a theatre and causing a panic" (52) (emphasis added). Madeline in *Inheritors* faces prosecution for violating this statute in defending Indian students' First Amendment rights.

disciplines, particularly in light of postbellum legal and social developments. Most expansively, the project affirms the value of the interdisciplinary venture itself following critical pushback.

Connections between literary and legal realism have not gone wholly uncharted; however, a detailed theorization and applied explication of the relationships between the realisms is absent from extant scholarship. Scholarship detecting links between the realisms has generally taken one of two approaches: a relatively cursory or suggestive theorization of the realisms' affinities or a focus on how specific literary realist texts exemplify legal realist conceptualizations of law (without a broader theorization of the relationships between the realisms).[26] This project contrastingly balances close reading with a more wide-ranging perspective that reveals the realisms' theoretical ties and points of distinction.

Stemming from both realist movements' relatively privileged origins, a robust body of scholarship has censured the realisms on ideological grounds. Critiques have centered on realists' perceived renouncement of idealism and morality as well as their complicity in upholding the very status quo they professed to abhor.[27] Literary realism confronted these charges first during the late nineteenth century, with lawyer-author Albion Tourgée's "The Claims of 'Realism'" (1889) exemplifying the "idealist" response to literary realism's focus on

[26] Works in the first category include Jay Martin's *Harvests of Change: American Literature, 1865–1914*; David Shi's *Facing Facts: Realism in American Thought and Culture, 1850–1920*; William Moddelmog's *Reconstituting Authority: American Fiction in the Province of Law, 1880–1920*; Allen Boyer's "Formalism, Realism, Naturalism: Cross-Currents in American Law and Letters"; and James Hopkins's "The Development of Realism in Law and Literature During the Period 1883–1933: The Cultural Resemblance" (which was written in 1933 but published half a century later). In addition, like Shi's monograph, Vernon Parrington's *The Beginnings of Critical Realism in America* evaluates realism interdisciplinarily; however, Parrington neglects to mention law. Theodore Dreiser's and Richard Wright's fiction has attracted scholars concentrating on how particular literary texts apply legal realist tenets. Examples of such scholarship in my second category include John McWilliams's "Innocent Criminal or Criminal Innocence: The Trial in American Fiction"; Donald Pizer's "Crime and Punishment in *An American Tragedy*: The Legal Debate"; and Trinyan Mariano's "Legal Realism and the Rhetoric of Judicial Neutrality: Richard Wright's Challenge to American Jurisprudence."

[27] Kenneth Warren avers that "one consequence of connecting literary styles and social change is that social criticism becomes implicitly, and often explicitly, literary criticism, leaving fiction itself vulnerable to questions about its complicity in maintaining the very order it seeks to challenge" (2).

unpalatable facts. Tourgée questioned literary realism's truth claims and decried the genre's lack of "hope, aspiration, and triumph," virtues he associated with a noble view of life (386). Legal realists confronted almost identical indictments, with their contemporary Felix Cohen perhaps presenting the most potent case against legal realism on moral grounds. Cohen identified "the lack of any definite criterion of importance which will dictate which of the infinite consequences of any legal rule or decision deserve to be investigated" as at the root of the movement's apparent failure. For him, only an ethical system could proffer such a criterion, yet Cohen argued that no advocates of legal realism believed in such a system or were willing to speak openly about it ("Review" (Ogden) 1150-51). Delay in addressing this pivotal axiological problem was for Cohen equivalent to repudiating the issue of values altogether ("Transcendental Nonsense" 848).[28]

Even more vigorous than critiques of the realisms on idealism and morality grounds have been complicity reproofs alleging that realists paid mere lip service to the cause of upending an unjust status quo. New Historicists like Amy Kaplan[29] and Marxist critics like Frederic Jameson have sought to dislodge the understanding of literary realism as "a progressive force exposing the conditions of an industrial society"; instead, they have claimed that the movement "turned into a conservative force whose very act of exposure reveal[ed] its complicity with structures of power" (Kaplan 1). For Jameson, authors who adopted the form of the realist novel signified their "professional endorsement of the status quo," as the texts' dedication to representing the

[28] Holmes and prominent high period legal realist Karl Llewellyn had both advised separating moral and legal concerns for preliminary analytical purposes (Holmes, "Path" 458; Llewellyn, "Some Realism about Realism" 1236), and several legal realists apparently followed their counsel, which came to be seen as an increasingly untenable position during fascism's rise and the eruption of World War II (Zaremby 95-97).

[29] Kaplan discusses how such revisionary "[h]istorical perspectives hold that the textual production of reality does not occur in a linguistic vacuum; neither is it politically innocent, of course, but always charged by ideology – those unspoken collective understandings, conventions, stories and cultural practices that uphold systems of power. These approaches situate realistic texts within a wider field of what has been called 'discursive practices'" (6).

present in an established genre enabled realists to avoid scrutinizing deeper systemic problems (145, 215). Or more bluntly, for these critics: "[R]ealism's humanitarian impulse is complicit from beginning to end with the economic project of U.S. capitalism" (Morgan 10).

Legal realists confronted similar charges of countenancing unjust realities, with Felix Cohen raising "the basic ethical issue between realism as a defense of the *status quo* and realism as a technique of social criticism" ("Review" (Arnold) 164). Legal realists in general supported traditional premises of liberal democracy and capitalism, even as they excoriated these systems' pathological functioning. This position is not startling for a group that navigated the systems into the upper echelons of academia,[30] the judiciary, and the executive branch. Marxist scholar Alan Hunt in the 1970s also foreshadowed Kaplan and Jameson's critiques of literary realists in arguing that legal realism implicitly provided "an account that carries conviction as its basis for the legitimation of law in mass political democracies"; for Hunt, legal realists espoused a "bourgeois democratic model" as a "domain assumption" (135, 138, 143). While Hunt allowed that "[c]ertainly the majority [of legal realists] would have wished to tip the fulcrum of the social equilibrium towards the disadvantaged, whether it be labour, the poor or the ethnic minorities, . . . none of them challenged the ability of the capitalist social system to resolve these problems" (48).

Recuperatory scholarship on the realisms – which I consider this project within the ambit of – has sought to rebut the contentions of amorality or a paucity of idealism as well as complicity. On the former issue, scholars have recognized the value of revisionism even absent an affirmative program and maintained that the realist groups upheld ideals. Everett Carter's

[30] As legal realist Thurman Arnold observed with characteristic candor, "Scholarship has its own capitalistic system and thousands of earnest and industrious men are dependent on it for both prestige and income" ("Jurisprudence of Edward S. Robinson" 1828).

defense of Howells, for instance, asserted that realism was a precondition to purposeful idealism (103). Where realists diverged from idealists was in decrying "the demonstrably unattainable"; as legal realist Jerome Frank averred, "What the law ought to be constitutes, rightfully, no small part of the thinking of lawyers and judges. . . . But there is a nice difference between ideals (or 'oughts') and illusions" (*Law and the Modern Mind* 168). Howells himself conceded the limits of realism as a purely descriptive technique absent a normative compass, declaring: "When realism becomes false to itself, when it heaps up facts merely, and maps life instead of picturing it, realism will perish too" ("Editor's Study" 973). He ultimately avouched that "[m]orality penetrates all things, it is the soul of all things" (*Criticism and Fiction* 83).

My project will corroborate these defenses in demonstrating how the realisms had a social justice agenda which realists promoted as pragmatic, as opposed to transcendent, idealists.[31] Although passages in their texts can be construed as enjoining value relativism, realists in practice usually subscribed to a "commonsense humanis[t]" utilitarian philosophy in which "happiness follows when we have pursued the course that will make for the most well-being for the most people" (Carter 165) or a form of "democratic individualism with changing content" (Alan Hunt 43). Legal realists, for example, in large part masterminded the New Deal (Curtis 158-59), and many literary realists were involved in labor reforms and the early stages of the civil rights movement. While realist texts as a whole emphasized problematizing rather than reconstructing reality and their axiology overall could have been more refined, the movements had key offsetting merits that sharply critical scholarship has underplayed.

[31] Holmes claimed that "artists and poets, instead of troubling themselves about the eternal, had better be satisfied if they can stir the feelings of a generation" ("Law in Science" 443). Frederic Carpenter's *American Literature and the Dream* traces the kinships between earlier generation idealism and Holmesian pragmatism (83-93).

Complicity critiques are also not entirely unfounded; realists' life experiences may have contributed to limiting their perceptions of reality. Acceding to this claim should nonetheless not ineluctably lead to the dismissal of the realists as traitors to the cause of social justice. The verbal legerdemain of reclaiming the term – complicity's Latin root denotes to "weave together," as in a "partnership with mankind" – is a possibility (Kolb 53, note 43). More substantively, complicity is a perplexing question of degree and kind; labeling a text (including this project, as a work of institutional scholarship) as complicit in the pejorative sense of a criminal accomplice is valueless absent further interrogation. Complicity should be considered to exist conceptually along a moral spectrum, with any given text, including the ones I dissect here along with this project, participating in a complex "dialectic between the promise of democratic humanitarianism and the experience of democratic complicity that shapes gender [along with race and class], citizenship, and social ethics in the modern United States" (Morgan 15).

Additionally, given that I construe literary realism and legal realism as dissenting movements, albeit not radical ones, against an unjust status quo, the complicity critique may be mitigated in this context. My project can moreover itself be envisaged as participating in a dissenting movement[32] as well as a broader scholarly enterprise attentive to the "politics of interpretation." The term has acquired a pejorative connotation among some scholars; to deem literature and law political pursuits seems to collapse analytically beneficial disciplinary boundaries entirely. However, to claim that a given text has political qualities or ambitions is not necessarily to assert that it is exclusively a political text; "Human activity [is] always political, if not *only* political" (Pfister 615, qtg. Richard Ohmann). Joel Pfister in "Complicity Critiques" (2000) thus advocates for a more "politically self-conscious literary cultural studies" that

[32] Michael Pantazakos characterizes the law and literature movement as a mode of "counter-jurisprudential" or "rebellious humanism" (40).

> might rethink its objectives not just as literary inclusion studies or meaning production studies or historicizing studies or complicity studies but as a revitalized and pragmatic *agency studies* that is capable of reconceiving the transformative power of cultural affirmation. It is crucial to focus not only on how culture contains, incorporates, or prevents progressive social change, but on how literature and literary studies may help spark the social agency that will attempt social transformation in inventive, egalitarian, and democratic ways. (624)

The texts this project analyzes endeavored to kindle the agencies that could creatively and equitably generate social transformations, and while I only imperceptibly presume to do the same, I hope that my project will sound powerfully in its own quiet way.

A Fraught Inheritance joins in a recent burgeoning of "politically self-conscious literary cultural studies" scholarship that has scrutinized the affiliations among law, literature, and the formation of American democracy.[33] In certain respects, the project can be viewed as a successor volume to Deak Nabers's *Victory of Law: The Fourteenth Amendment, the Civil War, and American Literature, 1852–1867* (2006). Nabers's monograph interrogates how American Renaissance literature engaged critically with the political and legal debates culminating in the ratification of the Fourteenth Amendment; my project narrates a literary-legal account of the

[33] Aside from the scholarship discussed next, Andrew Hebard's *The Poetics of Sovereignty in American Literature, 1885–1910* and Mitchell Meltzer's *Secular Revelations: The Constitution of the United States and Classic American Literature* have thematic and methodological parallels with my project. Of especial significance, Meltzer conceives of an "unstated constitutional poetics" influencing American literature (5). The vexed relationship between citizenship and race in the context of law and literature has especially engrossed scholars and frames this project (chapter one and the coda). Monographs from this millennium on the subject include Karla FC Holloway's *Legal Fictions: Constituting Race, Composing Literature*; Gregg Crane's *Race, Citizenship, and Law in American Literature*; Beth Piatote's *Domestic Subjects: Gender, Citizenship, and Law in Native American Literature*; Jon-Christian Suggs's *Whispered Consolations: Law and Narrative in African American Life*; Jeannine Marie DeLombard's *In the Shadow of the Gallows: Race, Crime, and American Civic Identity*; Carlyle Van Thompson's *Black Outlaws: Race, Law, and Male Subjectivity in African American Literature and Culture*; and Khalil Gibrain Muhammad's *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America*.

amendment's post-ratification history. Brook Thomas's *American Literary Realism and the Failed Promise of Contract* (1997) continues temporally from Nabers's book and cross-examines literary realist and legal texts to establish contract law's failure to provide an equitable basis for social relations in the Civil War's aftermath. My project suggests constitutional law initially failed to do the same, but by extending the period of investigation through World War II, I espy threads of interwoven literary and legal realist dissents abetting the mending of American democracy.[34] Hence, while Robert Ferguson's *Law and Letters in American Culture* (1984) mourned the splintering of the disciplines during the late antebellum years,[35] this project contrastingly evidences a telling, albeit oblique, concordance between the disciplines postbellum.

A Fraught Inheritance finally recognizes disciplinary disparities but attests to the continued intellectual vibrancy of the long law and literature movement,[36] which has been seen to originate during the project's epoch with John Henry Wigmore's 1908 list of legal novels.[37] The movement has arisen in part from law and literature's congruity as social practices based in language: "[L]aw and literature attempt to shape reality through language, use distinctive methods and forms to do so, and require interpretation" (Gewirtz 4). Articulated with this degree

[34] Brook Thomas's *Civic Myths: A Law-and-Literature Approach to Citizenship* delineates literature's role in this amelioration process.

[35] So deeply were they imbricated, Ferguson contended, that the Constitution can be construed as a literary document (*Beyond Law and Literature* 17). Eric Slauter's *The State as a Work of Art: The Cultural Origins of the Constitution* expounds on this claim.

[36] Whether the interdisciplinary field exists as such is contested (Baron 1062), and James Boyd White argued that law and literature scholars should espouse "no manifesto" in an eponymously titled article. A scholarly "movement" has been defined as "a cohesive tendency working in conscious collaboration with shared objectives" (Alan Hunt 2). Neither law and literature scholars, nor literary realists or legal realists, consummately satisfy these criteria – particularly of cohesiveness – but the realists assayed in this project nonetheless had significant commonalities, and many law and literature scholars harbor similar goals of incorporating insights from the humanities to illumine law as a social practice. Accordingly, I will continue referring to legal realism, literary realism, and the law and literature field as "movements" while recognizing the slipperiness of the term in these contexts.

[37] Wigmore defended lawyers' perusing literature for professional insights, discussing realist authors Charles Dickens and Honoré de Balzac at length. Wigmore found "the institutional abuses of contemporary life pictured in novels here and there with a realism which makes them almost appendices to the law books" and noted the "great movements of legal reform" "aided or reflected" in novels (577).

of abstraction, Paul Gewirtz's claim appears cogent; however, scholars have noted disjunctions between the disciplines at a more concrete level,[38] leading to skepticism about the value of the interdisciplinary enterprise.[39] Law, for example, while like literature open to interpretation, is less receptive (in fact, one may argue positively hostile) to irresolution. Moreover, as Robert Cover piercingly pronounced: "Legal interpretation takes place in a field of pain and death" ("Violence and the Word" 1601) in which literature intervenes, if at all, largely indirectly. Despite these integral disciplinary differences, law and literature scholarship has flourished, perhaps because, as Peter d'Errico averred over four decades ago, a humanistic approach to law constitutes "a search which is a praxis." The hybrid field for d'Errico offered the promise of optimally balancing reflection and activity, "so that we are neither academics separated from the 'real' world, nor 'activists' cut off from the process of inquiry and education" (58).

Interdisciplinarianism as a means of more accurately apprehending reality is another key impetus for many law and literature scholars, adding a meta-textual layer to this project. Critics, though, have questioned this emphasis, with Julie Stone Peters asserting that instead of seeking an ever-elusive real in the other discipline,[40] law and literature scholars should scrutinize the terms and consequences of interdisciplinarianism (451). An inquiry along these lines may probe the "complex and slippery historical interactions" of the disciplines[41] "that shape and are shaped

[38] Mark Kingwell's "Let's Ask Again: Is Law Like Literature?" and Anat Rosenberg's "Separate Spheres Revisited: On the Frameworks of Interdisciplinarity and Constructions of the Market" explicate but also complicate these disciplinary disparities.

[39] Most prominently, the debate between Judge Richard Posner, who claimed literature's limited utility for law in *Law and Literature: A Misunderstood Relation* (1988), and Richard Weisberg (among other scholars), who forcefully disputed Posner's assertions (see Richard Weisberg, "Entering with a Vengeance").

[40] "Law seemed, to the literary scholar, longing for the political real, a sphere in which language made things happen. Literature seemed, to the legal scholar, longing for the critical-humanist real, a sphere in which language could stand outside the oppressive state apparatus, speaking truth to the law's obfuscations and subterfuges" (448).

[41] Similarly, Robert Weisberg has advocated for scholarship on the "constructively mutually subversive relationship between the disciplines," an approach which can in turn subvert "the *apparent* structure of a culture" (3). My approach in the project synthesizes "narrative jurisprudence," which employs literature to critique jurisprudence, and "literary jurisprudence," which uses literature to ascertain law's meanings and values (Minda, *Postmodern* 155).

by an everchanging cultural idiom of justice" (Gregg Crane, "Path" 759, 773).[42] Ultimately, approaches like those that Peters and Gregg Crane commend may proceed beyond the exhausted supposition of literature automatically providing a more "accurate view of human nature than non-literary discourse" like law (Robert Weisberg, "Law and Literature Enterprise" 22).[43]

Disciplinary similarities may be brought into sharper focus by projects like this one assaying the oppositional tradition in each discipline, as contrasted with the more common analytical approach casting law as an authoritative force that socially apperceptive literature labors to resist. The concept of "legal fictions" is especially instructive in negotiating the disciplinary divide.[44] Legal fictions, such as the "supreme fiction" of the legal system's justice, are necessary for law's functioning but can also create conundrums in specific instances by "forc[ing] upon our attention the relation between theory and fact, between concept and reality, and [by] remind[ing] us of the complexity of that relation" (Fuller, *Legal Fictions* viii-ix). Fictionality in law is evidenced as well through hypotheticals that are used to gauge the scope of rules; the realist fiction I scrutinize can be considered as a protracted hypothetical exercise vis-à-vis law that dramatizes the human consequences of legal enactments.

Through its interdisciplinary approach meshing law, literature, and history, this project most decisively seeks to actualize law and literature movement founder James Boyd White's theory of "integration."[45] In *Justice as Translation* (1990), White pondered:

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[42] His essay's title here – "The Path of Law and Literature" (1997) – may allude to Oliver Wendell Holmes, Jr.'s touchstone legal realist address "The Path of the Law" from exactly a century earlier.

[43] Gregg Crane has comparably contended: "[T]he law and literature interaction is neither always a simple matter of positivistic law being corrected by progressive and humane literature nor always a matter of clear rationalistic legal precedents being complicated by ambiguous and paradoxical literature" ("Path" 767).

[44] Legal scholarship in the modern period often defended or critiqued "legal fictions," which Oliver Mitchell defined as "device[s] for attaining a desired legal consequence, or avoiding an undesired legal consequence" (253). Legal fictions may conceal actual alterations in a rule of law while purporting to adhere to the law's letter and can include "assertion[s] that certain facts do or do not exist, contrary to the truth of the matter" (Oliver Mitchell 253, 262).

[45] White's textbook *The Legal Imagination* (1973) is commonly identified as the fountainhead text for the law and literature movement (Pantazakos 39), and it was intended to infuse law students with an awareness of their

> What might it mean to integrate, to put together in a complex whole, aspects of our culture, or of the world, that seem to us disparate or unconnected, and in so doing, to integrate, to bring together in interactive life, as aspects of our own minds and beings that we normally separate or divide from each other? What kind of lives could we make for ourselves, what kind of communities with others? (12)

Integration for White is "an image not only of intellectual but of social and political life as well, a way of thinking about the relations between people and races and cultures as well as departments or fields" in furtherance of a "democratic conversation" (21, 101).[46] Doug Underwood's *Journalism and the Novel* (2008), which also grapples with the multiplex relationships between so-called "real world" discourse and fiction, is a felicitous example of scholarship inviting such a conversation. Underwood there articulates "the potential for a hybrid form of scholarship that mirrors the hybrid nature of much journalistically influenced literature," and his monograph delineates the cross-pollination between those discursive fields (13). Given their deep engagement with legal realism, the literary realist texts evaluated in this project are well-suited for such a scholarly concatenation. At its best, this approach offers the prospect of elucidating the distinctively "*literary* quality of literary works" (see Michael Davitt Bell 2) while

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discipline's human side (Peters 444). On a personal digression, like White (but as a student, not a professor), I bounded across the University of Chicago's Midway, which separated the law school and the English department, as if geographically traversing the disciplinary divide (see Minda, "Cool Jazz" 171).

[46] White clarifies that his conception of "integration" is to be distinguished from "merging," as of disciplines. Of prospective integrators, White advises:

> We would put ourselves, in short, in the position of translators, those who know that what is said in one language cannot simply be set over into another without loss or gain and who therefore conceive of their task as the creation of a new composition that will establish mutually respectful relations between them. To do this we need to find ways to hold in our minds at once different vocabularies, styles, and tones – different discourse systems – not to merge them but to integrate them, that is to place them in balance with each other, in order to make, in our talk and our teaching and in our writing, texts that have some of the life of poetry. (*Justice as Translation* 20)

White conceives of translators as culturally marginal but exemplary figures, explaining: "And what can I possibly mean when I suggest that the translator, who suffers this apparent loss (by duplication) of self and voice, can become a model for the rest of us, especially for lawyers and judges? The translator by circumstance inhabits the margins of culture, the lawyer the center, or so it may seem" (*Justice as Translation* 232).

combining discursive systems or practices "in such a way as to make a third that transforms our sense of both" (James Boyd White, *Justice as Translation* 21), such as what I call the recombinant jurisprudential poetics of my equally rigorous literary and legal project.[47]

Richard Wolfson's "Aesthetics in and about Law" (1945) indicates the expansive implications of my inquiry for both law and literature: "A broad study of legal art and literature might well throw light on the 'outsider's' view of law as a pattern, aesthetic or no, and perhaps on comparative relationships of art to society and society to law" (38). Wolfson encouraged scholars to consider kinships between stylistic periods in law and the arts,[48] and he postulated that "[i]f some continuing connection between artistic and legal style-periods is found, law can once again be looked upon as a community endeavor and its function in the community existence more fully comprehended" (47). I would tweak Wolfson's observation to add literature's communal functions, with the tentative fusion of the disciplines – as in my evaluation of literary realism and legal realism here – facilitating the decoding of the "constitutive rhetoric" (James Boyd White, *Heracles' Bow* 28) through which we fathom both heartening and disconcerting realities.

[47] As James Boyd White avouches: "Any meaningful comparisons must take place by a process of translation that is based upon rather full knowledge of the practices that define each community, and this at the level of particularity and not merely that of theory or technique" (*Justice as Translation* 15).

[48] However, he cautioned that an "absolute correlation" would not necessarily be found, given law's grounding in precedent resulting in a time-lag when responding to cultural developments (47). Writing in 1942, former Yale Law Dean Charles Clark perceived a connection between the realisms, though perhaps because of legal realism's privileging of the social sciences Clark declined to delve into the issue: "One may venture the thought that a somewhat similar gain in frankness and directness may be found elsewhere, as for example, in literature; but these are probably waters in which a lawyer should not venture" ("The Function of Law in a Democratic Society" 396). Julie Stone Peters contends that legal realism's deification of the social sciences helped birth the law and literature movement: "If earlier in the century legal realism had attempted, with the help of the social sciences, to bring social reality to law as an antidote to legal formalism, the humanist realm of law and literature was to serve as an antidote to the sterile technicality of the social sciences" (444).

Literary and Legal Realist Dissents as Modes of Epistemological Challenge

"Dissent," from the Latin verb *dissentire* ("to differ in sentiment"), assails "existing customs, habits, traditions, institutions, or authorities" (Collins and Skover xv; Shiffrin xi). Catherine MacKinnon pinpoints dissent's essence as "confronting power" or "structures of domination" (qtd. in Collins and Skover 113). Dissenters, such as the literary and legal figures in this study, can be seen to occupy liminal positions vis-à-vis power structures; for instance, they may affirm their commitment to the Constitution's transcendence but deplore current realities (see Sarat 3). Dissenters particularly aim to unsettle conventional means of seeing (or not seeing) reality, as Supreme Court Justice William Brennan, Jr., once indicated. Explaining what he sought to accomplish in his dissenting opinions, Justice Brennan quoted Joan Didion's justification for writing: "'*listen to me, see it my way, change your mind*'" (48). While dissent is not inherently a salutary act, conscientious dissents can "'give[] sight to the blind'" and "'heal institutional blindness'" (Collins and Skover 133, qtg. Paul Toscano), promoting enlightened social and constitutional developments by encouraging those who read them to see anew.[49]

The efficacy of landmark judicial dissents has been attributed in part to their personal, quasi-literary voices, as dissenting judges are not constrained to speak on behalf of an institutional body expounding a rule of law for a polity. Describing his paradoxical attitude toward filing dissenting opinions, Judge Robert Flanders alluded to Marianne Moore's "Poetry" in this quotation suggesting how dissenting opinions may employ creative rhetoric and articulate unwelcome truths: "'I, too dislike it: there are things that are important beyond all this fiddle. Reading it, however, with a perfect contempt for it, one discovers in it, after all, a place for the

[49] Donald E. Lively's *Foreshadows of the Law: Supreme Court Dissents and Constitutional Development* supports this assertion by tracing how Supreme Court dissents have affected the evolution of constitutional law. Dissents can also propel action in the form of a "political transformation" by "disrupting the complacency of polite society, which believed it and its members were materially unaffected by what was going on around it" (Burgess 212).

genuine'" (401). Justice Brennan believed that the most enduring judicial dissents "at their best, straddle the worlds of literature and law" in espousing a compelling constitutional vision (431). From this view, which applies Benjamin Cardozo's influential argument about the artistry of memorable judicial opinions in "Law and Literature" (1925) to the dissent context (507), judicial and (by extrapolation) scholarly legal dissents can be classified as "literature of dissent" (J. Louis Campbell 306) from within institutions complementing such literature from without.

Dissent can be conceived of as part of a "cultural politics, a cultural practice of engaging the question of injustice" (Sarat 2), and the practitioners of literary realism and legal realism I focus on both cast themselves as dissenters in this vein and appealed to the metaphor of sight in defining their aims. Howells called for a critical literary realism that would oblige the public "to examine the grounds of their social and moral opinions" and to set "about seeing how" to "make [their] thoughts pleasant" in conformance with ideals of "justice" (qtd. in Carter 193). Karl Llewellyn, whose 1931 manifesto "Some Realism about Realism" unofficially recognized legal realism and catalogued the movement's premises (1236-38), also educed the sight metaphor, but for legal realists. "[T]he job of a realist is to begin by seeing exactly what he is up against," Llewellyn asserted, and (akin to Howells) "[t]he second job of a realist is to find ways and means that will *work*" immediately to "implement ideals" ("Group Prejudice and Social Education" 14).

"The problems of vision, knowledge, and the relation of appearance to reality" permeate literary and legal realist texts, given that "[s]eeing accurately is the beginning of knowledge" (Kolb 95). Both realist groups particularly sought to unmask a superficial mode of engaging with reality that was promoted by the culture of spectacle pervading American society in the modern

period.[50] While the term "spectacular" can "signify sensational representations and the exhibition of a specific character (the common definition)," it can additionally "refer to discourses of vision, modes of visibility (the means or medium through which something is viewed or regarded), and the distribution of visual capital" (Hesford 8). This project analyzes spectacles in the more familiar sense of "sensational representations," but equally, if not more, salient to my inquiry is the second conception here of spectacular perception. Such a method of apprehending reality may warp perspectives of the ordinary and extraordinary even in the context of non-spectacular phenomena, thus constituting a generally flawed epistemology.

Dana Polan evokes the analogy of a painting's foreground and background to explain how a "world of spectacle" can activate such perverse, anti-cognitive tendencies. Viewers may disproportionately sanctify illusions or surface realities based on "a faith, virtually Rousseauist, in the purity of a cultural sight" (63):

> The world of spectacle is a world without background, a world in which things exist or mean in the way they appear. . . . The image shows everything, and because it shows everything it can *say* nothing; it frames a world and banishes into non-existence everything beyond the frame. The will-to-spectacle is the assertion that a world of foreground is the only world that matters or is the only world that *is*. (61)

The emphasis placed on the figurative foreground of life or what most conspicuously entices the eye – a point where "all attention, all consciousness, converge[]" – suggests the flatness, or one-dimensionality, of spectacular representations (see Debord 12; Garoian and Guadelius 299). This feature, coupled with the tendency of spectacles to exclude what lies "beyond the frame," can

[50] Susan Tenneriello recounts postbellum "spectacles bath[ing] the historical imagination across America with a pageantry of nationhood that celebrated patriotic mythologies on local and national scales," "conveying spiritually uplifting and culturally instructive entertainment" (94-95).

create a highly mediated, oversimplified picture of reality that also operates to impede other forms of cognition (Polan 63). Viewers may become superficial or passive gazers, absolving themselves of responsibility for that which exceeds the frame and is not seen (see Goldsby 256).

Such forms of manipulation can create a counter-reality preferable to the one in which people actually live and foment apathy or even enmity toward dissenters who would expose the spectacle's sham quality.[51] Spectacular phenomena can therefore precipitate social exclusions and deviations from democratic ideals: "Spectacle culture complies with the boundaries that isolate radical sentiments" while resisting "inclusionary bounds" and can "perpetuate the internal schisms that mask, segregate, and interrogate the transient discourse of belonging or not belonging, pressing the margins of democracy beyond sight lines" (Tenneriello 204). A crucial undercurrent in the literary and legal realist texts assessed in this project is accordingly an epistemological challenge that is not limited to problematic spectacles and the issues addressed explicitly in the works, but extends to readers' misperceptions of reality more broadly, the consequences of which may be the shifting of democracy itself "beyond sight lines."

Spectacular perception in the sense of a cursory means of looking without truly seeing in literary realist texts bears notable affinities with the brand of legal formalism that legal realists decried. Both methods of interpreting phenomena may emphasize visible indicators of reality, such as appearance or the language of law, over actualities that diverge from these indicia. Holmes insinuated such a link between spectacular perception in law and culture when dismissing a theory of legal consistency as mere window-dressing:

[51] Written in a different context and period, but nonetheless making a perceptive observation for this project's purposes, a pamphlet advancing a neo-Marxist critique of advanced capitalism proclaimed that "[t]he Spectacle has so successfully infiltrated Everyday Life that an attack upon the Spectacle appears to be an attack upon Society. When attacked the Spectacle threatens us with the Spectre of Anarchy" (Law 29).

> The form of continuity has been kept up by reasonings purporting to reduce every thing to a logical sequence; but that form is nothing but the evening dress which the new-comer puts on to make itself presentable according to conventional requirements. The important phenomenon is the man underneath it, not the coat; the justice and reasonableness of a decision, not its consistency with previously held views. ("Book Notices" 234)

Holmes's observation suggests the potential misuse of a legal form as a screen for a decision on alternative, potentially non-legal grounds; formalism as an analytical technique may imply the inexorability of a legal decision, thereby cloaking a judge or lawmaker's true exercise of power. In challenging spectacular perception and manifestations of that perception like spectacles, literary and legal realists sought to unveil these power relations as a preliminary step toward reaching what they perceived to be more just and reasonable social, political, and legal decisions.

Conceptualizing the Realisms and the Movements' Synergies, Tensions, and Limitations

Henry James in "The Art of Fiction" (1884) diagnosed the malady scholars of literary and legal realism would suffer in attempting to theorize the movements. He attested: "It goes without saying that you will not write a good novel unless you possess the sense of reality; but it will be difficult to give you a recipe for calling that sense into being" (387). The opacity of the terms "literary realism" and "legal realism" was evident to both movements' proponents; James, Howells, and Mark Twain ascribed different meanings to literary realism (Michael Davitt Bell 8), and Karl Llewellyn maintained that legal realists constituted "no group with an official or accepted, or even with an emerging creed" ("Some Realism about Realism" 1233-34). With this terminological instability in mind, I conceptualize the movements based on their practitioners' theorizations and applications, as supplemented by scholarship.[52] Moreover, instead of

[52] René Wellek commends this dual approach: "We cannot limit ourselves to writers who called themselves realists nor can we be content with the theories developed at the time. On the other hand the enormous variety of often quite

postulating an exclusionary classificatory scheme, I adopt a more malleable approach identifying varying degrees of realist tendencies in the texts analyzed; to analogize my approach to legal tests, I employ a totality of the circumstances rather than a conjunctive elemental standard. June Howard's explanation of her use of the term "naturalism" accords with my objective here in theorizing the realisms. In *Form and History in American Literary Naturalism*, Howard clarified: "[M]y intent is rather to evoke a sense of naturalism as a mediating concept that enables us to perceive significant similarities *and* differences among texts" (30). Accounting for realism as a mediating concept, I will below conceptualize literary realism, literary naturalism, and legal realism, including a discussion of how the movements negatively and affirmatively defined themselves, before theorizing the movements' symbioses, strains, and shortcomings.

Preliminarily, complications defining literary and legal realism arise in part because "realism" is an evanescent term of art: "There is no *Realism* (with a capital 'R'), only *realisms*, which are brought into being by changing narrative conventions that are in turn the product of a changing historical reality" (Lehan 35). Reality had become especially destabilized in the modern epoch,[53] resulting in a paradox for intellectual movements invoking the term as realism became both "an imperative and a problem" (Kaplan 8); "The age of realism is thus not the period when reality became the literary norm. On the contrary, realism developed into a central issue in mid-century precisely because the conception of reality had become increasingly problematic" (Marshall Brown 227). In light of fluctuating realities, it could be asked, what necessarily renders literary realism and legal realism more "real" than preceding movements in

contradictory opinions in modern scholarship as to the content and reference of the concept should serve as a warning that we should best not lose touch with the basic theories of the time and the acknowledged masterpieces" (239).

[53] "Pragmatism in philosophy, non-Euclidean geometry, Einstein's theories of physics, and new approaches in psychology and anthropology all seemed to cast doubt on the utility of systems of axioms and theorems, the value of inductive and deductive reasoning, and the power of formal rules to organize human affairs" (Fisher et al. xiii).

literature and law? Observing how literature has historically developed from one generation of authors revolting against their predecessors' representations of reality, Stuart Sherman suggested that "[t]he real distinction between one generation and another is in the thing which each takes for its master truth – in the thing which each recognizes as the essential reality for it" (454-55). For the realists scrutinized here, this "master truth" or "essential reality" was a more equitable vision of American democracy after the Reconstruction Amendments' ratification and the first Reconstruction's failure. Realism as a historical form or mode of "demystification" (Jameson 4) to its practitioners offered hope for instigating a more effectual national reconstruction.

American literary realism largely predated legal realism, perhaps because of law's delay at times in responding to cultural phenomena,[54] and the movement is seen as flourishing from the late nineteenth century until modernism's rise around World War I (Shi 283).[55] Definitions of literary realism have abounded, with denotations generally being more tautological than edifying. The most common keywords in these definitions are "fact" and "truth," as in George Becker's assertion: "[B]elief in fact as a way to truth is fundamental to realistic writing" ("Introduction" 28). More instructive may be to consider the genres literary realists defined themselves in opposition to, namely popular sentimental literature[56] and, depending on their form, romances. Realism was seen to "reject[] the fantastic, the fairy-tale like, the allegorical and

[54] As Roscoe Pound, an early legal realist who later became the dean of Harvard Law, averred in 1912: "The law does not respond quickly to new modes of thought. It does not change until ill effects are felt; often not until they are felt acutely. The moral or intellectual or economic change must come first" ("Social Justice and Legal Justice" 561).
[55] This narrative of an ostensible rise and decline is overly facile, however, considering literary realism's resiliency into the later modern period and contemporary times. For a recent defense of contemporary realism, see Ian McGuire's *Richard Ford and the Ends of Realism* (2015).
[56] Such works arouse pathos through "conventional situations, stock familiar characters, and rhetorical devices"; focus more on the observer's sympathy than the sufferer's plight; and feature "natural victims" including "defenceless women, aged men, helpless infants or melancholic youth" (Todd 2-4).

symbolic, the highly stylized, [and] the purely abstract and decorative" (Wellek 241), qualities associated with American Renaissance literature, including Nathaniel Hawthorne's texts.[57]

Literary realism diverged from romance along dimensions including form, ideology, and content (Holman 7). Formally, literary realists employed "[g]raphic scene-painting, recognizable characters, and plausible dialogue and narration" to create what Henry James deemed an "illusion of life" (Shi 119; James, "Art of Fiction" 390). As for literary realism's content and ideology, Vernon Parrington – in a passage with an unmistakably Howellesian flavor – connected literary realists' commonplace subject matter with their advocacy of progressive democracy.[58] Romantic literature, contrastingly, was for Parrington correlated with aristocracy:

> The realist, therefore, will deal objectively with the usual and common rather than with the unusual or strange, and in so doing he draws closer to the common heart of humanity, and learns the respect for simple human nature that is the source and wellspring of democracy. In delineating truthfully the prosaic lives of common people realism reveals the essential dignity and worth of all life. The romantic, on the other hand, is aristocratic. (248-49)

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[57] Hawthorne's 1851 preface to *The House of the Seven Gables* distinguished between proto-realist novels and romances. Hawthorne there avowed:

> When a writer calls his work a romance, it need hardly be observed that he wishes to claim a certain latitude, both as to its fashion and material, which he would not have felt himself entitled to assume, had he professed to be writing a novel. The latter form of composition is presumed to aim at a very minute fidelity, not merely to the possible, but to the probable and ordinary course of man's experience. The former—while, as a work of art, it must rigidly subject itself to laws, and while it sins unpardonably so far as it may swerve aside from the truth of the human heart—has fairly a right to present that truth under circumstances, to a great extent, of the writer's own choosing or creation. (v)

Frederic Jameson, though, posits a dialectical relationship between realism and the genres it defined itself in contradistinction to (2, 11). As Harold Kolb explains, "The realists could not accept romantic transcendentalism and its narrative corollaries, but they did acknowledge their debt to the romantic emphasis on personal experience, the individual, particularized description, democracy, and morality" (136).

[58] However, literary realists varied in the overtness of their advocacy, from Upton Sinclair's unabashed socialism in *The Jungle* to Henry James's more ambivalent political stance in *The Bostonians* (1886), which portrayed the perils confronting the New Woman; James, unlike Sinclair, did not seek to prescribe readers' conduct (see Shi 122-23).

Parrington associated romantic literature, rightly or wrongly, with a non-democratic (i.e., un-American) political system, harnessing debates about literary genres to political debates.[59] Lawyer Clarence Darrow's essay "Realism in Literature and Art" (1893) poetically captured realist writers' ultimate aims for this political intervention: "With the vision of the seer they feel the coming dawn when true equality shall reign upon the earth; the time when democracy shall be no more confined to constitutions and to laws, but will be a part of human life" (20).

Surprisingly, given Parrington's assertion about literary realism, naturalist literature arose largely in response to what its proponents perceived as elitist realist fiction. Frank Norris – who has been characterized as "to American literary naturalism what Howells is to American literary realism" (Link, *Vast and Terrible* 45) – demanded at the twentieth century's turn that his fellow naturalist authors like Stephen Crane "reject the teacup tragedies" of traditional realism ("Plea for Romantic Fiction" 215). A spirited critical debate has ensued since over whether the distinctions between literary realism and naturalism are of degree or kind (see Link, "Defining" 83; Jameson 149). The limited discussion here does not aim to resolve the scholarly dissensus; I will show both how literary naturalism can be conceived of as a formal and substantive outgrowth of literary realism[60] while accenting literary naturalism's singular qualities vis-à-vis its precursor.[61] I flag this issue given that all of my major literary realist texts can arguably be classified as naturalist ones. Recognizing that borders between the classifications are porous, and

[59] He also notably emphasized realists' apparent objectivity. Some early scholars of literary realism touted this quality in realists' fiction as proof of the authors' fidelity to the truth; Henry James himself had, however, questioned pure mimetic claims ("Art of Fiction" 388). Literary realism should be envisaged not as a stable genre impartially reproducing reality, but as a "dynamic conception of art" (Garland 142).

[60] As June Howard argues, "[I]t is true that naturalism can never be fully disengaged from realism and that it never discards although it may violate realistic conventions" (145).

[61] James Nagel enumerates several of the differences between the two modalities: "[T]he underlying ideas of the nature of human life, the extent to which people are responsible for their actions, the method of presenting narratives, the kinds of characters used, the handling of plot, the presentation of images, the tone, the genre, and even the style of Naturalism differed from Realism in important ways" (xxvii).

to employ the more inclusive of the terms, I will generally henceforth refer to my primary literary works as realist texts, except when I seek to gloss their distinctively naturalist facets.

Literary naturalism, resembling literary realism, has formal, thematic, and ideological features, some of which reflect literary realism's extremities and others of which are distinctive to the genre. Formally, naturalistic fiction shares literary realism's emphasis on "detailed documentation" (Pizer, *Twentieth-Century American Literary Naturalism* xi) based on an empirical methodology;[62] however, it often embraces romantic conventions that literary realists claimed to renounce. Frank Norris urged literary naturalists to compose texts within a "large canvas and allegorical framework that permit the expression of abstract ideas about the human condition" (220). As for subject matter, naturalism represented "an intensification of literary realism . . . with a new, additional emphasis on the rather 'unpleasant' dimensions of human character (sex, greed, violence, hunger for power) and sordid aspects of life (involving those traits plus the facts, especially visible in cities, of poverty, conflict, and brutal selfishness in action)" (Orlov 78). Literary naturalism's controversial themes have led some critics to regard the genre as more politically polemical than literary realism (Wells 2). Aside from the greater transgressiveness of topics broached, naturalist fiction's cardinal distinction from literary realism is its often fatalistic social determinism (Nagel xxviii), which challenges a cornerstone presumption of the American Dream. Naturalist fiction may disquiet readers' psyches by "call[ing] into serious question . . . the humanist values upon which community is based" (Papke

[62] Émile Zola, who is often identified as founding literary naturalism in the 1860s, contended that the naturalistic or "experimental novel . . . continues and completes physiology, which itself leans on physics and chemistry; for the study of the abstract, the metaphysical man, it substitutes study of the natural man subject to physio-chemical laws and determined by the influences of environment" (qtd. in Orlov 78). Zola's impact on the maturation of American literary naturalism is disputed, partly because of the disparity between Zola's theoretical pronouncements and his own practice, as well as because of differing scholarly views on whether Zola was actually describing literary realism (Link, *Vast and Terrible* 6, 14). Eric Carl Link also argues that literary naturalism should not necessarily be considered fully congruent with scientific naturalism in method (*Vast and Terrible* 13).

xi). As Mary Papke vividly observes, the texts can "take virtually every signifier of meaning and of order, even the order of language itself, and unmask its utter fragility. Particularly unsettling is the bleeding away of sharp limits, the order and ordering of boundaries which we believe are absolutely necessary to moral life and self-recognition" (ix).

Legal realism's rise coincided roughly with literary naturalism's at the turn of the century, though the movement fluoresced in the interwar period. Brian Leiter identifies legal realism as "quite justifiably, the major intellectual event in 20th century American legal practice and scholarship" (*Naturalizing Jurisprudence* 1).[63] Depending on one's conceptualization, the legal movement may be dated narrowly from 1900 to 1940 or more broadly seen to span from 1870 to 1960 (see Twining 341).[64] In either periodization, World War I often functions as a dividing line, with "sociological jurisprudence," a more moderate version of legal realism akin to early literary realism, prevailing during the prewar era. An arguably more iconoclastic jurisprudential philosophy that some critics see as bearing parallels with literary naturalism then dominated in the postwar epoch. Morton Horwitz thus avers, "Legal realism was neither a coherent intellectual movement nor a consistent or systematic jurisprudence. It expressed more an intellectual mood than a clear body of tenets, more a set of sometimes contradictory

[63] However, scholars have debated legal realism's novelty, and thus its significance as a watershed intellectual movement. In *Beyond the Realist-Formalist Divide: The Role of Politics in Judging*, for instance, Brian Tamanaha amasses historical evidence of legal realist strains preceding the movement's zenith. Indeed, *Uncle Tom's Cabin* (1852) contains several legal realist passages, as in the slave George Harris's excoriation of the discrepancy between rhetoric in the Declaration of Independence and his own experiences (100). One response to this line of argumentation has been that legal realists developed a fact-based (as opposed to purely theoretical) "*sustained and programmatic*" attack on what they believed to be erroneous formalist legal principles (see Llewellyn, "Some Realism about Realism" 1237). The contention here is comparable to the one that Howells and other literary realists intensified and sustained tendencies evidenced more passingly in prior literary texts (see *Criticism and Fiction* 104).

[64] The end dates are related to the waning of the New Deal, which many legal realists spearheaded, as well as World War II's impact on legal realist scholarship (Zaremby 95-97; Curtis 158). The ascension of the legal process school endeavoring to splice legal formalism and legal realism in the 1950s and 1960s (Dripps 125-26) has contributed markedly to this periodization. However, scholars have also recently theorized a "new legal realism" (see Nourse and Shaffer). From legal realism's and literary realism's intermittent revivals, one could contend that neither realism has ever wholly vanished from the literary or scholarly scene after their respective apogees in the late nineteenth and early to mid twentieth centuries.

tendencies than a rigorous set of methodologies or propositions about legal theory" (169).[65] Horwitz's claim accounts for legal realism branching in diverse directions from its late nineteenth century origins, much as subgenres like local color, muckraking, and naturalist fiction developed within literary realism. Given the legal movement's malleability and the interdisciplinary essence of this project, I classify scholars based predominantly in other disciplines who engaged with legal realist ideas as legal realists. Moreover, I categorize sociological jurists as legal realists, considering that their writings laid the groundwork for high period legal realism.

Sociological jurisprudence and interwar period legal realism have conceptual similarities. Lawyer Charles Chesnutt's *The House behind the Cedars* (1900) illustrates the quintessential myth that nascent and subsequent legal realists strove to countermand, that legal rhetoric reflects reality. The novel delineates an encomium to North Carolina's antebellum history – and, coincidentally, a sight I witnessed in a Monticello exhibit at the National Constitution Center[66]: "On almost every page of this monumental work could be found the most ardent panegyrics of liberty, side by the side with the slavery statistics of the state,—an incongruity of which the learned author was deliciously unconscious" (112). Similarly, citing one of Justice Holmes's dissents as a paradigmatic example, Roscoe Pound's 1909 definition of sociological

[65] Karl Llewellyn ultimately conceived of legal realism more as a methodology than a school (see Hull, "Some Realism" 965, note 275), though he employed the term "*movement*" in describing it ("Some Realism about Realism" 1234). Walter Kennedy, a contemporaneous critic of legal realism, ascertained key commonalities among realists:

> Despite the necessity for the classification of realists according to the degree of their revolt against the idea of a stable, predetermined legal order, there are unities of method which are discernable among all adherents to the realist technique. On the positive side: experimentalism, fact-finding, the functional approach, scientific methods and skepticism. On the negative side: denial of reason, free will, principles and rules. ("Realism, What Next?" 203, note 2)

[66] The Center's exhibit on "Slavery at Monticello," which I visited in August of 2014, featured rolling screen displays of Thomas Jefferson's testaments to liberty opposite extensive slave records from his plantation. As legal philosopher Morris Cohen aptly observed, "The misleading appearance of definiteness in maxims may be seen historically when we remember that the framers of the Declaration of Independence with its ringing note about all men being created free and equal had no objection to slavery" ("On Absolutisms in Legal Thought" 689).

jurisprudence emphasized the importance of actualities and the effects of laws relative to "assumed first principles" and "logic": "The sociological movement in jurisprudence is a movement for pragmatism as a philosophy of law; for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument" ("Liberty of Contract" 464). Hessel Yntema's 1960 retrospective on legal realism identified similar "common points of departure," if not a universally applicable crystallization of the movement, in summarizing his fellow realist Karl Llewellyn's premises:

> the conception of law and society in flux, with law typically behind; the notion of judicial creation of law; the conception of law as a means to social ends, and the evaluation of law by its effects; insistence on objective study of legal problems, temporarily divorcing the 'is' from the 'ought'; distrust of legal rules as descriptions of how law operates or is actually administered, and particularly of their reliability as a prognostic of decision; insistence on the need for more precise study of legal situations or decisions in narrower categories, and for sustained programmatic research on these lines. ("American Legal Realism in Retrospect" 319-20)

Describing the law in action along these dimensions as the realists commended could elucidate "the inter-relationships between judicial decisions and all the other events of the social scene" (Felix Cohen, "Problems of a Functional Jurisprudence" 23).

While legal indeterminacy based on paper rules alone was an integral tenet for legal realists, a more overtly ideological version of legal realism drawing upon this insight began to emerge in the early twentieth century, much as literary realism became more politicized over time. Jurists writing in this less strictly legal vein – whom my project focuses on – emphasized

law's contingency, non-neutrality, and indebtedness to other disciplines, including literature. Opening a major battle in the legal realism "wars," Pound in 1931 proffered a definition of legal realism that echoes Howells's emphasis on literary realists concentrating on "what . . . life is," although (Howells hoped) preserving a "heart of ideality" (qtd. in Carter 90; Shi 123). Pound claimed: "By realism they [younger generation legal realists] mean fidelity to nature, accurate recording of things as they are, as contrasted with things as they are imagined to be, or wished to be." Pound conceived of legal realists utilizing the term "realism" artistically ("Call for a Realist Jurisprudence" 697), and scholars subsequently suggested links to literature. James Hopkins in the 1930s contended that legal realists used the word in "a *literary* sense," and that "the experimental method" combined with an "emphasis on true observation" of the law "put the stamp of realism upon his [the legal realist's] thought" (58). Grant Gilmore's 1951 review of Llewellyn's monograph *The Bramble Bush* (originally published in 1930 and reissued in 1951) hypothesized: "If we were talking of a literary movement, we would say that *The Bramble Bush* was the first coherent manifesto of the realist or functionalist school" (1252).[67]

Pound even began his influential 1910 article "Law in Books and Law in Action" by recounting a scene from Mark Twain's realist *The Adventures of Huckleberry Finn* (1885). In the scene, Tom Sawyer and Huckleberry Finn are disputing about whether to use a case-knife (as books Tom read would recommend) or a pick-axe (as Huck thinks is a more practical instrument) to rescue Jim, a slave. While Huck comments about Tom's being "*Full of principle*"

[67] These invocations of literature are intriguing given legal realism's more explicit approbation of the social sciences; paradoxically, then, employing an approach counter to the one the legal realists touted here offers the possibility of rejuvenating understandings of the movement. Despite scholars typically associating legal realists with social scientific disciplines, numerous legal realists had familial backgrounds and academic interests in literature. Holmes descended from a literary family and Llewellyn had studied literature, including realism, as an undergraduate at Yale (Hull, "Romantic Realist" 118). Moreover, Roscoe Pound, Benjamin Cardozo, and Jerome Frank were among the legal realists whose scholarship conjectured synergies between the disciplines.

in avowing to use a case-knife, Tom ultimately employs the pick-axe; Pound construes the interchange between the boys as emblematic of the formalist/realist debate in law (12).[68]

Legal realists insisted that a "jurisprudence of conceptions" failed to accurately capture legal realities (Pound, "Mechanical Jurisprudence" 610), much as literary realists associated the romance genre with abstractions divorced from social realities. Classic legal formalism, at least as legal realists constructed the theory for their oppositional purposes, perceived of law as

> a scientific system of rules and institutions that were *complete* in that the system made right answers available in all cases; *formal* in that right answers could be derived from the autonomous, logical working out of the system; *conceptually ordered* in that ground-level rules could all be derived from a few fundamental principles; and socially *acceptable* in that the legal system generated normative allegiance.[69] (Pildes 608-09)

This theory indicated the relatively stable, non-political structure of classical legal thought (Horwitz 15), and Harvard Law Dean Christopher Columbus Langdell's case-centered approach to legal education, which could be seen to inculcate legal formalism in students, was an equal bête noire for legal realists. "Langdell's core belief was that the discipline of law, like algebra, is internally complete: those initiated to its method of reasoning can supply the correct rule for every case, and they did not, indeed should not, be concerned with the practical or political consequences of its application" (Carrington 468).[70] Contrasting with this more mechanistic,

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[68] Howells's famous grasshopper analogy for a literary realist aesthetic in *Criticism and Fiction* similarly distinguished between an idealized, veneer-laden "cardboard grasshopper," an apt metaphor for legal realists' view of classic legal formalism, and a "commonplace," "real" grasshopper (10-12), which could be equated with the multi-dimensional, bottom-up perspective on law that legal realists sought to delineate.

[69] Whether any judges, lawyers, or legal scholars at the time fully subscribed to this version of legal formalism – beyond invoking it as a cover when opportune – is doubtful. Noting that "no simple definition of formalism can be adequate," Robert Summers's *Instrumentalism and Legal Theory* expands on a dozen context-dependent contrasts between formalist and instrumentalist or realist positions about law and legal interpretation (157-58). Like literary realists, most legal realists had a dialectical relationship with their ostensible opposition; Brian Leiter has recently assessed the importance of legal doctrine to legal realists ("Legal Realism and Legal Doctrine" 1975).

[70] The preface to Langdell's 1871 *Contracts* casebook embodied this belief, concentrating exclusively on doctrine:

rhetorically-oriented view of law, legal realists defined law in terms of its ends of social control[71] and "sought to better understand the relationship between the law as studied by scholars, the law as practiced by lawyers, and the law as experienced by the common man" (Zaremby xiv).

Legal realist works can be seen to share methodological, substantive, and ideological qualities that distinguish them from more formalist writings and ally them with realist fiction. Legal realists championed applying empirical methods to law and emphasized fact specificity as a means for social reformation. Justin Zaremby reasons that "[t]hrough a study of the concrete, the particular, the contingent, realist scholarship would bring legal scholarship from the heights of Olympus to Main Street" (90), i.e., from the world of epic or the heaven of legal formalist abstractions to the terrestrial milieu portrayed in Sinclair Lewis's biting contemporaneous novels.[72] Llewellyn called upon his fellow legal realists to underscore "the heaping up of concrete instances" (*Bramble Bush* 12) of legal phenomena in action to render denials about social and legal injustices more implausible. A seminal text postdating high period legal realism but the movement's direct heir demonstrates this method's potential efficacy. Kendall Thomas attests of Charles Black, Jr.'s post-*Brown* article "The Lawfulness of the Segregation Decisions"

> Law, considered as a science, consists of certain principles or doctrines. . . . If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable in their number. It seemed to me . . . to be possible to take such a branch of the law as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines. (v-vi)

[71] Pound, for example, asseverated: "For the law is but a specialized part of the whole regime of social control. . . . In modern society social control through the force of politically organized society has become paramount. All other social agencies operate in subordination to the law. In its claims it has all but taken over the whole field of upholding the conditions of the social and economic order, whereby we maintain, further, and transmit civilization" ("Law and Social Work" 184-85). From this perspective, the "*effects* of formalism," which is an insular method of interpreting law, could be seen as at the crux of the legal realist critique (see Polat 49). While formalism is not necessarily tied to a particular political ideology, it has historically been affiliated with conservatism (Cox 96), perhaps because to the extent that the text of a legal enactment is grounded in a tradition that has facilitated the subordination of disempowered groups, a purely textual interpretation of the law may favor conservative ends.

[72] Lewis's satirical realist novels *Main Street* (1920) and *Babbitt* (1922) sought to debunk what he took to be delusions about the virtues of conventional middle-class American life.

(1960): "Black's granular description of the everyday inequalities that characterize the material culture of segregation offers the prose equivalent of pointillist perspective" (17). Legal and literary realists' focus on seemingly banal details was intended to show the larger social and legal ramifications of such minutiae if contemplated more than cursorily.

Legal realists were particularly interested in the relevance of "extralegal" facts for assessing law's actual operation,[73] and they were influenced by synchronic cultural and disciplinary developments that could illuminate such facts. As Benjamin Cardozo declared in 1928: "[W]ithout a full and rich background of knowledge and culture in fields foreign to the law itself, we shall never reach the perception of the problems to be solved. We shall never see it in its true relation to the lives of those about us, and missing its relation to life, we shall miss its relation to the law, which is to give the rule of life" ("Our Lady of the Common Law" 277-78). Different disciplines could provide legal and literary realists with multiple prisms through which to apprehend reality, with the social sciences and sciences enticing special realist attention. Sociology, anthropology, economics, psychology, physics, and mathematics were among the disciplines revolutionized during the modern period (Morton White 6; Horwitz 188). Both realist groups perceived that these disciplines provided tools enabling reality to be understood more objectively; literary realism, for instance, could now "pursue truth undistorted by the excesses of emotion," becoming "a discipline which would, like science, employ disinterested rationality to represent life as it was" (Jennifer Cook 3-4). While such representations of reality alone would

[73] Lon Fuller, a contemporaneous critic of legal realism, argued that "[t]he realists regard as one of the fundamental fallacies of the traditional method its assumption that the judge reacts only to those facts of the case which are visible through the prism of legal theory. In truth, the judge's decision represents a reaction to a whole situation, including many facts which from the standpoint of legal theory are irrelevant" ("American Legal Realism" 456). Roscoe Pound, for example, referenced the importance of the social and political contexts of the *Dred Scott* (1857) decision, in which the Supreme Court held that African Americans were excluded from national citizenship. Pound hypothesized non-legal factors as tiebreakers for judges in close cases, and thus "phenomena of the highest significance for the understanding of the actual functioning of judicial justice" ("Theory of Judicial Decision" 654).

not effect salubrious changes, realists held that a precondition for meaningful reform was clarifying what was to be reformed (Radin, "Unsystematic Science" 1277).

Despite these salient similarities, literary realism and legal realism also differed markedly because of the distinct disciplines from which they emerged as well as their practitioners' disparate backgrounds. Literary realism was less rigidly committed to implementing an empirical methodology derived from the social sciences. A purely empirical approach could lead to emphasizing macro-level, quantifiable phenomena over single instances and qualitative phenomena (Kennedy, "Principles or Facts" 59, 62).[74] Jerome Frank contended that "insensitivity" to distinctive features of lawsuits could result from overreliance on the social sciences, and that "sensitivity to uniquenesses is imperative, if the trial courts are to do real justice, and to avoid cruel, callous injustices" ("Both Ends against the Middle" 35); realist fiction ordinarily probed single cases in depth. Legal realists also occasionally evinced a propensity to reduce complex legal questions to simple judicial ones. As Felix Cohen summarized: "Fundamentally there are only two significant questions in the field of law. One is, 'How do courts actually decide cases of a given kind?' The other is, 'How ought they to decide cases of a given kind?' Unless a legal 'problem' can be subsumed under one of these forms, it is not a meaningful question and any answer to it must be nonsense" ("Transcendental Nonsense" 824). Realist fiction with legal themes, in contrast, often portrayed law's pervasive spectrality in everyday life and not as manifested more overtly through court cases alone.

[74] Arthur Nussbaum in 1940 noted the scholarly blind spots potentially arising from relying exclusively on an empirical methodology: "Statistical-mindedness carries with it the danger of a misdirection of legal thought. It tends to focus attention on points which are, or are considered to be, statistically palpable; and hence to neglect other, frequently more important problems, either by way of 'repression' or because they do not lend themselves to the statistical attack" (214).

Additionally, judicial and academic legal writing, even when composed by legal realists who ostensibly disdained abstractions, remained relatively theoretical as compared with realist fiction. Fred Rodell's "Goodbye to Law Reviews" (1936) uproariously but earnestly critiqued what Rodell believed to be the abstract and turgid style of law review articles at the time; nor was Rodell more impressed by the articles substantively. While exaggerating for rhetorical effect, Rodell did not propound an unfounded argument. Thurman Arnold's contemporaneous "Apologia for Jurisprudence" (1935) conceded, "Whether we like it or not, Law Schools are maintained and endowed as centers of abstract thought" (735).[75] Abstruseness is not inherently dubious and can be valuable in gleaning the import of particulars, but concrete representations also have singular affective and pedagogical capacities. An economics professor who writes novels has recently commented about how literature complements textbooks and lectures in his courses by showing the nuanced applications of complicated concepts: "The novels offer a far different vehicle for imparting basic economic principles than a dry textbook or lecture. 'Students are pulled along because of the plot line, but they learn economics along the way . . . . They learn these concepts inside of a novel and see them applied at the same time'" (Kenneth Elzinga, qtd. in Jaffee 65). Realist literature capitalized on the unique immersive and persuasive powers of imaginative fiction to augment more theoretical legal realist publications.[76] Literary realist texts were also more widely disseminated than either judicial or scholarly dissents, which were published mainly in case reporters and law journals catering to the legal profession.[77]

[75] Grant Gilmore challenged this claim about legal realism's being "a matter of abstract academic debate, at a far remove from the work-a-day questions which concern the practicing lawyer and his clients" ("Legal Realism" 1037).

[76] John Wigmore went as far as to contend that only in novels could the "deepest sense" of the reality of rules be apprehended ("One Hundred Legal Novels" 29).

[77] In the context of critical race scholarship, Kendall Thomas has argued, "Given the relatively private context in which it was produced and consumed, written academic discourse of the kind practiced by intellectuals such as Charles Black was by its nature an inadequate medium for doing the necessary cultural work to create a broad public constituency that could be mobilized behind a 'preferential' vision of racial equality jurisprudence" (22). Similarly,

The most notable distinction between the realist groups may have been their exponents and areas of representational interest. While legal realism was promoted mainly by white men through courts and at elite law schools (e.g., Yale and Columbia) (Hull, *Roscoe Pound and Karl Llewellyn* 7) that discriminated against women and people of color during the modern period and were often practically inaccessible to working-class Americans, literary realists were a diverse group based on attributes including race, gender, and class. Bruce Ackerman has detected a cultural conservatism among legal realists (*Reconstructing American Law* 19), who were part of a fairly insular institutional and professional network. Llewellyn cited only men and no African Americans in his preliminary list of legal realists, for example ("Some Realism about Realism" 1257-59). To their credit, legal realists were cognizant of the limitations on their perspectives. Llewellyn in 1931 confessed: "All that is clear to date is that until we know more here our 'rules' give us no remote suggestion of *what law means* to persons in the lower income brackets" ("Some Realism about Realism" 1247). Herman Oliphant, who was included on Llewellyn's list, more generally explained:

> Our social experience is limited to one class of people though we must govern all classes . . . . Individual temperament and our self-interest cause us, in the most subjective fashion, to select from the totality of our experience that which satisfies our temperament, and fortifies our interest. Thus but a small fraction of total social reality forms our attitudes and grounds our intuition of experience.[78] ("A Return to Stare Decisis" 228)

N. E. H. Hull contends: "Llewellyn had never dealt directly with reality. Instead, his realism was a set of instructions for a learned, specially trained elite – law students, lawyers, lawmakers, and judges" (*Roscoe Pound and Karl Llewellyn* 332).

[78] Or as Thurman Arnold articulated the point about realists' interest in maintaining the status quo: "No realist or skeptic ever quite escapes the influences of the symbols of his time, because most of his own conduct and the conditions under which he maintains his prestige are based on those symbols" (*Symbols* 42).

Many literary realists, in contrast, came from working-class backgrounds and were racial minorities or women writing from a relatively disempowered position vis-à-vis law during the period. Several of them had law-related experiences, whether through education or practice, but they generally remained outside of the power structures that legal realists were embedded in.

Their "social reality," in Oliphant's terms, accordingly differed from that of legal realists, and perhaps following from that alterity, literary realists explored a broader array of subjects than legal realists. Commercial law and socioeconomic legal issues preoccupied legal realists while gender and race concerns went largely unaddressed in their works despite the legal authors writing during a period when women and people of color were mobilizing for rights. A 1935 article on crime control by Yale Law Dean Charles Clark, also on Llewellyn's list, suggested a reason for this omission in euphemistically referring to the (for him) baffling "problem" of African Americans: "The presence of the negro and the whole racial problem therein involved is one of extraordinary difficulty" ("Law Enforcement" 287). Instead of dissecting this "problem," to evoke W. E. B. Du Bois's *The Souls of Black Folk* (1903),[79] legal realists largely elided the issue. Neither were gender concerns broached with the sophistication legal realists demonstrated in writings on more au courant topics for them. One of the few legal realist commentaries on gender – Jerome Frank's "Women Lawyers" (1945) – extolled women's entry into the profession yet reinforced stereotypes by recommending that female lawyers sand down law's harsher edges. Several literary realists, in contrast, were people of color or women who delicately and directly grappled with racial injustices and misogyny in their texts. Literary realism did evidence reactionary tendencies against these representations,[80] but a critical mass of realist fiction on

[79] Du Bois confessed there: "To the real question, How does it feel to be a problem? I answer seldom a word" (10).
[80] For instance, in Howells's complaint that African American Charles Chesnutt's novel *The Marrow of Tradition* (1901) was excessively "bitter" ("Psychological Counter-Current" 832).

these momentous subjects was nonetheless published. The following chapters will elaborate on these relationships between the realisms and further develop the conceptualizations here.

The Path of the Argument: Literary and Legal (Re)constructions of the Fourteenth Amendment

A Fraught Inheritance evaluates literary and legal realist texts that construe the Fourteenth Amendment, which formally cemented equal citizenship rights, including the right to due process and "the equal protection of the laws." Real-life incidents that questioned the efficacy of these rights from Reconstruction through World War II inspired the literary realist texts I assess, whose complementary legal counterparts range from judicial opinions to law review articles. The major literary texts evaluated intricately critique the so-called "unholy" trinity of Supreme Court cases: *Dred Scott v. Sandford* (1857), *Plessy v. Ferguson* (1896), and *Lochner v. New York* (1905). The project's historical arc begins from the Supreme Court's infamous decision in *Plessy* re-entrenching the rationale of *Dred Scott* and officially inaugurating the Jim Crow period. The analysis then spans through the Progressive Era and Jazz Age, with a spotlight on cases magnifying economic injustices, before revisiting *Plessy* half a century after the decision propelled the long civil rights movement. As this storyline unfolds, it will become evident that realist concepts increasingly became applied for ends the initial theorists may not have envisioned in the literary and legal realms, not unlike the founders in the context of the Constitution. Both realists' efforts could most eminently be seen as culminating in *Brown*, which a realist lawyer enamored of literature painstakingly laid the path to. The fictional texts I scrutinize especially supplemented legal realist texts by bringing home the dire ramifications of racial and socioeconomic injustices, with literary realists correlating domestic disorder in the most intimate sense with domestic disarray at the national level that legal realists identified.

The project's commodious temporal consideration of legal realism divides the movement into three phases, with late nineteenth century origins in Oliver Wendell Holmes, Jr.'s writings, sociological jurisprudence mainly preceding World War I but lingering into the interwar years, and high period legal realism in the 1920s and 1930s before the movement's apparent waning by the late 1940s. Literary texts analyzed reflect this periodization, with Charles Chesnutt's *The Marrow of Tradition* (1901) and Upton Sinclair's *The Jungle* (1906) dialoguing with early stage legal realism and Theodore Dreiser's *An American Tragedy* (1925) as an inflection point text set during the movement's transition. Lastly, Richard Wright's "The Man Who Killed a Shadow" (1946, 1949) interacts directly with a largely unremarked upon precursor case to *Brown* that involved several legal realists. The literary texts are also arranged to vary from narratives with more realist tonalities like Chesnutt's to those with more naturalist timbres, such as Wright's, thereby illustrating the diapason of literary realism's engagement with legal realism.

Chapter one, "Spectacles of Race and the Realities of Jim Crow," examines Chesnutt's novel alongside *Plessy*, and particularly Justice John Marshall Harlan's acclaimed solo dissent from a majority decision affirming the constitutionality of "separate but equal" laws. Chesnutt composed the novel in response to a white supremacist-instigated "race riot" and coup in Wilmington, North Carolina, which occurred only two years following *Plessy*. His text meticulously re-enacts the case while castigating the culture of racialized spectacles that perpetuated the dehumanization of African Americans and abetted judicial decisions like *Plessy* at the century's turn. The "tradition" of the novel's title is finally shown to be a double-edged sword; tradition in the sense of a blind fidelity to the past that Holmes critiqued is forsworn, but tradition as incarnated in fealty to apparently equitable constitutional ideals is lauded. *Marrow* is the only primary fictional text in *A Fraught Inheritance* written by a lawyer, and it intersperses

the main fictional account with passages dissecting Jim Crow laws' machinations more generally through a legal realist lens; the text often also melds the fictional and legal doctrinal storylines. *Marrow* thus most closely formally resembles this project, which it innervated.

Chapter two, "Illusions and Actualities Underlying 'Liberty of Contract,'" scrutinizes Sinclair's concomitant Progressive Era novel *The Jungle*. Driven to compose the text after Chicago's failed Great Beef Strike of 1904, Sinclair targeted courts he perceived condoning a rapacious form of laissez-faire capitalism under the guise of protecting due process rights. In *Lochner*, most notoriously, the Supreme Court invoked freedom of contract rights in nullifying a state law that ostensibly sought to ameliorate workers' conditions. Justice Harlan, however, again dissented, and this chapter evaluates his opinion and Justice Holmes's alongside Sinclair's "muckraking" text. By searingly representing the degeneration of a Lithuanian immigrant family in a largely unregulated milieu, Sinclair's novel vivifies and implicitly endorses the dissents. *The Jungle* notably analogizes "wage slavery" to chattel slavery in order to catalyze labor reforms. Although "freedom of contract," like "separate but equal," can be acontextually construed as an equitable legal principle, Sinclair's text overwhelms readers with contextual proof of the principle's illusoriness, much like *Marrow*. Subsequent legal realists employed similar evidentiary techniques in assailing what they took to be the *Lochner* majority's superficial, spectacular perception of labor relations. *The Jungle*'s portrayal of how class tensions can detonate in violence and death also links the novel thematically with *An American Tragedy*, which two decades later revealed the seamy underside of the Jazz Age.

Chapter three, "The American Dream and Its Socio-Legal Discontents," assays Dreiser's novel, which was published during legal realism's interwar apex and four years before the Great Depression. The text subverts the ideal of the American Dream, one variant of which Tennessee

Williams caricatured as the "Cinderella story" of success. Williams asserted that this narrative could be deemed "our favorite national myth, the cornerstone of the film industry if not of Democracy itself" ("The Catastrophe of Success" 99). Dreiser was especially riveted by a perversion of the Cinderella story in the form of homicides involving working-class men slaying their similarly situated lovers to woo upper-class women. Chester Gillette's 1906 murder of his lover, Grace Brown, followed this pattern, and Gillette was executed after a show trial tainted by prejudice. These judicial proceedings seemingly belied legal due process ideals, much as Dreiser believed Gillette was denied the social due process promised by the American Dream. Dreiser's fictional critique animates contemporaneous legal realists' criticisms of the socioeconomic and criminal justice systems, while anticipating future directions of legal realist inquiry. Through depicting the Gillette-like protagonist's prolonged murder trial, a setting which can be construed as a microcosm of the political system, *An American Tragedy* also directly addresses this project's pivotal concern: the viability of American democracy. Unlike most literary and legal realists' texts, Dreiser's naturalist novel presents an almost unremittingly bleak rendition of American society, delineating the downfall of a seemingly ordinary young man whose attempts to attain the American Dream terminate in death. The prospects for revitalizing American democracy are ultimately lodged with readers, whose realist understandings of law and society could in Dreiser's estimation help actualize the Constitution's equitable potential.

The project's main narrative affirms the realist movements' inclusionary democratic vision, but the coda, "Realist Imaginaries and the Specter of Race," suggests limits of even these progressive movements' commitment to racial and economic justice, underscoring the breadth of the task in reconciling American Dream rhetoric with reality. I here accentuate a major lacuna in the realisms – namely, race – in light of Wright's "The Man Who Killed a

Shadow." The short story was based on a Washington, D.C., homicide involving an African American man who slayed a white woman, allegedly after she called him a "black nigger." The defendant's case was litigated by Charles Hamilton Houston, a pioneering African American lawyer who was taught by legal realist professors. Despite Houston's efforts, the Supreme Court affirmed his client's capital conviction in *Fisher v. United States* (1946). Houston gave Wright the case transcripts from which Wright composed his short story, which I analyze together with the judicial proceedings to show shortfalls and virtues in realist imaginaries. *Fisher* intriguingly implicates several legal realists discussed in prior chapters; and thematically, the coda bookends the project in returning to the unresolved issues of *Marrow* on *Plessy*'s fifty-year anniversary. Almost three-quarters of a century after *Fisher*, the legally-sanctioned race and class inequities depicted by Wright and other realists continue to constitute our fraught inheritance,[81] with Reconstruction remaining, in Eric Foner's resonant words, an "unfinished revolution."

[81] "[T]he life of the imagination work[s] with inherited materials and against inherited constraints" (James Boyd White, *The Legal Imagination* (abridged ed.) xii).

"[T]he negroes have no well grounded cause of complaint. A sufficient number of cars have been set apart for their accommodation, and between the star cars [i.e., Jim Crow railroad cars] and the others there are no distinctions in make or general appearance. How is it then that they clamor for shadows when their substantial rights are already granted?"

–*New Orleans Times* editorial, 1867[1]

"[T]he United States presents to the world a sad spectacle of inconsistency and contradiction – a spectacle which reflects most significantly upon our boasted human freedom and brotherhood."

–*Donahoe's Magazine* article, 1896[2]

Straddling Reconstruction and the Supreme Court's infamous decision upholding "separate but equal" laws in *Plessy v. Ferguson* (1896), these press accounts represented dueling views of racial realities in the United States at the twentieth century's turn. The newspaper editorial, anticipating the majority opinion in *Plessy*, opined that quantitative and visible markers of racial equality in fact signified African Americans' attainment of "substantial rights." From this shady premise, the editorial concluded: "What real difference can it make to a negro whether he rides in a car ornamented by a star, or one which is not thus ornamented?" (qtd. in Olsen, *Thin Disguise* 35). Meanwhile, an article from a Catholic magazine echoed Justice John Marshall Harlan's *Plessy* dissent in suggesting that African Americans were not "clamor[ing] for shadows" but fundamental constitutional freedoms over a quarter century after the Civil War.[3] African American author Charles Chesnutt's *The Marrow of Tradition* (1901) intervened in this cultural constitutional debate by literarily portraying the "sad spectacle of inconsistency and

[1] Quoted in *The Thin Disguise: Turning Point in Negro History* – Plessy v. Ferguson (Olsen 35).
[2] Quoted in *The Thin Disguise: Turning Point in Negro History* – Plessy v. Ferguson (Olsen 128).
[3] As Justice Noah Swayne avowed in his *Slaughter-House Cases* dissent, the Reconstruction Amendments rose "to the dignity of a new Magna Charta," though the jurist sagely added the qualifier if "[f]airly construed" (125).

contradiction" permeating American law and society during a period now deemed the nadir of race relations.[4] The novel sold meagerly upon release (just under 3,400 copies in the first two years of its publication) (Sollors, "Introduction" xxxii), with a reception not unlike that of its complementary judicial text, Justice Harlan's dissenting opinion in *Plessy*.[5] However, both literary and legal realist works have since become acclaimed for their trenchant analyses of how racist spectacles and apparently equitable laws motivated by racism impeded African Americans from securing meaningful legal citizenship for nearly a century after the Reconstruction Amendments' ratification.

In addition to paying homage to Justice Harlan's *Plessy* dissent, Chesnutt's novel followed in a tradition of African American literary dissent dating to the antebellum period with David Walker, Martin Delany, and Frederick Douglass's activism.[6] Douglass's 1852 address "The Meaning of July Fourth for the Negro" challenged the hagiography surrounding Independence Day commemorations before slavery's abolition,[7] answering a resounding no to the question of whether "the great principles of political freedom and of natural justice, embodied in that Declaration of Independence, [are] extended to us" (qtd. in Colaiaco 52). *Marrow*, galvanized by Homer Plessy's attorney Albion Tourgée's writings,[8] crafts a comparable counter-narrative to such accounts as the preceding editorial. Its title alludes to journalist Henry

[4] The term "nadir" in the context of white-black relations here is attributed to historian Rayford Logan, who employed it in the subtitle of his book *The Negro in American Life and Thought: The Nadir, 1877–1901* (1954).
[5] Alan Barth comments: "Although this powerful dissent sparked a brief boom in the North for Harlan for the presidency, it evoked no general outrage in the country at the Court's relegation of the black to, at best, second-class citizenship" (29) with the sustaining of racially segregationist legislation under the Fourteenth Amendment.
[6] Texts in the literature of dissent tradition from the abolitionist period combined shock value with an emotional appeal and a didactic purpose (Eby, "Introduction" x).
[7] In the antebellum period, the Fourth of July, perversely, was often "a special day [for whites] to prosecute a campaign of racial terror," such as expelling blacks from the square facing Philadelphia's Independence Hall in 1805: "The message is 'You are not American'" (Coates, "Fear of a Black President" 86).
[8] Tourgée's (another literary-legal realist bridge figure's) influence on Chesnutt's literary career is documented in Chesnutt's journals: "If Judge Tourgée, with his necessarily limited intercourse with colored people, and his limited stay in the South, can write such interesting descriptions, such vivid pictures of southern life and character as to make himself rich and famous . . . why could not a colored man, who has lived among colored people all his life . . .

Grady's famous speech endorsing the retrograde "New South Creed," which encouraged regional rapprochement over race and shared economic interests (Gaston 18). Grady avowed of white supremacy: "This is the declaration of no new truth. It has abided forever in the marrow of our bones, and shall run forever in the blood that feeds the Anglo-Saxon heart" (qtd. in Mays 344).[9] Chesnutt's novel can also be construed as "an epitaph for the plantation romance," undermining mythical stories in the nostalgic genre whose popularity surged in the 1880s and 1890s by harkening to a time when the "negro problem" appeared to be contained (Bentley and Gunning, "Segregation as Culture" 428). Opposing this dominant perspective, which was epitomized by texts like Thomas Dixon's bestselling *The Leopard's Spots* (1902),[10] Chesnutt wrote to Booker T. Washington of his objective to show "our side of the Negro question, in popular form, as you have presented it in the more dignified garb of essay and biography" (160).

Yet Chesnutt's characterization of his novel here, contrasting it with purportedly more "dignified" non-fictional genres, merits interrogation. Criticism of *Marrow* has largely taken Chesnutt at his word in analyzing the text as a sentimental novel inspired by Harriet Beecher Stowe's *Uncle Tom's Cabin* (1852); a literary realist novel reflecting the influence of Chesnutt's mentor William Dean Howells; or a hybrid work combining the literary genres, with aesthetic tensions resulting from the amalgamation. While law as a theme in *Marrow* pervades scholarship on the novel, the interpretive possibilities arising from construing *Marrow* as a quintessentially

write so good a book[?]" (qtd. in Elliott 219). Tourgée's novel *A Fool's Errand* (1879) was inspired by his demoralizing experiences as a radical Republican during Reconstruction. He later encouraged Chesnutt, who aspired for *Marrow* to succeed Tourgée's book in "depicting an epoch in our national history" (qtd. in Elliott 220).

[9] Josh Green, a working-class African American, references the novel's title when he complains to Dr. William Miller, one of the text's protagonists, that a "'good"' black for "'w'ite folks"' is one who '"wants ter git down on his marrow-bones, an' eat dirt, an' call 'em 'marster"'" (71).

[10] Dixon's white supremacist novel retelling the Wilmington massacre was followed by *The Clansman* (1905), which D. W. Griffith adapted into the notorious film *The Birth of a Nation* (1915). Contrastingly, journalist David Bryant Fulton's *Hanover: Or the Persecution of the Lowly, A Story of the Wilmington Massacre* (1900), dedicated to anti-lynching activist Ida B. Wells, was a thinly-veiled fictional account of the riot from an African American's perspective.

legal text, and specifically a legal realist one presented in the guise of a novel, have been less deeply fathomed. Chesnutt worked as a legal stenographer but was certified as a lawyer, having passed the Ohio bar examination with stellar marks (Sollors, "Charles W. Chesnutt: A Chronology" 516); his non-fictional publications also frequently probed legal topics. *Marrow* is moreover permeated by overt and covert references to law and (more often) lawlessness. Chesnutt summarized his text as "a comprehensive study of racial conditions in the South, *in the shape of what is said to be a very dramatic novel*," blending a compelling plot with historical and social commentary; issues broached, continued Chesnutt, were predominantly legal ones including "miscegenation, lynching, disenfranchisement, separate cars, and the struggle for professional and social progress in an unfriendly environment" ("To Booker T. Washington" (8 Oct. 1901) 159-60) (emphasis added). Aesthetic complications in *Marrow* may thus be evidenced not only in its blending of literary genres, but in its attempt to weld a sophisticated constitutional analysis with the novel form.[11] A legal-literary reading of Chesnutt's text can partially explain, if not necessarily resolve, the apparent formal and substantive incongruities that earlier scholarship on the novel has identified. Additionally, this dual approach can illuminate literary realism's early imbrications with legal realism, which have been largely unheralded.

The immediate impetus for *Marrow* was an 1898 race riot in Wilmington, North Carolina, which was spearheaded by white supremacist vigilantes who sought to stanch African Americans' social, economic, and political gains in the city after emancipation. A democratically-elected "fusion" slate of officials comprised of Populists and Republicans aroused the supremacists' ire, although their ringleader claimed to be abiding by the law in

[11] William Dean Howells saw Chesnutt presenting "facts" for a "case" and rendering a "judgment" in *Marrow*, though as an "artist," not an "advocate" ("Psychological Counter-Current" 882).

coercing the officials' resignation and inciting racial violence.[12] Chesnutt described the carnage as "an outbreak of pure, malignant and altogether indefensible race prejudice, which makes me feel personally humiliated, and ashamed for the country and the state" ("To Walter Hines Page" (11 Nov. 1898) 116). 2,100 African Americans were effectively expelled from Wilmington, shifting the municipality's racial composition to majority white, and estimates range from 14 to 60 African Americans slain during the massacre (with no white fatalities) (Umfleet, "Findings" 1; Umfleet, *Race Riot Report* 121). *Marrow* culminates with a similar riot in Wellington (Wilmington's ironically-named analogue in the text), but the bulk of the novel is devoted to demonstrating how the racial hatred underlying Jim Crow laws rendered the debacle inevitable.

Legal realist insights from Oliver Wendell Holmes, Jr.'s writings and Justice Harlan's dissent in *Plessy* imbue *Marrow*. Yet while the novel applies theoretical tenets propounded by these eminent legal realists, it functions not as a form of institutional dissent but a dissent from the trenches, so to speak, composed by a path-breaking African American lawyer-author largely excluded from potent institutions but seeking to revolutionize them nonetheless. *Marrow* explores the complex ramifications of legal realism in the race relations context through its analysis of "tradition," *Plessy*, and the culture of racialized spectacles that reinforced African Americans' subordinate legal position at the century's turn. The novel's title's use of the word tradition as a specious justification for racist legislation and violent white supremacy reflects Holmes's wariness toward the term in his early writings, though not referring explicitly to race. *Marrow*'s subsequent re-enactment of the majority and dissenting opinions in *Plessy* is staged as

[12] Alfred Moore Waddell justified the municipal takeover as a "perfectly legal" changing of the guard:

> It was certainly the strangest performance in American history, though we literally followed the law, as the Fusionists made it themselves. There has not been a single illegal act committed in the change of government. Simply, the old board went out, and the new board came in – strictly according to law . . . . It was the result of a revolution, but the forms of law were strictly complied with in every respect. (295-97)

a debate between more progressive and dynamic versus hidebound views of tradition and law in construing the Constitution; the debate, however, transpires not in the august chambers of the Supreme Court, but aboard a segregated train with ordinary citizens in the roles of litigants and judges. In the fervent exchange, Justice Harlan's realism about Jim Crow laws' intent and effect is contrasted with a Supreme Court majority's formalism averring the enactments' facial and as-applied equality. The latter position prevails by force in the novel's sequence but is forcefully disproved as the text unfolds. In *Marrow,* such visible constitutional rights deprivations are paralleled by more invisible but equally inimical private contractual rights deprivations as a mixed-race African American woman is denied the patrimony of her white father. *Marrow*'s "domestication" of legal realism in this sense sought to affirm how no realm of life – even the most intimate – could remain immune from the pernicious effects of racially segregationist laws.

In addition to undercutting the supposedly creditable basis for Jim Crow laws, Chesnutt's novel meta-fictionally critiques superficial means of perceiving racial realities, such as those evidenced in the *Plessy* majority opinion. One of *Marrow*'s opening chapters, which is of a christening party, reveals dual narratives to readers: an ostensibly congenial one versus the more perturbing one that emerges upon a more careful scrutiny of the text. Readers are then primed to construe what seems to be a benign spectacle of race relations – northern whites' tour of Wellington – with greater circumspection. Cracks in race relations evidenced in the town tour materialize into insuperable cleavages with a near-lynching that foretells Wellington's racial massacre. Justice Harlan's *Plessy* dissent two years earlier had predicted such a catastrophe as the logical outgrowth of Jim Crow legislation that *Marrow* similarly characterized as "merely

chang[ing] the form of the same old problem" that had catalyzed the Civil War and that remained "the pivot of American politics" at the century's turn (59), and arguably continues to do so.[13]

Legal Realism and Marrow*'s Assailing of and Enveloping in "Tradition"*

Chesnutt's novel prior to *Marrow, The House behind the Cedars* (1900), intimated that expediency and avariciousness underlay much of the "tradition" that excluded an immense racial underclass from full American citizenship at the century's turn. Oliver Wendell Holmes, Jr.'s preface in *The Common Law* (1881) reflected a comparable view of the legal tradition. He argued there: "The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past" (1-2), such as slavery's legacies in America. Convenience and profitability are cited to justify an apparent legal inconsistency in an exchange from *Cedars* between the mixed-race John Walden and a white judge, Archibald Straight; Walden questions why the "one drop rule" of classification as an African American only applies in one direction:

> "Why shouldn't it be the other way, if the white blood is so much superior?" inquired the lad.
>
> "Because it is more convenient as it is—and more profitable."
>
> "It is not right," maintained the lad.
>
> "God bless me!" exclaimed the old gentlemen, "he is invading the field of ethics! He

[13] The white supremacist intimidation and violence in Charlottesville, Virginia (coincidentally, where much of this chapter was composed), is a current example (see Stolberg and Rosenthal). Additionally, *Plessy*'s contemporary revival through the criminal justice system is discussed in Michelle Alexander's *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010). Correcting the historical record is also an ongoing endeavor; one recent McGraw-Hill school textbook contained the following language before an outcry resulted in the offending text's modification: "Under segregation, all-white and all-African American schools sometimes had similar buildings, buses, and teachers. Sometimes, however, the buildings, buses, and teachers for the all-black schools were lower in quality." The revised text read: "Under segregation, the facilities of the African American schools were almost always significantly lower in quality" (qtd. in Kopplin).

> will be questioning the righteousness of slavery next! I'm afraid you wouldn't make a good lawyer, in any event. Lawyers go by the laws—they abide by the accomplished fact; to them, whatever is, is right." (117-18)

Marrow fundamentally questions this assumption that laws whose *raison d'être* is to benefit an elite population at the expense of a disempowered group should be presumed ethical or constitutional. The dialogue also explains why Chesnutt found fiction to be a fruitful mode to analyze the ramifications of the legal realist texts circulating in academia and the courts; he was not beholden to the "accomplished fact" and professionally obligated to consider it "right."[14] *Marrow* exemplifies Upton Sinclair's aesthetic theory that "all art deals with moral questions; since there are no other questions,"[15] among which Sinclair included issues of "freedom" and "justice" (*Mammonart* 9) that reside at the core of *Marrow*'s literary-legal realist critiques.

Chesnutt's novels, as well as Holmes's *The Common Law* and "The Path of the Law" (1897), contended excessive reliance on tradition, such as white supremacy, was stifling American law and society's development at the century's turn. Holmes in *The Common Law* particularly cautioned readers against "supposing, because an idea seems very familiar and natural to us, that it has always been so. Many things which we take for granted have had to be laboriously fought out or thought out in past times" (2). *Cedars* and *Marrow* present a variation on Holmes's claim of custom inducing legal stagnation[16] by portraying how custom could override enlightened laws that remarkably passed through the enactment process in the decades

[14] Though perhaps the same could be said about many of Justice Harlan's dissents in critiquing Judge Straight's amoral perception of the legal profession here.
[15] Holmes's description of the relationship between legal issues and morality in "The Path of the Law" is comparable: "[L]aw is the witness and external deposit of our moral life. Its history is the history of the moral development of the race" (459).
[16] William Dean Howells similarly contended that literary realism sought "to escape the paralysis of tradition" (*Criticism and Fiction* 15).

after the Battle of Appomattox. In the Reconstruction-set *Cedars*, Judge Straight anticipatorily assumes the guise of Holmes in an internal monologue that ends with a reference to "equity":

> 'Right and wrong,' he mused, 'must be eternal verities, but our standards for measuring them vary with our latitude and our epoch. We make our customs lightly; once made, like our sins, they grip us in bands of steel; we become creatures of our creations. By one standard my old office-boy [John Walden] should never have been born. Yet he is a son of Adam, and came into existence in the way God ordained from the beginning of the world. In equity he would seem to be entitled to his chance in life . . . .' (26)

Equity was a body of law that historically remedied the common law's shortcomings, accounting for circumstances in which justice may demand the alleviation of harsh rules. *Marrow* also explicitly references the term equity in tandem with justice as essential principles to mitigate the racial inequality that would otherwise persist in "troubl[ing] the American government and American conscience" (59). Through focusing on a specific case involving sympathetic African American protagonists – Dr. William Miller and his wife Janet – while re-enacting *Plessy*, the novel can be perceived as presenting both the equitable and legal cases for racial egalitarianism.

Yet obstacles to actualizing equality abound, as *Cedars* delineates when Judge Straight summarizes the relationship between custom and law in racial matters during the Jim Crow era, especially in the South: "'I remember we went over the law, which was in your favor; but custom is stronger than law—in these matters, custom *is* law'" (26). In *Marrow*, more often than not, the word "custom" becomes a talisman warding off humane thought, functioning as a necessary and sufficient justification for white supremacy. Custom as a euphemism for racial hatred in the novel is shown to be unbending and deeply implanted in the social soil, a force before which law must succumb when the two means of governing human conduct come into conflict. Dr. Price

early in *Marrow* attests to law's limits in the postbellum South amidst a passage that resonates with the *Plessy* majority's views of racism's intractability. "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences" (551), claimed the Court in *Plessy*;[17] Dr. Price likewise perceives: "Sins, like snakes, die hard. The habits and customs of a people were not to be changed in a day, nor by the stroke of a pen" (9).

Citing custom, the physician defends the racial supremacism of white Wellingtonians at-large and their exemplar Major Philip Carteret during a subsequent dispute with Dr. Alvin Burns, a white doctor who arrives from the North to operate on the Major's son and unsuccessfully invokes professional grounds for Dr. Miller to assist with the procedure. "'We are a conservative people, and our local customs are not very flexible,'" Dr. Price asseverates, continuing that Major Carteret has "'certain inflexible rules of conduct by which he regulates his life. One of these, which he shares with all of us in some degree, forbids the recognition of the negro as a social equal'" (45-47). When African American Sandy Campbell is later accused of murdering and raping a white woman, Polly Ochiltree, Major Carteret's *Morning Chronicle* newspaper implicitly references custom, calling on whites to exercise "their inherent sovereignty" by invoking "higher law" to temporarily suspend "the ordinary judicial procedure" (112-13). The identical phrase "higher law" is cited during white supremacist conspirators' disenfranchisement campaign, confirming the similar rationale underlying each "crusade": "The provisions of the Federal Constitution . . . must yield to the 'higher law,' and if the Constitution could neither be altered nor bent to this end, means must be found to circumvent it" (27, 143-44). In Sandy's case, the social vindication precedes the legal one to prevent his lynching; after white lawyer John Delamere concocts an alibi, a nongovernmental committee of white men permits Sandy's

[17] This discussion followed the majority's citation to custom and tradition as bases for the Court's decision (550).

exoneration. The next day's preliminary hearing is a pro forma affair, with white supremacist General Belmont guaranteeing that Sandy "'will be proved entirely innocent'" (137-39).

Marrow castigates this substitution of white supremacist communal justice for legal justice, associating white supremacy with a tyrannical past. Major Carteret is said to reflexively "believe[] in the divine right of white men and gentlemen, as his ancestors had believed in and died for the divine right of kings,"[18] a passage evocative of Holmes's argument that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past" (24; "Path" 469). Despite proclamations of a "New South," *Marrow* contends custom rendered modernity there an illusion. Following Major Carteret's son's birth, Chesnutt alludes to the infant's accidental privilege of likely being exempt from the primitive "justice" of lynching at the century's turn:

> Had the baby been black, or yellow, or poor white, Jane [a loyal African American domestic worker with longstanding ties to the Carterets] would unhesitatingly have named, as his ultimate fate, a not uncommon form of taking off, usually resultant upon the infraction of certain laws, or, in these swift modern-days, upon too violent a departure from established customs. It was manifestly impossible that a child of such high quality as the grandson of her old mistress should die by judicial strangulation, but nevertheless the warning [the baby's mole] was a serious thing, and not to be lightly disregarded.[19] (11)

[18] When later justifying Sandy's lynching, General Belmont, another aristocrat by birth, anachronistically references the ancient Roman practice of all of a master's slaves being killed if a slave murdered the master (111).
[19] Concerned about the mole, Jane seeks conjure remedies for the Carterets' son (11). A trace of Chesnutt's magical realism from *The Conjure Woman* (1899), employing surrealism to critique reality, is evident here and at other moments in *Marrow*.

In reference to "judicial strangulation" as a form of lynching, Mark Weiner explains: "The symbolism and social objectives of lynching, however, were achieved not merely through the ecstatic ritual of mob violence. Its civic principles could also be enacted, if less dramatically, within Southern courts of law, a process that was often described as a 'legal lynching,' which gave the impulses of lynching the sanctity of law and the cover of due process" (252).

While *Marrow* disproves the supposedly inherent basis for brutal legal and social customs in the Jim Crow South and reveals white supremacists' arbitrary construction of whiteness to entrench their racial privileges, the novel also acknowledges the alarmingly real consequences of the construction.[20] When African American Jerry Letlow attempts to whiten his skin and straighten his hair, General Belmont disparages the products Jerry uses as "'rank poison'" (146), which may be construed as the novel's condemnation of white supremacy, figured as an imitative performance without any original (Knadler 433-34). But even as the "Angry-Saxon" conspirators (58), as so deemed by Shakespearean fool Jerry, rely on a fictional construct to maintain their authority, they inflict actual harm on both races in their community, represented by the Miller and Carteret scions' death and imperilment during the Wellington riot.

Chesnutt, though, echoes Holmes in hinting that custom may be more amenable than readers think to progressive emendation. *Marrow* posits a paradoxical relationship between custom and the prospect of measures advancing African Americans' constitutional rights; custom is cited to justify lynchings and riots yet is also perceived by Chesnutt as a "dominant note" susceptible to a change in pitch in both the social and legal atmospheres (see "Charles W. Chesnutt's Own View of His New Story, *The Marrow of Tradition*" xxxix). Legendary defense attorney Clarence Darrow aptly observed in an 1893 essay on "Realism in Literature and Art,"

[20] John Dewey later similarly asserted: "Scientifically, the concept of race is largely a fiction. But as designating a whole group of phenomena it is a practical reality" ("Race Prejudice and Friction" 12-13).

"Custom has made most things good and most things bad, according to the whim of time and place," with the more deleterious consequences ensuing from "mistak[ing] custom for nature, and inherited prejudice for morality" (10, 11). In a 1903 essay "The Disfranchisement of the Negro," Chesnutt asserted that transforming public opinion (as on custom) was a precondition for enacting and enforcing laws that would render African Americans true citizens. Despite the essay's title underscoring law's importance, Chesnutt concluded that "it will be, after all, largely a white man's conflict, fought out in the forum of public conscience" (193). *Marrow* operates largely in this vital sphere, while hoping to instigate reforms in legal fora.

Perhaps the most startling instance of a change in public conscience – or, more cynically, a recalculation of white racial self-interest incidentally favoring African American rights (see Derrick Bell 523) – comes during the novel's depiction of Sandy's transformation. From being a potential lynch mob victim, Sandy becomes a victor in a perilous contest; white supremacy is thus shown to morph from a fatal force into an enabler of racial patronage:

> Upon his release he received the congratulations of those present, some of whom would cheerfully have done him to death a few hours before. With the childish fickleness of a mob, they now experienced a satisfaction almost as great as, though less exciting than, that attendant upon taking life. . . . Sandy, having thus escaped from the Mr. Hyde of the mob, now received the benediction of its Dr. Jekyll. (139)

Whereas the white supremacists were once primed to demolish the jail where Sandy was imprisoned, "the Wellington Grays," the city's "crack independent military company," guard him after John Delamere's testimony.[21] Holmes's claim of public opinion's capriciousness –

[21] This sequence echoes the "Murder Most Foul" chapter in Albion Tourgée's *A Fool's Errand* (1879). There, African American men scapegoated for murdering a white man (who is actually alive) also face lynching. The men are, however, "congratulated . . . on their escape" after a white attorney's testimony. "The change from seemingly savage cruelty to sympathy and good will [by local whites] was instantaneous," comments the narrator (81).

"We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind" ("Path" 466) – is concordant with the narrator's conclusion that "a slight change in the point of view had demonstrated the entire ability of the leading citizens to maintain the dignified and orderly processes of the law whenever they saw fit to do so" (138). Stephen Eric Bronner's characterization of the discrepant mindset of the bigot, as a pragmatic "bricoleur" who "scurr[ies] behind the shield of 'traditions' and 'established habits'" but can manipulate any text into saying anything to uphold his "existential sense of self-worth" (qtd. in Stern; Bronner 5, 7, 34), is suggestive of Wellington's white citizens here, being ready to roast Sandy until the gravity of the potential injustice threatens their race's reputation (136).

The white public's vacillation in an "'age of crowds"' (Chesnutt, *Marrow* 53) presented both impediments and opportunities for those seeking to revolutionize customary racial understandings in America at the century's inception as a preliminary step to overturning legal decisions like *Plessy*. Ryan Simmons indicates Chesnutt recognized custom's ambivalent operation in *Marrow*, notably when Major Carteret's son faces death during Wellington's riot:

> Particularly among the wealthy, middle-aged cynics such as Carteret whose power against African Americans seems most pernicious, an ideology is something that can and will be dropped as soon as its costs outweigh its benefits in the assessment of its bearer—Although it must be kept in mind that those benefits include psychological as well as more obviously material ones. Ideological positions such as Carteret's which to their bearers seem fixed and immutable, part of one's very identity, are shown in the novel to be tenuous and relative, after all.[22] (96)

[22] Lawyer James Weldon Johnson's *The Autobiography of an Ex-Colored Man* (1912) also underscores the point: "The Texan's [racist] position does not render things so hopeless, for it indicates that the main difficulty of the race question does not lie so much in the actual condition of the blacks as it does in the mental attitude of the whites; and a mental attitude, especially one not based on truth, can be changed more easily than actual conditions" (86).

"Custom," as the novel characterizes it, is then a shibboleth. Creatively applying Holmes's legal realist conceptions from *The Common Law* and "Path," *Marrow* demanded that readers of its time reconsider the validity of rituals and beliefs that were relics of an age preceding the Civil War and the constitutional metamorphosis of the Reconstruction Amendments. The text itself, however, relied on customs and traditions to accomplish this objective: the novel was conceived of as an heir to *Uncle Tom's Cabin* and celebrates the traditional, bourgeois family.[23] *Marrow* accordingly demonstrates Chesnutt's complex engagement with custom, law, and the relationship between these modes of governance that can cultivate social stability when functioning harmoniously but can undermine society's precarious concordance when imbalanced, as occurred with *Plessy*.

Plessy v. Ferguson: *The Decision and* Marrow*'s Literary-Legal Realist Re-creation*

While a Supreme Court majority at the turn of the century ostensibly determined that racially segregationist enactments fostered the public good, *Marrow* disproves this assumption in several episodes aside from the consummating riot. Most notably, the novel re-enacts *Plessy v. Ferguson* (1896) in its "A Journey Southward" chapter. The text stages colloquies among two legal realist physicians (one white and one black) and a legal formalist white train conductor who like the *Plessy* majority claims separate train car laws' equitability in theory and practice. Justice Harlan's dissent in the case had accurately predicted that "the judgment this day rendered will, in

[23] Chesnutt wrote of his hope for *Marrow* to "become lodged in the popular mind as the legitimate successor of *Uncle Tom's Cabin* and [Albion Tourgée's] *The Fool's Errand* as depicting an epoch in our national history" ("To Houghton, Mifflin & Co." (26 Oct. 1901) 162). Stowe's 1852 sentimental novel was America's first bestselling work of fiction internationally, the literary "shot heard around the world" (Ammons ix; Cone 117). As William Morgan comments on the relationship between sentimental and realist literary texts, realist authors "consistently locate in sentimentalism 'a continuing social project' that their authors, as realists, '(in some form) still want to sign onto'" (6, qtg. Bruce Robbins). Legal realists like Holmes similarly did not advocate a wholesale jettisoning of "tradition" (e.g., the Constitution), but they did recommend a "deliberate reconsideration of the worth" of potentially obsolete rules based on an evaluation of the laws' history and the ends they "seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price" ("Path" 469, 467).

time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case*" (559). *Plessy* construed the Fourteenth Amendment, one in the trio of constitutional amendments that represented the first major expansion of citizenship since the founding.[24] The Reconstruction Amendments, ratified between 1865 and 1870, had banned "slavery" and "involuntary servitude," except when imposed as a criminal punishment (the Thirteenth Amendment (1865)),[25] and extended citizenship rights across races (the Fourteenth Amendment (1868))[26] as well as voting rights to men of color (the Fifteenth Amendment (1870)).[27]

Yet a generation after the amendments' ratification, and three years following *Plessy*, Chesnutt's verdict on the Supreme Court endorsing a revival of the antebellum rights regime for African Americans appeared apt:

> The Supreme Court of the United States is a dangerous place for a colored man to seek justice. He may go there with a maimed right; he is apt to come away with none at all, with an adverse decision shutting out even the hope of any future protection there; for the

[24] As Albion Tourgée, Homer Plessy's attorney, framed it, this "*new citizenship*" was "new in character, new in extent; new in method of determination, new in essential incident" ("Brief of Plaintiff in Error" 317). Tourgée proclaimed that "[t]he people of the United States were not building for today and its prejudices alone, but for justice, liberty and a nationality secure for all time" against state impingements ("Brief of Plaintiff in Error" 312).
[25] "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Captain McBane exploits this exception in *Marrow* (24-25), like those actually involved in convict labor leasing schemes.
[26] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Amendment was designed to nullify black codes, neo-slave codes or early versions of Jim Crow laws that were enacted in the former Confederacy during the Civil War's aftermath ("Black Codes").
[27] "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." Subsequently, in 1920, the Nineteenth Amendment granted women the right to vote: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex." During the Vietnam War in 1971, the Twenty-Sixth Amendment lowered the voting age to eighteen to rectify the disparity between the minimum age of draft registration and when franchise rights vested (Grimes 141-42): "The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age."

> doctrine of *stare decisis* is as strongly intrenched there as the hopeless superiority of the Anglo-Saxon is in the Southern States. ("To Walter Hines Page" (22 Mar. 1899) 121)

Chesnutt's missive resonated with the legal realist salvo opening Justice Harlan's dissent in the *Civil Rights Cases,* a key precursor to *Plessy*: "I cannot resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism. It is not the words of the law, but the internal sense of it that makes the law; the letter of the law is the body; the sense and reason of the law is the soul" (26-27). The high court's decision there in 1883 may have been the proverbial nail in the coffin for African Americans' constitutional rights, especially (though not exclusively) in the South, until the "second Reconstruction" of the civil rights era (Foner xx). The majority invalidated the Civil Rights Act of 1875's public accommodation sections for trespassing into states' legislative domains, citing the "state action" requirement from an earlier case, *United States v. Cruikshank* (1876).[28] The Court also claimed the Fourteenth Amendment's "prohibitory," "corrective" character, as opposed to its positively granting African Americans rights (10-13). Those rights were henceforth effectively left "to the good judgment of the reconstructed slaveocracy," in John Wideman's words (128).[29] The majority ultimately concluded – with a breathtaking assertion hardly one generation after emancipation, following centuries of enslavement – that blacks "must cease[] to be the special favorite of the laws" (25). Justice Harlan's solo dissent in the case contrastingly argued for a more expansive, affirmative understanding of the federal

[28] The case arose from the Colfax, Louisiana, massacre of 1873, which was ominously similar to the Wilmington riot; dozens of African Americans were murdered by white supremacists during a disputed gubernatorial election (Charles Lane 11-13). The white defendants' convictions were overturned by the Supreme Court on the basis that the federal government lacked jurisdiction to prosecute the vigilantes (556-58).

[29] The *Slaughter-House Cases* (1873) had earlier devolved the primary responsibility of securing rights enumerated in the Reconstruction Amendments to states (74-77). As legal realist Robert Hale later explained, states then permitted private individuals to infringe African Americans' constitutional rights to much the same effect as if the states had directly impinged upon the rights ("Rights Under the Fourteenth and Fifteenth Amendments" 627-28).

government's powers to enact and enforce legislation intended to eradicate racial discrimination, given the Reconstruction Amendments' sweeping transformation of the Constitution (61).

Plessy accelerated the constriction of African Americans' rights by constitutionalizing the "separate but equal" legislation that mushroomed throughout ex-Confederate states with Reconstruction's official demise in 1877, once federal troops withdrew from the South. A majority of the Court upheld segregationist state public accommodation laws – in the case, a Louisiana separate train car provision – against Thirteenth and Fourteenth Amendment challenges.[30] The former argument was summarily dispensed with after citations to the *Slaughter-House* (1873) and *Civil Rights Cases*[31] while the majority concentrated its analysis on the latter contention, drawing on what Brook Thomas has theorized as "boundary ideology." Under this variant of legal formalism, different realms of human activity are subject to distinctive legal norms because of their supposedly inherent operational proclivities (Thomas, "Legal Argument" 317-18). For the Court, this meant that the Fourteenth Amendment protected African Americans' exercises of civil and political rights (e.g., voting, jury service, and property and contractual rights), but not social ones (e.g., a right to sit in a particular train car or marry a specific person). Social rights were to be left to the vicissitudes of society at-large,[32] which

[30] For readability, I have excised pincites from my discussion of the case, which is cited in the works cited section.
[31] Extending the majority's contention in the *Civil Rights Cases* that "[i]t would be running the slavery argument into the ground to make it apply to every act of discrimination" that could arise in the public accommodations context (24), the majority opinion in *Plessy* claimed that "[a] statute which implies *merely* a legal distinction between the white and colored races – a distinction which is founded in the color of the two races and which must always exist so long as white men are distinguished from the other race by color – has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude" (543) (emphasis added). The *Slaughter-House Cases* had earlier largely evacuated the Fourteenth Amendment's privileges and immunities clause of import in the race relations context by holding that the clause only applied to national, not state, citizenship.
[32] Regarding Plessy's argument, the Court averred that it "assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals" (551).

connoted a white majority largely indifferent or hostile to black rights at the century's turn.[33] The Court's ample passive voice in the opinion (e.g., "The case was decided . . .") and attribution of agency to the law or "nature" as opposed to people rhetorically reinforced boundary ideology. The judges "distanc[ed] themselves from unpleasant legal results" by purporting to "reach the decision because of the automatic operation of the law's logic, which goes on outside of their control, and which dictates to them the decision they write" (Mertz 383). Elizabeth Mertz concludes about the majority opinion as contrasted with Justice Harlan's dissent, "Taken together, [they] give us both the removed, tradition-bound voice retelling a story of 'how it has to be,' and a more immediate, critical, personal story of 'why we ought to change it'" (384).

Not unlike the Constitution itself during the antebellum period with respect to slavery, the Court's opinion employs several rhetorical devices "to justify or to veil the disparity between social practice and social ideals" (Charles Miller 148, 154). Most notably, the challenged statute's classification as governing "social rights," coupled with its apparently equitable language, was sufficient to render it constitutional. Corroborating Justice Harlan, however, evidence suggests this emphasis on apparent neutrality was a disguise for a decision on extra-legal grounds.[34] As Holmes commented in "The Path of the Law" on the illusoriness of legal reasoning, post-dating but arguably applicable to the majority opinion in *Plessy*:

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[33] The majority opinion's author, Justice Henry Billings Brown (who grew up in Massachusetts and Connecticut), has been described as "a reflexive social elitist whose opinions of women, African-Americans, Jews, and immigrants now seem odious, even if they were unexceptional for their time. Brown exalted, as he once claimed, 'that respect for the law inherent in the Anglo-Saxon race'" ("Henry Billings Brown").

[34] The Chief Justice at the time, Melville Fuller, was a former state legislator who opposed the Emancipation Proclamation, and Justice Edward D. White was a Confederate veteran (Klarman 320). Additionally, anticipating Major Carteret and his ilk's justifications of the lynchings of African Americans, as well as the emphasis on facial equality in *Plessy*'s majority opinion, Justice Brown proclaimed in an 1895 Yale Law School speech:

> The very fact that lynchings outnumber the legal executions is strong evidence of a feeble enforcement of the criminal statutes. The fact that such lynchings are most frequent in States where the accused is most perfectly protected by statutory guaranties, indicates a popular opinion that such guaranties are used to defeat justice and not to secure it. Let the people, who are, in the main, law abiding, or at least determined that others shall be so, once become satisfied that the law is being used to set the guilty free, and irregular methods of wreaking vengeance are inevitable. (*The Twentieth Century* 13)

> Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. . . . Such matters really are battle grounds where the means do not exist for the determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. (466)

In his opinion for the contingent "given body" or court majority, Justice Henry Billings Brown rejected the assertion that laws prescribing separate facilities implied racial inferiority and deemed the statute at issue a "reasonable" exercise of the state's police power, enacted in "good faith."

Moreover, the Court found that the longevity of racial distinctions was a pertinent factor in assessing a law's constitutionality and referenced the deleterious "tradition" of *Marrow*'s title: "In determining the question of reasonableness, it [the state legislature] is at liberty to act with reference to the established usages, customs, and traditions of the people, with a view to the promotion of their comfort and the preservation of the public peace and good order"[35] – the "people" here clearly referencing whites; as the narrator notes in *Marrow*, "for to Jerry [Letlow], as to the white people themselves, the white people were the public" (112). In tempered form, the opinion's language echoes historian Philip Alexander Bruce's *The Plantation Negro as a Freeman* (1889), which depicted African Americans as more violent and lawless once liberated. Black political, and stemming from that social, power was portrayed by Bruce as a dire threat to the so-called "tradition[al]" way of white life, rendering "reasonable" white revolt. Bruce

[35] It could be here contended that the majority opinion reflects a realist view of law in accounting for social policy considerations, albeit noxious ones articulated in dog whistle prose. Legal realism is not necessarily synonymous with moral perspicacity, though this project focuses on the movement's more enlightened dimensions.

advocated for separate racial spheres as if blacks and whites resided in different countries, and he analogized supporting racial commingling to defending "incest and rape" (49, 242).[36]

The majority in *Plessy* then added insult to injury by blaming Homer Plessy for construing the statute enforcing racial separation as stamping blacks with a "badge of inferiority," insisting nothing in the act did so. Finally, the justices raised the hypothetical of black political power as a threat to whites but claimed whites would not acquiesce in considering themselves inferior.[37] The Court thus chillingly portended the Wilmington riot, as white supremacists in the town staged a coup when a political slate favoring African American rights emerged victorious in an 1898 municipal election. In the riot's year, and in an apparent effort to entrench the rationale for *Plessy*, the Court would uphold poll taxes and literacy tests as presumptively constitutional measures, absent evidence to the contrary. The decision in *Williams v. Mississippi*[38] extended *Plessy*'s facial equality logic to the Fifteenth Amendment context and was also condemned in *Marrow*.[39]

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[36] The extreme of "commingling" at the time was miscegenation; as Leon Litwack has observed, "Behind every discussion and skirmish involving racial separation lurked the specter of unrestrained black lust and sexuality" (*Been in the Storm So Long* 265).

[37] The Court claimed: "The argument necessarily assumes that if, as has been more than once the case and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption" (551). Justice Harlan's dissent indirectly rebutted this contention in arguing, "Sixty millions of whites are in no danger from the presence here of eight millions of blacks" (560).

[38] About these insidious enactments, the Court there held that "[t]hey do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them" (225). The Twenty-Fourth Amendment, ratified in 1964, prohibited poll taxes in federal elections, but not until *Harper v. Virginia Board of Elections* two years later did the proscription extend to state and local elections, after the Supreme Court overturned its judgment in *Breedlove v. Suttles* (1937). Implementation of the Voting Rights Act of 1965 resulted in literacy tests being outlawed nationwide by 1970 (Penrice).

[39] *Marrow* explains how "grandfather clauses" (not invalidated until the Supreme Court's decision in *Guinn v. United States* (1915)), coupled with poll taxes and literacy tests, undercut African Americans' Fifteenth Amendment rights:

> After providing various restrictions of the suffrage, based upon education, character, and property, which it was deemed would in effect disfranchise the colored race, an exception was made in favor of all citizens whose fathers or grandfathers had been entitled to vote prior to 1867. Since none but white men could vote prior to 1867, this exception obviously took in the poor and ignorant whites, while the same class of negroes was excluded. It was ingenious, but it was not fair. (144)

Justice Harlan's solo dissent in the case assailed the majority opinion, and it is all the more astounding in being composed by a jurist who was born into a slave-owning family and who initially opposed the Thirteenth Amendment until Reconstruction-era racial terrorism impelled him to renounce his position (Przybyszewski 152-56). The Justice accordingly exemplified legal realist-style "enlightened skepticism" (Holmes, "Path" 469), and in *Plessy* he especially contested the majority's contention that the right to mobility at issue – a vital right many African Americans had been denied in antebellum times (*Civil Rights Cases* 39) – was a "social" right outside the Thirteenth and Fourteenth Amendments' purview. Justice Harlan first summarized the statute and presented the hypothetical exclusions of "colored attendants traveling with adults," a rhetorical move shrewdly appealing to whites' self-interest before engendering sympathy for African Americans.[40] Chesnutt also strategically began *Marrow* from the perspective of a white character, Major Philip Carteret, whose yearning for his son's survival ultimately compels him and his wife to attempt a racial reconciliation at the novel's end.

The Justice then framed the case legally as hinging on a state's right to "regulate the use of a public highway by citizens of the United States solely on the basis of race," claiming to leave aside the "apparent . . . injustice of such legislation" to focus only on "whether it is consistent with the Constitution of the United States."[41] After this arguable formalist maneuver appealing to the law alone, he categorized the right to locomotion as a civil one, first establishing that "[i]n respect of civil rights common to all citizens, the Constitution of the United States does

[40] A recent article argues this consideration, and not necessarily a devotion to African Americans' full equality (including social status and a greater share of national wealth), is at the pith of the dissent (Philip Hutchison 436).
[41] This may be construed as a disingenuous move separating law and justice. One means to reconcile the distinction would be to consider the subsequent analysis's reliance on the Reconstruction Amendments and more equitable high court majority decisions interpreting those constitutional enactments, as opposed to personal opinions about justice; *Marrow* is more explicitly infused with the latter. Justice Harlan's rhetorical move could also reflect his being bound by professional "usages and procedures" to address "himself not directly to a social question, but to a matter of policy translated into the language of law," thus becoming a hybrid statesman-jurist (see Walton Hamilton 1076-77).

not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights." He would have held that the public accommodations statute at bar was "inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by everyone within the United States."

Unlike the majority's narrow construction of the Thirteenth Amendment's ban on slavery and involuntary servitude, Justice Harlan interpreted the amendment to proscribe *de jure* and *de facto* slavery and involuntary servitude.[42] The Fourteenth Amendment to him "added greatly to the dignity and glory of American citizenship and to the security of personal liberty," with the two amendments combined, "if enforced according to their true intent and meaning," being sufficient to "protect all the civil rights that pertain to freedom and citizenship" by "remov[ing] the race line from our governmental systems." Recalling Holmes's warning about blindly imitating tradition, Justice Harlan contrasted the postbellum cases with antebellum precedents that the majority's *Plessy* opinion relied on, criticizing the citation to lower court decisions issued when "race prejudice was, practically, the supreme law of the land," before last generation's revolution in America's "supreme law" of the Constitution.

The Justice then confronted the majority's pivotal formalist counterargument to his claim, i.e., that the disputed statute did "not discriminate against either race, but prescribe[d] a rule applicable alike to white and colored citizens." His claims echoed those of Chesnutt's advisor George Washington Cable in "The Freedman's Case in Equity" (1885) from *The Silent South*; there, Cable elucidated the "vicious evasions" or "reluctant or simulated acceptance of [the

[42] He argued that the amendment "not only struck down the institution of slavery as previously existing in the United States," but that it prevent[ed] the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country" (555). The Justice's dissent later concluded that "[t]he arbitrary separation of citizens on the basis of race while they are on a public highway is a badge of servitude wholly inconsistent with the civil freedom and equality before the law established by the Constitution" (562).

Reconstruction Amendments'] narrowest letter" in "daily practice" because of Jim Crow laws condoned as "the *traditional* sentiment of a conservative people" (5, 18, 25). Like Cable, Justice Harlan avowed such laws' nefarious intent of "practical subjection" (*Civil Rights Cases* 62):

> Everyone knows that the statute in question had its origin in the purpose not so much to exclude white persons from railroad cars occupied by blacks as to exclude colored persons from coaches occupied by or assigned to white persons. . . . The thing to accomplish was, *under the guise of giving equal accommodations for whites and blacks*, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor to assert the contrary.[43] (emphasis added)

To him, the "real meaning" of the legislation was pure racial animus, being "conceived in hostility to, and enacted for the purpose of[,] humiliating" blacks, resuscitating slave and black codes. The Justice construed the statute to infringe on each race's personal liberty of locomotion and could discern no reasonable limiting principle to the majority decision.

Then came one of the most eulogized but vexed passages in American constitutional law, in which Justice Harlan distinguished between racial pride, which was not per se problematic in his estimation,[44] and racial equality under civil rights laws that he believed the majority decision had eroded:

> 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

[43] Then ex-Justice Henry Billings Brown tentatively agreed with this proposition in a 1912 law review article he authored about Justice Harlan's dissents, conceding that Justice Harlan "assumed what is probably the fact" regarding legislative intent here ("Dissenting Opinions" 338).

[44] As he avowed earlier in the opinion, "Every true man has pride of race, and, under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper" (554).

> principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

The passage's colorblind metaphor for legal vision, which could be construed as endorsing mere formal racial equality, was derived from Albion Tourgée's brief supporting Homer Plessy, although Tourgée had previously employed the image in his novel *Bricks Without Straw* (1880); Tourgée argued in the brief that "Justice is pictured blind and her daughter, the Law, ought at least to be color-blind" (qtd. in Olsen, *Thin Disguise* 90).[45] Color-blindness has salience today as a contested ideal, and it was recently invoked by Supreme Court Chief Justice John Roberts (in concurrence) and Justice Sonia Sotomayor (in dissent) in *Schuette v. Coalition to Defend Affirmative Action* (2014).[46] The contemporary debate about whether attaining a more equitable American society realistically requires the law to account for race has been spurred in part by

[45] *Bricks Without Straw* contrastingly has a more detrimental interpretation of legal colorblindness, demonstrating that the metaphor's convolutions were recognized at its origin: "Right he [a freed slave] had, in the abstract; concrete, none. Justice would not hear his voice. The law was still color-blinded by the past" (106).

[46] Justice Sotomayor asserted there: "In my colleagues' view, examining the racial impact of legislation only perpetuates racial discrimination. This refusal to accept the stark reality that race matters is regrettable. The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination" (*Schuette* 1676). Her final line here alluded to the Chief's claim in an earlier case that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race" (*Parents Involved* 748).

Justice Harlan's *Plessy* dissent over a century earlier (Grinsell 319). Controversy arises from how the passage itself unfolds, for assuming the white chauvinism reflected at its outset still holds true, color-blind enforcement of even facially equitable laws poses a serious challenge.

Finally, the Justice in effect foretold the Wilmington riot that *Marrow* was based on, which transpired two years after *Plessy*: "The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution."[47] He affirmed that recognizing African Americans' constitutional rights would be preferable to denying them,[48] and that harm from the majority's sanctioning segregation under a pretext of equality would redound to whites: "State enactments regulating the enjoyment of civil rights upon the basis of race, and cunningly devised to defeat legitimate results of the war under the pretence of recognizing equality of rights, can have no other result than to render permanent peace impossible and to keep alive a conflict of races the continuance of which must do harm to all concerned."

The jurist culminated with a plea to integrate African Americans into the body politic, the opposite of what the majority opinion would do, given its supporting enactments "plac[ing] in a condition of legal inferiority a large body of American citizens now constituting a part of the political community called the People of the United States, for whom and by whom, through representatives, our government is administered." This gesture to the nation's founders and

[47] He augured that Jim Crow laws "hostile to both the spirit and the letter of the Constitution" would in effect revive slavery: "Slavery, as an institution tolerated by the law would, it is true, have disappeared from our country, but there would remain a power in the States, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom to regulate civil rights, common to all citizens, upon the basis of race" (563).
[48] "If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race" (562).

President Abraham Lincoln – evoking the Constitution's preamble ("We the People") and the Gettysburg Address ("that government of the people, by the people, for the people shall not perish from the earth") – capped the dissent. Justice Harlan's peroration epitomizes future Supreme Court Justice (and legal realist) Benjamin Cardozo's insight that dissenting opinions may have a literary quality, "a dignity, an elevation of mood and thought and phrase. Deep conviction and warm feeling are saying their last say with knowledge that the cause is lost. The voice of the majority may be that of force triumphant, content with the plaudits of the hour, and recking little of the morrow. The dissenter speaks to the future, and his voice is pitched in a key that will carry through the years" ("Law and Literature" 505).

Marrow's "A Journey Southward" chapter enlivens *Plessy* by embodying Justice Harlan in the character of Dr. Alvin Burns, a white physician who accompanies his African American protégé, Dr. William Miller (a stand-in for Homer Plessy), on a train ride southward; a white conductor the men confront comes to represent the voice of the *Plessy* majority. Humanizing the stakes of the debate in *Plessy* was integral to Chesnutt's objective in composing *Marrow*. Ryan Simmons contends that the novel was "not clearly intended to convert racists into non-racists; it seem[ed] meant instead to change nonracists into antiracists – that is, to make the fight against racial injustice no longer an abstraction, but central to one's consciousness, and as a result to one's decisions as well" (95).[49] In the novel, Dr. Price, who believes himself "liberal," finds it "easy to theorize about the negro" and deem the issue of Dr. Miller's aiding in Major Carteret's son Dodie's surgery immediately after this chapter a matter of "'minor importance"' but "more

[49] Reflecting on his experiences discussing race relations with whites, Chesnutt wrote Albion Tourgée that "his own daily business contacts with 'the best white people of one of the most advanced communities' in the North" tempered Chesnutt's enthusiasm about the prospects for racial justice materializing in the near future. "Whenever he brought up the 'wrongs of the Negro,' Chesnutt noted, his white acquaintances 'dismissed' the subject 'as quickly as politeness [would] permit. They admit that the present situation is wrong, but they do not regard it as their personal concern, and do not see how they can remedy it"' (qtd. in Karcher 185).

difficult to look this man [Dr. Miller] in the eyes" and "tell him the humiliating truth" of why Dr. Miller cannot operate on Dodie (44-48).[50]

Both *Plessy* opinions were relatively unconcerned with the specifics of Homer Plessy's plight, naming him only a couple times and concentrating on the legally germane facts about him, such as his alleged racial composition and his refusal to be relegated to a Jim Crow car. The justices' preoccupation with race relations en masse had the effect of abstracting an issue that was a concrete, everyday reality for many African Americans throughout the United States[51] at the time. *Marrow*, then, can be seen as providing the proverbial "tree" picture complementing Justice Harlan's *Plessy* dissent's exposition of the "forest" of what "separate but equal" laws truly entailed; translating *Plessy* into anthropomorphic literary terms demonstrated what the justices' at-times complex constitutional and statutory analyses meant at the grass-roots level. In humanizing not only the litigants, but the justices, the chapter also functions to de-elevate the jurists from their pedestals. Having ordinary citizens channel the justices' legal reasoning suggests how law is not infallible but amenable to change, just as the people who generate it are. Conversely, by underscoring how judicial pronouncements rely on ordinary citizens like train conductors for their implementation, the novel empowers the public, whose collective defiance of the law could potentially instigate salubrious legal changes.

The sequence reflects an astute reading of the case's majority and dissenting opinions, exposing how formally "separate but equal" laws were anything but equal in reality while belying the false impression of placid segregated race relations white northerners' perceive in the

[50] *Cedars* describes how "the Southern mind, in discussing abstract questions relative to humanity, makes always consciously or unconsciously, the mental reservation that the conclusions reached to do not apply to the negro, unless they can be made to harmonize with the customs of the country," but hopes for readers to become aware of "[o]ur common race,—the human race," with "each one of us . . . in some measure his brother's keeper" (100, 122).
[51] That noted, Elizabeth Mertz argues that the dissent is relatively more concrete than the majority opinion and "attempt[s] to break out of strictly legal frames for discussing social problems" (381-82).

novel's subsequent plantation fiction-like tour. Unlike both judicial opinions, though, which begin with the contested statute, Chesnutt starts "A Journey Southward" with the people subject to the law. Dr. Burns and Dr. Miller's journey originates in Philadelphia, the historical birthplace of American liberty; in the American popular imaginary at the century's turn, the physical liberty of movement on trains that spanned the nation represented a concrete manifestation of constitutional liberty, particularly after the ratification of the Reconstruction Amendments (see Lee, "Estrangement on a Train" 346).[52] Justice Harlan's *Plessy* dissent expressed this connection between literal mobility and more ethereal freedom (and potentially inclusion) within the nation, and he is introduced vicariously through Dr. Burns. The physician coincidentally meets his acolyte, also en route to Wellington, aboard a southbound train, a transitory space befitting a nation in transition. Railroads epitomized the paradoxes of this historical inflection point, being a modern technological phenomenon (the first transcontinental railroad dates to Reconstruction (Arrington 8)), but one subject to Jim Crow laws with antecedents in slave and black codes. As Justice Harlan cogently argued in his earlier *Civil Rights Cases* dissent, impediments to mobility "are burdens which lay at the very foundation of the institution of slavery as it once existed. They are not to be sustained except upon the assumption that there is, in this land of universal liberty, a class which may still be discriminated against" (39).

At the outset of the physicians' colloquy, the narrator admonishes readers not to spring to stereotypical judgments about inferiority based solely on appearance, especially race, testing

[52] Steve Goodman's folk song "The City of New Orleans" (1971), from where the "Good Morning America" show's title is derived, is a eulogy to this idealized past; it portrays diverse passengers interacting on a southbound journey and contains this chorus in which the train becomes a synecdoche for the nation:

> Good morning America how are you?
> Don't you know me I'm your native son,
> I'm the train they call The City of New Orleans,
> I'll be gone five hundred miles when the day is done.

whether readers have absorbed the lessons of prior chapters – such as the christening party episode discussed below – in learning how to read and see scenes unconventionally:

> A celebrated traveler, after many years spent in barbarous or savage lands, has said that among all varieties of mankind the similarities are vastly more important and fundamental than the differences. *Looking at these two men with the American eye*, the differences would perhaps be the more striking, *or at least the more immediately apparent*, for the first was white and the second black, or, more correctly speaking, brown; it was even a light brown, but both his swarthy complexion and his curly hair revealed what has been described in the laws of some of our states, as a 'visible admixture' of African blood. (33) (emphasis added)

The narrator employs epanorthosis (self-correction) in endeavoring to pinpoint Dr. Miller's color (black, then brown, then light brown), and in doing so suggests conventional language's inadequacy in specifying the physician's complexion. The depiction ultimately resorts to stock legal language that proffers an equally equivocal sense of precision; "'visible admixture'" is a largely arbitrary standard with which to gauge the depth of "African blood."

Those pitfalls arise, though, from viewing the colleagues through "the American eye," whose fixation at the time was often on race (to the exclusion of other important personal attributes),[53] whereas the narrator's cosmopolitan gaze then proceeds to focus on similarities, aside from age and perhaps attire:

> [B]oth seemed from their faces and their manners to be men of culture and accustomed to the society of cultivated people. They were both handsome men, the elder representing a fine type of Anglo-Saxon, as the term is used in speaking of our composite white

[53] Similarly, Justice Harlan referred to the "eye of the law" not recognizing a "superior, dominant, ruling class of citizens" in his *Plessy* dissent (559).

> population; while the mulatto's erect form, broad shoulders, clear eyes, fine teeth, and pleasingly moulded features showed nowhere any sign of that degeneration which the pessimist so sadly maintains is the inevitable heritage of mixed races. (33)

This prelude establishes affinities between the physicians in terms of class, culture, and appealing appearance, suggesting their equality despite white supremacist tenets to the contrary. The backstory of how the men first met follows; Dr. Miller studied at a prestigious medical college with the nationally-renowned Dr. Burns and won a scholarship to continue his education in Paris and Vienna (33-34), an integrated education that spearheaded Dr. Miller's success and that contrasts with the segregated black school referenced in the plantation fiction tour chapter and alluded to by the *Plessy* majority.[54] *Marrow* explains that Dr. Miller's father Adam, a slave's son, strove to give his son "a professional education, in the proud hope that his children or his grandchildren might be gentlemen in the town where their ancestors had once been slaves" (34) likely denied formal schooling.[55] *Brown v. Board of Education* (1954) subsequently recognized education as imperative for class mobility and meaningful participation in a democracy.[56]

The main sequence commences with the doctors discoursing about race, Dr. Burns having discarded a newspaper he was perusing to converse with Dr. Miller. In this rendering, the train has the qualities of a Habermasian bourgeois public sphere, defined as a space where

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[54] The Court there approvingly cited judicial decisions upholding the constitutionality of segregated schools (545).
[55] As in Susan Glaspell's play *Inheritors* (1921), where Silas Morton perceived education as a linchpin of the American Dream and founded a college for working-class students, Dr. Miller's family views education as a means of self and communal improvement; Dr. Miller expends part of his inheritance on the teaching hospital charred in Wellington's riot (34).
[56] In his unanimous opinion for the Court overruling *Plessy* in the public educational context, Chief Justice Earl Warren reasoned:

> Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. (493)

"private people come together as a public" to debate on public questions with "a tact befitting equals" (27, 36).[57] Dr. Burns reflexively alludes to *Marrow* and Justice Harlan's dissent in *Plessy,* which argued that the destinies of African Americans and whites in the United States were "indissolubly linked" (560), during the men's dialogue: "'It is a great problem, Miller, the future of your race . . . . It is a serial story which we are all reading, and which grows in vital interest with each successive installment. It is not only your problem, but ours. Your race must come up or drag ours down'" (34). Dr. Miller believes Wellington's African Americans are at the vanguard of solving the so-called "negro problem," and Dr. Burns's delight about Dr. Miller's dexterity during a recent operation leads him to invite the African American physician to assist with Dodie's surgery; Dr. Miller accepts on the condition that "'it is agreeable to all concerned.'"[58] This discussion intermingling professional triumphs and potential breakthroughs in race relations connects an interracial effort to heal individual human bodies with curing a racially diseased body politic. "[P]leasant conversation" between the men ensues until the train passes Richmond, Virginia, the former capital of the Confederacy (34-35), at which juncture passengers become subject to a Jim Crow separate car law of the type contested in *Plessy*.

Voicing his dissent from the law, Dr. Burns urges Dr. Miller to remain with him in the car reserved for whites. Chesnutt here deviates from key details in *Plessy*, which was a test case. Homer Plessy was a laborer and an octoroon who could readily pass for white. He was only arrested for sitting in a white train car after identifying himself to the conductor as African American (Hoffer 2, 4; Lofgren 41), effectively proving the absurdity of the challenged "separate but equal" statute's binary construction of race. *Marrow,* contrastingly, focuses on a professional

[57] Habermas's theory has been critiqued for homogeneity (i.e., positing a unitary public sphere) and not adequately accounting for race, class, and gender marginalization. Essays in Bruce Robbins's *The Phantom Public Sphere* elaborate on these criticisms.

[58] Which, as discussed above, it is not, particularly to Dodie's racist parents.

class African American (a perhaps more relatable character to middle-class white readers) and the more typical instance in which African Americans like Dr. Miller who did not have Plessy's self-identification ability were relegated to "colored" train cars. Dr. Burns insists on the physicians' right to liberty, channeling Justice Harlan in proclaiming to the conductor: "'There is a vital principle at stake in the matter"': the Fourteenth Amendment's efficacy (35-36).[59]

The officious conductor expresses regret at parting "'*friends*'" after initially mistaking Dr. Miller as Dr. Burns's servant,[60] citing Virginia's separate car law; this exception proves the racism and classism of the general rule. Later, upon being consigned to a colored car, Dr. Miller observes "a colored nurse" with her "mistress" entering the white car and mulls about the injustice of his exclusion: "White people . . . do not object to the negro as a servant. As the traditional negro,—the servant,—he is welcomed; as an equal, he is repudiated" (40).[61] Continuing his debate with the conductor before being expelled from the white car, Dr. Miller remonstrates that he paid his "'fare on the sleeping-car, where the separate-car law does not apply,'" but the conductor contends that Dr. Miller may be reimbursed for the fare difference and demands the doctor's removal from the car reserved for whites (36). Professional accomplishments and economic class do not immunize the doctor from racism, and the sequence reveals the harsh mechanisms by which white supremacy was maintained. This portrayal

[59] This passage is later mirrored in Dr. Price's dismissal of Dr. Miller's right to assist in Dodie's operation: "'The life at stake here should not be imperiled by any consideration of minor importance'"; Dr. Burns rejoinders: "'[I]t is a matter of principle, which ought not to give way to a mere prejudice"' (46).

[60] Unlike in *Plessy*, where the sole exception to Louisiana's separate car law enabled African American caretakers to accompany white children, a legal exception here exists for African American servants accompanying their white adult employers.

[61] Dr. Price afterward echoes this observation: "If Miller were going as a servant [to Dodie's operation] . . . there would be no difficulty" (45). Dr. Miller's and Dr. Price's comments reflect Albion Tourgée's brief for Homer Plessy, in which Tourgée contended: "The exemption of nurses shows that the real evil lies not in the color of the skin but in the relation the colored person sustains to the white. If he is a dependent, it may be endured: if he is not, his presence is insufferable" (qtd. in Woodward 152).

contrasts with the northerners' sedate tour of Wellington and the majority opinion in *Plessy*, which presented segregation as a natural fact generally preferred by members of both races.

Exceedingly "nettled" at his authority being challenged by the physicians, the conductor then points to a sign designating the coach as "'White,'" which he presumes Dr. Miller saw and which he claims was so placed to exclude the African American doctor. The sign, an outsize formal indicator of the separate car law, functions as a colloquial distillation of the majority decision in *Plessy* and a spectacle of the law of-sorts. It states "'White,' in letters about a foot long, [which are] painted in white upon a dark background, typical, one might suppose, of the distinction thereby indicated," comments the acerbic narrator (36). Peter Goodrich's "Specters of Law: Why the History of the Legal Spectacle Has Not Been Written" discusses the significance of legal images, such as the sign here,[62] as manifestations of not just law, but the latent principles underlying the legal system, such as racist traditions in *Marrow*[63]:

> The visible words call up images of the unwritten specular patterns of custom and use, the paths of an itinerant justice and a moveable law. . . . The image propels the subject into the imaginary, into a spectral realm of unwritten law, custom, and use that is only ever partially present, always in the majority a sign of an immemorial pattern, a virtuous lineage, an inheritance. (806, 810)

Goodrich describes images giving law "its power and glory, its aura and effect" (790). He subsequently links legal images to jurisprudential philosophies, distinguishing between legal realism and formalism in characterizing governance as "what happens" and rules as "what appear[] to happen," with the image "shuttl[ing] between the two" and functioning as a "legal

[62] His article references a "brass plate with the word 'Private' in black letters" demarcating a law library for judges (809, 811), not so unlike the exclusionary Jim Crow signage at issue in *Plessy* and *Marrow*.
[63] The article's epigraph is consonant with *Marrow*: "Beware of the puddle of mens traditions; it infects often, seldom it refreshes" (773, qtg. Calfhill 20).

devise that hides the absence of law in the oeconomic order, in an administrative realm where it is not sovereign dictate but pragmatism, the quotidian of institutions that continues in its everyday order, its networks and decisions" (808).

The majority opinion in *Plessy* here functions as the formal rule, while the conductor's mundane actions are a form of low-level governance, with the "neatly framed" (36) "White" sign bridging the two and rendering the law visible, but not wholly so, in functioning as a legal spectacle. Goodrich's characterization of the inadequacy of legal spectacles in capturing the phenomena they endeavor to represent – he portrays images not constituting reality (810) – recalls Dana Polan's argument about more commonly recognized spectacles like the northerners' tour in *Marrow* offering "an imagistic surface of the world" (63) resembling the *Plessy* majority's perceptions. The manufactured nature of the sign in *Marrow* seems to belie the Court's contentions about racial segregation's organicity (see Julia Lee 352), and it incites Dr. Burns: "'You shall not stir a step, Miller,' exclaim[s] Dr. Burns wrathfully. 'This is an outrage upon a citizen of a free country'" (36).

Yet the conductor is obdurate in his determination to enforce the law, citing multiple grounds for why Dr. Miller must be demoted to a Jim Crow car, or put physically in his "place." The conductor's exchange with the physicians discloses the oft-times arbitrariness of law enforcement, regardless of written law. First, self-interest motivates the conductor: "'I have already come near losing my place because of not enforcing it, and I can take no more chances, since I have a family to support'" (36). Next, the conductor describes the wide discretionary berth the separate car law affords him, a rule-of-law deficiency Justice Harlan had alluded to in his *Plessy* dissent when discussing how the challenged statute's purpose was to exclude African Americans from cars reserved for whites, and not vice versa (from which it would reasonably

follow – and soon in the sequence does – that white passengers would not necessarily be excluded from cars reserved for African Americans). Officials are permitted to remove passengers like Dr. Miller by force with no viable redress, or simply switch cars at the next stop and have defiant passengers "'arrested and fined or imprisoned for resistance,'" which Dr. Miller knows is an accurate synopsis of the conductor's violent clout: "'It is the law, and we are powerless to resist it,'" he laments to Dr. Burns.

Adamant in staying with his respected colleague, Dr. Burns attempts to join Dr. Miller in the colored car, as a "'place that is too good for you is not good enough for me.'" This, though, prompts the conductor, "who ha[s] quite recovered his equanimity" by now and become "calmly conscious of his power,"[64] to explain that "'white passengers are not permitted to ride in the colored car.'" A profane outburst from Dr. Burns ensues, here deviating from Justice Harlan's more majestic language in his *Plessy* dissent, but conveying much the same sentiment: "'This is an outrage' . . . 'a d——d outrage! You are curtailing the rights, not only of colored people, but of white men as well. I shall sit where I please!'" Dr. Burns's assertion about white rights being circumscribed by segregationist enactments resonates with Justice Harlan's opening to his dissent in *Plessy*, which depicted troubling hypothetical exclusions of African Americans from cars reserved for whites;[65] and the tone of the conductor's response emulates that of the formalist majority, claiming the separate car law's apparently neutral operation upon all: "'The beauty of

[64] The *Plessy* majority recognized train conductors' prerogatives in this respect: "The power to assign to a particular coach obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular State, is to be deemed a white and who a colored person" (549). Virginia's separate train car law implicated in *Marrow* explicitly referenced train conductors being racial "judges": "The conductors or managers on all such railroads shall have power, and are hereby required, to assign to each white or colored passenger his or her respective car, coach or compartment. If the passenger fails to disclose his race, the conductor and managers, acting in good faith, shall be the sole judges of his race."

[65] More generally, the opinion subsequently asserted: "If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so" (557).

the system lies in its strict impartiality—it applies to both races alike.'" Dr. Burns retorts that the supposedly objective law "'is equally infamous in both cases'" but must acquiesce (37).

The congenial public sphere being ruptured, Dr. Miller is isolated in the "Jim Crow car," there being no other passengers there when he enters.[66] The car's description, delving into granular details like Justice Harlan's *Plessy* dissent did in delineating extensions of the majority's (il)logic,[67] instantly undercuts the notion of "separate but equal" as applied; equality was hardly "substantial" (the prescribed legal standard),[68] let alone identical. In contrast to the car reserved for whites, the Jim Crow car is described as "an old car, with faded upholstery, from which the stuffing projected here and there through torn places. Apparently the floor had not been swept for several days." Dr. Miller's thirst for constitutional rights is decidedly not quenched here: "[T]he water-cooler, from which he essayed to get a drink, was filled with stale water which had made no recent acquaintance with ice" (37).

About the only meaningful resemblance between the two cars is the reversed shade form of their signage, which visually reinforces African American inferiority (and, conversely, white superiority):

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[66] The following passage may have been based on Interstate Commerce Commission findings in the late nineteenth century. As the agency sharply summarized about one dispute it heard, African Americans were "put in a badly furnished car, popularly designated as the 'Jim Crow car,' of which only half is at their service, with liability to interruption and annoyances,' and were asked 'to call that equality of accommodations'" (qtd. in Lofgren 144).

[67] The Justice graphically presented the following scenario of jury service, a core constitutional right for African Americans upheld by the Supreme Court in *Strauder v. West Virginia* (1880), being defiled:

> May it not now be reasonably expected that astute men of the dominant race, who affect to be disturbed at the possibility that the integrity of the white race may be corrupted, or that its supremacy will be imperiled, by contact on public highways with black people, will endeavor to procure statutes requiring white and black jurors to be separated in the jury box by a 'partition,' and that, upon retiring from the courtroom to consult as to their verdict, such partition, if it be a moveable one, shall be taken to their consultation room and set up in such way as to prevent black jurors from coming too close to their brother jurors of the white race? If the 'partition' used in the courtroom happens to be stationary, provision could be made for screens with openings through which jurors of the two races could confer as to their verdict without coming into personal contact with each other. (562-63)

[68] *McCabe v. Atchison, Topeka & Santa Fe Railway* (1914) referenced the "substantial equality" standard (161). However, as Chesnutt noted in an essay contemporaneous with *Marrow*, "[A]s soon as the Supreme Court of the United States had affirmed the validity of this class of legislation, the pretence of equality was practically dropped. It could not be otherwise" ("The White and the Black" 141).

> The car was conspicuously labeled at either end with large cards, similar to those in the other car, except that they bore the word 'Colored' in black letters upon a white background. The author of this piece of legislation had contrived, with an ingenuity worthy of a better cause, that not merely should the passengers be separated by the color line, but that the reason for this division should be kept constantly in mind. (38)

The legal spectacle of a sign here becomes, in Goodrich's terms, a "specter of law," haunting African American passengers during the course of their journey with a sense of their subordinate legal status in fact. The sign also functions as a mundane instance of visual culture that breeds the conditions for catastrophic spectacles like the Wilmington riot. Ironically, Dr. Miller proceeds to read an editorial that "set forth in knowing language the inestimable advantages which would follow to certain recently acquired islands [Cuba and the Philippines after the Spanish-American War of 1898] by the introduction of American liberty" (38), a supposedly solid ("knowing") claim undermined by the very train car in which the physician is traveling. The editorial alludes to Justice Harlan's *Plessy* dissent evincing governmental hypocrisy in spite of global boasts about American freedoms;[69] Chesnutt in "The Disfranchisement of the Negro" observed the irony of "a nation which goes beyond seas to administer the affairs of distant people" failing "to enforce its own fundamental laws" (185).

Demonstrating the separate car law's capricious enforcement that Justice Harlan had predicted, the next passenger to join the physician is one technically barred from the car, Captain McBane. Dr. Miller is affronted by his presence; the narrator depicts the Captain as "represent[ing] the aggressive, offensive element among the white people of the New South, who

[69] "We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens, our equals before the law. The thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead anyone, nor atone for the wrong this day done" (562).

made it hard for a negro to maintain his self-respect or to enjoy even the rights conceded to colored men by Southern laws" (38). Conscious of his sophistication relative to the Captain, Dr. Miller resists being "branded and tagged and set apart from the best of mankind upon the public highways, like an unclean thing," by the recently enacted statute. The passage recalls Justice Harlan's argument about segregationist public accommodation laws imposing a "brand of servitude and degradation" (562) on compliant African Americans or leading to their (and civil disobedient whites') potentially being stigmatized as criminals: "But he is objecting, and ought never to cease objecting, to the proposition that citizens of the white and black race can be adjudged criminals because they sit, or claim the right to sit, in the same public coach on a public highway" (561). Dr. Miller signals a porter to expel the Captain, who has intruded for a smoke, mentioning his having "'paid first-class fare,'" in addition to the car's being marked for people of color (38-39). When the Captain is informed that "'it's against the law for you to ride in the nigger car,'" though, he exercises a right to mobility denied the similarly situated Dr. Burns, ejaculating: "'The hell you say! . . . I'll leave this car when I get good and ready'" (39).

Dr. Miller then remains alone perusing his newspaper until a dog enters the car, which in itself does not perturb him. Following his humiliating experiences aboard the train, however, he ruminates that the dog might be placed in the car and feels a "queer sensation" at the prospect; the physician momentarily believes himself reduced to the status of property, as slaves were legally classified in the antebellum period. The dog's appearance also evokes Major Carteret's earlier contention that "'the negro'" was "'capable of a certain doglike fidelity'" fitting "'him eminently for a servile career,'" as well as a young African American nurse's speculation that "white folks" favored "old-time negroes" for "much the same reason why they fondled their cats and dogs" (19, 29). Fortunately, the horrific thought of this abasement is a brief one for Dr.

Miller, as the dog is taken into a baggage-car; and it even licks the physician's hand when tramping down the aisle, which causes the animal-loving doctor to reconsider his objection to the canine's company (40). While this vignette in the chapter ends poignantly, overall it functions as a subtle but scathing commentary on African Americans' relative rightlessness at the time.

Dr. Miller next observes a "Chinaman, of the ordinary laundry type," being permitted to sit in the white railroad car that the physician was expelled from (40).[70] This stereotypical depiction may, at least to a contemporary reader, broadly seem at odds with the novel's objective to counter white supremacists' denigrating, one-dimensional portrayals of another marginalized population (i.e., African Americans). Yet Justice Harlan also alluded to Chinese immigrants and their descendants in his *Plessy* dissent, contrasting their apparently preferential treatment under the separate car statute at issue in the case to the prosecution of African Americans who technically had a full panoply of citizenship rights, and who may have been Civil War veterans:

> There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But, by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the State and nation, who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race. (561)

[70] Wu Tingfang's *America through the Spectacles of an Oriental Diplomat* (1914) represents a Chinese diplomat's dilemma on choosing which railroad waiting room to select (71-72).

Brook Thomas argues that "both Chesnutt and Harlan use[d] the image of the alien Chinese to bolster claims of African Americans for full and equal citizenship with whites" ("Legal Argument" 331), as opposed to countering bigots seeking to malign those of Chinese heritage during a period of rampant Sinophobia after the Chinese Exclusion Act's passage in 1882. Chinese immigrants were at the century's turn perceived as the paradigmatic unassimilable aliens; Jacob Riis in *How the Other Half Lives* (1890) vilified them as a "constant and terrible menace to society" requiring official suppression (62), and Theodore Roosevelt warned about the United States degenerating into a China in his 1899 "Strenuous Life" speech (21).

Not so unlike white supremacists who terrorized African Americans in the same period, vigilantes violently enforced the Geary Act of 1892, which extended the Chinese Exclusion Act (Pfaelzer 307), one of the most severe nationality- or race-based restrictions in American history (Erika Lee 36; LeMay and Barkan 51-55). Later, in a letter to Booker T. Washington that Thomas quotes, Chesnutt alluded to Congressman Henry Cabot Lodge's aspersions of new immigrants,[71] which were echoed in Justice Harlan's extrajudicial speeches (see Davison Douglas 1046). Chesnutt proclaimed it "nothing less than an outrage that the very off-scourings of Europe, and even of Western Asia may pour into this Union almost by the millions annually, and be endued with full citizenship after a year or two of residence, while native-born

[71] Lodge's infamous 1891 article on "The Restriction of Immigration" quoted a description of recent immigrants that resembled contemporaneous white supremacists' accounts of African Americans. Major Carteret in *Marrow* characterizes African Americans as a "morally undeveloped" "'race of weaklings"' to be "'eliminated by the stress of competition"' (55, 110); Lodge similarly emphasized non-Anglo-Saxon national newcomers' perceived inferior evolutionary status and otherness, including their inability or unwillingness to adapt to a supposedly civilized life in the United States:

> They are of a low order of intelligence. They do not come here with the intention of becoming citizens . . . . They live in miserable sheds like beasts. . . . Their habits are vicious, their customs are disgusting, and the effect of their presence here upon our social condition is to be deplored. They have not the influences, as we understand them, of a home; they do not know what the word means; and, in the opinion of the [congressional] committee, no amount of effort would improve their morals or 'Americanize' this class of immigrants. . . . whose exclusion is demanded by our duty to our own citizens and American institutions. (33, 36)

Americans," especially African Americans, remained second-class citizens despite their long national tenure (332). Even such apparent ideological opponents as Washington and W. E. B. Du Bois believed new immigrants constituted an economic threat to African Americans as well ("The Atlanta Exposition Address" 168; "The Conservation of Races" 882), perpetuating – for understandable but perhaps still problematic reasons – a zero-sum gain view of rights. *Marrow*'s stereotypical reference to those of Chinese descent in the sequence suggests that Chesnutt may have sought to shift where color lines were drawn to an extent, rather than endorsing mitigating the full array of inequitable conditions in America at the time.

After presenting these variants on how separate car laws were enforced, the sequence considers dimensions of class – professional and economic – that add a judicially unacknowledged nuance to the *Plessy* opinions. At one juncture where the physicians' train is halted, a group of working-class African Americans "swarm[s]" into Dr. Miller's car from a "conspicuously labeled colored waiting-room."[72] Referenced for the third time in the sequence, signage is shown to be a quotidian yet spectacular and spectral marker of Jim Crow laws' pervasiveness. Despite being persecuted by segregationist enactments, and in spite of his profession of "democratic ideal[s]," Dr. Miller becomes disgusted at the "noisy, loquacious, happy, dirty, and malodorous" African American laborers entering his car, who likely worked in the exploitative sharecropping industry prominent in the late nineteenth century notwithstanding the Thirteenth Amendment's ban on slavery and involuntary servitude (40-41).

Desiring to signal his class superiority, the physician thinks: "[P]ersonally, and apart from the mere matter of racial sympathy, these people were just as offensive to him as to the

[72] Even the labeling of restrooms in waiting rooms could reinforce African Americans' subservient status at the century's turn, with signs for white women's restrooms indicating "Ladies Parlor" and restrooms for African American women being designated "Colored Women" ("America on the Move").

whites in the other end of the train." The doctor surmises, with a tinge of elitism, that even if a classification system for train passengers is to be retained, it should be more "logical," instead of such a "brutal drawing of a color line." However, he soon reins in the more discriminatory musings and finds common cause with the workers; he ponders how upwardly mobile African Americans in his time would have their heads "figuratively" cut off by whites while "those who fell beneath the standard set" by whites could become the victims of lynching spectacles, having "their necks stretched, literally enough, as the ghastly record in the daily papers gave conclusive evidence."[73] With this double bind diminishing his optimism about America, Dr. Miller contemplates the necessity of racial uplift and endurance,[74] and he alights in Wellington as the sun is setting (41). Overall, the physician's prolonged ordeal in a legal system sanctifying white supremacy undercuts the majority opinion in *Plessy* and portrays a society rife with inter- and intra-racial divisions that make riots like Wellington's into inevitable occurrences threatening to desecrate what is for many the most sacrosanct of domestic spaces: the home.

Marrow*'s "Domestication" of Legal Realism*

Marrow correlates the fate of domestic (national) with domestic (home) spaces, and the novel's exposition of legal realism in the latter, characteristically sentimental space could have reflected Chesnutt's intent to "shift from an explicitly political context to an ostensibly apolitical one" of the family to garner stronger white support for African Americans' rights (Yarborough 242). Eric Sundquist has asserted, "No writer before Faulkner so completely made the family his means of delineating the racial crisis of American history as did Chesnutt. His fictional family was more often than not interracial, and it therefore functioned as a social embodiment of

[73] "How Not to Prevent a Lynching," the novel's twenty-second chapter, probes potentially fatal racial disparities between American constitutional law as written and as enforced at the twentieth century's inflection point.
[74] Dr. Miller exemplifies a Talented Tenth figure in Du Bois's terms, a professional class African American who would promote the entire race's advancement (*Souls* 72).

prohibitions and fear, of the taboo against the 'monstrous' that was everywhere visible but just as bluntly denied in American racial life" (394).[75] In this context, Olivia Carteret's legal evasion – her secretly burning the will and marriage certificate that would have entitled her mixed-race half-sister Janet Miller to a meaningful inheritance from their white father – is inextricably linked to more visible legal evasions in *Marrow*, such as the "separate but equal" law applied inequitably to Janet's husband. Olivia's attempted private denial of her sister's contractual rights parallels her husband's public campaign to deprive African Americans of their newly inherited rights under the Constitution,[76] a movement the *Plessy* majority opinion seemed to endorse.

In the novel, Chesnutt represents this rights denial as that of entering a home; just as Major Carteret dismisses Dr. Miller from his home before Dodie's operation, Olivia seeks to strip Janet of her inheritance. Earlier, Olivia's aunt Polly Ochiltree had evicted Janet and her mother Julia from the Merkell household in spite of Julia's marriage to Samuel Merkell, Olivia and Janet's wealthy white father. Olivia also believes Julia had no legal or "moral right" to remain on the estate after Merkell's death, and Polly's reference to Julia's "'pollut[ing]'" Merkell's body suggests the political ramifications of this domestic expulsion. The "body" could also signify the white body politic, with the household symbolizing the nation, from which African Americans were in a sense expelled during the waning days of Reconstruction, when

[75] David Walker's *Appeal* (1830) argued that African Americans in the antebellum period were perceived to be "not of the human family" (33), a metaphor for race that was in turn linked to the nation. One Southern senator at the turn of the century had pronounced that African Americans could not then "'be admitted to the family circle of the white race'" ("The South and Negro Suffrage" 292). The senator's language evoked the majority in *Dred Scott v. Sandford* (1857), which claimed that a state could not "introduce any person or description of persons who were not intended to be embraced in this new political family which the Constitution brought into existence, but were intended to be excluded from it" (406).

[76] The motif of inheritance is also interwoven in antebellum discourse; Yale University President Timothy Dwight proclaimed in 1810: "It is in vain to allege, that *our ancestors* brought them [African slaves] hither, and not we. We inherit our ample patrimony with all its incumbrances; and are bound to pay the debts of our ancestors. *This* debt, particularly, we are bound to discharge: and, when the righteous Judge of the Universe comes to reckon with his servants, he will rigidly exact the payment at our hands. To give them liberty, and stop here, is to entail upon them a curse" (qtd. in Coates, "The Case for Reparations" 62).

Julia and Janet were banished. Julia had refused to stay in the Merkell home without a state-sanctioned marriage (83-86, 156), which could signify African Americans' desire for state rights recognizing their incorporation in the nation more generally. Albion Tourgée's Reconstruction post-mortem novel *Bricks Without Straw* characterized marriage registration at the time as "the first step of legal recognition" for African Americans (107).

Before incinerating the documents that torment her, as her husband would prefer to do with the Constitution postbellum, Olivia must obtain them, which she does in a sequence that in itself constitutes an evasion of the law, if not an outright violation. Amidst the tumult of learning about Polly's murder, Olivia panics about the scandal that may ensue if, as Polly insinuated before her death, papers exist proving "the preposterous claim made by her [Olivia's] father's mulatto mistress," Janet's mother, Julia. Olivia dashes to her aunt's home and locates a "sealed envelope" of papers, which she "seize[s]" and "thrust[s] hastily into her own bosom," compromising the crime scene by tampering with evidence before police arrive (107-08). The placement of the papers in her bosom may partially stem from necessity, but the detail also suggests they comprise an integral component of her identity; later, she clasps her son to her bosom during a dream (161). The papers then go unmentioned for several chapters, as *Marrow* recounts Sandy Campbell's near-lynching and the build-up to Wellington's riot. However, the burning of the document occurring next in the narrative line evinces a connection between the three events. Olivia dreams of the riot – "a great white wall of water" signifying white supremacy – threatening her life and Dodie's soon after she chars the documents, and the "memory of her dream [comes] to her like a dim foreboding of misfortune" thereafter (160-63).

"The Missing Papers" chapter, simultaneous with riot preparations, portrays Olivia's agony about the documents. She queries her husband about the law governing her father's will,

hypothetically assuming it contains an even split. Major Carteret tries to assuage his wife's concern, dismissing any "'legal claim'" or "'moral obligation'" that Julia and Janet, who are "that woman and her child" for Olivia, could invoke, citing Julia's "'improper influence.'" For the Major, justice would have entailed "'whipp[ing] and expell[ing]'" Julia from town, with Janet, who is assumed to be illegitimate, being "'in the same category. Who was she, to have inherited the estate of your ancestors, of which, a few years before, she would herself have formed a part?'" (107). The Major's question obliquely references the *Plessy* majority's dismissal of Homer Plessy's claim "that the reputation of belonging to the dominant race, in this instance the white race, is property in the same sense that a right of action or inheritance is property."[77] The Court assumed the point but determined Plessy's sole recourse was to state law, if he was "lawfully entitled to the reputation of being a white man"; if not, it found he had suffered no legally actionable property deprivation in being expelled from a white train car (549).

Consoled by her husband's words indicating a will favoring her sister's rights would be "of no valid effect," Olivia returns to her chamber and yields to curiosity, first reading the will leaving "the bulk" of her father's estate to her, but ten thousand dollars and a plantation or a tract of land near Wellington to Janet. Even this relative pittance to the sister she calls a "bastard" enrages her,[78] as conferring elemental constitutional rights upon African Americans incenses her husband. Sharing her husband's zero-sum gain perception of legal rights, Olivia believes the

[77] Tourgée's oral argument in *Plessy* referenced inheritance, arguing to the justices that "[t]he most precious of all inheritances is the reputation of being white" (336).
[78] Olivia later "shudder[s] at the word" sister (159). She had previously dismissed a servant whose sister worked for "the Miller woman" and avoided Janet outside, as if her sister's presence would taint her (77, 80). Dodie's premature birth, which nearly kills his mother, and his falling out of a window are attributed to Olivia's seeing Janet; Major Carteret thus calls Janet "living evidence of a painful episode in Mrs. Carteret's family" (6-10, 47, 66-67).

bequeathal to Janet dispossesses Dodie, the "lawful" heir in her mind.[79] Infuriated, she throws "the offending paper into the fire"; while watching it burn, though, she espies a sentence that "had escaped her eye in her rapid reading": "'All the rest and residue of my estate I devise and bequeath to my daughter Olivia Merkell, the child of my beloved first wife.'" The word "first" implies a second wife, and the next morning the envelope "confront[s]" Olivia with "words [that] seem[] like a mute reproach" (154). The very sight of the envelope is "distasteful" – with Chesnutt reiterating the word he ascribed to Olivia when race relations arose as a subject during her son's christening party.[80] Nonetheless, the envelope seems to demand being opened, and Olivia finds there what she had previously overlooked, a "certificate of marriage, in due form," between her father and Julia, Janet's mother. Olivia's world is abruptly rent asunder; and while contemplating the supposed "empty formality" of the marriage for her father, in light of anti-miscegenation laws she wrongly assumes applied during Reconstruction (as they do in her time), she almost unconsciously drops the incendiary document into the fire (155).

Finally, another document Olivia had neglected in her haste to destroy the marriage certificate, a letter her father addressed to John Delamere, the executor of his will, remains to be read. The letter articulates the "'monstrous,'" in Sundquist's terms (394), at the time, acknowledging Samuel Merkell's marriage to Julia, a devout Christian and newly-emancipated slave. Both parties to the marriage agreed to maintain "silence" about it, but the missive ends with Olivia's father's admitting his "tie of blood" to Janet by leaving her "a reasonable bequest." He also explains his rationale for not openly confessing the marriage and Janet as his daughter

[79] Olivia presumes "this child's career would be so circumscribed by the accident of color that too much wealth would only be a source of unhappiness; to her own child, on the contrary, it would open every door of life." She also reasons that Janet is educated and fairly prosperous as Dr. Miller's wife, having "not suffered for lack of the money of which she had been defrauded" and not being in need of it now (162).

[80] Olivia is unnerved when the issue of race surfaces there, while her guests are seated at a "table tastefully decorated with flowers": "She had no desire to mar the harmony of the occasion by the discussion of a distasteful subject" (16, 19).

during his lifetime – for Olivia's sake and "in deference to public opinion, which is not easy to defy" for one lacking "moral heroism" in a bigoted environment. Yet the letter concludes optimistically with a request that in this "new era" for African Americans, if Janet's legitimacy is "a source of shame or unhappiness" for her, John Delamere should notify her, on her father's behalf, that "she is my lawful child, and ask her to forgive her father's weakness" (156-57).

Assuming Samuel Merkell to be a founding father-type figure, Janet's paternal legitimacy and inheritance rights in this sequence are equated with African Americans' affirmation as citizens now entitled to inherit the same constitutional rights afforded whites before the Civil War. *Marrow* describes freedom as an "immemorial birthright" for whites in America but a relatively novel concept as applied to African Americans during a transitional historical period imperfectly blending the "old with new," "race with race," and "slavery with freedom" (29). Eager to cling to her antebellum privileges, though, Olivia is mortified at the possibility of publicly recognizing Janet (67); her husband is similarly irate at seeing blacks at a politically significant site: "the steps of that noble building [city hall] disfigured by a fringe of job-hunting negroes, for all the world—to use a local simile—like a string of buzzards sitting on a rail, awaiting their opportunity to batten upon the helpless corpse of a moribund city" (22).

Unlike Major Carteret, however, who deploys blunt instruments to denude African Americans of their constitutional rights,[81] his wife has "a cultivated conscience" that is less easily satisfied after she has reduced the (to her) damning documents to ashes: "She had destroyed the marriage certificate, but its ghost still haunted her" (158, 160). She ponders what many whites who espoused the New South Creed likely thought at the time: why she must "be burdened with such a responsibility, at this late day, when the touch of time had well-nigh healed

[81] The narrator comments that "[i]n serious affairs Carteret desired the approval of his conscience, even if he had to trick that docile organ into acquiescence. This was not difficult to do in politics" (24).

these old sores" (161). While Olivia is "not familiar with legal verbiage" (154), Chesnutt has her reason much like a crafty lawyer (or the majority in *Plessy*) in endeavoring to extricate herself from a thorny situation. First, she analogizes her father's second marriage to another Reconstruction-era mixed-race marriage in Wellington that is socially spurned yet legally valid, with offspring of the couple legitimate: "In her heart she had no doubt of the validity of [her father's] marriage so far as the law was concerned; if one marriage of such a kind would stand, another contracted under similar conditions was equally as good." She next poses a hypothetical to her husband about her father's will's legality if he had lawfully wedded Julia. Major Carteret informs her that the will would then most likely be deemed valid under "'the law of descent and distribution,'" and absent the will, the property would be divided equally between the sisters (158-59).

Appalled at this prospect, as well as her father's "unpardonable social sin" of marrying Julia,[82] not merely a "social misdemeanor" of retaining her as a mistress, Olivia decides to avoid publicly avowing the marriage and her sister's legitimacy. She surmises that although a white woman like her would be socially stigmatized by a "base birth," an African American woman like Janet would lose "nothing by her supposed illegitimacy" and "would gain nothing by the acknowledgement of her mother's marriage" (160-61). Olivia's dismissal of her sister's claims echoes those of white apologists who in Chesnutt's time contended that the right to vote was "a mere paper right" to blacks and thus "to be lightly yielded for the sake of a hypothetical harmony." Chesnutt, meanwhile, asseverated that the ballot was "a basic right of citizenship" and "the Negro's sole weapon of defense," as proven by the fact that disenfranchisement was one of

[82] Which is now a "crime . . . by the laws of every Southern State" and threatens Olivia's own sense of racial purity and legitimacy; she would willingly prefer death to being mixed race (162). But this denial of interracial ties represses "the black element of her own life, which [is] part of her very identity" (George and Pressman 294).

white supremacists' first objectives to undercut progress African Americans had made during Reconstruction ("The Disenfranchisement of the Negro" 183-86).[83] Finally, however, motivated in part by the undeniable physical resemblance between her father and Janet, Olivia seeks to "indirectly" fulfill Samuel Merkell's wishes by giving Dr. Miller's hospital the sum stated in the will when an opportune time should arise (160-63).[84] Having in this way managed to refuse "acknowled[ging] the suppression of the will, in itself a criminal act," while still executing it to the letter, in her estimation, Olivia temporarily palliates her conscience (162). In the sequence, she becomes the equivalent of the formalist train conductor in "A Journey Southward," claiming to facially abide by the law even as she licenses arbitrary derogations from it to favor her race.

While revealing the private legal evasions coupled with more public legal evasions that divested African Americans of their rights,[85] this episode also exposes law's upside in conferring dignity,[86] as upon the relationship between Olivia and Janet's father and Janet's mother. Legal affirmation can in turn elevate those belonging to underclass populations, much to the chagrin of those who would rather efface their existence. As Olivia Carteret contemplates:

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[83] Franchise rights after the Civil War have been seen as both the symbol and substance of political liberty in the United States (Biagini 258). Chesnutt characterized the vote as the "power to demand what is their [the African American community's] due" ("The Disfranchisement of the Negro" 186), a key that would unlock more rights. By the century's turn, though, "Deep South states were, 'practically, as far as the colored voters are concerned, nonsuffrage states,'" lamented U.S. Representative Marriott Brosius (qtd. in Perman 21). Quoting a letter he had received from Wilmington, Chesnutt described this rights obliteration as a type of "'living death,"' and he foresaw that such "[o]ppressive, discriminating, and degrading legislation" would "be the order of the day for some time to come" ("To Walter Hines Page" (22 Mar. 1899) 121).

[84] "For, while the negro, by the traditions of her people, was barred from the world of sentiment, his rights of property were recognized." Olivia delays executing the will out of concern for her husband's investments and is aghast that "a demand for half the property at once would mean bankruptcy and ruin" (162-63).

[85] This episode and "A Journey Southward" delineate how legal implementation in many fields "depends not on the declarations of experts, but on the perceptions and knowledges of low-level state officials and ordinary citizens" (Murthy 410). Earlier in *Marrow*, John Delamere's will bequeathing most of his estate to Dr. Miller, in a trust for the physician's hospital, is also suppressed on racial grounds. The lawyer General Belmont's actions there parallel those of Polly and Olivia, who also claim to serve a "higher law" of white supremacy: "Mr. Delamere's property belonged of right to the white race, and by higher law should remain in the possession of white people" (141).

[86] The recent majority opinion in *Obergefell v. Hodges* (2015), which established same-sex couples' marital rights under the Fourteenth Amendment, cited the Constitution's granting the couples "equal dignity in the eyes of the law" (2608).

> Marriage was a serious thing—to a right-thinking woman the most serious concern of life. A marriage certificate, rightly procured, was scarcely less solemn, as far as it went, than the Bible itself. Her own she cherished as the apple of her eye. It was the evidence of her wifehood,—the seal of her child's legitimacy, her patent of nobility,—the token of her own and her child's claim to social place and consideration. (158)

The Constitution can be envisaged as a legal document with import resembling the marriage certificate from the state here, recognizing citizenship rights in the United States. It is a "solemn" contract to American citizens and others coming within its jurisdiction, being "cherished" by those whose rights are vulnerable to abuse without its protection. It can be perceived as tangible "evidence" of citizenship and "legitimacy" within the body politic while being a metaphorical "patent of nobility," recalling Justice Harlan's *Plessy* dissent: "In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful" (559). The Constitution accords political "place and consideration" to these citizens; and this weight Chesnutt assigns to the document explains why he saw evasions of it constituting such an acute threat to democracy, comparable to the social turmoil ensuing from evading lawful marriage contracts and wills made pursuant to these, both being instances of wrongful dispossessions of indispensable rights. A legal realist reading of the document-destruction sequence coupled with the *Plessy* re-enactment chapter demonstrates the nexus between domestic order at the micro and macro levels. The episode also suggests the uncontainability of the majority opinion's logic in corroding family relations and even African Americans' admitted civil and political rights like the franchise, as Major Carteret campaigns for in the buildup to Wellington's riot.

Boundary ideology's formal constraints thus prove unworkable in reality,[87] but the novel's final words, "'There's time enough, but none to spare'" (195) (in saving Dodie's life, which was endangered by his own parents' misconduct), suggest Chesnutt harbored a wisp of hope[88] that revolutionizing domestic relations – recognizing the ties writ small intertwining black and white lives in the United States (43) – could galvanize the sweeping national legal changes Justice Harlan's *Plessy* dissent had commended. Dr. Miller's last contemplation in "A Journey Southward" quotes one of Christ's beatitudes from the Sermon on the Mount to express this optimism: "'Blessed are the meek . . . for they shall inherit the earth,'" with African Americans potentially coming into their metaphorical "estate" (41).[89] Olivia's subsequent oral recognition of her sister as well as Janet's inheritance rights (entitlement to the Merkell name and half their father's estate), coupled with Major Carteret's permitting Dr. Miller entry into the Carteret home at the novel's closing, can be read to signify tentative steps toward African Americans' inclusion in American democracy as equal citizens.

But both Millers question the mercenary nature of the Carterets' gestures after white supremacists slay the Millers' son. Janet, for instance, repudiates Olivia's acknowledgement of Janet's white ancestry in "'throw[ing] you back your father's name, your father's wealth, your

[87] As Gunnar Myrdal would later affirm in *An American Dilemma* (1944): "[I]n reality it is not possible to isolate a sphere of life and call it 'social.' There is, in fact, a 'social' angle to all relations" (632).

[88] In his initial plot notes, Chesnutt wrote: "There is no redress and no hope of redress," and crossed out the word "[f]orgiveness" ("Plot Notes" 212-13). However, he later expressed hope for national "progress" in his reflections on *Marrow* ("Charles W. Chesnutt's Own View of His New Story, *The Marrow of Tradition*" xxxix), demonstrating the historical tensions in liberalism that Amanda Anderson has recently theorized in *Bleak Liberalism* (24). The novel's narrator vacillates between extremes of pessimism and optimism about the human condition: "The workings of the human heart are the profoundest mystery of the universe. One moment they make us despair of our kind, and the next we see of them the reflection of the divine image" (139). Sandy's narrow escape from lynching and the race riots exemplify these poles; soon before the latter, the narrator comments: "Selfishness is the most constant of human motives," with "[p]atriotism, humanity, or the love of God" being but transitory motivational factors for human action (143).

[89] While Major Carteret believes the obsequious African American Jerry Letlow's imitating whites proves "that the white man [is] to inherit the earth and hold all other races under his heel" (147), Chesnutt inverts the phrase's reference in Dr. Miller's wish here.

sisterly recognition'" (195). Moreover, the novel's leaving Dr. Miller on the threshold of entering the Carterets' home suggests the precarious nature of the Millers' incorporation into the nation after Wellington's white supremacist-incited riot and the long-simmering internecine conflict between the Carteret and Miller households. Like Justice Harlan, whose *Plessy* dissent illustrated how the majority decision constricted white rights, Chesnutt in *Marrow* indicated that whites' self-interest, rather than a more ideal moral desire to uphold African Americans' constitutional rights on equality grounds, would likely spur the reforms necessary to actualize the Reconstruction Amendments' promise at the century's turn.

Chesnutt, however, perhaps believed that readers moved by *Marrow*'s sentimental climax would campaign for African Americans' full citizenship rights before more catastrophes like the Wellington riot materialized and redounded to harm innocents representing the rising generation of Americans. The novel's final sequence, which is set in a palimpsestic space (the house where Major Carteret was born and where Dr. Miller's family now resides), portrays Olivia, who is nerve-stricken about Dodie, being sustained by Dr. Miller's arm (195), thereby leaving readers with an image of race relations transformed for the better, albeit under duress. Major Carteret's revelation near the novel's end – "for a moment the veil of race prejudice was rent in twain, and he saw things as they were, in their correct proportions and relations" (190) – reflects the epiphany Chesnutt sought for *Marrow*'s readers to experience, with the ultimate objective of rendering Justice Harlan's dissenting legal vision in *Plessy* into a reality.[90]

[90] Over half a century elapsed, though, before the Supreme Court "settled beyond question that no State may require racial segregation of interstate or intrastate transportation facilities" in *Bailey v. Patterson* (1962) (33). The Interstate Commerce Commission technically desegregated interstate bus and rail carriages soon after *Brown v. Board of Education,* but state recalcitrance (as with *Brown*) rendered the Commission's 1955 decisions in *Keys v. Carolina Coach Co.* and *NAACP v. Saint Louis-San Francisco Railway Company* largely ineffective until high court intervention (see Rothman).

Marrow*'s Re-visioning of Popular Spectacle Conventions*

While racist laws and traditions are shown to exacerbate social disharmony in *Marrow*, the novel endeavored to inaugurate more inclusive traditions by refashioning how readers perceived race relations well beyond the context of *Plessy*. Chesnutt sought to open readers' eyes to a divergent vision of racial realities than depicted in mainstream media and popular culture at the time,[91] and *Marrow* accordingly contains a multiplicity in points-of-view, across races (from a white supremacist editor to a black physician) and sexes. The novel operates meta-textually in the sense of calling attention to how narratives about lived realities are (mis)construed because of perceptive limits. *Marrow* educates readers on how to read, and see, before presenting a test in the guise of a standard spectacle scene: northern whites' tour of the South. Perspicacious readers should by then be visually literate enough to sense how racial dilemmas that afflicted America at the time of the novel's publication were hiding in plain sight.[92]

Chesnutt conceived that retraining readers on how to see went lockstep with retraining them on how to read because of the close nexus between reading and seeing that developed in the United States during the nineteenth century.[93] As with children's literature today, "Young readers were, in effect, trained in a repertoire of images at the same time they were trained in a repertoire of words," with theatrical techniques, which also pervaded adult publications, being "another indication of spectacle's centrality" at the time (Hughes 31-36). Amy Hughes concludes

[91] For example, "most national publications printed uncontested the accounts offered by spokesmen" for Wilmington's coup, which came to be seen by many white readers nationwide as a spontaneous incident arising from an untenable situation rather than a planned show of power, with African Americans portrayed as provocateurs unworthy of voting rights ("Letter to William McKinley" 414; "Negro Rule Ended" 1). National and local newspapers depicted purportedly upstanding whites as "citizens" and blacks as "negroes," naming white riot victims but not black ones ("Cause of Carolina Riots" 257; "Negro Rule Ended" 1).

[92] Philip Barrish asserts that one of literary realism's key objectives was "to uncover the interest, the suspense, the drama in moments that others might think of as uneventful or boring – those times when it only appears to those looking for obviously spectacular events that 'nothing happens'" (*Cambridge Introduction* 47).

[93] As Guy Debord argues, "To analyze the spectacle means talking its language to some degree – to the degree, in fact, that we are obliged to engage the methodology of the society to which the spectacle gives expression" (15).

that "[t]he process of becoming linguistically literate was also a process of becoming visually literate. Citizens routinely employed this methodology of seeing when assessing, interpreting, and understanding other people and, by extension, themselves" (39). Jacqueline Goldsby describes how a "civil right to look and interpret the world" at the century's turn was used to "perfect[] racism's hierarchies of privilege" (249), with legal interpretations in decisions like *Plessy* undermining African Americans' civil rights. *Marrow* challenges these pernicious laws and comparable customs through counter-spectacle pedagogies emphasizing how sight is an interpretive act, "a production, a transformation, and even an exclusion" (Polan 60).

One of the novel's opening sequences can be construed as a primer for readers and viewers cultivating the capacity to discern dissenting perceptions; the chapter spotlights a sentimental, ostensibly joyous spectacle – a christening party – underlain with disquietude. The ritual serves to emphasize the importance of perspective while amplifying the appearance versus reality leitmotif also evidenced in *Plessy* with the majority's attestation of the disputed statute's apparently equitable application. An observation about the formal and informal variants of the Carterets' son's name, Theodore Felix versus Dodie (11), begins the scene. Tom Delamere, the eventual perpetrator of Polly Ochiltree's murder, is first seen here as well; however, the narrator explains that "no discriminating observer would have characterized his beauty as manly" in spite of his "handsome" appearance at first glance (13, 16). Tom also prevaricates about his whereabouts at a card game to excuse his late arrival (14-15), recalls the "'gold piece"' his great aunt gave him every Christmas, and thinks that Sandy Campbell's "suit would make a great costume for a masquerade" as "a very comical darkey" (18-19). From these clues, the adept reader should be able to infer that Tom, not the loyal and honest Sandy, later participates in a cakewalk and robs and slays Polly Ochiltree. Polly's age here is construed not

from her dyed black and abundant hair, but more subtly from "the lines of her mouth, which are rarely deceptive in such matters," notes the narrator (in the pre-Botox age) (12).

Characters also read one another at the party; John Delamere "read[s] something of this thought" near the chapter's end, namely Olivia Carteret's "personal grievance against the negro race" (19). Her guest, journalist Lee Ellis, sees the more dapper Tom "Delamere with the eye of a jealous rival, and judge[s] him mercilessly," as they are rivals for Major Carteret's half-sister Clara Pemberton's affection (15). Of Clara, the narrator channels Ellis in contending that "it scarcely needed a lover's imagination to read in her fair countenance a pure heart and a high spirit" (14). While Tom's morality degenerates, Ellis's later misidentification of Sandy as Polly's murderer and subsequent retraction (132) suggest his perceptive aptitude evolves as the novel progresses, hopefully along with the reader's.[94] Chesnutt in *Marrow* most vitally sought to demonstrate the interdependence of African Americans and whites, despite indications to the contrary, as deftly captured in the relationship between Sandy and his employer, John Delamere (which is echoed when Dr. Miller supports the collapsing Olivia during the novel's climax). The narrator comments: "This attendant gave his arm respectfully to the old gentleman, who leaned upon it heavily, but with as little appearance of dependence as possible. The servant, assuming a similar unconsciousness of the weight resting upon his arm, assisted the old gentleman carefully up the steps" (12). After the party, though, "Under cover of the darkness, the old gentleman leaned on his servant's arm with frank dependence, and Sandy lifted him into the carriage with every mark of devotion" (20). By chapter's end, then, readers should be more attuned to how to read the novel and, more crucially, to probe what occurs "[u]nder cover of the darkness" in life.

[94] Rachel Wise, however, asserts that Clara and Ellis's prospective union entrenches racial loyalty (170).

After this training lesson chapter, *Marrow* juxtaposes seemingly benign and malignant spectacles to test readers' visual and textual literacies, a trope resonating with Justice Harlan's *Plessy* dissent; Northerners' tour of Wellington midway through *Marrow* corroborates the Justice's claims. The tour suggests that the popular white aristocratic hope for a return to the medievalist antebellum period of legalized slavery[95] is partially realized as the visitors receive a plantation fiction view of life for African Americans residing in the Jim Crow town.[96] The tourists can be positioned comparably to the Supreme Court majority in *Plessy*, which was comprised largely of justices from the North and Midwest deciding a case originating in New Orleans. The majority there claimed to defer to southern legislatures' determinations of what constituted a "reasonable regulation" of race relations (550),[97] as the tourists in *Marrow*'s sequence do in acquiescing to the white supremacist declarations of their southern hosts.

The sequence exemplifies Nina Silber's thesis in *The Romance of Reunion* (1993), which posits that many white northerners in the Civil War's aftermath initially viewed African Americans in the South through minstrel terms and "eventually cast southern blacks outside the reunion framework altogether, portraying them as strangers and as foreigners" (6). Of the mixed-sex tourist group in *Marrow*, the northern men express an interest in "a projected cotton mill" capitalizing on the raw materials reaped from the sharecropping industry that exploited many African American workers at the time. Meanwhile, the northern women endeavor to study

[95] Chesnutt's critique of spectacle culture was previously evidenced in *Cedars*, where a Ku Klux Klan-sponsored "pageant" of "masquerading" knights, held at a county fairground, was exposed as a feudal relic attesting to the former slaveocracy's desire for a restoration of antebellum times. African Americans in this dystopia would be serfs serving a white nobility, who would perform the roles of lords and ladies in a "renaissance of chivalry" (31-41).
[96] Tropes of such literature included simple-minded, content, well-treated slaves thriving in an idyllic setting (Barrish, *Cambridge Introduction* 155-57).
[97] The majority in *Plessy* contended that "[s]o far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and, with respect to this, there must necessarily be a large discretion on the part of the legislature" (550).

"social conditions," particularly "the negro problem."[98] "[A]t elaborate luncheons," a group of "prominent citizens and their wives" who exemplify dominant white opinions in the region present the visitors with "the Southern white views of the negro, sighing sentimentally over the disappearance of the good old negro before the war, and gravely deploring the degeneracy of his descendants. . . . It was sad, they said, to witness this spectacle of a dying race, unable to withstand the competition of a superior race" (72). The spectacle of the "elaborate" dining table appears here, with Chesnutt linking the superficially decorative space to many whites' false, sentimentalized views of the "good old" antebellum days compared with the post-emancipation epoch at the century's turn. Perhaps deliberately ignorant of exposés like Ida B. Wells's *Southern Horrors: Lynch Law in All Its Phases* (1892), the hosts deem lynching "rough but still substantial justice; for no negro was ever lynched without incontestable proof of his guilt" (73).[99]

After being inculcated with this patently delusive perspective, the visitors, "[i]n order to be perfectly fair," are given "an opportunity to see both sides of the question." While *Marrow* overall presents readers with this opportunity, the tour here does not permit visitors any such diversity in points-of-view. The white southerners accompany their northern guests to hear a sensationalist black preacher who appeals to a white audience by sermonizing that the earth is as flat as a "pancake" well after science has debunked that hypothesis (73), bolstering white supremacist beliefs of African American inferiority but also suggesting to readers the flatness, or

[98] Nathanial David Shaler, a Harvard University professor who educed the phrase then in vogue, proclaimed in 1884 that "[t]here can be no sort of doubt, judged by the light of all experience, that these people are a danger to America greater and more insuperable than any of those that menace the other great civilized states of the world" (qtd. in Muhammad 15). At least ten separate volumes on the "race problem" or "Negro Question" were published between 1884 and 1910 (Fossett 214-15).

[99] Demonstrating skewed priorities, journalists reporting on the 1895 Atlanta Exposition seemed more preoccupied with cruelty to horses at the Mexican exhibit than the national lynching epidemic or the torture of slaves absent from the event's plantation scenes. A proposal for bloodless bull-fights in the Mexican Village "drew from the press of the United States a tremendous and angry chorus of condemnation. It was never intended to allow the shedding of blood, and it was finally concluded that the terror of the horses would be cruelty in its worst form" (Cooper 90).

one-dimensionality, of the spectacle the visitors are viewing. The only other African Americans the northerners meet on their tour are the hotel employees who serve them and mission school teachers at a segregated academy. The narrator remarks, for readers who can read and see between the lines of what the northern tourists are oblivious to: "The negroes who waited on them at the hotel *seemed* happy enough, and the teachers whom they had met at the mission school had been well-dressed, well-mannered, and *apparently* content with their position in life. Surely a people who made no complaints could not be very much oppressed" (73) (emphasis added). *Marrow* questions this correlation between visual indicators of happiness and African Americans' actual plight at the century's turn in *Plessy*'s wake. Another telling detail – the mission school employees are not only "well-dressed" but "well-mannered" – alludes to how courtesy can "keep subordinated groups in their places," serving as a means of social control by stifling disagreement (Burgess 206-07).[100] Overall, the northerners' mistaken surface-level perceptions of the tour demonstrate how "[s]pectacle offers an imagistic surface of the world as a strategy of containment against any depth of involvement with that world" (Polan 63).

What the northerners' tour culminates with – a tongue-in-cheek cakewalk sequence that evokes the 1895 Atlanta Exposition's blockbuster "real" old plantation – underscores this point. The exhibition, a year before *Plessy*, has been characterized as "a debut of-sorts for the Jim Crow era," with a separate "Negro Building" showcasing African American art (Bentley and Gunning, "Segregation as Culture" 424-25). The Exposition romanticized chattel slavery, as the tour in *Marrow* does with neo-slavery, nationally reclaiming an idealized antebellum southern heritage. In Atlanta, a violent system of coercion was transformed into entertainment in exhibits that attested to the authenticity of the depictions: "The old plantation was one of the most popular

[100] Burgess continues that "courtesy has a propensity to conceal the violence that underlies it, leading the materially disadvantaged to be blamed when violence erupts" (209), as later with the Wellington riot.

features of the Midway and the only one which President [Grover] Cleveland honored with his presence. It was what its name signifies, with real negroes as the actors, and was as much superior to negro minstrelsy by white men as real life is to acting" (Walter Cooper 91; Bentley and Gunning, "Segregation as Culture" 424-25). Walter Cooper's description of an Egyptian exhibit at the Exposition being reproduced with "picturesque realism" (91) applies equally to the antebellum re-creation his program delineates. The emphasis, however, is placed on "picturesque" rather than "realism," much like the northerners' entire tour of Wellington, which ends with a cakewalk at their hotel:

> In order to give the visitors, ere they left Wellington, a pleasing impression of Southern customs, and particularly of the joyous happy-go-lucky disposition of the Southern darky and his entire contentment with existing conditions, it was decided by the hotel management to treat them, on the last night of their visit, to a little diversion, in the shape of a *genuine* negro cakewalk. (73) (emphasis added)

Tom Delamere, in blackface and duly arrayed in Sandy Campbell's suit, provides the evening's "most brilliant performance." Tom bestows his victory cake upon his partner "with a grandiloquent flourish, and return[s] thanks in a speech which sent the Northern visitors into spasms of delight at the quaintness of the darky dialect and the darky wit" (74).

Ellis harbors "a vague suggestion of unreality" about Tom's "grotesque" performance based on Sandy's prior "gravity and decorum." He nonetheless dismisses the thought from his mind on the theory that blacks may have a more inconsistent character than whites: "No one could tell at what moment the thin veneer of civilization might peel off and reveal the underlying savage" (75). The shrewd reader, however – as Ellis later becomes in realizing his mistaken identification – should be able to identify the culprit beneath the costume and question the tour's

carefully curated verisimilitude. The northern visitors are inclined "to criticise here and there, certain customs for which they did not exactly see the necessity, and which seemed in conflict with the highest ideals of liberty," as should readers, but deviations from such ideals are justified in their minds by the "local conditions" excuse that the *Plessy* majority effectively upheld and that *Marrow* assails: "[S]urely these courteous, soft-spoken ladies and gentlemen, entirely familiar with local conditions, who descanted so earnestly and at times pathetically upon the grave problems confronting them, must know more about it than people in the distant North, without their means of information" (73). They see what mainstream sources expect them to see, fitting their observations into an established framework to cope with destabilizing phenomena; psychologically, "when a piece of information is consumed fluently, it neatly slides into our patterns of expectation, filling us with satisfaction and confidence" (Derek Thompson 72). *Marrow*, though, rejects this complacent model of information integration and selective sight, challenging the white supremacist framework as it then prevailed. Chesnutt reveals how the northerners' response, mirroring the *Plessy* majority's, perpetuated neo-slavery and wrongly absolved whites outside the South of responsibility for a national problem requiring a national solution.[101]

Between this tourist spectacle and the Wellington riot in *Marrow* comes what can be deemed a tipping point spectacle: Sandy Campbell's near-lynching, at a time when the number of lynchings peaked nationwide (Wood 3). For even moderately cognizant readers, this incident plainly signals the anarchical sequence with which the novel concludes. Turn-of-the-century lynchings in the United States at times became mass spectacles drawing thousands of spectators,

[101] Jason Sokol comments that while "the North as a land of liberty holds power in the popular mind," it is also simultaneously true that "the North as a land of liberty has become a straw man" to many scholars; to these scholars, the North and South may be considered "rough racial equivalents," with northern progressivism "as a rhetorical mask that hides the reality of racism" that permeated the region before the civil rights era and into today (x-xii).

with newspaper announcements about their time, date, and place (seemingly objective details advertising "a white social event"); special excursion trains; photographs that would become commercial postcards sent to family and friends unable to attend the macabre occasions; and prolonged torture exemplifying spectacle's focus on the body *in extremis* (see Bentley and Gunning, "Turn of the Century Newspaper Reports on Lynching" 378; Wood 1-2). Critics as politically diverse as Jane Addams, a social worker in Chicago's Hull House, and Theodore Roosevelt condemned lynchings, with Addams presciently predicting that the retributive motive offered for the executions would redound to whites because of "a certain risk of brutalizing each spectator, of shaking his belief in law and order, of sowing the seed for future violence" (28). Roosevelt cautioned about the corrosive psychological effects lynchings had on spectators: "Whoever in any part of our country has ever taken part in lawlessly putting to death a criminal by the dreadful torture of fire must forever after have the awful spectacle of his own handiwork seared into his brain and soul. He can never be the same man" ("To Governor Durbin" 89). Lynchings, moreover, seemed to contradict other visible signs of national achievement; a priest at the time contrasted America's material progress as portrayed in world's fairs with the impressions of foreign observers who have "at the same time censured us severely for our toleration of the savage practice of hanging and burning human beings in utter defiance of civil authority" ("Takes Mrs. Felton to Task for Speech" 264). Contemporary commentators on lynching photographs have been haunted not only by the victims' maimed bodies, but the callous faces of spectators (Lacayo 23).

In *Marrow*, after the "popular verdict" based on manipulated press accounts convicts Sandy, preparations for his lynching commence. This perturbing passage compiling details from

actual lynchings, which I quote at length, captures the extent to which such extrajudicial murders had become spectacularized, inuring many whites then to cruelty[102]:

> To take time to try him would be a criminal waste of public money. To hang him would be too slight a punishment for so dastardly a crime. An example must be made.
>
> Already the preparations were under way for the impending execution. A T-rail from the railroad yard had been procured . . . . Others were bringing chains, and a load of pine wood was piled in convenient proximity. Some enterprising individual had begun the erection of seats from which, for a pecuniary consideration, the spectacle might be the more easily and comfortably viewed.
>
> [Ellis] learned that the railroads would run excursions from the neighboring towns in order to bring spectators to the scene; from another that the burning was to take place early in the evening, so that the children might not be kept up beyond their usual bedtime. In one group that he passed he heard several young men discussing the question of which portions of the negro's body they would prefer for souvenirs. (131)

In the first paragraph, a disembodied white public in Wellington seemingly reflects an immediate collective judgment that according Sandy due process would be the actual crime, for fiscal, retributive (his purportedly raping and murdering a white woman who represents the race (110)), and deterrence-related reasons. Thus, in the third sentence's passive voice, "An example must be made." The following paragraphs' listing of lynching preparations suggests the awful banality of

[102] Jacqueline Goldsby's *A Spectacular Secret: Lynching in American Life and Literature* and Amy Louise Wood's *Lynching and Spectacle: Witnessing Racial Violence in America, 1890–1940* probe the nexus between lynching and spectacle culture at the century's turn in the United States.

the event[103] as one that unites the local white community (across municipalities, and inculcating racial supremacy in youth) even preceding the lynching itself, with assorted nameless individuals performing their parts in planning the atrocity. The non-identification of potential perpetrators references how "[i]n the vast majority of reported lynchings" investigators "routinely concluded that black victims had met their deaths '*at the hands of unknown parties*'" or similar anonymous formulations although the attackers were often known (Litwack, "Hellhounds" 20). Most of the specifics mentioned emphasize not Sandy's mutilation, but prospective white spectators' convenience, as with the optimally placed pine wood piles; the grandstand construction monetizing the barbaric acts; the special railroad runs; and the impeccable timing to ensure children will still receive a good night's sleep, presumably after witnessing a heinous murder.

Jacqueline Goldsby accordingly characterizes lynching as not so much an anomaly in modern America as part of a twisted "cultural logic," a "networked, systemic phenomenon indicative of trends in national culture" (5), including the prominence of spectacle culture as a mode of comprehending seemingly divergent realities. *Marrow* demonstrates how the anarchy of racial violence at the time was perceived in entertaining terms, dehumanizing the victims of white supremacy while rendering an air of unreality to perpetrators' violent excesses and permitting their persistence, often with explicit or implicit legal sanction. As legal realist Robert Hale later reasoned, "[S]ystematic failure to prosecute for the lynching of Negroes is the practical equivalent of a formal withdrawal of penalties for such crimes" and "can hardly be said to be giving the Negroes *protection* of the laws equal to that which it [the state] gives to other potential victims" ("Rights Under the Fourteenth and Fifteenth Amendments" 639).

[103] Dora Apel has written of lynching photographs that "the numbing effect [of many whites toward violence against African Americans at the time] would not have taken place in isolation, or even primarily in the form of episodic spectacle lynchings. It would have to have been an everyday habit of life, taught in hundreds of ways, large and small, that black people were far their inferiors" (56).

Because of lynching's condonation by the state and the horrific ritual's spectacularization, even when evidence of Sandy's innocence emerges in *Marrow* and his murder is called off, "murmurs of dissent" arise: "The preparations had all been made. There would be great disappointment if the lynching did not occur" (138). The "show must go on" mantra leads a contingent of white citizens to consider that an innocent African American's right to life is trivial compared with what is perceived as a coveted theatrical performance to be witnessed by perhaps hundreds or thousands of whites; one white South Carolina newspaper editor in 1911 informed readers he "*went out to see the fun without the least objection to being a party to help lynch the brute*" (qtd. in Litwack, "Hellhounds" 20).[104] But in *Marrow*, more humane minds prevail to prevent this calamity from materializing, with Sandy receiving most of his employer John Delamere's wardrobe – a secondhand, superficial gift – and employment from Major Carteret as the white race's meager "vicarious atonement" in lieu of openly admitting Tom Delamere's race betrayal for murdering his great aunt (141-42).[105] Lacking one option for inciting the white public, Major Carteret and his co-conspirators intensify race-baiting through the press while Wellington's white men arm themselves, even "without any public disturbance of the town's tranquillity. A stranger would have seen nothing to excite his curiosity" (149),[106] even as readers should see plenty to do so given that the near-lynching foreshadows the riot.

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[104] Reflecting the conception of lynching as a performance, the 1911 lynching of Will Porter in Livermore, Kentucky, occurred on an opera house theater stage with an admission charge (Goldsby 227). Afterward, as the *New York Times* reported, "The lights were extinguished, the curtain lowered, and the mob filed out" (qtd. in George Wright 117).

[105] Publication of Sandy's exoneration is scant compared with the visualized hype about his purported guilt:

> As we have seen, the charge against Campbell had been made against the whole colored race. . . . This news, being highly sensational in its character, had been displayed in large black type on the front pages of the daily papers. The dispatch that followed, to the effect that the accused had been found innocent and the lynching frustrated, received slight attention, if any, in a fine-print paragraph on an inside page. The facts of the case never came out at all. The family honor of the Delameres was preserved, and the prestige of the white race in Wellington was not seriously impaired. (139-40)

[106] The novel also earlier warned: "The lull, however, was only temporary, and more apparent than real, for the forces adverse to the negro were merely gathering strength for a more vigorous assault" (142).

Marrow subverts "disaster spectacle" conventions while depicting the riot; in turn-of-the-century America, disaster spectacles (for example, of wars and natural catastrophes) theatricalized violence, death, and destruction, potentially desensitizing viewers yet invariably restoring "safety and order," with the emergency dramatized ultimately contained (Goldsby 222-23). The Wellington riot, though, eludes such bow-tied narrative closure and portrays the potentially fatal consequences of spectacular perception like the *Plessy* majority's view of race relations. "[T]he white people's day," or what co-conspirator General Belmont calls "'the final act of this drama,'" commences soon after Sandy's exoneration (149, 172). On a "fair" afternoon, the same seemingly sober streets the northerners toured are marauded by armed white men (ironized as "brave reformers") who harass and attack African Americans (171, 177). Unlike the northern tour chapter, whose brevity reflects the shallowness of what the tourists see, Chesnutt extends the riot over four chapters to delineate the total ruination of the congenial social vision the earlier chapter seemed to represent; white supremacy, enforced by violence, is what reigns in Wellington "in season and out" (143). Dr. Miller undergoes "a literal and symbolic descent," with the "social order . . . exposed as chaos" (Wideman 133-34) in a setting from Dante's *Inferno* characterized as a "seething caldron of unrestrained passions" (173).

Nor does the white mob indiscriminately assailing blacks consist of social outliers; instead, *Marrow* expresses the disparity between religious spectacles attended by supposedly reputable white citizens and their fiendish actions: "[T]o those unfamiliar with Southern life, it might have seemed impossible that these good Christian people, who thronged the churches on Sunday, and wept over the suffering of the lowly Nazarene, and sent missionaries to the heathen, could be hungering and thirsting for the blood of their fellow men" (167). Dr. Miller is forsaken

by white "friends" who do not bother disguising themselves amidst the riot (168),[107] and African American resistance or appeal to law is seen as futile. The physician abjures violence during this "'war'" because "'[i]n the minds of those who make and administer laws, we have no standing in the court of conscience. They would kill us in the fight, or they would hang us afterwards,—one way or another, we should be doomed'" (169). What he confronts at the riot's height – the bodies of several dead African Americans – affirms this catch-22 observation. While Dr. Miller initially thinks about the riot in spectacular terms, he is forced to repudiate an entertaining understanding of the debacle. After the physician hears firearms, the narrator comments, "He might have thought this merely part of the show, like the 'powder play' of the Arabs, but for the bloody confirmation of its earnestness which had already assailed his vision" (171, 173). Making Wellington into a "'white man's town'" (172) has real consequences for the blacks compelled to remain invisible by emigrating from the city or remaining *personae non grata* within it.

From Dr. Miller's perspective in the first three chapters,[108] the narrative transitions to a more omniscient point-of-view in "'Mine Enemy, O Mine Enemy!,"' the final, dramatic chapter of the riot sequence, which portrays the working-class African American Josh Green and his men attempting to protect a cluster of African American institutions from destruction (177). Unlike in popular fire-fighting disaster spectacles at the time, in which "the fire and flames themselves could not be real in order to prevent danger and actual destruction," the "illusion of danger" here is transmogrified into a reality, the victims are not all saved, and the closest figure to a hero is murdered (see Dennett and Warnke 105). As the refrain "'[k]ill the niggers!'" fills the air, Josh's band of armed African Americans makes a "formidable appearance," intending not to slay the

[107] Previously, white supremacist Captain McBane's mask came off during a Reconstruction-era Ku Klux Klan uprising (70), with *Marrow* symbolically linking the earlier insurrection and the riot.
[108] Chapters XXXII ("The Storm Breaks"), XXXIII ("The Lion's Jaws"), and XXXIV ("The Valley of the Shadow").

white mob threatening them but to safeguard their communal property until the "'gov'ner er de President'" intervene, Josh vainly hopes (178).[109] However, a white man's murder by Josh's group coupled with rumors that the band plans to "massacre all the whites and burn the town" precipitates violence (178-80). "'Vengeance!'" cries the white mob, and co-conspirator Captain McBane shares their passion, nor will he undergo a conversion in this realist text: "McBane had lived a life of violence and cruelty. As a man sows, so shall he reap. In works of fiction, such men are sometimes converted. More often, in real life, they do not change their natures until they are converted into dust. One does well to distrust a tamed tiger" (181).

Major Carteret attempts to halt the "'wholesale murder or arson'" that he disclaims intending despite provoking the white public, including onlookers who are "of the better class, or at least of the better clad" (as qualifies the wry narrator) (181-83). After he departs the scene, a showdown occurs between Captain McBane and Josh, with Josh becoming a spectacularized figure as death impends, remaining unscathed by the dozens of bullets being volleyed: "Some of the crowd paused in involuntary admiration of this black giant . . . his eyes lit up with a rapt expression which seemed to take him out of a mortal ken" (184). After Josh "burie[s] his knife to the hilt in the heart of his enemy," though, the white "crowd dashe[s] forward to wreak vengeance on his dead body" and disperses, glutted after gorging on violence for four hours (184). Inverting Ellis's ruminations on African Americans' purported susceptibility to savagery in the northern tour sequence, Chesnutt appends the following ironic postscript to the episode as a symbol of racial progress – a hospital meant to preserve lives – burns following the wanton obliteration of life during the riot: "[T]his handsome structure, the fruit of old Adam Miller's industry, the monument of his son's philanthropy, a promise of good things for the future of this

[109] Despite pleas for assistance, neither the president, William McKinley, nor North Carolina's governor interceded in the Wilmington riot (Umfleet, *Race Riot Report* 194-200).

city, lay smouldering in ruins, a melancholy witness to the fact that our boasted civilization is but a thin veneer, which cracks and scales at the first impact of primal passions" (184).

This cataclysmic ending of extrajudicial retributive injustice confirms the truth of Justice Harlan's *Plessy* dissent, only two years preceding the Wilmington riot, about the grievous consequences of the majority decision: "What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?" (560). Dr. Miller echoes the Justice in ruing "the hatreds to which this day would give birth: the long years of constraint and distrust which would still further widen the breach between two peoples whom fate had thrown into one community" (174). Nor is the community referenced here solely one town in the South, but the nation, for the riot chapters also implicate readers as "puppets" reflexively performing in the drama of life: "We are all puppets in the hand of Fate, and seldom see the strings that move us" (181), threads that become visible by *Marrow*'s fiery denouement.

The "spectacle" of African American social, political, and economic advancement feared by Major Carteret and his ideological kin in the Dunning School[110] is shown to be imperative to prevent incalculably worse spectacles from actualizing. Earlier in *Marrow*, General Belmont had complained of "'a spectacle of social equality and negro domination that made my blood boil with indignation,—a white and black convict, chained together, crossing the city in charge of a negro officer!'" as "'the last straw!'" necessitating immediate action (24).[111] Favoring African

[110] This was an influential group of historians that from the century's turn until the early civil rights era promoted the claim that the federal government's "Radical Reconstruction," in foisting a politically empowered African American population upon a recalcitrant white South, had been a colossal mistake (John David Smith 1-2).
[111] He was also appalled at African Americans making inroads into the legal system as justices of the peace and lawyers (23).

American disenfranchisement, Major Carteret had described "Negro citizenship [as] a gross farce—Sambo and Dinah [minstrel names] raised from the kitchen to the cabinet were a spectacle to make the gods laugh. The laws by which it had been sought to put the negroes on a level with the whites must be swept away in theory as they had failed in fact" (51).

By the time of the riot, though, Ellis, a stand-in for educated white readers of the time, realizes this "spectacle of a few negroes in office" is insufficient to warrant a municipal *coup d'état* and "wholesale murder or other horrors" (174). *Ex post facto* press justifications, passively voiced in *Marrow* – the murders of blacks "were said, perhaps truthfully, not to have been premeditated, and many regrets were expressed" (173)[112] – are exposed as shoddy excuses for an assault on democratic values and constitutional rights. Chesnutt began the riot sequence by explaining the purpose of recounting the events in his novel, to counter distortions permeating the popular press: "But the records of the day are historical; they may be found in the newspapers of the following date, but they are more firmly engraved upon the hearts and memories of the people of Wellington" (164), particularly the African Americans terrorized by white vigilantes with governmental officials' strident or silent support. As this section indicates, Chesnutt also pinpointed spectacle culture as one of the riot's accomplices, by how it concealed racial iniquities in the northern tour, euphemized the Wellington riot's brutality, and provided the rhetoric and imagery maligning efforts to fulfill the Reconstruction Amendments' promise.

Marrow's delineation of spectacle culture underscores how "[s]egregation was not simply a set of laws. It was more fundamentally a total culture, a way of life," with "[u]nspoken societal rules" "as important as court-issued laws" in creating a comprehensive "system of racial regulation" (Bentley and Gunning, "Introduction: Cultural and Historical Background" 22 and

[112] "The proceedings of the day—planned originally as a 'demonstration,'" were "dignified subsequently as a 'revolution,'" notes Chesnutt in *Marrow* (177).

"Segregation as Culture" 422-23). While the *Plessy* majority's pragmatic defense of a decision that upheld this system claimed that an alternative approach would "only result in accentuating the difficulties of the present situation" (551), *Marrow* portrays how a toxic brew of tradition, law, and racist popular culture ultimately endangers the lives of both races in the novel with the death of Dr. Miller's son and Dodie's imperilment during the riot. Chesnutt's text thus dramatizes the existential nature of the debate in *Plessy* as implicating the nation's survival. Complementing the novel's most poignant scene, a legal realist-inflected reading of *Marrow* reveals how not "shadows," but "substantial rights," were eviscerated by the Supreme Court's decision in *Plessy*. Yet in sounding clarion calls to reconcile the national self-image of "human freedom and brotherhood" with reality, Justice Harlan's judicial dissent and Chesnutt's literary one represented formidable intercessions on racial issues with repercussions into the present.

Chapter Two – Illusions and Actualities Underlying "Liberty of Contract"

"It is brutal with life. . . . It depicts, not what man ought to be, but what man is compelled to be in our world in the twentieth century. It depicts, not what our country ought to be, or what it seems to be in the fancies of Fourth-of-July spellbinders, the home of liberty and equality of opportunity; but it depicts what our country really is, the home of oppression and injustice, a nightmare of misery, an inferno of suffering, a human hell, a jungle of wild beasts."

–Jack London, reviewing Upton Sinclair's *The Jungle*, 1905[1]

"In every labor controversy, the issue goes not only beyond the interests of the specific litigants but even beyond the interests of an existing class. It involves a vast economic policy."

–Max Radin, *Law as Logic and Experience*, 1940

As Jack London's review of *The Jungle* suggests, and Charles Chesnutt's *The Marrow of Tradition* (1901) from the prior chapter illustrates, dissent can entail "coming out about . . . the material inequality and violence of the rule of law" (Burgess 209). While Chesnutt's novel focuses on African Americans' relative rightlessness at the twentieth century's turn, though, *The Jungle* depicts the tribulations of urban working-class Americans under the "vast economic policy" that Sinclair's novel evidences receiving official imprimatur: laissez-faire capitalism. Parallels can nonetheless be drawn between the plight of urban laborers, many of whom were

[1] "What Jack London Says of *The Jungle*" (483-84). Sinclair's text was originally circulated in *Appeal to Reason*, a widely distributed socialist weekly, during 1905. The following year, the modified text was published in novel form as *The Jungle*, after an independent investigation confirmed many of Sinclair's most controversial charges (Eby, "Introduction" viii).

non-Anglo-Saxon new immigrants,[2] and African Americans.[3] As W. E. B. Du Bois observed in *The Souls of Black Folk* (1903):

> The tendency is here, born of slavery and quickened to renewed life by the crazy imperialism of the day, to regard human beings as among the material resources of a land to be trained with an eye single to future dividends. Race-prejudices, which keep brown and black men in their 'places,' we are coming to regard as useful allies with such a theory, no matter how much they may dull the ambition and sicken the hearts of struggling human beings. (65)

The Jungle and *Marrow* also both critiqued Supreme Court decisions relying in part upon legal formalism as a cover – *Plessy v. Ferguson* (1896) and *Lochner v. New York* (1905) – and literarily re-enacted Justice John Marshall Harlan's legal realist dissents in the landmark cases.[4]

Apposite to *The Jungle*, Charles J. Bushnell, writing in 1902, perceived "the present discord between the principles of production and the principles of public control" as "the source of the paramount social problem of our day" (104). Three years later the majority in *Lochner*

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[2] Between 1890 and 1920, eighteen million immigrants entered the United States (Cott 132); old immigration (mainly from Northern and Western Europe) had preceded the Gilded Age, but new immigrants (largely from Southern and Eastern Europe) surged in after the Civil War, with Ellis Island in New York opening to process the influx in 1892 (Archdeacon 27, 112; Cunningham 60).

[3] The inflow of new immigrants coincided with efforts to enact restrictive immigration legislation prescribing literacy tests that bore exclusionary affinities to disenfranchisement amendments intended to proscribe black men from voting. Roy Lubove argues that new immigrants were "a national scapegoat upon whom frustrated Americans could focus their wrath" across class and regional lines (52). Organizations like the Immigration Restriction League advocated for laws to exclude "elements undesirable for citizenship or injurious to our national character" (qtd. in Michael Hunt 40), parroting similar rhetoric as white supremacists in the South who feared the corroding of "'a sacred principle, lying at the root of our social order, involving the purity and prestige of our race'" (Chesnutt, *Marrow* 47) with African Americans' social, political, and economic flourishing.

[4] Justice Harlan's *Lochner* dissent has only recently risen to the fore among legal academics and is seen by many of them to be better reasoned than Justice Holmes's more immediately impactful dissent (see Balkin 721). Sociological jurist Roscoe Pound in 1909, for example, lauded Holmes's dissenting opinion in the case as perhaps "the best exposition" of "the sociological movement in jurisprudence" ("Liberty of Contract" 464). That noted, media coverage at the time focused on Justice Harlan's dissent (Barry Friedman 1450). Many contemporary libertarian legal scholars have excoriated New Deal jurisprudence that decisively overruled *Lochner*, which they aver has become a bogeyman in the popular conscious. See, for example, David E. Bernstein's *Rehabilitating* Lochner: *Defending Individual Rights against Progressive Reform* (2011); Barry Friedman's "The Lesson of *Lochner*" (2001) rebuts revisionist accounts of the case.

would severely restrict the government's ability to exercise such control in annulling a maximum work hours statute for violating employers' and employees' "liberty of contract" rights under the Fourteenth Amendment. By depicting the harrowing experiences of a Lithuanian immigrant family in a largely unregulated, "jungle"-like world (employment-related and otherwise), Sinclair, like Chesnutt in *Marrow*, sought to articulate a reality elided by the Court; as Sinclair described it: "the kind of anguish that comes with destitution, that is so endlessly bitter and cruel, and yet so sordid and petty, so ugly, so humiliating—unredeemed by the slightest touch of dignity or even pathos. It is a kind of anguish that poets have not commonly dealt with; its very words are not admitted into the vocabulary of poets—the details of it cannot be told in polite society at all" (*The Jungle* 76).

Sinclair's novel "fu[ses] meticulous research with a passionate demand for social change" as a muckraking text, part of the "literature of exposure" contemporaneously composed by fictional and non-fictional authors including Frank Norris, Ida Tarbell, and Lincoln Steffens (Eby, "Introduction" ix). Scholarship has analyzed *The Jungle*'s efficacy as a muckraking novel, with the watershed Pure Food and Drug Act of 1906 enacted in direct response to the text's sordid depictions of working conditions (Eby, "Introduction" viii-ix).[5] Sinclair's book is also often situated in the proletarian and political novel genres, being construed as beginning in the sentimental novel mode before lapsing, as some critics contend, into a socialist novel. *The Jungle*'s engagement with laws involving workers' rights, though, has been less remarked upon, perhaps because of the text's more obvious focus on insurgent politics and the "white, middle

[5] Examples of threats to public safety and health pervade the novel, which portrays packers strong-arming Chicago's mayor into "abolish[ing] the whole bureau of inspection," with goat meat being improperly substituted for lamb and mutton soon thereafter, in addition to the contamination arising from squalid working conditions (94-96). Upon recounting "rats, bread, and meat [going] into the hoppers together," the narrator confronts readers' doubts by asserting that "[t]his is no fairy story and no joke"; a child is suspected of dying from putrid meat (123, 132). Another character ingests "patent medicines," which are actually unpatented and contain undisclosed ingredients that may be placebos or highly addictive, with no apparent restrictions on their production and dissemination (106).

class, respectable" issue of wholesome food (Crunden 190). Indeed, Sinclair would famously lament aiming for the public's heart in *The Jungle* and instead hitting it in the stomach ("What Life Means to Me" 594). A legal realist reading of his novel can in this view be deemed an originalist one, in the sense of according with authorial intent to critique legal enactments and judicial decisions circumscribing workers' rights. Sinclair's background supports this legal interpretation of the text; he studied law at Columbia (though without graduating) (Arthur 7) and, like Chesnutt, can be seen to have siphoned his legal experiences into his literary and public interest pursuits.[6] Aside from spotlighting an integral yet underexplored dimension of *The Jungle*, a legal realist reading of the novel demonstrates why *Lochner*, more than any other single case (including *Plessy*), galvanized the legal realist movement.

The Jungle is set in the Chicago packing industry and stockyards district, which the novel at the time claimed to be "the greatest aggregation of labor and capital in one place" (42),[7] and which could be seen as a "test case[] of pressing social dilemmas centered on capitalism and quality of life" (Eby, "Living Conditions and the Immigrant Worker" 388). Sinclair believed that 1904's failed Great Beef Strike in Chicago[8] exemplified laborers' abysmal status in workplaces like the fictive Durham's packing plant, which *The Jungle* deems a "national institution" (95), much as Chesnutt conceived that the Wilmington riot was a flash point for race relations at the century's inflection point. Paralleling *Marrow*, *The Jungle* climaxes with the disintegrating

[6] He campaigned unsuccessfully for the House of Representatives in 1920 and the Senate in 1922 as a Socialist Party member and for California's governorship in 1934 as a Democrat. He also helped found Southern California's chapter of the American Civil Liberties Union (Arthur xii, 197, 203).
[7] By 1919, the meatpacking industry was among the largest contributors to America's Gross National Product (GNP), with the five-company "beef trust" dominating production (Skaggs 90).
[8] The Amalgamated Meat Cutters and Butcher Workmen of America union struck once employers violated an agreement to treat union members equitably; the workers had been negotiating for higher wages and increased control of the shop floor. Blame for the strike's broken settlement agreement is discussed in *The Jungle*'s twenty-sixth chapter (258-59). One insult purportedly hurled by an Armour supervisor was, "'You went out of here like cattle, and like cattle you'll come back"' (Eby, ed., *The Jungle* 259, note 8).

spectacle that immediately inspired the text but concentrates mainly on the underlying laws and social conditions giving rise to the cataclysm. The prolonged narrative buildup to the strike dialogues with *Lochner*, refuting the majority's paean to contractual "liberty," which is more accurately characterized as "so much latitude as the powerful choose to accord to the weak" (Hand, "Sources of Tolerance" 5) in the world of the novel. Additionally, *The Jungle* anticipates several legal realists' criticisms of uninhibited freedom of contract[9] by showing what Charles Edward Russell's *The Greatest Trust in the World* (1905) called "the practical results to humanity of certain ideals of business success that we in this country have tolerated and even cherished," namely the "national deity of Success" (89-90). Sinclair's novel thus typifies Judith Resnik's assertion, "Knowing something of law offers ways of interpreting literature and makes plain that literary works ventured ahead of law to places that law had not yet understood" (418).

The Jungle also mirrors *Marrow* in its "domestication" of legal realism to endorse Justice Harlan's dissent from the majority decision. Sinclair's novel applies the tenets of contractual liberty, as envisioned by the majority in *Lochner*, to protagonist Jurgis Rudkis's family's first purchase of a house, and their defrauding literally brings home what Sinclair reasoned to be the dire personal ramifications of *Lochner*. Yet while *The Jungle* seems to straightforwardly apply Justice Harlan's *Lochner* dissent to the case of a specific family, the novel also hints at legal realism's potential limits as articulated by Justices Harlan and Oliver Wendell Holmes, Jr., in their *Lochner* dissents. Both critiques of the majority opinion appear largely untethered from a normative social vision, unless one assumes judicial deference to legislatures on policy matters constitutes such a vision. The dissents at most account for normative considerations hypothetically (as if the justices were legislators) while *The Jungle* underscores the problematics

[9] These scholars, lawyers, and judges with legal realist tendencies include Roscoe Pound, Louis Brandeis, Benjamin Cardozo, Morris Cohen (also a movement critic), Robert Hale, Max Lerner, Felix Frankfurter, and Walter Nelles.

of divorcing moral considerations from legal interpretation. Moreover, while *The Jungle* advocates reform through the same traditional democratic channels identified by Justices Harlan and Holmes, neither jurist was known to be sympathetic to the socialist cause that triumphs in the 1904 election with which Sinclair's novel culminates. *The Jungle*, then, like *Marrow* with *Plessy*, has a dialectical relationship with its corresponding legal realist text.

Resembling Chesnutt in *Marrow*, Sinclair in *The Jungle* sought more broadly to advance a meta-fictional critique of how many readers (including jurists) were misapprehending deeply disturbing phenomena, such as workers' quality of life; his novel could then potentially rectify such misperceptions by prompting readers to see beneath surface realities. Echoing *Marrow*, *The Jungle* begins with a traditional sentimental occasion (a wedding) in which the narration reveals what a superficial interpretation of the celebration would overlook, namely fissures in the façade of bliss at the ceremony. Careful readers of the nuptial scene can then charily construe what appears to be an equally innocuous though more modern urban spectacle instigating a sublime response: Jurgis's first factory tour. The initially auspicious affect induced by these spectacular scenes becomes undercut for both characters and attentive readers as the novel unfolds. The episodes evidence a degeneration from the joy of human romance and ostensible social communion to seduction-by-machine showing mechanical harmony upon first glance but upon closer scrutiny depicting the fragmentation of human bodies. Even more banal spectacles like department stores are cast as part of an all-encompassing economic system affording workers only cosmetic reprieves from daily agony. Sinclair juxtaposes Jurgis's awe during his first factory tour and even in some subsequent factory tours with a portrayal of dehumanized workers whose dissatisfaction understandably erupts into a more catastrophic spectacle – a violent strike

– near *The Jungle*'s close. Like Chesnutt in *Marrow*, Sinclair concluded his novel by vivifying the most calamitous consequences potentially arising from a major Supreme Court decision.

Marrow and *The Jungle* have formal and substantive parallels in their engagement with legal realism, including their narrative re-creations of a Supreme Court case with significant constitutional implications and their critiques of spectacular perception and problematic manifestations of spectacle culture, but the novels were focused on distinct though (as Du Bois commented) not wholly unrelated socio-legal dilemmas of race and class. Moreover, the texts were heirs to common legal realist but largely different literary realist lines of dissent (with the notable exception of *Uncle Tom's Cabin*[10]). *Marrow* was indebted to activist African American writings and could be seen as presenting a moderate case for constitutional reform; *The Jungle*, contrastingly, espouses the socialism touted by Sinclair's hero Eugene Debs as the panacea to cure national labor ills, while disturbingly blaming African Americans in part for many white laborers' underclass status. Yet although the novels were to this extent at cross-purposes, both could be seen as unified in their aim to translate the abstractions of legal realism into a discourse and realm with which readers could identify in fulfilling what Sinclair, and likely Chesnutt as well, saw to be "the true purpose of art": "alter[ing] reality" (*Mammonart* 9).

Lochner v. New York: *A Synopsis and* The Jungle*'s Literary-Legal Realist Re-enactment*

While *Marrow* deplores racist customs and laws that perpetuated neo-slavery through passages extending Holmes's and Justice Harlan's criticisms of tradition, *The Jungle* condemns the postbellum rise of "wage slavery" enabled by laissez-faire capitalism, an economic

[10] Sinclair cited *Uncle Tom's Cabin* as his literary exemplar for *The Jungle:* "In many respects I had 'Uncle Tom's Cabin' in mind as a model of what I wished to do . . . . I wished also if possible to make a popular book, one that would be read by the people and would shake the country out of its slumber" ("What Life Means to Me" 593). Jack London's review of Sinclair's novel posited that *The Jungle* had the sizeable potential to do for "wage slaves of to-day" "what *Uncle Tom's Cabin* did for black slaves" (2).

philosophy Justice Holmes explicitly found absent from the Constitution in his *Lochner* dissent and that Justice Harlan implicitly repudiated in his own dissent in the case.[11] Laissez-faire capitalism was the reigning economic theory during the Gilded Age, when exploitative trusts thrived and the nation had the industrialized world's highest workplace accident rate (Tindall and Shi 761). The breadth and rapidity of the Second Industrial Revolution in America led to a lag in legal enactments, and the legal vacuum expanded once an unsettled judicial environment gave governments and employers a license to err on the side of under-regulating businesses.[12]

The Supreme Court did sustain certain laws governing working conditions, such as *Lochner*-like statutes regulating mine workers' and mill workers' hours in *Holden v. Hardy* (1898) and *Bunting v. Oregon* (1917), respectively, along with a statute restricting work hours for women in *Muller v. Oregon* (1908). However, the Court nullified approximately two hundred economic regulations during the "*Lochner* era" from 1905 through the mid-1930s (Geoffrey Stone et al. 724), including collective bargaining laws and minimum wage[13] and maximum work hour statutes (Lively 66). The Triangle Shirtwaist Factory fire that killed 146 New York City garment workers in 1911 exemplified the tragic consequences of non-existent or lax regulations

[11] As Justice Holmes wrote: "A constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire.* It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States" (75-76). While Justice Harlan's dissent did "not stop to consider whether any particular view of this economic question presents the sounder theory" (72), the opinion advocated giving states expansive leverage to enact working conditions legislation. *The Jungle* touts a specific theory, ending with a rousing call for socialism as bringing "'a story of hope and freedom, with the vision of a new earth to be created"' (287).

[12] Decisions like *Lochner* (and *Plessy*) can instigate "regulatory cascades," which may "signal how an entire area of law should be understood" (Kuran and Sunstein 765-66).

[13] Resonating with *The Jungle* and alluding to *Adkins v. Children's Hospital* (1923), a Supreme Court decision striking minimum wage legislation for women, legal philosopher Morris Cohen would later reason: "The state, which has an undisputed right to prohibit contracts against public morals or public policy, is here declared to have no right to prohibit contracts under which many receive less than the minimum of subsistence, so that if they are not the objects of humiliating public or private charity, they become centres of the physical and moral evils that result from systematic underfeeding and degraded standards of life" ("Property and Sovereignty" 10-11). The *Adkins* Court, in contrast, dubiously claimed that subsistence was an "extraneous circumstance" in assessing the disputed statute's constitutionality: "Certainly the employer, by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty" (558).

(Berger A13), and Robert Bremner concludes about American labor's value during the period: "[H]uman life was ordinarily regarded as cheaper than the small cost of protecting it" (75). President Theodore Roosevelt recognized the judiciary's power of (de)valuing employees' rights in a controversial 1908 speech where he proclaimed that "[t]he chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a social philosophy; and as such interpretation is fundamental, they give direction to all lawmaking" (qtd. in Beard, *Readings* 288).[14]

A high court majority in *Lochner* upheld some working conditions legislation but also delimited regulatory efforts by striking a state statute's maximum work hours provision for bakers, citing the law's violation of employers' and employees' freedom of contract rights (and the latter's personal liberty) under the Fourteenth Amendment's due process clause. The Court effectively placed the burden of proof for such "social legislation" on the state and focused exclusively on the contested statute's diminution, and not compensating enlargement, of liberty; "planned governmental intervention in the economic sphere" was considered *a priori* "inimical to economic liberty" and more specifically "free enterprise" (see Hale, "Labor Legislation" 155; Hale, "Economic Liberty" 628). Paralleling the majority in *Plessy*, the *Lochner* majority suggested the inexorability of its decision under the law (Schauer, "Formalism" 511) and employed boundary ideology analysis, concluding that the disputed legislation unduly encroached upon the private sphere and did not meaningfully implicate the public.[15] As the Court

[14] In a legal realist vein, Roosevelt continued: "The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions" (qtd. in Beard, *Readings* 288).
[15] The framing of the question presented to the Court reflected this public/private dichotomy, which Justice Harlan's and Holmes's dissents challenged:

determined, "The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts."[16] In financial terms, found the Court, "The employee may desire to earn the extra money which would arise from his working more than the prescribed time, but this statute forbids the employer from permitting the employee to earn it," even if it "may seem to him appropriate or necessary for the support of himself and his family."[17]

The decision rejecting state intrusion into private lives and "private business[es]" corresponds with Brook Thomas's description of contemporaneous laissez-faire capitalist ideology, according to which

> the economy operated most efficiently and for the benefit of all when it was generated by mutually agreed upon contractual relations among autonomous, self-possessed individuals. Theoretically, such an economy left to regulate itself would generate a natural balance among its individual members and thus correct unnatural hierarchies based on preassigned status. (*American Literary Realism* 127)

Under this theory, which had its origins in Adam Smith's writings, a combination of a supply and demand equilibrium, free competition driven by individual selfishness, and "the moral

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> In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? (56)

[16] I have omitted pincites here for readability, but the opinion is cited in the works cited section.

[17] This key proposition is derived from *The Wealth of Nations* (1776), which was quoted with approval in the Supreme Court's *Butchers' Union* decision of 1884 (757). Adam Smith in the monograph claimed: "The patrimony of the poor man lies in the strength and dexterity of his own hands, and to burden his employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation" of "a most sacred property right. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him" (96).

sentiments which arise from mutual 'sympathy'" would ensure society's optimal functioning (Nelles, "Strike and Its Legal Consequences" 511). "'[N]atural rights' of individuals and the 'natural laws' of economics" were thus conjoined in the majority's analysis (see Nelles, "Strike and Its Legal Consequences" 511). State action was posed as an artificial impingement on both, even though, as legal realists like Robert Hale (a lawyer and economist) would later argue, such purportedly "natural" rights and laws actually depended on state intervention and, of equal significance, non-intervention, in the economy.[18]

With these antecedents, the majority opinion reverencing personal liberty (here, to work over ten hours per day) in part reflected a formalist interpretation of contractual relations between employers and employees, assuming that each party had equal bargaining power before the National Labor Relations Act's passage in 1935. Nonetheless, the Court disclaimed formalism, "look[ing] beyond the mere letter of the law"[19] in the case to discern unconstitutional motives underlying what it found to be the state's pretextual justifications for its paternalistic legislation[20]: "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives." The majority contended that the statutory provision at issue failed to safeguard the public's safety, morals, welfare, or health, asserting that "the interest of the public is not in the slightest degree affected

[18] His article "Coercion and Distribution in a Supposedly Non-Coercive State" (1923) elaborates on this theory.
[19] "The purpose of a statute must be determined from the natural and legal effect of the language employed, and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose" (64).
[20] "The State in that case would assume the position of a supervisor, or *pater familias*, over every act of the individual, and its right of governmental interference with his hours of labor, his hours of exercise, the character thereof, and the extent to which it shall be carried would be recognized and upheld" (62). In contrast, the *Plessy* majority approvingly cited a Massachusetts case upholding racially segregated schools on paternalistic grounds: "'[T]he rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security'" (544).

by such an act"; as the Court claimed, "Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week." The nexus between hours worked and a baker's health was also alleged to be "entirely arbitrary."

The majority then directly addressed the public ("we all") in raising a parade of horribles – "We mention these extreme cases because the contention is extreme" – if the legislation under review was to be deemed reasonable:

> It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature on this assumption. No trade, no occupation, no mode of earning one's living could escape this all-pervading power.

This line of argumentation was forecast in the *Civil Rights Cases* (1883); a Supreme Court majority there also construed the Fourteenth Amendment, striking the Civil Rights Act of 1875's public accommodation sections based in part on the following slippery slope rationale:

> If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress, with equal show of authority, enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the States may deprive persons of life, liberty, and property without due process of law (and the amendment itself does suppose this), why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and theatres? (14-15)

The common thread in these decisions appears to be upholding entrenched interests and, in *Lochner*, nipping regulatory legislation in the bud, given that "[t]his interference on the part of the legislatures of the several States with the ordinary trades and occupations of the people seem[ed] to be on the increase" at the century's turn.

Sociological jurist Roscoe Pound's article "Do We Need a Philosophy of Law?" (1905) critiqued this ostensible judicial veneration of individual rights and the corresponding corrosion of "the right of society to stand between our laboring population and oppression" (345);[21] the Court could be seen as occluding power struggles under the guise of impersonally protecting the Constitution and combating socialism (see Lerner, "Constitution and Court as Symbols" 1309; Holmes, "Path of the Law" 467). In his seminal article "Property and Sovereignty" (1927), legal philosopher Morris Cohen would later assert that while property's character as a "sovereign power compelling service and obedience" was potentially obscured "in a commercial economy by the fiction of the so-called labor contract as a free bargain," workers like Jurgis were positioned comparably to medieval subjects indebted to their lords, who had "dominion over the things necessary for subsistence" (12).[22]

The majority opinion bears resemblances to *The Jungle*'s factory tour sequences discussed below in focusing on a lack of evident coercion; deflecting attention from blue-collar workers' plight; and presenting a romanticized view of employment relations at a time of employer collusion and widespread suppression of union activity, as with "yellow-dog" contracts

[21] Pound's articles "Mechanical Jurisprudence" (1908) and "Liberty of Contract" (1909) expanded on his criticism in *Lochner*'s wake.

[22] Lawyer-historian Brooks Adams's lectures in *Centralization and the Law* (1906) and Robert Hale's influential article "Coercion and Distribution in a Seemingly Non-Coercive State" (1923) earlier advanced a similar argument demonstrating the comparable effect of exercises in political power (by the government) and economic power (by private parties).

that enabled employers to forbid employees from unionizing.[23] These rhetorical techniques downplayed how private transactions could potentially "'manipulate out of existence'" constitutional guarantees (see Hale, "Force and the State" 175, qtg. *Frost v. Railroad Commission of California* 594). At its outset, the majority opinion in *Lochner* formalistically suggests the importance of employers using "physical force" against employees for the Court's assessment of the work hour provision's reasonability: "There is nothing in any of the opinions delivered in this case . . . which construes the section, in using the word 'required,' as referring to any physical force being used to obtain the labor of an employee. It is assumed that the word means nothing more than the requirement arising from voluntary contract for such labor in excess of the number of hours specified in the statute."

Coppage v. Kansas (1915), in which the Supreme Court struck state legislation barring "yellow-dog" contracts, subsequently dismissed pecuniary pressure as a relevant factor for demonstrating employees' "coercion." The Court determined financial inequities were inherent in an economic system based on upholding private property rights (8-9, 17).[24] Yet "coercive" union and strike activities, another form of workers exercising their freedom of contract rights, were often proscribed by American courts until World War II (Gregory 349). As the Supreme

[23] "Yellow-dog" contracts were not banned by the Supreme Court until *Phelps Dodge Corporation v. National Labor Relations Board* (1941) construed the National Labor Relations Act to prohibit this "unfair labor practice" (Geoffrey Stone et al. 724, 728). Interestingly, citing *Lochner*, Justice Harlan authored the majority opinion upholding such contracts in *Adair v. United States* (1908) on the basis that employees were free to leave non-unionized workplaces. Justice Holmes dissented in *Adair*, arguing that the disputed statutory section "simply prohibits the more powerful party to exact certain undertakings, or to threaten dismissal or unjustly discriminate on certain grounds against those already employed" (191). *The Jungle* explains that while unions were suppressed, packers colluded in setting prices and in establishing baselines for workers' wages, reflecting unbalanced associative rights. Jurgis learns that "Packingtown [is] not really a number of firms at all, but one great firm, the Beef Trust," with managers meeting to "compare[] notes" every week; "one scale" exists "for all the workers in the yards and one standard of efficiency" (108).

[24] Citing his dissent in *Lochner*, Justice Holmes dissented in *Coppage*, declaring that states should have been able to proscribe yellow-dog contracts "to establish the equality of position between the parties in which liberty of contract begins" (27).

Court of New Jersey found as early as 1867, taking a legal realist view of coercion for employers during a strike:

> There is this coercion: The men agree to leave simultaneously in large numbers and by preconcerted action. We cannot close our eyes to the fact, that the threat of the workman to quit the employer, under these circumstances, is equivalent to a threat that unless he yield to their unjustifiable demand, they will derange his business and thus cast a heavy loss upon him. . . . In such a condition of affairs it is idle to suggest the manufacturer is free to reject the terms which the confederates offer. (*State v. Donaldson* 155-56)

After repudiating claims of employees being practically coerced to accept employers' terms of employment, the mirror image of the aforementioned New Jersey case, the *Lochner* opinion concentrates on the ominous possibility of white-collar workers' employment conditions, such as those of the justices, being overseen by the state.[25] The Court accordingly redirected focus from the central issue in the case, warning: "Not only the hours of employees, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the State be impaired."[26] In *Adkins v. Children's Hospital* (1923), over Justice Holmes's dissent, the Court similarly raised the "dangerous" specter of "maximum wage" legislation for white-collar employees in voiding a minimum wage statute for women (560). Following a comparable line of questionable reasoning, according to the *Lochner* majority, if the statute at bar applying to working-class employees was fully upheld, states could naturally contend that "bankers, brokers, lawyers, real estate, and many

[25] Felix Frankfurter, a future Supreme Court justice, warned of "limitations in personal experience and imagination" being construed "as constitutional limitations" ("Constitutional Opinions of Justice Holmes" 686).
[26] Though as Arthur Miller's *Death of a Salesman* (1949) would later suggest, middle-class and upper-class employees were hardly immune from exploitation by their employers.

other kinds of business, aided by many clerks, messengers, and other employs," worked in artificially-lit buildings that posed a hazard to their health requiring government regulation.[27]

This threat to office-based employees is contrasted with the following supposedly equitable state of unregulated employment relations – the justices' "idealized political picture of the existing social order" (Pound, "Theory of Judicial Decision" I 651) – which the disputed statute would undermine: "Of course, the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor." Emphasizing employees' supposed prowess, the opinion on three occasions indicates that the parties are "*sui juris*" (legally competent to manage their own affairs). A decision upholding the provision would thus insult "grown and intelligent men" who could presumably consent to a contract without being "wards of the State," according to the majority. The hyperbolic language in *Lochner* evidences that "the opinion is not written with such calmness as is the indispensable pre-requisite of that spirit of fairness which comes from an impersonal consideration of doubts as to the issue involved," as lawyer Theodore Schroeder would explain in a 1918 article applying psychoanalysis to judicial opinions (Schroeder, "Psychologic Study of Judicial Opinions" 102). Schroeder asserted that what judges "avoided, slighted, or emphasized" in their opinions could unconsciously reveal their otherwise "submerged personality" ("Psychologic Study of Judicial Opinions" 98), including possibly a fear of income redistribution from those in the justices' class

[27] Morris Cohen subsequently considered the possibility that this line of reasoning could be traced to "class bias" as "[j]udges are selected from the most successful lawyers, and success at the bar generally means wealthy clients. It is natural for one who has looked after the interests of such clients to continue to have an open ear to their just claims, and he cannot be expected to have as much sympathetic understanding of the claims of factory workers with whom he has not had such educative relation" ("Justice Holmes and the Nature of Law" 354). Cohen surmised that judges' perceptions of the desirability of legislation affected their determinations of constitutionality and that nearly all legislation is in fact "class legislation," in the sense that it "advantage[s] certain people more than others" ("On Absolutisms in Legal Thought" 689; "Constitutional and Natural Rights in 1789 and Since" 93).

to plaintiffs like the bakers in *Lochner*.[28] In considering the socioeconomic implications of its decision for the managerial class, the Court could be seen as positioned comparably to a partisan legislative body despite purporting to curb legislative factions; "That the legislature may be moved by faction, and without justice, is very true, but so may even the court," an illustrious future judge, Learned Hand, observed in a 1908 article ("Due Process of Law" 508).

In theory, liberty of contract promoted by the majority in *Lochner* seems to be an admirable ideal, especially for African Americans emancipated from slavery and new immigrants with limited constitutional rights. As Brook Thomas notes, "a society ruled by contract promises to be dynamic rather than static" since individuals freed from inherited status can "negotiate the terms of their relations with others," having "equality of opportunity," though not necessarily "equality of conditions" (*American Literary Realism* 2). Thomas, however, continues that "contract's promise [can] be invoked ideologically to create the illusion of equitable social relations when in fact they retain[] a residue of inherited and realigned hierarchy" (*American Literary Realism* 5). Formal equality (such as a facially neutral law) does not necessarily translate into actual equality, as seen in *The Jungle* when Jurgis's family pays an extortionate sum to stay at a hotel. While "[t]he law says that the rate-card shall be on the door of a hotel," comments the narrator, "it does not say that it shall be in Lithuanian" (25-26).[29] Jurgis

[28] As support for this possibility, in an 1895 speech before the graduating class at Yale Law School, Justice Henry Billings Brown denounced income redistribution as facilitating workers' sloth. He also warned of "the immediate peril" of "*the tyranny of labor*," which he framed as inept, spendthrift workers seeking more than the "great law of supply and demand," a "law of nature" per Rockefeller, would accord them (*The Twentieth Century* 16, 25). "The Distribution of Property," Brown's 1893 address before the American Bar Association, had propounded identical themes, foretelling that socialism would undermine civilization in the United States (see Glennon 561). As a jurist on the New York Court of Appeals, Justice Rufus Peckham, who authored the majority opinion in *Lochner*, had described a law regulating grain elevator rates as "vicious in its nature and communistic in its tendency" (qtd. in Kens 129).

[29] Walter Nelles later advanced a similar argument: "To say that because men's abstract rights are equal they are equally free is indeed a crude and violent *non sequitur*," particularly in the context of property rights like those implicated in *Lochner*. For him, "Since freedom depends on power, and legal rights are elements of power, when disparities of power widen, the inferior may need superior rights or privileges and immunities in order to enjoy such freedoms as it is desirable and practicable that they should have" ("First American Labor Case" 186-87).

at first espouses freedom of contract in relatively minimalist, formal terms reflecting the tenor of the *Lochner* majority opinion: "[W]hat more had a man the right to ask than a chance to do something useful, and to get good pay for doing it?" (57). In the abstract Jurgis is initially unsympathetic to social welfare policies seemingly undercutting his individualistic right to "independent judgment and action," as the *Lochner* majority put it, which is part of the broader notion of "freedom" in America to which his family subscribes (133). His father's plight, though, creates "a crack in the fine structure of Jurgis's faith in things as they are" (57-59). This crack eventually becomes an impassable schism from the *Lochner* majority's idealized version of contractual freedom as Jurgis endures unceasing employment tribulations; unionizing is said to give Jurgis "the first inkling of a meaning in the phrase 'a free country'" (87).

Justice Harlan's dissent in *Lochner*, which was on the cusp of garnering a majority (Kens 131), expressed cognizance of contractual liberty's Janus-faced nature; and well before legal scholars' theorization of a "living Constitution,"[30] the jurist argued that new commercial circumstances necessitated a revision in the Court's conception of the Constitution. Remaining a champion of personal liberty – which was the major basis for his *Plessy* dissent – the Justice nonetheless observed that the "common good," here as expressed in the contested statute, had historically required a compromise of individual rights.[31] As Morris Cohen would later observe, decisions like *Lochner* could constrict employees' rights while releasing employers "from all responsibility for the actual human effects of their policies" in staunchly promoting employers' individual rights ("Property and Sovereignty" 28).

[30] See, for example, Supreme Court Justice Stephen Breyer's *Active Liberty: Interpreting Our Democratic Constitution* (2005) and David Strauss's *A Living Constitution* (2010).
[31] Justice Holmes's dissent also saw the growth of the regulatory state as inevitable in the modern period and did not find the disputed statute extreme compared to other judicially-sanctioned limitations on contractual liberty (75).

Justice Harlan would have given local governments ample discretion to promulgate laws on what he perceived to be labor and employment issues within their domain of expertise, even assuming the enactments were partially animated by "the belief that employers and employees in such establishments [bakeries and confectionaries] were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength."[32] The Justice found "it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the State and the end sought to be accomplished by its legislation," namely protecting bakers' "physical wellbeing." Justice Harlan cited treatises[33] that the majority opinion glossed over, avowing that "there are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work each day, from week to week, in a bakery or confectionary establishment, may endanger the health, and shorten the lives of the workmen."

Subsequent New Deal-era Court judgments spelling the death knell for the majority opinion in *Lochner* would vindicate Justice Harlan's realist reasoning.[34] Like him, the high court

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[32] In the New Deal-era *West Coast Hotel Co. v. Parrish* (1937), the Court retracted the contractual freedom logic underpinning *Lochner* based on this rationale quoted from its earlier decision in *Holden v. Hardy* (1898):

> The legislature has also recognized the fact, which the experience of legislators in many States has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases, self-interest is often an unsafe guide, and the legislature may properly interpose its authority. (393-94)

[33] Holmes also conceived that insights from other disciplines could enrich law ("Path" 474), as did Supreme Court Justice Louis Brandeis, whose dissent in *Truax v. Corrigan* (1921) asserted:

> Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary can ordinarily be determined only by a considerations of the contemporary conditions, social, industrial and political, of the community to be affected thereby. Resort to such facts is necessary, among other things, in order to appreciate the evils sought to be remedied and the possible effects of the remedy proposed [on public and private interests]. (356)

[34] In 1937, the Supreme Court in *West Coast Hotel Co. v. Parrish* sustained a state minimum wage law for women, deferring to the state's findings: "The legislature of the State was clearly entitled to consider the situation of women

later approved what could be construed as legitimate limitations on contractual rights in disputable cases[35] and some indisputable cases verging on subjective duress, i.e., "the use of unequal bargaining power to force a person in an unusually distressing situation to agree to hard contract terms" (Dalzell, "Duress by Economic Pressure II" 360). In the wake of the Great Depression, a majority of the Court may have found merit in the views of legal scholars who contended "that no basic difference exists between economic duress and physical duress" in actuality (Dalzell, "Duress by Economic Pressure I" 237), an insight *The Jungle* also reflects.

Although Sinclair's text is set circa 1900-04, before *Lochner* was decided in 1905, the novel portrays what the majority opinion appeared to condone, even if its judgment was not explicitly an endorsement of a regulatory-less milieu; the specter of *Lochner* haunts the novel well beyond the parameters of the actual case. As legal realist Max Lerner asserted in a 1933 article: "Capitalism, itself a system of economic organization, reaches out beyond its economic confines. It entrenches itself in a system of legal rules and ideas that may be called capitalist

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in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances"; the majority also considered the public burden when "[t]he bare cost of living" went unmet (399). Another key high court pronouncement is from the contemporaneous *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, in an opinion upholding the National Labor Relations Act under the Commerce Clause: "We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. . . . We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience" (41-42). Four years later, in *United States v. Darby Lumber Co.*, the Court affirmed the constitutionality of the Fair Labor Standards Act, which set maximum hours and minimum wages for employees coming within its ambit.

[35] As Justice Harlan elaborated in his *Lochner* dissent:

> We judicially know that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration among civilized peoples and by those having special knowledge of the laws of health. . . . [T]he statute before us does not embrace extreme or exceptional cases. It may be said to occupy a middle ground in respect of the hours of labor. What is the true ground for the State to take between legitimate protection, by legislation, of the public health and liberty of contract is not a question easily solved, nor one in respect of which there is or can be absolute certainty. (71-72)

Justice Holmes's dissent also focused on the statute at issue nesting within a zone of reasonability: "A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss" (76).

jurisprudence. It creates a social system and a way of life" ("The Social Thought of Mr. Justice Brandeis" 22-23).[36] Critiquing the majority's constitutional ensconcement of laissez-faire capitalism, Justice Harlan's dissent in *Lochner* similarly – and presciently – warned that "[a] decision that the New York statute is void under the Fourteenth Amendment will, in my opinion, involve consequences of a far-reaching and mischievous character," which *The Jungle* is dedicated to probing in-depth. Justice Harlan's dissent only briefly addresses these human consequences of the majority decision, while Sinclair's novel enfleshes the bones of the judicial dissent. *The Jungle* largely eschews the federalist legal theory expounded upon and applied by the Justice,[37] instead tracing a particular protagonist's life under a *Lochner*-approved legal regime. Subsequent jurists, like Supreme Court Justice Louis Brandeis (who invented the "Brandeis brief"), would elaborate on just such human elements of the majority decision.[38]

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[36] Lerner majored in literature at Yale University for his Bachelor's degree and subsequently studied law there before leaving to pursue graduate work in economics and government. His research drew on Jerome Frank's and Thurman Arnold's more widely recognized legal realist scholarship (Severo; Lerner, "Constitution and Court as Symbols").

[37] As Justice Harlan wrote:

> [T]he statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government, the courts are not concerned with the wisdom or policy of legislation. So that, in determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the State are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health, as involved in the daily work of the persons, male and female, engaged in bakery and confectionery establishments. (69)

[38] In the following description of Louis Brandeis's social justice orientation as a labor lawyer, which is evocative of Sinclair's perspective on workers' plight in *The Jungle*, Max Lerner wrote:

> He grasped with some degree of realism the meagre content of life for the vast armies of labor. He sought the answer to the riddle of how a society that gave its masses no leisure from the grinding hours of labor and no protection from exploitation in the barbaric competition for profits, that took no measures to control how much they would be paid for their work or how they much would be charged for what they bought, and that made no provisions for them when they grew too old or sick to be profitable – how such a society could expect them to form the vital and intelligent units predicated in a theory of democracy. ("The Social Thought of Mr. Justice Brandeis" 8)

The "Brandeis brief," which debuted in *Muller v. Oregon* (1908), coupled social scientific data with personal testimony, as opposed to relying predominantly on traditional precedent-based legal arguments ("Brandeis Brief").

Workers' lack of protections in the workplace was mirrored by a paucity of rights outside it, creating an inescapable vicious circle that attested to the "far-reaching" nature of the majority decision in *Lochner*. Connecting the phenomena and reform efforts in each realm, contemporary scholars have described many bakers – 87 percent in New York City as late as 1912 – toiling at the time in "tenement" bakeries[39] for up to twelve hours per day, six to seven days per week (see Schweber 259; Abrams 182; Kens 8). Bakers, then, labored in an industry with hazards in many respects comparable to those Jurgis faces in Packingtown. When *Lochner* was decided, the "common labor" workforce that comprised two-thirds of those employed in Chicago struggled to earn enough to subsist (Halpern 28). In his 1902 reflections on the social problems plaguing Chicago's stockyards, Charles Bushnell found it "certainly evident something is radically wrong with our present industrial system, if thirty thousand workmen can supply thirty millions of people with meat foods, and in return can scarcely get enough to keep themselves on the average in decent livelihood" (95). This "[u]n-American standard of living" (Breckinridge and Abbott 450) in New York City's tenement slums had earlier been castigated in Jacob Riis's non-fictional exposé *How the Other Half Lives* (1890). In *The Jungle*, set a decade later, much like the cattle in overcrowded pens (261), the workers who slay them reside in congested residences.[40] Official negligence, coupled with political corruption endemic in Chicago at the century's turn,[41] demonstrates why Sinclair's novel depicts the city's ghettoes, stockyards, and packinghouses as "inferno"-like spaces with the municipality's highest death rate (6, 96).

[39] Comparably to the fetid factories in *The Jungle*, they have been described as "damp, dusty, rat-infested" "urban slum tenement cellars [that] debilitated most workers before they turned forty-five and caused many to die young" (Abrams 182).

[40] Jurgis is forced to live in a tenement after being evicted from his home, and the units are in a "wilderness," with four flats per building, each of the four being a congested "'boarding house' for the occupancy of foreigners—Lithuanians, Poles, Slovaks, or Bohemians. . . . There would be an average of half a dozen boarders to each room—sometimes there were thirteen or fourteen to one room, fifty or sixty to a flat" (28-29, 214).

[41] As documented in Lincoln Steffens's *The Shame of the Cities* (1904).

Through these agonizing portrayals, *The Jungle* impugns the conceptual basis for the *Lochner* majority opinion: liberty, particularly in the sense of an absence of law, as an unalloyed good. The Court there referenced "liberty" seventeen times, calling to mind Supreme Court Justice and legal realist Benjamin Cardozo's assertion that "[m]any an appeal to freedom is the masquerade of privilege or inequality seeking to intrench itself behind the catchword of a principle" (qtd. in Rothschild 11);[42] the *Lochner* majority took "refuge" in a "remotely abstract conception" of the generally favorable term "liberty" "to the detriment of any thorough-going analysis of the actual social situation" (see Morris Cohen, "Justice Holmes and the Nature of Law" 354). Morris Cohen later elaborated that "the freedom to starve, or to work for wages less than the minimum of subsistence," could hardly be deemed freedom in any meaningful sense, for "mere freedom as absence of restraint, without positive power to achieve what we deem good, is empty and of no real value" ("The Basis of Contract" 560). For him, "real liberty" in conformance with the Constitution entailed reasonable restrictions on freedom of contract for the public's welfare ("The Basis of Contract" 587). The *Lochner* court, though, predicted an overregulation of employment conditions severely restricting employers' and employees' constitutional right to liberty if the challenged statutory provision had been sustained.

Sinclair's novel reverses the direction of the slippery slope[43] in contesting the majority's argument that the statute at issue constricted contractual rights without compensatorily

[42] Similarly, but substituting precedential authority for principle, Theodore Schroeder surmised that "by the blind following of ancient precedents, [judges] seem to sanctify their wrongs" ("Social Justice and the Courts" 26).
[43] The majority in *Lochner* asserted that the challenged statute "might seriously cripple the ability of the laborer to support himself and his family" (59); Justice Harlan's dissent subverted the reference to what would be "seriously cripple[d]" by the majority decision, predicting that *Lochner* would "seriously cripple the inherent power of the States to care for the lives, health and wellbeing of their citizens" (73). In refuting the majority, one could argue that a baker working sixty hours per week (the statutory maximum in *Lochner*) should at a minimum have been able to support himself or herself, if not a family, without subsidies (which employers did not directly bear the onus of, thus "hid[ing] the real cost of production" (Morris Cohen, "Justice Holmes and the Nature of Law" 354)). Moreover, as *The Jungle* portrays, burnout from overwork can impede employees from being self-sustaining in the long run.

promoting the public's safety, morals, welfare, or health or individual employees' fitness. Justice Harlan's dissent found that "many reasons of a weighty, substantial character," based on "common experience," could support legislation of the type torpedoed in *Lochner,* and *The Jungle* could be seen to bolster the Justice's claim through its depiction of laborers' dismal lives. While the *Lochner* majority opinion construed a lack of "physical force" being used to coerce employees as evidence of their "liberty," *The Jungle* repudiates this superficial understanding. Sinclair's novel delineates how "employers and employees in such establishments [here including slaughterhouses] were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength" (69), to quote Justice Harlan's dissent's hypothetical justification of legislation like the provision struck in *Lochner*. Reliance on employers' largesse – Jurgis early on assumes his employer will be "responsible for his welfare" (42) – is shown to be a woefully inadequate substitute for legal rights.[44] As Jurgis inwardly exclaims, "the whole machinery of society was at their oppressors' command!" (171). The narrator, channeling Sinclair, expresses pique at packers buying "up the law of the land" and dealing "out their brutal will to him [Jurgis] from the seat of justice" (155)

[44] As Walter Nelles would subsequently argue, "The 'sympathy' upon which theoretical anarchists, since Adam Smith, have relied as adequate to restrain anarchic ferocity is, to be sure, a real factor in human affairs. But its single power is insufficient to produce important progress toward civilized amenity," which for Nelles required "less abstract forces" like the law ("Strike and Its Legal Consequences" 528). Reflecting Nelles's insight, with unwavering fidelity to their self-interest, the people Jurgis interacts with outside his family are generally devoid of mercy. Jurgis is released early from a hospital after a tunneling accident, as "his place was needed for some one worse off than he. That he was utterly helpless, and had no means of keeping himself alive in the meantime, was something which did not concern the hospital authorities, nor any one else in the city" (215). As the passage continues, "There would be no consideration for him because of his weakness—it was no one's business to help him in such distress" (216). Private efforts to aid the destitute are often divorced from altruism, with one newspaper, "which made much of the 'common people,' open[ing] a 'free-soup kitchen' for the benefit of the unemployed. Some people said that they did this for the sake of the advertising it gave them, and some others said that their motive was a fear lest all their readers should be starved off" (269). Saloons become "home[s]" for the needy, at times employing as "sitters" "one or two forlorn-looking bums who came in covered with snow or soaked with rain to sit by the fire and look miserable to attract custom[ers]" (217-19). *Marrow*'s critique of African Americans in the Jim Crow era having to rely on whites' "condescending friendliness," as opposed to "constitutional rights," for essential freedoms (144-45) reverberates with *The Jungle*'s wariness about marginalized populations' reliance on private assistance during perilous times.

in a criticism perhaps also directed at the *Lochner* majority and kindred courts unsympathetic to Sinclair's socialism; a corrupt local judge is said to be "the first finger of the unseen hand whereby the packers held down the people of the district" (152). *The Jungle* demonstrates that without affirmative legal protections, workers at the century's turn lacked vital rights associated with the term "liberty" in the employment context, such as humane working conditions, fair pay, reasonable work hours, compensation for work-related injuries, advance notice of termination and severance pay, and the ability to collectively bargain for these rights.

Through the classic literary (and legal) realist technique of delving into granular details, *The Jungle* discusses employment-related laws that are notable to twenty-first century American readers in their absence. For instance, far from the gaze of most factory tourists, employees at Durham's fertilizer plant labor in "suffocating cellars where the daylight never came," "with the thermometer at over a hundred," and their gaits become those of chimpanzees from stooping (97, 125-26).[45] Children are often employed (at a reduced salary, like women) despite contrary laws (68, 71-72), and female employees may be sexually harassed with impunity: "Connor, who was the boss of the loading-gang outside," "would make free with the girls as they went to and from their work" (104). Connor seduces Jurgis's wife Ona by blackmailing her, threatening the entire family's livelihood (146). Moreover, along with laborers in other industries, Packingtown workers may work sixteen hours per day (138). Naturally, then, the workday's end degenerates into "a struggle, all but breaking into open war between the bosses and men" locked into a system that benefits the packers (87). Sinclair here vivifies Louis Jaffe's 1937 assertion that "[a] growing productive capacity geared to a system of faulty distribution of wealth and its product

[45] The most dismaying example of working conditions is the famous passage in which workers are shown falling into vats, becoming part of "Durham's Pure Leaf Lard," though the passage's veracity was not confirmed by a government inspection (97). Young Stanislovas's being gnawed to death by rats at work is another egregious case (275), perhaps based on an actual incident Jacob Riis was informed about (see James Lane 51).

has intensified the competitive struggle within and among these groups [i.e., the economically underprivileged versus those relatively more privileged] to the point of economic civil war" (202). In the dystopic realm of *The Jungle,* even what seems like a straightforward procedural law – a statute of limitations – is manipulated by employers seeking to avoid compensating injured employees. The narrator explains that when firms during the period would likely have been found liable for accidents, they would at times attempt to coerce workers into signing away their claims or would promise the less gullible debilitated that they would be "provided with work" to support their families. The companies would then keep this promise formally "strictly and to the letter—for two years. Two years was the 'statute of limitations,' and after that the victim could not sue" (121).[46]

Agitation for workers' rights and other "subversive" behavior to protest deplorable working conditions results in blacklisting, as Jurgis discovers when he becomes unemployable in Packingtown after assaulting Connor for effectively raping Ona: "He was condemned and sentenced without trial and without appeal; he would never work for the packers again" (though Jurgis later manages to after benefiting from nepotism in the Democratic party machine (247)). The narrator explains that "[i]t was worth a fortune to the packers to keep their blacklist effective, as a warning to the men and a means of keeping down union agitation and political discontent." Given that "[t]here [i]s nothing in Packingtown but packing-houses," losing employment there becomes equivalent to being evicted from one's home (187-88). The stakes of losing one's position are also high, as a labor surplus exists. Newspapers only spuriously

[46] Sinclair's description here is evocative of an 1884 duress case in which an injured train passenger was offered the "choice between payment of hospital expenses incurred, transportation home, and a generous extra hundred dollars or so, or being left with his right to sue the company, but without immediate resources, separated from all his family, on a hospital bed" (Dalzell, "Duress by Economic Pressure II" 376). About such cases, Brooks Adams in 1907 pointedly commented, "human life is cheap, so cheap that it is cheaper than railway equipment; therefore the railways economize on equipment and buy the lives of those immolated" ("Modern Conception of Animus" 30).

advertise plentiful openings: "A full half of these were 'fakes,' put in by the endless variety of establishments which preyed upon the helpless ignorance of the unemployed" (189). The novel describes "a printer's error" advertising two hundred instead of twenty openings instigating a riot among the three thousand job-seekers desperate for employment at Durham's. Identifying the cause of this worker flurry, the narrator explains: "All the year round they had been serving as cogs in the great packing-machine; and now [the winter] was the time for the renovating of it, and the replacing of damaged parts" (78).

Justice Harlan's dissent in *Lochner* had quoted a state report asserting that "'[s]horter hours of work, by allowing higher standards of comfort and purer family life, promise to enhance the industrial efficiency of the wage-working class—improved health, longer life, more content and greater intelligence and inventiveness'" (71). Sinclair's portrayal of Jurgis, Ona, and Ona's stepmother Elzbieta's onerous, soul-sucking employment conditions vividly corroborates the cited report. Moreover, through imagery, the novel links this industrial form of "wage slavery" to the revitalized form of race-based slavery Justice Harlan had criticized in his *Plessy* dissent[47] and that Chesnutt excoriated in *Marrow*. Indeed, after publishing *Manassas* (1904), his novel exposing chattel slavery's depredations, Sinclair is said to have been offered a "subsidy to do for wage slavery what he had already done for chattel slavery" (Crunden 171). *The Jungle* explicitly analogizes (mainly) white laborers' abuse in America's spawning factories to the suffering of African American slaves before the Civil War, thus endeavoring to spark a similar level of outrage and amelioratory action in readers. The narrator comments: "Here was a population, low-class and mostly foreign, hanging always on the verge of starvation, and dependent for its

[47] He asserted there that "[t]he Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude" (555).

opportunities of life upon the whim of men every bit as brutal and unscrupulous as the old-time slave-drivers" (104).[48] A volume of *The Leopard's Spots* (1902), Thomas Dixon's bestselling white supremacist novel, which I saw displayed on an October 2014 excursion to the Gilded Age Tampa Bay Hotel, symbolizes this nexus of race and class exploitation at the century's turn.

Walter Rideout compares Jurgis and Ona's "descent . . . into the social pit" in *The Jungle* as a slaughter comparable to that of the cattle Jurgis slays daily (34);[49] thinks the imprisoned Jurgis: "He was of no consequence—he was flung aside, like a bit of trash, the carcass of some animal" (154). The couple's physical deterioration, with Jurgis becoming expendable to employers after several workplace injuries and Ona dying in childbirth, manifests their spiritual and marital disintegration from the novel's opening wedding scene as they become psychologically benumbed. Jurgis regularly feels non-sentient – "[t]his was in truth not living; it was scarcely even existing" (98) – merely being "a dumb beast of burden" (138). Ona's eyes resemble those of a "hunted animal" while Elzbieta does "stupefying, brutalizing work" that leaves her "no time to think . . . . every faculty that was not needed for the machine was doomed to be crushed out of existence. There was only one mercy about the cruel grind—that it gave her the gift of insensibility."[50] The occasional awakening of the family members' souls causes

[48] Augustine St. Clare in *Uncle Tom's Cabin* compares the two forms of slavery in their appropriations of workers' "'body and bone, soul and spirit"' (210). That noted, this passage in *The Jungle* continues to distinguish between wage slavery and chattel slavery in terms of visibility, claiming that "[t]hings that were quite unspeakable went on there in the packing-houses all the time, and were taken for granted by everybody; only they did not show, as in the old slavery times, because there was no difference in color between master and slave" (104). Sinclair even perturbingly alleged (contra *Marrow*) that "the life of the modern wage-slave is so much more mechanical and so much less picturesque than that of the chattel-slave of fifty years ago" ("What Life Means to Me" 593).

[49] Rideout's contention here echoes John Wideman's description of African American physician William Miller's "literal and symbolic descent" into social chaos during Wellington's race riot (133-34).

[50] Louis Jaffe's subsequent characterization of factory work accords with Sinclair's portrayal of its deleterious effects on Jurgis's family: "Consider, for example, the situation of a worker whose activity in an industry has shrunk to the single operation of tending a machine. Such work produces either intolerable frustration dangerous to the stability of the individual and of the society of which he is part or an atrophy of the volitional and creative impulses" (211).

"anguish [to] seize them, more dreadful than the agony of death. It was a thing scarcely to be spoken—" (133) by them and much of public at the time, including the majority in *Lochner*.

Sinclair's novel disproves the *Lochner* majority's liberty of contract principle as applied to both adults and children. While the majority opinion, narrowly construed, only invalidated part of a broader statute governing working conditions for one particular class of laborers, it foreboded ill for future legislation designed to protect even more vulnerable populations. In *Hammer v. Dagenhart* (1918),[51] over Justice Holmes's dissent, the Supreme Court struck a federal child labor act provision barring goods illegally produced by children from transportation in interstate commerce, citing the anodyne nature of the goods manufactured (there cotton) and Congress's intrusion into traditionally local matters. *The Jungle* delineates how even before *Hammer*, legal evasions detracted from the efficacy of enactments that restricted child labor. The grandmother of a Lithuanian family (the Majauszkienes) living near Jurgis's family informs the new arrivals about Packingtown's ethnic history and the deaths of children who were previously legally employed there, for "[i]n those days there had been no law about the age of children—they had worked all but the babies." Jurgis's family is more appalled by the new law prohibiting children from working before they are sixteen, but Grandmother Majauszkiene assures them that "the law made no difference except that it forced people to lie about the ages of their children."

This legal circumvention is essential for families to survive at times, but can pit family members against one another in a race to the bottom, as "[v]ery often a man could get no work in Packingtown for months, while a child could go and get a place easily; there was always some new machine, by which the packers could get as much work out of a child as they had been able

[51] The decision was subsequently overruled in *United States v. Darby Lumber Co.* (1941).

to get out of a man, and for a third of the pay" (68).[52] Elzbieta secures a certificate from a priest attesting that her son Stanislovas is two years older than his actual age to comply with the letter of the child labor law, and the boy quickly secures a position at Durham's operating the manufacturer's "wonderful new lard-machine" for ten hours per day. A state inspector visits the facility a couple times a year, causing the company to be "very careful to comply with the law," but this merely entails filing falsified documents instead of confirming their veracity (71). Grandmother Majauszkiene's verdict on the child labor law thus appears accurate: "[T]he law made no difference except that it forced people to lie about the ages of their children" (68).[53]

In the novel's rendering, lawmakers – paralleling the Supreme Court majority in *Lochner* and *Hammer* – are divorced from the reality of their working-class constituents' lives,[54] with their legislation perversely harming families at the threshold of death[55]: "One would like to know what the lawmakers expected them to do; there were families that had no possible means of support except the children, and the law provided them no other way of getting a living" (68). Stanislovas's plight is presented as one example of those "of the million and three-quarters of children who are now engaged in earning their livings in the United States" (72), minors lacking the capacity to volitionally contract with their employers. This episode hints at the limits of even Justice Harlan's *Lochner* dissent; the jurist's faith in legislators may have been misplaced absent effective measures to combat non-compliance and, Sinclair would argue, a transformation of American democracy on a scale not compassed in the dissent. Justice Harlan thus can be seen as

[52] Women are also paid a fraction of what men are: Marija "got this [a job] because the boss saw that she had the muscles of a man, and so he discharged a man and put Marija to do his work, paying her a little more than half what he had been paying before" (102).
[53] Robert Bremner corroborates this conclusion about state child labor laws in America near the century's turn (77).
[54] Though the legislators may reflect the views of higher class constituents; a passerby threatens eleven-year-old Vilimas, one of Elzbieta's children, with a truancy charge after observing him selling newspapers (194).
[55] Domestic violence also breeds in this environment, including with Jurgis, "for men who have to crack the heads of animals all day seem to get into the habit, and to practice on their friends, and even on their families, between times," reasons the narrator (117, 21).

espousing legal realism more as a moderate methodology than an outcome-determinative jurisprudential school, anticipating what Karl Llewellyn would later suggest of the legal philosophy (see "Some Realism about Realism" 1256). The Justice hypothesized about what legislators could have rationally enacted as a solution to the problem of oppressive bakery conditions without necessarily endorsing a view of reality that Sinclair saw as truer to workers' experiences and more openly aligned with Progressive social and economic justice causes. *The Jungle*, then, more explicitly than Justice Harlan's dissent, probes the moral dimensions of litigation like *Lochner* and *Hammer*, which purported to be about "liberty of contract" and "interstate commerce" in legal terms, but which also implicated profound human terms.

Through concentrating on the plight of Jurgis's family, from children to older adults, *The Jungle* personalizes the Justice's realist *Lochner* dissent, which relied on precedents and more abstract details from treatises,[56] a state report,[57] and a statistical compilation[58] in questioning the majority's invalidation of the statutory provision at issue as an improper exercise of the state's police powers. In critiquing the opinions in *Lochner*, Matthew Bewig observes that none of the justices considered the journeymen bakers involved as "active historical subjects" (419-20), an oversight *The Jungle* can be seen to rectify by centering on Jurgis and his family's situation. Sinclair's novel complements general social scientific sources Justice Harlan's dissent cited with

[56] Such as *Diseases of the Workers*:

> 'The labor of the bakers is among the hardest and most laborious imaginable, because it has to be performed under conditions injurious to the health of those engaged in it. It is hard, very hard work, not only because it requires a great deal of physical exertion in an overheated workshop and during unreasonably long hours, but more so because of the erratic demands of the public, compelling the baker to perform the greater part of his work at night, thus depriving him of an opportunity to enjoy the necessary rest and sleep, a fact which is highly injurious to his health.' (71)

[57] Cited in part for the proposition: "'[F]rom a social point of view, production will be increased by any change in industrial organization which diminishes the number of idlers, paupers and criminals'" (71).

[58] "Statistics show that the average daily working time among workingmen in different countries is, in Australia, 8 hours; in Great Britain, 9; in the United States, 9; in Denmark, 9; in Norway, 10; Sweden, France and Switzerland, 10; Germany, 10; Belgium, Italy and Austria, 11; and in Russia, 12 hours" (71).

concrete individual anecdotes about a fictional clan whose fates readers become invested in and whose predicaments they are induced to feel sympathy for. Specific instances in the text collectively bely what may be termed the *Lochner* majority's spectacular, factory tour-like perception of contractual power between employers and employees. *The Jungle* overall reads as a thorough indictment of Court-sanctioned governmental leniency after non-intervention had long proven detrimental to society, even if, agreeing with Justices Harlan and Holmes, the optimal degree of intercession to promote the public's health, safety, and welfare remained debatable. In validating this position, Sinclair in *The Jungle*, like Chesnutt in *Marrow*, narrativized Justice Harlan's dissent by focusing on the bleak experiences of underprivileged characters subject to the majority opinion's logic. Arguably, though, *The Jungle*'s most extensive critique of contemporaneous contract law, and the novel's simultaneous endorsement of legal realism, comes not in the employment context, but in a sentimental context literally closer to home, that resilient totem of the American Dream.

The Jungle*'s "Domestication" of Legal Realism*

As in *Marrow*, inclusion within or exclusion from the nation is associated with possession of or ejection from a home in *The Jungle*, evoking W. E. B. Du Bois's lament in *Souls*: "Why did God make me an outcast and a stranger in mine own house?" (10). Resembling Chesnutt's dual legal and familial engagement with *Plessy* in *Marrow, Lochner*'s premises about formal equality between parties that are in actuality disparately situated become translated to a more intimate, familial realm readers can readily apprehend as *The Jungle* describes how contract law may serve as a profiteering mechanism for the advantaged rather than a means to safeguard an immigrant family's dwindling assets. Linguistic barriers, informational

deficiencies, and a chasm in relative bargaining power, factors not fully weighed by decisions like *Lochner,* are revealed to be determinative even when laws appear facially neutral.

Early in the novel, an agent speaking Lithuanian finagles Jurgis's family into signing a deed for what they believe is the purchase of their dream home. Two lawyers even persuade the group that the contract is in proper "form" and "perfectly regular," despite the word "rental" amidst the (to them) "strange legal jargon" (50-52).[59] They subsequently discover an interest provision that undermines "[a]ll the fair structure of their hopes," both for the home and what it signifies (the Constitution's promise of having an equal opportunity for a fulfilling life in the United States[60]): "With interest thereon monthly, at the rate of seven per cent per annum" (69). The language here echoes the "fine structure" of Jurgis's hopes being dismantled upon learning about freedom of contract's limitations in the employment sphere. The interest provision's burial in the residential contract is "not fair," says the seasoned Grandmother Majauszkiene, a family friend, but "fairness had nothing to do with it" (69). About the potentially unconscionable provision, the narrator comments that "of course they had not known it. They had not been intended to know it. But it was in the deed, and that was all that was necessary" (70).[61]

The home itself, furnished with installment purchases bought at most likely exorbitant prices, is in reality not as impressive as it was depicted in the spectacular, nearly two-foot

[59] Morris Cohen described workers' contractual rights similarly: "If he is asked to sign any paper he does so generally without any knowledge of what it contains and without any real freedom to refuse" ("The Basis of Contract" 569).

[60] Max Lerner argued that the Constitution assured "stability" for new immigrants and was "the symbol of a Golden Age" for their future. To him, this "constitutional legend" merged with the "capitalist legend" of assiduousness and talent being duly rewarded ("Constitution and Court as Symbols" 1304); Jurgis's perspective upon reaching American shores embodies Lerner's theory.

[61] Similarly, when Jurgis is injured at work, *The Jungle* notes that he "might possibly have sued the company, and got some damages for his injuries, but he did not know this, and it was not the company's business to tell him" (216). Also, while the city has a relief-bureau and the stockyards district has a charitable society, Jurgis is unaware of these organizations and their activities are not publicized, "having more calls than they [can] attend to without that" (151).

placard that first lured the family,[62] though the residence's exterior is freshly painted and makes "a considerable show" to them (45-48, 54-55). Indeed, their first impression of the home is not unlike their perception of Packingtown's industries on their first factory tour, which leaves them "breathless with wonder" soon before the home sale sequence (33). Yet just as the family is quickly disabused of the notion that factories operate seamlessly, without workers' exploitation, they soon learn that their home is not as it appears. It is fifteen years old, with "nothing new upon it but the paint," constructed by a company that uses "the very flimsiest and cheapest material" and that "care[s] about nothing at all except the outside shine" (65). Grandmother Majauszkiene apprises the "very inexperienced" arrivals that the company deliberately sells homes like theirs with the intention of evicting buyers for non-payment and reselling the residences, which she hypothesizes occurs "more than half of the time," including at least four times prior for Jurgis's home (65-68). Factory employers' treatment of their employees is characterized comparably. Jurgis, Ona, and other family members are used and expeditiously dispensed with once they are no longer maximally profitable workers, to be supplanted by more vigorous hires. Like *Marrow*, *The Jungle* employs a metaphor of legacy to justify working-class characters' right to a more meaningful life; it portrays them as "'the disinherited of the earth"' who must "'have established their right to a human existence"' (286). Sinclair's novel yokes this right to the promise of national rebirth after the Civil War. *The Jungle* adapts the Gettysburg Address's cadences to the economic context, as Justice Harlan's *Plessy* dissent had done in the

[62] The "Home, Sweet Home" tagline in Polish (though not Lithuanian) coupled with representations of a blissful husband, wife, and likely infant also entice the group (45).

racial context[63]: "'that somehow, somewhen, the labor of humanity will not belong to humanity, to be used for the purposes of humanity, to be controlled by the will of humanity?'" (290).

Continuing its braiding of contract law in the employment and residential property contexts, *The Jungle* juxtaposes Jurgis's first stint in jail, after assaulting Ona's sexually abusive boss Connor, with the loss of his family's home. Jurgis is crushed, thinking "what was any imagination of the thing to this heart-breaking, crushing reality of it" and believing his family, sapped of their souls, had become like "dream people, who never had existed at all" (170). Contract law, then, while initially seeming to facilitate the newcomers' incorporation into the nation, through employment and home ownership, rapidly proves to be an illusory indicator of equal opportunity. The contractual freedom vaunted by the majority in *Lochner* for promoting workers' rights to support themselves and their families is shown to actually inexorably entrench families in poverty and, in *The Jungle,* lead to the deaths of three generations: Jurgis's father Dede Antanas, Ona, and Jurgis and Ona's second child, among others.[64]

Justice Harlan's *Lochner* dissent had forecast this outcome, as he argued there that undermining a state's ability to enact legislation regulating employment conditions could harm workers' health, "thereby diminishing their physical and mental capacity to serve the State, and to provide for those dependent upon them" (72). Sinclair's novel extends the dissent's analysis to a conceivably more poignant context by demonstrating how the hallowed space of the home, and all it represents, was not immune from the extremities of market logic at the century's turn in the United States; *The Jungle* graphically portrays the wide-ranging, corrosive effects laissez-faire

[63] The dissent referenced the majority's decision "plac[ing] in a condition of legal inferiority a large body of American citizens now constituting a part of the political community called the People of the United States, for whom and by whom, through representatives, our government is administered" (563-64).
[64] Along with her baby, Ona dies in childbirth at a "'place vere it is not fit for dogs to be born,'" according to midwife Madame Haupt (181). The couple's first son Antanas, in whom they (like the Millers and Carterets in *Marrow*) repose hopes for the future, is drowned after falling from a dilapidated sidewalk that the city failed to maintain (115, 202, 248), and Antanas's grandfather's death is attributed to an infection contracted at work (76-77).

capitalist ideology had on the core social institution of the family. Yet the novel probes not only legal causes of familial-national dissolution, but popular cultural phenomena – namely spectacles – that could be seen as giving rise to and reinforcing judicial decisions like *Lochner* by facilitating public disengagement from repulsive realities.

The Jungle*'s Censuring of Spectacular Perception and Urban Spectacles*

Midway through *The Jungle*, while tunneling under Chicago during an episode based on an actual incident,[65] Jurgis is struck by a speeding engine and loading car that "hurl[] him against the concrete wall and knock[] him senseless." Sinclair, though, notes that readers at the time would likely not have been aware of such workplace injuries, as "it was seldom . . . that more than a dozen or two men heard of any one accident." Jurgis awakens to find himself "covered by a blanket" while lying in an ambulance "threading its way slowly through the holiday-shopping crowds" (215). The passing mention of holiday shopping seems fairly innocuous, but department stores like Chicago's legendary Marshall Field & Company, which debuted its opulent State Street building in 1902, are potent symbols of a placid, bourgeois view of modern America, as well as everyday paragons of spectacle culture: "As they developed early in the century, department stores became core institutions which reassured Americans by their very existence that life was good, that beauty mattered, and that order and stability prevailed. Through displays, demonstrations, lectures, and entertainment spectacles, the stores defined a way of life while furnishing the necessities and luxuries that it entailed" (Whitaker, *Service and Style* 82 and "American Department Stores").

[65] The Illinois Telegraph and Telephone Company, aided by beef trust magnate J. Ogden Armour, had planned to use the tunnels, constructed under false pretenses, to help employers transport freight and undermine unions (Eby, ed., *The Jungle* 214, note 1).

Earlier in the novel, while imprisoned one Christmas Eve for assaulting his wife Ona's sexually abusive boss Connor, Jurgis recalls reveling in window-shopping while roaming Michigan Avenue, seeing:

> the store windows all decorated with Christmas trees and ablaze with electric lights. In one window there would be live geese, in another marvels in sugar—pink and white canes big enough for ogres, and cakes with cherubs upon them; in a third there would be rows of fat yellow turkeys, decorated with rosettes, and rabbits and squirrels hanging; in a fourth would be a fairyland of toys—lovely dolls with pink dresses, and woolly sheep and drums and soldier hats. (154)

Unmentioned by Jurgis, enrapt in his reverie cataloguing enticements for a festival of vicarious consumption, is the fact that in 1902 department store workers joined meatpackers in striking for higher wages. Additionally, a year after the Great Beef Strike, Marshall Field would contribute $55,000 in revenues (upwards of a million dollars in 2017 calculations) reaped from consumers toward strike-breaking efforts, including importing African American workers who were barraged by white union members (Whitaker, *Service* 182). This incident vivifies the splintering of race and class lines in the United States during the twentieth century's turbulent early years, even while the vast majority of factory workers were ensnared in an economic caste system different from, but in many respects comparable to, the racial caste system portrayed in *Marrow*; as *The Jungle* notes, manual laborers "were a class apart, and were made to feel it" (100).

Consumerism is only a temporary, and spurious, palliative for Jurgis[66]; the novel ultimately undercuts characters' fetishistic enamorment with commodity culture. The holiday

[66] Memories of a dingy valentine Ona's stepmother Elzbieta wiped the specks from momentarily buoy Jurgis's spirits in jail, but a more furious internal monologue ensues: "But no, their bells were not ringing for him—their Christmas was not meant for him, they were simply not counting him at all . . . . That was their law, that was their justice!" (154-55).

shoppers' apparent indifference to the "clanging" bell of the ambulance transporting Jurgis from the scene of the subsequent tunneling accident, scarcely bothering to move aside, signifies public and judicial indifference or hostility to the cries of vulnerable populations who were physically or psychologically afflicted in the century's opening years. Indeed, soon after Jurgis's release from the hospital, the text references "the hurrying throngs upon the streets, who were deaf to his entreaties, oblivious of his very existence—and savage and contemptuous when he forced himself upon them" (215, 221).[67] Moreover, the holiday shoppers who impeded the ambulance carrying Jurgis before were probably purchasing goods produced under arduous conditions, as *The Jungle* related in a prior chapter:

> The winter was coming on again, more menacing and cruel than ever. It was October, and the holiday rush had begun. It was necessary for the packing machines to grind till late at night to provide food that would be eaten at Christmas breakfasts; and Marija and Elzbieta and Ona, as part of the machine, began working fifteen or sixteen hours a day. There was no choice about this—whatever work there was to be done they had to do, if they wished to keep their places. (138)

Jurgis repeatedly has to work on Christmas Day itself (86, 154), and these behind-the-scenes revelations of the conditions under which Christmas meals were produced contrast markedly with the cornucopia of cuisine that "the hurrying throngs" may have relished on the holiday. Jurgis's misfortunes challenge views of employment relations in decisions like *Lochner* and bely popular American Dream myths about diligence and merit being duly rewarded.[68]

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[67] An injured Jurgis fears being arrested for begging, an action that renders poverty visible to the shoppers (188). *The Jungle*'s language here is redolent of Max Lerner's critique that "[t]he fear of the immigrant worker, and the contempt for him, have been influential in American history not only in heightening the clash between capitalists and laborers, but in putting behind the former a united body of opinion representing middle class respectability" ("The Supreme Court and American Capitalism" 694, note 84).

[68] As exemplified in Theodore Dreiser's 1898 interview with meatpacking industry tycoon Philip D. Armour ("Life Stories of Successful Men").

The Jungle addresses readers subscribing to such illusions and the limitations on their perceptions in the renowned opening wedding scene, which depicts Lithuanian customs adapted to the American context. Jurgis's marriage to Ona Lukoszaite is a standard sentimental episode with a spectacular quality derived from its visuality (as "[t]he *spec* and *spectacle* suggests") and relationality, "exceed[ing] the expected or routine" (Hughes 15-16), albeit not on the scale of subsequent spectacles in the text, such as the grandiose department stores discussed above and astonishing (to Jurgis) factory tours analyzed below. Like *Marrow*'s narrator, Sinclair's narrator presents a typical sentimental scene that also endeavors to educate readers visually in preparation for future episodes more directly implicating troubling instances of spectacle culture. Sinclair writes, with characteristic panache:

> The reader, who perhaps has never held much converse in the language of far-off Lithuania, will be glad of the explanation that the place was the rear-room of a saloon in that part of Chicago known as 'back of the yards.' This information is definite and suited to the matter of fact; but how pitifully inadequate it would have seemed to one who understood that it was also the supreme hour of ecstasy in the life of one of God's gentlest creatures, the scene of the wedding-feast and the joy configuration of little Ona Lukoszaite! (6)

The narrator takes readers into a doubly marginalized space – a "rear-room of a saloon" in the "'back of the yards"' – and one populated by people whom readers at the time may not have been familiar with (speaking "the language of far-off Lithuania"). After furnishing the basic "fact[s]," the narrator shifts from a more objective to a subjective perspective and spectacularizes the scene as one "of the wedding-feast and joy configuration" of the bride, briefly assuming her point-of-view, much as events are later filtered through her husband's perspective (6).

As the episode develops, the narrator shows "spectators" at the wedding gala observing guests listening to music and dancing at the celebration, just as readers observe the festivities. "[O]nlookers" who venture close enough are invited to dine, for "[i]t was one of the laws of the *veselija* [wedding feast] that no one goes hungry; and, while a rule made in the forests of Lithuania is hard to apply in the stock-yards district of Chicago, with its quarter of a million inhabitants, still they did their best" (7). The sheen of the wedding dinner soon fades, though, as the novel describes how Ona's stepmother Elzbieta clings "to her traditions with desperation," refusing "to lose all caste, even if they [her family] had come to be unskilled laborers in Packingtown" (16) Her desire to refuse "acknowledg[ing] defeat" (64) comes at an excruciating cost. While "[t]he *veselija* is a compact, a compact not expressed, but therefore only the more binding upon all" in Lithuania, with the implicit understanding that guests pay their way to enable the spectacle, Lithuanian youth in America forswear such customs to become free-riders, leaving the newlyweds substantially indebted (18).

Moreover, the episode as narrated repeatedly pierces the spectacle's sanguine veneer with the backstories of Lithuanian immigrants savoring music at the feast but suffering in workplaces otherwise; the *veselija* provides only an ephemeral respite. "You would smile, perhaps, to see them—," postulates the narrator, "but you would not smile if you knew all the story" (14). The narrator articulates a thought wizened readers may have about the nuptial spectacle – "It is very imprudent, it is tragic—but, ah, it is so beautiful!," aligning himself between "these poor people" and the reader (16).[69] The narrator in *Marrow* also has a more expansive, futuristic social and

[69] "There is no pretense in *The Jungle* that the group Sinclair is writing *about* is the same or even has much in common with the group he is writing *for*," posits June Howard (159). That noted, Sinclair does strive to ally readers with characters to induce empathy, rapidly shifting from third-person to second-person perspective on occasion, as here: "He is a beef-boner, and that is a dangerous trade, especially when you are on piecework and trying to earn a bride" (14). Later, when Jurgis dupes a "victim" while begging, the narrator asks "victims" like readers who have been accosted by beggars to consider "where he, the victim, would have gone" in Jurgis's place (219-20).

legal realist perspective than his characters while sympathizing with them at times. As Chesnutt's narrator there recounts, in a comment also directed at complacent readers, the lovelorn journalist Lee "Ellis had not lived long enough to learn that impossibilities are merely things of which we have not learned, or which we do not wish to happen" (16).

Soon after the meta-textual introduction of the wedding, *The Jungle* depicts Jurgis's first factory tour, transitioning to a more contemporary spectacle that has a different affect on first blush. The sentimental marriage feast centers on and apparently celebrates human concord while the factory tour diminishes humanity in scale by ostensibly concentrating on colossal machines that seem to dwarf workers. Both spectacles, however – like the department store whose display inveigles Jurgis – function similarly to mask harsh labor realities. The factory tour can be categorized as an "urban sublime" experience, one in which "terror and wonder" intermingle (Den Tandt 4). Christophe Den Tandt quotes Edmund Burke's *Philosophical Enquiry into the Origin of Our Ideas of the Sublime and Beautiful* (1757) in describing "'[v]isual objects of great dimensions,'" "of great complexity and magnificence" like the spectacle of the factory tour, being particularly apt to invoke such emotions (5); Jurgis initially experiences "beauty and terror" at a steel-works plant (197).

But just as the northerners' tour of Wellington in *Marrow* leaves the visitors with a spurious "pleasing impression" of race relations in the Jim Crow South (73), factory tours in *The Jungle* are shown to proffer visitors a skewed perception of harmonious class relations in early twentieth-century America. Both types of tours present themselves as instruments of unification that instead entrench "'separation and estrangement between man and man'" (see Debord 12, 151). They aestheticize exploitation for the tourists, making race and class oppression pleasurable to spectators – one by hearkening to a glorified antebellum past, the other by

rendering sublime the industrial postbellum present. As discussed earlier, *Marrow*'s tour plays out as vivified plantation fiction, and *The Jungle*'s factory tours are depicted as a series of new dramas starring machines (and, secondarily, their human operators and doomed animals) in a theater of relatively unbridled capitalist production.

In 1899, A. M. Simons observed the perversity of a situation in which machines seem more human than their living controllers while portraying a Chicago packing district tour as *de rigeur*:

> 'One of the sights of the town,' and no visitor thinks his tour of the World's Fair City complete until he has been piloted through the mazes of 'Packingtown' and seen the wondrous machinery that whirls the animal along in the transforming journey from pen to barrel. He gazes in amazement at the contrivances of iron and steel, whose variety, intricacy, and humaneness are only equaled in marvelousness by the uniformity, simplicity, and mechanicalness of their flesh and blood competitors. (3)

Factory tours became popularized partially for middle-class Americans to "cement" their class status by "spending leisure time watching others work," posits Allison Marsh.[70] She explains that workers had legitimate complaints about the tours because they "were so obviously PR tools. They had defined scripts and prescribed routes. You didn't necessarily see the whole picture of what was going on" in terms of real working conditions (qtd. in Waldman), echoing Dana Polan's argument about spectacles excluding what lies "beyond the frame" (63). The tours were potentially used as a "manipulative form of quality control" by requiring workers to be observed constantly (Waldman).

[70] Her forthcoming monograph, *The Ultimate Vacation: Watching Other People Work*, analyzes factory tours in the United States from 1890 through 1940 ("Allison Marsh").

Yet ecstatic upon receiving his first job, Jurgis accompanies his family on a tour of "the sights of Packingtown" led by a Lithuanian friend, Jokubas, as readers follow along. Like the southern tour guides in *Marrow*, "with the air of a country gentleman escorting a party of visitors over his estate," Jokubas commences the tour. The family construes the excursion to see the area's "wonders" spectacularly, as if they are "children in sight of a circus menagerie—which, indeed, the scene a good deal resembled." They begin with a panoramic perspective from "a raised gallery, from which everything could be seen. Here they stood, staring, breathless with wonder." Jokubas proudly cites area statistics, and his enthusiasm affects (and infects) Jurgis: "Had he not just gotten a job, and become a sharer in all this activity, a cog in this marvellous machine?" (33). The narrator sees a stream of animals being led to their death as symbolic but comments that "[o]ur friends were not poetical, and the sight suggested to them no metaphors of human destiny; they thought only of the wonderful efficiency of it all" (34), mirroring the limited perspective of many of *The Jungle*'s readers and the *Lochner* majority in Sinclair's estimation.

From the pens, the party proceeds to the factories manufacturing the products so pervasively advertised "by placards that defaced the landscape when he [the visitor] travelled, and by staring advertisements in the newspapers and magazines" (35).[71] This passage ties the goods emerging from the captivating spectacle of factory production to more prosaic but, in the narrator's perception, comparably problematic manifestations of visual culture – Guy Debord's nemeses later (115)[72] – in the incipient mass media age, including billboards pockmarking landscapes and periodical advertisements. The latter here return viewers' stares and, like a

[71] Morris Cohen similarly later asserted: "Business efficiency mars the beauty of our countryside with hideous advertising signs and would, if allowed, ruin the scenic grandeur of Niagara" ("Property and Sovereignty" 28).
[72] Debord's seminal *The Society of the Spectacle*, first published in 1967, was a neo-Marxist critique of spectacle substituting for reality "[i]n societies where the modern conditions of production prevail" (12) and consumer culture reigns.

charismatic speaker, have potent persuasive power, enticing working class and middle class individuals to live beyond their means while endeavoring to emulate the *ancien* and *nouveau riche*. The novel later condemns this hyper "'competition in display'" and "'competition in selling'" induced by marketing (320).[73]

For now, though, a Durham guide escorts Jurgis's group through a controlled tour of one of the plant's buildings, which substantively resembles the northerners' tour of Wellington in *Marrow*, both being fabulous and fallacious shows: "They make a great feature of showing strangers through the packing-plants, for it is a good advertisement. But *ponas* Jokubas whispered maliciously that the visitors did not see any more than the packers wanted them to" (35). From a special visitors' gallery, the family observes single-tasked workers and machines processing hogs. While the hogs' squeals momentarily vex the tourists and lead to a somewhat farcical – or, in the novel's context, all too real – narrative digression comparing the hogs' fates with humanity's, overall "[i]t was all so very businesslike that one watched it fascinated. It was pork-making by machinery, pork-making by applied mathematics" (36-37). Jurgis elevates the entire sequence into "a wonderful poem"; and according to the narrator, Jurgis "took it all in guilelessly—even to the conspicuous signs demanding immaculate cleanliness of the employees" who are soon depicted laboring on a blood-smeared floor. The deceptive signage here resembles the Jim Crow railroad car placards in *Marrow*'s "A Journey Southward" sequence; the tangibly equal signs in *Marrow* signify anything but equality, just as the signs in *The Jungle* are mere formalities. The cynical Jokubas, not unlike the narrator in *Marrow* during the plantation fiction

[73] Morris Cohen's criticism is comparable: "This power of the modern owner of capital to make us feel the necessity of buying more and more of his material goods (that may be more profitable to produce than economical to use) is a phenomenon of utmost significance to the moral philosopher." Cohen describes "pressure not merely on ever greater expenditure but more specifically for expenditure for ostentation rather than for comfort" motivated by the desire "to appear in a higher class than one's income really allows" ("Property and Sovereignty" 14).

subversion sequence, sarcastically translates the signs purporting to establish rules and takes Jurgis's family "to the secret-rooms where the spoiled meats went to be doctored." When the party reaches a room where waste materials are treated, and workers labor "in the midst of a sickening stench," "the visitors hasten by, gasping" (38).[74]

The group is then led outside to watch cattle being slaughtered, with the animals' methodical deaths being framed as a performance for another form of human consumption (as entertainment): "This made a scene of wonderful activity, a picture of human power wonderful to watch. It was all in one great room, like a circus amphitheatre, with a gallery for visitors running over the centre" (39).[75] An 1899 stereoscope card souvenir from Armour's Packing House presented the outcome of this mechanical killing in the form of "hundreds of dangling pig carcasses" (Savelieva), aestheticizing a disturbing sight. In *The Jungle*, the rapid pace at which the workers create these carcasses is compared to that of "a football game," and the floor they work on is slathered in blood that must have made the surface slippery, "but no one could have guessed this by watching the men at work," contends the narrator (40).[76] The passage can be seen to rebut one of the *Lochner* majority's bases for striking the work hours statute challenged in the case, as the Court dismissed the connection between bakers' overwork and the quality of the

[74] Later, readers learn that "[t]he fertilizer-works of Durham's lay away from the rest of the plant. Few visitors ever saw them, and the few who did would come out looking like Dante, of whom the peasants declared that he had been into hell"; workers are blanketed in hazardous, "foul-smelling" dust (124).

[75] Performative language also characterizes Jurgis's subsequent tour of a steel mill, which is in a "dome-like building the size of a big theatre. Jurgis st[ands] where the balcony of the theatre would have been, and opposite, by the stage," he witnesses the mill's operations (197).

[76] This passage echoes a subsequent one in which the narrator depicts how spectacles produced by a corrupt Racing Trust, which bribes government officials, are a charade and result from abusing horses. The animals are described not dissimilarly to abused laborers portrayed in *The Jungle*'s factory tour sequences:

> It [the Racing Trust] built magnificent racing parks all over the country, and by means of enormous purses it lured the people to come, and then it organized a gigantic shell-game, whereby it plundered them of hundreds of millions of dollars every year. Horse-racing had once been a sport, but nowadays it was a business; a horse could be 'doped' and doctored, undertrained or overtrained; it could be made to fall at any moment—or its gait could be broken by lashing it with the whip, which all the spectators would take to be a desperate effort to keep it in the lead. (244)

resulting food supply.[77] The contrast between the workers' apparent ease and the actual treachery of their conditions also evokes the ostensibly content African American employees seen living under segregation in *Marrow*'s Wellington tour. Finally, Jurgis's group sees the finished products, properly labeled and arranged: "The visitors were taken there and shown them, all neatly hung in rows, labelled conspicuously with the tags of government inspectors" earlier portrayed as mere rubber-stampers (in a legal realist touch) (38, 40).[78]

Jokubas boasts these products are sent "to every country in the civilized world," perhaps being awed by the scale of production in spite of viewing the factory tour "sceptically," or attempting to rationalize the maltreatment of input (i.e., factory workers) by citing the abundant output of their labor (42). Jurgis's family is amazed by Jokubas's citation of economic data, with Jurgis believing it to be almost profane to criticize the spectacularly-sized, vertically integrated enterprise he has just toured: "[I]t was a thing tremendous as the universe—the laws and ways of its working no more than the universe to be questioned or understood. All that a mere man could do, it seemed to Jurgis, was to take a thing like this as he found it and do as he was told" (42). Jurgis's belief in the immutability of the laws governing factory production, like those controlling nature at the time, is redolent of Debord's argument that the spectacle presents itself as "an enormous positivity, out of reach and beyond dispute. All it says is: 'that which appears is good, that which is good appears,'" demanding "passive acceptance" (15).

[77] As the Court stated, "In our judgment, it is not possible, in fact, to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman. The connection, if any exists, is too shadowy and thin to build any argument for the interference of the legislature" (72).
[78] The inspectors are described wearing blue uniforms with brass buttons and "giving an atmosphere of authority to the scene, and, as it were, put[ting] the stamp of official approval upon the things which were done in Durham's" (38). The novel subsequently recounts how in the evening, after the inspectors leave, workers mix condemned and permitted meats "with an air of business nonchalance which said plainer than any words that it was a matter of everyday routine," a rule-of-law subversion that contributes to undermining Jurgis's "faith in America" (62-63).

Jurgis's reasoning also recalls Standard Oil Trust mogul John D. Rockefeller's opprobrious claim about the inherency of economic Darwinism,[79] but the narrator's qualification of "it seemed to Jurgis" clarifies that Jurgis, like the northerners in *Marrow*, has misperceived that a facially benignant spectacle accurately represents reality. Jurgis is depicted as erroneously concluding that flaws in the system he views – for example, he is appalled by how the hogs are slain, as the northerners criticize derogations from the constitutional ideal of liberty for African Americans – are beyond his purview to change (37, 42). Jurgis's later working on only one part of a streamlined process (190) becomes emblematic of his myopia (or "humble-minded[ness]" (37)) and that of millions of other laborers in his class at *The Jungle*'s outset.

Yet even while Sinclair reports Jurgis's family's general wonderment during the tour, the narrative focuses on individual workers' tasks, attempting to humanize people mechanized in the tour who worryingly seem to become the products they produce; Jurgis is later reduced to a "mass of fertilizer" and sausage factory workers are "precisely the color of the 'fresh country sausage'" they make (126, 129). The novel thus exposes the factory tour as not affirming human life as much as attesting to "the visible negation of life" (see Debord 14). Moreover, each subsequent iteration of the factory tour evidences a more jaded perspective as the family has a "flesh-and-blood" view from the "inside" (56, 131) and readers have honed their visual and textual literacies. A sausage-room tour comes with a caveat and considers the human cost of innovative technology; the room is "an interesting place to visit, for two or three minutes, and provided that you did not look at the people, the machines were perhaps the most wonderful

[79] "The American Beauty Rose can be produced in the splendor and fragrance which bring cheer to its beholder only by sacrificing the early buds which grow up around it. This is not an evil tendency in business. It is merely the working-out of a law of nature and a law of God" (qtd. in Golembiewski 38).

things in the entire plant. Presumably sausages were once chopped and stuffed by hand, and if so it would be interesting to know how many workers had been displaced by those inventions."

While sausages seem "miraculously born from [a] machine," the narrative concentrates on what one worker does in twisting the sausages into links, which is "for the uninitiated the most perplexing work of all"; "It was quite the feat of a prestidigitator,—for the woman worked so fast that the eye could literally not follow her" (129). But the magical aura of a "mist of motion" soon fades, and the narrator rebukes voyeuristic tourists, including potentially readers (and judges), who would prefer to abscond from rather than confront the harsh realities that factory workers daily endure, both inside and outside their workplaces:

> [T]he visitor would suddenly notice the tense set face, with the two wrinkles graven in the forehead, and the ghastly pallor of the cheeks; and then he would suddenly recollect that it was time he was going on. The woman did not go on; she stayed right there—hour after hour, day after day, year after year, twisting sausage-links and racing with death. It was piece-work, and she was apt to have a family to keep alive; and stern and ruthless economic laws had arranged it that she could only do this by working just as she did, with all her soul upon her work, and with never an instant for a glance at the well-dressed ladies and gentlemen who came to stare at her, as at some wild beast in a menagerie. (129-30)

Even a harvester plant exemplifying welfare capitalism because of its more salubrious working conditions requires specialized laborers to work at the unremitting pace of machines, and their achievements are said to become boasts for revenue-reaping "captains of industry" in fancy

"banquet-halls" reminiscent of the "elaborate luncheons" that the northern visitors in *Marrow* are treated to (191).[80]

Profits from products manufactured by workers seen in the factory tours enable *The Jungle*'s spectacular pinnacle: the Lake Shore Drive mansion tour that Jurgis takes after he meets Freddy Jones, a packinghouse tycoon's inebriated son. Jurgis had previously worked for the magnate, and Freddy facetiously claims his father is "'[g]reat fren's with the men'" (227). "'Lights," commands Freddy to begin the tour (226), and the Tom Delamere-like degenerate aristocrat exults about his home in spectacular terms resembling those earlier employed to describe how Jurgis perceived his first factory tour, both being theatrical experiences: "'Lossa folks from country never saw such a place. Guv'ner brings 'em—free show—reg'lar circus!'" (227). Freddy "'show[s]'" Jurgis around, "'play[ing] the guv'ner,'" and the block-long residence with "towers and huge gables, like a mediaeval castle," exemplifies conspicuous consumption, as Thorstein Veblen conceptualized in *The Theory of the Leisure Class* (1899) (68). During the Gilded Age, America's *nouveau riche* displayed their wealth as a means to flaunt their social prowess; a socialist speaker in *The Jungle* maligns these elites' lives as a contest "'for supremacy in ostentation and recklessness'" (290). Freddy catalogues the Jones family's opulent possessions and their prices for an awed Jurgis. Objects include fancy furniture, renowned paintings, and "a swimming pool of the purest marble, that had cost about forty thousand dollars" (228-29), over a million dollars in 2017 figures. Jurgis reciprocally performs for Freddy in eating and drinking at his host's behest while Freddy "watch[es] him in wonder," becoming an object of higher class

[80] Earlier, *The Jungle* highlights the disparity between aggregate numbers and individual experiences: "There are learned people who can tell you out of the statistics that beef-boners make forty cents an hour, but, perhaps, these people have never looked into a beef-boner's hands" (14). While "the wandering visitor" (e.g., reader) may express skepticism about other packinghouse industry malfeasance, the workers' hands elude mental dismissal (96). Later in *The Jungle*, Thomas Carlyle's savior "captains of industry" from his eponymous essay in *Past and Present* (1843) become workers, or "citizens of industry" (191, 309).

observation even outside the factory (230). Jurgis's stay in this ethereal space is brief, though, as the butler eventually boots him out into the snow (232). The Great Beef Strike that soon ensues suggests the untenable serenity represented by the Jones manor, whose resplendency comes from exploiting workers like Jurgis's family.

Packingtown, where much of *The Jungle* is set, resembles Wellington in *Marrow*; it is "always a centre of violence," "a seething caldron of passion" (nearly replicating *Marrow*'s description of the Wellington riot) (259), with tensions that simmer until bubbling forth during the Great Beef Strike. As with *Marrow*, perceptive readers of *The Jungle* see signs of unrest before the disintegrating, lawless spectacular event. For example, a "'run on the bank'" creates a "scene of wild confusion" or "melée" until police arrive (109). Police-reserves in Sinclair's novel earlier suppressed unemployed workers who were rioting (78), and a failed impromptu strike based on an actual incident in which Irish American women protested a pay cut in 1900 also hinted at social discord (107). Additionally, *The Jungle* depicts social underworlds beneath the skyscrapers that adorned Chicago's skyline by the early twentieth century. These include jails, which are the "inner soul" of the city in the novel (with an entire criminal underworld paralleling the criminal overworld) (160, 238); detention hospitals, where social "dregs" live in "a miniature inferno" (220); and a community of tramps Jurgis meets during a rural interlude (208). So even while the public appears to enjoy a "summer of prosperity" one year, eating "generously of packing-house products" (127), *The Jungle* sets the stage for a catastrophe piercing this serenity. Although the factory tours attempted to aesthetically contain the ruthless logic by which factories were run in a largely unregulated age, they instead suggest the limits of the sublime as a form of pleasurable terror and awe is transmogrified into horror once a strike erupts.

Jurgis, however, occupies the position of the white supremacists in *Marrow* rather than their African American victims, with self-interest driving him to join the "scab labor" force supporting his employer. The narrator ironizes Jurgis, as Chesnutt did with the "brave reformers" (i.e., white supremacist posse) in *Marrow* to emphasize the extent of public deviation from America's presumed foundational ideals: "Jurgis became one of the new 'American heroes,' a man whose virtues merited comparison with those of the martyrs of Lexington and Valley Forge." The resemblance to those revolutionary figures "was not complete," though, qualifies the narrator (254). Spectacularizing a "beer-hunting exploit" during the strike, Jurgis's companion inflates details about strikers' attack on himself, Jurgis, and two other members of the "scab labor" force. "[N]ot more than two hours later," the press, an abettor of fear and violence like white supremacist Major Carteret's *Morning Chronicle* in *Marrow*, dramatizes the incident in the following headline, "printed in red and black letters six inches high": "VIOLENCE IN THE YARDS! STRIKE-BREAKERS SURROUNDED BY A FRENZIED MOB!" (255).

The imported workers who replace strikers are characterized by their incompetency, and Jurgis is tasked with organizing the men to ensure operations as smooth as those he had seen during his factory tours. This proves impossible, with the human "strings," to evoke *Marrow*,[81] underpinning the factory's functioning becoming manifest and undone. Without skilled employees, there is "no place for any one in particular and no system," as shown by Jurgis's being forced into a slaughter-pen despite his nominal supervisory position:

> It was a weird sight, there on the killing-beds—a throng of stupid black negroes, and foreigners who could not understand a word that was said to them, mixed with pale-faced, hollow-chested bookkeepers and clerks, half-fainting for the tropical heat and the

[81] "We are all puppets in the hand of Fate, and seldom see the strings that move us" (181).

> sickening stench of fresh blood—and all struggling to dress a dozen or two cattle in the same place where, twenty-four hours ago, the old killing-gang had been speeding, with their marvelous precision, turning out four hundred carcasses every hour! (256)

The reference to African American workers reflects a divide-and-conquer maneuver during the Great Beef Strike. To replace striking unionists, employers imported African Americans, who were desperate for work during an economic downturn and seeking to escape the dire conditions sanctioned by *Plessy* that *Marrow* exposes (see Halpern 35-36).

Self-defeatingly, Sinclair's novel here itself reflects a spectacle culture (e.g., minstrel show) view of African American laborers as simple-minded, mentally incapable of following directions. The narrator denigrates "[t]he ancestors of these black people" as "savages in Africa" (261). Though many whites are individualized in the text, black characters are often considered en masse, for example, as a "throng" or "rows of woolly heads" (260);[82] none of them are named in *The Jungle*. They are classed with "the lowest foreigners" (256) and typically associated with violence and disorder, as if Major Carteret's nightmares in *Marrow* had come to fruition.[83] *The Jungle* recounts an actual scene in which the new workforce's chasing of stray cows incited union members to attack their substitutes, whom the police protected, allegedly prompting over 4,000 of the unionists to riot ("Mob of 4,000 Men Charges Police" 1). At one point, a mob of women and children chased a black man, shrieking "Kill the fink, kill the fink."[84] The fracturing

[82] Also, some black characters in Sinclair's text are described as "burly" and "brawny" (35, 260), and the connotations attached to such terms in the near-contemporaneous *Marrow* are derogatory; Major Carteret warns Polly Ochiltree that a "'burly black burglar"' may rob her home (20).

[83] African Americans who partake in strike-breaking efforts are said to be "ignorant," "beast"-like, and threatening to refined whites. The novel portrays them as sowing disorder by being slothful, bullying their employers, committing violent crimes, and carousing (occasionally with white women, much to the narrator's dismay at the prospect of diseases spreading – even into the food supply – via miscegenation) (see 256-61).

[84] Ethnic and racial antagonisms would continue beleaguering the union in subsequent years, with rabble-rousers like Senator Benjamin Tillman ingraining in the displaced white workers' minds the image of African Americans as a "scab race" (Katzman and Tuttle 99, 100). African Americans were often barred from union membership, and thus

of race, ethnic,[85] and class lines is thus evidenced even in a work seemingly intended to uplift all workers, one whose epigraph is dedicated "to the workingmen of America," bearing witness to the complexity of the challenge in actualizing a more equitable American democracy.

With the arrival of African American and foreign workers, conditions degenerate to such an extent that hogs begin consuming one another, like their human counterparts locked in a social Darwininian struggle: "Frequently, in the course of a two or three days' trip, in hot weather and without water, some hog would develop cholera, and die; and the rest would attack him before he had ceased kicking, and when the car was opened there be nothing of him left but the bones" (257). While the "'Union Stockyards' were never a pleasant place," admits the narrator about the supposed eighth wonder of the world, they are now "not only a collection of slaughterhouses, but also the camping-place of an army of fifteen or twenty thousand human beasts" during a sweltering summer (261). Equally hot-headed police brutalize all unfortunate enough to cross their path and delight in thievery, which the narrator surmises is unlikely to be mentioned in press accounts of the strike. A showdown between Connor and Jurgis paralleling the one between Captain McBane and Josh at the riot's climax in *Marrow* caps the chapter, with

employment opportunities including whole trades, at the time (Jaffe 219). Populists and Progressives, while ostensibly promoting popular interests, generally distrusted people of color (Barry Friedman 1433).

[85] The novel's depictions of Irish and Jewish characters are also stereotypical and largely pejorative. Jewish characters are all shown partaking in shady or exploitative activities to secure wealth or status, a common anti-Semitic trope. A "Hebrew collar-button pedler" and Jewish pawnbroker who purchases stolen items for less than their value and temporarily secretes them are discussed in passing (214, 238). Longer passages seemingly narrated from minor characters' ("Bush" Harper's and "Scotty" Doyle's) perspectives discuss the schemes of Goldberger, a "'sheeny'" (a disparaging slang term for Jews) who is involved in a Racing Trust racket, as well as a wealthy Jewish brewer who is said to have "no brains" and is duped by Democratic politicos while seeking political office (244-46). Irish immigrants, who were also seen as inferior ethnic others by many Anglo-Saxon whites at the century's turn in America (McCaffrey 19), are typecast just as negatively. Jurgis meets Tommy Finnegan, an eccentric Irish character, at a union gathering; "Buck" Halloran is a corrupt political "worker" Jurgis encounters; and an Irishman hires Jurgis for a corrupt tunneling job in Chicago (88, 213, 242). Additionally, nearly all of Jurgis's nemeses are of Irish heritage: Scully (a "little dried up Irishman, whose hands shook," and who has "rat-like eyes"); Connor ("a course, red-faced Irishman" who sexually harasses Ona); Pat Callahan (the judge who first sentences Jurgis); and the Irish family that displaces his own brood from their home (104, 152, 169, 248).

Jurgis ultimately again imprisoned (263-64). Despite this scene of social mobocracy, the public's focus is on themselves: "[T]he country clamored like a greedy child for its food" (262).

The Jungle seems to foreground spectacles leading up to the chaotic strike, but spectacular episodes comprise a relatively small proportion of the text. Moreover, a laser-like focus on either spectacular extreme – the seemingly propitious earlier episodes the novel defamiliarizes or the dystopian later ones it painstakingly delineates – can obscure the underlying causes of socioeconomic turmoil that rived America as the twentieth century began. The majority of Sinclair's realist novel accordingly draws upon the embryonic legal realist movement attuned to law's inequitable operation in documenting quotidian episodes of race- and class-based oppression, socially enforced and often fortified by laws like the Supreme Court's decision in *Lochner*. As a Situationist pamphlet would contend in the 1960s, perhaps hyperbolically but still advancing a salient point for *The Jungle*, "Yet one ordinary, non-revolutionary week-end is infinitely more bloody than a whole month of permanent revolution" (Law 29).[86] A rhetorical analysis evidences that the majority opinion reflects a superficial perspective on labor relations comparable to that depicted in *The Jungle*'s factory tour sequences, and the novel portrays the grave ramifications of this misperception. In enlivening Justice Harlan's dissent in *Lochner*, Sinclair's novel shows the literal and figurative bloodiness of the ordinary and the unilateral nature of the formally bilateral "liberty of contract" principle at the twentieth century's turn.

Crystallizing Legal Realism and Literary Realism's Early Interconnections

A socialist speaker in *The Jungle* succinctly characterizes Sinclair's and Chesnutt's aims in *The Jungle* and *Marrow* by urging his audience to "'tear off the rags of its [the world's] customs

[86] The Situationists were a group of socially revolutionary European artists and intellectuals who advanced an anti-authoritarian Marxist critique of capitalism and believed in the imbrication of art and politics. Their organization, the Situationist International, was founded in 1957 and disbanded in 1972 (see Sam Cooper 1-5).

and conventions—behold it as it is, in all its hideous nakedness!"' (288).[87] The authors sought for this unveiling to "*modify[] other personalities, inciting them to changes of feeling, belief, and action*," to quote Sinclair in *Mammonart* (10). Legal realist tenets, as expressed in Justices Harlan and Holmes's dissents and Holmes's germinal writings, provided Chesnutt and Sinclair with a compelling jurisprudential theory to refute spectacularized perceptions and instigate readers' actions. The novels supplemented Justice Harlan's and Holmes's dissenting opinions, which like many other judicial dissents can be seen as courting the people most directly impacted by the majority's opinion ("From Consensus to Collegiality" 1315), the dissenting jurists having proved unsuccessful at persuading most colleagues. *Marrow* and *The Jungle* portrayed the social strife that the majority decisions in *Plessy* and *Lochner* could be seen to engender under the cover of endorsing legal principles like "separate but equal" and "liberty of contract"; "[F]air-sounding generalities too often shelter concrete evasions of them" (Frankfurter, "Mr. Cardozo and Public Law" 468).[88] Of particular relevance to *Plessy*'s and *Lochner*'s ramifications, future Supreme Court Justice Felix Frankfurter would later attest, "[I]n the most difficult areas of adjudication the issues which come before the Court do not primarily present questions as to the meaning of words but invite judgment upon ultimate issues of society" ("Mr. Cardozo and Public Law" 461).

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[87] As *The Jungle*'s narrator indicates in simultaneously referring to the novel's readers, "[T]he eyes of the people were getting opened" to the "black and hideous fact[s]" of life (292, 312). Several characters in *Marrow* also experience realist epiphanies. For example, Olivia Carteret reasons assiduously about different moral rules applying to whites but then considers that if this premise is untrue, slavery was "not merely an economic mistake, but a great crime against humanity" she would need to "atone[] for" (153). Dr. William Miller is impelled into confronting legal realities he initially conceived were seriously mitigated by emancipation, with "this old wound healed"; he instead sees the "the old wound still bleeding" and realizes "for a moment, the continuity of life, how inseparably the present is woven with the past, how certainly the future will be but the outcome of the present" (43, 70-71).

[88] Felix Cohen in his seminal article "Transcendental Nonsense and the Functional Approach" (1935) comparably critiqued tautological judicial reasoning based on such "transcendental" terms: "When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged" (812).

These "ultimate issues" included the Jim Crow regime and rampant laissez-faire capitalism in America at the twentieth century's inception. The preceding comparative analysis has shown that Justice Harlan's dissents underpin Chesnutt's and Sinclair's texts' critiques of these legally institutionalized systems, which disproportionately harmed already marginalized populations. Apropos of *Lochner* and *The Jungle*, Robert Hale noted the anomaly of an amendment that was designed to uphold African Americans' citizenship rights after the Civil War "doing little to protect him [the economically marginalized individual] from restrictions on his liberty initiated by more powerful individuals. Its more usual function has been to protect the more powerful against legislative attempts to limit *their* power to restrict the liberty of those less richly endowed by the law with property rights" ("Force and the State" 199). Alternatively, but to the same effect, *Plessy* and *Marrow* demonstrate how the Supreme Court wielded the Fourteenth Amendment as a shield to protect states' legislative attempts to restrict African Americans' liberty. In literarily censuring the majority decisions in *Plessy* and *Lochner* for upholding this convoluted legal regime, *Marrow* and *The Jungle* at times directly applied or creatively extended legal realist principles in Justice Harlan's dissents, along with those in Justice Holmes's judicial and extrajudicial writings. The novels also on occasion alluded to the limits of these legal texts with which they were intricately engaged, suggesting that *Marrow* and *The Jungle*'s critiques about the fallibility of perception may have applied to the dissenting jurists. As I have argued above in citing the racism in both novels, the same could be said of the literary authors as well.

Marrow and *The Jungle* reveal both the national and personal stakes of constitutional interpretation in the modern era. They vivify *Plessy* and *Lochner*'s legal inconsistency[89] and the

[89] While the statute under review in *Lochner* interfering with private businesses could not be sustained as a measure intended for the public's or individual employee's benefit, the majority expressed a capacious view of the state's police power in *Plessy*. Both decisions about the degree of deference courts should afford legislatures' determinations of reasonability were not necessarily consistent with each other – as evidenced by the inference of

problematic social consequences of constitutional rights impingements, along with depicting the cases' intimate aftereffects. The novels ultimately sought to forge empathetic bonds across race and class lines over the death of a child, whose demise represents a symbolic and actual snuffing of hope that could render the stakes of the debates about constitutional rights more palpable at the time. Both texts suggested that these personal losses and larger, cataclysmic events like the Wellington riot and the Great Beef Strike could also create the opportunity to reconstruct anew at dual domestic levels, with legal realism at the forefront of the public consciousness and sight. Through their realist writings, then, Justices Holmes and Harlan, and Chesnutt and Sinclair, can be seen to epitomize the judicial dissenters Supreme Court Justice William Douglas[90] memorably lauded as "keep[ing] the democratic ideal alive in the days of regression, uncertainty, and despair" (108).

legislative good faith in *Plessy* and lack of the same in *Lochner* – but consonant with elite norms about expediency and pseudo-scientific "naturalness." Legal realist Thomas Reed Powell subsequently asserted that "the logic of constitutional law is the common sense of the Supreme Court of the United States" (646).

[90] Who replaced Justice Louis Brandeis and is known as one of the Court's staunchest egalitarians but also one of its most tempestuous members, having had turbulent relationships with his fellow justices, law clerks, and four wives (see Karst 14-15; Bruce Allen Murphy, *Wild Bill*).

Chapter Three – The American Dream and Its Socio-Legal Discontents

"'[N]ot that I am condemning you for anything you cannot help. (After all, you didn't make yourself, did you?)' But this was too much, and the judge here cautioned him to use more discretion in framing his future questions."

–Theodore Dreiser, *An American Tragedy*, 1925

"Civilization expects to prevent the worst atrocities of brutal violence by taking upon itself the right to employ violence against criminals, but the law is not able to lay hands on the more discreet and subtle forms in which human aggressions are expressed."

–Sigmund Freud, *Civilization and its Discontents*, 1929

Published four years before the Great Depression, Theodore Dreiser's *An American Tragedy* from its very title telegraphs its take on perhaps the most fundamental and longstanding of American mythologies, the American Dream.[1] The novel begins with an ordinary young white man's, Clyde Griffiths's, apparently laudable pursuit of the Dream, seemingly taking the path trodden by Dr. William Miller in Charles Chesnutt's *The Marrow of Tradition* (1901) and Jurgis Rudkis in Upton Sinclair's *The Jungle* (1906). However, unlike those texts, which furnish at least an inkling of hope for their protagonists to actualize democratic promises, Dreiser's text – an early draft of which was tellingly titled *Mirage* (see Kern 82) – terminates with its protagonist's electrocution for murder. During Clyde's homicide trial, his attorney Reuben Jephson propels a dart into the heart of the American Dream in the guise of the seemingly

[1] The word "dream" is repeated over a hundred times in the novel, more than any other major substantive one (see Lee Clark Mitchell, "Repetition and Doubling in *An American Tragedy*" 51, note 29). James Truslow Adams's *The Epic of America* (1931), published in the Great Depression's wake, dated the American Dream to the nation's founding and trumpeted it as "the greatest contribution we have made to the thought and welfare of the world" (vii). Adams famously formulated the Dream as "a vision of a better, deeper, richer life for every individual, regardless of the position in society which he or she may occupy by the accident of birth. It has been a dream of a chance to rise in the economic scale, but quite as much, or more than that, of a chance to develop our capacities to the full, unhampered by unjust restrictions of caste or custom" ("America Faces 1933's Realities" SM1).

innocuous parenthetical presented above. Jephson's (side) query during his client's testimony injects into the trial proceedings the key question that law there cannot or refuses to compass but that Dreiser's narrative foregrounds. Later challenging traditional sexual mores as Clyde testifies, Jephson infuriates representatives of the law, namely a judge and prosecutor who think: "Why this young cynic! How dared he, via innuendo and in the guise of serious questioning, intrude such a thought as this, which by implication at least picked at the very foundations of society—religious and moral!" (712). These contrasting passages function both in the moment and meta-fictionally; the intense socio-legal skepticism Jephson articulates, which government officials fear will destabilize the bedrock of society, parallels Theodore Dreiser's methodology and objectives in composing *An American Tragedy*. Assuming a correspondence between Jephson and Dreiser, Dreiser can be seen to cast himself as an applied legal realist importing theoretical insights from the rising legal movement into the realist novel form.

Given that Dreiser's text was published after sociological jurisprudence had matured from the twentieth century's turn leading up to World War I and while legal realist scholarship was accreting, the novel dialogues with a generation of academic legal dissents published in the wake of *Lochner v. New York*'s (1905) seeming endorsement of laissez-faire capitalism.[2] *An American Tragedy* also came at an inflection point in legal realist historiography, vivifying contemporaneous critiques while anticipating developments during what is often identified as the movement's peak period dating from Karl Llewellyn's 1931 response to Harvard Law School Dean Roscoe Pound's criticisms in "Some Realism about Realism" up to World War II. Potentially because of its timing, *An American Tragedy* was a rare crossover realist text. *Marrow* was not cited in legal realist scholarship, which largely elided racial issues, and *The Jungle*

[2] That noted, it does not appear that Dreiser was acquainted with legal realism as a movement per se.

motivated the evolution of enacted law more than jurisprudence.[3] Several modern law professors were intrigued by Dreiser's novel; in 1926, Washington and Lee University law professor Albert Lévitt wrote to Dreiser to "especially commend the legal aspects of your story. I know of nothing in all of Anglo-American literature which gives so fine a description of criminal procedure as your book does" (qtd. in Gerber 217), the fineness possibly attributable to Dreiser's literary reputation and finesse in fictionalizing a true jury trial. Lévitt subsequently won an essay contest about whether Clyde was guilty of first-degree homicide and planned to draft an exam question based on the circumstances surrounding Clyde's alleged murder to test his class's "knowledge of the law as no other question I can think of" (Gerber 217-18). Additionally, Raymond Moley, a Columbia Law professor whose tenure there coincided with Llewellyn's, published a monograph, *Politics and Criminal Prosecution* (1929), that quoted extensively from Dreiser's novel.[4]

Dreiser's recognition in legal circles was matched by plaudits he received in popular and literary ones, with his novel achieving "immediate and unprecedented" popular success (Gerber 216) resembling *The Jungle*'s. Joseph Wood Krutch heralded *An American Tragedy* as "The greatest American novel of our generation" (qtd. in Elias 225), and F. O. Matthiessen later issued a paean to the naturalism of Dreiser's corpus, declaring that "Dreiser gave us the stuff of our common experience, not as it was hoped to be by any idealizing theorist, but as it actually was in

[3] Also, unlike those novels, *An American Tragedy* features a protracted trial, portraying legal realism in the trenches. Despite the oftentimes greater prominence of appellate court decisions, several legal realists recognized the importance of trial courts for ordinary citizens. As Jerome Frank affirmed, "[T]he trial court is and should be recognized as the pivotal point in our legal system" ("Mr. Justice Holmes" 597). Hessel Yntema similar described trial courts as "most directly impinging upon the life of the common citizens" ("Administration of Justice" 349).

[4] The prosecution manual belied the separation of law and politics in criminal prosecutions, and Moley asserted that "[t]he multitudinous activities of the district attorney in Dreiser's *American Tragedy* is a somewhat extravagant but suggestive picture of the extent to which an ambitious prosecuting officer may participate in law enforcement" (52). For example, "[t]he prosecutor may conveniently pick from the mass of materials at hand, cases which possess every possible motif, including that of sex" (75).

its crudity" (qtd. in Cain 121). *An American Tragedy* not only thematically underscored law, but itself became subject to legal injunction for the "crudity" Matthiessen touted as the novel's forte.[5] In *Commonwealth v. Friede*, a 1930 case that attested to the breadth of the text's defiance of socio-legal norms, *An American Tragedy* was alleged to contain "'certain obscene, indecent and impure language, manifestly tending to corrupt the morals of youth, the same being too lewd and obscene to be more particularly set forth in this complaint'" (472). Jurists' attempt to exclude passages from the novel there eerily echoed Jephson's judicial rebuke for uttering the unspeakable during Clyde's trial.[6] Massachusetts's high court in *Friede* ultimately upheld a bookseller's obscenity conviction (474), following a line of state cases enforcing bans on fiction including realist works like Upton Sinclair's *Oil!* (1927) (see Grant and Angoff 37-51, 159).

Despite such censorship, the social American Dream of self-made success and equality of opportunity, complemented by the legal American Dream ideal of "equal justice under law" (the phrase emblazoned on the Supreme Court building's façade), was contested on literary and legal fronts during the interwar period. In a 1935 essay published after a series of apparent homicides paralleling events in his novel, Dreiser acknowledged: "To be sure, there was operating a so-called social system which sought by law at least to enforce *some* measure of honesty and fairness. But as to the working of the same, how different!" ("I Find the Real American Tragedy" 5). Although Dreiser's text includes no unequivocal temporal markers – suggesting the abiding nature of the problems the novel elucidates – *An American Tragedy* is set from the 1910s through early 1920s, at the outset of the industrial and urban revolutions Roscoe Pound in 1920 identified

[5] Much like Dreiser's *Sister Carrie* (1900) and Stephen Crane's *Maggie: A Girl of the Streets* (1893) were effectively suppressed ("Comstock Law").

[6] In another uncanny instance of life mirroring art, a Jephson-like lawyer, Clarence Darrow, managed Friede's defense for violating a state Comstock Law enacted in the aftermath of the first federal obscenity statute, which was titled an "Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles for Immoral Use" (Ira Wells 100-02). Darrow had previously led the defense in the Scopes trial, which in 1925 challenged Tennessee's criminalization of teaching human evolution in state-funded schools (Rios 4).

as compelling a sociological transformation in an antiquated American legal culture (Pizer, "'Shapelessness of Fact"' 93; Pound, "The Pioneers and the Common Law").[7] This historical cleavage also catalyzed Dreiser's novel, which exposes major social tensions as the plot oscillates between urban and rural locales.[8] The interwar years were more generally permeated by "failure stories"[9] undercutting archetypal up-by-the-bootstraps narratives epitomized by Benjamin Franklin's *Autobiography* and Horatio Alger's *Ragged Dick* (both published fully in 1868).[10] Legal realists were simultaneously publishing tracts that signaled their engagement with the American Dream's shortcomings.[11] Scholarship revealing how ostensibly equitable criminal trial procedures failed to ensure just outcomes and how the presumption of individual free will underlying the criminal justice system was more an illusion than a reality transposed socioeconomic critiques developed by dissenting literary authors into the legal domain.

Contemporary criticism has noted the theoretical connections between Dreiser's novel and legal realism[12] and has analyzed the challenges to the American Dream posed by *An*

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[7] Dreiser likewise remarked in his essay collection *Hey Rub-a-Dub-Dub* (1920), "We build up rules wherewith life is to be governed, and behold!—some fine day the character of life changes and our rules are worthless" (21).
[8] *Sister Carrie* (1900) and *Jennie Gerhardt* (1911) earlier reflected Dreiser's interest in the social convulsions resulting from rapid urbanization.
[9] Orson Welles's press statement on *Citizen Kane* (1941), another excoriation of the American Dream, commented: "There have been many motion pictures and novels rigorously obeying the formula of the 'success story.' I wished to do something quite different. I wished to make a picture which might be called a failure story" (qtd. in Mulvey 95).
[10] F. Scott Fitzgerald's *The Great Gatsby* and Willa Cather's *The Professor's House*, also published in 1925, and Sinclair Lewis's *Main Street* (1920) and *Babbitt* (1922) were part of this "major fiction revolt of the period" (see Pizer, "'Shapeless of Fact"' 94). Morton G. White's *Social Thought in America* (1949) similarly theorized a contemporaneous "revolt against formalism" (the book's subtitle) in social thought, including the law.
[11] For example, of Jerome Frank, William Twining asserts, "the overall thrust of his endeavors concerning judicial procedures and institutions, legal education, the SEC, and as a judge was surely in the direction of trying to improve things according to some particular version of the American Dream" (353).
[12] As John McWilliams observes, "Clyde's trial shows us Dreiser's recognition that his own assumptions about criminality and civil justice are well in advance of the popular attitudes of 1925 as well as those of 1906. In fact, *An American Tragedy* reflects the thought of the more progressive legal realists" (95). Donald Pizer's "Crime and Punishment in *An American Tragedy*: The Legal Debate" (2009) and Kenji Gonda's "The Dancer from the Dance: Law and Literature in Theodore Dreiser's *An American Tragedy*" (2001) have more recently linked Dreiser's novel to developments in legal realism. However, this chapter questions Pizer's suggestion that the subject of legal realism's nexus with *An American Tragedy* is a largely exhausted topic for scholarship on the novel (445, 447). The following analysis will also elaborate on why I disagree with Gonda's contention that the novel reflects a more

American Tragedy's social determinist worldview and morose depiction of law. Unlike prior scholarship, however, this chapter also assesses the conceptual links between literary and legal realism that Dreiser's text illumines. Moreover, the legal realist texts discussed below, many of which are deeper cuts from a proverbial scholarly album, manifest new insights into *An American Tragedy*, particularly the political implications flowing from the text's critique of the nation's social and legal systems. Interpreting Clyde's trial as a synecdoche of the country's political system – with the prosecuting attorney representing the executive branch, jurors representing the legislature, and the judge representing the judiciary – uncovers the novel's dubiety about the virtues of majority rule and the efficacy of checks and balances in American democracy. Allusions to politics are, like Jephson's questioning of the American Dream, technically banished from the courtroom, but just as Jephson's parenthetical in the epigraph resides at the trial's core, politics can be construed as *An American Tragedy*'s beating heart.[13]

The novel germinated from Dreiser's fascination with Chester Gillette's 1906 murder of Grace Brown, which occurred for the same reasons that Clyde Griffiths conspires to kill his lover Roberta Alden and which was also followed by a trial infected with prejudice leading up to the defendant's execution. While Dreiser combed voluminous legal and media narratives of the notorious, emblematic crime, he "became convinced that there was an entire misunderstanding, or perhaps I had better say non-apprehension, of the conditions or circumstances surrounding the victims of that murder *before* the murder was committed" ("I Find the Real American Tragedy"

formalist rather than realist view of law (55); legal realist scholarship related to criminal law, which is almost wholly absent from Gonda's article (see 55-56), fosters doubt on his conclusion about Dreiser's purported legal formalism.

[13] Indeed, parentheticals during the trial underscore this imbrication of law and politics: "('Beautifully done!' observed Mason sarcastically, under his breath to State Senator Redmond. 'Excellent stage play,' replied Redmond in a stage whisper.)" and "('Well staged!' murmured Mason, softy and cynically. 'Pretty shrewd—pretty shrewd!' commented Redmond, lightly)" (715, 716).

9).[14] For Dreiser, the homicide represented not a horrific deviation from American Dream ideals requiring legal vengeance but instead the perverse culmination of such ideals mandating deeper contemplation of Gillette's plight, notably the mitigating considerations Jephson attempts to introduce during Clyde's trial. Dreiser claimed Gillette was "*really doing the kind of thing which Americans should and would have said was the wise and moral thing for him to do had he not committed a murder*" ("I Find the Real American Tragedy" 10).[15]

Numerous American Dream tropes are implicated in Gillette's and Clyde's course of (mis)conduct: "continually rising expectations (that tomorrow will be better than today), the entrepreneurial spirit, the sacredness of home, the seductiveness of wealth, the pressure to succeed, our perverse fascination with 'hope' and 'change,' and the belief that 'anything is possible'" (Samuel 5). Yet *An American Tragedy* "reproduces the Alger myth while emptying out its moralistic content, reconfiguring it within an estranged realm where the familiar iconography of United States nationalism is displaced into a merely formal phenomenon" (Giles 56). Law in the novel is depicted as failing to target the root cause of Clyde's dubious crime, the "discreet and subtle" (to quote Freud) social scorn he fears. A relentless desire for success, emblematized by the vapid socialite Sondra Finchley, transmogrifies in Clyde's case into a justification for slaying his pregnant working-class lover in a world where class stratification reigns and meritocracy is paid homage to more in words than in reality.

An American Tragedy applies contemporaneous legal realist critiques of laissez-faire capitalism's corrosive socioeconomic effects and the criminal justice system's infirmities while

[14] Or as Roscoe Pound contended in criticizing purely retributive understandings of criminal law, "The lawyer's interest is in the machinery of prosecution and conviction and the machinery of mitigation. With what goes on before the commission of an offence, with the conditions which generate offenders and ensure a steady grist to the mill of criminal justice, the lawyer is not concerned" (*Criminal Justice in America* 34).
[15] Steven Messner and Richard Rosenfeld's *Crime and the American Dream* (2013) presents a criminological analysis according with Dreiser's observation here about apparently legitimate means leading to illegitimate ends.

broaching lines of criticism on these subjects that subsequent legal realists would expound upon. These scholars conceptualized law interdisciplinarily and stressed the potential gulf between law's espousals and its actual functioning, frequently to demonstrate the discrepancies between "social justice" and "legal justice." *An American Tragedy* dovetails with legal realist writings spanning from Roscoe Pound's relatively modest calls to modernize jurisprudence by accounting for incipient sociological discoveries and Charles Beard's progressive economic historiography, which predated the novel, to Thurman Arnold's and Jerome Frank's more iconoclastic theorizations of the legal system's operation, which postdated the novel but were foreshadowed in fictional form there. Resembling Dreiser, these scholars were concerned with the interrelation between law and equity, particularly in the context of law's impact on economically marginalized groups. This issue is one of the paramount "problems" (to quote a pervasive word in the text) that *An American Tragedy* probes, revealing how working-class characters like Clyde confront tenuous odds in life. Merit and perseverance are shown to have minimal correlation with success in the novel: chance instead often has a decisive role in life outcomes.

Due process as a legal ideal enshrined in the Fourteenth Amendment is also propounded as a social ideal in Dreiser's text. In both realms, the standard is intended to establish equitable procedures through which individual rights and freedoms are vindicated. The first two sections of *An American Tragedy*, though, which track Clyde's life pretrial, expatiate on his lack of opportunities to rise until fortune grants him a meeting with his wealthy uncle, whose consequent disregard for Clyde's welfare triggers Clyde's fatal liaison. The text's third section on Clyde's trial delineates proceedings that constitute a form of duplicative oppression. Through a plexus of doppelgangers – with the conservative jury and judge and marauding district attorney in the legal system having extrajudicial counterparts in the novel's earlier sections – *An American Tragedy*

emphasizes the criminality saturating extant institutions. Clyde's attorneys, as vicariously representing Dreiser, evidence Jerome Frank's theory of fact-skepticism[16] questioning the purported naturalness of unjust social, legal, and political systems. They de-spectacularize the trial much as the novel as a whole undertakes to limn the tensions beneath systems depicted as being more prone to masquerade ideals than to act on them.

This unrelenting deconstructionism could render *An American Tragedy* vulnerable to the most devastating critique lobbed at legal realists: that they lacked an affirmative democratic vision. Limited individualism, however, emerges as an aspiration in much legal realist scholarship and in Dreiser's text. As a literary work, unlike a legal one, Dreiser's novel is not tasked with solving the problems it explicates, but a combination of public education (via realist fiction) and an injection of legal realism into the political and legal systems (with Jephson as the sine qua non legal realist and Dreiser's legal counterpart in the text) is alluded to as a method for reconstructing American democracy. Sharing *Marrow* and *The Jungle*'s objectives of encouraging readers to see anew and in turn advocate equitable reforms unifying legal and social justice for underclass populations, *An American Tragedy* endures as a watershed dual realist text.

Theodore Dreiser's "Sociological Imagination" and the "Problem" of Clyde Pretrial

An American Tragedy is methodologically informed by many of the same social science disciplines that legal realists relied upon to pierce the perceived bubble of law's hermeticism: economics, psychology, and sociology.[17] "Sociology was then the most progressive and

[16] Edmond Cahn has described this "a single doctrine with three associated prongs: It criticizes our capacity to ascertain transactions of the past; it distrusts our capacity to predict the concrete fact-findings and value judgments of the future; and finally, it discloses the importance of the personal element in all processes of choice and decision" (828).

[17] Providing practical examples of this interdisciplinary approach to law, Felix Cohen commented that "[t]he growing practice of including economic materials in legal briefs, the increased use of economists and statisticians by administrative bodies, and of psychiatrists and social workers by courts, the growing utilization of social research in legislative hearings and investigations, all testify to the contemporary significance of the functional approach and its promise for the future" ("Problems of a Functional Jurisprudence" 24).

innovative of the emerging social sciences, and this was the 'pioneering' era of American sociology" (Hull, *Roscoe Pound and Karl Llewellyn* 85). Roscoe Pound fathered sociological jurisprudence in the United States, with his 1904 article "A New School of Jurists" recognizing the proto-legal realist movement, which flourished until World War I, or arguably until Llewellyn's "Some Realism about Realism" in 1931 proclaimed sociological jurisprudence's metamorphosis. Aside from Pound, future Supreme Court Justices Louis Brandeis and Benjamin Cardozo were renowned sociological jurists[18]; and scholars from other disciplines, such as historian Charles Beard, also merit classification as sociological jurists. In a 1943 retrospective on sociological jurisprudence, Pound described how modern sociology was "devoted largely to social problems and to extensive and intensive picturing of contemporary social conditions" and that "[i]t was in connexion with sociology of this type that American sociological jurisprudence arose" ("Sociology of Law and Sociological Jurisprudence" 9). Sociological jurists defined law as "a specialized part of the whole regime of social control" (Pound, "Law and Social Work" 184). They therefore emphasized the social purposes and effects of laws over the "abstract content" of legal provisions[19] and generally sought for "the equitable application of law" (Pound, "Scope and Purpose of Sociological Jurisprudence III" 514-16).

Courts of equity historically accounted for the fact that law's universal character could lead to the subversion of justice in individual cases, such as those involving possibly unfortunate accidents and mistakes like Roberta's death (see Pound, "Liberty of Contract" 483). "'[L]aw is a general rule (even exceptions to the rule are general exceptions); while justice is the fairness of this precise case under all of its circumstances.' Now *all* of the circumstances of a case will

[18] They were appointed to the high court in 1916 and 1932, respectively; Cardozo replaced Justice Holmes ("Members of the Supreme Court of the United States").
[19] As Pound affirmed, "More than anything else, what threatens our constitutional guarantees and inherited liberties is the ineffectiveness of the machinery of realizing them in action" ("Judicial Councils" 59).

include many of the qualities and relations of persons, things, and events which the law does not take into account," including perhaps wealth (Patterson, "Role of Law in Judicial Decisions" 104, qtg. John Henry Wigmore). Equity could interact with law dialectically, with current equitable decisions becoming law in the future (see Pound, "Decadence of Equity" 24), thereby aligning "legal justice" with "social justice." This was imperative for Pound, who conceived a persistent divide between the two in 1912, with "fair play among social classes" being a prominent example of this split ("Social Justice and Legal Justice" 455, 456).

Charles Beard's controversial *An Economic Interpretation of the Constitution* (1913) indicated that the Constitution had exacerbated this rift. He there provocatively asked: what if "our fundamental law was not the product of an abstraction known as 'the whole people,' but of a group of economic interests which must have expected beneficial results from its adoption?" (17). Beard's implicit thesis in the monograph is that the Constitution was structured to uphold white male property owners' interests and not to ensure equal rights for "the whole people."[20] To the extent the Constitution is envisaged as a legal rendition of the American Dream, Beard's arguments have grave ramifications for the nation's social, legal, and political systems. Sociological jurisprudence's ultimate goal was to obviate potential calamities through redistributive justice, namely by suggesting how "more progressive law[s] might establish a more just distribution of rights and goods available to those subject to the laws" (Zaremby 37);

[20] Historian and lawyer Brooks Adams advanced similar, but more radical, arguments in his lectures in *Centralization and the Law* (1906) and his monograph *The Theory of Social Revolutions* (1913). Adams espoused economic determinist, Manichean views of class relations, categorizing law as a tool of oppression buttressing socioeconomic elites' control: "Law is the resultant of the conflict of forces which arises from the struggle for existence among men . . . . The dominant class . . . will shape the law to favor themselves" ("Law Under Inequality: Monopoly" 63-64). Pound, among others, criticized Adams's binary conception of class relations and concentration on class as an all-explanatory factor for socioeconomic and legal developments (see Pound, "Future of Law" 2).

Dreiser comparably dubbed himself an "Equitist" with a program of "a fair break for all" (qtd. in Elias 259).[21]

Pound's description of sociology's preoccupation with the "extensive and intensive" delineation of contemporary social problems applies consummately to *An American Tragedy*, whose first two parts (preceding Clyde's trial in part three) provide a panoramic factual backdrop of Clyde's life prior to his entanglement with the judicial system. The judge and prosecutor in Clyde's trial are in turn notable for the extent to which they vow fidelity to the letter of the law protecting a criminal defendant's rights while endeavoring to exclude from the courtroom the equitable factors that a sociological jurist would account for; Clyde's trial is accordingly associated with a regressive, unjust, and indeed fatal understanding of law and society. In contrast, Dreiser's "sociological imagination"[22] (Eby, "Psychology of Desire" 6) fabricates an indelible nexus between problems in life outside and inside the courtroom. Tracing the novel's references to the word "problem," which appears fifty-nine times in the text, illuminates Dreiser's engagement with the individual-social tension undergirding sociology and the environmental and "human factor[s]" influencing legal developments that sociological jurists accentuated (see Pound, "Liberty of Contract" 464). Clyde is incriminated in the vast majority of the instances when the novel adverts to a "problem," and his character's experiences highlight Clyde's dubious relationship to the various orders that aim to slot him into a defined position.

[21] Dreiser advocated for several underdog groups during the decade following *An American Tragedy*'s publication (Elias 267-68).

[22] Defined as:

> [T]he capacity to shift from one perspective to another – from the political to the psychological; from examination of a single family to comparative assessment of the national budgets of the world; from the theological school to the military establishment; from considerations of an oil industry to studies of contemporary poetry. It is the capacity to range from the most impersonal and remote transformations to the most intimate features of the human self – and to see the relations between the two. (Mills 7)

"[T]he problem of his proper course" in society is what bedevils Clyde, the son of devout Christian, working-class parents, at every major juncture of the text leading up to his homicide trial (212). Testifying there he is vexed by "the old problem that had so confused and troubled him in Lycurgus" (717). He perceives a lack of control over his life (162) and midway through *An American Tragedy* articulates what may be the paramount questions the text raises for not only Clyde, but the novel's readers: "What was it about his life that made things like this happen to him? Was this what life was to be like?" (446). Early on dispensing with the tether of religion's "fundamental verities" (652), Clyde is liberated to pursue the American Dream. He commits to taking a wayward (in his mother's view) route in life, ironically inspired by idealistic self-making rhetoric earlier documented by Dreiser. As a journalist, Dreiser in 1898 interviewed the Chicago meatpacking magnate Philip D. Armour for a feature on "Life Stories of Successful Men" in *Success* magazine. Dreiser asked Armour whether "the average American boy of today has equally as good a chance to succeed in the world as you had, when you began life." Armour responded emphatically in the affirmative: "Every bit, and better. The affairs of life are larger. There are greater things to do. There was never before such a demand for able men." Armour acknowledged "inherited ability" but believed in training and "prosperity for everyone, according to his ability." Dreiser, though, amidst an interview ostensibly intended to trumpet Armour's accomplishments, prognosticated where his own future authorial interests would lie, remarking on Armour's reading a U.S. history volume "full of shouting Americanism as anything ever written," with the tycoon being "colored by its [the book's] stout American prejudices" (357-61). Clyde's patron uncle, Samuel Griffiths, who owns a collar and shirt

factory, can be regarded as a fictional Armour, believing in giving lower class workers chances but rewarding only those who are "destined to rise" through extraordinary ability (179).[23]

Dreiser's novel's cardinal paradox is that while Clyde, in Samuel's words, is supposed to be seen as having "'a real chance'" to demonstrate his worth, he is in reality supposed to keep in '"his place'" (like Dr. William Miller in *Marrow*) and not presume "'to be placed on equal footing"' with Samuel's family (160). Clyde is to receive a modicum of economic assistance but no "'social attention—not the slightest'" until he proves himself commercially through a social Darwinian process (160). Clyde is "inducted into the very bottom" of Samuel's collar factory (178) – a literal basement housing a shrinking room – and in accordance with a theory of laissez-faire socioeconomic advancement he is left alone. Like Jurgis, Clyde is relegated to a dingy space, economically and socially;[24] both characters aid in the arduous steps through which raw materials are transformed into consumer goods and labor as part of an underclass enabling their employer's family to live lavishly. Nonetheless, Clyde must appear before the public as having support "in some form not absolutely incompatible with the standing of the Griffiths family here in Lycurgus" (178).[25] Clyde justifiably concludes he has been "merely . . . permitted to look into a world to which he did not belong" and "that because of his poverty it would be impossible to fit him into" (228).

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[23] Frank Cowperwood, the protagonist of Dreiser's *Trilogy of Desire* – comprised of *The Financier* (1912), *The Titan* (1914), and *The Stoic* (1947) – is also a tycoon (modeled on Charles Yerkes) (Zimmerman 191), but one who lacks Armour's and Samuel Griffiths's discipline and ability to pursue commercial success legally. Cowperwood has numerous affairs in the series and is tried and imprisoned for misusing municipal funds in *The Financier*.

[24] Clyde, though, is horrified when encountering working-class foreigners like Jurgis, whom he associates with the "basement world" outside the factory from which he has aspired to escape (193).

[25] This principle, and not Clyde's aptitude, explains his elevation to a supervisory position at the factory and accompanying salary boost. Inspecting the premises, Samuel is distraught at how Clyde's toiling in the factory's bowels reflects poorly on the Lycurgus Griffiths in general – compromising their reputation for "reserve and ability and energy and good judgment" – before employees and the public at-large who purchase factory products (230-32). Later, Clyde is lifted socially by Sondra not for reasons of merit but to slight his cousin Gilbert. Clyde is then acknowledged by Sondra's social circle and his uncle's family because of the bandwagon effect (321, 343, 367).

Clyde's uncanny physical resemblance to Samuel's son, Gilbert, could be seen as visible proof of the democratic credo of all men being created equal (Lauriat Lane, Jr. 217), which is followed in the Declaration of Independence by an uplifting reference to "unalienable" rights to "Life, Liberty, and the pursuit of Happiness." However, the comparison between the cousins, and the possibility of actualizing these founding ideals in law and in society, is in fact only skin deep in the troubled milieu *An American Tragedy* portrays. Samuel notably employs Clyde for a pittance partially from residual guilt over Clyde's father's disinheritance in Samuel's favor (177), a hidden (to Clyde) legal fact that taints the ideology of the self-made man by suggesting that an unfair fortuity is responsible for Samuel's meteoric rise and Clyde's family's privations. Clyde's first meeting with Gilbert, one of Clyde's doppelgangers, also incites Clyde's envy as he contemplates that his cousin's "airs and superiorities" derive not from talent and perseverance, but from a paternal bequest that includes a Princeton education unfeasible for Clyde (184, 333).

Clyde's mother early on accurately diagnoses her son's "unrest" at these personal deprivations as a "problem" (87, 655). Clyde's monomaniacal ambition throughout the novel, which depicts him from age twelve to twenty-one, is conversely to be "somebody" (172). This status is correlated in his mind exclusively with acquiring the accouterments of wealth necessary for social acceptance. Thriving intellectually or inculcating moral virtues is not in Clyde's bailiwick except to the extent such qualities contribute to his projecting an aura of affluence.[26] The only difference in Clyde's character as he ages is the increasing grandiosity of his aspirations leading up to his affair with Sondra Finchley, the heir to a company fortune. She is a

[26] "Invidious comparison" and "pecuniary emulation," which Thorstein Veblen theorized were motivated by the desire to imitate leisure class standard-setters, impel Clyde's conduct (see Eby, "Psychology of Desire" 199-200). Ironically (or befittingly), he works at a collar factory that makes products intended to "'give polish and manner to people who wouldn't otherwise have them, if it weren't for cheap collars"' (333).

living "compendium of American Dreams: house, car, beauty, youth, talent"[27] (see Cullen ii) valued in purely commodified, superficial terms, much as Clyde assays himself. Monetary worth and personal worth are wholly conflated by most of the novel's characters, a malaise legal philosopher Morris Cohen argued infected American society in his influential article "Property and Sovereignty" (1927). Cohen there – mirroring Dreiser in *An American Tragedy* – contended that private property owners possessed economic sovereign powers and sought recognition of the "actual fact that dominion over things is also *imperium* over our fellow human beings" (13).

While apprehending materialism in its full glory, Dreiser's novel delineates the mortal consequences of Clyde's myopic worldview. On the acquisitive bug, Cohen concluded, "It is certainly a shallow philosophy which would make human welfare synonymous with the indiscriminate production and consumption of material goods" ("Property and Sovereignty" 30). Narration in *An American Tragedy* emphasizes the chasm between what wealth-fixated characters erroneously perceive on the surface and actual phenomena. Ironic juxtaposition suffuses the text, with Clyde believing himself nearly at the apex of his life before being apprised of Roberta's pregnancy, being unable "to expel from his mind the thought that his future must in some way be identified with the grandeur that was laid out here before him" in Lycurgus (311). He figures Roberta's decease as "this terrible thing that had descended upon him so suddenly out of a clear sky" (737) whereas the narration indicates the inevitability of Clyde's downfall.

Several socioeconomic and legal factors actuate Roberta's death (and in turn Clyde's), particularly Roberta's failure to obtain an abortion; narrative itself in the form of antipathetic letters Clyde receives from Sondra and Roberta; and Clyde's overriding desire to protect the

[27] Clyde contemplates Sondra's (a seventeen-year-old's) "wealth," "beauty," and "resplendent home" (441-42). In their fateful first encounter, she is seated in a "beautiful car" (316), and Clyde soon thereafter learns about her victories in sporting contests (339). Questioned on the stand about what so enticed him about her, he also mentions such qualities associated with the American Dream as independence and intrepidity (721).

perception of his elite status. A major cause of Roberta's demise is her inability to secure an abortion a half century before *Roe v. Wade* (1973), at a time when the dissemination of information about contraceptives was prohibited, birth control clinics had been banned, and pregnancy out of wedlock generally resulted in social opprobrium (see Riddle 252). Roberta, like Clyde, comes from a traditional Christian family that would besmirch her as a "fallen" woman for obtaining an abortion, but she is willing to compromise her beliefs as she braves "one of those whirling tempests of fact and reality in which the ordinary charts and compasses of moral measurement [are] for the time being of small use" (403). However, Roberta consults with a conservative doctor who is unwilling to risk criminal charges for malpractice, reasoning that "this business of a contraceptal operation or interference with the normal or God-arranged life processes, well, that was a ticklish and unnatural business at best which he wanted as little as possible to do with" (417). Wealthier men or women, though, are able to evade laws proscribing abortion. The same doctor admits to helping "extricat[e] from the consequences of their folly several young girls of good family who had fallen from grace and could not otherwise be rescued" (416).[28] Clyde's barber comments "'money makes the mare go'" with regard to obtaining an abortion, a statement that "Clyde, confronted by his own problem, meditate[s]" on the truth of (425)[29] arguably not only in this circumstance, but in view of his entire life. Abortion laws in the novel thus typify the classic legal realist precept of the disparity between laws on the books and laws in action, the latter of which may be adversely impacted by class considerations.

[28] While the novel mentions that several "midwives" who perform abortions service the "foreign family section" in Lycurgus, neither Roberta nor Clyde is aware of their existence or is willing to confide in the immigrant workers who are knowledgeable (399, 429); the two strain to maintain their precarious class positions as a catastrophe looms. Entrenched locals generally believe foreigners (like Jurgis in *The Jungle*) to be "ignorant, low, immoral, un-American!" (257). "One should—above all—have nothing to do with them" is the unambiguous admonition Roberta receives from the supposedly respectable "lower middle-class group" she assumes herself to be part of (257).

[29] In an eerie transposition of Clyde's situation, one of Clyde's defense attorneys, Alvin Belknap, had his prosperous father pay for the abortion of a woman he had impregnated when twenty (almost Clyde's age) despite intending to marry another; Belknap was nevertheless able to wed his Sondra (622).

As Pound declared in the criminal justice context, "[F]or if all men are equal, their pocket-books are not, – giving certain litigants a conspicuous advantage in reality though a theoretical equality" of "fair play" ("Do We Need a Philosophy of Law?" 347). Clyde's subsequent criminal trial applies Pound's thesis and can be construed in part as penalizing Clyde for endeavoring to skirt legal rules and social strictures his cousin Gilbert would likely have been able to elude.

Narrative instigates and reinforces Clyde's plan to slay Roberta; his plot is inspired by a press account and follows his receiving antithetical missives from Roberta and Sondra: "Yet so wrought up had he been and still was, by the letter which Roberta had written him, as contrasted with the one from Sondra—so delightful and enticing was the picture of her life and his as she now described it, that he could not for the life of him quite expel that other and seemingly easy and so natural a solution of all his problem" (458). Envisioning life with Roberta, Clyde personifies a cycle of destitution and in reference to his consorting with Lycurgus's "fast set" thinks, "all this splendid recognition would be destined to be withdrawn from him, and this other world from which he sprang might extend its gloomy, poverty-stricken arms to him and envelop him once more, just as the poverty of his family had enveloped and almost strangled him from the first" (149, 445). While Roberta is identified with abjection, concealment, and a constricted life, Sondra resides in a mansion, poises like a bird in flight (symbolizing liberation for Clyde), and is reported about in the local press (242, 336, 430, 463), publicity Clyde seeks to bask in as her future husband if not for Roberta. Given these polarized images, marriage to Roberta, even temporarily to legitimize her and their child as she so ardently desires (499),[30] is dramatized by Clyde into "social, artistic, passional or emotional assassination" (442).

[30] While Roberta shares Olivia Carteret's belief in *Marrow* about legal marriage's signifying a deep personal commitment and social respectability, *An American Tragedy* questions this connection's existence in reality. Roberta and Clyde's prospective formal marriage is portrayed as wholly devoid of love – a "tarnished and discolored thing" – even as Roberta attempts to elevate it into the "sacrament" (449) that society generally views it

Roberta's pregnancy is the immediate "terrifying and all but insoluble problem" Clyde confronts (441), but she more acutely represents an existential dilemma, being one of Clyde's doubles and the cufflinks shackling him to the past self he has striven to flee from through his dogged pursuance of the American Dream. Like Clyde, Roberta seeks to escape her working-class family's economic fate; Clyde, however, strives to avoid identifying with her, though his efforts fail leading up to and following her death. She is repeatedly associated with spectral terms in Clyde's conscious; a "dread specter of disaster . . . almost constantly" besets his mind in relation with her (424). In a different sense than Clyde thinks, given the exposé of his prior life during the trial, "he had not really killed her" (515) – i.e., submerged his plebian upbringing and all that it signifies to the upscale coterie who determine his self-worth. Clyde connects lake waters to his predicament (460), and Roberta's body being dredged up from a lake typically evocative of the leisure class at play serves as a mute witness to his perfidy as well as a metaphor for the disturbances beneath the ostensibly placid surface of American society.[31]

Roberta's drowning sequence – Clyde's ill-fated act of independence on a pristine day soon after July Fourth – depicts him seemingly subconsciously striking his former lover with a camera as she, concerned about his unease, walks toward him on their boat. After conflating her with all the forces of life arrayed against him, Clyde "instantly yield[s] to a tide of submerged hate, not only for himself, but Roberta—her power—or that of life to restrain him in this way" (513). Knowing her inability to swim and his proficiency in swimming (having considered these facts, and the possibility of hitting her, when plotting her murder), he fails to rescue her after she

as and fetishizes a potential marriage certificate (499). Clyde meanwhile contemplates staging a "fake or mock marriage" as a superficial solution to his dilemma (439).

[31] Clyde is enthused at the prospect of observing "a little of that lake life of which he had read so much in the local papers" during the weeks preceding Roberta's death and links Sondra with "Twelfth Lake" (440, 441). He perceives that the lake where he takes Roberta has become "purely ideational" immediately before Roberta's death (505).

falls overboard from the blow and he accidentally capsizes the boat (which collides with her head) in response to her screams (458, 491, 513-14). While mulling over the happenstance of destiny apparently accomplishing what he was unable to do fully deliberately, though, Clyde fears both the class conscription Roberta personifies and the legal system will persist in haunting him: "The wonder and glory of all this— if only—if only he were not stalked after, as by a skeleton, by the horror not only of what he had done in connection with Roberta but the danger and the power of the law that deemed him a murderer!" (573-74).

This dread materializes in his murder trial, which is technically concerned with the facts of Clyde's life only to the extent to which they bear on the legal issues of whether he premeditated Roberta's drowning and intentionally struck the blow that led to her tumbling overboard from their boat. Yet by devoting over five hundred pages to Clyde's tribulations preceding the trial, *An American Tragedy* raises a more profound causation question: Did society's figuratively striking Clyde precipitate his misconduct? The novel's structure weighting extralegal facts reinforces its substantive argument about the importance of equitable considerations largely suppressed in Clyde's trial. Those proceedings disclose a gaping chasm between "legal justice" and "social justice" in a criminal justice system blighted with class-based prejudices, underscoring the inextricability of law with socioeconomic conditions and politics. The novel ultimately suggests that only by comprehending the full array of forces a legal decision reflects can the decision itself be fathomed in its true, perhaps sinister, complexity.[32]

[32] In the 1930s, Felix Cohen's "truly realistic theory of judicial decisions" would echo this insight. Cohen viewed each such decision as being "importantly a function of social forces, that is to say, as a product of social determinants and an index of social consequences," continuing that "[o]nly by probing behind the decision to the forces which it reflects, or projecting beyond the decision the lines of its force upon the future, do we come to an understanding of the meaning of the decision itself" ("Transcendental Nonsense" 843). Or as Cohen elaborated on in another article resonating with Dreiser's intent in juxtaposing literary and legal narratives in *An American Tragedy*, "In writing the life-history of a legal rule one does not reach the end of the story when the rule is obeyed or disobeyed. There remains to be told the meaning of obedience or disobedience, in terms of social institutions and

The Criminal (In)justice System and An American Tragedy*'s Legal Realist-Inflected Reasoning by Analogy*

Clyde's social problems are transmuted into legal ones in the text's novel-length third part, which re-enacts the two preceding parts through the prism of law in Clyde's murder trial as a small town in the Adirondacks confronts "this seemingly important lake tragedy" (520). Dreiser's rationale for appending a largely duplicative section (in effect re-narrating Clyde's life story) to an already epic-length book is evinced by legal realist Thurman Arnold's observation that "[a]ny violation of the symbol of a ceremonial trial rouses persons who would be left unmoved by an ordinary nonceremonial injustice" (*Symbols* 142). If the novel's first two parts delineate the latter type of injustice, the third part can be seen to ritualize and explicitly legalize the injustices Clyde endures. These two major segments of the text have knotty intersections: Dreiser constructs an intricate analogy between presumptions, characters, and events outside and inside the courtroom. "The relentlessness and inevitability of the sequence of events in the courtroom are an analogue on a smaller scale of the coercive movement of the novel as a whole" (Block 69), with coercion deriving largely from Clyde's inferior socioeconomic status.

In this expansive contextual frame, *An American Tragedy*'s trial sequence embeds at least four trials: Clyde's as an individual and the socioeconomic, legal, and political systems in which Clyde and Americans at-large are enmeshed. Contemporaneous and future legal realist insights are melded here, suggesting the book's influence on legal realist developments, particularly given lawyers' engrossment with the text. Two years before the novel's publication, Roscoe Pound hypothesized about popular culture's impact on legal theory's evolution:

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customs, in terms of the material things over which law gives control, in terms of human habits, modes of thought, fears, hopes, pleasures and pains" ("Problems of a Functional Jurisprudence" 23).

> New forms of legal precepts arise gradually and unnoticed below the surface, and before legal theory is aware of it become established in all but legal theory, and in time compel legal theory to recognize them. In this process, too, a political ideal picture of the social order penetrating the law from without, and little by little replacing, or at least retouching, the lawyer's traditional picture of the end of law, is a large factor. . . . Popular speech is sometimes much nearer to reality than legal theory. ("Theory of Judicial Decision" I 660-61)

Pound indicates a possible lag between literature (or popular speech's) representation of reality and that of legal theory, which may be attributable to law's traditional grounding in precedential analysis, but he also posits a dynamic interaction between law and its milieu to diminish the gap.

Throughout the interwar period, law was increasingly being conceptualized more interdisciplinarily, and perhaps no discipline riveted legal realists – and Dreiser – more at the time than economics. As early as the turn of the twentieth century, Oliver Wendell Holmes, Jr., in "The Path of the Law" (1897) associated a conjunction between law and economics with a revitalized legal field not unduly devoted to customary understandings of the law dissevered from current realities. He professed there, in a jab at legal formalists, "For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics" (469). Next generation legal realists who wrote in the Great Depression's wake, including Karl Llewellyn, Thurman Arnold, and Jerome Frank, often specialized in commercial law. Arnold's controversial anthropological monographs *The Symbols of Government* (1935) and *The Folklore of Capitalism* (1937) were, like *An American Tragedy*, keenly attuned to the disparity between formal language and showy appearances of legal,

political, and socioeconomic institutions as opposed to their actual operation; Arnold's ironic tone in analyzing these incongruities also resembles the narration in Dreiser's novel.

In passages that could explain Dreiser's interest in law and economics, Arnold proclaimed that the modern American judicial system was "the bulwark of all the older symbols and theories both legal and economic" (*Symbols* 127) and that "[l]aw and economics are the formal language of institutions on parade" (*Folklore* 138). Arnold posited law's function as being in part to "give recognition to ideals representing the exact opposite of established conduct" and argued that most of law's complications arose from this disjuncture. He contended that law's "develop[ing] the structure of an elaborate dream world where logic creates justice" could permit society "to look at the drab cruelties of business practices through rose-colored spectacles" (*Symbols* 34). On the more sanguine side, Arnold asserted that discerning law and economics from the outside could illuminate "what makes the wheels go round" and enable society to "catch a vision of how we can exercise control not only of physical environment but of mental and spiritual environment" (*Folklore* 164). Arnold claimed that a "fact-minded observer" did not necessarily have to be a pessimist, for "[a]cting within the limited range of day-to-day possibility, his observations may enable him to make guesses as to how current symbols may be used to obtain slight advances" (*Folklore* 162). Like Arnold, Dreiser sought to understand institutions that had deleterious effects in an effort to edify the public, even if not necessarily reposing hope in the possibility of drastically altering or dismantling such ingrained structures.

Several legal realists, including Roscoe Pound and Jerome Frank, linked economic infirmities with vulnerabilities in the criminal justice system, a theme that becomes pronounced as *An American Tragedy* builds to its denouement with Clyde's bias-ridden trial and execution. In lamenting what he perceived to be legal academia's neglect of criminal law, Pound

hypothesized in a 1927 article: "When criminal law breaks down in action, cracks are sure to develop in the economic fabric with which leaders of the profession are more immediately concerned" ("What Can Law Schools do for Criminal Justice?" 111). Pound criticized the infiltration of what he believed to be retrogressive laissez-faire economic principles ("the classical economic picture of free, individual competitive achievement") into the criminal justice system ("Individualization of Justice" 105).[33] Jerome Frank's books *Courts on Trial: Myth and Reality in American Justice* (1949) and *Not Guilty* (1957, published posthumously) exposed criminal justice system deficiencies.[34] Frank analogized what he termed the "fight" (as opposed to "truth") theory of justice, which is what the relentless district attorney Orville Mason espouses in prosecuting Clyde,[35] to laissez-faire economics. Extending Frank's reasoning, problems inherent in an adversarial criminal justice system can be compared to maladies congenital to a laissez-faire socioeconomic system. Frank's conclusion that "observation of court-room realities shows that the postulates of legal laissez-faire are insufficient as exclusive postulates" (*Courts on Trial* 92) therefore has broader resonances. Based on Frank's analysis, Samuel Griffiths's fight theory of life[36] is toxic for a robust society; a philosophy of individual victory at any price may exact exorbitant costs on the individual and communal levels.

[33] Darryl Brown's monograph *Free Market Criminal Justice: How Democracy and Laissez Faire Undermine the Rule of Law* (2016) elaborates on Pound's critique.
[34] However, Frank is best known for an earlier landmark monograph, *Law and the Modern Mind* (1930), which controversially applied psychoanalysis to judicial decision-making.
[35] During Clyde's direct examination, Mason's mood is described as "that of a restless harrier anxious to be off at the heels of its prey—of a foxhound within the last leap of its kill"; Clyde fears an imminent physical attack as Mason cross-examines him (738). Similar imagery arises in the socioeconomic context when Clyde is characterized as "not unlike a harried animal, deftly pursued by hunter and hound" in the form of the pregnant Roberta (433) and he espies a "lone cast iron stag pursued by some cast iron dogs" on the lawn of his uncle's home (191). The passages suggest his comparable subjection in both the legal and socioeconomic realms as an animal battling superior forces.
[36] Roscoe Pound's description of the common law theory of litigation as resembling "a fair fist fight, according to the canons of manly art, with a court to see fair play and prevent interference" ("Do We Need a Philosophy of Law?" 347), parallels Samuel's combat-based theory of life here.

While Clyde's trial attests to the resiliency of Samuel's beliefs in modern U.S. law and society at-large, *An American Tragedy*'s extended prelude to the trial signals the text's early engagement with problems arising from the imbrication of dysfunctional legal and socioeconomic systems. The fusion of these systems is illustrated by symbolic nomenclature, as in the name of the town where Clyde greets his doom, and plot patterning, through a leitmotif of accidents. Clyde's polestar as a youth – the ostensible promised land of Lycurgus, New York (147) – is referenced in chapter two (11). No such town exists; Chester Gillette, Clyde's real-life counterpart who shares his initials, worked in Cortland, New York (Lingeman 8). The town's name, though, is freighted with significance for Dreiser's creation of a sweeping parallel between inequitable legal and socioeconomic spheres. Clyde associates Lycurgus with his affluent uncle, whom he envisions as a modern version of an ancient Greek monarch renowned for his wealth, "a kind of Croesus, living in ease and luxury" (12). Samuel's ideals, namely "conservatism—hard work—saving one's money—looking neat and gentlemanly" (202), also resemble those of Lycurgus, an apocryphal ancient Spartan lawgiver known for his successful militaristic legal reforms in the face of a revolt by serfs, promotion of merit, and austerity ("Lycurgus"; Plutarch). Samuel similarly thrives commercially but is wary of challenges to his authority, seeks to "inure[]" his employees "to a narrow and abstemious life" for economic improvement, and "maintain[s] a calm and judicial air" (155, 178-79). That Lycurgus is an illusory figure – albeit one honored by a Supreme Court frieze ("Courtroom Friezes") – suggests the dubiousness of the values that he and Samuel represent. Although an oracle purportedly told Lycurgus that a state abiding by his laws would become world-famous (Plutarch), not unlike Samuel's view of his economic exceptionalism justifying social pre-eminence, the novel portends that only "so far nothing had happened to weaken or darken his prestige" (155).

Clyde's three major economic transgressions – all violations of class codes – not only dim the glow of his uncle's name, but are also legal transgressions that hasten his fall. Like Clyde's first encounter with Samuel, each of these life-changing incidents is attributable more to chance than to deliberate self-fashioning, belying a major premise of the American Dream. The novel's emphasis on chance here reflects much naturalist literature's grounding in biological Darwinism, including the principle of natural selection.[37] Clyde's seemingly erratic life pattern also accords with legal realists' underscoring of relatively haphazard variables governing legal decision-making, rather than formal language and deductive reasoning.

Intriguingly, Clyde only happens to meet his uncle in Chicago after absconding from the law. When previously living in Kansas City, Clyde had joined a clique with upper-class pretentions that commandeered a well-heeled man's expensive Packard car, struck the young daughter of a wealthy local family, and fled the murder scene to avoid possible homicide charges (121, 139, 162); however, Mason later capitalizes on evidence of Clyde's infraction during his homicide trial (699). The hit-and-run episode presages Clyde's conduct with Roberta, whom he first encounters at his uncle's factory but becomes more smitten with after they travel separately to a lake but coincidentally meet there while he is canoeing. In their relationship, Clyde bootstraps to his uncle's family name to impress Roberta and flouts a company rule strictly barring romantic relations with employees, a class demarcation enforced by local social mores (289, 303).[38] Clyde's subsequent affair with Sondra is sparked by her accidentally inviting him to

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[37] Honoré de Balzac, a progenitor to American literary naturalists, for instance:

> insisted in *The Experimental Novel* [1894] that the principle of 'the absolute determinism in the conditions of existence of natural phenomena,' which science accepts in relation to physical life in general, should also be accepted by the contemporary novelist seeking to depict the fates of specific individuals. The novelist should be an experimenter in the sense that he 'sets the characters of a particular study in motion, in order to show that the series of events therein will be those demanded by the determinism of the phenomenon under study.' (qtd. in Pizer, "The Problem of American Literary Naturalism" 91)

[38] Roberta learns of local taboos on "factory girls," especially those of a "[r]eligious, moral and reserved" bent, "aspiring toward or allowing themselves to become interested in their official superiors" (257). More generally in

ride in her car, as custom would dictate she do so for Gilbert, whom she takes Clyde to be (315). Like with Roberta, Clyde fosters the impression of an intimate connection with his uncle's family, although Sondra's parents still disapprove of the couple's liaisons because of Clyde's poverty (317, 437). The fourth potential incident in this series is, most momentously, Clyde's final encounter with Roberta. From the narrative pattern, it could be argued that Roberta's drowning was an accident, not a crime, though the legal relevance of this literary gloss on Clyde's life is questionable.

Aside from indicating limits on self-forging abilities because of the vagaries of chance, these episodes subvert the freedom associated with physical mobility in the American public's conscious, as cars, boats, and trains facilitate Clyde's being legally deprived of his liberty and life.[39] Clyde's efforts to escape confinement come to naught; as he broods on death row in a passage that encapsulates his – if not the novel's – conclusions about the legal and socioeconomic systems in which Clyde is ensnared: "There was a system—a horrible routine system . . . . It moved automatically like a machine without the aid or hearts of men. These guards! . . . they were iron, too—mere machines, automatons, pushing and pushing and yet restraining and restraining one—within these walls, as ready to kill as to favor in case of opposition" (848). The systems are here portrayed not unlike factories in *The Jungle*, being characterized by a supra-human logic of illogic: laissez-faire capitalism and its legal handmaiden operate routinely but erratically, "as ready to kill as to favor in case of opposition" (such as Clyde's attempt at upward mobility), in determining who within the systems' ambits will be graced with their beatitudes.

Lycurgus, the "line of demarcation and stratification between the rich and the poor" is said to be "as sharp as though cut by a knife or divided by a high wall" (257), with attempts to breach the barrier potentially resulting in death.

[39] Tellingly, one of the initial sights Clyde observes in Lycurgus is "an old and interesting graveyard, cheek by jowl with an automobile sales room" (194).

Following this line of analysis, individual free will – a cornerstone of both the American Dream and criminal law in the United States (via the *mens rea* requirement) – is largely illusory. To the extent the nation's socioeconomic and legal systems are grounded upon this assumption, then, they can be seen as seriously flawed institutions that may penalize individuals, especially those disfavored by accidents of birth (e.g., race, class, gender, and mental capacity), for actions (or inactions) beyond their control. Thurman Arnold was among the legal realists and criminologists arguing for early intervention to prevent crime by acknowledging such facts, diagnosing that "the important thing needed is the recognition of a national obligation to remove the misery and economic destitution into which criminals are born" (*Fair Fights and Foul* 245).

Absent such preventive justice measures, however, criminal trials intercede ex post to dramatize law enforcement, assert social control, and affirm communal ideals. Trials are technically intended to resolve individual litigants' problems, but they can also be conceived of as communal rituals "basic to the perpetuation of the social fabric" (Karaganis 158). A trial, by delineating legally acceptable bounds for individual conduct, can reinforce values without which the social fabric would fray or even rend irreparably. The trial process provides a particularly useful "way of talking about all the unsolved and unsolvable problems of society" (Arnold, *Symbols* 248) by instigating dialogues within and outside the courtroom about constraints on individual action to promote the public good. But while most of the characters in *An American Tragedy* view Clyde himself as the central problem to be resolved, or more accurately, contained,[40] through the machinations of a trial, Dreiser provides a more macroscopic

[40] Criticizing the American public's general obviation of complexity in social, political, and legal matters, Roscoe Pound argued: "There is a not uncommon assumption that legal and political and social miscarriages resolve themselves into a matter of good men and bad men and that our task is a simple one of discovery and elimination of the bad . . . . In truth the matter is much more complicated than the bad-man interpretation of social and political difficulties assumes" ("Future of Socialized Justice" 11-12). Shelley Fisher Fishkin comparably contends of *An American Tragedy*: "In the society Dreiser documents in the novel, the pain and complexity of life's problems are constantly denied in favor of the 'easy solution'" (127), such as executing Clyde.

perspective on what is actually on trial in the novel: the American Dream, an ideal that over ninety years after Dreiser's text perhaps continues to encapsulate "all the unsolved and unsolvable problems of society." Issues broached in criminal trials can include several tensions underlying the American Dream, such as "the principle of equality," "the adjustment of conflicting interests," and "the relation between respect for personality and the demands of social responsibility and solidarity" (Morris Cohen, "Moral Aspects of the Criminal Law" 989-90).[41]

The judicial process's avowed commitment to fairness and justice can mark that trials are an appropriate barometer through which to gauge a given civilization's values and its overall social, legal, and political haleness. An American judge in 1929 avowed that "[t]he civilization of our time is measured by the justice administered in our courts under our laws" (Frederick Crane 203), with the criminal trial for Arnold ideally symbolizing "a rational judicial system within a stable government and society" (Fenster 1104). This rationality for Arnold was evidenced by the extent to which trials conformed with the legal formalist aphorism (echoing John Adams) "that this is a government of law and not of men" (*Symbols* 147).[42] Arnold related the significance of due process and fair trials in the United States to "the humanitarian note that the underdog is always entitled to a chance" (*Symbols* 135), a passage articulating a keystone idea animating the American Dream and according with Samuel Griffiths's decision to employ Clyde as a factory lackey. In plotting Clyde's apprehension, Mason also perversely appeals to due process; the D.A. plans to seize Clyde and fling him in jail, after which Clyde will be told "with all due process of law, the starting circumstances that thus far seemed to inescapably point to him as the murderer of Roberta Alden" (551).

[41] As Robert Weisberg warrants, "a trial by or in a community is also a trial *of* that community" ("Proclaiming Trials as Narratives" 82).
[42] The "rule of law" conception captures "the idea that legal institutions are or ought to be impartial, transparent, and independent and that legal processes should be orderly, regular, and fair" (Lawrence Friedman 8).

Due process is most often invoked constitutionally as a baseline standard providing "not primarily . . . that right be done, but that appropriate machinery for doing right be provided" (Hough 219),[43] a concept that has expansive social connotations as well in *An American Tragedy*. Dreiser's novel implicates the Fourteenth Amendment's bar on states "depriv[ing] any person of life, liberty, or property, without due process of law," which expanded the scope of the Fifth Amendment's prohibition on a federal criminal defendant being "deprived of life, liberty, or property, without due process of law."[44] The due process principle, which the prior chapter also discussed in relation to criminal law, has its correlate outside criminal law in the Declaration of Independence's avowal that all men "are endowed by their Creator with certain unalienable rights," including "Life, Liberty and the pursuit of Happiness." An accused's federal right to a fair trial[45] is intended to ensure that such inalienable rights are infringed upon only after an unprejudiced legal process, including judgment by "an impartial jury."[46] However, five years before *An American Tragedy*'s publication, a *Harvard Law Review* editorial on the "Lawless Enforcement of Law" identified forty-four criminal cases in a single year finding a criminal defendant's right to a fair trial was compromised by "flagrant" prosecutorial or judicial misconduct (956). Whether or not Clyde is judged fairly by society before his murder trial, and

[43] Classical legal orthodoxy emphasized the significance of procedural equity (see Grey, "Langdell's Orthodoxy" 14, note 50). Pound, among other legal scholars, though, observed that strict adherence to procedural rules could lead judges "not to search independently for truth and justice" ("Causes of Popular Dissatisfaction with the Administration of Justice" 447-48).

[44] "Incorporation," the constitutional doctrine through which particular Bill of Rights provisions are applied to states via the Fourteenth Amendment's due process clause, largely postdates *An American Tragedy* and can be traced back to the Supreme Court's First Amendment decision in *Gitlow v. New York* (1925).

[45] This federal right in state cases arose via incorporation from the 1930s onward, with several seminal decisions during the civil rights era. Assessing a state's criminal procedures under the Fourteenth Amendment's due process clause in *In re Murchison* (1955), the Supreme Court held: "A fair trial in a fair tribunal is a basic requirement of due process" (136). *Powell v. Alabama* (1932), the Scottsboro Boys case based on the Fourteenth Amendment but implicating the Sixth Amendment (which contains fair trial guarantees), as well as *Palko v. Connecticut* (1937) and *Adamson v. California* (1947), which construed the Fifth Amendment, were among the criminal justice cases in a line of high court decisions selectively incorporating Bill of Rights provisions into the Fourteenth Amendment.

[46] *Duncan v. Louisiana* (1968) was the seminal Supreme Court case extending this right to state criminal prosecutions.

then by society's surrogates in the form of the jury during the trial, becomes indispensable to determine if Clyde was accorded "due process" socially and legally, or whether the population he is a proxy for is in fact subordinate among formal constitutional equals.

Dreiser's and Arnold's writings attested to equality's illusory nature in the legal, political, and socioeconomic systems. As Arnold maintained about trial proceedings, "From a realistic point of view a trial cannot be a product of exact logical analysis, but the dignity of law requires that it appear to be" (*Fair Fights and Foul* 242), including by pitting parties against each other "in a formally equal setting" (Fenster 1104). Analyzing Arnold's scholarship, Mark Fenster has concluded: "For Arnold, the modern criminal justice system fails to provide a rational solution to the contradictions within which it works, or to resolve the inadequacy and inequity of the larger society whose values it represents" (1102). *An American Tragedy* analogously holds that the perceived dignity of society requires verbal adherence to the equal opportunity creed, which functions like the ideal of pure logic does in the judicial realm. Yet while Clyde may be formally equal to his uncle in constitutional rights, Clyde's treatment socially and then legally during his homicide trial demonstrates a marked erosion of the constitutional equality ideal not only in his case, but the novel indicates in American society generally. As Jerome Frank would forewarn in an exposé of criminal justice system malfeasance: "Repeated and unredressed attacks on the constitutional liberties of the humble tend to destroy the foundations supporting the constitutional liberties of everyone. The test of the moral quality of a civilization is in its treatment of the weak and powerless" (*Not Guilty* 183). Arnold found "the very fabric of the State" threatened by judicial corruption during trials (*Symbols* 127, 129), as an unjust conviction would signal the failure of American society's most flaunted official mechanism for ensuring justice to all citizens. With these lofty stakes for judicial proceedings, dissenting judge Frank in

United States v. Antonelli Fireworks (1946) called for jurists' "jealous insistence that trials not only appear to be but actually should be fair" (663).

Frank was and continues to be seen as among the legal realists most skeptical about how law appears as an ideal as opposed to how it functions in specific cases, but he nonetheless epitomizes the movement's dominant tendency to challenge assumed first principles about law. Such tenets include the importance of rules in legal decision-making and faith in the judicial process, "the mere machinery of justice," in Pound's formulation ("Law in Books and Law in Action" 33), to correctly ascertain facts necessary to adjudge a case's merits. Frank's theory of fact-skepticism in trials sought to debunk these perceptions. He contended: "[O]ften the [unruly] elements in the trial process – the factors that inherently cannot be formulated in rules – play a dominant part in producing decisions" (*Courts on Trial* 106-07). Even assuming clear rules, Frank reasoned in a book review, "[I]f the facts 'found' by the trial court do not approximate the 'objective' facts of the case – the facts as they actually occurred – the court's decision will be wrong and unjust, no matter how impeccable are the legal rules applied by the court" (592). Adding another layer of complexity to fact-finding, Frank posited that "[t]he trial judges or juries are fallible witnesses of the fallible witnesses" (*Courts on Trial* 47). Frank's multiply refracted conceptualization of factual uncertainty has potentially significant ramifications for the legal and social systems. Legal philosopher Max Radin averred that "the first of the problems of law, the impossible problem of accurately describing a past event, has a distinct bearing on the last of our problems, that of justice" ("Permanent Problems of Law" 20). Social justice also requires a veracious portrayal of phenomena, which was what *An American Tragedy* sought to provide its original readers; Dreiser wrote "in large part to help [Americans] take a fresh look" at "important facts about themselves, their morality, their country and their dreams" (Fishkin 117).

Dreiser accordingly had similar aesthetic objectives of de-spectacularization as Upton Sinclair in *The Jungle* and Charles Chesnutt in *The Marrow of Tradition*, and he also employed characterization to enliven legal realist precepts. Dreiser's text climactically engages with the spectacle of Clyde's trial "as a means of sociocritical intervention," to quote Katharina Schmidt's description of legal realists' interest in a phenomenon that had engrossed turn-of-the-century scholars and artists (132).[47] While "Dreiser implicates the spectacular relationship in virtually all of Clyde's activities," "Clyde's media-saturated trial is the apotheosis of spectacle in the novel" (Karaganis 162).[48] Thurman Arnold, the legal realist who most extensively theorized trials as spectacles, characterized lawyers as having "an orchestra seat from which you observe the most fascinating spectacles" (*Fair Fights and Foul* 270),[49] and Dreiser's novel situates readers in this position to observe the range of characters participating in the drama of Clyde's trial.

Figures who signify more immutable opinions of law, as well as of social, economic, and political institutions, are particularly impugned in the text. The parochial world depicted in *An American Tragedy* is ultimately shown to be one in which majoritarian democratic procedures may sanction undemocratic outcomes, if democracy is defined expansively as a means of individual self-actualization through "economic, social, and moral emancipation," as political philosopher Herbert Croly theorized in his influential monograph *The Promise of American Life*

[47] Dreiser's 1922 autobiography recounted his "great interest . . . in life as a spectacle" (*A Book About Myself* 88). Clyde's trial comports with the definition of "show trials," judicial trials "held in public with the intention of influencing or satisfying public opinion, rather than of ensuring justice" ("Show Trial"). Murder trials in the 1920s "dominated public attention . . . in a way rivaled by no other category of public or private events except sports and the movies" (Brazil 163).

[48] For example, Dreiser writes of the trial's inception, "And in spite of the sense of struggle and tragedy in the minds of many, with an electric chair as the shadowy mental background to it all, a sense of holiday or festival, with hundreds of farmers, woodsmen, traders, entering in Fords and Buicks—farmer wives and husbands—daughters and sons—even infants in arms" (661). Peanuts, popcorn, and hot dogs are readily available for purchase (662), with the novel's description here bearing eerie parallels to the buildup to Sandy Campbell's near-lynching in *Marrow*.

[49] As Hessel Yntema elaborated, "The present drama of justice, if we regard its operation in individual cases or even speculate as to its potential service to the community, holds all the elements of supreme comedy and tragedy" ("Administration of Justice" 341).

(1909) (332). Croly also posited that social problems – including but not limited to the problem of poverty – were inextricable from democratic ones (171).[50] Dreiser's construction of a complex network of doppelgangers between actors inside the courtroom (a microcosm of the democratic political system) and outside the courtroom (society) connects the two realms. Dreiser's novel analogizes jurors to a representative sample of American society, especially as embodied by Roberta's father; the judge in Clyde's trial to Samuel Griffiths; and, most tantalizingly, the prosecutor Mason to Clyde himself.[51] These parallels point to Dreiser's intent to portray how Clyde is tried in court not only for the homicide for which he is indicted, but also, and most likely primarily, for extrajudicial offenses, social, moral, economic, and otherwise, he may have committed from the perspective of mainstream white rural American society in the 1920s. More broadly, by depicting jurors, the judge, and the prosecutor in Clyde's trial as respectively representing infirmities in the legislative, judicial, and executive branches of government, *An American Tragedy* inverts the trial's focus from Clyde's misdeeds to those of the nation whose native son he is.[52]

Dreiser's remarks on jurors in morally charged trials proffer insight about *An American Tragedy*'s portrait of a malfunctioning jury system. About the Gillette trial that inspired his novel, Dreiser maintained:

> [T]he murder was not one which could either wisely or justly be presented to an ordinary conventional, partly religious and morally controlled American jury and be intelligently

[50] Croly reasoned: "The American problem is the social problem partly because the social problem is the democratic problem. . . . A democratic ideal makes the social problem inevitable and its attempted solution inevitable" (30-31). He continued that "[t]he social problem must, as long as societies continue to endure, be solved afresh by almost every generation; and the one chance of progress depends both upon an invincible loyalty to a constructive social ideal and upon a current understanding by the new generation of the actual experience of its predecessors" (172).
[51] Additionally, as discussed in the prior section, Clyde's extrajudicial doubles include his cousin Gilbert and Roberta. Clyde's interchangeability with this range of characters indicates the magnitude of the problem he represents across class and gender lines.
[52] Bigger Thomas's trial in Richard Wright's thematically kindred *Native Son* (1940) is depicted similarly.

> passed upon. Rather I concluded that there were too many elements of a social and economic, as well as moral and religious, character to permit a jury (themselves the representatives, one might even say the victims, of these same financial conditions and social taboos) to judge fairly the guilt or innocence of the alleged murderer. ("I Find the Real American Tragedy" 9)

As in much of Dreiser's fiction, the parenthetical is particularly revealing. According to Dreiser's line of reasoning, jurors are to be blamed for perpetrating injustices on their own but they are, simultaneously, the victims "of these same financial conditions and social taboos." *An American Tragedy*'s extended comparison of Roberta's father, Titus Alden, to Clyde's jurors illumines the jurors' paradoxical, seemingly self-defeating behavior. Upon closer scrutiny, their actions appear less irrational than upon first blush; self-preservation impels them to sacrifice Clyde, thereby ostensibly restoring social harmony through democratic legal channels.

Titus, whose fury at his daughter's death precipitates Mason's and local society's desire to speedily execute Clyde,[53] espouses orthodox, abiding beliefs in law and society that Clyde's jurors share, serving as a foil to Holmes. Holmes evidenced a suspicious attitude toward unthinkingly following tradition when discussing criminal law, maintaining, "Far more fundamental questions still await a better answer than that we do as our fathers have done. What have we better than a blind guess to show that the criminal law in its present form does more good than harm? . . . Do we deal with criminals on proper principles?" ("Path" 470). Titus, however (perhaps understandably as a bereaved father), ponders no such niceties. Instead,

[53] Edwin Borchard's *Convicting the Innocent* (1932) contended that "prosecutors and juries [were] not impervious" to such public demands (xviii), and Mason assures Titus that a local jury will convict Clyde (542).

aligned with the age-old retributive theory of criminal justice,[54] "[F]orthwith there flared up in his mind a terrible and quite uncontrollable desire for revenge upon any one who could plot so horrible a crime as this against his daughter" (537). The trial process for Titus is intended to ensure the ancient "eye for an eye" principle is actualized without being leavened by Jesus's compassion for wrongdoers. As Titus notifies Mason, who is swept into a "retaliatory mood": "'I want him [Clyde] to be made to suffer as this pure, good girl has been made to suffer'" (542). While it appears that the trial empowers Titus and his class through their enlisting Mason to avenge the death of one of their own, Mason's prosecution is driven more by electoral considerations than commiseration with the working class or the pursuit of justice; Mason's is an exploitative, as opposed to altruistic, form of populism that enacts his chameleonish morality.

An American Tragedy at times appears sympathetic to Titus's plight – as in a touching scene when he meets his favorite daughter, Roberta, in a tatterdemalion overcoat (354) – but the novel's final verdict on Titus is harsh: Titus and the segment of American society he typifies, while conceiving themselves to be upstanding citizens preserving social order through the judicial and electoral systems, in actuality beget their and their children's oppression.[55] With repetitive rhetoric mirroring Titus's circumscribed worldview and a hardy dose of irony toward those who would acclaim Titus a "salt of the earth" American, the narrator explains:

> As for the parents of Roberta, they were excellent examples of that native type of Americanism which resists facts and reveres illusion. . . . Titus was a farmer solely

[54] Which holds that "[t]he moral order can be restored, or the violation atoned for only by inflicting evil (generally pain) upon the guilty" or that "everyone is to be punished in proportion to the gravity of his offense or the extent to which he has made others suffer" (Morris Cohen, "Moral Aspects of Criminal Law" 1010, 1011).

[55] Although Clyde and Roberta are also at times depicted unsympathetically, the novel appears to reserve its sternest condemnation for their parents' generation. This could be because Roberta's and Clyde's parents embody a relatively stagnant view of society premised on customary religion and morality in contrast with which Clyde's and Roberta's quests for self-amelioration may appear laudable. The younger generation's pursuit of the American Dream culminates in death, however, which is equally (if not more) discouraging than their parents' fate.

> because his father had been a farmer . . . . He was a Republican because his father before him was a Republican and because this county was Republican. It never occurred to him to be otherwise. And, as in the case of his politics and his religion, he had borrowed all his notions of what was right and wrong from those about him. . . . But they [the Aldens] were nevertheless excellent, as conventions, morals and religions go—honest, upright, God-fearing and respectable. (251)

Titus is depicted as a dubious paragon who has unquestionably accepted the economic, political, and religious orders bequeathed to him, regardless of whether they promote social justice for precarious characters like Clyde. Titus's conduct during Clyde's prosecution is seen to be as scripted and retrograde as his life in general. Titus's interpretation of tradition (the watchword from *Marrow*) dictates that he requite the cad Clyde for having violated and abandoned Roberta and the couple's unborn child to consort with a nouveau riche social butterfly. Titus hence provokes an equally infuriated vigilante public response against Clyde as Sandy Campbell faced when falsely accused of Polly Ochiltree's rape and murder in *Marrow*. At his trial's inception, Clyde perceives he may be shot or stabbed (665), a not unjustified conjecture after a woodsman threatens Clyde with lynching as a five-hundred person mob surrounds Clyde's jail: "'There he is, the dirty bastard! You'll swing for this yet, you young devil, wait and see!'" (599).[56]

Jurors in Clyde's trial are painted as largely a panel of Tituses, representatives of a particularly problematic segment of American society for Dreiser outside the courtroom. The jurors are identified mainly by occupation as farmers, country and town clerks, car dealers, innkeepers, insurance agents, and pharmacists (671, 775), much like the population Clyde

[56] A salient difference between *Marrow* and *An American Tragedy* here, though, is that Clyde is judged by his racial and, to an extent, class peers whereas Sandy in *Marrow* would likely have faced trial before a hostile jury of white men at the time.

encountered during the novel's first two sections. Indeed, this fact may explain why Dreiser found it unnecessary to name the jurors or present detailed information about their backgrounds in the trial section. Theoretically, jurors are supposed to represent equality through democratic judgment by peers and justice for the accused. Thurman Arnold asserted that the jury is "the great symbol of justice" and that "[w]e feel that our conception of human equality needs this concrete institution to give it reality" (*Symbols* 144, 145). In *Courts on Trial*, however, Jerome Frank argued that a jury system initially intended to advance these ideals and prevent governmental overreach had degenerated into the opposite[57]:

> The jury system, praised because in its origins, it was apparently a bulwark against an arbitrary tyrannical executive, is today the quintessence of government arbitrariness. The jury system almost completely wipes out the principle of 'equality before the law' which the 'supremacy of law' and the 'reign of law' symbolizes – and it does so, too, at the expense of justice, which requires fairness and competence in finding facts in specific cases. (132)

Dreiser's observations about jurors in trials like Clyde's accord with Frank's; Dreiser believed that vexatious situations, such as Clyde's, eluded black-and-white legal distinctions (e.g., did Clyde's actions constitute first-degree homicide or not?). Thus, even assuming jurors could be

[57] Edwin Borchard's *Convicting the Innocent* (1932) similarly catalogued sixty-five cases involving official wrongdoings and errors in the criminal justice system. The reasons for these injustices were "in the main, mistaken identification, circumstantial evidence (from which erroneous inferences are drawn), or perjury, or some combination of these factors" (vii), as Clyde's case involves. Borchard also discussed how innocent defendants could concoct stories to try to avoid the implications of what seemed like staggering evidence against them (xx), a strategy Clyde's attorneys pursue fruitlessly in creating an inaccurate change-of-heart narrative to explain their client's conduct. Justifying dubious defense tactics (matched by Mason), Jephson explains to Clyde: "'[I]n order to get justice for you, we've had to get up something else—a dummy or substitute for the real fact, which is that you didn't strike her intentionally, but which we cannot hope to make them see without disguising it in some way'" (663). On the stand and in his appeal, Clyde disavows plotting Roberta's demise and claims not to have struck her or willfully upset their boat (738, 827).

trained in formal legal reasoning and not be overly gullible to pathetic appeals, legal and epistemological limits could constrain jurors' ability to render just decisions.

While not every jury trial involves utterly capricious juries, Dreiser felt the confluence of factors involved in cases like Clyde's rendered jurors particularly prone to at best quasi-legal decisions. Both inevitable and less inevitable biases could contribute to creating trial situations diminishing the probability of justice for the accused. The likelihood of Clyde's receiving a fair trial could be seen as dampened when considering the composition of his jury, some of whom are his class peers but are generally not his peers in religion or age; Clyde's all-male jurors are, aside from "one exception, all religious, if not moral," and married, unlike Clyde. Like Titus, they are "all convinced of Clyde's guilt before they ever sat down, but still because of their almost unanimous conception of themselves as fair and open-minded men," deluded into thinking "they could pass fairly and impartially on the facts presented to them" (671). Sharing Dreiser's skepticism about jurors, Frank avowed in his landmark book *Law and the Modern Mind* (1930): "Proclaiming that we have a government of laws, we have, in jury cases, created a government of often ignorant and prejudiced men" (178). Jurors share the illiberal values of Lycurgus residents, who are described as "such conservative mill and business types as looked on work and their wages, and the notions of the middle class religious world of Lycurgus as most essential to the order and well being of the world" (199). Their certitude bears resemblances to Samuel Griffiths's and his son's rigid attitude toward the socioeconomic order, which apes John Rockefeller's: "Neither could tolerate the socialistic theory relative to capitalistic exploitation . . . . One had to have castes. One was foolishly interfering with and disrupting necessary and unavoidable social standards when one tried to unduly favor any one—even a relative" (178).

Intriguingly, then, a convergence across class lines is evidenced as the working, middle, and upper classes seem to coalesce around punishing Clyde for attempting to transgress class borderlines.[58] One theory for this ostensible public unification in which even Clyde's economic class opposes him is status anxiety. Clyde's jurors are mainly working class and middle class, but their morality could be seen to provide them with the cache that they may lack monetarily; Clyde's extramarital relations with Roberta then threaten to reflect shabbily on the virtue of his financially precarious class. Hence, during the trial, the defense's stress on Clyde's mental and moral cowardice (703) seems to perversely increase Clyde's culpability, as this emphasis taints his class by association. Moreover, Clyde's attempt to leapfrog class hierarchies through marriage can be postulated as infuriating the upper class, who conceive of him as an interloper, while also inducing his class peers' jealousy. Capitalizing on jurors' class positioning relative to the Lycurgus Griffiths, Mason casts Clyde as a cosmopolitan playboy having "'had more social and educational advantages than any one of you in the jury box'" (675), a questionable presumption absent further evidence. Mason's deployment of "invidious comparison" is calculated to appeal to jurors' prejudices[59] and increase the probability of a guilty verdict.[60]

[58] As John Dickinson (whom Pound mentored) observed, "Nothing is more usual than for members of a group to regard themselves as having a so-called 'vested' interest in the continuance of any existing state of the environment, human or physical, considered as advantageous" ("Social Order and Political Authority" 297). Max Radin thus argued that those who conceive of themselves as actual or potential members of a "governing class" "frequently enough fancy themselves in the role of repressing order and maintaining discipline" ("Enemies of Society" 349).
[59] "As [Thorstein] Veblen explains, 'a culture whose institutions are a framework of invidious comparisons' will only accept answers which reinforce what it already knows. Such a culture demands 'truth . . . of a ceremonial nature' which it treats like 'reality regardless of fact'" (qtd. in Eby, "Psychology of Desire" 205), in an echo of Arnold's argument about the upshot of the criminal trial process.
[60] Freudian psychologist William White found it "necessary to build up such an artificial personality if the emotion of vengeance [was] to be loosed against him [the offender]." White contended that true knowledge of the average criminal's personality, including "how pitifully inadequate it was to cope with the situation in which he found himself and how logical and understandable his conduct under all the circumstances really was" would hamper severe legal punishments (qtd. in Thomas Green 2032). Mason's portrayal of Clyde as an incorrigible "reptilian criminal" (531) conflicts drastically with the novel's representation of Clyde's character.

Intuiting the jury's and the judge's biases, Mason presents evidence not so much to prove the statutory elements of first-degree murder as to elicit an inexorable emotional reaction from jurors, the judge, and his audience (observing the proceedings live or vicariously). Appeals to decency, respectability, honor, and God's will pervade Mason's spectacular presentation, which is intended to stir public "sentiment" regarding the "almost damnable outrage" the D.A. perceives Roberta's death to be (531, 674-77, 755). Mason's litigation strategy to recast the trial as a moral and emotional conflict as opposed to a legal conflict[61] applies Joseph Hutcheson, Jr., and Edwin Hadley's "hunch" theory, under which judges were argued to reason less from a meticulous analysis of facts and law, as one theory of legal formalism would aver, but from intuitions about a decision based on personal notions of fairness, justice, and expediency. In this conception, judicial opinions served as ex post facto rationalizations that did not necessarily capture the judge's actual process of decision.[62] Jerome Frank considered the repercussions of Hutcheson and Hadley's "hunch" theory for jury trials in contending that "[t]here is very considerable reason to believe that juries often do not go beyond such composite (or gestalt) reactions in arriving at their verdicts" ("'Short of Sickness and Death"' 595), as opposed to rationalizing from admissible evidence to reach legal conclusions. While legal realists sought to expand this range of admissible evidence to include social scientific sources like sociological, psychological, and economic studies, Frank and Pound were among scholars opposed to the admission of emotional facts with a high probability of prejudicing the jury.[63]

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[61] Psychological legal realist Edward Robinson argued: "In a fact-minded study of the law it may be necessary to show that a jury trial is primarily a resolution of an emotional conflict – that it is concerned only secondarily with the fitting of the law to the facts" ("Law – An Unscientific Science" 257).

[62] Hutcheson's article "The Judgment Intuitive" (1929) and Hadley's article "The Place of the Hunch in Logical Analysis" (1935) elaborate on these contentions.

[63] As Lon Fuller, a critic of legal realism, noted: "One of the chief services of the realist school has been to enlarge the field of the legally relevant and to invest 'extra-legal' considerations with a species of respectability" ("American Legal Realism" 434). Frank, however, lamented "distorting emotions and prejudice" impeding jurors from accurate fact-finding ("Mr. Justice Holmes" 595), and Pound criticized "[e]xtravagant standards . . . conceded

An American Tragedy indicates the efficacy of Mason's "gestalt" approach preying upon jurors' and audience members' revulsion toward Clyde. Mason relies upon the audience to influence the jury,[64] as does Jephson, who during Clyde's direct examination gazes upon audience members before eying jurors (712). "Winning" with the jury is equated with Mason's victory to a judgeship, and Jephson's co-counsel Alvin Belknap, who is vying for the same office, is supported in his campaign by his law partner's ultimately futile efforts to persuade the jury here.[65] Jurors and audience members are described responding in a similar impulsive fashion to Mason's inflammatory evidence, implying the jurors' lack of insulation from public rage directed at Clyde. Photographs of Roberta's bruised face and Mason's lachrymose recitation of each letter she penned to Clyde are presented as having the deepest psychological impact on both the jury and audience, engendering actual or stifled tears (692, 694, 774). In addition to his other misdemeanors, Clyde's lack of mercy for Roberta, having struck her before the drowning and disdained her near-suicidal pleas during pregnancy (696) while gallivanting with Sondra and her set, foments the audience's and jury's wrath in turn. Given the audience and jurors' preconceptions, coupled with indignation whisked by a fanatic D.A. and press[66] and Clyde's being outnumbered on the witness stand essentially 127 to 8 (681, 699, 771), the typical burden of proof on the prosecution is reversed in Clyde's trial. His attorneys are practically compelled to

to juries in many jurisdictions because the application of rough standards of justice and the appeal to the emotions involved in these powers are strongly approved by the public" ("Justice According to Law" 701).

[64] "[I]n a number of striking instances a court room filled with a determinedly hostile crowd has exercised an overwhelming effect on the jury" (Radin, "Right to a Public Trial" 397).

[65] Mason earlier defeated Belknap, a former state senator and assemblyman, to become county D.A. (621).

[66] "Boy Slayer of Working Girl Indicted" is one incendiary headline from Clyde's trial, with the accompanying article claiming "almost overwhelming evidence" against Clyde (651). Sensationalist press accounts of spectacular trials were condemned by a number of legal realists for, among other problems, determining litigants' rights "by trial by newspaper in advance of trial by the courts" (Harlan Stone, "Progress in Law Improvement" 637). Through tainting witnesses and jurors before the presentation of evidence, media could adulterate the trial process.

prove their client is "not a quadruple-dyed villain" who perpetrated a "'devilish crime'" (699, 528).

At the close of arguments, the jury nonetheless receives extensive legal instructions of the nature many legal realists posited as mere verbal exercises, either because of lay jurors' lack of training in comprehending legal terms of art or because of their deliberately ignoring charges at odds with their personal views on the case. Pound believed that expansive jury power permitted for preservation of the law's letter while its spirit could be eviscerated through jurors' factoring in what he thought to be impermissible variables: "If the ritual of charging the jury on the law with academic exactness is preserved, the record will show that the case was decided according to law, and the fact that the jury dealt with it according to extra-legal notions of conformity to the views of the community for the time being is covered up" ("Law in Books and Law in Action" 19). Frank criticized how procedural rules could be manipulated to occlude violations of substantive laws and how jurors' discretion could become essentially unbounded and unappealable because of jury sacrosanction (see *Courts on Trial* 132). He went as far as to claim that in a jury trial the rules were "a mere subsidiary detail, part of a meaningless but dignified liturgy recited by the judge in the physical presence of the jury and to which the jury pays scant heed"; "religion" and "economic status" were for him among the factors potentially more compelling than abstract laws in explaining a jury's decision ("Mr. Justice Holmes" 591). Frank hence attributed to juries a "brutal[] directness" that disciplined judges may not necessarily have (*Law and the Modern Mind* 172). Applying this theory to *An American Tragedy*, while the earlier woodsman who apparently sanctioned mob brutality was not sanctioned, another woodsman who exclaims the legally unspeakable in Clyde's trial – "'Why don't they kill the God-damned bastard and be done with him?'" (759) – is judicially chastised for advocating the

abolition of due process in Clyde's case. The novel indicates that the woodsman is expelled from the courtroom for speaking a truth law only acknowledges through more covert means (like the jury) in the text (see Pizer, *Novels of Theodore Dreiser* 274).[67]

The judicial charge to the jury comes after Mason's impassioned peroration; the instructions are contrastingly couched in less moving legal terms emphasizing the burden of proof, value of evidence, and relevance of motive for jurors' deliberations and eventual decision. Jurors are asked to place the burden of proof on the prosecution: "'If any of the material facts of the case are at variance with the probability of guilt, it will be the duty of you gentlemen to give the defendant the benefit of the doubt raised'" (774). However, the remainder of the instructions, while possibly technically accurate, can be seen to favor the state. Mason's case is constructed largely on circumstantial evidence, which the judge pronounces as often "'more reliable than direct evidence,'" and proof of a motive is said to be "'by no means indispensable or essential to conviction"' (774). The key questions for the jury on the *actus reus* and Clyde's *mens rea* are framed dichotomously, neglecting epistemological advances in criminology[68]:

> "If the jury finds that Roberta Alden accidentally or involuntarily fell out of the boat and that the defendant made no attempt to rescue her, that does not make the defendant guilty and the jury must find the defendant 'not guilty.' On the other hand, if the jury finds that the defendant in any way, intentionally, there and then brought about or contributed to that fatal accident, either by a blow or otherwise, it must find the defendant guilty." (774)

[67] As Max Radin professed in "Pretense and Reality in Our Criminal Law" (1939): "We do not dare assert that a large number of our fellow citizens are not good enough to enjoy the benefits of habeas corpus and the rule against self-incrimination. However brutal and undemocratic, that assertion would have the merit of honesty" (146).
[68] Writing in 1951, but in full accord with prior generation criminological scholarship, Frederick Beutel stated: "Psychiatry and psychology indicate that the tests of *mens rea*, criminal intent, and knowledge of right and wrong, presently applied as basic concepts in criminal law, bear no relation to the real state of mind of criminals; while modern methods of proof of scientific facts have rendered many aspects of the jury system not only obsolete, but an actual impediment to fact finding" (428).

While the first sentence suggests Clyde's non-feasance is supposed to be legally irrelevant if Roberta caused her own death, even unintentionally, Clyde's lack of masculine valiancy is of immense importance to jurors, who wonder why Clyde was able to save himself but not her (749). The option in the second sentence meanwhile provides jurors significant leverage to deem Clyde guilty. As long as Clyde acted intentionally (which perhaps his inaction post-drowning is probative of), if he "in any way" even "contributed" to Roberta's toppling from the boat to her demise, jurors "must" find Clyde guilty. Such language appears to leave sufficient leeway for morally reactionary jurors to condemn Clyde's sexual transgressions as setting the groundwork for Roberta's decease. Clyde's life choices more generally are subject to jurors' scrutiny with the permissive instruction and through gamesmanship with objections that technically exclude evidence but are still impactful (683, 693, 746). As Clarence Darrow commented about a generic criminal defendant: "In theory he is tried on the charges contained in the indictment. In most cases by a constant stretching of the rules of evidence his whole life may be involved" (*Crime: Its Cause and Treatment* 178).

The jury is implied to find at least constructive legal intent, but *An American Tragedy*'s portrayal of the lead-up to the drowning is not transparent on this point, and the novel challenges the binary nature of the legal instruction as woefully unsuited to capture the reality of cases like Clyde's. Whether Clyde's plotting Roberta's murder for over a month, not rescuing her after the boat overturned despite being willing to save Sondra (828), but being unable to slay Roberta fully deliberately should render Clyde guilty remains uncertain. Temporary insanity is precluded as a defense to preserve the Lycurgus Griffiths' reputation (638), yet Clyde's mental state appears to be compromised in a manner eluding the jury charge because of his inherent

psychological makeup, economic straits, or both factors driving him toward "an impending and yet wholly unescapable fate" (482).[69]

Before the drowning the narrator suggests Clyde's tentative course of action in grappling with Roberta and all she epitomizes for him. His face is:

> [C]onfused and all but meaningless in its registration of a balanced combat between fear (a chemic revulsion against death or murderous brutality that would bring death) and a harried and restless and yet self-repressed desire to do—to do—to do—yet temporarily unbreakable here and now—a static between a powerful compulsion to do and yet not to do. . . . In truth not suggesting a brutal, courageous power to destroy, but the imminence of trance or spasm. (512-13)

Clyde hits Roberta with a camera "accidentally and all but unconsciously" after she strides toward him on their boat, unintentionally contributes to the boat's capsizing as he attempts to apologize and assist her, and is seemingly under a mental spell – the alluring call of the American Dream? – that prevents him from rescuing her despite her entreaties (514-15). Given the supposition of free will underlying both the criminal justice and socioeconomic systems, though, and Clyde's inability to invoke an insanity defense, he plausibly fails to receive the benefit of the doubt from jurors despite the judge's instruction. Dreiser's portrayal of the drowning indicates Clyde's culpability for planning the murder but implies that a charge of first-degree homicide resulting in the death penalty constitutes a disproportionate punishment.

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[69] It is said Dreiser pondered the free will-determinism antinomy "for forty years without reconciling the opposites to his final satisfaction" (Fruhock 15), a dilemma that the causation inquiry in Clyde's trial appears to definitively resolve through the jury's verdict even while the novel as a whole refuses facile answers. Clyde is unable to expunge the thought of killing Roberta from his mind but is also hesitant to execute his plans. Dreiser's/Clyde's vacillation may have reflected intellectual trends in the interwar years; while Clarence Darrow and William White were among the most doctrinaire psychological determinists and eugenicist organizations were prevalent, other legal realists had a more supple perception of human volition. During Nazism's rise, scholarship like Walter Wheeler Cook's "Eugenics or Euthenics" (1943) and Morris Cohen's "Moral Aspects of Criminal Law" (1940) particularly questioned whether class and criminality were inherited characteristics.

The jurors' guilty verdict – which could be seen as unruly in Frank's sense – contests the "notion of the popular will as the fountain of justice" (Pound, "Justice According to Law" 701), problematizing a cardinal tenet of American democracy.[70] Clyde is susceptible to a "herd critique"[71] of his behavior from both economically and socially conservative classes, with legal procedure being insufficient to alleviate the more distressing tendencies of his purported peers' judgments. Pound found most modern Americans' psyches "shaped largely by the thinking of our fellow men to a conformity demanded by the exigencies of the economic order as it was shaped in the past by the exigencies of a religious or political order" ("Values and Twentieth-Century Juristic Thought" 85), and these ascendant prior and current orders unite to ensure Clyde's condemnation. Leon Green suggests that Frank applied Pound's arguments to the trial context, and Green alluded to the figurative and literal walls Clyde perceives oppressing him on death row in describing how Frank "recognized that though law, judge and process be developed to their highest perfection in the end, as litigants and otherwise, we live under the judgment of our neighbors, from which there is no escape however stupid in the particular case it may be" (viii). If jurors sworn to promote justice are in prominent cases involving marginalized defendants arguably unable or unwilling to do so, the novel is hardly optimistic about the prospect of actors outside the courtroom fostering social justice for populations even less favored by fortune than Clyde, such as new immigrants depicted in *The Jungle* and African Americans portrayed in *Marrow*.

[70] Frank avowed: "'Democracy must, indeed, fail unless our courts try cases fairly'" (qtd. in "Say It With Music" 940, note 59).

[71] William White described this as a primeval and irrational method to judge human behavior in which jurors' reaction to the crime represented society's response as a threatened herd. White also claimed that the criminal was "a handy scapegoat" upon whom each member of society could transfer the guilt of his own harmful urges and via sublimation "delude[] himself into a feeling of righteous indignation" (qtd. in Thomas Green 2014-15).

Ultimately, the trial proceedings can be construed as manifesting a simulacrum of democracy in both the senses of the procedural process used to convict Clyde and the seeming class solidarity that arises through this legal ritual. The coalescence is seeming because the underlying conditions drowning Clyde and those in his socioeconomic boat remain unchanged; Clyde's tragedy is bound to repeat. Placing the responsibility for Clyde's plight in significant part upon society at-large, finding broader complicity in a deeper intent than technically concerns the court, could subvert the socioeconomic, legal, and political orders in which jurors are entrenched, an outcome that short-term self-preservation leads the jury to be loath to sanction.

Whether the jury system – and the form of majoritarian electoral democracy it epitomizes[72] – should be retained but reformed, or jettisoned in lieu of a more republican political system, is the pivotal issue brought to the fore by *An American Tragedy*.[73] The answer depends on whether jurors, who encapsulate the American public, are indicated to be educable out of ignorance or willful blindness in the novel, or if instead more nondemocratic procedures, like rule by enlightened experts who promote the self-actualizing democratic ends Croly envisaged, are paradoxically the optimal solution to the problems of modern U.S. democracy Clyde incarnates. The former position reposes more trust in individuals whereas the latter stance is more aligned with the Founding Fathers' suspicions of direct democracy, as evidenced in

[72] As Akhil and Vikram Amar explain about the constitutional link between jury service and voting, "Jury service has always been understood – in constitutional terms – as political participation akin to voting. Jurors vote – that's what they do when they decide cases – and the voting-jury link was recognized by the framers in the 1780s, by those responsible for drafting the 14th and 15th amendments, and still later by authors of 20th century amendments that protect various groups against discrimination at the ballot box." However, whereas voting in elections is a form of indirect democracy, voting as jurors directly empowers citizens to be self-governors in a variety of cases, thereby vividly "expos[ing] the full range of democratic vices and virtues" (Abramson 1-2).

[73] Dreiser's commentary on the novel ten years after its publication identified, without conclusively resolving, this issue. He asserted there: "[T]he law is no more than a reflecting of the majority of opinions or notions of the day, and sometimes not only a majority of notions but a majority of romantic notions" ("I Find the Real American Tragedy" 72), the term "romantic notions" having negative connotations in the context of Dreiser's realist oeuvre.

constitutional provisions like the electoral college (in Article II) and indirect election of senators (repealed by the Seventeenth Amendment in 1913).

Dreiser's text offers no unequivocal conclusions about this perennial debate, though it implies that literary realists like Dreiser and legal realists like Clyde's attorney Jephson (one of the few characters portrayed generally favorably in the novel) may be best primed to cultivate the public conscious and spearhead egalitarian social, political, and legal reforms.[74] The legal strategy of Jephson, previously shown to be a likely Dreiser stand-in within the text, corroborates this claim. Asked by Clyde why seemingly intrusive inquiries into Clyde's life are necessary during the trial, Jephson responds: "'Educational effect. The quicker and harder we can shock'em with some of the real facts of life around here, the easier it is going to be to get a little more sane consideration of what your problem was'" (719). High period legal realists had a more definitive position on the issue of how best to nurture the public good. During the New Deal, they in significant part oversaw the burgeoning of the administrative state, which privileges expert rule over popular rule,[75] a bureaucratic expansion criticized by Roscoe Pound, among others (Postell). Pound himself, though, seemed to vacillate on this issue of the desirability of expert rule. In 1907, he touted lawyers as a "progressive and enlightened caste whose conceptions are in advance of the public and whose leadership is bringing popular thought to a

[74] Relatedly, Karl Llewellyn in *The Bramble Bush* (1930) contended that the educational process, and not law, produced "*basic order*" in society; law then ensured this order's continuance (110).

[75] John Dickinson, for example, authored the seminal 1927 monograph *Administrative Justice and the Supremacy of Law in the United States*, which was dedicated to Roscoe Pound and Felix Frankfurter. In a 1930 article entitled "Democratic Realities and Democratic Dogma," Dickinson questioned the merits of "ordeal by number":

> In estimating the value of these and similar devices, what needs to be remembered is that decision by the 'ordeal of number' is, after all, only a makeshift, a matter of convenience at most, and not of essential justice. Because it is an acceptable rough-and-ready standard for many kinds of decisions, it must enter into the processes of democratic government at many points; but what particular kinds of decisions are to be made by counting noses . . . is a question which cannot be determined by considerations of abstract right and justice, but only by examining how far a particular method of counting has actually operated to aid or impede the governmental task of adjusting those interests in the community which, because of their numerical strength, their intensity, or their social value, are insistent enough for government to take account of. . . . Justice is not to be won by arithmetic or mechanics; it must be sought in more subtle ways. (300)

higher level" ("Need of a Sociological Jurisprudence" 920). By 1943, he contrastingly claimed: "The problems of the time are no longer obvious to all intelligent citizens nor are the means of solving them within the knowledge and experience of the public at large" ("Symposium in the Law of Divorce" Foreword 188). Pound here hinted at the futility of educating the public and preferability of expert governance,[76] a debate that continues in the legal and political spheres.

Regardless of whether *An American Tragedy* is construed to favor Pound's earlier or apparent later positions, the novel spurns rule by unenlightened experts, which is how the judge and prosecutor in Clyde's trial are cast. Justice Frederick Oberwaltzer, the jurist in Clyde's trial who is analogized to Samuel Griffiths, is "impartial enough" (647), much as Samuel is described as having a judicious temperament. Neither elite, however, is particularly receptive to equitable appeals intended to counteract the troublesome implications of legal or social majority rule. Judicial bias stemming from class, professional, racial, and other factors generated copious legal realist scholarship. While theoretically judges even today are often assumed to be dispassionate, or at least less partisan than the average layperson, many legal realists challenged this assumption. They claimed that judges decided cases based on subjective variables or merely echoed society's judgments instead of independently evaluating cases.[77] Cardozo's *The Nature of the Judicial Process* (1921) asserted: "The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or

[76] As support for this possibility, it is revealing that Pound primarily sought to spur legal reforms from law schools, contending: "To my mind the remedy is in our law schools. It is in training the rising generation of lawyers in a social, political and legal philosophy abreast of our time" ("Do We Need a Philosophy of Law?" 352-53). Other legal realists, like Frank, however, expressed more confidence in the public to stimulate legal advances (see *Courts on Trial* 36).

[77] The realists disagreed about the extent of judicial bias, however. Cardozo, for instance, argued professional norms (among other factors) cabined judicial discretion; Frank and other scholars contrastingly contended that judges possessed ample discretion to act on their personal predilections (Cardozo, *Nature of the Judicial Process* 141; Savarese 197).

fellowship has given us a place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties" (174-75).[78]

Further undercutting traditional assumptions about judicial objectivity, as noted earlier, hunches, and not fastidious legal reasoning from facts, were argued to be judges' modus operandi. Such hunches premised on a constricted conception of what so-called common sense mandated were argued to "create[] a fixation composed of merely part of the facts and part of the memories pertinent to those facts, and [to] bar[] other materials and issues which [could] be vital" in deciding cases (Hadley 413). Judicial conservatism in enforcing status quo privileges was also denounced, with Gilbert Roe's *Our Judicial Oligarchy* (1912) presenting an early version of this argument.[79] The upshot of these contentions was to de-idealize jurists as exponents of the law from their "high throne[s]" (*American Tragedy* 709) – much like Chesnutt did in *Marrow*'s train car sequence staging *Plessy* – and contrastingly depict judges as sensitive to the same forces as the public and having an equally limited view of social realities, albeit being trained experts.

An American Tragedy's portrayal of Justice Oberwaltzer as Samuel's double personifies this legal realist claim. Resembling Samuel in the socioeconomic sphere, the justice is in the legal sphere "of a sober and moral turn . . . inclined to favor conservative procedure in all things" (647). Like Samuel he benefited from patronage, though in the form of a political appointment, not an inheritance; he also summers at a local lake (647), indicating the class affinity between the

[78] George Everson's "The Human Element in Justice" (1919) provided empirical corroboration for these arguments in evaluating how judgments, both in the form of findings and penalties imposed, in public intoxication cases were "disconcertingly human, reflecting to an astonishing extent the personalities of the judges," as opposed to an abstract, commonly agreed upon standard of justice (as much of the public may assume) (90). Everson concluded on the potential disparity between formal and applied laws: "However good or inadequate laws may be, their enforcement depends upon the magistrates' attitude toward them and toward those guilty of breaking them" (99).
[79] As did Holmes, with an acerbic edge: "Judges commonly are elderly men, and more likely to hate at sight any analysis to which they are not accustomed, and which disturbs repose of mind, than to fall in love with novelties" ("Law in Science" 455); Clyde's attorneys pursue such an approach, with the consequences Holmes anticipated.

men. Both come from the affluent sector to which Clyde pleads for self-validation, with Samuel being Clyde's socioeconomic "judge." However, much as Samuel in the main neglects Clyde, Justice Oberwaltzer expends minimal mental energy deciding a critical change of venue motion Clyde's attorneys file based on the local public conflagration ignited by Mason and the press. The justice is instead "inclined to agree" with Mason's contention that transferring the trial's location would cost the county an exorbitant sum unwarranted by the facts (647), again demonstrating the pre-eminence of economic factors in the judicial system that legal realists underscored; efficiency as a metric in the economic realm is disturbingly transplanted to the legal realm in the novel.[80] The justice also finds no difficulty in placing the burden of appealing his lightly considered decision on the defense (647), comparable to how Samuel places the onus for Clyde's success almost entirely on his nephew, in spite of Clyde's subordinate economic status.

Declaring the trial "fair and impartial" (791), not unlike Samuel's perception of Clyde's receiving a fair shot at thriving socioeconomically, the jurist sentences Clyde to death. Clyde is condemned in a passage bereft of humanity in diction and tone, as if the judge is speaking on behalf of a disembodied society and legal system[81] mechanically executing Clyde:

> "[T]he judgment of the Court is that you, Clyde Griffiths, for the murder in the first degree of one, Roberta Alden, whereof you are convicted, be, and you are hereby sentenced to death; and it is ordered that, within ten days after this day's session of Court, the Sheriff of this county of Cataraqui deliver you, together with the warrant of

[80] Four major commercial thoroughfares face the courthouse where Clyde's trial is held (517), suggesting the physical proximity of legal and economic institutions. In another instance of monetary considerations and legal justice potentially conflicting, Clyde's appeal of his conviction is initially hindered by the Lycurgus Griffiths' refusal to provide funding (787), which aligns with their limited approach to assisting Clyde economically outside the courtroom.

[81] In *The Paradoxes of Legal Science* (1928), Cardozo proclaimed that "[o]rganized society speaks . . . in our Anglo-American system by the voices of its judges" (105). Morris Cohen specifically described "punishment as a form of communal expression" against wrongdoers ("Moral Aspects of Criminal Law" 1017).

> this Court, to the Agent and Warden of the State Prison of the State of New York at Auburn, where you shall be kept in solitary confinement until the week beginning Monday the 28th day of January, 19— and, upon some day within the week so appointed, the said Agent and Warden of the State Prison of the State of New York at Auburn is commended to do execution upon you, Clyde Griffiths, in the mode and manner prescribed by the laws of the State of New York." (792)

The passage's trajectory is a series of legal procedures culminating in death, a malevolent due process; having been ground through social and corporate machines, Clyde is now decimated by the legal one. Clyde's American Dream aspirations degenerate here into the nightmare of capital punishment, with the judge's stilted rhetoric as far from the buoyant language of Clyde's hopes as is imaginable. The pronouncement seems to alleviate actors in the social and legal systems of any personal responsibility for Clyde's demise, similar to the unnervingly aloof representation of the buildup to Sandy's near-lynching in *Marrow*: the Court, not the judge, sentences Clyde; Clyde "shall be kept in solitary confinement"; and who is "commend[ing] to do execution upon" Clyde is enigmatic. While such sterile discourse can ease decision-makers' consciences, though, the novel refuses to distance itself from the reality of Clyde's situation as Justice Oberwaltzer and Samuel do by invoking purportedly implacable legal and socioeconomic principles.

The outcome of this heedless fidelity to ostensibly fixed standards – the *Plessy* majority's "in the nature of things" line of reasoning (544) – is shown to be decay, both socioeconomically and legally. Titus's farm, inherited from his father, is portrayed as well past its heyday (444), its disintegration the novel's commentary on Titus's philosophy of life and law as well as that of the social cohort he typifies. While the Reverend Duncan McMillan, who is Clyde's confidant on death row, contemplates (as the narrator tongue-in-cheek states), "The simple and worthy virtues

which Roberta and her family seemingly represented in that romantic, pretty country world from which they had derived" (817), Dreiser's realist novel deconstructs such romanticization. Samuel, meanwhile, who is initially said to be "a practical and convinced man who believed in himself and considered his judgment and his decision sound—almost final—for the most part, anyhow" (147) (Dreiser's qualifier), is humiliated by Clyde's trial undercutting his judgment. Samuel's family feels compelled to exile themselves from their magnificent home and thriving business in Lycurgus and "begin life all over again—socially at least" (784). Steeped in the same dogma as Titus and Samuel, and after suppressing a dissenting juror by threatening public vilification and economic harm from a hung jury (775), Clyde's jurors convict him. The trial process thus appears less about evaluating evidence to reach legal conclusions grounded in facts than arriving at a foregone moral conclusion by manipulating evidence, reversing benign presumptions about the justice system's (and, by inference, democracy's) fair workings.

District attorney Orville Mason, "'the chief representative'" of the law's "power and majesty" locally (536, 585), recourses to seemingly ironclad moral principles in his campaign for a judgeship, which is fused with his crusade to ensure Clyde's speedy execution. The abuse of prosecutorial power because of its proximity to politics was a common legal realist critique,[82] with a conviction potentially being perceived as "a personal victory calculated to enhance the prestige of the prosecutor" (Borchard xv), as opposed to promoting legal justice. Prosecutorial discretion was seen as especially problematic in a legal system where prosecutors were said to combine "[t]o a considerable extent" the functions of "police, prosecutor, magistrate, grand jury, petit jury, and judge" (Moley vii-viii). *An American Tragedy* for this reason in part depicts former politician and future judge Mason in more depth than Clyde's judge and jury.

[82] Raymond Moley claimed in *Politics and Criminal Prosecution*, "Most important of all, the office thus vested with power is in reality sought and used for purposes of partisan politics" (vii-viii).

Law and politics are intimately intertwined from the outset of the prosecution. Even before Clyde's indictment, Mason's friend, coroner Fred Heit, envisions the political ramifications of Mason's prevailing at trial:

> "You know what the political situation here is just now. And how the proper handling of a case like this is likely to affect public opinion this fall. And while I certainly don't think we ought to mix politics in with crime there certainly is no reason why we shouldn't handle this in such a way as to make it count in our favor. . . . You know what a case like this might mean from a political point of view, if only we clean it up, and I know you're the one to do it, Orville." (529)

Heit, like Mason espousing allegiance to his legal "'duty'" and not political circumstances, claims fidelity to the axiom of separating law and politics yet immediately strategizes about how to manipulate Clyde's case to further his friend's political ambitions and concomitantly bolster his own career (646, 532). Heit is earlier shown lamenting his family's meager budget while thumbing through a catalog (517-18), and Mason has depended on merchants and county politicians for past electoral victories (527). In Heit's euphemistic words, the case only needs cleaning up, which in the course of the prosecution translates into exactly the opposite as Mason sullies the trial by employing sketchy, if not outright illegal, tactics. These include redoubling his efforts to convict Clyde after learning of two juridically irrelevant personal factors: Clyde's wealthy familial affiliations and Clyde's defense team's inclusion of his electoral rival (543, 648). Mason intimidates Clyde, accepts evidence his assistant taints, remains silent about and potentially withholds unfavorable evidence, fabricates proof, and favorably lobbies the governor for a "quick trial" timed to the local election as "fair and logical to everyone in this local world"

despite evidentiary complexity (544, 601-04, 617-18, 645-49, 673, 680, 688, 766).[83] Much as with Clyde's jury and judge, procedural rules appear fruitless at cabining Mason's discretion.

Mason's maneuvers, purported to be aimed at "'get[ting] at the truth in the case"' (590), manifest the D.A.'s marked deviation from ideal qualities of a judge[84] or prosecutor and stronger resemblance to the riot ringleaders in *Marrow*; however, his strategy relying on public support for vigilantism succeeds at the legal, political, and social levels. Upon Clyde's conviction, the D.A. relishes being "a victor and an elected judge!" who is lauded by the public as their "true hero" (778-79) after facing electoral and relatedly social banishment. While Justice Oberwaltzer deemed Belknap's and Mason's explicit references to the "political situation" during the trial "a very serious breach of court etiquette" and prohibited any further allusions to this effect "on pain of contempt" (683-84), the novel demonstrates how politics still bleeds into the proceedings. Mason grandstands as a "dynamic and electric prosecutor" delivering political speeches to prospective campaign supporters in the form of the audience and jury (see Radin, "Right to a Public Trial" 397; 671), and the political-legal stakes are so high that Mason and Jephson nearly come to blows in court (723), vivifying Frank's "fight" theory of litigation.

Clyde's case represents Mason's make-or-break moment "to revive a wavering political prestige" (528), not unlike the dilemma Clyde believed he confronted when choosing between Roberta and Sondra. The two men's backgrounds and characters are moreover uncannily similar

[83] Mason's infractions are storybook examples of those Frank identified: "Some prosecutors conceal evidence or witnesses important to the accused; improperly bait and badger witnesses for the defense; make unfair inflammatory comments on the evidence and on events during the trial; unlawfully introduce prejudicial evidence or make references which insinuate that the prisoner has committed other offenses than the one charged" (*If Men were Angels* 322). Citing Supreme Court decisions on the Fourteenth Amendment's applicability to the trial process, Mona Rosenman's "*An American Tragedy*: Constitutional Violations" (1978) provides a more detailed doctrinal analysis of Mason's, as well as the judge's and jury's, potentially unconstitutional conduct in the novel.

[84] Legal realists generally disavowed the possibility of purely impartial adjudication; however, jurists like Frank advocated that jurors, judges, and attorneys be more cognizant of their biases and strive to mitigate prejudices (see Paul 42).

despite their appearing to be polar opposites on the surface as upholders versus violators of law and order. That Clyde's chief legal tormentor may be Clyde's closest doppelganger (or second only to Roberta) is perhaps the novel's supremest irony and suggestive of the criminality underlying the supposedly normal.[85] But for chance, the text implies, Mason could well have been on trial; like Clyde, the D.A. rose through ingratiating himself with elites more than through merit, and Clyde's justification for his actions is that "[o]ther people did things like that too, didn't they—those young men in Lycurgus society—or they had talked as though they did" (758). Mason's voraciousness in hounding Clyde to death is not as far removed from Clyde's eagerness to slough Roberta as may be surmised. Mason and Clyde's doubling as characters on seeming extremes of a probity scale reflects the inefficacy of the socioeconomic, legal, and political systems in combating what the text indicates are the most selfish tendencies of human nature, exacerbated by the mythos of self-generated elevation underlying the American Dream.

As with Clyde, "the problem of his future" preoccupies Mason (528), having suffered during boyhood as the "son of a poor farmer's widow." Resembling Clyde, Mason is inclined to be "romantic and emotional" in the wake of hardships,[86] and although Mason looks nearly "sinister," he is claimed to be far from this, as the novel indicates of Clyde despite his portrayal at trial. Mason's austere upbringing leads him to like Clyde "look on those whom life had dealt more kindly as too favorably treated" (527). However, the animus Mason harbors toward Clyde as an apparently handsome member of the wastrel rich is not dissipated when facts prove otherwise; the prosecution instead transforms Clyde into a deviant representative of that class to

[85] Shelley Fisher Fishkin asserts: "In exploring the normality underlying the criminal, Dreiser also dared to explore the criminality underlying the normal" (125).
[86] Even on death row, Clyde is more "drawn to romance than to reality," i.e., a novel like *An American Tragedy* itself: "Where he read at all he preferred the light, romantic novel that pictured some such world as he would have liked to share, to anything that even approximated the hard reality of the world without, let alone this" (816).

secure Mason's electoral triumph and fulfill his personal vendetta in an instance of guilt by association (543, 550). Mason readily exploits his former class affinity with Titus (i.e., working class agrarian background) and early hatred for the affluent to ensure his political victory, which will possibly grant Mason the golden key permitting entry into the elite. Mason thus transforms Clyde's trial into less of a process for determining individual guilt than sustaining the socioeconomic class the D.A. has resented, but paradoxically still sought to be a member of.

Coroner Heit characterizes Clyde's trial as Mason's "golden opportunity" or "great chance" (526), with Dreiser employing the same diction for Clyde's view of Roberta's potential homicide, which is depicted as "his carefully planned opportunity" (507). While "opportunity" and "chance," terms referenced dozens of times in the novel, are associated with the viability of social due process and thriving in life during the first half of *An American Tragedy*,[87] the words are later linked with state-sanctioned murder and the sacrifice of human life for personal gain. The ostensible genie who prods Clyde to plot Roberta's demise speaks in the voice of American values – capitalizing on singular chances and attaining freedom and equality (484-86) – and rather than being an unreal presence, is in fact only too real an influence on Clyde, who is ensorcelled by the "Aladdin-like splendor" Sondra personifies (442), and on Mason as well.

The major distinction between the characters is that Mason adheres to the Alger formula for success leading up to upper middle-class respectability, rising gradually from a menial press position and marrying a local pharmacist daughter's, while Clyde, Icarus-like, plunges to his premature demise. As Clyde mulls on death row about his regrettable bold decisions, "Was it not true . . . that if he had led a better life . . . had been content to work and save, as no doubt most

[87] Though, as discussed earlier, a series of coincidental incidents in parts one and two precipitates Clyde's demise. Clyde and readers, however, are only fully aware of this grimmer underside of Clyde's "chances" in retrospect.

men were—would he not be better off than he now was?" (825).[88] Clyde and Mason nonetheless share an extreme opportunism that finally overrides moral, if not legal, constraints and that is premised on a zero-sum gain theory of personal advancement, which is gauged by socioeconomic visibility. Mason perceives the trial as his best chance for "legal and political and social fame the country over" (605), much like Clyde's rationale for marrying Sondra, a corporate heiress and cynosure.

Clyde's legal downfall is precipitated by Mason's recognition of Clyde's true feelings toward Roberta, held as tenaciously as Mason's abhorrence toward Clyde for trying to short-circuit the very process Mason has risen through. Mason is fully cognizant of Clyde's fear of social infamy or exile, given that the prosecution hinges on Mason's identical angst; as he informs Clyde in a sentence with self-referential undertones: "'I tell you that I have all the evidence I need right on my person'" (587). Clyde's cross-examination represents Mason's berating his double for rapacious impulses that Mason also, under the cover of law, exhibits during the trial: "'You didn't want her to live, in spite of your alleged change of heart! Isn't that it?' yelled Mason. 'Isn't that the black, sad truth? She was drowning, as you wanted her to drown, and you just let her drown! Isn't that so?"' Clyde's response to this accusation is sheer terror at "the closeness of Mason's interpretation of what had really happened" (748). Yet the diatribe applies equally to Mason, whose ambitions lead him to be eager for Clyde's electrocution regardless of potentially extenuating facts while claiming to be seeking "'*[e]xact justice*"' for the public (672).

[88] Yet Clyde continues pondering: "But then again, there was the fact or truth of those very strong impulses and desires within himself that were so very, very hard to overcome" (825). The "wild fever" of his American Dream aspirations connected with Sondra, "not unakin in its manifestations to a form of insanity," burns even after he faces death (827).

The issue of justice in Clyde's trial befuddles the reverend sent to console him in prison post-conviction, Duncan McMillan, who "never in his life before ha[d] heard or ha[d] had passed to him so intricate and elusive and strange a problem" (834). Neither the priest, most legal actors, nor Clyde's mother appear able to separate spiritual or moral from legal guilt. This distinction is at the crux of Clyde's defense strategy and is evocative of the legal realist differentiation between normative and descriptive visions of law, as most controversially captured by Karl Llewellyn's call, later qualified, for legal scholars to temporarily divorce the "Is" and "Ought" ("Some Realism about Realism" 1236; *Bramble Bush* 8-9). Clyde's attorney Belknap, Dreiser- and Holmes-like ("Path" 459), bifurcates moral concerns from statutory requirements[89] while acknowledging the dilemma ensuing from this separation; Belknap indicates that Clyde's predicament is "'one of the most puzzling cases I have ever run up against'" (635, 629, 703-04, 772-73). Mason contrastingly conflates religion, morality, and law and, like the judges involved in Clyde's case, finds no major problem with Clyde's conviction. The governor with "a deep-seated and unchangeable submission to law and order" who decides Clyde's fate through a clemency petition is more disturbed but feels duty-bound to reject equitable considerations for "mercy" that he thinks can be readily distinguished from legal considerations (840, 843). An ex-D.A. and judge, he demands from Clyde's priest "'material fact[s]'" for "'a legal proceeding'" and asseverates: "'I cannot act upon sentiment alone,'" for "'if the law is to be respected its decisions can never be altered except for reasons that are full of legal merit'" (844, 845).

[89] As does Jephson, to the dismay of Mason, the judge, and the audience, by asking Clyde during his direct examination: "'Didn't you know that all men, and all women also, view it [seduction] as wrong, and outside of marriage unforgivable—a statutory crime?' The boldness and ironic sting of this was sufficient to cause at first a hush, later a slight nervous tremor on the part of the audience which, Mason as well as Justice Oberwaltzer noting, caused both to frown apprehensively" (712).

Applying legal realist theorizations of criminal trials as socioeconomic and political phenomena, *An American Tragedy* affirms the relevance of extralegal factors for assessing legal merit while questioning to what extent merit is truly rewarded in American law or society; Clyde's attorneys' plea for his life is said to be "not without its merits and its weight" (773) but finally fails. Dreiser's novel undercuts positive assumptions of individual free will espoused by legal and socioeconomic systems in the United States by emphasizing unruly adverse realities Clyde endures preceding and during his trial. A vast fissure between the process the text posits Clyde should be due socioeconomically and legally and the due process he actually receives points to the scope of the problem Dreiser perceived the country confronting in assuaging tensions that could otherwise crescendo into social explosions. The novel's construction of an elaborate network of doubles inside and outside the courtroom suggests the inadequacy of extant social, legal, and political institutions in resolving the problems the text delineates. As in *Marrow* and *The Jungle*, victims of socioeconomic and legal injustices in *An American Tragedy* include youth representing the ascending generation, whose prematurely extinguished lives are figured as burying national hopes for reconciling American Dream ideals with realities.

While an effulgent future appears not to be forthcoming in Dreiser's novel, it is also not impossible, recalling *Marrow*'s tenuous final line that "'[t]here's time enough, but none to spare"' (195). *An American Tragedy* begins: "Dusk—of a summer night. And the tall walls of the commercial heart of an American city of perhaps 400,000 inhabitants—such walls as in time may linger as a mere fable" (1); the novel's envoy echoes: "Dusk, of a summer night. And the tall walls of the commercial heart of the city of San Francisco—tall and gray in the evening shade" (853). In the short term, then, the text indicates figurative walls will persist into the wane of a metaphorical summer in America, while in the long run suggesting the potential for the

fortifications' extinction. This image could be construed to symbolize America's apocalyptic collapse or more optimistically the disintegration of the walls impeding characters like Clyde.

The envoy casts light upon which of these possibilities Dreiser may have considered more likely at the time; the section shows Clyde's nephew Russell being immured by walls, though out West. Clyde's family, operating "The Star of Hope" mission, is shown to ironically chant "How firm a foundation," which could signify their – and mainstream American society's – utter failure to reform after the series of events leading to Clyde's execution (855). Russell is depicted pining for an ice cream cone, recollecting Clyde's pathway to perdition starting with selling ice cream sundaes (24, 856). Clyde's mother commands Russell to return home after purchasing the treat, but the novel's final scene showing the family retreating to the mission sans Russell is indicative of the youth's following in his late uncle's tread. The nascent promised land of California thus seems to hold little more promise than the East or the Midwest depicted earlier; the novel's enclosed form could signal that Clyde's tragedy is fated to repeat geographically and with the coming generation.

Robert Penn Warren's centennial homage to Dreiser captures how readers are not immune from this enclosure and intimates that Clyde's perplexities evoke a perturbing empathy:

> What man, short of saint or sage, does not understand, in some secret way however different from Clyde's way, the story of Clyde and does not find it something deeper than a mere comment on the values of American culture? Furthermore, the mere fact that our suspense is not about the *what* but about the *how* and the *when* emphasizes our involvement. No, to be more specific, our *entrapment*. We are living out a destiny painfully waiting for a doom. (116)

Readers' entrapment is evidenced through explicit imagery (e.g., walls) as well as through formal techniques including plot repetition (e.g., the envoy and other episodes as well as the doubled literary and legal renditions of Clyde's story), characterization (doppelgangers), and reiterated diction; readers are trapped in the text much as Clyde is ensnared in the milieu of the novel.[90] Suggesting a metafictional dimension of narrative entrapment, Clare Eby observes that Clyde is inspired to re-enact a drowning recounted in a local newspaper, leading to her conclusion "[t]hat the story keeps repeating itself becomes, of course, a pivotal fact in Dreiser's novel" ("Psychology of Desire" 199). "The anthropologist Claude Levi-Strauss hypothesized that when a culture keeps telling itself different versions of the same story, it is attempting to resolve, on a symbolic level, issues which have not been resolved in the collective experience" (Donovan 20-21). Following *An American Tragedy*'s publication, numerous books and movies, including *Machinal* (1928), *Native Son* (1940), *A Place in the Sun* (1951), and *About the Author* (2001), have revisited the seemingly everlasting story represented in Clyde's ordeals. Clyde's narrative has continued to resound with legal figures as well; New York Court of Appeals Judge Judith Kaye sponsored a lecture on the novel in 2006 and Supreme Court Justice Ruth Bader Ginsburg attended an opera version of *An American Tragedy* in 2014 (Herman 1981; Stein 2). By combining literary and legal realist critiques of American socioeconomic, legal, and political systems that to many present the most evanescent of promises to actualize democracy's capacities, Dreiser's text remains incisive almost a century after its blockbuster publication.

[90] Lee Clark Mitchell's *Determined Fictions: American Literary Naturalism* analyzes how such stylistic techniques underscore characters' lack of free will in *An American Tragedy* and in naturalist texts more generally, rather than functioning as evidence of naturalist fiction's formal deficiencies.

Postlude: Legal Realism, Literary Realism, and the American Dream on Trial

In the trial context, Thurman Arnold employed a literary analogy to frame the problem realists may pose to a self-satisfied society, and his observation can be construed as an *ars poetica* for *An American Tragedy*:

> The operation of our judicial institutions may be likened to the presentation of a play. . . . Unquestionably the play is exercising a stabilizing influence on the manners and customs of the community. Suppose into this very satisfactory situation we introduce a realist who insists on interrupting the actors in their most impressive speeches by telling the audience that it is only a theatrical performance. . . . Obviously the effect of the play is destroyed. ("Substantive Law and Procedure" 646)

Arnold's comparison here can be extended to encompass other institutions as well, in light of Chesnutt's and Sinclair's subversion of racist and classist spectacles in *Marrow* and *The Jungle*. Like Dreiser, Chesnutt and Sinclair can be seen as deconstructing problematic social and legal phenomena as well as the superficial method of engaging with reality promoted by the phenomena. The literary authors, though, diverged from Arnold's theory in their deeply critical approach. Arnold – unlike many other legal realists[91] – did not endorse demystification, contending that "[f]rom any objective point of view the escape of law from reality constitutes not its weakness but its greatest strength" (*Symbols* 44). For Arnold, law's ceremonial rituals and formalizations served indispensable communal needs, and the manipulation of illusions within these frameworks, rather than an inordinate focus on exposing acrid realities, was the approach

[91] Max Lerner's essay on Arnold asserts that "it has become the tradition of the school of legal realists to aim their sharpest javelin thrusts against the rituals and formalizations of the law. The realist believed that there is something more 'real' than these rituals, and he goes off in pursuit of that something. The interesting thing about Arnold, on the contrary, is that he finds the real meaning and force in the law exactly in the ritual itself" ("Shadow World of Thurman Arnold" 695).

most conducive to effective socio-legal reform. In contrast, literary realist texts like *An American Tragedy*, *The Jungle*, and *Marrow* often concentrated more on problem articulation than resolution, which may be attributable to their being works not tasked with solving the quandaries they revealed; law, antithetically, is at its core a problem-solving discipline. Also, Dreiser's novel in particular may be seen to diverge from legal realism as well as works conventionally classified as literary realist texts in its greater nihilism about the human condition and its somber view about the prospects of resuscitating American democracy in the near term.

Like many literary and legal realist works, including Chesnutt's and Sinclair's novels, *An American Tragedy* has a problem framing and elucidation orientation. Max Lerner (whose scholarship reflected Arnold's and Frank's influences) averred: "Half the task of realism is to ask the right questions about which to seek adequate information" ("Social Thought of Mr. Justice Brandeis" 16). In an updated preface to *Law and the Modern Mind*, Jerome Frank suggested a similar focus on problem clarification that resonates with Dreiser's depiction of Clyde's trial:

> The legal traditionalists' viewpoint has carried over to many educated non-lawyers, giving them a false and generally soothing impression of the operations of our courthouse government. In this book, I tried . . . to dissipate that false impression, because I felt that, in a democracy, the citizens have the right to know the truth about all parts of their government, and because without public knowledge of the realities of court-house doings, essential reforms of those doings will not soon arrive. ("Legal Thinking in Three Dimensions" 17)

Unlike Chesnutt and Sinclair, though, Dreiser did not explicitly conceive of his novel promoting such reforms. Dreiser implied a difference between law's pragmatic purposes – as a judge, for

example, Frank was required to resolve actual legal disputes – and literary authors' aesthetic aims.[92] Discussing his opinion of the most vaunted "imaginative art," Dreiser claimed:

> [W]ith these [the desire for social amelioration], however, as I must point out, the higher phases of imaginative art have nothing in common. These latter are not concerned with social amelioration as an end or a motive. Rather their purpose is to present life in the round, good, bad, and indifferent alike, without thought of change and without hope of improvement. They paint the thing as it is. (qtd. in Mookerjee 104)

Dreiser thus expressly disclaimed his novel's ambition to catalyze social progress, yet his portrayal of a disheartening status quo for Americans outside of Samuel Griffiths's set indicates the exigency of reform, which for Dreiser required society to figuratively see anew.

Roberta's death and its spectacular aftermath in Clyde's trial function comparably to the riot in *Marrow* or the strike in *The Jungle* as events instigating characters within the texts to re-envision both facts and the legal, social, economic, and political conclusions to be drawn from those facts. The governor in *An American Tragedy* who rejects Clyde's clemency request dismisses equitable appeals reflecting this new envisaging as "just a re-interpretation of the evidence as already passed upon," an attempt to undermine what the "proven facts seemed to indicate to him and everyone else" (843). But the qualifiers "just" and "seemed" destabilize the governor's certitude and intimate at what Dreiser perceived to be the substantial stakes of "re-interpretation." Hearing of Clyde's tribulations, Sondra is said to be "moved by her love for [Clyde] and for the first time in her young life shaken to the point where the grim and stern realities of life were thrust upon her gay and vain notice" (594-95), not unlike Major Carteret's reconsideration of white supremacy's pre-eminence once racism endangers his own son's life.

[92] Walt Whitman's 1855 preface to *Leaves of Grass* similarly distinguished the judicial and literary functions: "He [the poet] judges not as the judge judges but as the sun falling around a helpless thing" (1317).

This contrasts with Sondra's father's, much like the sanguine American public depicted in *The Jungle*, earlier presuming "peace and order" reigns in his home, with Roberta's demise being seen by elites as merely "'put[ting] a crimp in the fun around here for awhile'" (608, 565).

An American Tragedy's relentless deconstructionism in relation to *Marrow* and *The Jungle* could render it susceptible to the most ubiquitous criticism of legal realism: having razed such ideals about law as certainty, uniformity, and objectivity, it proposed no superior normative legal vision (Pound, "Call for a Realist Jurisprudence" 700). During Nazism's rise, some scholars associated legal realism's intense skepticism with nihilism (Kennedy, "Review of Legal Realism" 373). These claims were, however, often overstated; legal realists were instrumental in implementing the New Deal (Curtis 158), and Felix Cohen and Jerome Frank, among other legal realists, were vitally concerned with conceptualizing the role of ideals in law and advocating legal reforms. Frank defended legal realists as "eager – perhaps altogether too eager – to improve the judicial system, to make it more efficient, more responsive to social needs, more 'just.' . . . They are unflagging idealists." Unlike more complacent idealists, though, Frank argued that legal realists "believe[d] that the way to attain ideals is not by merely assuming that those ideals are now operative or easily attainable, but by painstaking study of what is now going on (thereby learning something of what can be made to go on thereafter)" ("Mr. Justice Holmes" 586-87).

Limiting unbridled individualism to benefit the greater good was a common normative aim among legal realists, as expressed in Judge Learned Hand's 1921 address on the deficiencies of trials to reach the heart of matters: "And still at times I can have hope that in America time may at length mitigate our fierce individualism, may teach us the knowledge we so sorely lack that each of us must learn to realize himself more in our communal life whose formal expression is and as I believe will continue to be the law" (106). Dreiser, who like Upton Sinclair became

fascinated with socialism (Loving 398), also lambasted what he called "complete individualism" in favor of a constricted individualism

> which will guarantee to all, in so far as possible, the right, if there is such a right, to life, liberty, and the pursuit of happiness; also, an equitable share in the economic results of any such organization as the presence and harmony of numerous individuals presupposes and compels. . . . Americans should not mentally follow individualism to its ultimate conclusion, for society is not and cannot be a jungle. It should be and is, if it is a social organism worthy of the name, an escape from this drastic individualism which, for some, means all, and for the many, little or nothing. (qtd. in Elias 258)

Ruminating on *An American Tragedy* a decade after its publication, Dreiser similarly proclaimed that "it is high time that new rules and new laws for this particular type of crime are considered, if equity or fair play is to be achieved" ("I Find the Real American Tragedy" 69). He equated the achievement of equity and fair play with "JUSTICE" but ended the essay by questioning whether justice "is ever substantially or even partially achieved" (72).

The most significant distinction between the naturalist strand of literary realism evidenced in Dreiser's novel and legal realism may be the degree of pessimism espoused about human nature and the consequent possibilities for meaningful reforms within the schema of established institutions. Legal realists shared social scientists' impulse toward solving communal problems through rational processes, but Dreiser's fiction, like that of many other literary realists, returns readers "to the unresolved epistemological and social questions themselves" (Morgan 11).[93] Scholars have long discerned a despondent strain in legal realism; Philip Mechem

[93] For example, Clyde himself is not "able to solve" the "strange shadings" of his conduct leading up to Roberta's demise (847), although the appellate court claims Mason strove to "truly solv[e] the question of the defendant's guilt or innocence" (840). Also, as discussed in the prior section, the novel gestures at solutions to cure the infirmities arising from majoritarian American democracy but presents no definitive proposal.

in 1936 criticized legal realists as propounding a "jurisprudence of despair" (669), and Morton Horwitz has more recently described "[p]erhaps the most significant difference between Realism and its pre-war reformist predecessors" as the earlier scholarly generation's "faith in reason, both as a reliable source of moral understanding and as a powerful internal guide to law" enabling the deduction of "civilized and humanitarian values" (170).[94] Compared with literary naturalism, however, legal realism generally reposed faith in the conventional tenets of liberal democracy and capitalism, as may be expected from a jurisprudence promulgated largely from elite law schools and devoted to the attainable from that perspective. Marxist scholar Alan Hunt claims that "even in its most polemical form, [legal realism] never became significantly radical; it presumed an unchanged constitution and a structurally unchanged legal system" (39, 40).

According to Hunt's reasoning, deviations from the ideal operation of current legal, political, and socioeconomic systems were posited by most legal realists as the problem to be remedied, without undercutting these systems' elemental assumptions; scholars have raised similar contentions about mainstream literary realism's relative conservatism.[95] Frank, for instance, although often categorized as an "extreme" legal realist, asserted: "Our democratic system is intertwined with our profit system. Efforts to obliterate a profit system in America are almost sure to breed civil war and either dictatorship or disintegration" (*If Men were Angels* 18, note). *Marrow* and *The Jungle* could be seen to comparably contend that aberrations from constitutional ideals were the problem to be palliated. Chesnutt avowed *Marrow* was "not a study in pessimism" ("Charles W. Chesnutt's Own View of His New Story" xl),[96] and Dr. Miller

[94] That noted, Alan Hunt disputes this distinction between pre- and post-World War I American jurisprudential scholars (40).
[95] Amy Kaplan's *The Social Construction of American Realism* and Frederic Jameson's *Antinomies of Realism* expound on these critiques.
[96] Chesnutt's reflections on *Marrow* articulated his "belief that the forces of progress will in the end prevail, and that in time a remedy may be found for every social ill" ("Charles W. Chesnutt's Own View of His New Story" xl).

is an exemplar of the typical pathway to the American Dream, albeit one stunted by racism. *Marrow*'s conclusion suggests rights inscribed in the Reconstruction Amendments may yet be attained by African Americans while in *The Jungle,* Socialist Party election victories ending the novel signal traditional majoritarian democracy's success in advancing workers' rights.

Contrastingly, Clyde's trial can be seen to exemplify law's inefficacy as an instrument of democratic reform. The proceedings reflect critical legal studies scholar Alan Freeman's contention (as summarized by critical race theorist Kimberlé Crenshaw) that "[i]f law functions to reinforce a world view that things should be the way they are, then law cannot provide an effective means to challenge the present order" (1352). Or, as Learned Hand, according with Freud in this chapter's epigraph, cautioned in his address: "We must not expect too much from formal changes; we may put our finger on this or on that which may be amended, and if it is done it may help, but the fundamentals lie elsewhere. You get out of a community what there is in it" (106). Hand avouched: "We shall succeed in making our results conform with our professions only by a change of heart in ourselves" (104), and perhaps the most salutary reading of *An American Tragedy* is that it, like *Marrow* and *The Jungle,* sought to effect this personal transformation in its intended audience. Dreiser's novel's ferocious fatalism arguably heightens "the reader's social consciousness" to conceive of a more equitable future (Walcutt 27).[97]

The literary and legal realists studied in this project composed dissents that sought to incite public action to realize this future, and my analysis here has shown the disciplinarily diverse authors' shared aims to revitalize American democracy. Dynamic legal realist

[97] As Mary Papke avers about literary naturalist texts' affirmative outlook on life despite their dispiriting depictions:

> For all its seeming pessimism, passivity, and self-destructiveness in the face of cultural crisis, naturalism depends upon the romantic hope that we will not simply settle for the spectacles of suffering or supreme indifference it presents with such visceral intensity. Naturalism thus asks us to refuse the hand dealt to us by our histories – if not to call for a new deck, since there isn't any other, then to reimagine the rules of the game and the order of play. (iv)

conceptions of law provided literary realists with a particularly generative theoretical framework for their social justice critiques, which I have shown were grounded amply, yet often subtly, in constitutional law. As the legal instantiation of the American Dream after the Civil War, the Fourteenth Amendment figured in both realists' writings as a beacon whose incandescence would alternately flicker and flare for subsequent generations of Americans. Chesnutt's, Sinclair's, and Dreiser's legal realist-inspirited literary dissents meanwhile continue to glow today for their prescience in confronting forms of injustice – racism, labor exploitation, and classism – that arise and abate as American history continues to unfurl.

Coda – Realist Imaginaries and the Specter of Race

"And if the word *integration* means anything, this is what it means: that we, with love, shall force our brothers to see themselves as they are, to cease fleeing from reality and begin to change it. For this is your home, my friend, do not be driven from it; great men have done great things here, and will again, and we can make America what America must become."

–James Baldwin, *The Fire Next Time,* 1963

"I don't care a rag for the '*the Union as it was*.' I want and fight for the *Union* '*better than it was*.' Before this is accomplished we must have . . . a thorough and complete revolution and renovation. This I expect and hope. For this I am willing to die—for this I expect to *die*."

–Lieutenant Albion Tourgée, 1863[1]

The narrative of literary realism and legal realism spun thus far has portrayed a predominantly symbiotic relationship between the movements, and has delineated both realists' visions of a more economically and racially egalitarian American democracy. As appealing as this tableau appears, however, seams in the story are evidenced upon a more penetrating inquiry. *The Marrow of Tradition* (1901), *The Jungle* (1906), and *An American Tragedy* (1925) all contain Sinophobic depictions[2]; neither Sinclair's nor Dreiser's text appears concerned with the American Dream's fulfillment for characters of color more generally, corroborating Jonathan Cullen's observation (alluded to by James Baldwin above) that "[t]he American Dream is in many ways a story of omissions" (119). This racial lacuna in literary realism had its analogue in legal realism: "Most canonical realists did not address the race question – that is, 'the

[1] Quoted in *Color-Blind Justice: Albion Tourgée and the Quest for Racial Equality from the Civil War to* Plessy v. Ferguson (Elliott 73).

[2] In Dreiser's novel, the depth of Clyde's fall is demonstrated by his confronting "an emaciated and sinister-looking Chinaman" on death row (795). Henry Wonham's *Playing the Races: Ethnic Caricature and American Literary Realism* analyzes additional pejorative depictions of racial minorities in literary realist texts.

problematic issue of the Negro's status in American life'" ("Legal Realism and the Race Question" 1608, qtg. Randall Kennedy 1624). *Lochner v. New York* (1905), and not *Plessy v. Ferguson* (1896), was the Supreme Court decision that inflamed the majority of mainstream legal realists.[3] Conjecturing why, Edwin Patterson claimed that racial issues taxed legal realists' commitment to approaching law "scientifically," asserting: "Racial problems are among the most difficult to deal with 'scientifically' because it is hard to find social scientists who can remain emotionally unbiased in such an investigation" ("Some Reflections on Sociological Jurisprudence" 405). Patterson's comment bears shades of William Dean Howells's review of *Marrow*, which acknowledged Charles Chesnutt's novel's moral preeminence but concluded "it would be better if it was not so bitter" in its representation of race relations post-*Plessy* ("Psychological Counter-Current" 832).

While Howells touted "that republic of letters where all men are free and equal" in his *Marrow* review ("Psychological Counter-Current" 832), Chesnutt questioned the color line's actual eradication in literary realism;[4] an identical proposition could be advanced about legal realism. The strident summons in Justice John Marshall Harlan's *Plessy* dissent seemed to go

[3] For example, in 1909, Roscoe Pound described Justice Holmes's dissenting opinion in *Lochner* as perhaps the "best exposition" of sociological jurisprudence ("Liberty of Contract" 464), and Max Lerner's "The Supreme Court and American Capitalism" (1933) claimed: "It is upon this broader question [about the nexus between Supreme Court decisions and the realities of American capitalism] that all our current theoretical interests in American constitutional law converge" (696); Lerner construed *Dred Scott* through an exclusively economic lens (690). Finally, Supreme Court Justice Harlan Fiske Stone's 1928 retrospective of the last half-century of major high court decisions neglected to mention *Plessy* among significant Fourteenth Amendment cases ("Fifty Years' Work of the United States Supreme Court").

[4] "Within the period that Susan Gillman has called the racist 1890s, the color line was reproduced and codified within aesthetic boundaries between realism ["Anglo-American objectivity"] and (black) melodrama" (Knadler 430). In 1901, Chesnutt complained to his editors, "I am beginning to suspect that the public as a rule does not care for books in which the principal characters are colored people or with a striking sympathy with that race as contrasted with the white race" and described his friends suggesting that he was veering toward undesirable "fanaticism" in *Marrow*. The missive ended by Chesnutt's repudiating Howells's claim of "no color line in literature" ("To Houghton, Mifflin & Co." (30 Dec. 1901) 170-72). *Marrow* alienated Chesnutt from many white progressives, perhaps because the novel did not comport with their more optimistic views on race relations (see Knadler 430-31).

largely unanswered in jurisprudence and case law over the following half century. Indeed, Justice Robert Jackson framed the issue before the Supreme Court in *Brown v. Board of Education* (1954) as a redux of *Plessy*, more specifically the color-blind passage in Justice Harlan's dissent and Albion Tourgée's (Homer Plessy's attorney's) brief: "Tourgée's brief was filed April 6, 1896 and now, just fifty-four years later, the question is again being argued whether this position will be adopted and what was a defeat for him in '96 be a post-mortem victory" (qtd. in Olsen, *Carpetbagger's Crusade* 354). During the intervening period, however, African American attorney Charles Hamilton Houston was gradually revolutionizing legal realist jurisprudence into an apparatus to secure economic and racial justice.[5] Houston, who was born the year before *Plessy* and was mentored by Roscoe Pound and Felix Frankfurter at Harvard Law School,[6] conceived of lawyers as "social engineers" (qtd. in Fairfax 26; Fairfax 18, 20).

Moreover, Houston could be seen as an heir to Tourgée, an expressly hybrid literary-legal realist figure[7] who has been characterized as "the most vocal, militant, persistent, and widely heard advocate of Negro equality in the United States, black or white," "during the last two decades of the [twentieth] century . . . . He was the Garrison of a new struggle, but the times

[5] Several contemporary scholars have recounted this accomplishment. See Gordon Andrews's *Undoing* Plessy*: Charles Hamilton Houston, Race, Labor and the Law* (2014); Rawn James, Jr.'s *Root and Branch: Charles Hamilton Houston, Thurgood Marshall, and the Struggle to End Segregation* (2010); and Genna Rae McNeil's *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* (1983). During his lifetime, Houston became so renowned that in 1939 a group of African American federal government workers sent President Franklin Delano Roosevelt a letter encouraging him to appoint Houston to the Supreme Court; Frank Murphy, also a stalwart proponent of racial justice, was ultimately appointed (Haygood 335-36).

[6] Justice Frankfurter also hired the first African American Supreme Court law clerk, William Coleman, in 1948. Like Houston, Coleman excelled at Harvard Law, graduating first in his class and participating on the school's flagship law review; he also became a prominent civil rights attorney, arguing nineteen cases before the high court (Hevesi).

[7] Tourgée authored *A Fool's Errand* (1879), which inspired Chesnutt to compose *Marrow*, after his disillusioning experiences on the North Carolina bench during Reconstruction. Tourgée's fiction is often replete with details that create a simulacrum of reality (see Elliott 213), and *Fool's*' preface modestly claims the novel's "one merit . . . is that of honest, uncompromising truthfulness of portraiture" (6-7). Like Chesnutt, however, Tourgée expressed trepidation about earning Howells's endorsement as a literary realist. Tourgée's 1889 essay "The Claims of 'Realism'" charged that Howells's conception of realism failed to appreciate literature's transcendent moral purpose to improve society, as opposed to merely depicting it as it is, and discounted the potency of human agency (386-88).

were wrong" (Olsen, *Carpetbagger's Crusade* 298).[8] Tourgée's title character in *A Fool's Errand* (1879) receives a missive that could be seen as reflecting the author's self-assessment in light of Houston's subsequent accomplishments: "Your course is the right one, and by pursuing it steadily you will sow the seed of future good. You may not live to reap its advantages, or to see others gather its fair fruits; but, as God is the God of truth and right, he will send a husbandsman who will some time gather full sheaves from your seeding, if you do not faint" (107). Tourgée crucially espoused the "pragmatic belief that racial justice must be achieved in the results of the law, not merely in the abstract principles behind it" (Elliott 5). Houston comparably evoked Pound in affirming "nobody needs to explain to a Negro the difference between the law in books and the law in action"[9] after Houston prevailed before the Supreme Court in a key precursor case to *Brown, Missouri ex rel. Gaines v. Canada* (1938) (79).[10]

Eight years after this landmark victory, Houston endured defeat before the high court in *Fisher v. United States* (1946), a case interweaving race, class, and criminal law issues broached in earlier chapters and implicating new and previously discussed legal and literary realist figures. Outwardly, *Fisher* was a first-degree murder case involving the viability of a diminished capacity defense in Washington, D.C. Yet as David Siegel avers, "It is perhaps best recognized not as a way station on the journey to greater recognition of the problems of mental illness by the criminal law but an effort by Houston and [Justice Felix] Frankfurter, each in his own way, to craft concepts and language which would permit the law to recognize, and more importantly begin to remedy, the problem of state-sponsored segregation in the United States" (371) during

[8] William Lloyd Garrison was a prominent abolitionist who founded the *Liberator* newspaper and helped establish the American Anti-Slavery Society (McDaniel 1).
[9] The allusion is to Pound's 1910 article "Law in Books and Law in Action."
[10] The Court held that Lloyd Gaines, an African American aspiring to attend law school in Missouri, had a constitutional right to legal education in the state of "substantially equal" caliber to that of white students; under the Fourteenth Amendment's equal protection clause, African Americans could not be required to leave the state to obtain equal training (350-51).

the lead-up to *Brown*. The defendant, Julius Fisher, was an African American groundskeeper at the National Cathedral convicted of slaying a white librarian after she allegedly complained about his subpar work performance and affronted him as a "'black nigger.'" Houston appealed the verdict condemning his client to death to the D.C. Circuit Court of Appeals, which, in an opinion authored by Thurman Arnold, swiftly upheld the conviction; upon more extensive deliberation, the Supreme Court affirmed over three dissents. While Justice Frankfurter's dissent chastised the majority for evading racial issues in the case, archival research reveals that the Justice's candid language about racism, including a reference to Richard Wright's *Native Son* (1940) and *Black Boy* (1945), was omitted from the published dissent, apparently at the behest of Justice Stanley Reed.[11] Houston, though, supplied case records to Wright, who in 1946, inspired by *Fisher*, composed and published (initially in translation) "The Man Who Killed a Shadow."[12] After American editors rejected the explicit story, in a possibly eerie mirror of the rhetorical tempering in the original case, *Zero* (a French magazine) published it in English three years later (*Richard Wright Encyclopedia*, "The Man Who Killed a Shadow" 248; Eugene Miller 210, note 1).[13]

Wright's narrative epitomizes Kenji Yoshino's assertion: "Banished from law as a polluted discourse, literature keeps surfacing in the wake of its enforced departure" (1839). The story's naturalistic rendering of *Fisher* could be deemed a mode of creative counter-jurisprudence in response to an unsettling court decision; and analyzing "The Man Who Killed a Shadow" alongside its corresponding legal texts, particularly Justice Frankfurter's evolving

[11] I rely substantially here on David Siegel's article about the case, "Felix Frankfurter, Charles Hamilton Houston and the 'N-Word': A Case Study in the Evolution of Judicial Attitudes Toward Race."
[12] "*L'homme qui une ombre*" was the story's French title, and it was published in the October 4, 1946 issue of *Les Lettres Françaises* (Hakutani 237, note 18).
[13] Intriguingly, the story appeared immediately before James Baldwin's influential essay "Everybody's Protest Novel," which excoriated Wright's fiction and triggered the contemporaries' estrangement (James Campbell).

dissent, suggests constraints on academic and judicial legal realism's efforts to combat racial iniquities. Houston's brand of legal realism, however, developed during his deanships at Howard University's law school and through litigating civil rights, labor, and criminal cases, may represent the best of his institutional mentors' lessons. Wright's fiction translates Houstonian jurisprudence into literary form, and its refusal to efface racial realities as the courts did in *Fisher* impels readers to confront, and more importantly strive to ameliorate, tensions between the American Dream and the American Dilemma. For, as Ta-Nehisi Coates recently warned, "If you can not bring yourself to grapple with that which literally built your capitol, then you are not truly grappling with your country. . . . Confronting the black experience means confronting the limits of America, and perhaps, humanity itself" ("Other People's Pathologies").

Legal Realism and Race: From an Aporia to Houstonian Jurisprudence

A thorough compassing of canonical legal realist writings uncovers relatively scant overt references to race. Legal realists seemed to "prefer[] to sidestep the racial question despite its extreme susceptibility to liberal critique" ("Legal Realism and the Race Question" 1608) and in spite of the issue's legal, social, and political saliency during the first half of the twentieth century. "There have been discussions of the proper 'approach,' – conducted for the most part at a respectful distance from the problems to be approached," a legal realist critic contended in 1934 (Fuller, "American Legal Realism" 430). Lon Fuller was not referring specifically to legal realists' engagement with racism, but Justice Oliver Wendell Holmes, Jr., also sensed a disparity between legal realist liberal democratic principles and practices in the preceding decade. Many legal realists, including Frankfurter (before his ascension to bench), lobbied unsuccessfully for anarchists Nicola Sacco and Bartolomeo Vanzetti to be pardoned during the 1920s, after the Italian immigrants were convicted of murder and sentenced to death under dubious

circumstances. Justice Holmes privately pondered, though, "If justice is the interest why do they not talk about the infinitely worse cases of the blacks?" (qtd. in Hull, *Roscoe Pound and Karl Llewellyn* 166). In a famous letter to Harold Laski, the Justice avouched: "A thousand-fold worse cases of negroes [sic] come up from time to time, but the world does not worry over them" (qtd. in Cover, "Origins of Judicial Activism" 1306).

A precise enumeration of legal realists is impossible, yet it is noteworthy that only three men typically classified as legal realists – Robert Hale,[14] Karl Llewellyn,[15] and Felix Cohen[16] – discussed race at any length in their scholarship.[17] Llewellyn delivered a paper on "What Law Cannot Do for Inter-Racial Peace" (1958) that lacks the analytical rigor of many of Llewellyn's other jurisprudential writings.[18] In the paper, Llewellyn counseled racial amity through personal interactions and a gradual approach to racial integration, particularly in public schools. Llewellyn perhaps rightly cautioned of law's limits in the desegregation context, as evidenced by *Brown*'s

[14] Hale is best known for his critique of the public-private distinction in law, as he contended that even relationships governed by private laws were affected by public laws and that private impingement upon rights could be comparable in effect to state coercion depriving individuals of rights. His articles "Force and the State" (1935) and "Rights Under the Fourteenth Amendment Against Injuries Inflicted by Private Parties" (1946) discussed postbellum cases involving race, spotlighting the disparity between constitutional rights on paper and in actuality. Hale also co-authored an amicus curiae brief in *Sweatt v. Painter* (1950) ("Legal Realism and the Race Question" 1618). The Supreme Court there held that because the University of Texas Law School "possesse[d] to a far greater degree [than the state's black law school] those qualities which are incapable of objective measurement but which make for greatness in a law school," the Fourteenth Amendment's equal protection clause barred the state from excluding all qualified African Americans from the institution (634).

[15] Llewellyn actively supported the NAACP in the 1920s and 1930s and helped draft an anti-lynching bill; however, he declined to lead the organization's legal committee ("Legal Realism and the Race Question" 1612, note 27). In 1941, he published *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*, a path-breaking work of legal anthropology. Six years later, though, in an instance of legal realist insularity, Jerome Frank criticized Llewellyn for not instead studying trial courts in New York City ("Plea for Lawyer-Schools" 1327-28).

[16] Cohen analyzed the relationship between race and discourse and was an advocate for Native American rights. "The Vocabulary of Prejudice" and the *Handbook of Federal Indian Law* are among his publications on the subjects.

[17] Other legal realists also referred to race passingly in their scholarship; for example, Morris Cohen (whose scholarship displays realist tendencies even as he critiqued the movement) alluded to the justice of the government's assisting former slaves, though not necessarily through direct reparations ("Positivism and the Limits of Idealism in the Law" 327; "Property and Sovereignty" 24-25). Lewis Jaffe's "Law-Making by Private Groups" (1937), an extension of Robert Hale's scholarship, cited Justice Harlan's dissent in the *Civil Rights Cases* (1883) and discussed African Americans' subsequent loss of union and franchise rights.

[18] The paper applies concepts from Llewellyn's article "Group Prejudice and Social Education" (1945).

turbulent aftermath necessitating federal force. However, his incrementalist approach – shared by Justice Frankfurter through his dilatory tactics in implementing *Brown* (Siegel 320) – may give short shrift to law's potential to denature prejudicial opinions. Felix Cohen may have come closest to crafting a compelling defense of legal equality in fact for African Americans as Charles Black, Jr., did in his seminal post-*Brown* essay "The Lawfulness of the Segregation Decisions" (1960). Cohen's 1948 review of *To Secure These Rights: The Report of the President's Committee on Civil Rights* endorsed a robuster presidential role in desegregation, with the federal government setting a national example, and connected deprivations of African Americans' rights to those of Native Americans and immigrants. For Cohen, the president was the sole elected official who represented the entire nation, and therefore was tasked with "lead[ing] in a great campaign to bring the practices of our Federal Government into line with the ideals that have made our Nation great and honored as few nations in history have ever been honored by the peoples of the world" (1145).

Although federal action, as later materialized in the form of the Civil Rights Acts of 1964 and 1968 and the Voting Rights Act of 1965, was imperative for the effective enforcement of racial minorities' constitutional rights, African American visionaries spearheaded the civil rights revolution culminating in these achievements. Martin Luther King, Jr., in 1959 praised African American lawyers' contributions in particular, singling out Charles Hamilton Houston and his protégé, Thurgood Marshall, in an address before the all-black National Bar Association[19]:

[19] The Association was formed in 1925 after the American Bar Association denied African Americans membership (Fairfax 22); the ABA technically integrated in 1943 but did not admit its first African American member until 1950 ("ABA Timeline"). Into the 1930s African Americans were to a large extent also excluded from law schools, especially elite institutions, and they comprised only one percent of the profession during Charles Hamilton Houston's lifetime (John Frank 31; McNeil 6). Law as a discipline and profession was accordingly not immune from Jim Crow, and unsurprisingly the line of cases climaxing with *Brown* focused substantially on desegregating law schools as a preliminary step to dismantling racially segregationist regimes in American society more generally.

> Words are inadequate for me to express the deep gratitude that we owe the lawyers of our race for bringing us to this significant point in the struggle. It goes without saying that some of the most momentous achievements in the civil rights struggle have come through the courts. . . . Long after the names of Governor Faubus and Senator Eastland will be forgotten in shame, the names of Charles Houston, Thurgood Marshall and a host of others will be creatively stenciled on the mental sheets of succeeding generations.[20] (qtd. in Andrews 218)

Houston participated in almost every civil rights case before the Supreme Court from 1930 until his premature 1950 death from overwork (Brittain 103),[21] and his use of empirical data in court cases reflected a legal realist methodology endorsed by his mentors, Pound and Frankfurter, which he married with ideals of racial and economic justice and a meticulous implementation strategy.[22] For Houston, "Learning the law and learning to think like a lawyer were but the elementary steps in becoming a social engineer. The third step . . . was the most critical: In order to give meaning to steps one and two . . . African American lawyers were obligated to know what the law *should* be" (Rawn James, Jr. 52-53) and toil ceaselessly toward that sacrosanct end; legal realist-style deconstruction was to be coupled with affirmative legal reconstruction. In light

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[20] Arkansas Governor Orval Faubus forcibly resisted desegregating Little Rock's Central High School in *Brown*'s wake and Senator James Eastland was the Senate's leading racial segregationist during the civil rights revolution (Reed 223-24; Hunter).

[21] He left his young son a haunting deathbed note: "Tell Bo I did not run out on him but went down fighting that he might have better and broader opportunities than I had without prejudice or bias operating against him, and in any fight some fall" (qtd. in Andrews 211).

[22] He described the five-prong strategy (which is not without contemporary application) as follows:

> We are taking these fights in their stages, one by one. First, the fight for physical security, next the fight for some semblance of order and justice in the processes of the administration of the government. Third, the fight for equal education, to furnish America with a class of citizens fully entitled and fully able to cope with all the difficulties and problems; fourth, to bring the Negro workers into the organized labor movement with full protection against discrimination; finally to give to the other liberal forces of America worthy recruits for the struggle to make a liberal America, to make this country a secure home for all people without regard to race, color, or creed. (qtd. in Andrews 130)

Albion Tourgée similarly connected economic and racial uplift, and stressed education's role in both (Elliott 144, 182).

of Houston's achievements, J. Clay Smith, Jr., in 1973 coined the term "Houstonian School of Jurisprudence,"[23] which he defined as a concept tracing "the scholarship and methods of civil rights advocacy in law and social policy regarding the limits imposed on black people, and those similarly situated, with respect to participation in the republic." Smith argued "for the elevation of Houston's ideas to the jurisprudential matrix" as "the basis of a school of thought" applying legal realist tenets to the civil rights realm ("In Tribute: Charles Hamilton Houston" 2174-75).[24]

Houston's exclusion from most classic accounts of legal realism may be explained by his paucity of publications in prestigious law journals, though he wrote widely in popular publications like the NAACP's *Crisis* and composed countless legal briefs (J. Clay Smith, Jr., "Forgotten Hero" 492-93). Thurman Arnold suggested that to the extent legal practitioners were perceived by academics as lacking "the time or perhaps even the inclination to make any close and careful study of the law" on a sufficiently lofty theoretical level – and Houston's jurisprudential philosophy requires extrapolation from pragmatically-focused writings – the practitioners would generally be excluded from "admission to the faculty of any respectable hall of learning" ("Law Enforcement" 4). Houston's non-Ivy League positions as the vice-dean and dean of Howard University's law school and an attorney for the NAACP have perhaps exacerbated his marginalization in many traditional accounts of legal realism. Rawn James, Jr., comments about several African American Howard University law professors in the 1920s and 1930s that "but for racist hiring policies, [they] would be teaching at America's top-tier law schools" (30). Houston, an Amherst College and Harvard Law S.J.D. (doctorate in law) graduate,

[23] His article "In Memoriam: Professor Frank D. Reeves: Towards a Houstonian School of Jurisprudence and the Study of Pure Legal Existence" first employed the term.

[24] Vestiges of a progenitor work to the "school," Justice Harlan's realist *Plessy* dissent, can be discerned in Houston's writings, as when he asserted, "The law and constituted authority are supreme only as they cover the most humble citizen" (qtd. in Andrews 217). The color-blind passage in Justice Harlan's *Plessy* dissent proclaimed: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful" (559).

may well have returned to his Ivy League alma mater – i.e., the legal realist mainstream – to teach absent Jim Crow.

Academia thus reproduced the racial stratification of the period, but a recent renascence of interest in incorporating Houston into chronicles of legal realism evinces attempts to desegregate American intellectual history. Houston may, cryptically, have foretold his rising scholarly reception, by virtue of the legal legacy he bequeathed to Americans. At nineteen, upon being selected a valedictorian of his Amherst class, Houston chose to speak on Paul Laurence Dunbar.[25] As Geraldine Segal recounts, "Someone objected to this selection, commenting that many people had never heard of Dunbar. Houston replied that by the time he finished speaking, everyone would know about Dunbar. His prediction was correct" (23). *Fisher v. United States* represented Houston's heroic, paradoxical pre-*Brown* effort "to give legal recognition to the social reality of racism, when that reality was itself sanctioned by the legal system" (Siegel 329); and the responses of legal realist judges, notably Thurman Arnold and Felix Frankfurter, to his claims demarcates the status quo bounds within which conventional legal realism operated.

Fisher v. United States *and Institutional Legal Realism's Limits*

Supreme Court justices characterized *Fisher* as a "tragedy" and "melancholy affair" (465, 484), and the brutality of the case facts, coupled with the racially provocative nature of the homicide and the legal actors involved with the litigation, render the case an exemplary one through which to interrogate how legal realism manifested or failed to manifest in the judiciary near the civil rights revolution's outset. At the time of the murder, Julius Fisher was a thirty-two year-old African American working as a groundskeeper and handyman in the National

[25] Dunbar is one of the first "influential black poet[s] in American literature." Financial straits precluded him from attending law school, but he became renowned for his dialect poetry and published the searing anti-racism novel *The Sport of the Gods* (1902) shortly before his premature death at thirty-three ("Paul Laurence Dunbar").

Cathedral.[26] He was orphaned young and had completed second grade, his highest level of formal schooling, at thirteen. Afterward, he had been employed in several working class positions, with no testimony indicating he was a problematic employee, before commencing work at the National Cathedral. His good nature was attested to, though he had criminal convictions for public intoxication and had been inebriated the night before the murder. Preceding the homicide, Fisher had an arms-length relationship with the victim, a thirty-seven year-old white librarian named Catherine Reardon who had been educated at William & Mary, the University of Virginia, and Middlebury. However, the day prior to the murder, which occurred on March 1, 1944, Reardon had reported Fisher to the verger, alleging that Fisher was not tidying the building adequately, the first to so complain; the verger informed Fisher of the charge. The next day, according to Fisher's account, Reardon criticized his cleaning and called him a "black nigger,"[27] the only time a white person had subjected him to the epithet. Fisher recalled being enraged and striking her; she began screaming and fled, after which he chased her and hit her with a firewood stick until it broke. He then choked Reardon until she lost consciousness, and Fisher testified he stopped assaulting her after the shouting ceased. Next, he dragged her body to a bathroom and returned to clean up the blood, but when she began screaming again, he stabbed her fatally in the throat. He finally hauled Reardon's body to a nearby pump pit, where it was discovered the following morning. After the D.C. Circuit and Supreme Court affirmed Fisher's first-degree murder conviction, he was electrocuted in 1946.

With his client confessing to the crime and an insanity defense being unfeasible because no evidence showed Fisher lacked the ability to distinguish right from wrong, Charles Hamilton

[26] The following summary of the case facts is synthesized from the judicial opinions, Siegel's and Edwin Keedy's articles on the cases, and José Felipé Anderson's article on Charles Hamilton Houston's criminal justice cases.
[27] The Supreme Court majority in *Fisher* stated that his original confession did not mention the insult; however, his written confession and testimony did (466).

Houston essentially advocated what would today be identified as a "black rage" defense.[28] The legal proceedings, however, couched the issue in the language of "diminished capacity" (then a novel defense in Washington, D.C.), and more conventionally as part of an argument for a flexible "reasonable person" standard that would account for behavior in a racially fraught situation; both contentions sought to disprove premeditation and deliberation, two elements of first-degree murder. Houston ultimately sought not exoneration, but a reduced second-degree murder charge that would spare Fisher's life. In preparing for the trial, Houston consulted with a prominent black psychiatrist, Ernest Williams, who "[m]uch like a legal realist" cited social scientific proof supporting the proposition that a racist environment keeping African Americans legally and socioeconomically subjugated had psychologically impaired Fisher and contributed to his committing the murder (Siegel 336-37). The trial judge, though, rejected an instruction that would have clearly required jurors to consider all of Fisher's characteristics, including presumably mitigating facts of race and class,[29] in reaching a verdict. The court's rationale was that Houston's request for an individualized instruction "present[ed] a very, very serious question whether or not we are going to institute a departure from the well-established methods of trying a criminal case" (qtd. in Siegel 348).

The D.C. Circuit, in an opinion by Thurman Arnold, unanimously upheld the trial court's decision. The terse (barely two page) opinion devoted one paragraph devoid of racial references to the facts (29). Arnold's following legal analysis acknowledged modern psychiatric research

[28] Patricia Falk's article on innovative theories of criminal defense discusses *Fisher* as an example of a "black rage" defense case involving "specific acts of racism as precipitating events" (752-53), or provocations.

[29] The requested instruction would have been as follows, according to the D.C. Circuit:

> The jury is instructed that in considering the question of intent or lack of intent to kill on the part of the defendant, the question of premeditation or no premeditation, deliberation or no deliberation, whether or not the defendant at the time of the fatal acts was of sound memory and discretion, it should consider the entire personality of the defendant, his mental, nervous, emotional and physical characteristics as developed by the evidence in the case. (29)

challenging the view of pure personal culpability for crime but, *pace* the trial court, concluded: "In the determination of guilt age old conceptions of individual moral responsibility cannot be abandoned without creating a laxity of enforcement that undermines the whole administration of criminal law" (29). While Arnold's conclusion appears startling based on his legal skepticism and liberal political leanings, his scholarship had anticipated this line of reasoning. In *The Symbols of Government* (1935), Arnold tellingly conceded, "No judicial machine is likely to question the underlying assumptions of the government it supports, however regrettable those assumptions may be" (140).

The Supreme Court, in a 4-3 decision,[30] upheld the lower courts' decisions on comparable grounds, with Justice Reed's majority opinion warning, "For this Court to force the District of Columbia to adopt such a requirement for criminal trials would involve a fundamental change in the common law theory of responsibility" (476).[31] Houston's argument seeking for Fisher to be judged "not by a theoretical normality but by his own personal traits" analogized Fisher's state of mind to that of a criminal defendant afflicted with diseases, congenital defects, or alcoholism, which several jurisdictions statutorily recognized as mitigating circumstances (466, 473-75). The Court, though, refused to judicially recognize racism as engendering a diminished capacity defense that could reduce Fisher's offense to second-degree murder, especially in the absence of a statute in Washington, D.C., explicitly establishing the defense under any circumstances. The majority's logic is evocative of Holmes's critiques about appeals

[30] Justice Robert Jackson did not participate in the decision and Chief Justice Harlan Fiske Stone died two months before the decision's publication. Justices Hugo Black, William Douglas, and Harold Burton joined Justice Reed's opinion for the Court (Siegel 355, note 168).

[31] This rationale was revived in *McCleskey v. Kemp* (1987). The Court there rejected an Eighth Amendment "cruel and unusual punishments" challenge by a condemned African American defendant despite an empirical study indicating racism infected capital punishment administration, for "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system" (314-15). Justice William Brennan, Jr.'s dissent tartly framed this claim as the majority's "fear of too much justice" (339).

to tradition[32] and redolent of the deference to local conditions rationale from *Plessy*.[33] It also nods superficially to legal formalism by referencing a seemingly well-balanced decision in the courts below:

> Our policy is not to interfere with the local rules of law which they [local courts] fashion, save in exceptional situations where egregious error has been committed. Where the choice of the Court of Appeals of the District of Columbia in local matters between conflicting conclusions seems nicely balanced, we do not interfere. The policy of deferring to the District's courts on local law matters is reinforced here by the fact that the local law now challenged is long established and deeply rooted in the District. (476-77)

The majority therefore upheld the trial judge's rejection of Houston's equitable jury instructions[34] and affirmed Fisher's first-degree murder conviction.

Both contemporaneous scholars and the three dissenting justices denounced what they perceived to be the Court's abdication of responsibility in the case, seizing on the language of "seeming[ly] nicely balanced" conclusions. Even preceding that phrase, the majority opinion emphasized the proper form of the jury instructions, as in premeditation and deliberation being "defined carefully by the instructions" (470) and given "in the usual form" (467). Although the

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[32] "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past" ("Path" 469).

[33] The majority there held:

> So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and, with respect to this, there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort and the preservation of the public peace and good order. (550)

[34] Additionally, while Houston did not request an instruction specifically referencing the epithet "black nigger," Justice Frankfurter's dissent contended that the majority should have required the trial judge to state the aspersion explicitly; the majority disagreed and also used the more euphemistic term "insulting words" (465, 469-70).

case did not expressly involve a constitutional claim,[35] one scholar linked the Court's higher level of scrutiny in constitutional cases to its duties of heightened review in *Fisher,* excoriating the majority for permitting a "palpable injustice" to ensue under cover of conformance with technical legal rules:

> The Supreme Court, as the final protector and conservator of constitutional rights, has imposed upon it the obligation and duty to see that lower judicial bodies, both state and federal, operate in accordance with the rules which are designed to foster that brand of justice which underlies our constitutional concept of due process, and choices by local judicial bodies 'between conflicting legal conclusions' which seem 'nicely balanced' should not be left undisturbed, where modern experience proves that such choices proceed upon false premises and result in palpable injustice, especially where human life is involved. (Taylor 642)

Justice Frank Murphy in a prior concurrence involving a railroad union that engaged in racial discrimination similarly critiqued the majority for deciding the case and analyzing the relevant "statute solely upon the basis of legal niceties, while remaining mute and placid as to the obvious and oppressive deprivation of constitutional guarantees," which to him made "the judicial function something less than it should be" (*Steele* 208). In *Fisher*, the Justice's dissent also criticized what he believed to be the majority's diminishment of the stakes of the issues, asserting:

> Here we have more than an exercise in statutory construction or in local law. It is a capital case involving not a question of innocence or guilt but rather a consideration of the proper standard to be used in judging the degree of guilt. What the Court says and

[35] The majority dismissed the viability of a due process claim (466).

> decides here today will affect the life of the petitioner as well as the lives of countless future criminals in the District and in the various states. (491)

Justice Murphy deemed the existence of diminished capacity "a scientifically established fact" and averred that Washington, D.C.'s statutory adoption of different degrees of murder at the turn of the twentieth century supported judicial recognition of the diminished capacity defense (492). He concluded that criminal jurisprudence as a whole would be "enlightened" by courts accounting for facts bearing on diminished capacity and that "[o]nly by integrating scientific advancements with our ideals of justice can law remain a part of the living fiber of our civilization" (493-94). Justice Wiley Rutledge's brief dissent agreed considerably with Justice Murphy's dissent, which supported Houston's legal theories, as well as Justice Frankfurter's dissent, which would have upheld Houston's proffered individualized jury instructions (494-95).

While Justices Rutledge's and Murphy's dissents aligned with Houston's defense in result and gave weight to strictly non-legal sources,[36] they fundamentally argued on the majority's terms and contained no references to race. In contrast, Justice Frankfurter's published dissent contended that the diminished capacity issue was tangential and concentrated instead on premeditation, construing the element through the lens of race (478-79). His opinion was also more concrete than the other four opinions in the case, beginning with a relatively detailed recounting of the facts. The Justice explicitly mentioned the term "black nigger" and focused on Fisher's testimony about how Reardon's screams so "unnerved him" that he was compelled to slay her (479-81). However, as a comparison with the Justice's draft opinions in the case will demonstrate, the dissent's language was neutered significantly before publication.

[36] The majority opinion also cited such scholarship, including William White's *Insanity and the Criminal Law* (1923), but nonetheless refused Houston's requested instruction absent explicit local authorization (475).

The published dissent commenced by openly acknowledging the murder's controversial nature: "A shocking crime puts law to its severest test" (477). Justice Frankfurter continued that "whether the [trial] court's charge was unimpeachable as an abstract statement of law" was beside the point, in a line of analysis reminiscent of Justice Harlan's in his *Plessy* dissent about the "separate but equal" fiction,[37] "For Fisher is not the name of a theoretical problem. We are not dealing with an abstract man who killed an abstract woman under abstract circumstances and received an abstract trial on abstract issues" (478). Justice Frankfurter reasoned that although the jury may appropriately have found Fisher guilty of a lower-degree homicide charge,

> [T]he justification for finding first-degree murder premeditation was so tenuous that the jury ought not to have been left to founder and flounder within the emptiness of legal jargon. The instructions to the jury on the vital issue of premeditation consisted of threadbare generalities, a jumble of empty abstractions equally suitable for any other charge of murder with none of the elements that are distinctive about this case, mingled with talk about mental disease.[38] (486-87)

Justice Frankfurter determined that "[i]n the circumstances of this case failure to charge the jury adequately was to deny Fisher the substance of a fair trial" (489), as a rightfully guided jury in his estimation could have determined that Reardon's insult so "unhinged his [Fisher's] self-control" that the requisite premeditation for first-degree homicide was lacking (485). The Justice underscored the Supreme Court's momentous role in capital cases and concomitant greater

[37] The Justice asserted there: "The thing to accomplish was, under the guise of giving equal accommodations for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor to assert the contrary" (557).

[38] The instruction on premeditation, quoted in the majority opinion, was as follows: "Then, there is the element of premeditation. That is, giving thought, before acting, to the idea of taking a human life and reaching a definite decision to kill. In short, premeditation is the formation of a specific intent to kill" (467). The trial judge also defined insanity and the "irresistible impulse" defense before concluding: "If, as I have said, there was such lack of willpower and control it must have been the result of a disease or disorder of the mental faculties. Mere loss of moral restraints leading to a surrender to criminal thoughts and passions is not enough" (467).

obligation to scrutinize lower court decisions, for "[m]en ought not to go to their doom because this Court thinks that conflicting legal conclusions of an abstract nature seem to have been 'nicely balanced' by the Court of Appeals of the District of Columbia" (489). Finally, in a passage perhaps unintentionally alluding to Justice Harlan's *Plessy* dissent, Justice Frankfurter concluded: "One can only hope that even more serious consequences will not follow, which would be the case if the Court's decision were to give encouragement to doctrines of criminal law that have only obscurantist precedents of the past to recommend them" (489).[39]

In contrast with his published opinion, Justice Frankfurter's draft dissents[40] more vividly delineated the racial aspects of the crime, reflecting a Houstonian jurisprudential understanding of the motivations driving Fisher's conduct, and condemned capital punishment.[41] The Justice may have moderated racially charged passages in response to a message from Justice Reed, who advised Justice Frankfurter: "[Y]ou could speak abstractly and enlighten lawyers, instead of concretely without, it seems to me, logical justification." Justice Reed was particularly concerned about Justice Frankfurter's use of the term "'black nigger' as a theme"[42] and suggested that his colleague was veering into Sacco and Vanzetti posttrial-style advocacy (i.e., for a commutation of Fisher's sentence), or at least that the Justice's opinion could be so construed by "stir[ring] racial feelings." For Justice Reed, the narrow question at issue in *Fisher* was the propriety of the trial judge's instructions, and it was unnecessary to repeat the epithet, which had been employed

[39] Justice Harlan argued that antebellum cases should not have guided the *Plessy* majority in construing the Fourteenth Amendment and presciently foretold that the majority decision would "stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens" (560, 563).
[40] The opinion underwent several drafts, none of which were dated (Siegel 358).
[41] He categorically repudiated capital punishment in early drafts; one draft declared: "Capital punishment has little to recommend it: at its best, it is an expedient of doubtful value for the deterrence of those who might otherwise commit murder; at worst, it is a retrogression to the *lex talionis*" (qtd. in Siegel 361). The published opinion, in contrast, concentrated on insufficient safeguards to prevent injustices in death penalty administration (477).
[42] As was Justice Rutledge, though he left the matter to Justice Frankfurter's "taste & judgment as to matters of persuasion" (qtd. in Siegel 364).

in few Supreme Court opinions before then, to resolve the issue (qtd. in Siegel 362-63). In his reply to Justice Reed, Justice Frankfurter cited his law school teaching experiences and rather unreservedly explained his refusal to "sterilize" the dissent by omitting the term "black nigger": "Very, very, very, [sic] few people get understanding through abstractions. [Unintelligible] for the test of minds [sic] grasp of a generalization and the capacity to apply it can come, and only very slowly, through concreteness. 'Life is not a dance of bloodless categories.' Neither is law. And Law is life – unless it is the outward form of force or fraud" (qtd. in Siegel 364).

While adamant about racial particularity in his private response to Justice Reed, Justice Frankfurter did modify the dissent's language before publication. For example, unlike the published opening passage quoted above, a draft initial paragraph stated that "[i]t is not enough that a trial should go through the forms of law or be a ceremonial execution" and explicitly referenced race: "We are not dealing here with an abstract Negro who killed an abstract white woman and received an abstract trial on abstract issues" (qtd. in Siegel 358-59). To underscore concreteness, one of the drafts cited Richard Wright's autobiography *Black Boy* (1945) and novel *Native Son* (1940), as if elevating literature to legally cognizable evidence, or at least recognizing the potential relevancy of literary sources to legal interpretation. Aside from Justices Frankfurter and Cardozo,[43] Jerome Frank may have been the legal realist most receptive to literature as a source of legal insights, and he surmised that literature's attunement to the granular could counterbalance law's gravitation toward abstraction. For him, "[T]he great literary artists . . . have poetic insights, a knowledge which, unlike that of the scientists, concerns the particular, the unique. Such 'poetic' writers . . . furnish a needed corrective of generalizations in meeting

[43] In a letter to a child seeking advice about preparing for a legal career, Justice Frankfurter recommended that the youth read widely, including "cultivat[ing] . . . the imaginative faculties by reading poetry" (qtd. in Ephraim London 275). Justice Cardozo published "Law and Literature," a seminal essay on the interrelation of the fields, in 1925.

individual human problems, the very sort of problems daily presented to trial judges." Connecting such "poetic insights" with "moral insights," Frank urged judges to be artists ("Both Ends against the Middle" 37-38, 40).

Reflecting this view, Justice Frankfurter in one draft contended that Fisher's "conduct can only be understood on the basis of the kind of feelings that are stored up in such a colored person. To be intelligible one must understand what it is that a man like Richard Wright was talking about in *Black Boy*. Miss Reardon's 'black nigger' pulled the trigger that made the gun go off" (qtd. in Siegel 359-60).[44] This passage, however, was largely excised from the dissent prior to publication; that opinion focused more on Fisher's "primitive" mental state than the racial provocation (481) although evidence failed to demonstrate that Fisher had what was then termed a "psychopathic personality" marked by a pattern of antisocial behavior (Siegel 343).[45] To a greater degree than initially apparent, then, Justice Frankfurter's published dissent comported with Justice Reed's request by emphasizing the technical issue of the impropriety of the trial judge's instructions relative to racial concerns addressed at length in earlier drafts. But beneath the jargon of instructional adequacy the published dissent does tacitly embed Houstonian jurisprudential principles, which Wright's "The Man Who Killed a Shadow" accentuates while indelibly impressing upon readers' minds the judicially suppressed racial dimensions of *Fisher*.

Poetic Judicial Review in "The Man Who Killed a Shadow"[46]

Wright's impetus for composing "The Man Who Killed a Shadow" mirrored his fellow realist Theodore's Dreiser's rationale for writing *An American Tragedy*. Both authors perceived

[44] In a subsequent revision to this paragraph, Justice Frankfurter also cited *Native Son* (qtd. in Siegel 360).
[45] However, I.Q. tests classified him as "borderline deficient," likely because of his limited formal education and the racially biased nature of such examinations, and he may have been suffering neurological damage from syphilis (Siegel 344; 328, note 51).
[46] The idea of poets reviewing legal decisions perceived as unjust is discussed in Carl Smith's essay "Law as Form and Theme in American Letters," which cites the writings of Ralph Waldo Emerson, Henry David Thoreau, and Walt Whitman (23-29).

that legal and popular accounts of apparently heinous murders overlooked the underlying causes for the alleged crimes, and that social and economic reforms would not ensue without accounting for these unpalatable facts that indicted individual defendants less than American society. Even though the trial in Wright's story is more anti-climactic than the legal proceedings in *An American Tragedy*,[47] the story has several parallels to Dreiser's novel: underclass characters live in Manichean worlds, within which they feel confined; personal instability permeates the protagonists' lives; dominant society fails to comprehend the characters; and law reinforces customary socioeconomic oppression.[48] Both texts also present themselves as counter-narratives telling equitable stories that belie desiccated legal portrayals of the defendants' lives. Dreiser and Wright, more than many legal realists, followed Llewellyn's advice that "[l]aw and lawyers must therefore stand to observation at the point where society has come to press upon the weak, the helpless, the obscure, the wretched" (*Bramble Bush* 144).[49] Yet given widespread social complacency, revolutionizing public opinion is indicated to be an onerous endeavor in Dreiser's and Wright's bleak texts. As Houston commented on the challenge of garnering white support for African Americans' civil rights in 1936: "The really baffling problem is how to create the proper kind of public opinion. The truth is there are millions of white people who have no real

[47] This may have been because Wright's *Native Son* features a prolonged trial.

[48] On these points, Wright's story depicts a bifurcated "black world" and "white world" on its first page (185), with racial segregation "hemm[ing] in" the protagonist (189), Saul Saunders, who (as discussed further below) has a destabilized life. Once arrested for murdering the Catherine Reardon character in the story, Maybelle Eva Houseman, Saul feels it "utterly hopeless for him to make them [the police] understand" how Maybelle's screams provoked him (199). Saul's candid confession appears so brutal to the policemen that their faces are "chalky" (199).

[49] Llewellyn also counseled law students to approach cases as dramatic narratives:

> So of the cases. Put yourself into them; dig beneath the surface, make your experience count, bring out the story, and you have here dramatic tales that stir, that make the cases stick, that weld your law into the whole of culture. There are the parties. There are, as well, the judges: working at shaping the law to human needs. In every case the drama of society unrolls before you – in all its grandeur, in all its humor, in all its futility, in the eternal wonder of the coral-reef. The clash of ideals, the courage of high hope – and man's purblind inadequacy with man's problems. This, for the seeing. Humanity and law – not two, but one. . . . The drama of society: each opinion a human document; each case a human struggle, warm with life; each changing rule a motion of the giant whose hands control your destiny and mine. (*Bramble Bush* 128)

knowledge of the Negro's problems and who never give the Negro serious thought. They take it for granted and spend their time and energy on their own affairs. . . . We have got to look facts in the face and realize what we are up against" (79).

Literary realism for Wright, like legal realism for Houston, provided a mode through which to identify such facts and command public attention to them, hopefully inducing public action. *Black Boy* referenced Wright's early interest in "realistic and naturalistic fiction and art," with "modern novel[s]" like Dreiser's *Sister Carrie* (1900) giving Wright a sense of "life itself" (118, 295). Aesthetic realism awakened Wright to how words could be deployed "as a weapon," with literature potentially constituting a "revolutionary expression" that delineated the "experiences of the disinherited" (*Black Boy* 293, 375). "The Man Who Killed a Shadow" is consummately such a text, depicting working-class African American protagonist Saul Saunders from birth through his murder of Maybelle Eva Houseman, the Catherine Reardon figure in the story, and into early in his trial. Wright's text shares two crucial features with Justice Frankfurter's published dissent in recognizing the symbolism of the homicide location and questioning more ostensibly logical legal explanations for the defendant's conduct. To a conspicuous extent more than that opinion, however, the story manifests a Houstonian jurisprudential understanding of Saul's plight, with material deprivations and psychological impairment attributable to white supremacy rendering Saul's murder of Maybelle readily foreseeable.

Wright's story transpires chiefly in Washington, D.C.; Saul is born near "the nation's capital," moves there permanently at fourteen, and commits the murder at the National Cathedral (185, 189, 190). On the geographical symbolism of *Fisher* and corresponding significance of the Supreme Court's decision in the case, Justice Frankfurter's published dissent avowed:

> The deference this Court pays to that Court's [the D.C. Circuit's] adjudications in ordinary cases involving issues of essentially minor or merely local importance seems out of place when the action of this Court, no matter how phrased, *sustains a death sentence at the seat of our Government* as a result of a trial over which this Court, by direction of Congress, has the final reviewing power. (489) (emphasis added)

Implicit in Justice Frankfurter's emphasis and Wright's in "The Man Who Killed a Shadow" is the assertion that racism exists at the heart of the nation, with the federal government condoning, if not actively promoting, Jim Crow. As suggested earlier, Felix Cohen analogously maintained that national power, especially as exercised by the president, could set precedents for more widespread social and political acceptance of African Americans' constitutional rights. Saul, though, while geographically within proximity to such power, feels psychologically alienated from it. Being "born black," explains the narrator, Saul "came into a world that was split in two, a white world and a black one, the white one being separated from the black by a million psychological miles" (185), with racial segregation inflicting hidden wounds on Saul's mind. Wright in *Black Boy* expressed his belief that "[i]t was in the psychological distance that separated the races that the deepest meaning of the problem of the Negro lay for me" (320).

Saul's perpetrating the homicide in the library of the National Cathedral, the "church and religious institution" where he is a janitor (190), is also of immense symbolic import. President George Washington and architect Pierre L'Enfant envisioned a "great church for national purposes" in 1791, three years after the Constitution's ratification, and the Cathedral is seen as "a spiritual home for the nation" ("Timeline"; "Announcement on the Future of the Lee-Jackson Windows"). Eugene Miller explains, then, that the story's setting "surely implies a 'metaphoric criticism of established rationalistic values and Christian institutions'" (215, qtg. Daniel

Hoffman). Thurman Arnold affirmed that "the literature of jurisprudence is a most important symbol of our rational moral attitude toward human institutions," and "[t]he institution which is at the head of the hierarchy representing the rational moral attitude today is the law" (*Symbols* 46, 48).

Among laws at the time were "separate but equal" statutes countenanced by the *Plessy* majority as natural occurrences (544). So deeply entrenched were Jim Crow laws that some states prescribed segregated storage for separate textbooks (Benno Schmidt, Jr. 470, 473), and Saul's experiences in the National Cathedral preceding the homicide are a microcosm of his traumatic experiences with racism outside the Cathedral. He is surrounded by "rows and rows of books" he only touches to dust. Having but a third-grade education in his thirties,[50] he is practically excluded from accessing the knowledge they contain (187, 190). He understands the books as minimally as he does "this white world into which he had been thrown," which is a "terribly manifest" and "continuously present" force in his life (187); the volumes reify "the white world that surrounded the black island of his life" (186). Saul's surface engagement with the books can be likened to the depth of his actualization of rights encoded in legal volumes, and the monographs function more as mocking signifiers of democratic promises than as repositories of enlightenment for Saul. He is dusting the volumes immediately before the murder, channeling accumulated fury from the morning's labor and his life into his slap of Maybelle after she criticizes his work and maligns him as a "'black nigger'" (192-93), as Reardon was alleged to have done in *Fisher*.

[50] As the narrator explains, "Saul was not dumb or lazy, but it took him seven years to reach the third grade in school. None of the people who came and went in Saul's life had ever prized learning and Saul did likewise. It was quite normal in his environment to reach the age of fourteen and still be in the third grade, and Saul liked being normal, liked being like other people" (186-87).

Like Justice Frankfurter's published dissent, "The Man Who Killed a Shadow" constructs an alternative rationalization for the murder than that advanced by the majority in the D.C. Circuit and the Supreme Court; paralleling Dreiser in *An American Tragedy*, Wright suggests the imperativeness of factual reinterpretation. Justice Frankfurter characterized Reardon's screams as "a key to the tragedy," citing twelve instances of Fisher's testimony (479). Fisher's preoccupation with silencing Reardon, and not intentional brutality, the Justice reasoned, motivated what could objectively appear to be ruthless conduct. Wright's story early on introduces this explanation for Saul's actions (which replay Fisher's[51]), but unlike the Justice's published dissent, the narrative explains why a white woman's screams could be so perturbing for an African American man at the time. As the story notes, and *Marrow* from half a century earlier corroborates, such wails could evoke memories of white vigilantism and police brutality, the officially authorized form of the same phenomenon: "[H]e heard that if you were alone with a white woman and she screamed, it was as good as hearing your death sentence, for, though you had done nothing, you would be killed. Saul got used to hearing the siren of the police car screaming in the Black Belt, got used to seeing white cops dragging Negroes off to jail" (188). When Maybelle shrieks, then, a stream-of-consciousness passage captures how Saul feels "again in one rush of emotion all the wild and bitter tales he had heard of how whites always got the black who did a crime and this woman was screaming as though he had raped her" (194). Her voice resembles "a lash cutting into his chest" (193), in a possible allusion to slave-whipping hinting at the historical roots of his fear. Equating her screams – linked sonically to police sirens – with his demise, Saul tortures Maybelle to death not from malice, the story denotes, but in reaction "to the feelings that her screams evoked in him" (195).

[51] Saul beats the victim on the head with a stick, chokes her, and stabs her in the throat with his knife (194-96).

In the narrative's most striking deviation from the factual record in *Fisher*, Wright sexualizes the encounter between Saul and Maybelle to vivify these emotions;[52] however, typical racial roles of aggressor and victim are initially reversed. No evidence in *Fisher* implied anything aside from a detached employment relationship between Fisher and Reardon preceding the homicide, but Houston during the trial tried to demonstrate "that Reardon was clearly the dominant participant" (Siegel 348). Wright's sexualizing racism (Bryant 119) is unsurprising in light of *Marrow*'s discussion of the "'burly black burglar'" myth (20)[53] and the *Plessy* majority's fear of racial "commingling," a euphemism for miscegenation (544). Before the murder, the narrative shows Saul cleaning the library while Maybelle Eva (an Eve-like figure) stares repeatedly at him; she is also characterized by Saul's supervisor as a "'crackpot'" (190-91).

On the fateful day, after berating Saul for not cleaning "'under my desk,"' Maybelle "blaze[s] at him": "'Why don't you do your work? . . . That's what you're being paid to do, you black nigger!'" (192, 193). The passage continues: "Her legs were still spread wide and she was sitting as though about to spring upon him and throw her naked thighs about his body" (193).[54] Upon Saul's uttering "'I don't like that'" and instinctively slapping Maybelle's face in response to her verbal insult and potentially the sexual invitation, racial, sexual, and financial problems converge for him: "He was in the worst trouble that a black man could imagine" (194), the horror

[52] Scholarship has focused on this dimension of the story more than the text's rewriting of *Fisher*. Articles on the imbrication of race and sex in the narrative include Earle Bryant's "The Sexualization of Racism in Richard Wright's 'The Man Who Killed a Shadow'"; Neal Lester's "Beyond 'Bitches and Hoes': Sexual Violence, Violent Sex, and Sexual Fantasy as Black Masculinist Performance in Richard Wright's 'The Man Who Killed a Shadow'"; and Marian Musgrave's "Triangles in Black and White: Interracial Sex and Hostility in Black Literature."

[53] Namely the white supremacist stereotype of the black male predator stealing from, raping, and murdering white women who embody racial purity and preeminence. As Major Carteret in *Marrow* explains: "'This . . . is something more than an ordinary crime, to be dealt with by the ordinary process of law. It is a murderous and fatal assault upon a woman of our race,—upon our race in the person of its womanhood, its crown and flower. If such crimes are not punished with swift and terrible directness, the whole white womanhood of the South is in danger'" (110).

[54] While seeming to exercise power over him here, she is portrayed as lacking full volition, as if "she was being impelled into an act which she did not want to perform but was being driven to perform" (192-93).

he had only tenuously evaded earlier. This representation of their encounter, as well as the story's portrayal of Saul's interactions with other whites, depicts whites as the main wellspring of the so-called "Negro problem." "The Man Who Killed a Shadow" thus exemplifies Gunnar Myrdal's contention in *An American Dilemma* (1944) that because of racial power differentials, "All our attempts to reach scientific explanations of why the Negroes are what they are and why they live as they do have regularly led to determinants on the white side of the race line" (xlvii).

The factual appearance versus reality dichotomy in "The Man Who Killed a Shadow" is developed as the murder unfolds. Like Justice Frankfurter's dissent, Wright's story signaled that the defendant's actions expressed not awareness of culpability but automated responses to ominous circumstances, thus disproving premeditation. Justice Frankfurter's dissent construed Fisher's possession of Reardon's ring not as proof of robbery but instead following from the ring coming off in his hand as he was dragging her. The ring's subsequent concealment was to the Justice not evidence of Fisher's intent to hide his crime but to prevent his wife from discovering the ring. Similarly, Justice Frankfurter reasoned that Fisher cleaned the crime scene not to hide evidence but because his responsibilities included keeping the library tidy (480-81). Resembling the dissent, in Wright's story Saul "mechanically" puts Maybelle's ring in his pocket after it comes off her hand when he is dragging her body, and he later places it in a nightstand "more to keep his wife from seeing it than to hide it" (195, 197). After beating Maybelle, he cleans the library floor because the blood "was bad . . . He had been trained to keep floors clean, just as he had been trained to fear shadows" (196); Saul's homicidal response to his fear of "shadows," i.e., whites, is here posited to be as scripted as his gesture to clean the floor upon assaulting Maybelle. He is said to have removed her underwear not to rape her, but because if wetted her panties "would make a good mop to clean up the blood" (196). The narrative also intimates that

while Saul's hiding Maybelle's body could be construed as damning proof, he "merely wanted to make sure that she would not be heard" (196). Following the homicide, Saul never contemplates fleeing, even though he could have escaped in a recently purchased car, and the gun he wields after being arrested is shown to be intended not to slay the police but himself; however, a police officer – another "white shadow[]" for Saul – strikes his face despite Saul's denial (199).

That so many vital facts in Saul-Fisher's narrative are susceptible to a contrary interpretation than the law indicates – Saul is charged with "'[f]eloniously, wilfully, purposely, and of his deliberate and premeditated malice'" killing Maybelle in the denouement (200)[55] – suggests that the legal system, and the socio-political system within which law operates, have reached fallacious conclusions about criminal justice, and about racism in America more generally. An alternative explication of facts than the one proffered by the Court could come from Houstonian jurisprudence, which typically amassed social scientific data to establish racism's pernicious effects on African Americans. In portraying Saul's hardscrabble background and psychological traumatization, as Ernest Williams had underscored in Fisher's trial, "The Man Who Killed a Shadow" expands upon the "why" that Justice Frankfurter's published dissent only vaguely referenced but that his unpublished drafts were more explicit about.

Wright, however, flipped the substantive emphasis in the story away from what he believed to be the more superficial legal causation question, which engrossed the majority and the dissents in *Fisher* as well, to the deeper socioeconomic and psychological causation inquiry; the story allots less than two pages to the legal proceedings and fourteen pages to the events

[55] Like the D.C. Circuit in *Fisher*, the trial court here omits mentioning race and concentrates on details of the first-degree murder charge that bear on Saul's alleged conduct, referencing no equitable facts (200-01); the passage is redolent of the disembodied voice of the law sentencing Clyde to death in *An American Tragedy* (792).

leading up to Saul's trial. Aside from Saul's vexed relationship with whites,[56] Wright's narrative depicts Saul's splintered family (as was common for enslaved people in the antebellum period);[57] geographic volatility in childhood;[58] and chronic alcoholism, which functions as a coping mechanism that restores "three-dimensional[ity]" to his surreal world (188). By age fifteen, Saul concludes that this life "was to be his lot," though he conceals his mounting "anxiety about the unexpected happening" from African American friends, who are impressed by his kindness and loyalty (187-89). In this precarious personal context, dominated by Saul's fear of "the shadows" "some day claim[ing] him as he had seen them claim others" (188), the importance of stable employment – which Maybelle threatens to undermine with her complaints – is magnified for Saul. He internally fumes: "So you're the bitch who snitched on me, hunh?" immediately before the murder (192).

Saul suffers from acute double-consciousness,[59] alienated from the "white shadow-world" he depends on for his livelihood but miserable at being consigned by whites to a subpar black world he inwardly rejects, for "he did not feel inferior and he did not think he was" (187). Saul's long-repressed anxiety manifests in the murder, which he is depicted as being doomed to commit because of the psychological angst ensuing from the insatiable arousal of his American

[56] Saul quits one job after a white colonel refuses to raise his salary; leaves another position where his boss directed what he conceived of as a "slighting remark" toward him; and feels incapable of complaining about Maybelle to his supervisor at the National Cathedral, reasoning, "why talk to one shadow about another queer shadow?" (189-91).
[57] Saul has minimal memory of his parents, who die in his childhood. His seven siblings are split among relatives after his parents' death; Saul lives with his grandmother until she also dies abruptly in his youth (186-87). Saul's relationship with his wife appears equally distanced. He marries her while "mildly drunk" as a reprieve from his depression and few details are provided about her aside from her working an overnight cooking job (189, 197). Wright's story starts, "It all began long ago" (185), arguably referring not only to Saul's problems but those of African Americans more generally during the period who were situated similarly as Saul.
[58] Readers are encouraged to empathize with Saul here through use of the second-person as he trails his grandmother across the South: "Towns were places you lived in for a while, and then you moved on" (186).
[59] As W. E. B. Du Bois defined the term in *The Souls of Black Folk* (1903): "It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his two-ness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder" (11).

Dream aspirations (187, 193).[60] "[A]n insurgent act is but a man's desperate answer to those who twist his environment so that he cannot fully share the spirit of his native land," Wright argued in *Black Boy* (355). Yet Saul is only able to perpetrate the homicide by relegating Maybelle to a mere "shadow" (as opposed to sentient human), reciprocating how he believes he has been treated by her and other whites. Nearly all the white characters in the text are described as unnamed "shadows" for Saul, who until his indictment is unaware of his victim's name despite working alongside her (200),[61] illustrating the psychological distance between the races in spite of physical proximity. The narrator remarks about Saul's assault of Maybelle, which can be seen to follow inexorably from mutual racial dehumanization, "It never occurred to him that he could help her, that she might be in pain, he never wondered even if she were dead" (197).[62]

This chilling line conveys the scope of the racism problem as Wright perceived it and existential necessity to terminate the cycle of internecine violence that his story epitomizes. Factual accuracy is shown to advance this objective, however slightly; the story ends with a physician's attesting to Maybelle's virginity in court (201), a minor atonement for Saul. His redemption from false accusations could be figured as that of African Americans more generally during the period, an integral first step from Wright's perspective to secure constitutional rights for people of color, and this exoneration notably comes from scientific evidence of the type

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[60] As Wright in *Black Boy* delineated the American Dilemma's impact on African American men:

> Although they lived in America where in theory there existed equality of opportunity, they knew unerringly what to aspire to and what not to aspire to. . . . Like any other American, I dreamed of going into business and making money; I dreamed of working for a firm that would allow me to advance until I reached an important position; I even dreamed of organizing secret groups of blacks to fight all whites . . . . Yet I knew —with the part of my mind that whites had given me—that none of my dreams was possible. (232, 313)

[61] The characters even seem to speak different languages; as Maybelle apparently sexually propositions him in demanding that he clean under her desk, Saul fails to fully comprehend the double-entendre. He responds: "'I just cleaned under your desk this morning'" but "sens[es] that he was not talking about what she meant" (193).

[62] Saul is so estranged from his actions that he is unsure if he actually committed the murder: "It seemed that he had just finished doing an old and familiar job" (197). This disturbing sentence is evocative of Saul's emotions in his prior position as an exterminator, which granted him a momentary burst of empowerment: "He liked seeing concrete evidence of his work and the dead bodies of rats were no shadows. They were real. He never felt better in his life than when he was killing with the sanction of society" (189-90).

Houston employed in litigation. Although Houston's approach was unsuccessful before a majority of the Supreme Court in *Fisher*, the hairsbreadth nature of the decision – a 4-3 split, with the dissenters being amenable to considering social scientific evidence on race – could in retrospect be seen to bode well for Houstonian jurisprudence in the longer term; *Brown* eight years later (controversially[63]) cited such scholarship.[64] Houston, then, while seeking to save an individual defendant's life in *Fisher*, was also deftly laying the groundwork for a national campaign to abolish *de jure* and *de facto* racial segregation. Houston's sharing *Fisher* case records with Wright demonstrates that the "architect of modern civil rights litigation" (J. Clay Smith, Jr., "Forgotten Hero" 487) conceived of literature as an indispensable ally in an ongoing struggle.

In 1951, a year after Houston's death and over half a century after legal realism's inception, Yale Law professor and French literature Ph.D.[65] Grant Gilmore acknowledged legal realism's value in demystifying law but lamented, "We stand amid the wreck and ruin of a jurisprudence which cannot be rebuilt" ("Review of *The Bramble Bush*" 1252). For Gilmore, "Llewellyn and his co-conspirators . . . . skillfully led us into the swamp. Their mistake was in being sure that they knew the way out of the swamp: they did not, at least we are still there" (1252). Gilmore's claim resounds jurisprudentially and socially today, but legal realism and literary realism's entwinement in the texts analyzed here suggests more progress from the mire

[63] As a contemporaneous *New York Times* article's title claimed of *Brown*: "A Sociological Decision; Court Founded Its Segregation Ruling on Hearts and Minds Rather Than Laws" (Reston).
[64] The now (in)famous footnote 11 referenced psychological research and Myrdal's *An American Dilemma*, based on which the Court held: "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding [of racial segregation's deleterious psychological effects on children] is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected" (494-95). The Court has since then not been consistent in reliance on social scientific evidence; as noted earlier, the majority in *McCleskey v. Kemp* (1987) was sufficiently perturbed at the wide-ranging ramifications of accepting empirical proof of racism in administration of the death penalty that it rejected an African American defendant's Eighth Amendment claim.
[65] Gilmore's dissertation was on the Symbolist poet Stéphane Mallarmé (Kornstein, "Success of the Word" 277).

than Gilmore accedes to. Immersing themselves in the homegrown tradition of dissent dating from the revolutionary era, legal realists came to embrace a more economically and racially egalitarian vision of American democracy, which materialized in the form of the New Deal and the civil rights movement. Less observed, at least from a legal perspective, has been how literary realists were simultaneously striving toward the same ends, transposing esoteric legal principles from cases and academic publications into more corporeal language and popularly accessible genres.

While undoubtedly committed to depicting law and society as they existed, the realists assayed above also "want[ed] and f[ou]ght for the *Union* '*better than it was*,"' to quote Albion Tourgée's declaration, for which he expressed a willingness to die at the height of the Civil War, the same year President Abraham Lincoln issued the Emancipation Proclamation. The two intellectual movements' successes and failures in attaining Tourgée's goal have much to teach us as the realists' heirs. Most notably, while we may not, in Judge Learned Hand's words, "hope to reach a formula which will prove the key to the lawyer's paradise," or an everlasting solution to the social and legal problems discussed here, scholarship like this project can "at least . . . serve us to know in what directions we can best move and for what success we can hope" (89).

Another Story: Revisiting the Athenaeum[66]

Justice Harlan in his *Plessy* dissent memorably affirmed, "The destinies of the two races in this country are indissolubly linked together" (560), and at the outbreak of World War II,

[66] By "another story" I refer to the word "another" in three senses, as in a repetition of the same story or a similar story and, in contrast, a different story. Which meaning materializes depends on how the past and present foreordain the future. The section title is inspired by the Head and the Heart song "Another Story," whose lyrics read in part: "I see a world / A world turning in on itself / Are we just like / Hungry wolves in the night / I don't want no music tonight // . . . . I'll tell you one thing / We ain't gonna change much / The sun still rises / Even with the pain // I tell you one thing / We ain't gonna change love / The sun still rises / Even through the rain."

Richard Wright, through Boris Max, Bigger Thomas's attorney in *Native Son*, echoed the Justice. Max's opening statement for his client nationalizes Bigger's case[67]:

> I know that what I have to say here touches the destiny of an entire nation. My plea is for more than one man and one people. Perhaps it is in a manner fortunate the defendant has committed one of the darkest crimes in our memory; for if we can encompass the life of this man and find out what has happened to him, if we can understand how subtly and yet strongly his life and fate are linked to ours—if we can do this, perhaps we shall find the key to our future, that rare vantage point upon which every man and woman in this nation can stand and view how inextricably our hopes and fears of today create the exultation and doom of tomorrow. (382)

With white supremacists overseas perpetrating millions of deaths, Wright clearly envisaged the import of domestic racial reconciliation to avoid a comparable catastrophe at home and to ensure America could remain a moral pharos during a perilous global time. Gunnar Myrdal redoubled Wright's plea four years later, presenting a stark national appraisal: "America is free to choose whether the Negro shall remain her liability or become her opportunity. The development of the American Negro problem during the years to come is, therefore, fateful not only for America itself but for all mankind. . . . To do nothing is to accept defeat" (1021-22).

Myrdal's *An American Dilemma* focused on the historical liability side of the racial question but optimistically ventured: "*The moral latitude is very wide in America: if there is much that is very bad, there is also unusually much that is extremely good*" (liv). Publishing *The Epic of America* (1931) during the Great Depression, James Truslow Adams foretold this mixed

[67] Bigger, an impoverished young African American man, is accused of raping and murdering his wealthy white employer's daughter after he accidentally chokes her to death while attempting to squelch her screaming. He is also tried for slaying his girlfriend, who is African American, upon fleeing from the initial homicide scene.

diagnosis of national morality. Adams's paean to buoy the country's spirits ends at the Library of Congress, which becomes a synecdoche for American democracy's optimal operation. Adams conceives the institution as "com[ing] straight from the heart of democracy" and serving as "a symbol of what democracy can accomplish on its own behalf. . . . Founded and built by the people, it is for the people" (414). Observing public use of a reading room, Adams enthuses:

> [O]ne sees the seats filled with silent readers, old and young, rich and poor, black and white, the executive and the laborer, the general and the private, the noted scholar and the schoolboy, all reading at their own library provided by their own democracy. It has always seemed to me a perfect working out in a concrete example of the American dream – the means provided by the accumulated resources of the people themselves, a public intelligent enough to use them, and men of high distinction, themselves a part of the great democracy, devoting themselves to the good of the whole, uncloistered. (415)

Instead of a library in the nation's capital as the site of racial strife undercutting equitable ideals signified by the USS Constitution, Adams contemplates the pursuit of knowledge fostering social harmony across lines of race, class, education, and age. The poignancy of the image moves him to reflect: "It seems to me that it can only be in some such way, carried out in all departments of our national life, that the American dream can be wrought into an abiding reality" (415).

For Adams, a new birth of freedom would originate from the interchange between distinguished scholars and other authors creating texts for the public good and a diverse citizenry eager to glean insights from the volumes; from legal realists and literary realists with distinctive means yet conjoined ends mobilizing public support for social and legal justice. Contemporary times may appear to underline shortfalls in the realists' achievements, but their ideological legacy retains its potency. In February 2017, as part of state litigation contesting President

Donald Trump's first executive order restricting travel from seven predominantly Muslim countries, the Commonwealth of Virginia filed a preliminary injunction motion whose supporting brief concluded by invoking Justice Harlan's *Plessy* dissent. After quoting the Justice's repudiation of cosmetic formalist arguments for "separate but equal" laws, the State continued:

> [W]hat Justice Harlan said next may be even *more* important for Twenty-First Century Americans to remember: 'the seeds of race hate' should not be 'planted under the sanction of law.' . . . Those seeds must be rooted out, as soon as possible, lest they germinate and poison more Americans. The Executive Order was conceived in bigotry and does not reflect who we are as a people. (*Aziz v. Trump* 23-24)

The assertion attests to the reality of nativist (il)legal actions yet aspires to the ideal, which it posits as an actuality: who we, the American citizenry, "are" transcends the President's conduct. The truth of this fortifying appeal is as adumbral in the United States today as it was in modern America, but as then, the vision provides spiritual sustenance for those who repose hope in a humanitarian Constitution that may, like its namesake ship, endure blows yet remain afloat.

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