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Identified, Misidentified, and Disidentified:
Subject Formation and Reformation in American Law and Literature

By

Aurelio José Pérez

A dissertation submitted in partial satisfaction of the

requirements for the degree of

Doctor of Philosophy

in

English

in the

Graduate Division

of the

University of California, Berkeley

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Spring 2010

Abstract

The Relationship of Newspaper Articles to Modern Culture

by

Aurelio José Pérez

Doctor of Philosophy in English

University of California, Berkeley

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In this dissertation, I examine legal definitions of race within the United States and the representation and reformulation of these categories within U.S. literature. The substrate of this dissertation is a collection of American literary and legal texts from the 17th through the 20th centuries. I examine how these texts chronicle, represent, and often intentionally misrepresent individuals' attempts to subvert and even openly challenge delimited identifications such as 'immigrant' or 'slave.' Often these challenges are leveled against the normative identificatory organ of 'Law,' that is, the judicial processes and legal decisions that establish and confirm these reductive identifications. The mode of the challenges I examine is movement, or literal mobility. When normative pathways of identification begin to fail, mobility gains importance as a means of transgressing, figuratively and literally, usually impermeable classificatory boundaries. The idea of mutable identity is almost a truism of modern Western thought. Less appreciated, however, is the connection between identity and location, and more pertinently, the coordination between movement and identity. This coordination is the first focus of my dissertation.

In order to understand these identifications and mobile re-identifications, this dissertation examines the sets of conditions – historical, social, biological, and especially legal – that seek rigidly to classify individuals as well as the sets of conditions that enable mobile re-identification. Phrased in another way: this dissertation explores both the possibilities of literal transgression of identificatory boundaries as well as the execution of such transgressions. Alongside literary chronicles of these transgressions, I analyze a variety of legal texts that have promulgated and structured reductive methodologies of identification. Whether negotiating slavery, Jim Crow, segregation, or post-WWII immigration politics, the examined literary texts are distinctly concerned not only with the tensions of identity, but the manners in which mobility or transit can enable self-determination through re-identification. Conversely, the examined legal texts display the formulation and repeated revision of criteria of reductive identifications chronicled in the examined literature. The power of law to establish interpretive methodologies that reductively identify individuals is the second focus of my dissertation.

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***IDENTIFIED, MISIDENTIFIED, AND DISIDENTIFIED:
SUBJECT FORMATION AND REFORMATION IN AMERICAN LAW AND LITERATURE***

I. AN INTRODUCTORY EXAMPLE

In *Incidents in the Life of a Slave Girl* (1861), Harriet Jacobs recounts the struggles she faces in surviving and escaping slavery.¹ Unable to escape the South, yet unwilling to remain a slave, Harriet Jacobs chooses to hide in the garret of her grandmother's house. The garret in which Harriet Jacobs remains is too small for her – during her interment Jacobs is unable to stand up or enjoy fresh air or sunlight.² More challenging to Jacobs than the space of the confinement, however, is its duration. Jacob remains in the nook above her grandmother's house for seven years, barely alive, socially dead, neither slave nor free.³

This incredible ability to remain entombed, as well as Jacobs' movement into other spaces, allows her to effect her own social and biological revivification. By challenging her oppression through an act of self-interment, Jacobs subverts her ostensible 'master' Dr. Flint and challenges her status as a slave. This relocation into a space unknown to and thus uncontrolled by the oppressive power structures of slavery initiates a crucial moment of re-identification for Harriet Jacobs; as she risks her life in a manner symbolically tantamount to living death, she simultaneously creates a possibility for a symbolic rebirth into a less delimited identity.

This movement into the garret and other movements by Jacobs are all attempts to surmount her social, symbolic, and juridical identification as a slave through movement. But the act, or these acts, of mobile-reidentification within Harriet Jacobs' autobiography are even more powerful because they simultaneously support Harriet Jacobs' project of literary re-identification. Written by an African-American woman in the slow build up to the Civil War, *Incidents in the Life of a Slave Girl* was an attempt to demonstrate to Northerners the terrors and iniquities of slavery and the humanity of those suffering under slavery's yolk. In this sense, Harriet Jacobs' publication is a literary exploration of slavery that establishes an identity for Harriet Jacobs that is foreclosed to her by law. It hardly requires mention that under contemporary law Harriet Jacobs was a 'slave' – or, more accurately – a fugitive slave. Deprived of basic rights, Harriet Jacobs is caught within the reductive legal identification of 'slave.' This reductive legal identification is self-contained: Harriet Jacobs cannot enter a court to challenge her status as a slave. Indeed, law even forbids Jacobs from attaining the education that might help her make this challenge.

¹ HARRIET A. JACOBS, *INCIDENTS IN THE LIFE OF A SLAVE GIRL, WRITTEN BY HERSELF* (Jean Fagan Yellin, ed., (2000) 1861).

² *Id.* at 114. ("The garret was only nine feet long and seven wide. The highest part was three feet high, and sloped down abruptly to the loose board floor.") See also, *Illustrations, id.* at 238 (showing a scale reproduction of Jacobs' hiding place). *Id.* at 114. ("There was no admission for either light or air.")

³ The property of African Americans – enslaved or free – was often subject to the whims of the white individuals who controlled the South. Indeed, what does it mean for a woman of color to "own" property when that property is subject to regular search or violation by white individuals? Thus, while Harriet Jacobs' grandmother was free and owned her house, her ability to possess her home was always limited by her ability to control the boundaries of her home. Jacobs' grandmother maintained this control only to the degree white individuals of her society ceded it. A recognition of the conflicted status of 'property,' whether Jacobs' body or her grandmother's house, parallels Jacobs' entrance into literature. In the mid-19th century the written page was a location or property that was owned by whites but occasionally granted to African Americans. Thus, Jacobs' occupation of the garret functions similarly to her occupation of the page.

Against the limitations placed on Jacobs by law are the possibilities opened up to her in literature. By recounting her story, Harriet Jacobs can attack slavery and humanize herself. In sum, Jacobs' project of re-identification comes through both the life she reveals to the reader as well as Jacobs' act of writing that life. This coordination between space, identity, and mobility and the tension between law and literature is not limited to Harriet Jacobs' tale.

In this dissertation, I examine legal definitions of race within the United States and the representation and reformulation of these categories within U.S. literature. The substrate of this dissertation is a collection of American literary and legal texts from the 17th through the 20th centuries. I examine how these texts chronicle, represent, and often intentionally misrepresent individuals' attempts to subvert and even openly challenge delimited identifications such as 'immigrant' or 'slave.' Often these challenges are leveled against the normative identificatory organ of 'Law,' that is, the judicial processes and legal decisions that establish and confirm these reductive identifications. The mode of the challenges I examine is movement, or literal mobility. When normative pathways of identification begin to fail, mobility gains importance as a means of transgressing, figuratively and literally, usually impermeable classificatory boundaries. The idea of mutable identity is almost a truism of modern Western thought. Less appreciated, however, is the connection between identity and location, and more pertinently, the coordination between movement and identity. This coordination is the first focus of my dissertation.

In order to understand these identifications and mobile re-identifications, this dissertation examines the sets of conditions – historical, social, biological, and especially legal – that seek rigidly to classify individuals as well as the sets of conditions that enable mobile re-identification. Phrased in another way: this dissertation explores both the possibilities of literal transgression of identificatory boundaries as well as the execution of such transgressions. Alongside literary chronicles of these transgressions, I analyze a variety of legal texts that have promulgated and structured reductive methodologies of identification. Whether negotiating slavery, Jim Crow, segregation, or post-WWII immigration politics, the examined literary texts are distinctly concerned not only with the tensions of identity, but the manners in which mobility or transit can enable self-determination through re-identification. Conversely, the examined legal texts display the formulation and repeated revision of criteria of reductive identifications chronicled in the examined literature. The power of law to establish interpretive methodologies that reductively identify individuals is the second focus of my dissertation.

II. CRITICAL DEFINITIONS

In order to accomplish the two aims of my dissertation, I need to outline the parameters of some of the terms and concepts I use. Terms such as 'space,' 'place,' 'movement,' 'identity,' and 'identification' are central to this dissertation. On one level, my usage of these terms is not uncommon. Despite their frequency, I do not intend to imbue the terms with special authority or expanded meaning. Indeed, I am less interested in an esoteric articulation of the terms I use than an acknowledgment that, like identities, terms can shift and evolve, succumb to and resist both appropriation and strategic deployment. On the other hand, I do not intend this acknowledgment of mutability as a claim against meaning. A term that can mean anything is seldom very helpful.

The first, and perhaps most important, terms to discuss are "identity" and "identification." In this dissertation, I both acknowledge and analyze the fluidity of identity, but this is only the starting point. I am more interested in how the 'who' of identity intersects with the 'what' of identification. By way of illustration, I seek to understand the battles that, whether

fought in international legal policy or the words of one's own diary, track the conversion of "I am someone" to "you are something." In my attempts to understand identity, I look at identity as more than just a process – looking at change itself is less than satisfactory. In this dissertation, rather, I attempt to interrogate the processes of change. I consider how identity changes, why it changes, as well as how and why individuals accept or resist those changes. Stated more specifically, I use this dissertation to chart the set of roles open to an individual as well as the manners through which an individual chooses from this set of identities, rejects the set entirely, or enlarges the set.⁴ I now consider the meaning of "identification."

In the readings I advance in this dissertation, "identification" is a counterpoint to "identity." Normally, these terms work together with the latter resulting of the former. But when individuals contest their identities, they are often contesting the processes by which they have been identified. It is exceedingly simple, yet hardly simplistic, to find contested identities and identifications in literature. Such identifications are apparent in almost all the texts I examine. At the same time, however, I focus on the identities of those individuals who exercise the power to identify others. As a discourse, law favors the evacuation and subsumption of identities into the greater whole. When we speak of will of Congress or the decision of the Court – we are talking about a singular whole composed of many distinct individuals. There is no simple answer for who is responsible for the Chinese Exclusion Act or *Plessey v. Ferguson*. It is equally difficult to say "who" has determined the admissibility of evidence or the legal identity of the individual or of a group. With this in mind, I stay focused on law's entanglement with processes of individual and group identification as well as the manner in which law often evacuates the identity of the identifier as well as the identified.⁵

In this dissertation, I view demarcated spaces and the mobility by which individuals transgress space to be powerful weapons for both resisting identification and bringing about one's own re-identification. Anyone who has ever played Tag or "hide and seek" growing up can understand how space can correlate with the potential of identity. If you are 'on base,' then you are safe. If you are not 'on base,' then you are in danger of being tagged or caught, of being reidentified from "not It" to "It." This comparison, admittedly facile, nonetheless demonstrates the effects of spaces and locations to set or convert identities.

In the following chapters, I look at identity and identification in a number of spaces.

⁴ In setting forth my own theories on racial identity and identification, I must acknowledge the influence of Judith Butler's scholarship on the cultural construction of gender coherence. Despite the guidance I have taken from Butler's work, gender coherence is not completely analogous to the coherence of racial identity. Butler stresses that the performance of gender is not voluntary. Comparatively, for a number of characters I examine, performance of an identity is a choice that can be performed or rejected, albeit with difficulty. The ability to choose one's racial identity, or, in Butlerian terms, perform one's identity, demonstrates the resistance of the subject while attesting to the powers of the ritualized performances, productions, acts, styles, and sequences that signal specific identities. At the same time however, I must note that, as with gender, many of the markers of racial identity are set in a manner that directs most individuals towards the performance of a specific identity; for many individuals identified as 'black' the performance of 'white' would be exceedingly difficult if not impossible. Not all individuals are capable of passing. Nonetheless it is this set of individuals—those able to traverse the lacuna of identity—on whom I focus in this dissertation.

⁵ At the basis of all of the identifications I examine is choice—the nature of choosing that is inherent in the notion of identification. Identification of course has multiple meanings in this context. The acts of these individuals to disavow their circumstances in favor of another possibility are an identification. On the contrary, the law's juridical efforts to lock identities into intelligible forms also serves as identification. Derrida and Cover's work on the force of law have been influential to my scholarship. See Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority"*, 11 CARDOZO L. REV. 919, 945 (Mary Quaintance trans., 1990); Robert Cover, *The Supreme Court, 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (Nov. 1983).

Some of these spaces are architectural – houses, apartments, cabins. Some of these spaces, such as the United States, a West Indian Island, or the honorable field of combat, are geo-political. Although these spaces are also actual locations, their boundaries are established by laws and rules. Whether discussing physical or codified spaces, we miss the importance of these spaces if we view them as only locations. To appreciate the difference between an abandoned field and the field of a duel, or a room with a bed and a bedroom in one's own house is to recognize not only the multivalence of a location, but rather a location's power to shift, shape, or refute an identity.

III. PERSONAL BACKGROUND

The project outlined above has been a long time in the making and has continued to evolve. In order to understand its implications, it helps to have a little background on how I got here. The importance of what I do is perhaps best approached by an overview of why I do it. Of course, why I do it depends on who I am.

As a young child I escaped a revolution in Nicaragua by immigrating to the United States. When the upheaval came, my parents left their home and country with whatever they could carry. On the backs of *burros* we crossed over the mountains into another country. From there my mother, originally from Ohio, grappled with the government of the United States until it granted permission for our family to enter and become citizens.

As I grew up, I often considered this story with ambivalent feelings of wonder and anger. I was secretly thrilled to have had such an exciting beginning in this world, yet my family's connection to Latin America and its manifestation in my dark complexion, hair, and eyes and my 'foreign' name irrevocably separated me from the other, paler faces among whom I lived in Southeastern Ohio. I was also separated by language. I had learned to speak English quickly, but I spoke with a Spanish accent. For a number of years my elementary school sent me to a speech therapist in order to 'correct' my speech.

Although I was ultimately successful in learning to sound like, if not quite look like, my peers, this was only the first of a number of times I would have to establish another identity in order to fit in. When I left Ohio for a prestigious college on the East Coast, I encountered another linguistic challenge. My new set of college peers was uninterested in my Latin-American roots – they had met numerous Latin Americans. On the other hand, a number of them found my Appalachian upbringing and the strange country accent that sometimes came out in my English interesting. For the first time then, I felt like a Midwesterner. Later, while living abroad, I would similarly start to feel like an American.

In themselves, these realizations are not that exciting. Neither are they unique. I imagine that most individuals who have moved from one culture to another have, in recognizing their differences from their new cultures, have also recognized how their identities coincide with the cultures from which they come. My personal recognition of this phenomenon dealt with more than my identity. For if difference was the background to identity – its coin – then mobility was the economy in which these differences came into poignant relief. It was my recognition of difference that allowed me to identify myself as Latino, as Midwestern, as American, but it was acts of movement that spurred these self-identifications.

Through these movements, I was brought to a cusp of realization – a penumbra of understanding that I would not be able to articulate for a number of years. I recognized the binary nature of identification. I knew that one is ever and always identifying one's

identification and one is ever and always being identified with identifications not of one's choosing. The shift from foreign to native, immigrant to citizen, white to brown, Midwesterner to East Coaster, etc. were accomplished through processes in which I took active part. But these identifications were also done to me in important ways.

IV. LITERARY CONNECTIONS

As important as I found the connection between my own identity and my physical location, literature showed me that such moves and the tense re-identifications they precipitated were not unique to my experience. Identity challenges are often central to a text and I had encountered these themes in numerous works.

During my undergraduate career, I spent many months reading the literature of the New Negro movement and the Harlem Renaissance. I remember the fascination I felt as I tracked the identities and identifications that grew out of and evolved during this period. But my interest in identity and its representation in literature did not culminate until after I had graduated and was living in Austria. It was during this time abroad that I first encountered ethnic German literatures and their complex treatment of alienation and identity. These literatures, which had grown out of waves of immigration to Germany following the Second World War and Reunification, were distinct.⁶

Written on a different continent, from the background of different religions, between multiple languages, and at the other end of the 20th century, the works of authors such as Emine Sevgi Özdamar and Wladimir Kaminer had, on their surface, little in common with the ethnic American literatures I had studied as an undergraduate. Despite these numerous 'cultural' differences, however, there was still a similarity, an aesthetic of not belonging, of mis-identification and disidentification. The thread of this aesthetic ran through the ethnic literatures of both the United States and Germany. In this regard, literature showed itself to be an exceptional medium for recording conflicts of identity and challenges of identification. While still in Europe, I applied to doctoral programs in literature in order to pursue literatures' ability to explore and, in part, explain these conflicts and challenges.

I came to the English Department at the University of California, Berkeley interested in the textualization, that is, the presentation of identity in literature, and the 'changes' in identity that occur. As described above, I was interested in mobility in literature, that is, literal movement and deliberate lack of movement, as strategies of re-identification. I was fascinated by instances of passage, migration, and/or transit, that is, by characters who literally moved in order to cross boundaries, both literal and figurative. Indeed, I was less concerned with the distinction or choice between 'figurative' and 'literal' movement than the installation of

⁶ Like the United States, Germany is a country fixated on identity and identification. Also like the United States, Germany is a country that struggles to cope with an atrocious past even as it becomes increasingly multicultural and diverse, both demographically and literarily. Not until this millennium did Germany finally make it possible for people of non-Aryan descent to achieve German citizenship. Germany revised their citizenship laws in order to harmonize with the legal standards of the European Union. Until this change to the *jus soli* (land-bound) conferment of citizenship, Germany had continued to acknowledge exclusively a *jus sanguinis* (blood-bound) conception of citizenship that had come into place with the 1935 passage of the "Reich Citizenship Law." Thus, only during the last decade or so has the significant population (according to once source approximately 6.5 million) of non-Aryan immigrants and their genealogical descendents been able to seek citizenship of the country in which some have resided for more than 30 years.

abstractions into a specific material reality – what was the ‘boundary’ and why was the boundary viewed as the boundary?

Gloria Anzaldúa’s *Borderlands/La Frontera: The New Mestiza* had taught me to challenge the conception of a border as a simple divide and instead to refigure it as an area to be inhabited, in which identity is a constant challenge. Similarly, Audre Lorde’s *Sister Outsider*, showed me that one individual might simultaneously be a part of and apart from the community. Together, these theorists and others spurred my realization that a study of societal oppression is a study of differences. Whether perceived or ascribed, these differences are often maintained through the border that contains and separates the normative space. The ability to blur these lines, to shuffle social hierarchies, to pass, and/or to engage hybridization—all focus on an ability to function from multiple locations within restrictive boundaries. Yet these movements, or multiple positions, are often attended by difficulties as well. When normative systems of cultural code are compromised, the typically incontrovertible truth of identity can be converted into a malleable character trait; hence, a sense of position can be lost and feelings of cultural alienation may occur. By examining these differences within spatial coordinates, I hoped to produce an inclusive examination of the way in which these literatures, chronicle, create, represent, and (intentionally) misrepresent the encounters of difference.

In the literary example cited above as well as many other texts, I recognized and charted the importance of mobility. In these texts, mobility was a means of transgressing usually impermeable classificatory boundaries, of becoming something else and someone else. At the same time, these chronicles of crossings both reified and subverted the normative pathways of identification. By tracking the explicit codification of space and the identificatory practices designed for and instituted against various groups of individuals, these literatures both cited the power of boundaries and spaces to establish identity even while publicizing the failure of such modes of identification.

V. LEGAL BACKGROUNDS

As I deepened my intellectual commitment to this evolving project, it became clear that my ability to understand encounters of difference was limited by knowledge of the systems through which these ‘differences’ were created and tracked. I realized that I need to examine the sets of conditions—historical, social, biological, legal, etc.—that seek to rigidly classify subjectivities as well as the sets of conditions that enable mobile re-identification. Phrased more simply: To study the transgression of identificatory boundaries I had first to study these boundaries. I began to consider these boundaries. What are they? Similarly, what were the normative frameworks of identification? More complexly, how are these boundaries, represented in literature, instituted and maintained in society?

Attempts to answer these questions had already pushed me in many directions; I had pored over the theories of Heidegger, Hegel, Foucault, and Marx and read the scholarship and criticism on legal theory in my field. Yet the approaches of continental philosophers and literary critics to questions of power and its deliberate imbalances were, in spite of their rigor, limited in many cases to broad explanations of the formation and continuance of oppressive systems.

More troubling however, the theories and discussions of law I studied often failed to accord with the stories and perspectives on the law that I gained from my mother, a correctional officer in a men’s prison in Ohio. While my mother’s perspective was not controlling, the

distance between the theories I had encountered and the experiences she had related to me as I grew up had left me dissatisfied with my understanding of law. This concern with law mounted.

As I continued my studies, my research, and my writing, I began to focus more and more on juridical considerations. I began to recognize and appreciate the manner in which legal codes have defined and continue to set the limits on spaces, movements, and identities. I became interested in how a system of rational thought and rules designed for the maintenance and improvement of society could be used to justify slavery, segregation, and oppression in many other forms. I was also deeply fascinated by the general status of law as a dominant codification of authority and power in the United States. Soon, law came to occupy a central role in my analyses. Within a short time, I began to recognize that the power and influence of law was pervasive – whether structuring ‘property’ transactions, controlling immigration, or formulating the criteria for biological identification, the power of law was paramount. I realized that in order to examine the ‘real’ ways in which power and authority are codified and enforced I needed to pursue a legal education. As with my initial interest in identity, there was also a personal aspect to my interest in law.

The American legal system at first denied and later allowed my entrance into the United States. Although I was too young to understand the political and legal maneuvers that had expedited our departure from Nicaragua and enabled my entrance into this country, I grew up with an acute awareness of the ability of legal boundaries fundamentally to change my life. This change, for all it gave and all it took, was in one very powerful sense an accomplishment of U.S. immigration policy.

The American legal system later allowed my parents to divorce. My parents’ separation would have been much less likely in Catholic Central America. Law negotiated and regulated the government housing project in which I spent over a decade. Social policies provided public schooling, subsidized lunches, and also the grants necessary for my mother to study police science and corrections. As mentioned above, law supplied my mother a job as a corrections officer. Her position brought my family out of poverty and taught us so much so quickly about the flaws of the American penal system. Legal mechanism has also put members of my family in prison and, later, allowed their release. How did any of these events happen? On a superficial level I understood these occurrences the same way I knew how to drive a car. Yet if I had really examined the cause of any of these events, if I had looked under the hood of this automobile, I would have been forced to acknowledge my ignorance of the processes that had repeatedly exerted fundamental effects on my life.

Taken together, the first quarter century of my life provided me with ample opportunity to develop and cultivate both an understanding of cultural alienation and an appreciation for the power dynamics through which legal and cultural construction of identity roles occur. These experiences with alienation and oppression educated me with a tenacity that I have still yet to encounter in a classroom. More important however, these experiences were echoed in the literary texts that had fueled my strong desire to pursue graduate study. As I acknowledged the importance of similar narratives to my own experiences, my immigrant identity, and the personal narrative that sprang from my experiences and identity, I realized that I needed a stronger understanding of law. By studying both the abstract theories and actual results of law in the United States, I hoped to tease out the connection between identity, mobility, and law’s establishment and maintenance of restrictive identificatory boundaries. Fortunately, UC Berkeley also had a law school.

The semester after I advanced to candidacy, I began my pursuit of a J.D. at Boalt Hall. By enrolling in law school, I intended to acquire both an alternative hermeneutic access to literature as well as a set of professional skills. Through the painstaking process of learning the rudiments of law, I hoped understand (and participate in) a discourse whose influence in American society is, without exaggeration, ubiquitous.

VI. COMPETITIVE DISCOURSES

From the first, my legal studies enriched my attempts to examine and interpret American literatures through discourses of culture, race, gender, and migration. As I read early cases in property, tort, and contract law, I became aware of the influences that law had exerted and continues to hold in American society and American literatures. By studying both theories of law and the application of laws, I augmented my understanding of the centrality of law to social constructions of identity categories while examining the legal origination and maintenance of normative spaces. In short, my studies at Boalt Hall provided me the unique opportunity to become informed about and contribute intelligently to the conversations about the overlap between law and literature. I came to understand, in different registers, the correlation between space and identity. By thinking like a lawyer, I both deepened and confirmed my suspicion that when more common identificatory frameworks fail, movement becomes a privileged and powerful means of re-identification.

Despite the opportunities I gained through my matriculation into a law school, the pursuit of a legal education also posed challenges to my project. First and foremost, concurrent completion of two graduate degrees was personally as well as academically challenging. Much of this dissertation was literally written in law school. Between classes in which I learned how to compose a suit, argue jurisdiction, or dispute the admissibility of evidence, I scribbled notes, thoughts, and revisions that I later incorporated into the following chapters. Law was in the air as I completed my doctorate, and law affected not only the substance but also the style of this dissertation.

After spending years learning to think, interpret, and write like the literary academic I had hoped to become, law school confronted me with a new paradigm of thought and expression. In legal writing, clarity and conciseness were paramount. Much of the goal of legal writing was to produce documents that could be read as quickly as possible. I was immediately taught to excise adjectives, frown upon clauses, and eschew élan. One sentence, one thought, one verb – that was the new mantra. The challenge of developing an alternative fluency and an alternative literacy was difficult. But in reading the cases lawyers read, and learning to write like a lawyer, I began to develop the ability to think like a lawyer and to understand, in a different manner, the power of legal language. The importance of this power becomes apparent through a comparison.

For Harriet Jacobs, and the other characters I study, literature and law are discourses in competition. Each discourse is a system, based on language, that seeks to identify the character against the identity offered by the other discourse.⁷ Whereas law might identify one individual as a slave, as black, or a criminal, literature probes, confounds, and subverts these identifications. As a discourse, literature explores possibilities that are foreclosed within and by the discourse of law. Although the conflict between the discourses of law and literature is apparent, recognition

⁷ Without making my project Foucauldian, I acknowledge Foucault's importance. Most important perhaps is his theorization of 'discourse' as a medium through which power relations can construct truth and/or the subject.

of the conflict still does not answer why it exists. Why the difference between literature and law?⁸

This question is not glib. Both discourses rely on the same currency – words. But there is difference between “It was the best of times, it was the worst of times...” and “You are prohibited... .” We see this difference most clearly in the consequences of the two phrases. The former phrase elicits an internal response, whether emotional, intellectual, or both. Its goal is to make one think or feel. Comparatively, the latter phrase elicits an external response. Its goal is to make one do or not do. As indicated by the literary examples above, the discourses of law and literature sometimes clash when they attempt to define not that which one should or should not do, but rather who one is or might be.⁹ These differences are apparent. Nonetheless, I did not discern all the ramifications of this discursive difference until I myself had spent years attempting to construe statutes and case law, write legal arguments, and interpret and even assist in the composition of legal opinions.

VII. FROM DISCURSIVE COMPARISON TO A COMPARISON OF DISCOURSES

My consumption, review, and production, of legal theories, arguments, and documents have increased my understanding of law as a discourse. Over the last four years, I have come to recognize the modes of thought prevalent in the law and placed myself in a position from which I might compare literature’s engagement with law with law’s engagement with literature. Comprehension of the ways in which law has historically contributed to oppression in the United States has enabled me to view literature as a discourse of the oppressed, a manner through which the disenfranchised record and attempt to change the society and the laws that have constructed and constricted identity. This query is not *sui generis*.¹⁰ Although Gayatri Spivak’s famous question – can the subaltern speak? – echoes in this dissertation, my stress is different.¹¹ In

⁸ Despite the difference between the two discourses, they remain connected. As Robert Cover notes “[n]o set of legal institutions exists apart from the narratives that locate it and give it meaning.” See Robert Cover, *The Supreme Court, 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (Nov. 1983).

⁹ I see this recognition as a reformulation and, in part, an expansion of J.L. Austin's concept of the performative utterance. See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962). According to Austin the illocutionary force of the word is always context dependent. To accommodate Austin’s theory to my project requires only the slightest shift, such that we recognize that the discourse in which the words are delivered is the primary determinant of the context. Nonetheless, the applicability of Austin’s theory is limited. While Austin was concerned with whether performative utterances are “truth-evaluable,” my project denies a true/false dichotomy. This is not to deny the importance of truth and falsehood to law or literature. Part of the project of legal discourse is deciding what is true. Literature is often already operating from a point of ‘falseness’ or fiction. Nonetheless, law’s ability to create truths that limit individuals as well as literature’s ability to (truthfully) reidentify individuals discounts a simple boundary between the true and the false.

¹⁰ I sometimes doubt the power of critics to speak for my interests and to speak my desires. Yet while I eschew attachment to any specific critical framework or paradigm, it would be, at best, myopic for me to deny the influence critical theorists have had on this project. The scholarship of other critics provides a constellation that structures my project even if it does not explicitly guide it. To paraphrase Emily Brontë: a number of these theorists “have stayed with me ever after, and changed my ideas; they’ve gone through and through me, like wine through water, and altered the colour of my mind.” EMILY BRONTË, *WUTHERING HEIGHTS* 164 (Plain Label Books, 1935 (1847 sub. nom. Ellis Bell)), available at http://books.google.com/books?id=rmt_jE2BpEwC&printsec=frontcover&dq=wuthering+heights&source=bl&ots=FZu_Wt7GCo&sig=tHWITctMaKD6sIFbh9t2f_vDW30&hl=en&ei=5RPGS6BPIP6yA_PMxLcN&sa=X&oi=book_result&ct=result&resnum=3&ved=0CB4Q6AEwAg#v=onepage&q&f=false (last visited Apr. 14, 2010).

¹¹ Gayatri Chakravorty Spivak, *Can the Subaltern Speak?* in *MARXISM AND THE INTERPRETATION OF CULTURE* 271 (Cary Nelson and Lawrence Grossberg, eds. 1988).

suggesting the term ‘subaltern,’ I am not just using “a classy word for oppressed.”¹² Indeed, my stress in the question is less on ‘who’ and more on ‘what.’ Whether Harriet Jacobs or Joe Christmas or Lucy Potter is truly subaltern or only oppressed misses the point. In this dissertation, I am interested less in who might be subaltern than what qualifies as ‘speaking’ – in the discourse of law these individuals are silent; in the discourse of literature they ‘speak.’

Ultimately, I attempt, in this dissertation, to perceive both the connections and disjunctures between the discourses of law and literature. Literature is a medium that records the legal construction and reduction of identities. At the same time, literature works against this reduction insofar as it provides a potential space for the transgression of established boundaries and thereby serves as an arena for identity struggles. But what is the difference? Part of the purchase of my project comes just from asking this question in such basic terms. As noted above, both literature and law depend on words. As further noted, each discourse uses words to accomplish different results. By itself however, this understanding helps little for statements that arguably implicate both discourses. Towards the beginning of *Puddn’head Wilson*, the narrator notes “Dawson’s Landing was a slave town.”¹³

In this sense, literature provides a discourse, or, if you will, a space in which an author might catalogue moments of individual or group resistance to identifications as well as the normative strategies, legal or otherwise, by which these identifications are made and transmitted. These moments are not recorded within the discourse of law. By recording these acts of resistance, literature, and my dissertation in turn, remain focused on the individuals who overcome coercion to affect their own re-identification. To get to the heart of this point, literature is the necessary access point by which I explore the ‘real’ ways in which these identities and spaces are controlled.

Not only does literature reveal the discursive limitations of law to sedulously explore identities and identifications, but literature can also vivify legal accounts. A century of American immigration law comes alive with the stories of those individuals it has affected. Despite this advantage, literature is also limited by this ability. In comparison with literature’s potential for artistic flourish and excess, law provides an actual record of how oppression and limitations are wrought by identification. Statutes and cases provide little more than is necessary to accomplish their results. It is this sparseness that reveals exactly the power of words to control and implement actions. Taken together, a consideration and comparison of these two discourses indicates both the basic causes and elaborate effects of restrictive identifications.

In this dissertation I repeatedly compare legal productions with literary productions. Nonetheless, the objective of this dissertation is more than a dry comparison of the two forms. Rather, the bounty of this dissertation comes from the cross-employment of interpretive modes that dominate each discourse. In the forthcoming chapters, I use close reading to analyze the hidden work of reductive hermeneutics performed by American laws and judicial decisions. Like statutory interpretation, I look to traditional canons of legal interpretation, guiding precedent, and legislative history to understand the statutes and cases I examine. But the methods of legal interpretation are only a starting point. Just as laws seek an identification, strategies of legal interpretation are weakened by their aim of discovering and installing one specific meaning. In contrast, I use close reading exegetically. As a tool of literary

¹² Leon de Kock, *Interview With Gayatri Chakravorty Spivak: New Nation Writers Conference in South Africa*, 23 *ARIEL: A REVIEW OF INTERNATIONAL ENGLISH LITERATURE* 3, 29-47 (1992).

¹³ MARK TWAIN, *PUDD’NHEAD WILSON AND THOSE EXTRAORDINARY TWINS* 4 (Sidney E. Berger, ed., Norton Critical Edition 1980) (1894).

interpretation, I employ close reading not to seek one ultimate answer, but rather than to investigate the numerous possible answers and interpretations. Explained through a metaphor, I use close reading as a light, not to illuminate one meaning (or identification), rather to discover the multiplicity of shadows cast by the language of law. By seeking the contortions, rivulets, and contradictions of logic – expressed in language – I reveal the awesome and often awful power of law.

This literary interpretation of law is complemented by a legally informed interpretation of the texts I examine. Every literary text I examine relies to some degree on legal processes. Whether considering fingerprints, immigration, or the lynch mob – law is the system, ever-present even if peripheral, that drives the identifications in the novel. As is so often the case, an understanding of the center is enriched (and made possible) by charting the periphery. Through an examination of the manner in which law handles the same problems engaged in the literary texts, the potential and progress of literature to engage themes of identity and identification becomes clear.

A consideration of the identities and identifications in my project necessarily anticipates the formation and potential reformation of the subject. Beyond the cross employment of legal and literary interpretative strategies, and beyond the consideration of power imbalances, remains the individuals – Lucy, Tom, Joe, and others – who endeavor to establish and re-establish their identities. As such, this project is about genealogies. In the following chapters, I track genealogy as just one of the many identificatory technologies deployed and confounded within the texts. Whether trying to maintain genealogies in Twain, escape them in Kincaid, or confronting the loss of genealogy in Faulkner, such genealogies repeatedly fail in their efforts to identify individuals based on their ancestries. In a biological or taxonomic perspective, the texts examined in this dissertation disavow genealogy; the characters named above reject the idea that a limited identity, racial or otherwise, is biology transmitted. Unlike the communities in which they live, these characters do not simply accept their identity as based on their forebears.

On a critical level, however, this dissertation is itself something of a Foucauldian genealogy.¹⁴ By providing historical origins for the reductive terms and limited categories into which American society has historically grouped individuals, this dissertation attacks the idea of these identities as ahistorical. Instead of accepting certain identities as true, I look to ways in which literature attacks this ‘truth’ as well as to the ways in which laws have articulated and re-articulated these identities, their boundaries, and the technologies of identification. At the center of this process is the individual/subject/body. For Foucault, the body was a privileged site for a ‘genealogical’ examination because of its capacity to receive the imprint of history. The body, for Foucault, was a location that itself “manifests the stigmata of the past experiences and also gives rise to desires, feelings, and errors.”¹⁵ By acknowledging and studying the individual as palimpsest, inscribed and reinscribed by competitive histories, or, in the terms of my project, identified and reidentified by evolving laws, I seek to both articulate and historicize the subject.

VIII. A FINAL NOTE

As American society continues to move towards greater ethnic hybridization, ‘identity’ becomes both more important and more challenging as both the number of ‘identities’ increases and the boundaries between ‘identities’ dissolve. Based on this growth, literature that engages

¹⁴ MICHEL FOUCAULT, *NIETZSCHE, GENEALOGY, HISTORY* (1971).

¹⁵ *Id.* at 83.

identity and that focuses on the successes and failures of identificatory methods gains cultural relevance. Overall, literature functions as a privileged discourse that both explores this hybridization at many levels not (often) found within other media and examines the slew of anxieties and pressures that attend instances of re-identification. I now concisely describe the challenges to identities and identifications that I address in each chapter of this dissertation.

IX. CHAPTER OVERVIEW

CHAPTER I: FICTIONS OF LAW AND CUSTOM: IDENTIFICATION STRATEGIES IN MARK TWAIN'S *PUDD'NHEAD WILSON*, *PEOPLE V. JENNINGS*, AND BEYOND

Within Mark Twain's novels set in the antebellum South, the plot operates on a quite simple racial system – those who are black are slaves, those who are white are not. However, in *Pudd'nhead Wilson*, Twain deliberately troubled this simple system. In *Pudd'nhead Wilson*, Twain became one of the first American novelists to posit and probe an issue frightening to both the antebellum community in which the novel is based and the post-reconstruction community from which Twain wrote: what would happen if a community were to lose its ability to distinguish between slave and freeman, between white and black? What would happen if a society with two distinct classes of citizens lost the ability to distinguish one class from the other?

In the first Chapter, I consider Twain's formation of a society anxious about miscegenation from a legal perspective. While literary critics and their theories have faithfully noted the boundaries of identity and the processes by which they have been created, denied, and reformed within the novel, only a limited amount scholarship on *Pudd'nhead Wilson* has focused on the legal aspect of these identifications and re-identifications. Studying the power and the function of the law in this novel is a way to understand both the power and the history of culture represented in the novel and culture from which Twain was writing.

Perhaps more important than literary critics' failure to provide fuller attention to the manner in which legal systems construct and constrain identities within this text, is legal scholarship's limited attempts to explore or even address the significance of the novel's final legal revelation. Although a work of fiction, the novel correctly posits and represents a scenario by which fingerprints are used to identify a culprit. This scenario, although now widely accepted in both courtrooms and fictionalized representations of courtrooms, was written by Twain seventeen years before any recorded U.S. court decision admitting fingerprints as identificatory evidence.

In this Chapter, I provide a consideration of the novel that focuses on the tensions and anxiety of identification and the identificatory systems that intend yet fail to confirm racial identities within the novel. In order to fathom the importance of the identificatory strategies Twain challenges or the strategy he ultimately introduces, I provide, in Part I of this Chapter, a concise overview of a small number of legal moves that established racial identification within the United States.

In Part II of this Chapter, I explore the influence of troubled identification systems and mobile transgressions in *Pudd'nhead Wilson*. In this Part, my greater focus remains on the charged encounters of difference as well as the power of law to construct and maintain identity. In this sense, *Pudd'nhead Wilson* functions as an archetypical narrative equation that enforces differentiation primarily through biological systems based on visible racial difference and

familial lineage. Within these systems, I explore mobility as a means of renegotiating identity and considering moments of stasis within the text, that is, moments when characters are induced not to move in order to maintain the roles they have assumed. In engaging this analysis, I pose and answer the following question: what tensions are laid bare as we oscillate between malleable identities and the impossibility of confirmed racial and genealogical identification?

Grounding this extensive consideration of law within this novel, I turn my attention to the case through which the most important legal development in this novel, fingerprinting, gains admission to the American justice system. In Part III of this Chapter, I analyze the first appellate court decision on the admissibility of fingerprint evidence, *People v. Jennings*. Initially contested on several grounds, the *Jennings* decision was the first step towards the instantiation of fingerprinting as an infallible identificatory technology. I use this case and related history as a platform to access and explicate the laws and manners through which race has been legally constructed within the United States. At the end of this Part, I return to both the depictions of race within *Pudd'nhead Wilson* and the novel's exposure of unsuccessful identificatory strategies in order to consider the novel's thoroughly anachronistic, yet remarkably prescient, utilization of fingerprinting as identificatory evidence. This prescience is not limited to Twain's inclusion of the trial scene. Rather, the novel functions as an arena in which anxieties about criminals and minorities combine and find specious resolution through legal application of identificatory technologies.

Legal scholarship has begun to accept the idea that race and racial boundaries are constructed and maintained through judicial and legislative action.¹⁶ Building on this acknowledgment, I cite and then look beyond the statutory constructions of race to question the manners in which legally accepted identificatory technologies have impacted Americans both historically and presently. In Part IV, I connect my literary and sociological consideration of *Pudd'nhead Wilson* advanced in Part II with the juridical history of fingerprinting concisely explored in Part III. Ultimately, I posit that while forensic technologies have moved away from explicit claims of racial identification, these technologies still often disparately impact, and are even often focused upon racial minorities within the United States. The judicial application of technologies to define and thereby control certain identities is a danger faced not only by the characters within the antebellum society of *Pudd'nhead Wilson*, but also in the more diverse society we currently inhabit.

CHAPTER II: INDIVIDUAL INDETERMINACY AND LEGAL DETERMINATION: RACIAL IDENTITY IN *DOE V. LOUISIANA* AND WILLIAM FAULKNER'S *LIGHT IN AUGUST*

Toward the end of *Light in August*, Faulkner's favorite attorney, Gavin Stevens, interpretatively glosses the culmination of Joe Christmas's strange career. In his reading of Joe Christmas, Stevens presents the reader with an interesting coordination of identity and mobility as perceived through the detached rationalism of a Mississippi lawyer. At the novel's end, Stevens' legal reading compresses tensions of space, movement, and identity that the novel engages almost episodically as it resolves and fails to resolve who and what Joe Christmas is.

Strung between inevitable racial indeterminacy and the predetermined tragedy of his ending, Joe Christmas lives in a world of demarcation that borders, at times, on symbolic

¹⁶ This is not to suggest that all legal scholars view race this way. Many parts of the scholarly community see race as both a natural aspect and a useful category. Some in law and economics believe the social/natural differences between races provide important information and as such law should not prohibit discrimination based on race.

overdetermination. When Christmas descends into the African-American section of Jefferson, Mississippi, he almost suffocates; he is unable to remain in this place that associatively and almost actively begins to identify him as ‘Negro.’ He must flee, move, ascend into the equally inhospitable and ultimately uninhabitable ‘white’ section of town. At other times, Christmas appears quite prescient of the spatial restrictions based upon his mutable yet ever-quantal racial identity; he knows which locations are open to different races and he adjusts his identity accordingly.

Rather than merely unpack the anxieties and hopes that constitute and attend the aptly denominated metaphor of ‘passing’ on the level of space and movement in my final Chapter, I go further to consider mediated interpretations of ‘passing.’ To phrase this as a question: How are acts of passing interpreted and inflected based on the discourse or medium in which they reside? I focus on three arenas in which the act of passing might succeed, yet often fails. By reading a legal case concerning an attempt to change racial identity, journalistic accounts of the case, and a literary exposition and psychological exploration of passing, I demonstrate the failures and successes not only of specific instances of passing, but also the specific advantages and limitations of each discourse to tell a story of deliberate racial (re)identification.

In the first part of this Chapter, I look at *Doe v. Louisiana*, a case in which a 48-year-old woman, Susie Guillory Phipps, challenged her racial designation by the state of Louisiana. The judicial opinions that preserve the case anonymize Phipps’ identity and contain little information beyond that required by legal discourse. Within these opinions, one can find only statements of law and a statement of the small number of facts required to support the holding, or judicial decision the court reached. Despite and, to a degree, through this dearth of information, the judicial decisions nonetheless racially identify Phipps. I explore the methods, to wit, the deployment of technologies, pseudo-scientific and legal, by which legal opinions accomplish this identification.

In Part II of this chapter, I look to journalistic accounts that tracked and animated the *Doe v. Louisiana* litigation. In reviewing these accounts, I pay special attention to the more complete access to the “story” in this medium, that is, journalism’s ability to display the background facts that tell us what exactly happened with Guillory Phipps. These journalistic accounts provide information on Phipps’s identity and background that is absent from the legal case. Despite the expanded breadth delivered through journalism, however, this medium also provides an insufficient “story” insofar as either spatial limitations or discursive traditions keep it from exploring the motives of the characters it follows.

In Part III of this Chapter, I turn my focus to literature. In contrast with judicial decisions or journalism, literature is a discourse able to access the minds and motivations of characters. Through such access, literature ironically comes closer to a ‘truth’ or totality of the ‘story’ than non-fictional discourses of law and journalism. This approach is further enabled because, unlike law and journalism, literature is comparatively free of discursive restraints – it is a mode of expression, exploration, and communication that requires attachment to neither the objective referent of the ‘law’ that characterizes judicial decisions nor the ‘fact’ that drives journalism. This does not imply that literature avoids law or fact. Rather, in establishing its own parameters, literature can engage or escape the constraints of rigid classifications whose concerns with the distinction between lawful and unlawful, factual and non-factual communication, restrict the scope and exploration of such themes.

As a counterpoint to *Doe v. Louisiana*, then, I examine William Faulkner’s *Light in August* in the third Part of this Chapter. Even though the novel does not deal with the same

factual situation as *Doe v. Louisiana*, the novel does center on indeterminate racial identity. Despite the difference in jurisdiction, time period, legal mechanism, and result, I compare *Light in August* to *Doe v. Louisiana* because both publications record a situation in which a system of setting an individual's identity at birth is challenged and finally construed, if not resolved, through a lawyer's argument. Indeed, *Light in August* goes further than either the legal case or the news account. Faulkner's novel not only displays, but also *explores*, the anxiety that can arise from racial indeterminacy in the South. This exploration ultimately demonstrates both the correlation between race and space within a Southern Society as well as the efforts by which the Southern society legally and extra-legally attempts to resolve racial ambiguity.

Like the extended literary reading with which I conclude this Chapter, *Doe vs. Louisiana* and its media coverage indicate the actual anxieties and pitfalls attendant to racial indeterminacy. Yet while the legal opinions and the case's media coverage explicate more directly the supposed power of Law to 'resolve' racial identity, both discourses also illustrate the formalistic inability of case law to communicate fully a resolution to indeterminate racial identities. Comparing *Doe v. Louisiana* to *Light in August*, in the final Part of this Chapter I recognize Faulkner's modernism as a stylistic development that allows him not only to explore the fragmented identity of Joe Christmas, but also to excavate psychologically the grounds for its lack of cohesion; in essence, Faulkner's modernistic style allows him to tell a story that law cannot tell. It is this style that allows Faulkner to answer for Joe Christmas fundamental questions that, even half a century later, the Law will not or cannot answer for Guillory Phipps – why might an individual harbor such anxiety about one's racial identity? And, how might racial indeterminacy help to resolve or exacerbate this anxiety? Ultimately, all three of these discourses, law, journalism, and literature, reveal the desire to resolve indeterminate racial identity while demonstrating the difficulty, if not impossibility, of such resolution.

CHAPTER III: WITH PRETENSE TO NEITHER THE OBJECTIVITY OF LAW NOR THE SUBJECTIVITY OF LITERATURE: A CONSIDERATION OF IDENTIFICATORY HERMENEUTICS IN JAMAICA KINCAID'S *LUCY* AND U.S. IMMIGRATION LAW

Jamaica Kincaid's fifth novel, *Lucy* (1990), is a first-person narrative written in the form of a journal. Having come north to work for as a nanny for an urban, white family, the eponymous narrator records her impressions of life as a young woman from the West Indies. Away from her family for the first time, Lucy reflects on that which she has left behind while surmounting a variety of new challenges and misconceptions about herself.

Since its publication, the novel has garnered an impressive amount of critical attention. The resultant criticism, which has variously situated *Lucy* in the critical discourses of feminism, post-colonialism, post-modernism, Caribbean literature, and Black Aesthetics, shares a common weakness. The eagerness of critical commentary to position the novel within assorted discourses has, by and large, contributed to a comprehensive failure to acknowledge the interpretative challenges posed by *Lucy*; by providing locations and interpretations for the text, critics have ignored Kincaid's textual emphasis upon dislocation and false hermeneutics.

In this Chapter, I explore *Lucy* as a novel in which a balance of determination and ambiguity maintains the central dislocation of the narrative. By maintaining these contradistinctive tensions, *Lucy* anticipates and works to challenge its own critical reception. In this Chapter, I re-read *Lucy* not only to find resistance (which has in many cases already been teased out and critically documented), but also to consider the ways in which this resistance is

surreptitiously included and ambivalently expressed. Exploring the novel's balance between invitation and rejection of interpretation, I create a framework that harmonizes both the text's rigorous maintenance of indeterminacy as well as the text's repetitive citation of misunderstanding and failed interpretations.

In the Part I of this Chapter, I perform a legal analysis that both focuses in and focuses out from Lucy's narrative. By examining the series of legal acts that enabled Lucy's immigration north and Jamaica Kincaid's immigration to the United States, I answer, in this Part, a number of questions that *Lucy* never poses: generally, how did Lucy emigrate? Specifically, what shift in legal circumstances enabled Lucy's fictional, and Jamaica Kincaid's actual, immigration? In this part, I provide a quick overview of the legal policies and practices that have structured identification and re-identification of both immigrants and racial minorities within the United States. Through the correlation and reading of case laws, census data, and statutes, I demonstrate not only the long and pervasive influence of racist judicial and legislative decisions regarding immigration, but also reveal the frequency with which these decisions come through the subjective apportionment of fluid racial identities.

In Part II of this Chapter, I provide a literary analysis of the novel that focuses on both the protagonist's rejection of false identifications of herself and misreading of her motivations. In this Part, I conclude that *Lucy*'s troubled hermeneutics demonstrate both Lucy's maintenance of her identity against repeated misidentifications and interpretations and Jamaica Kincaid's meta-critical rejection of reductive interpretations of her work. Linked to the legal analysis I present in Part I, in Part II I regard *Lucy* as both a touchstone and a departure point for a consideration of interpretative methodologies of the immigrant. Without denying Lucy the individuality she seeks, I ultimately read *Lucy* in this Chapter as an immigrant travelogue that succeeds because of, more than in spite of, its entrance into fiction.

**CHAPTER I:
 FICTIONS OF LAW AND CUSTOM: IDENTIFICATION STRATEGIES
 IN MARK TWAIN'S *PUDD'NHEAD WILSON*, *PEOPLE V. JENNINGS*, AND *BEYOND***

“Faith is believing what you know ain’t so.”

-Mark Twain, (1835-1910)

“Faith” is a fine invention

For gentlemen who see –

But microscopes are prudent

In an emergency.

-Emily Dickinson, (1830-1886)

I. INTRODUCTION

Revered in both middle schools and university literature departments around the country, Mark Twain’s novels are familiar to a multitude of American students. Without doubt they have been read, and even remembered, by some students of law. Yet while the humor and local color of Twain’s writing is widely acknowledged and praised, literary critics have only recently (that is, within the last century) begun to appreciate more fully the more serious revelations and implications of Twain’s oeuvre. His writings, particularly the novels, often focus on carefree protagonists who seek escape from or, conversely, their place within the societies in which they find themselves. But for every youthful adventure or Bildungsroman moment – for all the Toms and Hucks who rebel against society – there is no small number of characters whose movements and opportunities are more limited. Often these characters are slaves; being slaves, the limitations of these characters are established by law. Within a number of novels, Twain reproduces the simple system aspired to by the antebellum South – a society in which those who are black are slaves, while those who are white are not.

In *Pudd’nhead Wilson*, Twain deliberately troubled this simple system.¹ *Pudd’nhead Wilson* is one of the first American novels to posit and probe an issue frightening to both the antebellum community in which it is based and the post-reconstruction community from which Twain wrote: what would happen if a community were to lose its ability to distinguish between slave and freeman, between white and black?² What would happen if a society predicated upon a hierarchy of classes of citizens lost the ability to distinguish one class from the other? Stated

¹ MARK TWAIN, *PUDD’NHEAD WILSON AND THOSE EXTRAORDINARY TWINS, ILLUSTRATED*, (Harpers & Brothers, 1899) (1894) [hereinafter “TWAIN, illustrated edition”]. All full-page illustrations, unless otherwise noted, cite to this edition. See also MARK TWAIN, *THE TRAGEDY OF PUDD’NHEAD WILSON AND THE COMEDY THOSE EXTRAORDINARY TWINS*, (American Publishing Company, 1894) (1894) [hereinafter, “TWAIN, American Publishing Company Edition”]. All marginal illustrations, unless otherwise noted, cite to this edition. See also MARK TWAIN, *PUDD’NHEAD WILSON AND THOSE EXTRAORDINARY TWINS* (Sidney E. Berger, ed., Norton Critical Edition 1980) (1894) [hereinafter, TWAIN]. All textual citations, unless otherwise noted, cite to this edition.

² The works of other novelists, such as Herman Melville, Harriet Beecher Stowe, and Charles Chesnutt, have, in showing challenges to the racial systems of the societies about which they wrote, posed similar questions regarding objectification of African-American individuals. More recently, critics have noted this dearth of black subjectivities in American literature. See, e.g., TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* (1992).

simply, these are questions that concern identity and identification and the goal of this chapter is to answer these questions. But the point of this chapter requires further specification as a consideration of identity in Twain's work is, in a general sense, broad to the point of vagueness.

Literary critics have faithfully noted the boundaries of identity and the processes by which they have been created, denied, and reformed within *Pudd'nhead Wilson*. Nonetheless, only a limited amount of scholarship on *Pudd'nhead Wilson* has focused sufficiently on the means and manners of identification within the novel.³ Furthermore, much of this criticism has avoided prolonged consideration of the novel's final act of identification. At the conclusion of *Pudd'nhead Wilson*, the novel's namesake uses fingerprinting in a criminal trial to identify an individual as a murderer and as a black slave. While criticism has noted the resolution provided by this identification, critics have insufficiently considered the legal aspect of this and other identifications and re-identifications within the novel.⁴ Perhaps more important than literary critics' failure to provide fuller attention to the manner in which legal systems construct and constrain identities within this text, is legal scholarship's limited attempts to explore or even address the significance of the novel's final legal revelation.⁵ Although a work of fiction, the novel's terminal identification of the black culprit through through the new technology of fingerprints is amazing.

Without historical context, a reader is likely to overlook the legal impact of the novel's climax. Although the scenario of fingerprint identification of a suspect is now widely accepted in both courtrooms and fictionalized representations of courtrooms, Twain's court admitted this innovative technology almost two decades before any recorded judicial opinion admitting fingerprints as identificatory evidence.⁶ Despite the innovation of fingerprinting, the utilization of an identificatory technology to maintain racial hierarchies itself was quite standard. In part I of this chapter, I provide a concise overview of a small number of legal moves that established racial identification within the United States. This citation of statutory and judicial constructions of race, establish a platform from which I am able, in part II of this chapter, to explicate the desires and anxieties that accompanied racial identification in Twain's novel. At the same time, this historical overview allows me to question the manner in which legally accepted identificatory technologies have impacted Americans both historically and presently.

By studying the deployment of fingerprints and other identificatory technologies in *Pudd'nhead Wilson*, I focus, in part II of this chapter, on the identificatory systems that intend to confirm racial identities within *Pudd'nhead Wilson*. This analysis of identity, culminating in the

³ See generally, Sinéad Moynihan, *History Repeating Itself: Passing, Pudd'nhead Wilson, and The President's Daughter*, 32 CALLALOO 3 809 (Summer 2009); Simon A. Cole, *Twins, Twain, Galton, and Gilman: Fingerprinting, Individualization, Brotherhood, and Race in Pudd'nhead Wilson*, 15 CONFIGURATIONS 3 227 (Fall 2007); George M. Spangler, *Pudd'nhead Wilson: A Parable of Property*, 42 AMERICAN LITERATURE 1 28 (Mar. 1970); MARK TWAIN'S PUDD'NHEAD WILSON: RACE, CONFLICT, AND CULTURE, Susan Kay Gillman & Forrest Glen Robinson, eds. (1990).

⁴ But see, Jennifer L. Mnookin, *Fingerprint Evidence in an Age of DNA Profiling*, 67 BROOKLYN L. REV. 13 (2001) (noting the use of fingerprinting technology in PUDD'NHEAD WILSON). The claims of this article are considered further, *infra*.

⁵ But see, Mnookin, *infra* note 4; Paul E. Tracy & Vincent Morgan, *Big Brother and His Science Kit: DNA Databases for 21st Century Crime Control?*, 90 THE JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 2, 635 (Winter, 2000); Lucia A. Silecchia, *Things Are Seldom What They Seem: Judges and Lawyers in the Tales of Mark Twain*, 35 CONN. L. REV. 559, (Winter, 2003); Robin L. West, *Adjudication is Not Interpretation: Some Reservations About the Law-As-Literature Movement*, 54 TENN. L. REV. 203 (FALL, 1986).

⁶ I make this claim regarding courts within the United States. *People v. Jennings*, 96 N.E. 1077 (Ill. 1911); *cf.*: MARK TWAIN, *PUDD'NHEAD WILSON AND THOSE EXTRAORDINARY TWINS, ILLUSTRATED*, (1894).

novel's fingerprint identification, reveals a dialectic. On one side of this dialectic stands the novel's repeated, troubled attempts at identification and re-identification. The novel reveals almost a mania – Who looks black? Who talks black? Who is honorable? Who has black blood?⁷ Who has honorable blood? And how do we know? These attempts betray both an anxiety about identification and an excitement about the legal and scientific abilities to identify individuals and thereby maintain social hierarchies. On the other side of this dialectic stands the repeated failure of legal and scientific identificatory strategies and technologies. This failure suggests both a mutability of identity as well as a certain impossibility to determine identity and identification.

After an extensive consideration of identifications and identities within this novel, I turn my attention, in part III, to the case through which the most important legal development in this novel, fingerprinting, gains admission to the American justice system. In part III, I analyze the first appellate court decision on the admissibility of fingerprint evidence, *People v. Jennings* (“*Jennings*”).⁸ Initially contested on several grounds, this decision is the first step towards the instantiation of fingerprinting as an infallible identificatory technology. By comparing the actual case to the novel, I demonstrate the manner in which courts, real and fictional, began to rely on fingerprint evidence.

At the end of this discussion in part III, I return to both the depictions of race within *Pudd'nhead Wilson* and the novel's exposure of unsuccessful identificatory strategies. This return allows me to consider the novel's thoroughly anachronistic, yet remarkably prescient, utilization of fingerprinting as identificatory evidence. This prescience is not limited to Twain's inclusion of the trial scene, rather the novel functions as an arena in which anxieties about criminals and minorities combine and find specious resolution through legal application of identificatory technologies.

In part IV, I connect my literary and sociological consideration of *Pudd'nhead Wilson* advanced in part II with the juridical history of fingerprinting concisely explored in part III. By correlating the novel with the case, I expose how the instantiation of a supposedly infallible identificatory technology has initiated a paradigm shift in criminal forensics. Today, a century later, the paradigm is in the midst of another shift. In this final Part, I ultimately posit that while forensic technologies have moved away from explicit claims of racial identification, these technologies still often disparately impact, and are even often focused upon racial minorities within the United States. Taken together, this chapter reveals that the judicial application of technologies to define and thereby control certain identities is a danger faced not only by the

⁷ Within *Pudd'nhead Wilson*, the word “lineage” is never used. When discussing the transmission of identity, the novel and all characters within it metonymically reduce an individual's lineage to his ‘blood.’ This reduction of lineage to blood and compartmentalization of identity (Tom is part white, but part black) is pervasive to a degree that it can be hard to look beyond it. Nonetheless, this reduction is countered by a simple admission: From a biological perspective, there is no such thing as black blood or noble blood. The idea of blood quanta is not scientific, even if DNA has subsequently offered a similar regime of understanding heredity.

In order to refute the blood as identity paradigm, I endeavor to call lineage by the name of ‘lineage’ as opposed to ‘blood.’ However, the metonymy has its advantages – it is much easier to write: “Tom had black blood” and allow the wisdom of the reader to supply inferences necessary to convert this phrase into the more exact yet less wieldy: “Tom's lineage included ancestors identified as black.” The advantages of the metonymy multiply when attempting to wade through the novel's citation to and repeated insistence on *blood* identity. Despite these advantages, I have attempted to reject the term ‘blood’ when discussing lineage in this chapter. At the points at which I have been unsuccessful, I have used the term ‘blood’ to stay true to the hermeneutics of identity within the novel and not as an endorsement of that paradigm.

⁸ *Jennings*, *supra* note 6.

characters within the antebellum society of *Pudd'nhead Wilson*, but also in the more diverse society we currently inhabit.

PART I – LEGAL TECHNOLOGIES OF RACIAL IDENTIFICATION

In creating a novel based upon the breakdown of visual systems of racial demarcation, Mark Twain had placed his finger on the pulse of a chronic national anxiety.⁹ Slavery, which spread to the “New World” under religious auspices yet was propagated on financial grounds, necessitated a group of bodies that could easily be differentiated from the non-slave classes.¹⁰ The difference in skin color initially filled this requirement. Within slaveholding communities of the antebellum American South, ‘to be black,’ was often to be a slave.¹¹ And while the stereotypical criteria of ‘black’ identity varied from hair to skin, from facial structure to cuticles, the identification of someone as ‘black’ was, at first, a visual identification.¹² Nonetheless, the miscegenation between slaveholders and slaves produced offspring whose skin color and other physical attributes eroded the simple black/white binary and eroded with it society’s ability to visually distinguish legally inferior ‘black’ individuals from the ‘white’ individuals who benefited from the maintenance of this distinction.

Although freedmen or ‘free blacks’ existed before emancipation, even the descriptions “*free-man*” or “*free-black*” indicated the default status of the black body as “not-free,” without liberty, or, in one blunt word, enslaved. This correlation between ‘black’ and ‘enslaved’ continued in part until federal abolition of slavery nominally decoupled black identity from

⁹ Although Twain wrote about this anxiety in an Antebellum setting, the importance of this chapter is closely aligned with the recognition that this need for racial classification both predated and outlived Twain. See discussion of racial categorizations within United States censuses, *infra*, at note 19.

¹⁰ See, POPE NICHOLAS, V, ROMANUS PONTIFEX, (Jan. 8, 1455), *available at* <http://www.nativeweb.org/pages/legal/indig-romanus-pontifex.html> (last visited, Mar. 10, 2010). (In this Bull, the Catholic church “granted [...] the aforesaid King [of Spain the right] -- to invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies of Christ wheresoever placed, and the kingdoms, dukedoms, principalities, dominions, possessions, and all movable and immovable goods whatsoever held and possessed by them and to reduce their persons to perpetual slavery...”) (noting that “An English translation of ROMANUS PONTIFEX is [...] published in EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES TO 1648, 20-26 (Frances Gardiner Davenport, ed., 1917). To view the original Latin text of the bull, *see id.* at 13-20). This Bull would later be reformed by another Bull; POPE ALEXANDER VI, INTER CAETERA (May 4, 1493), *available at* <http://www.catholic-forum.com/saints/pope0214a.htm>. (last visited, Mar. 10, 2010). For a discussion of the economics of American slavery, *see generally* EUGENE D. GENOVESE, THE POLITICAL ECONOMY OF SLAVERY: STUDIES IN THE ECONOMY AND SOCIETY OF THE SLAVE SOUTH (1967); JAMES OLIVER HORTON & LOIS E. HORTON, SLAVERY AND THE MAKING OF AMERICA (2005) (“The slave trade and the products created by slaves’ labor, particularly cotton, provided the basis for America’s wealth as a nation. Such wealth provided capital for the country’s industrial revolution and enabled the US to project its power into the rest of the world.”) *See also, generally*, ORLANDO PATTERSON, THE SOCIOLOGY OF SLAVERY (1967); IAN HANEY-LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

¹¹ In the 1790 census only 7.9% of “blacks” in the United States were free. *See* Act providing for the enumeration of the Inhabitants of the United States, ch. 2, §1, 1 Stat. 101, 101 (1790). *See also*, First Census of the United States, Population of the United States as Returned at the First Census, 1790 (1791), *available at* <http://www.census.gov/prod/www/abs/decennial/1790.htm> (last visited, Mar. 10, 2010). Final census figures tabulated 59,511 free blacks, 697,697 slaves, and 3,929,326 total people in the United States.

¹² In earlier censuses, racial identity is taken for granted. This is discussed further in Section 2, *infra*, at note 19 et seq.

slavery.¹³ Although arguments over both the repercussions of the South's 'peculiar institution' and the extent to which American society has actually reached equality continue to this day, the Thirteenth Amendment undeniably changed the legal status of the black body.¹⁴ No longer enslaved, all people of African descent had gained literal mobility and the promise of its social counterpart. Between the legalized mobility of 'blacks' and the erosion of the ability to distinguish visually 'black' and 'white,' the opportunity for both social and racial passing increased. Similarly, Southern anxieties about keeping blacks in both their literal and sociological 'place' also grew.¹⁵

The federal deconstruction of barriers on the black body and the social mobility it (legally) enabled served to antagonize the tensions associated with distinguishing white from black.¹⁶ As time passed the necessity of maintaining rigid identity boundaries had grown more important just as the ability to accomplish such distinctions had become exceedingly difficult. To appreciate the importance of identificatory acts within the American judicial system, one must understand the power and disempowerment of identities through American case and statutory law. In both *People v. Jennings* and *Pudd'nhead Wilson*, the power of identification is readily apparent. The murder conviction of Tom Jennings leads to a death sentence. Similarly, Tom Driscoll is sentenced to life imprisonment when identified as a murderer and sold down river when identified as black. Despite the horror of a life in prison, Driscoll's racial identification trumps his criminal identification; the governor commutes his sentence as a criminal in order to place Tom within the slave economy. While *Jennings* displays both the power of fingerprinting and the hermeneutic contortions the appellate court performed to ensure the admission of this technology, *Jennings* does not, indeed, is incapable of addressing the anxiety of and need for racial identification within American legislation and jurisprudence.

This chapter does not seek to draw this connection; a number of scholars and much scholarship speak to governmental collusion in racism.¹⁷ In the first part of this chapter, I recognize and attempt to cultivate only one small section of this rich field; this part looks to the methodologies and technologies that by enabling racial identifications, have enabled differential formulation and application of laws to different races. Seen comparatively, this part argues that the employment and replacement of fallible technologies of racial identification in *Pudd'nhead Wilson* has mirrored racializing and racist identificatory practices that had, did, and continue to occur in the legislatures and judiciaries of the United States. Part I is neither exhaustive nor completely inclusive, but it does examine a limited number of means, methods, organizations... in a word, technologies whose identifications have disparately and deliberately impacted ethnic and racial minorities.

...

¹³ U.S. CONST. amend. XIII (ratified Dec. 6, 1865) ("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").

¹⁴ *Id.*; U.S. CONST. amend. XIV (ratified July 28, 1868). Even following emancipation, the correlation between black and slave continued.

¹⁵ It is perhaps unfair to limit these anxieties to the South, and it bears noting that such racial crossings are explored in a number of regions within the U.S., see, generally CLAUDE MCKAY, HOME TO HARLEM (1928); NELLA LARSEN, PASSING (1929), AND WALLACE THURMAN, THE BLACKER THE BERRY (1929).

¹⁶ See generally, U.S. CONST. amend. XIV (ratified July 28, 1868); *Brown v. Board of Education*, 347 U.S. 483 (1954).

¹⁷ See, e.g., IAN HANEY-LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

American history is filled with deliberately racist legislative and judicial actions. Attempts of the United States to limit naturalization to ‘free white persons,’ to exclude Chinese immigrants, or to torture enemy combatants have all rested on identification – who is white, Chinese, or an enemy combatant?¹⁸ These identifications have sought to accomplish similar goals; nonetheless a variety of tactics have been employed to accomplish these goals. In its earliest instances, legal policy for racial identification followed early acts of visual identification. In 1662, a court in colonial Virginia ordered perhaps the first census on American soil. Acknowledging a racial division, the court mandated the enumeration of the “Englishe” and “Negroes.”¹⁹ This juxtaposition of “*Negro*,” and “*Englishe*,” indicated the legal inability of the ‘Negro’ to be “Englishe” under the terms of the census.²⁰ In establishing this divide, the 1662 census contradistinguished the African race from the European national. In doing so, the census enumerated black bodies even as it situated the ‘Negro’ outside the privileges of a national identity. As with much early racist legislation, the categorical separation mandated by the census required no technologies other than vision and categorization. Granted, the actions of looking at an individual and deciding whether he or she is a “Negro” or “Englishe” hardly appear to qualify as technologies. Nonetheless, the development and implementation of this rudimentary system of identification, when applied to the entire citizenry of colonial Virginia, indicates the first widespread application of an identificatory technology in colonial America. This establishment of an either/or identity, Englishe *or* Negro, initiated a racial divide this country has yet to solve.

By the time the 1870 Amendment to the 1790 Naturalization Act was passed, allowing people of African descent to naturalize in the United States, clear-cut methods of visual identification had started to fail due, in part, to miscegenation during slavery.²¹ In response to this failure, Congress shifted its strategy of strict distinction from visual categorization to punitive enforcement.²² Responding to political changes wrought by the Civil War, the 1870 amendment excised the ‘white person’ restriction that had been within the first sentence of the original act.²³ Despite this move towards equality, the 1870 amendments also demonstrated an

¹⁸ Act of March 26, 1790 (1 Stat. 103). Restricting Naturalization to free white persons; Chinese Exclusion Act of 1882 Ch. 126, 22 Stat. 58 (1882) (Beginning ninety days after the passage of the act and lasting for ten years, the Chinese Exclusion Act was intended to stop the flow of Chinese laborers into the United States) (upheld by *Chae Chan Ping v. United States*, 130 U.S. 581 (1889)).

¹⁹ MINUTES OF THE COUNCIL AND GENERAL COURT OF COLONIAL VIRGINIA, 1622-1632, 1670-1676, WITH NOTES AND EXCERPTS FROM ORIGINAL COUNCIL AND GENERAL COURT RECORDS, INTO 1683, NOW LOST (HENRY READ MCILWAINE ED., THE COLONIAL PRESS, EVERETT WADDY CO., 1924), [HEREINAFTER, MCILWAINE], as cited by, *American Legal History – Russell*, Website hosted by Thomas D. Russell, Professor of Law, University of Denver, College of Law, at <http://www.houseofrussell.com/legalhistory/alh/docs/virginiageneralcourt.html> (last visited, Feb. 28, 2010). For the same account of this case, see *THE VIRGINIA MAGAZINE OF HISTORY AND BIOGRAPHY*, (PHILIP ALEXANDER BRUCE, ED.), June 1898, Vol. 5, at 236, available at http://books.google.com/books?id=EAclAAAAIAAJ&pg=PA236&lpg=PA236&dq=%22weighing+the+dangerous+consequences+of+such+pernicious+precedent%22&source=bl&ots=OaSsrOhRcr&sig=dN1Jedf0Id7gPh3nGIXJz7oOW5w&hl=en&ei=hruJS9KVNYSscgP31KmGAw&sa=X&oi=book_result&ct=result&resnum=1&ved=0CAoQ6AEwAA#v=onepage&q=&f=false (last visited, Feb. 28, 2010).

²⁰ *Id.* The full order reads: “*It is ordered* that every comaunder wthin the severall plantacons of this Colony shall take a generall muster of all the inhabitants men woemen and Children as well *Englishe* as Negroes inhabiting wthin the same and Retorne a lift of their names to the Governo^r and Councell at the next Quarter Co^{rt} to bee here holden.” Act of March 26, 1790 Restricting Naturalization to free white persons, 1 Stat. 103 (1790). See also, Amendments at 16 Stat. 254, Ch. 254, July 14, 1870; Amendment at 16 Stat. 254.

²² Act of March 26, 1790 Restricting Naturalization to free white persons, 1 Stat. 103 (1790).

²³ *Id.*

inordinate concern with identity. The amendments enacted numerous stiff penalties (5 years imprisonment, \$1,000 fine) for those who would make false oaths of identity or “personate the deceased.”²⁴ To understand completely the importance of the 1870 amendments, we must remember not only the political but also the social upheaval occurring during this period. In short, no tale of these times would suffice without recognizing both the emancipation of American slaves and the burgeoning industrialization of urban areas. This combination of economic opportunities in cities and a recently manumitted and newly mobile collection of potential employees spurred migration within the United States.

Having recently abolished slavery and therefore the distinction between slave and free, the federal legislature was attuned to the distinctions remaining between black and white. Furthermore, the legislature’s enactment of punitive measures against those who would ‘personate the dead’ evinces less a desire to maintain the boundary between the quick and the dead than between black and white. In a society in which governmental proclamations of equality more than counterpoised extant and legally enforced racial stratification, the advantages of passing to ‘black’ individuals with sufficiently ‘white’ appearances must have held allure and caused anxiety. The federal government’s move to grant naturalization independent of race, while increasing punishment for false (im)personation, indicates the struggle and ambivalence of federal efforts of identification. By disincentivizing acts of passing, the 1870 amendments to the Naturalization Act enacted punishments for any person who might through racial re-identification seek to obtain in reality the equality that the amendments had granted symbolically.

Despite these discriminatory implications, the punitive amendments to this act are exceedingly vague insofar as they do not attempt to identify an individual or a group, but rather penalize known acts of misidentification. The distinction is subtle, yet distinct: the unelaborated standards by which an individual might seek to re-identify one’s self in violation of the 1870 amendments signals both the anxiety of such re-identification, but more frightening still, the absence of any technology able to halt such re-identifications. The efficacy of visual identification and genealogy had been trumped as it were by miscegenation and mobilization; at this point, society had yet to develop a technology of identification able to counter this trump.

Lurking at the edges of Twain’s novel is exactly this scenario; writing in the 1890s about events in the 1830s, Twain charts not only the breakdown of visual and genealogical systems of identification, but arguably idealizes a past in which these systems were functional.²⁵ In this sense, the story of the clandestine swapping of a black child with a white child that starts the tale is, in one sense, the story of a racially stratified *Paradise Lost*. Like Milton’s poem, Twain’s novel looks to the past even while allegorizing the present.

Written twenty-five years after the Emancipation Proclamation and twenty years after the amendments to the Naturalization Act, Twain writes of a community strained by passing, from a society in which passing was less a novelty and more the touchstone of a pervasive cultural anxiety of mutable racial identity. This general anxiety and the attempt to assuage it in *Pudd’nhead Wilson* are readily apparent in another piece of legislation. This law had a more conspicuous interest in the maintenance of racial distinction as well as a more forthright, albeit impractical, attempt at maintaining identity distinctions.

²⁴ *Id.*

²⁵ Here, and all points in this chapter where I use “genealogy” or a derivative form, I use the term in the sense of biological lineage and not to suggest a Foucauldian tracing of the history of the subject.

A dozen years after the amendment of the Naturalization Act, Congress passed legislation that, in its efforts to limit further immigration, attempted to record markings of racial minorities in order to identify them.²⁶ Unlike the first census that had been mandated two centuries earlier, this legislation did not focus on the inter-racial and consequential inter-national difference between “Englishe” and “Negroes,” rather it attempted to record intraracial distinctions among the Chinese. By recording the distinctions, the Act sought to identify each member of the immigrant population in order to limit further Asian immigration. With this focus on race and immigration, the Chinese Exclusion Act anticipated an important question – 1) How might officials differentiate the Chinese laborers to be excluded from those who had previously immigrated to the United States?²⁷ The answer to the question lay in the production of a written document upon which all “physical marks and peculiarities, and all facts necessary for the identification of each of such” Chinese might be made.²⁸ After more than two hundred years of racially exclusive laws and judicial decisions, the Chinese Exclusion Act was the first legislative act to establish a schema for intra-racial identification.

As the Act predated the development of fingerprint identification, the identificatory method set forth in the Act was ambiguous, potentially difficult to apply, and still subject to all the disadvantages of visual identification.²⁹ Most troubling however, was the legislation’s prescriptive conversion of identity into a written document. Although language has been timelessly employed to distinguish between (and perpetuate the myth of) immutable racial categories, language remains a difficult and often inaccurate medium for the objective description of an individual. Perhaps cognizant of this unsuitability of language to detail “all facts necessary for the identification” of each Chinese immigrant, the legislators who drafted the Act chose to forgo further specification. Should immigration officers record height and weight of the immigrant? The hair and eye color? The texture of the hair or skin? The shape of fingernails? Moles? The potential list of metrics is quite large and guidance on how to identify Chinese immigrants is limited to the amorphous “all facts necessary.” Before the popularization of photographs or the introduction of fingerprinting to the United States, Congress likely mandated written description of each individual because it was the best technology available.

As new technologies developed in the early twentieth century, the means and methods of identifying individuals increased. By 1924, immigration legislation mandated all immigrants complete an application requiring duplicate submission of a birth certificate, copies of all public records pertaining to the individual, as well as photographs.³⁰ Just as Dawson’s Landing had supplemented visual systems of identification with a lineage-based determination of identity, American legislative policies mirrored this development in their attempts to reduce and package identity into a series of transportable documents.

Despite the power and importance of the documents required by this immigration legislation, birth certificates could still be forged and photographs often became less accurate as the subject aged or changed in appearance. Neither identificatory metric had the same claim to immutability as fingerprinting. Because of the supposed infallibility of fingerprinting, a

²⁶ Chinese Exclusion Act of 1882 Ch. 126, 22 Stat. 58 (1882).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Although mentioned in neither the Chinese Exclusion Act nor *Jennings*, much visual identification in the mid- to late-18th century was accomplished using a system of anthropometrics created by Alphonse Bertillon in 1882. The system identified and compared criminals based upon body measurements and distinguishing marks.

³⁰ Immigration Act of 1924 (aka Johnson Act aka Dickstein Alien Officials Act) May 26, 1924, Pub. L. No. 68-139; 68 Cong. Ch. 190; 43 Stat. 153 (1924). The application also required applicants to state their race.

“physiological autograph... [that] cannot be counterfeited... [nor] become illegible by the wear and the mutations of time,” the quick ascendance and acceptance of fingerprinting as an identificatory technology is unsurprising.³¹ To understand more fully American society’s desire for an infallible identificatory technology throughout the nineteenth century or the potential fingerprinting appeared to offer, I turn now to *Pudd’nhead Wilson*.

PART II – IDENTITIES AND IDENTIFICATIONS IN *PUDD’NHEAD WILSON*

In 1892, Mark Twain began writing the tale that would become *Pudd’nhead Wilson*. At the time, Twain was America’s foremost humorist and most famous author. By this point in his career, he had already published the adventures of both Tom Sawyer and Huck Finn. These novels, as well as his other writings, were widely enjoyed in North America and Europe and were known throughout the world. Nevertheless, Twain had fallen upon hard times. His investments had soured and his wife had become chronically ill. Despite his still burgeoning fame, Twain was close to financial ruin.³² Seeking a way to write his way out of debt, Twain began composing a novel that he hoped to publish quickly. Indeed, Twain was so frustrated by debt that he had engaged an American Magazine to serialize the tale. This publication method, which allowed him to start earning paychecks for his writing before the story was even complete, also required Twain to write on an inflexible deadline. By 1894 however, Mark Twain had completed and published *The Tragedy of Pudd’nhead Wilson and the Comedy Those Extraordinary Twins* as a set of two short novels.

Written less than three decades after the Thirteenth Amendment outlawed almost all forms of involuntary servitude, the novel takes place in a small slave-holding town in Missouri three decades before the Civil War.³³ By way of description, the novel deals primarily with the fate of two visually indistinguishable children who are cared for by the same slave woman, Roxanna, in the small town of Dawson’s Landing, Missouri.³⁴ One child, Tom, is the son of Roxy’s owners.³⁵ The other child, Chambers, is Roxy’s son. Although both children are ‘white’ in appearance, Chamber possesses 1/32nd ‘black’ blood and is “by a fiction of custom and law,” both a ‘Negro,’ and a slave.³⁶ Filled with fear that her own child will be sold down river, Roxy deliberately swaps the children.³⁷

These twinned youths grow up to follow discrete paths; one child is initiated into the gentry of his hamlet, while the other develops his humility in the slave quarter and the kitchen.³⁸ Despite his deprived upbringing, the ‘slave’ child, Chambers, is generally represented as a caring individual albeit limited by his ignorance of ‘white’ culture and customs.³⁹ Conversely, Tom is

³¹ TWAIN, *supra* note 1, at 108.

³² Sidney E. Berger, *Preface*, in MARK TWAIN, *PUDD’NHEAD WILSON AND THOSE EXTRAORDINARY TWINS X* (Sidney E. Berger, ed., Norton Critical Edition 1980) (1894).

³³ U.S. CONST. amend. XIII; TWAIN, *supra*, note 1.

³⁴ TWAIN, *supra*, note 1, at 5.

³⁵ *Id.*

³⁶ *Id.* at 9. It is no surprise that in discussing a text that flaunts misidentification that I should encounter the difficulty of distinguishing between Tom and Chambers. In this chapter, I follow the majority of scholarship on *Pudd’nhead Wilson* by referring to the children not by their given names, but by the names they carry throughout the majority of the novel, i.e., in this chapter, Roxy’s biological son is Tom and her charge, who is raised as a slave, is Chambers.

³⁷ *Id.* at 14.

³⁸ *Id.* at 17-19.

³⁹ *Id.* at 114.

both craven and prodigal.⁴⁰ Progressing from gambling to fraud, theft, and finally murder, Tom is completely degenerate despite or, so the novel hints, because of the many advantages he has gained through his purloined lineage.⁴¹

Alongside this plot runs another that is equally concerned with blood-based identity. Towards the middle of the novel, twin Italian aristocrats, Angelo and Luigi Capello, relocate to Dawson's Landing. Despite the nobility of their character, their initial exalted position in the society of Dawson's Landing is repeatedly challenged. Through the machinations of Tom, the community of Dawson's Landing comes to suspect that the twins are assassins and thieves. The Italian twins are ultimately accused of the murder of the town's patriarch, Judge Driscoll. This fortune contrasts pointedly with both the twins' aspirations and their initial standing in Dawson's Landing as accusations deprive them their blood advantages while re-identifying them as besmirched criminals. Although the (lack of) genealogical racial difference is the main focus of Twain's novel, the plotline of the Italian twins and their aristocratic inversion parallels the racial inversion of the novel's other set of changeling 'twins.'

As these two plot lines develop, Twain's novel demonstrates the failure of visual and genealogical means of establishing identity. At the novel's climax, the community of Dawson's Landing perceives the black slave as the white scion and views the noble Italian twins as base assassins. The novel finally resolves the drama of these plotlines during the twins' murder trial. At the trial, the lawyer Dave 'Pudd'nhead' Wilson introduces the community and the reader to a new corporeal system of identification based on the "certain physical marks... by which [any person] can always be identified... without shade of doubt or question."⁴² By presenting and then demonstrating fingerprinting, Wilson introduces a technology that can correctly uncross the identities of Tom, Chambers, Angelo, and Luigi. By adducing earlier fingerprint records, Wilson quickly exonerates the Italian twins, identifies Tom as the murderer, and reidentifies him as a slave.⁴³

In the course of *Pudd'nhead Wilson* Twain shifts the locus of identification from the skin, to the blood, and finally, from the blood to the fingertip as the mode of identification switches from the visual to the genealogical to the forensic. Yet for all the promise of fingerprinting, Twain's attempt to provide an incontestable system of identification remains challenged. Wilson's fingerprints do solve the interrelated failed identifications of the twins and the changelings. But the solution comes too quickly and too seamlessly to completely resolve the tension of the initial subversions of identity that launch and propel the plot of the story. Throughout *Pudd'nhead Wilson*, Twain sustains an explicit focus on the ubiquitous tension of identification and the manners through which systems of identification often fail, sometimes succeed, and are always open to manipulation. While this focus produces the perfect situation for the introduction of an infallible identificatory technology, this focus also intimates the unreliability of any system of racial identification.

In order to appreciate either the anxieties of identification or the manipulation of identificatory methods and technologies within *Pudd'nhead Wilson*, this part considers more fully the different identificatory methodologies and technologies within the novel. Moving from the visual, to the genealogical, to the forensic, in this section I track technologies of identification in a chronological manner. In both the community of Dawson's landing and 19th-century

⁴⁰ *Id.* at 19-21, 23.

⁴¹ *Id.* at 17-23.

⁴² *Id.* at 108.

⁴³ *Id.* at 108-13.

American society, visible identifications were later supplemented and/or replaced by genealogical identifications, which in turn were later supplemented and/or replaced by forensic identifications. This part follows this cascade of methods as it follows the specific ways in which Twain's novel identifies individuals primarily within matrices of race and honor and, to a lesser extent, within matrices of property, gender, life, and mobility. Stated more generally, I follow in these sections the different ways in which the novel identifies and demonstrates who is black *or* white, honorable *or* dishonorable, alive *or* dead, etc.

Interspersed throughout these sections on different methodologies of identification are the countermoves by individuals both within and outside *Pudd'nhead Wilson* to resist and deliberately misappropriate these technologies of identification. Indeed, with the exception of fingerprinting, *Pudd'nhead Wilson* dwells almost primarily on the failure and active subversion of identificatory methodologies rather than any (specious) efficacy they might possess. The straw man approach is part of the novel's strategy; *Pudd'nhead Wilson* suggests the normative pathways of identification through a plot that repeatedly veers from these pathways. The novel shows how identification normally operates in Dawson's Landing, in large part, by correlating the numerous exceptions that prove the rules. This subversion creates challenges – when black becomes white and honorable becomes dishonorable it is difficult to keep track of who is who and what is what. This attempt is troubled further by the interrelation between these Manichean dyads – racial identification as black or white limits identification as honorable or dishonorable, mobile or immobile, subject or object. The consequence of these interconnections is apparent in the sections that follow: both within the novel and within this chapter it is impossible to fully extricate a character's racial identification from the character's identification within other matrices – they overlap, blur, and sometimes even contradict each other. Thus, despite the best attempts of the community of Dawson's Landing or American society to compartmentalize or separate these identities, they successfully resist that separation. Although I have attempted, to a degree, to limit this confluence of identities in this part so that I might present a clearer and more compelling argument about identifications in *Pudd'nhead Wilson*, my partial failure is itself indicative of the ambiguities and impossibilities of identity that drive the novel.

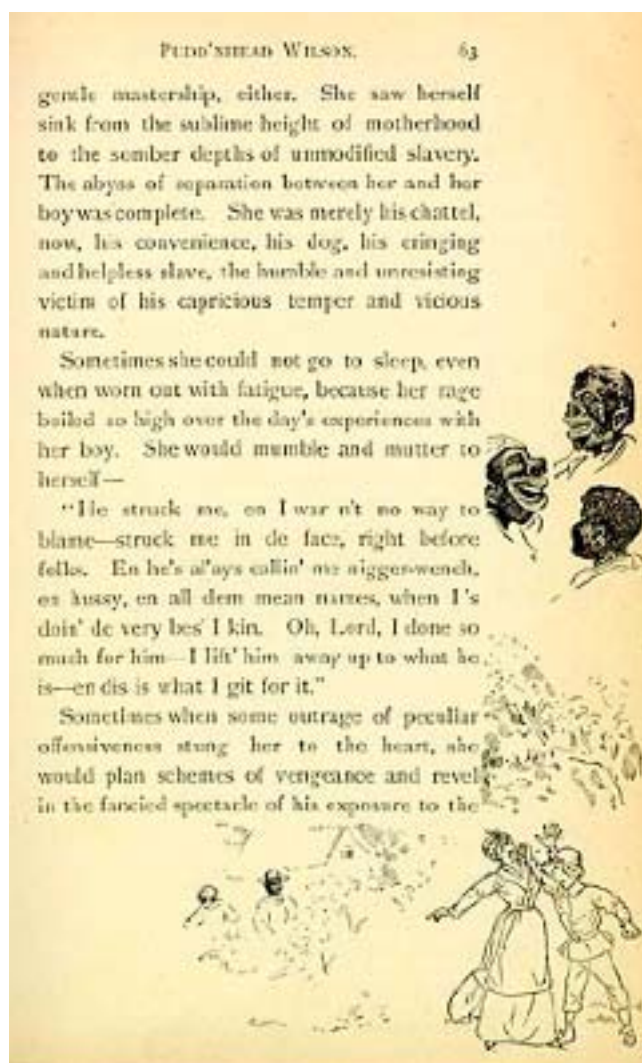
II.1 – THE VISUAL AND THE VISIBLE

Pudd'nhead Wilson wastes no time in describing the problematic identity of both Roxy and her son, Valet de Chambre: “To all intents and purposes [they were] as white as anybody... but by a fiction of law and custom [...] negro[s].”⁴⁴ Although presented by Twain in an antebellum slaveholding hamlet, the suggestion that racial identity rests upon the tenuous precepts of tradition and state power, touches an anxiety that the first publication of the novel indirectly suggests was even more challenging three decades after the end of the Civil War. But a consideration of identification within the novel would move too fast and miss too much, were it to look first to the attempts of the two legally black slaves to engineer one's conversion to whiteness. Roxy's exchange of her legally black child with her white charge is the complication the plot requires. But before dwelling on the motives or implications of this inciting incident, that is, before examining the “fictions of law and custom” undergirding the racial identity of Roxy and her son, we must examine the visual identificatory framework whose ability to (correctly) identify Roxy and her son as black had declined. That is, in order to understand how

⁴⁴ *Id.* at 9, 8-9. This name *Valet de Chambre*, through its French etymology, itself gestures towards old European aristocracy even as the literal meaning of the name suggests the lowly condition of its bearer.

Roxy or her son was able to become white, we must acknowledge and consider that both characters, in contradiction of their legal identities as black, *appeared* white. This device provides the structure on which Twain's novel depends. If Chambers, later known as Tom, had been born appearing black, whether by skin tone, hair texture, or any other physical and visible signifier, the tale of *Pudd'nhead Wilson* could not and would not have been.

While Twain was willing to center his story on the deeds and misdeeds of two black whites (or white blacks), his deposition of the predominant visual system of racial identification was a feat that the illustrations in many early editions of the novel declined to accommodate.



(Fig. 1) – Example of illustrations in the earliest American edition.

The first American edition of Twain's novel (American Publishing Company, 1894) included only small, cartoon-like, illustrations that were set around the margins of the text.⁴⁵

⁴⁵ MARK TWAIN, *THE TRAGEDY OF PUDD'NHEAD WILSON AND THE COMEDY THOSE EXTRAORDINARY TWINS 63* (Harpers & Brothers, 1894) (1894), available at Stephen Railton, *Selected Illustrations: Illustrating Pudd'nhead Wilson*, etext.virginia.edu/railton/wilson/pwillshp.html (last visited Mar. 10, 2010); also available at Stephen Railton, *The Tragedy of Pudd'nhead Wilson: First Edition Facsimile* <http://etext.lib.virginia.edu/railton/wilson/facsimile/pwchap4f.html> (last visited Mar. 10, 2010).

Because shading was difficult if not impossible with this mode of illustration, the racial ambiguity presented by the text was converted into caricature by an illustrator forced “to depict a character as either as white as the page or as black as the ink.”⁴⁶ These early depictions elide the complexity with which Twain handles themes of racial ambiguity, instead presenting racial identity in a contradistinctive ‘is or is not’ binary. To their credit, the marginal illustrations of the 1894 American Publishing Company edition do suggest familiarity with the text as they repeatedly represent both Roxy and Tom as paper-tone ‘white’ as opposed to book-ink ‘black.’ However, there is still a surprising amount of misrepresentation in the pictures. As children, both Tom and Chambers are dressed finely. This illustration does not accord with the novel’s description of the burlap in which Chambers was clothed. More important is the illustrators’ propensity to remind the reader of the racial difference.

At multiple points in the story, the depiction of a ‘white’ Tom or Roxy is set against contorted depictions of blacks.⁴⁷ None of the major characters in *Pudd’nhead Wilson* are visibly black; indeed, the novel names only two other characters within the novel who appear black.⁴⁸ Nonetheless, the greater majority of this edition’s illustrations finds ways to portray fully-inked black faces upon whose passing counterparts the novel focuses.⁴⁹ Not only do the illustrators distort these characters, they also multiply them. In the first complete edition of the novel, the 1894 American Publishing Company edition, only the first and last illustrations, of Dawson’s Landing and the trial, respectively, are free of ink-black characters. In this illustrative schema, Tom and Roxy are almost literally overshadowed by the ‘real’ but unrealistic black bodies that although largely absent from Twain’s text are ever present shadows within the illustrations. Nominally, racially, chromatically, and spatially marginalized, these dark mobs and big-lipped grinning faces are employed to denote proximity – to suggest that even when Roxy and Tom appear white they are the grotesque exceptions who are never far from wild caricatures of black bodies who patrol and maintain in so many ways the perimeter of this story.⁵⁰

In 1899, two new editions of the novel were published, each containing full-page illustrations by E.W. Kemble, the same artist who had illustrated the first edition of *Huck Finn*.⁵¹ One edition of *Pudd’nhead Wilson* was released as the fourteenth volume in the upscale, leather-bound “Édition de Luxe” of *The Writings of Mark Twain* and contained seven illustrations.⁵²

⁴⁶ Stephen Railton, *Selected Illustrations: Illustrating Pudd’nhead Wilson*, etext.virginia.edu/railton/wilson/pwillshp.html (last visited Mar. 10, 2010)

⁴⁷ See figure 1, *supra*.

⁴⁸ I am speaking of Jasper and Nancy. TWAIN, *supra* note 1, at 8. F.M. Senior and C.H. Warren, the illustrators of the marginal illustrations, did not forgo this opportunity to illustrate the racial difference while gesturing towards the racial proximity of these two characters. See American Publishing Company edition of PUDD’NHEAD WILSON 31, *supra* note 1.

⁴⁹ In the 1894 American Publishing Company edition, seven of the nine illustrations contain black faces. MARK TWAIN, *THE TRAGEDY OF PUDD’NHEAD WILSON AND THE COMEDY THOSE EXTRAORDINARY TWINS*, (American Publishing Company, 1894) (1894) [hereinafter, “TWAIN, American Publishing Company Edition”]. Similarly, in the “Édition de Luxe” of the novel, five of the seven illustrations contain black faces. MARK TWAIN, PUDD’NHEAD WILSON, (“Édition de Luxe” of THE WRITINGS OF MARK TWAIN 1899) (1894).

These illustrations are available at Stephen Railton, *Selected Illustrations: Illustrating Pudd’nhead Wilson*, etext.virginia.edu/railton/wilson/pwillshp.html (last visited Mar. 10, 2010).

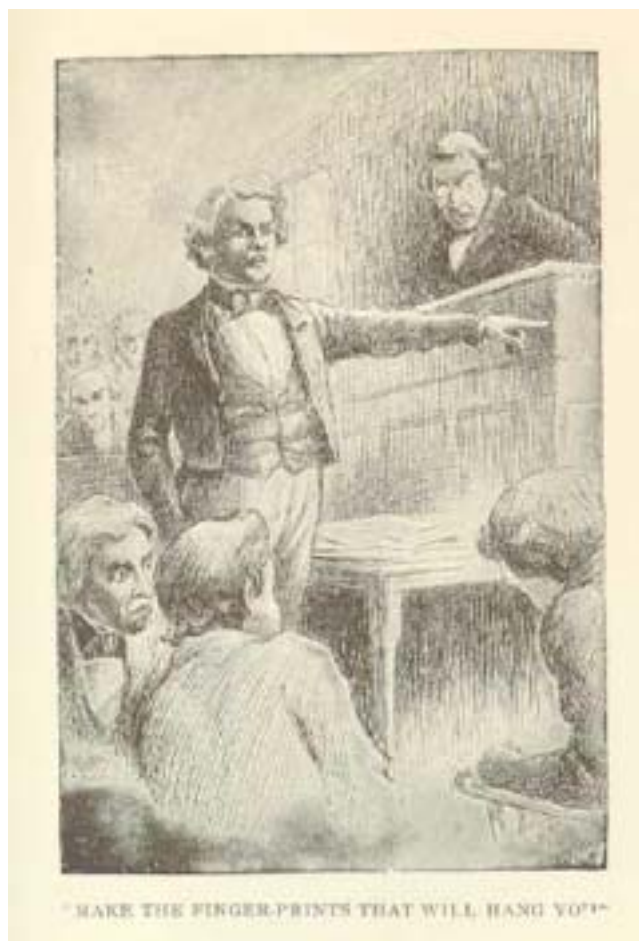
⁵⁰ TWAIN, American Publishing Company Edition *supra*, note 1, at 218, 63.

⁵¹ MARK TWAIN, PUDD’NHEAD WILSON, (“Édition de Luxe” of THE WRITINGS OF MARK TWAIN 1899) (1894); MARK TWAIN, *PUDD’NHEAD WILSON* (Harpers & Brothers, 1899) (1894). For a concise discussion of these editions, see Stephen Railton, *Selected Illustrations: Illustrating Pudd’nhead Wilson*, etext.virginia.edu/railton/wilson/pwillshp.html (last visited Mar. 10, 2010).

⁵² MARK TWAIN, PUDD’NHEAD WILSON, (“Édition de Luxe” of THE WRITINGS OF MARK TWAIN 1899) (1894).

The 1899 Harpers & Brothers edition, intended for mass-market distribution, was not as expensively produced and contained only two illustrations.⁵³

The second of these two illustrations appears towards the end of the 1894 illustrated edition of the novel.⁵⁴ The illustration shows a defiant Pudd'nhead Wilson pointing towards a judge while staring down at a person slumped in a chair.⁵⁵ The caption reads: "MAKE THE FINGERPRINTS THAT WILL HANG YOU."



(Fig 2.) – Dave Wilson identifies Tom Driscoll as Valet de Chambre.

The illustration depicts the climax of the novel and illustrates the moment at which Tom is revealed as both slave and criminal. As Wilson looks down at a person slumped in a chair, the reader concludes this is Tom. Yet the importance of this identification to the trial and to the novel, Tom is ironically unidentifiable.⁵⁶ Looking towards Tom from the back and the side, the illustration only gives the barest outline of Tom's physiognomy.⁵⁷ The reader can see neither his

⁵³ TWAIN, illustrated edition, *supra*, note 1, available at Stephen Railton, *Selected Illustrations: Illustrating Pudd'nhead Wilson*, etext.virginia.edu/railton/wilson/pwillshp.html (last visited Mar. 10, 2010).

⁵⁴ TWAIN, illustrated edition, *supra* note 1.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

eyes, his ears, nor his mouth.⁵⁸ A bit of his hair, a shaded profile, and his hand – that is all we get of the character whose identity drives the plot of this story.⁵⁹ But this illustration is less about seeing than being seen. While the picture does not reveal Tom’s visage to the reader, it does show seven other people staring at Tom.⁶⁰ As readers qua spectators we are immediately complicit in this act. We too stare at our bit of Tom. Furthermore, we stare at the assemblage of Tom’s community staring at him. We take part in this spectacle of identification even as we observe it. Within these layers of identification, the occluded focal point becomes all the more poignant. Tom, in this moment of conversion from innocent to criminal and from white to black, is not visible because he need not be visible. He undergoes no physical transformation at this moment; he, as a signifier, remains the same. The conversion comes rather in that which Tom signifies. Jurors, lawyers, and even a judge with preternaturally large eyes – the gazes of these actors as well our own gaze terminally identify Tom as a both a criminal and a black man. As this identification will be legally confirmed through Tom’s fingerprints, the illustration participates in the identification by precluding the reader’s visual identification of Tom. We do not need to *see* Tom to identify him because we have another, better technology of identification. Indeed, were Tom visible in the illustration it might actually confound the reader to see that at this moment in which Tom is revealed as black he remains as “white” as ever.

Yet to appreciate fully the complicity of the *Pudd’nhead Wilson*’s illustrators in the visual racial identification of characters, the other illustration in the mass-produced edition is perhaps even more important. Titled, “Roxy harvesting among kitchens,” the illustration was reproduced not only in the two editions of the novel produced in 1894 and 1899, but was also used as “the frontispiece for *Pudd’nhead Wilson* in hundreds of thousands of copies sold between 1899 and World [War] II.”⁶¹

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*



(Fig 3) – Roxy harvesting among the kitchens.

The illustration displays four characters. In the foreground stands a young child with a package or a loaf of bread. Three adults stand behind the child.⁶² The single male character is holding what appears to be a cup in his hands.⁶³ Two women stand behind him.⁶⁴ The man mostly obscures one of the women while the other woman, mostly visible, holds a pot or basket in one hand and has her other hand on an object in the pot or basket, perhaps a ladle.⁶⁵ All four characters look out of the picture; the child and the man look off to their left, while the two women stare out towards the reader.⁶⁶ Yet much more important than the action of the illustration is its composition. In the picture three of the four characters, including the centrally placed woman, are caricatured representations of black bodies.⁶⁷ For someone unfamiliar with the novel to which this illustration is attached, the stereotypical representation of a black woman in the center of the picture, complete with very dark skin, headdress, hoop earrings, and large

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

suspicious eyes, is Roxy.⁶⁸ Even the caption contributes to this interpretation: If Roxy is “harvesting among kitchens,” then it holds that she would collect her harvest within a basket.⁶⁹ As a character, this woman is positioned in the center of the illustration and despite her position behind everyone, she is composed as taller than the other characters.⁷⁰ If the actual perspective of the spectator is considered, this illustration depicts this black woman as very large; she is both the spatial and focal center of the illustration.⁷¹

Yet this is not the only visual trick of the image. The fourth character, the woman who is mostly hidden behind the man in the foreground, must, if the descriptions in the text are to be heeded at all, be Roxy.⁷² It is only this woman who does not appear as a caricature of a black slave. Yet with her hair bound with a handkerchief, everything below her shoulders hidden, and her face obscured and turned, it is hard to make out Roxy’s appearance at all.⁷³ One can only see a little more than half of this woman’s face and she is the character last to be noticed in the illustration.⁷⁴ Overall, the formal composition of the illustration does nothing to suggest that this woman, half-hidden in the background, has the “majestic form and stature... [or] noble and stately grace” with which Roxy is described.⁷⁵ Neither do the intricacies of the representation align with Twain’s description of Roxy’s “face[, that is] shapely, intelligent, and comely—even beautiful.”⁷⁶

Overall, this frontispiece image is worth more than the proverbial thousand words. The illustration gestures both towards the socio-historical period and position about which Twain wrote while revealing the racial conceptions that were contemporary to Twain. In this sense, the image is an exception that proves the rule, or rather the exception that proves the cultural inclination towards of racialization. Even in her own illustration, Roxy’s “comely—even beautiful” white appearance is marginalized. Her portrait is instead dominated by another set of black characters that absent from the text have moved from the perimeter to the center of its illustrations.⁷⁷ As the progenitrix who’s switched her ‘black’ son with her ‘white’ charge to launch the plot, Roxy receives the same treatment from her illustrators; her status as center of the story is stolen from her and granted to ‘black’ characters who have no claim to the narrative. The single view the reader receives of Roxy as she harvests among the kitchens is not a view of Roxy at all, but rather a caricature pastoral. Instead of viewing a black slave who, according to Twain, looks like a beautiful white woman, we as readers look into the slave kitchen complete with the shuffling subservient butler, pickanniny, and mammy.

As mentioned above, the eyes of these characters look in different directions out of the illustration. Perhaps they look all ways to make sure they are not discovered while filching.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* This supposition is confirmed by another illustration by E. W. Kemble in MARK TWAIN, PUDD’NHEAD WILSON, (“Édition de Luxe” of THE WRITINGS OF MARK TWAIN 1899) (1894). In the illustration, “ROXY AMONG THE FIELD HANDS,” Roxy is shown with the same scowling face, standing next to another extremely dark-skinned slave. Only two of Kemble’s seven illustrations from “Édition de Luxe” made it into mass-produced edition. See TWAIN, illustrated edition, *supra* note 1.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ TWAIN, *supra* note 1, at 8.

⁷⁶ *Id.*

⁷⁷ *Id.* I refer to these black characters as that because they never enter subjectivity. As these characters in Twain’s novel are treated as objects, they are ‘that’ rather than ‘who.’

Perhaps they look towards the invisible margin of the story from which they have been plucked for the illustration and to which they will return on the next page. It is among these unnamed caricatures that, from within the depths of the illustration, Roxy watches us – is that a scowl?⁷⁸ In complete counterpoint to the illustration of her son whose identification serves as the plot's climax, in this picture Roxy gazes into the foreground towards her stand-ins, her replacements, the gamut of caricatured racial identities to which Dawson's Landing's custom, American law, and even Twain's illustrators will attempt to tether her. But staring beyond the black individuals that populate the picture, defying the darkness that creeps across the half of her face that is illustrated, Roxy looks at us looking at her. In doing so, she watches her own identification occur for the innumerable readers of the "hundreds of thousands of copies" in which this illustration has appeared for more than a century.⁷⁹

By subverting the connection between race and color, that is, between legal and visual identifications of race, the various editions of *Pudd'nhead Wilson* provide an exceptional template for the visual identification of race. In granting the illustrations as another site of identification, the illustrators twist the plot of Twain's novel by attempting to undo the racial crossings such as miscegenation that enabled the novel or the active exchange of children that drove its plot. By refusing to draw the challenges to visual racial identification upon which Twain deliberately based his novel, the illustrators betray a societal desire for an infallible identificatory technology. The illustrator's decisions to either mis-identify or skew the race of the characters they drew comments profoundly on the need of late 19th-century society to misinterpret or marginalize Twain's description of non-stereotypically black bodies. Taken together, the illustrations clearly demonstrate the power and anxiety of racial identification without clearly depicting either of the novel's most important characters.

II.2 – THE TRANSMISSION OF IDENTITY: BLOOD AND GENEALOGY

As mentioned at the beginning of the previous section, *Pudd'nhead Wilson* subverts the efficacy and reliability of visual systems of identity demarcation very quickly and in a very simple manner within the story; the text introduces characters that although ostensibly 'white' when judged by the color of their skin, are irremediably 'black' when judged by their familial lineage.⁸⁰ The text presents this shift from a visual to a genealogical or lineage-based technology of identification both casually and pragmatically. These systems bleed together as the economy of genealogical racial identification is in first instance a transposition of a visual system of such identification: skin color and blood lineage intermix, resulting in the spurious idea of 'black blood.'

In *Pudd'nhead Wilson*, this system is advanced through the tenets of racist blood arithmetic – the idea that an individual might be some fraction of some race. Discussing Roxy, the novel notes, "[o]nly one-sixteenth of her was black, and that sixteenth did not show."⁸¹ The text likewise insists on the phenotypical whiteness of Roxy's child Chambers: "[h]er child was

⁷⁸ I discuss here the blackness in front of Roxy. But the right behind Roxy stands an open door that similarly offers the dark and unknown.

⁷⁹ *Illustrating Pudd'nhead Wilson*, *supra* note 32. Twain's role in these illustrations remains unclear. Although E.W. Kemble had produced illustrations for at least one of Twain's earlier novels, I am unsure of the extent, if any, of Twain's awareness or approval of the illustrations.

⁸⁰ A subtle yet important distinction warrants mention. These characters are judged primarily not only on the basis of their skin, but also on a variety of visual tropes associated with the skin.

⁸¹ TWAIN, *supra* note 1, at 7.

thirty-one parts white, and... he had blue eyes and flaxen curls.”⁸² This repeated notation of both characters’ apparent ‘whiteness’ and their possession of ‘black’ blood immediately destabilizes the efficacy of a visual system of racial classification. Presented bluntly, Twain creates two characters who are indistinguishably ‘white’ when evaluated by the technology of eyes, but incontrovertibly ‘black’ when evaluated by the tracking technology of genealogy.⁸³ That both Roxy and Chambers remain ‘black’ indicates the importance of racial identification, whether determined by physical attribute or familial lineage, to Dawson’s Landing.

Having introduced a community in which nothing more than one’s lineage can make one the servant and the other the master, Twain’s novel can be viewed, in one manner, as an experiment to demonstrate the power of such lineage or ‘blood.’ Like a methodical scientist, Twain constructs a situation in which his two research subjects are the same in every manner except one. Tom and Chambers live together, were born on the same day, and are even nursed by the same woman.⁸⁴ Both children carry the highly exalted blood of the First Families of Virginia (FFV).⁸⁵ Furthermore, the children are visually indistinguishable. To confirm the visual interchangeability of these two children to the reader, Twain provides an early scene between Roxy and the novel’s eponymous protagonist Dave Pudd’head Wilson.⁸⁶ Upon meeting the children, Wilson questions Roxy’s own ability to identify the children: “How do you tell them apart, Roxy, when they haven’t any clothes on?”⁸⁷

Despite this great amount of similarity, the one difference between the children is paramount to Dawson’s Landing – Roxy’s charge has no black ancestors, whereas one of Chamber’s sixty four great-great-great grandparents was black. Because Roxy’s son does not physically exhibit this blackness, the only apparent distinction between the children comes from their clothing. Only their clothing denotes their relationship to one another as future master and future servant. When denuded, the children are indistinguishable.

Only by meticulously tracking the familial lineage of the two individuals can Dawson’s Landing maintain this difference. As such, lineage, often reductively viewed as the ‘blood’ one possesses, is the predominant technology of identification in Dawson’s Landing. Normally this lineage is supplemented by acculturation and visual identification. Roxy is not black in Dawson’s Landing because she *looks* black, but because all other members of the community are familiar with her lineage; they know she is a slave and, as such, *must be* black. Secure in this knowledge, other individuals in Dawson’s Landing can thereafter visually identify her as Black through memory alone. To individuals who do not know Roxy, she is still black however. She is not black because she appears black, but because within Twain’s novel *she acts* and *talks* like the other blacks. Roxy’s lineage has introduced her to blackness, but her acculturation has confirmed it.

The situation is different for Tom and Chambers. Not only are the children visually indistinguishable, but they similarly inhabit that short period of time before they are distinctively recognized by the community or differently trained; they are before recognition or speech. At this point, the children are racially distinguishable only when externally distinguished by their

⁸² *Id.* at 8.

⁸³ Here, genealogical evaluation is legal evaluation. See discussion of *Doe v. Louisiana*, 296 So. 2d 809 (La. 1974) *infra*, chapter II.

⁸⁴ TWAIN, *supra*, note 1, at 5.

⁸⁵ *Id.* at 4.

⁸⁶ Despite his dismissive nickname, Dave ‘Pudd’head’ Wilson is largely presented as an irreproachable character in terms of both bearing and judgment.

⁸⁷ TWAIN, *supra*, note 1, at 9.

clothing. As the primary and perhaps singular caretaker of the children, Roxy possesses both the means and the opportunity to switch the children's clothing and thereby switch the children's identities. After establishing a situation in which the difference between the children is so little, whereas the difference in their societal position is so great, it is less than surprising that Twain advances his experiment by presently supplying Roxy a motive to switch her son with her charge.

Not long after Wilson's remark on the indistinguishability of the children, a string of thefts occur in the house of Roxy's owner. Set upon determining which of his many house slaves is responsible for the thefts, Roxy's master threatens to sell his slaves indiscriminately until the culprit is identified.⁸⁸

This alternative crisis of identification, in which Roxy's master attempts to identify the thief, sparks Roxy's realization of her son's identity as a slave.⁸⁹ Forced to acknowledge for the first time the tenuous connection she as a slave herself can expect to maintain with her son, Roxy becomes upset. She is afraid of losing her son and is willing to do whatever necessary to preclude their separation. Driven by this anxiety of separation, Roxy considers drowning her son and herself because "dey don't sell po' niggers down de river over yonder."⁹⁰ Initially, Roxy perceives death as the only way she and her son can escape their status as slave property and thereby preclude their separation. Roxy's choice to kill both her child and herself in order to escape slavery is one of the darkest moments in Twain's writing, but the tragic impact of this moment is immediately deflected in Roxy's vainglorious and maudlin attempts to plan her own death. These attempts are similarly connected to Roxy's genealogy.

As she prepares to depart to the river, Roxy catches sight of herself in a mirror and disapproves of her own clothing; she "ain't gywne to be fished out [of the river], wid everybody lookin' at [her], in dis miserable ole linsey-wooley."⁹¹ Putting on her best dress and putting up her hair "like white folks," Roxy attempts to appear ladylike so that others might remember her for her noble as opposed to her black forbears.⁹² In doing so, Roxy is deliberately, and under the touch of Twain's dark humor, gaudily attempting to effect her own terminal identification. Her plan, if consummated, will leave her a noble lady inseparably connected to both noble ancestors and her innocent progeny. But drowning oneself is not so simple in Twain.⁹³

⁸⁸ *Id.* at 12. Legally reduced to the status of property, these slaves are incapable of demanding any sort of due process that might stay their transfer to another master. Somewhat ironically, it is the slaves' own acts of conversion – they have stolen from their master – that highlights their property position. While such acts of petty theft potentially alleviate in some small way the strain of slavery, they also challenge the legal order of a society in which slaves, as possessions themselves, were unable to be possessors of property. By taking from their masters without permission, they implicitly own; by owning, they partially subvert both their status as object-possession as well as their legal inability to be the subject-possessor.

⁸⁹ *Id.* at 13.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ It bears noting that drowning is a theme that Twain approached with regularity in both this work, his other literary fiction, and the fiction of his life. In discussing his attempts to extricate the story of *Those Extraordinary Twins* from *Pudd'nhead Wilson*, he creates a well in which he drowns a number of characters. See TWAIN, *supra* note 1, at 121. Huck Finn's father, if not drowned, is found by Jim floating in a house down the river. Finally, Twain in a strange and sardonic bit of humor discussed the drowning of himself *or* his brother as a child: "We were twins, and one day when we were two weeks old - that is, he was one week old and I was one week old - we got mixed up in the bathtub, and one of us drowned. We never could tell which. One of us had a strawberry birthmark on the back of his hand. There it is on my hand. This is the one that was drowned. There's no doubt about it." See *Mark Twain*

After dressing herself up, Roxy is chagrined at the thought of exiting the world in her finest wear while her child goes to eternity clad in only a “miserably short little gray tow-linen shirt.”⁹⁴ She quickly dresses her son in the clothing of her charge. At this point, she finally recognizes that which Dave Wilson has previously foreshadowed; the children are indistinguishable. In her attempt to effect her own terminal identification as white and noble before passing from life to death, Roxy stumbles across a simpler act of passing that will ensure the security of her son even as it deprives her charge of his birthright. By switching the children, Roxy converts the possibility of her son’s whiteness into a reality. This move completes Twain’s experiment and incites the novel’s plot. Roxy’s switch implicates the inability of both visual and genealogical systems of identification in a double manner: in switching her slave son, Valet de Chambres, with the nephew of the small Missouri hamlet’s lead citizen, Thomas à Becket Driscoll, she not only refashions her son as white, but she also refashions Thomas, a child with pure white blood, as black, and thus by fiction of custom and law, a slave.

In all these instances, conceptions of visible racial identity are aligned to genealogical conceptions of identity. When Roxy performs the switch of the two children, she is, on one level shifting the emphasis from skin to blood as the focal point of unreliable identification systems. On another level, Roxy’s switch displays the interconnections between these two fundamentally flawed systems – established genealogies are connected to white skin. This collusion between race and lineage is reiterated more clearly at a later point in the novel to which I now turn.

II.3 – DISHONORABLE IDENTIFICATIONS: PARALLELS BETWEEN RACE AND NOBILITY

With the increasing unreliability of visual classification schemata, the transition to blood as the medium of both identity and purity in *Pudd’nhead Wilson* is a natural progression. The novel’s white community is willing to embrace this ideology of identity for their slaves in no small part because they had endorsed the value of this medium for themselves. Belonging to the illustrious bloodlines of the First Families of Virginia (FFV), a society based on a blood lineage as exclusive as black blood is inclusive, the aristocratic members of the novel likewise move in step to their own “code.”⁹⁵ As with the ‘one-drop-rule’⁹⁶ of racial identification, this blood economy is ultimately focused on the maintenance of the blood “without stain or blemish.”⁹⁷

Appeals for the ‘Smitten City’ N.Y. TIMES (Apr. 20, 1906), available at The New York Times 1867-1970 <http://www.twainquotes.com/19060420.html> (last visited Mar. 11, 2010).

⁹⁴ TWAIN, *supra* note 1, at 13.

⁹⁵ *Id.* at 4.

⁹⁶ Although the legal codification of the ‘one-drop-rule,’ by which an individual is ‘black’ if she contains a single drop of ‘black’ blood perhaps never extended as widely as it did in imagination, codifications of black identity were both common and strict. *See, e.g.* La. Rev. Stat. Ann. § 42:267 (1970) (repealed by 1983 La. Acts 46). The challenged statute states: “In signifying race, a person having one-thirty second or less of Negro blood shall not be deemed, described or designated by any public official in the state of Louisiana as ‘colored,’ a ‘mulatto,’ a ‘black,’ a ‘negro,’ a ‘griffe,’ an ‘Afro-American,’ a ‘quadroon,’ a ‘mestizo,’ a ‘colored person’ or a ‘person of color.’” Before the passage of this law in 1970, Louisiana law classified anyone with a “traceable” amount of black blood as black. Indeed, it bears reminding that the practices of identification and even disidentification through genealogy and blood quantification still exist in greater American society.

⁹⁷ TWAIN, *supra*, note 1, at 4. Whereas black blood is seen as an immutable determinant, the fluid that affects all its bearers, making them irreparably black, noble blood, e.g., the blood of the FFV or the aristocratic blood contained by Angelo and Luigi is constructed as exceedingly controvertible. Whereas black blood determines position and colors actions, this scheme is reversed for honorable blood; past actions have determined this blood status and current actions have the potential to sully this blood.

Yet while identity and position in relation to black blood is fixed, or at least as static as the genealogies upon which claims to sanguine purity rest, dishonorable deeds can sully noble blood. For the mixed-blood characters in this novel, black blood reduces to a despicable albeit ultimately inescapable taint – racial insufficiency/inadequacy is a foregone conclusion whereas for the noble members of Twain’s society, blood identity is less a curse to bear than an honor whose value is indicated by its potential for loss.

Despite the distinction between honorable blood and black blood, a hierarchical relation exists between them within the novel’s community. While the majority of the characters introduced in the novel are either ‘black’ or ‘noble’ in terms of blood, both Roxy and her son have both types of lineage, or as stated in the novel, possess both types of blood.⁹⁸ The confluence of these two bloods/lineages and the contradiction between the identities they prescribe culminates in one the novel’s strangest scenes.

At a public meeting Roxy’s son, now known as Tom, insults one of the twin Italian noblemen who have taken up residence in Dawson’s Landing. Unable to suffer the insult, the Italian kicks Tom in the seat of his pants. As the scion of one of the most illustrious families of Dawson’s Landing, Tom’s response is prescribed by the code. Nonetheless, Tom forgoes the opportunity to avenge his honor through the duel prescribed by the code, choosing instead to sue the Italian for assault.⁹⁹ By interpreting Luigi’s kick as an assault upon his body rather than his honor and seeking ‘legal’ rather than ‘honorable’ redress, Tom jettisons the system of redress among the noble in favor of a system established to deal with base parties.

Tom’s decision to file a legal action is initially viewed as incomprehensible to both Tom’s surrogate father, Judge Driscoll, other FFV members of Dawson’s Landing, and Dave ‘Pudd’head’ Wilson.¹⁰⁰ The importance of their rejection of legal remedy is put into high relief considering that the former is a judge and the latter is a lawyer. Surprisingly however, it is Roxy, whose ‘black blood’ disbars her from most social opportunities including participation in the rites and traditions of honor such as duels, who most strongly disapproves of her son’s actions.¹⁰¹

Quick to disparage her son for having betrayed the grand lineage of the FFV, Roxy fails to acknowledge a simple but important point: Tom’s FFV lineage is only important because she has suppressed his black blood. Indeed, Tom’s potential to participate in any aspect of the FFV economy of honor depends upon his supposed racial purity, a racial purity that Tom has received not from the lineage of his legally white father, but the actions of his legally black mother.

Roxy does not consider Tom’s access to the code; she is concerned only with his reason for not following the code. To Roxy, Tom’s actions are born of a despicable fear, and this fear is the result of the black taint of blood in her son: “It’s de nigger in you, dat’s what it is. Thirty-one parts o’ you is white, en on’y one part nigger, en dat po’ little one part is yo’ *soul*...dey’s enough to paint [your] soul.”¹⁰² From Roxy’s standpoint her son is not a “nigger,” rather he has a “nigger” in him; he is not black, rather one part of him is ‘paint’ed black.¹⁰³ Roxy’s belief in Tom’s biological taint of blackness and, furthermore, her correlation between a sanguineous taint and a characterological failure itself demonstrates Roxy’s own internalization of stereotypes. To

⁹⁸ *Id.* at 70.

⁹⁹ *Id.* at 59.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 71. Both Roxy’s race and gender would exclude her from participation in duels.

¹⁰² *Id.* at 70.

¹⁰³ *Id.*

Roxy, Tom's failure to respond according to the "Code" of the honorable might be the 'nigger' coming out of him, but Roxy's interpretation shows her complete acceptance of a white doctrine of racial inferiority.

In an interesting parallel, law in this scene is both the input and the output of Tom's racial identification. On the level of input, it is Tom's trip to court that leads Roxy to call Tom a coward. Roxy attributes Tom's ignoble pursuit of judicial remedy to his racial impurity. This situation, in which the mother demonstrates her white mentality in lambasting her son's display of his black character, are strange to be sure: Both mother and son appear white, yet both are black in terms of their lineage or 'blood.' Furthermore, Roxy excoriates her son for not being white enough when she is less white than he is. Nonetheless, Roxy's ideas about her son track the legal conception of Tom.

Roxy's ascription of Tom's cowardness to the "nigger" in him is an act of compartmentalization that seeks to locate and define the black within Tom. In this scene Twain poignantly connects the fiction of honorable lineage or blood with the idea of racial lineage and the fiction of black blood. On the level of output, Roxy's claim repeats, through her own idiolect, the actual juridical conception of Chambers; despite his flaxen curls and blue eyes, attributes that make him so similar to his changeling counterpart, the law is unwavering in its definition of his identity: Tom "was thirty-one parts white and... was a slave and by a fiction of law and custom a negro."¹⁰⁴ If Tom is to be a Negro per custom and per law, there is very little difference between Roxy's perception of her son and the juridical conception that the society of the novel would provide him. Through the hermeneutics of either, Tom is colored by his taint. In one short scene, Twain has laid bare the irony of racial identification

Despite the importance of race and the idea of a racial 'taint' to Roxy's explanation of Tom's action, Luigi's public assault of Tom places another black mark on Tom, a mark that rests on the honor of his lineage, or blood. Tom's success in an assault suit against the twin does not remove the blemish from the Driscoll name; legal redress has no value within the FFV's economy of honor. Because Tom refuses to duel Luigi in accordance with the code, Judge Driscoll must challenge the nobleman assailant. Only through this challenge can the judge repair the honor of the Driscoll family that Tom's cowardice has besmirched.

Just as one means of identifying race is only replaced by another in *Pudd'nhead Wilson*, the judge's choice to forgo the legal system of redress is repaired only through the substitution of another system. When Judge Driscoll duels Luigi, they take part in a codified negotiation of the insult. Under this system, Luigi's harm has not been done to Tom's person, but to the Driscoll name and family. As such, this system of negotiation replaces the legal system for those with honorable blood. But the operation of this system forms a curious parallel with the legal system it replaces because the honorable system of dueling is based on the very same precepts of purity and exclusion that structured the jurisprudential thought on slavery.¹⁰⁵ Just as the honorable duel stands as the *ultimate* system for a redress to insult, law establishes itself as the *ultimate* system for identification of the slave. In this sense, both the duel and the courtroom provide recognition and redress in a way that subsumes the individual to the lineage. Although there are no slaves, indeed can be no slaves, on the field of the duel, symbolically and literally, slaves are both conspicuously absent and peripherally present. Tom, secretly a slave, is not on that field. As a

¹⁰⁴ *Id.* at 9. When first detailing Roxy's 'mixed blood,' the text uses an analogous legal description: "the one-sixteenth of her which was black out-voted the other fifteen parts and made her a negro." *Id.* at 8-9.

¹⁰⁵ *Id.* at 69.

counterpoint to Tom's absence, Roxy silently watches from the haunted house that abuts the field in which Judge Driscoll and Luigi duel.

This connection between the legal code's prescription of slavery and the FFV code's prescription of honorable redress contains one more parallel – the two systems are self-contained. Just as the only way to fight a legal decision is to appeal it to another legal authority, breaches of the code are similarly cured only by the code itself. Shortly after the judge's duel with Luigi, Tom demonstrates this parallel.

Having fallen out of favor because of his decision to forgo the honorable route when he litigates his claim against Luigi, Tom likewise wins himself back into the favor of Judge Driscoll through the code. Using partial truths to present Luigi as an assassin, Tom depicts the Italian aristocrat's blood as besmirched by past treachery. If Luigi has besmirched blood then he is dishonorable and thus unworthy of entering a duel with Tom.¹⁰⁶ When the judge learns from Tom of the homicide Luigi has committed, he is shocked; however, this shock is not rooted in the murder itself, rather the manner in, according to Tom, Luigi has murdered.¹⁰⁷ To kill according to the code is not forbidden: the pistol duel fought between Luigi and the judge is sufficient proof of this. Yet, to be an assassin, that is, to kill someone who has neither done you wrong nor expects attack or, within the rhetoric of these codes, to engage an adversary somewhere other than upon the honorable field of combat is a craven act. The performance of one such act can stain the assassin's honor and thereby exclude that individual from the ranks of the honorable, just as one dark mark on an individual's lineage can exclude that individual from the privileges of a white racial identity.¹⁰⁸

¹⁰⁶ *Id.* at 78.

¹⁰⁷ *Id.*

¹⁰⁸ In this novel all boundaries of distinction come under attack. The Italian twins Angelo and Luigi serve as a parallel to Tom and Chambers in a variety of manners, yet they challenge systems of identification in unique way. Namely, the novel is rather ambiguous and almost ambivalent about the corporeal unity, and thus, identity of the twins. While Twain describes one the twins as “exact duplicates [except o]ne was a little fairer than the other,” the identity of the twins as grouped in one body or two is never clear due to the conflicting traces of conjointness that were, according to Twain, initially put into the novel during the earlier stages of its construction. Speaking of the twins of *Pudd'nhead Wilson* in the prologue to *Those Extraordinary Twins*, a novelette with which *Pudd'nhead Wilson* was written and published, Twain remarks that he “took those twins apart and made two separate men of them.” Nonetheless, this contradicts the tale the twins tell around Dawson's Landing:

Our parents could have made themselves comfortable by exhibiting us as a show, and they had many and large offers; but the thought revolted their pride...
We were [later] placed among the attractions of a cheap museum.

If these twins were two men, it is hard to imagine any reason for their having been exhibited in traveling European museums. A grammatical distinction made during the same episode confirms this hypothesis: “we were their only child.” Taken together these two instances leave little doubt that the twins are joined in one body. At the same time, we cannot overlook the gaping textual absence of any direct notation of the twins' conjointness.

The deployment of the twins, whose noble heritage, homicidal past, and generally exotic background complicate their position in the racial and social scheme of Dawson's Landing, likewise challenges identification at the most fundamental level. Irrelevant of Twain's intentions, the conflicting textual evidence concerning their corporeality is another instance of the novel's subversion of identification methodologies. As the majority of this subversion explores the precarious identifications between base or noble, white or black, the twins' ability to complicate corporeal enumeration (one body or two?), indicates the extreme measures to which the text will go in order to maintain focus upon the unreliability of systems of identification.

II.4 – BLOOD AS METONYMY OF LINEAGE: THE TRANSMISSION OF RACE AND NOBILITY

For a system of identification based on familial regression, it is somehow fitting that the noble lineages in *Pudd'nhead Wilson* go all the way back to the First Families of Virginia.¹⁰⁹ Boasting the first permanent settlement in America, the former colony appears a natural choice for an 'origin' myth of primal and noble American lineages.¹¹⁰ But this Eden is also the primal site of American slavery. In 1619, a damaged ship stopped in Jamestown.¹¹¹ Badly needing repairs and provisions the ship exchanged twenty slaves for the necessary goods.¹¹² This was colonial America's first recorded slave transaction.¹¹³ By 1629, a Virginia court had ordered an enumeration of "Negros" as distinct from the "Englishe" and by 1640 the same court had sentenced the first black servant to lifelong slavery.¹¹⁴ By 1662, the colonial Virginia legislature had overturned the century-long western practice of patrilineage descent in mandating that children born to slave women would themselves be slaves.¹¹⁵ In short, the very progenitors of the 'noble blood' in *Pudd'nhead Wilson* likewise initiated the racial distinctions and punishments that would lead to the American institution of slavery.

Within *Pudd'nhead Wilson*, the blood of the FFV sits firmly at the apex of the novel's hierarchy of lineages, just as lineages associated with black blood occupy the bottom. Yet when these lineages combine in Tom Driscoll, we see an individual whose character conforms poorly to any of the qualities he should have received.¹¹⁶ With features pale enough to pass for 'white,' he does not even approach the stereotypical conception of the 'Negro,' yet neither does his cowardliness, deviousness, or general underhanded nature fit well with the noble lineage of his biological father, the Colonel Cecil Burleigh Essex.¹¹⁷ Indeed, in many respects, Tom's blood lineage is better than that of the 'Tom' whose role he's usurped; Roxy informs Tom that "it ain't on'y just Essex blood dat's in [him], not by a long sight... [his ancestor] was Ole Cap'n John Smith, de highest blood dat Ole Virginny ever turned out."¹¹⁸ In another swipe at the legitimacy of blood lineage, Twain, through Roxy traces this 'highest blood' back even further from John

¹⁰⁹ Even disregarding modern revisions to history that place many other peoples in Virginia before the "First Families," the *first* English families in Virginia constituted the failed colony at Roanoke. Whether Twain might have had this initial attempt at American colonization in mind, or whether he was referring to the first surviving English colony, Jamestown, 1607 is unclear.

¹¹⁰ See Stanley Brodwin, *blackness and the Adamic Myth in Mark Twain's Pudd'nhead Wilson*, in MARK TWAIN, *PUDD'NHEAD WILSON AND THOSE EXTRAORDINARY TWINS* 332 (Sidney E. Berger, ed., Norton Critical Edition 1980).

¹¹¹ Lisa Rein, *Mystery of Va.'s First Slaves Is Unlocked 400 Years Later*, THE WASHINGTON POST, (Sept. 3, 2006) available at http://www.washingtonpost.com/wp-dyn/content/article/2006/09/02/AR2006090201097_pf.html (last visited Mar. 13, 2010).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ MCILWAINE, *supra* note 19.

¹¹⁵ Africans in America, The Terrible Transformation, Part I: 1450-1750, From Indentured Servitude to Racial Slavery, <http://www.pbs.org/wgbh/aia/part1/1narr3.html> (last visited Mar. 13, 2010).

¹¹⁶ In enumerating the types of 'bloods' possessed by Chambers or even entertaining the idea that his blood might be arithmetically partitioned is a fallacy that I repeat intentionally in order to explore its implications. If we are not aware of the prevalent conceptions of identity that were accepted during Twain's time, we are unable to understand better Twain's attempts to either describe, assert, or subvert their dominance.

¹¹⁷ TWAIN, *supra*, note 1, at 70.

¹¹⁸ *Id.*

Smith: "...en *his* great-great-gran'mother or somers along back dah, was Pocahontas de Injun queen, en her husbun' was a nigger king outen Africa."¹¹⁹

Roxy's words ironically implicate the constitution of the blood whose status she means to praise. Her citation of John Smith as the suma of noble blood lineage is inverted and revealed as ridiculous; Virginia's 'highest blood'¹²⁰ is the combination of the 'red' blood of Indians and the 'black' blood of Africans. To twist the knife further, these non-white progenitors possess noble titles no American has ever achieved. When Virginia's "highest blood" itself descends from an "Injun queen [and a] nigger king outen Africa," Twain invites us to consider basis upon which the noble blood/lineage of Dawson's Landing might both recognize the racialized origins of its gentry while denying blacks participation in this economy of honor.

More ludicrous than this denial is Roxy's profound belief in these blood differences. As willing as she is to subvert racial blood economies by switching her son, she is proud of the noble blood she believes flows in her son's veins because she (mistakenly) believes it does make a positive difference. Roxy is not alone in her belief in the power of blood; this conception and valuation of noble blood is shared by the upper class of Dawson's Landing in coextension with the society's legally enforced conception of racial difference. Yet in a community that utilizes blood as a system of class identification and as the necessary fallback for racial identification when systems of color demarcation fail, the ability to modify genealogical lineage by exchanging children indicates the unreliability of blood as either a system of identification or a social determinant.

II.5 – CONNECTIONS BETWEEN LOCATIONS AND IDENTITIES

Despite the failure of skin, blood, the body, or the fingertip to serve as a reliable source of identification, the society of Dawson's Landing is at no loss for a social scheme to differentiate among classes and characters of the story. Indeed, a much more inclusive conception of the construction of identity and the maintenance of difference comes from the analysis of location and mobility within the novel. From the opening sentence of the first chapter, "[t]he scene of this chronicle is the town of Dawson's Landing..." the novel displays a commitment not only to the demarcation but also the description of spaces and locations.¹²¹ The portrait of the small Missouri hamlet's layout initiates a concern with location and position that resonates throughout the novel. Twain's repeated evocation and description of geographic spaces in the novel is intimately linked to both the racial distinctions on which these spaces, indeed this society, depend as well as their selective transgressibility. Twain, master of the quick turn, likewise indicates these racial tensions from the first: the near-idyllic description of Dawson's Landing with which Twain begins the novel abruptly into the racial reality upon which this bucolic community depends: "Dawson's Landing was a slave holding town..."¹²²

In Dawson's Landing, the kitchen and the slave quarters are open to 'black' characters just as the front of the church and the jury box are spaces open only to whites.¹²³ Indeed, the ability of certain characters to pass racially and thereby travel within both sets of spaces is the

¹¹⁹ *Id.*

¹²⁰ With 'black' blood as a nadir, the urge to call Virginia's highest blood its 'whitest' demands acknowledgment.

¹²¹ TWAIN, *supra* note 1 at 3.

¹²² *Id.* at 4.

¹²³ When I write "black" or "white," I mean characters who are identified as black and/or white.

exception that indicates just how well these spaces function. Somewhat ironically, these acts of ‘passing’ denote the power of spatial regulation even as they chronicle its subversion.

I have already discussed the ‘field of honorable combat’ as a space whose entry can be restricted, yet this is only one of the many spaces in the novel that aligns itself with the identity of the characters. Comparatively, it is hard to describe a number of black spaces in this text for the simple fact that there are few black characters in the novel. White spaces are alluded to and described repeatedly in the novel. As readers, we visit or learn of the parlors, the meeting halls, the gambling dens of St. Louis, Yale, or the campaign rallies because all of these spaces are like the central location of Dawson’s Landing. They are white controlled space in which blacks, if present at all, are condemned to the margin. Besides Roxy and Chambers, there are only two black characters, Jasper and Nancy, whom the novel grants names.¹²⁴ The novel develops neither of these characters and both function primarily as conjunctions within the text; they are basically plot stevedores. Nancy is granted but a single line in the novel before returning to the unexamined margin, Jasper gains almost half a page. In Jasper’s one conversation in the novel, he engages Roxy in “idle and aimless jabber.” Outside the house of Roxy’s master, and thus evacuated from the physical as well as the symbolic structures of the tale, the conversation between Roxy and Jasper playfully displays intraracial and locational tension. Jasper has come to court Roxy, but the much lighter skinned Roxy will have nothing to do with Jasper’s darker skin. Citing Jasper’s “conceit,” Roxy says she would sell the slave “down de river.”¹²⁵ Although, the indistinct space of ‘down the river’ first appears in the guise of humor, the novel repeatedly and traumatically emphasizes the meaning of this location always connecting it to the black bodies that are sold there.

When Percy Driscoll, the owner of Roxy and three other slaves, attempts to learn who is responsible for the string of petty thefts within the household, he meets with adamant denials of guilt. Only when he promises to sell his slaves down the river randomly, does he extract a confession: “[three slaves] dropped to their knees as if they had been shot; tears gushed from their eyes, their supplicating hands went up, and three answers came in the one instant: ‘I done it!’”¹²⁶ The fear exhibited by these slaves confirms that being sold down the river is the “equivalent to condemning [slaves] to hell!”¹²⁷

Whereas the noble blood of the novel gestures towards genealogical and geographical origins in a mostly positive regression epitomized by the idea of return to the First Families of Virginia, the black blood of the novel is always imbued with terminal potential; it is the fluid that can ship a slave down river. Indeed, the indistinct location, “down the river,” incites the novel’s plot. Roxy’s fear of her son being sent ‘down the river’ leads her to remove her son from the unstable position of the slave crib. This is not the only time in which the fear of being sold ‘down the river’ appears in the text.

Strangely, the next time this trope arrives it comes from Roxy, yet unlike her early conversation with Jasper, she is no longer kidding. When Tom learns of his true parentage, it is this threat with which Roxy keeps him in check. It is not surprising that this same anxiety of relocation is again visited at the conclusion of the novel. In *Pudd’nhead Wilson* the condition of ‘blackness’ as determined by blood is repeatedly linked to this ambiguous location.

¹²⁴ TWAIN, *supra* note 1, at 8.

¹²⁵ *Id.*

¹²⁶ *Id.* at 12.

¹²⁷ *Id.*

Although ‘down the river’ is the abjected space most explored, the novel mentions many others. Overall, the absence of black bodies within the text results in an absence of black discourse; both contribute to the perception of black spaces as marginalized. When the text talks of the “‘nigger corner’”¹²⁸ of the courtroom, the “‘nigger gallery’”¹²⁹ of the church, or topically alludes to the kitchens from which Roxy might obtain food from other slaves, the novel is gesturing towards spaces that it at most only fleetingly enters.¹³⁰ While all the abjected spaces are not aligned with ‘blackness’ – one thinks of Yale at which Tom has studied or St. Louis to which Tough often travels – all of these spaces, black and white alike, are aligned with the training they facilitate.

In two years at Yale, Tom’s “manners [are] a good deal improved [and he loses] his surliness and brusqueness,”¹³¹ yet the core of his character does not change: “[h]e [returns as] indolent as ever.”¹³² Overall, Yale is a location that trains Tom as it offers him the chance to develop habits such as gambling. Tom is unable to practice these habits in Dawson’s Landing, and thus he repeatedly travels to St. Louis. This location, a space the text enters only once, provides Tom with both “refreshment” and further opportunity to train himself with “companionship to suit him.”¹³³

Tom’s education in and knowledge of social custom whether at the level of language, dress, or dueling, all establish his connection to his position as a white, upper-class member of Dawson’s Landing. The effect and importance of this training is completely discernable only through a consideration of the training of Tom’s counterpart. Through a sustained presence in the black spaces of Dawson’s Landing, Chambers is similarly instructed in how to act. Although this training is not as formal as Tom’s training at Old Blue, it nonetheless positions and concretizes Chambers into a fixed identity role.

It is not until the end of the novel, after the trial has re-identified the switched characters and Chambers has finally regained the social position into which he was born, that we as readers can view the full implications the training Chambers has received. Although Twain devotes only a single paragraph to a discussion of Chambers’ identity and location after the trial, it is enough for Twain to paint a stark portrait of Chambers’ isolation. Forever barred from the sanctuary of the slave kitchen, Chambers thereafter suffers his relocation into the ‘white,’ upper-class spaces of Dawson’s Landing. Describing the debilitation that accompanies the feeling of belonging to no social milieu, Twain calls upon every pejorative adjective in his lexicon. Embarrassing, base, vulgar, uncouth, defective, glaring, pathetic... these are the words with which Twain, in seven sentences, describes Chambers’ fit and comfort within the white society of Dawson’s Landing. Twain’s point is simple: Chamber’s training and acculturation as a slave have permanently condemned Chambers to the “misery” of his imposition.¹³⁴ At the end of *Pudd’nhead Wilson* Chambers is doomed to remain in a location in which he is unfit, a location in which he must remain because his identity requires such position.

¹²⁸ *Id.* at 99.

¹²⁹ *Id.* at 114.

¹³⁰ At repeated instances within the text, the Negro churches attended by Roxy gain mention. However, it is only at the end of the tale when Twain writes of the segregated church, as a location in which the white and black world of Dawson’s Landing almost meet, and thus a prime example for the observation of tensions, that we can observe the positional tensions attendant to a character who does not fit into the segregated racial binary. *Id.*

¹³¹ *Id.* at 23.

¹³² *Id.*

¹³³ *Id.* at 24.

¹³⁴ *Id.* at 114.

Conversely, a consideration of the scoundrel Tom is completely lacking after the trial. Twain does tell us that the reprobate is sold down river. But Twain mentions neither an exact location nor any specific troubles experienced by Tom. The curious and likely expansive set of tribulations that Tom suffers as an erstwhile ivy-league-educated gentleman recast as field slave in the deep South is perhaps too tragic for Twain to consider - a coda that not even Twain's wry humor might turn palatably sardonic. Or, in keeping with the rest of the story, perhaps there is a simpler explanation: the novel does not follow Tom into his slave life because to do so would be to follow a black character into a black space.¹³⁵ In either case, Tom's final punishment is not only slavery, that is, not only a loss of his class and racial status, but his evacuation or translocation outside of both the literary geography and narrative attention of the story. Having become black, Tom must inhabit the unexplored locations reserved for black characters, spaces into which Twain's narration seldom ventures.

As mentioned above, this terminal location of both Tom and Chambers into spaces in which they have been born but for which they were not bred is possible only because the training they have received until the end of the story. Chambers' movement from the "nigger gallery" to "[t]he family pew" indicates not only a literal relocation but also a symbolic movement to another identity. It is no coincidence that Twain's final gaze at Chambers details the effects of relocation on this character's identity. Nonetheless, the importance of this focus on Chambers and the movement it charts is better understood when set against the preceding lack of focus on Chambers or his location.

In the few instances Twain grants his attention to the much-maligned twin, themes of identification and location are similarly present. From the direct report of his birth: "[o]n the 1st of February, 1830, two boy babes were born", Chambers is already combined with, or twinned to, Tom. Yet despite the punctilious effort the novel makes to follow Tom, Chambers only has two conversations in the text, both of which occur at poignant moments of identification in the novel.¹³⁶ More important still, both of the conversations occur when Chambers is in or approaching the location of Tom. The novel does not go to Chamber so that we might hear from him and learn of him. In the very limited instances in which we hear from Chambers it is because he has entered white spaces in the novel.

We first hear from Chambers when he hesitates to fight the group of boys who taunt Tom as being in the care of his "Nigger-pappy."¹³⁷ Tom stabs Chambers "two or three times" for his refusal.¹³⁸ The collusion of color anxiety, racism, troubled genealogy, and violence in this scene is undeniable.

Tom's next speech, which occurs shortly after Roxy's return from her life as a steamboat chambermaid on the Mississippi river, also centers on misidentification. Picking up on Roxy's insult of him as a "misible imitation nigger dat [she] bore in sorrow en tribbilation," Chambers can at first only laugh.¹³⁹ From this laughter springs Chambers' most profound comment in the novel:

¹³⁵ The novel does gesture towards the black space of the field down-river into which Tom sells Roxy. However, we learn little of Roxy's experiences as a field slave, and that which we learn comes through her description of life once she has returned to Dawson's Landing. *See* TWAIN, *supra* note 1, at 86.

¹³⁶ *Id.* at 21, 35.

¹³⁷ *Id.* at 21.

¹³⁸ *Id.*

¹³⁹ *Id.* at 35.

If I's imitation, what is you? Bofe of us imitation *white*—dat's what we is—en pow'ful good imitation, too[...]we don't 'mount to noth'n as imitation *niggers*... .¹⁴⁰

By the novel's end Chambers will have learned that from the perspective of blood purity he is not *imitation* white, but actually white. Chambers will also learn that, insofar as racist culture has brought consistency between black and slave identity, he has indeed been quite a successful imitation “nigger.” These identifications of Chambers are just as easily inverted – by the novel's end, Chambers is irredeemably and thus tragically at best only imitating white from a cultural perspective, yet, despite his blood purity, he is doomed to continue imitating black.

Although Chambers' self-denomination as ‘imitation’ provides perhaps the best indication of the fiction of race within this novel, Roxy is impressed neither by Chambers' profundity nor his unintended irony; she has come to Chambers only as an intermediary. She wishes to speak with Tom but visits Chambers in order to have him deliver her request to see him. Carrying out this request, Chambers' role in the language exchange is minimized.¹⁴¹ Chambers is dislocated from the subjectivity of actual words and the present tense of speech; the text reports that he “brought the petition.”¹⁴² Tom stares at the man whose position he occupies. He has not heard the request that Chambers delivers. The text completely evacuates Chambers from the exchange as it slips into a passive construction while maintaining the past tense: “[t]he petition was repeated.”¹⁴³ It is only another act of violence upon Chambers' body by Tom that returns Chambers' to a verbal register; as Tom “[rains] cuffs upon the head” of Chambers, he pleads, “[p]lease, Marse Tom! - oh, please, Marse Tom!”¹⁴⁴

Chambers, by virtue of his status as a slave is always at risk of attack on his body. This risk only increases when he attempts to enter ‘white’ spaces. As a slave Roxy is also susceptible to violence upon her body at any point, but especially when she attempts to enter ‘white’ spaces. The novel's use of physical violence to police boundaries is pervasive enough to escape even the deliberation of specific actors: when Roxy surreptitiously views Judge Driscoll's duel with Luigi Capello a stray bullet glances her face. Even Roxy's visual encroachment into a location denied to her race ends with the infliction of violence upon her.

¹⁴⁰ *Id.*

¹⁴¹ See TWAIN, *supra* note 1, at 36. For clarity I have included the passage in its entirety:

Tom was stretched at his lazy ease on a sofa when Chambers brought the petition. Time had not modified his ancient detestation of the humble drudge and protector of his boyhood; it was still bitter and uncompromising. He sat up and bent a severe gaze upon the fair face of the young fellow whose name he was unconsciously using and whose family rights he was enjoying. He maintained the gaze until the victim of it had become satisfactorily palled with terror, then he said—

“What does the old rip want with me?”

The petition was meekly repeated.

“Who gave you permission to come and disturb me with the social attentions of niggers?”

Tom had risen. The other young man was trembling now, visibly. He saw what was coming, and bent his head sideways, and put up his left arm to shield it. Tom rained cuffs upon the head and its shield, saying no word; the victim received each blow with a beseeching “Please, Marse Tom!—oh, please, Marse Tom!”

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

But the locative aspects of text operate on more levels than race. The text is profoundly locative; Dawson's Landing is the single destination in which the majority of the characters' lives and action occurs. But more than this, the novel presents the small town as an ultimate destination of all the characters who can establish a claim to whiteness. Whether discussing the FFV, the Capello twins, or even Dave Wilson, Dawson's Landing is a final stop, the locative and narrative center of a novel whose characterological origins range from New York to Italy, from Virginia to Africa. It is only through attempting to transgress identity roles that characters actually leave Dawson's landing. The Capello twins plan similarly to spend the rest of their days in the slowly growing town, but the repeated insults to their honor, insults which culminate in their near conviction for the murder of Judge Driscoll, provide the necessary force to send them back to Europe. Why did the twins ever plan to remain in Dawson's Landing? Their eventual departure renders moot this simple question. Still, we can inquire as to what the Italian aristocrats find to hold them in this small Missouri hamlet. The novel perfunctorily suggests their fascination with the rustic charm they encounter in the place and in its people. But the efficacy of the reason, dubious from the first, further strains credulity when Twain's narratorial omniscience reveals that the twins patiently suffer the boredom that comes with the townsfolk's attentions. Having experienced such attentions, from such people in such places innumerable times before – the twins' presence in Dawson's Landing is best ascribed to a certain narratorial requirement: they are there because Twain has written them there. This is a location from which the novel's eponymous lawyer cannot escape. Having completed his legal studies in an Eastern law school, Wilson comes to Dawson's Landing to begin his legal practice. His legal practice fails to thrive and he is mocked and rejected by almost the entirety of his community, yet he chooses to remain. As with the twins, the novel never attempts to explain Wilson's choice to remain.

Conversely, it is only the discovery of Tom's true racial identity which can abject him from the location of Dawson's Landing to a location 'down the river.' Likewise, it is only the discovery of Chamber's 'whiteness' that ensures his continued presence in Dawson's Landing. In this simple matrix, a character's race and class denote not only the spaces he can inhabit, but also his potential for movement or stasis. This limitation might appear tenuous, nonetheless it is tacitly recognized and openly manipulated by both Tom and Roxy.

II.6 – PASSING: RE-IDENTIFICATION THROUGH RELOCATION.

Although Tom's fate is located in the 'hell' that lies down the Mississippi, he, along with Roxy, repeatedly subverts the novel's attempts at locative identification through their movements. Roxy, who initiates the novel's largest misidentification through the switch of the 'black' babe with 'white' babe, is also the first character to understand the alignment of literal movement with passing. Building on this realization, Roxy repeatedly triggers her own re-identification by relocating.

When freed in the will of Percy Driscoll, Roxy wastes no time in abandoning Dawson's Landing for life as a steamboat chambermaid. Her willful relocation onto the mobile craft allows her to travel and explore new cultures as it concurrently allows her to reconfigure her identity from (ex-)slave to wage earner. Having occasioned her own conversion into a 'Valet de Chambre' through literal mobility, she thereby grants herself the same social mobility that she has nominally, and later actually, imparted her son.

When Roxy later returns to Dawson's Landing to see her son, she takes up residence in "the haunted house" on the edge of town.¹⁴⁵ In a novel that is concerned with the boundaries between noble and ignoble, black and white, Roxy's self-positioning within a paranormal position likewise indicates a challenge or attempt to transgress another impermeable boundary. Obliquely connecting herself to the haunted space, Roxy draws attention to the boundary between the living and the dead; by occupying that boundary and locating herself in the haunted house, Roxy symbolically effects another passing as she becomes a ghost.

After her return to Dawson's Landing, Roxy learns that Tom has come into financial difficulties because of his gambling habit. Realizing that Tom's inheritance and thus her and her child's financial security is at stake, Roxy decides upon a curious solution that evinces both financial calculation and irrational love; she elects to allow Tom to sell her back into slavery in order to extricate himself from his dire financial straits. Roxy believes that this re-identification and relocation of her can save the son she loves.

Later, when Roxy escapes from the down river plantation, she will accomplish her relocation through another instance of passing. As with the previous instances, this re-identification will force Roxy to subvert another supposedly intransgressible boundary of identity. Escaping and returning North, Roxy reappears as a man:

The man turned around, a wreck of shabby old clothes, sodden with rain and all a-drip, and showed a black face... He said [to Tom], in a low voice:

"Keep still - I's yo' mother!"¹⁴⁶

Defined and identified by law and society as a slave, Roxy realizes that she must change her identity in order to escape the definition with which she would be saddled. To save her son from slavery she has symbolically cast off his blackness in order to make him white; in order to escape her identity as a female slave she again changes identity by changing clothing. Twain indirectly supports this gender relocation by ascribing the masculine pronoun to Roxy – she is the 'He' who can say, "I's yo mother!" As Roxy's identity continues to transform from slave mother to bankrupt chambermaid, to field slave, Roxy repeatedly counters by transgressing a normatively impermeable binary of identity – black to white, alive to dead, woman to man.

Her son, the beneficiary of Roxy's first act of passing, mirrors his mother in his own subversion of identificational axes. Yet whereas Roxy progresses through a series of identity transgressions in order to improve her increasingly deteriorating situation, Tom continues to change identities in order to conceal his complicated involvement in vice and crime. Saddled with gambling debts he cannot repay, Tom begins to rob the houses of his neighbors in Dawson's landing. In order to escape identification, Tom makes his raids during his supposed sojourns to St. Louis. Yet his raids become even more successful once he decides to cross-dress before pilfering.

Just as Roxy crosses gender to escape the law, Tom crosses gender to break it. In a suit "of his mother's clothing, with black gloves and veil," Tom passes through Dawson's Landing unnoticed during his pilfering raids.¹⁴⁷ Yet his disguise becomes more than his clothing; when Tom senses that Dave 'Pudd'head' Wilson has noticed him returning home at dawn after a

¹⁴⁵ *Id.* at 40.

¹⁴⁶ *Id.* at 84-85.

¹⁴⁷ *Id.* at 46.

night of theft Tom quickly decides to entertain Wilson “with some airs and graces and attitudes.”¹⁴⁸ In order for Tom’s disguise to work, he must not only look like a woman, rather he must move like one; vision suggests identity, mobility confirms it.

When Tom later plans to rob ‘his’ uncle, Judge Driscoll, Tom goes one step further in his “preparations” in a manner that combines Tom’s gender crossing with an act of racial crossing.¹⁴⁹ Before attempting to rob his uncle’s safe, Tom “[blacks] his face with a burnt cork.”¹⁵⁰ At this point Tom is a culturally white, yet genealogically black, slave passing as a white scion in St. Louis, who’s passing as a black woman. Despite these multiple layers of passing, Tom’s plan goes awry. Tom murders Judge Driscoll in order to escape detection. Murder is not enough, however; Tom can only escape through another instance of passing. Once he flees his home, he goes directly to the haunted house, burns his clothes, and “put[s] on a disguise proper for a tramp” before returning to St. Louis.¹⁵¹ This last act of passing is structured neither around race nor gender. By becoming a tramp, Tom is instead crossing a boundary of class. Just as Roxy has initially effected her own conversion from demobilized slave to mobile wage earner, Tom’s last disguise as a poor and mobile tramp, detaches him from the wealthy, yet spatially located, identity that he seeks to escape.

II.7 – FINGERPRINTING AND LEGAL IDENTIFICATIONS

Despite the many cases of misidentification in the novel, it is easy to forget that the climax of *Pudd’nhead Wilson* culminates with an instance of correct identification or, stated more accurately, re-identification. Not surprisingly, Twain completes the arc of the novel by resolving all the conflicts that have driven the plot; by the end of the story, the innocent have gone free and the criminal has been caught. Surprising, however, is that Twain’s resolution of the murder comes from the deployment of yet another identificatory technology.

From the beginning, *Pudd’nhead Wilson* presents the repeated breakdown of systems of racial identification and demarcation that creates a vacuum of social anxiety that must be filled. At its climax, *Pudd’nhead Wilson* presents an embattled society. With the murder of Judge Driscoll, Dawson’s Landing has literally and symbolically lost its patriarch, its honor, and its Law. Unable to identify a murderer and conspirator who passes between races and genders, Dawson’s Landing’s own identity is endangered.

Having demonstrated the failure of visual, genealogical, and even locative systems, Twain turns to an almost fantastic technology of identification. This methodology is based on “certain physical marks, which *do not change* their character, and by which [one] can *always* be identified” (emphasis added).¹⁵² In a desperate attempt to exonerate Luigi Capello of the murder of Judge Driscoll, Dave ‘Pudd’nhead’ Wilson introduces fingerprints that he has collected to show that it was Tom who held the weapon that killed the judge.

In contrast with the *deus ex machina* feel of the seamless and apparently incontrovertible resolution these “physical marks” bring to the trial, fingerprinting as a technology is laboriously and somewhat clumsily deployed in *Pudd’nhead Wilson*. Although the development of forensic fingerprinting would not begin until late in the 19th century, for Dave ‘Pudd’nhead’ Wilson,

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 93.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 95.

¹⁵² *Id.* at 108.

fingerprinting is already a hobby in the 1830s. Throughout the novel *Wilson*, for reasons unknown, attempts to collect the finger markings of the other members of Dawson's Landing.

To be sure, Wilson's strange hobby is as ostentatious as it is anachronistic. When Wilson finally does something with these finger markings during the novel's climatic trial scene, the identification amazes everyone in the courtroom, including the reader. Yet while the presentation of this identificatory technology at the novel's climax is astounding, the plot devices Twain utilizes to create this scene are highly suspect if not incredible.

Although important only at the end of the novel, fingerprinting enters Dawson's Landing at its very beginning. Shortly after the birth of Tom and Chambers, Wilson convinces Roxy to allow the children to participate in his scientific research and newest hobby. With Roxy's consent, Wilson records the finger markings of both children on glass strips and dutifully locks them away where they will remain until needed. It stretches the imagination to believe that Roxy would trust her infant charge and infant son to the hobby experiments of a town member whose esteem among his fellow citizens has merited him the ignominious epithet of 'Pudd'nhead,' but this is the smallest of a number of problems with fingerprinting.

With all the twists and turns, crossings, and misidentifications in this plot, it is not surprising that Twain anticipates and perhaps even invites incredulity from his readers. As an attempt to quell readerly disbelief, Twain opens *Pudd'nhead Wilson* with a "whisper to the reader." This short introduction, signed and dated by Twain promises the reader of the legal accuracy of the forthcoming story. Twain assures the reader that he has "subject[ed the law chapters] to rigid and exhausting revision and correction" by his friend, William Hicks "a trained barrister."¹⁵³ Twain further promises that the "chapters are right, now, in every detail."¹⁵⁴

Despite either Twain's dubious assurance of accuracy or Wilson's marvelous courtroom presentation, the novel never entertains the shortcomings of this ultimate identificatory technology. Wilson's use of forensic fingerprinting does catch the killer. However, fingerprinting as an identificatory technology is unable to denote race, blood lineage, or even gender. The limitations of fingerprinting are readily apparent to any contemporary reader, indeed to anyone familiar with the rudiments of current identificatory forensics. Nonetheless, this important aspect of Wilson's divine technology is left unexamined in the rush to solve the judge's murder and thereby restore social and racial order to Dawson's Landing.

Simply put, fingerprinting is a technology that, at best, can prove only that one certain person is still one certain person, *i.e.*, that the person who left one set of prints is the same person who left another set of prints. As Wilson successfully uses this technology to determine that 'Tom' is Chambers and 'Chambers' is Tom, it is hard to discount the success of fingerprinting. Yet, Wilson and the others in the novel too quickly accept the fingerprint explanation.¹⁵⁵ If it is possible for Wilson to posit that Tom and Chambers have been switched as children, why does he fail to consider the possibility of multiple switches having occurred? If Roxy had deliberately or inadvertently switched the children once before and once after their fingerprinting, then it would follow that Tom, although a murderer, was not Chambers, and thus not a slave. If the mental acrobatics that accompany the identification of children who were potentially switched X

¹⁵³ *Id.* at 1.

¹⁵⁴ *Id.*

¹⁵⁵ For a more in depth discussion of consanguinity, see Marc Shell, *Those Extraordinary Twins* 47 ARIZONA QUARTERLY 2, 29 (Summer 1991). Whereas Shell centers his discussion around the "complexities of a binary dialectic involving kind kin," and "the inascertainability of a consanguineous kinship," I think Twain ultimately posed a critique of identification practices. In exploring the systems by which black could be proven, from visual demarcation to racist blood arithmetic, Twain ultimately questions not the 'how' but the 'why' of racial distinction.

times before their fingerprinting and Y times after their visit to the ‘Pudd’head’ entails confusion, that is precisely the point. Unfortunately, Tom lacks a good defense lawyer; as such, there is no one in the novel to pursue this question.¹⁵⁶

Equally unsettling is the absence of any query about the timing of the switch; there is not one shred of evidence to support that Tom and Chambers were switched after their fingerprinting as opposed to before it. Indeed, would it not have made more sense to assume that Chambers was the murderer as the print on the knife matched the prints on the plate with his name on it? Should the members of the community trust the evidence and expert testimony of an individual representing the defendants? If the prints were left on glass, with natural oil from the hair, might the organic oil not have decomposed during the twenty years the plates set in the back of Wilson’s closet? These are among the questions that having been left unasked, the novel does not answer.

As a reader it is easy to overlook these challenges in spite of their appearance to any individual familiar with the checks of the American criminal justice system. Yet this oversight on the part of readers and literary critics is partially Twain’s fault. We do not question the accuracy of evidence, the number of times the children might have been switched, when these switches might have occurred, or, most importantly, who is the slave and who is the murderer, because Twain already answers these questions for us through exposition. In the course of the novel Twain has shown us the single switch, and the various instances of fingerprinting, and the Judge’s murder; the lack of factual scrutiny leveled upon Twain’s characters in Twain’s town in Twain’s novel establishes a narrative momentum that also contributes to the acceptance of fingerprinting as an almost divine system of identification.

As such, the questions posed above are unnecessary because *we* readers already know what happened. Fingerprinting only resolves the dramatic irony of the novel. Nonetheless, these questions are important not because of the answers they seek, but rather their revelation of numerous concerns with the validity of fingerprinting as an identificatory technology. For all its promise and potential, fingerprinting in *Pudd’nhead Wilson* remains an unproven identificatory technology that, at best, works only in conjunction with other systems of identification. Ultimately, Wilson’s citation of the immutability of fingerprints that “[e]very human being carries with him from his cradle to his grave,” gestures towards a consideration of other identification methodologies that fingerprinting might seek to replace, yet upon which it ultimately relies.¹⁵⁷

II.8 – PERSON AS PROPERTY, TERMINAL IDENTIFICATIONS AND LOCATION

It is no accident that Wilson’s revelation of Judge Driscoll’s killer is trumped by Wilson’s revelation of the killer’s black blood.¹⁵⁸ Heretofore, the indeterminacy of Tom’s

¹⁵⁶ As Tom was not on trial, it would have been exceedingly strange for him to have brought legal representation. I will not here undertake an explanation of the mockery of procedure that expedites Tom’s conviction. I note, however, that if he were a slave, Tom Driscoll could harbor few expectations of any legal protections. Similarly noteworthy is Twain’s ‘Whisper to the Reader,’ discussed further *infra*, in which he assures the reader that the chapters of *Pudd’nhead Wilson* have been “subject[ed] to rigid and exhausting revision and correction by a trained barrister.” Twain goes on to explain that this ‘barrister’ “studied law part of a while in southwest Missouri thirty-five years ago” and now works for room and board at the local “horse-feed shed.” See TWAIN, *supra* note 1, at 1.
¹⁵⁷ *Id.* at 108.

¹⁵⁸ Wilson’s achievement in the courtroom also catalyzes his own re-identification. This identity and his name are both based in a misidentification that originates in his attempt to perform an improper twinning. Twinning is a

identity challenges a community that depends on stable and exclusive categories of black *or* white in the same manner the criminal justice system depends on the stable binary of guilty *or* innocent. Only by setting Tom immutably into his original racial identity can the novel resolve the central misidentification from which the plot turmoil symbolically springs. Ultimately, it is this final racial identification that will limit Tom in terms of position and movement.

At the end of the novel, the trial is held to achieve justice. Yet, in spite of this aim, the simultaneous tension to jettison Tom from town and position him ultimately within the abjected black space of ‘down the river’ succeeds quickly and very quietly in perverting justice. After Tom’s conviction and re-identification as a slave, Tom is imprisoned in a state penitentiary. But Tom will not remain there long. Creditors of Chambers’ original owner Percy Driscoll protest the imprisonment of Tom.¹⁵⁹ They argue that as Percy has died insolvent Chambers should have legally passed to them upon Percy’s death in order to offset his debt. They complain further that they have already suffered financial loss from the many years they have been deprived possession of Tom, and that to deprive them further of their property would be unjust. Indeed, the creditors go so far as to suggest that all the misfortune for which Tom is responsible is a direct consequence of him not having passed into their possession upon Percy’s death. Intent on reconstructing Tom as a mobile object worthy of the dispensation down the river that might befall all slaves and must befall all bad slaves, the characters of the novel, from the creditors to the governor of Missouri, conspire to send Tom (now called Chambers) where he belongs. They cannot allow him to remain in prison as if he were a white subject; he must be sent down river. In the novel’s final line, the governor, as head of the state and *deus ex machina*, pardons Tom so that he might be sold “down the river.”¹⁶⁰

For all the focus on both the correctness of the legal procedures and the performance of justice, the novel either overlooks the lack of logic in the creditors’ legal complaint: before passing away, Percy Driscoll had already sold Chambers [called Tom]: Judge Driscoll “had gone privately to his brother [Percy]... and bought Chambers.”¹⁶¹ As a judge familiar with both property disputes and the law of property transactions, Judge Driscoll would have secured a bill of sale independent of the privacy of the transaction. If the pragmatism of argument were not convincing enough, consider the timing of the creditor’s complaint: Percy Driscoll died insolvent many years before the main action of the story, yet Chambers continued to serve Judge Driscoll’s household. During the many intervening years, no other party presented claim to Chambers, and indeed barring protracted litigation over the estate of Percy Driscoll, any financial claims would have subsided under whatever probate structure Missouri employed in the 1830s.

In short, if the claims of these mysterious last-minute creditors are to have merit, then Chambers’ continued and uninterrupted presence in Dawson’s Landing is highly peculiar. To invert this observation in a manner that points us towards an answer, the necessity (whether construed in judicial or economic terms) for evacuating Tom from a prison in which he might maintain some vestige of his white identity is highly suspect and only makes sense in the

concept related to the various types of segregation in the text. Whereas twinning encompasses the separation of one into two and the ability to see two that are one, segregation concerns the necessary maintenance of identity boundaries, the understanding that there are two that must not be one.

¹⁵⁹ The economic finds intersection with the juridical and the politics of identity yet again. This paper does no more than mention the connection between the juridical, the racial, and the economic, nonetheless this is a viable area for further critical research.

¹⁶⁰ *Id.* at 115.

¹⁶¹ TWAIN, *supra* note 1, at 22.

racial/locative schema explained above. While the ultimate turn of the text is the revelation of the racial identities of Tom and Chambers, or, alternately interpreted, the reallocation of racial identities to Tom and Chambers, the tension that this re-identification effects can only be mitigated by the relocation of each character. To make Tom black, the novel's society must insert Tom into a black space. The locative compartmentalization of this novel is not comfortable with only the abjection of Tom, rather it must relocate this character in a space of ambiguous location yet defined color identity: down the river.

For having breached the cherished divisions of race and class that maintain Dawson's Landing, Twain's community and indeed the state of Missouri punishes Tom through a relocation that depends upon one final act of passing. Male or female, dead or alive, noble or base, Tom or Chambers, black or white – the specious resolution of Tom's identity through the trial only sets the scene for one last conversion of identity. This act, which takes Tom and Chambers across an identity boundary more fundamental than those just listed, is accomplished only with explicit legal approval. At the same time, this conversion of Tom to slave, this change of subject to object is, despite its legal blessing, more fictional than the prohibited class, gender, and racial crossings it punishes.¹⁶²

The difficulties the modern reader experiences in observing Tom's connection to his ultimate destination are more palatable when we consider the inverse equilibrating movement of Chambers at the end of the novel. If Chambers' FFV blood has not succeeded in developing him into a gentleman, then what is the importance of this blood? The succinct answer: distinction. But the deceptively attractive quality of this answer belies its deeper complexity and indeed points towards an even more anxiety-charged and psychologically complex consideration of identity: if blood makes one honorable or black, what does it mean to be honorable or black? If this novel shows us that having black blood does not rule out phenotypical or sociological 'whiteness,' then what is the function and importance of this blood? In creating a novel that explores the "fiction[s] of law and custom [that make] a negro," Twain develops a series of questions to which neither he nor his society provide answers:

Why were [blacks] *and* whites made? What crime did the uncreated first [black] commit that the curse of birth was decreed for him? And why is this awful difference made between white and black?¹⁶³

PART III – *PEOPLE V. JENNINGS*

Approximately seventeen years after Twain published his fictional tale of a murder solved by fingerprint evidence, the Supreme Court of Illinois became the first appellate court in the United States to entertain an actual challenge to the admissibility of fingerprint evidence.¹⁶⁴

¹⁶² For a further discussion of the subject/object division and debate in conceptions of slavery, see PATTERSON, *supra* note 10. While Patterson ingeniously theorizes slavery as based not on the subject/object distinction, but rather the denial of the slave's ability to function fully as a subject by possessing other objects, this binary holds for my analysis and likely correlates better with Twain's own understanding of slavery. For an intriguing early case that indicates the comparative leniency with which gender crossings were handled, see *In re Thomas Hall*, in MCILWAINE, *supra*, note 19. While one case does not establish a trend, it does offer an interesting point of comparison for the judiciary's treatment of black and cross-gendered individuals in colonial America.

¹⁶³ TWAIN, *supra* note 1, at 9, 44.

¹⁶⁴ *Jennings*, *supra* note 6. The validity of fingerprinting is however an incomplete tale. *Jennings*, while first in the

As in *Pudd'nhead Wilson*, fingerprinting was utilized in *People v. Jennings* to identify a murderer. Unlike the novel, however, fingerprinting was only one of a variety of types of evidence that inculpated Thomas Jennings.

Early on the morning of September 19, 1910, Clarence Hiller left his bed to investigate a night-light that his wife had noticed was out.¹⁶⁵ When Hiller arrived at the light, he encountered an intruder with whom he grappled.¹⁶⁶ Both fell down a staircase. At the foot of this staircase, the intruder shot and killed Hiller.¹⁶⁷

Shortly after the murder, Thomas Jennings was encountered close to the scene of the crime.¹⁶⁸ Perspiring, bleeding from a fresh wound, and holding a recently-fired gun in his pocket that used the same shells as those that had killed Hiller, Jennings was also unable to produce an alibi for his whereabouts at the time of the murder.¹⁶⁹ A doctor later testified that both Jennings' wound and the holes in his clothing appeared to be from the grazing of a bullet. Sand in Jennings' shoes, matched sand found at Hiller's house. Furthermore, multiple eyewitnesses testified that they had seen a similarly-clothed man of Jennings's size and stature at and around the location of the murder. An eyewitness at another attempted robbery in the area also testified that he had torn Jennings' coat when Jennings attempted to flee his house. Finally, four distinct fingerprints were left on a freshly-painted rail the intruder surmounted in order to gain access to Hiller's house. Four experts who together had spent multiple decades studying and comparing tens of thousands of fingerprints concluded that prints on the rail came from Jennings. On the basis of this evidence, Jennings was convicted of Hiller's murder and sentenced to death.

Jennings appealed his conviction, claiming the trial court had committed multiple errors in its handling of the fingerprint evidence. Specifically Jennings argued in the alternative that fingerprinting evidence was inadmissible, that even if such evidence were admissible that experts' testimony was unneeded, and that even if such expert testimony were valid, as it had not been expressed as an opinion, it had therefore unfairly prejudiced the jury against him.

III.1 – ADMISSIBILITY OF FINGERPRINTS AS A CLASS OF EVIDENCE

Jennings first claimed that as neither common law nor statute provided for the admission of fingerprints as identificatory evidence, the trial court had erred in its admission. The Supreme

United States, came almost two decades after the first instance of criminal fingerprint identification. In 1892, an Argentine police officer utilized Galton pattern types to identify a mother who had murdered her two young sons. Even the status of *Jennings* within the United States is troubled. *Jennings* is cited as the first American case upholding the admissibility of fingerprint evidence. Still, as evidentiary fingerprinting was initially used in criminal trials in which the government was barred from appealing a defendant's exoneration, there is practically no way to know if and/or how often trial courts refused to admit such evidence. Distinct, yet also plausible is that fingerprint evidence had been admitted in the American courtroom before 1910 but either the convicted defendant did not appeal the issue of fingerprint admissibility, or the defendant was acquitted despite fingerprint evidence. Although each successive scenario appears less likely, it is possible than any one of them occurred. Nonetheless, due to the structure of the criminal legal system, in American judicial history fingerprinting evidence abruptly on the scene in the form of the *Jennings* court's confirmation of the admission. See, Carey L. Chapman, *Dr. Juan Vucetich: His Contribution to the Science of Fingerprints*, 42 J. FORENSIC IDENTIFICATION 286 (1992). For a further discussion of Galton, see note 182, *infra*.

¹⁶⁵ Jennings, *supra* note 6.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

Court of Illinois disagreed. Looking beyond the absence of American statute or case law admitting this identificatory technology, the court found support in both English case law and “standard authorities on scientific subjects... .”¹⁷⁰ Noting that fingerprinting had been used in “in thousands of cases without error,” the court determined that “this method of identification [was] in such general and common use that the courts [could not] refuse to take judicial cognizance of it.”¹⁷¹

Quite presciently, this standard of acceptance based upon usage and reliability by the relevant community was exceedingly similar to the admissibility standard articulated by federal appellate courts in 1923.¹⁷² In *Frye v. United States* (“*Frye*”), the D.C. circuit court issued a landmark decision holding that evidence would be admitted only if it had, “gained general acceptance in the particular field in which it belongs.” Somewhat ironically, polygraphy, one of the first and as of yet best-known technologies for such identification, ultimately led the court to revisit and revise admissibility standards for scientific evidence. The *Frye* test was meant to distance judges from the difficult task of deciding between science and pseudoscience.¹⁷³

That both courts propagated a very similar rule is however curious when considered more closely. While the *Jennings* court would likely aver that fingerprinting had, in the language of *Frye*, “gained general acceptance in the particular field in which it belongs,” both the scope and the proof of this acceptance is controvertible.¹⁷⁴ In 1911, neither statute nor American case law had confirmed the validity of fingerprinting practices. If fingerprinting had indeed been used in “thousands of cases without error,” the *Jennings* court’s choice to forgo citation to any of these cases is troubling at best. Furthermore, the ‘standard authorities’ cited by the *Jennings* court fall into two categories: these authorities are either encyclopedic accounts of fingerprinting noting its uses through history, or police manuals on administration, document production, and criminal investigations. The legitimacy of the first category is tenuous; the *Jennings* court failed to specify either the standard or the authority proffered by these compendia of knowledge.

The legitimacy of the second category is even more troubled. While the cited police manuals doubtlessly contained specific knowledge of dactylography that asserted its reliability, the Court’s unquestioned acceptance of this support is disquieting. The authority of these publications is unavoidably questionable if not exclusively limited because of an apparent conflict of interest. Produced by bureaus whose purpose is to investigate crimes and aid the conviction of suspects, these police manuals are exceedingly ill-positioned to support a capital conviction.

This conflict of interest similarly plagued the expert witnesses who testified in *Jennings* and other fingerprint cases.¹⁷⁵ The ‘standard authorities’ who testified to the reliability of fingerprint identification were all trained in criminal investigation and, more provocatively, employed by bureaus whose purpose was to assist in the conviction of suspects. Of the four experts who testified against *Jennings*, the court positively identified two as police officers and

¹⁷⁰ *Id.* at 1081.

¹⁷¹ *Id.* at 1081.

¹⁷² *Frye v. United States* 293 F. 1013 (D.C. Cir. 1923) (holding polygraph evidence inadmissible). See, also *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) (revising the standards of admissibility of expert witnesses and scientific evidence).

¹⁷³ Neither *Frye* nor the *Daubert* has provided a clearly defined standard for admissibility immune to the perils of subjective interpretation: *Frye* was open to interpretation, and *Daubert* fashioned itself only as a suggested methodology.

¹⁷⁴ *Frye*, *supra* note 172, at 1014.

¹⁷⁵ *Mnookin*, *supra* note 4.

one as “connected” with a police department. Indeed, none of the experts could claim independence from the biases of police work; one expert, although not an officer, had studied fingerprinting at Scotland Yard before “start[ing] the first bureau of identification in this country for the United States government at Washington.”¹⁷⁶ This expert was also co-editor of “the official journal for police and sheriff associations.”¹⁷⁷ Indeed, the four experts who testified were of a group of only nine students in the nation who had together studied a specific methodology of fingerprint identification under the same instructor.¹⁷⁸

In short, all the experts who testified against Jennings were inextricably allied to both one another and various state apparatuses focused on identification and prosecution. By admitting this evidence on the support of encyclopedias, police manuals, and police testimony, the *Jennings* court was letting the fox guard the hen house.¹⁷⁹

Nonetheless, it is not clear whether such potential conflicts of interest were avoidable in *Jennings* and other cases. To be sure, both forensic scientists and the public in the course of the last century have widely, if not universally, accepted the precepts of fingerprint technology – that we all have fingerprints, that they are unique, and that they can be used to identify individuals.¹⁸⁰ Yet at the time of *Jennings*, forensic fingerprinting had a very short history.

For all the importance and relevance of the decision both to the defendant and subsequent decisions, the *Jennings* court was quite terse about the background of the science they were admitting. While the *Jennings* court alluded to the use of fingerprints as insignia in the ancient world, the actual practice of forensic fingerprinting was less than two decades old at the time of the decision.

In 1880 Henry Faulds, a Scottish Doctor living in Japan published a paper in *Nature* first suggesting the forensic applications of fingerprinting.¹⁸¹ Although various individuals claimed their own previous use of fingerprinting, it was not until 1892 that Sir Francis Galton published

¹⁷⁶ *Jennings*, *supra* note 6, at 1082.

¹⁷⁷ *Id.* at 1082. The expert edited, THE DETECTIVE, a criminology magazine that contained photographs of wanted criminals and advertisements for law enforcement supplies. For many years the magazine was the official journal for police and sheriff associations. See Russell E. Bradford, *Mary E. Holland, America's First Fingerprint Instructor*, 14 1-2. THE PRINT 5 (Sept/Oct. 1998) available at Southern California Association of Fingerprint Officers, <http://www.scafo.org/library/140501.html> (last visited Mar. 13, 2010).

¹⁷⁸ Bradford, *supra* note 177. All four experts studied under “Sgt. John Ferrier, fingerprint expert with New Scotland Yard, [who] came to America as part of the security accompanying the ‘Queen Victoria diamond jubilee collection’ to the [1904] World’s Fair [in St. Louis]... Ferrier set up fingerprint exhibits at the Fair.” Sgt. Ferrier taught the Henry system of fingerprinting, a system that although developed in India by a (British?) woman and Indian underlings was named after their white male supervisor.

¹⁷⁹ For a discussion of recent challenges to fingerprint technology, see, e.g., *U.S. v. Mitchell*, No. 96-407 (E.D. Pa. 1999), specifically Transcript, *United States v. Mitchell*, (Sep. 13, 1999) (limiting expert testimony on fingerprints to latent examiners), as cited in Mnookin, *supra* note 4, at 64: “The judge in *Mitchell* did not even permit the defense experts who were not themselves fingerprint examiners—historian Simon Cole and forensic science professor James Starrs—to testify at trial, ruling that to qualify as an expert, defense experts would have to be latent fingerprint examiners.”

¹⁸⁰ Cf. Michael Specter, *Do Fingerprints Lie?* THE NEW YORKER (May 27, 2002) available at <http://www.michaelspecter.com/2002/05/do-fingerprints-lie/> (last visited Mar. 13, 2010) (discussing the comparatively high error rate of fingerprinting, and the subjectivity of ‘matching’ prints); see also, Mnookin, cited *supra* at note 4.

¹⁸¹ Henry Faulds, *On the Skin-Furrows of the Hand*, NATURE 605 (Oct. 28, 1880) available at, <http://galton.org/fingerprints/faulds-1880-nature-furrows.pdf> (last visited Mar. 13, 2010). For more general information on the history of fingerprinting see, *Early Fingerprint Pioneers*, http://ridgesandfurrows.homestead.com/early_pioneers.html (last visited Mar. 13, 2010).

Finger Prints, a discussion and analysis of the collection and comparison of finger markings.¹⁸² Galton's study informed the trial scene in *Pudd'nhead Wilson* – Twain had received an early edition from his English publisher.¹⁸³ Galton's study also helped to establish the first fingerprinting bureaus in the United Kingdom and India around the turn of the 20th century.¹⁸⁴ Nonetheless, the four experts who testified at Jennings' trial had studied this technology for no more than six years.¹⁸⁵ Furthermore, the bureaus in which they studied had existed for less than a decade.

I do not note this timeline to question the degree of expertise that one might obtain in six years, although this is itself debatable. Rather, I mention this timeline to suggest that neither at the time of *Jennings*, nor, as scholarship has suggested, even at the time of *Frye*, did there exist an independent 'scientific community' capable of testifying to the validity of fingerprinting as forensic evidence.¹⁸⁶ As forensic fingerprinting had been discussed, researched, and taught for less than a decade, the existence of a secondary-group of forensic scientists sufficiently familiar with the technology, yet sufficiently detached from the punitive doxy of criminal investigation, was doubtful. Barring such cadre of fingerprinting autodidacts – actual counterparts to the fictional David Wilson – the science of fingerprinting became reliable not because of vigorous debate and scientific agreement, but rather the unavailability of any other 'standard authority' which might controvert or question the infallibility of this new identificatory technology.

The *Jennings* court held fingerprints admissible as a class of evidence on this irrefuted and, at this time, irrefutable authority.¹⁸⁷ In this holding, however, the court noted the defense's failure to attack the substance as well as the form of the evidence by questioning "the taking of the fingerprints."¹⁸⁸ Although the published case makes it unclear whether the defense questioned any other aspect of either the collection or the interpretation of the fingerprints, the court only tangentially addressed these concerns.

The court focused instead on qualifications of the experts who had testified as established by locations in which they had studied fingerprinting, the duration of training, and the number of prints they had taken or examined. Despite this focus on training, the court provided very little discussion of the methods by which the experts actually reached their conclusion that Jennings fingerprints matched those left behind at the victim's house. The court noted that all the "witnesses [had] testified at more or less length as to the basis of the system and the various markings found on the human hand."¹⁸⁹ The court further noted that various experts had "found fourteen points of identity" on one finger and eleven points on another finger.¹⁹⁰ The court even reported the terms of the classification system: "'arches,' 'loops,' 'whorls' and 'deltas.'"¹⁹¹ Nonetheless the court's discussion of the specific procedure of fingerprinting remained mostly topical – the court never mentioned, let alone explained, what the experts meant by a "point of

¹⁸² FRANCIS GALTON, *FINGER PRINTS* (1892).

¹⁸³ Berger, *supra* at note 32.

¹⁸⁴ Simon A. Cole, *SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION* (2001). See also, *Early Fingerprint Pioneers*, *supra* note 181.

¹⁸⁵ Jennings, *supra* note 6, at 1081.

¹⁸⁶ Mnookin, *supra* note 4, at 62-63.

¹⁸⁷ Even assuming fingerprinting *hobbyists* existed in droves, it is still unlikely that many independent fingerprint experts existed in 1911.

¹⁸⁸ Jennings, *supra* note 6, at 1081.

¹⁸⁹ *Id.* at 1082.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

identity” or an “arch,” “loop,” or “whorl” nor how these terms of art might undergird the validity of this technology. In short, the court admitted fingerprinting as ‘reliable’ evidence without attempting a discussion of the qualities that made the evidence reliable.

III.2 – WERE EXPERTS NEEDED?

Although the defense in the *Jennings* did not appeal the substance of the fingerprinting evidence, they did attack the trial court’s admission of expert testimony as an unnecessary “aid to the court or jury in determining the questions at issue.”¹⁹² One can only attempt to divine the contours of this challenge from the impression they left upon the court’s opinion; nonetheless the challenge appears to have been simple: if differences in fingerprints were, upon collection and photographic amplification, self-evident to any person possessing standard mental and visual faculties, then expert testimony was superfluous at best and likely prejudicial. In rejecting this argument, the Supreme Court of Illinois noted that “[e]xpert testimony [is...] admissible when the subject-matter of the inquiry is of such a character that only persons of skill and experience in it are capable of forming a correct judgment as to any facts connected therewith.”¹⁹³ When scrutinized within the rest of the decision, the reason implicit in the court’s statement falters. On one hand, the *Jennings* court viewed fingerprinting as sufficiently self-evident that the court did not bother to explain the meaning of loops, whorls, arches, or other potential constituents of a match. Nonetheless, the *Jennings*, while cognizant of fingerprint’s “general and common use” as well as its employment “in thousands of cases without error,” failed to explain how this technology was “of such a character that only persons of skill and experience in it are capable of forming a correct judgment as to any facts connected therewith.”¹⁹⁴ This gap in judicial logic becomes all the more troubling in light of the relative lack of trained fingerprinting experts; if expert witness testimony was necessary to understand fingerprinting, then what experts testified during these “thousands” of earlier cases alluded to yet not cited by the *Jennings* court?¹⁹⁵

Despite the subsequent wide acceptance of fingerprinting as a science, the short shrift with which the *Jennings* court discusses of the specific techniques utilized by the experts necessarily limits their judicial conclusion; as the court has failed to specify the standard of a “correct judgment,” the court’s recognition of fingerprint experts as possessing the requisite “skill and experience” to reach a “correct judgment” is troubled.¹⁹⁶ The court’s own acknowledgement that “any intelligent person with good eyesight” might draw some of the conclusions reached by the experts itself indicates a challenge to the idea of forensic expertise in this area even as it indicates the attraction of the technology.¹⁹⁷

It is easy to baffle people with science. Talk of quarks or calculations and you lose your audience. And while most of us trust statistics, not many of us feel comfortable with the mathematical processes on which statistics depend.¹⁹⁸ Despite the difficulties of science, expert knowledge and testimony have a long history of introduction within the American judicial

¹⁹² *Id.* at 1083.

¹⁹³ *Id.* at 1082.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 1083.

¹⁹⁸ I am reminded of Stephen Hawking’s purported description of equations in *A BRIEF HISTORY OF TIME* (1988): “Someone told me that each equation I included in the book would halve sales. I therefore resolved not to have any equations at all.”

system and the difficulties of presenting complicated matters to juries and judges have long challenged litigators.¹⁹⁹ These challenges have induced litigators to repackage and clarify scientific complexities in order to aid the judiciary in the pursuit of justice. The difficulty of parsing science and the obscurity contained in scientific explanations has likewise led to the admission of scientific evidence and testimony that was later discredited.²⁰⁰ While the infallibility of fingerprinting has come under attack more recently, the speed and totality of the judiciary's acceptance of fingerprint evidence is impressive in light of the challenges other types of, arguably, scientific evidence have faced in gaining admission.²⁰¹

The comparative speed with which fingerprinting was accepted in fictional accounts like *Pudd'nhead Wilson* as well as actual cases like *Jennings* depended in no small part upon the balance this technology struck between the complex and the commonplace.²⁰² Difficult enough to require an expert, yet easy enough for the average person to understand, fingerprinting fascinates precisely because it can be employed as a science or enjoyed as a hobby. It is an identificatory technology that expounds the uniqueness of every individual in a manner immediately discernible to "any intelligent person with good eyesight."²⁰³ In a world in which seeing is believing, fingerprinting effectively recapitulates sight as it assuages the anxieties attendant to the inability to identify.

Accordingly, the ability of fingerprinting to turn the invisible into the visible, and thereby to make the unknown known, lends itself not only to revelation, but pushes further into the realm of spectacle. Whether identifying black or white, innocent or guilty, the development of fingerprinting was also a great boon to courtroom presentations.²⁰⁴ Although Wilson's ultimate courtroom act is the identification of Tom as both murderer and slave, Wilson's performance of this identification is based upon his earlier demonstration of fingerprinting to the jury.²⁰⁵ Only after Wilson has used fingerprints to identify members of the jury to one another correctly is he ready to guide them through the identification of Tom as murderer and slave. While the *Jennings* decision makes no mention of such a demonstration, other experts did not hesitate, and it seems almost exalted, in the ability to unlock the divine mystery of immutable identity contained in the fingertip.²⁰⁶

Like a magician's trick in which the spectator finds the card in his own pocket, performative demonstrations of fingerprinting were all the more successful because they initially placed the jury participants in the role of the identified. In this manner the expert's ability to properly distinguish the fingerprints of the jury member is positioned as the same act the expert invites the jury to perform in confirming his identification of the defendant as guilty. However there is a difference between correctly coordinating the fresh and complete prints of twelve jury members with the difficulty of matching a print, perhaps incomplete, partial, and/or smudged to

¹⁹⁹ Mnookin, *supra* note 4, at 31-44.

²⁰⁰ See e.g., *United States v. Scheffer*, 523 U.S. 303, 309, 313 (1998) (reversing U.S. Court of Appeals for the Armed Forces) ("there is simply no consensus that polygraph evidence is reliable... a polygraph expert can supply the jury only with another opinion, in addition to its own, about whether the witness was telling the truth.").

²⁰¹ Mnookin, *supra* note 4, at 43-44; *but see* *U.S. v. Mitchell*, 365 F.3d 215 (2004). See also, discussion of 'brain scanning,' *infra*.

²⁰² Mnookin, *supra* note 4, at 31-35.

²⁰³ *Jennings*, *supra* note 6, at 1083.

²⁰⁴ Specter, *supra* note 180; Mnookin, *supra* note 4, at 16-30.

²⁰⁵ In such demonstrations the expert is presented with a blind set of prints from members of the jury. The expert then takes another set of prints from the jury and matches them with the blind prints, thus identifying the jury-participants.

²⁰⁶ Mnookin, *supra* note 4, at 16-30.

a criminal suspect. In the former case, the size of the group is both manageable and closed; the prints of a known set of people are compared to another set of prints of the same group of people. Conversely, the actual case of criminal fingerprint identification is not restricted by the parameters of this controlled performance; it is impossible to compare the criminal's prints, as collected from the crime scene, with every possible individual capable of having committed the crime. This false comparison is akin to an expert demonstrating a simple multiplication to the jury as a means of invoking their respect for the expert's ability to perform a much more difficult and fundamentally different equation. This is not to suggest either ill will or disingenuity on the part of fingerprinting experts, but rather to highlight both the importance of and the potential fallacies contained within such a performance.

The *Jennings* court upheld the admission of expert testimony because of its "aid to the court or jury in determining the questions at issue."²⁰⁷ While the published decision in *Jennings* is unclear about the extent of this aid, the account in *Pudd'nhead Wilson* is not – the demonstration of fingerprinting serves less to 'aid' the jury than significantly misdirect them as to the efficacy of the technology. The full effect of expert testimony, and the danger *Jennings* claimed it presented, lies not only in the fact but also in the form of the testimony.

III.3 – STATEMENTS OF OPINION VS. STATEMENTS OF FACT

In the third contention of his appeal, *Jennings* argued that the experts' positive identification of the fingerprints as belonging to him unfairly prejudiced him at trial.²⁰⁸ *Jennings* contended that the experts should only have been able to testify that such was their opinion. Again, the court disagreed with *Jennings*.²⁰⁹ Acknowledging that experts are often restricted to the formulation of opinions and not facts, the court nonetheless carved out an exception for questions of identity.²¹⁰ The court noted that witnesses often testify to the identity of people or of handwriting; following this logic, the court found the admission of the experts' testimony, like the allocation of the expert witness status, to be within the trial court's discretion.²¹¹ The *Jennings* court reasoned that such testimony was not prejudicial as the "the jury [retained the ability] to determine the weight to be given to their testimony."²¹²

By itself, the *Jennings* court's decision to let the jury weigh the assertions of identification in the expert testimony aligns well with the deference given other witnesses. Insofar as witnesses testify as to that which they have perceived, it is the role of the jury to decide whom to believe. However, the contested witnesses in *Jennings* are not like other witnesses insofar as they are presented to the jury as experts in identification. These witnesses did not testify that they had been there the night of the murder and saw *Jennings* as he mounted the rail or heard *Jennings* as he crept up the stairs. None of the expert witnesses had the privilege of coterminous perception of any aspect of the crime. Nonetheless, in their testimony the court did allow them to identify the defendant without the precept or limitation of their testimony, the opinion on which it was certainly based.

Without ever clarifying the boundaries of their science or that which it had admitted or

²⁰⁷ *Id.* at 1083.

²⁰⁸ *Jennings*, *supra* note 6, at 1083.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

that which qualifies as expertise in the science, the court not only lets the ‘experts’ testify, but allowed the experts to further minimize any vestigial trace of doubt by testifying indicatively. Subtle in one sense, the difference between the speculative - ‘I think he is’ - and the definitive - ‘he is’ - lies at the crux of identification. The court’s decision to allow these ‘experts’ such power, a power all the more enthralling because of how deceptively lucid it appears to any person with “intelligence and a good set of eyes,” suggests the strength of desire for an ultimate and irrefutable identification. The decision of the *Jennings* court to elevate fingerprinting witnesses to the status of learned experts on one hand, while affording them the same testimonial leeway of any eyewitness on the street, smacks of expediency.

As the sole interpreter of “God’s Fingerprint language,” the experts in *Jennings* identified murderers with the power and finality of divine judgment.²¹³ By identifying the individual who *had* committed the crime as opposed to the individual *they believed had* committed the crime, the experts were given free reign to establish fingerprinting as an almost magical, if not divine, identificatory technology – “God’s fingerprint language.”²¹⁴ Perhaps more troubling, in claiming the irrefutable reliability of fingerprinting, the experts in *Jennings* were simultaneously instituting their own authority as the members of an elect cadre who might with unassailable certainty interpret God’s identificatory language as written upon our fingers.

The moves made by the experts in *Jennings*, moves allowed by the court, should not be surprising as they closely tracked Wilson’s own introduction of fingerprinting in a fictional courtroom seventeen years earlier. As with the *Jennings* decision, Dave Wilson’s introduction of fingerprinting into the courtroom less than allegorically suggests a new language with which experts could effectively and, so they thought, unambiguously identify individuals. Not surprisingly, Wilson’s description of fingerprinting is replete with references to writing. Wilson refers to fingerprinting as a human being’s “signature, his physiological autograph [... that] cannot be counterfeited [... nor] can it become illegible.”²¹⁵ Wilson assures the courtroom that “this signature is each man’s very own” and that “there was never a twin born... that did not carry from birth to death a sure identifier in this mysterious and marvelous natal autograph.”²¹⁶

Wilson’s descriptions resonate with his audience because the community of Dawson’s Landing yearned for a new identificatory language. There is no reason to believe that the *Jennings* court did not itself desire a divine language capable of identifying culprits. Yet even in its first judicially recorded use in *Jennings*, it is clear that all was not well with fingerprinting; although established as a technology of individual, as opposed to racial, identification, fingerprinting’s claim to objectivity is nonetheless debilitated by the subjective choices made in choice of subjects.²¹⁷

As discussed further *infra*, both now and at the time of *Jennings*, fingerprinting is an identificatory technology devoid of objective standards for determining matches. Furthermore, fingerprinting is limited in practice to police-employed examiners harboring conflicted interests, and is self-enforcing its own cultural authority insofar as it expresses the certainty as opposed to

²¹³ Moon v. State, 198 P. 288, 290 (Ariz. 1921) (quoting Frederick A. Brayley, FINGER PRINTS IDENTIFICATION (1910).

²¹⁴ *Id.*

²¹⁵ TWAIN, *supra* note 1, at 108.

²¹⁶ *Id.* at 108-09.

²¹⁷ One pertinent and contemporary example of the racialized bent of fingerprinting is the recent decisions of the Department of Homeland Security to fingerprint all non-naturalized visitors to the United States. See US-Visit What to Expect When Visiting the United States, Dept. of Homeland Security, http://www.dhs.gov/files/programs/editorial_0525.shtm (last visited Mar. 13, 2010).

the possibility of an identification.²¹⁸ Ultimately, fingerprinting can assuage but cannot singularly cure the anxieties of identification present in *Pudd'nhead Wilson* or latent in *People v. Jennings*.

In both *Jennings* and *Pudd'nhead Wilson* it is easy to overlook the potential fallibility of fingerprinting in light of the other evidence. Indeed, the *Jennings* appeal is constrained to the procedural inadequacies of the trial; the combined weight of the evidence as presented in the appellate opinion appears to incriminate Jennings beyond a reasonable doubt. Similarly, Tom's culpability in *Pudd'nhead Wilson* is incontrovertible; we know he is the murderer independent of any evidence, fingerprint or otherwise, because Twain has shown us the murder.²¹⁹

Nonetheless, to understand the peril of forensic fingerprinting the coordination between the legal and literary episodes of fingerprint identification provides a more complete picture than might be gained through either medium alone. Although fingerprint demonstrations were used in a number of early trials, it is unlikely that any of the judicial opinions discuss the demonstration of fingerprinting as thoroughly or establish the mood as completely as Twain's novel.²²⁰ Appellate transcripts do not record testimony and trial transcripts from the early 20th century are difficult to find. Even if recovered, the dry records of trial testimony lack the flair of Twain's depiction. And while Twain's depiction might veer towards melodrama, this melodrama likely approximates well the mood the prosecutors and expert witness attempted to create in the courtroom.

The emotional mood of Twain's presentation, while informative, is by itself incomplete. Although *Jennings* confirms the murder conviction, it establishes a potential for innocence that is entirely absent from Twain's novel. Beyond the troubled reasoning and specious conclusions of the *Jennings* court, Jennings' trial nonetheless began from a point in which it was unknown whether he was a murderer. In other words, Jennings was afforded a presumption of innocence that Tom did not and could not receive. Insofar as identification is an exercise in knowing that implicates its own process, the process is effete when that to be identified is already known.

By coordinating legal and literary episodes of fingerprinting, this chapter provides a wider perspective on its judicial invocation, description, and utilization of the forensic technology while highlighting the absence of challenges to fingerprinting in its earliest appearances in courtrooms, fictional and actual. Whether we focus upon the retributivist justice of *Jennings* or the racist Southern community circa 1830 about which Twain wrote, forensic fingerprinting operates as do the courts as does the Judeo-Christian God. Together they comprise a series of embedded systems that identify the guilty in order to punish them. Through the recognition and examination of the inability of the novel or the judicial opinion to completely

²¹⁸ It is worth noting that in *Pudd'nhead Wilson*, Tom is identified only because he accidentally provides the novel's eponymous savior with a perfect copy of his fingerprint. Fitting Twain's penchant for irony, Tom leaves the print while taunting Wilson over his inability to identify a suspect in the murder. Thus, the potential biases of an investigation are avoided when the murder's fingerprint is literally handed to Wilson.

²¹⁹ TWAIN, *supra* note 1, at 94.

²²⁰ See e.g., *State v. Cerciello*, 90 A. 1112 (N.J. 1914) (finding no error in the usage of finger prints on murder weapon), as cited by Mnookin, *supra* note 4, at fn. 20; *People v. Sallow*, 165 N.Y. Supp. 915, 918 (N.Y.C. Gen. Sess. N.Y. County 1917) (statute mandating fingerprinting of defendants is not violative of state constitutional protection that no person shall be compelled in any criminal case to be a witness against himself); *McGarry v. State*, 200 S.W. 527 (1918) (finding no error in the usage of finger prints on window); *State v. Kuhl*, 175 P. 190, 191 (Nev. 1918) (holding photographic enlargements of palm prints were properly admitted); *Stacy v. State*, 292 P. 885, 886 (Okla. Crim. App. 1930) (holding uncorroborated fingerprints from the door of a bank vault capable of upholding a robbery conviction, based on "numerous books, monographs, and articles on the subject of finger prints" including verses from The Bible and "Puddin Head Wilson").

portray either the gambit or means of fingerprinting, the insidious power of identification as exercised through judicial admission of expert witnesses, testimony, and demonstrations, becomes apparent.

PART IV – BEYOND FINGERPRINTING: THE RISE OF DNA AS AN IDENTIFICATORY TECHNOLOGY

It has become almost trite to note the burgeoning possibilities presented by bioscience and bioinformatics. Every day you open the newspaper, or increasingly, the website, only to learn about some further advance of science. I could quickly provide a number of examples here, but they would become dated almost immediately. As we continue into this new millennium, the progress of biology, in particular, biogenetics, will likely continue to dominate advances in science. Fifty years ago, the existence of DNA was unknown to the world and was theorized by only a certain small body of biochemists.²²¹ Nonetheless, Watson and Crick's discovery is now widely hailed as a forensic panacea.²²² Questions of paternity, liability, and culpability, in short – questions of identity – find resolution in science's most famous acronym.

With the discovery of DNA it appeared that science had finally encountered the final challenge to understanding life itself. Invisible yet present within every living organism, the ubiquitousness of DNA, despite its reliance on science for proof and postulation, still smacked of divinity. More sublime than its existence, however, was the challenge of understanding the "code" from which we are all constructed. Science quickly set itself to this challenge – researchers cultivated the ability to understand, produce, and ultimately manipulate DNA. At the same time, genetic research has attempted to ease the suffering of humanity by identifying and providing therapy for diseases.²²³ In the last three decades scientists have developed a battery of tests to screen for diseases. Although science has not provided cures at the same rate, hope remains high that science will begin to mollify, if not eradicate, certain diseases in the coming decades.²²⁴ Many of the techniques scientists have developed to identify, and ultimately eradicate, biological diseases have likewise been employed to combat the social illness of crime.²²⁵

More exciting than science's attempts to cure humanity are their attempts to replicate it. Within the last decade, researchers have made formidable advances in cloning technologies. The idea of cloning, heretofore ensconced firmly with the realm of science fiction, has slowly entered reality; using the divine language of DNA, science has realized the potential of a perfect twinning, while hinting at the dissolution of identity's most fundamental indices: individuality and death.

²²¹ J.D. Watson & F.H.C. Crick, *A Structure for Deoxyribose Nucleic Acid*, NATURE 171, 737-738 (1953). For an early history of genetics and the search for genes, see A.H. Sturtevant, A HISTORY OF GENETICS (2001).

²²² As with fingerprinting, the discovery of DNA also overlooks the contribution of a woman. Rosalind Franklin was a British X-Ray Crystallographer whose research formed the basis of the DNA structure proposed by Watson and Crick. See, BRENDA MADDOX, ROSALIND FRANKLIN: THE DARK LADY OF DNA (2002).

²²³ The importance of gene therapy has grown to the point that it has its own journal, see Gene Therapy, <http://www.nature.com/gt/index.html> (last visited Mar. 13, 2010). For more general information on 'gene testing,' see Gene Testing, Human Genome Project Information, http://www.ornl.gov/sci/techresources/Human_Genome/medicine/genetest.shtml (last visited Mar. 13, 2010).

²²⁴ When researchers finished decoding the human genome, the search for better, faster, and more effective medications began in earnest, see Michael D. Lemonick, *Brave New Pharmacy*, TIME MAGAZINE (January 15, 2001) at p. 61.

²²⁵ See Section on 'Brain Scanning,' *infra*.

In 1994, scientists announced the cloning of the sheep, Dolly.²²⁶ In the intervening years, scientists cloned a number of life forms including mice, rabbits, and dogs.²²⁷ It is even claimed that humans have already been cloned.²²⁸ Although the factual accuracy of these claims has not been verified, the implication is clear, humanity has entered an age in which scientific technologies can soon (already?) provide ‘perfect twins’ without the confluence of coincidence by which Twain constructed the plot of *Pudd’nhead Wilson*. Despite the intrigue afforded by Twain’s plot, its challenge depended upon the tractable credulity of his readership. In short, *Pudd’nhead Wilson* challenges both the idea of fixed identity and the idea of individuality through indistinguishable, yet racially contrary twins born on the same day. In the new millennium, this tale as told by science no longer depends on the trust of the reader. Indeed, science has gained the potential to propose a world in which one individual, cloned multiple times, might obsolesce the distinction between same and other; and such individuals, taken together, might render moot the boundary between life and death. If one individual is cloned thirty times, is the individual still alive if, after her death, the clones remain alive?

In short, DNA has great potential to dissolve ultimately the boundaries of identity. Nonetheless, the forensic application of DNA has been almost entirely concerned with the identification rather than the disidentification of individuals.²²⁹ Science, etymologically and etiologically concerned with knowing, is teleologically more interested in identification than ambiguation. Although the fundamental code of DNA might enable the perfect twinning of any individual, this latest version of ‘God’s language’ can likewise distinguish between any false pretenders to the claim of individual identity. Understood in this sense, DNA is just the most recent technology to promise identification. Even as the examination and manipulation of DNA portends both cloning and the eradication of disease, the comparison of genetic code holds itself out as a theoretically infallible identificatory technology. Among the 30-odd billion base pairs that constitute an individual’s DNA, forensic scientists have learned to seek, recognize, and compare the subtle yet indelible differences that distinguish each individual from another.²³⁰

²²⁶ See Dr. George Johnson, On Science: The Road to Dolly, <http://www.txtwriter.com/onscience/Articles/dolly.html> (last visited Mar. 14, 2010).

²²⁷ See *Chinese Scientists Clone Rabbit*, MAILONLINE (JULY 24, 2007) <http://www.dailymail.co.uk/sciencetech/article-470549/Chinese-scientists-clone-rabbit.html> (last visited Mar. 14, 2010); *Mouse Clone Success Hailed: Scientists Eye Extinct Species*, THE WASHINGTON POST (Nov. 5, 2008), available at <http://www.washingtontimes.com/news/2008/nov/05/mouse-clone-success-hailed/> (last visited Mar. 14, 2010); Rick Weiss, *In a Furry First, a Dog is Cloned in South Korea*, THE WASHINGTON POST (Aug. 4, 2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/03/AR2005080301145.html> (last visited Mar. 14, 2010).

²²⁸ *S Korea Unveils First Dog Clone*, BBC NEWS, <http://news.bbc.co.uk/2/hi/science/nature/4742453.stm> (last visited Mar. 14, 2010) (“Snuppy [the dog] joins a host of other cloned animals including Dolly the sheep, CC the cat and Ralph the rat.”); Alison Abbott, Disbelief Greets Claim for Creation of First Human Clone, 416 NATURE 570 (Apr. 11, 2002) available at <http://www.nature.com/nature/journal/v416/n6881/full/416570a.html> (last visited Mar. 14, 2010, subscription required).

²²⁹ DNA was initially used for paternity tests and criminal identifications. More recently, however, criminal defendants have challenged their culpability by seeking admission of genetic evidence that might question their responsibility for their actions. See, e.g., *Turpin v. Mobley*, 502 S.E.2d 458, 638, 642-643 (Ga. 1998). In at least one case, a jury acquitted the defendant in a murder case after hearing evidence linking her violence to her Huntington’s disease. Lori B. Andrews, *Body Science*, 83 ABA JOURNAL 44, 49 (1997).

²³⁰ The capability of growing organs from adult embryonic stem cells for use in individuals indicates another, partial means of cloning that holds its own set of challenges to the idea of the coherent individual. See e.g., Bob Beale, *Stem Cells Used to Create New Organ Tissue*, ABC SCIENCE ONLINE: NEWS IN SCIENCE (Oct. 14, 2003), available at http://www.abc.net.au/science/news/health/HealthRepublsh_966412.htm (last visited Mar. 14, 2010).

This widespread popularization of DNA as identificatory tool was concomitant with the widespread popularization of DNA as a newly-discovered foundation of life. Not surprisingly, recognition of DNA has grown in check with its level of popular acceptance. Like fingerprinting, forensic DNA evidence has become a divine language always already marking every person. Like fingerprinting, DNA, once inscrutable, might now by the clever scientist, aid the individualized identification of any and every individual. That the narrative of DNA as irrefutable identificatory technology shares numerous similarities with fingerprinting should not be surprising. The correlation between the two technologies was deliberate.²³¹ Before DNA had fully infiltrated the public consciousness and before the public had accepted DNA-testing, DNA closely fashioned itself on fingerprinting, going so far as to refer to itself as DNA fingerprinting.²³² For all the comparative complexity of DNA testing in comparison to fingerprinting, the new technology's acceptance was accelerated by its ability to appropriate the cultural currency heretofore ascribed to fingerprinting. "DNA-fingerprinting" was not only a re-iteration of fingerprinting, but an advancement over it.

The advantages DNA holds over fingerprinting as an identificatory technology are difficult to overlook. Despite its *supposed* infallibility, fingerprinting is still connected, both taxonomically and ontologically, to the finger.²³³ To match fingerprints investigators have to find prints that are hopefully not too smudged, lift the prints, and then compare the prints to either those of a suspect or group of suspects or those held within an electronic database of fingerprints.²³⁴

Another difficulty with forensic fingerprinting was the ease with which it can be evaded. As its ability of fingerprinting to solve crimes permeated national consciousness, criminals quickly realized the importance of donning gloves before perpetrating foul acts.²³⁵ This knowledge is not limited to active or would-be criminals either – just as popular media depicts the commission of crime, it likewise depicts the manners in which criminals avoid detection. It is perhaps not going too far to assert that most everyone knows you can avoid fingerprint identification by not leaving fingerprints.

²³¹ See, e.g., *Commonwealth v. Curnin*, 565 N.E. 2d 440, 441 n.2 (Mass. 1991) (as cited in Mnookin, *supra* note 4, at 40, fn. 79). This early taxonomic chimera of 'DNA-Fingerprinting' appropriates the public's perception of fingerprinting's reliability.

²³² Google returns over 485,000 hits for the phrase, "DNA fingerprinting." Search run Mar. 14, 2010.

²³³ For attacks on the infallibility of fingerprinting, see Mnookin, *supra*, note 4; Mitchell, *supra*, note 179.

²³⁴ New types of fingerprinting techniques can recover even smudged fingerprints from metal surfaces by running an electric current through the surface and mapping electric potential differences that occur because of the immediate interaction between salts in the skin and the metal surface. See Lewis Brindley, *Fingerprints Recovered from Wiped Metal*, RSC ("ROYAL SOCIETY OF CHEMISTRY"): ADVANCING THE CHEMICAL SCIENCES, (June 6, 2008) <http://www.rsc.org/chemistryworld/News/2008/June/06060801.asp> (last visited, Mar. 14, 2010).

²³⁵ See, e.g., Ismael Estrada, *How Serial Killer Stumped Cops For Decades*, CNN (Dec. 17, 2007)

<http://edition.cnn.com/2007/US/12/17/serial.killer/index.html> (last visited Mar. 14, 2010); *'If it doesn't fit, you must acquit' - Defense Attacks Prosecution's Case; Says Simpson Was Framed*, CNN,

<http://www.cnn.com/US/OJ/daily/9-27/8pm/> (last visited Mar. 14, 2010). See also: Raju Chebium, *Kirk Bloodworth, twice convicted of rape and murder, exonerated by DNA evidence: Case considered first DNA exoneration of death row inmate*, CNN (June 20, 2000)

<http://archives.cnn.com/2000/LAW/06/20/bloodworth.profile/index.html> (last visited Mar. 14, 2010); Mark Godsey, *Texas State Court Prevents State from Destroying Evidence That May Show an Innocent Man was Executed*, CRIMPROF BLOG: A MEMBER OF THE LAW PROFESSOR BLOGS (Sept. 13, 2007),

http://lawprofessors.typepad.com/crimprof_blog/exoneration_innocence_accuracy/index.html (last visited Mar. 14, 2010).

But just as black gloves quickly became the sartorial accomplice of a criminal seeking to evade fingerprint identification, latex gloves have come to symbolize the utilization of new biological technologies by which forensic scientists identify criminals by other evidentiary traces. Indeed, DNA enables identification from almost any biological evidence – if the perpetrator has left skin, hair, semen, saliva and/or blood at the scene of the crime, investigators have the opportunity to conclusively identify or exclude subjects.²³⁶ Also important is DNA's ability retroactively to solve crimes. Years before the rise of genetic forensics, investigators had collected biological traces of the perpetrator for less exact biological comparisons.²³⁷ With the advent of the newer technology, technicians could re-analyze old samples both to inculcate true felons and exculpate the innocent.²³⁸ To match DNA, investigators collect the biological matter and bring it to a lab. The lab extracts the DNA that resides in the nuclei of the cells of the organic matter.²³⁹ Once this small amount of DNA is extracted, researchers increase it through a process of amplification.²⁴⁰ Once amplified, researchers can check the DNA for certain highly variable parts of the DNA in which sequences, called Variable Number Tandem Repeats or VNTRs, are repeated a number of times. By comparing a number of VNTRs from a sample, researchers can compare DNA samples very accurately.²⁴¹

The early appreciation of cultural currency of DNA and genetic forensics depended upon and likely contributed to the technological advances that provided increasingly faster and cheaper genetic tests. When scientists completed the sequencing of the first human genome in 2003 they had spent thirteen years and three billion dollars to accomplish the task.²⁴² Just four years later, in the summer of 2007, a new scientific collaboration announced that they had

²³⁶ Although conclusive identification is the goal of forensic DNA comparison, the scientific processes that go into such identification are still complicated and sensitive. Conclusive identification depends also on the successful isolation, amplification, and comparison of DNA. It is quite easy to introduce error at any step.

²³⁷ See Brindley, *supra* note 234. Hair follicles, Blood samples, and/or Fingerprints, if properly collected, can last for a long time. Nonetheless, such staying power is eclipsed by the longevity of DNA, which has been isolated from Neanderthal fossils that are 70,000 years old. Tim Radford, *How Long Does DNA Last?*, THE GUARDIAN (Jan. 13, 2005) available at <http://www.guardian.co.uk/science/2005/jan/13/thisweekssciencequestions1> (last visited Mar. 14, 2010).

²³⁸ Besides the increase in the scope of material by which an investigator can solve a crime, genetic forensics likewise differs from fingerprinting in the challenges it has endured in seeking admission as evidence. Indeed, many early attempts to admit DNA evidence were challenged, with varying success, in appellate courts. See *e.g.*, *State v. Andrews* 533 So. 2d 841 (Fla. 1988); *People v. Wesley*, 533 N.Y.S. 2d 643 (N.Y. Co. Ct. 1988). In her article on the fallibility of fingerprinting, Mnookin argues persuasively that this critical examination and the ensuing legal challenges to DNA evidence retroactively catalyzed challenges to the validity of fingerprint evidence. Mnookin, *supra* note 4, at 43-56. See also: The Innocence Project, <http://www.innocenceproject.org/> (last visited Mar. 14, 2010). (“The Innocence Project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted people through DNA testing and reforming the criminal justice system to prevent future injustice”).

²³⁹ It bears noting that red blood cells are the only types of cells in the human body that do not contain DNA. Nonetheless when labworkers analyze the DNA they have found in blood, they are extracting DNA from the white blood cells (leukocytes) that are also in blood.

²⁴⁰ For a quick overview on types of amplification, see John M. S. Bartlett & David Stirling, *A Short History of the Polymerase Chain Reaction*, in 226 METHODS IN MOLECULAR BIOLOGY 3-6 (Aug. 2003); Saiki et al., *Primer-Directed Enzymatic Amplification of DNA with a Thermostable DNA Polymerase*, 239 SCIENCE 487-91 (Jan. 1988).

²⁴¹ See Wesley, *supra* note 238, at 1 (setting the chance of a false match assuming proper lab procedure and the absence of monozygotic twins was at between 1 in 840 million and 1 in 1.4 billion).

²⁴² Juan A. Lozano, *Scientists Gets Own Personal Genome Map*, THE WASHINGTON POST (June 1, 2007) available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/01/AR2007060101718.html> (last visited Mar. 14, 2010).

sequenced the genome of James Watson, a co-discoverer of DNA's structure.²⁴³ In all, the sequencing of Watson's genome had taken two months and cost only a million dollars.²⁴⁴ As current technologies continue to improve, scientists predict the cost of such entire genome sequencing could fall to one thousand dollars per person in the near future.²⁴⁵

While sequencing an entire genome is a much more intensive process in terms of money, time, and data than a more routine DNA match, a consideration of sequencing indicates the same technological advances that have likewise enabled the expansion of genetic forensics. Within the last decade every state has begun to compile DNA databanks to store the genetic information of felons in order to test them against samples from crime scenes.²⁴⁶ In 2006, New York Governor George Pataki proposed to collect DNA from everyone convicted of a misdemeanor, as well as all prisoners and parolees.²⁴⁷ New York City Mayor Michael Bloomberg heartily agreed with this proposal.²⁴⁸ As these databases have expanded, they have become more effective; with their support, law enforcement authorities are increasingly able to make arrests in crimes that have gone unsolved for decades.²⁴⁹ As of June 2005, the FBI's national DNA database, which includes genetic profiles of over 1.4 million offenders, had produced over 23,500 DNA matches assisting in more than 25,400 investigations.²⁵⁰ By April of 2007, the number of matches and assisted investigations had almost doubled.²⁵¹ By January 2010, the database had made over 105,700 hits that assisted in more than 103,400 investigations.²⁵² As the breadth of the databases has grown, so too, goes the thinking, the potential for expedited investigations and accurate identifications. Indeed, in February of 2008 the FBI announced plans for a billion-dollar biometric database that would contain and coordinate multiple identificatory measures of many Americans.²⁵³ Not surprisingly, legal scholars and watchdog groups alike worry about the privacy implications of such a database.²⁵⁴

²⁴³ *Id.*; See also, Ta-Nehisi Coates, *Playing the Racist Card: Ferraro's Comments About Obama Were Racist. Why Can't We Say That?* SLATE (Mar. 14, 2008) <http://www.slate.com/id/2186553> (last visited Mar. 14, 2010) ("James Watson not only claimed that blacks had lower IQs than whites but scoffed at any notion of intellectual parity because 'people who have to deal with black employees find this not to be true.'")

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ History of DNA Databases, Governor's Office of Crime Control & Prevention, <http://www.goccp.maryland.gov/dna/database.php> (last visited Mar. 14, 2010) ("Every State in the nation has a statutory provision for the establishment of a DNA database that allows for the collection of DNA profiles from offenders convicted of certain crimes.")

²⁴⁷ Diane Cardwell, *New York State Draws Nearer to Collecting DNA in All Crimes*, N.Y. TIMES (May 4, 2006) available at <http://www.nytimes.com/2006/05/04/nyregion/04dna.html> (last visited Mar. 14, 2010).

²⁴⁸ *Id.*

²⁴⁹ See Using DNA to Solve Cold Cases, National Institute of Justice, Special Report, U.S. Dept. of Justice (July, 2002) available at <http://www.ncjrs.gov/pdffiles1/nij/194197.pdf> (last visited Mar. 14, 2010).

²⁵⁰ Measuring Success, Federal Bureau of Investigation: CODIS, <http://www.fbi.gov/hq/lab/codis/success.htm> (numbers when visited July 21, 2005).

²⁵¹ Measuring Success, Federal Bureau of Investigation: CODIS, <http://www.fbi.gov/hq/lab/codis/success.htm> (numbers when visited Mar. 10, 2010).

²⁵² Federal Bureau of Investigation, CODIS-NCIS Statistics, <http://www.fbi.gov/hq/lab/codis/clickmap.htm> (last visited Mar. 14, 2010).

²⁵³ Kelli Arena & Carol Cratty, FBI Wants Palm Prints, Eye Scans, Tattoo Mapping, CNN, (Feb. 4, 2008) <http://www.cnn.com/2008/TECH/02/04/fbi.biometrics/index.html> (last visited Mar. 14, 2010) ("The bureau is expected to announce in coming days the awarding of a \$1 billion, 10-year contract to help create the database that will compile an array of biometric information -- from palm prints to eye scans").

²⁵⁴ *Id.*

As discussed at length *supra*, the final trial scene of *Pudd'nhead Wilson* culminates in the melodramatic identification of Tom as criminal and slave. With all the emphasis on identification and conviction it is easy to lose sight of Wilson's true purpose in the legal proceedings. Initially and formally, Wilson takes the case not to prosecute Tom, but rather to defend the wrongfully accused Luigi Capello. Nonetheless, Wilson's fingerprint technology is never advanced as an affirmative defense to the charges against Luigi. Even barring Wilson's recognition and identification of Tom's print, the infallible fingerprinting technology, when used to show that the bloody fingerprint on the Indian dirk belonged to neither twin, should have been enough to suggest their innocence. Suggestively, neither Wilson nor the novel considers this possibility. The idea that fingerprinting can remove suspects from consideration or exonerate them completely has likewise failed to find large cultural purchase. Fingerprinting might indeed rule out suspects or even exonerate convicts, but the cultural power of fingerprinting is identificatory; it rules people in, it does not rule them out. The ability to exclude as well as include – the power to say 'you are not guilty' as well as 'you are guilty' – is a power popularly held by DNA. And this is a power gained by those utilizing DNA testing.

Initially utilized in the prosecution of crimes and specifically the identification of criminals, DNA has proven further its importance and validity through the exculpation of the falsely convicted. As of this writing, hundreds of wrongly convicted suspects have been exonerated by this technology. DNA has gotten people out of prison, it has pulled people off of death row, it has even reached beyond the grave to cast doubt upon the convictions of the wrongly executed.²⁵⁵ In each instance, DNA gains the credibility that it takes from the American justice system; in the midst of providing freedom to the falsely convicted, DNA technology asserts its own cultural ascendance and its own superior identificatory prowess by revealing the failure of the identification advanced by the criminal justice system. Thus DNA's ability to identify is strengthened by its ability to re-identify or dis-identify – in this sense, DNA is a technology capable both of revising past identifications and changing the mistakes of the past. It is a technology that approaches identificatory omniscience – another indelible and divine language (requiring only four letters – A, C, G, and T) written within you and every living thing. Today and most any day, you can look on CNN or MSNBC, the pulpits of our information-driven world, for self-reinforcing examples of the efficacy and power of DNA. One recent story reports that a state's crime labs "confirm[suspect's identity] with all *scientific certainty*" (emphasis added), leaving police investigators "110% certain" of the suspect's guilt.²⁵⁶ That 'scientific certainty' should catalyze a level of popular certainty that outstrips statistical possibility is both ironic and disquieting.

If the language of divinity, inevitably, and certainty reads familiar, be assured this is no accident. Just as DNA sought to gain its own cultural credence by attaching itself to the name of fingerprinting, it was not long before many of the adjectives, metaphors, and more largely, hermeneutics of fingerprinting were appropriated by DNA. Everywhere, indelible, divine, ineffaceable – these adjectives, although employed by Twain and others writing or testifying about fingerprinting, were quickly applied to DNA.

Yet despite the illusory advent of a 'CSI-society' in which DNA and other evidentiary traces allow investigators to find their culprit without fail, despite the actual advances proposed

²⁵⁵ The Innocence Project, <http://www.innocenceproject.org/> (as of Mar. 14, 2010, 251 individuals have been exonerated through the work of The Innocence Project).

²⁵⁶ Josh Levs, DNA Links Man to TV Anchor's Death, Police Say, CNN (Dec. 1, 2008) <http://www.cnn.com/2008/CRIME/12/01/tv.anchor.death/index.html> (last visited Mar. 14, 2010).

and achieved by forensic DNA, and despite the current importance and prevalence of DNA in criminal forensics, the technology is less a shift in the paradigm of identificatory technologies than their latest and best iteration. The switch from the visual comparison of fingerprinting to the blood-quantization of genetics is ultimately only a shift in the type of evidence by which identification is made. The two technologies rely on disparate techniques and methodologies, but they remain epistemologically twinned. While fingerprinting depends on the analysis of unique ridges on the finger and DNA depends on the analysis of organic matter, in the end both technologies come down to a visual comparison. In fingerprinting the patterns of skin ridges on the finger are compared to other ridges, whereas with DNA bands signifying the presence of sequences are compared to another sample for the same pattern of bands.

To be certain, DNA is a remarkable technology that, as discussed above, has aided thousands of criminal investigations and has led ultimately to both the conviction of criminals as well as the exculpation of the wrongly accused and falsely convicted.²⁵⁷ Yet despite the number of advantages DNA has demonstrated over fingerprints, both technologies pale in comparison to the proposed goals of other forensic technologies currently under development. Like their precursors, these technologies claim to identify suspects with a high measure of confidence. Unlike fingerprinting, both the validity and forensic admissibility of these new techniques have been hotly contested by scientists and lawyers.²⁵⁸

IV.2 – NEW IDENTIFICATORY TECHNOLOGIES

Besides DNA and fingerprinting, criminal forensics relies on and/or is in the process of developing numerous other identificatory technologies. Some of these technologies, such as retinal scans or tattoo mapping, work within the framework of DNA and fingerprinting. These technologies depend upon recording and visually comparing the characteristics of an individual.²⁵⁹ This framework of visual comparison differs only slightly from the identification of criminals within the suspect lineup or the archetypical racial identification of African (-American) slaves. In all cases, one distinguishes or confirms identity by comparing whom or what one sees with whom or what one has already seen.

In comparison, other technologies like partial-DNA or family screening analyses are both more speculative and invasive. Like regular DNA analysis, partial-DNA or family screening analyses begin with the comparison of DNA collected at crime scenes to DNA held within record banks. However, partial-DNA analyses differ as they seek not only a direct match, but likewise check all DNA to see if any closely enough match the crime scene DNA to suggest a relation between an individual whose DNA is already in the database and a consanguineous family member.²⁶⁰ Similarly, police investigators who are interested in suspects who refuse to

²⁵⁷ Michele Berry, *Add the 198th Name to the List of People Exonerated Through DNA Evidence*, CRIMPROF BLOG: A MEMBER OF THE LAW PROFESSOR BLOGS (Mar. 30, 2007) http://lawprofessors.typepad.com/crimprof_blog/exoneration_innocence_accuracy/index.html (last visited Mar. 14, 2010).

²⁵⁸ See notes 265, 316, *infra*.

²⁵⁹ See, e.g., Arena & Cratty, *supra* at note 253.

²⁶⁰ Shaoni Bhattacharya, *Killer Convicted Thanks to Relative's DNA*, NEW SCIENTIST (Apr. 20, 2004) <http://www.newscientist.com/article/dn4908-killer-convicted-thanks-to-relatives-dna.html> (last visited Mar. 14, 2010); see also *Genetics and Privacy*, THE ECONOMIST, (May 1, 2008) available at http://www.economist.com/world/unitedstates/displaystory.cfm?story_id=11293939 (last visited Mar. 14, 2010, subscription required) (discussing expansion of 'familial searching' techniques).

provide genetic samples, have approached consanguineous family members of suspects to test their DNA in order to get enough evidence to receive a court subpoena for the extraction and testing of a suspect's DNA.²⁶¹ Such techniques are loosely analogous to genealogical methods of racial identification in *Puddin'head Wilson* insofar as they seek to establish identity by relying on known familial connections. If a suspect has no known familial members, such technologies are limited.²⁶²

More exciting than either of these technologies, however, is a new paradigm of identificatory technologies, some more developed than others, that seek to tie culpability to more than an individualized marking. Many of these technologies rely on the functional magnetic resonance imaging (fMRI) of the brain.²⁶³ This highly sensitive scanning of the brain records changes in blood flow levels to distinct areas during different actions, thoughts, and experiences.²⁶⁴ Various proponents claim the interpretation of such images can predict the presence or absence of thoughts or emotions.²⁶⁵ Others insist these technologies can go further, indicating the presence of memories or knowledge; in common parlance, these proponents suggest the ability to read a suspect's mind.²⁶⁶

More specifically, fMRI technology depends on charting blood flow to areas of the brain under a specific set of circumstances and then deciphering the implications of the charts. One common example is to test a criminal suspect for memory of specific incident or crime scene.²⁶⁷ This is often accomplished by placing a photograph of the crime scene before the suspect.²⁶⁸ By charting blood flows at various points in the brain, researchers intend to state accurately whether the suspect 'recognizes' the crime scene.²⁶⁹ As fantastic as this technology seems, this practice has been given judicial weight; in 2000, the Iowa Supreme Court noted the admission of a scanning technique persuasively referred to as "brain fingerprinting."²⁷⁰ This technology,

²⁶¹ Mallory Simon, *Tip, DNA Lead to Arrest in Student's Slaying*, CNN, (Nov. 27, 2008)

<http://www.cnn.com/2008/CRIME/11/26/brianna.denison.arrest/index.html> (last visited Mar. 14, 2010).

²⁶² DNA testing has similarly been used to prove such familial connections in high profile cases: partial DNA profiling demonstrated that Anna Anderson was not, despite her claims, the Russian Princess Anastasia Romanov, and to confirm that a male in Thomas Jefferson's line (reputedly Thomas Jefferson himself) had sired a son with his slave Sally Hemmings. See Michael D. Coble et al, *Mystery Solved: The Identification of the Two Missing Romanov Children Using DNA Analysis*, 4 PLOS ONE (3) (Mar. 11, 2009)

<http://www.plosone.org/article/info:doi/10.1371/journal.pone.0004838> (last visited Mar. 14, 2010); Thomas Jefferson and Sally Hemmings, A Brief Account, http://www.monticello.org/plantation/hemmingscontro/hemmings-jefferson_contro.html (last visited Mar. 14, 2010); See also discussion of *Doe v. La.*, chapter II, *infra*.

²⁶³ About Functional MRI (General), Columbia University Medical Center, Program for Imaging and Cognitive Sciences (PICS) <http://www.fmri.org/fmri.htm> (last visited Mar. 14, 2010). See also Leo Kittay, Admissibility of fMRI Lie Detection: The Cultural Bias Against "Mind Reading" Devices, 72 BROOKLYN L. REV. 1351 (Summer, 2007).

²⁶⁴ About Functional MRI, *supra* note 263.

²⁶⁵ Kevin N. Ochsner et al., *Reflecting upon Feelings: An fMRI Study of Neural Systems Supporting the Attribution of Emotion to Self and Other*, 16 JOURNAL OF COGNITIVE NEUROSCIENCE 10 1-27 (2004); Georg Northoff et al., *Functional Dissociation between Medial and Lateral Prefrontal Cortical Spatiotemporal Activation in Negative and Positive Emotions: A Combined fMRI/MEG Study*, 10 CEREBRAL CORTEX 1, 93-107 (Jan. 2000).

²⁶⁶ *Id.* (maybe the MEMER piece by Harwell?)

²⁶⁷ Lawrence Farwell & Sharon Smith, *Using Brain MERMER [Memory and Encoding Related Multifaceted Electroencephalographic Response] Testing to Detect Concealed Knowledge Despite Efforts to Conceal*, 46 JOURNAL OF FORENSIC SCIENCES 1 (Jan. 2001). For a legal consideration of this technology, see Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 335 (2002).

²⁶⁸ Farwell & Smith, *supra* note 267.

²⁶⁹ *Id.*

²⁷⁰ *Harrington v. State*, 659 N.W. 2d 509 (2003). See also, Lawrence A. Farwell, *Method for*

developed by Dr. Lawrence Farwell to measure a subject's memory or lack of memory about a crime, indicated that Terry Harrington had indeed not committed the 1977 murder for which he had been convicted.²⁷¹ The Supreme Court of Iowa declined to consider 'brain-fingerprinting' evidence as it was unnecessary to the resolution of the appeal.²⁷² The court's decision to overturn Harrington's conviction was based on other newly discovered evidence and claimed a *Brady* violation.²⁷³ Overall this and similar technologies both identify and inculcate an individual by recognizing the connection between the action and the mind. These highly advanced technologies posit that an act leaves a mark or taint upon the mind of the actor. These technologies read this mark.

It is no small irony that this next paradigm of identificatory technology is also found in *Pudd'nhead Wilson*. Twain's novel could not and did not posit fMRI technologies. Nonetheless, this new set of identificatory technologies find their counterpart in the effective but spurious palm reading that Wilson performs on Luigi Capello. These fMRI technologies also find substantive counterpart in the essentialist and inveterately racist identity roles granted to, and notions of identity harbored by, characters in *Pudd'nhead Wilson*.

To be sure, Twain's novel contains multiple instances in which external actions irremediably form the minds of the novel's characters. The source of Tom's malice is unclear, but his haughty and arrogant bearing is definitely enabled, if not also exacerbated by, his upbringing. Conversely, the external circumstances of Chambers' upbringing ultimately influence his mind. As with Tom, it is unclear whether Chambers' years of slavery are responsible for the underlying mettle of his character. Still, the final image of Chambers, of a man trapped in the cage of uncouth manners and language, is an internal state predicated on his upbringing as a slave.

But this new paradigm of technologies that purport to discover what's in an individual's mind is more complex than evinced by the influence of society upon the characters of *Pudd'nhead Wilson*, since it has coalesced in the idea of nurture. Rather, in locating misdeeds within an individual's mind, these new technologies most closely approximate the views Roxy and Tom take towards Tom's black blood.²⁷⁴ When Tom refuses to duel Angelo, Roxy accounts for this forfeiture within the economy of honor to Tom's blood: "It's de nigger in you, dat's what it is."²⁷⁵ Tom shares this feeling; after learning of his racial lineage, the "meek nigger" within Tom begins, oxymoronically, to assert itself.²⁷⁶ Thereafter, Tom avoids shaking hands and making other social contact. In short, he loses his sense of confidence and equality with his fellow (white) man.

But the new paradigm of fMRI technologies has sounder claim to accuracy and credibility than Twain's deployment of palm reading and is more complex than the externally motivated actions of Tom or Chambers within society. This is to say, these new identificatory technologies invert the analogy with respect to the criminal or racial taint. While the essentialized racism harbored by Twain's characters is distillable into the maxim: 'he who is tainted must do,' the new paradigm holds that 'he who has done, must be tainted.'

Electroencephalographic Information Detection. U.S. PATENT NO. 5,467,777 (1995).

²⁷¹ Harrington, *supra* note 270, at 523.

²⁷² *Id.*

²⁷³ *Id.*; See, *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding failure of prosecution to disclose evidence that may be favorable to the accused is a violation of the Due Process Clause of the Fourteenth Amendment).

²⁷⁴ TWAIN, *supra* note 1, at 70.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 45.

While the *Harrington* case is significant for its acknowledgement of ‘brain fingerprinting’ evidence, another potential identification is worth noting; at his original sentencing Harrington stated:

“I just want you to know that no matter what happens, I know I’m innocent, and as long as, you know, I feel that inside, then I’m going to keep on fighting because I know I can’t see myself locked up for the rest of my life for something I didn’t do. *I feel like I was judged by the color of my skin and not the content of my character*, and I’ll always feel that way until I get, you know, the kind of verdict the testimony shows, and that’s innocent or not guilty as they would say in the courtroom.” (emphasis added).²⁷⁷

As mentioned above, an identification of a lack of memories in Harrington’s mind assisted his release from prison after two decades. Nonetheless, it is not the absence of a memory as much as the presence of a belief that demonstrates the dangers of racial and criminal identification within the American justice system. Despite prodigious scientific progress in advancing the boundary of identification from the skin, the lineage, to the skin ridge, to DNA, and now, arguably, to thought and memory, it is telling that, in its first instance, this fMRI technology can only help to undo a judicial process based on the color of one’s skin.

Although brain fingerprinting was first utilized to reverse a conviction, this technology has not only been used to gain the acquittal of criminal convicts. The technology has also been utilized to aid prosecution. After brain scanning indicated that a suspect in a decades-old unsolved murder recognized details of both the crime scene and the murder weapon, details that had never been released to the public, the suspect plea-bargained to escape greater punishment.²⁷⁸ In neither this instance nor the *Harrington* case had fingerprinting or DNA properly identified the guilt or innocence of the men. Whether these technologies actually contributed to the misidentification of either suspect is unclear. Nonetheless, brain fingerprinting was singularly able to chart the impressions of culpability upon the two men’s minds and thereby correctly distinguish and identify the criminal.

A separate group of researchers in Germany has also used fMRI to ‘read minds.’ But in this case the researchers were concerned less with suspect culpability, but more with the accurate prediction of human thought.²⁷⁹ Using simple yes-or-no questions, the scientists measured and charted the blood flow in the brains of research subjects as they choose an answer for each question within a prescribed set.²⁸⁰ After calibrating their machine to each individual, the researchers charted and examined the slight differences in the blood flow within the brain of each subject as he or she answered the questions. Based on their readings, the researchers were able to correctly predict the respondents’ answer to a question with seventy percent accuracy.²⁸¹ Although this indicates a prediction rate only twenty percent higher than the proverbial flip of the coin, this research indicates one goal of fMRI technologies while highlighting the ethical dilemmas that come with the process of mind reading.

²⁷⁷ Harrington, *supra* note 270, at 523.

²⁷⁸ Brain Fingerprinting Laboratories, A New Paradigm in Criminal Justice, <http://www.brainwavescience.com/criminal-justice.php> (last visited Mar. 14, 2010).

²⁷⁹ John Dylan Haynes et al., *Reading Hidden Intentions in The Brain*, 17 CURRENT BIOLOGY 4, 323 (Feb. 20, 2007)

²⁸⁰ *Id.*

²⁸¹ *Id.*

Even more recently a group of researchers at the University of California, Berkeley have performed similar experiments.²⁸² In their research, subjects were shown a prescribed set of pictures while their brain flow was charted. Thereafter, subjects were shown the pictures in random order. Once calibrated, the program deduced the picture shown to the test subject with over ninety percent accuracy.²⁸³ Whether this recent twenty percent increase in accuracy comes from refinement of the examination methodology or genuine technological advance, both tests indicate the increasingly successful endeavors of scientists to identify the content of the mind through fMRI technology. Little aplomb is needed to recognize that the forensic applicability and evidentiary admissibility of such technologies might confront the judiciary within a number of years. Although fMRI still feel too unready and unproven to produce evidence capable of convicting an individual, it bears remembering that these fMRI technologies arguably have more scientific support than fingerprinting did at the publication of *Pudd'nhead Wilson*.

IV. 2 – *Frye & Daubert*, THE SEMINAL CASES.

As science fictional as such mind reading technologies might seem, the validity of these incontrovertibly intriguing, yet arguably spurious, methods rest upon a number of standards developed in the courts. Interestingly, the first relevant standard relating to the admissibility of scientific evidence was devised by a court to decide the validity of another identificatory technology that, like fMRI methods, seeks to identify the criminal by testing impressions upon the suspect and not impressions left at the crime scene.

In 1923, the Court of Appeals of District of Columbia examined “a systolic blood pressure deception test,” and found the expert testimony thereupon inadmissible.²⁸⁴ In examining a technology that claimed to deduce veracity of a suspect’s responses based upon certain biometrics recorded during witness questioning, the *Frye* court crafted a simple standard that subsequent courts would adopt (officially and unofficially) to admit and deny admission of expert testimony for the better part of the 20th century.²⁸⁵

Despite the six years that had elapsed between the first judicial admission of fingerprinting in 1917 and the judiciary’s subsequent provision of a standard for the admissibility of expert witness testimony and evidence, in reaching its conclusion the *Frye* court never considered more widely accepted technologies dependent upon the impressions left at crime

²⁸² Kendrick N. Kay, Thomas Naselaris et al., *Identifying natural images from human brain activity*, 452 NATURE 352 (Mar. 20, 2008), *discussed in* William Saletan, *Mindsweeper: Reading Minds with 90 Percent Accuracy*, SLATE (Mar. 3, 2008) <http://www.slate.com/id/2185599/> (last visited Mar. 14, 2010). Scientists are also continuing to refine sophisticated brain testing techniques that can shed light on both the truth of our statements, and the motivations behind our actions. Scans have likewise already “been used to identify brain signatures of disgust, drug cravings, unconscious racism, and suppressed sexual arousal, not to mention psychopathy and propensity to kill.” Patrick McGeehan, *Spitzer Wants DNA Sampling In Most Crimes*, N.Y. TIMES (May 14, 2007) page A1, *available at* <http://select.nytimes.com/gst/abstract.html?res=F60F1EF839550C778DDDAC0894DF404482> (last visited Mar. 14, 2010); *See also*, William Saletan, *Full-Mental Nudity: The Arrival of Mind-Reading Machines*, SLATE (Mar. 16, 2007) <http://www.slate.com/id/2161936/> (last visited Mar. 14, 2010).

²⁸³ Kendrick N. Kay, Thomas Naselaris et al., *Identifying natural images from human brain activity*, 452 NATURE 352 (Mar. 20, 2008).

²⁸⁴ *Frye*, *supra* note 172 at 1013. It is important to note that while *Frye* was topically concerned with the experts who could explain the meaning of the evidence more than the evidence itself, the point of the expert is to explain otherwise inscrutable evidence to the jury.

²⁸⁵ *Id.*

scenes, such as fingerprints. Instead the *Frye* court kept its focus on the method at bar, a technology by which criminal investigators proclaimed to cull evidence from criminal suspects.

Although the standard espoused by the decision continues to impact evidentiary procedures in many jurisdictions, the opinion itself is both concise and, apparently, simple.²⁸⁶ At trial, the court excluded the results of an expert testimony upon the early form of the polygraph.²⁸⁷ The trial court, unlike either its counterpart in *Pudd'nhead Wilson* or any of a number of contemporaneous cases that admitted testimony on fingerprinting, refused to allow the witness to “conduct a test [of the putative technology] in the presence of the jury.”²⁸⁸ This was claimed as error on appeal.²⁸⁹ Petitioners claimed the validity of the test, noting “that conscious deception or falsehood, concealment of facts, or guilt of crime... *always produce* a [measurable] rise of systolic blood pressure” (emphasis added).²⁹⁰ Despite these claims, the appellate court refused to examine more thoroughly the validity of the technology in order to ascertain its validity.²⁹¹ Concerned perhaps with the profusion and advancement of many technologies and aware of the impracticality of keeping the judiciary abreast of such developments, the decision in *Frye* ostensibly removed judges from the role of arbitrating the validity of scientific procedure. Instead the validation of expert witnesses and evidence was placed upon the scientific communities responsible for the development of the techniques. In determining the admissibility of polygraphy, the *Frye* court deferred to the relevant community of scientists; as polygraphy was not “sufficiently established to have gained general acceptance in the particular field in which it belongs,” the evidence was excluded.²⁹²

Given the scope of the decision’s eventual influence, the court’s decision is surprisingly brief. In only four pages, the *Frye* court sets a standard for the admissibility of expert witness testimony that ultimately influences evidence in trials for the next seventy years.²⁹³ More interesting than the brevity of the decision however, is the succinctness of its actual holding and rule. The court accomplishes both in only four sentences.²⁹⁴

²⁸⁶ *Id.*

²⁸⁷ *Id.* Despite the court’s holding polygraph evidence as inadmissible, a societal belief persists in the validity of lie detection through biometrics. Indeed, the plots of a number of films, e.g., *MEET THE PARENTS* and *FIRE IN THE SKY*, rely on polygraph tests. A television game show, *The Moment of Truth*, has been asking contestants personal questions and subjecting them to polygraph tests since 2008. In 2003, the National Academies Press published *THE POLYGRAPH AND LIE DETECTION*, available at http://www.nap.edu/catalog.php?record_id=10420#toc (last visited Mar. 14, 2010). The work was produced by the Committee to Review the Scientific Evidence on the Polygraph, the Board on Behavioral, Cognitive, and Sensory Sciences, and the Committee on National Statistics, under the coordination of the Division of Behavioral and Social Sciences and Education of the National Research Council of the National Academies. The 416-page review, concluded “that in populations of examinees such as those represented in the polygraph research literature, untrained in countermeasures, specific-incident polygraph tests can discriminate lying from truth telling at rates well above chance, though well below perfection.” *Id.* at 4.

²⁸⁸ *Frye*, *supra* note 172, at 1014; *TWAIN*, *supra* note 1, at 105. For list of cases, see generally Mnookin, *supra* note 3.

²⁸⁹ *Frye*, *supra* note 172, at 1013.

²⁹⁰ *Id.* The proclamation of an ability to reveal guilt unerringly through the detection and categorization of hidden, yet ineffaceable, biological indicia is an inevitable aspect of forensic identificatory technologies.

²⁹¹ *Id.* at 1014.

²⁹² *Id.*

²⁹³ *Frye* is still followed in some jurisdictions. See generally, David E. Bernstein, *Frye, Frye, Again: The Past, Present, and Future of the General Acceptance Test*, 2 EXPERT EVIDENCE REPORT 3 (Feb. 18, 2002) available at <http://litigationcenter.bna.com/pic2/lit.nsf/id/BNAP-57HQ4Q?OpenDocument> (last visited Mar. 14, 2010).

²⁹⁴ *Frye*, *supra* note 172, at 1014.

Numerous cases are cited in support of this rule. Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made.

Despite the brevity of the opinion and the rule the court promulgates, a close analysis of the language reveals the difficulty of deciding the validity of such technologies. At first the *Frye* court acknowledges a line between admissible and inadmissible “scientific principle[s] and[/or] discover[ies].” In the next sentence however, the *Frye* court retreats from this formalist approach, restructuring this line as a zone, a “twilight zone” no less. Ultimately the judges of the *Frye* court conclude that they “think” polygraphy has not yet been “sufficiently established to have gained general acceptance in the particular field in which it belongs.”²⁹⁵ This final sentence resembles less a foray into the ambiguous zone in which shades predominate and a judge might only with difficulty discern black, white, admissible, and inadmissible than the casting of a brittle chain. The sentence, which states the rule, contains eight prepositional phrases; as the sentence progresses each clause becomes more dependent on the last without ever bothering to satisfactorily explain the implications of that which has come before. By this shackled logic, the judgment is affirmed and the decision ends with neither discussion nor citation of that which might qualify as “established,” let alone “sufficiently established.” Nor does the *Frye* court provide any criteria for acceptance, general or otherwise, nor explain how either this court or other courts might recognize the “particular field” in which the expert evidence or testimony “belongs.”²⁹⁶ Indeed, the statement that there must be a line as well as the notation of a standard of “general acceptance” that might serve as this boundary, belies the basis of the appellate holding. In short, a careful consideration of the rule and holding espoused in *Frye* indicates both the amorphousness and subjectivity of this first standard for the acceptance of expert witness testimony and evidence.

Ultimately the *Frye* court’s rule on whether to admit expert witness testimony is itself based upon a troubled identification of which technologies met a practically undefined threshold of general acceptance. Although this standard seemingly shifted the identification of valid technologies from the judicial to the scientific bench, this shift was based in first instantiation on nothing more than what the three-judge panel in *Frye* and any judge or panel thereafter might “think [qualifies].”²⁹⁷ Whether used retroactively to evaluate fingerprinting or proactively to

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.* Note, despite citation to the scientific community and the rigors of acceptance, the *Frye* court affirmed the exclusion of the systolic blood pressure deception test without citation to proof or refutation of the technology. As such, the great precedent of *Frye* was built on a judicial hunch, of what the court thought such extrinsic evidence might have shown.

decide the admissibility of an fMRI technology, the deceptively stable and objective standard established in *Frye* clouds the subjectivity that stands at the center of a legal identification. While *Frye* ostensibly shifts the decision of admissibility from the judiciary to the relevant scientific community, the decision truly highlights the ultimate power of the judiciary in effectuating legal identifications. This power is wielded independent of the identifications proffered by DNA, brain scanning, fingerprinting, polygraphy, or any other putative identificatory technology; under *Frye* all would-be evidentiary entrants into the court must meet a standard of acceptance that, in its first use, depends only on what the judges “think.”²⁹⁸ The subjectivity of this standard makes it difficult to predict how a court might apply it to brain fingerprinting or similar technologies. None of these technologies have yet gained the cultural cache of fingerprinting or DNA, but whether they have gained “general acceptance in the relevant scientific community” is not so simple. The level of acceptance enjoyed by brain fingerprinting, examined *infra*, demonstrates the challenge of predicting whether a court will admit an identificatory technology. But before attempting to apply the *Frye* test to identificatory fMRI technologies, we need examine the ruling by which *Frye* was greatly supplemented if not entirely supplanted.

Despite the longevity and influence of the *Frye* decision, a 1993 Supreme Court decision deposed its primacy within federal courts.²⁹⁹ In *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (“*Daubert*”), the Court specifically held that the 1975 Federal Rules of Evidence, specifically Federal Rule of Evidence #702 (FRE 702) governing expert testimony, had superseded the decision in *Frye* and thereby rejected the idea that the admissibility of expert witness testimony find basis in ideas of “general acceptance.”³⁰⁰

Indeed, the Supreme Court saw Federal Rule of Evidence #702 not only as a supersession but also a liberalization of the *Frye* standard. While the *Frye* test focused on general acceptance, the *Daubert* standard suggested a number of explicit steps by which a court might determine the admissibility of expert witness testimony and evidence.³⁰¹ The fact pattern behind the case is quite simple. Jason Daubert was born with congenital birth defects.³⁰² During pregnancy, his mother had taken Bendectin to stop morning sickness.³⁰³ The complaint alleged that the medication, produced-by Merrell Dow Pharmaceuticals, had caused the birth defect. Merrell Dow denied liability. To prove causation, Daubert sought to admit eight reports showing a link between Bendectin use and animal birth defects. The trial court denied admission of the

²⁹⁸ *Id.*

²⁹⁹ Numerous jurisdictions still follow the *Frye* test. Nonetheless, the standard has not escaped excoriation by those who bemoan the profusion of “junk science” that by meeting this arguably-low standard has plagued the American courtroom. See, PETER W. HUBER, GALILEO’S REVENGE: JUNK SCIENCE IN THE COURTROOM (1993). While these identificatory technologies have sought impression both at the crime scene or upon or within the individual witness or suspect, the *Frye* test looked to the impression that the technology itself had made upon its “particular field.” *Frye*, *supra* note 172, at 1014.

³⁰⁰ 509 U.S. 579 (1993) (holding petitioners’ evidence on teratogenic effects of Bendectin unreliable and thereby upholding summary judgment). Although the facts of the case concerned prenatal side effects of a pharmaceutical, the court’s decision deliberately turned to the “much debated” *Frye* test in full acknowledgment that the “scholarship on [*Frye*’s] scope and application is legion.” *Id.* at 576; Fed. R. Evid. 702. Federal Rule of Evidence 702 provides: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

³⁰¹ *Daubert*, *supra* note 172, at 592-94.

³⁰² *Id.* at 582.

³⁰³ *Id.*

evidence because it did not come from the field of human epidemiology and because it had been neither published nor subjected to peer review. After a series of appeals, the case was granted *certiorari* by the Supreme Court. In upholding the decision made at trial, the Supreme Court provided a four-step standard by which subsequent courts might determine the admissibility of scientific evidence: 1) Can the technique or theory be, and has it been tested, 2) Has it been subjected to peer review and publication, 3), Does it have a known or potential rate of error and have standards been established to maintain its operation, and 4) is it generally accepted by the relevant scientific community.

Although popularly understood as a standard instead of a test, the ‘standard’ created by the *Daubert* ruling appears much more objective than the *Frye* ‘test’ it replaced. Just as identificatory technologies have slowly become more nuanced in the racial and criminal identification of individuals, the judiciary’s decision to apply the *Daubert* standard in lieu of the *Frye* test likewise suggests an evolution or refinement of the forensic evaluation of identificatory technologies. The result is definitely more nuanced. Although the Court explicitly insisted on the flexibility of its standard, a *Daubert* analysis of admissibility consists of (at least) four steps encompassing a technology’s empirical validation, subjection to peer review and publication, the establishment of a potential rate of error, as well as a consideration of its general acceptance.³⁰⁴ Yet the introduction of complexity does not of itself assure an improved standard; the *Daubert* Court’s enumeration of factors at best only distracts from the abundant subjectivity couched within this new evidentiary standard.

Because of the varying levels of ambiguity with which courts could and had defined many of the terms in the *Frye* decision, a technology like brain scanning might or might not have met the standards of admissibility. Although the *Daubert* standard appears more regulated, the admissibility of brain scanning, or, more generally, forensic fMRI evidence is perhaps even less clear. A step-by-step application of the *Daubert* factors shows only that while identificatory technologies attempt to look into the subjective mind of suspects, the admission of these technologies rests largely in subjective decision of the judge. To demonstrate the subjective aspects of the *Daubert* standard, I apply them quickly to forensic fMRI technologies.

(1) The First *Daubert* Factor: Can and Has the Theory or Technique Been Tested?

The *Daubert* court notes that a “key question” to determine whether “a theory or technique is scientific knowledge [is...] whether it can be (and has been) tested.”³⁰⁵ It is hard to argue against the importance of testing the theories and techniques seeking forensic admissibility. Still, the way in which the Court expresses this requirement leaves a trail of uncertainty. The Court’s reliance on the passive voice stressing that these theories or techniques “*can be* tested (and *ha[ve] been*) tested” (my emphasis) elides a consideration of which parties might responsibly test the theories or techniques: should the ruling court be responsible for this? Or the American Academy of Scientists? Or the National Institute of Health? Or add your own answer here – in the background the less-ambiguous, but still unsatisfactory, answer provided by *Frye* still echoes: ‘the relevant scientific community.’ But the *Daubert* Court continues: not only must the technology be testable, rather it must also contain a theory of falsification. That is, there must be a verifiable way in which the technology might be falsified. This focus on testing and falsification neither explicitly excludes nor supports the admission of brain fingerprinting. Dr.

³⁰⁴ *Id.* at 592-94.

³⁰⁵ *Id.* at 600.

Farwell has tested the technique.³⁰⁶ Then again, Dr. Farwell, as inventor of the process, is incapable of providing an independent evaluation of the technology.

As the technology records brain waves that show the presence or absence of information within the brain, the test's inability to record any type of wave might qualify as a theory of falsifiability. Any further speculation over the potential of a theory for falsification or the absence of a formulated theory of falsification likewise conflicts with the widespread forensic admission of fingerprinting. As discussed further, *infra*, fingerprinting has no well-formulated or largely accepted guidelines detailing when a match exists, and consequently, no guidelines for when a match does not exist.³⁰⁷ In short, the first prong of the *Daubert* standard is itself troubled as fingerprinting, the archetypical identificatory technology, arguably fails to meet the prong even after a century of forensic employment.

(2) The Second *Daubert* Factor: Has the Theory or Technique Been Subjected to Peer Review and Publication?

The second factor also fails dispositive application to already-admitted technologies (fingerprinting) as well as arguably admissible technologies such as brain scanning and fMRI. But has brain scanning been subjected to peer review and publication? Well, that depends. Brain scanning specifically and fMRI more generally have been published in *The Journal of Forensic Sciences* and *The Journal of Cognitive Neuroscience*, and cited by courts.³⁰⁸ As with *Daubert*'s first prong, this standard likewise debilitates itself through its passive construction – although the peer review and publication is required, the second prong of the *Daubert* standards provides no guidance on which parties need review or publish on the technology? Also, as with the first prong, the peer review and publication requirement arguably invalidates fingerprint evidence. Although fingerprinting has been written about for over a century, the majority of this writing has been descriptive of the process and applications of fingerprinting – more description than peer review.³⁰⁹ More concerning than the lack of extended critical consideration of fingerprinting are the results of the few extant studies. In 1995, the International Association for Identification (“IAI”) designed an exam to test the proficiency and accuracy of finger printers.³¹⁰

³⁰⁶ Farwell & Smith, *supra* note 267.

³⁰⁷ See note 310, *infra*.

³⁰⁸ See notes 164, 265, 270 *supra*.

³⁰⁹ See GALTON, *supra* at note 182. For more recent accounts of the blurred line between the ‘science’ and ‘advocacy’ of fingerprinting, see *Forensic-Evidence.com, Identification Evidence*, http://www.forensic-evidence.com/site/ID/ID00004_2.html (last visited Mar. 15, 2010).

³¹⁰ *Id.* Sandy Zabell, *Fingerprint Evidence*, JOURNAL OF LAW AND POLICY 143 (Mar. 15, 2005), available at http://www.brooklaw.edu/students/journals/bjlp/jlp13i_zabell.pdf (last visited Mar. 14, 2010). Zabell notes:

Despite the absence of objective standards, scientific validation, and adequate statistical studies, a natural question to ask is how well fingerprint examiners actually perform. Proficiency tests do not validate a procedure per se, but they can provide some insight into error rates. In 1995, the Collaborative Testing Service (CTS) administered a proficiency test that, for the first time, was “designed, assembled, and reviewed” by the International Association for Identification (IAI). The results were disappointing. Four suspect cards with prints of all ten fingers were provided together with seven latents. Of 156 people taking the test, only 68 (44%) correctly classified all seven latents. Overall, the tests contained a total of 48 incorrect identifications. David Grieve, the editor of the Journal of Forensic Identification, describes the reaction of the forensic community to the results of the CTS test as ranging from “shock to disbelief,” and added:

Errors of this magnitude within a discipline singularly admired and respected for its touted absolute certainty as an identification process have

Adhering to established scientific protocol, the IAI contracted the administration of the exam to Collaborative Testing Services, in order to avoid bias in either testing or grading procedure.³¹¹ The results were shocking.³¹² Less than half of the participants, forty-four percent, correctly identified all seven of the latent prints on the exam.³¹³ Even worse, twenty percent of the participants in the study, despite their training and status as fingerprinting experts, made a false identification.³¹⁴ The inability of fingerprinting to meet the second prong of the *Daubert* standard raises serious questions about the validity of the standard of fingerprinting itself.

(3) The Third *Daubert* Factor: Does the Theory or Technique Have a Known or Potential Rate of Error?

The third step of the *Daubert* standard analysis, empirical validation, logically follows the first two. After looking to whether the technology has been empirically verified and peer reviewed, *Daubert* then suggests judicial inquiry into the known or potential rate of error as well as the establishment of standards for controlling the techniques' operation. As relates to brain fingerprinting, these standards have been established and these rates have been calculated.³¹⁵ Nonetheless, it is the scientist who arguably stands to gain most from the widespread acceptance of brain fingerprinting who has set the standards of operation for brain fingerprinting. This observation serves less to impugn either Dr. Lawrence Farwell's character or the value of brain fingerprinting, than to reveal the inherent challenge facing the judge charged with deciding the degree of compliance between this technology and the third prong of the *Daubert* analysis.

As with DNA and fingerprinting before, the strongest supporters of this most current identificatory technology are the very same bodies responsible for the establishment of the respective technologies' controlling standards. As discussed in part III, *supra*, early fingerprinting lay almost exclusively within the province of bureaus of criminal investigation. Similarly, early opponents of DNA argued against the admissibility of this evidence in part because it had been evaluated and analyzed by the same biotechnology firms who stood to profit from the judicial admission and popular acceptance of such technologies.³¹⁶ Whether courts are

produced chilling and mind- numbing realities. Thirty-four participants, an incredible 22% of those involved, substituted presumed but false certainty for truth. By any measure, this represents a profile of practice that is unacceptable and thus demands positive action by the entire community. *Id.* at 25.

What is striking about these comments is that they do not come from a critic of the fingerprint community, but from the editor of one of its premier publications.

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ Farwell & Smith, *supra* note 267; Farwell, *supra* note 270.

³¹⁶ In 1993, William C. Thompson, in an article on the admissibility of DNA tests and testimony, compiled a list of appellate decisions holding DNA evidence inadmissible. William C. Thompson, *Evaluating the Admissibility of New Genetic Identification Tests: Lessons from the "DNA" War*, 84 J. CRIM. L. & CRIMINOLOGY 22, fn. 4 (Spring 1993). This list is copied here: State v. Schwartz, 447 N.W.2d 422 (Minn. 1989); Commonwealth v. Curnin, 565 N.E.2d 440 (Mass. 1991); Commonwealth v. Lanigan, 596 N.E.2d 311 (Mass. 1992); People v. Barney, 10 Cal. Rptr. 2d 731 (Cal. Ct. App. 1992); State v. Vandebogart, 616 A.2d 843 (N.H. 1992); State v. Anderson, 853 P.2d 135 (N.M. Ct. App. 1993); United States v. Porter, 618 A.2d 629 (D.C. 1992); People v. Atoigue, No. CR 91-95A, 1992 WL 245628 (Guam Dist. Ct. App. Div. Sept. 11, 1992); People v. Wallace, 17 Cal. Rptr. 2d 721 (Cal. Ct. App. 1993); State v. Bible, No. Cr-90-0167-AP, 1993 WL 306544 (Ariz. filed Aug. 12, 1993) (en banc). Trial court decisions holding DNA tests inadmissible include People v. Castro, 545 N.Y.S.2d 985 (N.Y. Sup. Ct. 1989); State v.

willing to overlook such conflicting interests for brain fingerprinting and other fMRI technologies has yet to be resolved.

The second part of the third step of the *Daubert* analysis likewise escapes simple resolution. Dr. Farwell insists that brain fingerprinting has been verified in over 150 trials without error/false positives. Others find the technology less reliable. In tests with the Department of Homeland Security, brain fingerprinting correctly identified all thirty people who had knowledge of classified material and also correctly identified the four test subjects without such knowledge. Nonetheless, professor John JB Allen of the University of Arizona Department of Psychology suggests that independent testing has shown the technology accurate at catching only fifty percent of the criminals.³¹⁷ At the other extreme, Dr. J. Peter Rosenfeld at Northwestern University claims that the test is completely useless for ‘fingerprinting’ the brains of psychopaths and has gone so far as to publish a list of “simple effective countermeasures” to the test.³¹⁸ Once again such disagreement is common for identificatory technologies; although finger printers can and have made errors in print comparison; no known rate of error has been established. Neither has the U.S. formulated potential rates of error. At the very least, other countries mandate a specific number of congruent points between prints before they can be declared identical and admitted as evidence.³¹⁹

(4) The Fourth *Daubert* Factor: Has the Theory or Technique Been Generally Accepted?

Ultimately, it is difficult to conjecture upon the admissibility of brain scanning as an identificatory technology under the *Daubert* standard. This difficulty stems not only from the lack of consensus relating to brain fingerprinting’s validity under the first three prongs, but more so because fingerprinting, itself the quintessential identificatory technology, complies so poorly with the standard postulated by *Daubert*. As neither the first, nor the second, nor the third step of the *Daubert* standard analysis supports the admission of expert witness testimony on fingerprinting, the acceptance of fingerprinting and arguably all other identificatory technologies rests still on *Daubert*’s fourth and final prong. Not surprisingly, this is precisely the standard that has governed admission previous to *Daubert*, also known as the *Frye* test.

In light of *Daubert*’s postulation of a standard that on its face does not allow for the admission of even fingerprinting, the question then shifts to whether brain fingerprinting has been generally accepted. Well, that depends. *Time Magazine* cited the inventor of brain

Wheeler, No. C89-0901CR (Wash. Co., Or. Cir. Ct. Mar. 8, 1990); State v. Despain, No. 15589 (Yuma Co., Ariz. Super. Ct. Feb. 12, 1991); State v. Fleming, No. 90-CR-2716 (Cook Co., Ill. Cir. Ct. Mar. 12, 1991); State v. Watson, No. 90-CR-5546 (Cook Co., Ill. Cir. Ct. Mar. 12, 1991); State v. Passino, No. 185-1-90 Fcr (Franklin Co., Vt. Dist. Ct. May 13, 1991); People v. Halik, No. VA00843 (Los Angeles Co., Cal. Super. Ct. Sept. 26, 1991); United States v. Porter, 120 Daily Wash. L. Rptr. 477 (D.C. Super. Ct. Sept. 20, 1991); People v. Keene, 591 N.Y.S.2d 733 (N.Y. Sup. Ct. 1992).

³¹⁷ Noah Schachtman, *Polygraphs Don’t Give True Story*, WIRED NEWS (May 14, 2004)

<http://www.wired.com/science/discoveries/news/2004/05/63452?currentPage=all> (last visited Mar. 14, 2010).

³¹⁸ See, J. Peter Rosenfeld, ‘Brain Fingerprinting’: A Critical Analysis, 4 THE SCIENTIFIC REVIEW OF MENTAL HEALTH PRACTICE 1 (Spring/Summer 2005) available at

<http://www.psych.northwestern.edu/psych/people/faculty/rosenfeld/documents/BFCRITREPRINT.pdf> (last visited Mar. 14, 2010); J. Peter Rosenfeld et al., *Simple, effective countermeasures to P300-based tests of detection of concealed information*, PSYCHOPHYSIOLOGY, 41 205–219 (2004), available at

<http://www.psych.northwestern.edu/psych/people/faculty/rosenfeld/documents/CMpaperreprint.pdf> (last visited Mar. 14, 2010).

³¹⁹ See Mnookin, *supra* note 4.

fingerprinting in 1999 as one of the “100 people who might be the next Picasso or Einstein.”³²⁰ At the very least such publicity indicates popular willingness, if not hope, for general acceptance. This willingness likewise finds purchase at the governmental level; Dr. Harwell’s first article on brain fingerprinting was co-authored by an agent at the Federal Bureau of Investigation.³²¹ The Central Intelligence Agency, Department of Defense, Secret Service, and Federal Bureau of Investigation have likewise studied the applications and reliability of brain fingerprinting.³²² Neither has the interest in this technology been limited to criminal investigation bureaus; in 2007, Georgia passed a state “resolution creating [a] Senate Study Committee on the use of brain fingerprinting.”³²³ Finally, as mentioned above, a state district judge in Iowa “agreed [in 2001] to consider brain fingerprinting as scientific evidence.”³²⁴ Taken together, these events all support an argument that brain fingerprinting has gained a level of general acceptance within the popular, investigatory, and judicial arenas. This support also presents an interesting question: in deciding whether brain fingerprinting has gained general acceptance, what deference should judges grant their colleagues who have already found the technology admissible? Furthermore, how should comity or the decision to admit in general be influenced or made when the technology is new enough not to have a position within a relevant scientific community? Whether brain fingerprinting is junk science or on the cusp of widespread acceptance remains to be seen, but the decision when made (and revised) will likely be quite subjective.

Such subjectivity is perhaps the intent of the Court. In *Daubert*’s unenumerated yet practical fifth step, the Court emphasizes that “the inquiry envisioned by FRE 702 is a flexible

³²⁰ TIME 100: The Next Wave, the 100 Innovators who may be “the Picassos or Einsteins of the 21st century.” Sarah Sturmon Dale, *Climbing Inside The Criminal Mind: THE BRAIN SCIENTIST*, TIME MAGAZINE (Nov. 26, 2001) available at <http://www.time.com/time/magazine/article/0,9171,1001318,00.html> (last checked Mar. 15, 2010); Schachtman, *supra* note 317.

³²¹ See Farwell & Smith, *supra* note 267.

³²² Report by the U.S. General Accounting Office to Senator Charles E. Grassley, titled “Federal Agency Views on the Potential Application of ‘Brain Fingerprinting’” (U.S. General Accounting Office 2001). These summary views are elaborated in the complete report, available at <http://www.gao.gov/new.items/d0222.pdf> (last visited Mar. 14, 2010). This report states

Officials representing CIA, DOD, Secret Service, and FBI do not foresee using the Brain Fingerprinting technique for their operations. (*Id.* at 4). CIA officials concluded that Brain Fingerprinting had limited application to CIA’s operations. (*Id.* at 11.) Overall, DOD officials indicated that Brain Fingerprinting has limited applicability to DOD’s operations. (*Id.*) According to FBI officials... [t]he developer had not presented sufficient information to demonstrate the validity or the underlying scientific basis of his assertions (*Id.* at 12). The technique had limited applicability and usefulness to FBI. (*Id.*)

But see, Rosenfeld, *supra* note 318, at 15:

One should, however, conclude with the hope that the baby will not be thrown out with the bathwater: just because one person is attempting to commercialize brain-based deception-detection methods prior to completion of needed peer-reviewed research (with independent replication) does not imply that the several serious scientists who are now seriously pursuing this line of investigation should abandon their efforts. On the contrary, brain activity surely forms a substrate for deception which patient investigation may elucidate.

³²³ Ga. Sen. Res. No. 593 (2007-2008 Reg. Sess.) available at http://www.legis.ga.gov/legis/2007_08/search/sr593.htm (last visited Mar. 14, 2010).

³²⁴ See, Sara Solovitch, *Mind Reader*, LEGAL AFFAIRS (Nov.-Dec. 2004) available at http://www.legalaffairs.org/issues/November-December-2004/story_solovitch_novdec04.msp (last visited Mar. 15, 2010) (discussing the decision of the presiding district judge, Timothy O’Grady, in the *Harrington* case, *supra* note 270).

one.”³²⁵ This notation of flexibility reinforces the apparent liberalization of the standard while maintaining its subjective application.³²⁶ While *Daubert* ostensibly shifted the burden from the scientific community to the judge to decide whether, the evidence is both “relevant” and “reliable” under FRE #702, such shift is arguably little more than a recanvassing of the *Frye* test.³²⁷ Indeed, under both *Frye* and *Daubert*, admission of expert witness testimony has remained a question of what the judge “thinks” when considering the sufficiency, reliability, and validity of the evidence.³²⁸ Furthermore, the Supreme Court has supported this subjectivity. In *General Electric Co. v. Joiner*, the Supreme Court held that trial court decisions of the admission of evidence should be reviewed on an abuse-of-discretion standard.³²⁹ Under this standard, it is less likely that an appellate court would overturn a trial court judge’s decision on evidence. The *Daubert* court kept this standard flexible in part because they understood that science is itself an uncertain realm. Indeed the four factors were posited as “general observations” for when to admit scientific evidence. Writing for the majority, Justice Blackmun noted “[a]rguably there are no certainties in science [rather]... [s]cience is a *process*.”³³⁰ This subjectivity and the appellate deference unto it is perhaps most apparent in relation to judiciary’s continued admission of fingerprinting.

Despite the IAI study’s detection of numerous errors in the practice as well as “substantive flaws in [the] methodology” of fingerprinting, the widely accepted identificatory technology has withstood most if not all challenges it has faced under *Daubert*.³³¹ Given the technology’s less than spectacular adherence to the *Daubert* factors, its continued admission must find at least partial basis in many decades of precedence. Yet despite either this adherence to precedent or the putative objectivity of any fingerprinting or identificatory technology before the Court, the *Daubert* standard is troubled not because its formulation is either under- or overinclusive, but rather because the standard consists of a series of subjective decisions that have arguably failed to advance beyond the single subjective precept of the *Frye* test. More harrowing, the judgments that continue to admit fingerprinting evidence, made by courts that will likewise rule on the admission of other identificatory technologies, hold little advantage over the judgments by which race and guilt are determined and ‘known’ within the racially stratified society presented in *Pudd’nhead Wilson*.

As mentioned above, the *Daubert* Court was correct to recognize science as an ongoing process; it is however unfortunate that unlike Twain, the Court did not extend this logic to a consideration of identification. While *Frye*’s twilight zone of admissibility, even when partitioned into *Daubert*’s factors might offer numerous shades of gray – identification, whether racial or criminal, allows fewer options. The process of science can bring about multiple endpoints, but identification, doomed to its formalist endgame of “is” or “is not,” recapitulates the ontology of a criminal justice system that while acknowledging ambiguities and establishing amorphous standards, concludes with “guilty” or “not guilty.”³³²

³²⁵ *Daubert*, *supra* note 172, at 594.

³²⁶ *Id.*

³²⁷ *Daubert*, *supra* note 172, at 589.

³²⁸ *Frye*, *supra* note 172, at 1014.

³²⁹ 522 U.S. 136 (1997).

³³⁰ *Daubert*, *supra* note 172, at 590.

³³¹ *Id.* at 593. See Mnookin, *supra* note 4.

³³² The *Daubert* Court was aware of this as well. *Daubert*, *supra* note 172, at 596-97. The Court notes the “important differences between the quest for truth in the courtroom and the quest for truth in the laboratory [and

This analysis is not to debate *Frye* or its supersession by *Daubert*, but generally to acknowledge the impact these two cases and their frameworks have provided for the admissibility of expert testimony. By plotting brain fingerprinting's potential fit within *Daubert*, I have indicated the similarities that remain between *Frye* and *Daubert* to show the continued subjective underpinning of the evidentiary standard. However, such correlation also indicates the disjuncture between flexible and inherently unpredictable *ex ante* evidentiary standards for identificatory technologies and the objective, definitive, and exceedingly difficult to refute status these technologies gain with admission. This disjuncture is important because by obfuscating the subjective determinant of these identifications of valid and invalid technologies, courts are at least partially concealing the cultural factors that play into identifications of race and culpability.

Neither is this analysis meant to suggest that *Frye* and *Daubert* are flawed. Nor does this all add up to a normative argument about whether brain scans should be admissible. This chapter's focus is identity. But it is about more than identity for identity's sake. The accomplishment of this chapter comes through the synergistic connections it develops between evidentiary technologies of legal identification and the difficult, challenging history in which the legal enterprise reifies and lends objective credence to identities through subjective legal processes and standards. This is the process by which what a judge "thinks" can admit a technology that can assert what a defendant legally "is." This, more or less, is the path by which Tom is legally identified as black, an alleged culprit is legally identified as guilty, and many others, through fingerprints, DNA, or brain scans, attempt to convict, gain acquittal, or gain exoneration. In this sense, not much has changed between Twain's century-old novel and current times. In another sense, however, much has changed. This change is best understood in light of biotechnological attempts to record impressions of the finger and impressions on the brain as well as *Pudd'nhead Wilson*. Twain's novel not only introduced fingerprinting to the American courtroom in order to resolve the disidentification driving its plot, but perhaps more importantly considered the indelible impressions of the environment upon the mind. In doing so, the novel previewed the next paradigm of identity.

As detailed in part II, part of Twain's project in *Pudd'nhead Wilson* was to deconstruct the "fictions of custom and law" that managed identification. The legal propertization and desubjectification of black characters, depended upon their racial identification through a succession of technologies.³³³ Twain's citation to a system of simple visual identification, a temptation too difficult for many illustrators to resist, was only a straw man; the failure of patent visual systems of identification due to miscegenation was the starting point of the novel.

So too fingerprinting. Stripped of all its bells and whistles, this presumably apodictic technology with which the 19th-century novel ended and 20th-century American jurisprudence began, is, at its core, a visual identification. Both fingerprinting and visual identification of race depend on a simple set of acknowledgments and a patent comparison made by a "reasonable man" concerning impressions made by human skin. Understood in this light there is little difference between: "This is a black man. I can see he *is* black." and "These are the two fingerprints. I can see they match; he *is* the criminal."

But as society lost the ability to determine an individual's race through skin color and individuals endeavored to conceal their racial identity, genealogical methods of identification arose. Racial identity, no longer, apparent in every case, retreated to the idea of racialized blood.

that] Law... must resolve disputes finally and quickly [and the] Rules of Evidence [are designed for] the particularized resolution of legal disputes."

³³³ See generally, PATTERSON, *supra* notes 10, 152.

When skin, hair, or fingernails no longer functioned as infallible racial signifiers, the idea of racialized ‘blood’ as held within lineage succeeded the seat of identity. Based in the idea of transmitted and transmittable blood, the economy of identity shifted to genealogy.

Through the scrupulous maintenance of racist blood arithmetic in the society Twain described as well as the society from which he wrote, consanguinity was the most advanced technology for racial identification. Roxy’s status as a slave under the fiction of law was based on the custom of meticulous genealogies. Four generations before the reader’s arrival in Dawson’s Landing, Roxy’s great-great-grandmother was black. We never meet this woman and indeed can only posit her existence through Roxy’s possession of 1/32 black blood.³³⁴ The grandmother’s entire existence is delimited by this black blood; she is the cultural synecdoche of the ‘taint’ she has transmitted. And despite the passage of time and generations and despite also our extremely limited knowledge of Roxy’s ancestry, custom has recorded the transmission of her ‘taint’ just as Law has enforced its meaning.

A century removed, DNA has supplemented, and in difficult cases replaced genealogy as the controlling identificatory technology. In absence of irrefutable visual identification, our society and Twain’s determine identity by looking both to blood lineages as well as the fingernail or hair in which these traits continue to show. The genealogical or sanguineous system of racial identification described by Twain reached its apogee in the 19th and early 20th century and parallels a literally sanguineous system of criminal identification that, in the 21st century, is still ascending to its acme. In short, both Twain’s society and ours look to blood to determine identity; the only difference is how they look.

It was clever of Twain to create a plot that might successively reveal the failure of cultural identificatory technologies. It was also precocious of him to employ a forward-looking yet anachronistic scientific technology to racialize and inculcate the individual with all the cultural force of law. But Twain’s brilliance lay not in the climactic bang of the trial scene, but rather in the whimpering dénouement in which Twain, at least for a moment, abandoned a biological conception of race. Beyond the customs, laws, technologies, and indices of racial measurement and identification, in *Pudd’nhead Wilson* Twain suggests that identity, and thus identification, is not revealed by the literal impressions of the individual upon society, but rather is formed by the impressions society leaves upon the individual.

Over a century ago Twain effected this paradigmatic inversion of identity by implicating the inner sanctum of one’s mind as the seat of identity, a citadel that once pierced might irrevocably situate one within a racial identity independent of one’s race. Although Chambers is racially ‘white’ by the end of *Pudd’nhead Wilson*, his mind is still “black.” Just as Chambers’ “black” body is enslaved until it is made ‘white,’ his mind remains ‘enslaved.’ Not until the novel’s end does Chambers experience the acute challenge of this identity. The novel’s society has symbolically sentenced Chambers to exile within a crowd of his blood and class peers. This sentence is not because of a black taint upon either his skin or his blood; instead Chambers’ ultimate anguish is born from the irreparable taint of slavery upon his mind. Barred from his set of normative spaces and excluded from his previous set of social relations, Chambers’ anguish suggests an internalization of racial identity that lies below or beyond the color or his skin, the (un)tainted blood, the (un)troubled lineage, or the (in)fallible fingerprint. Although judicial

³³⁴ Nor do we have any direct evidence that Roxy receives her black blood from her matrilineage. This assumption is based rather on a recognition that a white male-black female coupling (likely slave rape) was more likely than a black male-white female coupling in the 18th century.

process, aided by forensic evidence, has legally manumitted Chambers, this manumission only enables the subsequent revelation that Chambers' 'Negro' identity is within his mind.

Over a century later the American justice system, whose very *raison d'être* demands the identification and punishment of criminals, is likewise trying to access the minds of suspects. This is the paradigm shift of identification Twain postulated in 1893 and whose legal, ethical, and racial implications find display in *Pudd'nhead Wilson*. The same paradigm shift, advanced by scientific progress and regulated by popular and legal acceptance, is taking place today.

While a consideration of the forensic admissibility of brain fingerprinting and other brain scanning technologies can highlight the challenges and limitations of *Frye*, *Daubert*, and Federal Rule of Evidence 702 as catalysts or retardants upon this shift, the technologies also invite consideration of culpability as terminal identification. Just as Twain's novel employed the forum of the trial court to resolve the issue of culpability (who killed Judge Driscoll?) and thereby focused on an internal seat of identity (Who is Tom? Who is Chambers?), modern identificatory technologies similarly resolve culpability while probing fundamental questions of identity.³³⁵

In this sense the evolution of identificatory technologies concerned with culpability recapitulates Twain's presentation of racial identification in *Pudd'nhead Wilson*. In both the society presented by Twain and the one we inhabit, anxieties of identification seek relief in increasingly efficacious and punitive identificatory methodologies and technologies. Our justice system challenges itself to figure out who is guilty just as the society Twain presents challenges itself to figure out who is black. From skin to blood lineage to personality – *or* – from fingerprint to blood molecule to thought– in both societies, identifications depend upon ever smaller impressions. Moreover, at the terminus of both chains is the attempt to locate identity, racial and criminal, in the mind. This correlation between racialization and criminalization is coincidental neither in *Pudd'nhead Wilson* nor in the analysis I present here.

By inducing the repeated re-identification of Tom as a black baby, white adult, murderer, and then slave, Twain flaunts and deconstructs numerous cultural technologies of identification. In the end, both Tom and Chambers are little more than cultural palimpsests; they are the canvasses onto which society or even they themselves can project a variety of identities. The real bogeyman of Dawson's Landing, however, is neither Tom nor Chambers nor any identity with which either might be saddled, but rather the ease with which such identification and re-identifications can and do occur. In such an environment as presented by Twain, it is difficult not to read race as a construction and potentially a fiction. But to end an analysis here is to overlook the important role played by the Law in this process. Twain uses *Pudd'nhead Wilson* to reveal race as an inescapable, but ultimately arbitrary narrative construct and further to implicate unstable and fallible technologies of identification. Propping this status is a legal system whose further admission and sanction of troubled identificatory systems propagates the idea of stable identities at the cost of indiscriminate discrimination.

³³⁵ The tensions raised by such attempts are analogous to the difficult resolution between genetic predisposition and free will. Indeed, the actual effect of such strategic evidence may ultimately hurt the defendant's case. Speaking on the effect of genetic evidence to both ex- and inculpate suspects, Justice Ming Chin of the California Supreme Court has noted that such evidence may ultimately

end up hurting a defendant's case more than it helps. As the Illinois Supreme Court has observed, evidence that a defendant's family has a history of violence is not necessarily 'mitigating'; though it may 'invoke[] compassion,' it may also demonstrate the defendant's 'potential for future dangerousness.'

Justice Ming Chin (California Supreme Court), Traynor Lecture at the Witkin Judicial College, June 2007, *citing* *People v. Franklin* 656 N.E.2d 750 (Ill. 1995), 761, cert. den. 517 U.S. 1122 (1992).

**CHAPTER II:
INDIVIDUAL INDETERMINACY AND LEGAL DETERMINATION: RACIAL IDENTITY
IN *DOE V. LOUISIANA* AND WILLIAM FAULKNER'S *LIGHT IN AUGUST***

In the first chapter of this dissertation, I have considered various manners in which identity is contested and controlled within the discourses of law and literature. This chapter considers this same general question within another specific context: the American South. This chapter considers the manners in which racial identity has been determined for those who pass or might wish to pass as white in the American South. This examination leads to further consideration of identities and means of identification, but also to the movement and spatiality of these (re)identifications – the ways in which to move is to become and to stay is to remain.

Rather than merely unpack the anxieties and hopes that constitute and attend the aptly denominated metaphor of ‘passing’ on the level of space and movement, I go further in this chapter to consider mediated interpretations of ‘passing.’ To phrase this as a question: How are acts of passing interpreted and inflected based on the discourse or medium in which they reside? I focus on three arenas in which the act of passing might succeed, yet often fails. By reading a legal case concerning an attempt to change racial identity alongside journalistic accounts of ‘the story behind’ the case as well as a literary exposition and psychological exploration of passing, I demonstrate the failures and successes not only of specific instances of passing, but also the specific advantages and limitations of each discourse to tell a story of deliberate racial (re)identification.

In the first part of this chapter, I look at *Doe v. Louisiana*, a case in which a 48-year-old woman, Susie Guillory Phipps, challenged her racial designation by the state of Louisiana.¹ The judicial opinions that preserve the case anonymize Phipps’ identity and contain little information beyond that required by legal discourse. Within these opinions, one can find only statements of law and a statement of the small number of facts required to support the holding or judicial decision the court reached. Despite and, to a degree, through this dearth of information, the judicial decisions nonetheless racially identify Phipps. I explore the methods, to wit, the deployment of technologies, pseudo-scientific and legal, by which legal opinions accomplish this identification.

Part II of this chapter looks to journalistic accounts that tracked and animated the *Doe v. Louisiana* litigation. In reviewing these accounts, I pay special attention to the more complete access to the “story” in this medium, that is, journalism’s ability to display the background facts that tell us what exactly happened with Guillory Phipps. These journalistic accounts provide information on Phipps’s identity and background that is absent from the legal case. Despite the expanded breadth delivered through journalism, however, this medium also provides an insufficient “story” insofar as either spatial limitations or discursive traditions keep it from exploring the motives of the characters it follows.

In contrast with judicial decisions or journalism, literature is a discourse able to access the minds and motivations of characters and is the focus of part III of this chapter.² Through such access, literature ironically comes closer to a ‘truth’ or totality of the ‘story’ than non-fictional discourses of law and journalism. This approach is further enabled because, unlike law and journalism, literature is comparatively free of discursive restraints – it is a mode of

¹ *Doe v. Louisiana*, 479 So. 2d 369 (La. App. 1985), *cert. denied*, 479 U.S. 1002 (1986).

² The revelation and development of the minds and motives of characters is a hallmark of ‘good’ literature.

expression, exploration, and communication that requires attachment to neither the objective referent of the ‘law’ that characterizes judicial decisions nor the ‘fact’ that drives journalism. This does not imply that literature eschews law or fact. Rather, in establishing its own parameters, literature can engage or escape the constraints of rigid classifications whose concerns with the distinction between lawful and unlawful, factual and non-factual communication, restrict the scope and exploration of such themes.

As a counterpoint to *Doe v. Louisiana*, then, the third part of this chapter examines William Faulkner’s *Light in August*.³ Even though the novel does not deal with the same factual situation as *Doe v. Louisiana*, the novel does center on indeterminate racial identity. Indeed, the novel goes further than either the legal case or the news account. Faulkner’s *Light in August* not only displays, but also *explores*, the anxiety that can arise from racial indeterminacy in the South. This exploration ultimately demonstrates both the correlation between race and space within a Southern Society as well as the efforts by which Southern society legally and extra-legally attempts to resolve racial ambiguity.

Like the extended literary reading with which this chapter concludes, *Doe vs. Louisiana* and its media coverage indicate the actual anxieties and pitfalls attendant to racial indeterminacy. Yet while the legal opinions and the case’s media coverage explicate more directly the supposed power of Law to ‘resolve’ racial identity, both discourses also illustrate the formalistic inability of case law to communicate fully a resolution to indeterminate racial identities. Comparing *Doe v. Louisiana* to *Light in August*, the final part of this chapter recognizes Faulkner’s modernism as a stylistic development that allows him not only to explore the fragmented identity of Joe Christmas, but also to excavate psychologically the grounds for its lack of cohesion; in essence, Faulkner’s modernistic style allows him to tell a story that law cannot tell. It is this style that allows Faulkner to answer for Joe Christmas fundamental questions that, even half a century later, the Law will not or cannot answer for Guillory Phipps – why might an individual harbor such anxiety about his or her racial identity? And, how might racial indeterminacy help to resolve or exacerbate this anxiety? Ultimately, all three of these discourses, law, journalism, and literature, reveal the desire to resolve indeterminate racial identity while demonstrating the difficulty, if not impossibility, of such resolution.

PART I – *DOE V. LOUISIANA*: A LEGAL STORY

“It is all a question of expediency. There are no fixed rules to govern our judgment. There are simply matters of which we may take account.”⁴

- Judge William Shankland Andrews

In 1982 a strange case came to court in Louisiana.⁵ The issue before the court was straightforward: were the racial classifications on certain identificatory documents correct? The case had arisen from a similarly simple incident. Upon application for a passport, ‘Jane Doe’ discovered that her birth certificate listed her as “colored.”⁶ Doe attempted to change the racial

³ WILLIAM FAULKNER, *LIGHT IN AUGUST, THE CORRECTED TEXT* (Noel Polk, ed., Vintage International 1990).

⁴ *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928) (Andrews, J., dissenting).

⁵ *Doe v. Louisiana*, *supra* note 1.

⁶ Gregory Jaynes, *Suit on Race Recalls Lines Drawn Under Slavery*, N.Y. TIMES, Sept. 30, 1982, at B16.

classification on her birth certificate from “colored” to “white.”⁷ When the responsible administrative agency refused to honor her request for official racial reidentification because of state law, Jane Doe and other members of her family brought a legal action challenging their official racial classification. The statute challenged by Jane Doe et al., Louisiana Revised Statute 42:267, defined blackness as possession of ‘1/32nd’ or more of ‘black’ blood. The plaintiffs, however, claimed they possessed only ‘1/128th’ black blood, and that they were therefore under the legal limit for blackness.⁸ In the alternative, the plaintiff sought review of the constitutionality of the Louisiana statute that had defined them as colored.⁹

The challenged statute stated:

[i]n signifying race, a person having one-thirty second or less of Negro blood shall not be deemed, described or designated by any public official in the state of Louisiana as ‘colored,’ a ‘mulatto,’ a ‘black,’ a ‘negro,’ a ‘griffe,’ an ‘Afro-American,’ a ‘quadroon,’ a ‘mestizo,’ a ‘colored person’ or a ‘person of color.’¹⁰

The numerous terms in this statute display both the variety and flourish of terms for racial description, as well as the quick obsolescence into which such taxonomies fall. Indeed, the most common and currently accepted term, African American, is not on the list, and only two of the present terms – “black” and “colored” – are close to current acceptability. Other terms such as quadroon, smack of both temporal and conceptual antiquity. But Doe et al. challenged this statute, less for the multiplicity of terms it offered for having African-American “blood”, than for the inability to officially identify herself as white, that is, as the antithesis to the listed racial classifications.¹¹

Before passage of the challenged statute in 1970, Louisiana law had classified anyone with a “traceable” amount of black blood as black.¹² Under this previous codification of racial identity, Jane Doe’s first argument would have failed as even her claimed 1/128th black blood would have made her black according to the law of Louisiana. Despite the revised statute’s quantitative reduction of the constitution of blackness, Jane Doe’s arguments to the jury (as recorded by the press), were highly qualitative.¹³ Repeatedly proclaiming her whiteness, Jane

⁷ La. Rev. Stat. Ann. § 42:267 (1970) (repealed by 1983 La. Acts 46). For an interesting discussion of media interpretations of this case, see Squires & Bower, *infra*, at fn. 29. The scholarship of Squires and Bower cites to numerous media interpretations of the case, *see, e.g.*, Jaynes, *supra*, at fn. 6.

⁸ By the time *Doe v. Louisiana* came to court, the constitutionality of La. Rev. Stat. Ann. § 42:267 had already been challenged on the grounds that it was too vague to be administered and thus in violation of the Equal Protection Clause of the 14th Amendment. *See State ex rel. Plaia v. Louisiana State Bd. of Health*, 296 So. 2d 809 (La. 1974). Although the Supreme Court of Alabama found the statute enforceable, one Justice noted the lack of guidelines for applying the statute: “While this statute fixes an inflexible mathematical test, no legislative attempt has been made to establish how the test is to be met, the burden of proof to be applied, or the type of evidence needed to establish the required percentage of racial ancestry.” *Id.* at 811. (Barham, J., dissenting). *See also*, *State ex rel. Plaia v. Louisiana State Bd. of Health*, 275 So. 2d 201 (La. App. 4 Cir. 1973); *Thomas v. Louisiana State Bd. of Health*, 278 So. 2d 915 (La. App. 4 Cir. 1973).

⁹ *Doe v. Louisiana*, *supra* note 1.

¹⁰ La. Rev. Stat. Ann. § 42:267 (1970) (repealed by 1983 La. Acts 46).

¹¹ The status of “whiteness” as a ‘de-racialized’ identity is present.

¹² *See Sunseri v. Cassagne*, 195 La. 19 (La. 1940).

¹³ The quickness with which trial court transcripts are lost is impressive and suggests perhaps the greatest failure of law as a discourse; the comparative impermanence of the majority of legal decisions that, unlike journalism and law, are not published at the trial level, is a defining limitation on legal research.

Doe cited her blue eyes and light skin as proof of her Caucasian racial identity.¹⁴ The trial court, however, was unpersuaded and refused to change the classification on Doe's passport.¹⁵

Jane Doe appealed. Having lost on the facts of the case, Jane Doe claimed error in the legal decisions of the trial judge. Because the trial court's findings of fact effectively established Jane Doe's status as "colored," Jane Doe could only challenge the manner in which the trial court judge had applied the law to her situation as well as the trial court judge's ruling that the law was constitutional. However, by the time the appellate court decided *Doe v. Louisiana*, the Louisiana legislature had repealed the statute, shifting its statutory framework for racial classification from quantification to self-reporting.¹⁶ Despite the clear indication of legislative misgivings about the statute and the practices of racial identification it had mandated, the appellate court confirmed the decision of the lower court. The appellate court stated that although Jane Doe and other plaintiffs "might today describe themselves as white does not prove error in a document which designates their parents as colored."¹⁷ Perhaps to counterbalance their stern application of the repealed statute, the appellate court went on to display an enlightened view of race, noting that "[t]his anomaly [between self description and legal documentation] shows the subjective nature of racial perceptions but does not give appellants a cause of action to alter it."¹⁸

Ironically, the appellate court's recognition of the subjective nature of race had not kept Jane Doe from introducing evidence at trial that all black Americans have 'white' genes and that all white Americans have 'black' genes.¹⁹ Other genealogical and testimonial evidence, introduced by the state, suggested Jane Doe had and knew she had more than 1/128th black blood. All of this evidence, when considered in light of the appellate court's discussion of the subjective nature of race, shows that all parties – plaintiffs, defendants, and the court – acknowledged and perhaps desired a more flexible conception of race that might find basis in "the subjective nature of racial perceptions."²⁰ The argument was whether this conception might show itself through fair skin and blue eyes, as argued by Doe, or knowledge of one's African ancestry, as argued by the State.

Despite these gestures in the same direction, in *Doe v. Louisiana* none of the parties completely was able to move beyond the putatively objective quantitative approach set forth in the Louisiana statute or recognize the statute's subjectivity. Instead of stressing the subjectivity of race, both parties argued about what fraction black blood Doe actually possessed. That all parties adhered to a genealogical conception of race that held that a person might actually have 1/32nd black blood indicates the strength of both the ideas of "black" and "white" blood as well as the power of these ideas to constitute a black/white binary. Furthermore, this acknowledgment of a subjective conception of race, coupled with a reliance on empirical proof

¹⁴ See, e.g., Jaynes, *supra*, note 6.

¹⁵ *Doe v. Louisiana*, *supra* note 1, at 371.

¹⁶ The revised statute requires that birth certificates include the "Race or races of parents as reported by the parents." La. R.S. 40:34(B)(1)(l) (2009).

¹⁷ *Doe v. Louisiana*, *supra* note 1, at 371.

¹⁸ *Id.*

¹⁹ See Lolita K. Buckner Inniss, *Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness*, 49 DEPAUL L. REV. 85 (1999) (citing *Witness Says All American Whites 5 Percent Black*, UNITED PRESS INT'L, Sept. 14, 1982 ("Recently genealogist[s] have] theorized that black Americans have 25% white genes, and that white Americans have 5% black genes.") (referencing testimony of anthropologist Munro Edmonson, who testified as an expert in *Doe v. Louisiana*)).

²⁰ *Doe v. Louisiana*, *supra* note 1, at 371.

of race evinces both Jane Doe's desire to be on the white side of the racial dyad/divide as well as the lengths to which she will go to accomplish her recategorization.

Jane Doe's arguments concerning the racial intermixture of all Americans appear disingenuous. If Jane Doe believed that all blacks are white and all whites are black, it is unclear why she would go to the trouble to place herself on the other side of a false divide. How could Jane Doe, herself identified in the appellate transcript as a number of members of an extended family, seek such legal re-identification when she (they?) attacked the instability of racial demarcation itself? The appellate review of the case does not answer these questions.²¹ The trial record, including the transcript and complaint, is practically inaccessible and perhaps even impossible to find.²²

To a degree, blaming the plaintiff for arguing in this manner misses the point. To the uninitiated, the law and the forms of legal arguments can appear esoteric, if not convoluted. Jane Doe argues concurrently that she's not black and that everyone's black less because of personal belief in the contradiction, but because these arguments in the alternative increase her odds of achieving the outcome she desires – to be officially white. But by this process of elevating the ends above the means, Doe and the legal system whose game she plays, displays the faulty logic undergirding racial distinction and racial identity. It is clear that Doe wants to be 'white,' but her arguments for why – that she's not black enough to be black under the controlling statute and/or that all white people have black genes (and thus are black anyway) confound common sense even as this manner of 'arguing in the alternative' conforms to proper legal practice.

Despite the appellate court's affirmation of the trial court's holding, 'Jane Doe' continued to fight against the racial designation on 'her' birth certificate by appealing her case to the Supreme Court of Louisiana.²³ Not surprisingly, the Louisiana Supreme Court refused to hear Doe's appeal.²⁴ Having met judicial defeat three times, Doe appealed again, this time to the Supreme Court of the United States.²⁵ By denying certiorari in 1986, the nation's highest court effectively ended Doe's hopes of favorable legal resolution.²⁶ In their denial of review, neither the Louisiana Supreme Court, nor the Supreme Court of the United States provided further information regarding Jane Doe's desire to change the racial designation on her birth certificate or her perseverance in its pursuit.²⁷ This lack of comment, however, was not unordinary. At the appellate level, judicial decisions speak to issues of law, not issues of personal motivation.

For one studying legal discourse, Jane Doe's case almost seeks out obscurity as the case is not easily identified. This challenge of identification begins with the troubled identity of the case's named plaintiff, 'Jane Doe.' It is a bit ironic that a case born out of the desire for proper identification is advanced by a party that, at least at some initial point, wished to remain anonymous. It is perhaps even more ironic that the appellate opinion that ultimately denies this request for racial reidentification begins by affirmatively identifying the parties who collectively form 'Jane Doe.' Although the appellate court wastes no time in revealing the identities of Jane

²¹ The appellate opinion in this case is only four pages long.

²² See fn. 13, *supra*.

²³ Doe v. La. 485 So. 2d 60 (La., 1986).

²⁴ *Id.* The Supreme Court of Louisiana, gave a one-word response to Doe's appeal: "Denied."

²⁵ Doe v. Louisiana Dep't of Health & Human Resources, 479 U.S. 1002 (1986).

²⁶ *Id.* A party who wants the Supreme Court to review a decision of a federal or state court files a "petition for writ of certiorari" in the Supreme Court. If the Court grants the petition, the case is scheduled for the filing of briefs and for oral argument. When the Supreme Court denies certiorari, all appeal is exhausted.

²⁷ *Id.* The Supreme Court opinion notes only that the case was "[d]ismissed for want of substantial federal question."

Doe et al. at the beginning of its opinion, the court does not tell us why the case was originally filed under the party name “Jane Doe,” a pseudonym that epitomizes anonymity. Neither does the appellate court divulge its reason for revealing the actual name of the family that stands behind ‘Jane Doe.’²⁸ While this anonymity potentially denotes Doe’s hedging of her bets – ‘I don’t want it to be known who I am unless I am legally declared white’ – it indicates at the very least ‘Doe’s’ acknowledgment that the legal system might not, and indeed ultimately did not, agree with her own racial self-perception.

Altogether, Jane Doe’s desire for reidentification is, through the discourse of law, a multilayered act of concealment, evacuation, and misinterpretation. The thrust of the case is easily summarized – Jane Doe wishes to be officially ‘white,’ but the process of legal redress denies fulfillment of her desire. In denying fulfillment, the mode of the process announces only in a most limited fashion who desired what, who denies that desire, why it was denied, or even that the legal resolution of the desire had been pursued.

Stated alternately, the lack of a trial record for a case in which the moving party sought both anonymity and racial reidentification reveals law as a discourse whose status quo evacuates identity at multiple points. The status quo of legal discourse then is not just the passive placement of the action – a situation in which an individual’s right to identify herself is reconstituted as a legal request for that identification – but more, the repeated evacuation of the subject. When asking how did we get to Jane Doe, both as active subject challenging her legal identification, but more so as anonymized object identified by the State through the discourse of law, we should recognize the symbolic sublimation of that other set of actors, that other anonymous body responsible for making the decisions, scripting the opinions, and publishing them through the judicial organ of ‘the court.’

On either side of Jane Doe’s legal action we have a group of individuals collected and reduced to a symbolic label. ‘Jane Doe’ represents a group of individuals. This group is passive; it has come before the court and the court has granted the group’s first request for identification, or rather, anonymity. The group has come to court to request that the court identify the group as ‘white.’

On the other side of this transaction stands the court itself. Unlike ‘Jane Doe,’ the ‘court’ is the symbol for the group imbued with the power to identify other individuals. That the set of actual individuals comprising these symbols is easily discoverable does not mitigate that the discourse of law, at least in this case, is more about disindividuation and non-expression than correction and proper identification. This tension between the goal and the mode can be confusing.

Even after reading the appellate court’s opinion it is easy to be still in the dark, to wonder what is going on here. When I have given this case to my literature students, very few of them have been able to adequately comprehend the case upon first encounter. Legal writing can bewilder the uninitiated; this endemic inscrutability is deliberate. What the decision purports to offer is discrete: the legal holding, the rule, statements of law, and a limited amount of facts necessary to tie the previous parts together. How the legal decision is met in this case is likewise uncomplicated: race is reduced to technologies and procedures. The technology of vision (‘she does not look white’) is trumped by the technologies of lineage (‘genealogy indicates that she is / is not white’) is refuted further by a decision of law based on standing (‘your parents did not

²⁸ Doe v. Louisiana, *supra* note 1, at 371. The appellate opinion never discusses the reason for pseudonymous party title. The opinion begins “This appeal is brought by several members of the Guillory family, children and grandchildren of Simea Fretty and Dominique Guillory, both deceased... .”

complain about this and they are dead, therefore you have no right to complain about this now'). Yet at all levels an aspect of inscrutability remains. To partially resolve this inscrutability, we must look to the secondary treatment of the case.

PART II – JOURNALISM: SUSIE GUILLORY PHIPPS AND A STORY AS OLD AS THE COUNTRY

“Literature is the art of writing something that will be read twice; journalism what will be grasped at once.”

-Cyril Connolly, (1903-1974)

The absence of explication within the discourse of law and the relative obscurity of *Doe v. Louisiana* are offset by the wide and prolonged amount of attention the story received in another discourse, journalism. *The New York Times*, *People*, and *Time*, as well as an assortment of other news outlets, all reported on the case.²⁹ *Jet Magazine* even went so far as to report on the case in installments, tracking Doe’s legal rebuffs up the ladder of courts.³⁰ Indeed, the story received enough media attention that this attention itself was studied. In “In/Discernible Bodies: The Politics of Passing in Dominant and Marginal Media,” Catherine Squires and Daniel Brouwer examine the manner in which the attempt to pass in *Doe v. Louisiana* was received, interpreted, and reported in media coverage.³¹ Squires and Brouwer’s analysis of the media coverage of the Doe case, that is, journalism’s coordinated drive towards resolving the unknown, incisively reveals the manner in which *Doe v. Louisiana* was ‘told’ and thereby placed within a discrete number of frameworks.

Ironically, this scholarship and the numerous articles to which it refers are the easiest way to access excerpts from the trial transcript of *Doe v. Louisiana*. Such excerpts, whether extended quotations or reported synopses, cannot and do not give a complete picture of what occurred at trial. Still, this mosaic of background interviews, trial transcript reviews, and other journal research yields a secondary literature of surprising breadth, especially when compared to the sparseness of legal scholarship on the case.³²

²⁹ The scholarship of Catherine R. Squires and Daniel C. Brouwer has immeasurably aided my knowledge of the extent of the media coverage of *Doe v. Louisiana*. See Catherine R. Squires & Daniel C. Brouwer, *In/Discernible Bodies: The Politics of Passing in Dominant and Marginal Media*, in 19 CRITICAL STUDIES IN MEDIA COMMUNICATION 3, Sept. 2002, at 283. For a sampling of the journalism coverage of the Phipps case, see generally: *Color Bind: Louisiana Reforms—Sort of*, TIME MAGAZINE, July 18, 1983, at 17; Kent Demaret, *Raised White, a Louisiana Belle Challenges Race Records That Call Her ‘Colored’*, PEOPLE MAGAZINE, Dec. 6, 1982, at 155; Calvin Trillin, *American Chronicles: Black or White*, THE NEW YORKER, Apr. 14, 1986, at 62; *What Makes You Black?*, EBONY, Jan. 1983, at 115.

³⁰ See Squires & Brouwer, *supra* note 29, at 292. Squire and Brouwer report that: “*Jet* magazine’s coverage of the case, which consists of seven articles over a five-year period, began in 1982 and ended with the U.S. Supreme Court’s decision in 1986 not to hear the case.”

³¹ *Id.*

³² Only one piece of legal scholarship has granted the case sustained critical attention: Robert Westley, *First-Time Encounters: “Passing” Revisited and Demystification As a Critical Practice*, 18 YALE L. & POL’Y REV. 297, (2000). Another article has considered the constitutional challenges to the statute challenged by Guillory Phipps; see Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana’s Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY L. REV. 255 (1983).

A number of articles have discussed, succinctly, the importance of the case. See Cheryl I. Harris *Whiteness as Property*, 106 HARV. L. REV. 1707, (1993); Tanya Kateri Hernandez, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, a United States-Latin America Comparison*, 87 CORNELL L. REV. 1093 (2002); Neil Gotanda, *A Critique of “Our Constitution is Color-Blind”* 44 STAN. L. REV. 1, (1991).

Despite this breadth, these articles generally subsume the legal challenge brought by Jane Doe to the racial challenge and sociological anxiety presented by Jane Doe's legal challenge.³³ For journalism, the legal case functions first as the inciting incident and second as the awaited resolution – it is the hub around which a number of anxieties of identity coalesce as well as the vehicle that will bring resolution to these tensions.³⁴ Although each article uses the case as a foundation for its story, for some of these stories the factual beginning is little more than the anecdotal springboard for digressions upon and explorations into contemporary anxieties about racial identification and misidentification.³⁵

Besides the repositioning of the case, these articles also turn the dry words of the legal case into a story. The heart of this tale is no longer Jane Doe's challenge to the constitutionality of Louisiana Revised Statute 42.267 and the manner in which the Louisiana Office of Vital Statistics and Registrar of Vital Statistics executed the provisions of the statute. Instead, the articles bear the fruit that grows upon the trellis of who-what-where-when-why. In journalism this case is not about "Jane Doe" or the various members of the family represented by that party pseudonym³⁶; instead, we have "Susie Guillory Phipps."³⁷ And while journalistic accounts are direct in their descriptions of the "48-year-old, black-haired woman", strangely enough, "Jane Doe", as metonym of Phipps' legal anonymity, has been completely replaced by Susie Guillory Phipps. Many of these articles do not even include the case's legal citation or in any other way acknowledge "Jane Doe's" existence as it were.

Just as the news articles cannot but help destroy the mystery of Jane Doe revealed as Phipps, the journalistic accounts' obsessive focus on facts is undercut by their more general allegorical frames. Acknowledging the greater implications – legal, anthropological, and sociological of Guillory Phipps' suit, *The New York Times*' coverage of the case reduces Guillory Phipps' situation to a "story, a story as old as the country...".³⁸ In this article, the reader learns of the "thousands of Louisianans with Negroes in their ancestry" who consider themselves white. The reader also learns of the almost inevitable counterpoint to the dyad, to wit, the "thousand of others, blue-eyed and light as day, [who] consider themselves black."³⁹ Having quietly yet indisputably revealed the insufficiency of visual systems of racial identification, *The New York Times* and other publications, like the legal case from which they

Other articles have cited the case without much discussion. See generally Deborah Ramirez, *Race and Remedy in a Multicultural Society: Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957 (1995); Eric K. Yamamoto, *Representing Race: Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997); Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063 (1993).

³³ This statement does not disagree with the research produced by Squires and Brouwer. Rather this statement is the logically anterior supposition from which their argument flows. Squires and Brouwer explicate the numerous frames through which *Doe v. Louisiana* is fashioned in journalism. My claim here is that journalism refashions the story to provide a narrative more and less than that provided by legal discourse.

³⁴ See generally Calvin Trillin, *American chronicles: Black or White*, THE NEW YORKER, Apr. 14, 1986, at 62; *What Makes You Black?*, EBONY, Jan. 1983, at 115.

³⁵ See generally Calvin Trillin, *American chronicles: Black or White*, THE NEW YORKER, Apr. 14, 1986, at 62; *What Makes You Black?*, EBONY, Jan. 1983, at 115.

³⁶ *Doe v. La.* 485 So.2d 60 (La., 1986). The Louisiana Supreme Court's decision not to hear the appeal listed the names of the party members to the case: "In re Doe, Jane; Rougeau, Theresa Guillory; Rougeau, Regina; Rougeau, Tex Adam; Rougeau, Marie (Mary) Guillory; Fontenot, Armet Guillory; Parker, Lucy Guillory; Phipps, Susie Guillory; Rougeau, Mildred..." The ellipses with which the case concludes suggests that this list is incomplete.

³⁷ See Jaynes, *supra* note 6.

³⁸ *Id.*

³⁹ *Id.*

sprang, detail alternate systems of identification ranging back to the days before the Louisiana Purchase. The journalistic accounts discuss genealogical systems of identification... in which “impeccable records of [...] blood mixtures [...] kept by the Catholic church ...” established a system of “classifying [...] progeny” that involved sixty-four terms.⁴⁰

Compared to the sparse judicial record, news media’s placement of Guillory Phipps’ challenge into a much larger and complex narrative of American racial relations improves on the comparatively isolated and emotionally desiccated account found in published court records. Still, the news media’s focus on the larger ‘story’ of American racial relations, despite its revelatory denomination of Guillory Phipps’ as a protagonist in this drama, attempts to turn this individual instance of identificatory anxiety into a national racial allegory. Strangely enough, the news media’s denominative individuation (yet not quite identification) of Guillory Phipps is more than counterbalanced by the allegorical positioning that arguably evacuates her subjectivity; the conversion from Jane Doe to Susie Guillory Phipps has come with the expansion of this story from a specific challenge to the enforcement of a specific legislative act to “a story as old as the country.”⁴¹

Despite this dispersion into generality, news media coverage also provides a number of details that did not appear in the legal case. In short, the journalistic accounts provide Guillory Phipps with a narrative. In 1977 Guillory Phipps applied for a birth certificate from the Louisiana State Bureau of Vital Statistics.⁴² Upon learning that the state of Louisiana officially listed her as “colored,” Guillory Phipps became physically ill. Indeed, she felt such aversion to being labeled “colored” that she spent \$20,000 “trying to get the law declared unconstitutional and herself declared white.”⁴³ In response, the State of Louisiana spent \$5,000 to refute Guillory Phipps’ ‘proof’ and further collected testimony from Guillory Phipps’ relatives suggesting Guillory Phipps had been aware she was “colored.”⁴⁴ Such details, mostly excluded from the official judicial record of the case, are found in many of the journalistic accounts. Yet this profusion of details offers little more than a thumbnail sketch of the story; various journalists quickly and deftly explicate Guillory Phipps’ factual background and its culmination in Jane Doe’s legal case. Nonetheless the expository medium of journalism does not provide a sustained critical evaluation of the case. In short, journalism can tell us that the presence of one word, “colored,” in a certain position so offended Guillory Phipps that she became sick and spent tens of thousands of dollars in an attempt to remove that word. Journalism can also inform us that the word was so odious as to have potentially induced Guillory Phipps’ racial (self-)deceit, and that the descriptor was troubling enough to precipitate, shortly after the trial, the amendment of the legislation responsible for the appendage of the term.

But the journalistic facility at ‘who-what-where-when’ cannot completely distract from the cursory treatment granted ‘why?’ The sparse investigation of and reflection upon the motives of Guillory Phipps, her legal team, the lawyers defending the state, the legislature that enacted such a law, the legislature that repealed that law, or even the journalists reporting the story is born perhaps less of journalistic oversight than the difficulty of exploring such tensions when limited to a few thousand words. Space is limited, deadlines approach, and ‘why’ is a question that is

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* The article cites an attorney’s story that Guillory Phipps almost started a race riot when she buried her parents in the white section of the cemetery.

difficult even to express properly, let alone answer. Instead, journalists, unable to explore such motives in depth, are left to imply them in a phrase. By calling Guillory Phipps' tale "a story as old as the country," journalism suggests a collective knowledge, a cultural subconsciousness in which the literal fading of the boundary between 'black' and 'white' skin suggests the psychological eruption of darkly unknown things into the light. Such tensions, linked tighter to emotion than thought, are failed by the legal focus of judicial publications as well as the expository focus of news media.⁴⁵

Taken together, Phipps functions as a symbol – not only of the at least six other family members who have signed on to the same legal suit, but also for the cultural consciousness and burden of "race." Legal discourse has made 'Jane Doe' the capsule or legal container for Susie Guillory Phipps and the other parties to the suit – that is, legal discourse has fit many into this false identity. Thus set apart, 'Jane Doe' can affirm the existence without revealing the presence of the real yet occluded subjectivity/ies it carries to legal resolution. Susie Guillory Phipps' identity functions in the same manner within the discourse of journalism. Though Susie Guillory Phipps' identity is factually laid bare in the news media, her description – from physical depiction to meticulously researched genealogy – only evokes her as a vessel for a collective cultural anxiety. Legally, Guillory Phipps and her six or more family members compose "Jane Doe," a floating signifier possessed of the same ostentatious anonymity that is the inverse of identification. On a different level and within a different discourse, Susie Guillory Phipps serves the same purpose for you and me. In the hands of journalists, Susie Guillory Phipps herself becomes more than the sum of all the factual descriptions printed in black ink on the white page; she becomes the vessel of a cultural anxiety familiar to all of us (through our dusty yet ever-present knowledge of stories "as old as time"). She and her journey for resolution and identification become, metonymically, *our* journey for resolution and identification.

Despite this personalization and personification, journalistic coverage has failed to resolve this story. Thirty years after Susie Guillory Phipps applied for a birth certificate, we are far from knowing more than the scattered fact or half-forgotten quotation on the yellowing news page. Journalism has undoubtedly expanded the record of the event. Nonetheless, neither legal decision nor journalistic account details Phipps' anxiety or feeling of detachment, the fury, the doubt, or the potential panoply of other emotions. Because of these discursive limits, these emotions, whether unfelt, unexpressed, or, most likely, unrecorded, are equally inaccessible in this medium. Journalism describes and expands this story, but the story remains unexplained and therefore, to a degree, untold.

Within the discourse of law, the 'case' is compressed into technologies, legal and scientific, that together constitute methodologies of knowing and manners of identifying. While these technologies and the methods (by which they are formed) are necessary to resolve the cut-and-dried legal issues at play, they do not, indeed cannot, speak to the anxiety of identity: neither technologies nor methods can tell us why Susie Guillory Phipps' legal identification as 'black' acutely resonated as a personal mis-identification. They cannot explain the social reaction that spurred Guillory Phipps to physical illness, to refuse food, and to incur further financial detriment as she appealed her case again and again on the ever-diminishing chance of desired legal redress.

Misidentified by law and disidentified by news media, the name 'Susie Guillory Phipps' becomes a Jane Doe for you and me. The central figure in this tale is no longer Doe, but Phipps

⁴⁵ The repeated attempt to describe the occurrence elides engagement of the 'why?' See Squires & Brouwer, *supra* note 29.

and no longer six or more relatives, but all of us. By charting the factual points of a woman, living out a story we already know, journalism structures Susie Guillory Phipps as our floating signifier – a woman about whom we read, but whom we come to know as an unknown, whom we can only identify as unidentified. But when journalism collects facts for fiction, when the news media takes a real woman and turns her into a touchstone for a cultural anxiety, that is, when this discourse takes a real life and turns it into a story, should it not follow that we look at stories in order to understand real life? Is it misguided to look to literature to answer in some form all the questions that sprout upon the periphery of such reductive journalism? That is, both law and journalism are structurally limited from and discursively unable to undertake a full excavation, exploration, and explication of the grounds for Phipps’ actions – the wishes, the fears, the desires – in short, the set of subjective subjunctives that can capture the ‘why’ of her story, or, following the generalizing lead of journalism, the ‘why’ of a more general story of passing and racial reidentification.

PART III – LITERATURE: JOE CHRISTMAS AND THE TRUTH IN FICTION

From an interview with Gabriel Garcia Marquez:⁴⁶

Q: Do you think the novel can do certain things that journalism can’t?

A: Nothing. I don’t think there is any difference. The sources are the same, the material is the same, the resources and the language are the same. *The Journal of the Plague Year* by Daniel Defoe is a great novel and *Hiroshima* is a great work of journalism.

Literature does not operate under the same constraints as law and journalism. Unlike the other two discourses, literature is capable of getting into the minds of characters in order to explore both motivation and design. How does literature offer this? In a word, deliberately. Firstly, writers often create their own characters. Yet, while much of literature is predicated by the departure from reality (much of literature is, after all, fiction), it is a fiction suited for the approach of larger cultural truths. In short, literature is a discourse best designed for telling “a story as old as the country,” a story that the Law cannot fully acknowledge and that journalism will not explore.⁴⁷ As Salman Rushdie has noted: when history ceases to record truth, it becomes the job of literature to fill in the gaps.⁴⁸ Although Rushdie was perhaps thinking of specific

⁴⁶ Peter H. Stone, *Gabriel García Márquez*, in *WRITERS AT WORK, SIXTH SERIES*, (George A Plimpton, ed., 1984). *excerpt available at* http://www.readinggroupguides.com/guides_L/love_and_other_demons2.asp (last visited, Feb. 28, 2010).

⁴⁷ Law cannot acknowledge this story because American courts are structured only to resolve questions of fact and law. Although American courts sometimes comment on the greater importance of the questions they resolve, especially when a public right is at issue, an exposition of the background behind a story like Guillory Phipps’ is outside the domain of legal discourse.

⁴⁸ See Brian Finney, *Demonizing Discourse in Salman Rushdie’s “The Satanic Verses”*, <http://www.csulb.edu/~bhfinney/rushdiesat.html> (last visited Feb. 28, 2010), *also available at* <http://ariel.synergiesprairies.ca/ariel/index.php/ariel/article/viewFile/3141/3085> (last visited Feb. 28, 2010) (“[P]oliticians have got very good at inventing fictions which they tell us as the truth. It then becomes the job of the makers of fiction to start telling the (real) truth”). See also, SALMAN RUSHDIE, *IMAGINARY HOMELANDS: ESSAYS AND CRITICISM 1981-1991* 14 (1991) (“And the novel is one way of denying the official, politicians’ version of truth... literature can, and perhaps must, give lie to official facts”).

lacunae within the narrative of history, literature offers more than an ability to fill the gaps of a factual record, rather fiction can, and literature almost must, provide annotation and exegesis of the factual record. One of literature's roles is to hang explanations on the dry records of other discourses, to explain what they mean, and to let us know why stories such as Guillory Phipps' are important.

Part III of this chapter investigates the composition and analyzes the content of a novel that, although produced a half-century before the legal complaint filed by 'Jane Doe' and a few years before Susie Guillory Phipps' contested birth certificate, grapples with the same issues of racial identity. Yet this engagement goes beyond the context offered within the form of law or the structure of journalism.

When Faulkner's favorite attorney, Gavin Stevens, interpretatively glosses the culmination of Joe Christmas's strange career toward the end of *Light in August*, the reader encounters an interesting coordination of identity and mobility as perceived through the detached rationalism of a Mississippi lawyer. Of unknown, and debatable racial identity, the mediated Joe Christmas, like the mediated Susie Guillory Phipps, is the product of a Southern society that acknowledges the vertical binary of black-white relations and demands each individual's (exclusive and contradistinctive) racial identification. According to Stevens, Joe Christmas is not a white man unfairly labeled as black or a black man unfairly passing as white. Instead, Steven views Christmas as a man caught between the contradictory actions compelled by his white blood and his black blood. Set against the contradistinctive racial reality of the South, Stevens' encapsulation compresses tensions of identity that the novel engages almost episodically as it resolves and fails to resolve who and what Joe Christmas is.

Despite the tenuous validity of Gavin Stevens' culminative legal reading – a reading that glosses Christmas's identity primarily through his occupation of and movement through space - Stevens' interpretation of Christmas finds support within the novel. Strung between inevitable racial indeterminacy and the inevitable and predetermined tragedy of his ending, Joe Christmas lives in a world of demarcation that borders, at times, on symbolic overdetermination. When Christmas descends into the African-American section of Jefferson, Mississippi he almost suffocates; he is unable to remain in a place that associatively and almost actively begins to identify him as 'Negro.' He must flee, move, ascend into the equally inhospitable and ultimately uninhabitable 'white' section of town. At other times, Christmas appears quite prescient of the spatial restrictions based upon his mutable, yet ever-quantal, racial identity; he demonstrates both the means through which these spaces are entered and the manner in which racially ambiguous people such as himself might inhabit them.

Ultimately, Faulkner's novel displays Christmas's fractured identity and evaluates thoroughly these moments of passing as movements of passage. Christmas's own identity is based upon where he is and how he moves. This recognition of a coordination between movement and identity also applies to Susie Guillory Phipps. In one sense, Phipps did not become 'black' until she entered the Louisiana Department of Records and gained awareness of her racial status. Furthermore, she could not, legally, attempt to reidentify herself without entering a court of law.

Attempting to understand both the motivations behind and the execution of acts of racial reidentification, I read Christmas's performative acts of re-identification as inseparable from either the demarcated spaces of the Jim Crow South or the mobility through which the ingress, occupation, and egress of these spaces occurs. In this manner, the analysis here presented

disagrees with the work of Brewer and Squires.⁴⁹ For Brewer and Squires ‘passing’ seems to presuppose a set identity, e.g., a black passing as white. Yet while Faulkner’s society also reduces race to a binary, the repeated acts of ‘racial reidentification’ serve to erode not only the boundary, but the categories themselves. Christmas’s repeated passage between black and white denotes not only the fluidity of identity that comes with the act of passing, but the instability of the terms of identity between which the character passes.

Beyond a focus on the ambiguity rigorously and deliberately maintained by Faulkner, in this part I similarly acknowledge and examine the constraints upon these spaces and movements exerted by legal, and extralegal, systems and actors within *Light in August*. At first, I quickly situate Faulkner’s novel as a personal and societal production. By acknowledging the realities of the novel’s production – that is, by not treating the novel as a work that fell into the world fully-formed, or, having fallen, left no impact, we gain further insight into the salience of the themes it covers.

On a greater scale, a consideration of *Light in August* and, specifically, a comparison of the novel to other media that negotiate racial re-identification would be incomplete without a consideration of the novel’s background, production, revision, publication, critical reception, and popular appeal. An examination of the material aspects of *Light in August*’s production and reception demonstrates that literature, like journalism or law, is a cultural production shaping and shaped by economic and popular concerns. In a sense, an overview of *Light in August*’s production and reception displays the challenges encountered and negotiated by literature, challenges often more apparent in the contentions of law. Such an examination again places literature between journalism and law, the former displaying more clearly the emphasis on pulp production and commercial circulation and the latter operating as the popular arena for the resolution of legal, and often cultural, concerns.

In other words, an examination of literature’s ability to recapitulate society is one-sided in itself; society’s reflection in literature should not be considered apart from society’s influence on the production of literature. Before examining Faulkner’s intratextual exploration of identificatory anxieties, I look to the evolution and impact of *Light in August*.

III.1 – A REVIEW OF *LIGHT IN AUGUST*’S BACKGROUND

From the beginning of *Light in August*, Faulkner deliberately attempted to blend the technical innovations of his style with a novelistic form that he believed would more firmly establish his reputation as the foremost American author.⁵⁰ Although he had tentatively enjoyed this position since the publication of *Sanctuary* (1931), the portrayal of rape and murder in the earlier novel did not sit well with the American public.⁵¹ The work did, however, sell well (the best sales records of any of his works during his lifetime), nonetheless Faulkner hoped that *Light in August* would endear him to the public, while completely and irreversibly freeing Faulkner from the debt that often overshadowed his life.⁵²

Early in his career, Faulkner’s writing had been in many ways an attempt to ply a trade. Under the tutelage of his good friend Phil Stone,⁵³ Faulkner had read three groups of writers that

⁴⁹ See Brewer & Squires, *supra* note 29.

⁵⁰ DAVID MINTER, WILLIAM FAULKNER, HIS LIFE AND WORK 129-38 (1980).

⁵¹ *Id.* at 128.

⁵² *Id.*

⁵³ *Id.* at 25-27.

were to have a profound effect on his writing: the modernists, the symbolists, and the psychoanalysts. Faulkner knew well the work of writers such as Yeats, Pound, Eliot, Joyce, Keats, and Freud, and their influence is all felt within his fiction. Yet despite the lofty prose and formalistic abstractions of the writers he admired – stylistic innovations largely unpalatable to mainstream literary tastes – William Faulkner began writing with a focus on the wealth to be gained from publication. He achieved moderate success with his first two novels; nonetheless it was only when Faulkner felt condemned to obscurity that he ceased his attempts to write to the desires of the market and produced his first great work, *The Sound and the Fury*.⁵⁴ Faulkner remarks:

*One day I seemed to shut a door between me and all publishers' addresses and book lists. I said to myself, Now I can write. Now I can make myself a vase like that which the old Roman kept at his bedside and wore the rim slowly away with kissing it.*⁵⁵

Despite the reader's difficulty in accessing the work, a difficulty many readers also encountered in Faulkner's next novel, *As I Lay Dying*, these projects transformed Faulkner from a little known Southern writer to the critics' darling. Veering from and, at points, completely disregarding realist conceptions of time and space, Faulkner's style sought to replicate a stream-of-consciousness as it portrayed both the simple beauties and stunning pathologies of the American South.⁵⁶ Some attributed Faulkner's choice and treatment of his themes to a grim realism, others to a cruel surrealism. Nevertheless, there were few publishers or critics or authors who were unfamiliar with William Faulkner's work by the time he started writing *Light in August*.

For Faulkner, whose intermittent income from publishing never kept him long from debt, *Light in August* marks the second time that financial need exerted a stark influence on Faulkner's literary production.⁵⁷ Reworking the novel right up to publication, Faulkner intentionally repositioned many of the sections to follow a more chronological order and even reworked some of his prose. This revision of both the prose and the structure, discussed further infra, indicate Faulkner's attempt to revise against his modernist style. Faulkner undertook such revisions in order to pander to the reader who desired Faulkner's stories, but eschewed their convoluted arrangement. Stated alternately, *Light in August* was Faulkner's first attempt to write a 'novel.' Believing the novel form could bring him the success and financial stability he desired, Faulkner consciously broke from his past habits of writing about a character and seeing where the story led him. For perhaps the first time, 'plot' in Faulkner's art came from more than the circumstance of his genius coupled with the diligence of his revisions; in *Light in August*, plot arose from premeditated design.

But plot in *Light in August* consisted not only of the interweaving of multiple narratives that combined in Jefferson, Mississippi, but also the deliberate plotting of Joe Christmas's

⁵⁴ William Faulkner wrote *THE SOUND AND THE FURY* in 1929.

⁵⁵ Michael Millgate, *Introduction*, in *NEW ESSAYS ON LIGHT IN AUGUST* 13 (Michael Millgate, ed., 1987).

⁵⁶ Although Faulkner often stated that he was completely unfamiliar with the work of James Joyce, Faulkner greatly admired his work and was even known to recite Joyce's poetry from memory. See MINTER, *supra* note 50.

⁵⁷ Faulkner, in later years, often allowed money to influence his writing. Faulkner even went so far as to follow the lead of contemporaries, such as F. Scott Fitzgerald, by working as a screenwriter in Hollywood. See MINTER, *supra* note 50.

character. Under this direction *Light in August* becomes more than the story of a pregnant Lena Grove traveling to Jefferson, Mississippi, looking for Lucas Burch, but finding Byron Bunch. *Light in August* is also the story of Reverend Gail Hightower, who broods on the periphery of Jefferson; and it is the story of Joanna Burden, an aging spinster who also inhabits society's fringe. While all of these threads meet in Jefferson, Joe Christmas ties them together. He will employ Lucas Burch. It is in his cabin that Lena Grove will give birth. He will become lover and alleged-murderer of Joanna Burden and at the end of the novel, he will flee into Hightower's house only to find death and castration.

Christmas's ability to bring all these characters together contrasts his inability to bring himself together. Joe Christmas is a character who is neither white nor black, yet is doomed to exist in and be destroyed by a society in which no middle ground between these two racial extremes exist. Both Faulkner's creation of this character and this chapter's approach to him are dependent upon a framework through which Christmas incorporates union and division, identity and alterity, station and motion.⁵⁸

Yet while this chapter utilizes literary and legal analytics to interpret *Light in August*, Faulkner structured his novel under the influence of psychoanalysis and modernism. Following the precepts of these two frameworks, *Light in August* is episodic and traumatic. That is, it delivers itself through moments and scenes, the crucial parts of a character's past that reverberate through a character's present. The former theory seeks to assert the dominance of the past over the present, to understand the repetition of trauma that occurred at a primal scene. Modernism leads to stylistic disregard for normative (read, linear) representations of time and thereby allows a more immediate access to the past. The interaction between the two theories is complementary, if not synergistic.

III.2 – A REVIEW OF *LIGHT IN AUGUST*'S COMPOSITION, PRODUCTION, AND RECEPTION

As stated above, any attempt to appreciate the discursive advantages of literature should account not only for its thematic, but also its material formation, development, and evolution.

⁵⁸ Because I focus on identity in this chapter, and because Faulkner was constructing his identities under the heavy influence of the psychoanalytic paradigm, I must acknowledge psychoanalytic theory even if I do not fully engage it. Psychoanalytic theory, for all its difficulties and disadvantages, is also beneficial for the 'methodologies' and vocabulary it has developed. While the ascription of a singular 'methodology' might have sufficed at the time Faulkner was writing, the scholarship and research of psychoanalysts such as Anna Freud, Melanie Klein, Nicholas Abraham and Maria Torok have tempered these approaches and honed the vocabulary. In doing so, such scholarship greatly redefined the applicability and efficacy of psychoanalysis for understanding literature. Modern students of literature have a variety of theoretical approaches at their disposal for an examination of identity. Psychoanalysis is still necessary for the exploration of the interaction of incidents and tensions with/upon the identity. Critics such as Hortense Spillers have argued against the employment of a theory largely developed by white men designed to examine white subjectivity being used to examine female or black identities. I suggest that an acknowledgement of Spillers' critique underscores the importance of psychoanalytic theory to an understanding of Faulkner's art. As Faulkner defined white male subjectivity against the limited subjectivities of his 'Negro' and female characters, psychoanalytic theory provides a pertinent methodology for why Faulkner was unable or unwilling to more fully explore female or 'Negro' characters—a prevailing criticism of Faulkner is his creation of multiple female and Negro characters set against the lack of agency and investigation to which he subjects them. See also THOMAS STANLEY, *THE HISTORY OF PHILOSOPHY: CONTAINING THE LIVES, OPINIONS, ACTS AND DISCOURSES OF THE PHILOSOPHERS OF EVERY SECT.* 377/2 (1701) ("The Maker of all things took Union, and Division, and Identity, and Alterity, and Station, and Motion to compleat the soul"). A fuller discussion of Faulkner's creation of alterities is to be found in PHILIP WEINSTEIN, *FAULKNER'S SUBJECT: A COSMOS NO ONE OWNS* (1992).

Such accounting gains importance in light of the impressive amount of effort that went into the production, publication, and various re-issues of *Light in August*. It is somehow fitting that a novel concerned with movement and its effect on fractured and shifting identities in the South should itself spring from a partitioned and repeatedly revised manuscript.

The only extant complete manuscript of *Light in August* is held by the University of Virginia Library's William Faulkner Foundation Collection.⁵⁹ The corrected galley and the final pages of the novel's setting copy are held by the Humanities Research Center of the University of Texas.⁶⁰ Other pages of the pre-published version of the novel rest in several private collections.⁶¹ Despite the physical distance and textual differences between these multiple holdings, a number of Faulkner scholars have worked to standardize this and other works of Faulkner in the seventy-five years since *Light in August*'s original publication.

In 1985 The Library of America published William Faulkner's *Novels 1930-1935*. The collection was the first of four that together would encompass all of Faulkner's published novels and stories. Joseph Blotner, the acclaimed Faulkner scholar responsible for the two-volume biography of Faulkner's life, and Noel Polk, the premier Faulkner textual scholar, edited all four volumes, approximately 4500 pages in total. Polk worked on the graphological revisions of all texts in order to establish an authoritative text in accordance with the author's intentions.⁶² The text of *Light in August* included in The Library of America edition came from Faulkner's ribbon setting copy of the novel. Under the direction of Noel Polk, the ribbon setting copy was compared with the holograph manuscript and the carbon typescript. A list of the twenty small changes made by Polk and a short discussion of his editing was included in subsequent publications of *Light in August*.⁶³

The 1990 Vintage International edition of *Light in August*, the edition most commonly encountered today, is a 507-page text that was copied directly from the text published in *Novels 1930-1935*.⁶⁴ Although scholars developed the mass paperback edition from the handful of sources listed above, the linear trail itself elides the number of revisions Faulkner made to early versions of the novel prior to its publication. The number of changes Faulkner made to *Light in August* is concisely demonstrated by the devotion of an entire critical work to the revisions.⁶⁵ Published a decade before the Library of America compilation of Faulkner's published work, Regina K. Fadiman's *Faulkner's Light in August; A Description and Interpretation of the Revisions*, is a 226-page text dealing with many of the most important questions regarding the textuality of *Light in August*.⁶⁶

The lasting impression left by Fadiman's scholarship is of the incessant and almost furious revision *Light in August* underwent at Faulkner's hand. Fadiman writes:

⁵⁹ University of Virginia, Alderman Library website, <http://www.lib.virginia.edu/speccol/collections/faulkner/> (last visited, Feb. 28, 2010).

⁶⁰ REGINA K. FADIMAN, *FAULKNER'S LIGHT IN AUGUST: A DESCRIPTION AND INTERPRETATION OF THE REVISIONS* (1985).

⁶¹ For a further discussion of these private collections, see *id.*

⁶² FAULKNER, *supra* note 3, at 509-10.

⁶³ *Id.* at 509-12.

⁶⁴ *Id.* at i.

⁶⁵ FADIMAN, *supra* note 60.

⁶⁶ For further incite into the publication of *Light in August*, see generally MINTER, *supra* note 50; JOSEPH BLOTNER, *FAULKNER: A BIOGRAPHY* (1974). Although I have learned from both, neither approach Fadiman's consummate exploration of the novel's textuality.

The manuscript includes every manner of revision: copied-out leaves, paste-on slips carried forward from previous drafts and subdrafts, repagination, new insertions (most frequently appearing on the base page but occasionally added in new past-on slips), margin insets, and minute changes of a single word.⁶⁷

Nor was this revision limited to the manuscript itself; the galleys of Faulkner's novel likewise underwent substantial editing and re-editing. Stated succinctly, the extent to which Faulkner revised *Light in August* right up until publication is impressive. Even though these revisions progressively became shorter in terms of size, it is apparent that Faulkner sought both to strengthen some of the themes he had explored and to introduce more ambiguity into a number of the characters and situations he had constructed. Indeed, there is almost a correlation between the parts of the text important to this chapter's analysis and the lateness of their entry into the manuscript. That is to say, not only were the revisions impressive in terms of quantity, but the content Faulkner continued to introduce into and subtract from *Light in August* right up to publication fundamentally affected both the story and ensuing critical scholarship.

According to Fadiman, and confirmed by biographies written by Joseph Blotner and David Minter, William Faulkner had already nearly completed the "novel's narrative present" before he ever started on the "Christmas Flashback" section.⁶⁸ It is in this later-produced section, discussion infra, that Christmas experiences events that he can no longer remember. Despite their position beyond the grasp of his memory, these events have irrevocably contributed to his fluid identity. Stated differently, it is in this second section of the novel that Christmas sustains the psychological trauma that sets him on his destructive path in a narratological sense, or, from a critical perspective, enlightens the origins of Christmas's identity issues.

Without the addition of this section, the last twenty years of criticism on *Light in August* would have been impossible. It is also hardly possible that Christmas would have had the gravity to hold the novel together without the deeply explored interiority provided by this middle section. Yet to realize that Christmas's position was not firmly set until comparatively late in the writing process is disquieting to a literary critic; the richest psychological veins of the novel, added so close to the end, suggest they were closer to escaping inclusion. Fadiman notes that only in later revisions of the 'Flashback' section did Faulkner "heighten[] the ambiguity about Christmas's Negro blood."⁶⁹ The effect of such change, coupled with removal of explicit references to Christmas's black blood by an omniscient narrator in earlier chapters, heightened the uncertainty of identity that many critics have argued drove Christmas.⁷⁰

Even Faulkner's final revisions to the Virginia manuscript are important to much of the modern criticism on the novel. According again to Fadiman, Faulkner's last two additions to the novel were the inclusion of a scene in which Joe Christmas slaughters a sheep and a scene in which Lena Grove is described. The link between Joe Christmas's first sexual act (with Bobbie Allen) and his immediately subsequent slaughtering of a sheep and washing of his hands in its

⁶⁷ FADIMAN, *supra* note 60, at 194.

⁶⁸ *Id.* at 30, 67.

⁶⁹ *Id.* at 199.

⁷⁰ See, e.g., Judith Bryant Wittenberg, *Race in Light in August: Wordsymbols and Obverse Reflections*, THE CAMBRIDGE COMPANION TO WILLIAM FAULKNER (Philip M. Weinstein, ed., 1995); Andre Bleikasten, *Light in August: The Closed Society and Its Subjects*, in NEW ESSAYS ON LIGHT IN AUGUST 81 (Michael Millgate, ed., 1987); Martin Kreiswirth, *Plots and Counterplots: The Structure of Light in August*, in NEW ESSAYS ON LIGHT IN AUGUST 55 (Michael Millgate, ed., 1987).

blood speaks directly to examinations of the novel's corporal boundaries and fluid economies.⁷¹ Likewise, the comparison of Lena Grove as "something moving forever and without progress across an urn," intimates the female function as container, a symbol that Faulkner repeatedly emphasizes within the novel.⁷²

Seen through the discourse of journalism however, the comparatively late inclusion of a return to Christmas's formative moments makes more sense. Having factually outlined much of the plot, having introduced most if not all of the principal characters, Faulkner, having finally sketched the 'who,' 'what,' 'when,' and 'where' of his story was better prepared to animate it through a subtle yet profound exploration of why – why did Christmas, who could pass as white or could pass as black, vacillate between the two racial identities? Why did Christmas silently brood over his ignorance of his racial identity, yet alternately exhibit perverse satisfaction by being black in positions, literal and symbolic, in which his blackness constituted rebellion? The answers the novel suggests to or invites from the reader, even if hidden from the consciousness of Joe Christmas, all spring from Faulkner's later textual revisions.

III.3 – A NOTE ON *LIGHT IN AUGUST*'S RECEPTION

Faulkner's substantial revisions gave the story psychological depth as he carved out the 'why' of Joe Christmas's identity anxieties. *Light in August* was more than art for Faulkner; the author also calculated the novel to secure him wealth and fame. Yet despite Faulkner's meticulous attempt to craft a novel that would secure him critical and popular esteem, the reception of *Light in August* is best characterized by its ambivalence. Seen in light of Faulkner's entire career, the ambivalent reception is not surprising. Over the twenty-four years between the publication of his first novel, *Soldier's Pay*, and his reception of the Nobel Prize in Literature, Faulkner was intermittently rejected and embraced by those who read him in the United States. As mentioned above, Faulkner gained prominence with the 1931 publication of *Sanctuary*, a novel dealing with murder, rape, and thwarted justice. Nonetheless, the popular and critical esteem held for his work was always offset, if never quite balanced, by the acrimony directed at it by others. *Light in August* was Faulkner's first production after *Sanctuary*. Some critics praised *Light in August* as "a novel of extraordinary force and insight."⁷³ Other critics, however, saw it as a narrative of "murder and rape turning on the spit over the flames of arson... [a narrative in which] nothing is omitted except virtue."⁷⁴ By 1956, a dissertation on the reception of Faulkner's work, argued that "Faulkner's style was sometimes as effective as it was bad."⁷⁵

Interestingly, the critical reception of *Light in August* sometimes failed to recognize, or perhaps just acknowledge, the driving tension of the novel. An article in a 1933 edition of the *North American Review*, states:

⁷¹ FAULKNER, *supra* note 3, at 187.

⁷² FAULKNER, *supra* note 3, at 7. Along similar lines, the motif of the urn lends itself to the interpretation of Lena as a female frozen in some mythic and perhaps idealized, Keatsian time.

⁷³ Henry Seidel Canby, *The Grain of Life*, SATURDAY REVIEW OF LITERATURE 9, 153 (October 1932). See also Perrin Holmes Lowrey, *The Critical Reception of William Faulkner's Work in the United States, 1926-1950*, 130 (1956) (unpublished Ph.D. dissertation, The University of Chicago) (on file with The University of Chicago).

⁷⁴ Warren Beck, *Faulkner's Point of View*, 2 COLLEGE ENGLISH 8, 736, 737 (May, 1941) (Beck attributes this view to the work of an unnamed critic).

⁷⁵ Perrin Holmes Lowrey, *The Critical Reception of William Faulkner's Work in the United States, 1926-1950*, 97 (1956) (unpublished Ph.D. dissertation, The University of Chicago) (on file with The University of Chicago).

Joe Christmas, ... the one the reader best remembers, has Negro blood, and that black strain seems to creep wormlike through his entire personality, leaving behind it a trail of slime, slime which smears itself over almost the entire story of lust and violence and murder.⁷⁶

In approaching the anxieties of the South by writing about a character who does not know his identity, this critique is disturbingly racist, yet potentially unsurprising. As Faulkner's novel deals with the anxiety of racial taint and the lengths to which a society will go to destroy that taint, should it astound us that a critic from a society not too far removed from Faulkner's topic should view "Negro blood" as a 'black st[r]ain' that is a "wormlike... slime which smears itself over... lust and violence and murder"?⁷⁷ Indeed, the critic's recapitulating view of "Negro blood" as a horrible affliction that negatively affects not only the character who possesses it, but also the entire story in which that character is found, confirms a desire shared by numerous characters in the novel to equate black with debasement of every degree.

But this review also harbors a more curious confirmation. Beyond blaming almost every calamity in the story upon Christmas's assumed possession of black blood, the review converts the taint of possibility into an actual racial taint. Interpreting against the obscurity of Joe's racial identity that Faulkner meticulously preserves throughout *Light in August*, the reading in *The North American Review* betrays a desire to collapse the racial ambiguity embodied by Christmas. Unable to concede the irresolvability of Christmas's racial identity, the review buys into the idea of 'black blood' as well as the idea of the 'taint.'⁷⁸ More damning, however, the review follows the racist interpretations of characters in the novel as it allows the intratextual suspicion that Christmas possesses 'black blood' to transmutate into its actual possession. Following this reductive cascade, the suspicion of black blood becomes the presence of black blood becomes the presence of blackness becomes the presence of an inevitably and inextinguishably flawed character responsible for "almost the entire[ity...] of lust and violence and murder" in the novel.⁷⁹ To summarize, in *The North American Review*'s short piece on *Light in August*, Joe Christmas has gone from a potentially black character to a decisively black character to a character who must be black in order to explain away the sins – the transgressions, sexual and physical, between bodies, contained in Faulkner's novel. To *The North American Review*, Christmas's "Negro" identity is indisputable not because it accords with either textual evidence or Faulkner's intended construction of his maligned protagonist, but rather because of the resolution it provides to then-extant cultural anxieties regarding blackness. To critics such as the one who wrote for the *The North American Review*, the only thing more frightening than the idea that Christmas might be able to hide his blackness, commit his sins, and escape unextirpated, is that he might not be tainted by black blood, might not be black, might still be a murderer and might be murdered and castrated himself as a *white* man. Once again, this anxiety rests firmly on the idea of racial partition – that there is black, that there is white, and that never should nor shall the twain meet. Both within and without the novel, Christmas's blackness is defined less by blood than by the behavior of others towards him.

Despite the negativity of such reviews, Faulkner had completely entered the literary consciousness of the United States by the time of *Light in August*'s publication. After *Sanctuary*,

⁷⁶ Louise Geld, 235 THE NORTH AMERICAN REVIEW, 66-67 (Dec. 1933).

⁷⁷ *Id.*

⁷⁸ For a further discussion of the strange currency of the idea of black blood, see chapter 1, *supra*.

⁷⁹ Geld, *supra*, note 73.

the major American newspapers reviewed every novel Faulkner published. And, even if the publicity was frequently negative, it was publicity all the same. On balance, the critical reception of *Light in August* in the United States was positive. Nonetheless, every review of the novel harbored reservations. Interestingly, the European reception of the novel was not nearly as ambivalent. The News and Views of Literary London section of the *New York Times* presented a reprint of a review of the novel that praised the novel unambiguously.⁸⁰ Seventeen years later, American journalism itself recognized the disparity in *Light in August*'s critical reception; *The New York Times* noted "Faulkner himself... remains unread at home plate- though his genius is hailed without reservation in most European capitals."⁸¹ Although many reviews of *Light in August* had favorable points, the novel's less than enthusiastic reviews were still more positive than the initially lackluster sales figures for the novel.⁸²

Even as the United States began to critically appreciate Faulkner's work in the 1950s, little correlation existed between Faulkner's critically acclaimed and popular writing. A book order form printed as an advertisement in *The New York Times* in 1952 lists paperback copies of a number of Faulkner's novels for sale.⁸³ This advertisement includes *Light in August*, then available for \$1.25. Surprising, however, is the advertisement's graphic that stands above the book list. In this picture are eight books: *The Short Stories of Saki*, *War and Peace*, *Ulysses*, *The Philosophy of Plato*, *Walden – and other writings*, *The Basic Writings of Sigmund Freud*, *The Brothers Karamazov*, and *Sanctuary*. *Sanctuary*, not usually included on the list of Faulkner's great novels, let alone his greatest, is an astounding inclusion in a list of exempla of world literature. While Faulkner warrants inclusion in a list containing Tolstoy, Doestoyevsky, Freud, Plato, and Joyce, Faulkner's inclusion for *Sanctuary* is somewhat mind boggling from a contemporary perspective.

Nonetheless, in the early half of the 20th century, it was such novels as *Sanctuary* and *The Wild Palms* and not now-recognized classics such as *Light in August*, *The Sound and the Fury*, or *Absalom, Absalom!* that drove Faulkner's popular appeal. From the 1930s through the early 1950s there was not much overlap between the taste of critics and the taste of the public. In 1950, *Sanctuary*, in its New American Library and Random House editions, had sold approximately 1.2 million copies. *The Wild Palms*, another Faulkner novel that has received comparatively minimal critical acclaim or popular acclaim over the last half century, had sold a little more than a million copies in the two editions.⁸⁴ The sales of neither *Absalom, Absalom!* nor *Light in August* were considered worthy of mention.⁸⁵

Likewise, a 1932 "Best Sellers Here and Elsewhere" article in the *New York Times* listing the three works of fiction with the highest sales figures for the week, shows that immediately following its publication in mid-November, 1932, *Light in August* had cracked the top three in

⁸⁰ Herbert W. Horwill, *News and Views of Literary London*, N.Y. TIMES, Feb. 26, 1933, at BR 6 available at <http://select.nytimes.com/gst/abstract.html?res=F00D15F63D541A7A93C4AB1789D85F478385F9&scp=1&sq=herbert+w.+horwill+faulkner&st=p> (subscription required, last visited Mar. 2, 2010).

⁸¹ William Du Bois, *Books of the Times*, N.Y. TIMES, Aug. 24, 1950, at 39.

⁸² Indeed, the most interesting aspect of his reception is the disjuncture between the critically acclaimed publications and those that generated impressive sales figures; those publications most revered by Faulknerians today were comparatively less than lucrative ventures. Nonetheless, sales figures of the critically acclaimed novels have improved and likely surpassed their previously lauded siblings as critical and public perception of Faulkner's oeuvre has evolved.

⁸³ N.Y. TIMES, Feb. 17, 1952, at 221.

⁸⁴ Charles Poore, *Books of the Times*, N.Y. TIMES, Nov. 16, 1950, at 24.

⁸⁵ *Id.* Along with *The Sound and the Fury* and *Light in August*, critics view *Absalom, Absalom!* as one of Faulkner's greatest novels.

only one major U.S. city market, New Orleans.⁸⁶ By the beginning of December, the novel had already fallen from the first position to the third in New Orleans.⁸⁷ As underwhelming as such sales figures might appear, the novel did perform well enough. By 1934 the novel was in its 11th printing and had already been translated into French.⁸⁸ Yet between the published reviews and the recorded sales figures, it is clear that journalistic media acknowledged and, to a degree, understood Faulkner's story of a racially ambiguous man in the South alternately seeking and rejecting an ultimate identity. Although this media coverage was different from the coverage that Susie Guillory Phipps would later receive, neither Faulkner's story nor Guillory Phipps' experience fell fully formed into society; both events were set against and, to a degree, dependent upon the society in which they appeared.⁸⁹

III.4 – CORPOREAL BOUNDARIES: A CONSIDERATION OF IDENTITY IN *LIGHT IN AUGUST*

The American South in which William Faulkner lived and about which he wrote was predicated on racial and gender anxieties. In this society, women and men had distinct roles, as did whites and 'negroes.'⁹⁰ Yet four hundred years of miscegenation coupled with (slowly) increasing opportunities for women and 'negroes' allowed Faulkner to challenge this system by creating characters who did not fit into these firmly established roles as well as characters who challenged the binaries into which they could not easily fit. These characters were strange and atypical within the society about which Faulkner wrote. These were characters who, incapable of insertion into normative identities, were outsiders. When women do not act like women and preachers do not act like preachers and 'negroes' do not act like 'negroes' – what else could a community do but reject and seek to eject them?

In *Light in August*, Faulkner writes of a community bound by these expectations, a community that, appropriately enough, cannot lay full claim to any of the novel's major characters.⁹¹ Despite this lack of progeny, however, the community in which *Light in August* is set does contribute to each character's identification, rejection, and consignment to the periphery. *Light in August*, like *Doe v. Louisiana* and the journalistic coverage of Susie Guillory Phipps, is a story about actions of the community towards these outsiders and the reactions of these outsiders to the community – of their partial acceptance and submission to community will as well as their partial resistance and subversion of a community that has formed through such

⁸⁶ *Best Sellers Here and Elsewhere*, N.Y. TIMES, Nov. 21, 1932, at 22.

⁸⁷ *Best Sellers Here and Elsewhere*, N.Y. TIMES, Dec. 5, 1932, at 15.

⁸⁸ Maurice Coindreau, a professor at Princeton, produced the translation; *Book Notes*, N.Y. TIMES, Dec. 10, 1934, at 19.

⁸⁹ In *Faulkner, The House Divided*, Eric Sundquist attempts to locate, culturally, the position of Faulkner's work within the society that produced the work or the society the work helped produce. Drawing connections between contemporaneous legal, cultural, and political practices, Sundquist reads Faulkner as a scathing critic of the South, one unfortunately unable to write himself out of the problem he observes. ERIC J. SUNDQUIST, *The Strange Career of Joe Christmas*, in FAULKNER: THE HOUSE DIVIDED 63 (1983).

⁹⁰ I use this term for the cultural capital it carried when employed by Faulkner. In part my choice of the term also recapitulates a problem engaged by Faulkner as well as the *Doe v. Louisiana* court, *i.e.*, the problem of identification and categorization. Should I use the term Blacks? Or African-Americans? These terms perhaps miss the mark because they grant more than Faulkner has granted. In full recognition of the archaic feel and delimiting implications of the term 'Negro,' as well as the evolution all terms experience over time, I choose here to remain with the term chosen by Faulkner.

⁹¹ Perhaps fitting with a novel in which so many pariahs face so much persecution, none of the novel's six major characters actually originates in Jefferson, Mississippi, the fictional town in which the novel is set.

untenably rigid identificatory boundaries. Within *Light in August* the tensions attendant to these processes have received many decades of diligent critical attention. Still, gaps exist in the knowledge and understanding of *Light in August's* society.

The major deficiency of early Faulkner criticism was its refusal to probe the tensions surrounding race and gender quite as thoroughly and deeply as Faulkner himself had done.⁹² More recent Faulkner criticism has filled this void, yet this more recent criticism is perhaps too often limited by its inability to enlarge its viewpoint beyond the construction or repression of character types.⁹³ While all of this scholarship contributes greatly to an understanding of Faulkner's work, the analysis presented here, however, strikes into terrain outside the scope of most criticism. In my reading of *Light in August*, I move beyond a discussion of the breakdown of normative gender and/or race identities to investigate the demarcation systems established to fill the void of non-identification. This chapter queries the means and manners of identification through which the community of Jefferson, Mississippi seeks to catalyze acceptance and submission of these outsiders. This chapter investigates further the manner in which these characters utilize identificatory strategies towards their own ends. Without the societal ability to identify people and thereby group them into heretofore reified and celebrated categories, this chapter tracks the auxiliary systems of identification that members of the society depicted by Faulkner themselves create and utilize.

While looking to various manners of subversion within the novel, I nonetheless focus upon 'movement' as a favored means of both escaping and insidiously engaging the identificatory methodology of the community. In a society in which to be a woman or a 'negro' or a preacher means to pass and or inhabit specific spaces in a specific manner, characters' choices to move in ways they should not into spaces they are not meant to inhabit confounds normative methodologies of identification. Although a number of characters flaunt these restrictions on movement, this chapter's analysis focuses primarily on Joseph Christmas.

As a racially ambiguous character whose symbolically incessant pursuit of his own identification binds the multiple threads of novel's plot, a reading of Christmas provides the greatest insight on the legal subject matter at the beginning of this chapter.⁹⁴ Unsure of his racial heritage – burdened and ultimately destroyed by this indeterminacy – Joe Christmas serves as a fictional yet living symbol of a cultural anxiety about racial identification. He is a strange counterpoint to Susie Guillory Phipps, herself a living symbol of a distinct, yet similar, cultural anxiety about racial identification.

Yet before exploring the identificatory schemata and systems employed by Joe Christmas – that is, the manners in which he attempts to identify and reidentify himself through movement and thereby reveals the racialized spaces of his community, we must look to the zero point of Christmas's identity. That is, we must consider the primary manner in which Joe Christmas sets the boundaries of his own self.

Called 'Nigger' as a young child, yet raised 'white,' Christmas does not know his true racial identity. Bound to a racial binary into which he cannot fit, Christmas instead insists upon another boundary that he can control. Unable to engender a singular racial or gender identity, Joe Christmas relies instead on an assertion of his corporeal identity. Possessed of an irreducibly unknowable racial identity and a dubious gender identity, Christmas rejects the chaos of a

⁹² See, e.g., CLEANTH BROOKS, WILLIAM FAULKNER: THE YOKNAPATAWPHA COUNTRY (1963); IRVING HOWE, WILLIAM FAULKNER: A CRITICAL STUDY (1952).

⁹³ See, e.g., SUNDQUIST, *supra* note 89.

⁹⁴ Joe Christmas also equipoises Lena Grove's delivery of life and endless pursuit of her 'husband.'

society that would try to define him and even change him, by controlling the physical boundaries of the body. By strictly controlling that which enters and exits his body, Christmas establishes an economy based upon the only boundary whose impermeability he can hope to maintain: his skin. Because Christmas's skin cannot identify Christmas through demonstration it must identify him through encapsulation; Christmas's skin, unable to show who he is, must contain him. This system is not stable and numerous characters within the novel – Joanna Burden, Bobbie Allen, Byron Bunch, and Mrs. McEachern – attempt to influence Christmas, to get at Christmas by taking something out of him or putting something into him. In short, each character challenges Christmas's corporeal boundary.

Neither is this system exclusive. Although the deployment of this auxiliary system is most affectingly expressed through Christmas, Lena Grove, also relies on this dermal paradigm of identity assertion and maintenance. Indeed, *Light in August's* early exploration of such themes with Lena Grove provides insight to the novel's later engagement of Joe Christmas.

As the novel opens Lena Grove waits on the top of the hill. She has passed a wagon while it was stopped earlier. Now she waits for the wagon to climb the hill and carry her closer to Jefferson and the man she seeks. While waiting, Lena Grove remembers the wagon trips of her youth:

after she got to be a big girl she would ask her father to stop the wagon at the edge of town and she would get down and walk... she believed that the people who saw her... would believe that she lived in the town too.⁹⁵

Whether Lena Grove desires to appear more affluent or urbane, one thing is clear: by the time Lena Grove has become a "big girl" she is already aware of how others identify her. Furthermore, Lena Grove has already worked out a plan for how she might make others believe that she lives in town and, in doing so, subvert or modify those identifications. This recognition of identification and the concomitantly delivered attempt at identity modification through movement occurs numerous times in *Light in August*.

In the years between Lena's memory and the novel's opening, the little girl has become the expectant bride. But matrimony is not the external determinant of Lena Grove's identity, rather, it is Grove's status as a pregnant woman. Lena's physical condition defines her identity – she is the pregnant woman whose walking propels the story – even as her pregnancy suggests her corporeal vulnerability and instability. And just as Joe Christmas is the point man of dissolution in a society that must separate its races, Lena Grove is the ever-present reminder of subject division in a novel in which corporeal boundaries are challenges at the physical sites of identity.

Even as movement and its counterpart, stasis, form one auxiliary system of identification in the novel, the novel more subtly suggests a second system of identification and identity maintenance structured around the body. Before Lena Grove arrives in Jefferson, she has again attempted to position herself as a more affluent or urbane woman.

Remembering the breakfast she has eaten at a farmhouse with Armistid and his wife, she thinks: "I et polite... Like a lady I et."⁹⁶ Although Faulkner links this scene with Lena Grove's purchase of sardines (which she pronounces *sour-deens*) for the humorous effect it brings, this is the first instantiation of a link between identity and the controlled transgression of corporeal boundaries. To Lena Grove, part of being a 'lady' is eating like a lady; ladies allow food to enter

⁹⁵ FAULKNER, *supra* note 3, at 3-4.

⁹⁶ *Id.* at 26.

their bodies in different manners than those who are unladylike. Thus to mimic a lady's manner of corporeal transgression is to approach the identity of a lady and to leave an impression (the counterpoint of identification) as a lady.

In the novel's first thirty pages, Lena Grove has exhibited the connection between motion and stasis. This first instance in which Lena Grove waits to ascend a wagon is like the vast majority of those presented in the novel in that it focuses on movement. Such movement, while also symbolic insofar as it represents a desire either to change or to maintain one's identity, still operates in the literal register. That is, the movement is the deliberate movement of a body attempting to reposition itself in order to achieve a re-identification.⁹⁷ It is through Lena Grove's earlier descent from that wagon that she hopes to transmogrify herself into a city girl. Years later as the novel opens, it will be Lena Grove's ascent onto a wagon that will further her desire to become a wife.

This ascent underscores Lena Grove's status as a singular body traveling through the world and attempting to change its identity from pregnant woman to wife. Yet the incipient division about to befall Lena Grove counterpoises this search for union. Just as she is a body traveling through the world, she is a body carrying another body. Lena's identity is inescapably that of an object through which another subject has entered (resulting in pregnancy) and through which another subject will soon exit (birth). Fundamentally, Lena Grove exists in connection to others. To a large degree, Lena Grove is *only* the pregnant woman. She is a body traveling through the world. But just the same, she is a vessel through which another body will travel into the world. Lena Grove is aware that others identify her as a helpless pregnant woman; indeed, she relies on her apparent pregnancy and its connotations of exploitation and helplessness to travel across the land.

However, not all of Lena Grove's attempts to take advantage of this identity meet success. While staying at the house of Armistid, a farmer who has helped her along her journey, Armistid's wife inquires as to Lena Grove's identity. Lena Grove replies that she is traveling west in search of her husband, Mr. Burch. Mrs. Armistid finds Lena Grove's self-identification as a wife incredible and Mrs. Armistid presses Lena Grove on her claim: "Is your name Burch yet?"⁹⁸ Lena Grove, caught, admits "I told you false. My name is not Burch yet."⁹⁹ Even with a character whose racial and gender identities are never questioned, Faulkner displays Lena Grove in a manner that challenges and conflates who she is and who she is not, who she wants to be and who she will be.

The issues of identity Faulkner initially agitates with Lena Grove reach full boil with Joe Christmas. As noted above, Faulkner's composition of *Light in August* in a modernist style subverts chronological plot progression. With Faulkner, the past outstrips the present and the future is preordained. Despite the implications, this description almost fails to describe the middle third of the novel. This entire section, chapters 6 through 13, focuses on Christmas's past leading up to his murder of Joanna Burden. These chapters are episodic yet chronologically linear and they begin with a primal scene: A five-year-old child stands behind a curtain in the dietitian's room ingesting the "pink worm" of toothpaste that he has squeezed out of the tube.¹⁰⁰ A dietitian enters with her companion and they begin making love. The child, aware of their presence yet not understanding, continues squeezing the tube into his mouth; he becomes sick

⁹⁷ Further discussion on the correlation between movement and identification occurs later in this chapter.

⁹⁸ FAULKNER, *supra* note 3, at 17.

⁹⁹ *Id.* at 18.

¹⁰⁰ *Id.* at 120.

and vomits upon himself. The dietitian pulls him from behind the curtains, hissing, “You little nigger bastard!”¹⁰¹

Before we even conclusively learn that this child is the same Joe Christmas who at the end of the previous chapter was moving toward Joanna Burden’s house with the ominous thought, “*Something is going to happen,*” the novel has irrevocably united the themes of race, gender, and bodily fluids.¹⁰² It is at this moment of childhood discovery that a confluence of race, sex, and ingestion occur – this is the primary trauma that drives Joe Christmas. The other children at his orphanage have called him nigger before, but it is at this moment that Joe Christmas is interpellated into his black identity; it is ineffaceably seared into him. This might also hold true for Christmas’s sexual identity. Is it too much to suppose that a child in the orphanage might have some suspicion, some creeping idea that has not yet evolved to mount the plateau of knowledge that when he is called ‘bastard,’ it suggests that he is the product of an illicit act of sex? “Nigger”, “bastard”, “You” – these are the terms from which Joe Christmas will assemble his identity. This is what is occurring when Christmas is caught behind the curtain eating; these are the things that Joe connects to being caught eating.

Unable psychologically to process this moment, it continues to reverberate throughout Joe Christmas’s life. Sex, eating, race – these are the traumatic areas – the nodes that will frustrate Joe at best and the outlets that will prove perversely satisfying to him at his worst. In one scene, Faulkner displays the roots of Christmas’s identificatory anxiety. In a word, this scene is Christmas’s ‘why.’ Neither law nor journalism has proven an adequate medium to explain the crux of Guillory Phipps et al.’s racial anxieties. To be fair, even full access to the plaintiffs’ unlimited testimony, rambling interviews, and deepest memories would perhaps not suffice to explain their racial anxieties because the Phipps plaintiffs perhaps do not remember the primal reasons for their racial anxieties. Indeed, Joe Christmas cannot tell us or himself the primal reason for his anxieties because he does not remember them. To access these memories requires a novel that is willing to brush the limits of memory aside. Nonetheless, Joe’s inability to access this memory, does not stop it from remembering him; the identity trauma incurred by Christmas in this scene reverberates throughout the later events of the novel.¹⁰³

Unable to establish an incontrovertible racial identity, Christmas diligently controls his physical identity. The ‘corporeal’ virginity Joe Christmas exercises expresses itself at natural points of bodily entrance and exit such as the mouth and the penis as well as the artificially established points such as wounds given and received through physical violence. Christmas’s most active locus of control is his mouth. Having been chastised for eating toothpaste behind a curtain, Christmas thereafter mirrors the neuroses that Freud identified in the ‘oral’ stage of psychosexual development. As such Christmas is unable to eat food that women offer him.

Growing up in a strict Protestant household, Joe hates the regulation imposed by his father that forces Joe’s body to sweat and bleed through work and punishment. Christmas also hates his Protestant father’s almost fanatical aversion to lechery that shall later complicate Joe’s development of his own sexual identity. Mr. McEachern can make Christmas sweat and bleed, but the evangelical father cannot make Christmas open and spill forth into belief, or even speech. Even as a child, Christmas controls that which enters and exits his body. Joe can stoically accept the physical punishments of his adoptive father. However, Joe cannot abide the subtle and

¹⁰¹ *Id.* at 122.

¹⁰² *Id.* at 118.

¹⁰³ A further discussion of the idea of corporeal “virginity” in Faulkner’s work is presented by Philip Weinstein. See WEINSTEIN, *supra* note 58.

insidious female “soft kindness... that [Christmas] hate[s] worse than... the hard and ruthless justice of men.”¹⁰⁴

One night, Christmas’s adoptive mother, Mrs. McEachern, sneaks Joe dinner after his adoptive father, Simon McEachern, has punished Christmas for not having learned the catechism. At eight years old, Joe will choose to starve himself rather than take the food offered by his ‘mother.’ Overturning his tray of food on the floor, Christmas will neither take female aid nor grant either McEachern emotional access to him.¹⁰⁵ As with his adoptive father, Joe is unwilling to cope with the female McEachern who, in bringing him food, washing his feet, and trying to make him cry, also threatens Christmas’s control over the economy of his body.¹⁰⁶ Recoiling against his ingestion and evacuation of the “cool pink worm” of the feminine toothpaste, Christmas will let neither the religion of his adopted father nor the food of his adopted mother enter his body.

Joe’s introduction to Bobbie, the woman with whom he has his first consummated sexual experience, is also structured around a failed attempt at eating. With only ten cents in his pocket, Christmas mistakenly orders fifteen cents worth of food from the diner in which Bobbie is his waitress. Realizing his error, Christmas shamefully cancels part of his order; Joe cannot give, so he will not take. This transgression against the typical protocol of consumption exposes both Joe’s ignorance and general poverty. Instead of pressing him on his original order, Bobbie covers for Joe Christmas explaining to her manager at the café that she has mis-ordered.

While Christmas must feel relief that Bobbie reveals his shortcomings to neither the manager nor the other café patrons, Bobbie’s kindness both ingratiates and pierces Joe. From Bobbie he has taken without giving – he has shown himself as ‘soft’ in front of a woman. Filled with frustration and desire to thank Bobbie for her cover, Joe later returns to bring her the nickel he would have and should have had to pay for the cancelled cup of coffee.¹⁰⁷ This act, an attempt both to satisfy his debt and undo his display of weakness, is likewise the assertion of his identity that leads to their relationship. Joe is later willing to reveal himself further to Bobbie because at this first point of inadvertent revelation, Bobbie has not reviled Joe but has protected him.

Joe’s poverty is again revealed, years later, through another experience structured around eating.¹⁰⁸ During his first week of work at the Jefferson planing mill, Joe breaks his habit of silent and ceaseless work to ask Byron Bunch, a fellow worker, the pay scale for overtime. Christmas has worked incessantly from the first and has worn the same suit to work for a number of days. But it is not until Christmas asks about overtime that Byron realizes that Joe, once again, does “not have a nickel in his pockets.”¹⁰⁹ Just as with his encounter with Bobbie, this scene is initially structured around financial ability. Just as with Bobbie, this exchange transforms itself into an attempted exchange of food.

¹⁰⁴ FAULKNER, *supra* note 3, at 169.

¹⁰⁵ Christmas must have eaten at Mrs. McEachern’s table during his approximate thirteen years as a member of the family. However, Faulkner’s decision to portray only two meals with the family, a breakfast that Christmas is unable to attend and the rejected dinner, both enforce the symbolic resonance of Christmas’s refusal to imbibe anything from a woman.

¹⁰⁶ FAULKNER, *supra* note 3, at 155, 169.

¹⁰⁷ *Id.* at 183.

¹⁰⁸ Again this revelation concludes with an offer of friendship, but this time Christmas rejects the overture.

¹⁰⁹ FAULKNER, *supra* note 3, at 183.

Realizing that Christmas has probably not eaten in a while, Byron responds by offering to share “his own pail.”¹¹⁰ Despite not having eaten for three days, Christmas replies: “I ain’t hungry. Keep your muck.”¹¹¹ Joe’s acceptance of this offer would confirm Byron’s identification of Christmas as both impoverished and hungry – someone who is both incapable and incomplete. Christmas cannot compromise; to take food from Byron would endanger the unpierceable identity Christmas has maintained since childhood. Rather than admit an internal conflict or need, Joe will refuse the offer. By reinterpreting Byron’s lunchpail as a vessel for the transportation of waste, Joe will project his anxiety over internal compromise at the very offer of food and friendship that might provide him physical and social nourishment he requires. Coming from Byron, a white male, the identification of Joe as hungry is received as an insult, an insult to which Joe’s anxiety of identity forces him to respond in an “indolent and contemptuous” manner.¹¹²

Christmas views the offer of food from Byron as an insult. As discussed above, the offer of food from a woman alters both the form and the degree of the insult. Joe’s response is modified accordingly. While his rejection of Bunch’s offer is venomous, it is still a verbal rejection. Comparatively, Christmas’s rejection of food from women always approaches and usually crosses into violence. Christmas first directs this violence against the food women have offered – as a child Christmas throws Mrs. McEachern’s offerings on the ground. As a grown man, Joe will direct his violence not only at the offering, but also the one who offers.

In *Light in August*, Joanna Burden is the next person to offer Joe Christmas food. Unlike the story of Susie Guillory Phipps, in which the medium of journalism reduces Phipps’ racial anxiety to one line about her inability to eat and the physical sickness she felt upon learning her racial classification, *Light in August* lays bare the connection between racial identity and corporeal sanctity. Granted, the psychological pathology of Joe Christmas perhaps has no bearing on the psychological pathology of Susie Guillory Phipps’ illness. Nonetheless, *Light in August*, unlike the discourses of law or journalism, displays the scenes necessary to reconstruct a, if not *the*, determinant connection between its protagonist’s racial identity, consumption, and well-being. Indeed, Faulkner pushes the envelope further.

Before Joe Christmas even reaches the town of Jefferson, he has learned of Joanna Burden’s status as an aging spinster and decided to break into her house. Approaching the house late at night, Joe sees a wing that projects from the back of the house. ““That will be the kitchen” he [thinks] ‘Yes. That will be it.’”¹¹³ In entering the kitchen, the barriers between race, gender, and fluid economies collapse for Christmas just as they did during his primal scene.¹¹⁴ Here in Joanna’s kitchen, this “allmother of obscurity and darkness,” Joe is invisible and thus neither black nor white, male nor female, accessible nor inviolable, present nor absent. In short, he can become unbound and remain undisturbed. Indeed, this relaxation mirrors itself even in Joe’s movement: Joe does not walk or climb, instead “[he] seem[s] to *flow* into the dark kitchen” (emphasis added).¹¹⁵ Having encountered food, Christmas begins to eat in the dark. As Joe Christmas remembers the last time he has eaten this type of food, his “*mouth and tongue [weep] the hot salt of waiting [his] eyes tasting the hot steam from the dish.*”¹¹⁶ Within the synaesthesia

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 229.

¹¹⁴ *Id.* at 230.

¹¹⁵ *Id.* at 230 (emphasis added).

¹¹⁶ *Id.* at 230.

of tasting eyes and weeping tongue, Joe breaks down completely as his boundaries, inapparent in the darkness, dissolve completely under the sensory surge of the food. The memory of unrestricted access, of allowing food to enter, is so distant and so disarming as to bring Joe to a point before and beyond corporeal unity.

It is while engaged in this illicit act of ingestion and disidentification that the walls to the past dissolve as well. The dish of food pulls Christmas back twenty-five years, consciously reminding him of an earlier part of himself that he has forgotten and subconsciously connecting him to the earlier moment in which he consumed toothpaste out of sight of the dietitian. It is here in Joanna's kitchen, outside multiple matrices of identification, in conflation of sense and time, that Joanna Burden first approaches Christmas. Entering with a lit candle whose light reveals Joe; Joanna Burden views him transgressing the boundaries of inside/outside, male/female, and black/white that together constitute Joe's fissured identity. She has caught him in her light, pierced him with her view. Joanna Burden's single line confirms this identification and taunts Joe: "If it's just food you want, you will find that."¹¹⁷ Joe is undone by this encounter, shocked enough that he does "not even cease to chew."¹¹⁸

A quarter of a century after his experience with Mrs. McEachern, Joe Christmas is still unable to endure attempts to control entrance into or exit from his body. Joe Christmas's anxiety remains, but his arsenal of resistance has expanded. When Joanna Burden catches Christmas with his unified front down, in a way almost tricking him into ingest her food and exhibiting an opening that denies his complete wholeness, Christmas will attempt to repair this affront by doing the same to her. That Joanna Burden will taunt Christmas, letting him know that he can open himself to food and exalt in the corporeal ecstasy of self-penetration, only catalyzes Christmas's violent response; by raping Joanna, Joe will restore himself from the role of the powerless and identified object to the role of the powerful and identifying subject. By violating her corporeality and forcing Joanna to partake of fluid exchange with him, Joe will make Joanna Burden the one who can be pierced. Joe will make her the female one, the one who is incomplete, the one who is revealed. Joe will make her the 'Nigger bastard.'

Yet Joanna's curious resistance, or, more accurately stated, "her untearful... almost manlike yielding of that surrender" confounds Joe.¹¹⁹ Undone by Joanna when she catches him eating, Christmas is practically undone again by this untearful manliness. Joanna Burden's discovery of Joe has implicated him into a feminine gender role, but Joe is unable to invert her symbolic penetration of him through his literal penetration of her. That is, Joe attempts to invert the power dynamic that exists between the two by both feminizing Joanna and tainting her as 'Negro' through his own dark semen, but Joanna accepts punishment.¹²⁰ She does not cry; she

¹¹⁷ *Id.* at 231.

¹¹⁸ *Id.* at 230.

¹¹⁹ *Id.* at 234.

¹²⁰ It is not surprising, indeed, it is almost a necessity that such an attempted transference of identifying power occurs through exchanges within a fluid economy.

Although Joe Christmas's identity is fluid, I argue that Joe performs all of his sexual acts as a Negro in order to maximize the transgression presented. Joanna Burden does not initially know that Joe Christmas might be a "Negro." When she learns he is, she accepts and, indeed, exalts in the transgression it represents. This is not Joe's first encounter with a woman who subverts a normative white feminine identity by accepting sex with a Negro. In his past Joe has "bedded with the women and paid them when he had the money, and when he did not have it he bedded anyway and then told them that he was a negro." (*Id.* at 224.) Christmas has used the resultant outrage to shock the women. Sometimes he is beaten; sometimes he escapes beating. It does not matter to Joe, as hands on him can only reinforce his corporeality. This plan has failed Joe once; after 'bedding' with a woman he tells her he's Negro. Her reply, "What about it?", enrages Joe and he almost beats her to death. (*Id.* at 225). Unable to

does not scream. She controls herself in the same manner that Christmas has, in accepting beatings as a youth, controlled himself. And as much as Joe realizes that Mr. McEachern has failed to penetrate and change him, Christmas also realizes he has failed to penetrate and change Joanna.

In short, Joe fails in his attempt to alter or reposition Joanna and he realizes it. Christmas looks at her the next day and thinks: “*under her clothes she cant even be made so that it could have happened.*”¹²¹ To Joe Christmas, Joanna Burden remains whole. She is inviolable – she cannot be pierced. This acutely confounds Joe because to him weakness is being pierced. Joanna Burden has caught him in his moment of weakness and he has attempted to punish her only to learn he has not.

Soon Joe finds himself “faced [repeatedly] with necessity to despoil again that which he had already despoiled-- or never had and never would.”¹²² Yet despite all his attempts, Joe Christmas is unable to use sex as a medium for asserting his identity. Joanna Burden strips Joe of his power to prove himself as male, as inviolable, and even as white by frustrating Joe’s violent and sexual equilibration. In doing so, Joanna Burden destabilizes Joe’s identity even as she arrests him. This identificatory instability invites spatial stasis; Joe loses who he is, but maintains where he is. This correlation between mobility and identity warrants extended consideration.

III.5 – A CORRELATION BETWEEN IDENTITY AND MOBILITY¹²³

Ultimately, ‘who are you?’ is, for Joe Christmas, at first a question of ‘you,’ that is, what constitutes ‘you.’ Before the distinctions of race or gender, what are the biological limits that constitute where one individual begins and ends? This is a question that *Light in August* invites the reader to consider. More so, the presentation of this question in literature demonstrates the similar instability of these boundaries in law, a discourse in which ‘Jane Doe’ can denote six or more people, or journalism, in which Susie Guillory Phipps can serve as touchstone for a national trauma. But for Joe Christmas, an inability to stabilize his corporeal identity through fluid control and physical violence plays neatly against the movement, passages, and physical relocations Joe will make in order to change deliberately his identity. Just as Jane Doe’s legal action fails because of her lack of ‘standing,’ that is, her lack of opportunity for legal redress is metonymized into Jane Doe’s lack of permission to occupy the space of the courtroom, Joe Christmas will likewise change who he is and the scope of his privileges through ingress, inhabitation, and departure from physical spaces – in a word – movement.

This section explores *Light in August*’s stylistic, chronological, and geographical engagement of mobility. Specifically, this section examines the ways in which movement and mobility within the text enable the subversion of oppressive systems of demarcation and thereby allow identity change and maintenance. As in the previous section’s examination of corporeality, this section offers a literary counterpoint to Jane Doe’s porous legal narrative or the case’s epic repackaging into the saga of Susan Guillory Phipps. Just as the other two discourses

assert control over her through seminal fluid, he resorts to an economy of violence and the blood it emits. If he cannot affront her with illicit sexuality because she is a prostitute and cannot affront her with the perversity of his injection of a black taint into her, he will affront her with violence.

¹²¹ FAULKNER, *supra* note 3, at 235.

¹²² *Id.* at 234.

¹²³ I would like to thank Kelvin Black, Audrey Clark, Dorothy Hale, and Carolyn Porter for all assistance provided with this part of this chapter.

track Doe/Phipps' movement from court to court, each new geographic location providing opportunity to become 'white,' Faulkner's characters similarly move from place to place to accomplish their identities.

There are a number of instances in which *Light in August*'s major characters (Lena Grove, Joanna Burden, Gail Hightower, and especially Joe Christmas) attempt to establish, maintain, and/or change their identities through movement. These characters, none of whom 'originate' in the community of Jefferson, have come to Jefferson to assert or escape their identity. In this novel, their movement often aligns itself with a mutability of identity – these characters change through movement. The inverse holds true as well. Stasis is related to the concretization of identity within the novel. In *Light in August*, 'remaining' is analogous to 'being.' As *Light in August* centers around the inability of characters to find a place within the normative Southern binaries of gender and race, literal and symbolic mobility become the paramount means of enabling self-identification.

Such consideration of Faulkner's novel is not new. Indeed, the theme of movement in the text has been engaged by a number of scholars. However, their considerations have often centered upon movement as occurring within the closed society of the South, or Jefferson. In this criticism, the central characters of *Light in August* are all outsiders whose attempts to move into Jefferson propel the novel's plot. Engaging Faulkner's 'urn' motif, some of this scholarship discusses the endless movement of the novel's central characters set against their inability to change.¹²⁴ Hightower will always be stuck in the fury of galloping horses charging through a past he never experienced firsthand and Joanna will wear the burden of a familial murder she can hardly remember over a period of slavery she never directly experienced. Similarly, Lena Grove will remain ever the naïf with child, ever pursuing Lucas Burch, her ever-fleeing beau.

More recently, Faulkner scholarship has centered on the construction of identity within Faulkner's texts.¹²⁵ Although such considerations have utilized numerous critical methodologies, most of this scholarship is dependent upon psychoanalytic techniques, theories, and/or methods. This body of scholarship often focuses on the construction and deployment of gender, or race, or class within Faulkner's works.¹²⁶

III.6 – A READERS'S MOVEMENT

Perhaps the most interesting form of mobility, as well as the type of movement most often elided in modern critical interpretations of *Light in August*, is the movement made by the readers themselves. Too quickly explained away as part and parcel of Faulkner's modernist style, *Light in August*, in playing with concepts of time, space, and memory, approaches the South and its implicit anxieties in a manner inaccessible not only to other discourses such as law or journalism, but even to other prevalent literary modes. By writing in the modernist style, Faulkner brings the reader to the places realist fiction would not have been able to enter, the spaces in which "memory believes before knowing remembers."¹²⁷ Through such regressions and transgressions of realist literary practices the reader arrives at the formative moments of Joe Christmas's identity.

¹²⁴ See, e.g., BROOKS, *supra* note 92.

¹²⁵ See, e.g., SUNDQUIST, *supra* note 89.

¹²⁶ See, e.g., HOWE, *supra* note 92.

¹²⁷ FAULKNER, *supra* note 3, at 119.

The sixth chapter of *Light in August* centers around the origins that Joe Christmas himself is unable to remember – the past to which he cannot travel. In the above reading of the sixth chapter, I have analyzed Joe Christmas’s ‘primal scene,’ the original trauma that initiates his compulsive control over his corporeal boundaries. As mentioned above, Joe Christmas has forgotten these events, but they have not forgotten him. However, it is not enough to recognize Christmas’s inability to return consciously to these memories or the ability of these memories to repercuss throughout his adult life. Perspicacious readers must also acknowledge Faulkner’s volition in bringing us to these memories and the boundaries we must cross in order to understand them.

When the reader moves to conversations between Hines and Miss Atkins, the dietitian, or the dietitian and the matron, it is easy to overlook the privileged perspective in which Faulkner has positioned the reader. However, to explicate fully the anxieties and traumas that have left an indelible mark upon Christmas’s psyche, Faulkner ranges beyond the boundaries of Joe’s perception. Does it occur to most readers how quickly the novel moves from the memories to which Christmas no longer has conscious access to past events that Christmas could not possibly remember? *Light in August*’s sixth chapter, predicated on the traumatic moments and movements that Christmas cannot remember, inconspicuously displays events that Christmas has not even experienced. In the sixth chapter of *Light in August*, Faulkner is giving readers a tour; in traveling to the spaces and scenes that eclipse Christmas’s experience we are acquiring the information by which we as readers will identify Christmas as disidentified and unidentifiable. Ultimately, the reader and critic can identify Joe Christmas better than Joe Christmas can identify himself. But we must remember that this privilege comes not only from our ability to remember that which Christmas can no longer remember, but also our ability to access those occurrences that influenced Christmas even though he never had the opportunity to experience them directly.

Such privilege is not accidental. Faulkner does not allow the reader to explore any other character from such privileged positions. We never receive background on Byron Bunch or Lucas Burch. Lena Grove’s background, discussed above, is a six-page summary of the moves and crossings of literal and social boundaries that have led her to walk to Mississippi. Even with Burden and Hightower, characters who are almost debilitated by pasts that do not even belong to them, our knowledge comes only from that which they could conceivably have known themselves. Joanna Burden and Gail Hightower are indeed anchored to their pasts, but they are anchored through their knowledge. Comparatively, Joe Christmas’s detachment stems from his inability to connect to his past. Christmas’s ignorance of the roots of his troubled identity is precisely that which spurs his mobility.

The connection between mobility and knowledge of one’s background holds throughout the novel as knowledge and thinking are repeatedly portrayed as impediments to movement. At points within the novel, the only way to function is to impede thought through motion – to move faster than thinking. Only when Byron Bunch hears the cry of Lena Grove’s newborn can he retroactively acknowledge her pregnancy. He has seen her pregnancy, but he has not recognized it. When he hears that cry, he is initially befuddled. For Byron, “thought [is] going too fast to give him time to think. That [is] it. Thought too swift for thinking.”¹²⁸ As Byron Bunch recognizes the full implications of the child’s presence and Grove’s pregnancy, the hermeneutic disjuncture initiated by thought going too swift for thought becomes a full semiotic breakdown; “*It was like me, and her, and all the other folks that I had to get mixed up in it, were just a lot of*

¹²⁸ *Id.* at 398.

words the never even stood for anything, were not even us."¹²⁹ In first instance, this quotation reminds the reader of the novel's textuality – that we are reading a novel in which the only meaning in the words is the meaning we as readers make of the novel. But there is something more at work in Faulkner's choice to deliberately focus the reader on this process. The quotation also gestures towards the reader's movement with the characters. Within the words of *Light in August*, as within the words of *Doe v. Louisiana* or any other legal decision, individuals are reduced to plain 'words,' "words [that] were not even [them]." To link these symbols or identifications ("words") with individuals ("us" or [them]), both the novel and the legal case rely on the idea of the 'position' of words. In either discourse, these words, like the individuals they identify, 'stand for anything' that can be positioned or mobilized in the processes of identification. Position denotes who one is and movement enables who one can be.

To read these words, or any, then, is to bring position and movement together. To read is to move an identifying gaze over stationary words, to transform words into meaning, to participate in a process intended to actualize the identities of the characters on the page. To read too quickly is analogous to thinking too quickly; doing either can disable these identities by moving too fast. Thought can impede motion, but motion can also impede thought.

Through the disavowal of normative conceptions of time, space, self, and the manner in which these conceptions are accessed, Faulkner engages a modernist paradigm. Furthermore, by rejecting linear time structures, he brings the reader to the core of the anxieties driving his characters, anxieties often not apparent to the characters themselves. This breakdown of normative linearity also occurs within the characters as their (in)ability to understand their motivations often sets them outside of time, outside of text, and even outside of themselves.

After Byron Bunch watches Lucas Burch jump a train to escape his fatherly duties, an analogous situation occurs. As Byron makes his way back to Lena Grove who is resting in Burden's cabin, "the world rushes down on [Byron] ... it is too huge and fast for distance and time."¹³⁰ Thought and recognition come to Byron too quickly. Even though Byron continues to walk, his movement is deeply troubled. He "[leads] the mule for a good way before he remembers to get on it and ride."¹³¹ Even more disturbing is the fissure in Byron's position; "it is as though [Byron] has already and long since outstripped himself, already waiting at the cabin until he [Byron] can catch up and enter."¹³² Byron's thoughts have become so detached from his action that his actions are not helping him to catch up with his thoughts, but with his own identity. Byron's earlier realization of Lena Grove's pregnancy has revealed the sham of meaning. But here, at a point in which the world has become "too huge and fast for distance and time," the point at which very metrics of size and velocity have lost meaning, thought has similarly eclipsed the boundary of the self. In *Light in August* a number of characters become similarly detached. Such detachment occurs most poignantly for Joe Christmas.

While waiting 'for something to happen to him,' Joe Christmas turns his attention to a magazine. Already knowing, but not yet having realized he is going to visit Joanna Burden for the last time, Christmas reads "the magazine straight through as though it were a novel."¹³³ He does not turn to a later page when instructed; he reads the many texts in the publication out of

¹²⁹ *Id.* at 402.

¹³⁰ *Id.* at 411.

¹³¹ *Id.* at 441.

¹³² *Id.*

¹³³ *Id.* at 111. A layer of irony accrues when you consider that Christmas's ingestion of the magazine as though it were a novel is found in a novel that itself eschews a linear format. That is to suggest, for Faulkner, the typical novel, unlike the typical magazine, possessed a linear story structure.

order. Focused on something he knows yet cannot yet recognize, Christmas's refusal to follow the magazine's order leads him to jump from story to story. Such undeviating movement through the magazine indicates both Christmas's inattention to the world as well as his refusal to act like others or to take the routes taken by others. Christmas's action also demonstrates the textuality of the story before us; straight progression through the magazine, just as within *Light in August*, does not accord with linear progression of plot. By rejecting the normative conceptions of position and time in the magazine, Joe replicates his own detachment from space and time. Such detachment is an indictment of normative systems of description and measurement. Willing to depose metrics of time and space for Byron, Faulkner will similarly abrogate the distinction Christmas (and we readers) draw between the novel's past and future. In the distraction of his attempt to know what will, yet has already, happen/ed, this scene mirrors the reader's own progress through the *Light in August*'s circuitous narrative. We are the readers who already know, yet also seek to discover what will, yet has already, happen/ed to Joanna Burden. Such troubled recognition is shared by the characters: "Now and then [Christmas] would look up from the page... 'Maybe I have already done it.'" ¹³⁴ In short, Faulkner's style traverses the normative boundaries of thought, time, and movement. More important, many of the novel's characters also traverse these boundaries. By escaping the constrictive and restrictive networks of thought, time, and position, these characters exercise mobility in order to change, maintain, or understand their position within the Southern society.

III.7 – WINDOWS IN *LIGHT IN AUGUST*

A consideration of movement is encompassed not only by a consideration of characters, origins, and destinations, but also a consideration of the manner in which these characters move, and the media through which they travel. As characters repeatedly use windows to enter and exit locations throughout *Light in August*, a consideration of Faulkner's use of windows is pertinent to a more complete understanding of the function of movement within the novel.

Chronologically, this phenomenon first occurs during Christmas's youth. He desires to live differently than the life prescribed by his Puritan family, the McEacherns, who forbid him from leaving home in the evening. The McEacherns correctly suspect that Christmas leaves to date, attend dances, or engage in other activities they consider sinful. Unwilling to abide the strict rules of his adoptive father, Christmas circumvents his spatial restriction by using his window as an exit. As the gateway to a five-mile journey to town, the window functions symbolically and literally as an opening through which Joe can transform himself. On one side of the window, he is in his bedroom, and he is therefore Joseph McEachern, Protestant son of the Protestant McEachern family. He ostensibly obeys his parents; he does not engage in sin. He works hard; and he is rustic. On the other side of the window, he is Joe Christmas. He is physically free of and socially liberated from the McEacherns, their Protestant lifestyle, and their 'sinless' ways. On the other side of the window, Joe Christmas has a girlfriend, Bobbie. ¹³⁵ Accused of 'whoring' by his adoptive father, Christmas uses the window as an escape into a sexual identity. ¹³⁶ By itself, this incident is not quite impressive; the child who seeks liberation by climbing out of windows is not unique.

¹³⁴ *Id.* at 111.

¹³⁵ *Id.* at 170.

¹³⁶ Ironically, Joe later learns that Bobbie is indeed a prostitute. When Christmas learns that Bobbie is a prostitute he still continues to see her. Joe's acceptance of prostitution is perhaps galvanized by his earlier attempt to lose his

However, this is not the only time in which a window will be used to escape the oppression that comes with the life on the inside of that window. Towards the end of the novel, Lucas Burch is in the custody of the Yoknapatawpha sheriff's deputy.¹³⁷ Although Burch is attempting to aid the sheriff to capture Joe Christmas in order to gain the reward that Joanna Burden's family has posted for the capture of her murderer, the sheriff mistrusts the degenerate Lucas Burch.¹³⁸ Having learned of the relationship between Lena Grove and Burch, the sheriff directs his deputies to bring Burch to the old Negro cabin on the edge of Joanna Burden's property so that Burch might reacquaint himself with his fiancée and meet his child.¹³⁹ Correctly surmising that Burch intends to take no responsibility for the child or its mother, the deputy that accompanies Burch does not inform him as to grounds for his return to the cabin.¹⁴⁰ In a darkly humorous scene, Lucas enters the cabin, and, upon recognizing the situation, runs through a gamut of responses – “shock, astonishment, outrage, and then downright terror.”¹⁴¹ Like Christmas, Burch finds himself trapped. Outside that cabin he was and will be Lucas Burch, a free man. Inside the cabin he is Lucas Brown, father and fiancé. Following the pattern set by Christmas, Burch uses the window as the first step on the path to a freer existence. Yet, in an inversion of sorts, Burch is not escaping towards sexuality, but rather away from its consequences.¹⁴² That is, the window enables an escape not only from the deputy who sits in front of the cabin, but also from the domestic responsibilities attendant to remaining with Lena Grove.¹⁴³ Lucas goes through the window to avoid having to redefine himself; he is running from fatherhood just as Grove has walked towards motherhood.

Despite the importance of these two instances of fenestral egress, the remaining two instances warrant more sustained attention. To understand fully the importance of movement in these scenes, we must unpack their parallels. The first involves Lena Grove's abandonment of her uncle's home in Alabama; it is the exit that sets Lena Grove, and the novel, moving. The second concerns Joe Christmas's initial entrance into Joanna Burden's house – the entrance that leads to his doom.

Both instances involve characters climbing through a window, but perhaps more important than this movement, one character going into or coming out of a house, is the way in which each character accomplishes the deed. Lena Grove, already pregnant with the child she will carry from Louisiana to Mississippi, climbs with difficulty. She has crawled through the window before on her way to meet Lucas Burch, the man responsible for her pregnancy. Grove wryly notes that “[i]f [the climbing] had been this hard to do before, [she] reckon[s she] would not be doing it now.”¹⁴⁴ This quick scene in which a woman burgeoning with child struggles to raise herself is made all the more poignant when considered alongside the repetitive characterization of Lena Grove as “deliberate, unhurried, and tireless as the augmenting

virginity with a ‘Negro’ prostitute. Christmas is unable to consummate the sexual act with the first prostitute. Unable to have sex with her, he physically attacks her – this is the first of multiple instances in which Joe combines violence with sex, in which eliciting blood stands in for emitting semen. Nonetheless, further exploration of this theme currently exceeds the scope of this chapter. As explained *supra*, my use of the term ‘Negro’ is intended to reflect the cultural capital the word carried at the time when Faulkner was writing.

¹³⁷ FAULKNER, *supra* note 3, at 426.

¹³⁸ *Id.* at 422.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 426-27.

¹⁴¹ *Id.* at 428-29.

¹⁴² *Id.* at 432, 425.

¹⁴³ *Id.* at 432.

¹⁴⁴ *Id.* at 6.

afternoon itself."¹⁴⁵ She is a woman who will wait at a hilltop for a wagon to pick her up and bring her closer to her destination. She will continue in spite of obstacle and without perturbation on to encounter the father of her unborn child. Grove will even watch as this father/husband-(never)-to-be climbs out of a window in front of her in order to flee-escape-jump the first train he sees. She will sit there and watch this and her only comment, again wry, will be "Now I got to get up again."¹⁴⁶

Yet this woman, who is possessed of a bovine passivity and who exudes the peaceful luminescence of a nature mother in waiting, begins her own movement and that of the story with all the huffing and puffing and utter gracelessness and sardonic pathos of a pregnant woman climbing through a window. This mockery of Lena's gentle disposition and ceaseless advance suggest both the contemptible morality of a family that doesn't care if its pregnant relative goes as well as the symbolic turbulence of Lena's own birth. Yet, only through this base motion that parallels the violent act of physical birth can Lena Grove attain, in inversion of chronology, the peaceful light of *materfamilias* in journey.¹⁴⁷

For Joe Christmas, his decision to climb through Joanna Burden's kitchen window appears akin to his "natural manner of moving."¹⁴⁸ His comfort with this manner is indicated by the way he "seem[s] to flow into the dark kitchen: a shadow returning without a sound and without locomotion..."¹⁴⁹ Although Christmas cannot long abide his position in the feminine space of the kitchen, the "allmother of obscurity and darkness," the ease with which he has entered the space is amazing.¹⁵⁰

These two instances share one final important point; in each of the two cases, Faulkner emphasizes that their apparently inappropriate, if not illicit, movement through the window is unnecessary: "[Lena Grove] could have departed by the door, by daylight. Nobody would have stopped her. Perhaps she knew that. But she chose to go by night, and through the window," and "[Christmas] could discern a door... He would have found it unlocked if he had tried it."¹⁵¹ Yet for both Grove and Christmas, the movement through the window, that is, the way in which one enters or exits a space, is as important as the actual act of ingress or egress.

In all four of the novel's window passages, the window functions both literally and symbolically for characters' attempts to change (almost as literally and symbolically) their identities. In the latter two cases, the rejection of the normative mode of movement into or out of a space, represented by movement through a window, is also a statement of identity. Lena Grove's choice to go out the window indicates her agency in redefining her identity. Having first exited through the window to become a sexualized woman, she now abandons the house through the window in order to change/develop her identity again; she wants to become a wife before she becomes a mother. Lena Grove's movement through the window is her one action, the one decisive step she takes towards action, before experiencing complete enclosure in

¹⁴⁵ *Id.* at 10.

¹⁴⁶ *Id.* at 432.

¹⁴⁷ When translating *Light in August* into French (*Lumière d'août*, released, 1935), Maurice Coindreau asked Faulkner whether the phrase 'light in August' was a suggestion of Lena Grove's forthcoming motherhood, that is, that at the conclusion of her pregnancy, she would be 'light in August.' Faulkner denied this reading, referring instead to the ancient Hellenic light that illuminated the eternal movement on Keats' urn. Nonetheless, the double valence of the term 'light' still resonates.

¹⁴⁸ *Id.* at 230.

¹⁴⁹ *Id.* at 230.

¹⁵⁰ *Id.* at 230.

¹⁵¹ *Id.* at 6, 229.

Faulkner's 'urn motif.' After going through that window, Lena falls into motionless motion and the static identity of the expectant mother/expectant bride.

Just as Lena Grove's exit is a confirmation of who she shall be, Joe's skillful entrance is a confirmation of his atypical identity. He is one to whom normative identity is as foreign as normative movement. Joe does not go to the door and does not check to find the door unlocked, because that is the typical mode of entry. Furthermore, Joe enters the house as a thief; he does not wish to be offered food, he wants to take food. He knows that stealing violates social convention and that is precisely what he wishes to do. By piercing Burden's household, Christmas seeks to violate the sanctity of the space and to upset any who might catch him in this transgression. When Joanna Burden confronts Christmas and indicates that she is willing to let him have the food, just as she would have been willing to let him walk in through the front door, Burden's lack of anger, discombobulation, fear, or seemingly any negative emotion first confounds, and later infuriates, Christmas – what does it mean to steal from the willing? Or, if Christmas's identity depends upon the transgression of normative boundaries of propriety, what is he and who is he when he can no longer transgress those boundaries? This moment of confusion temporarily stops his motion. The confusion becomes fury – the fury, resolve. He attempts to rape Joanna, but is again confounded. Joanna Burden's "untearful... almost manlike yielding of that surrender" again denies Joe the pleasure of transgression; he can literally pierce Burden's physical body, but he is unable to perturb the stolid resolve of her character – as such, his own character becomes unsettled, he must sacrifice his own placidity.¹⁵² "My God," he [thinks], "it was like I was the woman and she was the man."¹⁵³ Perhaps ironically, this internal disturbance in Christmas occurs in tandem with his external arrest. After fifteen years of running, after untold instances of 'improper' movement deliberately intended to cross boundaries, spatial and physical, gendered and racialized, it is this last flowing passage through a window that inducts Christmas into a period of both self-doubt and physical stasis. This period, coterminous with his relationship with Joanna Burden, will continue until Joe starts moving again – until he again escapes into a temporarily stable identity.

III.8 – FIRST STASIS / FIRST MOVEMENT

It is facile to consider Joe Christmas as a character constantly and repeatedly undone by the tension of not knowing who or what he is. Raised in a white orphanage yet subjected to racial slurs by the 'white' children around him, Joe is simply unable to know his race yet doomed to inhabit a society in which racial identity is an *axis mundi*.¹⁵⁴ Unfortunately, to restrict one's understanding of Christmas to this misfortune that will blossom into tragedy, elides the deeper complexities of his character, specifically those that surface in his relations with Joanna Burden. While scholars have applied numerous descriptive terms (pariah, subject, outsider, interloper) to explain Christmas's presence within the society of Jefferson, *i.e.*, the degree to which he might

¹⁵² *Id.* at 234.

¹⁵³ *Id.* at 235.

¹⁵⁴ The *axis mundi* is the axis around which the world rotates – that is, it functions as a zero-point or origin of belief upon which all other knowledge builds. See, MIRCEA ELIADE, *Archetypes and Repetition*, in *THE MYTH OF THE ETERNAL RETURN* (Willard Trask trans., 1971); See also MIRCEA ELIADE, *Symbolism of the Centre*, in *IMAGES AND SYMBOLS* (Philip Mairet trans., 1991).

be incorporated into or belong to the society, such descriptions are disputable as they consider Joe Christmas's mutability as given.¹⁵⁵

To a number of critics, Joe Christmas is a counterpoint to Lena Grove. One is male, the other female. One is dark and doomed to become darker (in several senses), the other is light (maternal luminescence) and destined to become lighter (in at least one sense). Yet, in most critical estimations, both characters are connected by both their status as outsiders to the community of Jefferson, but perhaps even more so by their mobility. Like the characters on Keats' urn, Lena Grove is captured in perpetual movement.¹⁵⁶ In much critical contemplation, Christmas is similarly forever in motion. Yet, more important than Joe Christmas's position within Jefferson is the duration of his stay; Christmas remains in Jefferson for three years. Despite its apparency, this duration often escapes critical attention. "One place was the same as the other to [Christmas], in none could he be quiet..."¹⁵⁷ This is the dominant characterization of Christmas. Nonetheless, this characterization falters in light of the apparent static period Joe has entered.

The description of Joe as an anti-social yet hardworking employee of Jefferson's planing mill lasts only twelve pages yet firmly positions Joe as a marginal member of Jefferson. Although Joe is not amicable, in no way do the other workers despise him. Neither does Christmas arouse the workers' scorn as Lucas Burch does. Indeed, when Christmas fails to arrive one Monday morning, the other workers are not surprised by his absence. They suspect he might have quit working at the planing mill, but they do expect him to continue running bootleg whiskey.¹⁵⁸ Although Joe resides employment-wise, geographically, and symbolically on the margins of Jefferson, after three years of such peripheral residence he has established some semblance of belonging, perhaps not to the community, but to the community's margins. Easy to overlook yet perhaps even more important than Joe's stasis within Jefferson is the contraposition of Joanna's own flexibility in this respect.¹⁵⁹

As Christmas's inability to know his identity and his resultant inability ultimately to belong to any group is the paramount tension that drives the novel, it is not a surprise that the text avoids spending time on an exploration of Christmas's position in Jefferson or any acceptance or recognition or lack thereof. Such an examination might lead to a characterization of either his acceptance of the community or his stasis within it. Instead the text directs its attention/focus to Christmas's past and to Joanna Burden.

¹⁵⁵ Virtually every critic directly or indirectly addresses Christmas's relation to his society. Nonetheless, Phillip Weinstein's reading of Christmas as existing on the margins is perhaps the best approximation to the reading I wish to make. Yet Weinstein's interpretation still privileges position over the acts of movement that enables re(positioning). WEINSTEIN, *supra* note 58.

¹⁵⁶ In discussing the title of *Light in August*, Faulkner claimed he had referred to the ancient Hellenic light that illuminated the eternal movement on the urn described by John Keats in his "Ode on a Grecian Urn." See fn. 147, *supra*.

¹⁵⁷ FAULKNER, *supra* note 3 at 226.

¹⁵⁸ *Id.* at 43.

¹⁵⁹ Joe has publicly lived as a white man over these three years. His lack of self-positioning as a Christian testifies perhaps to the comparative secondary status of such identifications when compared to gender and race. Misogyny and racism clearly indicate the preference of male over female and white over black in Faulkner's South. Religion, as explored through such characters as the Burdens, Hightower, the Hines, and the McEacherns, is never presented as a strongly positive influence or force.

III.9 – FIRST MOVEMENT – A MOMENT IN THE PAST

The connection between identity and mobility is revealed early in Joe's life. After the often-explicated 'toothpaste' scene in which Joe first consciously experiences racial and gender trauma (and their collusion), the dietitian slowly goes mad under the anxiety of waiting for Joe to reveal her affair with the young county doctor.¹⁶⁰ Hopeful of escaping her problem, the dietitian suggests that Christmas be sent elsewhere, perhaps to an orphanage for Negro children. But by discussing Joe's Negro identity with both Hines and the orphanage's matron, the dietitian incites a struggle between the two characters to define Joe's identity.¹⁶¹

Afraid that the matron will move Christmas to a black orphanage in which he might be allowed to develop a 'Negro' identity, Hines kidnaps the child.¹⁶² Hines takes him and moves him in order to deposit Christmas at a new 'white' orphanage. Ostensibly Hines wishes for Christmas to prove his 'blackness' – for the latent taint to come out of Christmas. Hines fears that placing Christmas in a black orphanage will instead impress the racial stigma onto Christmas. The power of the scene is such that Hines' investment in maintaining Joe's racial ambiguity is not often questioned. Hines speaks of God revealing the child's racial identity, yet his uncertainty, his need to wait for proof of the Christmas's taint to manifest denies the certainty that has brought Christmas to an orphanage in the first place. That is, Christmas is only an orphan because Hines has actively murdered Joe's father and passively murdered Joe's mother. Hines has murdered Christmas's parents because of his unwavering belief in the miscegenation of the union. In short, Hines' 'wait and see' attitude, indeed his deliberate attempt not to allow resolution of Christmas's racial identity, belies the racial hysteria he has and will again exhibit within the novel.¹⁶³

Set against Hines' inconsistent grounds for attempting to keep Joe in a white orphanage is the curious motivation of the orphanage's matron to place Joe into an adoptive family: Immediately following the dietitian's remark that "it's bad for [Joe] to have to go to the nigger home... after growing up with white people," the matron decides "[w]e [the orphanage] must place him. We must place him at once."¹⁶⁴ This attempt to remove Christmas from the orphanage suggests the matron's realization that the insidious taint of 'blackness,' is less a sanguineous fact than a social construction. This view appears quite enlightened, but readerly acceptance of the matron's motive requires a suspension of that which we know about the society in which she operates. In a society obsessed with racial divides and the racial identities upon which these divides are predicated, the matron's quick decision to expedite Joe's placement within a white family is difficult to explain.

¹⁶⁰ FAULKNER, *supra* note 3, at 125.

¹⁶¹ The toothpaste scene also serves as a salient point for examining the formation of Joe's sexual identity. However, as my project is more concerned with mobility's role in enabling all identity changes and not any individual identity, I shall not discuss the collusion between sexual and racial identity. Such a discussion would distract from my focus in a project of this limited size. A further discussion of this collusion is found within Carolyn Porter, *Symbolic Fathers and Dead Mothers: A Feminist Approach to Faulkner*, in FAULKNER AND PSYCHOLOGY: FAULKNER AND YOKNAPATAWPHA 78 (Donald M. Kartiganer & Ann J. Abadie eds., 1994); Judith Bryant Wittenberg, *The Women of Light in August*, in NEW ESSAYS ON LIGHT IN AUGUST 103 (Michael Millgate ed., 1987).

¹⁶² FAULKNER, *supra* note 3, at 135.

¹⁶³ It is worth noting that Hines functions as a sort of authorial amanuensis – a crazy man whose inexplicable actions help to accomplish Faulkner's goal of maintaining Christmas's racial ambiguity.

¹⁶⁴ FAULKNER, *supra* note 3, at 135.

In one moment, the matron decides to subvert the racist blood arithmetic that constitutes blackness in the society of the South, an enveloping system of ‘is or is not’ that no other character in the novel, not Hines, Hightower, Burch, nor Burden can think to question.¹⁶⁵ In choosing to define Joe’s identity by the culture in which he has been raised rather than through the blood she believes him to possess, the matron indicates her own obsession with maintaining his ‘white’ racial identity. Believing the child might be black according to dominant definitions, she has engineered Joe’s first act of passing. Unfortunately it has occurred too late; this movement only contributes to Joe’s fissured identity.

In a Southern society obsessed with identity, the novel and its critical interpretations gloss over the role that the matron performs in taking Joe from a location in which he’s already begun an entrance into black subjectivity and placing him with a white Protestant family. An examination of both Hines’ and the matron’s moves show that *Light in August* is indeed a novel in which too much psychologizing can lead to questioning the motivations under which characters operate. Although the actions of both Hines and the orphanage’s matron are difficult to understand, it is important to realize that even when only five-years-old, Joe is already learning the correlation between mobility and identity that his ‘memory’ shall ever ‘believe’ even if his ‘knowing’ will not thereafter ‘remember.’

As mentioned above, Hines learns of the matron’s plans to place Christmas with a family and kidnaps the child. Just as Hines does not wish Christmas to grow interpellated into a ‘Negro’ identity, he is similarly set against Joe falsely believing himself white. The young Joe Christmas internalizes and interprets the experience of what is occurring during his kidnapping by Hines:

With more vocabulary but no more age [Joe] might have thought *That is why I am different from the others: because [Hines] is watching me all the time* [Joe] accepted it... [Joe] might have thought *He hates me enough even to try to prevent something that is about to happen to me coming to pass.*¹⁶⁶

In this moment, Joe realizes that he is different. Joe also understands that this difference leads Hines to hate him and that this hate is the ground for Hines taking Joe on his first trip on a train. Joe’s equation, however, does not explicitly name race as the ‘difference.’

Joe does not know the explicit actions that the matron has taken in order to find him a family, but Joe’s trip with Hines grants him a certain prescience. Meeting McEachern for the first time, Joe “looks at the man and he [knows] before the matron even [speaks].”¹⁶⁷ Christmas realizes that Simon McEachern has come to remove Joe from the orphanage, but this imminent removal is once again structured around a consideration of both movement and identity. Immediately following Joe’s realization and immediately preceding the matron’s inquiry as to whether Joe would “like to go and live with some nice people in the country,” Faulkner invites us to consider whether Joe thinks of his recent travel experience; “Perhaps he remember[s]

¹⁶⁵ Gavin Stevens, discussed further *supra*, is the character, after the matron, who comes the closest to advancing a cultural theory of understanding racial identity. Still, he does not come very close. His theory, which attributes Joe’s actions between his escape and his mutilation to his white or his black blood, is a specious step in the direction of acknowledging hybridized identity.

¹⁶⁶ FAULKNER, *supra* note 3, at 138.

¹⁶⁷ *Id.* at 141.

suddenly the train ride and the food, since even memory d[oes] not go much further back than that.”¹⁶⁸

While Joe stands in the matron’s office, the connection between his inevitable movement and his identity is underscored by the exchange between the matron and McEachern. McEachern requests to know more about Joe’s parentage; McEachern also requests to speak with the dietitian who has branded Joe a “nigger bastard”; McEachern even looks at Joe “convinced beforehand that he would see flaws.”¹⁶⁹ Perhaps Joe does not draw the connection between who or what his biological parents were and who or what he might be; perhaps it does not affect Joe to hear the name of the dietitian or even to be gazed upon like “a second hand [sic] plow.”¹⁷⁰ Yet Joe cannot escape realizing that his arrival in the McEachern household ends the period during which others refer to Joe as a “nigger.” The rupture of identity that first begins with the dietitian, Miss Atkins, calling Joe “a little nigger bastard,”¹⁷¹ has been temporarily concealed; or as Faulkner writes: “the promissory note which [Joe] had signed with a tube of toothpaste on that afternoon two months ago was recalled.”¹⁷² This concealment, like the surname ‘McEachern’ with which it arrives, cannot endure. Just as Joe knows that, “[His] name aint McEachern. [His] name is Christmas...”¹⁷³, he likewise knows that doubts about his racial identity exist, even if this knowing shall later not remember why.

Faulkner’s window into Joe Christmas’s time at the orphanage reveals the tension that arises from characters’ attempts to function in an economy of identity in which movement is the only currency. From the beginning of Joe’s conscious life, a double precedent is set: ‘being’ becomes synonymous with occupying, ‘becoming’ synonymous with moving. Yet it would be falling into a common trap to attribute the origination of such identity and mobility conflicts to either Joe’s time in the orphanage, or to restrict such a reading only to Christmas. This idea, which originates in the contrary conceptions of racial identity held by the orphanage’s matron and Doc Hines, reverberates throughout the novel.

III.10 – TRANSGENERATIONAL TRAUMA: A CRITICAL FOUNDATION FOR CHRISTMAS’S DILEMMA

In ‘psychologizing’ Joe Christmas, many critics locate the trauma of his fissured identity solely within his character, that is, these critics locate all traumas within the individual, Joe Christmas.¹⁷⁴ By beginning my examination of Christmas’s fissured identity, this chapter’s analysis replicates a common pathway that begins with the consciousness of the individual. Yet this reliance on the ‘individual’ as the irreducible recipient-unit of trauma has drawbacks. Through such an approach critics can fail to draw the powerful connection between the “closed society” of the South and the traumatized individuals that it produces and contains.

The structure and function of the society has held a prominent position in *Light in August* criticism. With a concern that centers on the “isolated individual” as a “dominant theme of contemporary literature,” Cleanth Brooks primarily sees the novel as a collection of outsiders

¹⁶⁸ *Id.* at 141.

¹⁶⁹ *Id.* at 142.

¹⁷⁰ *Id.* at 142.

¹⁷¹ *Id.* at 122.

¹⁷² *Id.* at 143.

¹⁷³ *Id.* at 145.

¹⁷⁴ Gavin Stevens is only the first critic to make this location.

moving within a community.¹⁷⁵ Brooks' attempt to understand the differences in the reception of the many outsiders who are central to the novels plot is undercut by almost actively refusing to more than cursorily consider race or gender.

Interested in the idea of inclusion and exclusion, Bleikasten's "*Light in August: The Closed Society and Its Subjects*," fundamentally differs from Brooks' analysis as it places the blame for the exclusion of the pariah on the pariah her/himself.¹⁷⁶ In doing so, Bleikasten suggests "the possibility that the alienation [experienced by characters in the novel] might originate... in some flaw of the social fabric itself."¹⁷⁷

Both of these critics seek to understand the space between the community and the individual, a necessary requirement for understanding movement. While Bleikasten's essay makes progress over Brooks' for the critical examination of society and fuller consideration of the characters within the novel it provides, both pieces of scholarship are limited by a reliance on explicating exclusion/societal tension at the level of the individual. This recurrent attempt to locate trauma within the 'individual' limits our ability to understand the mobility that these traumas can enable or disable.

A psychological understanding of many of the novel's characters is improved through an application of Abraham and Torok's theories of trans-generational haunting.¹⁷⁸ By freeing a psychological interpretation of the novel from the Freudian necessity of locating all trauma in the individual, the connection between the society that has created and re-created the social anxieties which the characters of *Light in August* harbor and the mobility through which these characters antagonize these anxieties becomes clear.

Through the theories of Abraham and Torok we can locate the root of Christmas's trauma neither in the primal 'toothpaste' scene nor in his adoption by the McEacherns. Neither does this trauma originate in Christmas's sacrilegious naming, in his birth, nor in his conception. All of these instances are reverberations of traumas that plague Joe with a sometimes-black identity, but an eternal "white racist hysteria."¹⁷⁹ That is to say, all of these instances are more properly understood as the loci of traumatic transmission. The traumas that drive Joe are intricately bound with his identity; he does not travel without them. But these traumas have traveled even more than Joe himself; they exist without him. Gavin Stevens, the district attorney in Jefferson, enters *Light in August* to make the same conclusion. Theorizing on why Joe had chosen to take refuge in Hightower's house after escaping from jail, Stevens produces an interpretation that centers on the interstices of identity, mobility, and trans-generational trauma:

But there was too much running with [Joe], stride for stride with him. Not pursuers: but himself: years, acts, deeds omitted and committed, keeping pace with him, stride for stride... It was not alone all those thirty years which [Mrs. Hines] did not know, but all those successions of thirty years before that which

¹⁷⁵ Cleanth Brooks, *The Community and the Pariah*, in TWENTIETH CENTURY INTERPRETATIONS OF *LIGHT IN AUGUST: A COLLECTION OF CRITICAL ESSAYS* 56 (David L. Minter ed., 1969).

¹⁷⁶ Bleikasten, *supra* note 70.

¹⁷⁷ *Id.* at 83.

¹⁷⁸ Nicolas Abraham & Maria Torok, *THE SHELL AND THE KERNEL*, VOLUME 1 (Nicholas Rand ed., 1994).

¹⁷⁹ SUNDQUIST, *supra* note 89. Sundquist's discussion of the "white racist hysteria" from which Joe suffers relates this affliction to a culture, which in the absence of visual markers, struggles to maintain racial divides.

had put that stain either on his white blood or his black blood, whichever you will, and which killed him.¹⁸⁰

Joe Christmas is not the only character that falters under the burden of traumas transmitted from the past. Indeed, just as trans-generational traumas have enabled Christmas's mobility, they are likewise responsible for the stasis exhibited by Gail Hightower and Joanna Burden.

Hightower seemingly struggles under the debilitating condition of having been "born about thirty years after the only day he seemed to have ever lived."¹⁸¹ As a child and as a man he is obsessed with his grandfather's charge against Jefferson, a small Civil War skirmish in which his grandfather fell. This obsession, or rather transgenerational phantom, has been transmitted to Hightower through the stories of a Negro servant, Cinthy. But these stories are not only a paralyzing force. Indeed, upon completion of his studies at the seminary, Hightower deliberately seeks a church commission in Jefferson. He travels in order to connect to this past. But once Hightower has arrived in Jefferson and accomplished this return, he becomes psychically paralyzed – he becomes an avatar to his grandfather. His fulfillment of this role renders him incapable of keeping his identity as minister separate from his identity as avatar or reverberation/repercussion of his grandfather's death. This inability leads to the breakdown of his marriage and his eventual dismissal from the church. Despite these embarrassments, Hightower remains in Jefferson. The town scares off his Negro servants. The town beats Hightower unconscious and leaves him tied to a tree. Hightower still refuses to leave. The only explanation for this continued defiance of the community's will, for this continued stasis, is Hightower's inability to concede the identity that his movement to Jefferson has first allowed him to actualize.

As stasis has defined Hightower's identity, it is not surprising that when he moves again – this time in order to help Lena Grove birth her child, that this mobility catalyzes another change in his identity. After the birth, "he moves like a man with a purpose."¹⁸² Having returned from the delivery, he decides to relax by reading English literature. Although he has lately read a lot of Tennyson, he lays aside the effete Romantic and chooses instead "food for a man... Henry IV."¹⁸³ Having brought life into this world, Hightower has revived his own masculine identity.

III.11 – JOANNA BURDEN, MOTION AND IMMOBILITY

Considered on the whole, Joe's movement through Joanna's window and entry into a three-year period of stasis corresponds exactly with the period of Joanna's movement. Overall, there is something of a transference of agency, a momentum of mobility that is maintained between the two characters. Before exploring this idea further, it is necessary to consider Joanna Burden both before and during her involvement with Joe Christmas.

Joanna Burden, who develops a raging sexuality and later descends into madness during her relationship with Christmas, is the only character who consistently steals the reader's

¹⁸⁰ FAULKNER, *supra* note 3, at 448.

¹⁸¹ *Id.* at 62.

¹⁸² *Id.* at 405.

¹⁸³ *Id.*

attention from Christmas.¹⁸⁴ To connect Joanna's ability to upstage Joe to her own development as a character is not incorrect, yet it indicates an incomplete understanding of the relationship between the two characters.

The coda of the proselytizing Burden family, Joanna is the feminine rupture of the four-generation Nathaniel-Calvin-Nathaniel-Calvin chain that has preceded her.¹⁸⁵ Although the men before her have ranged from New England to California, the family has come to rest in Jefferson, Mississippi. As suggested by their surname, they have come in order to bear the 'burden' of the black race that is a "part of the white race's doom and curse for its sins."¹⁸⁶ This 'curse,' as manifested in a public argument about the rights of Negroes, murders Joanna's grandfather and brother, leading Joanna's father to remain in Jefferson. With two shots, Colonel Sartoris destroys not only the Burden line of primogeniture, but also the family's mobility.

Although born in Mississippi, Joanna is epitomized as the archetypal outsider of her community: Jefferson views her as a Yankee 'nigger lover.' Because of this disdain, Joanna exists on the periphery of her community both geographically and socially; with few exceptions she has never left the house in which she was born. Her isolation is so complete that her language never loses its New England accent.¹⁸⁷ Neither does the community come to her; she lives in a "house which no white person save [Christmas] had entered in years and which for twenty years now she had been all night alone."¹⁸⁸

During the first stage of their relationship, Christmas attempts to destroy the virginity of a woman who, like her own house "remain[s] somehow impervious and impregnable... preserved too long now even to be lost."¹⁸⁹ It is Christmas's inability to conquer Joanna's virginity and thereby completely subdue her that inverts both the gender and the power structure that exists between the two. Furthermore, it is Christmas's compulsion to subdue Joanna sexually that roots him. It is "as though each turn of dark [sees Christmas] faced again with the necessity to despoil again that which he had already despoiled—or never had and never would."¹⁹⁰ Through this inability to be conquered, Joanna robs Joe of his mobility. Joe is "ready to travel one mile or a thousand, wherever the street of the imperceptible corners should choose to run again. Yet, when he [moves], it [is] towards [Joanna's] house."¹⁹¹ Joe realizes that he does not belong in Jefferson,¹⁹² yet his feet have already "surrendered."¹⁹³ Unable to pierce her identity, his mobility is controlled by Burden.

As if to offset the increasingly static and comparatively domesticated existence to which Christmas succumbs, Joanna, in the second stage of her relationship with Joe, begins, herself, to transform. This change, which comes "with the abject fury of the New England glacier exposed suddenly to the fire of the New England biblical hell," shocks, astonishes, and bewilders Christmas.¹⁹⁴ Joanna develops a perverse and voracious sexual appetite; she forces Christmas to chase her and rape her in a variety situations. This change does not take long: "[w]ithin six

¹⁸⁴ See WEINSTEIN, *supra* note 58, at 25.

¹⁸⁵ *Id.* at 20.

¹⁸⁶ FAULKNER, *supra* note 3, at 252.

¹⁸⁷ *Id.* at 240.

¹⁸⁸ *Id.* at 259.

¹⁸⁹ *Id.* at 260-61.

¹⁹⁰ *Id.* at 234.

¹⁹¹ *Id.* at 237.

¹⁹² *Id.* at 258.

¹⁹³ *Id.* at 237.

¹⁹⁴ *Id.* at 258.

months she [is] completely corrupted.”¹⁹⁵ Joanna Burden alters to such a degree that Christmas’s life begins to appear “conventional,” and this scares Christmas.¹⁹⁶ The role reversal between the two characters is complete.

As the inversion becomes ever more complete, it easy to recognize that Joanna is engaging a form of mobility that allows her to transform. It is slightly less obvious, yet paramount, to view this change on Joanna’s part in relation to Joe’s loss of this very same mobility. Joanna’s movement through the house and garden and into sexuality stands against Joe’s spatial and temporal location in Jefferson. As discussed above, Joe’s presence in Jefferson and thus this relationship to which he’s bound endures for three years.

During the course of their relationship, Joe’s identity is not completely static. At night, with Joanna, Joe undergoes changes that are directed by Joanna. When Joe realizes that it was “like [he] was the woman and she was the man,” Joe experiences a gender crossing over which he has no control.¹⁹⁷ Stuck in Jefferson and stuck with Joanna, Joe is also stuck in the feminine identity. When Joanna lies on the ground, “breathing: ‘Negro! Negro! Negro!’,” Joe’s identity similarly changes, this time along the axis of race.¹⁹⁸ As with the inversion of his gender identity, Joe has no choice in this matter. Staying with Joanna is making him feminine and black, the two identities towards which he is drawn, yet from which he also flees. At all points, Joe maintains his desire to leave; he thinks: “I better move. I better get away from here.” But in spite of these thoughts, he does not move, “something [holds] him.”¹⁹⁹ Despite Joe’s discomfort, he continues with Joanna. The cycle escalates further.

Even Joanna’s pregnancy, which would immutably fix Joe into the gendered role of the father, only makes Joe repeat, as opposed to act upon, his desire to leave.²⁰⁰ When Joanna suggests that Christmas study at a Negro school in order to become a Negro lawyer, Joe is so shocked by the suggestion that he symbolically falls apart. When Joanna first offers the opportunity Christmas can only bring his mouth to answer: “‘To school,’ his mouth sa[ys]. ‘A nigger school. Me.’”²⁰¹ At least one Faulknerian critic has argued that the psychological breakdown of Christmas’s identity is indicated through this physical dismemberment.²⁰² But this argument can proceed another step: Joe’s breakdown is a reaction to Joanna’s attempt not to transform Joe privately into a ‘Negro’ as she has done repeatedly during earlier stages of their sexual relationship, rather to define Joe publicly and therefore terminally as a Negro. For Joe, whose entire identity is built upon movement and the irresolvability of his racial identity, this stasis and location within a fixed identity is an attack on who he is. Psychologically incapable of weathering this trauma, he fractures.

This is not Joe’s first moment of decomposition. Joe’s first attempt at sex is with a black prostitute that he and his friends have hired. When Joe comes to the point of consummation, the point at which he will become sexualized at first touch of (or return to) the black and feminine, his identity similarly fractures. Although this act is a public and terminal entrance not into race but into the realm of sexuality, this fracture likewise results in a dismemberment of Joe’s body:

¹⁹⁵ *Id.* at 260.

¹⁹⁶ *Id.* at 260.

¹⁹⁷ *Id.* at 235.

¹⁹⁸ *Id.* at 260.

¹⁹⁹ *Id.* at 260.

²⁰⁰ *Id.* at 265.

²⁰¹ *Id.* at 276.

²⁰² See SUNDQUIST, *supra* note 89.

“his foot touched her. Then it touched her again because he had kicked her.”²⁰³ Here, as with the later instance, Joe is not only broken into pieces, but this fracturing, has led his body parts to act independently: his mouth speaks; his foot kicks. For Joe, such figurative and literal transgressions of boundaries initiate a crisis of corporeal unity that is a crisis of corporeal control. In these moments of crisis we can analytically recognize the method of Joe’s psyche: he controls himself in order to keep himself together. This recourse to violence in order to overcome the threat of a terminal identification is also the beginning of a pattern.

In relation to Joanna, Joe’s discomfiture at losing control over his fluid identity is mitigated by the inherent flexibility that this identity still maintains. When Joe carries Joanna’s education plan to its logical conclusion and realizes the necessity of divulging his supposed Negro identity, Joe is unable to listen to Joanna. By following Joanna’s advice Joe would have to live publicly as a Negro. Such a life would permanently destroy his ability to cross racial boundaries.²⁰⁴ The foreclosure of this ability would occur not only externally, but also internally. Joe has lived as ‘black’ before, but that was on his own terms. Here, however, this conversion would not function as a foray into Negro identity, but a permanent racial transmutation and social acceptance of a Negro identity. As with the cup of coffee in the café all those years ago, Joe will gain something, but it will cost him as well. In the café with Bobbie, Christmas will not take the black liquid that he cannot purchase, and now, he will not take the offer of a legal education because it will cost him his racial mutability, a price he is unwilling, indeed unable, to pay. For Joe to accede to Joanna’s desire, would make him a ‘Negro’ not only for Joanna, but for everyone – including himself. In neither instance is Joe able to ingest the blackness that he will not purchase.

Immediately following his rejection of Joanna’s offer, Joe takes his first step towards retaking control of his own identity and mobility; unable to assert his dominance over Joanna through sexual domination, Joe finally figures out how to break her control. Joe realizes that Joanna is not pregnant and tells Joanna she has mistaken menopause for pregnancy. By doing so, Christmas denies her sexuality; this recognition of uteral stasis – that Joanna has, in terms of fluid, stopped flowing, effects a counterbalance in Joe.²⁰⁵ Having placed Joanna, he can now return to motion and fluid identity.

In spite of this shift, Joe remains in Jefferson for another three months.²⁰⁶ The foundation of their relationship has cracked, but it has not yet crumbled. It takes one final act, one final attempt by Joanna to secure her control over Joe Christmas, for their relationship to end. This attempt occurs when Joanna starts praying over Christmas. It is after this discussion of prayer that Joe ceases to speak of leaving and starts to speak more darkly of ‘something happening to him.’²⁰⁷

²⁰³ FAULKNER, *supra* note 3, at 156.

²⁰⁴ During his fifteen years of traveling Joe does live “as man and wife with a woman who resembled an ebony carving” in Detroit. However, Joe’s ‘marriage’ supports rather than detracts from my point that Joe catalyzes identity change through movement and does not desire to be in any situation that would force to him to either relinquish his mobility or his flexible identity. (*Id.* at 225).

²⁰⁵ The contemplation of the mobile uterus suggests the Hippocratic or Platonic idea of ‘hysteria,’ in which madness emanates from uteri that have become too light from lack of sexual intercourse and have started to wonder around women’s bodies. As they wonder, the uteri cause adverse symptoms as they compress the other organs. See Sander L. Gilman, Helen King, Roy Porter, G. S. Rousseau & Elaine Showalter, *HYSTERIA BEYOND FREUD* (1993).

²⁰⁶ FAULKNER, *supra* note 3, at 280.

²⁰⁷ *Id.* at 104, 105. Profoundly affected by the religiously devout experiences Joe has had with Doc Hines and the McEachern family, the religious pathologies contained by Christmas’s character are too complex to analyze fully

Joanna's attempts both to place Joe into a gendered role and racialize him perturb Christmas. But it is only when Joanna Burden attempts to secure Joe with a concrete and immutable gendered, racial, *and* religious identity, that Joe begins to re-access his agency. Until this point, Joanna has led the narrative because she has been the character crossing the impermeable boundaries of gender, race, and religion; she has been the character who has begun to move in incorrect ways. Joanna's movement from asexual to hypersexualized to pregnant as well as her movement from austere reverence to salacious corruption and then back to fervent prostelyzation have reduced Joe. He has been symbolically castrated and transmuted into the "Negro." Joanna's movements have also fragmented Joe; he has become the mouth, the voice, the 'me' to which something is going to happen.

Although Joe is deeply perturbed by Joanna's attempt to secure him into a religious identity first by praying over him and ultimately through her attempt to make Joe join her in prayer, Joe regains control over his body and his identity. Ironically, this control is symbolized by the re-memberment of his body and Joe's movement. Waiting to meet Joanna for the last time, Joe has already escaped Joanna's control; he has moved from the dismembered uncertainty of "something is going to happen to me," to the "volitionless servant of... fatality... *I had to do it* already in the past tense; *I had to do it.*"²⁰⁸ In part, Joe's ability to break his stasis comes from his detachment from normative bounds of time; his blurring of the past tense follows his blurring of his identity. Already having projected himself into the future perfect of his action ('I will have done this'), Joe has symbolically reclaimed his agency.

In accord with this precedent, it is not surprising that Joe's actual reclamation of his agency begins with a part of his body acting upon an object. As an attempt to civilize and symbolically contain Joe, Joanna has replaced the buttons on Joe's garments. She has kept him clothed and kept him contained in clothing. Christmas has refuted this control by removing the buttons with his razor. But here, at the point in which the pitch of control changes, Christmas turns his attention to the final button that has held the shirt on him. "His right hand slid fast and smooth... it struck the button a light swift blow."²⁰⁹ In using his pocketknife to open up his shirt, Christmas has utilized violence and destruction to reveal himself literally and figuratively. Through the movement of his hand, Joe initiates a process of reidentifying himself – he stands there half naked, revealed as a man. By doing so Christmas indicates his willingness to use violence to take control of the situation.

After Joe cuts off the button in order to accomplish this identification on a symbolic level, Joe is ready to initiate himself more fully into his identity. He begins to walk. As Joe walks, textual evidence for Joe's reawakened agency starts to abound. As always, this identification is connected with movement. As Joe walks, the headlights of a car fall upon him causing his body to "grow white out of the darkness like a Kodak print emerging from the liquid."²¹⁰ Joe, who has been white in the eyes of Jefferson and black in they eyes of Joanna, demonstrates his shift away from his lover in the light these headlights. Rising out of the darkness and the liquid of the Kodak print, Joe becomes 'white' both physically and symbolically. Less important than his racial identification at this point is the racial mutability

here. For the scope of my argument, let the acknowledgement that Joe carries racial, gender, and religious trauma suffice. This trauma makes him avoid terminal identifications along these axes.

²⁰⁸ *Id.* at 104, 280.

²⁰⁹ *Id.* at 107.

²¹⁰ *Id.* at 108.

suggested by this transformation. Joe's return to movement has precipitated his return to a racially undefined self.

Shortly after his return to whiteness, Joe will counter his emergence into light and whiteness with a submergence into darkness and a 'Negro' identity.²¹¹ A day after cutting the buttons from his clothing, Joe walks through Jefferson. The conclusion of this journey is revealed from the get go: the narrator has already announced that the street Joe travels "le[ads] down through the negro section, Freedman town, to the station." Christmas has worked in Jefferson and lived on its periphery for a number of years, but, for the first time, he turns and walks down this road.²¹² Again Joe's movement leads to a racial transformation; again this transition is visible. As Joe leaves the town square, he "pass[es] people, white and black" and he "pass[es...] the homes of white people."²¹³ As he travels, this development in Joe is first evinced through the light's interaction with Joe. Just as Joe's proximity to the well-to-do owners of the automobile develop Joe as 'white,' his descent into "the black hollow,"²¹⁴ slowly turns him black: "the heavy shadows [...] slid[e] like scraps of black velvet across his white shirt."²¹⁵ By the time Joe has reached "the bottom of [the] thick black pit... abyss itself," the smell and voices of Negroes have "enclosed" him.²¹⁶

Within a matter of moments, Joe is drowning in this "lightless hot wet primogenitive space."²¹⁷ He turns – he must run, he must ascend to "the cold hard air of white people."²¹⁸ Only when "[t]he negro smell, the negro voices, [are] behind and below him," can Joe begin to relax. Independent of the internal tumult caused by his visit to Freedman town, Joe exhibits, in both his descent and ascent, control over his racial identity as well as the ability to alter that identity through movement.

III.12 – FINAL CONFESSIONS, FINAL IDENTIFICATIONS

By the end of the novel, Christmas has run for the better part of his adult life. Through all this running he has passed from black to white and back again as it suited him. Only Joanna Burden has interrupted Joe's control over his identity.²¹⁹ After overcoming his attachment to Joanna and the physical stasis and identificatory bifurcation precipitated by the attachment, Christmas has resumed moving and he has resumed passing. Without further change, Christmas's vacillation between the normatively contradistinctive racial identities could continue indefinitely. This return to status quo becomes impossible, however, as soon as Jefferson hears allegations of Christmas's black blood.

Between his sexual episodes with Joanna, Christmas has resided in a cabin on the edge of Burden's property. Lucas Burch has lived with Joe Christmas in this cabin. When a fire draws

²¹¹ There is not space here to explore Faulkner's alignment of femininity with wetness. Indeed, Faulkner saw women as structurally flawed. The view of women as "cracked vials of womenfilth" suggest a connection between not only race and gender and mobility, but also literal fluidity and moisture. This chapter must mention this connection even if it cannot explore it.

²¹² FAULKNER, *supra* note 3 at 114.

²¹³ *Id.*

²¹⁴ *Id.* at 115.

²¹⁵ *Id.* at 114.

²¹⁶ *Id.* at 114, 116.

²¹⁷ *Id.* at 114.

²¹⁸ *Id.* at 115.

²¹⁹ To an extent, this interruption was actually more a bifurcation of Christmas; he performed two racial identities. Joanna regards Christmas only as black, whereas Jefferson views him as white.

the townspeople to Burden's house, they encounter Lucas Burch alongside Burden's murdered corpse. Immediately suspected of the murder, Burch is afraid. In order to escape suspicion for the murder, Burch strategically reveals the potential of Christmas's mixed racial heritage. This statement immediately transforms Burch in the eyes of Jefferson. Now that Christmas is a Negro, Burch is no longer the murderer.²²⁰ Now that Christmas is a Negro murderer, the ending of the story is foreclosed; Christmas's society will attempt, unflaggingly, to pursue and destroy him.

In the deliberately ironic fashion of the novel, this irrevocable repositioning of Christmas within the eyes of Jefferson occurs at the same time Christmas explores the space between the two racial identities between which he has migrated his entire life. As with all self-identifications, Christmas's exploration of his identity occurs with movement. Christmas wants to move, so he walks. He walks for thirty miles.

While walking the thirty miles between Jefferson and Mottstown, the city in which he will eventually be captured, Joe's identity begins to break down in manners that have not yet occurred in the novel. The starvation, dehydration, and/or sleep deprivation that Christmas experiences during this journey likely induce many of these changes. But this journey is both a recap of and a summation to the endless road upon which Christmas has already traveled for fifteen years.²²¹ As Christmas walks he becomes weightless and he loses track of distance and time. It is not surprising that having lost control of the measurements of mobility that he soon thereafter loses control over the racial identity engendered by his mobility. But unlike the entire life that has preceded this walk, a life during which Joe has been white or black, definitively one to the exclusion of the other, Joe now becomes gray. At the end of his novel and at the limits of his physical capabilities, Christmas becomes a color that is neither one nor the other:

He breathes deep and slow, feeling with each breath himself diffuse in the neutral grayness, becoming one with loneliness and quiet that has never known fury or despair. 'That was all I wanted,' he thinks, in a quiet and slow amazement.²²²

Entering this grayness, Joe has actualized an identity that he has never even realized he has sought, an identity that devoid of racial tension, allows him peace.

Although Joe has finally eclipsed the despair and fury of his vacillating, yet unknowable racial identity, the Law will not allow him to enjoy it. Even as Joe actualizes this gray identity, he recognizes that the Sheriff and his men are chasing him into a black abyss from which there will be no exit. Even if Joe has developed the ability to perceive himself outside of the restrictive white/black binary of the South, he understands that in the eyes of the society that seeks him, he is forevermore (always already) a "nigger." Indeed, Joe's movement repeatedly frustrates his would-be captors. That is, while Joe has at first walked with no other purpose than leaving Jefferson except perhaps for walking itself, he is aware that the Law of Jefferson pursues him.

²²⁰ The community is willing to accept this explanation. Burch tells the sheriff, "That's right... Go on. Accuse me. Accuse the white man that's trying to help you with what he knows. Accuse the white man and let the nigger go free. Accuse the white and let the nigger run." Only the Marshall hesitates: "You better be careful what you are saying, if it is a white man you are talking about... I don't [sic] care if he is a murderer or not." FAULKNER, *supra* note 3, at 97-98.

²²¹ *Id.* at 339.

²²² *Id.* at 331.

Yet as Joe attempts to escape from the Sheriff and his men, he begins to lose his connection to the greyness – he starts turning black. At one point, he trades shoes with a young Negro he meets in order to throw the hounds off of his scent. The trade allows Joe to gain an advantage over his pursuers – they do lose his track – but the same shoes symbolize “the definite and ineradicable gauge of... movement” into both blackness and the black abyss that shall eventually claim him.²²³ In walking in Negro shoes, Joe is walking, to a degree as a Negro and, furthermore, is accepting as his own the Negro scent on the shoes that will confound the dogs. As Joe continues to move, it is this rising blackness that will move up Joe and eventually consume him.

The reader does not directly experience Joe’s initial capture. We learn only that he is apprehended while walking down the street in Mottstown. Perhaps Christmas has quit running and given himself over to his fate. Perhaps he is living out the last vestige of his gray identity, above the fury and the despair, and is no longer aware of his pursuit. Whatever the case, even Joe’s capture is an affront. That Christmas would dare continue to move like an innocent white man enrages society:

That was what made the folks so mad. For him to be all dressed up and walking the town... It was like he never even knew he was a murderer, let alone a nigger too.²²⁴

Either way, Christmas’s end is a foregone conclusion. Symbolically the abyss of blackness has been attempting to subsume and consume him. Sociologically, Joe’s death is assured the moment Lucas Burch denigrates his erstwhile cohabitant. Once the community of Jefferson first realizes that Joanna’s murder *might* have been committed by a Negro it immediately *was* committed by a Negro, but not any specific Negro rather ‘Negro’ itself.²²⁵ Racial tensions demand a sacrifice; Christmas, although not visibly a Negro, is figuratively tarred and transformed into the Negro that Jefferson requires.

Although it is Joanna’s murder that allows society to condemn and destroy Christmas, Joanna’s demise also demonstrates the fulfilling desire of Jefferson to set terminal identities for all of its characters. Throughout the novel Jefferson views Joanna as a spinster whose ostracization was complete at birth. For his part, Jefferson has viewed Christmas as little more than a bootlegger who lives in an old cabin on Burden’s property. Despite Jefferson’s thorough acquaintance with both individuals, the community is willing to transform each character completely and irrevocably at first opportunity. Jefferson’s own racist hysteria, always just below the surface, seizes on any opportunity to erupt. As discussed above, this hysteria will quickly convert Christmas into a “nigger” murderer who himself must die. However, the same drive to reconstitute Christmas into the palatable and immediately recognizable narrative trope of the ‘bad nigger’ will similarly reconfigure Joanna Burden. Once disdained, Joanna, in death, will be a young woman besmirched by a ‘nigger.’ This symbolic conversion from aged spinster to blossoming ingénue will maximize the transgression of her murder. Indeed, the community’s

²²³ *Id.* at 331.

²²⁴ *Id.* at 350.

²²⁵ *Id.* at 288. “Among them the casual Yankees and the poor whites and even the southerners who had lived for a while in the north, who believed aloud that it was an anonymous negro crime committed not by a negro but by Negro and who knew, believed, and hoped that she had been ravished too... .” This quotation is discussed further, *infra*.

“hope[] that she had been ravished too: at least once before her throat was cut and at least once after” demonstrates succinctly both the connection and perversion of Jefferson’s conception of race, sexuality, and violence.²²⁶

As both Christmas and Burden demonstrate, the boundaries of race and gender are returned to their impermeable status quo only by sacrifice that finally and forever attaches these characters with an identity. Only through their repositioning on the other side of the impermeable boundary between life and death can society (the novel?) find closure for the racial/gender ambiguity both characters have maintained in life. Only through this final transgression is the subjectivity of these characters psychologically set and literally destroyed. It is not without importance that both of these final transitions are mitigated through touch. It is Joe’s razor that finally turns Joanna into a paragon of Southern femininity. It is likewise through Hightower’s kitchen knife, in the hand of Percy Grimm, that Christmas reaches the apex of his blackness, an apex to which the novel takes us symbolically; “the pent black blood seemed to rush like a released breath. It seemed to rush out of his pale body like the rush of sparks from a rising rocket.”²²⁷ Neither does *Light in August* fail to quickly disclose the psychological stain that Christmas’s blood has left upon his assailants: “upon that black blast the man seemed to rise soaring into their memories forever and ever.”²²⁸ By the end of *Light in August*, Joe Christmas has become black, he has been seen, and he has been killed. In ultimately entering the normative role of a black male, being dismembered and desexualized, Christmas has found his ultimate position and his terminal identification.

IV. CONCLUSION

For all the critical attention given William Faulkner and all the scholarship produced on themes of identity and movement, it is surprising that critics have not more fully considered the relation between movement and identity in *Light in August*. In this novel William Faulkner undertakes a 500-page exploration of Joe Christmas’s ambiguous racial identity. In doing so, Faulkner provides readers an extended and specific insight into the racial anxiety that enables passing as well as the societal and psychological problems of racial identification and reidentification.²²⁹ Through an analysis of Joe Christmas and other characters, this chapter exposes some of the manners and instances through which the engagement of mobility can catalyze identity shifts.

Like Susie Guillory Phipps, Joseph Christmas will ultimately be identified by a societal power and a legal mechanism that will supersede the individual’s power of self-identification. However, when Joanna offers Christmas the opportunity to attend school and gain access to this power Joe denies this opportunity; he is unable publicly to embrace a ‘Negro’ identity. Christmas’s denial does not forestall his terminal racial identification. Nonetheless, Joe’s refusal to attend school does however preclude Christmas’s opportunity to become something else – a lawyer. He states: “‘To school,’ his mouth sa[ys]. ‘A nigger school. Me.’ [... ‘in order to] learn

²²⁶ *Id.*

²²⁷ *Id.* at 465. To push this analysis a bit further, the murder of Christmas is a racial confirmation and disconfirmation – ‘you are Negro, but no longer *a* Negro’ – just as his castration is determination and indetermination of his gender identity – ‘you are man, but no longer *a* man.’

²²⁸ *Id.*

²²⁹ It is not that Christmas can be neither white or black – indeed, he proves throughout the story that he can pass as either white or black. Christmas’s trauma stems from his inability to assert himself incontrovertibly as ‘not white’ or ‘not black.’ This subtle difference indicates the negativity of identity, that is, identity functions by negation.

law in the office of a nigger lawyer.’”²³⁰ Stunned by the premise of renouncing the power to identify himself, Joe is barred from becoming the condoned voice of the society that will destroy him – he cannot become the lawyer like Gavin Stevens who, removed from the action, might glean the facts and weave them into a final racial identification and legal judgment.

Yet beyond the ultimate legal identification of Christmas that Gavin Stevens can and does provide – *Light in August* succeeds not only through its display of the external forces that will identify Joe. Rather, the novel’s power comes through its presentation of those formative moments, these private vignettes to which neither law nor journalism can provide access. Compared to the first two discourses, literature both explicates the anxiety of identificatory disjuncture while displaying the alternative and auxiliary measures by which individuals can subvert or solidify their amorphous and or fractured identities. And although neither Christmas nor Phipps can ultimately refute their societal identification as ‘black,’ literature alone displays the ‘fury and despair’ that precipitates and flows from the troubled identification and re-identification of the self.

²³⁰ FAULKNER, *supra* note 3, at 276.

**CHAPTER III:
WITH PRETENSE TO NEITHER THE OBJECTIVITY OF LAW NOR THE SUBJECTIVITY
OF LITERATURE: A CONSIDERATION OF IDENTIFICATORY HERMENEUTICS
IN JAMAICA KINCAID'S *LUCY* AND U.S. IMMIGRATION LAW**

Jamaica Kincaid's fifth novel, *Lucy* (1990), is a first-person narrative written in the form of a journal. Having come north to work for as a nanny for an urban, white family, the eponymous narrator records her impressions of life as a young woman from the West Indies. As Lucy passes her first year away from home, she adjusts to her life in a new society, makes friends, dates, follows the breakdown of her employers' marriage, and ultimately quits her position, host family, and friends in order to start a new life, again. But the novel is more than a collection of events; as Lucy surmounts a variety of new challenges and misconceptions about herself, she reflects on both who she is and that which she has left behind.

On a critical level, *Lucy* is a novel in which the counterweights of determination and ambiguity maintain the central dislocation of the narrative. It is a novel in which the narrator assiduously tracks and, to a great extent, controls how things—locations, individuals, and cultural artifacts—are named and interpreted. By maintaining the contradistinctive tension between determination and ambiguity, *Lucy* not only controls interpretation within the novel, but also anticipates and works to challenge its own critical reception.

Although extant scholarship on the novel is enlightening and valuable, has broadened debates and significantly increased the novel's reputation, critics have yet to explore the novel's balance between such invitation and rejection of interpretation. In this chapter, I create a framework that understands both the rigorous maintenance of indeterminacy and the repetitive citation of misunderstanding and failed interpretations within the novel.

Yet, a literary analysis of indeterminacy and misunderstanding in the novel, by itself, would be incomplete. As mentioned above, the literary analysis in this chapter recognizes the text as a stand against interpretations as well as a locus of subversion. However, the literary analysis can only record these interpretations and artifacts that *Lucy*, both character and novel, subvert. By itself the literary analysis I offer can tell us 'what' is occurring in the novel, but it cannot sufficiently answer 'why.' To read Kincaid's novel as a movement towards dislocation in several senses certainly enlightens Kincaid's and *Lucy*'s projects, but this recognition does not tell us enough about this movement. To pose this question directly: what is this a movement from? A question of origin remains. In pursuing only the subversions of this text and advancing this interpretation against interpretation, my literary analysis of *Lucy*, indeed all literary analyses of the novel, are limited in their examinations of the set of material realities upon which the text necessarily depends. To pose the question more simply, how did this story happen? – or – what set of conditions enabled a young woman from the West Indies to abandon her family and homeland for a new country?

The reasons for this departure are numerous; critics of the novel, cited *infra*, have advanced a variety of theories. Nonetheless, there is only one manner in which this departure occurred. Long before *Lucy* (or Kincaid herself) could embark at her point of emigration or disembark at her point of immigration, she had to meet certain official requirements. In short, *Lucy* had to immigrate. If *Lucy* is, as some critics have suggested, an extension of Kincaid's

early 'island novel' *Annie John*, this extension, indeed this novel, depends upon Lucy's immigration, just as Kincaid's own immigration enabled her literary career.¹

My desire to explain both the critical moves within the novel as well as the set of political and legal realities that enabled the novel lends itself to a two-part chapter. In the first part of this chapter, I present an historical reading of laws and policies that have affected immigration in the United States. This first part is necessarily much larger in scope than the narrative contained in the novel. But by examining the series of legal acts that enabled Lucy's immigration north and Jamaica Kincaid's immigration to the United States, this part answers a number of questions that *Lucy* never poses: generally, how did Lucy emigrate? Specifically, what shift in legal circumstances enabled Lucy's fictional, and Jamaica Kincaid's actual, immigration? In one sense, this part provides a quick overview of the legal policies and practices that have structured identification and re-identification of both immigrants and racial minorities within the United States. Together the laws, decisions, and policies explored in this part demonstrate not only the long and pervasive influence of racist judicial and legislative decisions regarding immigration, but also reveal the frequency with which these decisions come through the subjective apportionment of fluid racial identities.

By diachronically exploring the system of laws and policies that gave rise to Lucy's immigration, this analysis provides a framework that is essential for understanding the interpretative challenges set forth repeatedly within the narrative. As such, the first part of this chapter situates *Lucy* as both a touchstone and a departure point for a consideration of interpretative methodologies of the immigrant. That is to say, the first part of this chapter apprises readers of the efforts to classify and identify immigrants within American history and, by doing so, alerts readers to the importance of Lucy's own attempts to resist troubling classifications and identifications in the novel. Without denying Lucy the individuality she seeks, this analysis of law and policy allows me to read *Lucy* as an immigrant travelogue that succeeds because of, more than in spite of, its entrance into fiction.

The second part of this chapter provides a literary analysis of the novel. Since its publication, Jamaica Kincaid's *Lucy* has garnered an impressive amount of critical attention from literary scholars.² The resultant criticism, which has variously situated *Lucy* in the critical discourses of feminism, post-colonialism, post-modernism, Caribbean literature, and black Aesthetics, shares a common weakness. The eagerness of critical commentary to position the novel within assorted discourses has, by and large, contributed to a comprehensive failure to acknowledge the interpretative challenges posed by *Lucy*; by providing locations for and interpretations of the text, critics have ignored Kincaid's textual emphasis upon dislocation and false hermeneutics.

In part II of this chapter, I propose a reading of *Lucy* that acknowledges the importance and interaction between the rigorous maintenance of indeterminacy and the repetitive citation of misunderstanding and failed interpretations. This reading has the advantage of raising awareness of the processes by which both the fictive characters in Kincaid's work within the novel as well

¹ For a discussion of Kincaid's immigration, see Dwight Garner, *The Salon Interview: Jamaica Kincaid*, available at <http://www.salon.com/05/features/kincaid.html> (last visited, Feb. 28, 2010).

² JAMAICA KINCAID, *LUCY* (Farar Straus Giroux 1991) (1990). All citations refer to this edition. See, e.g., MOIRA FERGUSON, *WHERE THE LAND MEETS THE BODY* (1994). JAMAICA KINCAID: A CRITICAL EDITION (Harold Bloom, ed., 1998); Katherine Sugg, "I would rather be dead": *Nostalgia and Narrative in Jamaica Kincaid's Lucy*, 10 *NARRATIVE* 2, 156; Edyta Oczkowicz, *Jamaica Kincaid's Lucy: Cultural "Translation" as a Case of Creative Exploration of the Past*, in *MODERN CRITICAL VIEWS: JAMAICA KINCAID* 117 (Harold Bloom ed., 1998).

as actual critics and scholars subconsciously, negligently, and even deliberately apply troubled interpretations and identifications to the novel.

Furthermore, my literary analysis focuses on the protagonist's rejection of false identifications of herself as well as misreadings of her motivations. I argue that *Lucy's* troubled hermeneutics assist both Lucy's maintenance of her identity against repeated misidentifications and interpretations and Jamaica Kincaid's meta-critical rejection of reductive interpretations of her work.

PART I – “HOW DOES A [POLICY] GET TO BE THAT WAY?”: THE DEPLOYMENT AND EVOLUTION OF IDENTIFICATORY HERMENEUTICS IN U.S. IMMIGRATION LAW

The first part of this paper seeks the complex answer to a simple question: What was the legal mechanism by which Lucy immigrated in the late 1960s? To answer this question, this part explores the fuller parameters of the legal system that instigated and regulated this system. Beyond any specific legislative act, a set of historical realities, legal precedents, and policy objectives precipitated and enabled Lucy and Jamaica Kincaid's immigration. The goal of this part is primarily historical as it explores the development of immigration policies through the 1960s as a means of further understanding the movements and identifications that, formally codified by immigration law, drive this text.

Yet before pursuing an answer to this question, it is necessary to make a small but important decision, an allowance that both looks forward and indicates the limits of this chapter's second Part. By focusing my literary analysis on the lack of denomination or naming in this novel, it is strange, but nonetheless necessary to begin the first part by denominating Lucy's destination as the United States. The inability to irrefutably make such a conclusion figures heavily in the second part of this paper. Nonetheless, this potential contradiction must be endured for the simple reason that an inquiry of the law relating to a specific act of immigration requires specification of which nation's immigration laws are under consideration.

The selection of the United States is supported by numerous grounds and numerous critics. Furthermore, it would be imprudent to ignore Jamaica Kincaid's own biography in making this decision; Kincaid, like Lucy, came to the U.S. as a teenager to work as an au pair.³ I mention this overlap less to draw correlation between Kincaid and her literary creation and more to support the necessary assumption with which I begin this Part.⁴ This selection is further endorsed by the history of immigration legislation. In the mid- to late-1960s, Congress made significant revisions in U.S. immigration law that certainly facilitated and likely enabled Kincaid's immigration.

To a degree, the answers to the questions posed above are quite simple: Lucy would likely have come to the U.S. when a 1965 amendment to the 1952 McCarran-Walter Act removed racial quota restrictions on immigration.⁵ But like literature, it is uncommon for a law to be *sui generis*. Rather, both law and literature reflect the society in which they are produced. And just as literature stands subject to the passage of time, so does law. Kincaid's realistic

³ KINCAID, *supra* note 2, at 7; Dwight Garner, *The Salon Interview: Jamaica Kincaid*, available at <http://www.salon.com/05/features/kincaid.html> (last visited, Feb. 28, 2010).

⁴ I hesitate in part to resort to reality to resolve a conflict concerning the migratory destination of a fictional character. Nonetheless, the series of textual clues in Kincaid's text confirm that if Lucy is indeed within a real city in which the inhabitants speak English, in which there are seasons, and in which there was a functioning subway system in the late 1960s, the only option outside of the United States would be Toronto.

⁵ This act and its importance are discussed more fully, *infra* at note 142.

depiction of a black servant, Lucy, and Twain's depiction of a black slave, Roxy, are both stages chronicling the black woman as child care provider, just as the slave codes that immobilized Roxy and the immigration laws that allowed Lucy's mobility are both stages in the legal identification and objectification of black bodies.

I note the correlation between the cultural determinants on law and literature to indicate the paucity of understanding gained from reducing the grounds for Lucy (and Kincaid's) immigration to the ultimate enabling legislative act. Our knowledge that the 1965 revisions to the McCarran-Walter Act removed racial quota restrictions still fails to explain why racial quota restrictions had existed prior to these revisions. In order to understand the construction and effects of this legislation, it is necessary to consider events long before its passage. Accordingly, the greater accomplishment of this first part comes through the complex ways in which the parameters of this question have redefined themselves as they have expanded.

What follows in this part, then, is an examination of the legislation that directly enabled Lucy's immigration into the United States preceded by an extended consideration of both the background for this legislation and a selection of other legal documents that have both recorded and shaped immigration within the United States. The points I connect here are, quantitatively, quite meager. Immigration law is a complex field and concern with American immigration precedes even the establishment of the United States. Nonetheless, the acts and decisions cited here, when connected, form a larger picture of American immigration law that, like many areas of law, is plagued by racism. The final result, in which one class of people is ultimately, legally identified as greater than another group, comes through laws.

It is important to remember that these laws not only exhibit the power of the State, but in themselves contain the interpretive moves made through which the State accomplishes injustice. As demonstrated repeatedly within *Lucy* and discussed extensively in the second part of this chapter, the power of reductive identifications lies in the interpretive methodologies, that is, the legal hermeneutics, of racism. As demonstrated in both *Pudd'nhead Wilson* and *Lucy*, these hermeneutics find application in the legal construction and control of identificatory boundaries.

Aware of the legal hermeneutics of racism, this chapter advances beyond the unsurprising revelation of historically racist laws to lay bare in some small way the means by which this racism has operated at points in 'American' legal history. To accomplish this task, this chapter constellates legal actions against a literary analysis of a fictional chronicle of one immigrant's experience. Ultimately, this part illustrates the connections among race, interpretation, and identity, while implicating the legal systems that, through racial identification and restrictions on both naturalization and immigration, have subjugated specific immigrant classes over the last 370 years.

In North American legal history the correlation between racial identity and mobility, specifically government's usage of identity to limit the movement of individuals, predates the founding of the United States by over a century. On June 4th, 1640, the Council and General Court of Colonial Virginia heard the complaint of one Hugh Gwyn. Gwyn had come to the court after three of his servants had absconded to Maryland.⁶ Gwyn petitioned the court give him a

⁶ MINUTES OF THE COUNCIL AND GENERAL COURT OF COLONIAL VIRGINIA, 1622-1632, 1670-1676, WITH NOTES AND EXCERPTS FROM ORIGINAL COUNCIL AND GENERAL COURT RECORDS, INTO 1683, NOW LOST (Henry Read McIlwaine ed., The Colonial Press, Everett Waddy Co., 1924), [Hereinafter, MCLWAIN], *as cited by*, American Legal History – Russell, Website hosted by Thomas D. Russell, Professor of Law, University of Denver, College of Law, at <http://www.houseofrussell.com/legalhistory/alh/docs/viriniageneralcourt.html> (last visited, Feb. 28, 2010). For the same account of this case, *see* THE VIRGINIA MAGAZINE OF HISTORY AND BIOGRAPHY, (Philip Alexander Bruce, ed.), June 1898, VOL. 5, at 236, *available at*

letter imparting him “liberty to make the sale or benefit of the said servants in the said Maryland... .”⁷ The court, “weighing the dangerous consequences of such pernicious precedent” that would come of allowing servants either to run away and be allowed to work or be sold to work in Maryland, instead ordered a letter written to the governor of Maryland instructing the return of the servants.⁸ Upon their return, the servants were first to be punished “as the nature of their offence shall justly deserve” and then returned to Hugh Gwyn.⁹

Court records indicate that a little more than one month later, the servants were brought before the Virginia tribunal.¹⁰ All three servants were ordered “to receive the punishment of whipping and to have thirty stripes apiece.”¹¹ This is where the similarity in punishment ended. The first two servants, a “dutchman” and a “Scotchman” were sentenced to serve a “whole year apiece after the time of their service [had] Expired” for having abandoned their master and three further years of service “to the colony.”¹² The other servant, “being a negro named John Punch [was sentenced to] serve his said master or his assigns for the time of his natural Life here or elsewhere.”¹³

Almost four centuries have passed since this proceeding. Still, it remains impossible to divine with absolute certainty the motivations of the court in this disparate sentencing. However, one is hardly able to overlook that, within the short record of this case, the three servants are differentiated only by their race.¹⁴ When Gwyn first comes to court, the servants are grouped together as a body of three: “they have run away.”¹⁵ In this first record of Gwyn’s case, the court does not mention whether it is aware of the racial identities of the three servants.¹⁶ As Gwyn likely had to describe the runaway servants to the court, such description being necessary to the letter intended for the governor of Maryland, the court was likely aware of the racial differences of the three men. However, this information was initially not important enough to warrant recordation. The court did not bother to differentiate criminals beyond its reach.

Unfortunately for John Punch, this racial difference was highly important to the court when he came before it. In perhaps the first instance of deliberately racist application of the law

http://books.google.com/books?id=EAclAAAAIAAJ&pg=PA236&lpg=PA236&dq=%22weighing+the+dangerous+consequences+of+such+pernicious+precedent%22&source=bl&ots=OaSsrOhRcr&sig=dN1Jedf0Id7gPh3nG1XJz7oOW5w&hl=en&ei=hruJS9KVNYSscgP31KmGAw&sa=X&oi=book_result&ct=result&resnum=1&ved=0CAoQ6AEwAA#v=onepage&q=&f=false (last visited, Feb. 28, 2010). For further discussion of this case, *see also*: AFRICANS IN AMERICA/PART 1/VIRGINIA RECOGNIZES SLAVERY, <http://www.pbs.org/wgbh/aia/part1/1p262.html> (last visited, Feb. 28, 2010). *See also*, RONALD H. BAYOR, THE COLUMBIA DOCUMENTARY OF RACE AND ETHNICITY IN AMERICA 54. (noting that “[t]his decision by the Virginia Council and General Court demonstrates the growing distinctions between indenture and enslavement,” *available at* <http://books.google.com/books?id=o2eWvyig9SgC&pg=PA54&lpg=PA54&dq=%22hugh+gwyn%22+virginia&source=web&ots=GhM6VaojdL&sig=ShlKzaccgSrSJ-2wzn8gpjmQmOi4#PPA54,M1> (last visited, Feb. 28, 2010).

⁷ McIlwaine.

⁸ *Id.*

⁹ *Id.* The language of this case and other 17th-century cases, discussed further *infra*, is early modern English. This English contains numerous usages and spellings that do not accord with contemporary standards. Because of the large number of these differences and because the profusion of such notation would unnecessarily impede the reader’s perusal of the language, I have refrained from using “[sic].”

¹⁰ *Id.* The servants were brought before the court on July 9th, 1640.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

within America, the court sentenced two European servants to an extra four years of labor, while converting John Punch, their *Negro* co-conspirator, from indentured servant to slave.¹⁷ Despite the court's earlier mandate to punish the servants "as the nature of their offence shall justly deserve," the greater punishment received by John Punch is not supported by the record. The court never describes the specifics facts of Gywnn's claims nor does the court in any other way suggest that John Punch deserves an extended punishment. The simplest conclusion is that before the colonial Virginia court, there was no difference in the nature of the offenses committed by the three men only a *judicially acknowledged* difference in the nature of the offenders.

The case of John Punch has been cited as being the first judicial sentence of enslavement in colonial America. However, this case was only one of the many early judicial attempts to control the movement, labor, and identity of individuals within the colonies. With this in mind, it is not surprising that the only case McIlwaine recorded between Gwyn's petition to sell or make use of his servants in Maryland and their subsequent sentencing in Virginia, was a judicial action seeking to capture other 'Negroes' who had abandoned their masters.¹⁸ On June 30, 1640, the court granted commission to *John Mattrom* and *Edward ffleet* [*sic*] "to levy a party of men, or more if need require, out of the trained band for *Charles river* county with arems and ammunition to go in persuit of certain runaway negroes and to bring them in to the governor."¹⁹ Although these "runaway negroes" are not identified as slaves, the fate of John Punch leaves little doubt that black bodies were viewed as property whose unauthorized movement posed, in the words of the court, "dangerous consequences" to early American societies.²⁰

While the importance of racial identity, restriction of mobility, and exploitation of labor are readily apparent in these two judicial reports, the themes of property and identity pervade the majority of the early Virginia cases recorded in McIlwaine's minutes. In some cases the treatment of property is benign; the court's enforcement of exchanges of "corne" for "the said *Tobaccoe*" and the tribunal's resolution of land disputes remind us of the agricultural production that made Virginia a highly valued English colony.²¹ Other cases indicate a view of individuals as possessions that appears disquieting at best. In early April 1629, the court received the testimony of George Vnwise who attested that his servant, Dorcas Howard, had become ill. Upon threat of beating, she admitted that she was pregnant.²² Although Vnwise testified that he had offered to send for midwives to help his servant through labor, she persuaded him to leave her alone.²³ When Vnwise returned to her the following morning, she announced a miscarriage.²⁴ Despite the servant's pronouncement, the bruises on the child's head raised suspicions of infanticide. The court deposed a number of witnesses who had viewed the child, but as all testified that the child "might bee borne alyve," the court held itself incapable of

¹⁷ *Id.*

¹⁸ *Id.* As this paper is attuned to the power of language, the lack of an appropriate term for those who were of African descent but arguably not Africans, yet who, preceding the formation of the United States, perhaps cannot properly carry the label of African Americans has not escaped my notice. I use the word 'Negroes' here to acknowledge the historical position of the term as well as the power it carried.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id. Re George Vnwise.*

²³ *Id.*

²⁴ *Id.*

deciding whether the child “were borne alive or deade,” and sent the case on for further review “at the Quarter Co^{rt} . . . at *James City*.”²⁵

The factual record for all the cases within McIlwaine’s minutes is sparse; as such, there is no way to know the cause of this infant’s death.²⁶ Nonetheless the record clearly evinces both an anxiety of identity – whose child is this? – as well as the view that violence was an appropriate means of inducing compliance of a female servant. It appears Vnwise felt no compunction to testify that he had beat his servant. Although such abuse and sexual control comport with our dim ideas about how life ‘must have been’ in a 17th-century agricultural colony, the anxiety of identity and the violence used to restrict illicit pairings (assault and murder) is a stunning reminder of the importance of the boundaries of this colonial American society. Still, in a case brought to court on March 25th, 1629, the selective transgressibility of these boundaries appears in a most curious form.²⁷

With a number of actions on their docket that day, the court first considered the case of Thomas Hall, “Christned by the name of *Thomasine*.” At issue before the court was “wether hee were man or woeman.”²⁸ In reciting the evidence the court admitted the depositions of numerous witnesses who attested to their own examinations of Hall. Some of these witnesses, having forcefully examined Hall, concluded he was a man.²⁹ Others however, noted that Hall “was both only hee had not the use of the mans parte. . . .”³⁰ With every identification and reidentification, the examining party commanded Hall to “bee put in. . . apparell” coinciding with his gender.³¹ For these witnesses, clothing was seen as an analogue of gender identity: to be a man, or a woman was to wear the respective apparel.³² Despite this reliance on the visual, Thomas(ine) Hall was doing more than passively representing both genders in her dress. Doubts about Hall’s gender first came to a head upon “a Rumof and Report that the said *Hall* did ly wth a maid of M^r *Richard Rodes*.”³³ On the contrary, other witnesses provided evidence of Hall’s female gender: a witness testified that when Hall was asked why he dressed as a woman, Hall responded “*I goe in woemans aparell to gett a bitt for my Catt*[...]”³⁴ The court, fully persuaded by neither set of witnesses, took testimony from Hall. In testimony, Hall recounted his birth “at or neere *Newcastle uppon Tyne*” and his travels thereafter as well as his many transitions between male and female clothing and, ostensibly, identities.³⁵

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* *Re Thomas Hall*. (“Exaicons taken before *John Pott* Esq^r gouerno^r the 25th day of *March A^o* [1629]” at 194).

²⁸ *Id.*

²⁹ *Id.*; (“*ffrancis England*... threw the said *Hall* on his backe, and then this exaiate felt the said *Hall* and pulled out his members whereby it appeared that hee was a perfect man”).

³⁰ *Id.* (Noting that Hall’s “mans parte. . . was a peece of fleshe growing at the . . . belly as bigg as the topp of his little finger [an] inch longe”).

³¹ *Id.* *Re Thomas Hall*. (“Exaicons taken before *John Pott* Esq^r gouerno^r the 25th day of *March A^o* [1629]” at 194).

³² For a foundational discussion of gender performativity, see JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

³³ MCLILWAINE.

³⁴ *Id.*

³⁵ *Id.* The passage, in which, Hall recounts his times as both a soldier and a needleworker is quite impressive:

Thomas Hall exaiad saith that hee being borne at or neere *Newcastle uppon Tyne* was as hee hath beene often tould Christned by the name of *Thomasine* and soe was called and went Clothed in woemans apparell there untill the age ot twelve yeares at wch age the said Exaiats mother sent him to his Aunte in London and there hee lyved ten[?] ye[ares] untill Cales Accon, at wch tyme a brother of his being pressed for that service this exaiate Cut of his heire an Changed his apparell

As with the case of Vnwise, the court ultimately conceded its inability to decide. Instead of identifying Thomas(ine) Hall as belonging exclusively to either gender, the court ordered it “published in the plantacon where the said *Hall* lyveth that hee is a man and a woeman... .”³⁶ Reinforcing the connection between gender and gender-specific clothing, the court further ordered that Hall “goe Clothed in mans apparell, only his head to bee attired in a Coyfe and Crosclath[?] wth an Apron before him...”³⁷

The court’s willingness to accept Hall’s hermaphroditism, intersex, and/or transsexualism, indeed to order cross-dressing, seems a remarkably prescient recognition of the limitations of the gender binary. Yet despite this court’s willingness to allow and even mandate fluid sexuality in 17th-century Virginia, racial boundaries remained intransgressible. To this colonial court, the difference between male and female could be selectively maintained and, in a fashion, ordered, if not accepted. Racial difference, on the other hand, meant the difference between one extra year and a lifetime of servitude.

Spurred perhaps by the difficult task of gender identification that had come before them that morning, the court ordered an enumerative action later that day.³⁸ The court ordered “that every comaunder wthin the severall plantacons of this Colony shall take a generall muster of all the inhabitants men woemen and Children as well *Englishe* as Negroes.”³⁹ The order, which stands as one of the earliest (if not *the*) earliest census in the new world, already entangles race, gender, and nationality as axes of identification.⁴⁰ Yet while *Re Thomas Hall* allows ambiguity within the identification of gender, the status of “Negro,” juxtaposed here against “*Englishe*” and later, in *Re Thomas Punch*, against “dutchman” and “Scotchman” indicates the inability of the ‘Negro’ to ever be English, Dutch, or Scottish.⁴¹ This census’s contradistinction between African race and European national enumerates the black body even as it situates the ‘Negro’ as outside the privileges of a national identity.

While the John Punch case is well acknowledged as the earliest judicial decision dealing with slavery within the early American colonies, the other cases within McIlwaine’s Minutes also indicate early colonial concerns with property and identity.⁴² More important for a historical analysis of the law of immigration, however, is the recognition that from the very beginning of American jurisprudence, courts have sought to immobilize and disparately punish racial minorities. Before there was a Department of Homeland Security, or a Department of Immigration and Naturalization Services, before Congress established the Bureau of Immigration, or saw fit to limit immigration or naturalization in any way, indeed, before there

into the fashion of man and went over as a souldier in the Isle of Ree bing in the habit of a man, from whence when he was returned hee came to Plymouth, and there hee changed himselfe into woemans apparell and made bone lace and did other worke wth his needle, and shortly after Shipping being ready for a voyage into this Country hee Changed againe his apparell into the habit of a man and soe came over into this Country.

³⁶ *Id.*

³⁷ *Id.* at 195. The full order concludes “... Apron before him And that hee shall finde suerties for his good behavio^r from Quarter Co^{rt} to Quarter Co^{rt} untill the Co^{rt} shall dischardge him and Cap^t *Nathaniel Basse* is ordered to see this order executed accordingly.”

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* The full order reads: “*It is ordered* that every comaunder wthin the severall plantacons of this Colony shall take a generall muster of all the inhabitants men woemen and Children as well *Englishe* as Negroes inhabiting wthin the same and Retorne a lift of their names to the Governo^r and Councell at the next Quarter Co^{rt} to bee here holden.”

⁴¹ *Id.*

⁴² *Id.* See also, BAYOR, note 6, *supra*.

was even a United States, there were courts in colonial America that were already concerned with racial identity. This concern led to both the distinction of identity through enumeration and the disparate and extreme punishment of non-white individuals who attempted to migrate without permission. Here, initial distinctions between *Englishe* and *Negroe*, established the disjuncture between nation and race in which a court of law could define an African(-American) like John Punch outside of nationality and thus beyond the purview of the advantages that accrete with citizenship. If such judicial decisions are not the origin of this disjuncture, they are ancestors of the same classification system, the same hermeneutics of racism, that centuries later would establish national and distinct racial-origin immigration quotas. Between these quotas, whose repeal enabled Kincaid and Lucy to travel to the U.S., and the predicative methodology advanced by 17th-century judicial decisions, lies the migration of attempts at reductive identification and demobilization from the decision of a judicial panel to the legislated will of a republic. It did not take long before these attempts at racial distinction, first promoted in case law, were advanced by the legislative bodies of the colonies.

Approximately one year after McIlwaine recorded the Virginia colonial court's decision to enslave John Punch, Massachusetts became the first American colony to recognize and authorize slavery.⁴³ Ironically titled the "Body of Liberties," this Act sanctioned the deprivation of liberty from any "captives taken in just wars and such strangers as willingly s[old] themselves or [we]re sold unto us [state citizens]."⁴⁴ The legislature defined neither the boundary between just and unjust wars, nor did it expound upon the circumstances that would lead strangers to sell themselves willingly into servitude. In 1661, Virginia followed suit.⁴⁵ Together, these early laws affected not only the millions of people who would suffer under American slavery, but many non-European immigrants centuries later. At its most basic level, immigration is the maintenance of the selective transgressibility of geographic boundaries. As the transgressibility of these boundaries was initially correlated with race, the first legislation in the colonies mentioning slavery advanced the necessary framework of racial exclusion and immobilization by which future naturalization and immigration legislation could find a basis.⁴⁶

Similar to McIlwaine's notes on the Virginia colonial court, the focus on identification and demobilization in colonial America often came with the drive to enumerate individuals. Over the last four centuries, the inquiry of legislative bodies into the scope of racial

⁴³ THE BODY OF LIBERTIES OF THE MASSACHUSETTS COLONIE IN NEW ENGLAND (1641), reprinted in 5 THE FOUNDERS' CONSTITUTION 46, (Philip B. Kurland & Ralph Lerner, eds., 1987). For discussion of the BODY OF LIBERTIES, see BENJAMIN FRANKLIN GRADY, THE CASE OF THE SOUTH AGAINST THE NORTH; OR HISTORICAL EVIDENCE JUSTIFYING THE SOUTHERN STATES OF THE AMERICAN UNION IN THEIR LONG CONTROVERSY WITH NORTHERN STATES (1898), available at, <http://books.google.com/books?id=wFE0AAAIAAJ&pg=PA214&lpg=PA214&dq=1641+massachusetts+slavery+%22body+of+liberties%22&source=web&ots=YamNsDTtIL&sig=SrVoL3auEAffvXK74JsabLsNPd4> (last visited, Feb. 28, 2010).

⁴⁴ GRADY, *supra* note 43, at 241.

⁴⁵ Act CII, Laws of Virginia, March, 1661-2, COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, vol. II, 116-17 (William Waller Hening, ed., 1823), available at <http://vagenweb.org/hening/vol02-06.htm> (last visited, Feb. 28, 2010). See also, JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 63-67 (1974); the Law Library of Congress page on "Slavery and Indentured Servants," <http://memory.loc.gov/ammem/awhhtml/awlaw3/slavery.html> (last visited, Feb. 28, 2010).

⁴⁶ By examining the laws that demarcated racial and national identity, we can understand more fully the national- and racial-origin quotas that for decades formed the basis of American immigration policy.

heterogeneity has occurred alongside actions to forfend the ability of non-whites to participate fully in civic life. Such practices were also part of the founding of this country.

The first Congress of the United States is noted for establishing the census.⁴⁷ However, even then Congress was not only concerned with enumerating the inhabitants of the newly formed country, but also establishing rules to govern which of those inhabitants might enjoy the privileges of citizenship. Although, or perhaps because, the United States was twenty percent black at its founding,⁴⁸ the first Congress also passed an act to limit naturalization to whites.⁴⁹

Despite a century-long colonial American tradition of racist application of laws, whose apotheosis was slavery itself, the first decennial census in 1790 enumerated more than 59,000 free blacks within the United States.⁵⁰ When aggregated with the approximate 700,000 slaves within the country, the racial heterogeneity of early America is undeniable. Nonetheless, the concurrent limitation of naturalization to “free white person[s]” immediately and irrefutably foreclosed the ability of racial minorities to enjoy the same privileges and protections of the country they were literally building. By legislative fiat, Africans could not become African-Americans.

In much of the scholarship on immigration, there are distinct and competitive claims as to which piece of legislation qualifies as the “first immigration law.”⁵¹ If naturalization is acknowledged as the endpoint of immigration, we are able to recognize the impact of decisions made even by the very first Congress. Although eighteen more years would pass before the U.S. actually attempted to close its borders to non-white races, the early restriction of naturalization to ‘free white persons,’ denied all but one racial group the advantages of citizenship.⁵² In this sense, the limitation of geographic border crossings was perhaps less pressing because of the stringent constriction of citizenship. Darker races, could and did come to the United States, but they would come deprived of an ability to become part of the United States.

Although the legislation and policies produced in response to the Civil War would rectify no small amount of the racial inequity within the United States, the limitation of citizenship

⁴⁷ First Census of the United States, Population of the United States as Returned at the First Census, 1790 (1791), available at <http://www.census.gov/prod/www/abs/decennial/1790.htm> (last visited, Feb. 28, 2010).

⁴⁸ ROGER DANIELS, *COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE* 3 (1990).

⁴⁹ Act of March 26, 1790 Restricting Naturalization to free white persons, 1 Stat. 103 (1790). *See also*, amendments to the act: 1 Stat. 414, Ch. 20, Jan. 29, 1795; Amendment at 1 Stat. 414, 1 Stat. 566, Ch. 54, June 18, 1798; Amendment at 1 Stat. 566, 2 Stat. 153, Ch. 28, Apr. 14, 1802; Amendment at 2 Stat. 153, 2 Stat. 292, Ch. 47, Mar. 26, 1804; Amendment at 2 Stat. 292, 4 Stat. 69, Ch. 186, May 26, 1824; Amendment at 4 Stat. 69, and 16 Stat. 254, Ch. 254, July 14, 1870; Amendment at 16 Stat. 254.

⁵⁰ Act providing for the enumeration of the Inhabitants of the United States, ch. 2, §1, 1 Stat. 101, 101 (1790). *See also*, First Census of the United States, Population of the United States as Returned at the First Census, 1790 (1791), available at <http://www.census.gov/prod/www/abs/decennial/1790.htm> (last visited, Feb. 28, 2010). Final census figures tabulated 59,511 free blacks, 697,697 slaves, and 3,929,326 total people in the United States. Although outside the scope of this paper, it bears mentioning that indigenous people were specifically excluded from enumeration.

⁵¹ *See, e.g.*, Michael Maggio, Larry S. Rifkin, Sheila T. Starkey, *Practicing Law in the Americas: The New Hemispheric Reality: Immigration Fundamentals for International Lawyers*, 13 AM. U. INT’L L. REV. 857; Joyce Kuo, *Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools*, 5 ASIAN L.J. 181 (1998); David M. Turoff, *Illegal Aliens: Can Monetary Damages be Recovered from Countries of Origin under an Exception to the Foreign Sovereign Immunities Act?*, 28 BROOKLYN J. INT’L L. 179 (2002); Michael R. Curran, *Flickering Lamp Beside the Golden Door: Immigration, the Constitution, & Undocumented Aliens in the 1990s*, 30 CASE W. RES. J. INT’L L. 58 (1998).

⁵² *See* notes 62, 79, *infra*; Slave Trade Prohibition Act, 2 Stat. 426 (1807).

would remain in subsequent amended versions of the Naturalization Act through 1870.⁵³ The opportunity for African-Americans to become U.S. citizens and, at least theoretically, enjoy the privileges of citizenship was a colossal and necessary step towards equality. Nonetheless, the postbellum 1870 amendment that ultimately excised the ‘white person’ citizenship standard from the first sentence of the Naturalization Act would also display a heightened and even inordinate concern with accuracy of an individual’s identity. After the 1870 amendments, the Naturalization Act for the first time contained numerous stiff penalties—5 years imprisonment, \$1,000 fine—for those who would either make false oaths of identity or “personate the deceased.”⁵⁴ Only after a number of similarly punitive sections detailing the great punishment for attempting to mis-identify oneself did the last section of the amendment almost dismissively deign to extend “the naturalization laws... to aliens of African nativity and to persons of African descent.”⁵⁵ This backhanded extension of rights, presented as it was after the series of restrictions on mis-identification, underlined the stakes of identity as it signaled a shift in the battle lines. Citizenship, now decoupled from whiteness, was a property right of a sort whose class of owners had recently expanded. Yet, once the potential class of possessors of this right had expanded, the legislature sought others ways to limit both the value of citizenship to the newly naturalized African-Americans as well as the transfer of this privilege. The 1870 Amendment only expanded the right of citizenship to Africans or African-Americans; individuals who were not European or African were still denied the privilege of American citizenship. As such, the prohibition on misidentification in the Amendments not only functioned to try to keep African-Americans from passing and thereby acquiring the other advantages of white identity, advantages no longer coterminous with citizenship, but also precluded any other races that might try to gain citizenship by passing as black or white.

The advantages of citizenship, granted and denied through the words of legislative bodies, carried great weight and impact upon the lives of those affected. The Congressional Annals for the Fourth Congress of the United States records a petition brought by four manumitted blacks pleading for relief for their similarly manumitted relatives who had been kidnapped and sold back into slavery.⁵⁶ The testimonial briefs of the four men recount their experiences of being hunted day and night by men with “guns, swords, pistols, and mastiffs,” being captured and imprisoned for four weeks, “suffering much for want of provision,” and

⁵³ 4 Stat. 69, Ch. 186 (1824); 16 Stat. 254 (1870).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ My research is tuned both to identity and the appellations it can carry. I use the term ‘blacks’ as an inclusive term for any people of African-descent including but not limited to Africans, African-Americans, Afro-Caribbeans, et al; Annals of Cong, 4th Congress, 2d session, Senate, 2015-24 (1796-1797). See Annals of Congress home page <http://memory.loc.gov/ammem/amlaw/lwac.html> (last visited, Feb. 28, 2010). I first found mention of this petition in Lolita K. Buckner Inniss, *Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness*, 49 DEPAUL L. REV. 85 (1999). Buckner-Inniss writes:

In other areas, freed slaves were subject to capture and resale. Such was the case in 1797, when four blacks petitioned the United States House of Representatives for federal protection of manumitted slaves in the South. The four men, Jacob Nicholson, Jupiter Nicholson, Job Albert, and Thomas Pritchett averred in their petition that they were all North Carolinians who had been set free by their masters, that they were pursued in order that they might be resold into slavery, and that while they and some of their family members had escaped, others had not. The men sought federal intervention to free their captured kinsmen and to prevent the repetition of such actions. Their petition, however, was rejected by the House.

finally escaping.⁵⁷ Arguing that the petition involved a judicial question, and moreover a judicial question not for the federal Congress or judiciary, but rather for the state of North Carolina that enacted the law, the House shamefully voted against officially receiving the petition.⁵⁸ This moment of history, preserved only insofar as Congress paid attention to it long enough to find it unworthy of their attention, represents specifically the conversion of non-whites to working objects in spite of their manumission and generally the continued racial stratification of rights in the early United States. An argument against hearing the case left unmade by Congress, but an argument with which a North Carolinian court easily could have refused to hear the case (an argument courts later infamously used) would have been to deny the petitioners' standing due to their lack of citizenship.⁵⁹ In refusing to receive the petition, Congress did not mention citizenship, indeed Congress did not need to mention citizenship status in order to demonstrate the United State's willingness to subsume the freedom of these men and their families to the exploitative labor practices and material profit of white slave owners. Congress's decision against intervention potentially catalyzed further racial restrictions and, in any case, offers a historical precedent for many subsequent injustices including the current exploitation of non-white immigrants as cheap labor within the United States.⁶⁰

It was not, however, until 1807 that the United States attempted to limit the rights and opportunities of individuals based not only on race, but also upon location.⁶¹ By controlling American ports and other "place[s] within the Jurisdiction of the United States," the Slave Trade Prohibition Act focused on limiting immigration as a supplement to the limitations of the naturalization act.⁶² Not surprisingly, the first congressional act explicitly focusing on

⁵⁷ *Id.*

⁵⁸ Annals of Cong., 4th Congress, 2d session, Senate, 2015-24 (1796-1797). See Annals of Congress home page <http://memory.loc.gov/ammem/amlaw/lwac.html> (last visited, Feb. 28, 2010).

⁵⁹ *Cf. Scot v. Sandford*, 60 U.S. (19 How.) 393 (1857) (concluding that blacks were not intended to be included in the definition of "citizen" in the U.S. constitution).

Dred Scot claimed that he was freed when entering into a territory without slavery. The Supreme Court held Scot had no claim to freedom as he was not a citizen within the meaning of the Constitution and, as such, had no standing to sue in the United States.

In this very famous case, racial bars to naturalization corrupted Dred Scot's attempt to gain justice. The appearance of location, movement, boundaries, and, ultimately, standing in the Court's argument makes the case very pertinent to a consideration of laws and limitations upon international migration.

⁶⁰ In the early 1800s states acted to limit or forbid manumissions, to require freed blacks to leave the state, and to allow recapture and resale of freed blacks. See, WINTHROP D. JORDAN, *WHITE OVER BLACK* 122-23 (1968).

⁶¹ Slave Trade Prohibition Act, 2 Stat. 426 (1807), U.S. Statutes at Large 9 Cong. Ch. 22 ("To prohibit the importation of slaves into any port or place within the jurisdiction of the United States, from and after the first day of January, in the year of our Lord one thousand eight hundred and eight").

⁶² *Id.* The following year, Congress considered and confirmed its authority under the Migration and Importation Clause of the Constitution to limit immigration in this manner. See Annals of Cong., 4th Congress, 1st session, House, 138-42 (1820). See Annals of Congress home page <http://memory.loc.gov/ammem/amlaw/lwac.html> (last visited, Feb. 28, 2010) (discussing the rights of the federal government under U.S. CONST. art. I, § 9, cl. 1 to halt the importation of slaves. Further distinguishing between 'Importation' and 'Migration') ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight"). Somewhat surprisingly, the amount of critical attention this Act subsequently received has focused on the importance and impact of this legislation regarding the American institution of slavery while overlooking the importance of this act to the history of immigration legislation within the United States. See, e.g., Renee Colette Redman, *Freedom: Beyond the United States: The League of Nations and the Right to be Free from Enslavement: The First Human Right to be Recognized as Customary International Law*, 70 CHI.-KENT. L. REV. 759 (1994); Paul Finkelman, *Civil Rights: Looking Back –*

immigration focused on the rejection of Africans and the exploitative labor to which they would have been subjected in the United States. While the rights of blacks had been explicitly restricted by earlier legislation, the Slave Trade Prohibition Act was the first law to restrict the entrance of blacks into the country and is arguably another first in immigration restriction. Despite the directed focus on immigration, this legislation necessarily affected not only the importation of new slaves, but also the mobility of all blacks already residing within the United States. As port masters responsible for enforcing the Act had difficulty differentiating between newly imported slaves, domestic slaves in transport, and the burgeoning number of freed blacks traveling, this legislation likely interfered with the rights of American blacks to travel.⁶³

This question of willful travel under the Migration and Importation Clause of the Constitution, as opposed to the forced migration of slavery, ultimately made it to the Supreme Court in the 1849 *Passenger Cases*.⁶⁴ At issue was whether the Constitutional Clause limiting Congressional prohibition of “[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit,” before 1808 applied only to the forced migration of slaves or whether it could be applied to immigrants as well.⁶⁵ In a highly procedural argument dealing primarily with the balance of state and federal powers, the Supreme Court held that state-levied taxes on foreign immigrants were an unconstitutional encroachment upon federal regulation of foreign commerce. These cases distinguished between imports, slaves, and immigrants, and advanced the suggestion, thereafter quickly forgotten, that “the whole history of immigration shows clearly that the framers of the Constitution never anticipated interposing obstacles to it.”⁶⁶

Despite the Court’s holding, the interposition of obstacles to immigration began to occur with greater frequency. In the mid-19th century, the United States faces a number of racial and immigrant problems. As divisions between the North and the South grew, the country continued to expand westward with the support of Asian immigrants who began arriving in large numbers in California.⁶⁷ Yet despite the growing tension between whites and blacks and Asians within America, the judicial and legislative decisions in the period following the *Passenger Cases* were ambivalent in their treatment of racial minorities and immigrants. Somewhat isolated from the Civil War that was waging in the Eastern sections of the United States, the California Legislature passed in 1862 “An Act to Protect Free White Labor against Competition with Chinese Coolie

Looking Forward: The Root of the Problem: How the Proslavery Constitution Shaped American Race Relations, 4 BARRY L. REV. 1 (2003).

⁶³ By 1830, there were 319,000 free blacks in the United States. See, JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 36 (1974). This number would increase to 500,000 by 1860. *Id.* at 165-67.

⁶⁴ U.S. CONST. art. I, § 9, cl. 1; *Smith v. Turner*, 48 U.S. 283 (1849) (aka the *Passenger cases*).

⁶⁵ *Smith v. Turner*, 48 U.S. 283, 572-73 (1849) (discussing the scope of U.S. CONST. art. I, § 9, cl. 1).

⁶⁶ *Id.*

⁶⁷ Too complex to explore fully in this paper, yet too important to overlook, the racial shift of the unwanted immigrant from black to yellow to black to brown throughout American history further complicates any simple understanding of the correlation between immigration and race. For more information on Asian immigration to the United States, see generally SCOTT INGRAM, WORLD ALMANAC LIBRARY OF AMERICAN IMMIGRATION: SOUTH ASIAN AMERICANS (2006), ELLIOT ROBERT BARKAN, ASIAN AND PACIFIC ISLANDER MIGRATION TO THE UNITED STATES: A MODEL OF NEW GLOBAL PATTERNS (1992), EDWARD JW PARK & JOHN SW PARK, PROBATIONARY AMERICANS: CONTEMPORARY IMMIGRATION POLICIES AND THE SHAPING OF ASIAN AMERICAN COMMUNITIES (2005).

Labor, and Discourage the Immigration of the Chinese into the State of California.”⁶⁸ The Act functioned by levying taxes against immigrant laborers.⁶⁹

In a boon to immigrant rights, the California Supreme Court invalidated the Act the same year, finding it in violation of the federal right “to regulate commerce with foreign nations.”⁷⁰ In its ruling, the court discussed a variety of racist tax acts that had been passed in California in order to discourage continued immigration of Asians into the state and noted that many of these had already been repealed or ruled unconstitutional in California.⁷¹

Indeed, many of the advances made by immigrants and minorities during this period were either qualified by exceptions or limited by the counter advances of racially exclusive legislation and judicial decisions. Lincoln’s Emancipation Proclamation, popularly understood as prohibiting slavery, was partial in its application and, like many laws dealing with racial exclusion, based on firmly demarcated spaces.⁷² The executive act freed only those slaves who were in territories rebelling against the Union.⁷³ This manumission was subsequently extended to all in 1865 by the passage of the Thirteenth Amendment. And although the Fourteenth Amendment assured due process and equal protection to all while overturning the earlier *Dred Scot* decision, these gains were counterbalanced by the exclusive and restrictive application that soon followed.⁷⁴ Between 1864 and 1888, eight states enacted ‘Black codes’ restricting the rights of African-Americans to work and to seek redress for wrongs.⁷⁵

In the postbellum period, racial restrictions aimed at Asians also increased. While courts had stymied earlier attempts of state legislatures to limit or tax immigration on the basis of federal preemption, newer legislation was not subject to such invalidation as it came from a federal government no longer encumbered by the myriad difficulties of state secession. While the South developed an increasingly restrictive network of Jim Crow laws in hopes of indefinitely forestalling the de facto implementation of the Fourteenth amendment and maintaining antebellum status quo, the federal government shifted its view to the West. In 1875 Congress passed the first federal immigration law that was not focused upon the entrance of Africans into the United States.⁷⁶ This “Act Limiting Asian Immigration into the United States,” ostensibly sought to disbar East Asians from entering the country for “lewd and immoral purposes.”⁷⁷ Yet while the first sections of the law discussed the impropriety of either

⁶⁸ I was unable to find an independent citation to this act, however it is referenced by name in *Lin Sing v. Washburn*, 20 Cal. 534 (1862).

⁶⁹ *Lin Sing v. Washburn*, 20 Cal. 534 (1862).

⁷⁰ *Id.*

⁷¹ *Id.* at 534.

⁷² Proclamation of Jan. 1, 1863, no. 17, 12 Stat. 1268 (1863).

⁷³ *Id.*

⁷⁴ U.S. CONST. amend. XIII. “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” (ratified Dec. 6, 1865); U.S. CONST. amend. XIV (ratified July 28, 1868).

⁷⁵ CHARLES FAIRMAN, *THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-1888*, 110 (1971). For an excellent overview of the development of segregationist regimes in the postbellum South, see C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).

⁷⁶ Act Limiting Asian Immigration into the United States. 43 Cong. Ch. 141, 18 Stat. 477 (1875). For a recent and impressive chronicle of the persecution faced by Chinese Americans, see JEAN PFAELZER, *DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS* (2007).

⁷⁷ *Id.*

prostitution or the importation of people against their will, the legislation also penalized anyone engaging in the “coolie-trade” of supplying labor.⁷⁸

It is difficult to gauge the efficacy of this legislation in reducing Asian immigration to the United States. Nonetheless, the passage of further, more sweeping legislation in 1882 suggests the “Act Limiting Asian Immigration” had not sufficiently assuaged anxieties about the influx of Asian laborers.⁷⁹ Beginning ninety days after its own passage and lasting for ten years, the Chinese Exclusion Act was intended to stop the flow of Chinese laborers into the United States.⁸⁰ With its focus on race, labor, and immigration, the Act anticipated two important questions – firstly, how might officials differentiate the Chinese laborers to be excluded from those who had previously immigrated to the United States, and, secondly, how should officials respond to immigration attempts by Chinese who were not laborers?

For both questions, the answer lay in the production of a written document upon which all “physical marks and peculiarities, and all facts necessary for the identification of each of such” Chinese might be made.⁸¹ After more than two-hundred years of racially exclusive laws and judicial decisions, this Act was the first to acknowledge the need for a schema for intra-racial identification. Nonetheless, the rudimentary schema mandated by the legislation was likely hampered to the point of inadequacy by its imprecision. Before the widespread acceptance of photography, the attempt to record physical identity with words lay bare the insufficiency of language as technology of physical identification.⁸² Although culturally, temporally, and racially removed from the experience of Lucy or her literary progenitrix, the Chinese Exclusion Act’s mandated reduction of identity into a transportable document indicates the racist history of passports while supporting Lucy’s opinion, explored *infra*, that such “documents showed everything [... yet...] nothing about [her].”⁸³

Despite Lucy’s sentiments, which were likely felt by innumerable immigrants, the Chinese Exclusion Act would live up to its name for the next sixty years. The Act, which appears irrefutably draconian and racist to a contemporary observer, unfortunately provides the same contemporary observer only small means of estimating the agitation caused by the presence of Chinese laborers within the United States. Just over three pages long, the legislation justifies its passage in only one sparse sentence of introductory notation: “the coming of Chinese laborers to this country endangers the good order of certain localities with the territory thereof...”⁸⁴ An

⁷⁸ *Id.*

⁷⁹ Chinese Exclusion Act of 1882 Ch. 126, 22 Stat. 58 (1882). *cf.* Magnuson Act (aka Chinese Exclusion Repeal Act of 1943), 78 Cong. Ch. 344, 57 Stat. 600 (1943). This Act repealed the Chinese Exclusion Act of 1882 and subsequent similar legislation sixty years after its passage. Consequently, the Magnuson Act enabled Chinese immigration and Asian naturalization. This legislation was popularly viewed as a reward for Chinese support of the U.S. in World War II.

⁸⁰ *Id.*

⁸¹ *Id.* It is important to realize that the passage of both the 1875 and 1882 acts preceded Congress’s order creating a Bureau of Immigration (Act of March 3, 1891). Cong. Ch. 551, 26 Stat. 1084 (1891).

⁸² Although the first permanent image, dubbed a heliograph, was recorded in 1826, photographs were not required for immigration documents until 1924. *See* Immigration Act of 1924, at note 121, *infra*; *see also* History of Photography, National Geographic. <http://photography.nationalgeographic.com/photography/photographers/photography-timeline.html> (last visited, Feb. 28, 2010).

⁸³ KINCAID, *supra* note 2, at 148.

⁸⁴ *Id.*; Chinese Exclusion Act of 1882 Ch. 126, 22 Stat. 58 (1882).

1889 Supreme Court decision on constitutionality of the Chinese Exclusion Act does, however, record more fully the fear of the “coolie-trade,” that precipitated the legislation.⁸⁵

Shortly after the passage of the Act, Chae Chan Ping, a Chinese laborer, challenged its constitutionality on the basis of Article 5 of the preexisting Burlingame Treaty between the U.S. and China.⁸⁶ The Burlingame Treaty “declared ‘the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and immigration of their citizens and subjects respectively from the one country to the other for purposes of curiosity, of trade, or as permanent residents.’”⁸⁷ Despite the precept of the preexisting Burlingame treaty, the Supreme Court upheld the Chinese Exclusion Act while elaborating at length on the dangers that had prompted the legislation.⁸⁸ The Supreme Court noted that “[Chinese] immigration was in numbers approaching the character of an Oriental invasion, and was a menace to *our civilization*” (emphasis added).⁸⁹ The a priori contradistinction between the “Oriental invasion” and “our civilization” advanced by the Court indicated clearly the manicheistic divide between the wanted and the unwanted, the civilized and the invaders. This reductive bifurcation not only propagandized the effect of this legislation – converting “we are excluding Chinese” to “we are protecting ourselves,” but subtly enlisted all who might read or hear the decision by collapsing ‘us’ into one civilization that, despite its lack of boundary besides the tacit “not Oriental,” is nonetheless endangered by the contradistinctive other.

Packaging its decision with further citation to the threat posed by Chinese immigration, the Court concluded “that a limitation to the immigration of certain classes from China was essential to the peace of the community on the Pacific Coast, and possibly to the preservation of our civilization there [as the Chinese were] foreigners of a different race in this country, who [unwilling to] assimilate with us, [were] dangerous to its peace and security... .”⁹⁰ In the face of such threat the Court had either forgotten or abandoned its earlier conviction that “the whole history of immigration shows clearly that the framers of the Constitution never anticipated interposing obstacles to it.”⁹¹ The ability of the Court to take unharmonious positions, if not contradictory approaches to immigration, indicates the expediency with which the judiciary aided Congress in controlling the permeability of national boundaries.

In a brutal nexus of race, labor, and immigration, the Chinese Exclusion Act and its judicial confirmation intended racial exclusion from both the geographic boundaries and the civic privileges of the United States. Just as important as the Court’s validation of the legislative acts was the Court’s complete deference to the exclusive categorizations of individuals by immigration officers. In *Nishimura Ekiu v. United States*, the Court declined to extend *habeas corpus* protections to immigrants who had challenged the legality of their exclusion.⁹² Espousing a ‘they-can-because-they-did’ rhetoric, the Court pontificated upon the power of the executive branch to enforce the laws of the State:

⁸⁵ Chae Chan Ping v. United States, 130 U.S. 581 (1889).

⁸⁶ *Id.*; Burlingame Treaty, July 28, 1868, U.S.-China, 16 Stat. 739.

⁸⁷ Chae Chan Ping v. United States, 130 U.S. 581, 595 (1889).

⁸⁸ *Id.*

⁸⁹ *Id.* at 594.

⁹⁰ *Id.* at 606.

⁹¹ *See*, note 65, *supra*: Smith v. Turner, 48 U.S. 283, 572-73 (1849) (aka the *Passenger cases*).

⁹² 142 U.S. 651 (1892).

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.⁹³

Having established a justification for almost any state action relating to immigration the court opined that

“[a]n alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful[... but, when] a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted.”⁹⁴

In spite of the fervent support provided by the judiciary to the executive branch to enforce and further the exclusion of these unwanted immigrants, the effects of the racist legislation and its unreviewable enforcement were themselves limited; it could effectively control the increase of Asian (and Asian-Americans) through immigration, but neither the 1875 Act limiting immigration, nor the 1882 Act excluding immigration could alleviate the political dismay towards the already sizable population of Asians within the U.S.⁹⁵

As discussed *supra*, the 1870 Amendment to the 1790 Naturalization Act had removed language restricting naturalization to “free white person[s]” and extended the right “to aliens of African nativity and to persons of African descent.”⁹⁶ The Civil War had, at great cost, shown the United States that African-Americans comprised an inextricable part of American society. However, the 1870 amendment failed explicitly either to prohibit or allow Asian naturalization.⁹⁷ Nonetheless, with few exceptions, the same political sentiment that had begun to exclude Asians through judicial decision and legislative fiat, likewise conspired to abridge the rights of the Asians already within the country.⁹⁸ In one contemporary case, this denial was accomplished based on ambiguities in naturalization; in *Baldwin v. Franks*, the Supreme Court concluded that

⁹³ *Id.* at 658.

⁹⁴ *Id.* at 660.

⁹⁵ It is impossible to enumerate with exactitude the number of Asians or Asian Americans within the United States in 1880 because of the system of racial classification employed. According to the 1880 census, there were 6,752,813 Coloreds in the United States. The table further specifies that “Coloreds” included “Chinese, Japanese, and civilized Indians.” At the same time there were 6,559,679 “Foreign-born” whites within the United States and 36,843,291 Native Whites within the country. 1880 Census, Table XX. More surprising however is the comparative growth of the “Colored” population in the United States between 1860 and 1880 as listed in Table IV of the 1880 Census: In 1860, Coloreds constituted 14.16% of the population (26,922,537 Whites, 4,441,830 Coloreds). In 1870, the percentage of coloreds had fallen slightly to 12.47% of the population (33,589,377 Whites, 4,880,009). In 1880, the percentage of coloreds had increased by only 5%, or in absolute terms, had grown less than 1% to 13.17% of the total population (43,402,970 Whites, 5,840,793). All data accessible at www.census.gov.

⁹⁶ See note 49, *supra*. 16 Stat. 254, Ch. 254, July 14, 1870; Amendment at 16 Stat. 254.

⁹⁷ *Id.*

⁹⁸ See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding discrimination against nationality to be in violation of the Equal Protection Clause of the 14th Amendment).

forcefully driving the Chinese from their homes was not an offense under a conspiracy statute as the Chinese were not ‘citizens’ within the meaning of the statute.⁹⁹ Although ‘citizenship’ was no longer restricted to ‘free white persons,’ it was still utilized to deny justice to racial minorities that the government had failed to keep from immigrating.

These legislative attempts to fashion and codify an essential difference between minority immigrants and Europeans who had immigrated in the previous decades and who were continuing to immigrate was not only a process of entrenching the hierarchy in which privileged (usually white) citizens dominated unprivileged (usually darker-complected) non-citizens, but also a campaign to stigmatize immigrants further by grouping them with society’s other undesirables. This move, discernible in the 1880 census’s enumerative amalgamation of “Chinese, Japanese, and civilized Indians” under the label of “Colored” was more apparent in another important piece of legislation.¹⁰⁰ In 1891 Congress passed an act creating “the office of the superintendent of immigration.”¹⁰¹ This act listed classes of individuals excluded from immigration.¹⁰² “Paupers,” “idiots,” “the insane,” “polygamists,” “persons suffering from a loathsome or a dangerous contagious diseases,” felons, and those convicted of “moral turpitude,” were all explicitly excluded from immigrating into the United States by this Act.¹⁰³ At the head of this odious list, however, was another group so distasteful to America as to deserve not only primacy in this list, but also another Congressional act. This group was Chinese laborers. Lest immigration officers forget the special depravity of laborers in the slew of other undesirables, the list set forth in the 1891 Act excludes also “any person... assisted by others to come, unless it is affirmatively and satisfactorily shown on special inquiry that such person does not belong to one of the foregoing excluded class, or to the class of contract laborers...”¹⁰⁴

This inclusion of immigrant laborers with the most disparaged sub-groups of society was an attempt not only to place ‘Colored’ immigrants on the far side of the citizen / non-citizen divide, but further to implicate the morality and even the humanity of these disempowered classes. From the viewpoint of immigration law, Chinese laborers were as detrimental to the American enterprise as the diseased, the mentally challenged, and the emotionally disturbed. As such, Chinese laborers were positioned within a set of groups distinguished by their inferiority: the morally inferior, the mentally inferior, the financially inferior, and, in the purview of American law and policy, the racially inferior. From this perspective, the exclusion of immigrants through the racist execution of state power was understandable and necessary; this was a battle to maintain civilization from the variegated hordes that (not who) were not only inferior, but also unwilling to assimilate to America. According to the highest Court in the United States, American peace and prosperity were endangered by those who would not become Americans. Absent from this propagandistic narrative, however, was the State’s resistance to minority assimilation.

⁹⁹120 U.S. 678 (1887). *cf.* *Scot v. Sandford*, *supra* note 59. Today, questions of citizenship and jurisdiction have been at the center of a series of cases the Supreme Court has heard deciding whether the (lack of) process afforded to ‘enemy combatants’ held by the United States in Guantanamo Bay, Cuba violates the Constitution. *See* *Boumediene v. Bush*, 169 L. Ed. 2d 391 (2007); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004).

¹⁰⁰ United States Census (1880), *supra*, at note 95.

¹⁰¹ An Act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor, Cong. Ch. 551, 26 Stat. 1084 (1891).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

In perhaps the most infamous, if not also the most ignominious, decision in the history of American jurisprudence, *Plessy v. Ferguson* demonstrated the great lengths to which the Court would allow society to go in order to disable attempts at racial assimilation.¹⁰⁵ Upholding the constitutionality of racial segregation, the Court held 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* – ha[d] no tendency to destroy the legal equality of the two races, or reestablish a state of voluntary servitude... [and the 14th Amendment] could not have been intended to abolish distinctions based upon color” (emphasis added).¹⁰⁶

Looking beyond the undeniable importance and the horrific repercussions of this decision, it is important to recognize the tenuous and dubious color distinction by which individuals could be kept legally “separate.” The ulterior motives behind the Court’s decision are plain when the entire record is considered. The Court bases its ruling on a color distinction “which must always exist.” However, this logic is discredited by the Court’s own admission that no appreciable color difference actually existed.¹⁰⁷ Speaking of his own appearance, Homer Plessy asserted he came “of mixed descent, in the proportion of seven eighths [*sic*] Caucasian blood and one eight [*sic*] African blood, [and] that the mixture of *colored blood was not discernible in him.*” (emphasis added).¹⁰⁸

The Court’s choice to ignore a lack of discernible difference between Plessy and the (other) white patrons with whom he attempted to travel is especially odd considering that the Court notes Plessy’s sanguineous constitution and apparent whiteness at the very beginning of its decision.¹⁰⁹ As there was no way to distinguish Plessy’s “race by color,” the Court’s decision, ultimately showed that discrimination, under the name of separation, could find basis not only in citizenship or visible racial differences, but also in the fiction of such differences.¹¹⁰ Despite the absence of “*a distinction which is founded in the color of the two races*” the Court was quite lucid, albeit illogical, in their reasoning “[this difference] *must always exist so long as white men are distinguished from the other race by color.*”¹¹¹ Formulated in this manner, Plessy’s unapparent yet legal “blackness” operated less to distinguish him from the rail patrons with whom he traveled than to distinguish them from him. This difference, arguably negligible or even nonexistent, nonetheless was the logical scaffolding upon which the court constructed an argument for separation. If “White men [were to be] distinguished from the other race by color – “ then this color “distinction... must always exist”... [in law], whether or not it continued to exist in reality.

Overall, the 19th century witnessed the development of a cascade of discrimination based on the legislatively postulated, governmentally enforced, and judicially confirmed collusion

¹⁰⁵ 163 U.S. 537 (1896).

¹⁰⁶ *Id.* at 543. Note the anxiety of racial separation in this single sentence: the words “color,” “white,” and “race” appear a total of nine times.

¹⁰⁷ *Id.* at 543, 537.

¹⁰⁸ *Id.* at 537.

¹⁰⁹ For an interesting and informative background on this case, see PETER IRONS, *A PEOPLE’S HISTORY OF THE SUPREME COURT: THE MEN AND WOMEN WHOSE CASES AND DECISIONS HAVE SHAPED OUR CONSTITUTION*, 221-33 (1999).

¹¹⁰ This compulsion to identify an individual resonates with the language of the Chinese Exclusion Act that mandates “all facts necessary for the identification of each” Chinese resident be recorded. See, Chinese Exclusion Act, *supra*, at note 79.

¹¹¹ 163 U.S. 537 (1896).

between race and alienage: Don't let *them* in. Don't let *them* challenge their exclusion. Equate *them* with miscreants and reprobates. If *they* are here, use laws not to protect *them*, but rather to disempower *them* further. And, finally, if one of *them* manages to assimilate visually, depose the primacy of visible indices of identification in order to keep *them* them and to keep *them* separate. As the 19th century concluded with such anti-immigrant sentiments and abominable racial relations, it is no surprise that the 20th century continued the same exploitative trends.

After the relatively large amount of legislation and important legal cases in the last decade of the 19th century, the first major immigration legislation of the 20th century was not passed until 1917. This "Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States," was similar to past federal immigration acts as it renewed exclusions on the physically, mentally, and morally debilitated (in an extensive list), as well as any "contract laborer who ha[d] been induced, assisted, encouraged, or solicited, to migrate to this country by offers or promises of employment."¹¹² The Act, perhaps hearkening back to the 19th-century California legislation that had been invalidated under the Commerce Clause,¹¹³ also included an eight-dollar head tax per immigrant.¹¹⁴ Furthermore, for the first time, the Act required all immigrants over the age of sixteen to pass a literacy test and exempted certain high-status professional classes such as lawyers, engineers, and physicians from the restrictions of this legislation.¹¹⁵ Taken together, the changes in this Act advanced the American policy of offering admission only to those individuals of secure constitution, wealth, and employment while confirming and partially expanding upon the racial exclusions against Asians set forth in previous legislation.¹¹⁶ The words of this 1917 legislation stand in contrast to and highlight the hypocrisy of the United States' more accepting view of immigration as engraved within the Statue of Liberty in 1903:

Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,...

¹¹⁷

Despite the noble aspirations of the poem, the United States did not request and actively sought to refute those very immigrants described upon this American symbol. Only four years after the previous act, Congress passed further legislation aimed at limiting immigration.¹¹⁸ Unlike the earlier Act of 1917 however, the 1921 Act sought to limit the annual growth of every immigrant population to three percent of the immigrant population as enumerated in the 1910 census.¹¹⁹ The Act specified the determination of nationality "by country of birth, treating as

¹¹² An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States. U.S. Statutes at Large Pub. L. No. 64-301; 64 Cong. Ch. 29; 39 Stat. 874, 875 (1917).

¹¹³ See *Lin Sing v. Washburn*, at note 69, *supra*.

¹¹⁴ *Id.*

¹¹⁵ *Id.* At this time in American history, the United States was interested in importing high-tier laborers but not low-wage laborers (Doctors yes, coolies no!). This pattern has arguably been inverted in recent history.

¹¹⁶ *Id.*

¹¹⁷ Emma Lazarus, "The New Colossus" (1883), available at <http://xroads.virginia.edu/~CAP/LIBERTY/lazaruspoem.html> (last visited, Feb. 28, 2010). For a short history of the poem and poet, see <http://xroads.virginia.edu/~CAP/LIBERTY/lazarus.html> (last visited, Feb. 28, 2010).

¹¹⁸ Alien Immigration Limited Emergency Immigration Act (aka Quota Law aka Three Per Cent Act). May 19, 1921. Pub. L. No. 67-5; 67 Cong. Ch. 8; 42 Stat. 5 (1921).

¹¹⁹ *Id.*

separate countries the colonies or dependencies for which separate enumeration was made in the United States census of 1910.”¹²⁰ As enforcement of this legislation was set to self-terminate on June 30, 1922, the 1921 act was only a trial run of forthcoming legislation.¹²¹

In 1924 Congress passed another Immigration Act that slightly modified and indefinitely extended most of the provisions of the earlier legislation.¹²² In the 1924 Act, the temporary national origin quotas of the 1921 Act became permanent, however they were shifted from three percent of the 1910 census to two percent of the 1890 census.¹²³ Despite the seemingly small shift in numbers, the effect was consequential. Similar to the 1921 legislation, this Act stated that immigrants would be counted nationally and that nationality would depend on the colonizing country unless such countries or territories were disambiguated in the 1890 census.¹²⁴ Despite any appearance of egalitarian application of objective standards, the proposed limits created numerous barriers to color-blind immigration. Most glaringly, the decision to set quotas based on 1890 population figures elided the impact of racist laws that had shaped immigration patterns immediately prior to the 1890 census.

The numbers of the 1890 census had surely been impacted by the 1875 legislation limiting Asian immigration and even more affected by the 1882 Chinese Exclusion act.¹²⁵ Furthermore, the categories of enumeration in the 1890 census also enabled the 1924 Act to disparately suppress immigration from certain areas of the world. Although the 1924 Act ostensibly set immigration quotas based on nationality, the 1890 census from which the 1924 Act drew its numerical obligations only provided national enumerations for a small number of countries, most of which were in Europe.¹²⁶ Comparatively, the entire continent of Africa had been recorded into one sub-category.¹²⁷ Deemed unworthy the stature afforded other continents, this continent from which many millions of people had been unwillingly transported was designated as a subheading under the residuary category of “All Others.”¹²⁸

By relying on woefully incomplete figures of a 30-year-old census to set quotas, the 1924 Act added injury to insult. As Congress had deliberately shifted to a census twenty years earlier than the original census chosen for quotas and effectively decreased immigration by fifty percent (a drop of three percent to two percent), the decision to limit immigration of many non-Europeans to a percentage of an untabulated figure represents more than negligence. Rather this concatenation of moves to decrease immigration preferentially (read: racially), all within a set of figures that, on their face, appear neutral, demonstrates yet another instance of racism accomplished through the methodology of identification. Less an interpretative than a distributive methodology, the quotas of the 1924 Act attacked race by reverting to an earlier

¹²⁰ *Id.* at § 2 (b).

¹²¹ *Id.* at § 5; Immigration Act of 1924 (aka Johnson Act aka Dickstein Alien Officials Act) May 26, 1924, Pub. L. No. 68-139; 68 Cong. Ch. 190; 43 Stat. 153 (1924).

¹²² Immigration Act of 1924 (aka Johnson Act aka Dickstein Alien Officials Act) May 26, 1924, Pub. L. No. 68-139; 68 Cong. Ch. 190; 43 Stat. 153 (1924).

¹²³ *Id.* at § 11(a), (“annual quota of any nationality shall be 2 per centum of the number of foreign-born individuals of such nationality resident in continental United States as determined by the United State census of 1890...”).

¹²⁴ *Id.*

¹²⁵ *Id.* See also, Act Limiting Asian Immigration into the United States, 43 Cong. Ch. 141, 18 Stat. 477 (1875); Chinese Exclusion Act of 1882 Ch. 126, 22 Stat. 58 (1882).

¹²⁶ U.S. Census of 1890. Table 32, pg. cxxxv, available at <http://www.census.gov/prod/www/abs/decennial/index.htm> (last visited, Feb. 28, 2010). Furthermore, most of these nations were grouped not only as nations, but further within sub-headings, e.g., “Slav Nations,” “Latin Nations.”

¹²⁷ *Id.*

¹²⁸ *Id.*

record that largely deprived non-European political entities of the advantages that would have come with Western nationhood.

More pertinent to Jamaica Kincaid, Lucy, and other West Indian Immigrants, the 1890 census delineated no further than only a sub-heading for immigrants from “Cuba & West Indies.”¹²⁹ However, as these islands were not further disambiguated into specific nations and territories, the legislation was not entirely clear as to the quota any single domain might have. Under the 1924 Act, the question remained whether immigrants from various West Indian nations and territories would enter under their own quota or under much more generous quotas granted the European colonizers of the islands.

For West Indian immigrants, there was a lot riding on this interpretation. The 1890 census had enumerated 23,252 immigrants to the United States from the area referred to as “Cuba & West Indies.”¹³⁰ Viewed conservatively, West Indian immigration would have been collectively limited to two percent of the 23,252 immigrants in the 1890 census.¹³¹ As it was impossible to disambiguate further the origin of the 1890 immigrants, the two percent (464 immigrants) would have been raised to 100 immigrants per country under a minimum per-country quota proposed in the legislation.¹³² Concurrently, the census had enumerated 908,141 English immigrants within the United States in 1890, which would have enabled 18,162 individuals to immigrate under the British flag annually.¹³³ If West Indian nations were grouped by their status as former British colonies, then residents of the nations and colonies would qualify for inclusion under this much larger quota.¹³⁴

Further complicating the calculation of national-origin quotas for the West Indies was the legislation’s separation of potential immigrants not only into quota and non-quota immigrants, but its concurrent establishment of separate preferences within these quotas.¹³⁵ Under Sec. 4(c) immigrants from “contiguous countries, Central or South America” were to be treated as non-quota immigrants.¹³⁶ However, as West Indian islands were not explicitly mentioned, it was unclear whether they qualified as ‘contiguous.’ Thus for West Indians during this time period, their chances of immigrating grew in check with interpretations of their position; their chances at qualifying increased with geographic proximity and national distance.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Immigration Act of 1924 (aka Johnson Act aka Dickstein Alien Officials Act) May 26, 1924, Pub. L. No. 68-139, 68 Cong. Ch. 190, 43 Stat. 153 (1924).

¹³³ *Id.* U.S. Census of 1890, Table 32, pg. cxxxv (page 5), available at <http://www.census.gov/prod/www/abs/decennial/index.htm> (last visited, Feb. 28, 2010).

¹³⁴ *Id.* The West Indies comprises 7,000 islands that are currently organized into twenty-eight territories. Although the British, Danish, Dutch, French, Portuguese, Spanish, and Swedish all had colonial interests within the West Indies at some point during history, the British presence was by far the largest. At different periods in history Great Britain maintained a colonial presence in Anguilla, Antigua and Barbuda, the Bahamas, Barbados, Belize, Bay Islands, British Virgin Islands, the Cayman Islands, Dominica, Grenada, Guyana, Jamaica, Montserrat, Saint Croix, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, and the Turks and Caicos Islands.

While British limits would have potentially allowed West Indians from these islands to enter the United States, these limits would have been potentially open to other British colonies not specifically named in the 1890 census. This expanded quota would not however have applied to England’s largest colony, India, as it had been specifically named as a nation within the 1890 census.

¹³⁵ Immigration Act of 1924 (aka Johnson Act aka Dickstein Alien Officials Act) May 26, 1924, §4(c), Pub. L. No. 68-139; 68 Cong. Ch. 190; 43 Stat. 153 (1924).

¹³⁶ *Id.*

Independent of the difficulties West Indian immigrants faced in discerning their quota status, the 1924 act also provided further challenges to immigrants as the legislation mandated a difficult application process for an immigration visa.¹³⁷ The application required duplicate submission of photographs, a birth certificate, and copies of all public records pertaining to the individual. The application also required applicants to state their race.¹³⁸ It was ultimately the non-reviewable decision of an administrator whether an immigrant had correctly completed all paperwork and was qualified for immigration under the selected quota, in short – whether an individual were a proper immigrant. And although the requirement of photographs mollified some of the problems of identification, discussed *supra*, other requirements in this legislation initiated other problems.¹³⁹ The request for racial self-identification invited the applicant to take concurrent part in the processes of identification, indeed to recapitulate the distribution of individuals into pre-existing racial categories and taxonomies and thereby model and, at least in this instant, conform to the hermeneutics of racialization that accompanied the racist impact of this immigration act.¹⁴⁰ As the initial visa received by an applicant was only valid for 4 months, this appears also as the first legislation to conceive of immigration as one step in a longer process; immigrants received visas valid for temporary visitation after which they had to meet the standards for naturalization.¹⁴¹

Although the 1921 and 1924 immigration acts were the first to instantiate admission quotas and to require identificatory materials and self-identification, the bulk of current immigration legislation was not enacted until three decades later. The 1952 McCarran-Walter Act, along with its subsequent 1965 amendment, are collectively referred to as the Immigration and Nationality Act (INA).¹⁴² Consisting of four titles, the Act is further divided into thirteen chapters, which in turn are further divided into 407 sections.¹⁴³

In marked contrast to the majority of the immigration legislation it succeeds, the 120-page Act is nothing if not comprehensive. While the 1924 Act suggests that Antiguans such as Kincaid, as well as West Indian Immigrants from unspecified current or former British colonies, should have qualified for immigration under the expansive quota applied to Great Britain, the unreviewable determination of the immigration official might have been inclined to limit immigration from these countries to one hundred individuals per year. Under the 1924 Act, ambiguity remained as to how to regard West Indian applicants for immigration visa. The 1952 Act, however, included stipulations limiting “[t]he annual quota of any quota area shall be one-sixth of 1 per centum of the number of inhabitants in the continental United States in 1920...”¹⁴⁴ Numbers and quota areas aside, the annual immigration from countries within the West Indies remained at 100 individuals with the exception of those hailing from “the Republic of Cuba, the Republic of Haiti, the Dominican Republic, the Canal Zone, or an independent country of

¹³⁷ Immigration Act of 1924 (aka Johnson Act aka Dickstein Alien Officials Act) May 26, 1924, Pub. L. No. 68-139; 68 Cong. Ch. 190; 43 Stat. 153 (1924).

¹³⁸ *Id.* at §7(b).

¹³⁹ *Id.* It should be noted that photographs are not as objective as they appear.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² McCarran-Walter Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered Sections of 8 U.S.C.) (1996); Immigration and Nationality Act Amendments of 1965 (aka Hart-Celler Act) Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911 [Hereinafter McCarran-Walter Act].

¹⁴³ *Id.*

¹⁴⁴ McCarran-Walter Act at § 201(a). Section 201, in part, reads: “[t]he annual quota of any quota area shall be one-sixth of 1 per centum of the number of inhabitants in the continental United States in 1920.”

Central or South America.”¹⁴⁵ By definitively resolving the ambiguity of the 1924 Immigration Act and denying West Indian nations the opportunity to remain under the banner of British nationality, the 1952 McCarran-Walter Act sharply reduced immigration from the West Indies.¹⁴⁶ Subsequently, West Indians were limited to a quota of one hundred per year.¹⁴⁷ This change particularly affected black West Indians who were less likely to qualify for quota exemption or immigration preferences based on their employment status.

Not surprisingly, it is difficult to calculate precisely the effect of the 1952 McCarran-Walter Act on West Indians. Although the Act greatly diminished immigration from many West Indian territories by restricting each territory to a national quota, the United States Census for 1950 failed to enumerate the number of immigrants who had come from the West Indies.¹⁴⁸ In the 1950 Census the number of West Indian immigrants might have been included under any of a

¹⁴⁵ McCarran-Walter Act at § 101(27)(c). Section (27) reads: “The term ‘nonquota immigrant; means- (c) reads: (C) an immigrant who was born in Canada, the Republic of Mexico, the Republic of Cuba, the Republic of Haiti, the Dominican Republic, the Canal Zone, or an independent country of Central or South America, and the spouse or the child of any such immigrant, if accompanying or following to join him;” Jamaica and Antigua did not gain full independence until 1962 and 1967, respectively.

¹⁴⁶ *Id.* Section 201 (b) reads

The determination of the annual quota of any quota area shall be made by the Secretary of State, the Secretary of Commerce, and the Attorney General, jointly. Such officials shall, jointly, report to the President the quota of each quota area, and the President shall proclaim and make known the quotas so reported. Such determination and report shall be made and such proclamation shall be issued as soon as practicable after the date of enactment of this Act. Quotas proclaimed therein shall take effect on the first day of the fiscal year, or the next fiscal half year, next following the expiration of six months after the date of the proclamation, and until such date the existing quotas proclaimed under the Immigration Act of 1924 shall remain.

¹⁴⁷ *Id.* The calculation of this quota is discussed *supra*.

¹⁴⁸ *Id.*; United States Census 1950, Table 49, pg. 98: “Country of birth of the foreign-born population, for the United States, urban and rural, 1950, and for the United States, 1870-1940.” Hope Lewis notes that President Truman initially vetoed the McCarran-Walter Act because it maintained racial as opposed to national origin quotas for Asian immigrants:

In his veto message, Truman praised the codification of the immigration and naturalization laws and the removal of racial barriers to naturalization. However, Truman criticized the retention of a quota system as being generally too restrictive of immigration and especially discriminatory against Asians in applying a racial rather than a national origins criterion for quota allocation.

See, Hope Lewis, Lionheart Gals Facing the Dragon: The Human Rights of Inter/national Black Women in the United States, 76 OR. L. REV. 567, fn. 43 (1997), citing E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY: 1798-1965, AT 307 (1981). For a view of the data categories of the 1950 census, see Census Data for the Year 1950, Statistical Data of the University of Virginia Library, available at <http://fisher.lib.virginia.edu/cgi-local/censusbin/census/cen.pl?year=950> (last visited, Feb. 28, 2010). From the categories it becomes clear that the 1950 census did not enumerate the specific number of West Indians who had immigrated to the United States. At best, one might consult other categories, such as “number of white persons born in other American countries,” “number of foreign-born white males,” “number of negro males,” “number of foreign-born white females,” and “number of negro females.” The failure to enumerate even ‘foreign-born negroes’ indicates the challenges to quantifying West-Indian immigration. For a view on the lack of disaggregation in the 1940 census, *see* Historical Census Statistics On Population Totals By Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990, For Large Cities And Other Urban Places In The United States, at fn. 3, reporting that “[d]ata on the foreign-born population by country of birth and race were published in the 1940 census only for the White population. Nationally, the foreign-born population from Spain and Latin America [was] shown as Cuba, other West Indies, Central America, and South America,” available at <http://www.census.gov/population/www/documentation/twps0076/twps0076.html> (last visited, Feb. 28, 2010).

number of specific categories.¹⁴⁹ As the census provided little information on the growth of West Indian populations, let alone the growth of populations from specific territories within the West Indies, the grounds for Congress's decision to reduce West Indian immigration so substantially are difficult to discern.¹⁵⁰

Similarly, it is difficult to discern the motivations behind Congress's decision to pass an eleven-page amendment to the Immigration and Nationality Act in 1965 that removed the quotas on West Indian immigration. Perhaps support for revision of the quotas had been buoyed by the recent passage of the Civil Rights Act.¹⁵¹ It is likewise possible that the growing recognition of international human rights had contributed to this legislation. In 1948, the United States had voted to ratify the Universal Declaration of Human Rights.¹⁵² Despite the United States' nominal support for such rights, a reading of the Declaration in light of then-extant American immigration law indicates the hypocrisy of U.S. affirmation. In Article 2, the UDHR declares:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour... national or social origin... Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

The race- and national identity-based immigration quotas set four years later in the McCarren-Walter Act appear to directly contravene this article of the Declaration.¹⁵³ As the United States was willing, in 1952, to disregard its signatory obligation to this international declaration, it appears unlikely that the United States would, barring other influences, seek accord between the two documents in 1965. Nonetheless, the growing recognition of international human rights, which helped produce the International Covenant on Civil and Political Rights in 1961, potentially catalyzed the 1965 amendment.¹⁵⁴

¹⁴⁹ United States Census 1950, Table 49, pg. 98. There is no listing for West Indies under the 1950 Census. The census does, however, enumerate immigrants from "Other America - 120,297," "All other - 69,658," and "Not Reported - 77,175."

¹⁵⁰ *Id.*; Congress's ground for this shift in West Indian immigration policy might be found in the legislative history of the Act. Nonetheless, the history comprises seventy-one distinct committee prints, House and Senate hearings (published and unpublished), as well as serial set collections. Taken together, these documents total many thousands of pages and have not yet been placed within an easily searchable electronic format. Although E.P. Hutchinson has compiled much of the pertinent legislative history in his aptly titled, *LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY: 1798-1965* (1981), I have not yet had the opportunity to engage Hutchinson's 752-page summation.

¹⁵¹ The Civil Rights Act of 1964 was landmark legislation that outlawed segregation in the U.S. schools and public places. Pub. L. No. 88-352, 78 Stat. 241 (1964). First conceived to help African Americans, the bill also initiated the Equal Employment Opportunity Commission. In order to circumvent limitations on the federal use of the Equal Protection Clause handed down by the Civil Rights Cases, Congress passed this legislation under the authority granted by the Commerce Clause.

¹⁵² The Universal Declaration of Human Rights, G.A. Res. 217A (III), GAOR, 3rd Sess., U.N. Doc. A/810 at 71 (1948).

¹⁵³ *Id.*; McCarren-Walter Act, note 142, *supra*.

¹⁵⁴ International Covenant on Civil and Political Rights – travaux – U.N. Doc. A/C.3/SR.1103 38 (1961). Cited in Berta Esperanza Hernandez-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform"*, 71 S. CAL. L. REV. 547 (1998). During the process of drafting and adopting Article 27 of the ICCPR, India proposed substitution of the word "persons" for

The International Covenant on Civil and Political Rights and similar international accords recognized the advantages that accompany citizenship and implicitly acknowledged the lack of rights that affect the stateless or those in the political interstice of national identities.¹⁵⁵ This recognition of international and immigrant rights was also occurring domestically. In 1955, New York City established a “Commission on Intergroup Relations” (COIR) in order to “promote[] understanding and respect between and among the many groups making the city their home.”¹⁵⁶ New York City apparently recognized the value of immigration and diversity in spite of the restriction that had been mandated under the McCarran-Walter Act.¹⁵⁷ Ultimately, such conceptions of international and individual rights speak to many of the concerns faced by the majority of (West Indian) immigrants, whether documented or undocumented, within the United States.

Independent of the source of the influence, the 1965 Amendment fundamentally shifted the treatment of all immigrants including West Indians attempting to enter the United States.¹⁵⁸ The effect of this change is difficult to fathom completely. For the previous forty years, the United States had been operating under a system of national-origin quotas by which seventy percent of immigrants to the United States hailed from only three countries.¹⁵⁹ The 1965 Amendment completely reversed this trend by setting June 30, 1968 as the date a total immigration limit for the United States would replace all national-origin quotas.¹⁶⁰ More

the word “citizens.” This amendment was turned down. The Covenant also noted that a person has these rights “irrespective of his or her nationality or statelessness.” Cf. European Convention for the Protection of Human Rights and Fundamental Freedoms 213 U.N.T.S. 222, *composed Nov. 4, 1950, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, and 8, which entered into force on 21 September 1970, 20 December 1971 and 1 January 1990, respectively.* While modeled with an eye on the UDHR, this convention was composed by Europeans concerned with Europe and, as such, is not as far reaching in its establishment of rights for immigrants.

¹⁵⁵ In 1966, two international covenants were passed that further focused on aspects of international human rights. Although their passage succeeded the 1965 INA amendment, both instruments demonstrate the traction international human rights had gained within international, if not also domestic, politics. See International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, art. 2, 993 U.N.T.S. 3, 6 I.L.M. 360. (entered into force Jan. 3, 1976). The International Covenant on Economic, Social, and Cultural Rights requires that States recognize, and undertake to ensure the following rights: the right to work (Art. 6); the right to just and favorable conditions of work (Art. 7); the right to organize (Art. 8); the right to social security (Art. 9); the right to an adequate standard of living (including food, clothing, and shelter) (Art. 11); the right to health (Art. 12) and recognition of the special needs of rural women (Art. 14); See also The International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/631 (1966).

¹⁵⁶ Berta Esperanza Hernandez-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century*, 23 *FORDHAM URB. L.J.* 1075 (1996), *citing* New York, N.Y., Local Law No. 55 (June 3, 1955) (codified as amended at New York, N.Y., Admin. Code 8-106 (1996)).

¹⁵⁷ McCarran-Walter Act, *supra*, note 142.

¹⁵⁸ Immigration and Nationality Act Amendments of 1965 (aka Hart-Celler Act) Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911. Similar to my discussion of the impetus behind the McCarran-Walter act (*see* note 142, *supra*), the instigation behind the 1965 act is potentially discoverable within the amendment’s expansive historical record. Nonetheless, with twenty-five published hearings and twenty-five committee prints, the paper trail of legislative history for the eleven-page 1965 Amendment surprisingly includes more documents than the legislative history of the one-hundred-twenty-page Act it amends.

¹⁵⁹ President Lyndon B. Johnson’s Remarks at the Signing of the Immigration Bill, Liberty Island, New York October 3, 1965, at Lyndon Baines Johnson Library and Museum Online Archives, *available at* <http://www.lbjlib.utexas.edu/Johnson/archives.hom/speeches.hom/651003.asp> (last visited, Feb. 28, 2010). See also, Alien Immigration Limited Emergency Immigration Act (aka Quota Law aka Three Per Cent Act). May 19, 1921, Pub. L. No. 67-5; 67 Cong. Ch. 8; 42 Stat. 5.

¹⁶⁰ Immigration and Nationality Act Amendments of 1965 (aka Hart-Celler Act) Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911, revised § 201(e).

sweepingly, the current immigration limit was raised immediately to 170,000 immigrants per annum until June 30, 1968.¹⁶¹ After this date, and upon the expiration of the national-origin quotas, the limit regressed to 120,000 new entrants.¹⁶²

Noting that the United States had been “built by a nation of strangers... [f]rom a hundred different places or more, [and that the country had] flourished because it was fed from so many sources--because it was nourished by so many cultures and traditions and peoples,” President Lyndon Baines Johnson advocated the replacement of origin quotas.¹⁶³ In their stead, the 1965 Amendment set a series of admission preferences based on immigrants’ skills.¹⁶⁴ Perhaps more importantly, the Amendment provided that visas for family members were to be granted “without regard for the numerical limitations of this act.”¹⁶⁵ This change enabled “families [who had been] kept apart because a husband or a wife or a child had been born in the wrong place” to reunite without navigating the difficult structure of the mainstream visa application process.¹⁶⁶ Within two months, the bill had “already reunited hundreds of families through its preferential admissions policy for aliens with close relatives in the United States” and ultimately led to the naturalization of some “104,430 resident aliens... as American citizens during the year.”¹⁶⁷

Although President Johnson’s signing remarks accurately noted that the “days of unlimited immigration are past,” his understanding of the bill appeared both to underestimate its importance while overestimating the fairness it afforded.¹⁶⁸ Despite the apparent objectivity of immigration ‘preferences,’ the desire to admit immigrants based on their ability to contribute to the United States surely had a disparate national and racial impact upon many ‘third-world’ countries that could not produce as many ‘high-preference’ applicants.¹⁶⁹ These preferences cut both ways as these ‘third-world’ countries suffered more greatly from the loss of the limited number of high preference applicants.¹⁷⁰ Even more glaringly, the blanket allowance of familial immigration, while ultimately beneficial to any immigrant seeking to bring her family to the United States, theoretically provided a disproportionate benefit to the three countries from which seventy percent of the immigrants over the previous forty years had emigrated.¹⁷¹

On the other hand, President Johnson’s notation that the Amendment was “not a revolutionary bill [and would neither] affect the lives of millions[, nor] reshape the structure of our daily lives[, nor] really add importantly to either our wealth or our power” was both arrogant and myopic. The arrogance of the comment rests within President Johnson’s rhetorical

¹⁶¹ *Id.* at revised §§ 201(a)(ii), 21(e).

¹⁶² *Id.*

¹⁶³ Johnson, *supra* note 159.

¹⁶⁴ *Id.*

¹⁶⁵ Immigration and Nationality Act Amendments of 1965 (aka Hart-Celler Act) Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911, revised § 201(e).

¹⁶⁶ Johnson, *supra* note 159.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ For example, fifty percent of Jamaican immigrants are nurses, yet Jamaica still is experiencing a nursing shortage. See Hope Lewis, *Lionheart Gals Facing the Dragon: The Human Rights of Inter/national Black Women in the United States*, 76 OR. L. REV. 567 (1997). (discussing discrimination against black women immigrants and native-born women of color as a violation of human rights and noting that some Jamaican migrant women overstay visa in order to work as household workers in the United States), *citing* Rhoma Tomlinson, *Jamaica - Population: Capital City Bursting At Its Seams*, Inter Press Service, May 29, 1996 (noting that in 1994, only forty-nine percent of the total number of nurses needed in the [Jamaican] public health system were available, “many having left because of poor working conditions and low wages”).

¹⁷⁰ Lewis, *supra* note 169.

¹⁷¹ Johnson, *supra* note 159.

maintenance of immigrants as others; he asserts boldly that the bill containing the amendments will not affect “*our* lives, *our* wealth, or *our* power” – this Amendment will help *them*, in *their* desire to join *us*, even though *they* will not become *us*.¹⁷² President Johnson’s comments further reflect an appalling near-sightedness as they seemingly fail to anticipate the effect of this eleven-page amendment. Between 1952 and 1965 the INA annually admitted only one hundred immigrants from each country within the West Indies; after the 1965 amendments took effect, New York City itself received an average of forty-three Caribbean immigrants per day, every day, for the next decade.¹⁷³ Overall, President Johnson’s suggestion that this Act would not shape the lives of millions of people was preposterous; within less than a decade it had already enabled over a million individuals to immigrate into the United States.¹⁷⁴ Because it is difficult to gauge the number of ‘chain-immigrant’ family members who came to the United States in the first decade after this reform, the 1.34 million immigrants allowed under the total is a conservative estimate of the number of individuals affected by the INA’s amendment.¹⁷⁵

While an exact enumeration of the number of lives affected by this immigration is impossible, the 1965 Amendment was very likely the pathway through which Lucy figuratively and her auctorial counterpart actually entered the United States. Yet to view this enabling Amendment in isolation from the three hundred years of legislation, executive enforcement, and judicial interpretation that had sought to control the movement of individuals debilitates all attempts to understand either Lucy or Jamaica Kincaid’s reluctance to be identified.¹⁷⁶ This ongoing endeavor to control and subjugate immigrants, manifest through immigration policies analyzed herein, has repeatedly occurred through the reductive interpretation of individuals into contradistinctive and immutable racial identities, racial identities as opposed to national identities, or the more recent and insidious numerical transformation of immigration. Whether 170,000 or 120,000, three percent of the 1910 figures, or two percent of the 1890 figures, the

¹⁷² *Id.*

¹⁷³ Lewis, *supra* note 169, at 586. Lewis notes that

[b]y the mid-1960s, there were some 56,000 Caribbean-American immigrants in New York City alone. After 1965, that number rose dramatically due to changes in immigration policy in both the United States and Britain. In Britain, anti-immigrant fervor underpinned laws which [sic] severely limited the number of people of color from former British colonies allowed to enter England. In the United States, however, the 1965 Immigration Act removed country-specific limitations on the number of immigrants who could enter the United States from the Americas. Between 1965 and 1974, 156,920 Caribbean immigrants migrated to New York City, 52,620 of whom were Jamaican. By 1980, foreign-born blacks represented 3.1% of the U.S. black population and 19.3% of the blacks in the New York City area. Those numbers rose significantly after 1980, following the declaration of amnesty windows for undocumented immigrants who could then send for close relatives.

¹⁷⁴ For a discussion of “Chain Migration,” see Michael M. Hethmon, *Diversity, Mass Immigration, and National Security at 9/11 – An Immigration Reform Movement Perspective*, 66 ALB. L. REV. 387 (2003); see also, Victor C. Romero, *Critical Race Theory in Three Acts: Racial Profiling, Affirmative Action, and the Diversity Visa Lottery*, 66 ALB. L. REV. 375 (2003).

¹⁷⁵ To calculate this number I assumed maximum possible immigration based upon 2.75 years of the expanded limits of 170,000 immigrants per annum (between October, 1965 passage and the July, 1968 abolition of national-origin quotas) added to 7.25 years of 120,000 immigrants per annum standard.

¹⁷⁶ Note that from the first to the last, Jamaica Kincaid troubles any identification of herself. The first word on the cover of her novel, *Jamaica*, identifies the author even as it misidentifies the island from which she hails – in this sense even Kincaid’s name functions as an ‘almost-but-not-quite’ geographical positioning of the self. On the back cover jacket of the novel, the second of three sentences of description on Kincaid reads: “She was born in Antigua, an island in the Caribbean, of which she remains a citizen.” Despite her literary and familial success within this country, Kincaid still refuses to be subject to the national identification of the United States.

allowance and exclusion of immigrants has been and continues to be a game of numbers and, increasingly, preferences. More importantly however, this control has been achieved through a process of interpretation and identification in which enumeration is only one step. To enable, to limit, to calculate – all these functions depend on the deliberate maintenance of difference. Whether discussing the literal entrance of physical bodies into the geographic state or the symbolic entrance of subjective individuals into the political state, American immigration and naturalization policies have been structurally and legally complicit in the restriction and depredation of immigrant identities. In order to explore more fully, the ramifications of and resistance to such policies on an individual level, I now turn to *Lucy*.

PART II – “SOMETHING ELSE ALTOGETHER”: A CONSIDERATION OF THE INTERPRETATIVE CHALLENGES IN JAMAICA KINCAID’S *LUCY*

Lucy, the eponymous voice of Kincaid’s novel, never tells us where she is. We learn quickly that she’s come to a city in which it snows, a city in which stockbrokers live.¹⁷⁷ We learn that the city has a large park, and a good art museum, and an underground train, among other things.¹⁷⁸ Yet within the one-hundred-sixty-odd pages of the novel, never once does Lucy decide to say where she is. Neither does she conclusively name any part of the city to which she has moved. No proper name is given for any of the places she goes. No borough or street receives denomination. And although it might be easier and arguably ambiguous to say “subway,” Lucy calls it the “underground train.”¹⁷⁹ The attentive reader perhaps gathers the locative clues to conclude that Lucy is in New York City. Indeed, the majority of critics elide the possibility of any other location; many unhesitatingly state that Lucy is in New York City.

Neither does Lucy ever declare her origin. We are reminded numerous times that she is from the islands, an ambiguous location to which the narrative returns frequently.¹⁸⁰ We learn that her island of origin was, and perhaps still is, a British colony (while in school she hated singing *Rule Britannia*); we learn that it is hot on the island.¹⁸¹ We learn of Lucy’s detestation of people who would reduce her as to coming “from the islands.”¹⁸² When someone finally asks Lucy “[w]here in the West Indies [she is] from?”, Lucy tells the reader of the sexual encounter that springs from the question – but she still does not tell the reader the answer.¹⁸³ The island from which Lucy hails remains unnamed. When Lucy travels to Mariah’s childhood home, or a museum, or a park, Lucy guides us through territory that is intentionally left unnamed. Throughout the novel, Lucy (and Kincaid) chooses to withhold the name of the island from which Lucy hails.

Such ambiguity is not limited to physical locations; the inherent spatial ambiguity of the novel’s content is mirrored and strengthened by a form that never expresses temporal location and thereby reinforces the novel’s dislocation. As Lucy recounts her first year with Mariah and Lewis, the family for whom she works as an au pair, she moves episodically through a series of unnamed positions. Lucy has dinner, she goes to a party, she takes a trip – all without saying exactly where she’s going or when it’s occurring. Any sense of temporal progression is further

¹⁷⁷ KINCAID, *supra* note 2, at 3, 47.

¹⁷⁸ *Id.* at 3, 94.

¹⁷⁹ *Id.* at 20.

¹⁸⁰ *Id.* at 56.

¹⁸¹ *Id.* at 135, 81.

¹⁸² *Id.* at 56.

¹⁸³ *Id.* at 56, 65.

weakened by the casual manner with which Lucy introduces the majority of these episodes. “One day” is Lucy’s quintessential opening to a scene in her narrative.¹⁸⁴ Occasionally she specifies, but only moderately: “one weekend, a Saturday night.”¹⁸⁵ Lucy’s vignettes temporally locate themselves most accurately, albeit still very generally, through the reference they gain in relation to one another; “... the following day,” “the next day.”¹⁸⁶ Yet the sheer repetition of Lucy’s temporally ambiguous entrance into her episodes impedes even such marginal internal referentiality. Occurring approximately twenty times in the short novel, Lucy’s repeated reference to “one day” strips further meaning from an already indefinite temporal marker. Considered alongside the deliberate spatial imprecision, Lucy makes very little effort to tell us either where she is or when she is there. Taken together, *Lucy* makes a concerted effort to avoid an explicit connection to any place or time; it is perhaps impossible and at the very least exceptionally difficult to connect this novel absolutely to either Antigua or New York.¹⁸⁷

In *Lucy*, this profusion of amorphous locations and temporalities is set against the concrete presence of the novel’s protagonist; that is, the ambiguity of position is balanced by the omnipresent narrator who, from title to terminus, leads us through her story. To discuss the centrality of Lucy in a novel written from her perspective is redundant. Nonetheless the novel endorses Lucy’s individual voice, her knowledge, her interpretative strategies and the triumph of these strategies, over that which the feminist critic Brook Lenz has described as “group knowledge.”¹⁸⁸

This endorsement of the novel’s other characters is perhaps the novel’s first notation of the “problematic poles of epistemic relativism and universalism.”¹⁸⁹ Lenz presents a feminist reading of the novel in which Lucy’s identity is correlated between her troubled relationships with her mother and her employer, Mariah. Lenz’s recognition of this divide speaks to the pronouncements of the feminist standpoint theory through which she initially reads Lucy, and later, to the critical necessity of understanding the multiple influences that contribute to Lucy’s development as a *female* subject. Lenz’s post-modernist assertion of “all knowledge as situated and discursive” is, however, undercut by her repeated citation of objective referents that do not exist in *Lucy*.¹⁹⁰ Although Lenz does at first acknowledge the spatial indeterminacy of the novel through parenthetical descriptions of the novel’s two primary locations as ‘presumably New York’ and ‘presumably Antigua,’ she later attenuates her own relativist focus as New York and Antigua return in her argument as definite positions, that is, settings in which the novel operates minus the initial presumptions.

While much of the critical literature on this novel has noticed the absence of locative and temporal specificity, all of the critical literature I have encountered has disregarded the structural significance of this ambiguity, choosing instead to fill these absences. The dominant critical thrust is to overlook the ambiguity in lieu of discussions of the locations and occurrences that critics read into the novel. New York, Antigua, a ‘Great Lake,’ the Vietnam War, Antiguan

¹⁸⁴ *Id.* at 5, 7, 11, 54, 63, 68, 76, etc.

¹⁸⁵ *Id.* at 63.

¹⁸⁶ *Id.* at 82, 91.

¹⁸⁷ Jamaica Kincaid was born on Antigua. Because of this, many of *Lucy*’s critics suggest that Lucy also hails from Antigua. The novel does make a final gesture towards temporal specificity under interesting circumstances to which I return later.

¹⁸⁸ Brooke Lenz, *Postcolonial Fiction and the Outsider Within: Toward a Literary Practice of Feminist Standpoint Theory*, 16 *NWSA JOURNAL* 2, Summer 2004, 100.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 102.

Independence: none of these locations or temporal occurrences is explicitly mentioned within the novel; however together they form the thematic and geographic terrain of its critical apprehension. Many critics read *Lucy* as more or less the next step in that which Moira Ferguson has termed “Kincaid’s progression of fictionalized autobiographies.”¹⁹¹ Some criticism even goes so far as to explicitly interpret the novel as nothing more than a very thinly veiled continuation of Kincaid’s 1985 novel *Annie John*, with Britain revealed as New York City and both Lucy and Annie John as additional *noms de plume* for Elaine Potter Richardson, alias, Jamaica Kincaid.

The autobiographical influence on *Lucy* is undeniable, yet critics err in reading the text solely through this influence: Lucy is not a mediated version of Kincaid, but *Lucy* is undeniably a mediation of Kincaid’s own experience as a West-Indian immigrant.¹⁹² Searching for correlations between Kincaid, who after emigrating from Antigua in the 1960s spent her first year in New York as an *au pair*, and Lucy, whose trajectory is similar if not the same, has been a challenge too simple for many critics to resist. Nonetheless, such a search not only diverts attention away from the ambiguity expressed by the text and this ambiguity’s function, but also further instantiates the idea of a one-to-one correlation between author and protagonist, a correlation challenged directly by Kincaid through interviews and indirectly by Lucy in the novel.

Reflecting on her relationship to her writings, Kincaid notes: “Everything I say is true, and everything I say is not true... I aim to be true to something, but it’s not necessarily the facts.”¹⁹³ Refuting Mariah’s attempt to connect her to other women, Lucy announces, “that society and history and culture and other women in general were something else altogether.”¹⁹⁴ By choosing to provide locations and connections rather than ambiguous locations, critics implicate their ability to recognize the importance of such ambiguity within the text.

As mentioned above, every critic whose scholarship I have examined has made locative and temporal connections the novel never explicitly makes. While this reception indicates critics’ propensity towards finding that which they seek, the novel almost invites such locative connections as it repeatedly alludes to times and places without specifically identifying any of them. Lucy’s description of a northern city with stockbrokers and snow, fabulous museums, and underground trains cannot help but elicit a deductive ‘Ah-ha! New York!’ from critics and casual readers alike. Neither is such deduction countered by either factual description – no description is presented that might contradict the novel’s location in New York City – or direct denial – Lucy does not deny New York is the location of the story. In short, the failure of critics to avoid

¹⁹¹ FERGUSON, *supra* note 2, at 11.

¹⁹² By presenting Lucy’s story as fiction, Kincaid perhaps allows herself to report on her life without adherence to the factual precepts that encounter such a report. It is then a formal choice. By structuring the text as fiction, Kincaid is free not to untether the story from the facts of her own immigrant experience. The freedom lets Kincaid keep Lucy’s narrative true to Kincaid’s creative intent. The fictional structure also allows Jamaica Kincaid a greater distance that comes from the production of a novel as opposed to an autobiography. As mentioned above, the novel form frees Jamaica Kincaid from the need to deliver a narrative that accounts in the same factual manner as a biography. The form also offers Jamaica Kincaid the opportunity to remove herself from the story insofar as it presented not as her story, but as the story of Lucy Potter. In sum, Lucy is Jamaica Kincaid’s creation, but Lucy is still a creation quite close to its creator. Note also that the category of ‘autobiography’ is perhaps less stable than ever; some autobiography theorists believe that all autobiographies are, to some degree, fictional. Indeed, as *Lucy* does draw on Kincaid’s experiences, it fits perhaps best in the genre of the ‘autobiographical novel.’

¹⁹³ See Kay Bonetti, *An Interview with Jamaica Kincaid*, 15 THE MISSOURI REVIEW 2 (1992), 124, 125. See also, Lenz, *supra* note 188, at 115.

¹⁹⁴ KINCAID, *supra* note 2, at 132.

the pitfall of ‘locating’ the novel is due in no small part to *Lucy*’s specious offering and assiduous maintenance of this almost-but-not-quite explicitness. The novel, through the veiled presentation of temporal and geographic locations, never attempts to deny the analytical logic that undergirds such locative conclusions, yet neither does the novel ever offer confirmation.

With the deposition of spatial and temporal systems of notation, the episodes of *Lucy* locate themselves through the thematic and associative connections that Lucy herself writes.¹⁹⁵ Whether on the lake, in the city, or at the park, these scenes, removed from temporal and spatial notation, resonate instead through the connections they make between Lucy’s present and her past. When Lucy encounters daffodils in a park, her focus immediately returns to a poem that she has had to learn and recite about daffodils during her youth.¹⁹⁶ When Lucy later watches her boyfriend Paul plunge his hand into a fish tank in order to retrieve a rhinestone starfish, Lucy’s narration immediately shifts to an earlier instance in her life when death, sex, and water had become connected.¹⁹⁷ Detached from systems of location, Lucy operates outside a normative paradigm in which the entrance and exit of geographical locations is catalogued through space and time. The novel instead repeatedly transgresses these indices as it journeys associatively through symbolic connections.

This escape from a positional matrix of here, now as opposed to there, then denies the distance – temporal, spatial, and symbolic, between the episodes Lucy relates. Lucy will not place Paul’s apartment in Queens or 1969, nor will she firmly position the death of Mr. Thomas, a village fisherman, in Antigua, 1963; this choice further emphasizes the symbolic connections Lucy makes. By choosing not to connect her experiences to a time or place, Lucy further enables such experiences to resonate with and flow into each other. This lack of distinction reinforces the focus on Lucy as the titular and singular narratological constant within the tale.

As the voice and the central physical presence of the novel, Lucy moves among many unconfirmed locations. Yet Lucy never informs the reader of her location, perhaps because after her departure from her island home she never substantially settles in any of the arenas she enters. The novel, which opens in departure, travels among multiple locations.

The novel begins with Lucy’s description of her ride from the airport.¹⁹⁸ Thereafter Lucy travels to Lewis and Mariah’s apartment, visits several locations in the city, and eventually moves into an apartment with a friend whom she has met in a park she often visits.¹⁹⁹ Like Lucy, the novel is unable to remain in any of the spaces it enters. Even the end of the novel is expressed more as a second act of departure than as a terminal act of location. I return to this scene shortly.

While Lucy’s narrative style favors symbolic association as well as temporal and spatial inexactitude, there is temporal progression in this story. Even as Lucy recounts an episodic narrative, her pearl-like vignettes are strung together by a narrative trajectory that progresses unambiguously from her entrance into a new country to her entrance into a shared apartment. For all the ambiguity of the text, its system of organization in a collection of ‘days’ that, taken together, constitute Lucy’s first year away from the islands, apparently contradicts the temporal dislocation of the text. In a narrative whose constant flashbacks are indicative of a well-indexed

¹⁹⁵ While these connections might also be understood as the hermeneutic/symbolic bridges built between Lucy’s presence in the North and her West-Indian past, to structure my consideration through these terms would debilitate my very attempt to read against spatial and geographic location in the text.

¹⁹⁶ KINCAID, *supra* note 2, at 7.

¹⁹⁷ *Id.* at 100.

¹⁹⁸ *Id.* at 1.

¹⁹⁹ *Id.* at 2, 26, 93, 133.

modernism, that is, in a narrative that has ostensibly set aside notational axes of time and space, what are we to do with this linear trajectory?

I would suggest that this narrative trajectory further confirms Lucy's dislocation. Despite the progression of vignettes and the conclusion of novel, the appropriate representation of this progression is not a line, but rather a loop. At both ends of the novel Lucy's beginning is less an entrance into the new than an exit from the past; as mentioned above, Lucy travels through many spaces in which she does not remain. Her movement into an apartment with her friend Peggy toward the end of the novel gestures to the possibility of a final location as it concurrently explodes this opportunity. Lucy has found another space and has begun a new 'temporal period' of her life just as she arrives at the end of her story. Yet despite the coordination of spatial, temporal, and narrative endpoints, this apartment is not home.

To understand the continuation of Lucy's dislocation, a dislocation that her ascent to financial independence and spatial liberty has not dispelled, we must ignore those critics who would read this as an achievement of Lucy as a feminine, black, or post-colonial subject. We need only heed Lucy's words: "I realized ... that I did not think of it as home, only as the place where I now lived."²⁰⁰ Home, as Lucy repeatedly asserts in the novel, still refers to a West-Indian island to which Lucy never wishes to return.²⁰¹

Even though the novel's terminus structurally arrests Lucy's movement and thereby sets Lucy within an ultimate position, Lucy remains figuratively dislocated. The novel's conclusion again evinces the profundity of this dislocation. Having sent her mother a false address, staring at a broken clock on her mantle, Lucy, through this move, has accomplished less her own insertion into a specific place at a specific time than the concretization of her own dislocation and detemporalization. Even Lucy's late reference to official "documents [that] showed everything about [her]" functions less as a manner of capturing Lucy within a static identity than a symbolic springboard through which she can become even more profoundly dislocated.²⁰²

Lucy's passport records both her name and her date of birth. Yet it is no accident that the date of the narrative is never implied until the end of the novel, and then only indirectly through these documents: "They showed that I was born on the twenty-fifth of May 1949."²⁰³ As Lucy is nineteen at the novel's beginning, we can assume that the novel concludes in or around 1969.²⁰⁴ This date could perhaps be established with less range, but more important than this establishment is the novel's concurrent movement against temporal positioning. Although Lucy has broken out of the repetitive structure of the 'one day' episodes and the larger structure of her one year contract to Lewis and Mariah, her citation of this date feels extraneous, outside the fabric of the novel; Lucy states as much herself when she notes that "these documents showed everything about me, and yet they showed nothing about me."²⁰⁵ Neither the map, nor the clock, nor the passport matters to Lucy. She recognizes these objects, the identificatory technologies of the modernist and contemporary world, artifacts that locate a subject in time and space and thereby "show[] everything about [her]."²⁰⁶ Nonetheless, she ultimately rejects these

²⁰⁰ *Id.* at 156.

²⁰¹ Lucy refers to her 'home' in the West Indies more than 30 times. Her specific decision never to return occurs on page 128.

²⁰² KINCAID, *supra* note 2, at 149.

²⁰³ *Id.* at 148.

²⁰⁴ *Id.* at 7.

²⁰⁵ *Id.* at 148.

²⁰⁶ *Id.*

hermeneutic indices by acknowledging that “these documents... show[] nothing about [her].”²⁰⁷ But a passport serves as more than a tether of a certain person to a certain time, birthdate, nationality, issuer, and series of locations as denoted by stamps (or lack thereof). A passport is also an identification, that is, a document that provides an identity to its bearer. Accordingly, Lucy’s denouncement of her passport culminates in an attack on the (denominative) nominal authority of the identificatory document. Lucy’s lack of investment in the terminology of temporal or geographic identification disavows its locative authority.

Throughout the novel Lucy has struggled with characters who have attempted to reduce her subjectivity by calling her different names. Referred to as ‘cargo,’ then ‘poor visitor,’ then the ‘girl from the islands,’ Lucy has good reason to reject the ability of labels to denote her subjectivity.²⁰⁸ The referential authority of naming practices is ultimately challenged when we finally gain access to Lucy’s actual name upon the last pages of the novel. Not surprisingly, this return to the ‘original’ if not ‘real’ notation of her subjectivity also constitutes the novel’s last flashback; on the island with her mother, Lucy inquires about the origin of her name. Her mother responds that Lucy has been named after “Satan himself” because of the “botheration” she has been since her conception.²⁰⁹ This nominal fracturing of the protagonist into both Lucy Josephine Potter per official document and Lucifer (“Satan himself”) per maternal revelation is only the penultimate attempt of the novel to stress the dislocation of its protagonist.²¹⁰

Heretofore, the inexplicit temporality and geography of the narrative has been counterbalanced by the explicit presence of Lucy who speaks through every page of the novel. The titular presence of her name, the word the reader first finds at the top of every page, likewise serves as a point of determination. In a novel in which the ambiguity of time and space is contradistinguished by the irreducible certainty of the eponymous narrator, her conclusive division into two names illustrates a profound fissure within and dislocation of her own identity.²¹¹ Nonetheless the etymological revelation of Lucy’s name, whether serious or cynical, actually delights Lucy. Unlike any other name in the novel, Lucy embraces the diabolic denomination; insofar as the name’s original bearer was a cast-out, condemned to eternal dislocation, the name fits her – and she knows it.

The narrative can only exceed this act of dislocation through an assault on its only remaining index of stability, the text itself. At the end of the story, Lucy is emotionally overcome. She has cut connection with her West Indian family, abandoned her surrogate employer-family, and chosen to end her relationship with her boyfriend and the friend of hers with whom her boyfriend is sleeping. In this maelstrom of emotions, Lucy cries into the journal in which she ostensibly records her story. Initiated by an emotional desire to “love someone so much that [she] could die,” crying itself becomes a subversion of Lucy’s character who is

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 7, 14, 56.

²⁰⁹ *Id.* at 152.

²¹⁰ The split between Lucifer and Satan is perhaps another level of nominal bipartition. Satan and Lucifer can be read as the same entity, and are employed this way by Lucy’s mother. Nonetheless, Lucy’s citation of *Paradise Lost*, in which Satan and Lucifer are distinct individuals, invites a further consideration of the novel’s divine and diabolic identifications and partitions.

²¹¹ Similarly, Brooke Lenz has read this scene as an identification with “Lucifer, whose decision to reign in hell rather than serve in heaven proceeds from a refusal to be defined and controlled by someone else, regardless of the circumstances surround that control,” Lenz, *supra* note 188, at 12. Interestingly, Lenz’s reading of Lucifer through Judeo-Christian mythology ends with Lucifer’s retention of self-control at the cost of his mobility; Lucifer is condemned to hell. Lucy, who “embraces” her name, does so, in my reading, as an act of further dislocation.

textually constituted by both her presence on a page that catalogues her life and her professed inability to love.²¹² This desire to be that which she is not and to do that which she cannot focuses on the many aspects of Lucy Josephine Potter / Lucifer's dislocation; this tension, encapsulated in Lucy's tears, is the novel's final attack on location. Outside of time and place, positioned between multiple names, even Lucy's medium undermines its location on the page as Lucy's precise words and complete presence dissolve into a "big blur."²¹³

In contrast to the various modes and increasing levels of ambiguity and dissolution explored in *Lucy*, the narrative as delivered through Lucy is distinctive for both its clarity and its directness. As the novel breaks down every index of location, Lucy's voice remains constant; the train of her words provides a central narrative force and attachment that equipoises the protagonist's and text's compulsive drive towards detachment. This is not to say Lucy's communication strategies do not evolve over the course of the novel; she does indeed begin to communicate less, but, when she communicates, Lucy remains very frank.²¹⁴ Through her willingness to communicate dreams and internal thoughts as well as her acknowledgement of her inability to understand, Lucy's openness of style contrasts with both the false interpretations she encounters as well as the indeterminacy with which Lucy describes the world.

While it is of little surprise that a novel operating between spaces, times, and, most importantly, cultures, should engage indeterminacy, the directness of Lucy's communication is surprising. Very early in the novel Lucy dreams that the patriarch of the family that employs her, Lewis, chases her around the kitchen. In the dream she is naked. More shocking than the dream is the nonchalance Lucy exhibits as she recounts the dream to Lewis, his wife Mariah, and their four young children over dinner. Although Lucy intends her account to indicate her relative comfort with the family with which she lives, Lucy's disclosure causes Lewis and Mariah to cycle through a series of indirect responses that indicate the communication breakdown between Lucy and her hosts.²¹⁵ At first, both Mariah and Lewis are silent.²¹⁶ Then Mariah clears her throat and Lewis clucks while repeating 'poor visitor.'²¹⁷ Finally Mariah suggests "Dr. Freud for visitor."²¹⁸ In spite of their many attempts at communication, attempts that possibly express their disapproval and definitely their concern, Mariah and Lewis fail to understand or make themselves understood to Lucy at either this point or later. In contrast, Lucy is direct and open throughout the scene; despite the indirect communication attempts of her employer-hosts, she acknowledges that she doesn't know who Freud is and also attests that she does not think Mariah or Lewis have understood her dream. In short Lucy is forthcoming, direct, and clear with her language even if she is unfamiliar with the indirect codes used by her employer-hosts.

Many of the novel's episodes can be reduced to the schema I have elaborated in which a determined voice speaks from an indeterminate space of misunderstanding. Within the arc of *Lucy*'s one-year narrative, a representative episode is likely to begin with the unspecific 'one day,' traverse the symbolically coordinated flashbacks that allow us to understand Lucy (associations that coming from Lucy, are not provided for any other character), and end with the

²¹² KINCAID, *supra* note 2, at 164.

²¹³ *Id.*

²¹⁴ The impetus for this shift away from communication later in the novel finds root not in Lucy, but in her physical inability to reply as well as her recognition of the futility of communication, *e.g.*, contemplating Lewis's infidelity, Lucy has trouble believing that Mariah did not expect her husband to act in this manner. *Id.* at 141.

²¹⁵ KINCAID, *supra* note 2, at 15.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

often repeated phrase that serves as an admission of both Lucy's inability to understand the situation and her desire for such understanding: "How does a person get to be that way?"²¹⁹

As one of the most common phrases in the novel, Lucy's oft-repeated question: "How does a person get to be that way," emphasizes Lucy's inability to understand the people she encounters after leaving the West Indies. Ironically, it is Lucy's repeated assertion of her own inability to understand that clearly indicates the challenge to hermeneutics in this novel. As suggested above, this hermeneutic failure is not limited to Lucy; she experiences misunderstandings with the majority of the characters in the novel. Yet the clarity and directness with which Lucy confronts these failed attempts at understanding repeatedly emphasize interpretation's importance both within and outside the text.

While Lucy is entirely forthcoming about her inability to understand certain people or their actions in the text, she also makes a repeated effort to preclude false interpretations of her own actions. When we are perhaps ready to ascribe feelings of homesickness or love to her, she adamantly proclaims: "I had long ago decided not to miss anything," and "I was not in love with [the man I was dating,] Hugh."²²⁰ In this manner, *Lucy* anticipates improper interpretations on the part of the reader even as the character Lucy recounts such instances of misinterpretation made by characters in the text. When Mariah comments on her desire for Lucy to "experience spending the night on a train," or proclaims her 'Indian blood,' or brings Lucy to the park to see the daffodils, Lucy notes the falsity of Mariah's expectations, that is, Mariah's misinterpretations of Lucy's possible reactions.²²¹ The commentary on these misinterpretations remains self-reflective; Lucy repeatedly acknowledges her own inability and desire to understand Mariah: "How does a person get to be that way?"

As discussed above, extant scholarship on *Lucy* has resolved much of the novel's ambiguity, spatial and temporal. Just as *Lucy*'s ambiguity maintains a curious relationship to Lucy's determinacy and focus on hermeneutic discordance, the critical destruction of this ambiguity, ambiguity the novel maintains too assiduously to be coincidence, is compounded by the larger critical fault of specification. Although the majority of critics acknowledge and comment upon the barriers to communication in *Lucy*, few, if any, recognize the irony implicit in offering (or rather forcing) their own critical interpretations on the novel. The critic Edyta Oczkiewicz astutely realizes the "incomplete communication" that occurs when Lucy recites her dream to Lewis and Mariah at dinner.²²² Oczkiewicz even discounts Lewis and Mariah's attempt to figure Lucy through Freudian interpretation. Discounting the ability of Freud's *Interpretation of Dreams* to understand Lucy's inchoate post-colonial identity, Oczkiewicz immediately thereafter reads this dream, and the other two dreams recorded in the novel, as indicative of Lucy's fears of colonial aggression.²²³ Whereas Lewis and Mariah suggest a reading of Lucy's dream of being chased by Lewis as Freudian and likely rooted in the sexual anxiety symbolized

²¹⁹ This phrase and very similar permutations of it are cited six times in the novel: *Id.* at 6, 17, 20, 41, 124, 155.

²²⁰ KINCAID, *supra* note 2, at 82, 70-71.

²²¹ *Id.* at 40, 7.

²²² Oczkiewicz, *supra* note 2, at 120.

²²³ See MOIRA FERGUSON, *Chapter 4: Lucy: A New Site*, in JAMAICA KINCAID: WHERE THE LAND MEETS THE BODY 107, 110, 111 (1994). Moira Ferguson makes a very similar reading of this in which "Lewis and Mariah encode the dream as sexual, not colonial, betraying their ethnocentrism." *Id.* at 110. Ferguson embarks thereafter into a symbolic reading in which "yellow represents domination." *Id.* at 111. Although not explicitly Freudian, there is little difference between the interpretative strategies imposed by Mariah and Lewis, and those of Ferguson and Oczkiewicz.

by man chasing woman,²²⁴ Oczkowicz reads the dream as an expression of colonial anxiety born of a white man chasing a black woman. Ignoring for a moment the gains of Oczkowicz's reading, this interpretation of Lucy's dream symbolism is itself based in pop-psychological notions of symbolized meaning brought into critical popularity by Freud. Indeed, Oczkowicz also engages the Freudian notion of the hidden unconscious to explain Lucy's development of a post-colonial consciousness as she asserts early in her discussion of the novel that Lucy "is not always fully conscious of what is happening to her."²²⁵

Katherine Suggs likewise reads Lucy through the lens of psychoanalysis. Detailing Freud's own comparison of the *unheimlich* or the 'uncanny' with the *heimlich* or the 'homely or familiar,' Suggs focuses not on Lucy's dreams, but rather on her memories and 'negative nostalgia.'²²⁶ Utilizing Anne Cheng's work on melancholy in ethnic literature, Suggs posits Lucy's mourning of her separation from her mother as constitutive of Lucy's identity. Thus, Lucy's life is a process of "continual escape" that, in creating "a self that is both a product of a particular past... [and] liberated from that past," remains psychologically dislocated.²²⁷ Interestingly, Suggs reads Lucy's choice not to fall in love as a testament to Lucy's recognition of her "psychic dilemma."²²⁸ Although revelatory interpretation is the modus operandi of literary criticism (this chapter included), critics tread a fine line in interpreting scenes in *Lucy* that center on the difficulties attendant to interpretation.

Like many aspects of *Lucy*, this problem of interpretation is repeatedly encountered in the text. When Mr. Thomas chooses to pursue illicit sexual encounters with the "picky-haired girl"²²⁹ Myrna instead of Lucy, Lucy is discomfited by her complicity in Mr. Thomas' interpretation of her as (chaste) like her mother; Lucy is disappointed by Mr. Thomas' interpretation of her. Nonetheless, Lucy recognizes the grounds for this identification and follows Mr. Thomas' interpretation, going so far as to read herself in the third person. Reflecting on her younger self, Lucy notes that

the Little Miss he [Mr. Thomas] knew was a teenage girl so beyond reproach in every way that if you asked her a question she would reply in her mother's forty-year-old voice—[and was thus] hardly a prospect for a secret rendezvous.²³⁰

It is also Lucy's recognition that her boyfriend, Paul, reductively sees her as an exotic object that kills her desire for the relationship. Looking at half-naked photograph Paul has taken of her, Lucy notes this as: "the moment that he got the idea he possessed me in a certain way, and that was the moment I grew tired of him."²³¹

Towards the end of the novel, Mariah again attempts to understand Lucy. Again Lucy recognizes this attempt and analyzes it for the reader: "Mariah wanted to rescue me. She spoke of women in society, women in history, women in culture, women everywhere."²³² This

²²⁴ Although Lewis and Mariah don't unpack this interpretation, could a Freudian interpretation avoid a search for latent sexuality in Lucy's dream?

²²⁵ Oczkowicz, *supra* note 2, at 118.

²²⁶ Sugg, *supra* note 2, at 165.

²²⁷ *Id.* at 166.

²²⁸ *Id.* at 167.

²²⁹ KINCAID, *supra* note 2, at 102.

²³⁰ *Id.* at 107.

²³¹ *Id.* at 155.

²³² *Id.* at 131.

juxtaposition between the individual Lucy, and Mariah's innumerable profusion of disindividualized "women," both reveals and debilitates Mariah's essentialism. Ostensibly Mariah talks to Lucy about specific women and their specific acts and contributions – specific acts, contributions, and identities that Mariah assembles into a narrative or matrix. Mariah's construction is an attempt to inform Lucy in order to place Lucy within this continuum. Mariah connects Lucy to this matrix of women, but Lucy refuses this interpretation. Lucy's silence prevents her from communicating her complete disagreement with Mariah: "But I couldn't speak, so I couldn't tell her that my mother and that society and history and culture and other women in general were something else altogether."²³³ Stunned into silence, Lucy refuses to name the "women" Mariah discusses thereby barring the reader from knowing or interpreting them. This is not only a rejection of Mariah's specific individuals, but also concurrently, a revelatory rejection of Mariah's interpretive interpellation of Lucy into a feminist reading. Lucy does not state this to Mariah; communication has broken down again. But to the reader, Lucy's stance against this interpretation is clear.

Despite the clarity and directness with which Lucy contradicts historical, cultural, or gender focused interpretations of her self and her relationships, critics repeatedly impose these very readings on the text. Altogether, *Lucy* contains a double pitfall of interpretation. Critics initially err by refusing the general temporal and spatial ambiguity of the novel as they presume to specify its indeterminacies. Critical approaches compound this error as they overlook the specific and determined moves against interpretative methodologies made by the novel. Only by disregarding the importance of these moments, that is through either a failure or an unwillingness to see both the ambiguity and the specificity of the novel, can critics generalize Lucy's story and read it through any of a number of larger critical frameworks. Ironically, the most common frameworks through which *Lucy* is construed – post-colonialism, feminism, and black literature – are fields committed to surmounting oppressive historical, societal, and cultural systems that would denigrate the black, female, and post-colonial subject. Yet, in the drive to read *Lucy* as a tale of the black, the female, and/or the post-colonial subject, critics ignore the novel's direct textual petition to allow Lucy to be Lucy, independent of allegorical and thereby reductive hermeneutics. This is a petition often made by Kincaid herself, a petition that critics are eager to cite yet incapable of taking at face value.²³⁴

Lucy's (and Kincaid's) eschewal of interpretive frameworks resonates with the novel's own insistent indeterminacy in relation to cultural artifacts. Just as the novel gestures towards temporal and spatial positioning without ever explicitly, locating itself, the novel engages the same playful strategy in its own cultural positioning. Indeed, the most prominent grounds for reading *Lucy* through any of the critical paradigms with which critics have met the novel lies with its resonance within the frameworks towards which it gestures with almost but not quite explicitness, yet ultimately rejects.

Only slightly less common than the critics' determinations of 'New York' or 'Antigua' as the novel's non-denominated locations are the cultural revelations that critics enjoy making. As a schoolgirl, Lucy is forced to memorize and recite a poem about daffodils; she enjoys the brightly colored paintings of a banker who left "a comfortable life with his wife and children" to go "to the opposite part of the world, where he was happier" and paint what he saw there.²³⁵ Lucy rejects a book that Mariah has given her on the female gender that begins with the line,

²³³ *Id.* at 131-32.

²³⁴ See FERGUSON, *supra* note 2, at 107; Lenz, *supra* note 188, at 98.

²³⁵ KINCAID, *supra* note 2, at 95.

“Woman? Very simple, say the fanciers of simple formulas: she is a womb, an ovary; she is a female—this word is sufficient to define her.”²³⁶ Neither Lucy nor *Lucy* says the poem is from Wordsworth, or that the brightly colored paintings of naked women on their native islands are by Gauguin, or that the quoted line of Mariah’s feminist tome could come only from Simone de Beauvoir’s *The Second Sex*. Admittedly, the ability to close the loop and recognize these cultural artifacts of Lewis and Mariah’s life, the life into which Lucy is negotiating her assimilation, is satisfying. There is a little moment of ‘ah-ha!’ But this pleasure of that small moment, this tumbler-fall of recognition, a pleasure of understanding, and more deeply, of belonging to a (the?) group that understands is precisely the understanding that Lucy lacks or denies herself and *Lucy* rejects. Furthermore, by recognizing these artifacts through our own cultural fluency, other critics and I ironically align ourselves with the characters in the novel who introduce Lucy to these artifacts – the very individuals whom she does not understand and, more troubling, do not understand her. As such, these interpretative temptations function, at least on one level, as traps designed to reveal and identify the critic who would seek to identify Lucy.

Despite this danger, these allusions to the productions of Western culture are enjoyable for that which they allow critics and readers to feel, interesting for what the presence of such pleasure (and its indulgence) imply about ‘us,’ and also intriguing precisely because they are so thinly veiled. While such veils might indicate *Lucy*’s lack of desire to name cultural artifacts, the novel does name some cultural icons, such as Freud and Shakespeare. Interestingly, Shakespeare and Freud as well as Milton, whose *Paradise Lost* is referred to in *Lucy*, figure less prominently in criticism on the novel than the cultural references that, like much of the geographic and temporal markers, are ever-implicit yet never explicit.²³⁷

Yet while critics have seldom hesitated to name Wordsworth and Gauguin as the poet and the painter to which the narrative repeatedly returns, such assumptions are made not only by critics; many of the editions of the novel carry one of Gauguin’s ‘exotic’ paintings of ‘island women’ on the cover.²³⁸ The painting of the brown-skinned, half nude woman staring back from the cover of the novel operates as both a rendition of Lucy—her race, her sexuality, her exoticism—and a reminder of the abstraction Lucy undergoes when reinterpreted or *read* through the eyes of the Western, white critic or artist.

Still, it must be stressed that the publication of the novel itself invites its readers to close this loop of interpretation. The novel almost wants us to connect Lucy with Gauguin’s exotic woman; whether it wants us to view that ‘woman’ to symbolize Lucy herself or the reductive processes by which Lucy will be interpreted within the novel is less clear. It is clear, however, that the paintings on the cover of most editions and discussed in the novel are not the only cultural artifacts that gesture ambivalently towards and away from Western culture.

At a number of points in her first year, Lucy encounters and recalls daffodils and a poem she has had to learn to recite about daffodils in her youth. Although Lucy has sedulously learned the poem, she comes north having never seen the celebrated flowers. Critics have specifically

²³⁶ *Id.* at 132.

²³⁷ Taken at face value, the critical preference for the unnamed Gauguin and Wordsworth over the named Shakespeare and Milton appears strange. If providing a cultural reading (and what reading isn’t cultural?) of the cultural relics of *Lucy*, why overlook the clearest artifacts at hand? Perhaps the small challenge of recognition makes the critic pause enough to consider the greater implications of the concluded recognition: “This is Gauguin... and what import Gauguin?” A fuller argument would likely contend that the unnamed cultural artifacts are more ‘important’ to the novel and therefore worthier of critical attention.

²³⁸ A detail of Gauguin’s painting, *Savage Poems*, is printed on the cover of many editions: *Savage Poems*, 1896, by Paul Gauguin, courtesy of the Fogg Art Museum, Harvard University Art Museums.

read the repeated encounter of daffodils as a disruptive return of a culture first experienced through colonialism. Critics first connect these daffodils to Wordsworth and then to England and then to the English colonialism that has exported descriptions of these daffodils if not the daffodils themselves. Colonialism is thus implicated generally for its effects on Lucy's home and perhaps specifically for the power it wields over Lucy, who in her (colonial) school is forced to learn the (colonial) poem.

But whereas the absence of locative notation in *Lucy* reinforces the centrality of Lucy, the repeated encounter of daffodils clearly signifies the thematic importance of the flowers just as Lucy's choice not to specifically, that is nominally, anchor the recurrence of this trope signifies the hermeneutic difficulties or even anxiety caused by these flowers. This trope provides a fertile space for a psychological or post-colonial interpretation, two interpretative directions that are impossible not to acknowledge when considering the numerous scenes in which either daffodils or the bouncing, blonde, daffodil-esque heads of Lewis, Mariah, and their four children cross Lucy's narrative landscape. Such readings with their focus on the return of colonial rule or familial trauma as symbolized by the daffodils deepen both our understanding and thereby our appreciation of the novel.²³⁹

Despite the importance of these critical approaches, these readings disregard Lucy's decision never to make an explicit connection to Wordsworth; this lack of referent reconfigures the relationship between cultural artifact and its interpretation and is quite important. By not supplying a nominal determinant Lucy denies Wordsworth the stature usually accorded to the father of English Romantic poetry. In doing so, Lucy presents Wordsworth neither as a benefit of English colonization nor does she allow him to stand as a cultural vanguard or capacious referent to colonialism and its violence. Stripped of the name, the grand encasing that might bring either characters within the story or characters outside of it to overlook the past violence the flowers might symbolize, we are free to observe Lucy's memory of this poem for the trauma it causes *her* unburdened by other histories. By withholding Wordsworth's name, the effect of the daffodils on Lucy remains about Lucy and not Wordsworth; her experiences are unmitigated by the multivalent connotations of the poet's name.

In this sense the novel's failure to name the painter or the poet, like its failure to locate places underlines the spatial and cultural dislocation of Lucy even as it reinforces her centrality within the text. She is not the object upon which colonialism or other violent systems operate, she is not the object who is interpreted. Rather she is the subject who rejects false interpretations, whether delivered through poems or persons.

Set against this dislocation is a large amount of travel. Although Lucy's trajectory is quite simple – she leaves her island home for a northern city before moving into an apartment towards the end of the narrative, Lucy's thoughts and prose return repeatedly to her origin. Returning to Lucy's home, as the narrative often does, we see that Lucy's inability to substantially relocate herself at the end of the novel lies in her incomplete detachment from the island on which she was born and raised. At the end of the novel, Lucy has broken off her employment with Mariah to move into an apartment with her friend, Peggy. She has put herself beyond her mother and her mother-figure, but she has not located herself beyond them. Yet while Lucy's move away from Mariah, another mother figure, ruptures the symbiotic connection and breaks the epistolary chain of communication with her mother, Lucy's relocation or entrance into a new domicile does not impede Lucy's associative or thematic returns to the islands, to the

²³⁹ The cascade from recognition to putative understanding to pleasure and appreciation is here as well.

past, and to her mother. Lucy considers her failure to escape, or rather, her inability to escape with her standard incisive clarity.

When Lucy recalls her mother's pronouncement that "You can run away, but you cannot escape the fact that I am your mother," Lucy dryly and rhetorically wonders "How else [Lucy might] take such a statement but as a sentence for life in a prison whose bars were stronger than any iron imaginable?"²⁴⁰ Although such a question acknowledges a sort of terminal positioning and seemingly forecloses the possibility of escape, Lucy's literal departure from the West Indies still functions as an attempt at physical escape that completes the process of exclusion.²⁴¹ Speaking of her lack of love for a man, Hugh, later in the novel Lucy notes the "almost unbreakable bonds" from which she is "only half a year free" as a constraint upon her ability to love a boyfriend.²⁴²

Interestingly, these unbreakable affective bonds of love "designed solely to make [Lucy] into an echo of her [mother]," function similarly to the recurrent trope of daffodils discussed above.²⁴³ Lucy fears that her mother's love will "make [her] into an echo" and feels that she "would rather be dead than become just an echo of someone."²⁴⁴ Comparatively, the profusion of daffodils in the text, whether encountered in Lucy's memory, a city park, a conversation with Mariah, or reconfigured in the "yellow-haired heads" of Mariah, Lewis, and their children, are likewise 'echoes' of an English poem that symbolically connects to multiple registers of Lucy's oppressive past.²⁴⁵ Yet as these 'echoes' remain incompletely bound to an unnamed poet, Lucy's return to this unnamed poet challenges and destabilizes the authority of the 'original.' In this manner, the unnamed poet functions as a retrogressive 'echo' of occurrences documented by the text. This inversion is perhaps subtle, but it has important implications. Instead of a normative reading in which Lucy's unresolved past trauma of learning to recite a poem about a type of flower that did not even grow on her island continues to erupt into Lucy's present, *Lucy* instead presents a schema in which Lucy's present allows her to reconnect to and throw light on this encounter with an unnamed poet in her past. The capacity of Lucy's traumatic experience with poetry to bleed into the present concurrently reifies and debases the power of the originary occurrence.²⁴⁶ Through repeated ruptures into and recurrences within the narrative, an incompletely located trauma from Lucy's childhood invites attention not only to another associative coordination among her experiences (and thus a further debasement of spatial and temporal categorization), but also to the processes through which these processes are interpreted.

²⁴⁰ KINCAID, *supra* note 2, at 90-91.

²⁴¹ Lucy first realizes this exclusion after the birth of her brother when it becomes clear that her parents harbor grand plans for him that they do not have for Lucy. This is one of many indications of the misogyny detailed by the novel; these moments have contributed to feminist readings of the novel.

²⁴² KINCAID, *supra* note 2, at 77.

²⁴³ *Id.* at 36.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 12.

²⁴⁶ In this manner, colonial mimicry operates not at the level of the colonized subject who learns and acts out the actions of the colonizer, but rather in the interpreted experience of the subject. *cf.* HOMI BHABHA, *Of mimicry and man: The ambivalence of colonial discourse*, in *THE LOCATION OF CULTURE* 85 (1994). Note also, Lucy's choice to focus on the meaning of this event while dispensing with the valorized name of the poem inverts her reaction to the poem itself. Assuming *arguendo* that the poem is William Wordsworth's "I wander'd lonely as a cloud," *Lucy* rejects the poem by failing to consider any of the deeper interpretations of the piece. Instead she collapses its internal meaning(s) into a trope of blonde heads and foreign flowers. In short, Lucy denies the poem any meaning other than what she gives it; it is only a grim experience from her past.

This is a strategy the novel later reemploys in developing the connections between Lucy and the painter. Lucy hears of this painter and views his work in a museum.²⁴⁷ Maintaining status quo, the novel never confirms the identity of this painter whose “life could be found in the pages of a book” and who “had the perfume of a hero about him.”²⁴⁸ Lucy compares herself to this painter and this comparison provides some of the novel’s most profound comments on gender inequality. Maintaining status quo, feminist readings of *Lucy* never fail to examine the complex interplay between Lucy and her ‘Gauguin’ within the novel. Yet by never bestowing this painter with a name, Lucy subordinates his presence within Western culture, a culture outside of her control, as she contains him in her own interpretation. This painter cannot correctly be referred to as Gauguin as Lucy has not liberated him through expression, the counterpoint of interpretation.

This control through naming is a power possessed not only by Lucy. As mentioned above, Lucy clearly denies many attempts of colonialist, psychological, feminist, social, and cultural interpretations by others.²⁴⁹ She rejects Paul when he feels he possesses her, insists to Mariah that those other women are “something else altogether” and does not even know who “Dr. Freud” is.²⁵⁰ However, Lucy does more than counteract the naming acts of others and their concomitant interpretations. Ultimately, Lucy maintains her own naming prerogative in a manner that advances beyond the ostentatious absence of names. When Mariah’s disloyal friend Dinah asks Lucy if she is “from the islands,” Lucy recognizes that “[t]o a person in Dinah’s position, someone like [Lucy] is ‘the girl’ – as in ‘the girl who takes care of the children.’”²⁵¹ Quickly and unflinchingly Lucy reads the ambiguously locative description for the exceedingly distinct and reductive interpretation it entails. Lucy recognizes that Dinah’s interpretive methodology in which “from the islands” equals “the girl” equals the servant. Recognizing this act of naming, and not content with her reduction to quasi-servant, Lucy rejects it. And she goes one step further. Having largely avoided names applied to her as well as providing names to others, Lucy counters by reading Dinah:

It would never have occurred to her that I had sized her up immediately, that I viewed her as a cliché, as a something not to be, a something to rise above, a something I was very familiar with: a woman in love with another woman [Mariah]’s life, not in a way that inspires imitation but in a way that inspires envy.²⁵²

By recognizing Dinah’s envy, Lucy initiates her own reductive reinterpretation in which Dinah equals cliché equals something to avoid. More powerful still, Lucy, having rejected Dinah’s reduction of her to “the girl,” literally denies and subordinates Dinah while objectifying her: Dinah is “a something *not to be*, a *something to rise above*.”²⁵³

²⁴⁷ KINCAID, *supra* note 2, at 93.

²⁴⁸ *Id.* at 95.

²⁴⁹ For a reading of instances of “colonialist interpellation” in *Lucy*, see Helen Tiffin, *Cold Hearts and (Foreign) Tongues: Recitation and the Reclamation of the Female Body in the Works of Erna Brodber and Jamaica Kincaid*, in *MODERN CRITICAL VIEWS: JAMAICA KINCAID* 150 (Harold Bloom, ed. 1998).

²⁵⁰ KINCAID, *supra* note 2, at 156, 132, 13.

²⁵¹ *Id.* at 56-58.

²⁵² *Id.* at 58.

²⁵³ *Id.* (my emphasis).

In spite of the conspicuous absence of names in *Lucy*, Lucy's rejection of names provided by others, and the limited and damning naming acts she performs, Lucy does accept one name in this novel – her own. But this acceptance is more than a moment of self-affirmation. In a scene near the beginning of Lucy's story yet near the end of the novel, Lucy recalls asking her mother the origin of her name.²⁵⁴ As discussed earlier in this Part, Lucy's mother responds that she has named her daughter after "Satan himself [because she has been] a botheration from the moment [she was] conceived."²⁵⁵ Instead of distress, this etymology pleases Lucy, she notes that she "would have much preferred to be called Lucifer outright."²⁵⁶ Lucy's embrace of her diabolic moniker at the end of the novel serves not only as an affirmation of her standoffishness and an inversion of the maternal power of nominal control, but also as a further act of dislocation. By proudly accepting her mother's name for her, Lucy both defines herself against the 'official documents' that would title her Lucy Josephine Potter and implicitly the officials who would name her. In so doing, Lucy concurrently subverts her mother's control by proudly claiming a name antithetical and antipodal to all those powers, cultures, and individuals that usually would attempt to name Lucy.²⁵⁷ By accepting the connection between her name and Lucifer, Lucy aligns herself with a character outside the space and the control of the rest of creation. It is an independent name for one who would reject the world as it is.²⁵⁸

The novel draws attention again to the power of nomination when Lucy desires to be renamed Enid during her childhood; hearing this Lucy's mother becomes "a ball of fury."²⁵⁹ It is only temporally later (yet narratologically immediately following this incident) that Lucy learns that her mother's fury over the name stems from another Enid who had tried to assassinate both Lucy and her mother. Overall, *Lucy's* repeated demonstration of absent, troubled, and failed namings does more than underline the tension between determinant identifications and indeterminate locations. Lucy's battle against identification by other characters and *Lucy's* battle against location is waged through a series of simple questions: Who is Lucy? Where is Lucy? What is Lucy? At both the physical and interpretive level, Lucy deliberately opposes expectations as she maintains her dislocation. Kincaid comments upon her own strike against expectations and the dislocation that has resulted:

As I go on writing, I feel less and less interested in the approval of the First World, and I never had the approval of the world I came from, so now I don't know where I am. I've exiled myself yet again.²⁶⁰

²⁵⁴ *Id.* at 151.

²⁵⁵ *Id.* at 153.

²⁵⁶ *Id.* at 154.

²⁵⁷ In such a system in which interpretative pathways are continuously challenged, it is not surprising that the tension of understanding occurs through an extraction of quotes and passages in *Lucy*, a process that is viscerally replicated in the novel's curious emphasis on dismemberment. Such sections can, and have, been read as indicative of the trauma that continues to inflict itself through the attempted fragmentation of the female or colonial/post-colonial subject's body into the heart, tongue, hand, and/or penis. However, a consideration of the fragmented body would not be complete without an exploration of the body's fluids and odors. Too large a topic to explore, yet too pertinent to remain unmentioned, the control of language as entrance and expulsion parallels Lucy's intentionally manipulated possessive economy of fluids and odors. She controls her identity by controlling her boundaries.

²⁵⁸ Despite the readily apparent lack of temporal, spatial, or cultural specificity in *Lucy*, Lucy's choice never to provide a patronymic for Lewis, Mariah, and their children is another instance of interpretative control through naming.

²⁵⁹ KINCAID, *supra* note 2, at 150.

²⁶⁰ FERGUSON, *supra* note 2, at 107.

Kincaid's exile, while not necessarily coterminous with Lucy's experience, nonetheless underlines the inevitable dislocation that accompanies subjugation (or interpellation) into multiple interpretative frameworks. If such an argument resonates with identity discourse arguments made by previous critics of *Lucy*, there is good reason. Yet while other theorists locate this tension in spatial difference or Lucy's past/colonial history, the dislocation of space and time in *Lucy* suggests that more than any specific interpretative methodology, the novel is primarily concerned with the hermeneutics, that is, the function and troubled application of interpretations within and without the text. As suggested above, this interpretation aligns with both Lucy and "[Kincaid's rancorous protest] against certain identity narratives grounded in either cultural, racial, or gender differences."²⁶¹ Speaking against such interpretations, Kincaid notes

Whatever I may say about being black, and Caribbean, and female when I'm sitting down at the typewriter, I am not that. So I think it's sort of limited and stupid to call anyone by these names.... My life is not a quota or an action to affirm an idea of equality. My life is my life.²⁶²

To fault critics for privileging spatial analysis to the detriment of hermeneutic considerations seems an ironic rejoinder to a novel about a woman who travels from the West Indies in order to escape the oppressive influences of others' interpretations. Aligning spatial separation with interpretative freedom, Lucy recognizes her desire to "put enough miles between [herself] and the place from which [her mother writes her]" as a means of escaping the "hundreds of years in every gesture, every word spoken, every face" that would allow to "be free to take everything in just as it came."²⁶³

While critics such as Niesen de Abruna and Suggs have read Lucy's trajectory as an escape from history, this view elides the centrality of interpretative agency as it conceals Lucy's impetus for emigration.²⁶⁴ By laying the blame on history, colonial and/or familial, critics (mis)identify Lucy's history as the catalyst of her departure from the West Indies instead of Lucy's relative inability to change her situation, her position, or her history.²⁶⁵ Lucy's desire to leave the West Indies is not a desire to escape history, but is instead a desire to escape the overdetermination of incontrovertible interpretations of her home, the "hundreds of years in every gesture, every word spoken, every face."²⁶⁶ This desire to "be free to take everything in just as it came," is a desire to avoid the foreclosure of reductive interpretations, a challenge that Lucy and *Lucy* continue to encounter.²⁶⁷ More positively however, Lucy wants to be in a space she can hermeneutically possess – a ground upon which she can have her own experiences and

²⁶¹ Sugg, *supra* note 2, at 2.

²⁶² Lenz, *supra* note 188, at 98.

²⁶³ KINCAID, *supra* note 2, at 31.

²⁶⁴ See Sugg, *supra* note 2; see generally, Laura Niesen de Abruna, *Family Connections: Mother and Mother Country in the Fiction of Jean Rhys and Jamaica Kincaid*, in *MODERN CRITICAL VIEWS: JAMAICA KINCAID 13* (Harold Bloom, ed., 1998).

²⁶⁵ I grant that Lucy's inability to change her situation, her position, or her history results from familial, colonial, and historical influence. Still, Lucy seeks to escape the effect and is arguably interested little in the cause.

²⁶⁶ KINCAID, *supra* note 2, at 29.

²⁶⁷ *Id.*

construct her own interpretations. Unable to achieve this goal in any of the spaces she inhabits, Lucy remains dislocated and detached.

Although Lucy's escape remains incomplete, her partial success resides in the agency she is able to fashion through distance, not in the distance itself. Early in the novel Lucy indirectly comments on this escape: "I could now look back at the winter. It was my past, so to speak, my first real past – a past that was my own and over which I had the final word."²⁶⁸ It is this agency, this control over "the final word" that is both the cause and proof of Lucy's success. While the end of Lucy's narrative, discussed *supra*, shows the inability of this success to reinscribe Lucy into temporal or spatial coordinates, a single letter to her mother evinces Lucy's newfound control of words.

In this letter Lucy claims her multifaceted break from all her mother's expectations, sexual, educational, and otherwise. The letter, whose envelope bears a false return address, will not only catalogue Lucy's rebellion against her mother's directions, but will also dominate her mother's words by ending the epistolary relationship. As Lucy's mother will not be able to reply to the letter, the letter asserts Lucy's willful entrance as well as her exit from communication. After sending this letter, after turning the final words of the novel into "one big blur," Lucy is in a space that, left unwritten, is free from the interpretation of either character or critic. This space beyond the end of the story, the final space Lucy provides us, is dislocated and inscrutable because we are exiled from it. Thus *Lucy* itself is another letter to another reader, another catalogue of Lucy's willful entrance and exit from communication. And like the singular letter she sends her mother, this missive bears no return address.

From the maintenance of ambiguity to the lucid and direct narrative style through which the eponymous protagonist asserts her rhetorical and hermeneutic agency, Jamaica Kincaid's *Lucy* is deeply concerned with interpretation. While the novel explicitly displays the failures of the assumptions and conclusions of characters, it concurrently challenges the methodologies through which readers and critics interpret *Lucy*. As a text that engages its own meta-textuality, it makes the same self-consciousness prerequisite of any critical project that would seek to approach Lucy, character or novel.

²⁶⁸ *Id.* at 23.

CONCLUSION

Towards the end of *Light in August*, Byron Bunch travels to Jefferson, Mississippi to summon a doctor for Lena Grove. Lena is in labor and Byron hastens back to the cabin in which he has left her. As he approaches the cabin door, Byron hears a child's cry and realizes, for the first time, that he has arrived too late. Lena's child has already been born. The cry distresses Byron. As he stands outside the cabin, Byron is filled with "the terrible and irremediable despair of adolescence."¹ The cry informs Byron he has arrived too late not only to assist the delivery of the child, but also to become Lena's first lover. At this point Byron also realizes his insignificance: "*It was like me, and her, and all the other folks that I had to get mixed up in it, were just a lot of words that never even stood for anything, were not even us.*"²

Finally confronted with irrefutable proof of Lena's pregnancy and, a fortiori, her sexuality, Byron recognizes the futility of his endeavors in a manner that disputes the semiotic capacity of words – their power to "*st[and] for anything.*" For Byron, this recognition, spurred by an infant's cry that arguably stands for nothing, is a moment of cynicism and regression. Byron's recognition is less an entrance into a system of symbolic meaning than his recognition that this system of meaning can break down. It is a moment of semiotic dissolution in which Byron's vexed comment reveals the capacity of words to grant meaning as fallible at best and failed at worst.

Since I first read those words many years ago, my trust in language has never been the same. I would later acquaint myself with the theories and scholarship of the structuralists and post-structuralists. Through their work, I would become familiar with the idea of language as capable of misleading, deceiving, failing – a system of signs and symbols in which slippage is inevitable. But Byron's realization stands for more than the fallibility of language. His comments on language imply more than the potential failure of language; they also reveal the purpose of language. Despite the potential of language at any point to reveal itself as unstable, to show itself as "*just a lot of words that never even stood for anything,*" such failures are more than counterbalanced by the success of language. For the most part, language does 'stand for something.' Language maintains a capacity for identification that is unequaled. To a degree, Byron's comment is the exception that proves the rule.

It is this power of language to identify an individual that, expressed most simply, has motivated this dissertation. Throughout the course of this dissertation, I have attempted to maintain diligent focus on the modes by which language performs identifications. But, as Byron obliquely observed, "words" only have meaning when processed through the interpretive capacity of an entity. While I have focused in this dissertation on the way 'identity' is assigned and contested through language, this project has necessarily rested on interpretation, legal and human. I have queried both the ways in we *understand* and *comprehend* identity as well as the ways in which the law *understands* and *comprehends* identity. This is a project of hermeneutics interested in both the modes by which we construct both "I am" and "you are." Indeed, Byron's recognition of the language's failure to stand for anything is predicated upon his own previous failure of interpretation. Words fail Byron only when he is confronted with a cry that pierces his willful misunderstanding of, and perhaps even deliberate choice not to recognize, Lena's pregnancy and comprehend the consummated sexuality upon which it depends. When Byron's

¹ WILLIAM FAULKNER, *LIGHT IN AUGUST*, THE CORRECTED TEXT 402 (Noel Polk, ed., Vintage International 1990).

² *Id.*

mis-identification of Lena as unspoiled is destroyed, Byron must momentarily forfeit the medium through which he has previously identified her.

Just as there are multiple systems of interpretation, my examination of identities and identification in this dissertation depends on different frameworks of language. To accomplish my project, I have examined in this dissertation the distinct identificatory capacities of two different frameworks that I call discourses – law and literature. Although I often distinguish between the ways literature accomplishes identification in relation to the law, the two discourses remain, in several senses, in apposition.

Some of this similarity comes from the shared larger goal of the examples I study in each discourse – both the legal acts and the novels I read in this dissertation rely on words to identify. But this is not the only overlap between the discourses. Both law and literature also provide a space in which competitive claims to an identity or identifications themselves can clash and find consequence if not resolution.

To allow for the potential of resolution, both discourses also create a space in which more specialized techniques and technologies of identification can find purchase. One of these technologies is fingerprinting. Discounting the lack of certain procedural safeguards and standards, the instantiation and promulgation of fingerprinting as an irrefutable identificatory technology is the same in courtrooms as in fictionalized representations of courtrooms. To be certain, the safeguards and standards by the criminal justice system make all the difference when evaluating the guilt or innocence of a defendant. Nonetheless, the presentation of fingerprint evidence to the jury in *Pudd'nhead Wilson* approximates the presentation of fingerprint evidence in actual courtrooms.

Law and literature operate in different registers, that is, each discourse has a different claim to power and a different network for accomplishing the identifications set forth in its writings. Nonetheless, both discourses utilize strategies and methods to accomplish their identifications. I have broadly grouped these strategies and methods together as “technologies.” Some of these strategies and methods, like forensic fingerprinting and DNA, readily fit within the popular understanding of the term “technology.” Other modes of identification, such as censuses, familiar genealogies, or even visual identifications, press the boundaries of “technology.” By grouping so many means of identification into the term “technology” I do not mean to contort or distend the term into semiotic futility. Instead, I take full account of the myriad methods through which the discourses of law and literature accomplish the project of identification. That is, part of the reward that comes from my focus on identification is the expanded understanding of the numerous frameworks and methodologies, or, in a word, “technologies” by which *we* and *the law* identify individuals.

While my dissertation is focused on identification within discourses and through technologies, to provide a complete overview of my project I need spend a moment on movement. In all the novels I have studied, literal mobility functions as a privileged manner of refuting both identifications and the oppression that comes from them. By entering and remaining in a white space of privilege both Tom Driscoll and Joe Christmas can escape, for a set period, the disadvantages that come with a black racial identity in the South. Similarly, Lucy Potter’s struggle to escape her identification by and through her families begins and ends with acts of literal abandonment and relocation.³ Explained succinctly then, this dissertation attends

³ It should be noted that mobility does not always equate with liberation. Joe Christmas’s movement away from the orphanage or Roxy’s decision to work on a steamship are movements from one troubled location into another in which each character is arguably less ‘free.’

to the technologies employed in law and literature that assist in identification as well as the power of movement to shape, shift, and refute these identifications. This is what I want this dissertation to tell you.

But telling you that this occurs should not require hundreds of pages. Indeed, the few paragraphs above suffice to a certain degree. Nonetheless, the many thousands of words that precede this conclusion are important because it is through them that I explore *how* these identifications occur. The body of this dissertation, in sum, tells you in detail *how* law and literature construct the subject through identity and identification, *how* these discourses rely on technologies, and *how* movement impedes the heuristics and hermeneutics on which these technologies rely.

In the first two chapters of this dissertation, those dealing with *Pudd'nhead Wilson* and *Light in August*, I set up a discursive comparison. Throughout this dissertation I am interested in identity and identification, how they are known and how they are produced. In the first two chapters, however, I look at the ways in which law and literature handle a very similar problem. Both chapters deal with passing and, more specifically, the spaces in which identities can clash or be reduced, and the ways of knowing and technologies of identifying that can minimize the angst of this passing.

In *Pudd'nhead Wilson* I am interested in fingerprinting, specifically how fingerprinting functions for both law and literature as a panacea to the anxieties of passing. In Twain's novel this technology immediately dons an authority that makes it appear incontrovertible and irrefutable. To appreciate the grace that both Twain and the American justice system quickly grant fingerprinting, I discuss the identificatory technologies that fingerprinting would supplant. I look at visual identification and genealogical identification of race. More specifically, I look to the failures of these identificatory technologies. If Tom Driscoll were visually distinguishable from the 'white' individuals among whom he passes, Twain would have no story. Similarly, if Dawson's Landing's reliance on familial genealogy were able to distinguish Tom from 'white' members of the community, then Dave Wilson (and Twain) would have no reason to present to Dawson's Landing (and Twain's reading public) a new technology that might undo the spurious racial crossings and rectify, as fast as possible, their effects.

In *Light in August*, Faulkner does not employ fingerprinting to resolve the quandary surrounding Joe Christmas's vacillating racial identity. The absence of this technology, however, should not limit our understanding of the very similar moves made by Faulkner. Both *Pudd'nhead Wilson* and *Light in August* deal with unknown racial identities and characters who pass. Both Tom and Joe live in tension with the strict racial divides prescribed by their respective Southern societies. Furthermore, both characters become aware of their ability to transgress normatively intransgressible racial boundaries and engage that ability to their own advantage. By being 'white' Tom can remain in the esteem of his (white) family and society and remain in line to inherit the estate of his uncle, Judge Driscoll. Somewhat similarly, Joe's actions – from his work at the planing mill, to his bootlegging, to his connection with Joanna Burden – remain acceptable because, to the extent they are known, Jefferson attributes them to a 'white' man. In short, both novels deal with instances of individual racial passing and the ways in which communities know and maintain racial divisions in ways that do, and arguably must, arrest/contain/destroy the invisible 'black' individual.

The two novels also end in similar manners. Twain concludes *Pudd'nhead Wilson* on a positive, albeit potentially false, note. When Dave 'Pudd'nhead' Wilson uses fingerprinting to reveal Tom Driscoll as both murderer and slave, Twain's novel suggest that the possibility of

black individuals passing as white individuals can now be curtailed if not foreclosed and that Dawson's Landing (and society) might continue with untroubled racial distinction.

Set against the increasing dysfunction of technologies of racial identification that enabled the novel's plot, Wilson's deployment of fingerprinting promises a new way of knowing an individual's identity. Fingerprinting stands as a new technology of identification in which an individual is, from birth to grave, ineffaceably inscribed with God's language. Although the technology is new, the paradigm is familiar.

Like visual or genealogical means of identification, fingerprinting depends on a biological trace. Viewed in this manner, fingerprinting is not a new development so much as a recognition of an immutable aspect of humans. Each individual's fingerprints have *always* been there. In this sense, the introduction of fingerprinting is functionally and theoretically less a development or advancement of a new technology than the sudden abruption of a method of identification that, like race, finds its basis in an ahistorical conception of biological identity. Under this paradigm, black remains black and white remains white and both races remain distinct. The change is only in the biological mark or residue that's examined. Whether Twain believes that fingerprinting can and/or will solve the anxiety spurred by the dissolution of visible markers of racial identity is unclear.

Light in August similarly deals with the societal distress arising from malfunction of identificatory technologies and, towards the end, confronts the dissolution of entrenched racial boundaries intimated by these failures. Unlike Twain's novel, however, *Light in August* offers no succor. The tale of the passing individual in both novels is finished through legal explanation qua interpretation. Just as in Twain's novel, Faulkner does have a lawyer – Gavin Stevens – who does ultimately explain Joe Christmas. But Stevens' explanation is less of a prelude to a judicial decision, than an epilogue to a lynching; by the time Stevens speaks, Joe Christmas has already been tracked, caught, and viciously executed by a militia of racial zealots. As such, Stevens has neither judge nor jury. He can provide a denouement only for the motley assemblage of individuals in his office, and you, and me.

As Joe Christmas's murder has effectively given him a racial identification that law will not consider further, the novel does not, at its end, require a whodunit conclusion. Indeed, *Light in August*, like much of Faulkner's work, is a whydunit – a novel in which the actors and their actions are known but the motivations remain unclear. Faulkner's novel, despite being composed approximately four decades after *Pudd'nhead Wilson*, does not offer a new technology to assuage the identificatory anxiety of Jefferson, Mississippi. Indeed, Stevens' reading of Christmas does not even resolve Christmas's racial identity. Instead of determining that Christmas is white or is black, Steven reads Christmas as a racial Chimera – as a man comprised of two distinct racial identities in tension with each other.

Unlike the resolution provided by either Dave Wilson or Christmas's execution, Stevens' reading does attempt to resolve increasingly specious racial distinctions. Ultimately, Stevens' reading of Joe as one individual comprising two conflicting identities is a further challenge to the conception of distinct racial identity put forward in both novels and maintained by *Pudd'nhead Wilson*. Twain's novel ultimately asks

[w]hy were [blacks] *and* whites made? What crime did the uncreated first [black] commit that the curse of birth was decreed

for him? And why is this awful difference made between white and black?⁴

Despite the quality of the inquiry, it is a query of origins. While the end of *Pudd'nhead Wilson* focuses on the resolution of Tom's criminal and racial identity, the periphery of the novel seems to look backwards to some vague and difficult point at which race began. This focus on the origin of the race does not equate with a focus on a solution to interracial tensions. Indeed, the only advance suggested in *Pudd'nhead Wilson* is an advance in technology – how race is identified or perceived – not how it is known or conceived.

Stated alternately, fingerprinting shifts only the locus of identification. By itself, fingerprinting has little effect on a flawed and oppressive conception of race that it tacitly confirms. That is to say, *Pudd'nhead Wilson*'s unflinching query of the grounds for racial distinction is only a precursor to the interpretation made by Stevens at the end of *Light in August*. Although Stevens' idea of one individual harboring multiple and contradictory racial identities is hamstrung by a continued devotion to black inferiority – "... the black blood failed [Christmas] again, as it must have in crises all his life" – Stevens' reading nonetheless stands as a sincere, albeit troubled, reconceptualization of racial identity.⁵ This reconceptualization of identity is carried further in Jamaica Kincaid's *Lucy*.

Unlike the novels upon which I focus in the first two chapters of this dissertation, *Lucy* is not a novel about racial passing. Like the other novels, however, it is a novel that centers on identification and the manners in which identity is formed and reformed. In *Pudd'nhead Wilson* the racial economy of Dawson's Landing is simple. Black is black and white is white and never the twain shall meet. As the locus of identification shifts from the skin to the blood to the fingerprint, the novel can only gesture at a conception of race untied from biological referent. This gesture is taken up in *Light in August*.

In Faulkner's novel, the attorney Gavin Stevens shifts the determinant of race from the outward technologies that describe individuals to individuals themselves. Identity can now be inside the individual and open to conflict and division. Identity can be pondered and discussed – it is no longer a set fact awaiting proper revelation. Despite the progress indicated by this internal conception of identity, in *Light in August* the identity of the racialized individual is still outwardly controlled. Whether Joe Christmas is finally interpreted as a "nigger rapist" by Percy Grimm or a man with conflicting black and white bloods by Gavin Stevens, the final identification still comes from the white individual who uses legal and extralegal means to control both the community and the 'black' bodies within it.

Comparatively, *Lucy* realizes the full potential of the new paradigm of identity set forth in *Light in August*. Just as Stevens internalizes the locus of identity in *Light in August*, the control over this internal identity has shifted in *Lucy*. No longer is the court or a lawyer responsible for the ultimate identification or interpretation of the racialized individual; Lucy Potter stresses her own control over her identity throughout the novel.

It is difficult to calculate the effect of this shift as the stakes of identity are arguably much lower in *Lucy* than the other two novels. Lucy Potter survives. She is not murdered like Joe

⁴ MARK TWAIN, *PUDD'NHEAD WILSON AND THOSE EXTRAORDINARY TWINS* 44 (Sidney E. Berger, ed., Norton Critical Edition 1980) (1894).

⁵ FAULKNER, *supra* note 1 at 449. This is a reconceptualization that Twain, while arguably able, ultimately did not reach in *Pudd'nhead Wilson*. Within a succession of ways of knowing racial identity, the novel grants small focus to an exploration of what is known about racial identity.

Christmas, nor is she enslaved like Tom Driscoll. Indeed, Lucy's success is that she escapes any terminal identification. By the end of the novel she has broken free from those individuals who would seek to control her through an identity. She has moved away from the prudishness of her mother and the misogyny of her biological family. By the end of the novel, Lucy has similarly abandoned both her boyfriend and her second family. In doing so she has repeatedly declined the identities – tractable daughter, servant, exotic lover, nascent feminist – with which these individuals would saddle her.

Like Tom and Joe before her, Lucy has accomplished this control over her identity through movement. She *moves* away from her family in the West Indies and later *moves* away from her surrogate family in New York. Unlike her two literary forebears, however, Lucy maintains this agency throughout the novel. At the end of *Lucy*, the eponymous protagonist is still controlling where she goes and, more importantly, who she is.

This control of mobility and identity is more than a rejection of identificatory technologies or Lucy's own attempt to vacillate between exclusive racial identities. Lucy is not rejecting any specific identification, as much as she is fighting a barrage of identifications. For Lucy, it is not a question of whether she is black, but what it means that she is black, is a woman, is from the West Indies, and is living in the North. On all these fronts, Lucy contests reductive readings of her identity.

By contesting the ways others identify her, Lucy takes a clear stand against identificatory hermeneutics. Throughout the novel Lucy opposes individuals, critics, and governmental power structures that might seek to encapsulate her in theoretical frameworks or identificatory documents. Taken together, Lucy Potter is perspicacious. She understands that every subject is assailed by external objectification. This perspicacity is outstripped perhaps only by her precociousness – Lucy knows what's at stake in the struggle to interpret her own identity. Her reading of herself, like her writing of her life, remains in her control.

As mentioned above, both the tensions of identity and the means of controlling one's identification in *Lucy* are found in movement. Lucy, Joe, and Tom all move in order to maintain their control over who they are and how others identify them. It is the means by which they both escape and perform different identities. But Lucy's movement does not enable her to escape genealogies or fingerprinting or other technologies of identification. Rather, Lucy's movement permits her escape from interpretative frameworks. Ultimately, this escape demands the dissolution of Lucy's connections to all others, including the critics and the reader.

This dissertation ends, then, with an ambivalent look towards the future. If Lucy's control over her subjectivity constitutes an attack, not upon any identificatory technology, but of the hermeneutics of identification, what is to come of identity? At its terminus, this dissertation then is no longer an interrogation of identity or identities, but of identification – the way in which identity is established.

As law is a primary method for establishing identity, it should come as little surprise that law and its power to identify is repeatedly encountered in the literature I engage in this dissertation. As with literature, the project of law is, in large part, a project of determination of figuring out what is what. In other terms, law is a project of identification, of figuring out who is who. By determining the identity of individuals, law provides a space of interpretation in which a critical mind might recognize and explore the manner in which identity is legally wrought.

My reliance on law to punctuate this dissertation should be even less surprising. Legal actions and decisions repeatedly provide a historical basis for and credence to the many misidentifications and disidentifications I track in this dissertation. Set against these literary

examples, law provides an alternative and actual narrative of the ways in which law has defined, separated, enumerated, and foreclosed identity not only within American literature, but also throughout American history.