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Creating Difference: The Legal Production of Race in American Slavery

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A thesis submitted in partial fulfillment of the requirements for the Doctor of Philosophy degree in English

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CREATING DIFFERENCE:
THE LEGAL PRODUCTION OF RACE IN AMERICAN SLAVERY

(Thesis format: Monograph)

by

Shaun N. Ramdin

Graduate Program in English

A thesis submitted in partial fulfillment
of the requirements for the degree of
Doctor of Philosophy

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ABSTRACT AND KEYWORDS

This dissertation examines the legal construction and development of racial difference as considered in literature written or set during the final years of American slavery. While there had consistently been a conceptual correspondence between black skin and enslavement, race or racial difference did not become the unqualified explanation of enslavement until fairly late in the institution's history. Specifically, as slavery's stability became increasingly threatened through the nineteenth century by abolitionism and racial slippage, race became the singular and explicit rationale for its existence and perpetuation. I argue that the primary discourse of this justificatory rationale was legal: through law race and its meaning was finally determined. However, as there was not a substantial body of legal texts, such as legislation and judicial opinions, defining race prior, legal determinations of race during this brief and tumultuous period ultimately produced race in service of slavery.

To frame and understand these legal issues, my dissertation turns to nineteenth-century American literature. Because of the elusive nature of racial difference, literature provides a means to reflect upon and critique the law's complicity in producing race. I begin with an overview of the difficulty of understanding and defining race as a concept, as well as the reasons why and when race became definitive of American slavery. I then turn to Frederick Douglass's *My Bondage and My Freedom* (1855) which explores how race came to signify wrongdoing as a consequence of race-based slavery. I then discuss how knowledge of racial difference, characterized by its uncertainty, was stabilized by gender. As considered in Lydia Maria Child's 1867 novel, *A Romance of the Republic* an

individual's uncertain racial identity was legally determined by recourse to his or her mother's. The next chapter examines Mark Twain's *Pudd'nhead Wilson*, published in 1894, which refutes the very existence of a racial difference, suggesting its legal existence is arbitrarily produced for the purposes of slavery. Finally, I conclude with a consideration of the limits of, and unexplored issues raised by, this project.

Keywords: slavery, American literature, American legal history, race studies, race relations, racism, Douglass, Child, Twain.

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From the beginning this project was urged forward by my supervisor Dr. Martin Kreiswirth, and he was tremendously patient in allowing me to complete it. I am always grateful for his advice, and his enthusiasm for the topics this dissertation considers, as well as for my thoughts on them, were essential to my completing this work. I am deeply appreciative of his mentorship and I look forward to continuing our dialogue on law, literature, and numerous other subjects.

Every accomplishment in my life is attributable to the love and support of my parents, Nehru and Lila Ramdin. This dissertation is no exception. I am not capable of expressing the extent of my gratitude for all that they have given me, so I will simply thank them for always expressing their belief in my abilities.

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INTRODUCTION

Racial Difference in American Slavery

Introduction

In 1910 Frank Ferrall of North Carolina, who wanted to divorce his wife, found himself litigating the content of legal racial definitions before the state Supreme Court. After marrying his wife, Susie, in 1904, and subsequently having children with her, Frank decided he wanted to end their marriage. However, in seeking to divorce Susie, Frank did not question her fidelity to the marriage or complain of her conduct throughout it. Rather, Frank's reason for seeking a divorce was that he had discovered that Susie was not the person he thought she was: rather than being white, as he had assumed and understood before and at the time they were married, contrary to her physical appearance and claim otherwise, Susie was actually legally black.¹

Relying on North Carolina statutory law that "All marriages between a white person and a negro or Indian or between a white person and a person of negro or Indian descent to the third generation inclusive... shall be void," Frank commenced his divorce proceeding in 1907 by claiming that Susie's great-grandfather was black.² Susie's response was that she had always been honest with Frank about her racial heritage.

¹ Notwithstanding that this project is about complicating or troubling racial categories or definitions, I have endeavoured to be consistent with my use of the terms 'black' and 'white' to describe individuals. My use of such descriptors marks an individual's social identity, i.e. his or her 'status'. And, for the most part, they correspond to an individual's self-definition and legal status. In instances where such racial identity is problematic, for example with those who do not self-identify with their racial legal status, I have tried to note the problematic use of racial designations. This suggests the difficulty in talking about race and the slipperiness of its signification.

² Code §1810 (1883), § 2083, Revisal of 1905 (North Carolina).

Specifically, she denied his claim that she was legally black but did concede that she possessed some “strain of Indian or Portuguese blood” and that there had been rumours she was of negro descent, all of which Frank had been aware of before their marriage.³

At the trial of Frank’s claim for divorce, the jury determined that he had failed to establish that Susie’s great-grandfather was in fact a “negro” and, as such, found that Frank had failed to establish that Susie met the statutory definition of negro.⁴ Frank subsequently appealed the trial court’s finding, urging the North Carolina Supreme Court to reconsider the racial identity of Susie’s great-grandfather. In particular, Frank argued that assessing whether an individual was “pure negro” required a consideration of whether that individual had lived as one – an individual’s “authentic” racial identity was reflected, at least in part, by the company that individual kept – and the trial jury erred in not considering any such evidence, relying instead on the documentary evidence adduced at trial as to Susie’s great-grandfather’s race.⁵ Frank’s understanding of race,

³ See Ariela J. Gross, *What Blood*, 101.

⁴ Again, realizing that racial distinctions and consequent definitions of the races is a vexed issue, as I discuss in more detail below, I am using the designations ‘black’ and ‘white’ as terms for their respective, broadly conceived racial categories. That noted, given its historical content, the use of the term “negro” is required throughout. To some extent ‘negro’ is synonymous with ‘black’ in that it captures the same range of phenotypic characteristics denoted by ‘black’. Nonetheless, ‘negro’ has a legal resonance within slavery that ‘black’ did not, for example in its use in legislation. Moreover, because of its legal deployment to categorize it also captured those did not appear ‘black’ but were nonetheless legally ‘negroes’, for example by way of legal definitions turning on genealogy as in *Ferrall v. Ferrall*. In any event, I have attempted to restrict my use of the term ‘negro’ to discussion of those sources that use it.

⁵ As Daniel J. Sharfstein notes, Frank’s brief argued that the legislative definition of “negro” must have included those who had even remote negro ancestry as well as those who were socially or culturally defined or treated as “negro”: “Nevertheless, Frank Ferrall pressed his case for the most extreme, biologically driven assumptions about race were false. ‘[T]he word ‘negro’... cannot mean a pure-blooded African,’ Ferrall’s brief argued. ‘There have not been any in the State in a century...’. Rather, the statutory prohibition of marriage between whites and people ‘of negro descent to the third generation[] must have meant the descent of any person whose social status, associations and daily living stamped him as being a negro” (*Secret History* 1506).

encompassing both behaviour and classificatory records, failed to persuade the state Supreme Court and the jury verdict was upheld.⁶

In dismissing Frank's appeal, Justice Hoke noted that the legislative definition of "negro" in place at the time had developed organically in North Carolina: earlier authorities had defined a negro as anyone within four or five generations of an "African" ancestor but, at the time of Frank's appeal, that ancestral connection had been reduced to three generations. Following its earlier decision on racial definitions and schooling rights, the Court held an individual's race must be determined by his or her blood, and for an individual to meet the statutory definition of "negro" required proof that his or her ancestor within three generations had negro blood.⁷ Moreover, the Court held that while Susie's great-grandfather may have associated with negroes, to define race through his behaviour or conduct, as opposed to the more measurable or quantifiable notion of "blood," was found to be "objectionable" as it set a "varying and uncertain standard by which to determine a most important legislative requirement in the civic and social polity of the commonwealth" (178). While Frank may or may not have been factually correct about it, his failure to establish in court that Susie's great-grandfather was legally a negro ultimately doomed his attempt to divorce her.

⁶ *Ferrall v. Ferrall*, 153 N.C. 174.

⁷ *Hare v. Board of Education*, 113 N.C. 9. The Court in *Ferrall*, by reference to precedent, tracks the percentage or quantity of negro in an individual through the notion of negro 'blood' transmitted by ancestry, i.e. eventually if enough generations of race-mixing had occurred, the negro blood in an individual would be sufficiently diluted by white blood to that individual could no longer be fairly or properly characterized as a negro. Given blood was not and could not be literally measured, it operated as a pseudo-scientific marker – a presumed biological feature – of race, the presence of which in often long-deceased ancestors was ultimately determined in non-biological ways such as behaviour, community opinion, and enslavement. Certainly, courts often resorted to phenotypic assessments of race in respect of individuals present before them but, even then, the notion of negro blood remained a fiction to signify difference.

In addition to Justice Hoke's reasons, Chief Justice Clark provided reasons for his concurring opinion. After reproaching Frank for attempting to "bastardize his own innocent children," Chief Justice Clark noted that a judicial declaration of Susie's blackness would mark their children as negroes, "a fate which their white skin makes doubly humiliating to them" (180).⁸ Finding it incongruent that Frank would scorn racial mixing and disdain negroes, but still attempt to have his wife and children declared black (particularly when they did not appear black), Chief Justice Clark's reasons conclude that:

The eloquent counsel for the plaintiff depicted the infamy of social degradation from the slightest infusion of negro blood. He quoted from a great writer not of law, but of fiction, the instance of a degenerate son who sold his mulatto mother "down the river" as a slave. But his crime was punished, and surely was not greater than that of this husband and father, who for the sake of a divorce would make negroes of his wife and children, hitherto white and whom the jury still finds to be so. (180-81)

Chief Justice Clark thus found that Frank's paternal obligations ought to have precluded him from ever claiming his children's blackness, and to have even made the claim ought to have been shameful. In doing so, the learned judge referenced Mark Twain's novel, *Pudd'nhead Wilson*. That minor literary reference in an appellate decision on how race

⁸ As Chief Justice Clark summarizes Frank's position: "He deems it perdition for himself to associate with those possessing the slightest suspicion of negro blood, but strains every effort to consign the wife of his bosom and the innocent children of his own loins to poverty and to the infamy he depicts. The jury did not find with him and he has no reason to ask any court to aid him in such a purpose" (180-181).

was legally determined in early twentieth-century North Carolina usefully frames the issues and tensions explored in this project.

First published as a novel in 1894, *Pudd'nhead Wilson* examines slavery in the 1850s along the Mississippi river. Its narrative, among other things, revolves around master and slave infant boys switched at birth, each then raised as his racial and social 'other'. Certainly, the narrative's closure turns on their adult selves being re-installed to their original positions of master and slave after a dramatic courtroom revelation of their 'true' racial identities during a murder trial. On its face, Twain's narrative of master/slave confusion and deception, corrected and stabilized by a succinct and uncomplicated legal declaration of racial difference, seems appropriate to the Court's emphasis on ancestral transmission of race in *Ferrall*. However, the novel – and the judicial reference to it – reveals the problematic but unquestioned presumptions inherent in legally defining race.

By Frank's appeal in 1910, and after slavery's abolishment, 'Jim Crow' laws were in full effect, segregating and subordinating blacks on the basis they were racially distinct from whites and inferior to them.⁹ While reminiscent of the racial duality of slavery, such segregation required first and foremost an ability to distinguish between the races, something that became particularly urgent after slavery had been abolished and the fact

⁹ "Jim Crow", of course, refers to the collection of laws and practices designed to subordinate blacks at the close of the nineteenth century and into the twentieth. As Michelle Alexander describes it: "By the end of the nineteenth century, every state in the South had laws on the books that disenfranchised blacks and discriminated against them in virtually every sphere of life, lending sanction to a racial ostracism that extended to schools, churches, housing, jobs, restrooms, hotels, restaurants, hospitals, orphanages, prisons, funeral homes, morgues, and cemeteries... [This] new racial order, known as Jim Crow – a term apparently derived from a minstrel show character – was regarded as the 'final settlement,' the 'return to sanity,' and 'the permanent system'. Of course, the earlier system of racialized control – slavery – had also been regarded as final, sane, and permanent by its supporters. Like the earlier system, Jim Crow seemed 'natural,' and it became difficult to remember that alternative paths were not only available at one time, but nearly embraced" (35).

of black subordination gave way to potentially unfettered interracial encounters and relations. Thus, after Emancipation formally rendered all citizens equal regardless of race, Jim Crow era legislation and judicial decisions revised and refined racial definitions in an attempt to demarcate black from white, culminating in the ‘one drop rule’ – an absurd, constructed notion of race that permitted blackness to be legally tracked and identified in the transmission of ‘black blood’ (theoretically down to even just one drop of it).¹⁰ But as racial definitions and distinctions became increasingly convoluted to explain and maintain racial segregation, the fundamental presumption that race, or racial difference, existed as a thing that could be legally determined and defined nonetheless persisted.

Pudd’nhead Wilson subverts this presumption. When confronted with the racial deception perpetrated against the community, the court accepts proof of racial difference in fingerprints – a legal determination presented in the narrative as privileging first and foremost the property relations of slavery. Like the evidentiary reliance on records of ancestral race in *Ferrall*, fingerprints function in *Pudd’nhead Wilson* as determinative proof at law of racial identity. However, as I argue, the fingerprint records accepted by the court as definitive in *Pudd’nhead Wilson* do not in fact reveal any extra-legal truth about race, whether biological, historical, or otherwise. Rather, fingerprints operate merely as an arbitrary marker of difference possessed of legal authority to signify racial difference. In *Ferrall*, race is similarly arbitrary: when unable to see or agree on an

¹⁰ The “one drop rule” refers to laws passed throughout many states in the twentieth century, i.e. after slavery, that identified as ‘black’ any individual who possessed “one drop” of black blood. Its implementation reflected the extremes to which racial segregation was pursued as well as the cultural anxiety about the difficulty of stabilizing any such racial categories. Again, though, as noted above, such recourse to blood provided a dubious, pseudo-biological explanation for difference that could only be substantiated in non-biological ways.

individual's racial identity, the court's finding of negro ancestry in that individual – once up to five generations removed, now three – is determinative of his or her blackness as statutorily mandated. In their reliance on arbitrary markers to distinguish and stabilize racial categories amidst the apparent absence of, or disagreement over, racial difference, the courts in *Pudd'nhead Wilson* and *Ferrall deem* the existence of racial difference, confirming its possibility. And in arbitrarily selecting specific criteria as determinative of racial difference, those courts *produce* racial difference for the purpose of identifying it.

The difficulty in defining 'race'

This thesis explores this production of racial difference at law during slavery. In arguing that racial difference was produced during this specific historical period, I do not mean to suggest that legal discourses and definitions singularly created or produced races or racial difference. Rather, this project explores how the notion of racial difference was legally manipulated during slavery to perpetuate and maintain racial distinctions. Peggy Pascoe articulates how the law is active in formulating and defining the racial concepts and categories it legitimates, "... the legal system does more than just reflect social or scientific ideas about race; it also produces and reproduces them" (47). This thesis thus emphasizes the *presumption* of racial difference and does not attempt to resolve the dispute over whether races and racial differences are in fact real or essential as opposed to constructed. Indeed, the lengthy and ongoing dispute over whether race is real continues to be predictably contentious.

Even within the scientific community there is vigorous debate over the factual existence of race. That debate, which is ultimately the province of the geneticists,

touches on such areas as epistemologies of biological classification, natural selection, and methods of measuring genetic variance. In 2004's *The Race Myth: Why We Pretend Race Exists in America*, biologist Joseph L. Graves, Jr., states, quite simply, "The fact is that no biological races exist in modern humans" (5). Graves, Jr.'s argument, briefly, is that there is not adequate genetic variation across the human population to justify or explain distinctions between groups along 'racial' lines and any such grouping has been arbitrary.

Conversely, and more recently, in 2014's *A Troublesome Inheritance: Genes, Race, and Human History*, journalist Nicholas Wade argues that there is in fact a biological reality to race: "Analysis of genomes from around the world establishes that there is a biological reality of race, despite the official statements to the contrary of leading social science organizations" (4). While Wade is careful to state that any biological reality of race does not inherently or necessarily lead to a racial hierarchy, he argues that a fear of racism erroneously overlooks that there has been measurable genetic variance over time within groups of peoples typically understood as distinguishable races, suggesting racialized development or evolution.

The current general consensus among academics outside the natural sciences exploring the concept of 'race' is that race is not a scientific fact but a construction. For example, Wade notes that the American Anthropological Association and the American Sociological Association each refute that race has a biological reality, stating instead it is "about culture" or a "social construct," respectively (5). Indeed, for those who argue that race is *only* constructed, any argument as to race's biological reality is misguided at best.

As historian Barbara Jeanne Fields writes in her influential piece, “Slavery, Race and Ideology in the United States of America”:

Belief in the biological reality of race outranks even astrology, the superstition closest to it in the competition for dupes among the ostensibly educated... Anyone who continues to believe in race as a physical attribute of individuals, despite the now commonplace disclaimers of biologists and geneticists, might as well also believe that Santa Claus, the Easter Bunny and the tooth fairy are real, and that the earth stands still while the sun moves. (96)

Nonetheless, there are visual or phenotypic differences between people that are capable of being grouped. But in response to ‘common sense’-type assertions that the fact such groupings may be made proves different races exist, those who argue race is merely cultural emphasize the arbitrary emphasis on skin colour (or other features) over other physical features that are not shared by all people.¹¹

For example, in arguing that race is a “myth” that “exists outside the realm of rational thought”, historian Jacqueline Jones writes that “Americans who would scoff at the notion that meaningful social or temperamental differences distinguish brown-eyed

¹¹ As Winthrop D. Jordan notes, some time ago, about the ‘genetic approach’ to race in his seminal *White Over Black: American Attitudes Toward the Negro 1550-1812*: “One of the most important recent breakthroughs has been the conception of *race* as a group of individuals sharing a common gene pool. Such a definition emphasizes the fact that racial characters such as skin color are unlikely to remain stable over long periods of time. It underlines the fact that the continued existence of races is dependent upon geographical or social separation. It places in proper perspective the biological differences among human beings: all mankind shares a vast number of genes in common, yet at the same time various populations differ as to frequency of genes. With this in mind, racial characteristics may be defined as biological traits which various populations possess in varying frequencies” (584). Jordan’s point, ultimately, is that following this line of thought, a group of peoples perpetually isolated from other populations would eventually come to form its own race and “In this sense, races are incipient species” (584).

people from blue-eyed people nevertheless utter the word ‘race’ with a casual thoughtlessness” (x). Certainly on the one hand, Jones and others appear to be correct: our conceptions of race do privilege, perhaps illogically or unjustly, certain visible traits – skin colour, hair type, and eye shape, for example – over others. Moreover, as I explore in this project, racial identifications may persist even in the absence of the visible physical features typically used to define race. On the other hand, those traits that we do cite as racial difference do appear to originate from or aggregate around different geographical areas, thus confirming, at least as a commonplace, that it is possible to group people into subsets or categories according to shared visible characteristics. Of course, neither view of race, each of which I would describe as ‘common sense’, considers in any meaningful way the allegedly genetic or biological underpinnings of race.

This thesis does not attempt to reconcile these contradictory views on race nor does it attempt to provide a singularly decisive conclusion on the alleged factual or essential existence of race. That race may not be visible but nonetheless persist even in the absence of any such visible markers (for example, by way of consanguinity or heredity) confirms the complicated and paradoxical essence of race. Resolving this fundamental historical paradox of race is an aim far beyond the disciplinary scope of this thesis.¹² It does, however, explore the problematized fact of this paradox by way of an examination of how race was conceptualized in legal discourse and fiction in a brief but transformative period of American history – the final years of slavery.

¹² Perhaps the most useful definition is offered by Thomas Sowell, who sees race as both biological and social: “Race is not entirely in the eye of the beholder, but it is a social concept with a biological basis” (1).

Moreover, while this thesis does not consider whether race is in fact transhistorical, it is nonetheless fundamentally concerned with its *significance*. As any theorist of the issue, from the historical to the scientific, would agree, race has had and continues to have social meaning, and it is not necessary to determine its factual existence to investigate its conceptualization, treatment, and deployment. In concluding that race is socially constructed, Eduardo Bonilla-Silva nonetheless notes that:

... race, as other social categories such as class and gender, is constructed but... it has a *social* reality. This means that after race – or class or gender – is created, it produces real effects on the actors racialized as “black” or “white”. Although race, as other social constructions, is unstable, it has a “changing same” quality at its core. (9)

It is in this sense that this project remains in dialogue with, and contributes to, broader or more comprehensive examinations of race. In the end, though race may or may not be a knowable reality, it is undeniably real in its effects, for example forming the basis of policies and actions ranging from explicitly racist calls to reform immigration and past ‘affirmative action’ practices, to the more seemingly benign areas of medical research and multicultural social programs.¹³ Whether it is a fact or not, to borrow from the title of Cornel West’s seminal 1994 book, “race matters”.¹⁴

¹³ As Randall Kennedy summarizes it, “Racial sentiments, moreover, are devilishly difficult to isolate and quantify in specific instances. In gross, however, the evidence is overwhelming, that racial attitudes affect judgments pervasively – from the administration of justice to support or opposition to social welfare programs, to dating and the marriage market, to employment decisions” (*Persistence* 7).

¹⁴ And it matters, excruciatingly so, in the United States, where race continues to be conceptualized as a critical binary, despite the extensive and ongoing racial mixing. To the extent individuals may be possessed of black and white racial heritages, the logic of hypodescent ensures they are re-raced as, primarily or fundamentally, ‘black’.

What ‘race’ meant to American slavery

This thesis explores the legal formulation of racial difference during the latter period of American slavery. Broadly conceived, law – legislation, submissions, judicial opinions – is particularly pertinent to formulations of identity. As Patricia J. Williams emphasizes in *The Alchemy of Race and Rights*, because “Laws become described and enforced in the spirit of our prejudices”, they provide important data on diffuse cultural beliefs and practices (67). Further, noting the law’s capacity to render the unknown known and the irrational rational, perhaps in furtherance of our prejudices, Colin Dayan explains:

... legal persons have no fixed definition, but instead take on changing capacities variously granted by the state, such as legal rights, freedoms, duties, and obligations. Jurisprudence responds to the “craving for the rational” when confronted with what Alexander Nekam regards as the necessities of “social control and valuation”. To be acceptable, communal emotions must be endowed with a “rational form”. This incarnation is granted through “the art of the law.” (25)

Thus, in addition to rendering comprehensible that which remains on the limits of understanding, the law’s ability and capacity to define also possesses an authority that endows its definitions with legitimacy.

Importantly, and contrary to the conventional wisdom that skin colour was always the fundamental reason for American slavery, racial difference did not become the singular reason and justification for enslavement until relatively late in the institution’s

history.¹⁵ And for that reason, the legal attempts to catalogue, define, and understand racial difference during a formative period in the concept's history are particularly instructive. That noted, while the push to *legally* define race so as to perpetuate slavery, including the various and conflicted legal understandings of race that resulted, was belated, the concept or notion of race was nonetheless always relevant to enslavement.

As Michelle Alexander writes in *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*: “Initially, blacks brought to this country were not all enslaved, many were treated as indentured servants” (23).¹⁶ But, as Alexander continues, although blacks may not have been legally enslaved at the outset of American history they, like Indians, were nonetheless almost always viewed as subordinate to whites:

By the mid-1770s, the system of bond labor had been thoroughly transformed into a racial caste system predicated on slavery. The degraded status of Africans was justified on the ground that Negroes, like the Indians, were an uncivilized lesser race, perhaps even more lacking in intelligence and laudable human qualities than the red-skinned natives.

(25)

¹⁵ This is an essential point to which I repeatedly return. Following others, such as Thomas D. Morris and Gross, I argue that circumstances such as race-mixing and abolitionism in the mid-nineteenth century created a pressure to *legally* define race so as to justify slavery as well as to clearly demarcate its boundaries. Although slavery may have always been racially driven, there was little need to legally define race prior.

¹⁶ As Barbara Jeanne Fields writes, “Although African or African-descended slaves dribbled in from 1619 on, the law did not formally recognize the condition of perpetual slavery or systematically mark out servants of African descent for special treatment until 1661. Indeed, African slaves during the years between 1619 and 1661 enjoyed rights that, in the nineteenth century, not even free black people could claim” (104).

This perception of black inferiority, itself rooted in the belief of a distinct ‘black’ race, ultimately provided and confirmed the legitimacy of the racialized nature of American slavery.

Certainly, perceptions (or beliefs, or presumptions, or ‘conventional wisdoms’, etc.) do not possess legal authority. But as Randall Kennedy notes, “By the time of the founding of the United States, virtually all slaves were black, although not all blacks were slaves” (*Race, Crime* 30).¹⁷ And because of this fairly stable racial correspondence to the positions of master and slave (which inherently presumed a distinct and inferior black race) – particularly before increased racial mixing posed an explicit threat to slavery’s distinct racial statuses – there were limited attempts to legally define the distinct and different races. As Daniel J. Sharfstein notes generally about the historical period of slavery, “Southern courts and communities did not strictly define the color line because there was little reason to go beyond slavery’s proxy of racial boundaries, and an inflexible racial regime only threatened to interfere with the smooth functioning of a slave society” (*Crossing* 597). Practically, then, there was not a significant need (or desire) to legally define racial difference for most of the duration of slavery.

In his comprehensive *Southern Slavery and the Law: 1619-1860*, Thomas D. Morris, for example, notes that there was only one statutory definition of “negro” during slavery:

Exactly how did Southern whites categorize people at law and for what purposes? It may seem odd but the only effort to define a “negro” in

¹⁷ Daniel J. Sharfstein writes that “Ideas of innate racial difference were already old at the time of the Founding. Colonial North America had an advanced vocabulary of racial purity and pollution, and despite continual claims to the contrary, the one-drop rule was hardly unique to the United States” (*Crossing* 608).

statutory law was in the Virginia code of 1849. The whole section was this: “Every person who has one-fourth part or more of negro blood shall be deemed a mulatto, and the word ‘negro’ in any other section of this, or in any future statute, shall be construed to mean mulatto as well as negro.” (22)

Nonetheless, this singular statutory definition of “negro” did not preclude other attempts to articulate who was one, particularly where enslavement was concerned. Importantly, as Morris continues, “There were other efforts to provide descriptions of a ‘negro’ in legal sources [such as opinions and commentary], but not in statutes” (22).¹⁸ However, while the presumption of racial inferiority always underpinned slavery, the impetus to articulate slavery as distinctly race-based came in the mid-nineteenth century as that unspoken presumption was being challenged.

In large part this challenge was the result of disagreement over the practice of slaveholding: as slaveholders’ authority to own slaves was questioned, particularly by other whites, slaveholders’ explanation and justification for enslavement became primarily racial.¹⁹ As Fields notes, “... slavery got along for a hundred years after its establishment without race as its ideological rationale” (114). However, as she continues, race became explicitly important to slavery’s functioning “... when the denial of liberty became an anomaly apparent even to the least observant and reflective members of Euro-

¹⁸ Morris notes that although “negro” may have largely avoided statutory definition, there were consistently attempts to legislatively define “mulatto” throughout antebellum history (22-23).

¹⁹ As David Brion Davis writes: “The greatest single peril to the Southern slavocracy was the possible disaffection of nonslaveholding farmers and workers followed by an alliance with blacks, both slave and free. This point underscores the crucial function of racism and racial identity, which succeeded in maintaining much unity among whites” (*Inhuman* 185).

American society... [as racial] ideology systematically explain[ed] the anomaly” (114). This reification of racial difference as the marker of difference between master and slave thus came at a particular moment in slavery’s history.²⁰

More specifically, as Ariela J. Gross writes, race became the explanation and basis for enslavement in the mid-nineteenth century when white Southerners were required to respond to the pressures of abolitionism:

During the colonial era, and even in the early republic, race had rarely provided the explicit justification for slavery... As the institution of slavery came under increasing attack in the 1830s from Northern abolitionists as well as from insurgent slaves, Southern white ideologues, including judges and lawyers, developed a more explicitly racial justification for slavery. (*What Blood* 4)

While racial subordination had always been an integral component of American slavery, it did not become the paramount explanation for, or articulation of, slavery until white slaveholders were forced to explain the nature and scope of the institution to white abolitionists.

Further, the increasingly undeniable hypocrisy of maintaining and enforcing enslavement within a land founded on ideals of freedom, as well as pressure from abolitionists to end slaveholding, coincided with an exponential increase in the number of

²⁰ Fields explains that race resolved the conceptual discord created by enforcing enslavement in a land founded on freedom: “But slavery got along for a hundred years after its establishment without race as its ideological rationale. The reason is simple. Race explained why some people could rightly be denied what others took for granted, namely, liberty, supposedly a self-evident gift of nature’s God. But there was nothing to explain until most people could, in fact, take liberty for granted – as the indentured servants and disenfranchised freedmen of colonial America could not. Nor was there anything calling for a radical explanation where everyone in society stood in a relation of inherited subordination to someone else: servant to master, serf to nobleman, vassal to overlord, overlord to king, king to the King of Kings and Lord of Lords” (114).

slaves in the first half of the nineteenth century: “Even without significant illegal imports from Africa or the West Indies, the number of American slaves increased from 1.5 million in 1820 to nearly 4 million in 1860” (Davis, *Inhuman* 182). Thus, interracial relationships of all kinds continued from colonial times, and likely multiplied due to the increased numbers of whites and blacks, including in the form of interracial unions that threatened the relatively stable racial dichotomies of slavery. As a result, as Gross discusses, “Southern states initially tried to reinforce black people’s *essential* identity as slaves by tightening their manumission laws and making it increasingly difficult for owners to set slaves free” (*What Blood* 30).

The commingling of the races, however, proved difficult to restrict. As Walter Johnson writes:

Throughout the nineteenth century, southern states passed ever-more-detailed laws defining the acceptable limits of drinking, gambling, and lovemaking along the lines of race and slavery. Those laws attempted to control sites where black and white, slave and free, bargained and socialized freely with one another, places where the white supremacist ideology upon which the defense of slavery increasingly relied was daily undermined in practice. (*Politics* 21)

And, as Gross continues, “...even as lawmakers tried to make slave status more congruent with blackness and freedom more congruent with whiteness, people of all colors continued to cross racial boundaries – and the law’s efforts to prevent it were uneven” (*What Blood* 30).²¹ Accordingly, what Johnson, Gross, Morris, and others note

²¹ As Gross continues in respect of the treatment of interracial unions at law: “Although most states in both the North and the South had bans on interracial marriage and fornication before the Civil War,

is that the legal emphasis on race arose at a time when racial distinctions were becoming troublingly elusive, because of racial mixing or, more troublingly, because the typical, visual markers of black and white were increasingly difficult to identify.

Indeed, as efforts were made to ensure slavery was fundamentally and exclusively a racial phenomenon, who was legally black and who was legally white more and more became a *legal* concern in the final years of slavery. As Gross observes from her empirical research, there were "... sixty-eight cases of racial determination appealed to state supreme courts in the nineteenth-century South. More than half of these (thirty-six) took place in the last years of slavery – between 1845 and 1861 – and the majority involved men" (*Litigating* 120). The racial "justification for slavery" thus occurred at a time of a significant increase in the population of those who were racially ambiguous.²² And the primary discourse of "justification" of race-based slavery was legal – not necessarily statutory, but rather in the proliferation of judicial decisions and commentary attempting to define racial identity.²³

Alabama had no barrier to interracial marriage until 1852, and Mississippi's statute provided only that ministers and officials were authorized to celebrate marriages between free whites. Interracial unions were a kind of blank spot in the law, neither permitted nor forbidden" (*What Blood* 30).

²² As Mark V. Tushnet writes, emphasizing the racialized nature of slavery was one way to assure non-slaveholding whites they could not be enslaved, and thereby obtain their support for an economic system that at times was contrary to their interests: "If the classifications of slave and master were the only ones available, nonslaveowners could reasonably fear that they would be treated as a subordinate class. To secure the allegiance of non-slaveowners to the political interests of the master class, they had to be assured that they would not be as subordinated as slaves. Law could provide such assurances by drawing rigid lines around the class of slaves, thereby guaranteeing that the lesser protections that the law gave to slaves would not seep into the law governing nonslaveowners. As many scholars have noted, the categorizing effect of race had the additional attraction of inserting nonslaveowners into the highest class in the hierarchy instead of creating an intermediate category for them. But it was enough for these political purposes to bracket slaves off from nonslaveowners by *some* categorizing device" (*American Law* 38). That "categorizing device" was race.

²³ Ian Haney Lopez emphasizes that law produces, at least in part, race which is ultimately socially constructed: "Law is one of the most powerful mechanisms by which any society creates, defines, and regulates itself. Its centrality in the constitution of society is especially pronounced in highly legalized

Accordingly, “one of the legal jobs of race was to decide who could be a slave and who could not” as it came to operate as an “ordering principle” for slavery (Morris 29). In particular, race provided the basis and explanation for why only certain individuals could be enslaved, thereby stabilizing the widening disjunct between observable ‘racial’ difference and slavery: “As far as slavery was concerned, in the widest sense a white could not be a slave, a person of color could be, a black presumptively was, and those who fell between a white and a quadroon might be, but the evidentiary presumption of liberty was in their favour” (Morris 29). Threatened from without by abolitionism and threatened from within by racial slippage, race became most important to justifying slavery when such a justification was most needed.

The scope of this thesis

This thesis thus explores, in those final years of slavery, some of the ways in which racial difference was legally manipulated. Because definitions of the distinct races did not possess a substantial legal existence prior to this period, such manipulations amounted to the *production* of racial difference. Importantly, this production included determining the legal significance of race and racial difference. As Ian Haney Lopez writes in his *White By Law: The Legal Construction of Race*:

Race is not, however, simply a matter of physical appearance and ancestry. Instead, it is primarily a function of the meanings given to these.

On this level, too, law creates race. The statutes and cases that make up

and bureaucratized late-industrial democracies such as in the United States. It follows, then, that to say race is socially constructed is to conclude that race is at least partially legally produced. Put more starkly, law constructs race” (7).

the laws of this country have directly contributed to defining the range of meanings without which notions of race could not exist. (11)

The legal production of race created it as a thing to be legally determined, stabilized and with meanings or specific significance even, as I examine, in the absence of the common sense visible markers of racial difference.

In examining this production of racial difference at law, I do not aim to provide a comprehensive survey of all law pertaining to slavery during the period. Different states possessed different, and often conflicting, statutes and decisions on the nature of race, and assembling them all would be an undertaking too ambitious for a project of this size. I have, however, selected diverse texts that in themselves reflect the scope of the various laws in this period. In so doing, it is clear that the variance or differences between the states' laws were substantially less than their commonalities and shared reasoning and, as a result, a broad understanding of how race operated as a legal concept during the period may be achieved. Further, in pursuit of such a broad understanding, this project takes a correspondingly broad view of the law, and considers such diverse legal texts as judicial opinions and legislation. It also considers, to a lesser extent, how such legal texts about race operated to define and shape the understanding and significance of race generally. In so doing, it aims for an expansive view of how the legalities of slavery shaped race and its meanings in the final years of slavery.²⁴

Although this thesis is fundamentally concerned with exploring the legal production of race or racial difference, it does so largely by turning to literature. Such interdisciplinary mixing may, at first glance, seem counterproductive. As Kieran Dolin

²⁴ As a methodological point, and to borrow from Tushnet: "... I am primarily concerned with the 'general' law of slavery... and am less concerned with the local variances except as they illuminate general propositions" (*American Law* 9).

writes, “As distinct linguistic forms of life, law and literature speak different kinds of sentences: one commanding obedience under threat of punishment, the other inviting pleasurable recognition and assent” (9). Nonetheless, as Dolin ultimately claims, each discipline can illuminate the other. In particular, literature may assist with framing, conceptualizing, and understanding difficult legal issues raised in, but restricted by, legal discourses. Ian Ward notes in respect of the ‘law and literature’ movement that: “As Nancy Cook concludes, ultimately law and literature, in its use of terms that are not immediately ‘legal’, ‘helps identify and clarify important issues in the legal realm that might otherwise remains clouded’” (26). The literary examination and consideration of legal problems and issues that may appear foreclosed or settled within legal discourses has proven particularly important to understanding American concepts of race.

Karla Holloway explains that “Literatures in the United States have consistently reflected and creatively engaged America’s shifting social judgments on questions of rights that the law has arguably settled, or at least that the law has sought to provide, through various rulings, with a substantial judicial framework for resolution” (22). However, focussing on the way in which race has been, and continues to operate as, a “legal fiction” (22) in American culture, Holloway emphasizes the creative and potentially subversive qualities of literature as enabling an important critique of that legal fiction:

Even though American jurisprudence has shown itself willing to engage, determine, and amend questions of gender and race, U.S. literatures took up similar questions but without the necessity that the law has for resolution and fixity. In fact, literature’s openness to conflict and its

practiced interest in complexity and ease with the obscure kept the pretense of legal resolution from being the sociocultural panacea its regulations would offer. The legal fiction of race and identity was the liberal imaginary, the terrain of literature. (21-22)²⁵

Given the complex history and precarious nature of racial difference, literature provides a means to understand and critique the law's participation in its historical production: it is literature that provides a glimpse into the American imaginary – including in respect of legal conceptions of race – wherein often conflicting and discordant thoughts on race and difference may be considered free from the restraints and demands of legal practice and enforcement. Accordingly, in each chapter of this project I examine a particular literary work and a specific legal issue raised in it pertaining to the production and meaning of racial difference during the last years of slavery.

The first chapter of this thesis examines Frederick Douglass's 1855 autobiography, *My Bondage and My Freedom*, which details his life in slavery in and around Maryland. Therein I argue that, among other things, Douglass notes that the maintenance of slavery – the legal subordination of slaves as property – relied on the presumption that slaves were always committing some wrongdoing, violating some law, code of behaviour, or standard of conduct. This presumption legitimated slaveowners' authority, especially in respect of their legal right to discipline their slaves. Moreover, it

²⁵ To be clear, Holloway's point is that black writers in particular have illuminated and exposed the complicated legal mechanics of restricting rights and citizenship under the misguided (and simply incorrect) notion of race. As she notes: "However, in the (fugitive) hands of creative writers, the principles attached to rights become malleable fictions that depended on the bodies that are constituted as its primary actors – its characters. This book will argue that black folk made for particularly complex literary characters precisely because of the way in which their very bodies were out (side of) law.... While law just kept trying to sort it out, literature – especially that written by black writers – would out the inconsistencies, explore the lacunae, and weigh the unanticipated accompaniments embedded in racialized narratives that made a diction of the law" (22).

permitted owners to legally parcel or assign their authority to others, including in respect of their right to discipline slaves, pursuant to the contractual relationships that underpinned the economic imperatives of slavery. Thus, when black was becoming synonymous with enslaved, this presumption of slave wrongdoing imbued black skin with the taint of the same. This meaning or significance of black skin, generated within slavery, extended to non-slave states by way of the 1850 federal *Fugitive Slave Act*, which operated as a kind of racial profiling whereby blacks in any state were effectively legally presumed to be fugitives in contravention of the law. Black skin was thus produced or conditioned by the law of slavery to signify illegal conduct.

The second chapter turns to Lydia Maria Child's 1867 *A Romance of the Republic* to explore the connection between race and gender within slavery. *Romance* tracks the journey of two sisters in antebellum Louisiana, who look and are raised as white, from their white upper-middle class beginnings to their potentially being sold into slavery and eventual return to white society. In so doing, *Romance* considers the factual slipperiness of race and the corresponding legal attempt to stabilize it. Specifically, to resolve the inability caused by racial intermixture to distinguish or visually track racial difference, the law arbitrarily emphasized sex difference as a measure to distinguish between the races – the child took the condition of its mother. For the protagonist sisters in *Romance*, who were raised and self-identify as white (having not been given any information to the contrary by their family), this amounts to re-racing them as black and as slaves, on the basis of arbitrary legal definitions of racial difference that precede them. Further, in highlighting the legal *production* of racial difference as gendered, *Romance* ultimately suggests racial equality cannot be achieved without gender equality.

The final chapter of this project considers Twain's *Pudd'nhead Wilson*, set in 1850s Missouri where, as the enslaved were appearing whiter, legal determinations of racial difference had become particularly important. Where Douglass and Child problematize the issue of race and its legal significance, they nonetheless accept its factual existence. Twain, on the other hand, questions its actuality, refusing its very knowability or measurability, scientific or otherwise. In the end, *Pudd'nhead Wilson* considers that in the absence of any discernible sign of race, the law in fact *produced* it for the purposes of maintaining or perpetuating slavery.

In selecting these literary texts for analysis from the many that provide valuable insight on the legal issues explored in this thesis, I have endeavoured to reflect both geographical and temporal breadth. To be clear, each text takes as its subject matter the legal significance or definition of race in the waning years of slavery. And, as noted above, each text takes a different state as its setting, thereby enabling a broader, if thematic, picture of the legal racial dynamic of those years that would go on to inform racial issues nationally. But the publication dates of these literary texts cover a span of roughly 40 years: from 1855 to 1894. Collectively they reflect a critical period in American history as slavery was abolished, but the racial freedom and equality that ought to have followed it was undone by ever rigidifying racial distinctions and increasingly legislated black subordination. In moving from Douglass's *My Bondage* published during slavery, to Child's *Romance* published just after Emancipation, to Twain's *Pudd'nhead Wilson* published near the turn of the century, this thesis considers the ways in which slavery legally defined race, as well as the significance and legacy of such definitions, as black equality continued to be elusive as the twentieth century approached.

It may be trite to say that race is a complicated, historical phenomenon. But this thesis attempts to disentangle one aspect of that complicated phenomenon by focussing on its representation and consideration during a brief period within its development in American history. In questioning how race was legally produced and perceived, and how it operated during the final years of slavery, this project contributes to historical, cultural, and theoretical considerations of how law formulates identity and, more specifically, how and why racial identity was legally configured through law during slavery. Further, in turning to literature to explore these legal questions, this project contributes to studies into American literature and history, as well as to interdisciplinary law and cultural modes of inquiry. What this thesis finally concludes, and what the literary texts it examines present and support, is that race is largely a legal phenomenon, its continued existence and meaning produced by, and unknowable without, the various legal attempts to define it and identify its memberships and significance.

CHAPTER ONE

The Impudent Slave: Frederick Douglass's *My Bondage and My Freedom* and the Conflation of Black Skin and Wrongdoing

"No black is ever up to any good."
-Patricia J. Williams

Introduction

In its August 12, 2013, decision in *Floyd et al v. The City of New York*, 08 Civ. 1034 (SAS), the United States District Court, Southern District of New York, ruled that the defendant City of New York was liable for the New York Police Department violating the Plaintiffs' rights through its use of an ostensibly crime preventing policy known as 'Stop-and-Frisk'.¹ As deployed, the policy permitted, and in fact encouraged, the NYPD to stop and search individual citizens without having probable cause to do so. The named Plaintiffs in *Floyd*, each of whom had been subjected to this 'Stop-and-Frisk' policy, claimed the NYPD had violated their constitutionally guaranteed rights.

The Plaintiffs in *Floyd* claimed that in addition to Stop-and-Frisk being unconstitutional, they had been also been unjustly or unfairly targeted by it. Specifically, they alleged they were stopped and searched on the basis of mere suspicion, contrary to the Fourth Amendment, which protects citizens against unreasonable searches and

¹ *Floyd, et al v. City of New York, et al*, was, in fact, a federal class action lawsuit brought on behalf of minorities against the New York Police Department for unlawful stop-and-frisks based on racial profiling. The named plaintiffs had all been subjected to such unlawful police conduct. USDJ Scheindlin issued two decisions – one on liability (which is discussed here), the other on remedies. The City of New York appealed USDJ Scheindlin's rulings but on January 30, 2014, agreed to drop its appeal and pursue the court-ordered remedies.

seizures.² Further, in addition to claiming their respective subjections to Stop-and-Frisk were inherently unreasonable, the Plaintiffs also claimed the policy was wrongfully deployed against them. In particular, the named Plaintiffs, each of whom was black or Hispanic, alleged that they were targeted by Stop-and-Frisk because of their race, contrary to the Constitution's guaranteed equal protection of the law, which prohibits intentional discrimination on the basis of race, among other things. Accordingly, the thrust of the Plaintiffs' case was that the Stop-and-Frisk policy was not being conducted in a racially neutral manner.

The trial of this matter lasted nine weeks, stretching from March through May of 2013. In her reasons, and prior to turning to her findings of fact at trial, United States District Judge Scheindlin noted the following facts, among others, were uncontested:

- Between January 2004 and June 2012, the NYPD conducted over 4.4 million *Terry* stops;³
- The number of stops per year rose sharply from 314,000 in 2004 to a high of 868,000 in 2011;
- 6% of all stops resulted in an arrest, and 6% resulted in a summons. The remaining 88% of the 4.4 million stops resulted in no further law enforcement action.

² Amendment IV of the U.S. Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

³ '*Terry* stops' are a legal practice whereby the police briefly detain an individual on the basis that individual is suspected of criminal activity (see *Terry v. Ohio*, 392 U.S. 1 (1968)). This is a lower threshold for police detention than probable cause, but such detention is also meant to be brief. A Stop-and-Frisk incident would be a *Terry* stop with a search of the individual.

- In 52% of the 4.4 million stops, the person stopped was black. In 31% the person was Hispanic, and in 10% the person was white;
- In 2010, New York City's resident population was roughly 23% black, 29% Hispanic, and 33% white;
- In 23% of the stops of blacks, and 24% of the stops of Hispanics, the officer recorded using force. The number for whites was 17%; and
- Between 2004 and 2009, the percentage of stops where the officer failed to state a specific suspected crime rose from 1% to 36%. (6-7)

As a result, the facts determined at hearing included that blacks were subjected to Stop-and-Frisk at a rate double their population while, conversely, whites were subjected to the policy at a rate of one-third their population.

Given that neither party disputed the claim at trial, the disproportionate targeting of blacks by Stop-and-Frisk was unsurprisingly borne out in the evidence: focusing on the expert testimony proffered at trial, USDJ Scheindlin concluded that blacks were discriminatorily targeted by 'Stop-and-Frisk' in a number of ways. The learned judge's findings included that "the NYPD carries out more stops where there are more black and Hispanic residents" and that "Blacks and Hispanics are more likely than whites to be stopped within precincts and census tracts... even in areas with low crime rates, racially heterogeneous populations, or predominately white populations" (9). Moreover, it was found that, somewhat paradoxically, for the period from 2004 to 2009, blacks were determined to be 14% *more* likely than whites to be subjected to the use of force during Stop-and-Frisk searches, yet were found to be 8% *less* likely than whites to endure further enforcement action beyond the stop itself (9). Further compounding the evidence

of their differential treatment, blacks were also found to be 30% more likely to be arrested (rather than merely receive a summons) than whites for the same suspected crimes (9). As USDJ Scheindlin determined, “together, these results show that blacks are likely targeted for stops based on a lesser degree of objectively founded suspicion than whites” (9).

In response to this largely uncontested evidence of differential treatment, the City did not deny that blacks and Hispanics were disproportionately targeted by Stop-and-Frisk. Rather, the City’s testimony, offered through its experts, invoked “suspect race description data” which assumed the appropriate racial deployment of Stop-and-Frisk should correspond to the rates of the races in suspect descriptions provided by victims of crime, and not racial neutrality or population breakdown (51). Put another way, the City’s position at trial was that a racial bias in the deployment of Stop-and-Frisk is appropriate given the racially disproportionate numbers of black and Hispanic criminal suspects. Indeed, in defence of “the fact that blacks and Hispanics represent 87% of the persons stopped in 2011 and 2012”, the City entered evidence that “approximately 83% of all known crime suspects and approximately 90% of all violent crime suspects were blacks and Hispanics” (51).

USDJ Scheindlin rejected the City’s argument that Stop-and-Frisk’s racialized targeting was justified by the racial statistics of crime suspects. Rather, the learned judge held that the legally correct racial distribution of Stop-and-Frisk searches – that is, the only racially neutral deployment of Stop-and-Frisk – would reflect the racial distribution of the general population and not that of suspected criminals:

This [Stop-and-Frisk deployed on the basis of suspect race description data] might be a valid comparison if the people stopped were criminals, or if they were stopped based on fitting a specific suspect description. But there was insufficient evidence to support either conclusion. To the contrary, nearly 90% of the people stopped are released without the officer finding any basis for a summons or arrest, and only 13% of stops are based on fitting a specific suspect description. There is no reason to believe that the nearly 90% of people who are stopped and then subject to no further enforcement action are criminals. (51-52)

The Court thus held that the City's professed reasons for its clearly racialized application of Stop-and-Frisk did not, and could not, contribute to crime prevention.

Crucially, then, in her conclusion that "there is no reason to believe that their [Stop-and-Frisk stops] racial distribution should resemble that of the local criminal population, as opposed to that of the local population in general", USDJ Scheindlin noted a flawed presumption in the City's position at trial (52). Specifically, and in light of the fact that the racialized deployment of stops failed to result in crime prevention, USDJ Scheindlin aptly commented that the City wrongly presumed criminality in respect of black and Hispanic citizens: "I conclude that Dr. Fagan's [the Plaintiffs' statistics expert] benchmark is the better choice. The reason is simple and reveals a serious flaw in the logic applied by the City's experts: there is no basis for assuming that the racial distribution of stopped pedestrians will resemble the racial distribution of the local criminal population *if the people stopped are not criminals*" (51). Effectively, the City ran Stop-and-Frisk – and attempted to justify at trial its racially differential deployment –

on the basis that blacks and Hispanics are appropriately presumed guilty of some potentially criminal activity simply because of their race. Although its reasoning was rejected by the Court at trial, for the City black (and brown) skin in-and-of-itself signified the likelihood of criminality, and therefore merited racially specific crime prevention and law enforcement practices.

The notion that black skin is demonstrative of criminality or potential criminality is hardly novel to contemporary policing practices or even our current era. In *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America*, Khalil Gibran Muhammad notes that social scientists and statisticians endeavoured in the latter half of the nineteenth century to better understand racial relations in the wake of black freedom, as well as “at what pace... [blacks] ... would enter the modern urban world as citizens” (20). But as Muhammad continues, this work nonetheless presumed black inferiority in ways largely beholden to the conceptual underpinnings of the racial slavery that had just ended.⁴ Thus, following the racial equality ostensibly provided by Emancipation, blacks continued to be subordinated. This was achieved predominantly by conceptualizing them as criminals. Emphasizing national censuses as attempts to render this new black free life into comprehensible data, Muhammad focuses on the 1890s – twenty-five years after Emancipation – and forward, arguing black criminality became the key explanation and justification for perpetuating the subordination of free blacks.⁵

⁴ At the core of this disciplinary or conceptual cultural shift was an attempt to understand what free blacks meant to the broader body politic. As Muhammad eloquently puts it: “The monumental shift from slavery to freedom meant more than the transformation of slaves into freedmen – the realization of the hopes and prayers and resistance of four million people; it also meant a paradigm shift in the terms used to discuss, debate, and deal with them. The slavery problem became the Negro Problem” (20).

⁵ Muhammad explains that “With the publication of the 1890 census, prison statistics for the first time became the basis of a national discussion about blacks as a distinct and dangerous criminal

Moreover, that explanation and justification was legitimized through social science, the primary discourse at the turn of the century (and perhaps into our present) for defining the scope of black identity and its relation to the broader cultural sphere:

Out of the new methods and data sources, black criminality would emerge, alongside disease and intelligence, as a fundamental measure of black inferiority. From the 1890s through the first four decades of the twentieth century, black criminality would become one of the most commonly cited and long lasting justifications for black inequality and mortality in the modern urban world. (20-21)

Of course, the notion of black criminality as an explanation for persistent black subordination inherently legitimated discriminatory thought and practices, and the naturalness of white supremacy.⁶ As Muhammad continues, “For white Americans of every ideological stripe – from radical southern racists to northern progressives – African American criminality became one of the most widely accepted bases for justifying prejudicial thinking, discriminatory treatment, and/or acceptance of racial violence as an instrument of public safety” (4).

This chapter explores the identification of black skin with wrongdoing (if not criminality *per se*), tracing it back to American slavery as essential to the subordination of blacks generally and the maintenance of slavery specifically. In turning to Frederick Douglass’s 1855 autobiography, which details his time in and escape from slavery, I

population... [as it showed]... that African Americans, as 12 percent of the population, made up 30 percent of the nation’s prison population” (3-4).

⁶ As I discuss, this presumption of black criminality also operated to subordinate blacks in slavery, even though asserting whiteness as *racially* superior was not necessarily intended by or explicitly claimed through it (though it was obviously a result).

explore how the fact of being enslaved signified *some* wrongdoing which, in turn, justified or explained the discipline and punishment of slaves as necessary to preserve the institution of slavery itself. Moreover, as Douglass notes, this slave wrongdoing, which was presumed, also precluded slaves from advancing a defence or response to their alleged wrongdoing by characterizing that too as a punishable wrong. As a result, and what Douglass illustrates, is that the presumption of their wrongdoing also silenced slaves.

According to proponents of slaveholding, this ‘silencing’ of slaves was essential to maintaining or perpetuating the economic basis of slavery.⁷ And by the mid-nineteenth century, as those proponents increasingly emphasized race as the basis or reason for enslavement, this presumption of slave wrongdoing took on a distinctly racial character. Once black skin became the definitive mark of enslavement – whether of the enslaved or the enslaveable – it also came to mean wrongdoing. This conflation or presumption of black skin and wrongdoing was ultimately exemplified, and reached its logical conclusion, in the federal *Fugitive Slave Act* of 1850.⁸ That *Act* effectively presumed *blacks* guilty of illegal conduct in illegally attempting to escape slavery – of contravening the *Act* itself – on the basis of mere allegations of the same (and because it precluded any substantial response by blacks to any such allegations). Moreover, because of its federal scope, the *Act* extended this presumption of blacks’ illegal conduct, generated within slavery, into non-slaveholding states. Thus as race became the justification for slavery amidst calls for the institution’s abolition, the legal status of black

⁷ As I explore, those who disagreed with slavery also recognized, often reluctantly, this feature of it as essential to its practice.

⁸ *Fugitive Slave Act 1850*, 9 Stat. 464.

people as property *throughout* was reified, and the presumption of blacks' wrongdoing both established and confirmed their status as (silent) property to be circulated within the economy of slavery.

The mechanics of plantation authority

Born into slavery in 1818 Maryland, Frederick Douglass ultimately became a key figure in the abolitionist movement after escaping from bondage as a young man. Teaching himself to write – in-and-of-itself a transgressive act – Douglass, after achieving freedom, eventually lectured and published on the horrors of slavery and the philosophical and moral rights of freedom.⁹ From a literary perspective, Douglass is most renowned for his autobiographical *Narrative of the Life of Frederick Douglass*, published in 1845, which detailed his life in and escape from slavery.¹⁰ *My Bondage and My Freedom*, published in 1855, is his second autobiography – a revised and expanded version of his *Narrative*, devoting more narrative space to his participation in the abolitionist movement.

To provide context for Douglass's story, as well as to cement his centrality to the abolitionist movement, the original editor of *My Bondage* includes in his preface a letter

⁹ Christopher Hager explains about the potential dangers of slave literacy to slaveholding: "Ironically, many slaveholders ranked among the nineteenth century's most committed believers in the importance and liberating potential of the ability to write. They tacitly acknowledged a form of racial equality that almost no one else did: if African American slaves accepted literacy, they could be expected to use it more or less as white people did – to communicate with each other and speak their minds. They especially would use it, southerners feared, to rebel or escape" (31). As Lisa Sisco also notes, "In many ways, Douglass's acquisition of literacy is a series of acts of resistance, because his master and the southern legal code specifically say he shouldn't be taught to read or write" (19).

¹⁰ As Henry Louis Gates writes in arguing Douglass defined the genre of slave narrative: "It was Frederick Douglass's *Narrative* of 1845 that exploited the potential and came to determine the shape of language in the slave narrative" (83).

composed by Douglass in response to his editor's "urgent solicitation for such a work" (5). Douglass's letter focuses his text's aims through a legal metaphor: in seeking to expose the horrors of slavery to the reader, Douglass intends through his narrative to place "slavery on trial" in the court of public opinion (7). More specifically, Douglass characterizes his narrative as evidence to be considered in the public adjudication of the legitimacy of slavery (while noting that the enslaved are also simultaneously on trial in that same public forum): "Not only is slavery on trial, but unfortunately, the enslaved people are also on trial. It is alleged that they are naturally, inferior ; that they are so *low* in the scale of humanity, and so utterly stupid, they are unconscious of their wrongs, and do not apprehend their rights" (7). From the outset, Douglass suggests that the subordination of slaves, including how they are legally defined as well as how they are more broadly understood by the public, is central to his text's polemical aims.

In focussing on these conceptions of the slave, Douglass emphasizes the presumption inherent in slavery that the enslaved have committed wrongs. These wrongs – which are attributed to the *fact* of their race – result in and justify their enslavement: it is understood and expected that slaves have committed "wrongs" leading to their subordinated existence, regardless of such wrongs resulting from slaves being "stupid" or ignorant. Such race-based "wrongs" are thus essential to the maintenance or perpetuation of racialized slavery. However, this presumption of slave wrongdoing, at least so far as Douglass is concerned, is somewhat merited (even if ultimately caused by the greater 'wrong' of slavery). As he acknowledges, while a slave his very subsistence often depended upon stealing the food of others: repeatedly caught within the bureaucracy of slaveholding, Douglass notes that although he tried to live a moral life within slavery and

“hated everything like stealing, *as such*” he “did not hesitate to take food” from his master when hungry (139). But for Douglass, the legitimacy of such thievery – such illegal conduct – extended beyond the master-slave relationship. Rather, Douglass formulates the need and justification for his thievery within the broader racial hierarchy.

Claiming theft for survival as a slave’s *right* to be exercised against whites regardless of whether they owned slaves, Douglass writes:

It was necessary that the right to steal from *others* should be established ; and this could only rest upon a wide range of generalization than that which supposed the right to steal from my master... “I am,” thought I, “not only the slave of Master Thomas, but I am the slave of society at large... Since each slave belongs to all ; all must, therefore, belong to each.” (139-40)

This generalized subordination of slaves – that slaves were the property of all members “of society at large” – was integral to the conception of slaves as property. As Saidiya V. Hartman writes: “Since the subjection of the slave to all whites defined his condition in civil society, effectively this made the enslaved an object of property to be potentially used and abused by all whites” (24).¹¹ The social inequality of slavery, which defined slaves as owned or potentially owned by any member of the master class, was essential to

¹¹ As Hartman continues, it is perhaps paradoxical to consider the slave in relation to “civil society” given he is excluded from it. However, this strange social position is precisely the slave’s designation: “It is a tricky matter to detail the civil existence of a subject who is socially dead and legally recognized as human only to the degree he is criminally culpable. Yet it is the anomalous status of the enslaved that determined the specific uses of the slave as object of property and the relation between citizens and those who can be identified as civil subjects in the most circumscribed and tentative fashion” (24).

the specific property relations comprising the institution.¹² Crucially, his emphasis on the general inequality of slavery enables Douglass to articulate a model for slave survival whereby slave wrongdoing within or against “society” generally – i.e. potential or actual slaveowners – is necessitated and justified by slavery itself.

Douglass does not limit his examination of slave wrongdoing merely to this notion of a slave “right” to wrongdoing resulting from the wrongful nature of the institution. Rather, as he illustrates, whether slaves actually committed wrongdoing was largely immaterial within slavery. As he examines throughout *My Bondage*, the disciplinary practices of slavery treated slaves as always doing wrong, irrespective of their actual conduct.¹³ Presumed, often arbitrarily or capriciously, to have misconducted themselves – either by way of actual or imagined actions – slaveholders and their representatives produced slaves as guilty of some wrongdoing.¹⁴ Thus, regardless of whatever slave transgressions against society slavery may have legitimated, their conduct was always already transgressive as slaves were inherently presumed within the institution to have committed, or were always about to commit, some wrongdoing. This unquestioned presumption was essential to preserving slave inferiority and, correspondingly, preserving mastery within slavery.

¹² As a type of property ownership, this notion of circulation or potential ownership by many is perhaps unsurprising about slavery. However, it is worth re-iterating that the expression of that ownership was absolute – to function, slavery was the complete and total legal domination of one individual by another.

¹³ As Eric J. Sundquist notes, *My Bondage* distinguishes itself from the *Narrative* in that it reflects an explicit commitment by Douglass to “report in greater detail... that his initial quarrel with northern white abolitionists came precisely over the question of whether or not he was qualified to interpret the meaning of his own life” (*Introduction* 4).

¹⁴ By ‘guilty’ I do not mean the strictly *legal* sense of the word. Rather I mean they were guilty of contravening the rules or codes of conduct of their plantations (many of which were the same across plantations).

Importantly, the practical significance of this presumption included the administration of slavery, including its operational structure and in particular the plantation. Notwithstanding Douglass's noting of the public adjudication of slavery's legitimacy, discussed above, he observes in *My Bondage* that even a public condemnation of slavery would do little to ameliorate the horrific treatment of the enslaved. Emphasizing that the plantation as an institution insulated itself from external criticism, Douglass writes that "To be a restraint upon cruelty and vice, public opinion must emanate from a humane and virtuous community. To no such humane and virtuous community, is Col. Lloyd's plantation [a plantation on which Douglass was enslaved] exposed" (50). To alter the beliefs and conduct *on* the plantation would require "humane and virtuous" influence from without, but the plantation is not "exposed" to any such influence. This lack of exposure to the kind of virtuous community that would advocate for slavery's end would no doubt be due, in part, to its Southern geography where the correctness of slavery was generally accepted. However, for Douglass, the plantation's isolation from virtuous thought, including anti-slavery beliefs, is not simply a response to or guard against abolitionist thought. Rather, its isolation is constitutive of its functioning, essential to its continued operation and existence.

Fashioning the plantation as its own authority required the exclusion of all extra-plantation authority:

That plantation is a little nation of its own, having its own language, its own rules, regulations and customs. The laws and institutions of the state, apparently touch it nowhere. The troubles arising here, are not settled by the civil power of the state. (Douglass 50)

Conceived of as an autonomous space, removed from even “the laws and institutions of the state”, the plantation was accountable only to itself. In that sense, the plantation perpetuated its isolation from the virtuous community advocating for slavery’s end. As Paul Gilroy writes, “The state’s lack of access to the plantation illustrated the plantation’s general inaccessibility to the varieties of modern, secular political reason to its reform” (59). Regardless of its potential for reform by way of external pressure, the plantation insulated itself from outside authority in an effort to render the authority of the slaveowner unquestionable or supreme on and upon his property.¹⁵ But in addition to outside forces, such as abolitionism for example, pressure against slaveholding came onto the plantation itself in the form of slave resistance, formal and informal, individual and collective. To contain such resistance on the plantation – to ensure a master’s power over his slaves – required reifying slaveowner authority as the *singular* authority over slaves.

Ira Berlin notes that the maintenance of enslavement required a constant negotiation of the master/slave power dynamic as a result of conflict within the plantation itself (5). Dramatizing this constant conflict as essential to slavery, Berlin writes that:

The ongoing contest forced slaveowners and slaves, even as they confronted one another as deadly enemies, to concede a degree of legitimacy to their opponent. No matter how reluctantly given – or, more likely, extracted – such concessions were difficult for either party to

¹⁵ This notion of plantation authority was of course a fiction or an ideological crutch. As Berlin writes: “The planters’ efforts to seal their plantations from outside influences failed utterly, in large measure because the requirements of production necessitated at least some slave mobility. Slaves developed an intricate system of internal communication, and news between plantations moved with lightning speed. Still, the planters’ efforts to wall off their estates, combined with the near-total absence of interior towns and the growing size of slaveholding units, increased the density of the slave population and deepened its identification with the land” (201).

acknowledge. Masters presumed their own absolute sovereignty, and slaves never relinquished the right to control their own destiny... The refusal of either party to concede the realities of master-slave relations only added to slavery's instability. (5)

While the power of masters on the plantation may have been routinely renegotiated in the ongoing struggle for dominance over their slaves, slave resistance – the very instability of this power dynamic – had to be contained or suppressed to ensure the continued functioning of the institution. But crucial to such containment strategies was to conceptualize the plantation as an isolated space of its own authority, particularly in respect of the disposition of disagreements between master and slave. It was the slaveowner himself that was and had to be the final and only arbiter of plantation disputes.

That slaveowner authority was defined and maintained as perfect or unassailable so as to ensure the discipline and subordination of slaves is unsurprising. As Douglass asserts about owner determinations in respect of his slaves, "... the judgment of the master must be *deemed* infallible, for his power is absolute and irresponsible" (85 emphasis added). Emphasizing that there was nothing inherently authoritative about an owner's "judgment", slavery's perfection nonetheless required treating it as beyond reproach or scrutiny. "Infallible" authority, however, did not singularly rest in the individual figure of the slaveowner. Rather, it rested in the authoritative *structures* of ownership within slavery as the nature of the plantation and its production demands meant that one individual could not oversee or run the plantation entirely and, as a result,

an administrative delegation of slavowner power was required.¹⁶ Focussing specifically on the role of the plantation overseer – an individual hired by a slaveowner to manage and, in particular, discipline, a plantation’s slaves – Douglass highlights that such disciplinary authority was necessarily beyond reproach: “As I have said of the overseer of the home plantation, so I may say of the overseers on the smaller ones ; they stand between the slave and all civil constitutions – their word is law, and is implicitly obeyed” (53). In interposing himself between the slave and the broader legal order, the overseer’s rule as an extension of the owner’s will was absolute.

It was the responsibility of the overseer to adjudicate and discipline slave conduct. In respect of allegations of slave misconduct, as Douglass notes, the overseer possessed the singular authority to hear and address them: “The overseer is generally accuser, judge, jury, advocate and executioner. The criminal is always dumb. The overseer attends to all sides of a case” (50). Douglass’s metaphor of a biased, procedurally unfair criminal trial as the forum through which slave wrongdoing on the plantation was adjudicated, highlights the manner in which slaves were precluded or refused the opportunity to respond to allegations of wrongdoing. But it also illustrates how a slaveowner’s power consolidated itself by his being the final authority and disciplinarian on all matters pertaining to the regulation of his slaves.¹⁷ And as the slaveowner’s authority on the plantation was configured as the only appropriate forum in which slave

¹⁶ As Davis describes them in contrast to Northern farms, “the larger Southern plantations were more like the agribusinesses of the later twentieth century in terms of size, efficiency, and complex organization” (*Inhuman* 181). Davis’s point is one reason why the South became economically successful from slavery in a way the North could not was because the South “... produced an exportable product for which there was international demand” – cotton (Davis, *Inhuman* 181). Further, as Berlin notes, the wealth of the planters led to a distinct ruling society, refashioning themselves as a “feudal class” (197).

¹⁷ As discussed later, this was a (deployment of) power confirmed legal.

wrongdoing could be addressed, the disciplinary rights of owners were necessarily confirmed. The exercise of such disciplinary rights was largely through the owner's managerial or delegated authority.

My Bondage's focus on the role of the overseer in slave discipline underscores the administrative aspects of plantation production: functioning as a managerial stand-in for the slaveowner, ensuring the unfettered exercise of the owner's authority required finality to overseers' decision-making pertaining to slaves. This was accomplished by precluding slaves from appealing their treatment by the overseer to the slaveowner – a fact of slavery that Douglass finds definitive of its cruelty. Writing that “One of the first circumstances that opened my eyes to the cruelty and wickedness of slavery, and the heartlessness of my old master, was the refusal of the latter to interpose his authority, to protect and shield a young woman, who has been most cruelly abused and beaten by his overseer in Tuckahoe”, Douglass designates the failure of owners to protect their slaves from the abuse of overseers as “heartless” and “cruel” (63). Moreover, the refusal to appeal treatment at the hands of an overseer to the master was rooted in presuming the slave had committed some wrongdoing to merit such treatment in the first place.

Noting that anyone would be moved by the undeniable physical evidence of the poor girl's suffering, Douglass writes that when asked to intervene his “Old master seemed furious as the thoughts of being troubled by such complaints” (64). For Douglass, the “cruelty” of his master is largely a matter of efficient regulation of the enslaved:

This treatment is part of the system, rather than a part of the man. Were slaveholders to listen to complaints of this sort against the overseers, the

luxury of owning large numbers of slaves, would be impossible. It would do away with the office of overseer, entirely ; or, in other words, it would convert the master himself into an overseer. (64)

Overseers were thus meant to free owners from the quotidian inconveniences of the mechanics of production, including discipline. As such, to require owners to adjudicate disputes between overseers and slaves would be to undermine the power of overseers and correspondingly burden owners with the very unwanted managerial responsibilities they were trying to avoid. As Douglass concludes, the preclusion of such informal ‘appeals’ was meant to ensure efficient plantation management: “It would occasion great loss of time and labor, leaving the overseer in fetters, and without the necessary power to secure obedience to his orders. A privilege so dangerous as that of appeal, is, therefore strictly prohibited ; and any one exercising it a fearful hazard” (64).¹⁸

This is unsurprising given the economic motivations of slavery.¹⁹ As William E. Wiethoff writes in respect of the role and function of overseers within the mechanics of plantation production, “By the late 1820s a policy against slave complaints had become commonplace in plantation management” (135). However, as Wiethoff continues, this

¹⁸ Despite repeatedly noting that the institution of slavery sought to preclude the slave’s right of “appeal” against overseers, Douglass notes that slaves who managed to make some kind of case against their treatment could achieve some degree of informal redress: “Nevertheless, when a slave has nerve enough to exercise it, and boldly approaches his master with a well-founded complaint against an overseer, though he may be repulsed, and may not even have that of which he complains repeated at the time, and though he may be beaten by his master, as well as the overseer, for his temerity, in the end the policy of complaint is, generally, vindicated by the relaxed rigor of the overseer’s treatment. The latter becomes more careful, and less disposed to use the last upon such slaves thereafter” (64). As discussed later in this chapter, the attempt to appeal gave cause for further discipline against the slave, as ‘appealing’ was wrongdoing in-and-of-itself.

¹⁹ For a comprehensive review of how slavery formed the basis for, and refined the techniques of, the modern capitalist (American) economy, see Edward E. Baptist’s *The Half Has Never Been Told: Slavery and the Making of American Capitalism*. Therein, Baptist explores “The idea that the commodification and suffering and forced labor of African Americans is what made the United States powerful and rich...” (xxi).

refusal to allow slaves recourse to their owner to complain of an overseer's conduct, including in respect of allegations of wrongdoing made against them, was also designed to legitimate the institution of slavery itself:

Unlike the employers and managers of factory workers, slaveowners felt a duty to justify their business decisions as part of a larger need. They felt duty-bound to defend a way of life and not merely to make a profit. As a result they proclaimed “laws” and not merely rules. In a rhetorical parallel with their legislation, the linguistic tenor of their business politics was extremely bipolar. At the affirmative pole, planters sought “a perfect understanding” so that they might manage their work force “absolutely.” At the negative extreme, slaves were “never” to question their orders.

(136)

Certainly, this demand for slaves' absolute obedience was made in pursuit of the economic imperatives of slavery. But it was also crucial to reifying the institution, as well as the power imbalance within it. In particular, this demand rendered people as property within the plantation – transforming them into items to be deployed in furtherance of their owners' purposes, commercial and otherwise. Moreover, this demand for such total and complete slave obedience – or, rather, the unlimited power of masters – was confirmed at law.

Legal authority: people as property

Later in his life, though while still enslaved, Douglass learns the trade of caulking. Permitted by his then owner, ‘Master Hugh’, to pursue his own caulking employment

contracts, Douglass is nonetheless required to provide the bulk of his earnings from those contracts to Master Hugh. Becoming "...more and more dissatisfied with this state of things", Douglass complains of the inherent injustice in forwarding the fruits of his labour to his owner:

To make a contented slave, you must make a thoughtless one. It is necessary to darken his moral and mental vision, as far as possible, to annihilate his power of reason. He must be able to detect no inconsistencies in slavery. The man that takes his earnings, must be able to convince him that he has a perfect right to do so. It must not depend upon mere force ; the slave must know no Higher Law than his master's will. (233)

To render the slave compliant with the unfair taking of his or her employment earnings required formulating such taking as correct or proper. But more generally, according to Douglass, the maintenance or persistence of such an unjust relationship hinged on extinguishing the slaves' capacity to question their unjust circumstances. Further, the slave's "power of reason" was to be supplanted with his or her owner's "will": efforts to eliminate the slave's "power of reason" to protest his or her conditions, such as the refusal to permit appeals to an owner of an overseer's conduct, were consistent with an ideology that viewed slaves merely as objects to be circulated within the economy of slavery. Indeed, formulating slaves as an extension of their master's will, including in respect of disciplining slaves, ultimately reflected a conceptual and legal correspondence between the slave and chattel.²⁰

²⁰ Of course, as Douglass writes: "I now saw, in my situation, several points of similarity with that of the oxen. They were property, so was I ; that they were to be broken and so was I" (155). After all, as

It is worth noting that the legal notion of “Slaves as ‘chattel,’” which they were for most purposes of the time...”, was not uniform or consistent across all states (Morris 61). Specifically, in certain states such as Kentucky, Arkansas, and Louisiana (though not in Maryland) slaves were conceptualized at law as real estate or real property: “For one reason or another rules of real property law were applied to slaves in some instances in over one-third of the jurisdictions that made up the slave South” (Morris 64). While the distinction within property law between chattels personal and real property was traceable to the English common law, and carried within it significant legal effects, ultimately it determined whether the property in issue was movable or not. Defining slaves as chattel, as in Maryland, meant they were directly the property of their master, as opposed to merely being an extension of the land he owned (and which the slaves worked) as in the states where they were defined as real property (Morris 64). As a result, the distinction was most relevant in disputes pertaining to the disposition of estates that included slaves. However, as Morris continues, whether conceptualized as real property or chattel, the fundamental legal status of the slave was an item to be owned²¹:

Ultimately, of course, whatever rules were applied by statutes or judicial rulings to slaves, what was crucial was dominion. For this purpose the concept of property, the notion of a person as a “thing,” was obviously the central “incident” in slavery. Whether the person was defined as a chattel

Douglass also notes, slaves were, effectively, chattel: “Horses and men – cattle and women – pigs and children – all holding the same rank in the scale of social existence... Personality swallowed up in the sordid idea of property ! Manhood lost in chattelhood!” (128-29).

²¹ The principle that the slave was in all aspects owned by his or her master – and that there was no right for slaves beyond the master’s authority – was (legally) determinative of the fact and experience of enslavement.

or as realty had no real moral dimension, and it did not raise the status of the slave. What it did do was determine what particular legal and equitable rules, what precise “incidents” of property law, would be used by judges and chancellors. (80)

While slaves may have been conceptualized as chattel in the majority of states, regardless of whether they were realty or chattel, to render them in a manner that reflected in all aspects their master’s complete ownership of them – that is, the effective transformation of people to property – required a disciplinary apparatus more complicated than that deployed merely on chattel.

In his remarkable comparative study of slavery, *Inhuman Bondage: The Rise and Fall of Slavery in the New World*, David Brion Davis notes that the operation of slavery in the nineteenth-century American South generally required masters to possess unlimited power over their enslaved, as they would over chattel. Reiterating this ‘chattel principle’ as articulated by slave James W.C. Pennington, Davis writes:

In theory, the Southern slaveholder possessed all the power of any owner of living chattel property, such as horses, sheep, cows or oxen. We have seen that Aristotle referred to the ox “as the poor man’s slave”; “the chattel principle” was probably best defined by the American fugitive slave James W.C. Pennington:

The being of slavery, its soul and its body, lives and moves in the chattel principle, the property principle, the bill of sale principle; the cart-whip starvation, and nakedness, are its inevitable consequences.... You cannot constitute slavery without the chattel

principle – and with the chattel principle you cannot save it from these results. Talk about kind and Christian masters. They are not masters of the system. The system is master of them. (*Inhuman* 193)²²

However, as Davis continues, “In practice it proved impossible to treat human beings as no more than possessions or as the mere instruments of an owner’s will, though attempts to do so were often made, as many former slaves recounted” (194). It was practically impossible, then, to establish and maintain control over slaves on the fundamental premise they were chattel lacking volition or intention. Accordingly, the mechanics of slave discipline required legal regulation more complex than would be necessary if humans could in fact have been treated as mere chattel.

This difficulty in attempting “... to reduce a human being to salable chattel is what...” Davis identifies as “the basic ‘problem of slavery’” (*Inhuman* 35). Like Berlin, Davis defines the ongoing struggle between slave and master for control over the slave’s being as definitive of slavery. But for Davis, the struggle (and ultimate inability) to transform people into property – the source of the “paradox” underpinning enslavement – lies in the fact that human dignity cannot be extinguished (*Inhuman* 35). Efforts made to annihilate the slave’s will or reason were doomed to fail, according to Berlin and Davis, because of the slave’s enduring dignity. Similarly, in his comparative study of slavery, *Slavery and Social Death*, and in relation to Douglass, Orlando Patterson offers a

²² As Walter Johnson argues, Pennington’s notion of ‘the chattel principle’ was that the institution of slavery was organized around the auction block: “Pennington, that is, figured the relation of the slave trade to the rest of slavery in a way that was both spatial and temporal: the trade was a means of spreading slavery over space and (adversely) transforming it over time. The trade, he argued, was a passageway from slavery’s present to its future” (*Future Store* 1).

definition of slavery that emphasizes that enslavement required a refusal to recognize the dignity of the slave: “*slavery is the permanent, violent domination of natively alienated and generally dishonored persons*” (13).²³ It is the ruthless, perpetual, and systematic dishonouring of individuals that defines enslavement for Patterson. Thus for Berlin, Davis, Patterson, and others, dignity or honour is an essential aspect of individual identity, slave or otherwise, and the institutionalized refusal to recognize that aspect of identity is a constitutive component of enslavement.²⁴

Whether it was dignity or honour in slaves that was irrepressible such that it led to disobedience or even slave resistance, there was undeniably in slaves a volition and capacity to act contrary to masters’ orders that distinguished them from other property, including chattel. As Davis continues:

Although a slave is supposed to be treated like a dog, horse, or ox, as reflected in all the laws that define the slave as a chattel or thing, the same laws have had to recognize that slaves run away, rebel, murder, rape, steal, divulge revolts, and help protect the state from external danger. (*Inhuman* 35)

²³ To be clear, this is a preliminary definition of slavery offered by Patterson, though the remainder of *Slavery and Social Death* is devoted to developing that definition. For Patterson, slaves are best conceptualized most appropriately as dishonoured individuals, who become property. Their key status is that they are excluded – alienated – from the rights and rites of society generally, and are thus available to become human property. For Patterson, slaves are present in social sphere but absent from participation therein. They are socially dead.

²⁴ I do not mean to suggest that dignity and honour are equivalent, though they are obviously related. The notion of dignity, as I understand its use in the work of Berlin and Davis, refers to the drive for recognition – a sense of self that merits esteem and correspondingly refuses to be owned. Honour, as I understand its use in Patterson, includes dignity but also invokes the forms of its (precluded or refused) recognition. As I discuss later, this suggests an affinity between the legal positions of the criminal and the slave.

The maintenance of slavery thus had to grapple with and respond to the fact that slaves were *human* and capable of *human* actions. Further, slaveowners would have been confronted with the fact of that humanity in their daily encounters and exchanges with slaves, including in the form of miscegenous relationships. But with few exceptions, the nature of that legally recognized slave humanity was criminal – contraventions of the general law of Douglass’s “society” – that could not remain unaddressed within the legal order.²⁵

Thus, although chattel (or some other species of property) at law, there were moments when the slave was legally recognized as human. As Hartman writes, these moments were ones of slave criminality:

Not surprisingly, the agency of the enslaved is only intelligible or recognizable as crime and the designation of personhood burdened with incredible duties and responsibilities that serve to enhance the repressive mechanisms of power, denote the limits of socially tolerable forms of violence, and intensify and legitimate violence in the guise of protection, justice, and the reconfiguration of slave humanity. (62)

The recognition of slave criminality – even though it served to legitimize the deployment of disciplinary power, including in respect of slavery – paradoxically re-signified the slave as a person, including at law. Indeed, this notion of slave agency, particularly for wrongdoing, rendered slaves fundamentally and *legally* different from other forms of

²⁵ There were, of course, other recognitions of slave humanity that did not turn on criminality. Certainly, there were miscegenous relationships, consensual and non-consensual, between white male slaveowners and black female slaves. Davis also notes that “Virtually every slaveholding state has had to arm slaves, no matter how reluctantly, in times of crisis” (*Inhuman* 35). The key point, however, is that overwhelmingly it was largely in criminality that a slave was legally recognized as human.

property. In particular, despite not obtaining any legal benefits of personhood, slaves were nonetheless held legally accountable as *people* for their wrongdoing. As Mark V. Tushnet writes “Everywhere in the slave South, the law imposed criminal liability on slaves for their actions, justifying this by noting that slaves were human beings with all the moral responsibility any human being would have” (*Slave Law* 14).²⁶ Conversely, despite such legal (and social) recognition of slave humanity or personhood within the discourse of criminal law and responsibility, little legal recourse existed for slaves to protect them *as people* from the abuse of masters, as victims of criminal conduct.

Emphasizing that blacks, whether enslaved or free, lacked protection *from* criminal activity perpetrated against them by whites, Randall Kennedy notes that such absence of legal protection was integral to the subordination of blacks. As Kennedy writes:

Part of the strategy for denigrating all blacks involved depriving them of legal protections against conduct that was deemed criminal when visited upon whites. Hence, in the slave South (the locus of the great mass of the black population in antebellum America), officials decriminalized violence inflicted upon blacks to the extent thought necessary to assert and preserve white supremacy. (*Race, Crime* 30)

This failure to protect blacks from criminal activity was stretched to its extreme within the slaveowning relationship as “Throughout the antebellum period, the law shielded

²⁶ As Tushnet continues, “Treating slaves as human beings for purposes of holding slaves liable for the crimes they committed was easy enough, but what about crimes committed *against* slaves?” (*Slave Law* 14). As I discuss, there were legislative restraints against masters. However, given the legal impediments against slave testimony, as well as an overriding judicial commitment to buttressing master’s authority, prosecuting instances of crimes against slaves were difficult even when pursued.

slaveowners from criminal liability for killing a slave if death resulted from violence administered for the purpose of subduing resistance or imposing discipline” (Kennedy *Race, Crime* 30). The legalities of slavery permitted such abusive conduct, identifying it as necessary discipline for slave wrongdoing. According to Andrew Fede:

The late eighteenth century and early nineteenth century law increased the scope of white civil liability and criminal liability for slave abuse. Nevertheless, even this law had a legitimizing effect; it continued to decriminalize white violence that would have been criminal at common law, to the extent that the violence at issue was thought to be a “necessary” or “ordinary” incident of slavery. (61)

By allowing what would otherwise be criminal conduct to discipline slaves, the law ensured the subjugation of slaves to the unimpeachable authority of mastery.

In *My Bondage*, Douglass provides a number of anecdotes to establish abuse or even murder of slaves was not punishable in any legal or even informal way. For example, noting, “... that killing a slave, or any colored person, in Talbot county, Maryland, is not treated as a crime, either by the courts or the community,” Douglass writes of a Mr. Thomas who escaped legal censure after he killed two slaves, one of whom he “butchered with a hatchet, by knocking his brains out” (94). Douglass further writes that he had observed Mr. Thomas boasting of these actions, “... saying, among other things, that he was the only benefactor of his country in the company, and that when ‘others would do as much as he had done, we should be relieved of the d---d niggers” (94). This is not to suggest that there was no possibility of legal redress for the

abuse of slaves. But, as Douglass makes clear, even when community consensus pushed for legal sanctions for slave abuse, the legal system typically failed to prosecute.

“As an evidence of the reckless disregard of human life – where the life is that of a slave”, Douglass provides an anecdote wherein the wife of slaveowner Mr. Giles Hicks murdered Douglass’s wife’s cousin, “a young girl between fifteen and sixteen years of age” (94). Angered by the girl’s failure to awake in the night to attend to the Hicks’ crying baby, Hicks’ wife murdered and subsequently mutilated the girl’s face. She also took great pains to bury the girl. Eventually, a coroner’s jury was empanelled, and it was determined that the girl had been beaten to death by being clubbed with firewood while she slept. While Douglass is clear that the brutal murder of the girl did cause concern through the community, he also notes that Hicks’ wife wholly avoids any legal sanction:

I will not say that this most horrid murder produced no sensation in the community. It *did* produce a sensation ; but, incredible to tell, the moral sense of the community was blunted too entirely by the ordinary nature of slavery horrors, to bring the murderess to punishment. A warrant was issued for her arrest, but, for some reason or other, that warrant was never served. Thus did Mrs. Hicks not only escape condign punishment, but even the pain and mortification of being arraigned before a court of justice. (95)

Notwithstanding what appears from Douglass’s anecdote to be at least some pressure from the community to punish the girl’s murder, the legal system fails, or refuses, to pursue Hicks’ wife.

Community recognition of a slave's humanity – whether by way of legal sanctions that sought to punish slaves' criminal behaviour or more generally social concern that they not be abused by their owners – did little to mitigate the repressive understanding at law that slaves were property. As Fede frames this issue: "... one must acknowledge that the logic of slave law was the logic of absolute legal oppression of one person over another. By defining slaves as property, the law stripped slaves of all legal rights" (10). In fact, the law served to doubly subordinate slaves by holding them accountable for crimes against society, all the while maintaining them as property of their masters and bereft of protection from them. As Fede continues:

The concomitant definition of slaves as persons for other purposes was necessary and it accomplished two ends not inconsistent with this paramount aim. First, it protected the public interest and the owner's interest, and second, it burdened slaves with special legal duties and obligations that marked the complete oppression of the system. Consequently, the law created legal duties in slaves while it denied slaves' legal rights. This is the despotism of the slavery relationship expressed in legal terms. (10)

At all turns, the slave's legal identity as property was confirmed, even in moments when it ought to have been disrupted by the slave's undeniable humanity. Whether holding slaves accountable as human perpetrators of criminal conduct, or refusing to recognize them as human victims of criminal conduct, at all points the legal subordination of slaves to their masters was reinforced. This was even the case when instances of slave abuse

were actively prosecuted, as opposed to merely acknowledged within the broader community but legally ignored.

This tension at law between enabling or ensuring mastery and protecting the enslaved from abuses of that mastery, was importantly explored in the 1829 North Carolina Supreme Court decision of *State v. Mann*, 13 N.C. 263. Briefly, the white John Mann had been accused of criminally abusing Lydia, a slave he did not own but had hired as labour. At trial, Mann's defence was that Lydia had not followed his orders and, in her refusal to submit to his disciplinary authority, her conduct merited his shooting and wounding her. Finding that Mann's actions extended beyond any reasonable response to Lydia's conduct, the jury in the trial at the lower court found Mann guilty of assault and battery and he was fined five dollars. Mann appealed the trial court's decision.

The appellate court's ruling has interested scholars of slavery because of its clear elucidation of the fundamental principles of slavery, as well as the court's ambivalence in uttering them.²⁷ Overturning the trial court's decision on the principle that masters could not be legally sanctioned for actions against their *own* slaves, Judge Ruffin found, for the majority, that the contractual relations of temporary ownership, such as Mann's interest in Lydia, cannot efface this fundamental principle. Reasoning that the culturally "established habits and uniform practice of the country," for better or worse confirm slavery's legitimacy, Judge Ruffin notes that for the institution of slavery in all its forms and expressions:

²⁷ The scholarly significance of the *Mann* decision is explained by Tushnet: "Scholars have been intrigued by *State v. Mann* because Judge Ruffin's opinion brings into view a large number of issues that have broad significance for understanding not merely Southern law but Southern slavery and even law itself" (*Slave Law* 38).

The end is the profit of the master, his security and the public safety ; the subject, one doomed in his own person and his posterity, to live without knowledge and without the capacity to make anything his own, and to toil that another may reap the fruits... Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. *The power of the master must be absolute to render the submission of the slave perfect.* (266 emphasis added)

Determining, then, that it was necessary to the maintenance of slavery to refuse to find Mann guilty of excessive abuse, Judge Ruffin held that the very essence of slavery must be the master's unlimited dominion over the slave. As a consequence, failure to maintain the complete "submission of the slave" at all times could only lead to a breakdown of slavery – the result of which would be the subversion of the institution.²⁸

Importantly, one aspect of the *Mann* decision is Judge Ruffin's articulation of the inherent unjustness and cruelty of the master-slave relationship and the power dynamic it exemplifies. In response to the need for absolute mastery to maintain slavery, he observes:

I most freely confess my sense of the harshness of this proposition. I feel it as deeply as any man can. And as a principle of moral right, every person in his retirement must repudiate it. *But in the actual condition of things, it must be so. There is no remedy.* The discipline belongs to the state of slavery. They cannot be disunited, without abrogating at once the

²⁸ See William Goodell, *The American Slave Code in Theory and Practice* (1853), 122-127, for an illustration of the "Unlimited Power of Slaveholders" (107).

rights of the master, and absolving the slave from his subjection. (266 emphasis added)

Recognizing, then, that while immorality may define slavery, the Court noted that its practical continuation necessarily calls for a legal confirmation of the propriety or correctness of such immorality. This immorality, which cannot be undone given the fact of slavery's existence, "...constitutes the curse of slavery to both the bond and free portions of our population. But it is inherent in the relation of master and slave" (266-67). In *Mann's* refusal to extend to slaves legal protection from abuse by those who have *some* property interest in them, courts were held to not be able to properly intervene in the relationship between master and slave for to do so would completely undermine the essence of mastery, which is that the master's necessary right to final determinations concerning the slave's being because the slave is *his* property. For the Court, the point was not simply to articulate the institutional necessity of mastery's rights over slaves, but also to articulate the *only* model of slave subordination that could justify and perpetuate slavery.

In his reasoning, Judge Ruffin's refusal to criminalize Mann's abuse of Lydia demonstrates how the disciplinary apparatus of slavery hinged on a silencing of the slave. As Judge Ruffin reasoned, to eliminate the slave's claim of legal protection first requires eliminating the possibility of recognizing the slave as a legal subject with rights that extend beyond her master's will: "We cannot allow the right of the master to be brought into the discussion in the courts of justice. The slave, to remain a slave, must be made sensible that there is no appeal from his master; that his power is in no instance usurped; but is conferred by the laws of man at least, if not by the law of God" (267). It is through

this fundamental denial of recourse to an authority beyond the master that the “submission” and “obedience” of the slave are rendered “perfect”. Put another way, the “perfection” of slavery was achieved by rendering slaves silent within the effort to transform them into property.

As “North Carolina had no protective statute” the *Mann* decision represents the reasoning whereby it fell exclusively to “the authority of the courts to uphold indictments of slaveowners for a common law assault and battery or cruelty as an offense *contra bonos mores*” (Morris 190).²⁹ Like North Carolina, Maryland also did not possess any statutory protections for slaves from the abuse of masters and, to that extent, *Mann* provides some context for the legal climate in which Douglass found himself. It is worth noting that those states that lacked statutory protection for slaves were the minority as “Most jurisdictions, however, adopted laws, if at all, to punish masters criminally for cruelty or inhumanity” (Morris 183). However, even in those states that possessed protective legislation for slaves, and where prosecutions of abusive masters were pursued, given that mastery was considered and legally treated as absolute it remained difficult to prosecute masters absent their having taken shocking, non-disciplinary action. As Kennedy notes, “Although courts did find on occasion that masters committed crimes by killing slaves, such instances were notably rare. To be convicted, a master had to do something that was egregiously cruel even by the highly permissive standards of the slave regime” (*Race, Crime* 30-31).³⁰

²⁹ Of course, as Morris notes, even in those states that did possess some ostensible legislative protection for slaves from their masters, any claim for protection by the law was necessarily impeded by “... a serious evidentiary problem. Slaves could not testify against their masters” (184).

³⁰ Kennedy explains: “The law governing other sorts of violence against slaves mirrored the evolution of the law governing homicide. Over time, slaves were accorded increasing protections against

This ultimately legal presumption of the master's absolute disciplinary power (which, as unchecked, carried with it a presumption of slave wrongdoing) manifested itself in procedural obstacles that rendered legal remedies for their abuse at the hands of their masters beyond the reach of slaves. In particular, in trials of slave abuse, slaves were disallowed from providing any evidence of the alleged abuse, the effect of which was to treat them as having in fact committed some wrongdoing and were thus deserving of the abuse they suffered.³¹ For example, in relation to South Carolina, which did possess slave protection legislation, Morris notes that although courts and legislators were aware that precluding slave testimony could result in further slave abuse, particularly as plantations were distant from one another and a white person may not have observed the abuse (and therefore be available to testify on behalf of the slave), slaves were not permitted to provide evidence against their owners (184). Ultimately, however, this absence of slave testimony – the slave's *legal* silence in respect of allegations of being abused – effectively operated to confirm the correctness or legitimacy of the abusive actions.

Perhaps because they were precluded from testifying, but nonetheless surprisingly, the evidentiary gap created by the absence of the slave's testimony as to the

nonfatal assaults. Slaves even received additional protection against sadistic owners; several states eventually passed laws prohibiting masters from inflicting 'cruel or unusual' punishments upon slaves. Like the law of homicide, however, the law of assault and battery deprived slaves of the protections accorded to whites" (*Race Crime* 32-33).

³¹ As Douglass notes in respect of his master – Master Hugh – seeking prosecution against men who had assaulted Douglass in front of only blacks, "But [Esquire] Watson insisted that he was not authorized to do anything, unless *white* witnesses of the transaction would come forward, and testify to what had taken place. He could issue no warrant on my word, against white persons ; and, if I had been killed in the presence of a *thousand blacks*, their testimony, combined, would have been insufficient to arrest a single murderer. Master Hugh, for once, was compelled to say, that this state of things was *too bad* ; and he left the office of the magistrate, disgusted" (231).

alleged abuse was filled by presuming the abuse actually happened.³² As Morris writes: “This [evidentiary] difficulty was dealt with by reversing what is today a benchmark of Anglo-American criminal justice – the presumption of innocence. The rule was that the white in charge of a slave who had been abused would be presumed guilty of the offence” (184). However, as Morris continues, this presumption of guilt was so easily refuted by the slaveowner that it was effectively immediately reversible: “... the presumption of [the owner’s] guilt would be nullified by the owner’s oath [to the contrary]” (184). Unless a slave, who could not testify, could provide “... two white witnesses [who] offered ‘clear proof’ of the owner’s guilt”, the owner “... would be discharged...” of the claim of abuse (Morris 184). Accordingly, on the mere testimony of the owner – who may or may not have witnessed the abuse, and in the absence of any evidence from the slave – the slave was determined to have behaved in a manner that merited the abuse. Denied any meaningful opportunity to rebut the claim, the slave was thus legally determined to have committed some wrongdoing.

Importantly, the legal framework authorizing the discipline of slaves occasionally reflected contradictory aims as, throughout the nineteenth century, laws were at times implemented to restrict or limit masters’ disciplinary power over slaves. But as Davis notes, whatever the respective legislative intentions may have been, such legal

³² In relation to the legal ‘rights’ of slaves (or absence thereof), Kennedy makes the important qualification that: “The formalities of law should not be confused with what actually happens. Just because the legal order gave whites, particularly owners, broad leeway to brutalize slaves without fear of prosecution and punishment does not mean that whites characteristically did so. There were, after all, forms of social control other than law which regulated whites’ behavior. These included conscience, regard for reputation, a desire to protect economic investment, and a sense that the overall protection of the slave system was best accomplished by showing slaves that the master class had a sense of honor” (*Race Crime* 33-34).

restrictions on masters ultimately did not guarantee protection or even ensure survival for slaves:

By the nineteenth century state laws were *supposed to* protect slaves from murder and mutilation. They set minimal standards for food, clothing, and shelter. They also prohibited masters from teaching slaves to read or from allowing slaves to carry firearms or roam about the countryside. They increasingly restricted or in effect prohibited manumission. (*Inhuman* 193 emphasis added)

Moreover, to the extent slaves' humanity problematized their legal status as chattel, such humanity had no positive impact on slaves' lives. Rather it only provided an opportunity to legitimate or justify masters' authority over slaves by authorizing slave discipline as a constitutive element of slavery. As Morris continues, "These slave codes acknowledged that bondsmen were human beings who were capable of plotting, stealing, fleeing, or rebelling, and who were likely to be a less "troublesome property" if well cared for under a program of strict discipline" (193-94). While slave codes and laws regulating slavery often appeared on their face to provide some protection to slaves, the disciplinary powers of masters was effectively unlimited.

Crucially, as articulated in the *Mann* decision, even when the evidence supported a finding of abuse, the maintenance of slavery required the legal order to *refuse* to limit the scope of masters' disciplinary authority. This legal allowance of masters' unlimited power over their enslaved permitted and authorized masters to discipline slaves as they alone saw fit. And the inability of slaves to appeal to any extra-plantation authority – which resonated *on* the plantation as slaves could not appeal overseers' conduct to

slaveowners – was crucial to perfecting this disciplinary power. Essential, then, to the exercise or deployment of that disciplinary power across all forums was the presumption of slave wrongdoing.

Presuming slave wrongdoing on the plantation and beyond

In one particularly chilling episode during his time on Col. Lloyd’s plantation, Douglass writes of the murder of a fellow slave named Denby.³³ Working under the overseer Mr. Gore, who “with the malign and tyrannical qualities of an overseer... combined something of the lawful master... [and] could torture the slightest work or look into impudence,” Douglass writes that both Lloyd and Gore were adamant about the need to demonstrate their authority to ensure the obedience of plantation slaves (91). Knowing only that Denby offended the overseer Gore in some way, Douglass relays Denby’s demise. Observing that one day Denby broke away from Gore after Gore administered “but few stripes” as punishment for his offence, Douglass writes that Denby refused to return to Gore and endure the rest of his punishment (92). As a result, “It is said that Gore gave Denby three calls, telling that if he did not obey the last call, he would shoot him. When the third call was given, Denby stood his ground firmly ; and this raised the question in the minds of the by-standing slaves – ‘will he dare to shoot?’” (92). The tragic conclusion of Denby’s resistance to discipline is, of course, his death. After refusing to exit the creek in which he had taken refuge from Gore’s discipline, “*Gore shot him dead !*” (92). While Denby’s murder demonstrates a particularly gruesome example

³³ Also called “Demby” throughout.

of the brutality of slavery, it also illustrates how slave discipline functioned to concretize the power imbalance and corresponding property relations constituting slavery.

In stating that “A thrill of horror flashed through every soul on the plantation” upon hearing of Denby’s murder, Douglass notes that Gore – who was in the employment of Denby’s owner Col. Lloyd – was “arraigned” by Col. Lloyd to explain Denby’s death (93). In his defence, Gore argued that he ultimately had no choice but to kill Denby, for to allow Denby to live after his explicit public disobedience would be to invite plantation disorder. Douglass writes that Gore “... argued, that if one slave refused to be corrected, and was allowed to escape with his life, when he had been told that he should lose it if he persisted in his course, the other slaves would soon copy his example” (93). In his confrontation with Denby, Gore’s continuing authority as overseeing manager of the plantation thus hinged on making an example of Denby to the witnessing slaves.³⁴ Specifically, as exemplified by Gore, to develop a seamless presentation of authority that in itself would dissuade slave disobedience would require those with the ability to discipline to do so as they see fit.³⁵ According to Douglass, slave discipline required adherence “... to the maxim, practically maintained by slaveholders, that it is better that a dozen slaves suffer under the lash, without fault, than that the master or the overseer should seem to have been wrong in the presence of the slave” (91). Essential, then, to this formulation of mastery is that the authority of the master (or his representative) is

³⁴ Publically punishing a slave to demonstrate authority was a common plantation disciplinary technique. As Douglass writes: “It is quite usual to make one slave the object of especial abuse, and to beat him often, with a view to its effect upon others, rather than with any expectation that the slave whipped will be improved by it...” (192).

³⁵ As Hartman writes, “In these instances, the exercise of power was inseparable from its display because domination depended upon demonstrations of the slaveholder’s dominion and the captive’s abasement. The owner’s display of mastery was just as important as the legal title to slave property. In other words, representing power was essential to reproducing domination” (7).

beyond reproach and cannot be incorrectly applied. And as a necessary consequence or effect of that irreproachable authority slaves were constantly at risk of being found guilty of some infraction, whether real or imagined.

Pleading “that cowardly alarm-cry that the slaves would ‘take the place,’” Gore takes the position that failing to kill Denby after threatening to do so would invariably subvert the entire slave order, “the result of which would be the freedom of the slaves, and the enslavement of the whites” (93). Evoking the racialized organization of plantation slavery, Gore argues that any faltering in the twinned ideological production of slave wrongdoing/unimpeachable mastery would lead to social disorder. Of course, the continued subordination of slaves required that mastery in all its forms consistently be presented as a rigid racial distinction between the (black) enslaved and their (white) masters. But as plantation overseer, Gore’s relationship to the ownership rights underpinning slavery exposes the institution’s investment in the public disciplining of slaves: the implementation of a uniform disciplinary system among the multiple levels of authority within slavery, required actively precluding slaves from appealing to one “master” concerning their treatment at the hands of another. And in disabling slaves from presenting and protesting within slavery their individual experiences of mistreatment they were effectively silenced.³⁶ Crucially, for Douglass, such silencing turned largely on the slave’s assumed or presumed wrongdoing.

³⁶ As Jeannine DeLombard explains in respect of the inability to prosecute Gore’s actions as they were witnessed only by slaves who could not testify: “The enforced silence of the slave witnesses means that, just as the material evidence of Gore’s crime is rendered invisible by the physical setting in which it occurs... any testimony evidence of Demby’s murder is similarly effaced by the legal environment of the South, in which white violence is sanctioned by mandatory black silence” (262).

As Douglass writes, establishing *after* discipline that a slave misbehaved was easily accomplished, particularly as the slave was already presumed to have committed some wrong:

The slave is sometimes whipped into the confession of offenses which he never committed. The reader will see that the good old rule – “a man is to be held innocent until proved to be guilty” – does not hold good on the slave plantation. Suspicion and torture are the approved methods of getting at the truth, here. (203)

However, in addition to being presumed to have committed some wrong, slaves found *any* action could be construed as misconduct deserving discipline. As Douglass also notes:

The man, unaccustomed to slaveholding, would be astonished to observe how many *floggable* offenses there are in the slaveholder’s catalogue of crimes ; and how easy it is to commit any one of them, even when the slave least intends to it. A slaveholder, bent on finding fault, will hatch up a dozen a day, if he chooses to do so, and each one of these shall be of a punishable description. (190)

While this presumption or deeming of slave misconduct legitimated the discipline slaves received, it also precluded the ability for slaves to argue innocence in relation to such charges of wrongdoing. As noted above, both informal and formal appeals of punishment were disallowed. However, as Douglass continues, the combined effect of this unlimited power over the slave *and* the presumption of the slave’s wrongdoing, was that the very attempt of the slave to establish his or her innocence in relation to

allegations of wrongdoing was in-and-of-itself an offence. Put another way, there can be no ‘innocent’ slave.

As Douglass continues to catalogue the various slave actions that may be deemed misconduct, he notes the slave’s attempt to declare his innocence in response to false charges is, in fact, one of the greatest slave crimes in slaveholding society:

Does he ever venture to vindicate his conduct, when harshly and unjustly accused ? Then, he is guilty of impudence, one of the greatest crimes in the social catalogue of southern society. To allow a slave to escape punishment, which has impudently attempted to exculpate himself from unjust charges, preferred against him by some white person, is to be guilty of a great dereliction of duty. (190)

But the ‘crime’ of impudence was not limited merely to the advancement of protestations of innocence. Rather, as Douglass writes, it was a ‘catch-all’ offence, that reflected masters’ capricious determinations of wrongdoing. Whether aware or not, at any time a slave could be found to have been ‘impudent’ – to have been deemed to have committed wrongdoing and thereby properly disciplined.

Focussing on an incident he observed early in his time at Col. Lloyd’s plantation – the whipping of a woman named Nelly – Douglass writes that:

The offense alleged against Nelly, was one of the commonest and most indefinite in the whole catalogue of offenses usually laid to the charge of slaves, viz : “impudence.” This may mean almost anything, or nothing at all, just according to the caprice of the master or overseer, at the moment.

But whatever it is, or is not, if it gets the name of “impudence,” the party charged with it is sure of a flogging. (70)

Determining that to the extent “impudence” can be understood Nelly was guilty of it, Douglass writes “This offense may be committed in various ways ; in the tone of an answer ; in answering at all ; in not answering ; in the expression of countenance ; in the motion of the head ; in the gait, manner and bearing of the slave” (70). Caught in an impossible position whereby their very existence on the plantation could merit punishment, slaves were subjected to the “caprice” of their owners whom exercised their right to flog and assault their slaves as they saw fit.³⁷ Discipline for impudence then enabled the master to punish the slave without any predetermined or knowable cause – that is, to punish the slave for being a slave – thereby requiring the slave to internalize through self-vigilance the master’s incontestable disciplinary will. And this marking of black slaves as consistently guilty or always potentially guilty of some wrongdoing served to reify their circulation as objects within slavery.

In relation to his autobiography’s pivotal moment – his physical resistance to abuse from an overseer – Douglass illustrates how the mere accusation of disobedience

³⁷ Punishing ‘impudence’ is really about punishing the agency – the humanity – of slaves. That agency is simply formulated in terms of wrongdoing or criminality, which is not surprising since it permits a conceptual reconciliation of the slave’s legal status of property with his or her criminal liability. In this sense, it may be useful to think about it in relation to Hegel’s master-slave dialectic. The key difference, as Leonard Cassuto notes, is that “Unlike Hegel’s bondsman, the American slave was held captive by a doctrine of black inferiority that encompassed his entire existence. The law held that whites could never be enslaved... the American system... held a slave regardless of the work that he did – or did not do – for his master” (241-42). Accordingly, the slave’s intentional move to crime is the reciprocal or corresponding movement within the dialectic – a recognition of his or her status as object and embracing, by way of criminality, the only opportunity to force a recognition from the master of the slave’s agency. As Costas Douzinas notes, crime and criminality are essential to the unfolding of “the law from abstract right to morality and eventually to the ethical state and solidarity... [insofar as]... the essence of crime is the criminal’s demand to be recognized and to be respected as a concrete and unique individual against the uniform coercion of the legal system (276-77).

functioned to silence slaves, thereby transforming them effectively into property.³⁸ Treated particularly poorly by the overseer Covey, to whom his legal owner Capt. Auld had temporarily provided him as labour, Douglass notes that he was incapable of protesting to Auld how Covey had been mistreating him. Focussing on what he believed to be unjust beatings by Covey – ostensibly punishment for Douglass’s alleged laziness and defiance – Douglass is clear that Auld would not intervene on his behalf:

He [Auld] first walked the floor, apparently much agitated by my story , and the sad spectacle I presented ; but, presently . it was his turn to talk. He began moderately, by finding excuses for Covey, and ending with a full justification of him, and passionate condemnation of me. “He had no doubt I deserved the flogging. He did not believe I was sick ; I was only endeavoring to get rid of work. My dizziness was laziness, and Covey did right to flog me, as he had done.” (168)

Assuming that Covey’s accusation of Douglass’s laziness was merited, Auld refuses to speak to Covey on Douglass’s behalf. However, in addition to presuming the correctness of Covey’s actions, Auld also refuses to interfere in Covey’s temporary mastery over Douglass.

As Douglass continues, “After thus fairly annihilating me, and rousing himself by his own eloquence, he fiercely demanded what I wished him to do in the case !” (168).

Incapable or unwilling to consider that Douglass had been victimized by a mistaken or

³⁸ Specifically in respect of the master-slave dialectic, Margaret Kohn notes that Douglass’s willingness to fight for freedom rendered him free, even if he legally was not: “In choosing to risk death rather than endure bondage, Douglass felt himself to be free, even though he had not yet escaped from slavery... Douglass had no reason to believe his physical condition would improve by fighting back, yet he nevertheless chose to risk his life rather than be subject to ‘brutification.’ Of course, the victory against Covey did not win Douglass his freedom; he was still a slave. But he gained self-respect and recognition and thereby set in motion a process which culminated in his freedom” (504).

cruel “slave employer,” given Covey’s allegations of insubordination Douglass’s protestations to the contrary are irrelevant for Auld (169). Indeed, as Douglass notes, mastery hinged on the presumption of the slave’s wrongdoing: “The guilt of a slave is always, and everywhere, presumed ; and the innocence of the slaveholder or the slave employer, is always asserted” (168-69). Moreover, as is established in Douglass’s narrative, any efforts by a slave to assert his or her innocence – the very attempt to be acquitted of the presumption of wrongdoing – is in-and-of-itself wrongdoing to be punished.

In response to Auld’s presumption that Douglass must have committed *some* misconduct to necessitate Covey’s discipline, Douglass writes that any rebuttal or assertion to the contrary would have been impudence and would have led to further punishment:

With such a complete knock-down to all my hopes, as he had given me, and feeling, as I did, my entire subject to his power, I had very little heart to reply. I must not affirm my innocence of the allegations which he had piled up against me ; for that would be impudence, and would probably call down fresh violence as well as wrath upon me. (168)

Squeezed, then, into a situation whereby the accusation of wrongdoing operated as the determination of wrongdoing, Douglass explains how the presumption of guilt extended beyond the adjudication of slave complaints. Because the charge and determination of impudence attached to the slave’s denial of wrongdoing, the slave’s abilities to express him or herself were necessarily and severely restricted within slavery. As Douglass writes, no punishment for impudence was typically necessary to quiet the slave. Rather,

the knowledge that impudence warranted punishment was enough to effectively present slaves from defending themselves. As such, when confronted with an accusation, and inevitable presumption, that a slave had been disobedient, “The word of the slave, against this presumption, is generally treated as impudence. ‘Do you contradict me, you rascal?’ is a finer silencer of counter statements from the lips of a slave” (Douglass 169).

That the guilt of slaves extended beyond a mere presumption, and was in fact *produced* by slaveholders, identifies the importance of slave guilt or wrongdoing to the administration of plantation slavery. And that charges, such as impudence, however ill-defined or malleable, ever needed to accompany a master’s incontestable right to punish his slaves, suggests a desire to rectify a fundamental inability to legitimize discipline within slavery. Accusing slaves of the overdetermined charge of impudence, for example, allowed slaveholders to publicly exemplify, and reify the force of, their authority. And, as such, plantation administration refused the humanity of slaves to render them property. This practice and legal principle of refusing to permit slaves to advance claims of innocence in response to allegations of wrongdoing in and out of the courtroom, expanded and culminated in the *Fugitive Slave Act* of 1850 which effectively presumed *blacks* to have illegally conducted themselves in contravening it.

Signed into law in 1850, the *Fugitive Slave Act* ensured slavery became a federal, inescapable responsibility.³⁹ Specifically, it enabled slave states to extend slaveowner rights into non-slave states by permitting the retrieval and return of slaves who had escaped to non-slave states. The *Act’s* procedure for collecting and returning fugitive

³⁹ The 1850 *Fugitive Slave Act* was distinguishable from the earlier 1793 version in that it did not allow states to pass legislation to preserve or protect the freedom of allegedly fugitive slaves. As a result, slavery – or more precisely its effect – was wholly pervasive.

slaves to their owners was rather straightforward: it empowered commissioners of the federal court, or those vested with the same authority, to issue a warrant that permitted detention and return of an individual to an owner-claimant who could prove the detained individual was in fact his fugitive slave. And establishing that the allegedly fugitive slave was the claimant's property was remarkably simple. An affidavit filed with the court in the claimant's home state describing the slave was required by a federal commissioner and, if satisfied the description matched the captured individual, the federal commissioner authorized the return of the fugitive slave to the claimant.

In the context of the *Fugitive Slave Act* the threshold for claiming an individual as property was thus surprisingly low. As provided in articles 9 and 10 of the *Act*, an individual could be found in violation of the *Act* on the bare claim of a slaveowner presented merely by affidavit filed in another state. Moreover, under the *Act*, there was no opportunity available to the individual claimed as a fugitive slave to rebut such a claim as section 6 of the *Act* refused the admissibility of evidence or submissions from the allegedly fugitive slave in respect of the claim.⁴⁰ As a result, the "*prima facie*

⁴⁰ Article 6 of the 1850 *Fugitive Slave Act* provided: "*And be it further enacted*, That when a person held to service or labor in any State or Territory of the United States, has heretofore or shall hereafter escape into another State or Territory of the United States, the person or persons to whom such service or labor may be due, or his, her, or their agent or attorney, duly authorized, by power of attorney, in writing, acknowledged and certified under the seal of some legal officer or court of the State or Territory in which the same may be executed, may pursue and reclaim such fugitive person, either by procuring a warrant from some one of the courts, judges, or commissioners aforesaid, of the proper circuit, district, or county, for the apprehension of such fugitive from service or labor, or by seizing and arresting such fugitive, where the same can be done without process, and by taking, or causing such person to be taken, forthwith before such court, judge, or commissioner, whose duty it shall be to hear and determine the case of such claimant in a summary manner; and upon satisfactory proof being made, by deposition or affidavit, in writing, to be taken and certified by such court, judge, or commissioner, or by other satisfactory testimony, duly taken and certified by some court, magistrate, justice of the peace, or other legal officer authorized to administer an oath and take depositions under the laws of the State or Territory from which such person owing service or labor may have escaped, with a certificate of such magistracy or other authority, as aforesaid, with the seal of the proper court or officer thereto attached, which seal shall be sufficient to establish the competency of the proof, and with proof, also by affidavit, of the identity of the person whose service or labor is claimed to be due

evidence [from the owner claimant] would be sufficient to enslave an accused fugitive” (Basinger 324).

This impermissibility of slave testimony was only one of a number of procedural rights refused to slaves claimed under the *Act*. As succinctly noted by James Oliver Horton and Lois E. Horton, “The rights and protections of those accused of being fugitives were further reduced by denying them the right to speak in their own defense, by making no provision for habeas corpus, and by not requiring that they be represented by counsel or receive a jury trial” (145). Thus, as a compromise between the North and the South as to the national significance and rights of slaveholders the *Act* was remarkably effective, at the cost of the fugitive’s rights of course. Jeffrey Schmitt summarizes the lack of procedural safeguards for those accused of contravening the *Act* as follows:

The Fugitive Slave Act met southern demands so effectively that it denied alleged fugitives the traditional legal protections afforded to other northern citizens and thus essentially create a presumption of slavery in the North. In hearings before a federal commissioner – who was paid a higher fee when ruling in favor of the slave catcher – alleged fugitives were denied

as aforesaid, that the person so arrested does in fact owe service or labor to the person or persons claiming him or her, in the State or Territory from which such fugitive may have escaped as aforesaid, and that said person escaped, to make out and deliver to such claimant, his or her agent or attorney, a certificate setting forth the substantial facts as to the service or labor due from such fugitive to the claimant, and of his or her escape from the State or Territory in which he or she was arrested, with authority to such claimant, or his or her agent or attorney, to use such reasonable force and restraint as may be necessary, under the circumstances of the case, to take and remove such fugitive person back to the State or Territory whence he or she may have escaped as aforesaid. In no trial or hearing under this act shall the testimony of such alleged fugitive be admitted in evidence; and the certificates in this and the first [fourth] section mentioned, shall be conclusive of the right of the person or persons in whose favor granted, to remove such fugitive to the State or Territory from which he escaped, and shall prevent all molestation of such person or persons by any process issued by any court, judge, magistrate, or other person whomsoever.”

basic due process rights, such as the right to testify and a trial by jury. These proceedings were deemed summary and final – no appeal or writ of habeas corpus was permitted. Moreover, stiff penalties were imposed on any one who interfered in the rendition. (1319)

In addition to being a legal process unjustly weighted in favour of claimants, this national statutory scheme for the return of absconded property *necessarily* possessed a racial character.

The descriptions and identifications of fugitive slaves in affidavits filed by owners for return of their property under the *Act* obviously possessed what would be considered a ‘racial’ character. After all, as Morris notes:

Most slaves in North America were Africans or persons who had African ancestors. That led to a significant principle of American slave law. As Cobb put it, “the black color of the race raises the presumption of slavery.” With one notable exception the general presumption based on “blackness” was a commonplace of Southern law by the nineteenth century. (21)⁴¹

Indeed, given that it was a legal principle that blackness was a key marker or signifier of enslavement, the identification of a slave, practically speaking, was visual and included such phenotypic traits of blackness such as skin colour, a “flat nose and woolly hair”.⁴²

⁴¹ The exception, for Morris, was Delaware. In *State v. Dillahunt* (1840) it was ruled that a black witness in a murder trial was ruled competent on the basis that it was no longer fair to “presume slavery from color” as a result of the majority of blacks in that state being free (17,000 out of 20,000) (21-22).

⁴² *Hudgins v. Wright*, 11 Va. 134 (1806). See also *State v. Cantey*, 20 S.C.L. (2 Hill) 614 for the proposition that only blacks can be slaves (or, rather, that whites cannot).

Crucially, to the extent that an individual appeared white that individual “was presumed free, and the burden of proof of slavery rested on the person claiming him or her as a slave (Morris 26).⁴³ As a result, and in its very simplicity, the presumptive enslavement manifested in the *Fugitive Slave Act* spilled over into a general racial subordination whereby even free blacks could find themselves presumptively enslaved, in particular if they matched slaveowners’ written claims. As Larry D. Stokes explains:

[A] White could fraudulently claim that a Black was a slave, and there was very little that a Free Negro could do about it. There always existed the danger of a free Black being kidnapped, as often happened, and taken into slavery. A large majority of free Blacks lived in daily fear of losing what freedom they had. One slip of ignorance of the law would endanger their slight freedom and place them into slavery. (268)

The fact that free blacks could very easily be caught by claims under the *Act* reveals the legislative push to conceptualize and define slavery in purely racial terms.⁴⁴ Moreover, it demonstrates the procedural bias built into the *Act* to ensure claims, however specious, were established and remedied.

Within the statutory process for claiming a fugitive slave, the slaves themselves – or blacks who met the affidavit descriptions – were incapable of providing any substantive defence to a claim of fugitive property. For all intents and purposes then, the

⁴³ See, for example, *Gobu v. Gobu*, 1 N.C. (1 Tay.) 164 (1802).

⁴⁴ As I discuss in the introductory and third chapters of this project, blackness and enslavement were always conceptually conflated. However, the push to legally define blackness (and by extension who precisely was a slave) did not occur until the final decades of slavery, in particular the 1850s. In any event, to the extent the *Fugitive Slave Act* (1850) violated the citizenship rights of free blacks, the matter was resolved, obviously, in *Dred Scott v. Sandford* (1857), which held that blacks were not citizens in any substantive sense any way.

Act effectively operated to presume blacks of contravening it.⁴⁵ As Kennedy summarizes it, “The *Fugitive Slave Act* profoundly undermined blacks’ sense of security in the North by making any African-American an accusation away from quasi-criminal legal proceedings which were tilted heavily in favor of any person alleging a property interest in a black human” (*Race, Crime* 84).⁴⁶ That slaves were not permitted to testify in proceedings instituted under the *Fugitive Slave Act* ought not to be surprising. It was consistent with a legal effort to render slaves chattel within the property relations of slavery: as noted above, and notwithstanding that slaves could be punished by law for their criminal activity, slaves were not permitted to testify in respect of abuse perpetrated against them. However, this refusal to permit slave evidence was part of a broader *racial* evidentiary bar. As Kennedy notes, “In all of the Southern states and in several of the Northern ones, blacks (regardless of their status as slaves or freedpeople) were barred from testifying against whites” (*Race, Crime* 37). As a result, “This legal disability drastically undermined blacks’ security; absent white witnesses, blacks could be

⁴⁵ Stephen M. Best recognizes the figure of the fugitive slave embodied the tension or conflict within the law caused by the slave as subject (willfully contravening the law) and object (property under it to be collected): “The law needs to embrace two incommensurables. In the hand of humanity rests the ‘fugitive’ slave, who, like his or her legal analogue (the fugitive who flees from justice), willfully eludes obligation. Yet in the hand of interest lies the slave or person who, by definition, has done nothing to incur his or her debt, since there is no slave in advance of liability who can will a debt: property in personhood *tout court*. The figuration of the fugitive as debtor produces a willful subject against the express legal nullification of willfulness. To be precise, it projects a willful subject when the will-less is in suspension, fabulates a subject now owned when the owned escapes (to use the language of the common law) ‘absolute dominion,’ fantasizes a person at the precise moment when the security of property is subject to greatest question” (81).

⁴⁶ As Kennedy notes, “Pursuant to the *Fugitive Slave Act*, approximately three hundred runaways were returned to bondage between 1850 and 1860” (*Race, Crime* 84). As Davis further fleshes it out in nothing that travel to free land was actually quite difficult for slaves seeking to escape: “According to a very conservative estimate, the number of annual runaways in the 1850s would have exceeded 50,000 (1.26 percent of the 1860 slave population; about 5 out of every 400 slaves). But the vast majority of these slaves remained fairly close to their farms or plantations and either returned or were captured within days or weeks. It is probable that between 1830 and 1860, no more than 1,000 or 2,000 fugitives annually made it to the North and achieved freedom” (*Problem* 235).

swindled, assaulted, or killed with impunity” (Kennedy *Race, Crime* 37). Blacks could also be enslaved even if free. As Kennedy suggests, this refusal to permit slaves to testify was a result of the racial presumption that blacks would be prone to dishonesty and, as a result, such evidence ought not be used, particularly in relation to whites and their rights: “Behind this exclusion was the widespread belief that, as a matter of racial character, blacks are mendacious and that it would therefore be unjust to use their racially tainted testimony in circumstances that put at risk the property or liberty of whites” (*Race, Crime* 37). Thus in addition to the presumptions about and the legal status of slaves (as well as the disciplinary requirements of slavery) blocking their ability to give evidence, racial presumptions about blacks, including their propensity for misconduct such as their inability to be truthful, also informed their preclusion from testifying (Morris 230).

Accordingly, blacks – and in particular, slaves – were placed in an intractable position: they were presumed to have committed wrongdoing (to have placed themselves outside the legal order) but were also precluded from advancing any defence to such allegations, either on the plantation or in the courtroom. This presumption of wrongdoing, which in turn silenced them, was essential to preserving the power dynamics of slavery. But it was also essential to preserving the racial dynamics of slavery, for the presuming of wrongdoing both informed and imbued the legal *meaning* of their skin colour, distinguishing it phenotypically and in significance from that of whites (who were presumed innocent, free, and competent to testify).

Unsurprisingly, black freedom did not reverse the presumption of black wrongdoing. In fact, it provided the opportunity to legally re-define black existence as criminal. As Douglas A. Blackmon summarizes it:

Beginning in the late 1860s, and accelerating after the return of white political control in 1877, every southern state enacted an array of interlocking laws essentially intended to criminalize black life. Many such laws were struck down in court appeals or through federal interventions, but new statutes embracing the same strictures on black life quickly appeared to replace them. Few laws specifically enunciated their applicability only to blacks, but it was widely understood that these provisions would rarely if ever be enforced on whites. (53)

Following Emancipation, a host of legislative changes rendered it effectively illegal to live as black.⁴⁷ Emphasizing how these changes operated to realize a kind of re-enslavement of blacks, Blackmon continues that in respect of contravening such legislation “In nearly all cases, the potential penalty awaiting black men, and a small number of women, snared by those laws was the prospect of being sold into forced labor” (54). Racial equality following slavery remained elusive as black freedom resulted in a legal commitment to translating blackness as a marker of enslavement to one of criminality.

Colin Dayan notes a conceptual affinity between the legal subject of the criminal and that of the slave. In respect of the post-Emancipation legal push to re-conceptualize blacks as criminals, Dayan argues that the legal apparatuses of slave subjection and

⁴⁷ By way of examples, Blackmon writes: “Every southern state except Arkansas and Tennessee had passed laws by the end of 1865 outlawing vagrancy and so vaguely defining it that virtually any freed slave not under the protection of a white man could be arrested for the crime. An 1865 Mississippi statute required African American workers to enter into labor contracts with white farmers by January 1 of every year or risk arrest. Four other states legislated that African Americans could not legally be hired for work without a discharge paper from their previous employer – effectively preventing them from leaving the plantation of the white man they worked for. In the 1880s, Alabama, North Carolina, and Florida enacted laws making it a criminal act for a black to change employers without permission” (53-54).

criminal discipline informed each other, ultimately blending into the *racial* subordination that paradoxically characterized black freedom. Following Patterson's conception of slavery as social death, Dayan argues the legal position of the 'socially dead' slave was congruent with that of the convicted criminal who is 'civilly dead' – alive but prevented from participating in the broader civil, political sphere:

In juxtaposing the “social death” of slaves with the “civil death” of felons, we recognize how statute and case law became more effective than social custom in effecting rituals of exclusion and in maintaining the racial line. These legal engines of dispossession, once systematized and firmly embedded in human affairs, were applicable everywhere and recognized by everyone. (43)

The systematized dispossession of individuals, as criminals or as slaves, was achieved through legal mechanisms that operated to define and impose determinations of wrongdoing and, ultimately, race. And in their authority to proliferate and make such determinations, those legal mechanisms reflected back to the populace 'truths' about race, wrongdoing, and their conflation.

For Dayan, the unquestioned and insidious nature of such (legal) 'truths' about black skin and wrongdoing is traceable to the legal conflation of black people with property. The manner in which slave law reconciled the categories of 'person' and 'property' in the singular figure of the legal slave, required a recognition and disavowal of the individual that were in constant tension. As Dayan writes:

The legal strategy [to render blacks property] worked first to recognize slaves as persons only to deprive them of their inherent dignity what they

would otherwise be due by nature or under God. Slave law thus both created and contained the subject, as it scrutinized and redefined the person in law. For this legal non-descript, who had no civil rights to lose, could be deemed, when it served the needs of the owner, something that engenders affection and esteem. (44)

Though like the dead, who possess no rights that can be withheld or taken away, the slave nonetheless existed and was present, to be resurrected at the whims of his or her owner, only to be conceptually removed from the civil sphere again when the owner deemed it suitable.

This understanding of the slave as socially dead did not elude Douglass. As he describes the state of the slave's existence: "The possibility of ever becoming anything but an object slave, a mere machine in the hands of an owner, had now fled, and it seemed to me it had fled forever. A life of living death, beset with the innumerable horrors of the cotton field, and the sugar plantation, seemed to be my doom" (220). But as he immediately continues, and reflecting on time he spent in prison for his "intended flight" (217) from slavery, he explicitly connects this rumination on enslavement to the punishment of the criminal: "The friends, who rushed into the prison when we were first put there, continued to visit me, and to ply me without questions and with their tantalizing remarks. I was insulted, but helpless ; keenly alive to the demands of justice and liberty, but with no means of answering them" (220). It is this civil death that, like that of the prisoner, that defined the slave's existence. All too aware of the unjust position in which he is placed but actively prevented from taking any steps to rectify it, the slave, like the wrongfully imprisoned, is deprived of rights or access to justice. But

this experience of enslavement was racialized, also defining what it meant to be black: “The racialized idiom of slavery in the American social order depended on the legal fiction of ‘civil death’: the state of a person who though possessing *natural life* has lost all civil rights” (Dayan 44 underlining added). And it is this understanding of blackness, rooted and indistinguishable from the legal subject of the slave, that provided the conceptual means to disenfranchise blacks and continued to do so even after slavery had been abolished.

Conclusion

Douglass, as he explains it in *My Bondage*, eventually escaped slavery. His opportunity for freedom came, somewhat ironically, from the unusual freedoms afforded to him within slavery.⁴⁸ Thus, in 1838, while in Baltimore and permitted to be away from his master, he took his chance to escape: “On Monday, the third day of September, 1838, in accordance with my resolution, I bade farewell to the city of Baltimore, and to that slavery which had been my abhorrence from childhood” (143). How precisely he escaped is not divulged so as to keep secret the techniques used by slaves to procure their freedom. As he writes, “How I got away – in what direction I traveled – whether by land or by water ; whether with or without assistance – must, for reasons already mentioned, remain unexplained”. Nonetheless, Douglass had become a fugitive. And it is in actually committing wrongdoing that he finds liberation, for as Davis explains, “For the fugitive,

⁴⁸ See Davis, *Problem* 226-32. In respect of Douglass, Davis writes, “His trip, beginning September 3, 1838, exemplified in extreme form the fortuity that had governed Douglass’s early life. It should be stressed that only a small number of runaways succeeded in obtaining their freedom, and many from Maryland were either captured at the beginning and then put on the auction block, or were later seized in the streets of Philadelphia or New York” (230).

standing on free soil could bring a certain sense of ‘rehumanization,’ of achieving human capacities that slaveholders attempted to destroy” (*Problem* 230).

This inversion of the dehumanizing presumption of wrongdoing is essential to Douglass’s eventual obtaining of freedom. It is also essential to his narrative aims. In communicating the experience of slavery, largely for abolitionist purposes, Douglass catalogues the various abuses he endured and observed, but also how slavery operated to ensnare and perpetuate the subordination of individuals as well as considering why slavery exists. To be clear, for Douglass enslavement was not fundamentally racialized, and *My Bondage* does not theorize racial difference or its epistemology, legal or otherwise. Indeed, in contemplating *why* he was enslaved, Douglass concludes it was not skin colour that was determinative of his fate:

Once, however, engaged in the inquiry, I was not very long in finding out the true solution of the matter. It was not *color*, but *crime*, not *God*, but *man*, that afforded the true explanation of the existence of slavery ; nor was I long in finding out another important truth, viz ; what man can make, man can unmake. (69)

Of course, throughout *My Bondage* Douglass does note the racialized nature of slavery and freedom, as well as the racialized enforcement of laws supporting such a social dichotomy. But, as Barbara Jeanne Fields notes, the cultural conception of ‘race’ used by Douglass was not equivalent to contemporary ones: “Both Afro- and Euro-Americans used the words that today denote race, but they did not understand those words the same way” (115). Nonetheless, and as I explore, by the time of *My Bondage and My Freedom*’s publication in 1855, race was in fact becoming the legal basis for slavery, as

citizens and courts struggled to explain what slavery was and to define who precisely it affected. And as those legal racial definitions were refined and implemented – informing our own conceptions of race and racial difference – what black skin meant in slavery would define what it would mean going forward.

My Bondage demonstrates there were already certain legal connotations to black skin that would inform and delimit the legal definitions of race that would shortly arise as slavery sought to maintain itself. And chief among those connotations was the presumption of slave wrongdoing – a presumption about blacks *produced* within slavery that would obtain legal reality and enforcement after it as black skin came and continues to mark criminality. This notion has largely characterized, and continues to characterize, the black experience in America. From the plantation and Fugitive Slave Acts, to Jim Crow, to Stop-and-Frisk, the racial profiling of black skin as indicative of wrongdoing or even criminality has been legitimated in statutes and judicial opinions. What *My Bondage* illustrates is that this presumption of wrongdoing was foundational to slavery itself as it was essential to the practices and legalities of slaveholding that attempted to render or transform people into property.

CHAPTER TWO

'Partus Sequitur Ventrem': Lydia Maria Child's *A Romance of the Republic* and the Stabilization of Racial Difference

"Reader, my story ends with freedom; not in the usual way, with marriage."
-Harriet Jacobs

Introduction

A central concern of Frederick Douglass in his 1855 autobiography, *My Bondage and My Freedom*, is his unavoidable uncertainty about his origins. As Douglass's narrative articulates his life within the dehumanizing conditions of slavery – his precise date of birth, for example, remains unknown to him – the withholding or absence of fundamental self-knowledge is shown by Douglass to be integral to the subordination of slaves. To the extent, then, that Douglass's narrative functions as a kind of ontogenesis (as well as an illustration of the man escaping slavery), he is required to speculate and theorize on those elements of his existence unknown to him.

For Douglass himself, a lack of knowledge about his familial heritage is essential to his enslavement. In the third chapter of his narrative, entitled "The Author's Parentage," Douglass writes that he knew the identity of his mother, but was uncertain as to who his father was. Emphasizing the significance of such unknown paternity to his enslavement, and slavery generally, he writes: "I say nothing of *father*, for he is shrouded in a mystery I have never been able to penetrate" (41). However, as he continues, the very notion of fatherhood is antithetical to slavery and his lack of knowledge on this

specific point exemplifies slavery's dehumanizing aims. In particular, Douglass notes that a slave's knowledge of his paternity would enable familial networks that would, in turn, create a sense of belonging or community that would challenge or potentially subvert slavery's dominance:

Slavery does away with fathers, as it does away with families, and its laws do not recognize their existence in the social arrangements of the plantation. When they do exist, they are not the outgrowths of slavery, but are antagonistic to that system. (41)

Because the notion of 'family' for the enslaved contradicted and could disrupt the mechanics of slavery, slaveholders endeavoured to prevent slaves from forming or realizing family units including refusing them the legal recognition of a family unit (as well as refusing the legal entitlements and consequences that would flow from such recognition). Critical to effecting such a refusal of family was precluding or preventing slaves' knowledge of their paternity.

Despite never conclusively solving the mystery of his father's identity, Douglass states that there were rumblings his master was also his father. However, he is quick to note that even if true such a revelation would be inconsequential:

There was a whisper, that my master was my father ; yet it was only a whisper, and I cannot say that I ever gave it credence. Indeed, I now have reason to think he was not ; nevertheless, *the fact remains, in all of its glaring odiousness, that, by the laws of slavery, children in all cases, are reduced to the conditions of their mothers.* (46 emphasis added)

The irrelevance of a slave's paternity is thus caused *and* confirmed by the legal principle that maternity determines a child's status with respect to freedom or enslavement: the legal fact of a child's enslavement is grounded in, and justified by, the legal status of that child's mother. Given that Douglass's mother was a slave, his status as slave was thus legally predetermined regardless of who his father actually was. As Douglass continues, because children follow the condition of their mother – and therefore slaveowners could breed as well as purchase slaves – slaveowners were often financially motivated to beget and enslave their own progeny.¹ And in emphasizing the ease with which the institution of slavery could be sustained and perpetuated, Douglass highlights the fundamental connection between gender and enslavement at the institution's core: where a conflict arose over an individual's status as slave, the status of that individual's mother decisively resolved it, regardless of that individual's paternity or what rights for that individual *ought* to have flowed from it.

Indeed, children born from unions of white slaveholding men and black enslaved women, as Douglass suspected himself to be, were subjected to a strange historical legal tension. The force of inheritance pursuant to English common law, generally applicable outside slavery, was patrilineal and ought to have resulted in the freedom of such children. However, slavery's insistence on a contradictory logic of matrilineal inheritance of slave status ensured such children were enslaved. It was therefore not possible for a father from outside of slavery to disrupt the transmission of the enslaved status or identity to his child: "The order of civilization is reversed here. The name of

¹ "This arrangement admits of the greatest license to brutal slaveholders, and their profligate sons, brothers, relations and friends, and gives to the pleasure of sin, the additional attraction of profit" (Douglass 46).

the child is not expected to be that of its father, and his condition does not necessarily affect that of the child” (Douglass 41). As Douglass continues, whether free or enslaved, white or black, the child’s status is restricted entirely to its mother’s:

He may be the slave of Mr. Tilgman ; and his child, when born, may be the slave of Mr. Gross. He may be a *freeman* ; and yet his child may be a *chattel*. He may be white, glorifying in the purity of his Anglo-Saxon blood ; and his child may be ranked with the blackest slaves. Indeed, he *may* be, and often *is*, master and father to the same child. (41-42)

This reversal of “the order of civilization” thus amounts to property interests of the slaveowner being prioritized over any legal interests the father (or his child) may have, including when the slaveowner himself was the father. To achieve such a prioritization of legal interests, however, first requires a centralizing and prioritizing of the race of the child’s mother: because a mother’s legal status within slavery was determinative of her child’s, her legal racial identity was also determinative of her child’s race.² And, to the extent there was any visual slippage between race and enslavement – between phenotype and legal status – that slippage was stabilized by maternity.

In this chapter, I explore this relationship between maternity and slavery, gender and race, by turning to Lydia Maria Child’s 1867 novel *A Romance of the Republic*. A work of sentimental fiction published two years after the formal end of slavery, Child’s *Romance* nonetheless takes as its subject the family unit as it was imbricated within the

² As noted in the introductory and third chapters of this project, the legal correspondence between blackness and slavery is traceable to the founding of the colonies. However, as I also explain, the attempts to pin down racial difference, in the service of slavery, did not substantially commence until the final decades of slavery, largely because the racialized presumption of enslavement was being subverted and challenged by race-mixing and social conduct, as well as by resistance to slavery itself.

power and property dynamics of slavery. Specifically, it explores the cultural consequences of the matrilineal transmission of racial identity during slavery, particularly in the absence of any observable markers of racial difference.

Romance tells the tale of the Royal sisters – Rosabella and Flora – daughters born in early nineteenth-century Louisiana to Mr. Alfred Royal, a white merchant, and his octoroon wife, Eulalia. The narrative opens with the daughters as young adults, their mother long departed and their doting father experiencing financial difficulties. On his death, which incites the narrative, his creditors seek the value of his estate which, coming as a shock to all those involved, also includes his daughters: the Royal parents, as it turns out, have concealed the legal race and status of the mother, Eulalia, by telling all that she was of Spanish descent. As a result, the daughters' legal race remains unknown to them. Given the entire Royal family, including Rosa and Flora, appear racially white, this racial deception was easy to effect. Yet despite its ease – or perhaps because of it – the Royals fail to take the requisite steps to ensure Eulalia's freedom. At the time Alfred first fell in love with Eulalia, her father disclosed to him that she was legally black and, as he was experiencing financial difficulties, proposed Alfred purchase her so they could be together as well as help him alleviate some of his debt. Thus knowing Eulalia's racial heritage, and understanding its legal significance to their romantic relationship, Alfred did just that. However, although he and Eulalia loved each other, and for reasons that are unclear, despite knowing he ought to have done so to be legally married, Alfred failed to manumit her and then marry her in a foreign jurisdiction in which interracial marriages were permitted. The result is that following his purchase of Eulalia they were never married and she continued to be his property until her death. Further, because Alfred also

failed to manumit or free their daughters with Eulalia – who were unavoidably born as his property – on his death they form valuable parts of his estate.

Romance's narrative is thus driven by the legal principle that a mother's legal identity as slave (and corresponding legal racial identity) is ultimately determinative of that of her children: thrust on their father's death into a network of property relations that would have them enslaved, the girls learn for the first time of their *legal* blackness. But in focussing on the repercussions of this legal principle, Child problematizes legal definitions of race by presenting a narrative of potential enslavement for individuals that appear, live, and self-identify as 'white'. Indeed, in exposing enslavement as potentially unhinged from typical markers of race, such as conduct or skin colour, Child demonstrates the difficulty in pinning down any singular, quantifiable notion of race or racial difference, as well as the corresponding difficulty of legally defining that racial difference. But in identifying a factual slippage or disconnect between 'blackness' and slavery, as well as within any notion of blackness itself, Child also demonstrates how the law stabilized it, arbitrarily, through maternity.

Accordingly, in this chapter I argue that *Romance* ultimately explores how racial difference was perpetuated and, in fact, produced during slavery. In emphasizing the primacy of matrilineal transmissions of race, *Romance* demonstrates the centrality of both gender and the notional family to slavery and racial difference. And through a plot that entwines, among other things, a clandestine escape from potential enslavement, European high society, and multiple interracial romances, *Romance* reveals and subverts the gendered construction of race at law. But in so doing it must re-iterate the patriarchal order inherent in marriage, for the Royal daughters' freedom is achieved, in the last

instance, through interracial marriages and their re-entry into wealthy white society wherein they repeat the same racial deception in which their own father ensnared them. As a result, although *Romance* does not realize the degree of social *racial* reform Child presumably sought, it nonetheless illuminates and grapples with the manner in which racial difference was understood and produced by way of gender difference. Restrained, then, by the legal realities it seeks to expose, *Romance* nonetheless glimpses a radical vision of both racial and gender equality wherein neither can be realized without the other.

The racialized limits of the family

Taking as his goal the theorizing of the possibility of intimacy across the racial divide *within* slavery, Randall Kennedy writes that “Interracial intimacy played a prominent role in the development of the free black community during the age of slavery” as “A substantial portion of that [free black] community was comprised of individuals who had been born to enslaved mothers and freed by their white fathers, or born to black fathers (slave or free) and free white mothers” (*Interracial* 66).³ Because of the frequency with which interracial relationships between white men and enslaved black women resulted in children, Kennedy notes that “the court reports of the slave states furnish scores of similar examples of white men who sought to help their black mistresses and children escape the deprivations imposed upon them by enslavement and racism”

³ As I discuss later in this chapter, I do not mean to overlook or disavow the gendered violence that typically characterized sex across the slavery line. But as I discuss, one can discuss interracial intimacy as a fact within slavery in an effort to understand the nuances and machinations of racial ideologies. This is particularly the case in instances where slaveholders sought to free their children who, contrary to owner intention or desire, were doomed to slavery, as explored in *Romance*.

(*Interracial* 47). Noting that Louisiana courts in particular saw a number of claims by white men to liberate their mistress and progeny property, the cases Kennedy alludes to focus on the wills of white males who sought, upon their death, to ensure the freedom of their mistresses and children. Presumably because such instances could be legally understood through established principles of estate law and, in particular as the exercise of an individual's right to dispose of his property on his death, "The cases recounted... all had relatively happy endings" (Kennedy 49).⁴ But, as Kennedy argues, while the emancipation of slaves would have been legally enabled, by way of testamentary disposition for example, when those slaves were in fact *related* to their owner such mechanisms of emancipation would have conflicted with the legal prohibition against interracial relationships: "In other instances, however, laws designed to discourage interracial intimacy frustrated efforts on the part of white men to provide for women and children who were deemed by authorities to reside on the other side of the color line" (49).

In its plot of concealed racial histories and interracial relationships, *Romance* exposes this legal conflict between familial rights and slavery's legislation as racialized by situating the Royal family at the intersection of competing racial epistemologies of personal experience and legal definitions. On the one hand, Eulialia's 'blackness', though seemingly negligible and concealed, exists as a legal fact: it is accepted by her father and Alfred and it is legally transmitted to her children who, unbeknownst to them,

⁴ See Kennedy, *Interracial*, 48. In particular, Kennedy therein relays the story of Jean-Baptist Lagarde of nineteenth-century Louisiana which, to some extent, echoes the story of *Romance*. Lagarde a white overseer, purchased a slave and reproduced with her. For reasons that are unclear, he failed to manumit their daughters, though he had intended to send them to France to live with his sister if he died before he failed to do so. Fortunately, they were ultimately purchased and emancipated by a friend of Lagarde's after he died.

possess it. On the other hand, the Royal daughters are raised to believe in their exclusive whiteness as their mother's legal racial identity is kept from them and they, as the offspring of a wealthy white merchant, have enjoyed the privileges of wealth and whiteness. In setting up this competition, Child identifies an ambivalence within legal (re)productions of racial difference. Parentage and genealogy provide definitive legal proof of an individual's race: in the absence of biological or behavioural markers of an individual's race, legal recourse could be taken to ancestry as evidence of an individual's racial identity. However – and perhaps precisely because it provided legal proof of race – the family unit could also subvert or resist legal definitions of race, as the Royals have done, by enacting a racial identity different from the arbitrary schema of blood or genealogy imposed by the law.⁵ As the Royal family eventually learns, however, any familial redefinition of its members' racial identities runs the risk of being erased and rewritten by the legal classifications it seeks to evade.

Noting that this tension between the family unit's racial identity and the legal definitions of race is a common feature of novels exploring resistance to hegemonic racial categories, Julie Cary Nerad explains that fiction emphasizing parental redefinitions of race usually gives way to the law's authority to classify:

As text after text tells us, the parents' desire to protect their children from white-supremacist social structures, laws, and ideological race categories motivates their silence. The parents often plan to reveal their children's legal racial identity to them once they have matured. This challenge to the

⁵ As I discuss in the third chapter of this project, one legal way to define race was by behaviour. This permitted individuals to be classified a particular race, contrary to biological or ancestral definitions, according to how they lived, including where they lived and with whom they associated.

law's authority sets the family in opposition to – rather in collusion with – the nation. The law, however, ultimately asserts and enforces the individual's legal racial classification, usually with dire cost. The children, who have formed white (and often racist) identities, frequently lose them along with the property of whiteness to which they feel entitled.

(818)

Narratives focussing on the familial usurpation of the legal authority to define race emphasize the failure of the family to maintain its ability to classify as it typically gives way to legal definitions and schema. Nonetheless, even if such familial redefinitions are only temporary they exhibit the instability of racial categories as well as the potentially incommensurable application of such definitions with personal definitions or experience.

For the Royal family, redefining their daughters' race provides them the opportunity for self-definition contrary to legal definitions. And by the narrative's end, when the Royal daughters finally obtain the opportunity for racial self-definition as white, that opportunity is less an attempt to escape their legal status as black and more a return to their previous self-identification as white. Bearing in mind that the Royal daughters lived, were raised, and had no knowledge that they were anything but white before the creditors of their father's estate informed them of and forced them to confront their legal status as slaves (thereby legally re-racing them as black), it ought to be unsurprising that they each settle and form families with white men. Moreover, within those families they repeat with their own children the narrative of familial whiteness with which they were deceived but exclusively lived.

For example, Flora conceals from her children with the white Franz Blumenthal the truth of her, and their, racial identity. Earlier in the text, Flora states that “Rosa and I were brought up like little princesses, and we never knew that we were colored. My mother was the daughter of a rich Spanish gentleman named Gonzalez...” (101). Acknowledging that the truth would eventually be provided to her own children, “it was not deemed wise to inform them [her children] of any further particulars, till time and experience had matured their characters and views of life” (287). Nonetheless, the narrative of ancestry Flora provides to her children defines them as legally white and encourages them to conceive of themselves as such:

These children were told that their grandfather was a rich American merchant in New Orleans, and their grandmother a beautiful and accomplished Spanish lady; that their grandfather failed in business and died poor; that his friend Mrs. Delano adopted their mother; and that they had a very handsome Aunt Rosa, who went to Europe with some good friends, and was lost at sea. (286-87)

This repeated concealing of Eulalia Royal’s legal racial identity allows Flora’s children to live without the immediate repercussions of their own legal blackness – something Flora was unable to do upon her father’s death. Flora’s decision to reconfigure her children’s racial history implements the very same racial conflicts between the law and exclusive familial definitions that capture the Royal daughters. But in returning to the Royal family’s ‘white’ racial identity, Flora enables herself, and by extension her children, to live the Royals’ race – the only one they have known.

Although at no point in the narrative do they conceive of themselves as black or slaves, at its end the Royal sisters ‘re-assume’ this original racial identity of white and publicly assert themselves as such in their return to white society. Their return to whiteness fundamentally suggests racial difference is constructed: the racial identity the daughters experienced within their family is, for them, their *only* racial identity. As Nerad writes, because of that experience, the re-claiming of whiteness at the narrative’s end is a return to their authentic racial selves, paradoxically analogizing the daughters to intentional ‘passers’ – those who knowingly and actively enact a racial identity other than their own – who typically and inevitably return to their black identity:

Many protagonists, like Rosa and Flora Royal, simply cannot or will not relinquish the white identity they have always known, although they do learn more about the needs of post-emancipation African Americans and attempt to promote the goals of racial uplift from their position as middle-class white women. In this sense, these characters have more in common with intentional passers who do reclaim a black identity than unintentional passers who don’t and instead live as white, or they retain the identity to which they have been socialized. (835)

But to some extent the Royal daughters are not passers. They have not lived or experienced a black identity they actively seek to evade (nor do they seek to evade the white identity that defines their lives). Nonetheless, Nerad’s focus on the sisters’ claim to whiteness reframes *Romance* as a narrative of inverted passing and, in so doing,

highlights that to the extent the Royal daughters have an authentic racial identity it would be that of whiteness.⁶

Ultimately, then, the narrative of *Romance* follows the defining, disruption and undoing, and eventual reclaiming of the Royal daughters' whiteness. That racial identity, which by any measure other than legal ought to be stable and uncontested, is legally disrupted by their father's death. As Flora succinctly explains its immediate effects on them: "... But *cher papa* died very suddenly; and first they told us we were very poor, and must earn our living; and then they told us that our mother was a slave, and so, according to law, we were slaves too..." (101). The consequences of Alfred Royal's death thus illustrate the supremacy or primacy of legal definitions of race: while racial difference may be fundamentally elusive, thereby permitting Alfred Royal to actively re-race his daughters pursuant to his wishes, his failure to reconcile those wishes with legal requirements leads to the daughters' potential enslavement. It is this paternal desire to define race that creates a tension between the Royal family and the law, ultimately resolved in favour of the latter, which renders the definitive transmission of racial identity through maternity.

While *Romance* focuses on the subversive potential of the family to re-define race, it also exposes the legal limits of that potential: while Royal challenges the legal definitions of his daughters' race, his goals are undermined by his failure to legally

⁶ It seems to me the correct way to classify the narrative pursuant to the sisters' final subversion of their legal racial identity is as a 'transracial' narrative, as I discuss later. The notion of passing, inverted or otherwise, implies a stability of racial categories and intentional evasion that I do not think correctly reflects their plight. Rather, while I argue that they identify first and foremost as white, the Royal daughters' slippage into blackness lacks intentionality and reveals how the (legal) structures of racial difference may be incommensurable with personal experience and are, in the last analysis, arbitrary.

realize his intentions. Despite loving her and knowing how to do so, Alfred Royal fails to take the requisite steps to obtain a legal marriage to Eulalia. As he explains to the young Alfred King early in the narrative:

“... If I had manumitted her, carried her abroad, and legally married her, I should have no remorse mingled with my sorrow for her loss. Loving her faithfully, as I did to the latest moment of her life, I now find it difficult to explain to myself how I came to neglect such an obvious duty. I was always thinking that I would do it at some future time.” (20-21)

His failure to manumit her despite his knowledge that “marriage with a quadroon would have been void, according to the laws of Louisiana”, forced Eulalia to live her life with Alfred Royal without the protection of freedom or marriage (21).

For women involved in interracial relationships, their prospect for freedom pursuant to those relationships was mediated by two somewhat opposed legal principles. First, interracial marriages were illegal.⁷ While sexual relationships between white men and black women were common, precluding the possibility of marriage between them – presumably in an effort to curb such expressions of interracial desire – denied the women any legitimacy or corresponding rights under the law.⁸ However, and second, the law

⁷ Laws against interracial coupling crucially took marriage, and not sex *per se*, as their focus. As Peggy Pascoe explains it: “Although many historians assume that miscegenation laws enforced American taboos against interracial sex, marriage, more than sex, was the legal focus. Some states did forbid both interracial sex and interracial marriage, but nearly twice as many targeted only marriage. Because marriage carried with it social respectability and economic benefits that were routinely denied to couples engaged in illicit sex, appeals courts adjudicated the legal issue of miscegenation at least a frequently in civil cases about marriage and divorce, inheritance, or child legitimacy as in criminal cases about sexual misconduct” (49-50). As Pascoe also notes, “Of the 41 colonies and states that prohibited interracial marriage, 22 also prohibited some form of interracial sex” (n15, 50).

⁸ The converse arrangement during slavery – black men with white women – is explored by Kennedy in *Interracial Intimacies* (59-66). Among other things, Kennedy notes that in certain states, white women who elected to marry slaves doomed themselves and their children to a life of servitude. In

nonetheless permitted the provision of freedom to black women in interracial relationships. Specifically, they (and any children they might have in such relationships) would be legally defined as the property of their white lovers and could thereby achieve freedom through the legal mechanisms available to owners to bestow freedom upon their slaves such as manumission or estate disposition. Royal's failure to procure the freedom of Eulalia is situated at the intersection of these legal outcomes: the prohibition against interracial intimacy meant he could not marry Eulalia, and his failure to manumit or free by will their daughters correctly identifies them as part of his estate on his death, to be subjected to creditors' remedies regardless of what his wishes may have been.

Alfred's failing of his family is two-fold: his initial negligence vis-à-vis his wife is repeated with his daughters. As he tells Alfred King, "... After I lost her [Eulalia], it was my intention to send the children immediately to France to be educated. But procrastination is my besetting sin; and the idea of parting with them was so painful, that I have deferred and deferred it" (21). And wholly aware of the legal ramifications of such negligence, Royal is incapable of offering any adequate explanation for these failures.⁹ This kind of paternal failure in maintaining the re-raced identities of family members is a common feature of narratives that seek to subvert the legal imposition of racial identity on individuals. As Andrea K. Newlyn writes, "Like a number of transracial narratives, and a considerable amount of sentimental fiction, *Romance* stages

respect of free blacks and white women, Kennedy notes that "This topic is in need of considerable excavation..." (66), but suggests that surprisingly there was a white tolerance for this type of relationship that disappeared after slavery (67).

⁹ It appears Royal did seek to manumit his daughters a few months before his death. But at that point he was too deep in debt to have his property exempted from his creditors grasp. As Signor Papanti explains to Alfred King: "... He [Royal] did manumit his daughters a few months before his decease; but it was decided that he was then too deeply in debt to have a right to dispose of any portion of his property" (164).

the failure of paternal authority. In a plot common to transracial narratives, the dying father neglects to manumit his wife, leaving his orphaned children slaves” (53).¹⁰ This narrative focus on paternal irresponsibility and failure to exempt children from slavery forms the substance for Child’s anti-prejudice polemical intentions: Royal’s failure to manumit at least his children, which must strike the modern reader as horrible carelessness, highlights the legal problems accruing to miscegenous relationships in slavery and the children born of them.

That Royal’s negligent handling of his estate allows his intentions to be overwritten reveals the legal significance of his paternal negligence. Narratives focusing on the failure of this kind of paternal authority emphasize the legal processes and definitions of racial difference. Specifically, Royal’s *inaction* brings into focus the importance of *maternity* to legal definitions of race: while Royal’s legal failings initiates the girls’ plight, their legal fate is determined through recourse to the maternal definitions of race. As Newlyn explains:

The staging of [paternal] neglect (and of the repercussions of that neglect) in *Romance* reveals a fundamental tension surrounding patriarchy in a slaveholding economy as paternal authority is superseded by other modes of exchange and different systems of authority. Transracial narratives thus make visible the tension between patriarchal notions of genealogy and bloodlines, and a slaveholding economy that legally mandates that “the child follow the condition of its mother”. (53)

¹⁰ I discuss ‘transracial’ narratives later in this chapter but, briefly, transracial narratives are distinguishable from passing narratives in that the former emphasize the ideological structures that produce racial knowledges over the individual agency emphasized by the latter.

The void created by the failure to exercise his paternal obligations is, by default, filled by their mother's legal status thereby marking the girls as black in his effective absence.

'Partus sequitur ventrem': the child follows the mother

In tracing the history of American legal formulations of racial difference, “Historians can actually observe colonial Americans in the act of preparing the ground for race without foreknowledge of what would later rise on the foundation they were laying” (Fields 107). Indeed, as Daniel J. Sharfstein writes, “... the color line was formally demarcated through a patchwork of statutes and common law rules dating back to the seventeenth century” (*Crossing* 604). Fundamental to distinguishing between the races was the legal principle, first codified in 1662 in Virginia that the child follows the mother in determining the status of children born of miscegenous relationships: “all children born in this country shall be held bond or free only according to the condition of the mother”.¹¹ At the time of such codification legal uncertainty as to how to define mixed-race individuals reigned throughout the colonies. For example, as Barbara Jeanne Fields notes, “A law enacted in the colony of Maryland [in 1664] established the legal status of slave for life and experimented with assigning slave condition after the condition of the father. That experiment was dropped” (107). In respect of the Virginia statute, Thomas D. Morris argues that the emphasis on maternity in the 1662 law was meant to alleviate this uncertainty about the status of children born of miscegenous relationships and provide a definitive method for classification amidst competing racial epistemologies: “Clearly, there was uncertainty about the status of persons born of

¹¹ See Thomas D. Morris, *Southern Slavery*, 403.

miscegenous relationships. The law of 1662 settled it” (44).¹² After all, “Paternity is always ambiguous, whereas maternity is not” (Fields 107).

The conceptual stability provided by matrilineal definitions of racial difference facilitated the economic motives of slavery. Fields explains that the principle’s basis was that “Slaveholders eventually recognized the advantage of a different and unambiguous rule of descent [from that of paternity, was]... one that would guarantee to owners of all offspring, however fathered, at the slight disadvantage of losing to them such offspring as might have been fathered on free women by slave men” (107).¹³ In addition to potentially increasing the property and wealth of slaveholders in their slaves, the principle that the condition of the child follows the mother helped limit slaveowner liability for their progeny. As Morris notes, the principle was implemented to alleviate the financial obligations that would accrue to white male slaveholders *as parents* if they reproduced with their slaves:

Why was this particular rule adopted? There is no special reason to believe that the English of the seventeenth century would have been squeamish about separating a child from its mother. If the English rule – that status followed the father – was used, the white men who crossed the color line, however shadowy it might be, would then be liable for raising the child. (44)

¹² What the 1662 law “settled” was the slave status of children born to white men and enslaved women. But, as I explain later, this would also come to settle the legal racial identity of such children as racial mixing, including across the slavery line, continued.

¹³ As Fields explains in respect of Maryland’s abandonment of its 1664 paternity-driven statute: “Nevertheless, the purpose of the experiment is clear: to prevent the erosion of slaveowners’ property rights that would result if the offspring of free white women impregnated by slave men were entitled to freedom” (107).

In resolving this tension between offspring rights and property rights that inhered in mixed-race children – particularly those born from the master-slave relationship – it was property rights that proved decisive. As with animal property, the principle of *partus sequitur ventrem* – the notion that the child’s identity followed its mother’s – singularly conceptualized the progeny of slaveowners and their slaves as the accretion of slaveowner property.¹⁴

In the burgeoning colonies, implementing this principle was “A departure from the English common law tradition linking a child’s status to that of the father...” (605). But as Rachel F. Moran notes, such divergence from historical principles was attributable to a desire to ensure property rights sustained themselves, as well as to reify racial distinctions. In particular, because of the population dynamics within the Chesapeake area, the 1662 Virginia statute ensured that slavery would continue. Emphasizing the lack of white women in Virginia would have certainly encouraged this form of cross-racial sexuality, and that such relationships were initially legally tolerated, Moran states:

The imperative of consolidating racial boundaries was so great that Chesapeake authorities were willing to undo the legal tradition of *paterfamilias*. A long-standing English rule mandated that a child’s status follow that of the father. Given the initial scarcity of white women in the Chesapeake, most interracial sex probably took place between white men

¹⁴ As Morris states: “Race was a factor, but it did not necessarily determine the outcome. Rather, the key rests in the concern for the property rights of the slaveowner. According to English law on chattel property, the increase of that property belonged naturally to the owner of the property. As Blackstone put the matter about the mid-eighteenth century, “Of all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil that ‘*partus sequitur ventrem*’ in the brute creation, though for the most part in the human species it disallows the maxim.” Blackstone, at this point in his work, treated the Latin phrase not as a rule that determined the status of someone, but as a rule that determined the ownership of something” (45).

and black women. As a result, the majority of mulatto offspring were free under the English approach. In 1662, Virginia departed from tradition by making a child's status follow that of the mother. (21)

Nonetheless, although interracial marriages were not unlawful in the early colonial era, "As the institution of slavery was consolidated in the late seventeenth century, marriages across the color line became anomalous and dangerous exceptions to the emerging racial hierarchy" (Moran 19). Just as mixed-race progeny were deemed unable to take advantage of their partial whiteness, the prohibition against interracial marriage sought to eliminate any advantages of whiteness that could be transmitted through the family unit. Specifically, black women were precluded from claiming the freedom that could result from interracial relationships with white men.

The racial logic common to both the law against interracial marriage and matrilineal determinations of race was one of hypodescent. As Moran explains it, the logic of hypodescent inherent in the 1662 rule assured that black people – or those deemed as such – remained subordinate to whites:

The adoption of a rule of hypodescent kept blacks from transmitting special privileges to the next generation through interracial sex or marriage. This racial tax on offspring precluded them from gaining official recognition of their white ancestry. By erasing their white heritage, the racial classification scheme converted mulattoes into blacks by a type of parthenogenesis: it was almost as though the child had been generated by a single parent without intercourse across the color line.

While sex across the racial divide during slavery often did not carry familial intentions, even when it did, as with the Royals, there could be no escaping the resulting ‘taint’ of slavery.¹⁵ As Fields observes, this *reproduction* of slavery ensured the *production* of racial difference: “the Practical needs – the needs to clarify the property rights of slaveholders and the need to discourage free people from fraternizing – called for the law” (108). The result, and not the cause, of these practical needs of slavery was the implementation of racial difference: “*Race* does not explain that law [*partus sequitur ventrem*]. Rather, the law shows society in the act of inventing race” (Fields 107). The legal principle of *partus sequitur ventrem* thus defined the scope of race pursuant to slavery, implicitly capturing mixed-race individuals within slavery by re-signifying them as black.

Despite Virginia’s early explicit legislative commitment to ensuring what amounted to the strict racial identification of mixed-race children, there was no uniform statutory adoption of the principle of *partus sequitur ventrem* across the colonies nor across the post-Revolutionary states. Nonetheless, as Morris notes, in more informal ways states routinely implemented and followed the notion that the child’s ‘condition’ follows its mother’s as “They did through judicial rulings... [where] the source for that

¹⁵ I emphasize the prohibition against interracial sex which obviously need not be restricted to sex within marriage. As David A. Hollinger writes: “The principle [of hypodescent] is widely taken for granted in the United States right down to the present, and is even defended as a political strategy in some contexts by organizations speaking for the interests of African Americans. But the principle originates in the property interest of slaveholders. Children begotten upon slave women by their owners or by other white men would grow up as slaves, adding to the property of the owners of the women and preserving the amazingly durable fiction that male slaveholders and the other white males in the vicinity were faithful to their wives. The principle was sharpened during the Jim Crow era, when opposition to social equality for blacks was of course well served by a monolithic notion of blackness, accompanied by legislation that outlawed as miscegenation black-white marriages, but left less strictly regulated any non-marital sex in which white males might engage with black females” (1369).

norm could just as well have been the common law doctrine, which agreed with the civil law, that to the owner of property belongs the increase” (48).¹⁶ Within the early colonial period – and coinciding with the formal implementation of slavery – owned mothers gave birth to owned children.¹⁷ Of course, as mixed-race children were consistently defined as the property of their white fathers, those fathers could manumit their mixed-race children as noted above by disposing of them as property. Indeed, from the early colonial period to Emancipation, “... white fathers had commonly freed their mulatto children, especially in such cases as youthful indiscretion when, as adolescents, they had acted out of their new-found sexuality in the slave quarters and... felt some moral obligations toward their unfortunate offspring... [or where] the children were the products of long-term, stable relationships with mulatto mistresses” (Kinney 9). However, while the right to manumit one’s slaves, including progeny, persisted throughout slavery, that right became increasingly restricted throughout the nineteenth century as the shifting economics of the South necessitated more available slave labour.¹⁸

¹⁶ The principle of *partus sequitur ventrem* was not legislation in all states. As Morris notes, “nearly one-half of the Southern states, in other words, made no provisions in their black codes to affirm the notion that the condition of the child followed the mother or to adopt expressly the civil law phrase, *partus sequitur ventrem*. This does not mean, of course, that the other states did not use that norm” (47-48). In those states that did not have a codified commitment to the principle, it nonetheless was perpetuated at court.

¹⁷ This legal principle, of course, continued and ensured the multiplication of property (and confirmation of rights in that property), as it also legally re-wrote blacks as property (even as it was required to perpetuate the legal fiction of blackness as in *Romance*). As Karla Holloway explains it: “Systems of U.S. slavery meant that whatever relations slave masters would have with enslaved women, none of them could face a threat to their fundamental rights of property. No indentured servant’s child not enslaved would inherit the social or legal status of a white father. Because slavery could be passed on, and because it became distinctive to persons who were not white – in that era Indigenous Americans or Negroes – its embodiment became as much identity as it was status. Claims of race and class were sutured to the claims of and nature of property” (32).

¹⁸ As Kinney notes, “Between the Revolutionary and the Civil Wars, marked changes took place in the slave codes and laws intended to prevent racial mixing, called ‘amalgamation’ after the process of combining mercury with another metal to create a uniform alloy. In the South, especially after the

The increasing emphasis on racializing to maintain slavery in the years preceding the American Civil War necessitated a policy shift that made manumission difficult and, ultimately, impossible. Emphasizing the changes in the mid-nineteenth century, such as Nat Turner's Rebellion and the increased reliance on the cotton gin, James Kinney singles out Louisiana as demonstrative of the states' movement towards more restrictive manumission rights. Noting that Louisiana became increasingly hostile to the presence of free people of colour, Judith Kelleher Schafer summarizes the legislative changes: "Beginning in the late 1830s and throughout the 1840s, Louisiana lawmakers passed various acts granting legislative manumission that required some newly freed people of color (whom police juries had allowed to remain in the state) to post bond to ensure that they would not become public charges" (7-8). As slavery was becoming a national concern, Louisiana culture became intolerant of previous legal practices of manumission:

By the early 1850s, however, Louisiana legislators no longer took such a charitable view of manumission or the resulting increase in the population of free people of color. By this time slavery had moved to the center of the national political stage... [as] the willingness of supposedly respectable people to stop enforcement of the harsh Fugitive Slave law of 1850 infuriated and frightened southerners. (Schafer 8)

These restrictions on manumission were, in large part, achieved by re-iterating and enforcing the principle of *partus sequitur ventrem*, thereby hinging racial identity on

Slave Act of 1807 increased the need to breed domestic slaves, and after 1830 when extensive use of the cotton gin, Nat Turner's rebellion, and other factors increased proslavery pressures, the laws became more restrictive" (8-9).

maternity. In Louisiana, however, this was not a principle that had defined its legislative or policy development from the outset.

Specifically, Louisiana's French civil law tradition historically dictated that the child's condition followed its father's, meaning white men would have transmitted whiteness with legal significance in their reproducing with black women: "Striking evidence of the shifting situations between 1830 and Emancipation comes from Louisiana where, even among the upper classes, miscegenation had been common because of the shortage of white women. Under the French Napoleonic code, children took the status of their father, and thus most mulattoes were free" (Kinney 11).¹⁹ However, in their increasingly restrictive laws for mixed-race individuals, this historical French principle was altered in 1832 to ensure their status followed that of their mothers, bringing Louisiana in line with the other states: "Under the Americans, however, Louisiana courts decided in 1832 to enslave the children of slave mothers" (Kinney 11). Further, in the final years of slavery, the freedom to emancipate one's mixed-race children was finally taken away entirely. As Kinney explains, "In addition, numerous court cases from the 1840s show increased restrictions on legacies to mulattoes, generally limiting inheritance to one-fourth or less of an estate. Finally, in 1857, Louisiana prohibited the emancipation of mulatto children, despite protest from French and Spanish creoles" (11). Accordingly, prior to 1857 it remained available to white fathers in

¹⁹ In noting that Texas and Louisiana possessed somewhat different legal systems from the other states, Morris writes: "Louisiana's legal order was a tangled blend of French and Spanish concepts and, after 1803, of some aspects of the English legal tradition. Although Louisiana was acquired by the United States in 1803, its legal structure was not changed completely. The rules and procedures of English criminal law largely supplanted the civil law of the French and Spanish, but the law relating to succession to property and transfers and uses of property remained that of the continental civil law" (8).

Louisiana, such as Alfred Royal, to manumit their mixed-race children.²⁰ But even prior to Louisiana's prohibition on emancipating mixed-race children in 1857, mixed-race children of white slaveowners were always their property first, and their family second.²¹

Regardless of these restrictions on manumission laws or the restrictive definition of *partus sequitur ventrem*, it was consistently available to slaveowners on their deaths to free their slaves. As Schafer notes, such claims were in keeping with Louisiana legislation which positively permitted the liberation of slaves: "The Louisiana *Civil Code* made it legal to free slaves not only during the lifetime of the owner, but 'by a disposition made in prospect of death,' or by last will and testament. Leaving slaves their freedom by will happened frequently in New Orleans, although no figures exist to specify how often" (59). In instances where others' property interests in a slave conflicted with those of his or her owner, liberation was necessarily complicated. As exemplified by Alfred Royal, because slaves were fundamentally property, when a deceased's estate – the sum total of his property assets – was less than his debts owed to creditors or when a rightful heir had a claim to a slave the deceased intended to free, the testator's disposition of freedom could be subordinated to other interests: "Most of these transactions went

²⁰ I do not mean to suggest that manumission in Louisiana prior to 1857 was a simple process. As Judith Kelleher Schafer outlines, there were a number of legal procedural impediments that made manumission difficult including requiring jury trials for manumission suits, "defining them as adversarial procedures against the state" (72).

²¹ Louisiana's increasingly harsh laws against slave freedom must be understood as a commitment to slavery as opposed to merely racial oppression, though the latter was certainly the effect of the former. As Mark V. Tushnet describes: "The Supreme Court of Louisiana, in a state with a large population of free blacks, was perhaps more conscious than courts elsewhere of the problems of line-drawing, and it explicitly refused to equate slave law with black law when, in 1856, it held unconstitutional a statute entitled, 'An Act relative to slaves and free colored persons' because both the title and the body of the act covered two distinct subjects" (*American Law* 140). Tushnet's point is that a distinction must be drawn between 'black law' and slave law. While such legal regimes often overlapped, they were distinct owing largely to the presence of free blacks who would not be subject to even racially motivated slave law.

smoothly, as long as the succession's debts did not exceed its assets after freeing the slave property and the designated slaves did not deprive legitimate heirs of their rightful inheritance" (Schafer 59). Notwithstanding legal mechanisms to free children from enslavement, the fact of interracial mixing remained problematic at law.

It is within this context of restricted manumission abilities and permitted testamentary dispositions of freedom that Royal's failure to free his daughters must be read. As explained by Signor Papanti, the family friend and teacher of the Royal daughters, Royal's failure to legally emancipate his daughters would inevitably render them his property regardless of his personal intentions. Subsequent to Royal's death, Signor Papanti explains the daughters' predicament to their teacher, Madame Guirlande:

"At your request," replied the Signor, "I went to one of the creditors, to ask whether Mr. Royal's family could not be allowed to keep their mother's watch and jewels. He replied that Mr. Royal left no family ; that his daughters were slaves, and, being property themselves, they could legally hold no property. (50)

For Signor Papanti, this discussion with the creditor he is relaying was the first time he learned of Eulalia's racial identity and, by extension, of Royal's inaction. As he continues to Madame Guirlande:

I was so sure my friend Royal would not have left things in such a state, that I told him he lied, and threatened to knock him down.... I was never more surprised than when he told me that Madame Royal was a slave. I knew she was a quadroon, and I supposed she was a *placee*, as so many of

the quadroons are. But now it seems that Mr. Royal bought her off her father ; and he, good, easy man, neglected to manumit her...”. (50)

Further, as the reader knows by this point in the narrative, the Royal daughters are part of their father’s estate, subject to creditors’ remedies upon his death. Indeed, given his financial troubles, it seems likely Royal would not have been able to procure his daughters’ freedom by will even if he had sought to do so. And having Royal’s creditors confirm his suspicions as to Eulalia’s legal status renders apparent to Signor Papanti Royal’s romantic history and corresponding legal responsibilities: purchasing his eventual wife so they could pursue their romantic relationship, Royal only half-meets the requirements to obtain her freedom. Failing to manumit Eulalia results in their children never transcending the status of her property absent their own manumission, despite his best attempts to formulate their racial identity pursuant to his own wishes.

Moreover, Royal understood the legal consequences of failing to manumit his daughters. As Papanti continues:

“He [Royal] of course knew that by law ‘the child follows the condition of the mother,’ but I suppose it did not occur to him that the daughters of so rich a man as he could ever be slaves. At all events, he neglected to have manumission papers drawn till it was too late ; for his property had become so much involved that he no longer had a legal right to convey any of it away from creditors.” (50-41)

Suggesting that Royal perhaps erroneously presumed his wealth and status could overwrite the racial identity of his daughters, Signor Papanti is unable to provide a definitive explanation for Royal’s negligence. Even if the status realized through

extensive personal wealth would have implied his daughters' freedom, the fact of his poor business dealings and resulting indebtedness would have undermined it. More importantly, in emphasizing the outcome of Royal's negligence on his daughters, Papanti frames that negligence pursuant to established laws Royal *ought* to have known. It is because he "of course knew that by law" that a child's status with respect to freedom is determined by that of the child's mother that Royal's negligence is particularly troubling. Paternal inaction here is not simply a failure to follow one's presumed familial duties. Rather, it is a failure to adequately respond to an established and well-known legal principle.²²

Gender inequality in (interracial) marriage

It is precisely this legal principle that is exploited by Rosa's first husband, and ostensible saviour from slavery, Gerald Fitzgerald. When the sisters are launched into potential enslavement on their father's death, his young friend – Fitzgerald – steps in to offer the daughters safety. Specifically, he offers to help them avoid their father's creditors, and certain enslavement, by secretly fleeing the state. They agree to his plan. And, as Rosa reciprocates Fitzgerald's feelings for her, she and Fitzgerald agree to follow

²² As Holloway explains this principle and its known, practical advantages for (white male) slaveowners: "Legal investiture in maternal identity allowed critical patterns and codes of conduct to emerge. It was a pattern that preserved the commercial values inherent in paternity, privilege, and property. White plantation males could father children from their female slaves with the concurrent assurance that they would benefit both from an increase in their own property and be free from any concern that their progeny – whether males or females – would have any heritable claims. In the United States heritability meant that enslaved mothers had enslaved children and no claim to the value they represented to their owners. That experiential phenomenon came to be known as "one drop" *rule* (of black blood – statutes that were so fiercely nurtured that percentages of blood – blood quantum – led to a perverse vocabulary of legal identities (mulatto, quadroon, octoroon, and quintroon). Blood conveyed local sensibilities, carried legal consequence, and protected the propertied value of whiteness by its attention to even miniscule evidence of the taint of blackness. But the evolving legalisms that sutured families to histories of color as well as histories of race would continue to be an entailment" (33).

propriety and be married. Fully aware, however, that interracial marriages are illegal (and aware the girls do not realize otherwise), Fitzgerald facilitates their escape from Louisiana to his cabin in Georgia, where the daughters are to inconspicuously remain until such time as they can ostensibly re-enter society. What quickly becomes clear to Rosa and Flora in Georgia, however, is that they are at Fitzgerald's mercy.²³ From their youth, spent sheltered and under their father's care, to their eventual marriages and entrance into society, Rosa's 'marriage' to Fitzgerald most acutely reveals the nexus between gender and race within slave society – a nexus that defines the Royal sisters' struggle.

The Royal sisters legally belong to Fitzgerald by virtue of his machinations: paying the Royal estate creditors, who believe the sisters are missing, under the pretence of clearing up his old friend Alfred Royal's debts, Fitzgerald becomes the sisters' owner. After moving them into his home – and living as a family in which he is ostensibly married to Rosa – Fitzgerald on one of his trips away to attend to business marries the white socialite Lily Bell, with whom he returns. Understanding that her own 'marriage' to Fitzgerald was a sham and never properly effected, and that as his property she has been rendered powerless and at his mercy, Rosa confronts him telling of her hate for him. Although he becomes immediately regretful of his response, Fitzgerald wastes no time in clarifying that Rosa is not his wife or even romantic partner but, rather, his property:

²³ Importantly, there was no manumission in Georgia. As narrated in the text: "There are greater obstacles in the way than she [Rosa], in her experience was aware of. The laws of Georgia restrained human impulses by forbidding the manumission of a slave. Consequently, he must either incur very undesirable publicity by applying to the legislature for a special exception in this case, or she must be manumitted in another state" (186). This was correct. As Morris notes, "After a decade of bitter controversy among the members of the Georgia court, the state legislature, in 1859, adopted a law prohibiting all postmortem manumissions whether 'within or without the State'" (379).

[Rosa]: “No Mr. Fitzgerald, you have fallen below hatred. I despise you.”

His brow contracted, and his lips tightened. “I cannot endure this treatment,” said he, in tones of suppressed rage. “You tempt me too far. You compel me to humble your pride. Since I cannot persuade you to listen to expostulations and entreaties, I must inform you that my power over you is complete. You are my slave. I bought you of [sic] your father’s creditors before I went to Nassau. I can sell you any day I choose; and by Jove, I will, if—”. (143)

While Rosa and Flora are legally his property, Fitzgerald’s legitimate marriage to Lily emphasizes to Rosa both the reality of her legal status and the corresponding illegality of her marriage to Fitzgerald. But, as racial difference provides the legal basis and reason for Fitzgerald’s ownership of the girls, it is gender difference that enables his scheme of ownership. Where slavery permits Fitzgerald to claim the girls as his property, it is marriage, or the notion of it, that enables his vision of owning them.

This vision of owning the girls revolves around his desire to romance both Rosa and Flora, all the while keeping them in seclusion. Prior to his marriage to Lily and pleased with his arrangement of having the girls sequestered at his Georgia estate, Fitzgerald “would laugh and say: ‘Am I not a lucky dog? I don’t envy the Grand Bashaw his circassian beauties. He’d give his biggest diamond for such a dancer as Floracita; and what is his Flower of the World compared to my Rosamunda?’” (84). In fact, at his introduction to the daughters he notes to Alfred Royal himself that “If I were the Grand Bashaw, I would have them both in my harem” (12). Such comparison to a

Turkish sultan's harem is not wholly misguided. After all, Fitzgerald aims to keep the girls secluded from the world so as to continue his efforts to be have sex with both of them. However, Fitzgerald's invocation of a Turkish harem suggests the essence of the sisters' oppression is primarily due to their gender and not their race. Indeed, it highlights the problematic relationship between those two aspects of their identity. As Carolyn L. Karcher writes:

His [Fitzgerald's] emulation of a Turkish sultan whose prize harem slaves were Caucasians involves keen ironies. The reversal of cultural roles recalls that whites were once enslaved by the dark-skinned peoples they now despise, and the adoption by a Christian of Islamic practices makes a mockery out of the argument that slavery served to Christianize the African. Only one of the Grand Bashaw's privileges continues to elude Fitzgerald – a plurality of wives. Before long, he takes the last steps towards translating his fantasy into reality, first by demanding sexual favors from Flora, ultimately by acquiring a legal bride. (90-91)

Although race may be the mechanism by which Fitzgerald comes to legally own the Royal girls, his motivations for doing so are primarily sexual. Thus, while his 'harem' is a product of the intersection of gender and race, it is gender inequality that is first and foremost its effect. Further, because of Rosa's insistence on marrying Fitzgerald to legitimate or render acceptable their time together in escaping from New Orleans, Fitzgerald's 'harem' is fundamentally a sexist, rather than a for-profit venture.

As noted above, *Romance* contrasts the girls' lived experience of whiteness with the legal defining of race through maternity. In so doing, *Romance* centralizes the role of

the family in the production of race, in both a formal legal capacity and in a more informal – and potentially subversive – domestic sense. But as the family unit may enable freedom from racial oppression, it implements a patriarchal order that cannot be escaped. As Karcher astutely notes, the Fitzgerald house mimics the Royal household in form and, to some extent, substance: in both homes, the sisters are kept from the outside world, ostensibly for their benefit. Fundamentally, that congruency is premised on their racial identity. Where their father had sheltered them from the truth of their legal racial identity in an effort to avoid the possibility of enslavement, Fitzgerald invokes that possibility as a reason to keep them sheltered. Although both patriarchs look to insulate the sisters from slavery, what operates as benign paternalism in the Royal household reappears as sinister oppression in the Fitzgerald manor. But, while Fitzgerald's devious intentions seem wildly removed from the peace of the Royal household, the strictures of patriarchy remain the same in both homes and vary only in degree. As Karcher writes, pursuing Fitzgerald's metaphor of the Turkish harem:

In the Royal household patriarchy had worn a benign face, and the patriarch's true relationship to his womenfolk had lain hidden. In the Fitzgerald household, the meaning of patriarchy is spelled out. The patriarch discloses the face of the slavemaster, and the protective husband steps forward as the Grand Bashaw. (91)

The only free domestic life available to the sisters echoes the domestic life in which they were raised (albeit in a more sinister manner). But even at the prospect of escaping race-based slavery – which Fitzgerald offers – the sisters nonetheless find themselves

property, suggesting they are constrained by, or that there is a conflation of, the oppressive structures of slavery *and* patriarchy.

Indeed, the narrative is ripe with conflations of women with property *within* the context of ostensibly intimate or loving relationships. For example, in response to Fitzgerald's plan to shuttle herself and Flora away in secret so as to avoid their father's creditors, Rosa and Fitzgerald have the following exchange wherein her literal status as his property is foreshadowed and couched in his sexual desire for her:

“But if your plan should not succeed, how ashamed you would feel to have us seized!” said she.

“It *will* succeed, dearest. But even if it should not, you shall never be the property of any man but myself.”

“*Property !*” she exclaimed in the proud Gonzalez tone, striving to withdraw herself from his embrace.

He hastened to say: “Forgive me, Rosabella. I am so intoxicated with happiness that I cannot be careful of my words. I merely meant to express the joyful feeling that you would be surely mine, wholly mine.”

(61)

Similarly, the acquaintance of Mrs. Delano (Flora's assumed mother who enables her entrance into white society following her escape from slavery) and abolitionist Mr. Percival suggest later in the text that Fitzgerald's treatment of the sisters as property is as a result of a gender balance inherent in marriage. Intimating that the indecency inherent in maintaining human property could infect even those relationships external to slavery it is noted that: “‘If she has ceased to interest his fancy, very likely he may have sold her,’

said Mr. Percival; ‘for a man who could entertain the idea of selling Flora, I think would sell his own Northern wife, if the law permitted it and circumstances tempted him to it.’”

(222)

Of particular significance is a brief but illustrative exchange between Mr. Percival and another of Mrs. Delano’s acquaintances – the Southern gentleman, pro-slavery Mr. Green. In commenting on his time in Italy with Fitzgerald, Mr. Green says to Mrs. Delano and Mr. Percival that:

“...But at the Blue Grotto, wonderful as it was, we didn’t quite drive away Fitzgerald’s blue devils, though it made him forget his vexations for the time. The fact is, just as we started he received a letter from his agent, informing him of the escape of a negro woman and her two children ; and he spent most of the way back to Naples swearing at the Abolitionists.”

(274)

Of course, Green does not realize he is referring to the plight of the Royal sisters themselves. His ignorance is further dramatized as “Mr. Green, quite unconscious of the by-play in their [Flora’s, Mrs. Delano’s, and Mr. Percival’s] thoughts, went on say, ‘It is really becoming a serious evil that Southern gentlemen have so little security for that species of property’” (274). In response, Percival exposes the reach of the notion of ownership in people: “‘Then you consider women and children *property*?’ inquired Mr. Percival, looking up from his book” (274). Percival receives no meaningful response to his question as Green, instead, takes offence at someone of Percival’s station being an abolitionist.²⁴

²⁴ The remaining exchange between Percival and Green emphasizes that slavery is wholly unjust and cannot be contextualized within class or racial dynamics in an effort to make it just: “‘I should

Perhaps the most compelling example in the text that establishes gender is the primary cause of the sisters' subordination – and not singularly race – is the manner in which Lily Bell's legitimate marriage to Fitzgerald parallels the sisters' own plight. Lily, the daughter of a wealthy Boston merchant, falls in love and marries Fitzgerald while he, unbeknownst to her, has maintained the Royal daughters sequestered at his Georgia estate. Shortly after their marriage, Fitzgerald and Lily return to Georgia and commence their life together, with Rosa hidden away and remaining unknown to Lily. However, despite Lily's unawareness of Rosa, as Karcher notes, "Yet she [Lily] will learn that her fate is inextricably intertwined with Rosa" (92).

From the outset Fitzgerald's relationship to Lily echoes his relationship to Rosa: indeed, to some extent, he has purchased Lily from her father. As we learn, although her family is respected and had been wealthy, her father had fallen into debt and Fitzgerald 'obtains' Lily from him by way of funds for debt repayment. Echoing Royal's actual purchase of Eulalia and Fitzgerald's actual purchase of the Royal sisters, Fitzgerald's relationship with Lily is coloured as one of ownership. Moreover, Lily's role as mother of the Fitzgerald heir, also named Gerald, is mirrored and ultimately usurped by Rosa's own role as mother to Fitzgerald's child. Unwilling to damn her own child with Fitzgerald to possible slavery, Rosa surreptitiously switches her infant with Lily's. No one, including Lily or the boys, learns of the switch until the boys are grown, and the opportunity comes for Rosa to advise Lily's 'son', Gerald, that she is in fact his mother. The boys, who appear nearly identical, are thus raised and socialized as their racial and class opposites.

consider my birth and position great misfortunes, if they blinded me to the plainest principles of truth and justice,' rejoined Mr. Percival" (274-75).

Importantly, Lily's whiteness and its advantages cannot protect or insulate her from the far-reaching effects of slavery, and the fact of racial difference generally is foregrounded in her relationship to Fitzgerald. Tying their lives together well beyond being merely 'married' to the same man, Rosa's baby switch forces Lily and the Bell family to confront the arbitrariness of racial distinctions within slavery. Further, it mires them in the horrific property relations underpinning slavery, contrasting the laws of inheritance with the matrilineal transmission of race. Demonstrating how the callousness of a slaveholding society perverts even the most loving families, Lily's father refuses to provide an inheritance for 'her' son (who has been revealed to him as black as a result of Rosa's switch), or for Lily's actual son (raised by Rosa, who though legally white has been raised to believe he is black and has taken a black wife). As Mr. Bell states to Rosa's spouse Alfred King:

“... A pretty dilemma you have placed me in, sir. My property, it seems, must either go to Gerald, who you say has negro blood in his veins, or to this other fellow, who is a slave with a negro wife.”

“But he could be educated in Europe also,” pleaded Mr. King; “and I could establish him permanently in lucrative business abroad. By this arrangement –”

“Go the Devil with your arrangements!” interrupted the merchant, losing all command of himself. “If you expect to arrange a pack of mulatto heirs for *me*, you are mistaken, sir.” (393-94)

The racial deception that so infuriates Bell is effected, of course, because the two boys are phenotypically similar – their racial difference is not observable. But in addition to

the switch again emphasizing the arbitrariness by which racial distinctions are drawn and believed to exist, Child links its persistence to gender inequality. Namely, racial difference and its meaning are inextricably entwined with the subordination of women within the family unit: Fitzgerald's effectively purchasing Lily from her father for marriage contextualizes their *white* familial reproduction within the broader, legal fact of racial difference. This is particularly so as their family is reconfigured by Rosa's baby-switching without their knowledge, which captures them in a narrative of racial transmission without their consent, as exemplified in Bell's property potentially and eventually being disposed of under typical and legal testamentary practices to either a 'biologically' black (but culturally white) or a culturally black (but 'biologically' white) heir. *Romance* imbricates the (re)production and extension of racial difference within the family unit which is itself (re)produced and knowable only through gender inequality.

Undermining prejudice

From their sheltered beginnings in the Royal household as the daughters of a Louisiana businessman, Rosa and Flora are plunged into potential enslavement, surreptitiously transported out of Louisiana to other states and eventually Europe, and ultimately find happiness in relationships and family with old family friends, Alfred King and Franz Blumenthal respectively, as they return home. Throughout, and despite their contested legal racial identity, the Royal sisters self-identify as white: they were raised as such, live most comfortably among white society on both sides of the Atlantic, and eventually return to white society in America. Further, and crucial to the narrative discrepancy between the Royal sisters' legal racial identity and their lived, self-identified,

whiteness, is the fact they appear white. By any marker other than legal definition, the Royals are white.

Cassandra Jackson broadens the critical significance of the Royal sisters' whiteness, focussing on the use of mixed-race characters in post-slavery fiction as enabling explorations of the *national* character. Extending beyond merely commenting upon the relationship between distinct races, mixed-race characters allowed for an examination of the legal definitions of race and freedom that bound *all* citizens:

While I agree with [Hazel] Carby that the increasing frequency of these figures during this era is a reflection of institutionalized racism, I want to propose that by the time that post-Reconstruction writers were producing mulatto fiction, mixed-race characters already functioned as complex cultural signs of the contradictions posed by a nation that had constructed its essential identity as free in the midst of slavery and racial exclusion.

(4)

Mixed-race characters had regularly been invoked by writers during slavery, and following slavery they continued to provide provocative material by which the legacy of slavery, and its impact on the future of the nation, could be explored. As Jackson continues: “Mulatto figures had long provoked consideration of the ways in which racial ideology shaped national policy and social and political relationships” (4). Of course, following the Civil War national policies about race were completely changed, but it is within the context of these changes that *Romance* was published.

Following the Civil War the Thirteenth and Fourteenth Amendments to the Constitution heralded the arrival of racial equality. The Thirteenth Amendment,

implemented in 1865, declared slavery abolished.²⁵ And, in 1868, the Fourteenth Amendment promised racial equality.²⁶ In particular, section 1 of that amendment provided citizenship and equal protection under the law to *all* individuals born in the United States. As a result, the two amendments constitutionally disallowed any abridgements or limitations to the citizenship guaranteed to all citizens, including prohibiting racialized slavery. And yet, despite these laudable legislative steps, severe racial inequality persisted. As Douglas A. Blackmon explains it, culture lagged behind law: “The Civil War settled definitively the question of the South’s continued existence as a part of the United States, but in 1865 there was no strategy for cleansing the South of the economic and intellectual addiction to slavery” (41).²⁷ This “addiction” among whites to racial subordination in the form of slavery persisted in the form of racial discrimination *without* slavery.²⁸ As Karcher succinctly summarizes it: “Both the major

²⁵ Amendment XIII, Section 1 of the U.S. Constitution provides: “Neither slavery nor involuntary servitude, except as a punishment crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

²⁶ Amendment XIV, Section 1 of the U.S. Constitution provides: “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

²⁷ Blackmon explains that in response to black freedom, southern whites militarized and organized in an effort to alienate and subjugate the newly freed blacks. Given the climate within and immediately slavery, this should be unsurprising: “In the first decades of that span, the intensity of southern whites’ need to reestablish hegemony over blacks rivaled the most visceral patriotism of the wartime Confederacy. White southerners initiated an extraordinary campaign of defiance and subversion against the new biracial social order imposed on the South and mandated by the Thirteenth Amendment to the U.S. Constitution, which abolished slavery. They organized themselves into vigilante gangs and militias, undermined free elections across the region, intimidated Union agents, terrorized black leaders, and waged an extremely effective propaganda campaign to place blame for the anarchic behavior of whites upon freed slaves” (42).

²⁸ Norman A. Redlich explains this ‘addiction’ as a desire among southern whites to re-capture after Emancipation the racial hierarchy that was stable during slavery: “The period following the Civil War was one of psychological adjustment in the North and South to the dramatic social changes worked by

successes of the era – the abolition of slavery and the enfranchisement of the black man – and its failures – the substitution of peonage for slavery in the South; the persistence of virulent racial bigotry and discrimination, relegat[ed] blacks to the status of a permanent underclass throughout the nation...” (81).

Romance, published at the dawn of Reconstruction, looks back to slavery-era laws and policies to understand the generation of difference that proved foundational to the racial discrimination of slavery and post-slavery black subordination. As Karcher notes, the novel examines slavery’s formulation of racial difference to contemplate equality following it. But it is within this broader sphere of racial discrimination, as opposed to racialized slavery, that Karcher situates Child’s polemical intentions. In particular, Karcher emphasizes Child’s abolitionist past as well as her more expansive aim of combating prejudice after slavery.²⁹ And to combat that prejudice – to enable a re-visioning of a racially equal America – Child uses the trope of interracial marriage. Citing Child’s personal correspondence, Karcher writes:

Heading the list of the discriminatory statutes and practices for which she had castigated her fellow northerners was an “unjust law” forbidding “marriages between persons of different color.” Thus it seems fitting that Child should have made interracial marriage her chief metaphor for the

the war and its aftermath. The vanquished South began justifying its effort in the war, and the great loss of life it incurred, by developing a mythology about Southern culture and the cause of state’s rights” (485).

²⁹ Drawing from Child’s letters, Karcher notes: “As Child confided to her friends, her intention was to address the issue of racial prejudice, which she had long recognized as crucial for the American people to tackle if they were undo the evil of slavery and fulfill the egalitarian promise of their national creed. ‘Having fought against *slavery* till I saw it go down in the Red Sea,’ she wrote, ‘I wanted to do something to undermine *prejudice*; and there is such a universal passion for novels, that more can be done in that way, than by the ablest arguments, and the most serious exhortations’” (82).

egalitarian partnership of America's diverse races to which she summoned her compatriots in *A Romance of the Republic*. (82)

Superficially, Child's use of marriage to conclude the narrative simply conforms to the standard practices of the romance genre. However, her use of interracial marriage bespeaks a particular vision of racial equality: as gender is integral to racial difference, her reliance on *interracial* marriage glimpses a link between racial equality and gender equality, suggesting the former cannot be achieved without the latter.

Romance closes with both Royal girls marrying white men. Rosa, after being deceived by her false marriage to Gerald Fitzgerald – and having given birth to their child – moves to Europe, where she re-invents herself as an opera singer. Concealing her racial identity from the world, she marries the kind white Louisiana businessman Alfred King, an old family friend who knows the truth of her racial identity and who has loved her for a number of years. Similarly Flora, who also conceals her legal race, marries the gentle white Franz Blumenthal, her father's clerk who also knows the truth about her and seems to have loved Flora his whole life. Eventually, both couples and their children return and settle close to each other in Louisiana. The narrative, then, which commenced with the sisters being informed of their status as property (and the corresponding fact of their legal racial identity and threat of being sold into slavery), closes with their marriages to white men and entry into white society. It is interracial marriage that resolves the sisters' legal dilemma and restores them to their original identities.

Yet despite *Romance*'s transgressive plot of racial deceptions and interracial marriages, as well as Child's well-known personal aims to undermine prejudice and racial discrimination, contemporary critics of the novel have argued the text's subversive

potential is limited. In particular, critics have suggested that Child's vision of racial progress is fundamentally tempered in two ways. First, it is argued that the Royal sisters ultimately choose to live as 'white' in their marriages. Understanding the sisters' legal racial identity of black as their authentic or true racial identity, critics have argued that Child re-iterates the racial hierarchy of slavery by having the daughters disavow that authentic or true racial identity of blackness in favour of living whiteness. Second, and related, in relying on marriage and family to enable racial equality, it is argued that Child installs a patriarchal understanding of gender, as exemplified in the gender inequality inherent in marriage, as a solution to the race problem explored in the narrative.

Karsten H. Piep, for example, summarizes this perceived shortcoming in *Romance* as follows:

Yet her [Child's] reliance on the traditional plot conventions of romance, centering on the adventures of genteel bourgeois characters, may have contributed to preventing Child from envisioning a postbellum society in which whites and blacks meet as equals... [T]he interracial marriages in Child's novel become a metaphor for the possibility of restoring social order and averting further civil strife. (172)

But, as Piep continues, the manner in which interracial marriages are effected or realized in the text limits the extent to which they achieve or demonstrate racial progress:

And even though the marriages between Rosa and King and between Flora and Blumenthal represent a clear break with social taboos, *A Romance* insists that amalgamation and the complete absorption of blacks into the white mainstream are the only practical means of ensuring the continued

existence of an American society whose core principles are threatened by the immoral and potentially destructive institution of slavery. (172)

For Piep and others, the novel's reliance on the trope of interracial marriage is racially progressive insofar as it explores transcending the racial divide in a loving way. However, any prospective racial equality achieved through interracial marriage is tempered by the gender *inequality* inherent in marriage. Interracial marriage in the text does not subvert racial or gender hierarchies but, and especially given the Royal sisters' self-identification, rather reiterates them, repeating the order of post-Civil War society forming the basis of the discrimination Child targets.³⁰ And it is this "duality [between progressive ideals and repetition of hegemony that critics suggest] lies at the heart of Child's *A Romance of the Republic...*" rendering it a text that capitulates to the very power structures it aims to criticize (Karcher 83).³¹

While such criticism of *Romance* is rightfully grounded in an attempt to explain the scope and limitations of Child's vision of racial equality, it implicitly repeats as stable

³⁰ Further, to be clear, the nature of interracial marriage for Piep is one of blackness being lost in its absorption by whiteness. As a result, the seemingly subversive deployment of race is in fact a repetition of the status quo: "The novel's primary aim, then, is not so much to undermine as to preserve the foundations of the republic's war-torn social order, for its romantic resolution serves to reaffirm the inherent justice and superiority of white middle-class norms and values. Although based upon a firm belief in the nominal equality of blacks, Child's idealized vision of America's postwar society still leaves the traditional hierarchies of class, gender, and race largely intact" (173).

³¹ As Karcher writes: "Of course interracial marriage represents a subversion, rather than a fulfillment, of the romance plot's traditional function – to re-establish the harmony of a social order threatened with disruption. While adhering to the convention of symbolically reconciling class antagonisms through marriage, the marriage in question violates one of the society's primary taboos. Nevertheless, to the extent that it ratifies the central institution of patriarchy and upholds the norms of the dominant race, interracial marriage does not fundamentally challenge a social order that subordinates women to men, people of color to whites, and the working class to the bourgeoisie. Instead, it merely provides a means of gradually absorbing people of color into the white middle-class mainstream" (82-83).

the categories of identity the text struggles to undermine.³² Specifically, the critical notion that *Romance* merely recapitulates the slavery and post-slavery racial hierarchy overlooks the manner in which it nonetheless disrupts or questions the historical production of racial knowledge. Moreover, the entwined criticism that, as an inherent feature of the romance genre, patriarchy is inevitably repeated as a solution to the identity problems raised in the text, is fundamentally correct. However, such criticism fails to adequately account for or appreciate the text's revelation of how gender is essential to racial difference or how such understanding of racial difference was foundational and traceable back to racialized slavery. To be clear, the novel does advance racial equality through gender compromise: rather than a complete reformulation of the meaning of race and gender following slavery, Child's plot of interracial marriage does re-install by way of marriage the patriarchal structures that enable such conceptual distinctions. Nevertheless, the text's subversive potential is maintained, if not wholly realized, in its elucidation of the intersection between gender and race. As such, though it fails to provide a program or model for complete reform, *Romance's* conceptualization of this intersection is radical in that it glimpses the potential for social reform even if such potential cannot be practically realized.

Criticisms that *Romance* re-constructs the racial hierarchies it presumably aims to undermine emphasize what they view as the assimilationist policies inherent in Child's

³² As Piep writes: "Ultimately, then, presumed racial inferiority – clad in evolutionary terms as the lamentable but undeniable backwardness of the black populace as a whole – once more afforded a pretext for the restriction of African American participation within a renovated society bent on maintaining its color-based social hierarchies" (171).

vision of interracial marriage.³³ Particularly problematic for these critics have been the final scenes of the novel that suggest black subservience as a pre-condition to racial harmony. Following Emancipation, and re-settled in their ‘new’ white identities, the Royal sisters find their future in their families’ shared destiny. Gesturing towards a potential new America in Reconstruction, the narrative closes with a “tableau” of the newly reformulated Royal family, enjoying their freedom and each other within a racially egalitarian America:

This playful trifling was interrupted by the sound of the folding-doors rolling apart; and in the brilliantly lighted adjoining room a tableau became visible, in honor of the birthday. Under festoons of the American flag, surmounted by the eagle, stood the American flag, stood Eulalia, in ribbons of red, white, and blue, with a circle of stars round her head. One hand upheld the shield of the Union, and in the other the scales of Justice were evenly poised. By her side stood Rosen Blumen, holding in one hand a gilded pole surmounted by a liberty-cap, while her other hand rested protectingly on the head of Tulee’s Benny, who was kneeling and looking upward in thanksgiving. (440)

Amidst the tattered flag of the Union’s triumph stands Rosa’s and Flora’s daughters – Eulalia and Rosen, respectively – themselves ostensibly emblematic of the new post-

³³ Eric Lott identifies that even antislavery advocates like Child still fell prey to assumptions about the fundamental difference of black people from whites, for example in their patronizing belief in the innate goodness of blacks: “Nor was the antislavery movement exempt from such condescension. Awkward attempts to rewrite what were believed to be natural differences into special racial capacities resulted in notions of racial ‘variety without inferiority,’ as Lydia Maria Child, editor of the *National Slavery Standard*, put it: ‘Flutes on different keys... will harmonize the better.’ Although the idea was to move ‘feminine’ values to the cultural center, such arguments relied on the black inferiority they sought to displace. Karen Sanchez-Eppler has suggested that this tendency derived in part from the final asymmetry of white women and blacks in such rhetoric” (33).

slavery America, in turn holding symbols of that America's promises of justice and freedom. Yet, that tableau of prospective equality, featuring the mixed-race children of the Royal sisters and their respective white husbands, is tempered by its inclusion of Benny, the son of the Royals' sisters' faithful servant Tulee, who is featured in a submissive position and subordinate to the visibly white girls.

Piep for example argues that Benny's physical subordination within the tableau exemplifies Child's limited vision of racial equality: "Though recently freed, the racially unmixed black child [Benny] still kneels down. And while the patronizing hand of his social superior prevents him from rising up, he assumes the devout posture of puerile thankfulness" (172). Although all the children are legally black, only Benny's blackness is observable. For Piep, such racial positioning within the tableau mimics Child's vision wherein blackness remains subordinate to (apparent) whiteness post-slavery. As such, the equality Child envisions is unavailable to Benny:

After the revelries are over, destiny, it seems, will shine much brighter on the fair-skinned children on top than the black boy on the bottom of this new, albeit more benign social hierarchy. Commenting upon the apparent color-coding that permeates the tableau, Jean Fagan Yellin writes that "as in pre-Emancipation versions of the double emblem, this assignment of the role of liberator to the light-skinned girl and the role of grateful, kneeling ex-slave to the dark child suggests an endorsement of white superiority that contradicts egalitarian claims." (Piep 172)

Here, Benny's submissive posture is read as an imaginative failing of the text. Romance may cross racial lines, it is argued, but difference, and its significance, persists.

Similarly, Dana D. Nelson argues in her introduction to *Romance* that:

A Romance of the Republic works to eliminate categories of racial difference, to show that “blacks” can be like “whites.” But what it fails to allow – a positive evaluation of cultural or social configurations different from those of the white middle and upper classes – effectively prevents the novel from holding out a radical promise for racial tolerance or understanding. (vii)

For Nelson, the failure of the text to imagine a positive black cultural contribution stems from white inability to accommodate and accept cross-racial differences:

In other words, the novel is not able to imagine a new society that could countenance the rich cultural variety produced by intersections of African cultural heritage in slave quarter communities across the South. It can’t imagine “white” liking anything about “black” culture. Its contributions to cross-racial understanding are blunted because the novel fails to imagine social cross-*cultural* relationships to complement romantic cross-*racial* ones. (vii)

Child’s model of racial reform, according to this line of criticism, amounts to a less hostile imitation of slavery-era black subordination. And, according to Piep, Nelson and others, it is precisely because Child’s vision of equality hinges on assimilation that her vision of *racial* equality is necessarily compromised, including within the trope of interracial marriage.

Debra J. Rosenthal notes that, conventionally, nineteenth-century American novels advocating reform of racial policies typically do so by proposing assimilation.

When miscegenation is a factor in the realization of that proposed assimilation, it typically takes the form of the raced individual acquiescing to the white lover's wishes. Thus, "in conciliatory conceptions of miscegenation, the Native American or black surrenders him- or herself in the arms of the white lover, thereby deflecting anxiety about the dark other taking up arms" (Rosenthal 7).³⁴ While miscegenation novels do offer racial progress, the nature of that progress is not an equitable refashioning of relations between the races, but rather the absorption of blacks into white culture or the implicit benign dominance of whites over blacks. That her readership was comprised almost exclusively of white women emphasizes the difficult position in which Child's aims situated her: wanting to present a provocative plot that would inspire anti-prejudice sentiment, but also wanting to adhere to the romance form and its generic conventions, Child's vision of assimilation *as* racial progress is perhaps to be expected. That noted, critical reconciliation of the text's transgressive plot of miscegenation and its seemingly conservative closure of assimilation – which emphasizes the text's subversive limits – has focussed on the willingness of the Royal sisters to live as white.

Knowing that they are legally black, and potentially slaves due to the legal consequences of their father's failings, the sisters' decisions to marry white men and mask their legal race has been viewed by critics as an implicit inability by Child to imagine for the Royal sisters a (black) freedom that would equal white freedom. At the core of assimilation-emphasizing interpretations of the text is the narrative fact that the

³⁴ Rosenthal's broader point is that novels about miscegenation typically take two forms, where assimilation seems the only viable form of racial progress: "Because the existence of white and nonwhite bodies in close proximity so vexed people in both the North and the South, representing such closeness fictively inevitably took on political dimensions. Novels with miscegenation themes tend to fall into two overlapping categories: those that, often in ideologically unsuspect ways, defend the status quo and those that advocate social transformation, usually via assimilation" (7).

Royal sisters *choose* to live as white. Therefore, any positive or happy racial progress for the sisters is necessarily compromised or tainted by their implicitly privileging and preferring whiteness to blackness – i.e. they *pass* as white. The notion of passing, of course, reveals the constructed nature of racial difference: because racial identity may not be observable, the notion that an individual may *perform* a racial identity alternative to their ostensibly biological one signifies race as a cultural or social phenomenon (as opposed to a scientific or biological expression). In the act of passing, the problems inherent in identifying racial difference as phenotype is exploited by individuals who are legally black but live in society as white so as to reap the benefits that accrue to whiteness. The concept of passing, then, hinges upon the individual's intention to deceive the social order by refusing his or her *deemed* racial identity. Indeed, *Romance* addresses the kind of deception inherent in passing in its refusal to agree that is what the Royal sisters have done. In response to the allegation by Mr. Green that she has attempted to “pass such a counterfeit on society” in respect of presenting Flora as her (white) daughter, Mrs. Delano states:

“I have attempted to pass no counterfeit on society,” she replied, with dignity. “Flora is a blameless and accomplished young lady. Her beauty and vivacity captivated me before I knew anything of her origin ; and in the same way they have captivated you...”. (277-78)

Mrs. Delano, who functions as a stand-in for Flora's mother, refuses to concede the primacy of Flora's legal racial identity or that Flora is somehow evading or departing from her true ‘black’ self. Sympathetic to the sisters' plight, and understanding them to be for all intents and purposes white, Mrs. Delano continues that “I have learned not to

estimate people and things according to their real value, not according to any merely external accidents” (278).

Reading the Royal sisters’ ‘final’ whiteness then as advocating assimilation overlooks the manner in which the narrative destabilizes racial knowledge and identification. Specifically, *Romance* problematizes the notion of passing in two ways. First, the will to racial deception typically present in passing is lacking. While the novel’s evocation of interracial marriage results in the Royal sisters capitulating to white patriarchal notions of femininity there is, practically speaking, no deceptive intent on their part. Appearing white and having lived their lives as white, the Royal sisters’ decision to live as white is not the evasion of their authentic racial identity but, rather, a return to it. Second, and related, the notion of passing paradoxically iterates a stability to race that *Romance* struggles to undo. While the act of passing reveals a slippage between the phenotypic markers of race and their social meanings, the concept of passing as an evasion of one’s racial identity implicitly requires a stable racial identity to evade.³⁵ Of course, that stable racial identity is legal – the sisters’ ‘true’ race invoked by critics is a legal one. Nonetheless, criticism that *Romance* envisions equality through passing or

³⁵ While I argue that the critical notion of ‘passing’ implements racial stability at the level of interpretation, it is also present within the passing novels themselves. Julie Cary Nerad points out that passing novels often carry a theme of racial uplift, suggesting that characters who pass as white *ought* to self-identify as black and commit to racial progress. Failure to do so often results in those characters suffering some kind of punishment: “Framed in biological terms, passing (regardless of intent) is usually understood as perilous for the passer’s ‘true’ black identity and thus in conflict with her responsibility to both her African American family and the race. Social conventions frequently punish individuals who fail to fulfill this responsibility” (815). As such, as Nerad continues, the desire to advance racial reform within the novel undermines its aims by ultimately emphasizing the biological truth of race: “However, by supporting the tenets of racial uplift and punishing passers who reject the black race, some passing novels minimize their subversive potential by associating racial responsibility with the single drop of black blood, thus reinscribing the association between racial identity and biology” (815-16). Of course, in *Romance*, there is no racial uplift *per se*, and the novel is distinguishable in that sense.

through racial deceptions elides how the narrative fundamentally subverts racial self-identification. Beyond merely suggesting that racial difference is socially constructed, *Romance* emphasizes the primacy of those structures, interrogating precisely how racial difference is produced and imposed.

Newlyn argues that *Romance* is not a passing narrative but a transracial one. While both narrative forms generally aim to subvert race, their techniques to do so are different: passing narratives emphasize individual intention to subvert or deceive racial categories, whereas transracial ones focus on the social institutions that produce race and thus demonstrates an inherent instability within racial definitions. As Newlyn defines them:

Unlike passing narratives, which focus on a character's racial (or other) crossing and culminate in the restoration of a "real" racial identity, transracial narratives are concerned less with the performing subject or the restoration of stable racial identities; what these narratives call attention to instead are the performative structures of racial and gender identity themselves. (45)

Thus, while both passing and transracial narratives emplot individuals living differently from their legal racial status, distinguishing them permits critical consideration of narratives that do not seek to racially define their characters but, rather, to illustrate their movement across races.

In particular, in transracial narratives the ensuing racial confusion is not due to individual agency but an inability of racial definitions to adequately fix and delimit individual racial identity:

In transracial narratives, crossracial embodiment appears divorced from subjective agency – it is not individuals who transgress the norms (as in passing texts), but the norms which govern the process of transgression and reincorporation. Racial crossing occurs, then, because of prevailing political, sociojuridical, and economic rules and imperatives, mandates that are conspicuously external to the subject herself. (Newlyn 45)

It is precisely because the Royal sisters have lived and conceive of themselves as white – and are black only at law – that Newlyn argues *Romance* highlights the structures of identity formation rather than the characters’ subjective intent to deceive. Because transracial narratives emphasize the structures and strictures of racial knowledge as opposed to subjectivity or individual desire, they are not driven by the individual’s racial journey or realization to the same extent as passing narratives. As such, “... unlike passing texts, which focus on and culminate via the disposition of individual identities, what is important is not the fate of specific individuals but the structural mandates regulating racial identity within a slaveholding economy” (Newlyn 52). Criticism of *Romance* focussing on its imaginative limits implicitly understands the narrative to be one of passing and, as a result, emphasizes the narrative’s closure at the expense of overlooking its development.³⁶

While the sisters do appear to choose to live as white, despite their knowledge of their contrary legal racial identity and their personal understanding of the unjustness of

³⁶ Neraid also emphasizes the social structures producing race in *Romance*, characterizing it as a novel of “unintentional passing”: “*A Romance* thus illustrates another common trope in unintentional passing novels: despite a recognition that the preceding generation of parents failed in its (national and racial) responsibility to its children, these grown children repeat their parents’ actions and do not tell their own children that they are legally black” (823).

slavery, the narrative more broadly explores how racial knowledge is produced and, because it is arbitrary, how it is stabilized.³⁷ In summarizing her life, Flora emphasizes that whiteness was her singular racial experience and ultimately it was the *law* that forced the recognition of her blackness:

“... Rosa and I were brought up like little princesses, and we never knew that we were colored. My mother was the daughter of a rich Spanish gentleman named Gonzalez. She was educated in Paris, and was elegant and accomplished. She was handsomer than Rosa... But *cher papa* died very suddenly; and first they told us we were very poor, and must earn our living; and then they told us that our mother was a slave, and so, according to law, we were slaves too. They would have sold us at auction, if a gentleman who knew us when papa was alive had n’t [sic] smuggled us away privately to Nassau...”. (101)

Framing the revelation of her blackness as a result of the property interests vested in her person, Flora is nonetheless clear: in her life prior to this legal definition she was white and had no reason to think otherwise.

At its core, then, *Romance* emphasizes the arbitrary legal definitions of race imposed on the characters over their disavowal of a ‘true’ or ‘authentic’ racial identity about which they never knew. In their learning of the law that has redefined them as

³⁷ As Holloway writes about the ways in which literature has engaged the familial reproduction of race through law: “Literature certainly engages these issues of color and status, especially in the passing and tragic mulatto narratives, but instead of accepting a nuanced legal resolution, literature explores and resurrects the complications of identitarian-dependent fictions.... These vocabularies and practices represented the facts of social and legal customs and were clearly evident in the rule of society, and the processing of laws forced as much attention to color as they created ways to disclaim it” (33-34).

black – contrary to any other marker or mechanism of racial identity – the incomprehensibility of their situation is put into stark relief:

Their friend [Madame Guirlande] hesitated. “Remember, you have promised to be calm,” said she. “I presume you don’t know that by the laws of Louisiana, ‘the child follows the condition of the mother.’ The consequence is, that *you* are slaves, and your father’s creditors claim a right to sell you.”

Rosabella turned very pale, and the hand with which she clutched a chair trembled violently. But she held her head erect, and her look and tone were very proud, as she exclaimed, “ *We* become slaves! I will die rather.” (54)

Reading the text as ultimately confirming a racial ontology and hierarchy generated within slavery (and persisting past it) implements a stability or knowability to race that the text tries to undo.

In addition to the (racial) experience of the Royal sisters, this undoing of race and its appearance is further exemplified in the brief narrative near the end of the text of George Falkner. In Massachusetts, Lily Bell’s father helps apprehend two fugitive slaves – George and Henny. Unbeknownst to Bell, George is in fact the son of his daughter, Lily, and her husband Gerald Fitzgerald – he is the baby that Rosa switched for her own with Fitzgerald, but who was presumed lost at sea after Rosa took him with her on her European travels. A dispute arises between Bell and the abolitionist Percival over the right to claim George as a fugitive slave, as the abolitionist Percival disagrees with

the lack of procedural rights available to blacks to protect them from wrongful or illegal enslavement:

“But,” urged Mr. Percival, “that a man is *claimed* as a slave by no means proves that he *is* a slave. The law presumes that every man has a right to personal liberty, and it is proved otherwise ; and in order to secure a fair trial of the question, the writ of *habeas corpus* has been provided.”

(315)

Notwithstanding the legal inequities against blacks within slavery, the issue quickly becomes one of knowledge of racial difference underpinning slavery and the legal apparatus perpetuating it, including fugitive slave laws. As they continue:

“It’s a great disgrace to Massachusetts, sir, that she puts so many obstacles in the way of enforcing the laws of the United States,” replied Mr. Bell.

“If your grandson should be claimed as a slave, I rather think you would consider the writ of *habeas corpus* a wise and just provision,” said the plain-speaking Francis Jackson. “It is said that this young stranger, whom they chased as a thief, and carried off as a slave, had a complexion no darker than his.” (315)

Race is thus unhinged from the *effect* of slavery. In potentially subjecting the biologically white George Falkner to *re*-enslavement, Child establishes the absurd reach of slavery to unilaterally and without question define as slaves, and thereby black, those individuals who have no connection, ancestrally or behaviourally to the institution or its racialized foundation.

Critics who thus read *Romance* as confirming a racial ontology and hierarchy generated within slavery (and persisting past it into the new Republic guiding the behaviour of its racialized citizens) must implement a racial determinacy the text tries to resist. Moreover, the familial re-formations that close the narrative allow the Royal sisters' whiteness and corresponding happiness do not resolve the epistemological uncertainty around race inherent at the beginning of the text but, rather, recycles it. Flora and Rosa do not live as black. But there is no reason for them to do so and the narrative's conclusion illustrates a disjunct between race and individual identity – between the dynamic lived aspect of race and the static legal definitions that arbitrarily hinge on ancestry – that extends beyond any resolution of the girls' predicament. On the one hand, where the novel opens with the Royal sisters being plunged into potential enslavement, their decision to live as white is a return to their racial identity. On the other hand, racial resolution through the family unit paradoxically re-enacts the precise dilemmas that initiated their plight. As Nerad explains it referencing the sisters' re-entry into white society: "I would argue that the inheritance they [Rosa and Flora] restore is not a false one. They restore the paternal inheritance lost through Alfred Royal's failed business ventures. Thus, just as Rosa and Flora make their debut in the novel as white, they bow out as white" (823).

Although the closure of the novel appears to restore racial and broader social order by re-installing the Royal sisters into the bourgeois sphere as white (with Benny as their subordinate), they claim what was and ought to have been their familial inheritance – racial and perhaps otherwise – even if their legal racial identity quietly follows them into the new Republic. Moreover, while the sisters' lived whiteness allows them to avoid

their legal enslavement, it emphasizes the problems inherent in knowing race, situating their existence within the slippage between white and black. And because that slippage is stabilized by the mechanistic deployment of a legal definition of race devoid of a phenotypic basis – i.e. *partus sequitur ventrem* – the narrative’s closure of the sisters’ re-institution of the family unit echoes the significance of the family unit to the (arbitrary) production of racial difference.

Conclusion

In its consideration of interracial intimacy, *Romance* for the most part focuses on loving relationships. This is historically inconsistent with the kind of sex that typically crossed the slavery line. As Kennedy notes, “There was probably more black-white sex during this period than at any other time (thus far) in American history. Most of it was unwanted sex, stemming from the white males’ exploitation of black women...” (*Interracial* 41).³⁸ However, as Kennedy continues, there were also instances of loving relationships across the racial line, as fictionalized many times in *Romance*, and considering their existence need not undermine recognizing the gendered violence that typified black-white sex during slavery:

We can be sensitive to the plight of enslaved women, however, and still acknowledge that consensual sex, prompted by erotic attraction and

³⁸ As David Brion Davis summarizes the violence that typified interracial sex during slavery: “White planter society officially condemned interracial sexual unions and tended to blame lower-class white males for fathering mulatto children. Yet there is abundant evidence that many slaveowners, sons of slaveowners, and overseers took black mistresses or in effect raped the wives and daughters of slave families. This abuse of power may not have been quite as universal as Northern abolitionists claimed, but we now know that offenders included such prestigious figures as James Henry Hammond and even Thomas Jefferson. The ubiquity of such sexual exploitation was sufficient to deeply scar and humiliate black women, to instill rage in black men, and to arouse both shame and bitterness in white women” (*Inhuman* 201).

other mysteries of the human condition, has occurred between subordinates and superiors in even the most barren and brutal settings. Evidence of consensual sexual intimacy within the confines of bondage is found in the unusual solicitude shown by certain masters toward slaves with whom they had sex and by whom they sired children. Freeing a slave mistress of the offspring of such a union, acknowledging paternity of or assuming financial responsibility for a slave's children, marrying a former slave – all of these are potentially telltale signs of affection. (*Interracial* 45)

As Kennedy notes, we know from a variety of sources that there were seemingly caring, intimate relationships between slaveholders and their slaves. Certainly, we know from the court documents and legislation that there were instances where slaveholders sought to liberate their progeny-property, presumably out of some sense of paternal obligation or even affection. In considering these relationships and what they reveal about the familial dynamics of slavery and their clash with the broader property regime, we obtain a clearer understanding of the scope and nature of interracial relationships within slavery as well as of how and why racial difference was produced during slavery.

Interracial sex, including interracial intimacy, revealed the limits of social racial definitions. As Winthrop D. Jordan explains in his seminal *White Over Black*:

The relationship between miscegenation and society was intricately reciprocal. While miscegenation altered the tone of society, the social institution of slavery helped reshape the definition of miscegenation from fusion of that which was different to fusion of higher and lower; hence

slavery was of course responsible for much of the normative judgment implied in the concept of miscegenation. (475)

For Jordan, as slavery and racial subordination imbued miscegenation with social meaning, miscegenation in turn impacted the social meaning of racial difference and slavery. In particular, miscegenation both in its exercise and its proclaimed illegitimacy reiterated that racial difference was a *fact*. That fact of racial difference rested on a belief in its existence: "... as both slavery and miscegenation rested, in the final analysis, upon a *perception of difference* between the races..." (Jordan 475).³⁹ It is this *perception of difference* that *Romance* examines.

The story of the Royal sisters is one of potential enslavement disconnected from racial difference measured by any standard – phenotypic, behavioural, or experiential. What *Romance* illustrates is that even in the absence of any “physiognomic fact” of race the ideological commitment, and legal reality, of racial difference ruthlessly persisted. It did so by way of established legal principles – *partus sequitur ventrem*, in particular – that ensured race, however tangentially or imperceptibly, existed and remained definitive of enslavement. In so doing, *Romance* illuminates the significance of racial difference and how it was conditioned by slavery’s racial categories and understandings: race, particularly in the final years of slavery as experienced by the Royal sisters, was the unquestionable Southern explanation for slavery. Given conflicting rights and inheritances arising from interracial sexual relationships within slavery, the arbitrary and historically legally inconsistent principle that the condition of the child follows its mother’s sustained slavery and its apparatus of racialized power relations. But that

³⁹ Jordan roots this “perception” in “physiognomic fact” (475). Child, of course, refuses such biological fact in her exploration of the persistent perception of racial difference.

principle to some extent extracted slavery from racial difference as the *cause* for slavery, rendering racial difference instead its *effect*, as *Romance* suggests. Of course, what *Romance* also suggests is that slavery's property relations re-inscribe race as a legal operation, even where it seems by all other measures that racial difference is absent. In focussing on the family (or, at least, sexual reproduction) as the site of *reproduction* of slavery and racial difference, *Romance* establishes racial difference (and slavery) as self-perpetuating, an arbitrary legal principle designed to ensure the continuation of an institution on which it is based and which confirms its existence. It is this insidious reach of slavery and its legal underpinning of racial difference as determined and perpetuated by maternity that *Romance* examines.

CHAPTER THREE

“By a Fiction of Law and Custom”: Mark Twain’s *Pudd’nhead Wilson* and the Creation of Racial Difference

“If inequality treated by the law alone is so hard to eradicate, how is one to destroy that which also seems to have immovable foundations in nature herself?”

- Alexis de Tocqueville

Introduction

In my earlier chapter on Frederick Douglass’s 1855 autobiography *My Bondage and My Freedom*, I discussed how the identification of black skin with wrongdoing was generated within slavery. Specifically, I examined how the order and efficient operation of the plantation presumed slaves had committed some wrongdoing that necessitated and legitimated their constant discipline. The deployment of this presumption and resulting discipline of slaves was routinely confirmed as legal: in an effort to render slaveholders’ authority over their slaves as perfect, or at least incontestable by slaves, courts typically refused to interfere with the exercise of slaveholders’ disciplinary powers. Importantly, as black skin became the ideological reason and basis for enslavement, the presumptive wrongdoing of slaves became conflated with black skin. As a result, and as exemplified in the 1850 *Fugitive Slave Act*, black skin, whether that of free or enslaved, came to signify wrongdoing or even illegality.¹

¹ As I discuss, following slavery, the racial divide rigidified as legal decisions and legislation proliferated in an effort to define the races, as exemplified in the Jim Crow-era. This push to distinguish the races carried with it a refinement and implementation of the legal measures to criminalize black presence.

My chapter on Lydia Maria Child's 1867 novel *A Romance of the Republic* investigates that novel's complicated understanding of the intersection between race and family within slavery. In its narrative of the Royal daughters' journey from their sheltered existence of white upper class Southern society to potentially being sold into slavery and back again, *Romance* elucidates the manner in which racial difference was sustained and perpetuated within slavery. Because the Royal daughters appear, and were raised as, white, Child illustrates the slipperiness of racial distinctions, particularly in respect of phenotype. Moreover, as Child emphasizes, when an individual's racial identity was uncertain as a result of such markers of race not corresponding with that individual's claimed *legal* racial identity, that uncertainty was resolved by a legal principle that determined and defined racial identity matrilineally. Accordingly, an individual's racial identity was that of his or her mother's, irrespective of that individual's appearance, conduct, or claims otherwise.²

In this chapter, I turn to Mark Twain's novel, *Pudd'nhead Wilson*, which provides a productive counterpoint to *My Bondage* and *Romance* on the problematic nature of legal and practical constitutions of race within slavery. Where Douglass takes racial difference as a fact, albeit to consider its cultural significance, and Child re-iterates the legal stabilization of racial difference even as she subversively questions its ultimate knowability, Twain in *Pudd'nhead Wilson* refuses any ontology of racial difference, biological or otherwise. Rather than simply condemning the institution of slavery without questioning the racial difference that came to legally define it, Twain explores

² Of course, phenotype was not determinative of the mother's racial identity either so, as in *Romance*, women who did not appear nor live as black may have birthed black children by white men, simply as a result of legal definition. The conclusion of such reasoning was eventually manifest in the 'one-drop rule'.

the legal *production* of racial difference for the express purpose of enslavement. Thus where Douglass and Child ultimately accept racial difference and its legal significance, Twain refuses any stable epistemology of race, thereby refuting any meaningful legal definition of the same. This chapter, then, focuses on Twain's fictional examination in *Pudd'nhead Wilson* of the legal and cultural knowledge of racial difference within slave society.

Published in 1894, *Pudd'nhead Wilson* is a strange blend of multiple intersecting plots set within a Missouri slaveholding town that, although resolved in the narrative's final scene – a dramatic courtroom reveal of a murderer's true, racial identity – require some disentangling.³ It begins with the arrival of David Wilson to the sleepy, slaveholding town of Dawson's Landing, Missouri, in 1830. On his arrival, Wilson's planned career ambition is to practice law, but that ambition is ill fated when he immediately alienates some of the town's more influential citizens. When he and those citizens hear a dog irritatingly barking in the distance, Wilson wryly notes that he wishes he owned half of the dog so he could kill his half. The other citizens completely misunderstand his joke. Rather, taking his comment literally, they conclude Wilson does not understand basic conceptions of property and ownership in respect of a single animal – nor even the consequence that killing half an animal would kill it entirely – and as a result they deem him foolish – a 'pudd'nhead'.

At roughly the same time as Wilson seals his fate with the town's elite, and elsewhere in Dawson's Landing, a slaveowner threatens to sell a young slave mother named Roxana, as well as her fellow slaves, down the Mississippi river as punishment for

³ For a much clearer review of the plot, as well as a consideration of *Pudd'nhead Wilson*'s significance to law and literature studies, see Richard Posner's *Law and Literature*, 25-28.

a minor theft on his property. Eventually relenting on his threat, the slaveowner orders life on the plantation to resume as before. Nonetheless, Roxana remains haunted by the contingency of slave existence, particularly as it may affect her child. Frightened that she and her child could so easily be ‘sold down the river’ at any time to a much harsher slave existence, Roxana resolves to rescue her son from such a fate. Importantly, Roxana and her son are both phenotypically white. As they are described: “She was a slave, and salable as such. Her child was thirty-one parts white, and he, too, was a slave, and by a fiction of law and custom a negro” (9).

In a plot reminiscent of the infant switching in *Romance*, Roxana takes advantage of her son’s whiteness, his youth, and his nearly equal age to their master’s son, Tom, and switches the infants to save her son – the appropriately named Valet de Chambre – from slavery. The switch remains unknown to the community and the children themselves. Even the master does not discern his child is not his own. The narrative then moves forward twenty years and finds the switched heirs of mastery and slavery as men. As grown men, Roxana’s son, the ‘black’ master Tom, is selfish and cruel; the master’s son, the ‘white’ slave, Valet, is docile and passive, but decent and capable.⁴ As a result of his bad habits, including incurring gambling debts, Tom takes to disguising himself to steal from the town’s residents.

⁴ Importantly, Lawrence Howe notes that “... *Pudd’nhead Wilson* invokes racial stereotypes not in order to endorse them as the stable language of truth but to illuminate the breakdown of the master-slave opposition in the portrait of Tom. The theme of doubling is not, then, simply some Twainian quirk but an ambiguity inherent in the reversible stereotypes of aristocrat and Negro that Tom embodies” (502).

During this period, Italian twins also arrive at Dawson's Landing.⁵ The twins find themselves victimized by Tom's thievery shortly thereafter, as he disguises himself and steals from them a jewel-embroidered dagger. Tom's theft of the dagger is significant. Because of his debts and his unwillingness to wait for the death of his wealthy uncle, who has raised him and is one of the town's most influential citizens, Tom comes to murder him with the twins' dagger.⁶ And because the murder weapon is found, and is known to belong to the twins, they are accused of and charged with the murder of Tom's uncle and subjected to a full trial.

Wilson acts as the twins' legal representation at trial, and ultimately obtains their exoneration. But he does through his own evidence – private records of the fingerprints of the town's residents he has accumulated over the years for his own experiments with the new science of fingerprint identification. In the courtroom demonstration of his series of Tom's fingerprints at the twins' trial, including those taken when Tom was an infant prior to Roxana's infant switching and those taken after the switch, Wilson establishes

⁵ In early drafts of the text, the Italian twins are conjoined. There are traces of this early conception of them as conjoined in the published text, most clearly in their self-narrative of having been used as a sideshow attraction when younger.

⁶ It is worth noting that Tom's is wearing 'blackface' as his disguise when he sets about to steal from his uncle (when his uncle awakens to find Tom stealing he tries to stop him and is murdered by Tom): "Then he [Tom] blacked his face with a burnt cork and put the cork in his pocket" (93). Eric Lott has noted in his discussion of Twain's *Huckleberry Finn* that "Twain's response [to minstrel shows] marks a real (and perhaps typical) attraction to and celebration of black culture. Indeed, in *Following the Equator* (1897) he notes his love of beautiful black bodies and his disgust for white ones. But when such observations do not fall into derision, they are clearly the patronizing obverse of it, and at the very least signify an unexamined investment in exoticism" (31-32). As a corrupt, but phenotypically (and raised as) white person, Tom's blackface in this criminal moment is significant. It does not suggest Twain diverged from the simplistic (and perhaps condescending) view of blacks Lott identifies. But it does suggest that Twain views race, to the extent it exists in *Pudd'nhead Wilson*, to be composed of learned behaviours (or at least cultural). After all, Tom's misdeeds are not the product of his (minor) blackness, but rather the result of having been indulged because of his whiteness. Moreover, Tom's wearing of blackface further complicates the matter by suggesting the behaviours attributed to, or defined as the expression of, race – or, rather, the way understanding of certain behaviours are racialized (such as the view that blacks were inherently criminal) – are ultimately fictitious or perhaps deceptive.

that Tom's fingerprints are on the murder weapon. Those records also reveal the fact of the baby switch and, by extension, Tom's legal racial identity. However, Tom's blackness is not merely incidental to his having been identified as murderer. Rather, it situates any punishment for Tom within slavery's network of property relations.

Specifically, the novel closes with the court conditioning Tom's punishment for murder according to his recently regained status as slave: the court dictates that Tom's punishment ought not compromise his value as property, and the court directs he is to be sold to satisfy the estate creditors who were cheated by Roxana's earlier infant switching. Thus, after presenting switched *racial* identities within slavery, which ultimately results in the murder, the narrative reconciles its disparate plots with a conclusion that "restor[e] racial order" through the court's re-assigning of the original names and social positions to Tom and Valet (Gair 204). Consequently, the tension between the narrative's opening of racial subversion and its closing's apparent capitulation to the hegemony of race has been troubling for some critics. On its surface, the narrative appears to reinforce as correct the racial hierarchy within slavery.

Certainly, *Pudd'nhead Wilson* appears to foreclose the possibility of subverting 'race' within slavery. Myra Jehlen, for example, argues that the novel's plots fundamentally restrain Twain's imaginative potential, exemplifying a broader trend within his works "which frequently end... in the refusal, or inability to imagine a significant change" (154).⁷ In so arguing, Jehlen notes that the critical dilemma within

⁷ Jehlen's point here is that Twain's oeuvre is characterized by an ambivalence towards the potential of black male power, such that in *Pudd'nhead Wilson* Twain is required to return the black murderer to slavery without explicitly confirming the social value of slavery: "There is nothing joyous in restoring the status quo of Dawson's Landing. Twain may have been reluctant to see black men acquire the power of whites and may have viewed their bid for a share of power as outright usurpation. He did not vindicate white society. This is a familiar dilemma in his works" (54).

the text arises from the inability to reconcile a subversive reading of the narrative with its final reification of slavery-era logic. As she continues, this critical “stalemate here seems particularly frustrating: change must be defeated yet nothing of the established way of life appears worth preserving” (54). Similarly, Christopher Gair writes that Twain ultimately reiterates the racial difference he presumably set out to subvert, suggesting the novel “illustrates the extent to which a writer as sensitive as was Twain to the subtleties of his culture’s racial discourses remains unable entirely to escape the logic of such [racialized] language” (205). Viewing Twain as locked into merely repeating the hegemonic and restrictive terms of racial difference, critics such as Jehlen and Gair suggest that “Twain veers between an ability to read through those ‘fictions of law and custom’ that support the racial hierarchy and an inability to do anything but reinscribe them” (Gair 205).⁸

While such readings of *Pudd’nhead Wilson* are correct to emphasize that the narrative’s emplotment of Tom’s re-enslavement re-iterates the legal logic and significance of racial difference within slavery, I argue that Twain’s demonstration of the relative interchangeability of master and slave reveals the constructed nature of racial difference and artificiality of race as a system of classification. As such, I interpret Twain as inquiring into the *production* of racial difference at law. In his tale of

⁸ Gair ultimately situates the novel’s writing within the cultural longing for slavery era racial relations despite its conclusion being clear that Wilson’s triumph at its close exemplifies the lack of racial equality following slavery: “Written at a moment when nostalgia for antebellum plantation codes was gaining credence – and only a few years before the publication of hugely popular plantation novels by Thomas Nelson Page and others – *Pudd’nhead Wilson* partially shares the conservatism of such texts and, finally, will not permit Roxy’s power to survive. Instead, as the friendship between Judge Driscoll and Wilson seems to signify, a new alliance between traditional white Southern does and new legal and scientific Northern ones reimposes old bonds... In his conclusions, however, Twain is unambiguous: the power accrued by David Wilson, placed at the heart of the developing economy of Dawson’s Landing, comes at the expense of the freedoms and opportunities promised to the emancipated slave and the immigrant after the Civil War” (205).

indistinguishable infants ultimately *deemed* racially different, Twain suggests that there is no measurable criteria by which essential racial identity can be definitively determined. Moreover, Wilson's final courtroom dramatics, wherein the law 'correctly' re-races those before it, reveal that the markers of racial difference the law invokes as authoritative are, in fact, arbitrary. While its conclusion may appear to capitulate to the demands of slavery, *Pudd'nhead Wilson* ultimately suggests that racial difference itself is arbitrary: any legal determination or adjudication of that difference is not premised upon a stable ontology of race that precedes its legal determination but is in fact constituted by it. In approaching the text as an interrogation of the legal foundations of racial difference within slavery, this chapter considers *Pudd'nhead Wilson* as finally subversive, exposing the failings and epistemological limits of race as a system of knowledge. As such, rather than citing the novel's troubling conclusion of re-enslavement as an implicit affirmation of the legal racial hierarchy, I argue that it destabilizes the very notion or reality of racial difference at the site of its production and, by extension, confounds the possibility of a legal order or institution premised upon race.

Racial subordination after Emancipation

Criticism grappling with *Pudd'nhead Wilson*'s exploration of the legal manipulations of racial difference have fruitfully interpreted the text within the time of its writing. By the time of its publication at the end of the nineteenth century and despite their supposed freedom from slavery, blacks found themselves still subordinated in new and often violent ways. Indeed, as Susan Gillman notes, the 1890s was "... a decade that saw not only an epidemic of lynchings but also the beginnings of newly enacted Jim

Crow laws defining the ‘Negro’s place’ in a segregated society” (88). As such, Gillman concludes that, “the novel may thus speak even more pointedly to the growing racism of its own era of the 1890s than to the race slavery abolished thirty years earlier” (88). Contextualizing the narrative within the anti-black animus of the 1890s has proven helpful in elucidating the text’s complicated legal and racial dynamics. In particular, the manner in which citizenship was bifurcated along racial difference post-Emancipation has assisted critics in understanding the doublings and dualisms that form the substance of the narrative.⁹ On the one hand, the formal aim of Emancipation was racial equality. And the corresponding constitutional amendments sought to ground the positive laws of the United States in that new, explicit principle of racial equality: by a federal commitment to overcome the historical subordination of blacks, these legislative steps attempted to now re-conceive blacks as citizens when they were once property.¹⁰ On the other hand, despite these legal pronouncements of equality, substantive disparities persisted between blacks and whites following Emancipation, particularly in the South, by way of laws and theories designed to confirm the perceived reality of racial

⁹ As Khalil Gibran Muhammad summarizes the transition of black enslavement to black freedom: “This latest crisis [on how to scientifically comprehend black fitness for citizenship and participation in this broader political sphere] had begun in the 1860s. In a moment equivalent to a historical blink of the eye, four million people were transformed from property to human beings to would-be citizens of the nation. Only a decade before, few white Americans other than abolitionists had anticipated that black people would become the legal equivalents of white people. In those outrageously heady days of the 1850s when slavery debates still raged, colonization schemes were still being hatched, and white optimism still percolated for black extinction if emancipation had to come, the possibility of living among and abiding black judges, politicians, and schoolteachers was, for many, unimaginable” (16).

¹⁰ Summarizing the constitutional aspirations of equality following the Civil War and the Emancipation Proclamation, Akhil Reed Amar writes that: “First, in 1865, the Thirteenth Amendment ended slavery forever. Then came the Fourteenth Amendment... ratified in 1868, making all persons born in America – blacks no less than whites, women no less than men – full and equal citizens, and pledging to protect all fundamental civil rights against state and federal encroachment” (351).

difference.¹¹ Ultimately, the cumulative effect of such laws and theories was to render any black citizenship secondary or subordinate to that of whites.

In his seminal *To Wake the Nations: Race and the Making of American Literature*, Eric J. Sundquist argues that the very concept of American citizenship within slavery – whole, but exclusively white – was bifurcated during Reconstruction and Jim Crow-era policies, where a legal racial hierarchy within equality was sought. As Sundquist explains, Twain’s turn-of-the-century fictional return to slavery in *Pudd’nhead Wilson* suggests Reconstruction’s increasingly institutionalized racial difference to have been an effect or echo of racialized slavery:

... it [the novel] corresponds to an array of dualisms making up the contemporary American racial trauma: theories of miscegenation and “blood” contamination that polarized the races and both divided and blurred mixed-race identity;... and pervading all, the dual layering of antebellum and post-Reconstruction (or Old South and New South) ideologies, the recreation of the dynamics of slavery in new masquerade that Twain adumbrated here... by imposing upon antebellum dramatic action an allegory of the 1880s and 1890s. (232)

Arguing the text emphasizes that the material legacy of slavery extended beyond its practice or legality, Sundquist considers *Pudd’nhead Wilson* as a phenomenon of doubles

¹¹ As C. Vann Woodward writes in *The Strange History of Jim Crow*, the comprehensive subordination of blacks following Emancipation was legally achieved through statutes – ‘Jim Crow’ laws – which “constituted the most elaborate and formal expression of sovereign white opinion upon the subject. In bulk and detail as well as in effectiveness of enforcement the segregation codes were comparable with the black codes of the old regime... That [segregation] code lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking. Whether by law or by custom, that ostracism extended to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to unreal homes, morgues, and cemeteries” (6).

– races, temporalities, and individual identities – that is essential to its racial critique. In particular, Sundquist writes that, as a tale about slavery written after the fact, Twain “reiterates the moral structure of slavery (in the time frame of the plot) and of postbellum racism and segregation (in the implied allegorical time frame of the narration)” (*To Wake* 226). As such, rather than finding the narrative confirms the racial logic of slavery, Sundquist characterizes it as a manipulation of the epistemological ‘certainty’ of race during slavery so as to comment on the tortuous legal lengths pursued after slavery to maintain it. In defining postbellum America as a social order of “dualisms” generated by this commitment to a rigid epistemology of racial difference, Sundquist argues that the novel ultimately explores America’s historical production of race.

In arguing that *Pudd’nhead Wilson* exposes (the persistence of) racial difference as fundamentally a problem generated within slavery, Sundquist frames such argument with the time of the text’s writing and, in particular, with the U.S. Supreme Court decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896): the novel distills “the dilemma over national discrimination against blacks that would reach its authoritative constitutional expression two years later in the Supreme Court ruling in the case of *Plessy v. Ferguson*...” (*To Wake* 227).¹² Exploding the contradictions inherent in the court’s

¹² Although *Pudd’nhead Wilson* was published two years before the decision in *Plessy*, Sundquist suggests Twain would likely have been familiar through the press with its facts but, in any event, it was the culmination of a cultural logic already existing: “Although the Court’s landmark ruling in favour of the doctrine of ‘separate but equal’ was not handed down until 1896, Homer Plessy’s case had been pending since January 1893, after being carried up from the Louisiana State Supreme Court to the high court on a writ of error. Despite the manifold thematic and figurative entanglements between *Plessy v. Ferguson* and *Pudd’nhead Wilson*, it is not necessary to argue that Twain had specific knowledge of the case as it came before the Court. It is quite likely for several reasons that he did; but more critical is the fact that *Plessy* brought to a climax the series of Supreme Court decisions, legislative maneuvers, and developments in sociological theory that had already created the atmosphere in which Twain’s wrenching text was composed” (227-28).

reasoning in *Plessy*, wherein difference *within* equality permitted inferior treatment, Sundquist writes:

Like *Pudd'nhead Wilson*, a text preoccupied with problems of legal rights, evidence, codes of authority, and the interplay of “natural” and artificial laws, and culminating in a melodramatic burlesque of a trial that sets right subverted racial roles and boundaries, *Plessy v. Ferguson* was at once a mockery of law and an enactment of its rigid adherence to divided, dual realities. (*To Wake* 237)

The *Plessy* decision itself, released in 1896, solidified the ‘separate but equal’ doctrine as consistent with the constitutional amendments that were to ensure black freedom and equality following slavery.

Briefly, the *Plessy* decision tested the limits to which the post-slavery Thirteenth and Fourteenth constitutional amendments would put blacks on equal footing with whites. In response to Louisiana passing in 1890 the *Separate Car Act*,¹³ which required separate train cars for blacks and whites, Homer Plessy – a free, mixed race ‘octoroon’ nonetheless legally black under Louisiana’s laws – challenged the law (with some assistance and encouragement from the Citizens’ Committee to Test the Constitutionality of the Separate Car Act, a group dedicated to having the law repealed). In 1892, Plessy purchased from the East Louisiana Railroad Company a first class-ticket for, and boarded the white car of, a train headed from New Orleans to Covington. As he intended, and with planned assistance from the rail company who sought to have the law repealed for financial reasons, Plessy took a seat in the whites-only car where he was

¹³ *The Statute of Louisiana, Acts of 1890*, c. 111.

promptly arrested by rail officials for violating the *Act*.¹⁴ Both the trial court and the Supreme Court of Louisiana upheld the *Act* as constitutional. Plessy then pursued his claim to the United States Supreme Court where he was, again, unsuccessful. In finding that the *Separate Car Act* was constitutional – and that Plessy, who at 1/8th black and 7/8th white was phenotypically white but nonetheless legally black and therefore legally required to ride in Louisiana’s black rail cars – the majority of the U.S. Supreme Court held that it was ultimately not the role of the courts or the law to ensure substantive racial equality.¹⁵

Specifically, the majority in *Plessy* held that the formal, legal declarations of equality cannot alter the ‘biology’ of race nor can they alter the historical social or cultural practices surrounding it. Moreover, the Court held it was not its role to shift culture or social perception to meet legislative aspirations. Writing for the majority, Justice Brown explicitly remarks that the law cannot fairly be expected to overcome natural differences among people or their response to them:

Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation... If one

¹⁴ The penalty for violating the *Separate Car Act* by sitting in the wrong car was a fine of \$25 or jail time of 20 days.

¹⁵ To be clear, *Plessy* is ultimately an analysis of the Fourteenth Amendment claim. At the outset, the Court dispensed with the Thirteenth Amendment claim noting that the noting of racial difference in legislation cannot possibly amount to the involuntary servitude abolished by the Thirteenth Amendment: “A statute which implies merely a legal distinction between the white and colored races – a distinction which is founded in the color of the two races and which must always exist so long as white men are distinguished from the other race by color – has no tendency to destroy the legal equality of two races, or reestablish a state of involuntary servitude. Indeed, we do not understand that the Thirteenth Amendment is strenuously relied upon by the plaintiff in error in this connection” (543).

race be inferior to the other socially, the Constitution of the United States cannot put them upon the same place. (551-52)

In its reasoning, the majority first presumed that racial difference is biological or essential (and, effectively, observable). As a result, and second, the majority presumed that any cultural response to such an essential, physical *reality* is beyond the law's jurisdiction to alter. Thus, pursuant to the majority's reasons, the practice of distinct and segregated racial dealings was both natural and legal: for Justice Brown, who wrote the majority's reasons, such racial segregation was wholly consistent with the Fourteenth Amendment, notwithstanding its declaration of racial equality.

After determining the Thirteenth Amendment was not applicable to Plessy's claim in respect of the *Separate Car Act's* unconstitutionality (determining, effectively, that the Act did not re-institute the involuntary servitude prohibited by that amendment), Justice Brown observes that:

The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally,

recognized as within the competency of the state legislatures in the exercise of their police power. (544)¹⁶

Confirming the constitutional correctness of segregation, and thus bringing “to fruition the long assault on the Fourteenth Amendment that had begun with the *Slaughterhouse Cases* of 1873,” *Plessy* confirmed the natural and legitimate historical prejudices against blacks were immune to substantive efforts for racial equality, for example through racial integration (Sundquist, *To Wake* 237).¹⁷ Indeed, in his assessment of the basis of *Plessy*’s claim, i.e. that the maintenance and enforcement of racially segregated cars is consistent with racial equality, Justice Brown notes that only a cross-racial willingness to intermingle – achieved naturally or voluntarily and not as a result of legislative demands or requirements – could possibly lead to equality:

¹⁶ Justice Brown continues by providing an ostensibly non-contentious and previously determined legal form of racial segregation: “The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced (544).

¹⁷ The *Slaughter-House Cases*, 83 U.S. 36 (1873), decision is actually a consolidation of three similar cases from Louisiana – *The Butchers’ Benevolent Association of New Orleans v. The Crescent City Live-Stock Landing and Slaughter-House Company*; *Esteben et al v. The State of Louisiana et al*; and *The Butchers’ Benevolent Association of New Orleans. v. The Crescent City Live-Stock Landing and Slaughter-House Company* – were the U.S. Supreme Court’s first interpretation of the Fourteenth Amendment to the Constitution. Briefly, in response to health concerns pertaining to the waste disposal of slaughterhouses in New Orleans, in 1869 the Louisiana legislature passed *An Act to Protect to the Health of the City of New Orleans, to Locate the Stock Landings and Slaughter Houses, and to Incorporate the Crescent City Livestock Landing and Slaughter-House Company*, which permitted New Orleans to create the Crescent City Livestock Landing which would centralize all municipal slaughterhouses. The *Act* thus provided Crescent City with a monopoly over the butcher trade, forcing existing butchers to close and re-open shop under Crescent City’s purview. The various plaintiffs alleged the *Act* violated the Fourteenth Amendment, particularly in respect of the equal protection it guaranteed, claiming the *Act* provided a small group of individuals control over the butcher industry to the unfair, arbitrary detriment of everyone else. The lower courts found the *Act* complied with the Fourteenth Amendment and ruled in favour of Crescent City. The U.S. Supreme Court, in a 5-4 decision, held the Fourteenth Amendment impacted only federal, and not state, citizenship. As a result, and given it was state legislation, the *Act* did not and could not violate the plaintiffs’ Fourteenth Amendment rights. Of course, although enacted in response to Emancipation, it should be noted that the Fourteenth Amendment’s applicability is not restricted to issues of racial equality, as exemplified in the *Slaughter-House Cases*.

The [plaintiff's] argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races... [but]... if the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary act of individuals. (551)

Insisting, then, that court enforcement of racial integration would not (and likely could not) lead to racial equality – and moreover that individuals cannot be legally manipulated into perceiving the races as equal – Justice Brown formulated the provision of separate services for the races as commensurate with equality: racial segregation wherein each race was assured similar conditions, such as separate but similar railway cars, would, in fact, be racial equality.¹⁸

The majority did not simply adjudicate Plessy's claim. Rather, they went beyond it, re-formulating Plessy's argument against segregation as paradoxically iterating the

¹⁸ For the Court, claiming that the issue is one of preclusion of the races' political rights (as opposed to the natural and fair separation of the races), to the extent legislation did not interfere with the portending of such rights it was compliant with the Fourteenth Amendment, provided it did what it said it would do. Reasoning by analogous precedents, Justice Brown writes: "The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres and railway carriages has been frequently drawn by this court. Thus, in *Strauder v. West Virginia*, 100 U.S. 303, it was held that a law of West Virginia limiting to white male persons, 21 years of age and citizens of the State, the right to sit upon juries was a discrimination which implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step toward reducing them to a condition of servility. Indeed, the right of a colored man that, in the selection of jurors to pass upon his life, liberty and property, there shall be no exclusion of his race and no discrimination against them because of color has been asserted in a number of cases. *Virginia v. Rives*, 100 U.S. 313; *Neal v. Delaware*, 103 U.S. 370; *Bush v. Kentucky*, 107 U.S. 110; *Gibson v. Mississippi*, 162 U.S. 565. So, where the laws of a particular locality or the charter of a particular railway corporation has provided that no person shall be excluded from the cars on account of color, we have held that this meant persons of color should travel in the same car as white ones, and that the enactment was not satisfied by the company's providing cars assigned exclusively to people of color, though they were as good as those which they assigned exclusively to white persons. *Railroad Company v. Brown*, 17 Wall. 445" (545-46).

black inferiority that equality, including its purported realization through ‘separate-but-equal’ segregation, is meant to overcome. Specifically, and on behalf of the majority of the Court, Justice Brown notes that:

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. (551)

Re-casting Plessy’s argument against segregation (and for integration) as suggesting one of blacks preferring the company of whites (or at least refusing to endure the company of other blacks), and therefore suggesting the inferiority of blacks to whites, it is implied that the social meanings and values of race are constructed. According to this reasoning, black protest against ‘separate-but-equal’ forms of equality necessarily marks or signifies blackness as subordinate to, or inherently less equal than, whiteness.¹⁹ Thus even as the Court framed the significance of racial difference as a *social* or behavioural issue (only to deny the law’s ability to alter its course), it nonetheless grounded its reasoning in the perceived *reality* or essential nature of racial difference. Although the Court in *Plessy* defined separated races in similar circumstances as consistent with equality, such separation presumed the existence and knowability of racial difference.

¹⁹ Stephen M. Best explains that the Court’s recourse to “counterfactual” reasoning to consider Plessy’s claim – a ‘what-if’ method of reasoning – enables them to elide the historical realities of racial subordination in favour of a formal approach to the law, the past, and race: “Testing the plaintiff’s social imaginary, his vision of an alternative present – and finding it wanting – the *Plessy* court confirmed why the current present is the *only* present possible. It is on the grounds (if we might call it that) of the counterfactual’s ontological modesty that courts required to guarantee equal protection of the laws found an alibi for historical responsibility, that the law improvised a detour around historical causes, around the ‘event’ of emancipation” (228).

Sundquist notes that *Plessy* echoes the slavery-era Supreme Court decision of *Dred Scott v. Sandford*, 60 U.S. 393 (1857), in its unqualified acceptance and statement that “a distinction which is founded in the color of the two races and which must always exist so long as white men are distinguished from the other race by color” (543). In particular, *Dred Scott* laid the conceptual groundwork for legal *racial* segregation in its holding that black Americans were a distinct racial group, legally ineligible for citizenship because of the “... customs and traditions that had created dual legal systems for both southern and northern blacks” (Sundquist 236). *Dred Scott*, of course, ultimately held that blacks during slavery, whether free or enslaved, were not and were never contemplated by the Constitution’s framers to be American citizens and, as a result, they did not possess any of the rights granted or protected under that document. It is this legacy of racialized inferiority that *Plessy* re-iterates.

Scott’s legal claim was ultimately one for freedom. Having been born into slavery in Virginia at the turn of the century, in 1820 Scott’s then owner took him to Missouri where he was purchased by Dr. John Emerson. Emerson subsequently took Scott to Illinois (which was a free state having only recently prohibited slavery in its constitution), and then moved to the Wisconsin Territory (wherein slavery was also prohibited under the Missouri Compromise), taking Scott with him. Eventually, Emerson settled in Louisiana, where he was married, and sent for Scott and his wife Harriet (whom Scott had married in Wisconsin). On their way to Louisiana and Emerson, Scott and Harriet’s daughter was born on the Mississippi, between Iowa and Illinois. Although on reaching Louisiana the Scotts could have sued for their freedom on the basis they had been taken to free territories by their owner, or at least for their daughter on the basis she

had been born in a free territory, they did not, and they continued to serve Emerson and his family. In 1838, the Emersons relocated to Missouri, taking the Scotts with them. On Emerson's death in Missouri in 1843, his widow Eliza inherited his property, including the Scotts, and she continued to use them as slaves. Scott finally attempted to purchase from Eliza freedom for himself and his family, but she refused and he was forced to sue for it in 1846.

By the time the U.S. Supreme Court released its decision, Scott's suit had moved up and down the Missouri courts, eventually switching to the federal jurisdiction.²⁰ Finding 7-2 in favour of the defendant, the majority of the Court, in reasons written by Chief Justice Taney, framed Scott's suit as one of standing – namely whether blacks, whose ancestors were brought to the United States as slaves, possessed all the rights guaranteed under the Constitution including Scott's action of suing in federal court.²¹ Finding that blacks did not, and given Scott's racial heritage and history of being owned

²⁰ Scott first brought his suit to the Missouri court in 1846. It was dismissed on a technicality – specifically that he had failed to establish by way of witness that he was in fact Emerson's widow's slave. Nonetheless, the trial judge granted a new trial. Emerson appealed this to the Supreme Court of Missouri but was unsuccessful. At the new trial, which did not commence until 1850 as a result of unrelated matters, Scott called witness testimony to establish Emerson's ownership of him and his family, and was successful under Missouri precedent. The widow Emerson appealed the trial court ruling to the Supreme Court of Missouri while, at the same time, she transferred ownership of Scott to her brother, John F.A. Sanford as she had moved to Massachusetts. In 1852, the Missouri Supreme Court reversed the trial court's decision, finding that the Scotts were slaves and to the extent their claim for freedom was having been on free soil, they ought to have brought that claim when they were in those states. Scott sued again in 1853, this time in federal court on the basis his new owner – Sanford – was a New York resident. The trial judge directed the jury to resolve the question of Scott's freedom by way of Missouri law and, as a result, they found for Sanford. Scott then appealed that decision to the U.S. Supreme Court (who, by error, misspelled the defendant's name as Sandford).

²¹ As Chief Justice Taney writes: "The question is simply this: can a negro whose ancestors were imported into this country and sold as slaves become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen, one of which rights is the privilege of suing in a court of United States in the cases specified in the Constitution?" (403).

was not in issue, it was found Scott had no standing to sue for freedom and the Supreme Court dismissed his suit.²² For the majority of the Court, it was inconceivable that the framers of the Constitution would have intended for blacks to be citizens under it.²³ This was because black presence in the states had been attributable largely to slavery:

No one of that [African] race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise. The number that had been emancipated at that time were but few in comparison with those held in slavery, and they were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population rather than the free, it is obvious they were not even in the minds of the framers of the Constitution when they were

²² “And, upon a full and careful consideration of the subject, the court is of opinion, that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts, and consequently that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous” (426-27).

²³ In respect of the Declaration of Independence, Chief Justice Taney writes that: “But it is too clear for dispute that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration, for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted, and instead of the sympathy of mankind to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation” (410). In respect of the fifth section of the ninth article of the Articles of Confederation, Chief Justice Taney writes that: “Words could hardly have been used which more strongly mark the line of distinction between the citizen and the subject – the free and the subjugated races. The latter were not even counted when the inhabitants of a State were to be embodied in proportion to its numbers for the general defence. And it cannot for a moment be supposed that a class of persons thus separated and rejected from those who formed the sovereignty of the States, were yet intended to be included under the words ‘free inhabitants,’ in the preceding article, to whom privileges and immunities were so carefully secured in every State” (418-19).

conferring special rights and privileges upon the citizens of a State in every other part of the Union. (411-12)²⁴

Chief Justice Taney supported this originalist interpretation of the Constitution with a review of the slavery laws of England and then of the States, noting that "... when we look to the condition of this race in the several States at the time, it is impossible to believe that these rights and privileges were intended to be extended to them [blacks]" (412).²⁵

In finding the fact and practice of enslaving Africans meant the framers could not have viewed them as equal to whites, Chief Justice Taney drew a physical distinction between blacks and whites – that of race – justifying the conflation of blackness with property:

They [the framers] spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were

²⁴ As Andrew P. Napolitano summarizes the manner in which the majority opinion in *Dred Scott* dismissed Scott's claim: "The Court's holding in *Dred Scott v. Sandford* was that blacks were not considered (and were not intended to be considered) as citizens under the Constitution. They could not claim any of the rights and privileges the Constitution guaranteed and secured to citizens of the United States... Thus, because Dred Scott was not a citizen, he could not sue in the federal courts and diversity jurisdiction – which allows federal courts to hear cases between *citizens* of different states – was inappropriate" (60).

²⁵ As Best explains the logic of this originalist interpretation: "For 'originalists' such as Andrew Jackson, John C. Calhoun, and Roger Taney (author of the 'Opinion of the Court' in *Dred Scott*, intent involved the psychological motives of the founders – it was implicated in their very personalities and desires. The 'original intent' of the Constitution achieved its force only through the instrument of textual perspicuity, which the originalists access through reference to the instrument's language at the time of its ratification and which they would defend rhetorically through reference to the 'letter of the law' and the 'plain meaning' of its words (the ability of the document, in common parlance, to 'speak for itself'). The meaning arrived at by any subsequent court would be an expression, in their view, of the voluntariness, mutuality, and reciprocity – of the 'consent' and the exercise of 'popular will' – that gave rise to the Constitution itself as a legal instrument" (40).

never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection. (410)²⁶

In affixing enslavement to black skin (or at least formulating it as an unavoidable consequence of race), Chief Justice Taney rendered constitutional the perpetuation of race-based slavery. As Sundquist explains it:

Taney's argument was not, strictly speaking, biological, but it blurred the biological into the constitutional in an even more unsettling and philosophically rigid way. The legal justification of racial inferiority, that is to say, was constructed and discursive; the law of slavery was branded into African American beings by "indelible" marks... having been already "impressed" on blacks at the time the Declaration of Independence and the Constitution were drafted.... (*To Wake* 236)

Because blacks were already fated to enslavement at America's founding, that enslavement is implicitly protected by the Constitution, while blacks, who were simultaneously found to not be citizens under it or at all, were *not*.²⁷ This fate of legal racial subordination echoes in *Plessy*.²⁸ Because in *Plessy* black skin already signifies

²⁶ As Sundquist explains it, "Despite casting his opinion in terms of a natural racial hierarchy, Justice Taney rested his notorious opinion about African American noncitizenship on customs and traditions that had created dual legal systems for both southern and northern blacks" (*To Wake* 236).

²⁷ Holloway explains the racialized nature of citizenship as being generated by the Constitution: "Although 'three-fifths' is a fraction [that first constitutionally described the quantity of personhood in blacks but was eventually] made whole with full personhood and citizenship, citizenship does not endow one with a completed humanity. Citizenship is the way in which law recognizes – or does not recognize – persons. And it does so with a peculiarity of language that points to the origins of our considerations that divided humans into different classes by race" (52-53).

²⁸ Chief Justice Taney employs something of a 'floodgates' argument in respect of states' rights if blacks were citizens under the Constitution. Noting that such a finding would either deprive states of

difference – a difference ripe with cultural meanings generated within slavery available only for legal recognition and not re-definition or reconsideration – any substantive interpretation of the broad constitutional commitments to racial equality was avoided. In its purely formal understanding of the Constitution and its amendments, *Plessy* implicitly re-iterated an historical understanding of the Constitution generated within, and perpetuating race as the reason for, slavery.

This capitulation to, and application of, slavery-era judicial understandings of black skin was of course incongruent with post-slavery black freedom. As Catherine O’Connell notes about slavery’s persistent mark on black skin following Emancipation: “... one of the ironies of the race cases of the 1890s was the reliance on antebellum case law as precedent, even though the post-Civil War constitutional amendments should have made it irrelevant and obsolete” (118).²⁹ It is within this cultural climate – the post-Emancipation legal re-installation or re-iteration of blackness as an insurmountable marker of difference that authorized and legitimated dual and distinct citizenships along racial lines – that *Pudd’nhead Wilson* was written. And it is against this “... ‘dual’ citizenship that in effect allowed the reconstitution of aspects of chattel slavery,” that the

their rights to define citizenry (or, if they disobeyed, render the Constitution worthless), he writes: “And if persons of the African race are citizens of a State, and of the United States, they would be entitled to all of these privileges and immunities in every State, and the State could not restrict them, for they would hold these privileges and immunities under the paramount authority of the Federal Government, and its courts would be bound to maintain and enforce them, the Constitution and laws of the State to the contrary notwithstanding. And if the States could limit or restrict them, or place the party in an inferior grade, this clause of the Constitution would be unmeaning, and could have no operation, and would give no rights to the citizen when in another state” (423).

²⁹ There is a limit as to how far it can be argued that *Plessy* was an attempt to undo legislative freedoms for blacks. As Michael J. Klarman explains it, *Plessy* was a decision that was still consistent with established legal principles and doctrines: “... contrary to popular belief, these rulings were not blatant nullifications of post-Civil War constitutional amendments designed to secure racial equality. On the contrary, *Plessy*-era race decisions were plausible interpretations of conventional legal sources: text, original intent, precedent, and custom. They can be criticized, of course, but not on the grounds that they butchered clearly established law or inflicted racially regressive results on a nation otherwise included to favor racial equality” (9-10).

text is perhaps best approached (Sundquist *To Wake* 233). However, as Sundquist also notes, “A full understanding of... [*Pudd'nhead Wilson*]... must therefore trace the intricate relationship between Twain’s fascination with questions of psychological and racial doubling, and the pervasive dualisms in race theory and the laws of segregation” (*To Wake* 233). To comprehend the polemical aims of Twain’s “novel of racial crisis” requires an analysis of the dualities that comprise the text – citizenship and temporality, as well as individual and racial (Sundquist *To Wake* 233). It is in the manner in which it deploys these dualities that *Pudd'nhead Wilson* subverts and undermines legal racial knowledge.

The uncanny limits of racial difference

Pudd'nhead Wilson opens with an introduction to the town of Dawson’s Landing, “half a day’s journey, per steam-boat below St. Louis” in 1830 (3). Characterized as “a slave-holding town, with a rich slave-worked grain and pork country back of it”, the town is “Growing” and guided by the “First Families” of Virginia who maintain the town’s “code” of honour and respectability (4). After introducing a handful of these revered leaders of the community – “chief” among them, Judge Driscoll, Tom’s uncle who Tom, as his false heir, will eventually murder – the narrative presents “Mr. David Wilson, a young fellow of Scotch parentage” (4-5). Learning that Wilson had studied law and had come to Dawson’s Landing to “make his fortune”, it does not take long for Wilson to stymie his career aspirations:

He [Wilson] had just made the acquaintance of a group of citizens when an invisible dog began to yelp and snarl and howl and make himself very

comprehensibly disagreeable, whereupon young Wilson said, much as one who is thinking aloud –

“I wish I owned half that dog.”

“Why?” somebody asked.

“Because, I would kill my half.” (5)

As noted above, Wilson’s seemingly innocuous remarks – his “thinking aloud” – doom his professional future in Dawson’s Landing (5). Because the citizens are incapable of recognizing his ironic wit his comment generates plenty of controversy.³⁰

As the conversation evolves among the citizens who overhear his “fatal remark,” what becomes clear is their immediate disdain for Wilson’s perceived ignorance (5). Because he is instantly characterized by those citizens as ignorant or uneducated, including in respect of presumably basic principles of property ownership, Wilson is deemed to be unaware that his killing his half would kill the entire dog. Emphasizing that both ownership interests in the dog were inextricable, one citizen notes that if Wilson kills his half, he would kill the other half and, by extension, “be responsible for that half, just the same as if he had killed that half instead of his own” (6). The citizens’ confusion grows. As another citizen summarizes it:

“... If he [Wilson] owned one half of the general dog, it would be so, if he owned one end of the dog and another person owned the other end, it

³⁰ The actual irony of the exchange is that it is the townspeople whose sophistication is stunted: it is the townspeople’s inability to understand irony or humour that leads them to conclude Wilson is foolish. Importantly, though, the power or ability to impose such a label is unilateral. It is only the townsfolk elite that can label Wilson as foolish and not the other way around. Given the number of them, and their prestige and history within the town, it is unsurprising the town alone possesses the ability. In opening the narrative with this act of misunderstanding and labeling, Twain foregrounds at the outset the ideologies and ideological power of the townspeople (as well as how those ideologies or notions operate as ‘truths’ even in spite of their erroneous foundations or presumptions).

would be so, just the same; particularly in the first case, because if you kill one half of a general dog, there ain't any man can tell you whose half if [sic] was, but if he owned one end of the dog, maybe he could kill his end of it and –". (6)

As others debate the possibility of actually owning half a dog, as well as the repercussions of trying to exercise such a property right by killing one's half, the discussion ultimately degenerates into such confusion and incomprehensibility that their only recourse is to conclude Wilson a "perfect jackass... a pudd'nead" (6).

Because Wilson's joke hinges upon shared ownership of a single object, it highlights the presumptions of individual autonomy that reify personal possession and relations of ownership: Wilson's joke unsettles the assumptions of individuality and autonomy that bind individuals into a community. Specifically, in expressing his interest in the dog as one of shared ownership, Wilson suggests a mode of ownership wherein multiple property interests converge in one object, but would nonetheless allow complete expressions of individualized ownerships. The citizens' entirely literal reading of Wilson's remark is the inevitable result of their failure to comprehend plural ownership in an indivisible object.

While Wilson's joke appears minor, a significant amount of text within the narrative is devoted to it: it is important, and importantly troubling, to the town. As Evan Carton explains it, Wilson's joke exposes to the citizenry the limits of ownership. In particular, Wilson's remark:

... challenges the legalistic distinctions and the proprietary or titular claims that underlie the ordered existence of Dawson's Landing. It rejects

the model of community (or of representation) as formal organization, plotted and particularized by discrete bestowals of names and titles, and substitutes a model of community as integrated and dynamic creature of the ongoing enterprise of communication. (Carton 84)

For Dawson's Landing, title, ownership, and property are social expressions of autonomous individuality. But Wilson's remark disrupts this logic by implying the individual is conceived of as autonomous only by virtue of being integrated into, or dependent upon, the community. And because the constituents of Dawson's Landing refuse to acknowledge that individual ownership necessarily exists with the broader network of (social) property relations, they dismiss Wilson as absurd. Rather than concede that legal ownership is a relational phenomenon, the citizenry insist that individual ownership precedes its legal recognition and is, therefore, only confirmed by the law. Thus, as Carton continues,

The townspeople cannot afford to recognize their intuitive grasp of Wilson's meaning. They agree that the whole dog would die but conclude that Wilson could not have intended this; to conclude otherwise would be to admit his vision of a community in which the individual cannot assume full possession or control of property and events yet must accept full responsibility for them. (84)

Realizing that "Either Wilson's remark, then, or the fundamental assumptions of Dawson's Landing must be unintelligible... [the] townspeople make the choice that will not unseat their reason" (Carton 84).³¹

³¹ As the narrative describes the townspeople: "But irony was not for those people; their mental vision was not focussed for it. They read those playful trifles in the solidest earnest, and decided without

Wilson's oblique joke on the limits of ownership strains the distinctions between individual and community, and between legal rights and the limits of their exercise. But it is not so much his joke that troubles the townspeople but, rather, Wilson himself. As described in the text, "the group [those citizens who were present for his joke] searched his face with curiosity, with anxiety even, but found no light there, no expression that they could read. *They fell away from him as from something uncanny*, and went into privacy to discuss him" (6 emphasis added). But Wilson's perceived uncanniness is not simply that he reveals the limits of the conventional ideologies of the town, but also that in doing so he is inscrutable. Derek Royal explains that:

In almost every case, Wilson's words and actions do not lend themselves to an authoritative reading, leaving the townspeople with nothing more than a foggy series of words – something uncanny, a cipher, a witch, a pudd'nhead, a fool – to account for his indecipherability. As a text, he elides the interpretation of Dawson's Landing.... (420)

Royal emphasizes that Wilson resists the authorities that comprise and unify the town. And the cause of Wilson's uncanniness is that in such resistance he makes explicit the implicit epistemologies on which the town's authorities are based. Specifically, Wilson exposes the arbitrariness of the distinctions and divisions that comprise the town – distinctions the town takes as literal, natural or unquestionable, including the ostensibly absolute nature of private property. Since "what he performs, in essence, is a delineation of the cultural and political boundaries within the town, much in the way that the First Families of Virginia once outlined honor and the aristocratic foundations of slaveholding

hesitancy that if there had ever been any doubt that Dave Wilson was a pudd'nhead – which there hadn't – this revelation removed that doubt for good and all" (25).

society”, Wilson subverts the very epistemologies of identity – group, individual, legal, political – by revealing their limits (Royal 424).³² And it is precisely Wilson’s laying bare the conceptual limits of the town’s founding philosophies that renders him “uncanny”. Importantly, Wilson’s uncanniness is not merely a character trait or quirk. Rather, it is exemplary of the narrative generally.

In his 1919 essay, “The Uncanny”, Sigmund Freud defines it as a “feeling” that “... belongs to the realm of the frightening, of what evokes fear and dread” (123). Aiming to provide a theory that would explain why certain works of art evoke “fear and dread”, as opposed to being just generally “frightening”, Freud proposes two lines of inquiry that lead back to the same definition. Both his multilingual etymological inquiry into the “uncanny” and his cataloguing of narrative devices that evoke it conclude that the uncanny “is that species of the frightening that goes back to what was once well known and had long been familiar” (124). The uncanny, however, is distinguishable from being merely frightening because it suggests the “unknown and unfamiliar” (125) which has long been thought “surmounted” (154). In its multiplicity of evocative forms, the uncanny strains the limits of what is known:

The most extraordinary coincidence of wish and fulfillment, the most baffling repetition of similar experiences, in the same place or on the same

³² Representing the elite of Southern aristocracy, the First Families of Virginia – the F.F.V. – are the self-titled upper class families of Dawson’s Landing who can trace their roots back to the initial colony of Virginia: “In Missouri a recognized superiority attached to any person who hailed from Old Virginia; and this superiority was exalted to supremacy when a person of such nativity could also prove descent from the First Families of that great commonwealth. The Howards and Driscolls were of this aristocracy. In their eyes it was a nobility. It had its unwritten laws, and they were as clearly defined and as strict as any that could be found among the printed statutes of the land” (58).

date, the most deceptive sights and the most suspicious noises... It is thus solely a matter of testing reality, a question of material reality. (154)³³

What is clear is that experiences of the uncanny arise from a question or “testing” of the known or “reality”.

Of particular assistance to any exploration of the uncanny in *Pudd'nhead Wilson*, with its narrative of switched master and slave, is Freud's example of doubles as a primary technique in the narrative realization of the uncanny. In his reading of E.T.A. Hoffman, whom he deems “... the unrivalled master of the uncanny in literature,” Freud writes that the use of two characters that are largely indistinguishable may evoke the uncanny:

[One of]... the most prominent of those motifs that produce an uncanny effect... involve the idea of the ‘double’ (the *Doppelgänger*), in all its nuances and manifestations – that is to say, *the appearance of persons who have to be regarded as identical because they look alike*. (141 emphasis added)

While the narrative deployment of effectively identical characters may be unsettling to the reader, it becomes uncanny when the distinctions between those characters begin to be effaced such that one character bleeds into the other:

This relationship is intensified by the spontaneous transmission of mental processes from one of these persons to the other – what we would call telepathy – so that the one becomes co-owner of the other's knowledge,

³³ Freud's point here is that for those who believe they have adequately “surmounted” the “animistic convictions” of the past – religious and superstitious beliefs – the feeling of the uncanny is always explained through a scientific explanation of reality. I take this to mean, however, that the experience of the uncanny persists even in the modern era of scientific rationality.

emotions and experience. Moreover, a person may identify himself with another and so become unsure of his true self; or he may substitute the other's self for his own. The self may thus be duplicated, divided and interchanged. (Freud 142)

For Freud, it is not simply the interchangeability of characters that is uncanny but also the disintegration of the boundaries and borders between those characters that renders doubles. Further, as Freud argues, like the switched heirs of mastery and slavery in *Pudd'nhead Wilson*, "Finally there is the constant recurrence of the same thing, the repetition of the same facial features, the same characters, the same destinies, the same misdeeds, even the same names..." (142). It is *Pudd'nhead Wilson's* blurring of the autonomous and clearly distinguishable identities of master and slave, of black and white, that makes it uncanny, as it strains the "material reality" of racial difference in Dawson's Landing and beyond. And in demonstrating the ease with which those positions are subverted, Twain interrogates the very knowability of who is, and who ought to be, master and slave.

Mid-way through the narrative, when Roxana informs Tom that he is, in fact, her black son, Tom's immediate refusal to believe her gives way to a confusion and uncertainty about himself. The shock of learning that the only racial identity he had known, that of whiteness, is not correct leads Tom to question his identity generally: "For as much as a week after this, Tom imagined that his character had undergone a pretty radical change. But that was because he did not know himself" (45). Resulting in his uncertainty as to how to behave among his white friends and associates, this revelation leads Tom to grapple with his 'new' racial identity. For example, blaming his newfound

inability to assert himself at meals with his ‘family’ as a result of “the ‘nigger’ in him...”

Tom’s behaviour is altered by the secret he now harbours:

His ostensible “aunt’s” solicitudes and endearments were become a terror to him, and he avoided them.

And all the time, hatred of his ostensible “uncle” was steadily growing in his heart; for he said to himself, “He is white, and I am his chattel, his property, his goods, and he can sell me, just as could his dog.”

(45)³⁴

Like the dog Wilson wished he half-owned at the beginning of the narrative, Tom finds himself the object of property. But uncertain how to respond to those who love him but unknowingly own him, Tom comes to resent them for their rights in him.

While Tom finds himself changed as a result of his ‘new’ or actual racial identity, such change is not absolute. Upon learning of his blackness:

In several ways his opinions were totally changed, and would never go back to what they were before, but the main structure of his character was not changed, and could not be changed... Under the influence of a great mental and moral upheaval his character and habits had taken on the appearance of complete change, but after a while with the subsidence of the storm both began to settle toward their former places.

³⁴ Carton explains that Twain’s grammar implicitly recognizes the tension between race as essential and performative in the figure of Tom whose opinions of self change when he discovers he is black: “Tom doubtless understands ‘nigger’ to be a concrete referent to a biological fact. The reader, however, avails himself of the ironic alternative, an alternative that Twain stresses for us by placing ‘nigger’ between quotation marks. It is not, of course, Tom’s genetic make-up that his attitudes suddenly reveal, nor is it a biological identity that ‘nigger’ signifies. A mere fabrication of pernicious social convention, ‘nigger’ does not really refer at all: it constitutes only a sign... that wields the symbolic power with which it has been invested...” (89-90).

He dropped gradually back into his frivolous and easy-going ways and conditions of feeling, and manner of speech, and no familiar of his could have detected anything in him that differentiated him from the weak and careless Tom of other days. (45)

At first stunned by the revelation of his true racial identity, Tom alters his behaviour in response to his previously unknown blackness. Finding himself at first changed, Tom skulks around town, disconnected and alienated from the slaveholding community in which he once confidently moved.³⁵

To some extent, his meekness is entwined with race – as though he was acting (or perhaps properly behaving as) black, incapable of knowing which race he is as the experiences of each bleed into each other. As noted in respect of his interactions with his uncle, which foreshadows Tom’s eventual murder of him:

He [Tom] dreaded his meals, the “nigger” in him was ashamed to sit in at the white folks’ table, and feared discovery all the time, and once when Judge Driscoll said, “What’s the matter with you? – you look as meek as a nigger,” he felt as secret murderers are said to feel when the accuser says “Thou art the man!” Tom said he was not well, and left the table. (45)

³⁵ Interestingly, Tom finds his appearance sickening after Roxana’s racial revelation. As noted, “The ‘nigger’ in him went shrinking and skulking here and there and yonder, and fancying it saw suspicion and maybe detection in all faces, tones and gestures. So strange and uncharacteristic was Tom’s conduct that people noticed it and turned to look after him when he passed on; and when he glanced back – as he could not help doing, in spite of his best resistance – and caught that puzzled expression in a person’s face, it gave him a sick feeling, and he took himself out of view as quickly as he could. He presently came to have a hunted sense and a hunted look, and then he fled away to the hill-tops and the solitudes. He said to himself that the curse of Ham was upon him” (45).

But this new meekness and self-reflection does not persist. Rather, as Tom learns, he can conceal his legal racial identity and assume the behaviours enjoyed when he thought he was white. Tom thus vacillates between performing the knowledge of his secret blackness and performing his original whiteness, before finally assuming the latter position entirely. And his ability to move between distinct identities dictated as such by a conceptualization of racial categories presumed distinct within slavery highlights the novel's complicated approach to race.

George E. Marcus notes that the text's evocation of doubles and crossed identities is a narrative technique specifically attuned to the problems inherent in self-definition. Focussing on Tom's interiorized psychic split on realizing his true racial identity, Marcus notes that Tom psychically grapples with two irreconcilable identities, signalling a fundamental division in Tom's being between his public and private personae:

[Twain]... used the specific tactic of a doubled self to demystify the essentialism of racial identity in a society where the operation of racial classification was overlaid upon a more basic ideology of autonomous individuals (race is correspondingly hard and fast in a society in which the individual self is hard and fast...). (197)

For Marcus, racial difference in the text is a product of the arbitrary markers of individual identity, which includes racial identity, such that breaking down an individual's racial identity signals a breakdown of individuality itself. As he continues, in the novel "... race [is] a kind of allegorical vehicle for probing the injury generated by the American habits of social classifications, combined with the powerful cognitive hold of the unified self construct – that is, race as a story through which another more profound story of self

can be told...” (198). For Marcus, the symbolic order of racial difference is an entry point for Twain into the complicated conceptual mechanics of identity formation, enabling the opportunity to subvert the nineteenth-century prevailing ideology of individual autonomy upon which such community systems, such as ownership in Dawson’s Landing, are premised.

It is because of “... the incompleteness with which he [Twain] treats this topic [race],” that Marcus suggests racial difference is a secondary concern of the text (199). While Marcus is correct in suggesting the text fundamentally explores the limits of self-determination and individual autonomy, his relegation of race to a corollary thematic concern of the text somewhat overlooks how individual identity in Dawson’s Landing is inseparable from racial identity. That is, in subordinating race in his interpretation of the text, Marcus implicitly accords race a categorical stability the novel fundamentally aims to undo. While the text questions presumptions of individual autonomy, it more importantly suggests that such notions of autonomy and identity are produced through racial difference. That is, the very achievement of individual autonomy in Dawson’s Landing – an ideology necessarily predicated on a commitment to rigid racial distinctions – is deconstructed by the narrative in its laying bare the legal production of race *as* identity.³⁶

In that sense, *Pudd’nhead Wilson* itself is evocative of the uncanny. As Nicholas Royle explains it, the uncanny is fundamentally a psychic phenomenon. But to

³⁶ For a thorough analysis of the psychoanalytic foundations and implications of the concept of the uncanny, see Mladen Dolar’s, “‘I Shall Be with You on Your Wedding Night’: Lacan and the Uncanny”. In respect of ideology and the uncanny, Dolar writes that: “The uncanny is always at stake in ideology – ideology perhaps basically consists of a social attempt to integrate the uncanny, to make it bearable, to assign it a place, and the criticism of ideology is caught in the same framework if it tries to reduce it to another kind of content or to make the content conscious and explicit” (19).

adequately theorize its effects in a given instance requires contextualizing its cause or reason. Suggesting the uncanny is the response to knowledges largely viewed as unproblematic having been problematized, Royle writes that “The uncanny, then, is not merely an ‘aesthetic’ or ‘psychological’ matter (whatever that might mean): its critical elaboration is necessarily bound up with analyzing, questioning, and even transforming what is called ‘everyday life’” (23). According to Royle, the uncanny is more than the specificities of individual experience as it includes its evocation: it is the experience of the limits of knowledge as well as the recognition that the individual has been constituted by such limited knowledge. As Royle continues about the manner in which the uncanny is the revelation of the individual’s constitution by various discourses:

This applies not only to issues of sexuality, class, race, age, imperialism and colonialism – so many issues of potentially uncanny ‘otherness’ already evidenced in the nineteenth century... As Christopher Johnson has described it...: ‘we are animated and agitated by a power of program that sometimes seems to violate our most intuitive sense of self-determination’.

(23)

It is in his exposing the manner in which the individual is imbricated in, and produced by, cultural systems of knowledge that Wilson seems uncanny. Challenging the very notion of “self-determination” Wilson’s fatal remark undermines the presumptions of autonomy and individuality that are the foundations of property ownership. Moreover, that challenge to individuality hints at a model of legal identity created and installed by the law. Wilson’s joke foreshadows the text’s complicated and uncanny approach to racial difference: it highlights that the strict racial dualism underpinning one’s legal status

within slavery is created or constituted by the law itself and is a necessity to perpetuate the unequal society that exists.³⁷ Racial identity is not an essential fact of an individual's being to be recognized, but is ultimately a legal declaration, arbitrarily determined but necessarily imposed upon the individual.

Fingerprints and the arbitrariness of racial difference

While recourse to the racial legal and political dynamics of the 1890s usefully frames *Pudd'nhead Wilson's* allegorical aims, its setting captures a specific moment in the American legal history of racial production. Susan Gillman, for example, notes that early drafts of the novel set its beginning in 1850. Importantly, after a series of revisions, and "the addition of the race plot," the published version of the text re-organized the narrative, changing its opening to 1830 and therefore placing the trial "around 1850" (88). According to Gillman, this setting was no coincidence, but rather a calculated invocation of a particular moment in slavery's history: "... 1850 becomes a memorable year and the Mississippi River locale a special place. The census of 1850 counted mulattoes for the first time. In that year, in Kentucky and Missouri, there was one mulatto slave for every six black slaves..." (88).³⁸ 1850s Missouri, then, was a moment of increased 'white' slavery: the unprecedented levels of miscegenation and interracial

³⁷ As Martin Kreiswirth writes, "It [the uncanny] is not merely doubt about ontological basics, about, say whether some person or event exists or doesn't exist, or whether the identity of our own reflection is real or imaginary. It concerns, rather, the essential undecidability of the distinction between the two possibilities themselves" (127). As I discuss, the manner in which the distinction between the races is understood is wholly arbitrary, which ultimately suggests there is no distinction between them.

³⁸ Of course, even though blackness could be understood or communicated as 'fractions' of an individual's racial identity, racial difference still operated as a binary even in the absence of any visible markers of it.

reproduction meant the proliferation of legally enslaved (and enslaveable) bodies that increasingly appeared more white. As Gillman continues:

And in that year, Joel Williamson comments “the slave frontier was the trans-Mississippi South, and it was also pre-eminently the area of mulatto slavery”; he concludes that where slavery was strongest and getting stronger, it was also becoming whiter.” (88-89).

Crucially, then, while Twain may have been concerned with exploring the legal manipulations of racial difference following slavery, the narrative’s specific setting recalls a time when black skin was becoming the singular reason for enslavement while, at the same time, slavery was becoming phenotypically whiter. By situating the narrative within this tumultuous period of increased racial breakdown, Twain does not reify race in order to subvert it. Rather, *Pudd’nhead Wilson*, illustrates that racial difference, to the extent it exists, does not precede its legal determination but is rather produced by it.

Ariela Gross illustrates this problematic nature of legal racial knowledge by turning to the 1835 South Carolina Court of Appeals decision of *State v. Cantey*, 20 S.C.L. (2 Hill) 614, wherein the Court “found to be white several witnesses ‘whose maternal grandfather... although of a dark complexion, had been recognized as a white man, received into society, and exercised political privileges as such’” (*Litigating* 164).³⁹ The witnesses in question were “respectable... one of them is a militia officer, and their caste has never been questioned until now” (*Cantey* 614-15). The issue before the court, however, was whether the social status and position of these individuals outweighed

³⁹ Gross notes that South Carolina “had no hypodescent rule before the Civil War” suggesting that *Cantey* is “the clearest judicial statement of the overriding importance of white manhood as a performance of legal prerogatives...” (*Litigating* 164).

certain evidence of their negro ancestry, particularly given their ambiguous racial appearance. Finding that it did, Judge Harper writes that:

... it may be well and proper, that a man of worth, honesty, industry and respectability, should have the rank of a white man, while a vagabond of the same degree of blood should be confirmed to the inferior caste... *It is hardly necessary to say that a slave cannot be a white man.* (616 emphasis added)

For Gross, *Cantey* demonstrates that where the visible signifiers of race were ambiguous or obscured, the courts would turn to individual behaviour and community racial recognition to determine and implement that individual's racial identity. But, as Gross also notes, *Cantey* summarizes a peculiar logic whereby racial identity and its meaning to slavery were reversed: rather than define racial identity as preceding and signifying slavery or freedom, racial identity is retroactively evoked or recognized to explain enslavement. Thus, as Judge Harper shifts from racial appearance to performance in determining racial identity, the result is that an individual who has acquired the benefits of whiteness must be white. But such reasoning implies an essentialism in respect of blackness, i.e. only blacks can be enslaved.⁴⁰ Judge Harper's strange logic here certainly maintains the order of racial slavery, but it does so not simply by ensuring that identified

⁴⁰ As Gross explains it: "*A slave cannot be a white man.* Here was the clearest possible statement that racial identity was neither a scientific fact nor a mere matter of documentation but rather a socially and legally defines status that rested on a deeper ideological commitment to race, in which white equaled free (civic, responsible, manly) and black equaled slave (degraded, irresponsible, unfit for manly duties) (*What Blood* 55).

blackness can be enslaved, but rather by way of the more abstract proposition that identified whiteness cannot be enslaved.⁴¹

Willing, then, to accept community status or performance as evidence of an individual's racial identity, Judge Harper's commitment to racialized slavery takes the form of a tautology. Where an individual's racial identity is essentially unknown, behaviour in keeping with racial norms could provide sufficient proof of a racial identity then taken as *effectively* – or at least legally – essential.⁴² Thus, this dialectical reasoning of racial essence and performance advanced by Judge Harper enables the conceptual possibility that whiteness is a performed behaviour that essentially resists slavery.⁴³ Suggesting that white or black skin may not be determinative of one's legal racial identity, but rather may be retroactively read on/in the individual as based on his/her behaviour and social identity, Judge Harper's decision in *Cantey* exemplifies both the

⁴¹ To explain the manner in which whiteness was equated with citizenship, Gross turns to the Georgia case of *Bryan v. Walton*, 14 Ga. 185 (1853), wherein a testator's whiteness was in dispute in respect of his ability to dispose of his estate after his death. As Gross writes, "This definition of whiteness [of establishing whiteness by way of civic participation] may appear to modern observers as a kind of circular argument: in order to be a citizen, one must be white; in order to be (recognized as) white, one must act like a citizen. Yet contemporary participants in the Southern system did not view these arguments as circular: rather they saw them as self-evident... civic acts was one more form of reputation evidence: if a man was allowed to vote, at least some people must have recognized him as white" (54).

⁴² Daniel J. Sharfstein explains: "Robert Westley's elegant essay on racial passing interpreted the sentence to be the highest expression of the one-drop implications of maternal descent laws, which were codified across the South in the nineteenth century: "Judge Harper's coup de grace... set[] up purity of blood, of character, of liberty, and of personhood as natural barriers to the demise of race distinction through mixing... The Harper doctrine made whiteness natural, something that resided internally in purity of blood and character" (*Crossing* 620)

⁴³ As Gross glosses Judge Harper's reasoning in *Cantey*: "Certainly it was the cardinal rule on which black slavery was based, that a white man could not be a slave. But 'a slave cannot be a white man' suggested that not only did status depend on racial identity, but status was part of the essence of racial identity. Being degraded signified black 'blood,' and, conversely, behaving honestly industriously, and respectably, exercising political privileges... qualified one for whiteness *even if* one's 'degree of blood' alone might consign one to 'the inferior caste' (164).

difficulties inherent in identifying race and the lengths to which courts were willing to go to preserve the notion of racial difference and its meaning to slavery.

Set, then, not at an appeal court nor after the formal end of slavery, but rather at the level of courtroom trial in slaveholding Missouri, *Pudd'nhead Wilson's* closing restoration of Tom's blackness (and his corresponding return to slavery) illustrates the authoritative legal production of racial difference or identity. The trial, as fact-finding venture was the appropriate forum for determining disputes of racial identity.⁴⁴ And this was particularly the case in the slaveholding states of the 1850s where trials were invoked for such determinations. Gross estimates that throughout the nineteenth-century there were "sixty-eight cases of racial determination appealed to state supreme courts..." and that "More than half of these (thirty-six) took place in the last years of slavery – between 1845 and 1861 and the majority involved men" (*Litigating* 120). As a methodological point in her considerations of nineteenth-century racial epistemologies, Gross emphasizes the significance of the "trials themselves in order to suggest a more complex interplay between legal and cultural meanings of race," writing that:

Trials brought to the surface conflicting understandings of identity latent in the culture, people who had lived lives on the "middle ground" of ambiguous status for years had to fall on one side of the line. Trials required a confrontation between every day ways of understanding race and definitions that fit into "official," well-articulated racial ideology that

⁴⁴ Because trial courts, unlike appeal courts, are tasked with reviewing evidence – its admissibility, weight, and meaning – the race was both realized and maintained through trial level determinations of what constituted legal proof of race. Through delineating and demarcating the markers of race accepted as legally sound – whether biological, cultural, or some mixture thereof – the trial courts installed the very terms of racial difference on which they relied. The signifiers of race deemed legally authoritative were not a fact of their extra-legal reality but were, instead, produced at law.

supported the maintenance of slavery and postwar racial hierarchy.
 (*Litigating* 118)

Conceptualizing the trial as the site where the conflicting understandings and meanings of racial difference were argued and challenged, Gross notes the importance of the trial to the community's understanding of itself.⁴⁵ As a forum to mediate the disparate, conflicting discourses of race and its significance, the trial offered a definition of, and stability to, racial difference where there was seemingly none.

Amongst the multiple forms of racial determination, "The courtroom confusions about how to decide whether someone was black or white, whether this was seen as the *essence* of race or simply the best available *evidence* of race, reverberated throughout Southern culture because of the importance of the courtroom as a cultural arena" (Gross, *Litigating* 119). According to Gross, the racial determination cases of the 1850s demonstrate judicial reasoning as to the complicated 'reality' of racial difference: because race was always presumed to exist despite being frequently unobservable or ambiguous, courtroom definitions offered stability and reassurance in place of the uncertainty and conceptual dissonance underlying race's fundamental unknowability. Specifically, where the community was unsure whether race was a material, identifiable reality that precedes (and dictates) its social expression, or rather an expression of a fundamental (but potentially unobservable) biological difference amongst groups, the courts provided an answer by finally suggesting it could be *both*. What Gross's research establishes, and what Twain fictionalizes, is that because courts did not examine the

⁴⁵ As Gross writes, "Thus, trials of racial determination were important not only to the litigants themselves whose personal freedom, property holdings, and status as masters and slaves hung in the balance, but also to the neighbors who participated in the trials as witnesses and jurors, as well as those who learned its lessons through gossip, newspaper accounts, and literary narratives" (119).

presumption of racial difference, they were able to find it in either essence or performance, blood or behaviour, or both.⁴⁶

Southern trial courts thus varied in the ways in which they recognized racial difference (or its absence). Beholden to, and enabling of, an ideology of racial difference, trial courts provided multiple ways to identify blackness: rather than provide a definitive methodology for identifying the truth of racial difference, the courts provided a number of ways and forms through which the presumptions of racial difference could be proven. Precisely because there was no definitive, indisputable criteria through which race could be identified, the courts implicitly provided a series of techniques for identifying racial identity where its determination was obfuscated. Trials did not prove the indisputable *fact* of race, but instead provided a number of avenues for creating it: rather than reveal the true or extra-legal indicators of race, trial courts found more refined ways to manipulate the presumption of racial difference into existence. In allowing and encouraging multiple and contradictory legal proofs or definitions of race, courts did not collectively provide a consensus as to the appropriate form (and content) of racial determination, but implicitly produced numerous ways to reify race as an extra-legal reality.⁴⁷

⁴⁶ At the core of such findings of difference was a presumption of black inferiority: “The trials thus reveal the implications of a racial ideology that decreed that ‘negro blood’ made a person inferior in virtue, competency and behavior – that ‘blood’ made a person act in certain ways. The ‘laws’ of race could be subverted by people who followed all the rules of whiteness but ‘hid’ their intrinsic blackness. Law, which provided the forum for these challenges, made a discourse of race as performance especially salient” (Gross, *Litigating Whiteness* 113).

⁴⁷ As Sharfstein glosses it, the fundamental point is that there were multiple and often conflicting ways to assess at race at trials throughout the states: “when the important conclusion to draw is that race is a social construction, there is little need to inhabit the worlds and minds of individual lawyers, litigants, witnesses, and judges. Instead, it is enough to show that courts relied on contradictory statutory definitions of race, historically derived metaphors for race, or performative as opposed to scientific evidence” (*Secret* 1483).

This legal recognition of race, however, was not an explicit commitment by courts to formulate and impose race on its own terms. Rather, according to Gross, the 1850s trial determinations of racial identity reveal the lengths to which courts would go to find a ‘truth’ about race that could be integrated by and into the law. In particular, “Trials in the early nineteenth century, like *Phoebe v. Vaughan*, often revolved around documentary evidence, status, and ancestry” (Gross, *Litigating* 151).⁴⁸ Further, as exemplified in *Cantey*, the slippery notion of race as behaviour was judicially accepted, ultimately suggesting one’s true or authentic racial identity is merely behaviour, or that it at least could be transcended or concealed through performing community beliefs about racialized behaviour. However, despite a multiplicity of ways to legally determine race, Gross notes that by “... the 1850s... as the question of race became more central and more hotly contested, courts began to consider ‘scientific’ knowledge of a person’s ‘blood’ as well as the ways she revealed her blood through her acts” (Gross, *Litigating* 151). As such, “The mid-nineteenth century saw the development of a scientific discourse that located the essence of racial difference to physiological characteristics such as the size of the cranium and the shape of the foot, and attempted to link physiological, moral, and intellectual difference” (Gross, *Litigating* 151). This move to quantitative or measureable criteria to legally establish race thus sought to remedy the

⁴⁸ *Butcher v. Vaughan*, 8 Tenn. 4 (1827). The Plaintiff, Phoebe, brought a claim that she was of American Indian, and not negro, descent and was therefore not properly enslaved. Historical records, and not physical appearance, was determinative of whether she had been properly enslaved and, in the end, she was freed.

ambiguity and conflict inherent in community and common-sense definitions of race, which were often at odds with individuals' appearances.⁴⁹

Although "... the introduction of a 'scientific' discourse about race into the [1850s] courtroom, traces its roots to the well-documented rise of 'racial science' among phrenologists and medical doctors during their period," the 'science' invoked in *Pudd'nhead Wilson's* conclusion is, instead, the anachronistic use of fingerprinting (Gross, *Litigating* 153). Influenced by Francis Galton's *Finger Prints*, published in 1892, Twain was fascinated by Galton's thesis "... that fingerprints can establish the identity of the same person at any stage of his life, between babyhood and old age... as well as differentiate between twins" (Gillman 97).⁵⁰ As Sarah E. Chinn explains it:

Twain's debt to Galton is clear throughout *Pudd'nhead Wilson*. Galton devised the practice of oiling the hand by passing it through one's hair and then pressing the fingertips on glass – the method Wilson uses in the novel – although he did not think this was as efficient as using ink or smoke collected on paper. He called fingerprints "self-signatures"

⁴⁹ As Gross observes in elaborating on the cases of that period: "The 1850s saw the clamor around race rise to a fever pitch. The trials of racial determination not only garnered local attention because of the often salacious subject matter, but they also became the objects of a national political discourse because they fed into abolitionist claims about white slavery and 'tragic octoroons.' Suits for freedom were politicized in the newspapers and in retellings by abolitionists and fugitive slaves. Litigants became more invested in the search for the true essence of race, but despite the rhetoric suggesting that common sense could help distinguish between whites and blacks, that essence was elusive. Increasingly documentation of status gave way to two arguments for whiteness or blackness: science and performance. In the postbellum years, the stakes in these courtroom battles changed somewhat, but the shape of the conflict retained important continuities with disputes of the 1850s" (*Litigating* 153).

⁵⁰ Gillman notes that Twain "devoured" *Finger Prints* in 1892 as he was writing *Pudd'nhead Wilson* (97). In particular, she notes that he was taken with the manner in which fingerprints could distinguish between individuals, including twins, and could also be used to identify criminals and "...ferreting out the less willful kind of imposture that had fascinated Mark Twain: the possibility 'of a harmless person being arrested my mistake for another man'..." (97).

(Galton, 1892: 168), a phrase quite similar to Twain's "natal autographs,".... (44)

In addition to illustrating the methodical nature of fingerprinting as ostensibly reliable, *Pudd'nhead Wilson* narrates that the legal determination of racial difference is ultimately arbitrary, even when reached through 'scientific' evidence or knowledge.

One of Wilson's various hobbies undertaken upon his failure to practice law in Dawson's Landing, fingerprinting furnishes him with a private library of the town's various citizens. In true Galtonian fashion:

He [Wilson] carried in his coat pocket a shallow box with grooves in it, and in the grooves strips of glass five inches long and three inches wide. Along the lower edge of each stripe was pasted a slip of white paper. He asked people to pass their hands through their hair, (thus collecting upon them a thin coating of the natural oil,) and then make a thumb-mark on a glass strip, following it with the mark of the ball of each finger in succession. Under this row of faint grease-prints he would write a record of the strip of white paper – thus:

"JOHN SMITH, *right hand*".

and add the day of the month and the year, then take Smith's left hand on another glass strip, and add name and date on the words "left hand." The strips were not returned to the grooved box, and took their place among what Wilson called his "records". (7)

As a system of cataloguing individual identities, Wilson's process of fingerprinting is routine and systematic – a scientific process repeatedly deployed through the novel as Wilson expands and develops his 'records' of the town's inhabitants. Thus while it is Wilson's fingerprint records that provide the narrative with its dramatic courtroom conclusion of authentic identities amidst ongoing deception of the community, Twain introduces the form and method of fingerprinting at the beginning of the text and legitimates its practice as it occurs through the narrative. And whether or not fingerprinting possessed scientific merit in the 1890s, for Twain it certainly had significance as Wilson's anachronistic use of it throughout the text is internally consistent, thereby presenting the fingerprint slides as reliable evidence.

Early in the narrative, and in his first encounter with Roxy, Wilson asks to fingerprint the two children in her care (her own and her master's infant), asking "How do you tell them apart, Roxy, when they haven't any clothes on?" (8). Assuring him that she can tell them apart when even the plantation master cannot, the narrative continues that "Wilson chatted for a long while, and presently got Roxy's fingerprints for his collection – right hand and left – on a couple of his glass strips, then labeled and dated them, and took the 'records' of both children, and labeled and dated them also" (9). And importantly, this initial fingerprinting is followed by another round "two months later," the day before Roxana conceives of and executes her infant-switching scheme, because Wilson "... liked to have a 'series' – two or three 'takings' at intervals during the period of childhood, these to be followed by others at intervals of several years" (8). Collecting, then, not just fingerprints of individuals, but multiple copies of those prints over time,

Wilson's record-keeping protocol is designed to provide authoritative records of its subjects.

The narrative closes with Wilson finally getting his first court case. Representing the Italian count Luigi Capello against charges of murdering Judge Driscoll, Wilson finally makes public what the reader has always known: Judge Driscoll's murderer is his false nephew Tom. Importantly Wilson obtains Luigi's exoneration through the prosecutorial failure to match his (or his twin's) fingerprints to the murder weapon. And finding a match for the fingerprints on the undisputed murder weapon would lead the court to the actual murderer. After advancing to the court his "theory" (107) that the murder of Judge Driscoll was not planned, but rather the result of a robbery gone awry, "Wilson [takes up] several of his strips of glass" – "... familiar mementoes of Pudd'nhead's old-time childish 'puttering' and folly..." – and lays them out in preparation to divulge their specific evidentiary value to the court (108). Begging "the indulgence of the court" to allow him some "remarks in explanation of the evidence," Wilson launches into his explanation of both the science of fingerprinting and its relevance to the trial (108). In a lengthy explanation to the court he explains that:

"Every human being carried with him from his cradle to his grave certain physical marks which do not change their character, and by which he can always be identified – and that without shade of doubt or question. These marks are his signature, his physiological autograph, so to speak, and this autograph cannot be counterfeited, nor can he disguise it or hide it away, nor can it become illegible by the wear and the mutations of time." (108)

Carried by the individual from his birth to his death, fingerprints provide a method for identifying each individual as unique and discernible.

As a “physical mark” imprinted upon the individual, fingerprints are a “signature” that the individual cannot eliminate or “disguise.” And, in noting that fingerprints cannot be disguised, Wilson reiterates their narrative and evidentiary value. Because so much of *Pudd’nhead Wilson’s* plot turns on Tom’s various disguises and costumes meant to conceal his identity, as well as a literal switch of people, the adequate and complete identification method of fingerprints offered by Wilson cuts through and corrects all the ruses and misdirections: fingerprints provide indisputable identification of the individual. Thus, as Wilson continues:

“This signature is not his face – age can change that beyond recognition; it is not his hair, for that can fall out; it is not his height, for duplicates of that exist, it is not his form, for duplicates of that exist, also, whereas this signature is each man’s very own – there is no duplicate of it among the swarming populations of the globe!” (108)

Where the other physical traits of an individual can be concealed or altered – either intentionally or inevitably over time – the “natal autograph” is unique. It is without “duplicate” and an invariable physical mark upon the individual that can stand in for the individual. Fingerprints are thus uniquely interchangeable with the individual.

Further, as Wilson explains the meaning of fingerprints to his courtroom audience, who suddenly become “interested once more,” he also confirms the consistency of his fingerprinting technique (108). Reminding them he has been steadily keeping fingerprint records for many years, he notes for them that: “For more than twenty years I

have amused my compulsory leisure with collecting these curious physical signatures in this town. At my house I have hundreds upon hundreds of them. Each and every one is labelled with name and date; not labeled the next day or even the next hour, but in the very minute that the impression was taken..." (109). Assuring them that his methodology has always been consistent, and that he has eliminated the possibility of cataloguing errors, Wilson also reminds them that he likely has records of those in attendance in the courtroom: "There is hardly a person in this room, white or black, whose natal signature I cannot produce, and not one of them can so disguise himself that cannot pick him out from a multitude of his fellow creatures and unerringly identify him by his hands" (109). Subtly remarking that he has been racially indiscriminate in his accumulation of his fingerprint records, Wilson states that all present could be identified by those records: no disguise could adequately overcome the truths they record. As both Wilson and the reader know, in the court sits Tom, the actual murderer and mixed-blood individual who has also been passing as white. And Wilson, gleefully agreeing to the prosecution's insistence that "the blood-stained finger-prints up the knife handle were left there by the assassin of Judge Driscoll," reveals the assassin was not the twins but Tom (111). After the twins' prints are shown to not match those on the murder weapon, Wilson provides the prints that do. But in demonstrating the prints of the murderer, Wilson is required to invoke Tom's racially correct baby prints taken before he was switched with his master and heir.

Returning "to the infant autographs of *A* and *B*," Wilson has the jury confirm that "these large pantograph facsimiles of *A*'s [and *B*'s], marked five months and seven months" match (111). Introducing the records marked eight months, however, reveals a

stunning inconsistency – the fingerprint records of *A* and *B* at eight months do not match their earlier records. And it is at this point that Wilson reveals to the community Roxana’s earlier baby switch: after establishing the legitimacy of the fingerprint records – the consistency of his methodology as well as fingerprints as an authoritative science for determining identity – Wilson relies on them to first recognize individual identities, and then to ascertain that those individuals’ identities had been switched at some point.⁵¹ Thus, when the juror foreman notes different fingerprints have been labelled the same, Wilson responds “Do you know how to account for these strange discrepancies? I will tell you. *For a purpose unknown to us, but probably a selfish one, somebody changed those children in the cradle*” (112 emphasis added). The “purpose” of the switch has always been known by the reader: Roxana’s inauguration of the very events of the narrative was designed to save her own child from slavery, even if it meant damning another. But this contextual information is never related as Wilson exposes merely the *fact* of the switch.

As Wilson explains to the courtroom:

“*A* was put into *B*’s cradle in the nursery; *B* was transferred to the kitchen and became a negro and a slave” – [Sensation – confusion of angry ejaculations] – “but within a quarter of an hour he will stand before you white and free!” [Burst of applause, checked by the officers.] “From

⁵¹ The authoritative nature of fingerprints, which ultimately do not signify anything of substance, echoes Twain’s “Whisper to the Reader” which opens the text. In particular, therein Twain confirms that he consulted with a lawyer to ensure the legal passages in the text are correct: “He was a little rusty on his law, but he rubbed up for this book, and those two or three legal chapters are right and straight, now” (1-2). However, as expected, Twain undermines any certainty that *Pudd’nhead Wilson* offers by noting “He [the lawyer] told me so himself” (2). Put another way, the correctness of the legal passages is confirmed merely by way of claiming it is correct – there is no absolute confirmation of this fact.

seven months onward until now, *A* has still been a usurper, and in my finger-records he bears *B*'s name. Here is his pantography, at the age of twelve. Compare it with the assassin's signature upon the knife handle. Do they tally?" (112)

And, as the jury foreman notes that *A*'s print match "*To the minutest detail!*" the prints on the murder weapon, the whole truth is revealed. Conflated with, and subsumed by, Judge Driscoll's murder, Roxana's racial deception is finally rectified. Singling out Tom before the entire courtroom, Wilson triumphantly announces that: "The murderer of your friend and mine – York Driscoll, of the generous hand and the kindly spirit – sits among you. Valet de Chambre, negro and slave – falsely called Thomas a Becket Driscoll – make upon the window the finger-prints that will hang you!" (112). At last providing his courtroom declaration of Judge Driscoll's murderer, Wilson also illuminates and resolves a fraud perpetrated against the community of which it was entirely unaware.

Importantly, however, the fingerprints that establish Tom's blackness do not reveal any essential truth about race or its identification. Rather, Wilson's fingerprints operate only to confirm the free/slave statuses of Tom and Valet as infants when they occupied their correct legal statuses. After all, Tom's blackness is and has always been imperceptible. His interchangeability with his white master is precisely what facilitated the ease with which Roxana switched them in the first place, and which remained undetected all along. As a result, the infant fingerprints which mark Tom's blackness do not mark any extra-legal truth about race or its identification. Thus as Tom's race lacks any phenotypic or behavioural expression, it is arbitrarily imposed on him, as it was on his mother, as "a fiction of law and custom" (9). As Gillman explains it, although

Wilson's declaration resolves the legal dilemma driving the narrative, it offers no *meaningful* information about race: "Neither the triumphant tone nor the burst of applause from the audience nor the aura of logical deduction and absolute clarity disguises the fact that Wilson's conclusion, though strictly 'the truth,' is also illogical and arbitrary, almost more confusing than clarifying" (99). Rather, the fingerprint records simply refer to the infants' social positions – 'A' and 'B' – and racial difference, which is not detectable but is nonetheless read into them as an explanation for their initial positions of master and slave:

Yet in spite of the methodologically essential social context, the fingerprints tell us nothing socially, as opposed to physiologically, significant about either A or B as individuals, much less about the lives of "Chambers" or "Tom." *What they prove, in fact, is that one can be interchangeably 'white and free' and 'a negro and a slave'* (Gillman 99 emphasis added).

It is thus that in the courtroom re-racing of Tom, the tensions of the various dualisms underpinning the text *appear* to be resolved but, in the last analysis, no substantial information about race or its significance is provided.

Nonetheless, even in its purely formal operation, the fingerprint revelation stabilizes the (racial) ambiguity and uncertainty generated by the events that preceded it. Certainly, Wilson's uncanniness is finally resolved and he is finally entirely accepted into Dawson's Landing. Earlier in the text, when his practice of fingerprinting is first observed, it is presented as mysterious or suspicious. As noted above, the form and technique of this science is explained. But its meaning – and in particular its meaning to

Wilson – is unknown to those in the town: “He often studied his records, examining and poring over them with absorbing interest until far into the night, but what he found there – *if he found anything* – he revealed to no one” (7 emphasis added). Although withholding Wilson’s reason for fingerprinting, that early description does explain his method, suggesting that Wilson knows what he is doing even if those around him do not: “Sometimes he copied on paper the involved and delicate pattern left by the ball of a finger, and then vastly enlarged it with a pantograph so that he could examine its web of curving lines with ease and convenience” (7). As the fingerprints correct the racial deception perpetrated against the community, the significance to the town of Wilson’s fingerprinting hobby, as well as Wilson himself, are revealed. Thus, while Tom of course finds himself doomed at the twins’ trial, Wilson manages to find personal success.⁵² While his joke on dog ownership alienated him from the town as a result of its laying bare the interdependency of individuals in a community, particularly in respect of property ownership, Wilson’s courtroom conflation of individual identity and race, which conceals such interdependency by presenting individual racial identity as an essential feature of their identity, returns him to the town triumphant.⁵³ In re-iterating this

⁵² Interestingly, Valet’s fate is only briefly alluded to. On learning that he is in fact the true heir, he is rescued from slavery and assumes the proper role of heir. Sadly, the wealth and goods to which he ends up with access only emphasize his inabilities attributable to having been raised in slavery, including illiteracy and “... the basest dialect of the negro quarter” (114). Suggesting that race is purely behaviour or training (or at least devoid of any biological determination) it is noted that even after Valet has been declared white, he cannot take advantage of it and is, in fact, frightened by its consequences: “His gait, his attitudes, his gestures, his bearing, his laugh – all were vulgar and uncouth; his manners were the manners of a slave... The poor fellow could not endure the terrors of the white man’s parlor, and felt at home and at peace nowhere but in the kitchen” (114). See Lee Clark Mitchell’s, “‘De Nigger in You’: Race or Training in *Pudd’nhead Wilson?*” for a discussion of the extent to which race is treated in the text as one of individual training or learning.

⁵³ “The town sat up all night to discuss the amazing events of the day and swap guesses as to when Tom’s trial would begin. Troop after troop of citizens came to serenade Wilson, and require a speech, and shout themselves hoarse over every sentence that fell from his lips – for all his sentences were

unquestioned racial ideology of the town, Wilson finds community acceptance embracing the ideology and reflecting it back to them as authoritative.

More importantly, Wilson's courtroom declaration of Tom's blackness, in addition to confirming for the town the essential nature of race, also confirms its significance. In particular, it converts Tom into property, to be properly re-situated within slavery.⁵⁴ As a result, the public disclosure of Tom's identity as murderer by way of fingerprints creates two legal identities for him – murderer and enslaved – each to be ruled on by the court.⁵⁵ Thus conflicted between punishing a murderer and appeasing the creditors of the Driscoll estate (of which Tom as his uncle's property necessarily forms part), “the tautological subtleties of the color line” are most evident in the court's reasoning (Sundquist, *To Wake* 258). The two legal positions Tom eventually occupies are thus mutually exclusive: to be punished as a murderer is to extract him from the system of chattel slavery, but to deem him as singularly an object of property is to forego punishing him. In the last analysis, it is deemed by all involved, including the court, only sensible to return him to slavery: “Everybody granted that if ‘Tom’ were white and free it would be unquestionably right to punish him – it would be no loss to anybody; but to shut up a valuable slave for life – that was quite another matter” (115). Deeming it unjust to

golden, now, all were marvellous. His long fight against hard luck and prejudice was ended, he was a made man for good” (Twain 113-14).

⁵⁴ As Chinn explains, Wilson's courtroom identification effectively silences Tom, turning him into an object such that, given the conclusive nature of his fingerprints, he does not even really need to be present: “The reader's identification with Tom is brief and glancing, but not insignificant. Audience is crucial to the climactic scene of the novel, in which Tom is exposed as both ‘really’ black and as Judge Driscoll's murderer. More importantly, during that scene, Tom is transformed from audience member to spectacle, from white subject to black object (and object of exchange in the system of chattel slavery)” (38).

⁵⁵ As noted in the text, although “The false heir [Tom] made a full confession and was sentenced to imprisonment for life... a complication came up” (114).

further extend Tom's terror on the propertied of Dawson's Landing, the creditors argue they had been deprived of the full value of their property for the last eight years by virtue of Tom's racial deception: Tom ought to have been properly catalogued as his uncle's property – an asset that would form part of his estate.⁵⁶ They further argue that if Tom had been treated as (their) property in the first place he would not have been free to murder Judge Driscoll, and “Everybody saw the reason in this” (155). Thus, almost as soon as Tom's guilt had been established he was “pardoned” by the Governor for his crime, and the creditors sell him down the river (115). Once Tom's secret blackness is finally ‘recognized’ by the court, his re-installation into slavery is easily achieved.⁵⁷

⁵⁶ As Thomas D. Morris notes in respect of the criminal offences of slaves: “Masters, under various pressures, turned away from the use of the law to reinforce their authority over their slaves by prosecuting them for crimes unless they were capital offenses such as murder, rape, or arson. But masters were involved in other ways. They could be held legally liable for the criminal conduct of their slaves, such as in requirements that they pay the legal costs for the successful prosecution of their slaves or make some restitution for the injuries caused by them” (251). Interestingly, as Morris goes on to note, by the end of the eighteenth century, “States imposed a responsibility on owners to provide legal counsel for an accused slave...” (251-52). That noted, Missouri seemed to exempt masters from paying the costs for the legal defence of their slaves, even if slaves were required to have legal counsel to defend this. This was because the court in Missouri formulated this as a responsibility of justice and not a contractual responsibility between the master and his slave's counsel, as in *Manning v. Cordell* 6 Mo. 474 (1840) and so this “exonerate[d] Missouri masters from this form of duty or legal liability” (Morris 253). Further, as Morris notes, owners could be liable for “some form of restitution for the criminal offenses of their slaves... In 1835 the Missouri legislature approved an adaptation of continental civil law. It provided that ‘every person who shall be injured by the commission of any offense against his person... committed by a slave, shall have an action against the master or owner of such slave for the time, to recover any damages by him sustained by the commission of such offense, not exceeding in amount the value of the slave’” (259-60). As discussed in the first chapter of this thesis, there was a curious tension in the legal response to the criminal offences of slaves, reflecting their unique status as human property. In his examples from Missouri in respect of owner liability for slave criminality, Morris notes that in *Jennings v. Kavanagh*, 5 Mo. 27-28 (1837), the Missouri Supreme Court found the relevant statute did not allow recovery against a master whose slave had killed another slave as that was a property crime; and in *Ewing v. Thompson*, 13 Mo. 137-39 (1850), the court refused to permit recovery because slaves possess an agency that the master cannot be expected to entirely control and, absent any indication the slave's criminal conduct was as a result of lax discipline, the master cannot be liable (260).

⁵⁷ Crucially, then, Tom's blackness operates as a marker through which the multiple conflicting interests in his person can converge and be resolved. As Sundquist writes: “Brought to light, so to speak, Tom's blackness is ruthlessly efficient: it deprives him of property and at the same time turns him into property. In the plot's terms he is part of the creditor's inventory, but in terms of the novel's

In its purportedly scientific analysis, the fingerprints may properly function to adduce individual identity, but their arbitrary conversion to *racial* marks is in service of slavery. And, in the court's unquestioning acceptance of their evidence as racial difference, that arbitrariness is concealed. After all, as Tom and Valet were initially indistinguishable, their fingerprints merely recorded their *social* positions of master and slave. Therefore the final courtroom re-identification confirms only those initial social positions. As it does so, it reads back into those positions a racial essentialism in slavery that has in fact been entirely unobservable. The logic of racialized slavery is thus reversed: Tom's fingerprints alone identify on him the "indelible marks" of race, but only *after* his identity as slave has been established. The Court's reasoning is thus to some extent the obverse of the Court's in *Cantey* – in Dawson's Landing, a slave can *only* be a black man. Accordingly, the "fiction" that defined Tom as black in the first place is subsequently legitimated in Wilson's 'science' of fingerprints, rendering the community's ideology authoritative and truthful.⁵⁸

Conclusion

To be clear, science was not the singular explanation of racial difference during slavery. In reviewing the manner in which historians have incorrectly emphasized the

contemporary frame of reference, the sudden exposure of Tom's hidden blood puts him... in bondage to the entire white race" (258).

⁵⁸ As Carton explains: "No set of fingerprints, not even those of identical twins, duplicate each other. Fingerprints conceal human interdependency. They collapse the distinction between biology and convention, for they represent biology in the service of convention. Tom's scornful depiction of them as 'palace window decorations' does not entirely mistake their political function" (92).

courts' scientific approach to race in the nineteenth century, Gross writes that a more nuanced review of the nineteenth century racial identity cases is required:

By drawing the contrast between nineteenth-century biological essentialism and early twentieth-century anthropological theories, which saw racial differences as the product of social and cultural construction, these historical accounts make “science” appear to have been the monolithic language of race in the nineteenth century. (*Litigating* 153).

Certainly, as noted above, behaviours such as civic participation impacted legal determinations of race. However, as Gross continues, “Only nine cases appear to have relied on expert scientific testimony about racial differences” though eight of those nine were after 1848 (*Litigating* 153).⁵⁹ While expert testimony is not the only way in which a scientific understanding of race would have been before the courts, Gross confirms the legal emphasis on scientific or essentialist approaches to race in the mid-nineteenth century – that is, during the final years of slavery – an emphasis that would not have been previously required when the identification of visible whiteness with freedom was less challenged. Further, following slavery, when blacks were beginning to make significant steps towards legal equality, the ‘fact’ and inescapability of race became increasingly important to ensure that racial equality would remain out of their reach.

In noting that the political advancements made by blacks during Reconstruction had largely been undone by the 1890s (and would continue to be undone into the new century), Michael J. Klarman explains that, “By around 1890, race relations in the South

⁵⁹ That is nine of what Gross has identified as the total of “...sixty-eight trials of racial determination appealed to state supreme courts in the nineteenth-century South” (*Litigating* 109).

had begun what was to be a long downward spiral” (10).⁶⁰ Noting this spiral ultimately meant that “The number of blacks [being] lynched each year rose dramatically,” Klarman summarizes the political losses blacks endured in this period:

The same... politicians... who had earlier campaigned for black votes now demanded disenfranchisement. States adopted poll taxes and literacy tests to suppress any black voting not already nullified by fraud and violence. Segregation in railway travel increased, soon it was mandated by statute. Blacks seldom sat on juries any longer. Black officeholding waned, then disappeared. Racial disparities in educational funding increased in the 1890s; early on the twentieth century, they became enormous... Virtually all this integration disappeared in the 1890s. (10-11)

Fundamental to withdrawing or eliminating black rights – including by way of extensive violence and intimidation – was a belief in the factual distinctness and difference of blacks from whites that had unavoidable political consequences.⁶¹

The basis for this black subordination continued the scientific inquiries into race begun during slavery. Khalil Gibran Muhammad has noted that even in efforts to

⁶⁰ In summarizing the political advancements made by blacks following Emancipation, Klarman explains: “Extraordinary changes in racial attitudes and practices occurred in the Reconstruction decade following the Civil War. Slavery was abolished. The 1866 Civil Rights Act and the Fourteenth Amendment guaranteed blacks basic civil rights, such as freedom of contract and property ownership. The Reconstruction Act of 1867 and the Fifteenth Amendment enfranchised blacks for the first time in most of the nation. Additional federal legislation in the 1870s solidified suffrage protection, forbade race discrimination in jury selection, and guaranteed equal access to common carriers and public accommodations. Southern blacks voted in extraordinary numbers, electing hundreds of black officeholders. Black jury service was common; streetcars generally were desegregated; and blacks finally gained access to public education. In the North as well, blacks in most states voted for the first time; restrictions on their legal testimony were removed; and blacks were admitted to public schools, which in some states were integrated” (10).

⁶¹ For a review of the various ways in which race was legally conceptualized between Emancipation and the beginning of Jim Crow-era changes, see Michael A. Elliott’s, “Telling the Difference: Nineteenth-Century Legal Narratives of Racial Taxonomy”.

understand the implications of black freedom and ostensibly equal political participation, scientific theories of race and racial difference dominated. Beginning in the 1860s and:

Using new data from the 1870, 1880, and 1890 U.S. census reports, the earliest demographic studies to measure the full scale of black life as freedom, these post-emancipation writers helped to create the racial knowledge necessary to shape the future of race relations. Racial knowledge that had been dominated by anecdotal, hereditarian, and pseudo-biological theories of race would gradually be transformed by new social scientific theories of race and society and new tools of analysis, namely racial statistics and social surveys. (20)

In consolidating the various formal and informal ways of assessing race, these new “social scientific theories of race” sought to provide an explanation of blackness that would predict, to ultimately limit, black civic participation. It is this 1890s climate of extensive black subordination, as well as its seemingly scientific basis, that Twain considers in *Pudd'nhead Wilson*. And to do so, he turns to the latter years of slavery in which scientific explanations about race began to take hold.

In particular, *Pudd'nhead Wilson* refuses the “indelible mark” of blackness – generated within slavery and with its meaning persisting after. As black freedom required whites to consider what blackness meant to the broader society, as well as how it could be definitively identified in the absence of slavery, *Pudd'nhead Wilson* questions the very knowability (and by consequence significance of) race itself. In its tale of indistinguishable master and slave, and corresponding declarations of their racial difference taken to be scientifically true, the novel demonstrates the very fact of race to

be nothing more than ideology – a conceptual commitment that conceals and explains the arbitrariness of the racial divisions that underpin it. And what *Pudd'nhead Wilson* dramatizes is the tautological nature of the 'science' that confirmed those divisions. Fingerprints in Dawson's Landing, like phrenology, notions of 'blood', or even skin colour, do not in themselves reflect an inherent or culturally significant difference. Rather, they merely reflect the search for one. In exploring slavery's racial logic during the anti-black animus of the 1890s, Twain illustrates the historical emphasis on race to have been an unavoidable result of the racial dualism generated within slavery: whatever the method for determining it, an individual's race had to be posited. In the end, *Pudd'nhead Wilson* shows that no matter how strongly believed or asserted, the existence and persistence of race, within slavery and without, is little more than "a fiction of law and custom".

CONCLUSION

“What is a White Man?": Potential Directions

In his essay, “What is a White Man?”, published in 1889 by the periodical *The Independent*, Charles W. Chesnutt considers its titular question. In an effort to comprehend racial whiteness and the persistent subordination of blacks following Emancipation, Chesnutt briefly reviews the legislation defining “a mulatto or person of colour,” both within slavery and after, so as to understand precisely who would be legally considered black (5). Noting that states identified blackness in an individual down to statutorily set fractions of ‘negro’ ancestry, Chesnutt concludes that although such legislation typically dictated that inheriting even minor fractions of such ancestry defined an individual as black, individuals who self-identified and lived as white could nonetheless possess a (very minor) fraction of such ancestry that would not disrupt or subvert their whiteness. Further, to the extent an individual’s whiteness was challenged, and in the absence of conclusive ancestral evidence, establishing that he or she had exercised certain rights or privileges afforded only to whites would provide definitive proof of whiteness.

In noting that whiteness could survive *some* blackness and that it also possessed a performative element, Chesnutt notes a disjunct between legal racial definitions and the individual experience of race. Focussing on children of interracial relationships, typically considered black and illegitimate as a result of the illegality of interracial unions, Chesnutt questions why they should not qualify or be identified as white, particularly in

cases where they appeared white and their conduct suggested the same. That is, the legal designation of such individuals as black was often unfairly or wrongly at odds with how they lived and potentially even their ancestral history. Such racial designation, however, was not arbitrary. Rather, it was the unavoidable result of the post-Emancipation push towards racial purity, which culminated in the ‘one-drop’ rule. For Chesnutt, the promise of black equality as well as the increasing population of mixed-race individuals, would require a reconsideration of the meaning of race and its divisions to ensure a meaningful, national political future.¹ Although a full consideration of the reasoning and implications of Chesnutt’s essay is beyond the scope of this chapter, the essay usefully frames a number of issues raised or suggested in this thesis that were unexplored but would further illuminate the manner in which race was produced within slavery.

The most obvious of these issues is an examination of how the law (legislation, judicial decisions, and individual legal actors) produced whiteness as a racial identity. This thesis, of course, focussed on the legal production of blackness and racial difference during its formative period in slavery. But to be sure, whiteness too was produced. However because of its hegemony it was in the background of those legal productions of blackness. As a result, the manner in which whiteness was conceptualized and produced, especially in its relation to blackness, often went unexamined or unarticulated. In the Supreme Court 1857 decision of *Dred Scott v. Sandford*, for example, (the potential for)

¹ “More than half of the colored people of the United States are of mixed blood; they marry and are given in marriage, and they beget children of complexions similar to their own. Whether or not, therefore, laws which stamp these children as illegitimate, and which by indirection establish a lower standard of morality for a large part of the population than the remaining part is judged by, are wise laws; and whether or not the purity of the white race could not be as well preserved by the exercise of virtue, and the operation of those natural laws which are so often quoted by Southern writers as the justification of all sorts of Southern ‘policies’-are questions which the good citizen may at least turn over in his mind occasionally, pending the settlement of other complications which have grown out of the presence of the Negro on this continent” (6).

black citizenship was distinguished from that of whites on the basis that blacks possessed a permanent mark, acquired in part from the historical circumstances of slavery, making it inconceivable they would be entitled to the same legal treatment as whites. The majority legitimated this difference by invoking the Constitution's framing: reasoning the founders would not have ever understood blacks to be citizens, the majority defined citizenship going forward to be only what the founders presumably intended. The consequence of such an originalist reading of the Constitution was an implicitly racialized, limited understanding of citizenship beholden to slavery: in *Dred Scott* citizenship was unquestioningly white.²

As W.E.B. DuBois would write in the 1920s that "The discovery of personal whiteness among the world's peoples is a very modern thing," the Court's reasoning in *Dred Scott* ought not to be surprising (224).³ While the Court understood that the practice of slaveholding that defined America's past, conditioned its future, it paid no critical attention to how that past racially conditioned the past understandings of citizenships on which it relied, nor how such understandings were incommensurable with the abolition of slavery and constitutionally guaranteed (racial) equality. Moreover, the court's emphasis on blackness as different – a difference it acknowledged was generated within slavery – normalized and concealed the whiteness implicit and inextricable from

² Joe R. Feagin notes that: "The principal foundation of this country's legal system is the U.S. Constitution. In 1787, at Philadelphia, fifty-five white men met and created a constitution for what most have viewed as the 'first democratic nation.' These founders of European background and mostly well-off. Some 40 percent were or had been slaveowners and many others profited as merchants, shippers, lawyers, or bankers from economic connections to the slavery system" (29).

³ Feagin explains: "For centuries the white racial framing of ingroup superiority and outgoing inferiority has been, to use Antonio Gramsci's term, *hegemonic* in this society – that is, it has been part of a distinctive way of life that dominates all aspects of society" (11).

the citizenship it withheld from blacks. It also incorrectly formulated American slavery as having always been the expression of *racial* inequality.

David R. Roediger explains that it took some time before the practice of American slavery became the expression of purely racial difference: “Even in colonies deeply associated with plantation agriculture, it took time for white supremacy to emerge as a centerpiece of the legal and labor systems” (2). Scholars such as Roediger, Edmund S. Morgan, and Theodore W. Allen, have traced the creation of white racial supremacy within slavery to an effect of class consolidation, particularly among whites. The purpose of such class consolidation was to legitimate economic disparity: by the eighteenth century, those whites wealthy enough to hold slaves began to conceptualize and promulgate the notion of whites as a unified race collectively distinguishable from blacks, as opposed to scattered or disparate (white) individuals, many of whom lived and toiled alongside and in the same (poor) conditions as blacks.⁴ As Allen explains:

Edmund S. Morgan... concludes that the subordination of class by “race” at the beginning of the eighteenth century is the key to the emergence of the republic at the end of it.... The modern historian Gary B. Nash is more explicit: “In the late seventeenth century,” he writes “southern colonizers were able to forge a consensus among upper- and lower-class whites... Race became the primary badge of status.” (Vol. 2, 20)

This shift to a racial as opposed to economic or class explanation for slavery justified slaveholding as a racial phenomenon, thereby eliding the economic inequalities amongst whites that slavery generated.

⁴ As David Brion Davis notes, even into the nineteenth century a small number of free blacks managed to acquire and keep slaves, suggesting the persistence of slavery as a class phenomenon (*Inhuman* 180-181).

The period of this ideological shift is somewhat beyond the historical scope of this project. But it provides context for how and why whiteness was defined or understood within slavery, particularly in the nineteenth century when race fundamentally became a *legal* problem. For example, as Ariela J. Gross notes, when it became urgent for the courts to distinguish between black and white in the 1850s and 1860s, particularly in respect of slavery, whiteness was frequently legally established by its past performance. As Gross explains, “In racial identity trials – and particularly at the appellate level – judges gave special weight to the civic performance of white manhood” (*What Blood* 49). And, for women, “... performing whiteness meant acting out purity and moral virtue” (Gross, *What Blood* 49). To avail oneself of the privileges of whiteness required having already done so. This tautological notion of whiteness, particularly in respect of civic duty, suggests the manner in which whiteness largely operated as an unspoken default of a binarized understanding of race, caused by slavery. An examination of the manner in which whiteness resulted from the legal configurations of blackness as different and distinguishable, including in respect of class dynamics, would be a useful supplement to this project.

Obviously, race in America was not a binary of black/white. Although in many ways it has been treated as such, particularly in respect of slavery, to suggest otherwise is wrong. To its detriment, but because of its focus, this thesis does not consider the relationship or significance of other races. In respect of slavery, Thomas D. Morris, for example, writes that although “... the experience with Indian slavery was not deep...” (19) and “Even though marginal, Indian slavery did exist” (20). The experience of Indians, and their legal treatment as potentially enslavable, certainly complicates the

racial dynamics considered in this thesis. Among other things, it suggests that while slavery largely hinged on notions of black inferiority, it was not entirely a racially binary proposition, either practically or legally, even though it largely became one as slavery developed into the mid-nineteenth century. Certainly, a tracing of the ways in which Indian identity was produced within and without enslavement would shed additional light on the connection at law between blackness and slavery, particularly to the extent blackness legally amounted to difference from whiteness.

American racial dynamics were even further complicated in the prerequisite cases, fifty-two cases between 1878 and 1952 that considered who was white for the purposes of joining the American citizenry. Those cases considered individuals from ethnicities such as Japanese, East Indian, and Eastern European. The prerequisite cases were determined largely by way of scientific evidence or ‘common sense’ propositions about race. Either way, as Ian Haney Lopez argues, “The prerequisite cases compellingly demonstrate that races are socially constructed” (7). The legal construction of these other races, which occurred during Reconstruction and Jim Crow, flesh out America’s racial history in important ways, including demonstrating how white supremacy existed in all cross-racial encounters. In particular, they confirm that racial supremacy was achieved by whiteness being the norm of citizenship from which other races deviated.

Noting the above topics merit exploration to better understand the issues raised in this thesis, does not mean the issues raised within it have been exhaustively mined. For example, as noted in this thesis, one reason for the increase in cases distinguishing between the races in the 1850s was abolitionist pressure on slaveholders. At the core of the abolitionist movement was an effort to do away with bondage. In that sense,

abolitionist philosophies shaped the meaning and significance of race, and a critical elaboration of their involvement in the production of racial difference within slavery would provide useful context to the legal definitions that reigned. Similarly, to the extent slavery era racial definitions conditioned Reconstruction and Jim Crow era black subordination, a fuller exposition on the post-Emancipation legal manipulations – including the legal and political advancements made by blacks after Emancipation and that were lost in Jim Crow – would better illustrate the legal origin and historical transmission of anti-black discrimination.

While the literary texts selected for this thesis represent a significant period in the history of American race relations, there are a number of other texts I could have selected from that same period, many of which overlap in their relevance and that supplement or expand my analysis. For example, Harriet Beecher Stowe's fictional *Uncle Tom's Cabin* and Harriet Jacobs' autobiographical *Incidents in the Life of a Slave Girl*, published in 1852 and 1861 respectively, offer compelling narratives of plantation life, including the horrific treatment of the enslaved and how it shaped the meaning of black skin. In respect of the gendered stabilization of racial difference, Frances Harper's 1892 novel, *Iola Leroy*, provides a useful counterpoint to the white Child's *Romance of the Republic*, including because of Harper being African-American. Similarly, William Wells Brown's *Clotel, or the President's Daughter*, published in 1853 concerns itself with the effect of miscegenous relationships on children, fictionalizing the relationship between Thomas Jefferson and his slave Sally Hemmings that had then been the subject of much popular opinion. Finally, Rebecca Harding Davis's 1867 novel *Waiting for the Verdict* and Pauline Hopkins' 1903 novel *Of One Blood* each examine the arbitrariness and absurdity

of racial differences. Particularly because they were published on either side of Twain's *Pudd'nhead Wilson*, these novels provide useful context for the conclusions Twain's text draws.

* * *

In *The American Slave Code in Theory and Practice*, published in 1853, abolitionist William Goodell surveys the various laws and certain cases across the states pertaining to slavery. Contemplating, among other things, the "Origin of the [Master-Slave] Relation, and its Subjects" (258), Goodell concludes that "*The whole process [of slavery] is, and has been, illegal, from beginning to end*" (260). Specifically, Goodell argues that there had been no legislative or statutory foundation for implementing slavery in the colonies. As a result, "When statutes *were* enacted, they did not pretend to create or originate their relation... They only *assume* or took for granted the existence of slave property, and made laws for its security and regulation" (260-61). For Goodell, American slavery was a phenomenon, illegally implemented, assumed without foundation to have been a fact of society.⁵ Importantly, he goes on to explain that as a result of such assumption, the laws that (wrongfully) preserved slavery, "... [did not] define, with exactness, who were slaves and were not slaves" (260). Thus, in addition to

⁵ Briefly, Goodell's argument is that the slave trade had been determined illegal by the English courts and that law applied to the colonies. Subsequently, the states never properly enacted legislation to legalize slavery and in some instances state courts early determined slavery to be illegal. Nonetheless, the practice persisted and was preserved by municipal laws which Goodell finds insufficiently authoritative to overturn or undo the higher legal determinations of slavery's illegality: "Put this by the side of the Southern decisions, before cited, that slavery can have no legal existence in the absence of municipal law, and we have the result that slavery in this country had *no legal origin*, and has continued to exist *without law* ; since (by the same testimony) 'no legislative act of the Colonies can be found in relation to it'" (268).

there being no *legal* basis for slavery – and because its practice in the colonies had been an acquired custom – there were no clear or rigid legal definitions distinguishing between master and slave.

Of course, that blacks were fundamentally subordinated by the practice of slavery was well understood by Goodell. He notes that the “subjects” (271) of slavery are blacks – either “The *descendants* of all who were stolen by John Hawkins and others on the coast of Africa!... [thereby]... being ‘born to a slave inheritance!’” (272) or “*Free* people of color [who] *may* be and continually *are* brought into slavery, in this country, in a variety of ways” (274). While emphasizing this historical connection between blacks and enslavement – whether they inherited or acquired their slave status, blacks were to be enslaved – Goodell also notes that on occasion, whites have also been enslaved.⁶ Suggesting this to be a recent phenomenon, wherein the fact of racial intermixture resulted in ‘pure’ whites wrongfully being captured and enslaved on the basis they matched physical description evidence supporting claims advanced under the 1850 *Fugitive Slave Act*, Goodell writes:

Several known instances have occurred already of the successful kidnapping of *free* whites, without a drop of negro or Indian blood in their veins! And the process of intermixture of the races is now so far advanced, and is so rapidly going forward, that a “perfectly white complexion, light blue eyes, and flaxen hair,” are scarcely a presumptive evidence of freedom. (282)

⁶ Importantly, Goodell also notes the existence of Indian slavery which, by statute, ensured descendants of enslaved Indians were to be enslaved: “But the descendants of Africans are not the only subjects of American slavery. The *native Indians* have also been enslaved, and *their* descendants are still in slavery” (281).

For Goodell, because (white) “Persons thus described are advertised as runaway slaves,” like free blacks they too would be available and liable to be ensnared in the procedurally unfair and biased *Act*, resulting in their illegal ‘return’ to slavery (282).

It is this difficulty in maintaining the racialized underpinning of slavery that this thesis considers. Because there was a racial correspondence in slavery’s early development that reflected *presumed* racial distinctions (and their knowability), there was no need to legally define the races (or their related positions within that master-slave racial hierarchy). However, as that racial correspondence was increasingly destabilized through the nineteenth century – by racial mixing, the presence of free blacks, and Northern abolitionists – it became urgent to identify the distinction between the races and its significance. That urgency was perhaps most clearly and importantly articulated in the legal arena as legislators, litigants, and courts struggled to conceptualize what it meant to be racially different within slavery.

Nonetheless, consensus or agreement on how to identify blackness legally continued to be out of reach, even as it became more and more important for slaveholding to do so. Legal texts from the final years of slavery reflected conflicting definitions of race: at any given time, in any given courtroom, notions of behaviour, ancestral records, or scientific or physiognomic evidence could prove determinative of race. There was thus no singularly definitive way across the states to legally establish racial difference, as would be expected if race was, in the last analysis, essential. Concerned with the various ways in which race was legally understood during slavery, the literary texts examined in this thesis suggest that race, or knowledge of its existence, was ultimately *produced* during and in service of slavery.

This is not, of course, to argue the texts suggest race was invented or purely created within slavery. Certainly, Douglass accepts race as a fact. Nonetheless, *My Bondage and My Freedom* establishes that its significance – its meaning – was conditioned by the demands of slavery: blackness eventually came to signify wrongdoing that legitimated slaveowner disciplinary power over slaves. This conflation of blackness and wrongdoing persisted, even after slavery, most explicitly in the Jim Crow era policies that effectively rendered black existence illegal. Child also accepts the fact of racial difference even as she examines its perpetuation. In contrasting the lived experience of racial identity with the law's authority to race, *A Romance of the Republic* problematizes racial identity, unhinging phenotypic and behavioural markers of race from enslavement, illustrating the possibility that those who live and self-identify as white could nonetheless be legally declared black and subjected to enslavement. In the end, *Romance* suggests (legal conceptions of) race to be an effect of slavery and not its cause. Even Twain's *Pudd'nhead Wilson* does not entirely disavow the possible existence of race even though it fundamentally questions whether race or racial difference is ever truly knowable. In that text, Twain undermines a scientific methodology of identifying race, showing any such approach merely confirms what has already been determined to exist.

Together these texts suggest that legal definitions of race during slavery were arbitrary. The terms of such definitions – whether maternity, civic participation, ancestry, or blood – were arbitrarily determined and imposed, often in the absence of discernible hallmarks of race. However, while such stabilization of the elusive nature of race may have relied on arbitrary and often conflicting criteria, the deployment of legal definitions was not arbitrary. Rather what these literary texts, as well as the legal texts

against which they are herein read, illustrate, is that in slavery the *presumption* of race was determinative of its *existence*. To confirm this presumption of racial difference – to confirm the belief in slavery as inherently, properly, and understandably based on racial distinctions – race was legally produced.

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