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School of Humanities

**A RABID DOG, THE THIRD SHOOTER, AND FIFTY HEAD OF CATTLE:
MYTHOS AND LOGOS IN THE CULTURE OF AMERICAN CRIMINAL JUSTICE**

A Dissertation in American Studies

by

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ABSTRACT

This dissertation holds that the operation of criminal justice in America – the day-to-day practices of adjudication and enforcement – is characterized by two faculties which occupy the larger and more inclusive realm of sovereignty: the forceful and the rational. I call these faculties *mythos* and *logos* after the philosophical and anthropological names given to the competing methods of answering universal questions which have prevailed since very ancient times. The use of these ancient philosophical terms is intentional and reflects the crux of my theoretical orientation, which is unabashedly classicist, although thoroughly up-to-date. I will demonstrate that the dual forces of *mythos* and *logos* continue to compete in the present-day arena of criminal law and in the contest which seeks to answer difficult social questions playing out in that arena by virtue of what courts and lawyers call “the adversary system.” This contest between opposing forces becomes explicitly obvious in the law’s current efforts to address the consequences of wrongful criminal convictions, the area which I use as a case study to approach the prevailing division between *mythos* and *logos* in twenty-first century American legal sovereignty.

Throughout this doctoral dissertation, I use American Studies methodologies including historical analysis, close textual reading, ethnographic practice, and archival research. In keeping with the multi-disciplinary approach which American Studies uses to answer questions about the American experience, I have informed my work from the fields of literature, psychology, cognitive science, jurisprudence, ancient and modern philosophy, religious studies, classical mythology, and history. Additionally, being an

experienced attorney, I incorporate my legal training and knowledge within and alongside my American Studies methods.

The result is an interdisciplinary scholarly endeavor which blends the rigorous methods of two different fields: American Studies and the law.

TABLE OF CONTENTS

List of Illustrations		ix
Preface		x
A.	American Studies and the Law	x
B.	The Argument	xiv
C.	<i>Mythos</i> and <i>Logos</i>	xvi
Acknowledgments		xx
Dedication		xxiv
PART ONE		1
Chapter One.	“An Element of the Beast:” American Exceptionalism and the Problem of Wrongful Convictions.	1
A.	Introduction: “A Matter of Life and Death”	1
B.	From Evelyn Curry to Leonel Herrera	10
C.	Logic, Authority, and Finality	16
D.	American Exceptionalism and the Law	24
E.	<i>Mythos</i> and <i>Logos</i>	31
F.	Wrongful Convictions, the Persistence of <i>Mythos</i> , and the Pennsylvania Experiment	35
G.	Exceptionalism and the <u>State</u> of Exception	46

PART TWO	48
Introduction to Part Two	48
Chapter Two. <i>To Kill a Mockingbird: Mythos and Logos in the Moral Wilderness</i>	55
A. Introduction	55
B. The Story	57
C. Atticus Uncovered	60
D. Bob Ewell's Wilderness	77
E. Boo and Heck	80
F. Conclusion	86
Chapter Three. <i>The Ox Bow Incident and the Mythos of Actual Innocence</i>	87
A. Introduction	87
B. The Novel and the Film	89
C. "The Conscience of Humanity"	93
D. Arthur Davies	96
E. Willard Tetley	101
F. The Ox Bow Incident	104
G. After the Ox Bow	107
H. Time, Precedent, Majority and a Murder in Kansas	111
I. Willard Tetley in the Twenty-first Century	121

J. Conclusion	125
Chapter Four. <i>The Man Who Shot Liberty Valance: Mythos and Logos Consolidated</i>	128
A. Introduction	128
B. John Ford's Film	130
C. Dorothy Johnson's Story	137
D. The Man Who <u>Didn't</u> Shoot Liberty Valance	142
E. The Man Who Raped Jennifer Thompson	147
F. The <i>Logos</i> and <i>Mythos</i> of Human Memory	155
G. Print the Legend	160
Chapter Five. "Unfortunate Guilt:" The State of Exception in Twenty-first Century America	167
A. Introduction	167
B. "The most amiable prerogative of the crown"	168
C. "It's been a rough couple of days"	171
D. "Trying to circumvent the judicial process"	178
E. The Politicalization of Clemency	184
F. Mythos, Logos, and an Execution Reprieved	199

**Conclusion. “The administration of justice by the courts
is not necessarily always wise.”**

205

Endnotes

210

List of Sources

211

List of Illustrations

Action Comics number 1, page 1	2
Action Comics number 1, page 5	3
Police sketch of Jennifer Cannino-Thompson rapist	149
Photo of Ronald Cotton line-up	149
Bobby Poole and Ronald Cotton	152
Ronald Cotton and Jennifer Cannino-Thomson	153

**A Rabid Dog, the Third Shooter, and Fifty Head of Cattle:
*Mythos and Logos in the Culture of American Criminal Justice***

SPERO T. LAPPAS

PREFACE

A. American Studies and the Law

In 2005, *American Quarterly*, the journal of the American Studies Association, published a special symposium issue entitled *Legal Borderlands: Law and the Construction of American Borders*. The journal's editor, Marita Sturken, called it "an unprecedented collaboration of scholars in the interdisciplinary fields of legal studies and American studies" (Sturken v). The title of the edition, *Legal Boundaries*, recalled the ongoing "global turn in American studies [which] raises new questions about the boundaries of the field and of the reach of 'America' itself" (Dudziak, Volpp 593). It also introduced a conversation that went beyond talk of physical borders but also, most importantly, to the way "that law has shaped and policed the borders of the United States" including "borders of and within identities [and] borders of power relations" (Sturken v). The law, Sturken recognized, "is a key factor in the construct of national identity" (Sturken v).

That recognition may seem too obvious to warrant much discussion. Every nation state expresses and defines itself by and through its laws. Indeed, every sovereign act and pronouncement by which a nation affects its culture constitutes to some extent a "law" by virtue of its official source. In the Introduction to *Legal*

Boundaries, Mary Dudziak and Leti Volpp observed that states enact and pronounce laws “as an expression of who we are as a people” (Dudziak, Volpe 595). American law in particular, they recognized, “helps define the boundaries of American national identity” (Dudziak, Volpp 596). Why then has the discipline of American Studies, while practicing intersectionality as a method for answering deep questions about the American character, largely excluded the potent vector of legal sovereignty from its study of the intersections? Why could Dudziak and Volpp correctly complain that “law and American studies have often operated in separate intellectual spaces” (Dudziak, Volpp 594)? The answer may be discomfort with the harder edges of legal methodologies, which are less free-wheeling than those found in American Studies and other liberal arts fields. Or it may simply be a case of lack of true legal education on the part of American Studies scholars. Whatever the reason for its absence, this constitutes a lacuna which needs to be filled.

Unfortunately, this intellectual “borderland” between American Studies and American Law has tended to weaken any integrated effort to understand the United States. “Law is an important technology in the drawing of dividing lines between American identities” (Dudziak, Volpp 594) and those lines and identities arise not just from cultural and historical sources; they also come off “the shelves of law libraries” (Dudziak, Volpp 593). If we ignore the practice of legal sovereignty as a potent provocateur and a faithful mirror of the culture, then we mistakenly consign law and legal scholarship to play “the role of tagalong” to the study of other forms of cultural influence (Dudziak, Volpp 595).

Writing in *Legal Boundaries*, legal sociologist Austin Sarat described the importance of the law to a comprehension of the American identity. “No set of conceptual boundaries is more important, or more in need of critical examination, than those associated with the rule of law” (Sarat 611). The United States Supreme Court has defined Americans as “a people who aspire to live according to the rule of law” (*Planned Parenthood v. Casey* 868) and Boston University Law School dean Ronald Cass has “observed that the rule of law is ‘central to our national self-definition’” (Sarat 611). No less an observer than Alexis de Tocqueville saw that the “spirit of the laws . . . gradually permeates . . . into the bosom of society” (quoted at Sarat 611).

By 2005, American Studies had interrogated many of the definitional spaces into which American cultural forces categorized its subjects. The 2002 compilation, *The Futures of American Studies*, (Pease, Wiegman) for example, contained chapters on gender, race, and class as pigeon holes by which America forced individual identities into non-permeable and often misleading binaries. Walter Benn Michaels’s article “Autobiographies of the Ex-White Men: Why Race is Not a Social Construction” (Michaels 231-247) illustrated this trend by his provocative conclusion that there is no such thing as race. “Whiteness (in particular and race in general) is not – like class – a social construction; it is instead – like phlogiston – a mistake” (Michaels 246). Michaels’s advice that “we ought to give up the idea of racial identity altogether” (Michaels 245) was a forceful challenge to the sort of cultural demarcations of personal identities that can offend individuality and exalt the mythos of traditional binary notions of identity over the logos of expanding social consciousness.

However, while American Studies was busily mapping out the lines between other binary categories of personal condition it was ignoring one of the most potent divisions which America imposes on its citizens: the binary between legal guilt and legal innocence. When the Solicitor General of the United States told the Supreme Court in 2011 that his (our) government's position was that "there is no right at present to actual innocence" in America (*Osborne v. District Attorney* 24-25) he claimed a shocking right of the nation state to condemn its citizens with no meaningful opportunity for exoneration. Forcing an innocent person into a pigeon-hole of guilt is at least as momentous a cultural phenomenon as forcing that person into an unwanted racial or gender identity. It certainly deserves the sort of intellectual investigation which American Studies scholars can bring to the task. I intend for this dissertation to advance that effort. Just as Shelley Fisher Fishkin plumbed the complex depths of America's racial experience by using her literary examination of Mark Twain as "the consummate Rorschach test for anyone who sets out to understand the United States" (Fishkin 145), I will use similar tools to light out for the American territory and understand how the country feels about justice.

B. The Argument

America was a mythic place before it ever became a nation. Long before Ronald Reagan or Mario Cuomo saw America as a shining city upon a hill, John Winthrop urged his Arbella shipmates to make themselves into a high beacon of righteousness by emulating God's first chosen people. The Jews, a nation made exceptional by divine providence, would inspire the pre-emergent Americans to recognize their own divine selection as a covenant people. Long after the collapse of the Puritans' initial wave of naive optimism, and with it Perry Miller's putative First Errand, the notion that America possessed a sacred place among nations has continued to reign unimpeded. When Sacvan Bercovitch observed that American "nationalism carries with it the Christian meaning of the sacred" and saw that national meaning as "consecrated . . . by a divine plan," he recognized a feeling that informs all notions of the American experience. The law is no exception. The American justice system has no special immunity to the draw of mythological beliefs.

The dogma that American law springs from a sacred fount is as original as the Declaration of Independence's identification of a "Creator" as the source of rights, and as recent as presidential candidate Mitt Romney's 2012 declaration in Euclid, Ohio that "the Constitution was not just brilliant but probably divinely inspired." Americans, and the courts that rule over them, have often forgotten Jefferson's warning that they should not view their laws "with sanctimonious reverence and deem them like the ark of the covenant," (quoted at Levinson, 9) and have instead prayed at the church of what Touqueville called our "civil religion" (Levinson 11). This sacralization of the law's

simple mission of deciding disputes continues to infect the American justice system with a mythology composed of a “web of understandings, myths, symbols, and documents” (Levinson 10). The *mythos* of the law’s divine perfection has forced an unfortunate dichotomization within its core sovereign functions of just adjudication and fidelity to the truth.

C. *Mythos* and *Logos*

My thesis holds that the operation of criminal justice in America – the daily practices of judgment and enforcement – is characterized by two faculties which occupy the larger and more inclusive realm of sovereignty: the forceful and the rational. I call these faculties *mythos* and *logos* after the philosophical and anthropological names given to the competing and evolving methods of answering difficult universal questions which have prevailed since very ancient times. I will demonstrate that the binary forces of *mythos* and *logos* continue to compete in the present day arena of criminal law and in the contest to answer hard social questions which plays itself out in that arena by virtue of what courts and lawyers call “the adversary system.” This contest between opposing forces becomes explicitly obvious in the law’s current efforts to address the consequences of wrongful criminal convictions, the area which I use in this dissertation as a case study to approach the prevailing division between *mythos* and *logos* in twenty-first century American legal sovereignty. Throughout this dissertation, I will use American Studies methodologies including rhetorical analysis, popular culture, historical analysis, close textual reading, ethnographic practice, and archival research. Because my discussion will explicitly address notions of cultural mythology, the reader will no doubt recognize my acceptance of myth-and-symbol analysis as a methodology which retains a potent vitality in any effort to understand the American experience. While I understand that the prevailing fashions of American Studies hold that myth-and-symbol has been subsumed or even blown away by the winds of change since the 1970s’ move towards race/gender/ethnicity, I do not agree with this vogue. Instead, I

see the continued utility and vitality of this method, which certainly can and does allow room for incorporating the race/gender/ethnicity categories – or any other categories – a scholar wishes to examine. Therefore, this dissertation defends the approach that myth-and-symbol is not only not out of date, but in fact remains intrinsic to excellent American Studies practice. By way of example, I point out that today's American Studies scholars frequently problematize binaries as the fundamental tool of their research into gender, race, and other areas. This dissertation also problematizes a binary, located within the law (and therefore society), which is best analyzed by forthright use of a myth-and-symbol approach, since this binary (between guilt and innocence) is so ancient and so deeply rooted in the cultural past.

The notion that vital social issues are resolved by the interplay of force and reason is a very old idea: old enough, perhaps, that we may consider it innate to the human condition. In **Chapter One** of this dissertation, I will identify the American mythos which allows the binary to flourish in modern law: the myth of American Exceptionalism which occupies the territory of constitutional adjudication so completely that it often leaves little room for the logos of logical rationality. During the course of this discussion, I will use a few relevant judicial decisions to illustrate the methods by which this binary currently expresses itself at the highest levels of American constitutional thought.

In **Chapters Two, Three, and Four**, I will illustrate the pervasiveness of this *mythos-versus-logos* binary in American culture by showing how it percolates through popular literature and cinema. I will do this through a close analytical reading of three

iconic texts of American frontier justice, all of which are narratives of justice and mistaken judgments: *To Kill a Mockingbird*, *The Ox Bow Incident*, and *The Man Who Shot Liberty Valance*. These three books, and the films which they inspired, all anthropomorphize the law's dichotomy of force and reason by giving each of those faculties to two different characters in the narrative. In *To Kill a Mockingbird* we find them in the persons of Boo Radley and Atticus Finch. In *The Ox Bow Incident* they appear as Willard Tetley and Arthur Davies. In *The Man Who Shot Liberty Valance*, the film version particularly, they become Tom Doniphan and Ransom Stoddard; although there, they dramatically coalesce into the single identity of the story's ambiguous title character. In these chapters, I will also discuss present day currents of wrongful conviction jurisprudence in an effort to demonstrate how those ideas are central to the American consciousness of justice and fairness.

In **Chapter Five**, I conclude my discussion by analyzing the practice of executive clemency as the last resort of the wrongly convicted. The analysis of this practice, by which the executive authority assumes to itself the ability of admitting its own errors, will illustrate the fashion by which political authoritarianism has hijacked the process of redeeming innocence. Along the way, the practice of clemency inculcates American government with what philosophers call "the state of exception," explicitly and intentionally devaluing the *logos* side of the sovereign binary.

In this fashion, I demonstrate that the dual forces of logical rationality and authoritarian power perform a pervasive *pas de deux* though American law and culture. Any sovereign state imposes itself on the culture that resides within it by defining those

behaviors which it will allow and those which it will forbid. This definition rings hollow, however, without an enforcement process which rewards compliance and penalizes violation. The extent to which cultural actors recognize that process as reasonable and fair delineates the state's entitlement to call itself just.

As a scholar, I am aware that pure objectivity is at best, as Peter Novick put it in the title of his history of the American Historical Association, a "Noble Dream."

Accordingly, throughout this dissertation I attempt to place my personal beliefs as far outside the discussion as possible. Of course, the binary which I recognize inherently describes a competition between adversaries. Having spent most of my professional life advocating for a preference of *logos* over *mythos*, I have long ago staked out my intellectual territory and that preference may inevitably intrude into the following pages. Even if that is the case, the fact that I am aware of it should allow for at least a fair case to be made here for the other side.

Acknowledgments

“One looks back with appreciation to the brilliant teachers,
but with gratitude to those who touched our human feelings.”
Carl Jung

President Kennedy is credited with saying that “victory has a hundred fathers” (he also said that failure is an orphan, an observation which, hopefully, is not germane to the present context) and this project confirms his observation. I have benefitted from the help, guidance and support of many friends and colleagues throughout the research and writing of this dissertation and I take this opportunity to name a few -- in no particular order.

Thanks go first to Professor Mary Richards of the Harrisburg Area Community College who read many of these chapters, discussed them with penetrating wisdom, and gave me the benefit of her expertise by making innumerable, valuable suggestions on their composition.

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I am indebted to Professor Ilana Shiloh of the Academic Center of Law and Business in Tel-Aviv, Israel for introducing me to the State of Exception and to the work of Giorgio Agamben when we met at the 2013 conference of the Athens Institute for Education and Research, and for sharing her unpublished paper “Caught in a State of

Exception: Kafka's *Man from the Country*, Camus's *Outsider*, and Flannery O'Connor's *Misfit*.” Although I have not quoted directly or indirectly from that paper, her knowledge of Agamben’s work and that of Carl Schmitt opened for me many avenues of thought which I hope I have followed faithfully and to good result.

Too many other friends to name sustained my efforts with their up-lifting words of encouragement and their patient toleration of my incessant rants on issues general and arcane, most of which meant nothing to them except as the content of my ceaseless prattling. My colleagues in the doctoral cohort of 2012 gave me the benefit of their friendship, comradery, and classroom insights, all of which greased the wheels for my re-entry into college life. I am grateful to all of them.

During the writing of this dissertation, I have often been reminded of Professor James C. Hogan, formerly the Frank McClure Chair Professor of Classics at Allegheny College, under whom I studied Greek from 1971 to 1974. A scholar of incandescent brilliance, he taught me to read Homer and Plato – but more than that, to understand that a lot of very good ideas have been around for a very long time. I recall that he was not exactly tickled when I decided to go to law school; he thought that I had a future in the humanities. Well Jim, it took longer than we expected – but here I am. “Athena took the form and voice of Mentor.” Thanks!

Closer to home, I owe deep debts of gratitude to several members of the faculty at The Pennsylvania State University, Harrisburg. Here are a few of them.

I met Professor Michael Barton even before applying to the Graduate School and his assurance that an aging lawyer might have a place in academia was a

tremendous boost. When he approved of my very first major paper as a graduate student that gave me the confidence to believe that he may have been right. He has given me his friendship, collegiality, and support and I thank him for all of that. More than that however, I have discovered along the way that he is a delightful travel companion, a ready wit, and a fine fellow with whom to share a dingy Parisian jazz club in the wee hours of the morning.

Professor Simon Bronner has been a consistent source of inspiration and affirmation. As a classroom teacher, he introduced me to many of the theories and methods which I use in this dissertation. His comments on my early Atticus Finch paper helped me see that over-rated lawyer as fertile territory for further exploration. He did me a great and un-repayable boon early in my career here (he knows what I mean and I will not embarrass him by identifying it) and I have ever since been awed by his generosity. As important as all of that, I recall that when I attended a matriculation ceremony on August 26, 2012 he greeted me from the academic procession with the words “Welcome home.” And thus I have felt since then.

When Professor John Haddad read my term paper for Nineteenth Century American Civilization, an essay about the United States Supreme Court’s occasional reliance on the quotes and thoughts of Henry David Thoreau, he thought that humanities scholarship could have a place in the understanding of legal history and thinking. Those remarks helped to convince me that the tools of American Studies and the law could be combined for a greater understanding of each of those fields; and of course, this dissertation is the direct outgrowth of that belief. Additionally, he is a

splendid classroom teacher and has justly earned the affection and admiration of his students – including me.

As I was planning my final year of course work, I asked Professor Don Hummer if he would allow me to register for his course on Crime and Public Policy, even though I did not have the requisite bachelor's degree in Criminal Justice. He agreed, and that began a rewarding friendship and tutelage which continued with his consent to serve on my Doctoral Committee. He may read these words from his sabbatical perch in Australia, but that distance does not diminish my gratitude or respect. (And anyway, he can't stay there forever!) His teaching helped me to look at a subject about which I thought I already knew a great deal – crime and justice – from an entirely new perspective. The essence of true education.

The privilege of batting last in this distinguished line-up goes to my advisor Professor Charles Kupfer. Professor Kupfer has spent the last three years fulfilling every good hope I had about academia when I started on this path. He is a prodigious intellect and a wonderful teacher. But more than that, he has become a dear friend for life. He has shared with me, always without hesitation or complaint, his time, his wisdom, his patience, and his encyclopedic knowledge of – well, just about everything, and my life is richer for knowing him. During this writing, he has been a gentle critic; but when the times came for him to correct my words or my tone, his comments were always well aimed and he always threw strikes. I am proud and delighted to give him my most profound and heartfelt thanks for his gigantic contributions to my endeavors.

Dedication

This work is dedicated to (who else?) my son Doctor Tom Lappas and my daughter Attorney Alexandria Lappas. The excellence of their accomplishments and their profound goodness have always inspired me and led my efforts. Their encouragement of my long-held dream made me believe in its possibility and its worthiness. Additionally, they had the good graces to hold their tongues whenever they felt, as they surely must have felt from time to time, that their old man had lost his marbles. Whatever I have ever accomplished, here or elsewhere, I have accomplished for them, with them, and on account of them. They are brilliant and wise, loving and kind, and quite simply the two best people I know. I have achieved quite a few things in my time, but the proudest honor of my life is being their father.

Ali and Tom, I love you more than my next breath. This one's for you.

PART ONE

CHAPTER ONE

“An Element of the Beast:”

American Exceptionalism and the Problem of Wrongful Convictions

“He who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast.”

Aristotle, *The Politics*, Part XVI.

A. Introduction: “A Matter of Life and Death”

“A tireless figure races through the night. Seconds count. Delay means forfeit of an innocent life. The governor’s estate is finally reached.” The governor is awakened by a fantastic visitor’s urgent news. *“Evelyn Curry is to be executed in fifteen minutes for murder. I have proof here of her innocence. A signed confession. . . . Don’t you realize! I’ve proof she’s innocent and you alone can save her.”* The governor glances at the stranger’s papers then screams into the phone. *“Hurry! – connect me with the penitentiary.”* There is excitement in the death chamber as the warden takes the call, *“STOP!”* he orders the executioner, *“The governor has pardoned her!”* The innocent Evelyn Curry falls to her knees and tugs at the priest’s robe, *“Thank God! I told you I was innocent.”* She has been saved by the act of a reasonable executive who was willing to consider and act upon proof of innocence. All it took was a phone call, and a little help from one of America’s most important cultural icons.

The rescue of Evelyn Curry appears in *Action Comics* number 1, June, 1938, as the very first reported mission of that exemplar of “the American dream” (Engle 339), Superman. His youthful creators Jerry Siegel and Joe Shuster knew that a large part of that dream has to do with the perfection of the administration of justice. Eventually their hero’s powers would grow with his popularity – the 1938 Superman could not yet fly through space, divert asteroids, or squeeze coal into



Action Comics 1, page 1.

diamonds – but he could already “run faster than an express train” and “raise tremendous weights” and he inaugurated those powers by correcting an individual case of the judicial system gone awry. A single comic book adventure represents a thin slice of American culture, but the creators’ choice of an exoneration narrative to begin Superman’s career as the “champion of the oppressed” expresses at least three important things about the correction of wrongful convictions and its centrality to America’s collective consciousness of legal fairness. First, the story’s primacy speaks to the importance that the authors judged it to have for Superman’s mission of

“devot[ing] his existence to those in need.” Later in *Action* number 1. Superman rescues an abused woman, vanquishes a wife-beater, saves Lois Lane from gangsters, and exposes a crooked politician. But before any of that, he saves an innocent prisoner: “a matter of life and death.”

Second, the authors’ choice of such a first story demonstrates their confidence that American readers would accept an exoneration tale as a worthy inauguration for their new champion. In 1938 America there was nothing controversial about saving the innocent. Soon after Evelyn Curry’s exoneration, the United States Supreme Court would invalidate a 1940 murder conviction, declaring that “if . . . imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release” (*Fay v. Noia* 402). Superman’s salvation of Evelyn coincided with his mission to “turn his titanic strength into channels that would benefit mankind.”

Third, and most interesting to the present study, is the method which Superman chose to



Action Comics number 1, page 5.

set things right. Instead of crashing through the governor's door he could have barged into Evelyn's prison cell and carried her to safety. Our immigrant from a still-undisclosed distant planet may have "sworn to devote his existence to helping those in need," but he was no vigilante. Rules are rules, and the Man of Steel was committed to proper legal process. Even the Governor of Metropolis was relieved to know that his eleventh-hour visitor was "on the side of law and order." Thus, when the 1938 Superman obtained the confession of the real killer he could correctly expect that "proof of . . . innocence" would rectify a wrongful conviction.¹

Superman's preferential respect for due process is even more impressive when we consider the powers at his disposal. As Umberto Eco has said of Superman, he is "by definition the character whom nothing can impede" and one who is "gifted with such powers that he could actually take over the government, defeat the army, or alter the equilibrium of planetary politics" if he chose to do so (Eco 16, 22). He has the power to operate as a one man state of exception, acting at the "threshold at which logic and *praxis* blur with each other and a pure violence without *logos* claims to realize an enunciation without any real reference" (Agamben 40). Nonetheless, he "is profoundly kind, moral, faithful to human and natural laws, and therefore it is right (and it is nice) that he use his powers only to the end of good" (Eco 22). He expects nothing less from the society he serves and protects. If he could not have rightly expected the Metropolitan legal system to despise the execution of an innocent person, then Superman would have been free to use what Bradford Wright calls "the righteous violence" at his disposal to "relieve deep social problems" (Wright 13).

This American fascination with, and repulsion for, wrongful convictions has been long embedded in the nation's historical and cultural identity. Northwestern University's Center on Wrongful Convictions identifies the first such case as the 1819 conviction of Jesse and Stephen Boorn for murdering their brother-in-law Russell Colvin. Although this designation is suspect, over a hundred years earlier Salem had executed twenty suspected witches after all, the Boorn case is interesting on at least three levels.

First, when Russell Colvin disappeared with neither a trace nor explanation, the evidence of the Boorns' guilt looked overwhelming. Their hatred of Colvin was a matter of public knowledge in the Manchester, Vermont community where they all lived. When Colvin went missing they became logical suspects in his presumed death. Several eyewitnesses testified to a violent argument among the three men on the day of Colvin's disappearance. One of Jesse's fellow prisoners testified that Jesse had admitted killing Colvin, and both Boorn brothers later confessed to the police in a misguided hope to receive lenient treatment. To the contrary of that hope, they were convicted on their confessions and sentenced to hang (First Wrongful Conviction).

Second, the evidence of their innocence – arriving after their conviction but in time to save them from the gallows – was unimpeachable. On December 22, 1819 Colvin returned to Manchester very much alive and bolstered his claim of the Boorns' innocence with the possibly unnecessary assurance to Stephen that "You never hurt me" when he found out why the brothers were in jail.

Third, the story of the Boorns' wrongful convictions and the failures of justice that caused them spread like wildfire. As one commentator has observed, "[t]he

Boorn-Colvin case became the subject of sermons, lectures, and articles examining the religious, legal, and philosophical implications of false accusations, coerced confessions, [and] the power of gossip The case was invoked by defense attorneys throughout the century to warn juries of the danger of convicting a man on circumstantial evidence alone” (*The Dead Alive*). The notoriety of the case inspired renowned British mystery novelist Wilkie Collins to write *The Dead Alive* in which an innocent defendant faced death for murdering a man who later reappeared in the fashion of Russell Colvin. *The Dead Alive* was republished in 2006 by Northwestern University Press; still a cautionary tale of justice miscarried. It was probably the English language’s first popular literary treatment of a wrongful conviction.

But it was certainly not the last. Mark Twain had David “Pudd’nhead” Wilson exonerate the Capello twins of the murder of Judge Driscoll using the nascent, and eventually discredited, technology of fingerprint identification. Perry Mason exculpated his clients with stunning regularity through eighty books and stories, and then once a week on television from 1957 to 1966. Mason succeeded by using the “spectacular and unorthodox methods” which his creator, real-life criminal defense attorney Erle Stanley Gardner, claimed to have used during his own career (Gardner 1) and his extraordinary popularity allowed Gardner to establish an organization of forensic experts, “men who were specialists in their line ... [and] public spirited enough to donate their services to the cause of justice” (Gardner 16-17), to investigate potential miscarriages of justice. He called his group The Court of Last Resort and it was one of the first organized efforts to correct wrongful convictions. Perry Mason’s creator rode

the cultural zeitgeist with the same confidence as Superman, but with less success.

“Gardner’s efforts caught the public’s imagination but not even an author with Gardner’s reach succeeded in reforming the systemic problems that lead to unfair trials” (Sullivan 606, quoted at Gould 214).

Other cultural treatments of exoneration are too numerous for an exhaustive listing. Television series from *The Defenders* through *The Practice* to *The Good Wife* have portrayed passionate champions for innocence. Popular films such as *12 Angry Men*, *Call Northside 777*, and *My Cousin Vinnie* depict close calls with injustice. More recently, the 2011 PBS documentary *Death by Fire* exposed unreliable forensic science as a leading cause of wrongful convictions (*Death by Fire*), and prominent documentarian Ken Burns did the same thing for false confessions in his 2012 film *The Central Park Five (The Central Park Five)*. In 2014, National Public Radio serialized an investigation into the possible wrongful conviction of Adnan Syed for the 1999 murder of his girlfriend Hae Min Lee (*Serial*). The cultural impact of that series and the podcast it inspired may have contributed to Syed being recently granted a new appeal of his conviction; it certainly contributed to his ability to pursue such an appeal. A trust fund set up for Syed’s legal defense raised more than \$91,000 from 980 donors through a LaunchGood online fund-raising drive (George). Filmmaker Errol Morris investigated Randall Adams’s conviction for murdering Dallas police officer Robert Wood, and his 1988 documentary *The Thin Blue Line* led to Adams’ exoneration and release. (*The Thin Blue Line*).

Journalists have played their own roles in the popularization of innocence narratives with Harrisburg, Pennsylvania's own Pete Shellem exonerating at least four innocent prisoners in the fashion of Jimmy Stewart's fictional Richard Conte. The Innocence Institute, part of Point Park University's investigative journalism program, has investigated seventeen convictions. Its most recent success was the 2013 exoneration of David Muchinsky after he served 25 years for a double murder he did not commit ("Munchinski Free after Serving 25 Years in Wrongful Conviction").

Before Shellem's untimely death in 2009, he explained his own preoccupation with innocence. "I know sooner or later," he said, "I'm going to find another [case] that makes me sit back and say 'What the hell?'" (Cattabiani). That "What the hell?" attitude reflects a deeply held American and western notion that the innocent deserve no punishment. "[T]he most fundamental principle of American jurisprudence," is "that an innocent man not be punished for the crimes of another" (Committee Report 1, citing *Commonwealth v. Conway*). This principle is as old as Genesis and Abraham's challenge to God "Wilt thou also destroy the righteous with the wicked?" (*Bible*, Genesis 18:23) There may be other religious authority for the proposition that rain should fall on both the righteous and the wicked alike (*Bible*, Matthew 5:45) but Americans seem to hold a core belief that in their own presumed reliable justice system the righteous will stay dry.

This "bias against punishment" started at the beginning of time (God's command to Moses that he slay not the "innocent and the righteous" (*Bible*, Exodus 23:7) "was supposedly handed down from Someone who was around 'in the beginning'"). It has

traveled through the *Commentaries* of English jurist William Blackstone ("Better that ten guilty persons escape than that one innocent suffer") and the correspondence of Benjamin Franklin (writing that the bias for innocence "has been long and generally approved; never, that I know, controverted") (Volkh 181). Philosopher Jeremy Bentham rejected innocence bias on utilitarian grounds – "We must be on guard against those sentimental exaggerations which tend to give crime impunity, under the pretext of insuring the safety of innocence" – and clergyman William Paley thought it unpatriotic – "he who falls by a mistaken sentence may be considered as falling for his country" (Volkh 193). Nonetheless, by 1970 America the principle was so ingrained in legal thinking that it deserved to be called a maxim (Volkh 198). The Supreme Court confirmed its constitutional underpinnings in its 1970 decision of a case called *In re Winship*. "[T]he requirement of proof beyond a reasonable doubt in a criminal case [is] bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free. (*In re Winship* 372)

Ironically, it was also in 1970 that this "fundamental value determination" in favor of innocence began to erode.

B. From Evelyn Curry to Leonel Herrera

While Superman was busy saving Evelyn Curry in 1938, Henry Friendly was a partner with the New York City law firm of Root, Clark, Buckner, Howland and Ballantine. He was developing an expertise in regulatory law which earned him great professional eminence and which eventually carried him to a seat on the United States Court of Appeals for the Second Circuit. The several federal Courts of Appeal are inferior only to the Supreme Court. The Second Circuit covers all of New York State, as well as Connecticut and Vermont and its jurisdiction over the nation's business and financial centers give its judges enormous prominence and power. There, Friendly became known as a scholar of prodigious intellect and in the opinion of at least one of his colleagues he became "the greatest federal judge of his time" (Dorsen 344, quoting Judge Richard Posner).

Friendly was also a prolific writer, writing 1,056 published judicial opinions alone (Dorsen 2). In 1970, he wrote an article for the University of Chicago Law Review ironically titled "*Is Innocence Irrelevant?*" (Friendly) In it, Friendly bemoaned the recent judicial trend of taking seriously prisoners' claims that they had been wrongly convicted. Those claims were clogging the courts, burdening judges, and creating the false impression that American justice was gravely flawed. "The proverbial man from Mars would surely think we must consider our system of criminal justice terribly bad if we are willing to tolerate such efforts at undoing judgments of conviction" (Friendly 145). Friendly urged federal judges to be less solicitous of such claims of injustice and less squeamish about wrongful convictions. Once a citizen is convicted at a "fair" trial,

Friendly believed, the courts need no longer worry about him or her. After all, every convict complains about his or her conviction. Either the evidence was no good or the court was biased. If there is nothing better to say, the prisoner will claim to be innocent. These appeals generally lose, the defendant is generally guilty and so why should judges be bothered? If innocent people are occasionally put in prison – or to death -- so what? Friendly urged his judicial colleagues to willingly accept that kind of collateral damage in exchange for a manageable system. They must, Friendly compassionately proclaimed, remain “content that conventional notions of finality should keep an innocent man in prison” even in cases “where the error [is] as apparent as could be” (Friendly 154). The convenience of the court was more important than its work.

In 1985, Friendly became despondent about his wife’s recent death and his own failing health and killed himself in his Park Avenue apartment (Dorsen 1, 339-345). After his death, his daughter Joan wrote of her father that his suicide was consistent with his “deeply melancholic” personality and his view that the world was “weary, stale, and unprofitable.” His decision to capitulate to “the futility and meaninglessness of his own life and of life in general” (Dorsen 345) meant that he did not live long enough to see the United States Supreme Court follow his advice in its 1993 handling of the appeal of Leonel Herrera, a decision by which the Court elevated the *mythos* of finality over the *logos* of just adjudication with an permanence that has lasted to the present day. With respect to the modern rejection of innocence claims which has spread

through American criminal justice like an epidemic of disregard, the *Herrera* case is Patient Zero.

On the night of September 19, 1981 Trooper David Rucker stopped a speeding driver on a lonely stretch of Texas Highway 100, six miles east of Los Fresnos. Rucker was a 1-year veteran of the Texas Department of Public Safety, an amateur local historian, and the married father of three. A few minutes later, a passing motorist found him lying next to his police car, dead from a single gunshot to the head. It was 10:40 p.m.

At the very moment that Rucker's body was discovered, Los Fresnos Police Department rookie officer Enrique Carrisalez stopped a car as it sped away from the Rucker murder scene and toward Los Fresnos on Highway 100. While Carrisalez chatted with the driver of that stopped car, the driver pulled out a .38 caliber revolver and shot him in the chest. Carrisalez survived the shooting, briefly, and the next day an investigator showed Carrisalez a single photograph of the police suspect for the Rucker murder. He identified his shooter as Leonel Herrera and died eighteen days later. He was 22 (*Herrera v. Collins*).

The circumstantial evidence pointing to Herrera's guilt looked promising for the prosecution. The speeding car belonged to Herrera's girlfriend and he drove it regularly. Type A blood, like Rucker's, was found on the car and on Herrera's clothing (even in his wallet). Herrera's social security card was found next to Rucker's body, and when he was arrested his pants pockets contained a letter which made several possible admissions. Based on that evidence, Herrera was convicted and sentenced to

death for the Carrisalez murder on January 21, 1982 . Eighteen months later, with nothing more to lose, he entered a guilty plea to murdering Officer Rucker in exchange for a life sentence.

Herrera fought his death sentence for eleven years, challenging it in the Texas Court of Criminal Appeals, the United States Supreme Court, the 197th District Court of Cameron County, Texas, back to the Texas Court of Criminal Appeals, to the United States District Court for the Southern District of Texas, to the United States Court of Appeals for the Fifth Circuit, back to the Supreme Court of the United States, back to the trial court, back to the Texas Court of Criminal Appeals, back to the United States Supreme Court, back to the United States District Court for the Southern District of Texas, back to the United States Court of Appeals for the Fifth Circuit, and back again - - for the fourth time -- to the United States Supreme Court (*Herrera v. Collins*). He was convicted of the Carrisalez murder by eye-witness testimony, by dying declaration, by identification of the getaway car, by circumstantial evidence, and by his own handwritten words. The Carrisalez jury convicted him beyond a reasonable doubt. Not one of the judges on any of the five courts which refused to save his life ever expressed the slightest doubt of his guilt.

He appealed on the grounds that the police violated proper procedure, that his trial judge violated the rules of evidence, that his confession was involuntary, that his death sentence was unfair, that his lawyer was incompetent, that mitigating evidence was ignored, that he suffered from various mental problems, that his trial counsel did not understand death penalty law, that the judge would not let him speak at his trial,

and that exculpatory evidence was ignored. All of these appeal grounds were rejected by the reviewing courts, often summarily and usually without much conversation.² But on December 12, 1990, in a last ditch appeal, Herrera presented an argument that temporarily stopped the executioner in his tracks. He was, he claimed, "actually innocent." That is, not only was his trial flawed and unfair and not only had his rights been violated, but he was innocent in fact -- he did not kill Officer Carrisalez. The real killer was his dead brother Raul Herrera and he presented Raul's confession and an eyewitness to Raul's guilt to prove it. Thus, Herrera's final appeal raised what seemed at first blush a simple issue: if he was truly innocent the United States Constitution should not allow him to be put him to death. Superman had saved Evelyn Curry with far less.

When Herrera's case reached the United States Supreme Court, the justices expressed opposition to any rule which would allow them to execute an innocent man. They called it "intolerable" (*Herrera v. Collins* 870), "contrary to contemporary standards of decency" (*Herrera v. Collins* 876), and "shocking to the conscience" (*Herrera v. Collins* 876). Justice Harry Blackmun called the execution of an innocent man "perilously close to simple murder" (*Herrera v. Collins* 876). But those qualms had no real traction. The Court affirmed Herrera's death sentence and he was executed on July 1, 1993. From that day until today, simple proof of innocence, no matter how compelling or unequivocal, has never by itself been enough to correct a wrongful conviction. Judge Friendly's admonition that finality should trump fairness has been given full voice.

The appeal of Leonel Herrera reflected a sea change in the law's approach to post-conviction claims of actual innocence. No longer would courts consider such claims logically or judge them according to a rational review of the evidence. Instead, the power of the law would be applied to protect itself from inconvenience and embarrassment. Review of innocence claims, which had historically been one of the main functions of the "Great Writ" of *habeas corpus*, had become too burdensome to the courts which had to conduct those reviews. Protecting innocent prisoners from undeserved punishment, even execution, had become "very disruptive" to the business of the courts and giving innocent people new trials would impose an "enormous burden" on the prosecutorial agencies that had convicted them already (*Herrera v. Collins* 417). The Court recognized an overarching "need for finality in capital cases" which militated against considering innocence claims, even one that presented the confession of the real murderer. The *Herrera* Court, unlike Superman's governor of Metropolis, did not consider another person's confession a "truly persuasive demonstration of actual innocence" (*Herrera v. Collins* 417). Justices Antonin Scalia and Clarence Thomas approved the courts' newfound risk-tolerance and said that the whole question of saving innocent people from execution was too "embarrassing" for judges to address. "With any luck," they hoped, "we shall avoid ever having to face [it] again" (*Herrera v. Collins* 428).

C. Logic, Authority, and Finality

The twin cases of the fictional Evelyn Curry and the real-life Leonel Herrera nicely frame the binary components of legal reason and authoritarian brute force which constitute American legal sovereignty. In a justice system which demarcates criminal guilt from innocence along the line of reasonable doubt, it is hard to not to harbor such a doubt when someone else has confessed to the crime. Superman knew that, and so he did not have to rescue Evelyn Curry directly. The *Herrera* court did not and left Herrera to die in Texas's electric chair. Chief Justice William Rehnquist and the *Herrera* majority absolved themselves and their judicial colleagues of any duty to truth and reason with the glib observation that "it is an unalterable fact that our judicial system, like the human beings who administer it, is fallible" (*Herrera v. Collins* 415). Innocent prisoners would henceforth have limited recourse to the courts and instead were forced into the uncertain political waters of executive clemency. Innocent condemnees would have to beg the same state that sought their execution on account of their presumed guilt for mercy on account of their claimed innocence. Since the rational faculties of the law would not save them, their only resort would lie with the authoritarian side of the binary that was already fighting for their death.

Herrera did seek clemency, which to no one's surprise was denied. The Supreme Court and the State of Texas told Herrera what he already knew: that in the jurisprudential contest between reason and authority, between *logos* and *mythos*, authority generally wins. On the night he was executed, his last words were "I am innocent, innocent, innocent. Make no mistake about this; I owe society nothing.

Continue the struggle for human rights, helping those who are innocent I am an innocent man, and something very wrong is taking place tonight.” (“Offender Information,” Texas Department of Criminal Justice Website). Perhaps he was right.

But there is another way of looking at Herrera’s case. Perhaps what really doomed him was skepticism about the value of his new evidence of innocence. When his case reached the Supreme Court, a young Assistant Solicitor General named John Roberts wrote a brief on behalf of the United States urging such skepticism. Roberts had started his own legal career as a law clerk to the finality-loving Henry Friendly. He later became a judge of the Court of Appeals and today he is the Chief Justice of the United States. When the former *Judge* Roberts testified at his Supreme Court confirmation hearings, Senator Richard Durbin asked him about Herrera’s case and about Justice Blackmun’s assertion that “The execution of a person who can show that he is innocent comes perilously close to simple murder.” No problem, said Roberts. Herrera’s case was not even about innocence. It was, he claimed, “mis-portrayed as an issue of actual innocence” (*Confirmation Hearing Transcript* 273-74). There was no DNA evidence said Roberts who disposed of Herrera’s proof of innocence with a slick one-liner: “Well guess what? I didn’t do it, my brother did and he’s dead now.” If someone else committed the murder for which Leonel was getting executed, that was “to some extent an claim of innocence” Roberts had to admit – but he insisted that it didn’t have to be “taken seriously” (*Confirmation Hearing Transcript* 274).

When asked point blank by Senator Patrick Leahy “Does the constitution permit the execution of an innocent person?” Roberts said “I would think not” but he also

proposed that judges should "take into account the proceedings that have already gone on." In other words, the faulty process which has condemned an innocent person to die deserved to be treated with deferential regard. Courts must respect the flawed process of the law, even when that respect executes an innocent person (*Confirmation Hearing Transcript* 306-07).

In order to unequivocally illustrate the disregard with which present day American law treats cases of post-conviction innocence, let us remove the element of skepticism from the analysis by examining a case where the prisoner's innocence was not just asserted by his own defense but was unanimously conceded, even by the prosecutors who struggled to keep him in prison for a crime which they admitted he did not commit. Let us consider the appeal of Michael Wayne Haley.

Michael Wayne Haley had been in trouble for most of his life. The Texas Attorney General called him a career offender even though many of his convictions had been for minor crimes. Eventually, in 1994 he stole a cheap calculator from a Wal-Mart store, a theft which under Texas law exposed him to a maximum sentence of two years. Nonetheless, Haley was convicted not just of being a thief – a crime of which he was clearly guilty – but of being an "habitual offender" – a separate crime of which he was just as clearly innocent.

The Texas "habitual offender" law applied to a convicted defendant who had already committed two previous felonies, but only if he or she had committed the second prior felony after being sentenced for the first one. In other words, if a person was sentenced on a first felony and then committed another one after that sentencing

he or she was a habitual offender under Texas law and could get twenty years for his or her next (third) conviction. Such prior felony convictions were called “sequential” and they drastically increased the potential sentencing consequences of a third offense for the “habitual offender” who committed them. Before Haley stole the Wal-Mart calculator he had been convicted of amphetamine delivery and sentenced on October 18, 1991. He had also committed an attempted robbery on October 15, 1991: three days before his sentencing in the drug case. Thus, the drug delivery and the robbery were not “sequential” – the second crime happened before the first sentencing – and Hayley was indisputably not a habitual offender. Nonetheless, he was convicted of being a habitual offender and received a sentence of sixteen years.

Hayley's case involved a "congerie of mistakes" and every judge and lawyer who examined it agreed that his lengthy sentence was illegal. He had been convicted and sentenced of a crime – being a habitual offender – which he did not commit. Nonetheless, when his appeal reached the United States Supreme Court in 2004 the State of Texas fought to make Haley continue serving his illegal sentence. Justice John Paul Stevens complained that "the unending search for symmetry in the law can cause judges to forget about justice" and thought that "this should be a simple case." It wasn't (*Dretke v. Haley*).

The proof that Haley was not guilty came from the official records of his criminal history and it was as unimpeachable as the calendar. But the Texas prosecutors told the Supreme Court, that "justice was being done" because Hayley had received "a full and fair trial." Of course, Texas had to agree, there was an "indisputable error at

sentencing" and Haley's sentence was "unlawful." The error was so clear that it resembled "a law school hypothetical." Texas conceded all of that, prompting one Justice to ask why the court should engage in a "jurisprudential striptease" to keep an innocent man in prison and making another one wonder if there was "some rule that [Texas] can't confess error" or if "the trial lawyer's obligation to do justice is . . . somehow missing" in Texas. But the Texas Attorney General argued that freeing Haley from his unwarranted sentence would be "disruptive of the federal system" and would result in "circular reasoning." He may be innocent, Texas argued, but "he is only innocent in the most technical of legal sense [sic]." He should stay in jail (*Dretke v. Haley*, Oral Argument transcript).

The Supreme Court agreed and refused to free Michael Haley. Instead, it sent his case back to the lower courts to determine if there was some technical loophole he could wriggle through. For example, maybe his trial counsel had not competently defended him (*Dretke v. Haley*). One might expect that the justices would realize that a competent lawyer should know that October 15 comes before October 18. But then, one might also expect that a sovereign state would not exert its awesome power to keep an admittedly innocent man in prison.

Haley's case illustrates as clearly as any I have found the binary divergence between reason and authority which occupies the contemporary terrain of wrongful convictions. Reason, in Haley's case as elsewhere, is the territory of the defense – Haley was certainly innocent, Herrera was likely innocent, and a system which values

fair adjudication and truth-telling as its norms should have said so. Authoritarian force is a space occupied by the power-players in the legal system: courts and prosecutors.

As the Friendly article and the cases of Leonel Herrera and Michael Wayne Haley illustrate, the proponents of the authoritarian side of the legal dichotomy never express themselves in terms of unfairness or injustice, and certainly never in the language of a cruel disregard for innocence. Instead, they advance the virtue of finality in legal decision making. Friendly had strongly disagreed with the Supreme Court's 1963 pronouncement that "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." He wondered "Why do they have no place?" and believed it appropriate that such notions "should keep an innocent man in prison" (Friendly 149, 154). He agreed with Justice Harlan that "[b]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation" (Friendly 149).

We have seen that the Herrera Court preferred "finality in capital cases" to a long-lasting search for truth, and in Haley's case the Court affirmed the complicated set of procedural rules which subordinate innocence determinations to "finality, comity, and the orderly administration of justice" (*Dretke v. Haley* 388). Chief Justice Roberts himself once proposed that federal courts should never even examine death penalty convictions from state courts, because such an affront to the finality of verdicts "makes a mockery of the criminal justice system" (quoted at *Snyder* 1226).

It is important to recognize the true meaning of buzz-phrases like “finality” and “end to litigation” in the context of wrongful convictions analysis. The finality to which courts and prosecutors refer is the finality of convictions. Findings of guilt, the conviction of prisoners – in other words, verdicts which represent the successes of the criminal justice system’s authoritarian stake-holders – should remain forever immune to subsequent doubts as to their correctness. Verdicts of “not guilty” are already immune to revision by virtue of the Fifth Amendment’s guarantee against double jeopardy: an acquitted defendant can never again be prosecuted for the same offense, and so an acquittal is forever constitutionally “final” no matter what subsequent proof of guilt may impeach it. There is no analogous constitutional or jurisprudential imperative against correcting a mistaken finding of guilt, and as noted above the Supreme Court once considered the exoneration of innocents to be a core judicial responsibility. The tendency to immunize convictions from later doubt of their correctness has developed as a cultural phenomenon as much as a legal one, arising from a deep national longing to believe in the perfectability of the legal process, and justifying the observation that law plays “the role of tagalong” to other forms of cultural influence (Dudziak, Volpp 595). When one Massachusetts prosecutor declared that “Innocent men are never convicted. Don't worry about it, it never happens in the world. It is a physical impossibility,” (quoted at Weinberg,) he invested legal decision-making with a naive but unadulterated sense of what constitutional law professor Stephen Calabresi has called American Exceptionalism in the context of constitutional jurisprudence.

Americanists will recognize that phenomenon as a facet of a larger American experience, but in the world of legal sovereignty it means something very special.

D. American Exceptionalism and the Law

In his 2006 article "A Shining City on a Hill: American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law," Calabresi observes that "[f]or almost four hundred years, Americans have defined the United States as an exceptional nation with an exceptional mission in the world." This self-definition is such a core element "of the ideology of what it means to be an American [that] it is quite literally un-American to think the United States is not a special place" (Calabresi 1344, 1345). However, the specific nature and definition of this spirit of exceptionalism – "the ways in which the United States varies from the rest of the world" – remains a "constant topic of discussion" (Lipset 17).

In *The Roots of American Exceptionalism*, the political scientist Charles Lockhart analyzed four specific American policy vectors – tax, medical care, abortion, and immigration – and compared them to the policies of four other countries – Sweden, Canada, France, and Japan – and then concluded that America is "exceptional" in a qualitative rather than a quantitative sense: it is not better, just different. "Americans," claims Lockhart, "are more predisposed than the citizens of other societies to perceive humans as relatively equal individuals who are capable of mastering their own fates if only governments will leave them free to look after themselves." Americans are exceptional, in Lockhart's view, because of these "hallmarks of individualism" which make them distinct without making them excellent. (Lockhart 1-19, 185).

Eminent Twentieth Century sociologist Seymour Martin Lipset, like Lockhart, posits that "America continues to be qualitatively different" and he stops short of saying

that this perception of a qualitative exceptionalism translates into a belief in American superiority. “[E]xceptionalism is a two-edged phenomenon; it does not mean better. This country is an outlier . . . the positive and the negative are frequently opposite sides of the same coin” (Lipset 26). Lipset does agree with Lockhart that collective personalities define the national identity and he locates the germ of exceptionalism in an “American Creed” which “can be described in five terms: liberty, egalitarianism, individualism, populism, and laissez-faire” (Lipset 19). He constitutionalizes the exceptionalistic mentality as part of America’s “exceptional focus on law” and the Constitution’s intense “commitment to individualism” (Lipset 20).

Calabresi observes that the relationship which Lipset touches upon between American exceptionalism and American law and has gone largely uncharted. He calls Michael Ignatieff’s *American Exceptionalism and Human Rights* “[t]he only substantial book I was able to find that has applied American exceptionalism to law” (Calabresi 1340, note 27). A close reading of Ignatieff, however, reveals that his brand of exceptionalism is akin to Lockhart’s, different rather than better. Calabresi clearly maps out a different course for his own view of exceptionalism as that term relates to the law. For Calabresi, “American exceptionalism is absolutely exceptional among all the exceptionalisms of the world.” America has a “universal creed” which allows it to be a “good country that is committed to good values” in a way that other countries are not. Calabresi, a law professor and constitutional scholar, “seek[s] to apply [other] scholars’ historical, sociological, and political science scholarship to law.” He disagrees with Lipset, and concludes that American Exceptionalism means more than difference

without superiority. To the contrary, Calabresi's constitutional America is unequivocally better. It a "beacon of freedom for the whole world" in a way that distinguishes it from those countries that can only watch her light shine forth. America is "plainly a good society" and Lincoln was right to call it "the last best hope of man on earth" (Calabresi 1415).

While the title of Calabresi's article recalls John Winthrop's Arabella sermon, he locates that notion of American specialness in the much older European habit of imagining a Western Eden. For his premise that "American exceptionalism is originally a European idea" he cites colonial historian Jack Green.

Throughout the Middle Ages, Europeans had posited the existence of a place - for a time to the east, but mostly to the west of Europe - without the corruptions and disadvantages of the Old World. The discovery of America merely intensified this "nostalgia for the Golden Age and the Lost Paradise" and actually aroused new hope for their discovery somewhere on the western edge of the Atlantic.

(Greene 25-26, quoted at Calabresi 1345)

Twenty-five years after Columbus landed in the New World, itself a term which teems with unspoiled perfection, Sir Thomas More located his fictional Utopia somewhere beyond the Atlantic. Later European writers "continued to identify the dream of a perfect society with America and to locate their fairylands, their New Atlantis, their City of the Sun in some place distant from Europe and in the vicinity of America" (Greene 28, quoted at Calabresi 1345).

Calabresi traces the development of American Exceptionalism on Western shores through literature, religion, politics, and ultimately law. He finds it, for example,

in the founding era (“[T]he idea of America as a special place with a special people called to a special mission was never to go away.” Calabresi 1352); in the work of Herman Melville (“[W]e Americans are the peculiar, chosen people - the Israel of our time; we bear the ark of the liberties of the world. . . . God has predestinated, mankind expects, great things from our race; and great things we feel in our souls.” Calabresi 1361, quoting Melville, *White Jacket*); in the architecture of the Statue of Liberty (“It was originally named ‘Liberty Enlightening the World,’ a fitting name for the national icon of a country that had just abolished slavery and that saw itself, and was seen by others, as a shining city on a hill.” Calabresi 1365); and in the twentieth century civil rights movement (“So I say to you, my friends, that even though we must face the difficulties of today and tomorrow, I still have a dream. It is a dream deeply rooted in the American dream that one day this nation will rise up and live out the true meaning of its creed.” Martin Luther King’s August 28, 1963 speech, quoted at Calabresi 1370).

Calabresi locates the origin of legal exceptionalism in the religious tendency of Americans to sacralize their own national identity, including their own legal identity. Here, he relies heavily on the jeremiad scholarship of Sacvan Bercovitch and thereby places his article explicitly, though perhaps unintentionally, four-square within the American Studies conversation. While quoting Benjamin Rush for the opinion that “the Union of the States, in its form and adoption, is as much the work of a Divine Providence as any of the miracles recorded in the Old and New Testament were the effects of a divine power” (Calabresi 1404), Calabresi reminds us that Bercovitch credits another Founder, John Adams, with the same idea. “As Bercovitch observes,

'Adams's use of the Great Migration as precursor to the War of Independence is a significant testament to the secular-sacred typology developed through the eighteenth century'" (Calabresi 1354, quoting Bercovitch 131). All told, Calabresi mentions Bercovitch's work thirty-one times in an eighty-two page article and he repeatedly recognizes the jeremiad form as an important vehicle for the transmission of the exceptionalist notion.

Bercovitch explains that '[i]n Hebrew tradition [the] dual function [of the jeremiad] is something of a paradox. The chosen people had sinned and continued in sin, had been punished with exile and were being threatened with more severe punishments unless they reformed; but they remained chosen nonetheless, still the keepers of the ancient promise to Abraham.'

(Calabresi 1350). Moreover

Sacvan Bercovitch quotes Henry Clay, who warned Americans in 1832 that "[i]t belongs to you.., to decide whether [the] great blessings of Liberty and Union shall be preserved.... The eyes of all civilized nations are gazing upon us.' 75 Bercovitch also quotes other American "jeremiads," Charles Drake and Abram Maury, who urged their fellow citizens that '[i]f our experiment succeeds... "we will become a beacon.., to the nations of the earth," and "the genius of America, like the star in the east, will lead the earth's people" to redemption. "But if we should become corrupt and unprincipled.., no horoscope will be needed to forecast our destinies," for then "the expiring cries of Liberty shall be heard in accents of agony, bewailing the fate of her last and loveliest abode.'

(Calabresi 1359, quoting Bercovitch 134).

Calabresi's treatment of legal exceptionalism culminates with observations about America's sanctification of its constitutional law. He posits that the prevailing American idea "that America is an exceptional nation, with an exceptional people and an exceptional role to play in the world" requires a companion idea "that [America] must therefore have its own laws and Constitution" (Calabresi 1337). The Constitution

defines the parameters of American Legal Exceptionalism for Calabresi and he believes that Stanford Levinson and Michael Kamen are “dead right” when they consider “the Constitution as the focal point of the American creed” (Calabresi 1398). Like Kamen and Levinson, Calabresi sees the Constitution as the national “Ark of the Covenant,” the vessel that houses the essence of the American character. He goes on to quote Congressman Caleb Cushing who in 1834 explicitly identified the Constitution “our Ark of the Covenant” and Martin Van Buren whose 1837 inaugural address described it as “a sacred instrument.” (Calabresi 1398, 1399).

This sacralization of the Constitution, which Calabresi and Alexander Bickel both call “the secular religion of the American republic” (Calabresi 1399, quoting Bickel 24), explains the reverence which territorializes the legal system embraced within that constitutional Ark. If we “find our visions of good and evil” in the Constitution’s mandates (Calabresi 1399, quoting Bickel 24), then we may see the justice system that enforces those mandates as an expression of “America’s exceptional moral mission” (Calabresi 1399). When the law becomes exceptional by virtue of presumed divinity then that very sacredness may discourage even a healthy skepticism. The law which may otherwise be considered a mere system for preserving order in a complex society must now become a “web of understandings, myths, symbols, and documents” which give rise to the American character itself (Levinson 10). As such, it is no longer simply a regulatory code but a reliquary for which Madison could urge “a more than common reverence;” which Washington could insist be “sacredly maintained;” which Lincoln could demand be “religiously observed;” and which John Quincy Adams would enjoin

all citizens to “write . . . on the doorframe of your house” like the mezzuzahs required of the Israelites in Deuteronomy 6:7-9 (Levinson 12). This variety of Constitutional exceptionalism must naturally demand a sanctimonious regard for the verdicts and decisions rendered by the legal system which the Constitution has erected and which its promises of Due Process nominally protect.

Any treatment of wrongful convictions must face the dilemma of this myth. Levinson quotes legal commentator Max Lerner for the point that America views the Constitution’s legal architecture as “something which it believes to possess supernatural powers, an instrument for controlling unknown forces in a hostile universe” (Levinson 12). In the social universe which the law seeks to control, crime and violence often present themselves as the hostile forces which require the “supernatural powers” of myth to contain them.

E. *Mythos and Logos*

Human beings have used myths to achieve a psychological control over of emotional understanding of “unknown forces in a hostile universe” for a very long time. Before astronomers recognized the Earth’s circular orbit, the ancient Greeks knew that Helios drove the chariot of the sun between the horizons. Before climatologists could explain the changing seasons, Persephone’s periodic captivity in Hades answered that mystery. Before meteorologists knew the source of lightening, that unknown force came from the hammer of Thor or Zeus’s thunderbolts. Joseph Campbell makes it a function of myth to “render a cosmology, an image of the universe of the world around us” (Campbell 519). Allen Dundes tells us that “[a] myth is a sacred narrative explaining how the world and man came to be in their present form” (Dundes 1).

For Dundes, the element of sacredness “distinguishes myth from other forms of narrative such as folktales” and “means that all forms of religion incorporate myths of some kind” (Dundes 1). Another consequence of sacredness is that myths stand on their own authority. When the Greek poet Hesiod recounted the story of all creation in mythic terms, he “did not assume that the history he [was] about to tell could be deduced from natural evidence or that he could arrived at the account of the origins of the universe without supernatural aid.” Instead, he “invoke[d] the Muses as both the authority for his claims and the source of his information” (Cohen, Curd, Reeve 2).

Hail, children of Zeus! Grant lovely song and celebrate the holy race of the deathless gods who are for ever, those that were born of Earth and starry Heaven and gloomy Night and them that briny Sea did rear. Tell how at the first gods and earth came to be, and rivers, and the boundless sea with its raging swell, and the gleaming stars, and the wide heaven above, and the gods who

were born of them, givers of good things, and how they divided their wealth, and how they shared their honours amongst them, and also how at the first they took many-folded Olympus. These things declare to me from the beginning, ye Muses who dwell in the house of Olympus, and tell me which of them first came to be.

(Hesiod, *The Theogony*, lines 104-115. Emphasis added.)

Similarly for Homer. When he recounted the Olympian gods' interference on the battlefields of Troy he claimed a sacred, supernatural source material.

Sing, goddess, the anger of Peleus' son Achilleus
and its devastation, which puts pains thousandfold upon the Achaians.

(Homer, *Iliad* 1:1-2. Emphasis added.)

Even the devoted Christian poet John Milton approached his mythological tale of the Fall of Man by asking for celestial inspiration.

OF Mans First Disobedience, and the Fruit
Of that Forbidden Tree, whose mortal taste
Brought Death into the World, and all our woe,
With loss of Eden, till one greater Man
Restore us, and regain the blissful Seat,
Sing Heav'nly Muse, that on the secret top
Of Oreb, or of Sinai, didst inspire
That Shepherd, who first taught the chosen Seed,
In the Beginning how the Heav'ns and Earth
Rose out of Chaos: Or if Sion Hill
Delight thee more, and Siloa's Brook that flow'd
Fast by the Oracle of God; I thence
Invoke thy aid to my adventrous Song,

(Milton, *Paradise Lost*, Book 1, lines 1 - 13. Emphasis added.)

Milton's Book One "muse" might have been the Holy Spirit instead of some pagan deity, but later in the poem he conflates his Christianity with old Greek pantheism and makes his mythological inspiration explicit by invoking the classical Muse of astronomy, Urania.

Descend from Heav'n Urania, by that name
If rightly thou art call'd, whose Voice divine
Following, above th' Olympian Hill I soare,
Above the flight of Pegasean wing.
The meaning, not the Name I call: for thou
Nor of the Muses nine, nor on the top
Of old Olympus dwell'st, but Heav'nlie borne,
Before the Hills appeerd, or Fountain flow'd,
Thou with Eternal Wisdom didst converse,
Wisdom thy Sister, and with her didst play
In presence of th' Almighty Father, pleas'd
With thy Celestial Song.

(Milton, *Paradise Lost*, Book 7, lines 1 - 12. Emphasis added.)

For Hesiod, Homer, and Milton the claim of celestial inspiration explained their sources of information and authorized them to proclaim their subject matter. But it had one more advantage as well: it bolstered their credibility, assuring that all audiences would accept the veracity of their narrative. Who, after all, could dispute the testimony of the gods? Such a heresy would be like rejecting the Ark of the Covenant.

Thus, *mythos* served pre-scientific humanity as a sacred and authoritarian device for answering society's hard and important questions. Eventually however, in the classical world at least, *mythos* yielded to *logos*: "the pragmatic mode of thought that allowed people to function effectively in the world [and which] had, therefore, to correspond accurately to external reality" (Armstrong xi). This "major shift" (Herman 12) probably started around 585 B.C.E. when the pre-Socratic philosopher Thales of Miletus used mathematics to predict a solar eclipse (Cohen, Curd, Reeve 1) and then to calculate the height of a pyramid. About a hundred years later, the Ephesian philosopher Heraclitus took Thales's accomplishments one step further and told his

followers that the rational faculties of universe, its *logos*, provided a single source of “independent, objective truth available to all.” (Cohen, Curd, Reeve 24) Thus, “a new, rational way of understanding the world was born” (Herman 12). No longer would men and women, or governments, need myths for the purpose of “controlling unknown forces in a hostile universe.” They could now rely on a system of thought which made “a commitment to argument and critical inquiry together with a view about the nature of justification” (Cohen, Curd, Reeve 1).

In other words, common sense, reason, and science would now prevail. Gone was the dogmatic authoritarianism of *mythos*.

F. Wrongful Convictions, the Persistence of *Mythos*, and the Pennsylvania Experiment

“The *logos* holds always but humans prove unable to understand it.”
Heraclitus, Sextus Empiricus

But as we have seen in previous sections of this chapter, when it comes to legal sovereignty, authoritarian *mythos* never went very far away. The mythology of American legal exceptionalism hijacked logical truth-telling and replaced it with an uncritical deference for the finality of guilt. Judge Frank’s detestation for the flood of innocence petitions which issued from disgruntled prisoners and the Rehnquist court’s skepticism about their general validity partially explain the law’s transition from Evelyn Curry to Leonel Herrera. However, other factors were also at play. The 1960s and 1970s saw crime rates on the rise and many politicians “rode the public’s fear of disorder to victory in the 1980s and 1990s” (Gould 2). Crime and criminality had become a cultural analog for the public’s perception that American morality was in a state of decline. Law professor Jon Gould describes the work of sociologist Katherine Beckett whose survey of twenty-five years of news-reporting revealed a public sentiment that “leniency in the criminal justice system” was related to “liberal permissiveness,” an excess of welfare benefits, and the creation of a “criminal underclass” (Gould 26). Savvy conservative politicians took electoral advantage of the “coincidence of an increase in the postwar crime rates at a time of antiwar and civil rights disturbances” and enacted punitive innovations which were “contrary to what almost everyone with close knowledge of the topic thinks makes much sense” (Gould 26, quoting Beale 64, 65). The public’s “fear of disorder” joined with a perception of

increasing immorality, family disruptions, increased (and undesirable) social diversity, a general deterioration of America's "moral cohesion," and an alarmingly rising crime rate to encourage "support for increasingly punitive measures to enforce moral norms" (Gould 27). The fact that the crime rate was actually *falling* and not rising during those years between 1975 and 2000 when cries of "law and order" reigned ascendent further illustrates the contra-empirical sway of *mythos* (Gould 27).

However, the turn of the twenty-first century saw "a growing recognition in popular culture that the criminal justice system was capable of serious errors" (Gould 1). Public fear of crime had started to subside and politicians had taken their "tough on crime" rhetoric to its apogee with increases in the number of crimes punishable by death, longer and harsher prison terms, and draconian mandatory minimum prison sentences (Gould 26-28). Changes in "political and social life [had] raised the salience of the issue" of wrongful convictions and by 2001 ninety-four per cent of Americans believed that "innocent defendants are sometimes executed" (Gould 11). "Incontrovertible proof of innocence" after convictions was changing the public's perceptions of crime and with it the entire culture of legal exceptionalism (Gould 11).

The study of wrongful convictions began in earnest with the discovery that the analysis of genetic materials found in human tissues provided a largely unimpeachable identifier of the specific human being who had contributed those tissues. Studies of blood, semen, skin cells, and other human tissues could tell investigators the identity of the person who had left that material at a crime scene and thus often identify the real criminal. Certainly, before the judicial acceptance of DNA evidence "American lawyers

and crusaders [had] fought to overturn the convictions of people they believed innocent' (Scheck, et al. xix). However, until the "revelation machine" (Scheck, et al. xx) which DNA evidence provided, the belief in innocence after conviction was largely anecdotal, personal, and unverifiable. Without the kind of unimpeachable, and timely, evidence as had saved the Boorn brothers, convictions had become, to the delight of Judge Friendly's followers, final.

"The source of public confidence in our criminal justice system resides in its ability to separate those who are guilty from those who are not" (*Wrongful Convictions Committee Report* 1. This report will hereafter be cited as "*Committee Report.*") and the system had always exercised that ability through the use of trials and appeals. Witnesses testified at trials. Their testimony was evaluated by lay jurors. Convictions were reviewed for procedural, but not empirical, correctness by judges who applied complex standards of legal, but not factual, integrity. Guilt and innocence were demarcated by vague terms like "reasonable doubt" and "burden of proof" and courts routinely held that convictions need not rest on an absolute certainty of guilt. Professor Brandon Garrett puts the problem nicely in *Convicting the Innocent*: "The system places great trust in the jury as the fact finder. . . . Yet at a trial, few criminal procedural rules try to ensure that the jury hears accurate evidence" (Garrett 7). A criminal trial may be, as the United States Supreme Court has said, "the paramount event for determining the guilt or innocence of the defendant" (*Herrera v. Collins* 416), but at that paramount event "few rules regulate accuracy rather than procedures" (Garrett 8).

Against this backdrop came the discovery that DNA can identify criminal perpetrators and exculpate non-perpetrators, presumably without error. In 1996, the United States Justice Department released its landmark report *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial*. In addition to providing the Department's imprimatur to the DNA exonerations, that report presented the chilling datum that fully one fourth of the rape suspects referred to the FBI for prosecution was proved innocent by DNA. Thus, in such referrals there was a one in four chance that the police, and even the victim whose opportunity to observe the perpetrator was close and intimate, would be wrong. (Gould 17-18).

The national reaction to the news that police, witnesses, courts and juries were so often mistaken included the establishment of statewide investigative bodies to determine how such mistakes could happen and how they could be stopped. One such body was Pennsylvania's Advisory Committee to Study the causes of Wrongful Convictions. The work of the Advisory Committee, and the challenges and resistance which its work confronted, present an apt case study of the continuing contest between rational *logos* and authoritarian *mythos* in the twenty-first century, post-DNA, jurisprudence of innocence.³

In 2006, John Rago, an assistant professor at the Duquesne University School of Law, published an article entitled "A Fine Line Between Chaos & Creation: Lessons on Innocence Reform from the Pennsylvania Eight" in the *Widener University Law Review* (Rago). That article discussed several Pennsylvania cases in which convicted

defendants had been discovered to be factually innocent of the crimes for which they had been convicted. This problem, the conviction of the innocent, implicated “[T]he most fundamental principle of American jurisprudence,” namely “that an innocent man not be punished for the crimes of another” (*Committee Report* 1, citing *Commonwealth v. Conway*). Professor Rago’s article came to the attention of State Senator Stewart Greenleaf, then chairman of the Pennsylvania State Senate Judiciary Committee. Senator Greenleaf’s interest in wrongful convictions and in Professor Rago’s article prompted him introduce Senate Bill 1069 (2006) to establish an Innocence Commission to study the issue in Pennsylvania and recommend reforms. Bill 1069 passed the Senate by a vote of 49–0 and was referred to the more conservative state House of Representatives, where it was never reported out of the House Judiciary Committee. The Senate, acting alone, passed Senate Resolution 381 (2006) which established a committee charged with advising the bipartisan and bicameral research agency of the Commonwealth’s General Assembly, an agency called the Joint State Government Commission. (Lappas, Loftus 312) The Committee was tasked to “to study the underlying causes of wrongful convictions . . . [and to] develop a consensus on recommendations intended to reduce the possibility that in the future innocent persons be wrongfully convicted” (Pennsylvania Senate Resolution 381(2006); Lappas, Loftus 311). Rago was appointed to chair the Advisory Committee and I was appointed to be one of its inaugural members.

Other states also undertook similar missions. California, Connecticut, Florida, Illinois, Louisiana, New York, North Carolina, Texas, and Wisconsin had established

state bodies under various mandates and with varying levels of authority to investigate the wrongful convictions problem (Lappas, Loftus 311). By the time Pennsylvania entered the debate, decades of study by scientific and legal experts had identified the chief causes of wrongful convictions and had also identified practical methods of reducing faulty results. The Pennsylvania Committee approached its work with those decades of scholarship available as a foundational starting point.

Although the mission of the Advisory Committee sounded non-controversial – find ways to protect innocent people from unjust punishment – it quickly devolved into a tug-of-war between the scholarly empiricism of scientific and academic experts and the doctrinaire authoritarianism of the Commonwealth’s prosecutorial and police agencies. The Pennsylvania District Attorney’s Association immediately objected to the very idea that innocence claims warranted serious investigation. On March 21, 2007, the president and legislative chair of that association wrote to the members of the Joint State Government Commission protesting that similar bodies in other states were nothing more than unwitting tools of activists and defense attorneys. The Pennsylvania Advisory Committee in particular was alleged to be compromised by some of “the most vocal of Pennsylvania’s anti-death penalty movement, criminal defense ideologues and other activists [with] a strong bias against prosecution and in favor of criminal defendants and inmates seeking to overturn their convictions.” Unlike those radicals, the District Attorneys Association membership was sworn to uphold “a system that, by design and practice, protects the innocent.” The message was clear: only prosecutors could be trusted to do the right thing because they and they alone worked to protect the

criminal justice system and thus society in general. Reformers had “radical personal agendas” and would never be fair to the citizens of the Commonwealth. The Advisory Committee was “one-sided and predisposed” and its work could only be a dangerous assault on justice (Pennsylvania District Attorneys Association Letter 1-3). The District Attorneys also launched an *ad hominem* attack on Professor Rago whom they called “an advocate [for] criminal defendants” who had “already firmly made up his mind” even before the Committee began its work (Pennsylvania District Attorneys Association Fact Sheet, 2007, p. 3).

Next, the District Attorneys mounted a public relations campaign that began with an opinion piece written by its president James Martin and published in the Harrisburg Patriot newspaper as “State Crime Panel Stacked Against Justice” (Martin). The improvement of the law’s accuracy was a goal that only seemed reasonable “on the surface.” In fact, he warned, the committee membership was monopolized by private lawyers, professors, prisoner rights advocates, public defenders, and other renegades who were “determined to tear away at the criminal justice system.” Only prosecutors did “the right thing for the right reason.” Everybody else threatened “the integrity of the governmental process” and would unleash “injustice [upon] crime victims and their families” (Martin). The Senate eventually added more prosecutors and police officers to the Advisory Committee until they outnumbered defense lawyers seventeen to eleven. Nonetheless, the prosecutors continued to complain that they were outgunned and “severely under-represented” (*Independent Report* 3).

Over the course of the Advisory Committee's thirty-four meetings from 2007 to 2011, and during the testimony of dozens of distinguished legal and academic experts, the prosecutors' opposition continued unabated. They questioned the committee's mission, the definition of innocence, the possibility that any convictions were wrongful, and the usefulness of scientific studies. When one advisor correctly observed that the prosecutors didn't want to address the Committee's mission at all, preferring instead to "pat[] ourselves on the back for getting ninety-nine per cent of the defendants who were guilty," two prosecutors accused him of "personal attacks" and "sarcasm" (Advisory Committee, June 7, 2007 audio-recording).

Pennsylvania's battle for wrongful conviction reform thus became a pitched battle between intellectual coherence and traditional authority. The reformers asserted the *logos* of empirical evidence and scientific proof as the basis for improvement. The police and prosecutors favored the *mythos* of official discretion, their own honesty and dedication, and anecdotal experience as values that militated against making any changes and in favor of preserving their own unchecked power to dispense justice however they saw fit. This contest played itself out most conspicuously during the testimony of scientific witnesses.

On June 7, 2007, social psychologist Tara Burke described her methodology for identifying the causes of some wrongful convictions. One prosecutor castigated her for accepting DNA exclusion as evidence of innocence, preferring instead to believe prisoners to be guilty if they ever committed later crimes after their exoneration (Advisory Committee June 7, 2007 audio-recording). Writing about her Pennsylvania

experience years later, Professor Burke recalled a "giant divide between prosecution and defense" members of the Committee. Not only did the prosecutors argue against logic, but their "stereotypical" positions "further supported much of the social psychological literature regarding biases (such as confirmation bias) that I was speaking about in the first place" (Burke email).

On August 8, 2008, John Jay College of Criminal Justice professor Saul Kassin spoke to the committee about his research on false confessions – a field in which he is the country's leading expert. After a four hour lecture which traced decades of research and demonstrated how false confessions regularly lead to miscarriages of justice, a prosecutor accused Kassin of doing "a disservice to a committee like this and to the criminal justice system when you create a false impression that our system is so severely broken." When a shocked Professor Kassin asked the prosecutor which particular case studies he rejected, the prosecutor said that he rejected "all of them." Chairman Rago complained about the personal attack on a distinguished scientist but the prosecutor continued to berate Kassin as a biased and unreliable "defense expert" (Advisory Committee August 8, 2008 audio-recording).

The Committee's clearest contest between *logos* and *mythos* centered on the leading cause of wrongful convictions, the unreliability of eyewitness identifications. "Other causes of wrongful convictions have been recurrently found, but convictions based partly or completely on mistaken eyewitness identifications have been shown to comprise the vast majority of the DNA exoneration cases in the United States. As importantly, this reflects data for the past 100 years as almost every study of wrongful

convictions confirms that roughly two-thirds or more involve eyewitness misidentification” (*Committee Report 21*).

Eyewitness identifications are interesting to the field of wrongful convictions for at least two reasons. First, because they are so pervasive and dangerous. But second, because they involve what psychologists call “system variables:” they are often caused by faulty police procedures and therefore better procedures can mitigate their occurrence. In that way, they are uniquely amenable to correction and mitigation. That was the lesson of Professor Gary Wells, one of the world’s foremost identification experts, when he spoke in Harrisburg about his thirty years of research on identification accuracy. Based on this testimony and a survey of the scientific and legal literature, the Committee recommended that police identification procedures be supervised by officers who do not know whom the investigators suspect of being the perpetrator. This kind of “double blind administration” eliminates the possibility that a knowledgeable officer will inadvertently direct the witness’s attention to the person or photograph of the police suspect, thus compromising the integrity of the witness’s selection. (*Committee Report 5*).

The prosecutors’ reaction to this simple suggestion was pure *mythos*: self-referent authoritarianism, devoid of any *logos*, argument or reason. The prosecutors countered three decades of peer-reviewed scientific study with three platitudes about the mythological perfection of the *status quo*. First, mistaken eyewitnesses are no problem because “ordinary jurors [can] be trusted to judge for themselves which witnesses are credible and which are not” (*Independent Report 4*). Second, any

proposed reforms to existing police procedures accused the police of crookedness or stupidity by “offensively and baselessly presum[ing] that police investigators in Pennsylvania have been obtaining identifications by suggesting to witnesses, either intentionally or through incompetence, which members of lineups and photo arrays are the suspects” (*Independent Report* 47). Finally, and most importantly, the prosecutors advised ignoring the reform proposals because of their source: “[a] committee of law professors, defense attorneys, and defense experts.” The police officers’ representatives agreed that it was a grave error to “trust academics and the defense attorneys before we trust citizen juries” (Pennsylvania District Attorneys Association 2011 Press Release). All of the science, the *logos*, that had revealed the frailty of eyewitness identifications and the difficulty that jurors have separating accuracy from mistakes should be ignored in favor of the vested traditions, the *mythos*, that held to the contra-empirical view that it was wiser “to place our trust in the collective wisdom, experience, and common sense of twelve ordinary jurors” (*Independent Report* 4). The view that science should reign supreme in the answer to scientific questions was nothing more than a competing “worldview,” and one with which the *mythos*-driven prosecutors would forever “very strongly disagree” (*Independent Report* 4).

G. Exceptionalism and the State of Exception

Thus, we have seen the consequences of the American mythic desire to believe in the law's infallibility. This belief, or the desire to hold it, expresses itself in the elevation of finality over correctness in criminal adjudication and the willingness to ignore science and reason in order to preserve the supremacy of tradition and the authoritarian control of the machinery of decision making. This American legal exceptionalism has deep roots in religious and near-religious veneration of the American Constitution and consequently in the legal system which that Constitution has established.

The binary which I have proposed and explained, that which exists between *logos* and *mythos*, between the law's opposing faculties of reason and force, closely parallels the theories of Carl Schmidt, Giorgio Agamben, and other political philosophers who have postulated a "state of exception" as the locus of sovereign power. When Schmidt defined the sovereign as "he who decides on the state of exception" (*Sarat Mercy on Trial* 71), he was defining the sovereign power to ignore rules and exempt itself from the normal operation of law as the purest identifier of ultimate governmental authority. Agamben calls the state of exception the ability to establish a "no-man's-land between public law and political fact" (Agamben 1) where the "law" is removed from the "force of law" and where "potentiality and act are radically separated" (Agamben 37-38). Agamben calls the rational potentiality of the law its "norm" and the opposing dynamism the "realization" or "concrete application" (Agamben 36). It is within this concrete realization of the law's influence, the seat of

the exception, where exceptionalism and sovereignty reside. To understand what this has to do with our study of wrongful convictions, let us return to the case of Michael Haley.

The norm in Haley's case, just as it is in every legal contest, is that the truth should be found and that once it is found it should be applied. The sovereign position in *Haley*, however, was the exact opposite of that norm. Texas knew that Haley was innocent, that was the truth. But it wanted to keep him in jail nonetheless – in other words, Texas sought to “radically separate” the potential, normative effect of Haley's innocence from the concrete, exceptional application of his continued punishment. The Texas prosecutor, in Agamben's language, sought to occupy the state of exception: the place where “the opposition between the norm and its realization reaches its greatest intensity” (Agamben 36). It is a place where the sovereign can ignore the normal truth-telling mission of the law and replace it with the exceptionalistic prerogative preserving its own dominion. It is a place filled with a “mystical element” by which the legal sovereign “seeks to annex anomie itself” by assuming to itself the right to ignore *logos*, logic, reason, science and the truth (Agamben 39). Legal authoritarians prefer the finality of judgment to the opening of false convictions because they are the sovereigns, looking at the issue from the perspective of their exceptionalistic repose.

It is within this state of exceptionalism that the *mythos* resides.

PART TWO

Introduction to Part Two

In the language of important American legal guarantees this binary between reason and majesty resides often unseen, hiding in plain sight, and evading much recognition as a remnant of ancient dichotomies. The Constitution's promise that life liberty and property remain sacrosanct except when taken away by due process places the authoritarian power to deprive in opposition to the power of the rationality of due process to protect. This is a step away from the Declaration of Independence's promise that life and liberty (along with the pursuit of happiness) are "inalienable rights" – they cannot be alienated or taken away at all – but the Constitution at least guarantees no alienation without satisfying the *logos* of due process. Similarly, the Fifth Amendment's Taking Clause which prohibits sovereign confiscation of private property without "just compensation" limits the power to condemn by the dual guarantees that the taking must be compensated and the compensation must be "just:" in other words reasonable and logical. When Felix Frankfurter famously wrote that "due process is not a yardstick, it is a process" he took due process outside of the realm of brute force measurement and imbued it with more ephemeral notions of vague equity, all of which are measured in terms of their compliance to rules of logic and reason rather than against the dictates of authoritarian prerogative.

In the criminal law, the Constitution preserves a defendant's legal innocence unless the state can sustain a burden of proving guilt "beyond a reasonable doubt." This burden is often expressed in language that requires the state to "overwhelm" the

presumption of innocence, a forceful expression of the use of sovereign power, while the defendant, to remain innocent need only have reason – “a reasonable doubt” – on his side.

As I will demonstrate in the next three chapters of this dissertation, the sovereign contest between *logos* and powerful *mythos* has become deeply embedded in the American literary experience. However, that contest finds itself illustrated in literature far older than the iconic American texts which I will examine; indeed, far older than America itself. Thousands of years ago, the authors of antiquity were describing the two sides of sovereignty – the reasoned and the forceful – by assigning each faculty to a human actor who demonstrated its essential nature. A glance at two ancient stories will illustrate how these dual faculties have long figured in narratives about freedom and justice.

The *Book of Exodus* tells the story of how the God of the Israelites commissioned Moses to liberate the Jews by expressing His decision with a logical argument. He had good, empirical, reasons for the salvation of the captive nation. He had reviewed the available evidence and had chosen the best and most just course of action.

I have seen the affliction of my people who are in Egypt and have heard their cry because of their taskmasters. I know their sufferings and I have come down to deliver them out of the hands of the Egyptians and to bring them to a good and broad land... And now behold, the cry of the people of Israel has come to me and I have seen the oppression with which the Egyptians oppress them. Come I will send you to Pharaoh that you may bring forth my people the sons of Israel out of Egypt.

(*Bible, Exodus 3:7-8, 3:10*)

Thus, when Moses spoke to Pharaoh (*Bible, Exodus 5:1*) he had the force of reason behind his demands. “Thus says the Lord, the God of Israel. ‘Let my people go that they may hold a feast to me in the wilderness’” (*Bible, Exodus 5:1*). Nonetheless, both God and Moses correctly predicted that Pharaoh would refuse this logical injunction, and that his refusal would rest on simple authoritarianism rather than a superior *logos*. When Moses predicted that “they will not believe me or listen to my voice” (*Bible, Exodus 4:1*), God agreed that “the king of Egypt will not let you go unless compelled by a mighty hand” (*Bible, Exodus 3:19*). As religious scholar Nahum Sarna observes, “The clear implication of these words is that the man is possessed by a ruthless and stubborn character. . . . He will eventually yield, but reluctantly, and only under the compulsion of overwhelming force” (Sarna 63). Sure enough, even divine rationality was lost on Pharaoh, he would not listen to reason and simply “turned and went into his house” (*Bible, Exodus 7:23*). His heart remained “hardened” against logic through nine plagues, and only when a mighty hand “smote all the firstborn in the land of Egypt” did Pharaoh accept Moses’s original plea. “Go serve the Lord as you have said,” agreed the reluctant Pharaoh. “And bless me also” (*Bible, Exodus 12:31*).

This story from *Exodus* presents an early clash of dualities. Moses’s catalog of logical reasons for the liberation of the Jews (they are suffering, their slavery is oppressive, they undergo cruel affliction at the hands of their taskmasters, they deserve freedom in a broad and happy land, and God wants them to worship him at liberty) falls flat in the face of Pharaoh’s stubborn authoritarianism. His heart is hard he will not immediately listen to reason, he just turns and walks away. Only when *logos* combines

with a superior force – “a mighty hand” – does the sovereign relent. The same thing was happening a few hundred miles to the north.

At about the same time that Pharaoh rejected Moses’s inspired advocacy, a similar story played out on the Trojan beachhead. The Greeks had besieged Troy for nine years with larger and smaller degrees of success. Their most recent successful skirmish resulted in the capture of slaves one of whom was favored by the god having local jurisdiction, and her captivity provoked a divine response with striking parallels to the litigation of the *Exodus*.

Agamemnon was the chief general of the Greek forces mustered to rescue Helen, the wife of his brother Menelaos, from her kidnapping by the Trojan prince Paris. During a recent raid on the great walled city, the Greeks had captured “booty and captives” (Hogan 9) including the young maiden Chryseis who became the prize of Agamemnon. Chryseis however, was favored by the god Apollo whose priest Chryses was the girl’s father. Just as the Lord Jehovah commissioned Moses to rescue his own favored captives, the Jewish nation, Apollo dispatched his priest to redeem the favored girl’s freedom.

Atreus’s son had dishonored Chryses, priest of Apollo,
when he came beside the fast ships of the Achaeans to ransom
back his daughter, carrying gifts beyond count and holding
in his hands wound on a staff of gold the ribbons of Apollo
who strikes from afar, and supplicated all the Achaeans,
but above all Atreus’ two sons, the marshals of the people:
“sons of Atreus and you other strong grieved Achaeans,
to you may the gods grant who have their homes on Olympus
Priam’s city to be plundered and a fair homecoming thereafter,
but may you give me back my own daughter and take the ransom
giving honor to Zeus’ son who strikes from afar, Apollo.”

(Homer, *Iliad* 1:11 – 21)

Thus, just as Moses articulated God's well-reasoned demands – let my people go because they deserve liberty – Chryses delivered his reasoned pitch for Chryseis's freedom: I represent Apollo, the god that will reward your compliance, and I will pay you for her freedom. This logical case convinces the majority of the Greek assembly.

Then all the rest of the Achaeans cried out in favor
that the priest be respected and the shining ransom be taken.

(Homer, *Iliad* 1:22 – 23)

Only King Agamemnon, as stubborn and obstinate as Pharaoh, ignored the logic of this entreaty.

Yet this pleased not the heart of Atreus' son Agamemnon,
but harshly he drove him away with a strong order upon him:
“Never let me find you again, old server, near our hollow
ships, neither lingering now nor coming again here after,
for fear your staff and the God's ribbons help you no longer.
The girl I will not give back; sooner will old age come upon her
in my own house, in Argos, far from her own land, going
up and down by the loom and being in my bed as my companion.
So go now do not make me angry; so you will be safer.”

(Homer, *Iliad* 1:24 – 32)

Thus, Agamemnon rejected the reasonable course apparent to everyone but him on the sole, unprincipled ground of his own sovereign preference: “this pleased not the heart of . . . Agamemnon.” He despises the petitioner's divine authority (“the God's ribbons [will] help you no longer”) just as Pharaoh despised Moses's divine authority, also represented by a miraculous staff. Agamemnon's heart was as hard as Pharaoh's, he was brutal and dismissive of reason.

But then Chryses taught Agamemnon the same lesson that Moses taught Pharaoh. Exactly as the God of the Israelites sent Pharaoh a plague to underscore Moses's message, Apollo sent a plague to chasten Agamemnon. "[T]he god responds by striking the army with a plague" when Agamemnon rebukes the holy priest (Hogan 9). Just as Jehovah's curse failed for nine days, so did Apollo's, succeeding only on the tenth.

Phoebus Apollo heard him,
and strode down along the pinnacles of Olympus, angered
in his heart, carrying across his shoulders the bow and the hooded
quiver; and the shafts clashed on the shoulders of the God walking
angrily. He came as night comes down and knelt then
apart and opposite the ships and let go an arrow.
Terrible was the clash that rose from the bow of silver new.
First he went after the mules and the circling hounds, then let go
a tearing arrow against the men themselves and struck them.
The corpse fires burned everywhere and did not stop burning.
Nine days up and down the host ranged the God's arrows
But on the tenth Achilles called the people to assembly

(Homer, *Iliad* 1:44 – 55)

Moses explained the purpose of the Plague of the Firstborn to Pharaoh (Exodus 11: 2-8) and Agamemnon had his own prophet who explained Apollo's plague to the Greeks.

Among them stood up
Kalchas, Thestor's son, far the best of the bird interpreters,
who knew all things that were, the things to come and the things past, . . .
For the sake of his priest whom Agamemnon dishonored
and would not give him back his daughter nor accept the ransom.
Therefore the archer sent griefs against us and will send them
still, nor sooner thrust back the shameful plague from the Danaans
until we give the glancing – eyed girl back to her father
without price, without ransom, and lead also a blessed hecatomb
to Chryse; thus we might propitiate and persuade him."

(Homer, *Illiad* 1:69-100) And just as Pharaoh responded to this plague by reluctantly accepting the logic of divine command and releasing the Jews to Moses, Agamemnon responded to Apollo's intervention by restoring Chryseis to her father Chryses.

In both of these ancient stories, a human agent carries the celestial ordinance to a stubborn ruler who initially rejects it in favor of his own self-declared preeminence. Eventually, the *logos* of revelation finds a powerful ally, quells the chaos of the plagues, and overrules the *mythos* of imperial invincibility. Chaos. *Logos*. Reason. Authoritarianism. *Mythos*. Redemption. The taming of disorder. These elements have resonated in human consciousness for a very long time and they reappear almost three thousand years after Homer in the stories of American justice to which we now turn. All stories have the added similarity that they relate to the redemption of captive innocence, the wrongly captured and convicted. We can remember these ancient tales as we leave the courts of Pharaoh and the Greeks to examine the re-emergence of those patterns in Maycomb, Alabama, Shinbone, Colorado, and Bridger's Wells, Nevada: three mythical realms on the American Frontier.

CHAPTER TWO

***To Kill a Mockingbird:* Mythos and Logos in the Moral Wilderness**

If paradise was man's greatest good, wilderness, as its antipode, was his greatest evil. In one condition the environment, garden-like, ministered to his every desire. In the other it was at best indifferent, frequently dangerous, and always beyond control.

Roderick Frazier Nash
Wilderness in the American Mind, p. 9.

A. Introduction

Heck Tate, the sheriff of Maycomb, Alabama in Harper Lee's classic novel *To Kill a Mockingbird*, was a weak man. He could not resist the lethal bigotry of his own home town, he could not protect a prisoner in his custody, he was a poor courtroom witness, he was easily tricked by the dim-witted locals, he allowed injustices to flourish, he arrested a man he knew to be innocent and saw to his conviction for a capital offense, and he did not even trust himself to shoot a rabid dog. But when Heck Tate declared that "Bob Ewell fell on his knife" and thus absolved Boo Radley of Ewell's murder, he placed himself squarely at the intersection of legal authority and the exceptionalist nature of sovereign *mythos*. Heck Tate, along with Atticus Finch and Boo Radley, illustrate the composition of legal sovereignty on the moral frontier.

American Studies scholar Leo Marx has said of literary analysis that "the first obligation of the scholar, like any other reader of literature, is to know what the work is about" (Marx 28). *To Kill a Mockingbird* complicates that task because it is about so

much. It is explicitly a “ story about race and racial oppression” in the American South of the 1930s (Lubet 1335). It has been called “a tender family narrative” (Phelps 511), and the author herself said that it was “a love story pure and simple” (Hoff 392). On its surface, it is a story about a lawyer defending an unpopular but probably innocent client and losing, and as such it may be a reflection on other contemporary false convictions like those of the Scottsboro Boys or Leo Frank (Lubet 1356-57, Freedman 473-74). It is a meditation on race, class and gender in small town America (Lubet 1359-1361). It may even be “a queer text” that “radically subverts gender and racial types, and in doing so locates an ethos of decency and humanness in an otherwise hierarchal world” (Umphrey, Sarat 9). All of these appraisals read part of the book, but Lee has her narrator point us directly to the novel’s true meaning with her very first sentence: “When he was nearly thirteen, my brother Jem got his arm badly broken at the elbow” (Lee 3). More than anything else, *Mockingbird* is the story of the social and historical forces that came together to break a child’s arm under a spreading Alabama oak tree.

B. The Story

To Kill a Mockingbird is the adult reminiscence of Jean Louise “Scout” Finch of her small town youth in Maycomb, Alabama. Scout’s father is Atticus Finch: lawyer, legislator, and community pillar. The novel is beloved and its plot well-known. Because the details of the plot figure quite precisely into the analysis which this dissertation chapter offers, a plot recapitulation is in order.

The younger Scout and the widowed Atticus lived with Jem in a home presided over by their black housekeeper Calpurnia. Atticus earned a meager living in Depression-era Maycomb where professional people often got paid in produce by clients and patients for whom “nickels and dimes were hard to come by for doctors and dentists and lawyers” (Lee 23). He never went to law school but was admitted to the bar after “reading law” in Montgomery. He put his younger brother Jack through medical school, and then practiced in Maycomb where he had been “born and bred” and was related to almost everyone in town (Lee 4-5). He worked out of an office in the courthouse which he furnished with a hatrack, a checkerboard, and a spittoon (Lee 5).

The autumn that Jem Finch gets his arm broken follows the summer in which Tom Robinson, a simple-minded and partly crippled black laborer, is accused of rape by Mayella Ewell. Mayella is the despised daughter of Bob Ewell, head of a family predisposed to “congenital defects, various worms and the diseases indigenous to filthy surroundings.” Mayella had no friends, no one respected her, and she was “trash.” But she was white, and therefore “Tom was a dead man the minute Mayella Ewell opened her mouth and screamed.”

The local judge appoints Atticus to represent Tom at trial. Atticus accepts reluctantly and immediately predicts that he will fail to save Tom. The trial proceeds with Mayella's accusation and weak corroboration from her father and the county sheriff. Atticus presents no real defense aside from his client's denials. Tom's version of the case is that he had one day been walking past the Ewell home when Mayella summoned him inside to break up a piece of furniture for her. Unbeknownst to Tom, Mayella had long planned to seduce him and to that end she had plotted to get her seven siblings out of the house by sending them into town for ice cream. Tom quotes Mayella as telling him, "Took me a slap year to save seb'm nickels, but I done it. They all gone to town." Tom describes Mayella as the aggressor in a physical embrace that was interrupted by Bob's unexpected arrival. Tom runs away in fear and Bob calls the sheriff.

The trial testimony reveals, much to Atticus's apparent surprise, that Mayella had been beaten by an assailant who used his left hand. This revelation appears to inculcate Mayella's left-handed father Bob, a frequent and violent inebriate, and to exculpate Tom who has no use of his left arm due to an old injury. Atticus makes a stirring closing argument which, while missing or ignoring much of the evidence, exhorts the jury members to accept their social responsibility to render equal justice under the law. Nevertheless, the jury inevitably convicts Tom and sentences him to death. While awaiting his appeal, he is shot to death by prison guards who claim he was trying to escape. The trial experience has made Bob Ewell angry and hateful and leads him to torment Tom's widow, the judge, and Atticus.

A few months after Tom's death, Jem escorts Scout to a Halloween pageant which she attends dressed in a ham costume to honor Maycomb County agriculture. While walking home, the two children are attacked by a man smelling of whiskey but whom Scout cannot identify owing to her costume. Scout escapes the attacker's grasp but Jem is badly hurt, suffering the broken arm which Lee foreshadows at the book's beginning. Scout runs for safety, soon realizing that a strange man is carrying Jem home. At the Finch home Atticus summons a doctor who proclaims that Jem will recover and the sheriff who investigates the scene of the attack and tells Atticus that "Bob Ewell's lyin' on the ground under that tree down yonder with a kitchen knife stuck up under his ribs. He's dead, Mr. Finch" (Lee 305).

The children's savior is revealed to be Arthur 'Boo' Radley, the Finches' mentally disabled neighbor. Boo Radley had been a mystery figure through the preceding chapters of the novel, an unseen hermit around whom community suspicion and children's superstitions had arisen. "Boo was about six-and-a-half feet tall . . . he dined on raw squirrels and any cats he could catch, that's why his hands were bloodstained— if you ate an animal raw, you could never wash the blood off. There was a long jagged scar that ran across his face; what teeth he had were yellow and rotten; his eyes popped, and he drooled most of the time" (Lee 14). Boo had certainly killed Bob Ewell while rescuing the Finch children. Atticus wants to convene a grand jury to address the homicide but Sheriff Tate refuses, instead manufacturing the fiction that Bob died an accidental death. "I may not be much, Mr. Finch, but I'm still sheriff of Maycomb County and Bob Ewell fell on his knife. Good night, sir" (Lee 317).

C. Atticus Uncovered

Interwoven with this plot-line is the narrative of the Finch family, which establishes Atticus to be a loving father, a compassionate neighbor, and an esteemed local citizen. The fictional Atticus is so righteous that his goodness shelters the entire community. As his neighbor Maude Atkinson says, “We’re so rarely called on to be Christians, but when we are we’ve got men like Atticus to go for us” (Lee 104). The literary Atticus, on the other hand, has become a cultural phenomenon. Book Magazine named him the seventh best character in American fiction since 1900 (www.infoplease.com), and Harper Lee won the Pulitzer Prize for creating him (Hoff 390). His 1961 cinema portrayal earned Gregory Peck the Academy Award for best actor and Horton Foote the Award for best screenplay (Hoff 390). The American Film Institute calls him the greatest hero in the history of film (www.afi.com). Indeed, it is no exaggeration to call Finch one of the most admired characters in all of American fiction.

Much of his renown comes from admirers who widely regard him as the paradigmatically great lawyer. Whole cohorts of attorneys had their path to the law set by their admiration of Finch’s courageous commitment to justice and his presumably excellent use of legal methods on behalf of his clients and in service of what is right. Lee’s conception of the 1935 small town Southern lawyer has been said to have inspired more people to become lawyers than any real life advocate. “Many attorneys have asserted that Harper Lee’s portrait of Atticus Finch has been a hero and a model for them on a very personal or individual plane” (Johnson 483). He has been called “a model lawyer” (Phelps 511). Morris Dees, the crusading creator the of the Southern

Poverty Law Center and destroyer of the Ku Klux Klan across America, says that he is a civil rights lawyer because of Atticus Finch (Lithwick). Professor Stephen Lubet, the author of one of the legal profession's leading advocacy textbooks, calls Atticus "the ultimate lawyer" (Lubet 1340). When law professor Monroe Freedman had the temerity to write an article critical of Atticus, he found out how deep Atticus-worship runs in modern American culture. "The mythological deification of Atticus Finch was illustrated by Atticans who wrote to equate my rejection of Finch, literally, with attacking God, Moses, Jesus, Gandhi, and Mother Teresa" (Freedman 25, quoted at Phelps 512). He is revered as the "person" who has done more for "the self image and public perception of the legal profession" than anyone else (Lubet 1339), and his reach goes so far that when Anne Wynne started an organization to work for gay and lesbian rights – an issue which the Atticus of the novel never touched upon – she called it "The Atticus Circle," borrowing the name as an easily understood metaphor for social justice in general. "I started Atticus Circle, named after Atticus Finch in *To Kill a Mockingbird*, a man who absolutely stood up for the rights of others" (*Atticus Circle*).

This homage results partly from a respect for Atticus's decency, honesty, compassion and integrity, not to mention his evident excellence as a father. But it is also regularly expressed in terms of his perceived excellence as a lawyer. Author and trial lawyer Mike Papantonio calls Atticus a "scholar" (Papantonio 20) and attributes to him "almost every quality . . . a trial lawyer may wish to have" (Papantonio 7). Lubet calls his courtroom skills "courtly" and "deft" (Lubet 1340) and Dees puts him in the same class as legal great Clarence Darrow (Papantonio 3). Law professor Teresa

Godwin Phelps calls him “the quintessential lawyer, the lawyer unafraid to confront his community with its own prejudices” (Phelps 511). He is the “lawyer as hero” (Hoff 401) whose “adulators” consider him “a paragon of social activism” and “a mythologized hero” (Freedman 480). Atticus is an “icon” (Lubet 1361), he maintains a “mythic stature” (Johnson 485), and he performs “heroically” (Johnson 488). Even one of Atticus’s rare detractors calls him “a skilled lawyer” and a “superb advocate” (Freedman 481, 482).

So widespread is his adulation, in fact, that when one legal scholar dared to question his eminence *The New York Times* reported that story as news. Not even “the canniest clairvoyant”, claimed *The Times*, “could have foreseen an attack on Atticus Finch. . . . Atticus Finch, the sagacious and avuncular lawyer-hero . . . who drove a generation of real-life Jems and Scouts to become lawyers themselves” (Margolick).

Which of these accolades does Atticus deserve? What accounts for his constant popularity as a “moral archetype [who] reflects nobility on” lawyers everywhere? Certainly, we cannot rightly dispute the reality and persistence of Atticus-adoration, nor the “enduring importance of *To Kill a Mockingbird* in the individual and national consciousness” (Johnson 485). *Mockingbird* is a “resonant cultural text” and “a classic text in American cultural-legal studies” (Umphrey, Sarat 3). Atticus is “popular culture’s most important embodiment of lawyerly virtue” (Umphrey, Sarat 4).

It is worth considering these grounds for hero-worship to determine if Atticus’s literary reputation rests on false pretenses. How much of this cultural adulation should Atticus’s lawyering really earn him? Not much. To the contrary, despite the adulation,

a fair reading of the novel debunks the image of Atticus as great lawyer. *Mockingbird*, both on page and screen, reveals him to be a mediocre lawyer at best: uninformed, unskilled, unprepared, and largely unconcerned.

First of all, his defense of Tom Robinson falls somewhere between ineffective and inept. He calls no witnesses on Tom's behalf, even though Tom's employer is in the courtroom enthusiastically willing to give character evidence for the defense (Lee 222). He allows damaging hearsay evidence to be introduced, even while the judge waits unavailingly for a defense objection (Lee 190). He repeats the same question three times, drawing the ire of the court and allowing a prosecution witness to augment his answer to the defendant's detriment (Lee 191). He allows the prosecutor to cross-examine the defendant with an irrelevant and inadmissible prior misdemeanor conviction (Lee 223). His cross-examination of Mayella Ewell leads her into her most explicit accusation of rape (Lee 211). He never seriously considers asking for a change of venue out of the toxic local atmosphere (Lee 165), and he regards the trial judge, his friend John Taylor, to be "a good judge" even though he does not follow the laws of evidence (Lee 192). Most appalling, Atticus's only arguable defense – that the injuries to Mayella's right side indicate a left-handed assailant like her father Bob Ewell, rather than Tom Robinson whose left arm is uselessly crippled – had not even been considered until it arose unexpectedly at trial. When Sheriff Tate told the court about the location of Mayella's bruises, Atticus and Tom learned "something they hadn't bargained for" (Lee 192). Clearly, Atticus had done no pre-trial investigation

whatsoever, not even so much as asking a few simple questions to his friend, the local sheriff.

Second, aside from his unsuccessful defense of Tom, the book tells us nothing from which we can assume that Atticus is an otherwise good lawyer. We never learn of him having won any other cases. When two of his earlier clients faced the gallows for murder, the best that Atticus could do was “be present at their departure” (Lee 5). His best friend, when asked about Atticus’ lawyerly skills, can only say that he knows how to write a “meddle” proof will, and that he is the town’s best checkers player (Lee 104). He is grossly ignorant of the laws of evidence and his law library consists of only one book, which gets so little use that Scout describes it as “unsullied” (Lee 5).

Neither does Atticus deserve any credit for volunteering heroically for Tom’s defense. In spite of the fact that his housekeeper Calpurnia speaks highly of Tom and his family, Atticus does not get involved until Judge Taylor orders him to take the case. “I’d hoped to get through life without a case of this kind,” he complains to his brother Jack. “But John Taylor pointed at me and said, ‘You’re it’” (Lee 100). Indeed, Atticus had “a profound distaste for the practice of criminal law” and derived his professional success and “reasonable income” from his “relation[ship] by blood or marriage to nearly every family in town” (Lee 5).

Atticus’s character and his resolve is tested in one of the novel’s most famous scenes. Atticus learns that a lynch mob plans to storm the county jail where Sheriff Tate has recently placed Tom Robinson. The mob members have tricked the sheriff into leaving town on a “snipe hunt,” a wild goose chase into the outlying woods of

Maycomb County, leaving the jail and its prisoner unguarded. Atticus goes to the jail to await the mob, but not until stopping off at his office for a comfortable chair and a newspaper (Lee 172, 171). When the mob arrives, Atticus is unarmed and alone, with no real plan for repelling the four carloads of violent men who “smell of stale whiskey and pigpen” (Lee 172). He tries to discourage the mob with an ineffectual lie – “Heck Tate’s around here somewhere” – but the mob members know that they have circumvented Tate’s interference by sending him and his deputies “so deep in the woods they won’t get out till mornin’” (Lee 172). Unbeknownst to Atticus, his children have followed him to the jail; they arrive just in time to place themselves between their father and the mob. Atticus reacts to the situation with “a flash of plain fear” and trembling fingers, but he does nothing to protect the children. In fact, when one mob member grabs Jem Finch, it is Scout and not Atticus who rushes to his defense with a well-placed, though bare-footed, kick (Lee 172-73). Eventually, the mob retreats in the face of Scout’s kind words to one of the ringleaders, Atticus collapses with relief against the jail-house wall, and the children return home (Lee 175).

The practice of lynching flourished in Alabama in the era portrayed in *Mockingbird*. Between 1889 and 1940 there were 303 documented cases, and in the 1930s there were about twenty per year (Johnson 491). Lynching, and the regular, unsuccessful attempts to introduce anti-lynching legislation in the Congress, became one of the most shameful and overt episodes in the long, sorrowful history of American race relations. Some cases were obscure, some were famous, all were violent. The trials of the Scottsboro Boys, more black men accused of raping a white girl, happened

near Harper Lee's hometown of Monroeville, Alabama and just a few years before her placement of the Robinson trial in Maycomb. The Scottsboro trials provoked at least four racist murders of accused rapists in Birmingham and Tuscaloosa and a lynch mob numbering in the hundreds gathered near the Scottsboro jail threatening the lives of the defendants and their lawyer Samuel Leibowitz (Johnson 491-92). In 1915 Leo Frank had been lynched by the "best citizens" of Marietta, Georgia amidst chants of "hang the Jew" after his wrongful conviction for rape (Freedman 473). In 1906, Ed Johnson was convicted of raping a white woman in Chattanooga, Tennessee and then lynched while his case was under review in the United States Supreme Court. Chattanooga's judge and sheriff conspired with Johnson's killers (Curridan, Phillips). As Professor Bryan Fair observes "there has never been a shortage of similar prosecutions" to the case of Tom Robinson and such cases often ended badly, sometimes at the end of a vigilante rope (Fair 405). Lynching had long "served as a method to reinforce and maintain a white supremacist social order, especially in the south following Reconstruction" (Shuler 4) and the trial of a black man for raping a white woman was the "paradigm racial prosecution" (Fair 405).

In such an atmosphere, Tom Robinson's peril would have been genuine and acute. So too would have been his lawyer's. The armed mobsters who ordered Atticus to "get aside from the door" and gave him fifteen seconds to produce Tom for hanging clearly meant business (Lee 172-73). Atticus's lack of a plan, his lackadaisical response to the mob, and his general ineffectiveness against this threat may signal a

casual ineptitude but he did place himself in harm's way and so his courage justly earns him his readers' respect.

However, his response to the lynch mob and the judgment he passes upon their mission is less laudable. While Atticus does not condone the mob mentality neither does he unequivocally condemn it. He tells his daughter that the vigilante leader, Mr. Cunningham, is "basically a good man" who is still "a friend of ours" and benignly attributes his homicidal racism to the "blind spots" which decent people suffer. Even his son Jem knows that attempted murder is a failure of character and not vision. "Don't call that a blind spot. He'd'a killed you last night when he first went there." Atticus's toleration of mob racism as a wholesome slice of small town life is undeterred. "A mob's always made up of people, no matter what. Mr. Cunningham was part of a mob last night, but he was still a man. Every mob in every little Southern town is always made up of people you know." (Lee 179)

Atticus had earlier told his children the story of another mob, a Ku Klux Klan raiding party who terrorized one of Alabama's rare Jewish families and Maycomb's only one.

"Way back about nineteen-twenty there was a Klan, but it was a political organization more than anything. Besides, they couldn't find anybody to scare. They paraded by Mr. Sam Levy's house one night, but Sam just stood on his porch and told 'em things had come to a pretty pass, he'd sold 'em the very sheets on their backs. Sam made 'em so ashamed of themselves they went away."

(Lee 167. Quotation marks in the original.)

Atticus's glib disregard for the terror suffered by the cowering Levy family and his acceptance of the Klan as a "political organization" is compounded by his pat indifference to the Klan's habit of terrorizing Catholics as well as Jews and blacks. He dismisses Catholic victimization on the near-sighted grounds that he has "never heard of any Catholics in Maycomb" and dismisses mob violence as a thing of the past. "'We don't have mobs and that nonsense in Maycomb. . . . The Ku Klux's gone,' said Atticus. 'It'll never come back.'" (Lee 167).

Professor Freedman takes Atticus's "fatuousness" to indicate a deeper moral failing and a fundamental misunderstanding of personal responsibility.

What are we to make of this fatuousness? That a lynch mob is not a lynch mob because it's "made up of people"? That because Cunningham is "still a man," he has no moral responsibility for attempted murder? Who does have moral (and legal) responsibility for a wrongful action if not the person who commits the wrong?

(Freedman 476-77). As Freedman further observes, Atticus the state legislator never introduced a single bill to mitigate the effects of racial injustice, never worked for local desegregation, never undertook a single death penalty appeal, and was not even shocked at the conviction of Tom Robinson, an apparently innocent man. "They've done it before . . . they'll do it again," he blithely predicts (Freedman 481-82). Even his jail-house vigil is a weak endorsement of his commitment to justice; there is no reason to believe that Atticus would have lifted a finger to help a man who was not his client. He did nothing, after all, to protect or vindicate the unfortunate Levy.

The movie is somewhat kinder to Atticus as lawyer. In the film, his understanding of the left-handedness defense appears to be better planned and more

carefully strategized. When Judge Taylor visits him with the news of Tom's imminent indictment and says that he has been thinking about appointing Atticus, Atticus volunteers with firm resolve. "I'll take the case," he promises. Nonetheless, in the film as in the book Atticus's defense of Tom is lame and ineffectual. He bases his cross-examination and his final speech largely on the absence of medical corroboration of Mayella's story, the kind of evidence which has never been a required part of the prosecution's burden of proof in a sexual assault case. And, most damning, he allows the case to proceed without a clear-cut accusation of rape. Mayella's initially vague and broad assertions that Tom was "on me" and "took advantage of me" makes out a case of assault but not of rape – especially since she clearly does not remember the occurrence of any forced intercourse: "the next thing I knew Papa's in the room standing over me hollering 'who done it? Who done it?'" That curious question from Bob Ewell -- "Who done it?" – directly contradicts Bob's earlier sworn testimony that he was able to see, recognize and positively identify Tom as his daughter's rapist. "I seen that black nigger yonder ruttin' on my Mayella," Bob had testified. "I sawed who he was all right," and then "I knowed who it was" (Lee 196, 198, 199). Atticus never makes any use of this powerful impeachment, not in cross-examination and not even in his closing argument. In fact he is the one who brings out Mayella's first and only specific allegation of rape. "Is this the man who raped you?" he demands of her, giving her an unfortunate opportunity to answer with a resounding "He most certainly is!" Tom could have probably done a better job defending himself.

So what accounts for Atticus's undisputed and persistent adoration? Why has he become and why does he remain a cultural icon of American goodness and rectitude? This cannot be explained by professional excellence, commitment to civil rights, steadfastness in the presence of evil, or effectiveness in the face of peril. It comes, instead, from his role as the bearer of *logos* amidst the chaotic wilderness of American racial injustice. Atticus Finch is an American Jeremiah, crying out against the bedlam. In the wildness that swirls through Lee's Maycomb, Alabama, Atticus and Atticus alone occupies a "higher order of civilization aris[ing] from his rationalistic, pragmatic approach to human problems" (Johnson 508). Atticus Finch may be a poor lawyer and an apologist for the mob, but he is a pioneer on the social frontier. And as is the case with many pioneers, that has made him an American hero.

As Frederic Jackson Turner famously argued, the American geographical frontier closed around 1880. He notes the 1890 findings of the Superintendent of the Census about the elimination of a western reaching "frontier line" and takes this to mean "the closing of a great historical movement" (Turner 1). But the concept of "frontier" was not so fragile as that. We need look no further than John Kennedy's 1960 acceptance speech, delivered a few months before the first publication of *To Kill a Mockingbird*, to know that decades after Turner's prediction of closure the most aspirational president of the latter twentieth century felt that Americans "stand today on the edge of a New Frontier -- the frontier of 1960s, the frontier of unknown opportunities and perils, the frontier of unfilled hopes and unfilled dreams . . . Beyond that frontier are uncharted areas . . . of ignorance and prejudice" (Kennedy). The adult

Jean Louise Finch recalls that around the time of the Tom Robinson trial, Macomb County and the rest of America had been told by President Roosevelt that they had nothing to fear but fear itself (Lee 6). She may have also remembered, though not reported, that Roosevelt also had a few words to say about the still present, still expanding American Frontier. Three short years after the death of Tom Robinson, Roosevelt told the nation that "We have come a long way. But we still have a long way to go. There is still today a frontier that remains unconquered--an America unclaimed. This is the great, the nationwide frontier of insecurity, of human want and fear. This is the frontier--the America--we have set ourselves to reclaim" (Roosevelt).

The symbolic greatness of Atticus Finch, and the reason that he resonates as a hero across the generations, must come from his willingness to enter the frontier of legal equality in spite of the Puritan, Calvinist, predestination of his inevitable failure. Just as Puritan preacher John Winthrop believed that "God Almighty in His most holy and wise providence has . . . predisposed of the condition of mankind . . . [that] some must be . . . high and eminent in power and dignity; others mean and in submission" (Winthrop), Atticus knows that Tom Robinson is "predisposed" by the providence of racial hatred to be convicted and killed. Atticus tells his brother Jack that "The jury couldn't possibly be expected to take Tom Robinson's word against the Ewells" (Lee 100) and before the trial has even started he predicts to Sheriff Tate that Tom will "go to the chair" (Lee 166). Even eight year old Scout knows that Tom became "a dead man" at the moment of Mayella's accusation (Lee 276).

Nonetheless, the novelized Atticus accepts, almost welcomes, the inevitability of defeat for the opportunity to “jar the jury a bit” (Lee 100) in order to see that “the truth’s told” in court (Lee 166). He acts out that determination most symbolically in his closing argument to the jury: a speech that is more jeremiad than advocacy.

Just as Puritan preacher Jonathan Edwards began the sermon *Sinners in the Hands of an Angry God* with a catalogue of sins before delivering his final admonition, Atticus’ case summation drips with a catalogue of lamentations on the fallen state of legal inequality. He starts with complaints that the prosecution was wrong from the start, he bemoans the total lack of evidence against Tom, and he denies that a crime has even been committed. Next, he targets the moral guilt of the complainant Mayella, her “cruel poverty and ignorance,” and the “enormity of her offense” against justice. Finally, he goes straight at the community which the jury represents. The jury’s adherence to the “rigid and time-honored code” (Lee 231) of racial suspicion and hatred allowed the prosecution witnesses to be comfortable in “the cynical confidence that you gentlemen would go along with them on the assumption – the evil assumption – that all Negroes lie [and] are immoral beings” (Lee 231-32).

Then, like Edwards, the Atticus of the book closes with a ray of hopeful obligation. While Edwards admonishes his sinners to choose righteousness with pleas that they “now awake and fly from the wrath to come,” “fly out of Sodom,” and “escape to the mountain, lest you be consumed” (Winthrop), Atticus admonishes his jurors to choose legal egalitarianism with pleas that they do justice. After reminding the jury

that Jefferson's promise that "all men are created equal" is a legal fiction ("some ladies make better cakes than others") he says this:

"But there is one way in this country in which all men are created equal – there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein, and the ignorant man the equal of any college president. That institution, gentlemen, is a court. It can be the Supreme Court of the United States or the humblest J.P. court in the land, or this honorable court which you serve. Our courts have their faults, as does any human institution, but in this country our courts are the great levelers, and in our courts all men are created equal.

. . .

I'm no idealist to believe firmly in the integrity of our courts and in our jury system – that is no ideal to me, it is a living, working reality. . . ."

(Lee 232).

Bercovitch's theories on the Jeremiad influence on American character are worth remembering and underpin this argument. For Bercovitch, the Jeremiad was not just a Puritan device, it retained its cultural potency long after the Puritan days were over. It continued to function even when its context was no longer overtly or consciously religious. It provided a format for communication and understanding shaped by religion but able to function in a secularized society. Political argumentation today, even (or especially?) those put forth by non-religious advocates, often has a Jeremiad structure and form. Climate-change warnings, for example, point to disaster but offer a slim hope of redemption if certain actions are taken at once. This is the heart of Bercovitch's discovery. He recognizes a new Americanized Jeremiad form which was "a mode of celebration rather than of lament" (Berkovitch 95) and "its function was to make social practice conform to a completed and perfected social ideal" (Berkovitch 95). This form and this function, though no longer specifically religious as they were in

the sermonizing days of Jonathan Edwards and Samuel Danforth, still retain the sacred tendency of their roots. The later day Jeremiad, as Bercovitch astutely points out, speaks to an American mission which has been “consecrated . . . by a divine plan of progress” (Berkovitch 93). It helps take that “mission” – which could otherwise be dismissed as “patent fiction” and helps imbue it with “all the emotional, spiritual, and intellectual appeal of a religious quest” (Berkovitch 87). This residual sacredness sanctifies the later Jeremiads and the later Jeremiahs, and it sacralizes the American mission and character that express it.

This explains why America worships Atticus Finch. He wields the rhetorical power of the sacred mission – the mission to potentiate the American qualities of justice, decency, fairness, and equity. The fact that he does so in a courtroom helps his cause, and his image. Just as Jeremiads are inherently religious, so are courtrooms inherently ritualistic. Promises to tell the truth are expressed as sacred religious oaths. The territory is ruled by a robed judge whose vestments bespeak his or her ritualistic power. And the questions to be judged are inhabited by sin. Thus, when Atticus extols the Robinson jury to “do your duty” and seek justice, he can exhort them “in the name of God.”

Atticus’s closing argument on Tom’s behalf is revealed as intentionally Jeremiadic and explicitly symbolic by his advancement of the specific argument on which he knows he is predestined to fail. Just as Jonathan Edwards could not inspire the Christians of his eighteenth century audience to salvation, Atticus could never inspire his Maycomb County jurors to a belief that the black Tom Robinson was the

functional equal of the white Mayella Ewell. Even as Atticus tells the jurors that he is “confident that [they] will review without passion the evidence [they] have heard” (Lee 233) he fully knows that they will not. This is bad lawyering, but it powerfully invokes of the American Dream of equal justice. When Atticus stood before the jury and made that speech, he was staking out his place in the American wilderness of race hatred and trying, in his determined but doomed way, to civilize it. Just as Turner calls the American geographical frontier “the hither edge of free land” (Turner 1) Atticus occupied the hither unsettled edge of free thought about racial equality.

Atticus Finch was created in one historical hotbed of civil rights turmoil, a few years after the United States Supreme Court repudiated “separate but equal” laws in its 1954 landmark decision in *Brown v. Board of Education*. He was placed in another, a time where racial and ethnic murders abounded. He was willing to forgive a lynch mob and told his daughter that “Most people are [nice] when you finally see them” (Lee 323). He expected to see his client’s life sacrificed as part of a larger revelatory mission. His functional Puritanism allowed an explicit belief in the predestination, the *a priori* failure, of his struggle. His religious role is expressed in the words of his neighbor Maude Atkinson when she says that “We’re so rarely called on to be Christians, but when we are we’ve got men like Atticus to go for us” (Lee 104). Yet when his most fervent admirer is called upon to name even one thing he does well she says “I don’t rightly know” (Lee 104).

When Atticus Finch stood before Tom Robinson’s jury he was unprepared, sloppy, and ineffective. But he dreamed and stood for the American Dream, the

constitutional imperative of equality, long before that dream was the reality which he pretended. He expressed that dream in simple though imperfect terms, and his “jarring” demand for equality blazed a trail through the dark Maycomb County back-country of ignorance and bigotry. When Scout asks if he expects to save Tom Robinson, he says “No” and makes his forecast of Tom’s demise specific: “We were licked a hundred years before we started,” he tells her. But his dream for equal justice – his own personal sliver of the American Dream – convinces him that the certain forecast of loss “is no reason for us not to try to win” (Lee 87).

It may be, as Professor Freedman suggests that “Atticus Finch is both more and less than the mythological figure that has been made of him” (Freedman 482). The question remains, though, what is the mythology that his symbolic identity invokes? Turner posits that the concept of frontier “is an elastic one” demarcating civilization from the wilderness (Turner 2). And 1935 Maycomb, Alabama was a pretty wild place in which to seek social justice.

D. Bob Ewell's Wilderness

Roderick Nash, the theorist of the American wilderness, observes that wilderness is a state of mind (Nash 2). It means much more than a barren or physically inhospitable outback. The concept includes “[a]ny place in which a person feels stripped of guidance, lost, and perplexed” and, even more broadly, “the moral chaos of the unregenerate” (Nash 3). In *Mockingbird*, this wilderness occupies the racist temperament of the populace. It is there, to quote Nash, that Atticus finds “an alien environment where the civilization that normally orders and controls his life is absent” (Nash 2). Atticus tells his children that all people are nice, even the lynch mob that threatened him and despised his client. But in spite of the civilized legal processes in which he believes and within which he operates, he confronts the moral wilderness of covert malignancy amidst the common folk. When the local newspaper editor B. B. Underwood rails against the senselessness of Tom’s death, Scout reads the editorial with confusion.

How could this be so, I wondered, as I read Mr. Underwood’s editorial. Senseless killing — Tom had been given due process of law to the day of his death; he had been tried openly and convicted by twelve good men and true; my father had fought for him all the way. Then Mr. Underwood’s meaning became clear: Atticus had used every tool available to free men to save Tom Robinson, but in the secret courts of men’s hearts Atticus had no case.

(Lee 275-76) The hardest of the novel’s hearts, and the least secret, belongs to Bob Ewell who personifies the wild, moral chaos which Atticus tries to quell with *logos* and the law.

The Ewell family is the “disgrace of Maycomb” and Bob’s son is the “filthiest human” Scout has ever seen (Lee 32, 29). The family disdains the civilizing effects of education, they never go to school, and they live in a garbage dump like the “absolute trash” they are. They eat the detritus of decent society, “gleaning” the trash for their daily bread and competing with “the varmints that feasted on Maycomb’s refuse” (Lee 194). Their home is disheveled in the chaotic fashion of “the playhouse of an insane child” and they disdain even the most basic traits of simple humanity. “They were people, but they lived like animals” (Lee 194, 33). The family’s depravity is persistent with poverty and squalor that does not change from one generation to the next. When Atticus’s brother Jack recalls previous Ewell family debasement Atticus tells him that although he is “a generation off. The present ones are the same, though” (Lee 100). They are unmatched in their loathsomeness, excellent in their vulgarity. Atticus declares the Ewells “members of an exclusive society made up of Ewells” and Ewells alone (Lee 34).

Moreover, the Ewell family in general and Bob Ewell in particular occupy a legal no-man’s-land, exempt from the regulations of civilized society. Bob keeps his children away from school, immune from compulsory attendance laws; “[n]o truant officers could keep their numerous offspring in school.” He raises them in an environment exempt from regulated hygiene or sanitation; “no public health officer could free them from congenital defects, various worms, and the diseases indigenous to filthy surroundings” (Lee 193). Even the weighty prohibition against hunting out of season, “a capital felony in the eyes of the populace,” did not apply to Bob Ewell. He drank away his welfare

checks and fed his children with “any game [he] could hit” whenever he could hit it. Atticus understood that the law itself applied only to “the common folk” and not to Bob Ewell who would “never change his ways” (Lee 34). In short, within the moral universe of *To Kill a Mockingbird*, Bob Ewell represents a one-man ethical wilderness.

Although Steven Lubet wonders about the accuracy of the Ewells’ claim of rape (“What if Mayella Ewell was telling the truth? What if she had been raped (or nearly raped) by Tom Robinson?” Lubet 1340), the totality of the novel argues against that speculation. The inconsistencies between Mayella’s testimony and Bob’s, the proof of the left-handed beating, the implausibility of the prosecution narrative, and the evidence of Tom’s general good character strongly suggest a frame. Indeed, Lee identifies Bob Ewell as the author of injustice. When he silences the courtroom, turning the “happy picknickers into a sulky, tense, murmuring crowd” with one naked accusation – “I seen that black nigger yonder ruttin’ on my Mayella!” – Lee has Bob “sitting smugly in the witness chair, *surveying his handiwork*” (Lee 197. Emphasis added). Bob’s malignant craftsmanship against Tom culminates with his victim’s death at the hands of the prison guards, an achievement which Bob celebrates as “one down” – leaving “about two more to go” (Lee 276). Atticus recognizes this calculus as a threat against himself and Judge Taylor, both of whom humiliated Bob during the trial.

E. Boo and Heck

After the trial, Atticus's sister Alexandra wondered if Bob's "permanent running grudge against everybody connected with that case" was irrational; after all, "he had his way in court, didn't he?" (Lee 287) Atticus explained that he and Judge Taylor had prevented Bob from achieving the heroism he expected to follow Tom's downfall. His moment in the limelight of injustice ended abruptly with the verdict and he returned to his previous, intolerable, life of misery and scorn. "[V]ery few people in Maycomb really believed his and Mayella's yarns," Atticus observed. "He thought he'd be a hero, but all he got for his pain was . . . was, okay, we'll convict this Negro but get back to your dump" (Lee 287). Bob responded by spitting in Atticus's face, burglarizing the judge's house, and tormenting Tom's widow. When Bob threatened to "get" Atticus "if it took the rest of his life," Atticus dismissed those rants. They turned out to be literally true. Bob tried to "get" Atticus by killing his children on their way home from the Halloween pageant, and it took him the rest of his life as he died in the attempt.

Atticus tried to quell the wild chaos that Bob represented by resorting to the twin tendencies that characterized his elevated state of civilization: "the tendency to reason a system of behavior and his respect for the written legal code" (Johnson 498). His trial defense of Tom Robinson relied on "devotion to the truth and . . . genteelness" (Johnson 486). He is, after all, a lawyer and not a vigilante and he uses a lawyer's tools: words, speeches, arguments, logic, and rationality. *Logos*. He cross-examined Bob and Mayella, albeit not very effectively, and he argued to the jury that they should do justice. That was all the law allowed him to do, and the fact that he knew in advance

that his methods would fail did not expand his options. He knew that in a black-versus-white case, the trial jury was just a lawfully impaneled lynch mob. He explained that reality to Jem.

“Those are twelve reasonable men in everyday life, Tom’s jury, but you saw something come between them and reason. You saw the same thing that night in front of the jail. When that crew went away, they didn’t go as reasonable men, they went because we were there. There’s something in our world that makes men lose their heads— they couldn’t be fair if they tried. In our courts, when it’s a white man’s word against a black man’s, the white man always wins. They’re ugly, but those are the facts of life.”

(Lee 251-52) In spite of those ugly facts of life, Atticus believed in the law, he believed in the jury system, and he believed in capital punishment as the proper penalty for rape (Lee 250-51). He favored eyewitnesses to circumstantial evidence, he preferred judicial sentencing to sentencing by juries, he knew that “people have a way of carrying their resentments right into a jury box,” and he understood that “no jury in this part of the world” would have spared Tom’s life (Lee 252, 250). Certainly, none of those ideas was new for a lawyer as seasoned as Atticus and none arose during the Robinson trial. Atticus always expected to lose the case. He always knew that the law in which he believed would fail to save such an innocent man as Tom Robinson and vanquish such a scoundrel as Bob Ewell. When his own children feared for his safety and told him to “do something” in the midst of Bob’s post-trial outrages, Atticus “smiled wryly.” “Do what? Put him under a peace bond?” (Lee 249) Atticus’s sarcastic reply expressed his knowledge that civilization and its lawyerly *logos* were impotent against Bob Ewell.

Boo Radley though succeeded where Atticus so dismally failed. He extinguishes Ewell's threat and the chaos of his wild reign of terror with one thrust of a kitchen knife. He is the hermit who never leaves his house; the savage who stabbed his father with a pair of scissors; the bogey-man whom tardy children fear in the dark. He is likely crazy, owing to the horrors visited upon him by his father's religious zealotry (Lee 48-51). His mental defects, what the sheriff calls "his shy ways" (Lee 317), prevent him from exercising or representing any part of society's *logos*. Boo is all about brute force, the simple though righteous violence that civilizes the wilderness. His heroism in killing Ewell and rescuing Jem bodes well for a future in which community can be "reimagined as inclusive and bound by affection that overcomes barriers of race and difference" (Umphrey, Sarat 3). Boo's moral and heroic strength nurture the reimagined, peaceful future in a way that Atticus's civilization never could. When Turner called the frontier "the meeting point between savagery and civilization" (Turner 2), he posited a place that needed Boo Radleys to tame it. Atticus may have been a pioneer on the social frontier, but "the wilderness masters the colonist" (Turner 2). Boo Radley was the Calvary. That is why Boo "is the moral center of the story" (Umphrey, Sarat 9) and why the book is about how Jem broke his arm.

Lee's lesson that sometimes only force can tame the wild, is made explicit by Heck Tate's post-mortem appraisal of Bob Ewell. "Mr. Finch, there's just some kind of men you have to shoot before you can say hidy to 'em. Even then, they ain't worth the bullet it takes to shoot 'em. Ewell 'as one of 'em" (Lee 308-09). This shooting reference recalls the one other time in the novel when a gun was used. There, the Finch

housekeeper Calpurnia calls Atticus at his office to report that a rabid dog is loose on the street. Atticus rushes home with Sheriff Tate and sees the dog approaching the Radley house. This is the sheriff's first appearance in the novel and he arrives wearing a gun-belt lined with bullets and carrying a heavy rifle. The men quickly recognize the town's peril; if the dog is not quickly killed he may enter one of the nearby houses, probably the Radley place. Nonetheless, Sheriff Tate refuses to take the shot and Atticus exhorts him not to waste time. "Don't just stand there, Heck! He won't wait all day for you—." But Tate fears his own ineptness. "I can't shoot that well and you know it!" In spite of the fact that Atticus has not fired a gun in thirty years, Tate feels "mighty comfortable" leaving the task to him. Atticus takes the gun and kills the dog with a single shot, surprising his onlooking children who had become convinced that he was feeble old man ("Atticus was feeble: he was nearly fifty . . . [he] didn't do anything.") (Lee 109, 102). Atticus, it turns out, "was the deadeast shot in Maycomb County in his time:" so good, in fact, that he abjures hunting because his excellence gives him "an unfair advantage over most living things" (Lee 112). His nickname, "One-Shot Finch," and Sheriff Tate's warning that killing the dog was "a one-shot job" anticipates Tate's assessment of Bob Ewell; the man who needed to be shot but who didn't deserve the single bullet that his killing required (Lee 309).

Sheriff Tate's impotence in the face of the mad dog foreshadows his impotence in Bob Ewell's wilderness. "I can't shoot that well" becomes his later admission that "I'm not a very good man" (Lee 316). His inability to save the town from the mad dog becomes his inability to save the town from killing the innocent Tom Robinson. He

knows that the system he represents is unreliable (Simon 1377), he knows that Tom was innocent (Mezey 124) and that his death was wrongful, affirming that “There’s a black boy dead for no reason” (Lee 316). He, like Atticus, has thus far tried to use the law’s faculty, to be an agent of *logos*, but to no avail. Bob Ewell’s unregenerate, chaotic wilderness (Nash 3) needed a single shot to tame it, or a kitchen knife under the ribs.

Only when Tate augments the representational *logos* of legal office with the authoritarian prerogative of *mythos* does he find himself in a position of instrumental agency. He knows that Boo has killed Ewell and assumes that the killing was justified by Ewell’s aggression against the Finch children. “I never heard tell that it’s against the law for a citizen to do his utmost to prevent a crime from being committed, which is exactly what he did” (Lee 317). Atticus, still acting purely from the *logos* of legal rationality, is not so sure. Maybe Jem killed Ewell. Maybe it was Boo. No matter, the law has a process for answering that kind of question “at the county court.” If his own concrete circumstances were to allow that process to be bypassed, then Atticus’s psychological scaffolding would collapse. He would see himself as a bad man and a bad parent, unworthy of his children’s respect. His integrity would be shattered beyond repair and his self-image fractured past recognition. “[N]obody’s hushing this up,” he tells Heck Tate. “I don’t live that way. . . . I can’t live one way in town and another way in my home” (Lee 314-15).

But Tate, unlike Atticus, has had enough of the *logos* that ratified Bob Ewell and killed Tom Robinson. He is no longer the reluctant shot or the halting witness. He is no

longer the feckless toady to whom Bob Ewell ran for cruel reprisals. He is now “cool,” “quiet,” “solid,” “stolid,” and defiant. He is satisfied with the prospect that he may commit perjury or obstruct justice – “Bob Ewell fell on his knife. I can prove it,” he falsely proclaims before reenacting a pantomime of Bob’s fictional, accidental self-impalement (Lee 313-16). When Atticus objects to Tate’s intended subterfuge, he Tate dismisses those objections out of hand. “It ain’t your decision, Mr. Finch, it’s all mine. It’s my decision and my responsibility.” If Atticus dares to resist the *mythos* that Tate is erecting, the sheriff will dispose of that resistance peremptorily. “I’ll call you a liar to your face,” he promises (Lee 316).

Commentators, both literary and legal, have either criticized or applauded Atticus for participating in Tate’s deception. Either he recognizes that “law is proven inadequate, because on occasion reason dictates that laws and boundaries must be overridden for justice to be done” (Johnson 499), or his decision “to spare the reclusive Boo Radley from a murder prosecution” by “countenanc[ing] Sheriff Heck Tate’s fiction that the nefarious Bob Ewell actually fell upon his own knife” represents a severe “ethical lapse” (Margolick). Both of these views miss the fundamental point. Atticus agreed to nothing. There was nothing left for him to countenance or condemn. Tate had assumed to himself “both legal and social authority” (Mezey 124). He announced it with a finality that brooked no disagreement from Atticus. “I may not be much, Mr. Finch, but I’m still sheriff of Maycomb County and Bob Ewell fell on his knife. Good night, sir” (Lee 317).

F. Conclusion

Thus did that unlikely sovereign Heck Tate subsume the violence that Boo Radley used to tame Bob Ewell's moral wilderness and place it squarely within the state of exception. No legal process would ever pass on Boo's actions. No judge or jury would ever approve or disapprove of his deeds. Such processes may be the law of *logos*, but Tate usurped the sovereignty of the state into his own hands – "it's my decision and my responsibility" – and invented a *mythos* that served his purpose. The power of his office gave him the ability "to decide on an exception and exempt a subject from the reach of 'regular' laws" (Sarat *Mercy on Trial* 71). The normative faculty of Atticus's law fell completely to the "concrete application" of Boo's brute agency and Tate's authoritative sanction.

Atticus may have hated that development and felt that defeat even more bitterly than the one that doomed Tom Robinson. Scout, however, understood. "Mr. Tate was right," she assures her father. And when, years later as an adult, she identified the story of that summer as the time that Jem broke his arm, she could appreciate that "the Ewells started it all" (Lee 3).

CHAPTER THREE

***The Ox Bow Incident* and the *Mythos* of Actual Innocence**

Like other human institutions, courts and juries are not perfect. One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation. But with regard to the punishment of death in the current American system, that possibility has been reduced to an insignificant minimum. This explains why those ideologically driven to ferret out and proclaim a mistaken modern execution have not a single verifiable case to point to, whereas it is easy as pie to identify plainly guilty murderers who have been set free. The American people have determined that the good to be derived from capital punishment—in deterrence, and perhaps most of all in the meting out of condign justice for horrible crimes—outweighs the risk of error.

Antonin Scalia
Concurring Decision in *Kansas v. Marsh*
548 U.S 163, 199 (2006)

A. Introduction

Walter Clark's *The Ox Bow Incident* is by far the darkest of our three texts. Its message is so bleak that before it could become a Hollywood movie, its plot, conclusion, and characters all needed makeovers. Its narrator became heroic; its lesson became easy and explicit; and the moral arc of its frontier universe eventually bent toward justice. The book, however, is a very different matter – it is ethically ambiguous; it poses difficult, maybe unanswerable, questions about the character of human justice; and it invites a deep contemplation of the nature of law as an agency of social virtue. As we have seen in Chapter Two, *To Kill a Mockingbird* transcends the

presumed tragedy of its story and ends in a future age from whence the adult Jean Finch can recall the advance of civilization in the summer that Jem broke his arm. In Chapter Four we will see that *The Man Who Shot Liberty Valance* ends with the death of a bad man and the ascendance of a (mainly) good one. But *Ox Box* is different. This novel about three lynchings near Bridger's Wells, Nevada is, as Wallace Stegner has called it, "the report of a failure of individual and social conscience and nerve" (Stegner xii). It presents us with an unmitigated and unequivocal injustice and it shows us that such things may happen inevitably in "a civilization in the throes of being born" (Stegner xii). Indeed, the tolerance of unmitigated and unequivocal injustices may identify those communities where social conscience remains nascent and unformed. In this regard, twenty-first century America continues to have a great deal in common with Bridger's Wells.

B. The Novel and the Film

Aimless prairie rider and sometimes ranch-hand Art Croft narrates Clark's novel. His story begins when he and his cowboy pal Gil Carter enter the town of Bridger's Wells after a long winter riding the range and making the spring round-up. The town, a one time stagecoach stop, is now "as dead as a Piute graveyard" (Clark 5) with a saloon, a general store, and a boarded-up church. The hope of a nearby gold strike went unrequited, and the cottonwood and poplar trees are bare and dying. It is a town where a range-weary cowboy had five options: he could "eat, sleep, drink, play poker or fight" (Clark 12). Art and Gil start with drinking at Canby's Saloon, a place that serves only whiskey and where a painting behind the bar shows a heavy, half-naked woman pretending not to notice a man sneaking up behind her. It is called "Woman with a Parrot" after the bird that rests on her wrist. Canby, however, calls it "The Bitching Hour," and feels sorry for the man: "Always in reach and never able to make it" (Clark 7). The townsfolk are nervous with the persistent news of rustling on the prairie and Gil behaves as if "something was going to happen" (Clark 3).

After some drinking and fighting, Gil and Art see the town's men gathered around a young cowboy named Greene who has frantically ridden into town with the report that local ranch hand Larry Kincaid has been killed by rustlers – "shot right through the head, I tell you" (Clark 30). Kincaid worked for Drew, the region's leading rancher, and although he was just "an ordinary rider" his pleasing personality and easy ways made other men "cotton to him," especially his best friend Jeff Farnley who had ridden with him "from the Panhandle to Jackson Hole ever since they were kids" (Clark

31). Farnley immediately mounts up, aiming to “get the sons-of-bitches,” and saloon-keeper Canby predicts a lynching (Clark 33, 31).

Farnley’s impetuous thirst for quick vengeance quickly succumbs to the circumstances – he doesn’t know who the killers are or where they have gone, and he isn’t even carrying a gun – and he agrees to wait for the formation of a lawful posse. No one speaks against chasing down and capturing the bandits, but the matter is complicated by the absence of any instrumental local authority. The town’s sheriff, Sheriff Risley, has left Bridger’s Wells for a few days and the brutal and stupid deputy Butch Mapes is the only law in town.

Eventually, twenty-eight men form a posse under the leadership of Willard Tetley, a former Confederate major with a checkered and uncertain past, and they ride off into the dark, following a tip that the rustlers have headed into Bridger’s Pass. At a spot called Ox Bow, the posse comes upon Donald Martin and his two hands, a feeble minded old man and a stereotypically disreputable Mexican. The Martin party’s guilt for Kincaid’s murder is presumed by their presence on the trail where the mob expects to find the killers, and then established to the posse’s satisfaction by their suspicious possession of fifty head of Drew’s branded cattle. Martin has no bill of sale for the cattle, and the Mexican has Kincaid’s gun which he claims to have found on the trail. Major Tetley questions them, demands a confession, and offers leniency to anyone who will implicate the others in Kincaid’s murder. With no further evidence of guilt or innocence, Tetley asks the posse to vote between hanging the suspects on the spot or “putting this thing off and turning it over to the courts” (Clark 200). Only five of

the twenty-eight – Major Tetley’s son Gerald, another townsman’s son, one of Drew’s ranch-hands named Moore, a Black lay preacher called Sparks, and the Bridger’s Wells store-keeper Arthur Davies -- vote against immediate hanging. Martin is allowed to write a letter for posthumous delivery to his wife, Tetley gives the three condemned men “two minutes to pray” (Clark 205), and then they are hanged. As the self-satisfied posse returns to town filled the pride of a job well done, they meet Sheriff Risley, the local judge, and the very much alive Larry Kincaid. The judge demands the arrest of all of the posse-men for murder, but the sheriff refuses and falsely claims that he can’t recognize any members of the mob (Clark 210-212). “It’ll have to be that way,” he tells the judge, and the killers go back to their homes and their freedom.

The remainder of the book deals with the aftermath of the wrongful executions. The men take up a collection for the benefit of Martin’s widow and Drew promises to send her the money that Martin paid for the fifty head of cattle. Some members of the posse belatedly wonder whether they could or should have stopped the hangings. Tetley’s son commits suicide and the Major follows suit, literally falling on his sword. The book ends with Art and Gil getting drunk together and agreeing that they will both be glad when they can leave Bridger’s Wells.

The film version of *The Ox Bow Incident* was released in 1943. As Professor Robert Louis Felix describes the times, “War was world wide, the United States was in the midst of it, and patriotism was in full cry” (Felix 645). Thus, that zeitgeist combined with Hollywood’s prevailing code of film values to demand a more righteous conclusion to a tale of vigilantism and murder. Although the film tracks the novel’s story about the

false report of Kincaid's death and the posse's wrongful hanging of the Martin party, the film's sheriff does not shirk his legal duty. Storekeeper Davies identifies the guilty men and the sheriff promises arrests and prosecution. "God better have mercy on you," he warns the mob. "You won't get any from me." The villainous Major Tetley shoots himself after his son accuses him of murder and sadism, but the innocent Gerald survives. Art and Gil, who in the film but not the book have voted against the lynching, head to Martin's ranch where they promise to commit themselves to a redemptive life of caring for his widow and children. Thus, while the two noble cowboys ride off to the strains of "Red River Valley," the film makes a stirring promise, wholly absent from Clark's novel, that chaos yields to "correction" and that "justice will be served" (Felix 645). Professor Harry Tepker declares the film to be "nearly flawless as an introduction to the need for law and due process in civil society" (Tepker 1209). And the portrayal of its "reconstructed hero" (Tepker 1219), Henry Fonda as the transformed Gil Carter, was nominated for an Academy Award.

C. "The Conscience of Humanity"

One of the most striking changes between the book and the film centers around Martin's letter to his wife. In the book, Martin writes the letter and gives it to Arthur Davies to deliver. Davies takes the letter and reads it, concluding from its content that Martin must be innocent of murder and rustling because the written words reveal that "Martin was not the kind of man who could either steal or kill" (Clark 199). Davies tries to get the other posse-men to read the letter and be similarly convinced but all refuse, either because they do not want to invade the privacy of Martin's last words to his wife or, like Gil, because they doubt its efficacy. "You can't change rustlin' and murder," Gil says (Clark 199). After they discover that Kincaid is still alive, Davis, Gil and Art talk about the letter again. Only Davies has read it and he says that Martin wrote about him to his wife. "He told his wife how kind I was to him, what I risked trying to defend him." The remainder of the letter was a consolation to his wife, "[t]o keep her from breaking herself on grief . . . And he reminded her of things they had done together" (Clark 229). Art dismisses Davies' belief that publication of the letter would have saved Martin: "That kind of argument can't stand up against branded cattle, no bill of sale [and] a dead man's gun" (Clark 231). The fatal moment had its own momentum and had become immune to human sensibilities. "You don't get all set up for a hanging and stop for some little feeling you have" (Clark 231). Even Davies finally has to acknowledge the inconclusiveness of Martin's words. "There was nothing a court would have called proof. A court won't take the picture of a man's soul as proof" (Clark 229).

He never tells us more about Martin's letter and Clark does not give its text to the reader.

In the penultimate scene of the film, however, Gil has Martin's letter and he reads it aloud to the assembled posse riders who have gathered in Canby's saloon to drown their guilt in whiskey.

My dear Wife,

Mr. Davies will tell you what's happening here tonight. He's a good man and has done everything he can for me. I suppose there are some other good men here, too, only they don't seem to realize what they're doing. They're the ones I feel sorry for. 'Cause it'll be over for me in a little while, but they'll have to go on remembering for the rest of their lives. *A man just naturally can't take the law into his own hands and hang people without hurtin' everybody in the world, 'cause then he's just not breaking one law but all laws. Law is a lot more than words you put in a book, or judges or lawyers or sheriffs you hire to carry it out. It's everything people ever have found out about justice and what's right and wrong. It's the very conscience of humanity. There can't be any such thing as civilization unless people have a conscience, because if people touch God anywhere, where is it except through their conscience? And what is anybody's conscience except a little piece of the conscience of all men that ever lived?* I guess that's all I've got to say except kiss the babies for me and God bless you.

Your husband, Donald.

(Emphasis added.) For the movie's audience, the letter thus becomes the filmmaker's manifesto against anarchy and describes the source and nature of law. For the book's readers, that same manifesto is played out at greater length as a bitter contest of reason against authority which Clark joins between the thoughtful storekeeper Arthur Davies and the brutal soldier Willard Tetley. It is a contest between conscience, social integrity, and the law's presumed divinity on the one hand, and physical potency,

authoritarianism, and the thirst for retribution on the other. As both Davies and Tetley respond to the same societal chaos – rampant rustling, frontier anarchy, and the presumed murder of an innocent victim – they occupy the two poles of the sovereign binary which this dissertation investigates. They are Atticus Finch and Boo Radley, Ransom Stoddard and Tom Doniphon, challenging chaos with the dual faculties of law and power, *logos* and *mythos*. They give us as clear a portrayal of this dichotomy as we are likely to find anywhere in the literature of the American frontier.

D. Arthur Davies

Clark makes Davies an unappealing and impotent physical specimen.

Davies was an old man, short and narrow and so round-shouldered he was nearly a hunchback, and with very white silky hair. His hollow, high-cheeked face, . . . was white from indoor work, and he had deep forehead lines and two deep, clear lines each side of a wide, thin mouth. The veins made his temples appear blue. He would have been a good figure for a miser except for his eyes, which were a queerly young, bright and shining blue. . . .

(Clark 33-34). Nonetheless, when everyone else gets out of the way of the headstrong Farnley, Davies alone goes after him “in a little, shuffling run” and seizes his horse by the bridle (Clark 33). Davies argues that no one knows who the killers are, where they have gone, or how many are in their gang. He expresses solidarity, genuine or not, with Farnley’s hatred, but urges reflective restraint. “We’re all with you about Kincaid,” he says. But, “It won’t help Larry to get yourself killed too” (Clark 34). As the mob mentality builds around Davies and Farnley, the local minister Osgood suggests that the men consult the local judge, Judge Tyler, for advice. A rancher named Earl Bartlett will not hear of it. The law has no place in Bartlett’s universe of rights, wrongs, and justice. “If we wait for Tyler, or any man like Tyler . . . there won’t be one head of anybody’s cattle left in the meadows by the time we get justice. . . . For that matter . . . *What is justice?*” (Clark 36-37. Emphasis added.) This is the first time in the book that anyone has asked that question. Bartlett has no answer, but he knows that justice has nothing to do with “fee-gorging lawyers,” judges, or courtrooms. “Stretch the bastards,” urges Bartlett and the sooner the better (Clark 38).

In one of the pivotal scenes of the book, Davies takes up Bartlett's question – "What is justice?" – during a barroom conversation with Gill and Art and the stagecoach driver Bill Winder who has come to town to join the posse. Winder favors Bartlett's brand of action – "I'd string any son-of-a-bitchin' rustler like that" – and has a deep contempt for the kind of legal process that has allowed the "damn, thievin' railroads" to ruin the frontier and steal the livelihood of "honest to God men" (Clark 45, 48). The discretion of the mob and the caprice of gang violence is Winder's answer to every social crisis. He prefers immediate action based upon uninformed, common sense notions of the situational imperatives. "One good fast job, without no fiddlin' with legal papers, and that's all there'll be to it" (Clark 48). Davies claims to agree that "legal action's not always just" and then reels Winder in with a Socratic question: "What would you say real justice was, Bill?" Winder, a rough man who preferred mules to horses because he can't become emotionally connected to a mule, becomes "wild" at Davies's resort to logic (Clark 50). Nonetheless, he unknowingly responds with a time-honored definition of justice: the notion of retributive just deserts. For Winder, justice was about "seein' that everybody gets what's comin' to him" (Clark 50). Rustling and murder are wrong, and it is up to the community --"The rest of us. The straight ones." – to assign blame and mete out proportional punishment (Clark 50). Davies responds with a threefold refutation of the right of extra-judicial vendetta.

First, Davies wonders how can one know, in Winder's world of rough justice stripped of legal niceties and "excuses by the book" (Clark 49), what crimes are worthy of blame in the first place. Rustling and murder may be wrong, says Davies, but how

do we know that? When Winder replies that “you just know” they are wrong because “[t]hey’re against the law” he immediately recognizes the circularity into which he has fallen. In a society dismissive of “book” laws, the notion of illegality has no meaning. If every man’s ethical opinion is a law unto itself, then assigning legal blame for societal transgression is a slippery matter indeed.

Second, Davies argues that the law’s process has a value above and beyond the substantive regulations to which that process applies. The laws of the “book” may prohibit murder and the consensus of the “straight” community may endorse that prohibition, but nonetheless the proportional punishment which Winder desires must issue from some regular process. “If we go out and hang two or three men,” argues Davies, “without doing what the law says, forming a posse and bringing the men in for trial, then by the same law, we’re not officers of justice, but due to be hanged ourselves” (Clark 51). The killer’s crime “puts him outside the law, but leaves the law intact.” The lynch mob that engages in “unpunished extra-legal justice” disrupts the very fabric of society. “It’s infinitely more deadly when the law is disregarded by men pretending to act for justice than when it’s simply inefficient” (Clark 51).

The crux of Davies legal argument comes from his third contention: that the worst legal system is better than the best anarchical state. Gil questions that contention on the grounds that any law needs men to enforce it and that sometimes those men will be no better than the ones who were at that moment forming the mob. True enough, says Davies, but “the poorest of them is better fitted to judge than we are. He has three big things in his favor: time, precedent, and the consent of the majority

that he shall act for them” (Clark 52). Gil understands that the element of “time” allows for unhurried deliberation and Davies explains his other two points: “He explained that precedent and the will of the majority lessened personal responsibility and gave a man more than his own opinion to go on, so he wasn’t so likely to panic or be swung by a mob feeling” (Clark 52).

Gil notices that as Davis defines his tripartite jurisprudence he “warmed up like a preacher with real faith on his favorite sermon” (Clark 52). Lawlessness is not merely inconvenient or disruptive says Davies, it is *sinful*, “a sin against society.” The law deserves respect because it contains the distilled wisdom and conscience of the entire human experience; but more than that, it represents man’s surest path toward divinity.

True law is more than the words that put it on the books. . . . True law, the code of justice, the essence of our sensations of right and wrong, is the conscience of society. It has taken thousands of years to develop, and it is the greatest, the most distinguishing quality that has evolved with mankind. None of man’s temples, none of his religions, none of his weapons, his tools, his arts, his sciences, nothing else has grown to, is so great a thing as his justice, his sense of justice. The true law is something in itself, like God, and as worthy of worship as God. If we can touch God at all, where do we touch him save in the conscience? And what is the conscience of any man save his little fragment of the conscience of all men in all time?

(Clark 53)

It is easy to see that these sentiments about the divinity and universality of law are what the film’s screen-writers put into Martin’s letter to his wife. The film is only seventy-five minutes long after all, with not much time to spare for extended disputations on the *lex naturalis*. Furthermore, encapsulating Davies’s lessons into the

words of the innocent victim of men who have disregarded those lessons adds an ironic poignancy and the emotive punch of the film's cinematic climax.

Thus does Davies rail against the rising lynch mob. He has no physical force to back up his logical arguments, Clark's portrayal makes him a physical weakling with nothing but *logos* on his side. His arguments are elegant and cogent and Art and Gil know that he makes more sense than Farnley, Bartlett, and Winder. However, just as Ransom Stoddard knew that words are no match for guns, Gil realizes that Davies's philosophical disputations will be no match for the fury and the nooses of the mob. "That may all be true," agrees Gil. "But it don't make any difference now" (Clark 53). Davies, for his part, will soon learn that even the "greatest ideas" will not carry the day in the face of violent opposition (Clark 53). Atticus learned that lesson in Judge Taylor's Macomb County courtroom and Ransom Stoddard will learn it on the main street of Shinbone, Colorado. Davies' own legal education is about to begin. Major Tetley will soon bring *mythos* to Bridger's Wells.

E. Willard Tetley

Major Tetley is the biggest man in the valley after the rancher Drew. He arrives with a “military rigidity” and reviews the gathering posse with passive amusement. He has been summoned by the rancher Bartlett – he of the “stretch the bastards” theory of justice – with whom he enters Bridger’s Wells. He had been a Confederate cavalry officer and the son of a slave owner “and he had that kind of a code and a sharp, quiet, head for management” (Clark 87). When he rides into town with an entourage consisting of Bartlett, his son Gerald Tetley, and a Mexican ranch-hand, he had already judged Bartlett’s second-hand report of the Kincaid murder and “was obviously ready to go somewhere” (Clark 97). Tetley had none of Davies’s “great ideas” and was contemptuous of any thought of disbanding the posse.

Irony was the constant expression of Tetley’s eyes, dark and maliciously ardent under his thick, black eyebrows. His hair, even gray, was heavy and of senatorial length, cut off straight at his coat collar and curling up a little. There were neat, thin sideburns of the same gray from under his campaign hat to the lower lobes of his ears, and a still thinner, gray moustache went clear to the corners of his mouth but didn’t cover the upper lip of his mouth which was long, thin, inflexibly controlled, but as sensitive as a woman’s. He was a small slender man who appeared frail and as if dusted all over except his eyes and brows with a fine gray powder. Yet, as he sat quietly, rigidly, his double-reined bridle drawn up snugly in his left hand in a fringed buckskin glove, his right arm hanging straight down, we all sat or stood quietly too.

(Clark 97-98) Prior to Tetley’s arrival, Davies appears to have won the day with his reasoned triptych call for time, consensus, and the respect for precedent. The killer is probably headed out of the valley via the “south pass” and that head start makes quick capture unlikely; the sheriff is a good man and can be trusted to find the killer

eventually; and upon that apprehension, the conventional legal processes can be trusted to dispense proper justice. "There aren't twelve men in the west who wouldn't hang him," Davies promises the mob (Clark 96).

Critically, the mob has started to question the strength of Greene's evidence about Kincaid's murder. Greene is a young man, excitable and unreliable, and he does not even claim to have seen the killing with his own eyes. "Osborn told me," he repeats over and over again as he explains his sources. He becomes red in the face, comes close to tears, and avoids the glances of the posse-men who long for certainty and easy answers (Clark 92-93). Davies jumps on Greene's weakness as one more reason to go slow. "Really, he doesn't know anything about it. He didn't see any rustlers or any killer. He didn't even see Kincaid" (Clark 93). These arguments cool the mob, Canby offers free drinks all around, and for a moment it seems like crisis has been averted.

But Tetley's arrival changes all of that. Art had predicted that Tetley's participation "would make a difference" (Clark 87) and sure enough, when he looks at the crowd and loathingly accuses them of "disbanding" not even Davies can stand up to him. Tetley's news that his hired man has seen three strangers driving cattle bearing Drew's brand through the more accessible Bridger's Pass galvanizes the crowd's resolve and re-convinces the townsfolk of the urgency of immediate pursuit. The news about Bridger's pass does nothing to corroborate Greene, and it says nothing about Kincaid's fate or circumstances. There is no reason to believe that Drew's cattle on the trail mean that Kincaid is dead, much less murdered. But the knowledge of an easier

apprehension, it will be easier to catch men who flee through Bridger's Pass than the south pass, forces the posse to forget the circumstantiality of Greene's testimony and Davies's further arguments fall on deaf ears. The availability of forceful action sends *logos* from the field and Davies abandons any hope of calling off the posse "It was hard [for Davies], when it had all been won." He stands pathetic in the face of brute force, "as if someone had hit him but not quite dropped him" (Clark 99). Even Judge Tyler, whom Davies has summoned in a last ditch effort to squelch the mob hysteria with an appeal to the primacy of lawful authority, is impotent in the face of Tetley's dominance. When the judge declares the posse "illegal" and protests that he does not approve of killing, Tetley dismisses his disapproval with a bemused "No?" At Davies's suggestion that he try to avoid a lynching, Tetley's voice becomes "dry and disgusted" (Clark 102). When Davies exhorts him to abide by the rule of law, Tetley answers that he will instead "abide by the majority will" (Clark 102). And when the judge demands that Tetley "bring these men in for a fair trial," Tetley promises that he will, to the contrary, carry out "true justice" (Clark 103). Clark makes it plain that there is no legal justification for Tetley's actions: the sheriff is not there to authorize his posse; he refuses a judicial order to secure the captives for trial; he anticipates and welcomes a lynching; and he dismisses all accusations of illegality. Thus, Tetley's forceful dominance of the scene works a suspension of the positive law in Bridger's Wells. He and his posse occupy the state of exception as they pirate the sovereign power, foreswearing and despising all *logos* in favor of the *mythos* of their own vigilante prerogative. Off they ride.

F. The Ox Bow Incident

The apprehension and execution of the Martin party are almost anti-climactic after Tetley has engineered the collapse of the legal process. They are found, questioned, they deny their guilt, demand a fair trial, and are then put to death. But the incident at the Ox Bow valley carries the sovereign binary forward with further contentions between Davies and Tetley. These contentions revolve around the efficacy of proof, the illegitimacy of vigilantism, and the risk of error.

With respect to proof, Martin's guilt is presumed from his possession of Drew's branded cattle, his lack of proof of purchase, and the improbability of his story. Drew is known to give bills of sale as a matter of practice and to avoid cattle sales after the spring round-up. Nonetheless, Davies presses the point that Martin may be the innocent victim of suspicious circumstances and that Tetley's proceedings lack any legitimacy absent Martin's confession. "They say they're innocent," Davies tells Tetley, "and you haven't proved they aren't" (Clark 172). Tetley, while claiming that he would prefer a confession, remains willing to act even without one and he responds to Davies's argument forcefully and without any pretense of rational rebuttal. He orders Mapes to drag Davies away and shut him up, silencing any further interference by *logos*. As Professor Tepker notes, this "brief scene . . . depicts Tetley's complete power over the mob" (Tepker 1213).

Tetley's response to Martin's letter demonstrates the extent to which he has become willing to ignore any potential exculpatory evidence. When Davies urges him to read the letter as circumstantial evidence of innocence, Tetley dismisses him on the

dubious grounds that although “It may be a fine letter” he simply doesn’t care to know what facts it may reveal. “If its an honest letter it’s none of my business to read it, and if it isn’t I don’t want to” (Clark 190).

With respect to vigilantism, Davies takes up Martin’s plea for a fair trial. “This is a farce,” he tells Tetley. “This is, as Mr. Martin has said, murder if you carry it through. He’s perfectly within his rights when he demands trial” (Clark 172). Tetley’s answer ignores the plea for legality and instead insists that he will seek the “will of the majority” as he had earlier ironically promised. “We must act as a unit in a job like this. Then we need fear no mistaken reprisal” (Clark 200). When Tetley conducts the poll for hanging and the vote carries twenty three ballots to five, Martin and his colleagues are doomed.

Finally, it is with respect to the risk of error and the impotence of doubt that Tetley’s contempt for legal reasoning becomes most explicit. When Gil notices that even Tetley seems to harbor some doubt of Martin’s guilt, Tetley rejects the relevance of uncertainty and asks if Gil’s “stomach for justice is cooling” (Clark 175). Martin himself pleads that the mob should want further deliberation, the first of Davies’s three virtues of legal process. “I’d do a lot of asking before I’d risk hanging three men who may be innocent,” promises Martin. Tetley, however, rejects the need for inquiry and proof in a matter as serious as murder. “If it were only rustling, . . . maybe. With murder, no. I’d rather risk a lot of hanging before too much asking. Law, as the books have it, is slow and full of holes” (Clark 174). Furthermore, Tetley claims that history goes against Martin and Davies. “This isn’t the first time. We waited before,” he

recalls, suggesting that he had been disappointed with the result of that remembered delay. When Martin protests to Tetley that “You don’t care for justice. You don’t even care if you’ve got the right men or not. . . . You’ve lost something and someone’s got to be punished. That’s all you know,” Tetley “just smiled” (Clark 203-04). William Blackstone may have thought it “Better that ten guilty persons escape than that one innocent suffer” (Volokh 173), but Clark makes it plain that such a maxim finds no place in Tetley’s vigilante jurisprudence.

G. After the Ox Bow

In an edition of the novel that makes up 241 pages, the trial of the Martin party – from discovery to execution – lasts only fifty-two. The first 155 pages set the scene and begin the legal debate that forms the novel's core. The final thirty-two pages deal with the aftermath of Ox Bow, the reactions of the participants, and the deaths of Willard and Gerald Tetley.

Gerald Tetley attempts suicide on the way back to Bridger's Wells even before he learns that Kincaid is still alive. He never had his father's spirit for cruelty or dominion or his "guts" and the major has brought him along to expose his frailty and toughen him up. Tetley assigns Gerald the task of whipping the horse that serves as Martin's gallows platform, but Gerald proves incapable of the killing and Martin ends up dangling by the neck and strangling until Major Tetley has him shot. Gerald mistakes his own tenderness for weakness, and tells Art early in the chase that he had agreed to come along because "I'm weak . . . and my father's not" (Clark 118). His first suicide attempt is thwarted, but when he returns home he hangs himself in the barn.. His father receives the news dispassionately, as if a courier "had delivered a package from the store" (Clark 227). The major, though, then locks himself up in his study and jumps on his sword. Clark never suggests that the major's suicide expresses guilt over Martin – Tetley had declared in advance that he accepted the risk of error – or remorse for Gerald – Tetley clearly despised the "female son" who bore his name (Clark 203). Most likely, the major simply couldn't stand to anticipate the embarrassment and condemnation that would follow his gigantic blunder. The other townsmen were

already blaming him and some were calling for his lynching. Like the Biblical King Saul, who preferred to die before he would let his enemies “come and pierce me through and make sport of me,” Tetley was left alone with no one to facilitate his final escape and so he “took his own sword and fell upon it” (*Bible, 1 Samuel 31:4*).

The last chapter of the novel finds Art Croft asleep in a room above Canby’s saloon recovering from an accidental gunshot wound. When he awakens from a long sleep, he finds a distraught Davies sitting in his room. The old storekeeper looks awful, disheveled and troubled, and although exhausted “he was still fighting something” (Clark 220). Croft asks him what is wrong, and thus begins Davies’s final confession.

Davies has chosen Art to speak to and has waited for him to wake up. “You’re the only one will understand,” he says. Davies, perhaps remembering Art’s interest in the three virtues of law that Davies explained to Winder, takes Art to understand the principles of “basic justice” which Davies believes make him as guilty as Tetley in the matter of Martin’s death. The two men agree that Tetley was “a depraved, murderous beast,” that nothing mattered to him but “power and cruelty,” and that he “extracted pleasure from every morsel of suffering” he had inflicted on the Martin party (Clark 224-225). But Davies feels that he himself is equally to blame for the lynchings. Tetley may have committed a “sin of commission” by executing three innocent men, but Davies blames himself for a “sin of omission” for not having stopped him (Clark 222-27). Perhaps he could have stood up to Tetley more effectively, perhaps he could have stopped him at gunpoint, perhaps he could have shot and killed him and thus broken

the will of the mob. Whichever of those courses he should have but failed to take, he assumes full blame for the deaths on two grounds.

First, because he alone had read Martin's letter and become convinced of his innocence. The ones who had not read it could be forgiven for following Tetley: they didn't have Davies's revealed truth. "You didn't know, but I did," he moans (Clark 229).

But more than that, Davies blames himself for allowing injustice because he, unlike the others, was able to recognize the nature of "true justice" and had taken upon himself the role of its agent. "I took the leadership, and with it I accepted the responsibility. I set myself up as the power of justice, of common pity, even. I set myself up as the light to oppose Tetley's darkness" (Clark 230).

Art challenges Davies's self-condemnation. The letter proved nothing and would not have changed a single mind. No one doubted Martin's guilt and so no one bears the crime of cold-blood. But Art agrees with Davies on one point: the lynching was an injustice because it did not follow the conventional rules of established legal process. "We all knew we should have brought them in like you said" (Clark 230). Thus, Art and Davies meet on the common ground of their shared weakness in the face of Tetley's power. Davies, who continues to accuse himself for playing the "emissary of peace and truth," confesses the sin of a cowardly avoidance of confrontation. His lip service to justice was nothing more than "empty, gutless pretense." Tetley, for all his bestiality, surpassed Davies where it counted. "I let those three men hang because I was afraid. . . . Tetley had guts, plain guts, and I didn't have it" (Clark 234). Art, like Davies, knew they should have brought Martin back for trial and abhorred the

commission of murder but never got past a few “wild ideas” about facing Tetley. “I guess I just thought it was settled. I didn’t like it, but it was settled” (Clark 232).

H. Time, Precedent, Majority and a Murder in Kansas

Could Davies or Art have stopped the lynching? Unlikely. Davies objected to Tetley's every move, demanded a fair trial for Martin, had the law on his side, and tried to rally support for his position. Still, Tetley and the mob ignored him with ease and impunity and when he became too pestering Mapes simply dragged him away. It is hard to take his self-criticism seriously and easier to agree with Art that Davies had done all he could and that only Tetley's murder would have stopped the hangings (Clark 237). As for Art's self-blame, if he had taken up arms against the mob he would have stood with five unarmed pacifists against Tetley, Mapes, and twenty more frustrated, vengeful, blood-thirsty cowboys. (Nothing of Gil's behavior in the book convinces me that he would have joined Art's mutiny, but it is unlikely that he would draw on his pal.) Davies would like to share the responsibility for the deaths, but the blame falls squarely on Tetley.

The question remains, however, of what is Tetley really guilty? Clark seemingly would have us believe that Tetley's actions are so far outside accepted legal principles that Davies is correct to call him a "depraved, murderous beast." But we should ask to what extent Tetley's actions really do violate Davies's legal triptych of time, precedent, and majority. Davies posited that the poorest of jurisprudential men is "better fitted to judge than we are. He has three big things in his favor: time, precedent, and the consent of the majority that he shall act for them . . . [P]recedent and the will of the majority lessened personal responsibility and gave a man more than his own opinion to

go on, so he wasn't so likely to panic or be swung by a mob feeling" (Clark 52). Does Tetley really stray from any of these rules?

First, *time and careful deliberation*. Tetley's "trial" of Martin lasts only a few hours but he does at least gather some evidence and give the accused a meager opportunity to prove their innocence. Indeed, the time he takes to condemn the Martin party draws criticism from the mob. Hotheads like Farnley would have preferred to gun them down in their sleep on the barest of suspicion, and Bartlett and Winder would "string them like that." Tetley's inquiry may be a kangaroo court, but he gives the accused "the only kind of judges a murderer and rustler gets in . . . this God-forsaken country" (Clark 170). Farnley in particular argues against any delay which may allow lawful authority to frustrate the mob's intention. "Now what are you dreaming about, Tetley. . . . Do you want Tyler and the sheriff to get us here and the job's not done?" (Clark 184) Nonetheless, Tetley does evaluate the evidence of the branded cattle, Martin's unlikely account of a sale after the spring round-up, and the possession of Kincaid's gun. He seeks, but does not obtain, a confession, and he gives the true killer the chance to exonerate his cohorts. It may be that he reaches a verdict before weighing the facts, but we will soon see that not even the modern United States Supreme Court would necessarily disapprove of that practice. In any event, death verdicts have been returned in courts of record in less time than Martin's trial lasts and we cannot rightly conclude that Tetley has grossly violated Davies's criterion of timely deliberation.

Next, *precedent*. By 1885 (the date that Professor Tepker assigns to the story, Tepker 1209) cattle vigilantism already had a long history. As Clark reminds us through the voice of Earl Bartlett, “They don’t wait for that [regular] kind of justice in Texas anymore . . . They go and get the man and they string him up” (Clark 36). Modern day America has not unanimously condemned its history of extra-judicial justice. For example, the badges of Montana State Police officers proudly recall that tradition.

Vigilantes are an often revered part of Montana’s history. From Absarokee to Zurich, tales are told to elementary, middle-school, and high-school students about “vigilante justice” that was nothing if not swift. Helena, the capital, even boasts its own tribute to the vigilantes with a “Vigilantes Day” including a parade and other events. But perhaps the greatest tribute Montana has given them is the symbol 3-7-77 on the patch worn by Montana Highway Patrol troopers across the state. The numbers were added to the patch in 1956 and added a final gloss of respectability to the actions of the original law enforcement group. Promoted to chief administrator that year, Alex Stephenson personally designed the new insignia as a tribute to law and order. “We chose the symbol,” he explained later, “to keep alive the memory of this first people’s police force.”

(“3-7-77”) Tetley explicitly invokes precedent in support of swift justice. Martin’s case is not unique and not unprecedented. “It’s not the first time” this situation has arisen, and he bemoans the mistakes of the past that were caused when “[w]e waited before” (Clark 182). Davies might not approve of Tetley’s procedures, surely he does not, but he has no complaint based on a lack of precedent.

Finally, *majoritarianism*. From the beginning, Tetley swears to abide by the will of the majority (Clark 102) and at the end he claims the authority of the “unit” of the mob as a hedge against “mistaken reprisals” (Clark 200). Even Gil recognizes the

protection of the group, assuring Art that “There’s not a damn thing they can do to us as long as we stick together” (Clark 123). As it turns out, this rough majoritarianism is ratified by the one actor in the novel whose regular legal authority is unquestioned: Sheriff Risley. Rather than condemn all the mobsters, he absolves them on the grounds of their consensus. “I’m not even looking for the leaders,” he says. “No one had to go if he didn’t want to” (Clark 211). When Davies speaks of the majority, Art supposes that he means a larger societal consensus: “It took a bigger ‘we’ than the valley to justify a hanging” (Clark 510). But Davies never actually says that. Whatever criticism Davies can legitimately raise against Tetley, he cannot accuse him of failing to observe majority rule.

So we see that Tetley has, in his own rough way, abided by Davies’s three-fold requirements of justice. But do his actions comport with present day jurisprudence? When he tells Martin that he would rather hang an innocent man than ask too many questions does that view have any current constitutional traction? And when he says that he would deal more conscientiously with a mere rustler than with a murderer, would any modern judge credit his view that the gravity of an offense militates against finer scrutiny? And what about Martin’s underlying accusation that the whole affair was driven by an impulse to get even? Can we respect a constitutional jurisprudence that honors the retributive urge? It would seem that the present day answers to all three questions is “yes.”

To better understand the nineteenth century clash of *logos* and *mythos* at the Ox Bow, we have to visit twentieth century Wichita, Kansas. On June 17, 1996, Michael

Lee Marsh broke into the Wichita home of Marry Ane Pusch and, after laying in wait, murdered her and her and her nineteen month old daughter. He stabbed the mother to death, set fire to the house, and left the baby to die in the blaze. He was caught, convicted and sentenced to death. There was never any serious question of his guilt (*Kansas v. Marsh*, Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Petitioner, 2).

By the time his case reached the United States Supreme Court in 2005, three decades of Supreme Court authority had required a death sentence to “reflect a reasoned moral response to the defendant's background, character, and crime” reached after consideration of mitigating circumstances (facts about the case or the defendant which militated against death) and aggravating circumstances (statutorily defined factors which made the defendant more eligible to be executed) (*Penry v. Lynaugh* 319). If the aggravators outweighed the mitigators, death was a constitutionally appropriate punishment. In any other case, it was not (*Gregg v. Georgia*). All of this ended with the prosecution of Michael Marsh.

In a legal system that allows the death penalty, the problem of deciding who should get it has figured as the ultimate challenge. Common decency and the need that a justice system deserve the respect of the governed requires that there be some rationality, a *logos*, underlying such decisions. However, for most of American history, the law did not impose any rules on this sentencing decision and instead accepted the *mythos* that such decisions could justly arise from good conscience alone. As recently as 1971, the Supreme Court ruled that a prisoner's “constitutional rights [were not]

infringed by permitting the jury to impose the death penalty without any governing standards.” (*McGautha v. California, Crampton v. Ohio* 185). In other words, juries could justly decide for themselves who deserved to die and who did not with no more law to restrain them than encumbered Major Tetley at the Ox Bow. A five judge majority of the 1971 Supreme Court thought that it was not only unnecessary to standardize death sentences, it was impossible.

To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

(*McGautha v. California, Crampton v. Ohio* 204) The Court found “it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution” (*McGautha v. California, Crampton v. Ohio* 207).

The sentencing procedures which the Court approved in *McGautha v. California* and *Crampton v. Ohio* were bleak: in McGautha’s California trial, the jury was told that “beyond prescribing the two alternative penalties [of life and death] the law itself provides no standard for the guidance of the jury in the selection of the penalty, but rather commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience, and absolute discretion of the jury” (*McGautha v. California, Crampton v. Ohio* 190). Crampton’s Ohio jury was told that death was the default punishment absent grounds for mercy: “If you find the defendant guilty of murder in the first degree, the punishment is death, unless you recommend mercy, in

which event the punishment is imprisonment in the penitentiary during life” (*McGautha v. California, Crampton v. Ohio* 194).

The dissenters (Justices Brennan, Douglas and Marshall) were appalled. They declared that “[t]he due process clause of the Fourteenth Amendment is fundamentally inconsistent with capital sentencing procedures that are purposely constructed to allow the maximum possible variation from one case to the next, and provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice” (*McGautha v. California, Crampton v. Ohio* 248). The courts had required that even such minor decisions as whether a defendant had to pay court costs could not be made constitutionally without some *logos* “sufficient to enable defendants to protect themselves against arbitrary and discriminatory” decisions (*McGautha v. California, Crampton v. Ohio* 262). In 1886 the Court had ruled in a case called *Yick Wo v. Hopkins* that a municipality’s decision of whether or not to grant a laundry licence could not constitutionally be left to “an unguided, unbridled, unreviewable exercise of naked power” (*McGautha v. California, Crampton v. Ohio* 252). The dissenters railed against the irony of a jurisprudence which “found an almost identical . . . procedure inadequate to license a laundry” but sufficient “to license a life” (*McGautha v. California, Crampton v. Ohio* 252).

In 1972, the United States Supreme Court decided the case of *Furman v. Georgia* and condemned the *mythos* of discretionary death sentences, finding that their randomness violated the Eighth Amendment’s prohibition of cruel and unusual punishments (*Furman v. Georgia* 239). Justice Potter Stewart agreed with the *Furman*

majority and famously said that “death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual” (*Furman v. Georgia* 309). Amidst 250 pages of orders, opinions, concurrences, and dissents, that one metaphor for random cruelty best summarized the reasons that the nation’s capital punishment statutes all fell down on the same day. Four of the justices who decided *Furman v. Georgia* along with Stewart had no problem with the death penalty nor with how the states were administering it. Two other justices didn’t care about that administration or about lightning bolts or the like. They thought the death penalty was always unconstitutional, mainly on the somewhat extra-textual grounds that it was just plain wrong. But the three vote middle, Stewart, Douglas, and White, stopped short of pure abolition and instead found the devil in the details. The trouble with capital punishment for them was a matter of process. Without a guiding *logos*, death was unconstitutionally cruel.

Pro-capital punishment state legislatures raced to find procedures which would pass constitutional muster. Most of those new sentencing schemes involved the kind of systematic balancing of aggravating and mitigating factors which had been proposed by the American Law Institute in a document called the *Model Penal Code* (Banner 269). Different states employed Model Penal Code’s general suggestions in different ways; but all post-*Furman* death penalty statutes had to “specify precisely what the jury was to consider in choosing the appropriate sentence” (Banner 269). The Supreme Court approved these systems in a group of five 1976 decisions dealing with death sentences from Georgia, Texas, Louisiana, Florida and North Carolina. Those

decisions have come to be collectively known as *Gregg v. Georgia* and they held that although a death sentence could never be the mandatory punishment for murder if the sentencing authority found that aggravating factors outweighed mitigating factors then death was constitutional (Banner 271-75, *Gregg v. Georgia*). How the weighing process itself could be conducted in a way that removed random discretion was anybody's guess, but at least a sentencing jury would reach its ultimate decision only *after* applying some test. Human lives were finally placed on a status equal to commercial laundries.

The *Gregg*-approved balancing tests required two implicit but indispensable parts of the sentencing calculus. First, there must be a weighing of some aggravating factors against any mitigating factors. Second, the calculation must precede the decision. In fact, the decision was based upon the calculus. This was always considered obvious. If there is to be a system for determining who should live and who should die, then the decision should require a proper application of that system existed. What is the point of having any kind of system if the jury can simply disregard it, decide on a verdict, and then rationalize its decision after the fact. Maybe we never know what really goes on in the jury room, but at least we expect, here as with all other kinds of jury instructions, that jurors will do what they are told (*Richardson v. Marsh* 206).

In 2006, the nominal issue in *Kansas v. Marsh* was whether a state could make death the default punishment in capital litigation. The Kansas statute, which had been ruled unconstitutional by the Kansas Supreme Court, required a death sentence if the prosecution proved that the mitigating circumstances did not outweigh the aggravating

circumstances (*State v. Marsh* 534-35). Although this law placed a nominal burden on the prosecution, its actual effect was that in case of a draw -- a situation which the Supreme Courts of Kansas and the United States called "equipoise" -- the defendant got death. The tie went to the executioner in all cases. The Kansas Supreme Court reviewed the history of federal death penalty jurisprudence and concluded that an equipoise decision meant that the jury had not made a "reasoned moral choice" that the defendant should die. Equipoise meant that the jury couldn't decide which sentence was appropriate. To require death in the face of such doubt would, the Kansas Supreme Court held, unconstitutionally make the jury's confusion a death qualification (*State v. Marsh* 534-35).

The United States Supreme Court would have none of this. It accepted the argument by the Kansas Attorney General that even in an equipoise case the prosecution had sustained several burdens of proof. It had convicted the defendant of murder, it had convicted the defendant of a capital murder (which under Kansas law required at least one additional element), and it had proven that the mitigating factors *were not outweighed* by the aggravating factors (*Kansas v. Marsh* 173). This last point may seem like grammatical circularity; with both sides presenting their case, an equipoise finding reveals the jury's conclusion that the prosecution has not proven overwhelming aggravation. The Supreme Court, though, accepted the Kansas plan and ruled that in capital litigation alone, to the exclusion of every other litigated fact in our judicial universe, a party can sustain its burden of proof by proving conclusively that it is has not.

I. Willard Tetley in the Twenty-first Century

The decision in *Marsh* is extraordinary for its explicit holding that the Kansas death penalty system (and by analogy all other capital systems) are simply ancillaries to, and not calculators of, the ultimate decision. The courts may have built a *logos* around weighing, but that architecture is just a facade. “Weighing is not an end; it is merely a means to reaching a decision. The decision the jury must reach is whether life or death is the appropriate punishment” (*Kansas v. Marsh* 179). In other words, it doesn’t matter how the jury gets to a death sentence, the only important thing is that they know where they are headed. “The Kansas jury instructions clearly inform the jury that a determination that the evidence is in equipoise is a decision for...death” (*Kansas v. Marsh* 179). The Supreme Court upheld the Kansas process because juries know in advance what outcome follows the results of their calculus. They can predetermine that a defendant should die and then engage in a “measured” though belated “normative process” which decides “the appropriate sentence for a capital defendant” (*Kansas v. Marsh* 180). The notion that juries should deliberate on evidence and let that deliberation define their verdict is a myth. Just like Major Tetley, American sentencers after *Marsh* can reach their verdict first and find their reasons later.

The Court’s oral argument in *Marsh* foreshadowed its final decision. Chief Justice Roberts felt that the entire balancing test idea, the work of forty years of litigation, was quixotic. He wondered “how realistic is [equipoise] as a possibility when you’re talking about [such] abstract concepts as mitigating factors, like how much mercy should be shown?” (*Kansas v. Marsh*, Transcript of Oral Argument, 32) He could not

believe that a jury could weigh aggravating and mitigating factors and conclude “you know, I just can’t decide” (*Kansas v. Marsh*, Transcript of Oral Argument, 35). For the Chief Justice, a jury does not have to weigh the evidence and follow it logically to a verdict. Rather, “the verdict that the jury returns is a verdict of death” and they can follow any mythic path that gets them there (*Kansas v. Marsh*, Transcript of Oral Argument, 39).

Justice Scalia rejected *logos* even more plainly. In addressing the defense position that equipoise indicated confusion and uncertainty, he responded that

. . . you are really not being accurate when you say “the jurors can thereby avoid the difficult choice.” They don’t avoid the difficult choice. They are fully aware under the statutory scheme that if they don’t find that the mitigators outweigh they are condemning this person to death. That’s the moral choice they’re faced with. And when they come in with a verdict, they know what they’re doing. And I consider that a moral - - a moral judgment on their part.

(*Kansas v. Marsh*, Transcript of Oral Argument, 39-40).

A friend-of-the-court brief filed by the Criminal Justice Legal Foundation (“CJLF”) was even more explicit.⁴ After arguing that equipoise was a constitutionally appropriate criterion for execution, and then dismissing the question on the grounds that this situation is “highly unlikely in the real world,” CJLF argued that none of this really matters anyway: “Discretionary jury decisions are, in reality, largely beyond the control of instructions” (*Kansas v. Marsh*, Brief for Amicus CJLF, 20). All of the rational constitutional structures that courts have erected to make death sentences constitutional became obsolete with *Marsh*. In the eyes of CJLF, a capital verdict is “beyond the control of instructions;” in the eyes of the Chief Justice, the concept of

mitigating factors is so “abstract” that there may not be any “reason to think that jurors do come to that balance between such inchoate concepts in the first place” and the balancing process may not be “realistic” anyway (*Kansas v. Marsh*, Transcript of Oral Argument, 33, 32) . For Justice Scalia, the verdict and not the weighing is the “moral choice they’re faced with” (*Kansas v. Marsh*, Transcript of Oral Argument, 40). And for the majority of the Court, the *logos* of weighing is just “a means to an end”(*Kansas v. Marsh*). Put this all together and twenty-first century America has a capital punishment system which, no matter how much we try to tinker with its machinery, is unrealistically concerned with ambiguous and inchoate concepts, beyond effective judicial control, and simply a set of rationalizations invented to justify predetermined results. When Major Tetley explained to Donald Martin that he did not deserve a fair trial because the mob had already judged him to be “a murderer and a rustler” (Clark 170) he described a system in which the verdict decided the process instead of *vice versa*. Tetley told Martin that his “judges” were allowed to decide his fate before they considered a word of evidence. In 2006, the United States Supreme Court told Michael Marsh the same thing.

The *Marsh* decision also ratifies Tetley’s tolerance for error in murder cases. Tetley, we will remember, believed that it was a mistake to ask too many questions about guilt, and that in murder cases that mistake is compounded by the seriousness of the crime. By the time *Marsh* was decided, 121 years after Donald Martin’s hanging, hundreds of capital prisoners had been exonerated by DNA evidence. Justice David Souter dissented from the court’s ruling on the grounds that this history of exonerations

strongly militated against making death sentences easier to get (*Kansas v. Marsh* 202-11). With error riding rampant over the criminal justice system, the law should no longer tolerate the risk of wrongful executions. The *Marsh* majority found this suggestion ridiculous.

The dissent's general criticisms against the death penalty are ultimately a call for resolving all legal disputes in capital cases by adopting the outcome that makes the death penalty more difficult to impose. While such a bright-line rule may be easily applied, it has no basis in law. Indeed, the logical consequence of the dissent's argument is that the death penalty can only be just in a system that does not permit error. Because the criminal justice system does not operate perfectly abolition of the death penalty is the only answer to the moral dilemma the dissent poses. This Court, however, does not sit as a moral authority. Our precedents do not prohibit the States from authorizing the death penalty, even in our imperfect system. And those precedents do not empower this Court to chip away at the States' prerogatives to do so on the grounds the dissent invokes today.

(*Kansas v. Marsh* 181)

Justice Antonin Scalia reiterated Major Tetley's arguments about punishment and risk-tolerance in his concurring opinion. Murder is a terrible thing, he wrote, and American society has had enough of it. Mistakes may happen, but maybe (to quote Tetley) it's better "to risk a lot of hanging before too much asking."

The American people have determined that the good to be derived from capital punishment - in deterrence, and perhaps most of all in the meting out of condign justice for horrible crimes - outweighs the risk of error. It is no proper part of the business of this court, or of its justices, to second-guess that judgment, much less to impugn it before the world.

(*Kansas v. Marsh* 199)

J. Conclusion

So we see that Major Tetley's jurisprudence of pre-determination of guilt, retributive sentencing, and error tolerance finds jurisprudential support at the highest modern levels of American legal authority. But what of the ultimate question which *The Ox Bow Incident* asks: what if the "murder victim" is discovered alive? Certainly, when a prisoner is condemned (or executed) for a crime that never took place we must recognize that event as a gross, but unlikely, injustice. Not so fast.

One of America's leading legal scholars, Professor Alan Dershowitz of the Harvard School of Law, has commented on just this problem. Dershowitz reminds us that proof of innocence is no defense, and he frames his conclusion in terms that Arthur Davies could easily understand upon seeing Larry Kincaid alive and well. If innocence is no defense and if Tetley's and Scalia's modest level of risk-aversion is outweighed by the need for retributive justice, then

[l]et us be clear precisely what this means. If a defendant were convicted, after a constitutionally unflawed trial, of murdering his wife, and then came to the Supreme Court with his very much alive wife at his side, and sought a new trial based on newly discovered evidence (namely that his wife was alive), [some] justices would tell him, in effect: "Look, your wife may be alive as a matter of fact, but as a matter of constitutional law, she's dead, and as for you, Mr. Innocent Defendant, you're dead, too, since there is no constitutional right not to be executed merely because you're innocent.

(Dershowitz) Dershowitz's speculation is borne out by Scalia's demonstrated willingness to accept Judge Friendly's advice that "conventional notions of finality should keep an innocent man in prison" even in cases "where the error [is] as apparent

as could be” (Friendly 154). As we have seen, Scalia had made this point already in *Herrera v. Collins*. He made it again 16 years later in the case of Troy Davis.

On August 17, 2009 Troy Davis came before the Supreme Court claiming to be innocent of the murder for which he had been sentenced to death. Eighteen years earlier he was convicted of murdering an off-duty police officer and he had been fighting his conviction ever since. When he came to court in 2009, he had a contention as pure as Leonel Herrera’s claim in 1993: he was innocent and he could prove it. He has been convicted upon the testimony of multiple eyewitnesses, most of whom recanted their trial testimony averring that the police had intimidated and threatened them into falsely implicating Davis. Davis claimed that another state witness was the actual murderer (*In re Davis*, 130 S.Ct. at 1). The Supreme Court ruled that he was entitled to an evidentiary hearing where he would have a chance to prove his innocence. Scalia, joined by Justice Clarence Thomas, disagreed..

A court hearing on Davis’s claims, said Scalia, would be a pointless waste of time because even a finding that he was innocent would be irrelevant.

This Court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is “actually” innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged “actual innocence” is constitutionally cognizable.

(*In re Davis*, 130 S.Ct. at 3). “Constitutionally cognizable” is bit of legal jargon which identifies a germane argument. When Scalia said that Davis’s innocence was not cognizable, he was saying that proof of actual innocence simply would not matter. He

made his point explicit. None of Davis's "evidence of actual innocence" could "form the basis for any relief" (*In re Davis*, 130 S.Ct. at 4). Innocent or guilty, Davis had to be executed. As far as Scalia and Thomas were concerned, no court had "power to grant relief" (*In re Davis*, 130 S.Ct. at 3).

Following the *logos*, in the Supreme Court as at the Ox Bow, was simply "not a sensible way to proceed" for Antonin Scalia (*In re Davis*, 130 S.Ct. at 4). Troy Davis was executed on September 21, 2011. His last words exhorted America to "see the truth" (Marlowe, Davis Correia, Davis 258, 266).

CHAPTER FOUR

The Man Who Shot Liberty Valance: Mythos and Logos Consolidated

Of the nature of the soul . . . let me speak briefly, and in a figure. And let the figure be composite -- a pair of winged horses and a charioteer. Now the winged horses and the charioteers of the gods are all of them noble and of noble descent, but those of other races are mixed; the human charioteer drives his in a pair; and one of them is noble and of noble breed, and the other is ignoble and of ignoble breed; and the driving of them of necessity gives a great deal of trouble to him.

Plato
The Phaedrus, section 246a

A. Introduction

Liberty Valance was a villain and a thug. He terrorized the Colorado Territory south of the Purgatoire River and made a mockery of local law enforcement. He highjacked stagecoaches, assaulted women, disdained authority, threatened democracy, and stole a widow's last treasure. He was thin-skinned and brutal in the face of insult. He avoided fair fights, tormented weaklings, murdered innocents, and tortured the helpless. His name reflected his libertine hostility for civilization, and he symbolized the anarchic tumult of the frontier. In a lawless land he cut a wide swath of vicious cruelty. As long as he remained alive the West would remain wild. Someone had to quell his chaos and instill order in the hinterland. But who?

Dorothy Johnson's story *The Man who Shot Liberty Valance* begins in 1910 when Senator Ransome Foster and his wife return to the town of Shinbone to bury the former gunfighter Burt Barricune. Barricune was never the senator's friend, he was

instead his “nemesis,” his “enemy” and his “conscience” during an association that started over forty years before (Johnson). They competed for and loved the same girl, they fought against and despised the same outlaw, and they fostered and grew with the same chaotic frontier until the railroad and civilization made one of them prominent and the other one obsolete. They occupy opposite poles of the many binary structures constructed by the novella and by the John Ford film it inspired – “East and West, Civilization and Savagery, Order and Disorder, Law and Outlaw, and Legend and History” (Matheson 357). But ultimately, their characters merge “into one being” (Livingstone 225) and become “combined into a single figure” (Dienstag 304); they come to symbolize the two-sided representation of American legal sovereignty, personified by the unified duality of the title character.

While Johnson’s novella was well received when it was published in 1949, the story’s chief recognition comes from the 1962 John Ford movie of the same name. The film is “a favorite of political theorists” (Dienstag 312) for its exposition of the dual nature of sovereignty and “the matrix of representation that creates the relationship between” law and power (Dienstag 290). Because the story of the film is markedly different from Johnson’s original text, and because the film has garnered the most critical attention, I will begin by describing the movie’s plot and then turn my attention to Johnson’s novella.

B. John Ford's Film

The film begins with Ransom Stoddard arriving in the town of Shinbone to attend a funeral. Stoddard is a United States Senator, former governor, former ambassador to France, and the popular favorite to become the next vice president. His unexpected and unannounced arrival in Shinbone creates a sensation, especially when he announces that he is there on account of the death of Tom, a man who is unknown to newspaper editor Maxwell Scott. Stoddard agrees that Scott deserves “the story” for his visit and consents to tell it, mainly out of respectful memory for his old friend Dutton Peabody, the first editor of the *Shinbone Star* whom Stoddard claims once fired him from the paper. In the front room of the mortuary *cum* carpentry shop with Doniphon’s body lying in state in another room, Stoddard begins telling the story which occupies most of the rest of the film as a flashback to his early days in Shinbone. It bears noting that Stoddard is the one and only source for this “story.” The senator has led his listeners away from the other available witnesses – his wife Hallie, the former town marshal Link Appleyard, and Doniphon’s sidekick Pompey, all of whom sit with Tom’s coffin in another room – and outside of their hearing he claims that he is “the only one who can tell it through.” Like the three newspapermen who listen with rapt attention and take notes for their next edition, we have no one but Stoddard to trust for its truth. This is his story.

Ransom Stoddard had left his home back East, and traveled west fresh out of law school carrying a sack of books and a licence to practice law in the “territory.” Although Ford never identifies that territory he tells us that Stoddard’s destination is

“south of the Picketwire,” another name for the Purgatoire River which runs through southern Colorado. Stoddard approaches Shinbone on the Overland Stage intending to bring law and order to the frontier, but his stage is hijacked and robbed by the notorious highwayman Liberty Valance. When Stoddard comes to the aid of a female passenger, an elderly widow who resists Liberty’s theft of the broach given to her by her late husband, Liberty casts him aside and asks “what kind of man are you?” Ransom answers that he is “an attorney at law,” and that he will put Liberty in jail for the robbery. Liberty laughs at the authority of Ransom’s law books, literally tearing them to pieces. He tells Stoddard, “I’ll teach you law, Western law!” and then beats him savagely with his trademark silver knobbed whip.

Tom Doniphon, local rancher and “the toughest man south of the Picketwire,” finds the waylaid and severely injured Stoddard on the trail and carries him into Shinbone to be nursed back to health. Ransom, whom Doniphon calls “Pilgrim” throughout the film, repeats his intention to prosecute Liberty and starts researching territorial law in order to locate the town marshal’s jurisdiction to make an arrest. Tom is amused by those efforts; he knows that Marshal Appleyard is an ineffectual old fool and no match for Liberty Valance. Tom tells Ransom that “those law books may mean a lot to you, but not out here.” He tells Ransom to “start packing a handgun” so that he can “settle[] his own problems.” Stoddard is astonished. “Do you know what you’re saying to me? You’re saying just exactly what Liberty Valance said. What kind of community have I come to?”

Recovering from Liberty's beating, Ransom is befriended by Hallie, the beautiful waitress at Peter's Place restaurant and the object of Doniphon's affection, and by Dutton Peabody, the newspaper editor. He hangs his legal shingle "Ransom Stoddard, Attorney at Law," outside the newspaper office and begins gathering news for Peabody. He starts a school for adults and children alike, teaching them how to read and introducing elementary concepts of civics and government. All the while, the social context of the times revolves around the territory's bid for statehood and the conflict which that bid engenders between the cattlemen and the settlers. When Peabody sets the front page of the *Star* with the headline "Cattlemen Fight Statehood: Small Homesteaders in Danger," Doniphon warns him that if he publishes that story Shinbone's "streets will be running with blood" because Peabody's "noble words" are no match for the army of gunmen which Liberty Valance is assembling on behalf of the cattle cartel. Liberty has already murdered a few farmers and with the election for statehood approaching, Doniphon predicts greater violence. Hearing this, Ransom is finally forced to acknowledge the impotence of legal authority and representative democracy. Even though the homesteaders can out-vote than the ranchers, Ransom has come to realize that "When force threatens, talk's no good anymore." He decides to challenge Liberty with a handgun which Peabody has secretly given him. His efforts at marksmanship reveal him to be a hopeless gunman, and Tom warns him that a duel with Valance would be suicide.

In spite of the threat of violence, the town convenes a meeting to elect two delegates to the territorial convention on statehood. Although Liberty Valance intrudes

on the meeting and insists on his own election, the town picks Ransom and Peabody. Liberty, enraged by this resistance to his demands, destroys the newspaper office and beats Peabody nearly to death. Ransom learns of this outrage, gets his gun, and tells the marshal to summon Liberty out into the street for a final showdown.

Hallie learns of Ransom's disastrous plan and sends for Tom to stop the fight and save Stoddard. Tom, after all, is the only force which can stand up to Liberty's menace. Liberty may be "the second toughest man south of the Picketwire" but Tom is first. In every scene in which we see Liberty and Tom together, Liberty yields to that primacy and backs away from Tom's every challenge. But in the desperate moment of the final gunfight, Tom does not arrive in time and Liberty and Ransom face off in front of Peter's Place. Liberty makes sport of Ransom, first shooting a flowerpot by his head and then putting a round into his right arm. Ransom retrieves his gun with his non-dominant left hand and Liberty threatens to put his next shot "right between the eyes." The two men fire simultaneously and to the stunned amazement of all onlookers, Liberty falls dead in the street.

Tom arrives belatedly, apologizes to Hallie for getting there "too late" and congratulates Ransom for having "got yourself out of that fix real handy." When he sees Hallie lovingly ministering to Ransom's wounds, he recognizes her devotion to him, abandons his own plans of courtship and marriage, gets wildly drunk, and sets fire to the home that he was building for married life. His hired hand Pompey saves him from certain death, carrying him from the blaze.

With Liberty Valance dead and with Ransom Stoddard enjoying the eponymous praise, and sometimes the blame, that has followed his identification as the movie's title character, Ransom and Peabody go to the territorial convention. The convention must nominate a representative to the United States Congress, and Ransom is the favorite of the statehood contingent. The cattleman's candidate, Buck Langhorne, is nominated by the cartoonish windbag Major Cassius Starbuckle who promises that Langhorne would continue to keep "this great territory inviolate." Peabody condemns Langhorne as "the cattlemen's mouthpiece" and nominates Ransom after a speech in which he explicitly locates Stoddard in the midst of the developing frontier. Starbuckle's speech, Peabody says, reminds him of the old days.

I could see once again the vast herd of buffalo and savage redskin roaming our beautiful territory with no law to trammel them except the law of survival, the law of the tomahawk and the bow and arrow. And then, with the westward march of our nation, came the pioneer and the buffalo hunter, the adventurous and the bold. The boldest of these were the cattlemen, who seized the wide-open range for their own personal domain, and their law was the law of the hired gun. But now, today have come the railroads and the people. The steady, hard-working citizens, the homesteader, the shopkeeper, the builder of cities. We need roads to join those cities, dams to store up the waters of the Picketwire, and we need statehood to protect the rights of every man and woman, however humble. How do we get it? I'll tell you how. We get it by placing our votes behind one man. One man! And we have that man with us here. He is a man who came to us not packing a gun, but carrying instead a bag of law books. Yes. He is a lawyer and a teacher. The first west of the Rosy Buttes. But more important, he's a man who has come to be known throughout this territory in the last few weeks as a great champion of law and order.

Ransom Stoddard -- once nothing more than an "effete law-berarer" (Dienstag 297) and an inept gunman -- has become the builder of cities and the champion of law and order. In short, he represents the civilized future not only because he has brought the law

in his sack of books, but because he has quelled the chaos of the wilderness by shooting Liberty Valance.

Starbuckle will have none of that. He argues that Ransom is a cold blooded murderer with “the mark of Cain” upon him and “bloodstained hands.” Killers have no place in “the hallowed halls of government” says Starbuckle, and Ransom Stoddard is no better than a common criminal. Ransom feels the sting of this rebuke and runs out of the convention hall intent on leaving the convention, Shinbone, and the West. He tells Tom Doniphon that he’s “going back East where I belong,” refusing to “build a life” on the solitary accomplishment of having shot Liberty Valance. Tom dismisses his objections and tells him to recall his climactic duel with Liberty Valance. “Think back, Pilgrim,” counsels Tom, and thus begins a flashback-within-a-flashback as Tom tells Ransom the second “story” of the film.

Tom had not arrived on the streets of Shinbone “too late” as he told Hallie, and Ransom had not got himself “out of that fix real handy.” In fact, Tom and Pompey were hiding in the nearby shadows as Liberty threatened to shoot Stoddard “right between the eyes.” Tom had Pompey toss him a rifle, and as Ransom and Liberty fired together Tom shot at the same time. Liberty’s death, it would seem, is on Tom’s hands. “Cold blooded murder,” he calls it. “But I can live with it.” He saved Ransom’s life because Hallie wanted him alive, and he has regretted it ever since. Nonetheless, Ransom survived his brush with death and the film exits the internal flashback with Tom exhorting Ransom to “Go back in there and take that nomination.”

Thus ends Senator Stoddard's memoir to editor Clark. Clark looks at his notes, tears them up and throws them into the fire of a nearby stove. The senator is disappointed. "You're not going to tell the story Mr. Scott?" "No," says Scott. "This is the West, sir. When the legend becomes fact, print the legend." The funeral is over, Ransom and Hallie board the train headed to Washington, and the conductor promises them an on-time arrival because "Nothing's too good for the man who shot Liberty Valance."

C. Dorothy Johnson's Story

If Dutton Peabody appeared in Johnson's story (he does not) he might not recognize the heroic builder of cities which Ransome (spelled with a terminal "e" in the book) had become onscreen. Johnson tells us that her hero, Ransome Foster, is "haughty," "condescending," "cringing," and "sneering" (Johnson 32). He manages to "add[] vanity to his other unpleasantnesses," and whatever honest work he performs becomes "disgraceful" by his influence (Johnson 36, 32). He is ungrateful for even the greatest favors, he feigns but does not actually practice humility, and his personality is in a constant state of flux from one loathsome incarnation to another, none of which he "admire[d] . . . very much" (Johnson 32). The Ransome of the film does not travel to the West with a bag of laws and an august intent to tame the wilderness, he is a "just another tenderfoot with his own reasons for being there" (Johnson 26). He has escaped from a troubled life back east, fleeing from a quarrel with the executor of his father's estate, with two thousand dollars of his own he is "reckless and without an aim" (Johnson 33). He is a "dude from the East, quietly inquisitive, moving from one shack town to another." Until he met Burt Barricune (the Tom Doniphon of the film) "he had been nobody in particular" (Johnson 26).

After seven months of aimless wandering, Foster encounters Liberty Valance and his henchmen on the prairie. Liberty whips him with his cudgel, chases off his horse, kicks him into unconsciousness, and leaves him to die on the trail. There is no profit motive behind this brutality, he doesn't rob Foster or even take his saddle. He does it "for no reason except that Liberty, meeting him and knowing him for a

tenderfoot, was able to do so” (Johnson 33). The encounter leaves Foster bitter and hateful, and unlike the Stoddard of the film who prefers legal action to private vendetta, Foster sets his mind to luring Liberty into town where he will settle the score or die trying. Foster has been transformed by Liberty’s barbarism; the man he was before “died on the prairie” and he has become a new man, one whom he hates as much as he has come to hate Liberty (Johnson 33).

Barricune rescues the Ransome of the story just like Doniphon rescues the Ransom of the film and brings him to the town, here called Twotrees, where Ransome moves from one menial job to another and shoots four boxes of cartridges a week to prepare for his moment. He meets Hallie, who allows him to beg meals from the restaurant where she works as a waitress. She is Burt’s girl, but she provokes in Ransome “an emotion he knew he could not afford” (Johnson 37). He starts a school where he teaches her and a handful of children how to read and write. He teaches Hallie, and Hallie alone, Shakespeare’s 29th Sonnet – “When, in disgrace with fortune and men’s eyes,/ I all alone beweepe my outcast state” – and the 79th – “Do not so much as my poor name rehearse,/ But let your love even with my life decay” – bemoaning his pitiful state, anticipating his death at Liberty’s hands, and demanding from her the everlasting devotion which he himself could neither feel nor express. “Hallie understood the warning, he knew,” but “her earnestness in learning was distasteful to him” (Johnson 38-39).

Ransome makes a point of becoming conspicuously obnoxious, so much so that Burt warns him that “They’re talking clean in Dunbar . . . Where Liberty Valance hangs

out” (Johnson 35-36). He walks around with a little book of Greek – “It was written by a man named Plato,” he tells Hallie – and when Liberty finally takes the bait it is the book as much as anything else that draws him back to Ransome. “He’s interested in the dude that anyone can kick around,” says Burt, “this here tenderfoot that boasts how he can read Greek” (Johnson 40). When Burt tells him that Liberty Valance is in Twotrees, Ransome knows that “the time has come.” He rides into town for battle, first transforming himself with a final haircut which confuses the barber who thought him “partial to that long wavy hair” (Johnson 40). The marshal has left town on the pretense of an emergency summons, not wanting to be around when Liberty comes to town. The storekeepers refuse to admit Ransome, not wanting their establishments to be shot up. When Ransome finally sees Liberty in the street, he mythologizes his fate as “the classic situation” of the lethal struggle. “What reasons other men have had, I will never know. There are so many things I have never learned. And now there is no time left” (Johnson 42). The two men face off – “I owe you something,” Ransome answered. ‘I want to repay my debt.’” – two guns fire, and Ransome wakes up later in the saloon, unsteady, in agony, and with a bullet-shattered right shoulder – but still alive (Johnson 43).

Foster, unlike Stoddard, is prosecuted for killing Liberty Valance. He pleads guilty to disturbing the peace and pays a ten dollar fine (Johnson 44). Only when he prepares to collect the “Dead or Alive” bounty on Liberty’s head does Burt tell him that he doesn’t deserve the reward. “You didn’t kill Liberty. . . . You fired once and missed. I fired once and I generally don’t miss” (Johnson 44-45). There is never a hint in the

story that Ransome was proud when he thinks himself the killer of Liberty or sad when he thinks that he is not. Indeed, when Burt confirms that they can never be friends – Hallie has fallen for Ransome after all – Ransome decides to take all the credit. “Then I shot Liberty Valance,” he announces. That decision costs him whatever was left of Burt’s friendship and defines the remainder of his life. “[T]hat was when Burt Berricune started being his conscience, his Nemesis, his lifelong enemy, and the man who made him great” (Johnson 45).

Ransome is left with the problem of what to do in Twotrees, now a cripple with one good arm and no prospects for making a living. “There is always a way out,” he muses and thinks that perhaps he will go back East. “Burt had been his way out when he met Liberty on the streets of Twotrees. To go home was the way out of this” (Johnson 46). Instead, he takes up the practice of law late in the story, marries Hallie, runs for judge and wins, runs for the state legislature and loses (his opponents paint him as a murderer), and eventually becomes governor and then senator. Burt fades into obscurity and obsolescence, “An unwanted relic of the frontier that was gone, a legacy to more civilized times that had no place for him” (Johnson 48). When he dies, the local newspaper reporter explains that he “had been nobody” (Johnson 25).

Thus ends the story of the novella’s flashback. It is worth remembering that Ransome Foster does not tell that story; and that difference distinguishes the story’s flashback from the film’s. Dorothy Johnson gives us the historical account from her authorial perch as omniscient observer. Her narration gives us a level of confidence that we could never have if Foster was the narrator. Even when the reporter asks

Ransome one simple question – why did he come to Burt’s funeral? – Senator Foster “could not give the true answer” (Johnson 26). Ransome Foster, it seems, cannot be trusted with the story to “tell it through.”

But indeed, how thoroughly should we rely upon Ransom Stoddard’s telling of *his* remembered story? How thoroughly should we rely on any memory at all?

D. The Man Who Didn't Shoot Liberty Valance

Some commentators have questioned the authenticity of “story” in the film’s description of the final duel between Ransom and Liberty. Gertrud Koch writes of the “doubt of the double narration” which tells the story; Ransom is telling newspaper editor Maxwell Clark what Tom has told Ransom (Koch 690). Sue Matheson goes further and claims that “Stoddard’s account of his life rings false” and that the movie is “an elegy for the simple unvarnished truth” (Matheson 367). All of this may be true. But Matheson and Koch miss the thematic significance of the skepticism which the film invites from the viewer. The tools available to the medium of film itself -- the photography, the choreography, and the scene design -- makes us question not only Stoddard’s memoir but also his re-telling of the story which he attributes to Doniphon. This doubt arises from the competing visual depictions which John Ford gives his audience for the shootout in the streets of Shinbone.

The first depiction of the duel comes from Stoddard’s eyewitness recollection of the event. In Stoddard’s first telling of the story, he and Liberty shoot at the same time and Liberty falls to his knees, rises and staggers a few steps before falling dead in front of the Shinbone Saloon where the townsfolk had elected Ransom and Peabody earlier that day. The second eyewitness account is Doniphon’s version, with Tom testifying to Stoddard at the territorial convention. In that depiction, the dying Liberty staggers off-screen before falling and dying directly in front of Peter’s Place restaurant. Matheson says that both versions are “believable” and Koch says Stoddard’s recollection locates the movie “in the ambiguity of political and historical representation through the

doubled flashback” (Matheson 360, Koch 688). But the differences between these two stories – where Liberty is shot, what he does next, and where he falls and dies – help the film tell us two important things about the law’s sovereign binary. First, they present an unreconcilable dichotomy of law versus order forcing the viewer to decide whether it was *logos* or *mythos* that calmed the feral wilderness. And second, they expose the frailty of eyewitness perception, the discrepancies that often arise between different accounts of the same event, and the fundamental unreliability such evidence.

Much has been written about the symbolic identities of the three characters of Liberty, Tom, and Ransom. Dienstag writes that “One of these men (in the movie, Jimmy Stewart as Ransom Stoddard) is largely a representative of law who gains stature and political authority in the course of the narrative while the other (John Wayne as Tom Doniphon) represents an extra-legal power who loses both” (Dienstag 293). Jeanne Heffernan holds that Liberty Valance is the “symbol of the anarchy of unruly passions;” that Tom Doniphon is the “symbol of the moral ambiguity of spiritedness;” and that Ransom Stoddard is the “symbol of reason and the rule of law” (Heffernan 148). David Livingstone takes up Heffernan’s point and makes much of her theory that the film “endorses the Platonic Socrates’ tripartite soul (reason, spiritedness, and appetite) along with the philosopher’s insight that the three parts must be hierarchically arranged in the soul of the just man” (Livingstone 218). Sydney Pearson also finds Socrates on the streets of Shinbone as the three men personify the Platonic ideal that “to be just no doubt requires . . . a rightly ordered soul” (Pearson 23).

If Ford has divided the three part of Plato's perfect soul by "separating the parts into three archetypal characters" (Livingstone 218) then the question of who really did shoot Liberty Valance becomes critical to our understanding of the narrative. Clearly, Liberty – the spirit of anarchy, unruly passions, and unbridled licentiousness – represents "pure unadulterated violence and chaos without hint of redeeming feature" (Boehnke 61). He is the Bob Ewell of *Shinbone* – chaotic, unjust, and wantonly cruel. Is he vanquished by Ransom, the symbol of law and order, or by Tom, the symbol of gun-toting violence? Which side of the sovereign binary reigns supreme over that chaos? Can we know the answer, or is it forever lost to the swirling uncertainty of myth? The answers to these questions define the ultimate meaning of the film.

John Ford does not give us much help. Both Tom's version and Ransom's are coherent and both witnesses clearly believe the veracity of their accounts. Ransom is so sure that he killed Liberty Valance that he is ready to leave home and abandon his beloved Hallie, being unable to deny Major Starbuckle's accusation of blood-thirstiness. Tom is so sure that he killed Liberty Valance that he will let Hallie respect Ransom as a statesman rather than detest him as a killer, and he lives out the life of sad and lonely obscurity which his "cold-blooded murder" requires of him. In the territorial West, there is nothing like ballistics evidence to decide the matter and the forensic examination of Liberty's corpse consists of a drunken doctor announcing that "he's dead" while swigging down a slug of whiskey. If the film version of the story would have had a criminal prosecution for the shooting of Liberty Valance, as did the story, the case would have had to be determined by eyewitness testimony.

Ford does not merely give us two differing *verbal accounts* of who shot Liberty, he gives us the two competing versions as two non-identical *visual depictions*. Each depiction consists of the eyewitness account of the person telling the story and each is internally consistent with the story which its observer recounts. Ransom, who remembers that he shot Liberty head on, sees Liberty recoiling from the frontal impact, staggering backwards. Tom, who remembers shooting from Liberty's left, sees his rifle shot throwing Liberty sideways, staggering lopsidedly before he collapses. Thus, both eyewitnesses recall events unfolding consistently with their differing perceptions of reality: the differing realities of whose bullet hit Liberty Valance. Obviously, the filmmaker could have told the two different stories while showing and re-showing the same filmed visualization of the shooting, depicting the event identically for both eyewitness accounts. Even though the actual different cinematic appearances of the shooting are subtle, and even if they result from the perspective of the viewers or the parallax of different angles, those facts do no more than make these competing depictions more like actual eyewitness disagreements: multiple eyewitnesses see the same events from different places and they often perceive differently. No reason inherent to film-making required Ford to show the events happening differently depending on who sees them and who reports them. Why then does Liberty die one way in Ransom's story and another way in Tom's?

Perhaps, as Pearson believes, *Liberty Valance* is a film in which the viewer will "see something slightly different and slightly new with each viewing" (Pearson 27). But that does not explain why the two people (the two survivors at least) most involved in

the movie's most critical event are shown to have seen that same event, at the same time, in starkly different ways. A discussion of that observational discrepancy, combined with a brief study of eyewitness psychology, will answer that question. Further, it will illustrate the film's importance to an understanding of the legal binary and wrongful convictions. Finally, it will identify the man who really did shoot Liberty Valance.

E. The Man Who Raped Jennifer Thompson

On July 26, 1984, Jennifer Thompson was an undergraduate at Elon College in Burlington, North Carolina. She had gone on a date with her fiancé Paul and the two of them ended up in bed back at her apartment. Paul left around 11:00 p.m. without waking her and Jennifer slept soundly until about 3:00 a.m. when she was awakened by an unfamiliar presence her bedroom. When she called out “Who’s there?” a man put a knife to her throat and threatened to kill her if she made any noise. “Shut up or I’ll kill you,” he snarled. Over the course of the next half hour the unknown man raped and assaulted her, finally letting her go into her kitchen from which she escaped the ordeal. She ran to a neighbor’s house, naked except for a blanket which she had wrapped around her body. The neighbor called 911 (Thompson-Cannino, Cotton, Torneo 10-19).

As the police investigated the crime, Jennifer gave them a description of her attacker. Although the bedroom was dark, she had gotten glimpses of him in the dim light seeping through her blinds from a lamppost in the parking lot outside her bedroom window. When he turned on her stereo, the LCD display illuminated him briefly as did the bathroom light when he allowed her to use the toilet (Thompson-Cannino, Cotton, Torneo 10-19). She concentrated on remembering everything she could about his appearance and later described him to the police.

An African-American young male, light complexion, close cropped hair with a pencil thin moustache, smaller nose, but almond shaped eyes. He's 20, 22, 23 years old, about 175, 185 pounds, five foot 11, maybe six foot, six foot one. He's got on a navy shirt with white stripes on the sleeves and dark fatigue pants I think with canvas boat shoes.

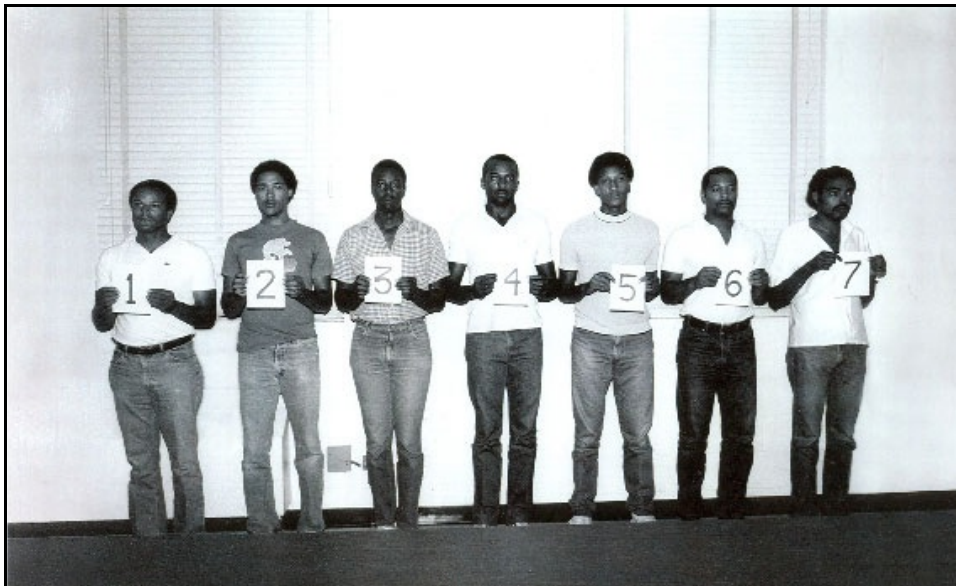
(Gates PSL Transcript 7)

Suspicion eventually fell upon Ronald Cotton, an employee at Somer's Seafood Restaurant which was located near Jennifer's apartment. He lived in the Burlington housing projects and had a criminal record for breaking and entering with intent to commit rape. When a police artist's composite drawing was released to the media, a Somer's manager recognized him and called the police (Thompson-Cannino, Cotton, Torneo 44). A police detective then showed Jennifer a photo-array, a group of six photographs of possible suspects, and Jennifer identified Ronald Cotton as her rapist. She was "positive" of her choice, and the police reinforced her choice. "You did great, Ms. Thompson," they assured her (Thompson-Cannino, Cotton, Torneo 32-33).

Next, the police had Ronald Cotton and six other men appear in a live line-up. Again, Jennifer selected Cotton as her rapist. Again, she was certain. "It was him. There was no doubt in my mind," she later recalled. Again, the police validated her decision. "We thought that might be the guy," a detective told her. "It's the same person you picked from the photos" (Thompson-Cannino, Cotton, Torneo 35-37).



Police sketch of Jennifer Thompson's rapist (Thompson-Cannino, Cotton, Torneo).



Ronald Cotton line-up. Cotton is number 5. (Thompson-Cannino, Cotton, Torneo)

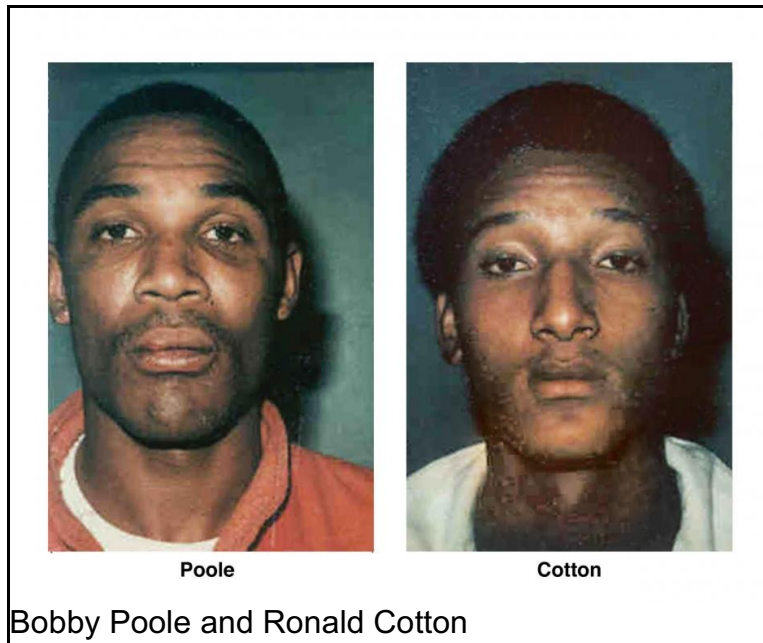
Ronald Cotton stood trial for the rape, was convicted upon Jennifer's positive eyewitness identification, and was sentenced to life in prison plus an additional consecutive sentence of 50 years (Thompson-Cannino, Cotton, Torneo 68-70). The prosecutor praised Jennifer for removing a dangerous predator from society, the police detective hugged her, and Jennifer confidently believed that she had helped to achieve an important piece of justice. "I had done my job well, and Ronald Cotton would rot in prison." She hoped that he would "know the horror of being raped" before leaving "this earth for hell" (Thompson-Cannino, Cotton, Torneo 70-72). Jennifer visited with the district attorneys and detectives and they all celebrated with a bottle of champagne. Raising their plastic cups they toasted "the justice system." It was Jennifer's happiest day in six months (Thompson-Cannino, Cotton 71-72).

Throughout the police investigation, trial, and sentencing, Ronald Cotton consistently denied raping Jennifer Thompson and he refused to consider any kind of plea bargain. "I'm not pleading guilty to something I didn't do," he told his lawyer. "Despite the bars all around me, I was an innocent man" (Thompson-Cannino, Cotton, Torneo 92).

Ronald's case took a strange turn after he started serving his life sentence at the North Carolina Central Prison. While there, he met another convicted rapist named Bobby Poole. Ronald and Bobby were both from Burlington and they resembled each other so closely that the guards often couldn't tell them apart. Ronald believed that Bobby might have committed Jennifer's rape, but Bobby denied any involvement and Ronald had no proof. Eventually, however, a jailhouse lawyer named Kenny confirmed

Cotton's suspicions. Kenny had helped Poole with his legal paperwork and he told Ronald that Poole "told me he did the crimes you're in for" (Thompson-Cannino, Cotton, Torneo 110). Cotton's good luck continued when the North Carolina Supreme Court overturned his conviction on the grounds that the judge had admitted improper evidence at his first trial. His luck quickly turned for the worse, however, as a second rape victim, Mary Reynolds, positively identified Ronald as her attacker. At his second trial, Cotton would have to defend against two separate rape charges (Thompson-Cannino, Cotton, Torneo 118-122).

In November 1987, Ronald was convicted of both rapes. The judge excluded the evidence of Bobby Poole's confession to Kenny on the grounds that he "didn't think any of this evidence pointed directly to Poole" (Thompson-Cannino, Cotton, Torneo 134). Both victims positively identified Ronald Cotton, and when a lawyer pointed to Poole and asked Jennifer "Do you recognize this man in front of you, Mr. Bobby Poole?" she answered "No, sir, I've never seen him before in my life" (*Gates PSL Transcript* 9). After his conviction, Cotton was sentenced to two concurrent life sentences plus 54 years (Thompson-Cannino, Cotton, Torneo 143). Once again, Jennifer and the prosecution team celebrated the convictions. "And again, we toasted with champagne, because the system worked. That's the way it's supposed to be. Ronald Cotton would never get out of prison" (*Gates PSL Transcript* 9).



Bobby Poole and Ronald Cotton

In June 1995, DNA analysis of semen from the Reynolds rape was tested and identified Bobby Poole as the rapist. There was no DNA available from the Thompson rape, but when detectives interviewed Poole he confessed to both crimes. Poole confirmed his guilt of Jennifer's rape by revealing details about the crime that only the perpetrator would know. Cotton was brought back to court, all charges were dismissed, and he left it a free man (Thompson-Cannino, Cotton, Torneo 212, 208). He had served over 10 years in prison for crimes he did not commit.

Jennifer Thompson had sat in a courtroom with the man who raped her, the man whose face she had tried so hard to remember, and she swore that she had never seen him before in her life. Even after seeing Bobby Poole, she again swore that Ronald Cotton raped her. How did that happen? Jennifer herself did not know. "They brought Bobby Poole into the courtroom during the second trial. How could I have been in

same room as my rapist and not recoil? I didn't even recognize him" (Thompson-Cannino, Cotton, Torneo 213). After Cotton's exoneration, Jennifer sought him out to apologize for her colossal and costly blunder. They became close friends, co-authored a book which they subtitled "Our Memoir of Injustice and Redemption," and became activists in the wrongful convictions movement. "They travel around the country working to spread the word about wrongful convictions and reforms – especially for eyewitness identification procedures – that can prevent future injustice" ("Ronald Cotton," The Innocence Project).



Intellectually, Jennifer Thompson accepted and acknowledged the fact of Cotton's innocence. The *logos* of scientific evidence, Poole's confession, and unimpeachable proof of Ronald's false conviction convinced her that she made a

dreadful mistake. However, she has continued to suffer the consequences of the powerful *mythos* created by years of persistent, authoritative, endorsement of her mistaken identification. For over a decade, Police officers, detectives, prosecutors, judges, and juries had been telling her that she had accused the right man and recognized the right face. They had used her accidental mistake to crush the life of an innocent man and then drank champagne toasts to justice. That *mythos* took its toll on Jennifer. For years after Ronald's exoneration, she continued to have nightmares of her 1984 ordeal. In those nightmares, the face of her rapist was still the face of Ronald Cotton. "I know Ronald Cotton is not my rapist, but I cannot get him out of my nightmares. He's still in my memory. . . . Maybe Bobby Poole's face should be there, I don't know. But, not Ronald's. And how do I remove that?" (*Gates PSL Transcript* 11)

F. The *Logos* and *Mythos* of Human Memory

Jennifer Thompson's confusion of Ronald Cotton for Bobby Poole teaches a frightening cautionary tale about the risks of eyewitness mistakes of the sort that are implicated in 72 per-cent of all documented cases of wrongful convictions ("The Causes of Wrongful Convictions," Innocence Project). As I discussed in Chapter One of this dissertation, the phenomenon of identification error occupies a battleground between the forces of scientific *logos* and the *mythos* of traditional reliance on authoritative discretion jury verdicts, and common sense. On the side of *logos*, decades of scientific research has confirmed that eyewitness mistakes are really errors of human memory. When Jennifer identified Ronald Cotton as her rapist, she was remembering an event that never happened – she remembered that Ronald had raped her when in fact he had not. "Eyewitness testimony . . . relies on the accuracy of human memory" (Loftus, Ketcham 15) and human memory has been proven to be a fragile instrument. Although *logos* teaches that "human memory is far from perfect or permanent" (Loftus, Ketcham 17), *mythos* insists that "memories are preserved intact, our thoughts are essentially imperishable, and our impressions are never really forgotten." No less an authority than Sigmund Freud believed that long-term memories remain perfect and inviolate, buried "deep in the unconscious mind, too deep to be disturbed by ongoing events and experiences" (Loftus, Ketcham 16).

To the contrary of *mythos*'s conventional wisdom, psychological scientists have identified memory as a malleable faculty, and individual memories as highly vulnerable to extraneous influence. Not only can memories of specific occurrences be altered by

the occurrence of other events (Steblay, Wells, Douglass 2), but people can be made to “remember” events that have never taken place. Entirely false memories of events that never happened in the first place can be implanted in human consciousness.

In 1995, the eminent cognitive psychologist Elizabeth Loftus reported on an experiment in which she and her colleagues attempted to convince 24 adult research subjects that they had gotten lost in a shopping mall when they were between the ages of four and six. The subjects thought that were participating in a test of childhood recollection, whereas in fact Loftus intended to “plant a pseudo-memory . . . that would be at least mildly traumatic, had the experience actually happened” (Loftus 72). After interviewing her subjects’ relatives, Loftus

constructed the false event using information about a plausible shopping trip provided by a relative, who also verified that the participant had not in fact been lost at about the age of five. The lost-in-the-mall scenario included the following elements: lost for an extended period, crying, aid and comfort by an elderly woman and, finally, reunion with the family.

(Loftus 72) Loftus’s experiment resulted in 29 percent of her subjects “remembering” the totally fictitious event. Some of the subjects even enriched the false memory with simulated details which they spun out of the whole cloth of their imagination. One subject recalled that her female rescuer was “heavy-set,” “older,” and “nice.” Loftus also reported another researcher’s success in planting the false memory of a childhood accident in which the subject spilled a punch bowl at a wedding reception.. There, 25 percent of the subjects remembered the non-occurrence with one subject “recalling” the particulars that the wedding had been outdoors and that he was punished for his carelessness (Loftus, Pickerell 723, 725). By 1997, Loftus could report that

My students and I have now conducted more than 200 experiments involving over 20,000 individuals that document how exposure to misinformation induces memory distortion. In these studies, people “recalled” a conspicuous barn in a bucolic scene that contained no buildings at all, broken glass and tape recorders that were not in the scenes they viewed, a white instead of a blue vehicle in a crime scene, and Minnie Mouse when they actually saw Mickey Mouse. Taken together, these studies show that misinformation can change an individual’s recollection in predictable and sometimes very powerful ways.

(Loftus 71) Loftus calls the power of extraneous influences to create false memories or modify real ones the “misinformation effect.” It occurs “when people who witness an event are later exposed to new and misleading information about it, [causing] their recollections [to] become distorted” (Loftus 71).

In Ronald Cotton’s case, Jennifer’s identification of the wrong man began as a simple but predictable mistake. Ronald’s picture was in the original photo-array and Bobby Poole’s picture was not. She believed in the detectives’ competence, she assumed that they had found her rapist, and she expected that they had included his picture in the array for her to find (*Gates PSL Transcript* 8. Thompson-Cannino, Cotton, Torneo 32). In such cases, it is common for witnesses “to identify the person . . . who most closely resembles the eyewitness’s memory of the perpetrator relative to other members of the group” whether the actual criminal appears in one of the photographs or not (Wells, Loftus 157). At first, Jennifer’s identification was tentative – “I think this is the guy” – but with a little prodding from a detective she became certain (Thompson-Cannino, Cotton, Torneo 33). The officers rewarded that selection with their praise and cemented it with their reinforcement: “Good job, Jennifer. We thought that was him” (*Gates PSL Transcript* 8). The positive feedback of this and subsequent

reinforcements made Jennifer forever certain that Ronald Cotton was the rapist and indelibly planted that false memory in her consciousness, even to the point that she saw him in her nightmares after knowing him to be innocent.

This tendency of positive feedback to create false certainty “has been conceptualized in the research literature as a system variable that has powerful impact on the retrospective judgments of an eyewitness in the immediate aftermath of a lineup decision.”

Fifteen years of research tell us that when a lineup administrator confirms an eyewitness’s lineup identification, (“Good, you identified the suspect”), the witness is subsequently likely to render a significantly inflated retrospective report of the quality of the identification process (certainty and ease of the identification) as well as his or her viewing experience for the crime event (how good the view was, how much attention was paid to the event) and other testimony-relevant judgments.

(Steblay, Wells, Douglass 2) In other words, we tend to believe that our perception of events is correct when outside agents and circumstances corroborate that belief.

Returning now to Shinbone (or Twotrees), we can appreciate that either Tom or Ransom (or Burt or Ransome) operates under the delusion of a false memory about who shot Liberty Valance. Both memories, however, are powerfully reinforced.

Ransom(e) thinks that he is the killer based on the consensus of the community: including, in the movie, several onlookers who believe him to be the only shooter and see Liberty fall dead after a single shot. Tom/Burt thinks that he is the killer because he knows Ransom(e) to be a hapless gunman and he believes in his own proficiency: “I fired once, and I generally don’t miss” (Johnson 45). Accordingly, this “feedback effect” (Steblay, Wells, Douglass 2) causes each shooter to believe that he is the killer and

influences their recollections of the events they observed. Both recall the shooting as having occurred consistent with their own beliefs and Ford shows us the cinematic evidence of their different recollected realities. In the aggregate of those realities, those two characters coalesce into *the man* who shot Liberty Valance.

G. Print the Legend

Still, there are several textual and cinematic reasons to disbelieve both Ransom's and Tom's accounts of the shooting. The story, unlike, the film, does not have Liberty tormenting Ransome with preliminary near-misses. The two shooters fire together and maybe Ransome just gets lucky. Certainly, when Burt takes credit for being the actual killer he gives Ransome no persuasive account of his own involvement in the duel, or even why he was nearby in the first place. Ransome's subsequent declaration that "I shot Liberty Valance" is hard to disprove, and there is no reason from the text to believe that Ransome ever really does credit Burt with saving his life. He never shows any gratitude and never considers Burt to be his friend.

In the film, we see greater persuasive evidence of Ransom's ineptitude with a gun and the chances that he could have shot anyone at all – much less, "the second toughest man south of the Picketwire" – seem vanishingly remote. Add to that the fact that Liberty sadistically shot Stoddard's dominant right arm and forced him to fight left-handed and we are left to wonder how or if Ransom could ever have actually believed that his aim had been true. On the other hand, we also have reason to question Tom's identity as the killer because we have good cause for skepticism about the entirety of the Stoddard flashback. As Matheson has noted, Stoddard claims that he is giving Clark the scoop because he was fired from his job on the *Shinbone Star*, but the audience never hears a word about any such thing (Matheson 364). We can take the matter further than Matheson does and notice that in the Stoddard flashback, Ransom works at the *Star* right up to the time that Liberty destroys its offices and brutalizes its

editor. Directly after that he becomes territorial delegate and then congressman. Thus, in Stoddard's flashback memoir, there is no time for him to ever have been fired and his alleged motivation rings false. It is as if "Stoddard's story. . . is simply made up as it goes along" (Matheson 364). If we cannot credit the truth of Stoddard's larger flashback, then we can not be sure that he ever really received the blockbuster revelation that occupies Tom's shorter internal flashback and all we can know for certain about the death of Liberty Valance is that the railroad conductor – the only character who speaks about the shooting outside of either flashback sequence – credits it to Stoddard.

The theatrical trailer for *The Man Who Shot Liberty Valance* told potential moviegoers that the film's characters would "bring America's frontier to heroic life again" and that only one of those characters "could be sure that he knows the real identity of the man who shot Liberty Valance." Indeed, however, none of the characters really does know for sure. Kent Anderson correctly calls the movie "a memory play" and notes that the story is composed of "a series of cinematic sketches of distant things remembered" (Anderson 11). Alan Barr places the truth deeper in the mythic past, noting that "In the modern Shinbone, only a select remnant can even remember the man in the plain coffin, the once-heroic and esteemed Tom Doniphon. The archives of the *Shinbone Star* notwithstanding, the current editor is ignorant of this near-mythic figure" (Barr 175). Matheson suggests that Stoddard's account is the dubious and time-addled recollection of an "aging politician" (Matheson 358). Anderson feels that the film "begins as a mystery" without seeing that it remains a

mystery through and through (Anderson 11). In a case where the only evidence comes from memory, Jennifer Thompson and Elizabeth Loftus teach us not to be too sure of the proper verdict.

In the search for a solution to Anderson's mystery, Johnson's text gives us a tantalizing clue. In that story, the lethal duel does not arise because Foster seeks to avenge Liberty's beating of Peabody: there is no Peabody in the story. Ransome instead seeks vengeance for his own beating and Liberty is willing to accommodate him even though he almost never comes to town, there being "nothing he'd want here in Towtrees" (Johnson 30). His eagerness to fight Foster stems from his contempt of the man "that boasts how he can read Greek" (Johnson 40) and who carries around a little book written "by a man named Plato" (Johnson 37). At the time that he meets Liberty in the streets of Twotrees, Ransome Foster does not yet represent law and order. In spite of telling a storekeeper that he has "read law" and that he "may lay claim to being a scholar" (Johnson 35), he did not bring any law books into the West and he does not take up the practice of law until long after the gunfight. Nonetheless, he does represent the sort of Eastern erudition which Liberty finds simultaneously impotent – Foster remains "the dude that anybody can kick around" – and threatening (Johnson 40). In the film, the connection between erudition and lawfulness is made even more explicit by the message on Stoddard's schoolroom blackboard: "Education is the basis of law and order."

Thus, the Liberty Valance who represents the "murderous civil strife" (Livingstone 219, quoting Newell 47) that inhabits Frederick Turner's not yet closed

American frontier (Anderson 11) fears both the rational faculty symbolized by Ransome and the taming violence symbolized by Burt. Livingstone makes the Platonic connection by recalling the *Georgias* in which Socrates has the philosopher describe the natural man who gives free rein to his appetites. This is Liberty, posits Livingstone, contrasting him to Ransom who “displays an alternative manliness” (Livingstone 219). Heffernan sees *The Republic* in the movie and opines that “In *The Man Who Shot Liberty Valance* we encounter the tensions that Plato describes between the rational, spirited, and desiring elements of the soul writ large in a colorful cast: we witness up close the fragility of an emerging polis” (Heffernan 151). Without disputing the elegance of either one of these Platonic references, and without knowing which particular dialogue Ransome Foster preferred in his little Greek book, we might carry the Platonic analysis forward by seeing Liberty and his two nemeses – in the book and the film – in the context of Plato’s *Phaedrus* and his Parable of the Charioteer.

The Phaedrus deals with such far ranging questions as friendship, love, reincarnation, rhetoric, the relative values of speech and writing, and, most importantly to us, the nature of the human soul. Plato had already taken up the subject of the soul in *The Republic* where he confronted the philosophical dilemma raised by his Theory on Non-Contradiction: a thing cannot be itself and not itself at the same time. Commonplace observations reveal that humans sometimes love and loath the same thing, desiring and being averse to the same stimulus. Thus, concluded Plato (speaking as Socrates) the person who can simultaneously occupy two different states

of desire must be more than a singularity. That person must have a multiplex consciousness consisting of distinct, competing, faculties.

It is obvious that the same thing will never do or suffer opposites in the same respect in relation to the same thing and at the same time. So that if ever we find these contradictions in the functions of the mind we shall know that it was not the same thing functioning but a plurality.

(Plato, *The Republic*, Book IV, 436)

As Heffernan observes, in *The Republic* the three soul-elements are the rational, the spirited, and the appetitive and Plato makes this divided soul recapitulate the nature of the city state whose classes of citizens must coexist in order for the state to flourish. In the *Phaedrus*, the soul has three parts joined together like a driver with two horses.

We will liken the soul to the composite nature of a pair of winged horses and a charioteer. Now the horses and charioteers of the gods are all good and of good descent, but those of other races are mixed; and first the charioteer of the human soul drives a pair, and secondly one of the horses is noble and of noble breed, but the other quite the opposite in breed and character. Therefore in our case the driving is necessarily difficult and troublesome.

(Plato, *The Phaedrus*, section 246a). Thus, Plato's charioteer integrates – "drives" – the dual faculties of reason and violence. Neither one can reign dominant because ultimately they are under the unifying control of the charioteer. The driving may be as "difficult and troublesome" as taming a frontier but eventually these two faculties become merged into one entity, they coalesce into the motive identity of the charioteer. A bystanding eyewitness would not be able to differentiate their opposite characters, they have both become incorporate into the personality of the driver.

Thus it is for the two cinematic eyewitness accounts of the shooting of Liberty Valance. Was it Ransom Stoddard, rational lawgiver, who quelled the libertine chaos? Or was it Tom Doniphon, high-spirited gunfighting ruffian? This is a good question, but ultimately it becomes as meaningless as “which of Plato’s horses pulls the chariot?” The dual narration of the book and movie and especially the film’s divergent, and inconclusive, eyewitness accounts have unified these characters into one narrative identity. The man who shot Liberty Valance is himself a unification of reason and force; law and violence; Ransom and Tom. The two Shinbone rivals become integrated into the charioteer of civilizing futurity; one force controlling two motors. One sovereignty pulled by two natures, the force of reason and the force of force. *Logos* and *mythos*.

Accordingly, when the Ransome Foster of the book insists against all odds “Then I shot Liberty Valance” he is telling the truth, without regard to whose bullet found its lethal mark. And when the Ransom Stoddard of the movie fails to correct the railroad conductor who tells him that “Nothing’s too good for the man who shot Liberty Valance,” he takes no more praise than he deserves. John Ford’s screenwriters put this integration of identities into perfect focus with the most famous line of the film, spoken by the newspaper editor Maxwell Scott. When Scott refuses to publicize the Doniphon-as-killer story, he explains his decision. “This is the West, Sir. When the legend becomes fact, print the legend.” Clark doesn’t say that the legend and the fact can live side by side, or even that there is some reconcilable middle ground between the “legend” (Ransom is the killer) and the “fact” (Tom is the killer). One has simply

become the other, they are an undivided whole. The legend and the fact have become one. Reason and force have unified into the sovereign *mythos* that won the West.

Print the legend.

CHAPTER FIVE

“Unfortunate Guilt:”

The State of Exception in Twenty-first Century America

“Who can see the excitements and convulsions which may arise in our future history.”

Justice John McClean
Dissenting Opinion in *Ex Parte Wells*
59 U.S. 421, 319 (1855)

A. Introduction

In the last three chapters I have discussed the ways in which three important texts about frontier justice demonstrate the contest between *logos* and *mythos* for sovereign authority to quell the wilderness of social lawlessness. In *To Kill a Mockingbird*, we saw that the unalloyed *logos* of Atticus Finch failed dismally until Heck Tate allowed it to become merged with Boo Radley’s brute force. In *The Ox Bow Incident*, we saw that a resort to *mythos* alone, the prerogative to suspend logical inquiry, contributed to even greater social chaos and disorder. But then, in *The Man Who Shot Liberty Valance* we saw *logos* and *mythos* consolidate successfully to conquer the frontier’s wild anarchy and make room for civilization. In closing this dissertation, I will discuss the extraordinary legal faculty of executive clemency to demonstrate that the contest between *logos* and *mythos* continues to play itself out in modern American government and that we still live in the state of exception which that contest creates. In doing so, I will examine the battle that *mythos* wages for supremacy over *logos* by analyzing events that are taking place even as I write this final chapter.

B. “The most amiable prerogative of the crown.”

Executive clemency is a governmental act which mitigates or removes the consequences of a person’s legal guilt. In a very real and yet unreal way it changes our understanding of past events to transform guilt to innocence. The United States Supreme Court has called it “an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed” (*Ohio Adult Probation v. Woodward* 281). Graceful forgiveness even after proof of guilt recalls Jesus’s rescue of the woman caught “in the very act” of adultery from the mob of Pharisees, none of whom dared to “cast the first stone” (*Bible, Gospel of John* 8:1-11). It has continued through early British justice with Lord Edward Coke’s 1680 recognition that clemency is “a work of mercy, whereby the King . . . forgiveth any crime, offence, punishment [or] execution” (Coke 223). In his eighteenth century *Commentaries on the Laws of England*, William Blackstone wrote that “the last and surest resort [to mercy] is the king’s most gracious pardon; the granting of which is the most amiable prerogative of the crown” (Blackstone, Chapter 31). Clemency is written into the Coronation Oath of the British Sovereign which requires kings and queens to promise that they will “cause Law and Justice, in Mercy, to be executed in all [their] judgments” (Kershaw, Simon).

Executive clemency is one of only two criminal justice procedures written into the main text of the United States Constitution, trial by jury is the other. Presidents are empowered “to grant Reprieves and Pardons for Offences against the United States” (*United States Constitution*, art. II, section 2, clause 1). They have used that power to

dispense mercy but also to correct historical injustice, as in Johnson's pardon of Dr. Richard Mudd, to repair national divisions, as in Carter's blanket amnesty for draft evaders, and to reward political loyalty, as in George W. Bush's commutation of Scooter Libby's prison term. The Constitution which eventually conferred this power evinced Alexander Hamilton's view that "[t]he criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel." Recognizing the essential value of that power, Hamilton counseled its hardy use. "Humanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed" (Hamilton, *Federalist* 74).

Although the placement of the American pardon power with the chief executive reflects the English tradition of placing that authority with the king or queen (*Ex Parte Wells* 308-17), there was no easy agreement about where that power should reside. The Framers, doubtful of unchecked monarchical discretion, feared the abuses which might attend placing the power in a single hand. Edmund Randolph cautioned that granting the President sole power to pardon traitors could allow him to camouflage his own treason by protecting his co-conspirators (Duker 501-02). George Mason agreed that an unscrupulous president could use his unshared pardon power "to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt" (Duker 502). Excluding the pardon power from the system of balanced authority that checked all other constitutional powers seemed to ignore James Madison's insight that "[i]f men were angels, no government would be

necessary.” Perhaps, as Madison observed “[a] dependance on the people is . . . the primary control on the government” but that control might not always be enough. Madison knew that “experience has taught mankind the necessity of auxiliary precautions” (Madison, *Federalist* 51).

Future Supreme Court justice James Iredell made the eventual prevailing argument that the power was uniquely ill-suited to anticipatory restraint. “It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice” (Harris, Redmond 4). Iredell and Hamilton accepted John Locke’s view that with respect to pardons a strong executive should have the power “to do many things of choice which the laws do not prescribe” (Locke 384-86). The Constitutional Convention defeated a motion that would have required the Senate’s consent for the granting of pardons and followed Iredell’s advice that the power be vested in a duly elected executive: “a man who had received such strong proofs of his possessing the highest confidence of the people” (Harris, Redmond 3-4). While such a placement carried some risk of presidential abuse, that danger would be powerfully mitigated by the likelihood that such a leader would be unwilling to earn “the damnation of his fame to all future ages” (Duker 503).

C. "It's been a rough couple of days"

Executive clemency has two forms. The first is an absolute *pardon* which completely erases the prisoner's conviction and absolves him or her of any consequences of guilt. "A pardon is the exercise of the sovereign's prerogative of mercy. It completely frees the offender from the control of the state. It not only exempts him from further punishment but relieves him from all the legal disabilities resulting from his conviction. It blots out the very existence of his guilt, so that, in the eye of the law, he is thereafter as innocent as if he had never committed the offense" (*Pennsylvania Prison Society v. Cortes* 222). The second form of clemency is *commutation* which reduces the prisoner's sentence, usually so that he or she can be released from prison on parole.

Both forms of clemency occupy a strange place in a system of judicial adjudication. "The power of commutation overrides the law and the judgments of courts. It substitutes a new, and, it may be, an undefined punishment for that which the law prescribes a specific penalty" (*Ex Parte Wells* 319). Austin Sarat cites French philosopher Jacques Derrida as well as Giorgio Agamben (whom we met in Chapter One) for the recognition that "clemency exists at several fault lines" of legal consistency (Sarat, *Mercy on Trial*, 73). Sarat places the pardon power squarely within Agamben's power to decide the exception and agrees with Derrida that the exception-making act of clemency places the pardon power "on the terrain of law" while still making it a "power above the law." (Sarat, *Mercy on Trial*, 72-73). Sarat observes that while "sovereignty embodies a conception of power that is decisionist" and which "cannot, of course, live

without the conception of a norm,” the clemency power which derives from the very essence of that sovereignty exists in an “inside/outside relation to law” (Sarat, *Mercy on Trial*, 74, 72). Clemency “appears to be outside of, or beyond, the law and thus [is] a threat to a society dedicated to the rule of law” (Sarat, *Mercy on Trial*, 69). The power of a sovereign authority – whether president, governor, or king – to pardon crimes and commute sentences creates “a suspension of the law” (*Ex Parte Wells* 319). It is “essentially lawless:” a condition that Agamben and Derrida find “troubling” (Sarat, *Mercy on Trial*, 30).

These philosophical concerns express themselves in political controversies, resulting as much from the methods of clemency as from its subjects. When Gerald Ford pardoned Richard Nixon’s Watergate crimes, he invoked domestic tranquility and national healing. He explained that “the tranquility to which this nation has been restored by the events of recent weeks could be irreparably lost by the prospects of bringing to trial a former President of the United States” (Ford Proclamation). That proclamation was, like the pardon itself, a political and not a legal requirement. Nothing in the Constitution requires an executive to explain his pardons. In fact, the United States Supreme Court has recognized that the “broad discretion” residing in pardoning authorities “need not be fettered by the types of procedure protections” required elsewhere in the law by accepted notions of due process (*Ohio Adult Parole Authority v. Woodward* 282) . While one Justice has opined that the Constitution “might” be offended if “a state official flipped a coin to determine whether to grant clemency” (*Ohio Adult Parole Authority v. Woodward* 289), such arbitrary decision

making has never actually been condemned as unconstitutional when it comes to pardons.

Most of the original thirteen states followed the federal lead and gave their governors the solitary power to grant clemencies (Harris, Redmond 4). Today, twenty-four states retain that system of individual gubernatorial authority. Ten states give that authority to a state agency, often called the Board of Pardons, which acts by its own authority. Six states employ a system of shared responsibility which requires the governor to obtain, but not necessarily accept, the advice of the board of pardons before granting clemency. The other ten states forbid their governor from granting pardons without the affirmative approval of a “gatekeeper” board (Clark).

In Pennsylvania before 1997, either form of *clemency* – pardon or commutation – required a majority vote of the Board of Pardons and the Governor’s approval. On the other hand, the power to *reprieve*, or postpone the effective date of, a prisoner’s sentence was the Governor’s solitary power and it did not require any authorization by the Pardons Board. The Commonwealth’s constitution provided that:

“In all criminal cases except impeachment the Governor shall have the power to . . . grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons....”

(*Pennsylvania Constitution*, art IV, section 9(a), amended 1997)

Pennsylvania’s gatekeeper Pardons Board was comprised of five members, always including the Lieutenant Governor. In 1992, that member was Mark Singel. In

1997, amidst great controversy, the pardons gate became much narrower. It all began with Reginald McFadden.

Margaret Kierer attended the opera at Manhattan's Lincoln Center on September 27, 1994. After the performance, the 78 year old arts lover took the train to Long Island and started walking home from the train station around midnight. She never made it to her front door. The next day her body was found five blocks from her apartment. She had been raped, robbed, strangled, stabbed six times, and tossed over a fence. A few hours later, 41 year old Reginald McFadden tried to use her ATM card. He was arrested for her murder and thereby changed the Pennsylvania law of pardons.

Reginald McFadden had been sentenced to life in prison for the 1969 suffocation murder of 60 year old Philadelphian Sonia Rosenbaum when he was only sixteen (Liptak). He spent the next twenty-four years as a model prisoner and on August 27, 1992, the Pardons Board voted four to one to commute his sentence. Governor Robert Casey released him from prison on July 7, 1994 (Berger) and he quickly moved to New York State in violation of the terms of his parole. Pardons Board member and Attorney General Ernie Preate cast the lone dissent from the commutation vote. "In my view, he's a manipulator," recalled Preate. "I didn't think his application was sincere" (Aig, May 29, 1995).

Preate was proved right two months after McFadden's release. On September 6, 1994 McFadden kidnapped Robert Silk in Elmont, Long Island. Silk's decomposed body was found in Rockland County four months later (Berger). On September 21,

McFadden grabbed Jeremy Brown in front of her South Nyack home while she was putting out her recyclables, dragged her back into her house, and raped her three times over the next five hours (Aig, November 6, 1995). Six days later he murdered Margaret Kierer.

On the day Reginald McFadden murdered Margaret Kierer, Mark Singel and Tom Ridge were locked in a close race to become Pennsylvania's next governor. Singel held a small lead (Janofsky), but he had voted to commute McFadden's sentence thus giving Ridge what experts called "the first hard and true issue" in the campaign (Cattabiani). Six years earlier, George H.W. Bush had ridden Michael Dukakis's furlough of Willie Horton all the way to the White House, and Ridge thought he could use McFadden to a similar purpose. Singel apologized for the McFadden vote and emphasized the fact that during his tenure on the Board of Pardons only eight of 2,614 clemency petitions were approved. Nonetheless, Ridge flooded Pennsylvania with campaign ads portraying Singel as soft on crime. "Tom Ridge wants to put criminals in jail. Mark Singel voted to let them go. Which do you want as governor?" asked a Ridge television commercial (McDonald). Preate, who had voted against McFadden, chimed in to support his fellow Republican. "Ridge is much more conservative and hard-line, while Mark is very, very liberal in relation to the others on the board," claimed Preate (Janofsky). Mark Singel clearly understood the political danger presented by his McFadden vote. "It's been a rough couple of days," he observed after McFadden's indictment (Janofsky). He was, on that point at least, correct. Ridge won the 1994 election by a margin of almost two-hundred thousand

votes (*The Pennsylvania Manual* 7-18, 7-19). He was not yet finished with Reginald McFadden.

Although Singel's vote for McFadden had no practical effect, even if he had voted against commutation McFadden would have still had the three to two majority which was then sufficient under Pennsylvania's constitution, Governor Ridge wanted to close the door on future clemency. In 1997 he introduced a tough-on-crime legislative package, including a ballot initiative which would amend the state constitution to require a unanimous vote of the Pardons Board before a governor could commute a life term or a death sentence. "If we require a unanimous decision of a jury to send a criminal to prison for a life or death sentence," Ridge declared, "then we should demand no less than a unanimous decision of the Board of Pardons to recommend granting them a pardon or commutation" (Eshelman). Naturally, all criminal convictions require unanimity, not just life or death verdicts, but former-prosecutor Ridge neglected to mention that. The amendment ballot passed on November 4, 1997 and Article IV, section 9(a) of the constitution was amended to provide that "no pardon shall be granted . . . in the case of a sentence of death or life imprisonment [except] on the unanimous recommendation in writing of the Board of Pardons." Two permanent members of the Pardons Board were *ex officio* politicians, the lieutenant governor and the attorney general, who could be expected to remember the electoral lessons taught by Reginald McFadden and Mark Singel. Pennsylvania was already one of the only states where life prisoners had no chance for parole (DeJesus). It was also a death

penalty state. Now, on the eve of the twenty-first century, Ridge's constitutional amendment made it one of the hardest in which to get clemency.

D. “Trying to Circumvent the Judicial Process”

Terrance Williams was eighteen years and three months old when he used a tire iron to beat Amos Norwood to death in a Philadelphia cemetery on June 11, 1984. He returned later, doused Norwood’s body with gasoline, and set it ablaze. It took four days for someone to find Norwood’s charred remains, and after the police used his teeth to identify him they discovered that someone was using his credit card. The investigation led to Terry Williams who was arrested on July 23. His accomplice in the Norwood murder, Marc Draper, was the chief witness against him at trial and Williams was convicted and sentenced to death (*Commonwealth v. Terrance Williams*, 524 Pa. 218). The jury had no trouble finding that Terry had “a prior significant history of violent crimes” and therefore deserved execution. Six months before killing Norwood, Terrance had murdered Herbert Hamilton by stabbing him to death with a ten-inch butcher knife and beating him with a baseball bat. Two years before that he had invaded the home of Don and Hilda Dorfman, terrorized them at gunpoint, and robbed them of cash, jewelry, and their car (*Williams v. Beard*). After three decades of appeals, his execution for the Norwood murder was scheduled for October 3, 2012 (Dean).

Pennsylvania had not executed one of its citizens since killing serial killer Gary Heidnik on July 6, 1999 (Terrance Williams Clemency Petition 3). Heidnik, like the two other prisoners whom Pennsylvania had executed since the United States Supreme Court reinstated capital punishment in 1977, was a “volunteer:” he had dropped all of his legal appeals and surrendered to his fate. Terrance Williams took a different

course. He filed appeal after appeal and even as his execution date loomed near he applied to Philadelphia judge M. Teresa Sarmina to overturn his sentence. Such last-minute applications rarely work, so Williams's lawyers also asked the Board of Pardons to commute his death sentence to a life term. His petition called it a "unique case." In a way it was. No Pennsylvania prisoner had come this close to an involuntary execution in over fifty years and Williams appeared to have a convincing argument. He claimed that both Norwood and Hamilton had raped him for years before their deaths and that their killings, while still illegal, resulted from victimization rage and thus did not warrant execution. His petition alleged that Williams had only recently revealed the abuse to a psychologist and child abuse specialist, and that earlier disclosure had been thwarted by shame and confusion. As Williams' lawyers pointed out, "it is extremely difficult for victims of sexual abuse to come forward and publicly acknowledge their abuse. This is particularly true with child victims" (Terrance Williams Clemency Petition 3).

Those child abuse allegations resonated in post-Jerry Sandusky Pennsylvania. Without mentioning the disgraced football coach by name, Williams invoked "the sobering events at Penn State" as grounds for believing him. The politics of clemency gave the Penn State angle special meaning. Governor Tom Corbett, who had signed Williams's death warrant on August 9, 2013, was the attorney general who started the investigation at Penn State. Pardons Board member Linda Kelly was the attorney general who arrested Sandusky. Williams's lawyers emphasized that both Corbett and Kelly had vocally condemned child sexual abuse. Further, in the aftermath of

Sandusky's arrest, both had publically sympathized with the child victims' late reports of abuse, agreeing that it must have been "incredibly difficult . . . to unearth long buried memories of the shocking abuse that they suffered" (Terrance Williams Clemency Petition 3).

Even Philadelphia district attorney Seth Williams, whose office was fighting to execute Terrance Williams, had once recognized that "it is extremely difficult for sexual abuse victims to admit that the assault happened"(Terrance Williams Clemency Petition 3). That recognition, however, did not stop the district attorney from condemning Terrance Williams and his lawyers for their "last ditch effort to escape punishment" and blasting them for "trying to circumvent the judicial process." The Williams clemency effort was "especially inappropriate in light of his violent history;" it was based on assertions that did not satisfy the formal rules of courtroom evidence (it was "hearsay . . . double hearsay, even triple hearsay in some instances"); it ignored the fact that many courts had ratified his death sentence ("From the Philadelphia Court of Common Pleas, through the Pennsylvania Supreme Court, to the United States District Court, to the United States court of Appeals, up to the United States Supreme Court, all upheld Williams death penalty conviction.") and it did nothing to change the simple fact that Williams was indeed guilty of murder ("Statement on Terrance Williams Clemency Petition").

On September 16, 2012, the Pardons Board voted three to two to approve Williams' request for clemency (Hurdle). This majority win was nonetheless a defeat for Williams because of the 1997 constitutional amendment which required unanimity. The

scheduled execution was seventeen days away. Nothing but Judge Sarmina stood in its way (Duker 503).

Seth Williams's objections to Terrance's commutation request pointedly ignored the history, purposes, and nature of clemency. Furthermore, by complaining about a possible subversion of the judicial process and accenting the persistent fact of Terrance Williams's guilt he vocalized the larger obstacles which clemency faces in twenty-first century America.

First, the history of clemency jurisprudence demonstrates that its use supplements the judicial process and does not subvert it. The United States Supreme Court recognized this truth most explicitly in its decision in *Herrera v. Collins*. After denying Herrera's efforts to seek a judicial determination of his innocence, the Court held that the availability of clemency mitigated the harshness of that denial.

"Clemency is deeply rooted in our Anglo-American tradition of law, and it is the historic remedy for preventing miscarriage of justice where judicial process has been exhausted. In England, the clemency power was vested in the Crown and can be traced back to the 700s . . . Executive clemency has provided the 'fail safe' in our criminal justice system . . . It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible."

(*Herrera v. Collins* 415).

Justice Scalia was glad that clemency relieved the courts of any obligation to decide the constitutionality of executing the innocent. "With any luck, we shall avoid ever having to face this embarrassing question again, since it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce

an executive pardon” (*Herrera v. Collins* 428). Herrera’s own efforts to obtain executive clemency failed and he was executed on May 12, 1993.

The embarrassment of Scalia’s question has been exacerbated by subsequent state and federal legislative limitations on a prisoner’s access to judicial review. The Pennsylvania Post Conviction Relief Act and the federal Anti-terrorism and Effective Death Penalty Act (“AEDPA”) both impose strictly enforced time limits on the presentation of post-conviction claims of innocence. It was AEDPA’s time deadlines and its requirement that federal courts defer to state courts on many critical issues that persuaded Scalia that Troy Davis did not deserve a hearing. Davis was executed after asking the Georgia Board of Pardons for commutation. In spite of “the extreme doubt in Davis’s case,” his clemency request was rejected and he was executed on September 21, 2011 (Clayton).

The conflation of innocence with clemency is illustrated by District Attorney Williams’s assertion that proof of guilt should frustrate clemency. Certainly, innocent people do not need mercy -- they only need justice. Only the guilty need dispensation for their proven guilt. Chief Justice William Rehnquist agreed in 1998 when he explained that a grant of authentic clemency never needs proof of innocence. Instead, it acts alone as “a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations” (*Ohio Adult Probation Authority v. Woodward* 273). As legal experts Jonathan Harris and Lothlorien Redmond observe, “when a convicted and condemned prisoner proves his or her actual innocence (presumably after years on death row), it is

no great act of grace to grant that prisoner freedom. Nor is it an act of mercy or humanity, rather, it is simply what is due. The release of a person wrongfully convicted of a crime is no act of discretion, but rather, is mandatory. It is not clemency, but exoneration” (Harris, Redmond 2). Clemency which requires proof of innocence is not clemency at all.

E. The Politicalization of Clemency

From 1995 to 2014 the Pennsylvania Board of Pardons received twenty-nine requests for commutations of life sentences. It granted only six (Pennsylvania Board of Pardons website). Demands for proof of innocence and respect for the original conviction combined with political expediencies to misdefine clemency. As law professor Len Sosnov explains, Pennsylvania governors stopped believing in mercy after the McFadden debacle. “They would rather keep every single inmate in than risk damage to their political career if a person was released and did something that got bad publicity” (DeJesus). The federal experience corresponds with that Pennsylvania practice. Even in this age of mass-incarceration (Alexander 7-9), one commentator has noted that President Obama has pardoned almost as many Thanksgiving turkeys as drug offenders (Reilly).

Pennsylvania’s two-tiered clemency process is managed in such a way as to allow a high level of secrecy, potentially concealing an equally high level of caprice. Its records, while technically open, are difficult to access. Its hearings, while legally open to the public, are not transcribed and so unavailable to scholarly study. Its decisions, while momentous to the criminal justice system, are not catalogued in any fashion that allows for analysis or review. Faced with this reality, the best tools for understanding the Pardons Board and its work are the tools of ethnographic study: observation, archival review, and interviews.

I conducted such an examination between January 7, 2014 and May 5, 2014 using the following methods.

Interviews: I interviewed former Pennsylvania Attorney General Ernest Preate, Jr. at his law offices in Scranton, Pennsylvania on April 28, 2014. As attorney general, Preate was a member of the Board of Pardons from 1989 to 1995. He is now engaged in the private practice of law.

On April 5, 2014, I interviewed Pardons Board Secretary Tracy Foray. Foray was the administrator of the Board's operations and its custodian of records. She attended the Board's sessions and presided over the agenda at the Chairman's direction.

On May 5, 2014, I interviewed Professor John Rago by telephone. Rago is an associate professor of law at Duquesne University and the former Chairman of the Pennsylvania Senate's Advisory Committee to Study Wrongful Convictions. He was the principle author of that Committee's final report and remains active in criminal justice reform efforts throughout the Commonwealth.

Archival review: I obtained access to the Board's archives by filing three requests under Pennsylvania's Right to Know Law. These requests sought access to pardons applications and records of board action on those applications. The archival review took place on two occasions, January 27, 2014 and April 5, 2014 at the Board's administrative offices at 333 Market Street, Harrisburg. During those visits, I reviewed between fifty and sixty applications. Some of those applications had attached to them the Governor's Grant of Pardon, indicating that the application had been granted. The lack of such an attachment did not reflect a final denial because there is no time limit

for the Governor's action. The applications did not indicate whether or not the Board made or withheld a recommendation of clemency.

Although the Board of Pardons is not a judicial agency, it resembles a court in many respects. Thus, just as judicial records qualify as ethnographic archival data (Merry 129), the Board's records serve the same function. The value of ethnographic archival review became obvious during my interview with Board Secretary Foray. Foray confirmed that the board decisions are not docketed or filed in any fashion that allows for easy review. The only way to access them was by using the methodology which I employed – formal legal request and on-site study – and to her knowledge I was the first researcher ever to do that. Although all Board's staff members were cooperative during their dealings with me, their cooperation was likely motivated by their legal duty to comply with my requests rather than by any desire to assist my scholarly inquiries. During our interview, Foray asked me if I planned to make any further document requests. When I said that I did not, she replied, "My Right-to-Know person will be happy to hear that!" (Foray Interview)

Observations: The Board conducts two kinds of public proceedings: Merit Review Sessions and Public Hearings. The Merit Review Sessions are held in the Senate Hearing Room, 8 East Wing, Capitol Building, Harrisburg, Pennsylvania. The purpose of those sessions is to decide if an applicant will receive a Public Hearing. I attended and observed Merit Review Sessions on February 27, 2014 and observed 131 votes. Only one member of the Board, Lieutenant Governor Jim Cawley, was present with his administrative staff. The other four members participated by telephone. Public

Hearings are held in the Supreme Court Courtroom, Main Capitol Building, Room 437, Harrisburg, Pennsylvania. I observed twenty eight public hearings on February 20, 2014 and March 13, 2014.

The Board sessions are tape recorded and staff members are present to take notes. The audio-recordings are not transcribed and the Board website contains no link to transcripts or other descriptions of past hearings. If the Board renders written recommendations about the pardons applications it hears, there is no record of such opinions and they are not part of any public archive. The only record of the Board's actions is the vote taken in public session, and even that tally is not available for public review other than by formal request under the Right to Know Law. Thus, the Board members' questions and comments in public session are the best window into their individual and collective approach to their mission, and that information is only available to the on-site observer. Similarly, with respect to the existence of any hidden agendas of the Board the verbal exchanges within the courtroom provides the best evidence. Finally, the information which the Board receives about each application consists of more data than the bare application, but the full scope of that information is confidential. Foray refused my request for further details, stating "I don't think I can tell you that" (Foray Interview). Therefore, the nature of the inquiries which the board members express during their questioning of the applicant provides the best, though admittedly incomplete, insights into the information upon which they base their consideration. Here too, on-site ethnographic observation provides information which is not otherwise available.

Legal ethnography is nothing new, but previous studies have mainly concentrated on judicial proceedings such as trials, plea bargaining, traffic court, and the roles of advocates in the legal process (e.g., Austin; Bogira; Brickley; Conley, O'Barr; Cunningham; Maynard). None of my informants had ever heard of an ethnographic study of a clemency Board. The Board Secretary confirmed that no one had done such research in Pennsylvania during her tenure (Foray Interview); former Preate thought such a study broke new ground (Preate Interview); and Rago thought that such a study was important to alleviate public confusion about the pardon process (Rago Interview). An email inquiry to the Pennsylvania Joint State Government Commission confirmed that not even that research arm of the Pennsylvania legislature had never undertaken such a study. Therefore, this important agency presented fertile ground for ethnographic study. Indeed, the Board's description of its own methods creates more darkness than light.

Neither the Pennsylvania Constitution nor the laws or regulations governing the Board establish minimum eligibility requirements in order to apply for executive clemency. Also, the law does not establish a specific list of factors that the Board must consider in evaluating applications. As a result, each of the five Board members is free to rely upon the information that he/she feels is most important both in deciding to grant a public hearing and in deciding to recommend clemency to the Governor.

("Factors Considered by the Board")

The Board of Pardons conducts its public hearings in the courtroom of the Pennsylvania Supreme Court. The courtroom is a hugely ornate judicial chamber with a large elevated bench for the presiding officials. Its appointments are lavish and rich. Gold-plated chandeliers hang from the ceiling. Dark mahogany wainscoting surrounds

dozens of luxuriously upholstered leather chairs in the spectator's gallery. The room is topped by a soaring stained glass dome and decorated with sixteen elaborate murals by Pennsylvania artist Violet Oakley.

These murals depict themes which proclaim the majesty of the state, as well as religious and mythological scenes which sacralize the room and the proceedings that take place within it.

The courtroom's bench is separated from the gallery not just by elevation, but by a large non-public space that participants are allowed to enter only by invitation. The speakers who address the Board do so from a fixed podium which defines the space they are allowed to occupy and which requires that they remain standing while the Board members are seated, stationery while the Board members may wander freely about, and attentive while the Board members may turn away or speak to one another. The podium is separated from the bench by a long curved railing which provides a further physical delineation between the roles of the participants. The applicants are called forth from the gallery one at a time when it is their turn to speak, but they never get closer than ten feet to the officials who tower over them in judgment.

Although the design of an appellate courtroom differs from that of a trial courtroom – for example, it does not need a jury box or a witness stand – both demonstrate what W. T. Austin calls “a hierarchy of spatial importance” (Austin 287). All participants in the social scene of public hearings are “strategically situated in a spacial or territorial sense” based upon the social status they occupy in the scene (Austin 286). The powerful Board members are in the front, raised up high, protected by

rails and negative space. The supplicating applicants stand far below and await their turns in the back of the room. As each supplicant answers the call to come forth, he or she passes through what Douglas Maynard calls spaces of “dominant and subordinate encounters” within “the ecology of the courtroom.” This passage takes the applicant from “an area of most subordinate involvement,” sitting alone in the gallery, to “the dominant encounter” up front where he or she confronts the scene’s power source with which they have come to commune (Maynard 244).

This approach to power recalls the courtroom’s resemblance to places of religious worship. Like a church, the courtroom has a lesser place for the supplicants to sit and an exalted place from which the officiant presides. The supplicants come forward seeking civic or divine salvation, and in both places they are surrounded by ornamental grandeur which proclaims the importance of the ritual. During our interview, Rago correctly called the pardons process “ecclesiastical” (Rago Interview). The religious motif is exemplified in the Pardons Board venue by the courtroom’s most famous mural which elaborately intertwines calligraphic representations of the words “law,” “love,” and “wisdom” to associate the venue’s legal function with larger motifs of compassion and sagacity. This mural is entitled *Divine Law*.

Indeed, all of these characteristics – size, ornamentation, separation, and motif – combine to express the majesty of the powerful state into whose domain the applicants have entered. That expression is further bolstered by the entry itself. Although the Board’s public hearings are just that – public – and may be attended by any person without explanation, on the days that I attended the hallway leading to the courtroom

door was guarded by two armed officers of the Pennsylvania Capitol Police who asked each entrant what his or her business was. The officers had no apparent function there, from that location they could not provide security within the courtroom, and their questions were inappropriate. Nonetheless, their mere presence was a further expression of governmental might. While a sophisticated visitor might know that he or she could safely ignore their questions and enter with impunity, many other attendees – including pardons applicants – likely succumb to this demonstration of authority and enter the room already chastened by the state's power.

The Board of Pardons has not always met in this courtroom. Attorney General Preate remembers meeting in a state office building on Harrisburg's Market Street (Preate Interview). Clearly, the transition to the current venue was a deliberate reach for conspicuous majesty. The Board is a statewide agency under the auspices of the Governor's office: it could commandeer any public room in Pennsylvania for its purposes. The decision to sit in what may be the most awe-inspiring public space in the Commonwealth correlates to the awesome power that the Board wields over the applicants.

The intentionality of this correlation is apparent from the venue in which the Board conducts its other kind of public sessions, the Merit Review votes. Those sessions are not attended by the applicants and so they do not need, or receive, the intimidating majesty of the courtroom. The Board conducts merit review votes in a state senate hearing room which, while well-appointed and formal, inspires none of the awe of the courtroom.

The main participants in the pardons process are the Board members and the applicants. Other participants play lesser roles, but those roles are so minor as to make them unimportant to the ethnographic study. Lawyers, for instance, are largely insignificant. Applicants can bring lawyers with them to the hearing and the lawyers can accompany the applicant up to the area of Maynard's dominant encounter. However, the lawyers cannot speak for the applicant and they cannot argue the case on the client's behalf. Before the public hearings begin, the Lieutenant Governor explains that the Board wants to hear from the applicant, not from counsel. Lawyers may speak after the applicant, but only with the Board's permission and only to sum up. Board Secretary Foray told me that "When lawyers try to make a presentation, they are stopped" (Foray Interview).

The Board consists of five members. The Commonwealth's elected Lieutenant Governor and Attorney General serve by virtue of their offices. The other members are appointed by the Governor with state Senate approval. By law, the Board is composed of a corrections expert, a crime victims' representative, and a physician, psychologist or psychiatrist (Pennsylvania Constitution, art IV, sec.9). During the study period the Board composition was as follows: Jim Cawley, Lieutenant Governor; Kathleen G. Kane, Attorney General; Louise B. Williams, Victim Representative; Harris Gubernick, Corrections Expert; John P. Williams, Psychiatrist.

The other main participants are the applicants. Although, in theory, the Board exists for their benefit, they occupy a subordinate role during the proceedings. They wait to be called and approach the bench only with permission. Most applicants have

supportive friends or family members with them in the gallery, and when each one is called forward some small ritual of encouragement was common: an exchanged smile or nod, a pat on the back, or a verbalized word of good luck. Many applicants dressed formally, but some wore casual working clothes. They represented every economic and educational class. Although most of the applicants seemed not to have much formal education, some emphasized their schooling in support of their application. One spoke of his *summa* bachelors degree from Shippensburg University, and another said that he had a BA, an MBA and “will have a PhD in 2015.” None of the applicants whom I observed demonstrated any familiarity with public speaking or advocacy. Some read from written texts, others spoke extemporaneously with varying levels of success. They addressed the Board with differing levels of respect. One applicant called the tribunal “Honorable Lieutenant Governor and Members of the Board;” another called them “you guys.” During our interview, Board Secretary Foray recalled attending many hearings at which the applicants addressed the Board with “Hey” (Foray Interview).

One significant difference among applicants was in the way they answered the Board members’ questions. Most were direct and sincere, but as I will discuss in greater detail later, some attempted to minimize their involvement in the crime for which they sought a pardon. One applicant lied about his juvenile criminal adjudications even though the Board had his criminal record in their files. When confronted with that lie, he said “I’m sorry” and not surprisingly was denied clemency.

Since *Herrera*, clemency is often the last stop for the wrongly convicted, often the last stop on the way to the gallows. Accordingly, I paid special attention to the way

the Board addressed claims of innocence. Furthermore, to the extent that the Board rejected innocence claims, did that rejection betray a hidden agenda?

The term “hidden agenda” comes mainly from the work of legal ethnographers Conley and O’Barr. In their article “Hearing the Hidden Agenda: The Ethnographic Investigation of Procedure,” they define hidden agendas as “the unappreciated factors that cause people to resort to the legal system and the undisclosed objectives that they pursue within the system” (Conley, O’Barr 182). Although Conley and O’Barr concentrate on the hidden agenda of litigants they also address the conflicting hidden agendas of legal tribunals, “the clash of perspectives between judge and litigant” (Conley, O’Barr 183, 186). Conley and O’Barr correctly describe the “inaccessibility [of hidden agenda study] to conventional research techniques,” and conclude that such agendas may only be “discoverable if one pays close attention to what litigants say in and out of court” (Conley, O’Barr 182-83). If we expand Conley and O’Barr’s scope to include all participants in a legal process, then we may agree with ethnographer John Flood that “The key for system theorists is that the law appears to be a system as a result of the ways it is constructed by its practitioners” (Flood 34). Using ethnography to examine the hidden agenda of legal processes “makes us simultaneously stand inside and outside the *mise en place* as we research” (Flood 33).

In examining the Board’s appreciation of innocence claims, we should first note that the Board sees itself in the business of dispensing mercy and forgiveness. “It’s basically a mercy board,” according to Attorney General Preate (Preate Interview). As Rago noted, “you must have done something wrong or you won’t be requesting

forgiveness" (Rago Interview). The verbal formulation "I am innocent, please forgive me" is nonsense. Therefore, if the Board considers its main function to determine which guilty applicants deserve forgiveness, it may be predisposed to discount claims of innocence. My observational study revealed evidence to support this conjecture. During my observations, the Board members denigrated each applicant who denied or minimized their guilt.

One petitioner sought a pardon from her conviction for robbery by explaining that "I did not commit that [crime] but I was there." She claimed, inarticulately, to having been "misconstrued as being in the wrong case at the wrong time." Attorney General Kane was incredulous that she would have pleaded guilty under those circumstances and rejected her explanation that "My public defender told me to." Governor Cawley admonished her to stop lying and reminded her that "It is very important that you be 100% honest." When she repeated her claim that she had admitted to a crime which she didn't commit in order to protect a friend, Cawley sneered that "that was pretty magnanimous of you." The applicant agreed without irony that "yes, it was" and her clemency petition was denied.

Another petitioner sought a pardon from his conviction for aggravated assault during a bar fight. While stating that he was before the Board seeking a pardon "for a crime I committed in 1996" and that "I am guilty and I regret it," he then proceeded to deny each element of his crime. While the police reports claimed that he had hit someone with a telephone receiver, he claimed that was "not true." He denied telling the police that he was "attacked by homosexuals" and he denied that one of his victims

required hospitalization. Was he accusing the police of “shoddy police work?” asked Cawley. The petitioner accepted that option and was denied clemency.

Another applicant sought a pardon from her conviction for selling drugs. She was innocent, she claimed but the actual dealer was a tenant in her home. She told Board Member Williams that she “was not involved in any way.” When she was asked why the police claimed that she drove a drug dealer to two separate transactions, she stated that no evidence had ever been presented in support of that allegation. Cawley sarcastically accused her of claiming that “they [the police] made it up,” and she was denied clemency

Another applicant sought pardons from a series of crimes including drug law violations and bribing a police officer. He claimed to be “guilty by association” and alleged that he had been conducting a private investigation into police corruption in order to provoke an FBI inquiry. “I admit my guilt,” he said, “but I was trying to build a case that I was set up by corrupt cops.” By the time he stopped talking, Gubernick’s mouth was hanging open in disbelief and John Williams was smirking. The applicant was denied clemency.

Certainly, none of those four applicants presented their claim of innocence very convincingly. They were inarticulate, sometimes smug, and often self-contradictory. But there was no objective reason to assume that their stories could not be true. Defendants do sometimes plead guilty to crimes they did not commit; lawyers do sometimes give bad advice; and some police officers are corrupt. These are three of

the leading causes of wrongful convictions. If the applicants' stories *were* true, then they applicants deserved to have their false convictions erased.

However, it was apparent from observation that those stories failed to receive fair consideration. This failure stood on two legs. First, the Board does not attempt to resolve factual disputes. As Attorney General Preate forcefully stated during our interview, the Board has no investigative staff and has no means to engage in a factual review. "There should have been some independent investigative review," Preate noted. The lack of data made it "very hard" to make reasoned decisions (Preate Interview). Without objective information about guilt or innocence, the Board can easily retreat to its mercy-dispensing role, making intuitive judgments about the applicants' apparent remorse. The innocent claimant would not, of course, show any remorse and thus would be denied clemency.

Second, and most reflective of the Board's hidden agenda, pardon grants are politically dangerous. According to Professor Rago, "It's no accident that they don't have [an investigative] staff." Granting innocence-based pardons would make the Board and the Governor appear to be second guessing the court system and would make them look "soft on crime" (Rago Interview). Because of these fears, the pardons system has "fallen into an abyss," according to Preate and "doesn't do what it's supposed to do" (Preate Interview).

Preate attributes this abyss largely to the commutation of Reginald McFadden's life sentence and his release on clemency in 1992. Preate believes that Ridge was elected governor based largely on the McFadden case which he believes "dramatically

changed the history of the Commonwealth.” Ever since McFadden, pardon grants have become politically sensitive. “The fear of another McFadden” shut down consideration of clemency for life-or-death-sentenced inmates. Politically based clemency aversion eventually spread to other applicants as well. With two of the five Board members being elected officials who want to be governor someday “getting clemency is almost impossible.” Preate identifies the Board’s hidden political agenda in colorful terms. “If you want to commit hari-kari, then vote for commutation” (Preate Interview). Rago agrees and sees this hidden political agenda as the cause for the general secrecy which infects the Board’s operation. “The process is a quiet one,” Rago believes, “because it is not popular with law enforcement or with Joe Public.” This agenda makes the clemency process ineffective for the innocent claimant. “I don’t want to call it a dead end, but it is nearly a dead end,” complains Rago. “The law shouldn’t work this way” (Rago Interview).

F. *Mythos, Logos, and an Execution Reprieved*

On September 28, 2012, five days before Terrance Williams was scheduled to die by lethal injection, Judge Sarmina vacated his death sentence and ordered a new sentencing hearing. She based her ruling on a discovery that for twenty-eight years the Philadelphia District Attorney had suppressed evidence that supported his claim of sexual victimization. This was the same claim that District Attorney Williams had called meritless when he opposed Terrance's clemency application. According to Sarmina's ruling, the trial prosecutor had wanted to win so badly that she engaged in "gamesmanship" to secure Williams's execution (*Commonwealth v. Williams*, Court Order, September 28, 2012). District Attorney Williams filed an immediate appeal to the Pennsylvania Supreme Court which over-ruled Judge Sarmina (*Commonwealth v. Williams*, 105 A.3d 1234). The federal Court of Appeals had already rejected Williams' final appeals (*Williams v. Beard*). These actions meant that nothing stood in the way of William's execution.

In the gubernatorial election campaign that raged on during the autumn of 2014, capital punishment was a key issue. Incumbent governor Tom Corbett touted his support of the death penalty, confirming at the final candidates debate that "I do continue to support it and I just recently signed some death warrants" (Belanger). On January 13, 2015, seven days before leaving office, he signed one for Terrance Williams. Williams was scheduled to die on March 4, 2015 (Wolf Memorandum 1).

Corbett's opponent Tom Wolf declared that "we ought to have a moratorium on capital punishments in Pennsylvania." Wolf explained his position at an October 8,

2014 debate. “I am not convinced, unlike the governor, that we are actually . . . dispensing justice fairly. I think that there’s some people that are targeted more than others when we accuse them of capital crimes and convict them. And I think we sometimes send the wrong people to their death. We need to make sure we are doing the right thing.” He explained that he would create that moratorium by using the governor’s constitutional power of reprieve. “A governor actually does have the ability to grant reprieves . . . and I would use those reprieves to create a moratorium to actually make sure that what we are doing is working and it is working fairly” (“Governor Wolf Promises Moratorium on Death Penalty,” C-SPAN).

After Wolf became Pennsylvania’s governor on January 20, 2015, he cancelled Terrance Williams’s execution, relying on the “authority granted in Article IV, § 9 of the Constitution of Pennsylvania” (Wolf Memorandum 1). Wolf cited the “unending cycle of death warrants and appeals [which] diverts resources from the judicial system,” he observed that “[n]umerous recent studies have called into question the accuracy, and fundamental fairness of Pennsylvania’s capital sentencing system,” he recognized that those studies “suggest that inherent biases affect the makeup of death row [and] . . . that a person is more likely to be charged with a capital offense and sentenced to death if he is poor or of a minority racial group, and particularly where the victim of the crime was Caucasian.” In 2003, a study commissioned by the Pennsylvania Supreme Court concluded that there were “strong indications that Pennsylvania’s capital system does not operate in an evenhanded manner.” A 2007 study by the American Bar Association (ABA) “found numerous areas of concern, including inadequate procedures to protect

the innocent, failure to protect against poor defense lawyering, the lack of state funding for capital indigent defendants, [and] significant capital juror confusion.” The ABA concluded that “the Commonwealth of Pennsylvania fails to comply or only partially complies with the many of the ABA’s Recommendations and that many of these shortcomings are substantial.” Pennsylvania’s State Senate had appointed its own study committee in 2011, and that committee had not yet issued its final report. For all of those reasons, Wolf decided to reprieve Williams’s sentence, postponing his execution “until I have received and reviewed the forthcoming report of the Pennsylvania Task Force and Advisory Committee on Capital Punishment . . . and any recommendations contained therein are satisfactorily addressed.” He announced that he would also “to grant a reprieve in each future instance in which an execution is scheduled, until this condition is met” (Wolf Memorandum 1 - 4).

The governor’s official Reprieve Memorandum never mentioned the word “moratorium,” nor did it propose to commute or change any prisoner’s death sentence: a constitutional power which Wolf clearly knew he did not have. The Memorandum carefully set forth the governor’s reasons for the reprieve and in addition to the Supreme Court and Bar Association studies it cited published reports by some of the nation’s leading death penalty experts including several law professors, one sitting Pennsylvania Supreme Court justice, and the Death Penalty Information Center (Wolf Memorandum 2, notes 1, 3). It made no political arguments and accepted the death penalty as the positive law of the Commonwealth. It recognized the primacy of the judicial system in capital adjudication and specifically disclaimed any expressions of

mercy. “[T]his reprieve is in no way an expression of sympathy for the guilty on death row, all of whom have been convicted of committing heinous crimes, and all of whom must be held to account. The guilty deserve no compassion, and receive none from me” (Wolf Memorandum 1). Whatever one’s political views may be of capital punishment, on a philosophical level Wolf’s action was pure *logos*.

Philadelphia District Attorney Williams responded to the Williams reprieve by asking the Pennsylvania Supreme Court “to promptly negate” it complaining that it was “in direct violation of the constitution” (*Commoweth v. Terrance Williams*, Docket 14 EM 2015, Emergency Commonwealth Petition, 3, 25). He averred that “[n]ever before has a sitting Governor purported to negate a criminal penalty in an entire class of cases,” that Wolf’s act was “not, in fact, a reprieve, but an open ended suspension of a death sentence,” and that the governor’s actions were “not permissible in a government that is founded on the principle that the people are to be ruled by laws . . . and not [by] the personal whims of a king or dictator” (*Commoweth v. Terrance Williams*, Docket 14 EM 2015, Emergency Commonwealth Petition, 4, 18, 25). The district attorney never mentioned the official or academic studies that had provoked Wolf’s actions, and in a pleading that contained approximately 54 paragraphs over 25 pages, he spent about half of it describing the defendant’s awful crime and the procedural history of the case which led up to the death warrant. He argued the execution should proceed in spite of the governor’s reprieve because the “death sentence [was] authorized by the General Assembly, imposed by a jury, and subject to exhaustive judicial review over a period of decades” (*Commoweth v. Terrance Williams*, Docket 14 EM 2015,

Emergency Commonwealth Petition, 25). It mis-characterized the reprieve as something it was not, it ignored the fact that other governors had reprieved executions (Tom Ridge did it twice), and it glossed over judicial authority that allowed reprieves to be granted for any purpose (*Commonwealth v. Terrance Williams*, Docket 14 EM 2015, Response of the Governor to Emergency Commonwealth Petition, 1-10).

Setting aside the personal invective that called the governor a lawless dictator, the prosecution's position in the *Williams* case is a direct appeal to the *mythos* of finality, the infallibility of the law's processes, and the supremacy of the jury verdict. Although he never mentioned Agamben or Derrida, Seth Williams's entire argument boils down to a complaint that Wolf as governor serves as "the one who decides on the state of exception" (Agamben 1). The contest between Wolf and Williams illustrates the place inside-and-outside the law where clemency resides, within the "no-man's-land between public law and political fact" (Agamben 1). The political fact is that the constitution grants Wolf the power to reprieve sentences. He could have postponed Williams's execution for a hundred years if he wanted to and the district attorney would have no grounds for appeal. The public law of verdict finality opposes any tinkering with the sentence, but the public law of constitutional authority allows it.

Thus, the district attorney's position that Wolf has acted lawlessly ignores the fact that the constitution is the organic law of the state, and his actions derive from that source. The attempt to impose a judicial check on the power of reprieve ignores the political check that James Iredell successfully urged upon the federal constitutional convention, that an elected executive derived his prerogative by having "received such

strong proofs of his possessing the highest confidence of the people.” Seth Williams’s complaint is not with Tom Wolf. William’s outrage stems from his agreement with Sarat that clemency “appears to be outside of, or beyond, the law and thus [is] a threat to a society dedicated to the rule of law” (Sarat, *Mercy on Trial*, 69). Like Agamben and Derrida before him, the district attorney of Philadelphia worries that clemency is “essentially lawless” and he is as troubled by it as they are. He and Tom wolf are locked in a contest to determine which one of them wields the power of exception: shall the governor exercise the exception to preserve the life of a person who the state has condemned? Or can the prosecutor claim the exception to limit the constitutional power of executive prerogative? As of this writing, the answer to that question remains unresolved. Terrance Williams remains on death row. His March 4, 2015 execution date has come and gone without incident. The Pennsylvania Supreme Court has ordered written and oral arguments to be submitted in due course. No decision has yet been issued.

Sometimes, it would seem, in the never-ending contest between *logos* and *mythos*, it is hard to locate of the state of exception.

CONCLUSION

“The administration of justice by the courts is not necessarily always wise.”

Chief Justice William Howard Taft
Ex Parte Grossman, 267 U.S. 87, 120 (1925)

One of the most spirited and important scholarly debates about innocent convictions started in 1987 with a article in the *Stanford Law Review* written by philosopher Hugo Adam Bedau and sociologist Michael Radelet. In that article, “Miscarriages of Justice in Potentially Capital Cases,” Bedau and Radelet discussed “350 cases in which defendants convicted of capital or potentially capital crimes in this century, and in many cases sentenced to death, have later been found to be innocent” (Bedau, Radelet 23-24). They recognized that “[f]ew errors made by government officials can compare with the horror of executing a person wrongly convicted of a capital crime” and used a scientific methodology to investigate the likelihood of such horrors (Bedau, Radelet 22). They concluded that although the number of wrongful executions was small by comparison to the vast number of cases which come into the criminal justice system, “[o]ur results lead us to believe that the small number of cases in our catalogue in which major doubts remain about the guilt of the executed is an indication not of the reliability and fairness of the system, but rather of its power and finality” (Bedau, Radelet 85).

Responding to the Bedau/Radelet study, two federal prosecutors, Stephen J. Markman and Paul G. Cassell, wrote “Protecting the Innocent: a Response to the Bedau-Radelet Study,” an article in which they claimed that Bedau’s and Radelet’s 350

cases did not raise any concerns about wrongful convictions but rather that the Bedau and Radelet study proved that “the risk is too small to be a significant factor in the debate over the death penalty” (Markman, Cassell 121).

Bedau and Radelet then wrote their own response to Markham and Cassell. They reviewed and restated their point that their original study had used an empirically valid systematic methodology, and asserted that the arguments in the Markham and Radelet article had no methodology at all. They pointed out that the prosecutors accepted discredited jury verdicts as proof of guilt and that they believed that “the trial court is the final authority on the factual question of the defendant's guilt.” Worse yet, Markham and Cassell argued that “part of the evidence against the defendant is the fact that a trial court judged the [innocent] defendant to be guilty ‘beyond a reasonable doubt’” (Bedau, Rodelet, “The Myth of Infallibility: a Reply to Markman and Cassell,” 162-163).

The prosecution tendency to rely on discredited verdicts and erroneous unanimity as persistent proofs of guilt, revealed a larger problem with the debate about wrongful convictions.

The basic problem with Markman and Cassell's response is that it seems bent on defending the criminal justice system in every regard that bears on the death penalty and its administration. This inflexible stance requires our critics to deny that anyone actually innocent has ever been executed, lest the criminal justice system itself be charged with such an error. It may be that the failure of the criminal justice system to acknowledge error of this sort is itself part of the problem rather than evidence that no such errors have occurred. Criticism of Markman and Cassell's sort seems to us not seriously intended to show how the death penalty is ‘Protecting the Innocent.’ *Instead, it is an effort to protect the myth of systemic infallibility: the myth that prosecutors in capital cases never indict an innocent person;*

that if they do the trial courts can be counted on to acquit; that if the courts convict they sentence to prison rather than to death; that if courts do convict and sentence to death the appellate courts may be relied on to rectify an erroneous conviction; and that if the appellate courts fail then the chief executive will come to the rescue. We do not believe this myth, we do not sympathize with the effort to protect it, and we trust that anyone who studies our research will agree with us in rejecting the myth. We stand firmly behind every conclusion reached in our original essay.

(Bedau, Radelet, "The Myth of Infallibility: a Reply to Markman and Cassell," 169-170.

Emphasis added.)

These "myths of infallibility" represent a large part of what I have called *mythos* in the preceding chapters. We saw it in the Pennsylvania law enforcement response to the Report of the Wrongful Conviction Advisory Committee. We saw it in Justice Scalia's opinions in *Marsh*, *Herrera*, and *Davis*. We saw it in Judge Friendly's preference for finality over review. And we saw it at the Ox Bow.

The belief that only the guilty are arrested, convicted, condemned and executed is a comforting notion. It allows us to believe in the divine infallibility of our government and our justice system, and many people do genuinely hold to the belief that the system is perfect or at least perfect enough. When Major Tetley executed Donald Martin, he was being brutal, inconsiderate, unjust, and peremptory. But there is nothing in *The Ox Bow Incident* that convinces the reader that he knew that Martin was innocent. The jury that convicted Tom Robinson may have been captive to their racist inhumanity, but nowhere does Harper Lee tell us that they knew, or even believed, that Tom was innocent. When Antonin Scalia wrote that Leonel Herrera's case was "embarrassing" and that the law did not allow a re-trial for Troy Davis he was

expressing a harsh view of constitutional jurisprudence, but it would be unfair to accuse him of being in favor of killing the innocent. Rather, Tetley, the Robinson jury, Scalia, the Texas prosecutor in *Haley*, Markham, Cassell, and others simply believe that *to the extent that they speak with the authority of the sovereign state* they are infallible – or at least infallible enough. They are as willing to reject the *logos* of science and nature as was the Philadelphia prosecutor who told Saul Kassin that his scientific discoveries about false confessions made him a stooge for criminal defendants. This myth of infallibility allows its adherents to forget that the normative mission of the law is truth-telling, and to place the review of past convictions squarely within the state of exception where “the opposition between the norm and its realization reaches its greatest intensity” (Agamben 36). The belief in the perfect correctness of official decisions, jury verdicts, and court judgments, allows the myth-holder to cling to and accept the law’s “mystical element” which “seeks to annex anomie itself” by assuming to itself the right to ignore *logos*, logic, reason, science and the truth (Agamben 39). It allows the exception-stating sovereign to suspend the messy search for truth and to replace it with a comfortable and convenient penchant for finality. Heck Tate may not have been much but he was the sheriff of Macomb County, and that would let him call Atticus Finch a liar to his face and enforce the finality of his own fictive myth that “Bob Ewell fell on his knife.”

Where does this *mythos* come from? Why are smart people – and Scalia, for example, is nothing if not smart – so skeptical about empirical truth and so willing to struggle, as Bedau and Radelet say of Markham and Cassell, to “protect the myth of

systemic infallibility?” I believe that part of the answer can be found in another myth: the myth of American Exceptionalism which I discussed in Chapter One. There is no way to deny, and no reason to discount, the fact that Americans view the law as a sacred Ark which contains their hopes for a life of perfect order. The world can be a frightening place, and people hope for the law to salve their fear. The *mythos* that allows Americans to cling to the hope that good conquers evil is at least as old as the myth of the shining city on the hill. If and when we allow ourselves to recognize the *logos* that human institutions have human failings, we allow a cognitive dissonance which leads to frustration, disappointment, and distress. Those who ignore, or at least discount, the *logos* of uncertainty and fallibility can faithfully believe in the perfect justice of conviction and death sentences. The plague that this *mythos* unleashes on American justice is not the frogs and infant deaths that Jehovah visited upon Pharaoh or the lethal arrows that the archer god Apollo rained on the Achaeans. It is, instead, the virulent certainty that innocent citizens can be convicted and condemned without recourse to the protection of the *logos* of truth.

The law can be a god whom we worship pleading for peace, or a human construct which we accept as imperfect and unreliable. In the end, maybe the best alternative is to see the law reflected by Atticus and Boo, the duality which coalesces into the unitary sovereign Heck Tate, and Tom and Ransom, the mythic “man” who shoots Liberty Valance, taming the moral chaos, momentarily (at least) reducing our terror of the wilderness, and allowing hope for civilization on the frontier.

ENDNOTES

1. All of the preceding quotes come from the June, 1936, story "Superman" by Jerome Siegel and Joe Shuster. Superman made his first appearance in *Action Comics* number 1, relevant pages of which have been reproduced herein.
- 2.. The history of the *Herrera* case appears in several judicial decisions, including those reported at 471 U.S. 1131 (1985), No. 12848-02-Texas Criminal Appeals (1985), 904 F.2d 944 (1990), 498 U.S. 925 (1990), 819 S.W.2d 528 (1991), 112 S.Ct. 1074 (1992), 954 F.2d 1029 (1992), 112 S.Ct. 1074 (1992).
- 3.. Much of the following discussion relies on the author's previously published work. Lappas, Loftus. "The Rocky Road to Reform, State Innocence Studies and the Pennsylvania Story."
- 4.The Criminal Justice Legal Foundation identified itself as "a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment." This friend of the Court disagreed with the *Kansas* decision in part because "this misinterpretation of the Constitution could threaten capital punishment in other states [and]...it may lead to the loss of innocent lives." Presumably, it was not mainly concerned about Eugene Marsh in this regard.

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Who's Who in the East (25th, 27th editions, 1995-1996, 1999-2000)

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