

# Haverford Journal

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## **Why the Supreme Court of New York is Not the Supreme Court of New York**

Bryan T. Camp, '82

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## **Self-(Un)Conscious Narrative of the Female Body**

Hilary Franklin, '05

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## **History is What Hurts**

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## **Diamond Matchbooks**

Marisa Wilairat, '05

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Student work appearing in *Haverford Journal* is selected by the Editorial Board, which puts out a call for papers at the end of every spring semester. Entries are judged on the basis of academic merit, clarity of writing, persuasiveness, and other factors that contribute to the quality of a given work. All student papers submitted to the *Journal* are numbered and classified by a third party and then distributed to the Board, which judges the papers without knowing the names or class years of the papers' authors.

The introductory paper of *Haverford Journal* is typically a contribution of interest from an established academic, chosen at the discretion of the Editorial Board.

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# Dedication

We would like to dedicate the second issue of the *Haverford Journal* to Professor Richard Freedman and Emily Cronin, who have agreed to provide the Journal with a home in the John B. Hurford '60 Humanities Center.

In our second year, we have strived to produce another volume of works that demonstrate the intellectual prowess and extraordinary academic scholarship of Haverford students. Professor Freedman and Ms. Cronin have showcased their belief in our project and in the academic merits of Haverford students by challenging us to refine our mission, engaging in a discourse to help the board develop its operations, and promising to secure the future of the Journal in the Humanities Center.

We are grateful to Professor Freedman and Ms. Cronin for taking our project under their wings and enthusiastically pursuing its steady growth. We hope that their efforts are reflected in this issue.

- The Editorial Board



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# Why the Supreme Court of New York is Not the Supreme Court of New York

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Bryan T. Camp '82

## I. Introduction

If you have watched any episode of “Law & Order” or of its endless spin-offs, you have seen something which causes no end of confusion among my first year law students.<sup>1</sup> It is not some obscure legal doctrine or gnarly ethical dilemma. It is much simpler. It is the label on the black screen that tells you where the next scene occurs. At some point in the show, that black screen will say something like “Supreme Court, Trial Part 31, Monday, March 19.” This label seriously confuses my students because they think that an institution called the “Supreme Court” ought to be the highest court, the place where the legal drama ends, not where it begins. In other words, they discover that the Supreme Court of New York is not...well...the Supreme Court of New York. It is the trial court. The job of highest court has been performed by the New York Court of Appeals since 1847.

This arrangement of New York courts confused me too, when I was a law student, long before “Law & Order” was even a gleam in Dick Wolf’s eye. I have since learned, however, exactly *why* the Supreme Court of New York is not the Supreme Court of New York. The simple answer: it never was. The more complex answer is a pretty cool story of the interplay of law and politics during the second two-party era, the time of Whigs and Democrats. I have been studying this, with particular attention to the New York Constitutional Convention of 1846. This paper will share some of what I have learned so far.

Described as “the first people’s convention,” the 1846 New York Constitutional Convention was arguably the apogee of Jacksonian de-

mocracy; its product was “the People’s Constitution.”<sup>2</sup> Among its many reforms, the 1846 Convention restructured New York’s legal system.

New York has always had one of the more eccentric legal systems of any state in the Union but never more so than for the first 70 years of its statehood. From 1777 until 1846, it was one of only four states that physically separated law and equity practice into separate courtrooms with a Chancellor heading the equity side and a Supreme Court heading the law side.<sup>3</sup> From 1777 until abolished by the 1821 Constitutional Convention, it was one of only two states to use the judiciary—through a Council of Revision—to review all laws *before* they were enacted, and object to those “inconsistent with the spirit of this constitution, or with the public good....”<sup>4</sup>

The most unusual feature of the New York legal system, however, was its court of last resort. From the close of the Revolution until 1846, parties took their final appeal to what was perhaps the strangest court in American legal history, the Court for the Correction of Error and Trial of Impeachment (“CCE”). Unique among American state courts, it was made up of the entire 32 member New York senate, the Lieutenant Governor (acting as President of the Senate), and either the Chancellor (when hearing appeals from the Supreme Court) or the three Supreme Court Justices (when hearing appeals from Chancery). Cases were usually decided by between 20-25 of this potentially 37-member court.<sup>5</sup>

To modern ears, a court consisting of politicians in judicial garb sounds like a violation of a fundamental feature of our democracy: the separation of judicial power from legislative and executive power. And yet the CCE persisted for some 70 years without anyone making that complaint. In fact, the CCE bore an implicit stamp of approval from no less a figure than James Madison. In his 1788 Federalist essay #47, “to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct,” Madison looked at how the various state constitutions addressed the separation of powers issue. After reviewing New York’s 1777 constitution, Madison concluded that it made “no declaration on this subject, but appears very clearly to have been framed with an eye to the danger of improperly blending the different departments.”<sup>6</sup> By 1846, however, most folks agreed that the blending had become improper and the CCE should be abolished. But that did not make the Supreme Court the Supreme Court. Instead, the 1846 Constitutional convention replaced the CCE with the

Court of Appeals. This paper explores both the decision to abolish the CCE and the debate on how to reform the Supreme Court which resulted in the decision to still leave it subordinate to a newly created court of last resort, the Court of Appeals.

Part II examines the Convention debates and actions regarding the abolition of the CCE and concludes that while many Democrats objected to the CCE on ideological grounds, it was more bi-partisan prosaic reasons that motivated the reformers to kill off the CCE. The critiques from all ideological spectrums boil down to this: the CCE did not and could not provide proper legal guidance to lower courts, litigants, and lawyers. Part III then looks at what problems the reformers faced in replacing the CCE and concludes with a surprise ending regarding the historical meaning of “supreme.” That is, while the Supreme Court was not the Supreme Court, it was still supreme.

## **II. Critiques of the CCE Before and During the 1846 Convention**

By 1843, various concerns, particularly about the legislature’s power to create large state debts for the financing of internal improvements, led some politicians and leaders to agitate for a constitutional Convention.<sup>7</sup> Among the proposed reforms was reform of the judicial system, including abolition of the CCE.<sup>8</sup>

The call for a constitutional Convention was sounded by the New York Democratic party and its newspapers and magazines. Radical Democrats, such as Michael Hoffman, Azariah Flagg, and Theodore Sedgwick, organized Constitutional Reform Committees to create opportunities for petition gathering, speeches, parades, and other noisy hoopla. And it was through the Democratic press that reformers first preached the word of constitutional redemption through convention. Up until early 1845, Whigs evidenced little enthusiasm for either the convention question in general or the judicial reform branch of the convention question in particular.<sup>9</sup> However, at least one leading Whig newspaper, Thurlow Weed’s *Albany Evening Journal* (“AEJ”), seemingly came out in favor of a Convention as early as 1843, the year the Democrats began their agitation. One week after a huge New York City pro-Convention rally in August 1843, the AEJ took this jibe at its Democratic rival, the *Argus*:

Michael Hoffman, Col. Young, Recorder Morris, and L. Sherwood, all of them men whose praises the *Argus* has never, until now, been weary of sounding, have issued a programme

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for a Convention to amend the Constitution. But our neighbor makes no response. This is unkind. Well, the Reformers need and shall have help. We go for the Convention. We hope they will make room for us.<sup>10</sup>

Weed goes on to list his reforms, including elimination of the property restriction for black suffrage and a constitutional provision to circumvent the Fugitive Slave law.<sup>11</sup> While Weed may have been trying to scare off the Democrats by parading the horrible Whig reforms that might occur, it is more likely that he genuinely favored a Convention. Certainly he later gave his unqualified support to the results of the Convention, including the judicial reforms, even as other Whig journals decried the new Constitution and urged its defeat because of those reforms.<sup>12</sup> And while Weed did not give the detailed analysis that one finds in the Democratic press, he still listed judicial reform as one reason a Convention was needed.<sup>13</sup>

The New York legislature's proposal for a constitutional Convention in 1845 was resoundingly endorsed in the November elections.<sup>14</sup> Delegates were elected on April 28, 1846, with the Democrats capturing over 60% of the seats (79 to 49, 128 all told). Given that the Democrats had trounced the Whigs in the November 1845 elections, however, the spring 1846 margin of victory was surprisingly small.<sup>15</sup> Among the prominent Democrat leaders not elected to the Convention was one Greene C. Bronson, a talented but acerbic Justice of the Supreme Court (of whom more later), who lost to the equally prominent Whig lawyer C.P. Kirkland.<sup>16</sup>

The Convention convened on June 1, 1846 in Albany. After spending the first two weeks wrangling over what procedure to follow to come up with a procedure to follow in reforming the Constitution, the Convention decided to distribute the substantive work of drafting reformed constitutional provisions among 18 committees of 7 delegates each. Each committee was to bring back to the Convention a report and model constitutional article. The Convention voted to assign 13 delegates, however, to Committee No. 10 on judicial reform because of the perceived importance of the issue. All the committee members except two were lawyers.<sup>17</sup>

Several members, mostly Whigs, spoke openly on how they felt judicial reform to be the most important question facing the Convention and the main reason why the Convention was called for.<sup>18</sup> A majority of the delegates seemed to agree as demonstrated by one telling event. The Convention had originally placed the judiciary question sixth and

the financial reform question (state debt) third on the agenda. However, the debate on agenda item two, the bill of rights, was still in full swing at the end of the 10th week of the Convention and some members began to notice that time was running short.<sup>19</sup> Charles Ruggles (D), chairman of the judiciary committee proposed to move consideration of the judicial question up from sixth to third, just ahead of financial reform. After some discussion, his proposal passed, 58-46, with over 80% of the Whigs, as well as 9 of the 12 judiciary members present, voting in the affirmative. That fact did not go unnoticed. One radical Democrat suggested that the Whigs were motivated by more than just a burning desire for judicial reform:

He intended to say that the judiciary committee desired to secure for their report an early consideration, ...that would naturally draw to the support of a motion to give it preference, all the members of that committee. [But] there were those who sought that opportunity to accomplish a certain object... almost all the whig members voted on that side—and...all this foreshadowed a disposition to get rid of a certain subject. But he meant to charge no combination upon the judiciary committee.<sup>20</sup>

Whatever the motives of particular delegates for early consideration of the judiciary question, there was undoubtedly bi-partisan agreement on the need for reforming the judicial system as a whole, quite apart from the CCE issue. The convention rhetoric was shot through with notions of generally “purifying” the judicial system from various evils.<sup>21</sup> If one divides the critiques of the CCE into practical problems and ideological concerns, the overwhelming reasons articulated for reform have to do with the former. Although Democrats and Whigs differed somewhat in rhetoric, they agreed on many of the substantive points. I will detail the “practical” critiques in Subpart A and the “ideological” critiques in Subpart B.

### **A. The Practical Reasons For Abolishing the CCE**

Most of the complaints in the 1846 Convention regarding judicial reform in general concerned the practical problems of a growing judiciary. Law could not be what it should be unless two conditions were fulfilled: a well organized judicial system needed to be administered by impartial

men.<sup>22</sup> Unfortunately, this was not the case in New York State.

Reformers were particularly apoplectic about the practical problems with the CCE. It was the central flaw in the (dis)organization of the New York judiciary. One defect was the manner in which the CCE decided cases. From the Democratic side, listen to Michael Hoffman, who was not only a radical Democrat, but also a prominent lawyer:

During the argument of a cause, the members of that Court, apparently a majority, read, or write, or talk, or walk about like busy politicians at a husting, and the decencies of Judicial decorum and attention seem entirely disregarded.<sup>23</sup>

From the Whig side came agreement from Ambrose Jordan. Speaking as a lawyer who frequently practiced before the court, Jordan roundly condemned its “whole organization” as defective:

It was too numerous and expensive. It was composed principally of men uneducated in the law. Their usual mode of hearing arguments was loose and inattentive. Members frequently voting on questions involving the highest interests who had heard but a small portion of the arguments and sometimes when they had heard no part; of late years “log rolling and lobbying” had been more or less extensively practiced, the whole matter had been too much a game of chance, in which the most adroit, and many times the least scrupulous player had all the advantage. ...Private and personal solicitation after a cause had been submitted was a most dangerous and corrupting practice, and he [Mr. J.] was as well convinced, as of his own existence, that such practices had been resorted to and that his clients had been made the victims. He desired no more of it.<sup>24</sup>

A second practical problem was that the CCE’s membership was ill suited to its task. Both Democrats and Whigs agreed that the CCE’s composition was not appropriate for the highest court in the state. Jordan, and other Whigs, objected mostly to having “men uneducated in the law” making legal decisions. The Democrats had a different take on it:

Argument is almost unnecessary to show that the decisions of such a Court must be loose and fluctuating in an alarming degree. The members are politicians—elected as politicians—

—daily acting and voting as politicians. Is it likely that by changing their title from that of a Senate—to that of a Court of Errors that they can free themselves from the strong partizan bias which they must so certainly feel?<sup>25</sup>

To some, the fact that the members of the CCE were elected was a point in its favor.<sup>26</sup> But to most reformers, far from being a blessing, elections were a curse because voters were asked to elect one man to fill two jobs which had different requirements. The fact that Senators were elected “rather to make laws than administer them, to press the measures of a party rather than to compose differences between individuals, to exhibit skill and devotion as advocates rather than wisdom and impartiality as judges” meant that “the people cannot often find an active politician and a good judge in the same person.”<sup>27</sup> As a result, the members of the CCE were unable to free themselves from their “strong partizan bias.” Reformers claimed that they could point to “numerous cases” in the previous five years where the “vote nearly represents the actual state of the political parties.” In making that claim, however, their zeal overcame their accuracy.<sup>28</sup>

As a result of these defects in organization and in membership, the CCE’s decisions and opinions did not command respect from other legal actors, both in reality and in perception. The reality was, as the Whig lawyer Jordan believed, that the decisions themselves were useless. There was no “proper” opinion of the court. There were simply the opinions given by individual members of the court, assigning reasons for their personal vote. Sometimes a senator would vote first and write his opinion afterwards.<sup>29</sup> The Senators felt no need to even engage in the reasoning process; they would as likely decide the case based on what they heard from the lobby man at lunch as from the counselor in court.

The Democrats agreed, parading the example of their champion, Supreme Court Justice Greene C. Bronson, whose biting dissent in *Butler v. Van Wyck*<sup>30</sup>, refused to follow the CCE’s earlier reversal of the Supreme Court in a case directly on point because, he contended, the CCE decision was illegitimate. In his opinion, Bronson ripped the CCE for both the inconsistency of its decisions, and the manner in which it arrived at them:

There is a further reason why the decision of the court for the correction of errors should not be implicitly followed. It is well known that some of the members of the court do not con-

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sider themselves tied down to what are sometimes called the strict and technical rules of law, but feel at liberty to decide according to their own sense of what is right in the particular case under consideration, without much regard to legal precedents. That this sentiment has not often found its way into reported cases, may be accounted for by the fact that it is more commonly adopted by those members of the court who are not in the habit of preparing written opinions...<sup>31</sup>

More intriguing are the critiques made by those, both Democrat and Whig, who defended the CCE's integrity but nonetheless thought that the perception of "loose and fluctuating" opinions did irreversible damage. The Whig delegate James Tallmadge summed it up this way:

In suits between individuals its [CCE] integrity and its intelligence had never been doubted; in cases of party conflicts and political controversies, its liability to swerve had latterly been sometimes questioned.... Sir, we trust we have purity in this tribunal. It is not only necessary to have justice done, but to believe that it is justice, and make the people believe so. The community at large must be made to believe that the adjudications of the courts are to be taken for truth, and for the reason of their purity.<sup>32</sup>

What was needed, according to Tallmadge, was a court that would command public confidence in its decisions, a court free from the influence of any other branch of government, legislative, executive or judicial, a court that would be able to successfully resolve disputes between both individuals and departments of government. But the CCE could not do the job. To prove this Tallmadge told of another conflict between the Supreme Court and the CCE over the constitutionality of the 1838 General Banking Act, played out in the case of *Warner v. Beers*.

In *Warner*, the issue was whether the General Banking Act was constitutional. The New York constitution required laws creating banks to be passed by a two-thirds majority.<sup>33</sup> Since 1804, banks had been allowed to operate only under charters granted by a specific Act of the legislature. The 1821 constitutional provision requiring the two-thirds assent of the legislature was generally considered to have been written to protect against some of the resultant abuses of special charter grants.<sup>34</sup> The General Banking Act allowed banks to be formed, without any specific Act of

the legislature, by essentially filing a piece of paper with the Executive branch. The General Banking Act itself, however, was not passed by a two-thirds majority. Indeed, while the Whigs could muster a two-thirds majority in the Assembly, they could only scrape up a bare majority in the Democrat-controlled Senate, even with the help of those Democrats who voted with them “under the express instructions from Tammany Hall.”<sup>35</sup>

The Supreme Court, not wanting the issue to go up to the CCE in 1840 when the Whigs controlled the Senate, decided *Warner* on a technicality. Although the defendant pled that the Act was unconstitutional, the court—on its own motion—held the plea technically defective and refused to consider the issue, thereby refusing to dismiss the plaintiff’s case and allowing the plaintiffs to proceed. The court explained:

The requisite constitutional solemnities in passing an Act which has been published in the statute book, must always be presumed to have taken place until the contrary shall be clearly shown. Should the defendant withdraw the demurrer, and plead specially that the law in question did not receive the assent of two thirds...it will then be in order to pass upon the validity of such an objection.<sup>36</sup>

But when the case was appealed, the CCE ruled on the constitutional issue anyway. Not surprisingly, it held the Act constitutional.<sup>37</sup>

In Tallmadge’s words, the Supreme Court then “disobeyed—they refused to acquiesce—they combated—they would not yield to the decision of the court of errors” which “the subordinate tribunals were bound to have assented to...as the law of the land.”<sup>38</sup> The Supreme Court could get away with that kind of behavior, Tallmadge contended, because the CCE’s concurrent existence as the Senate opened it up to criticism that its decisions were corrupt and therefore entitled to little respect.<sup>39</sup> As long as there was conflict, the law would remain in “perplexity and confusion” much to the disgrace of the state.

Democrat complaints are consistent with the Tallmadge critique. Even if the actual opinions were consistent and predictable, the mere *perception* that they were influenced by politics and not law undermined the court’s ability to settle the law:

...the highest Court of Appeal in the State unites in itself both the powers of making and of administering the laws. This union can not exist without exposing the members compos-

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ing the Court—in cases to the undue influence of political prejudices and partisan interests, which leads to a corrupt administration of the law—and in many more cases to a suspicion of such influence, which seriously impairs the usefulness of the Court, by weakening the moral weight and authority of its decisions.<sup>40</sup>

These critiques of the CCE attacked its ability to command obedience to its decisions. Because of its mode of operation and its membership, its opinions either deserved no respect or else, in fact, received no respect. It is important to emphasize that these critiques did not object to the CCE in theory, did not contend that it violated some notion of separation of powers, that it over-reached its position and usurped the powers of the courts or the powers of the legislature. The complaint was that cases had become just like bills to be voted on, no one knew which way was up, and that was a poor way for the highest court in the state to do business.

This is not to say that critiques based on separation of powers ideas were absent. The next subsection explains those. But those critiques were not bi-partisan. They came from the Democrats.

### **B. The Ideological Reasons for Abolishing the CCE**

The Democrats had a problem. The New York legislature had become too powerful. Over-legislation has been the curse of the country, as every body knows. There is a way to cure it—and there never was a better time than the present, when it marks are fresh and numerous, and we can readily trace them.<sup>41</sup>

Those marks, where “reckless legislation” had trampled on the rights of the people to lead their lives free from governmental interference, included: the creation of corporations “for almost every purpose, until some suppose that nearly all natural functions can be dispensed with;”<sup>42</sup> the delegation of eminent domain to corporations whereby “one citizen [was] compelled by law to sell his land to another;”<sup>43</sup> the massive state debt created by the legislature,<sup>44</sup> and, of course, the usual Democratic complaint that “[w]e have indulged in special legislation ever since the Revolution and have seen the folly, nay, the wickedness of it.”<sup>45</sup>

The Democrats had a plan. They would so arrange the machinery of government to cure legislative over-indulgence. This they would accom-

plish by two reforms: constitutional prohibitions and decentralization. The first was necessary because, whereas the U.S. Congress was a body of enumerated powers, the New York Legislature was conceded to be like the British Parliament. It was omnipotent except as restrained by either the U.S. or the New York constitutions.

Now, the prohibition are few, very few, and the power to do mischief by haste, ignorance, or corruption, is all but omnipotent. Shall this remain so forever? The courts have long lamented the abuse of salutary constitutional limits to the legislative power—and all philosophic statesmen have seen the evil of this English doctrine. Let us demand a constitutional code of prohibition...<sup>46</sup>

The second was necessary because centralization of power in the New York legislature threatened the people's sovereignty and control over their affairs.

It is both the right and the duty of our citizens, to retain to themselves for their direct and individual exercise, whatever power they can exert within the limits of the towns and counties. Every departure from this, every function yielded up by the people...is an approach toward aristocracy—a departure from the democratic theory; and step by step, as we proceed in this direction, the influence of government becomes less and less pure.<sup>47</sup>

Both of these proposed reforms were threatened by the CCE. First, constitutional prohibitions would do no good as long as the legislators also wore judge's gowns, since "a factious majority" might pass any questionable bill and then establish its constitutionality in the Court of Errors by the same majority which had first carried it through the Senate. Indeed, one proponent of reform declared that the state had no constitution at all as long as the legislature held this power to construe the constitutionality of its own acts.

The fundamental idea of a constitution is, that it is an instrument in which the people impose restrictions and limits on the legislature, and which that legislature cannot transcend without a direct appeal to the people themselves. No such state of things exists with us, simply because...the legislature

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construes the Constitution. ...who can doubt that their construction will be in the last degree lax and dangerous?<sup>48</sup>

Nor was the abuse of this power some mere fanciful or theoretical possibility. There was one "black page" on the CCE's record which "clearly indicates the corruption which the system might foster and protect."<sup>49</sup>

[P]roof of the existence of this power and an instance of its exercise, may be found in the passage of the General Banking Law in 1838, which being intended to create monied corporations, required a two-thirds vote of the legislature. A majority, however, passed it. When the constitutionality of the bill came before the Court of Errors, a mere majority was sufficient, and it was found, to sustain the law.<sup>50</sup>

The reference here was to *Warner v. Beers*, which I briefly mentioned above. That decision was reviled by the Democrats who recounted its history in lurid, and somewhat inaccurate, detail.<sup>51</sup> Likewise, the assertion repeatedly made during the convention debates, that the CCE had never declared any legislative act unconstitutional, was not quite accurate.<sup>52</sup> While not true, these allegations point up just how critical the abolition of the CCE was to the reformers in order to enable the judiciary to properly carry out that "most delicate, and, at the same time, the proudest attribute of the American jurisprudence": constitutional review of laws.<sup>53</sup> So long as the judiciary was unable to take the constitutional measure of legislation and, if necessary, strike it down, the omnipotence of the legislature would continue. Here is the idea of we often associate with the term "separation of powers."

Even while the CCE truncated judicial power, however, Democrats also claimed that it exercised a nefarious influence on legislative powers. The CCE contributed to poor quality legislation in two ways. First, it took up valuable time that could be better used drafting laws. For example, one reformer estimated that, in 1845, the court sat for 167 days, disposing of just 54 cases.<sup>54</sup> Another complained that the Senate "must employ two-thirds of the whole year in hearing and deciding particular cases."<sup>55</sup> Second, not only did the CCE take away the time available to write clear legislation, it also took away any motivation for doing so:

As a court of last resort, the Senate reviews and construes the statutes which it has assisted to enact. In enacting them, it

knows and feels that it reserves this great power to construe them. Under such circumstances, haste is indulged, careless obscurity encouraged, and the utmost diligence will do no more than make the law so that it can be understood.<sup>56</sup>

Thus, as a consequence of lack of time and interest, the legislature put out only “multifarious, contradictory, hasty, undigested statutes,” by which “the whole body of the law is rendered deformed, dark, doubtful and uncertain.”<sup>57</sup> Therefore,

until the Senate is divested of judicial power and duty, it can never perform its most useful legislative functions in the government. We can expect no useful simplification of the law practice and pleadings, or clear, consistent, intelligible statutes.<sup>58</sup>

The structure of the New York State government was mixed up, thought the Democrats. The legislature performed judicial functions and the judiciary legislated. As a result, the citizen had to be incessantly on his guard to prevent *both* the legislature and the judiciary from usurping his rights.<sup>59</sup> As the situation stood, the patriotic citizen had to spend so much time enforcing his rights through the ballot box and the right of petition that he had no time to attend to the real business of life, to live in peace and make money. He had become “a slave to liberty,”

—and the only question is, in what manner [citizens] can arrange the representative system so as to ensure the discharge of their duties without [those duties] interfering seriously with their business and personal comfort.<sup>60</sup>

Clearly the present system would not work:

[S]o long as the legislature is omnipotent, so long as the executive power and patronage, continue to be great sources of corruption, so long as the judiciary is badly organized and we have no tribunal to test the constitutionality of laws, except the body which enacted them...there will be occasion for unceasing endeavor and watchfulness on the part of every good citizen; and with all his pains he will fail of securing the public safety.

The Democratic reform vision held the promise that the machinery of government could be so arranged as to require much less attendance from the citizen. The balance of power must be finely tuned and the proper order of things established. Integral to that order, of course, was that the judiciary be elected. By separating out the judicial from legislative functions, however, voters would not now have to try and elect one man to do two distinct jobs, one conceived of as judicial and the other conceived of as political.

The ideal legal order in the Democratic mind, as revealed by these ideological critiques, would leave the legislature free to restrain the discretion of the courts by enacting well-written laws that precisely spelled out uniform rules of action. At the same time, it would leave the courts free to prevent the legislature from enacting rules which, though uniform, were partial or unconstitutional. Thus each branch would be free only to prevent the other from abusing its power over each citizen. In sum, elimination of CCE was "necessary to preserve the Senate as part of the legislature,"<sup>61</sup> which, in turn, would help make the laws more certain and precise.

### III. The Meaning of "Supreme"

If the CCE was to be abolished, what should replace it? In their debates over the answer to that question, the reformers revealed some interesting conceptions about the function of a Supreme Court and the meaning of the term "supreme." While to a modern ear "Supreme Court" is synonymous with "Court of Last Resort," the early 19th century New York lawyer understood something different.

As its name implied, the Court for Correction of Errors was not set up to try cases. Its function was merely to correct those errors the other courts made in trying cases. The CCE was the court of last resort. As such, its function was not to settle the day-to-day kind of legal questions. Rather, it was to address and decide only those cases "presenting great and novel questions which will occasionally arise under any judicial system, where the ordinary courts after the fullest argument and scrutiny fail to satisfy the public or the parties in interest."<sup>62</sup>

Most interesting, however, was that no one thought it the CCE's job to be *the* source of uniform rules of decision for the State of New York. It turns out that the Supreme Court was not called the Supreme Court out of whimsy. It had always been Supreme in the sense that it exercised

statewide jurisdiction and continued to do so, and was expected to provide a uniform rule of decision for the state. The 1846 Convention debates over the judicial reform proposals well illustrate the difference between concepts of Supreme Court and court of last resort and thus show how contemporaries thought of the CCE's purpose.

The judicial reform proposals submitted to the convention by the Judiciary Committee went beyond merely abolishing the CCE and replacing it with a purely judicial organ. The reform proposals also replaced the Supreme Court with a 32 member court to be located in eight districts, with the justices' jurisdiction confined to those districts. Moses Taggart {W} was the first to raise an objection to the idea of a 32 member Supreme Court: "A supreme court, maintaining its unity and still divided into eight parts would be as difficult to understand as some systems of theology."<sup>63</sup> The chief problem was that it was unclear whether the justices would hold court only in their district or if they would ride circuit throughout the state. Either way drew objections, both from Whigs and Democrats, that the court would be unable to maintain uniformity. George Simmons {W} thought that a 32-judge court split up eight ways was too diffuse and would produce opinions which would not be considered authentic and undisputed law.<sup>64</sup> His plan was to give 16 members of the court general state jurisdiction and arrange the other 16 into a subordinate district court system. Charles O'Connor {D} likened the traveling version to a bull-frog court, leaping around the state.<sup>65</sup> Its justices would have neither the authority and respect of "real" justices nor the experience of local judges with local affairs (up-country justices, for example, would know nothing of maritime matters when they came to N.Y. City), with tragic consequences for the new court of last resort, the Court of Appeals:

The first uniformity court in this new system was the court of appeals—answering to the supreme court in the present system. ...The undying spirit of litigation so characteristic of people, free, independent and prosperous, such as ours, would not abide by the decisions of these rambling district judges [i.e. Supreme Court justices]. ...And was there a lawyer...who believed that this court of appeals would survive for eighteen months the duty thus thrown upon it?<sup>66</sup>

The defense of the Committee's plan on this point was carried out primarily by Ambrose Jordan {W}, who thought it an absurd proposition that

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these 32 judges, all belonging to the same tribunal, all learned in the law, all familiar with the decisions of the appellate court, all desirous of doing their duty, all intermingling their labors, all in constant and familiar communication with each other, should willfully attempt to establish conflicting rules of law.<sup>67</sup>

Likewise, John Brown {D} could not conceive that the justices of one supreme court district would disagree with their brethren in another district unless "the questions were so novel, so difficult and unsettled in this country and in England, that it was a proper subject for the judgment of the court of appeals." Once that court had, "in due season," made its decision, it would "settle the law finally and forever upon the facts submitted, and that would be a rational, enlightened and just disposition of the controversy."<sup>68</sup>

Although these four delegates came down on opposite sides of the issue, their remarks share a common conception that the function of a court of last resort was different than the function of a supreme court. They all tried to structure a Supreme Court that would have unity. The fact that the new court of last resort would also be the first court of unity was a problem.<sup>69</sup> The argument was that a 32-member Supreme Court would not be able to meet together and perform the function of a "Supreme" Court: providing a statewide uniform rule of decision. It would no longer be Supreme.

#### **IV. Concluding Thoughts**

In the past few years, many legal academics have become increasingly concerned about recent federal Supreme Court decisions which seem to deny the power of the federal Congress to share in the interpretation of the Constitution. The complaint is that the judiciary is becoming too powerful, that judicial supremacy has become "judicial sovereignty."<sup>70</sup> As one commentator has noted: "In the legal academy the view critical of judicial review is ascendant, often flying under the banner of 'popular constitutionalism,' which is the idea that since the constitution rests on popular consent, the judiciary must be as beholden to decisions of Congress about what the Constitution means as Congress is to the judiciary."<sup>71</sup> To support the critique, legal scholars have attempted to recover historical ideas of the judicial role in the early Republic and debate just when ideas of judicial supremacy took hold and became a part of our constitutional

fabric with those who are concerned about judicial sovereignty claiming that judicial review usurped the original notions of the proper role of a judiciary in a democracy.<sup>72</sup>

In one sense, my study supports that the claim that ideas of judicial supremacy became ascendent over other concepts of the judicial role. From what I can see, Whigs and Democrats in New York in the 1830's and 1840's agreed that separation of the CCE from the Senate was necessary to the well-ordered administration of the laws. They agreed that the separation was necessary in order to constrain the legislature's voracious appetite for power. Both sides saw the separation as freeing the judiciary from grip of the legislature so that it could properly control the legislature by becoming more judicial and less legislative, more law-like and less political. The rhetoric now denied that a single person could be both a legislator and a judge.

But cutting against this view are two points. The more modest point is the striking evidence that both Whigs and Democrats thought the CCE should be abolished because its membership and procedure prevented it from performing its function: to settle the law. Its work product was too slow, too difficult to digest, and no longer commanded the respect of other legal actors. While the separation of powers critique is present, both Whigs and Democrats were practical lawyers first, political theorists second. They wanted a system that worked for them and their clients.

The second, and perhaps more ambitious claim I would make is that to the extent ideological concerns motivated the abolition of the CCE, notably among radical Democrats, the notion of popular constitutionalism embraced rather than rejected the notion of judicial supremacy. Judicial supremacy, the idea that the judiciary had the final say over a law's constitutionality, was perfectly consistent with notions of popular constitutionalism because proper separation not only freed the judiciary to control the excesses of the legislature, it also freed the legislature so that it could properly control the judiciary. In this sense, my study suggests that the idea of judicial review was consistent with the idea of popular constitutionalism. Rather than usurping power from the people, a strong judiciary gave more power to the people but in a more manageable form than taking to the streets, or petitioning the legislature, or becoming a "slave to liberty" by endless elections.<sup>73</sup> Elimination of the CCE as the highest court of the state was a necessary part of increasing popular control over the judiciary.

Sadly for my first year law students, once the reformers had abolished the CCE, they did not even consider making the Supreme Court supreme in all senses of the word. Instead they ultimately decided to replace the CCE with a new court of last resort called, appropriately enough, the Court of Appeals. As part of ensuring popular control over the judiciary, each member of the new Court would be elected. The history of this Court is also an interesting one, but far beyond the modest scope of this paper. I cannot resist, however, one concluding tidbit: the first person elected to be Chief Judge of the Court of Appeals was none other than former Supreme Court Justice Greene C. Bronson. He promptly set about reviewing all cases from the former Supreme Court, even those which he himself had decided.<sup>74</sup> Not surprisingly, Judge Bronson of the Court of Appeals never found occasion to overrule Justice Bronson of the Supreme Court. So, for one small group of unhappy litigants, the 1846 reforms did, in effect, transform the N.Y. Supreme Court into the court of last resort.

### Endnotes

<sup>1</sup>I am Professor of Law (in all senses) at Texas Tech University School of Law. Yes, you skeptics, Texas Tech *has* a law school... located right across the parking lot from the basketball arena (true story). It's actually a good law school, too, so it's not just my students who get confused. Students at Columbia, Chicago, and Stanford get confused too.

<sup>2</sup>Peter J. Galie, *Ordered Liberty: A Constitutional History of New York* (Fordham U. Press 1996) at 100, 110.

<sup>3</sup>The other three were New Jersey, Maryland, and North Carolina. Immediately after the Revolutionary War, the New York Supreme Court consisted of three justices who rode circuits, holding nisi prius courts where issues of fact would be tried before a jury and one judge. The justices also would hear appeals en banc from the circuit trials to decide controverted matters of law. As the state grew and more cases arose, two more justices were added to the court. In 1821, the revised N.Y. Constitution reorganized the Supreme Court back to three justices who were restricted to a purely appellate function, to be exercised en banc. Eight circuit judge positions were created to handle the trial of cases in the Supreme Court. On the Equity side, since one Chancellor could not handle all of the equity cases, even in the period immediately following the Revolution, the practice was for testimony in equity cases to be taken in writing by an examiner, who then prepared a report which was reviewed by the Chancellor or, at one point, an Assistant Chancellor. The 1821 Constitution created eight Vice-Chancellor positions, akin to the circuit judgeships. In fact, quite often the same man would be both a circuit judge and a Vice-Chancellor. The Vice-Chancellors reviewed the examiners' reports and appeals from the Vice-Chancellors' decisions lay to the Chancellor.

<sup>4</sup>Article III, Constitution of 1777. See e.g. *Livingston v. Van Ingen*, 9 Johns. 507, 563 (CCE 1812)(Thompson, J., "It certainly affords a strong and powerful argument in favor of the constitutionality of a law, that is has passed not only that branch of the Legislature which constitutes the greater portion of our court of dernier resort, but also the Council of Revision..."). Illinois also established a Council of Revision in its initial constitution in 1818. *Spragins v.*

Houghton, 3 Ill. 377 (1840).

<sup>5</sup>There was apparently a quorum requirement of at least 17. See *Stewart's Exr. v. Lispe-nard*, 26 Wend 255, 295 (CCE 1841), a case where only 17 members of the court voted and where Justice Bronson remarks that he was present only for purposes of quorum.

<sup>6</sup>Madison, Federalist No. 47, in Clinton Rossiter, ed., *The Federalist Papers*, (Mentor 1961) p.301, 305.

<sup>7</sup>For one account of the various reform proposals, see Charles Z. Lincoln, *2 Constitutional History of New York*, pp.65-73. Charles W. McCurdy also gives a very nice account of the political events leading to the 1846 convention in his excellent study of the anti-rent movement, *The Anti-Rent Era in New York Law and Politics 1839-1865*. (U.N.C. Press 2001). Finally, for a contemporary account, Michael Hoffman gave a long speech detailing the events leading to the convention, reported in the Bishop, W., & Attree, W., eds., *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York*, (*The Evening Atlas*, Albany 1846) (hereafter "*Atlas Ed.*") (D), *Atlas Ed.* p.673 col.2. I should note here that two sets of reports of the Debates of Proceedings of the 1846 Constitutional Convention were published, one by the *Atlas*, an organ of the more radical Barnburner Democrats, and the other by the *Albany Argus* newspaper, which was the mouthpiece of the more conservative wing of the Democracy, often called the Hunkers. As one might expect, they differ somewhat, mostly in selection of whose speeches to report. The *Argus* edition is titled *New York State Constitutional Convention Debates and Proceedings*, (*Albany Argus*, 1846), (hereafter "*Argus Ed.*").

<sup>8</sup>As early as 1811 some began to complain that the "peculiar organization and practice of this court" made it difficult to "establish a system of precedents." Yates, 9 Johns. at 415, Sen. Platt. Nevertheless, only one proposal even affecting the CCE was offered at the 1821 Convention and that was to exclude the Chancellor and the Justices from participation in CCE deliberations and voting. It failed. Lockwood, *An Analytical and Practical SYNOPSIS of all the CASES ARGUED AND REVERSED in Law and Equity in the COURT FOR THE CORRECTION OF ERRORS of the STATE OF NEW YORK, from 1799 to 1847*, p. xliii. Even as judicial reform became an increasingly important question between 1834 and 1846, and both Democrats and Whigs advocated constitutional amendments, it was not until 1841 that any proposal abolished the CCE. All others left it much the same as it had been since the Revolution.

<sup>9</sup>One Whig, George Simmons, had introduced reform proposals in 1841 which kept the CCE in a slightly altered form. For one view of the history of reform proposals, see Hoffman, *Atlas Ed.*, p.671. Hoffman places the blame for reform's failure on the Senate. For a more neutral view, see Lincoln, *2 Constitutional History of New York*, pp. 64-73.

<sup>10</sup>*AEJ*, August 23, 1843 p.2 (emphasis in original). This could also be a poke at the Barnburner-Hunker split in early 1843 since the *Argus'* editor, Edwin Crosswell, was a Hunker and those who were driving the reform bandwagon—including Michael Hoffman, Samuel Young, Thomas Morris (later Mayor of New York)—were all Barnburners. I do not know about Sherwood's affiliation.

<sup>11</sup>*Id.* The Supreme Court had just decided *Prigg v. Pennsylvania* the year before.

<sup>12</sup>see e.g. *Am. Whig Rev.* at 520 (Nov. 1846).

<sup>13</sup>Then, too, there is the subject of Judiciary Reform. For year past this paper and others have diligently labored to direct the attention of the People...to the necessity of reform in this department..." *Albany Evening Journal*, August 23, 1843 p.2.

<sup>14</sup>For the story of how the bill was passed and how the Whigs, who were a tiny minority in the 1845 legislature, turned the measure into a Whig measure, see Alexander, *A Political History of the State of New York*, (2 Vols. 1906), Vol. 2 pp. 90-103. See also McCurdy, *supra*, at 187-193, for a similar account of how the Whigs performed political judo on the Democrats in 1845.

<sup>15</sup>The Whigs were, in fact, beginning something of a comeback; they did even better in the fall 1846 elections.

<sup>16</sup>I got the information on voting and returns from the *Albany Evening Journal*, which reported the election returns in its April 29 through May 6 editions.

<sup>17</sup>One commentator suggested wryly: "At the end of the committee appeared a merchant and a farmer, possibly for the reason that condiments make a dish more savory." 2 Alexander 109. Actually, three committee members listed themselves as farmers, Thomas Sears (D), John Stephens (D), and George Patterson (W), and one described himself as a merchant, Orris Hart (D). But the self-descriptions may be misleading. For example, Enoch Strong (W) listed himself as a farmer, though he practiced law. See the exchange between Strong and John Brown (D) in *Atlas Ed.*, p.605 col.1, for a good example of anti-lawyer sentiment. Even if Alexander is wrong on the numbers, he may well be correct in his analysis. While Patterson participated in the judiciary debates, Stephens, Sears and Hart remained silent.

<sup>18</sup>See e.g. *Speeches of W.B. Wright* (W), *Argus* p.480; *Jordan* (W), *Argus* p.410; *Kirkland* (W), *Argus* p.449; *Harris* (W), *Atlas* p.639.

<sup>19</sup>*Argus* p. 410 col.1 *Speech of Jordan* (W).

<sup>20</sup>Levi Chatfield, *Argus* p. 413-14.

<sup>21</sup>Although this paper focuses on the CCE, I do not want to entirely lose sight of the fact that the bi-partisan agreement to abolish it was part and parcel of a bi-partisan agreement on the need for more general judicial reforms. Many of the evils were well known. Generally, the system simply could not handle the volume of controversies submitted to it. Significant delays slowed every step of the process. Hurlbut, *New York Evening Post*, July 17, 1843 p.2; 18 *Dem. Rev.* 404, 413 [June 1845] For example, the CCE was two years behind in its docket. Sedgwick, *New York Evening Post*, August 17, 1843 p.2; 18 *Dem. Rev.* 404, 416 [June 1845]. By forcing those who sought the law's protection to "pay money largely to enforce a right, and then to have half a generation pass away...before a final decision upon one's claim can be had," delay made "a mockery of justice." Hurlbut, *New York Evening Post*, July 17, 1843 p.2. Specific courts came in for specific criticism of their operations. First, county courts were corrupted with the practice of taking fees. Most judges in the state were paid a nominal per diem allowance for each day they sat on the bench while their real income came from the collection of fees for filings, examination of witnesses, appeals, etc. Both Whigs and Democrats agreed that this method of compensation corrupted administration of the laws by creating pressures on the judges to act so they would get the fee. Cf. *Speech of J.J.Taylor* {D} in *Argus Ed.* p. 469 col. 1, with *Speech of Ambrose Jordan* {W}, in *Argus Ed.* p. 451 col.1. Second, the Chancery Court also took its hits from all directions. The Whigs complained it was inefficient. See e.g. *Speech of Kirkland*, in *Argus Ed.* p.450 col.1 [August 11]. The Democrats called it despotic. Sedgwick, *New York Evening Post*, August 17, 1843 p.2; David D. Field, *New York Evening Post*, January 14, 1846. Both Whigs and Democrats objected that it was a one-man court. Cf. Simmons in *Argus Ed.* p.619 col.2 [September 7], with Swackhamer in *Argus Ed.* p.878 col.1 [August 12]. Finally, the Supreme Court was defective in its separation of trial function from appellate function---its justices had lost touch with practical trial experience and thus made unrealistic decisions. O'Connor in *Atlas Ed.* p.693 col.2 [August 19]

<sup>22</sup>Sedgwick, *New York Evening Post*, August 17, 1843 p.2. To Sedgwick, the "law pervades and controls every class, every occupation, almost every considerable transaction of social existence. It is with you when you lie down, and with you when you rise up; and were it what it should be, in its omnipresence and its beneficent impartiality, it could have no more fitting parallel than divinity itself." Note that although Sedgwick says law is intangible, he is not expressing a belief in natural law. Like most Democrats, he was a thoroughgoing positivist who believed that laws were created by the will of society and it was the legislature's job to

decide the law and write it down so that all might know and obey it. The Democrat Michael Hoffman was a notable exception—see *Atlas Ed.* p.731, 735 where Hoffman claims that the job of the legislature was to determine natural law and set it down in writing. For a good description of the gradual displacement of natural law by common law during this time period, see Robert M. Cover, *Justice Accused* (Yale U. Press 1977) 8-118 (discussing the interplay in the context of slave law).

<sup>23</sup>Hoffman, *New York Evening Post*, September 27, 1843 p.2. See also John Brown (D), in *Atlas Ed.* p.731 (August 22).

<sup>24</sup>Jordan, in *Argus Ed.*, p.516 col.2 (August 21).

<sup>25</sup>NYEP 8/17/43 - TS.

<sup>26</sup>O'Connor, in *Argus Ed.*, p.502 col.1 [Aug. 19].

<sup>27</sup>13 Dem. Rev. 569 [Dec. 1843].

<sup>28</sup>I reviewed all cases issued by the CCE during the 10 years prior to 1846. Over the 5 year period referred to in the 1843 Democratic Review magazine critique, 8 cases out of 154 were “nearly” split along party lines, where “nearly” is defined as more than 85%. Only one case was ever voted along strict party lines and that was in 1838. That is hardly a trend. I have a list of the cases and party affiliation of the CCE members in my files if anyone cares to look.

<sup>29</sup>The reports of the CCE opinions sometimes note that a senator delivered an oral opinion before the vote and then reduced it to writing for the reporter’s benefit. But the reports make no distinctions between opinions given before the vote, either orally or in writing, and those not created until after the vote. Cf. *Smith & Hoe v. Acker*, 23 Wend. 653 (CCE 1840, Bronson, J. dissenting) with *Hanford v. Archer*, 4 Hill 271, 274 [CCE 1842, Opinions of Hopkins and Bradish].

<sup>30</sup>1 Hill 438 [S.Ct 1841].

<sup>31</sup>*Butler v. Van Wyck*, 1 Hill 438, at 463-4 [S.Ct. 1841](Bronson, J., dissenting). Butler was one of an interminable number of debtor/creditor cases which turned on an inconsistency between two statutes, an inconsistency highlighted by economic conditions after the Panic of 1837. In a series of cases, the Democratic Supreme Court interpreted the statutes one way. *Beekman v. Bond*, 19 Wend. 444 [S.Ct. 1838]; *Randall v. Cook*, 17 Wend. 56 [S.Ct. 1837]; *Doane v. Eddy*, 16 Wend. 529 [S.Ct. 1837]. But in 1840, the Whig-dominated CCE overruled those decisions in *Smith & Hoe v. Acker*, 23 Wend. 653 (CCE 1840). That is the decision that Justice Bronson scorned. The reversal in *Smith*, however, cannot be attributed to party affiliation. First, the vote was not along party lines. The CCE voted to overrule the Supreme Court by a margin of 21 (16 W, 5 D) to 4 (1 W, 2 D, and the Chancellor). Second, the minority votes should not be read as approving the Supreme Court’s doctrine. The Chancellor had urged affirmance of the Supreme Court on two other grounds, unrelated to the construction of the statute, and the minority members gave that as the reason they joined him. The majority, however, refused to consider the Chancellor’s arguments because they thought that the issues involved had not been properly presented to the Supreme Court below. Such niceties did not always bother the CCE during that term. See *Warner v. Beers*, 23 Wend. 103 (1840), another politically charged case where the CCE decided to rule on an issue that the Supreme Court had carefully refused to consider or allow to be presented. Third, a later Democrat-dominated CCE reaffirmed the *Smith* decision and again reversed the Supreme Court. *Hanford v. Archer*, 4 Hill 271 (CCE 1842). The vote there was 17 (12 W, 4 D) to 7 (6 D, and the Chancellor). Almost all of the dissenting votes came from newly elected Democrats but only three of the dissenters made it clear (either in this case or by their votes in earlier cases) that they approved of the Supreme Court’s doctrine and wanted to reverse *Smith*. Bronson was the only Supreme Court Justice to disobey the CCE’s reversal.

<sup>32</sup>*Id.* at 899-900.

<sup>33</sup>The controversy which brought this case to court arose when a bank chartered under the new law sued to collect on a promissory note made to it. The defendant (who was a sureties on the note) argued the bank had no authority to collect because the law under which it was purportedly created—the General Banking Act—was constitutionally infirm.

<sup>34</sup>*People v. Morris*, 13 Wend. 325 [S.Ct., 1834, Nelson, C.J.]. Contra 2 Lincoln 27-45.

<sup>35</sup>*Albany Evening Journal*, April 19, 1838

<sup>36</sup>*Thomas v. Dakin*, 22 Wend. 9 [S.Ct. October Term 1839, Cowen, J.].

<sup>37</sup>Although it's beyond the scope of this paper, my study of this controversy suggests that it was less about political disagreements than it was about differing conceptions of the power of judicial review and judicial roles. Throughout this discussion one should not forget that all three Supreme Court Justices—Samuel Nelson, Esek Cowen, and Green C. Bronson—were conservative Democrats. And their opinions, as well as those from the CCE, reveal more a split in statutory interpretative approaches—even among Democrats—than party politics. That the conflict was more institutional than political is also implied by a later case, *Gifford v. Livingston*. 2 Denio 380 (CCE 1845). There, after the Democrats had regained control of the Senate, the CCE nonetheless reaffirmed its holding in *Warner*. Of course the upcoming Constitutional Convention might have also affected Democratic votes.

<sup>38</sup>*Id.* at 910 col.2.

<sup>39</sup>*Id.*

<sup>40</sup>13 U.S. Mag. & Dem. Rev. 563, 569 [Dec. 1843].

<sup>41</sup>E.P. Hurlbut, in *New York Evening Post* July 18, 1843 p.2.

<sup>42</sup>*Id.*

<sup>43</sup>*Id.*

<sup>44</sup>Theodore Sedgwick, *New York Evening Post*, August 17, 1843 p.2.

<sup>45</sup>*New York Evening Post*, July 18, 1843 p.2.

<sup>46</sup>*Id.*

<sup>47</sup>E. P. Hurlbut, in *New York Evening Post*, July 20, 1843 p.2.

<sup>48</sup>Sedgwick, *New York Evening Post*, August 17, 1843 p.2.

<sup>49</sup>Thomas Morris [D], in *New York Evening Post*, August 17, 1843 p.2 (emphasis in original).

<sup>50</sup>13 Dem. Rev. 569 [Dec. 1843].

<sup>51</sup>Morris' speech to one of the 1843 Reform Meetings is the best example. He claimed that the suit was commenced in 1838 between amicable parties, immediately after the spring adjournment, reached the CCE and was decided "before a single man who voted for the law, vacated his seat in the Court." See *New York Evening Post*, August 17, 1843 p.2. *Warner v. Beers* came before the CCE in 1840, two years after the passage of the original act. This meant that about half of the Senate which had originally passed the measure had been replaced, with Democrats being replaced by Whigs. 1840 and 1841 were the only two years that the Whigs had control of the Senate. Senators sat for four year terms and elections came each year, so one fourth of the Senate seats were open each year. Of the 32 senators in the 1840 Senate, 15 had been part of the 1838 Senate and 17 had not been. Now it could be that Morris meant simply that all the Democrats who had voted against the Banking Act had been replaced by Whigs who would support it. That was most likely true.

<sup>52</sup>See e.g. O'Connor, Atlas Ed., p.693 col.2. In fact, three statutes were held unconstitutional by the CCE under the 1821 constitution. The cases are: *Van Hook v. Whitlock*, 26 Wend. 43 [CCE 1841]; *Purdy v. People*, 4 Hill 384 [CCE 1842]; and *Warner v. People*, 2 Denio 272 [CCE 1845]. Lincoln, 5 *Constitutional History of New York* 156-157 [1905]. Accord Corwin, "The Extension of Judicial Reform in New York: 1783-1905," XV Mich. L. Rev. 281, nt.1, 286, 306 [Feb. 1917]. In three other cases, it was the Supreme Court who found laws to be unconstitutional.

<sup>54</sup>David D. Field, *New York Evening Post*, January 8, 1846 p.2. Only 30 of these cases were reported, see 2 Denio 205-607, and See Table I in the Appendix.

<sup>55</sup>Michael Hoffman (D), *New York Evening Post*, August 10, 1843 p.2.

<sup>56</sup>*Id.* (emphasis in original).

<sup>57</sup>*Id.* See also Hoffman, in *Atlas Ed.*, p.671 col.2.

<sup>58</sup>*Id.*

<sup>59</sup>And the executive too, but that is another subject.

<sup>60</sup>Hurlbut, *New York Evening Post*, October 3, 1843 p.2.

<sup>61</sup>Hoffman, in *New York Evening Post*, August, 10 1843 p.2.

<sup>62</sup>Charles O'Connor, in Bishop, W., & Attree, W., eds., *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York*, (*The Evening Atlas*, Albany 1846) [*"Atlas Ed."*] p.697.

<sup>63</sup>*Argus Ed.* p.439 {August 10}.

<sup>64</sup>*Argus Ed.* p.378-9 {August 1}.

<sup>65</sup>*Argus Ed.* p.503-505 {August 19}.

<sup>66</sup>*Id.* p.504.

<sup>67</sup>*Atlas Ed.* p.707 {August 19}.

<sup>68</sup>*Id.* p.730-31.

<sup>69</sup>Note also that one finds both a Whig and Democrat on each side of the issue, suggesting that party ideology or discipline was less important to the question of judicial reform than were conceptions about the judicial role and the interplay of law with politics, which did not appear strongly correlated with party affiliation. This is another aspect of the judicial reform movement in New York that I am studying.

<sup>70</sup>Larry D. Kramer, *Forward, We the Court*, 115 Harv. L. Rev. 4, 13-15, 128-69 (2001) (arguing that the Rehnquist court has aggressively moved from the traditional idea of judicial review where the Court has the last word on whether a particular statute comports with the Constitution to a jurisprudence of "judicial sovereignty" where the Court has the only say in the matter and reviews all actions with no regard to the views of the other branches).

<sup>71</sup>Barry Friedman, *Judging Judicial Review: Marbury in the Modern Era: Mediated Popular Constitutionalism*, 101 Mich. L. Rev. 2596, 2598 (August, 2003).

<sup>72</sup>Cf. Prakash and Yoo (judicial review was there from the beginning) with Kramer, supra, (no it was not).

<sup>73</sup>One Whig editorial, lamenting the proposal to elect judges, wondered facetiously what these election-crazed reformers would propose next—election of cabinet posts? \_\_ Am. Whig Rev. 520, 526-7 {November 1846}. In fact, the Whig Review's counterpart had made just such a proposal. 16 Dem. Rev. 170 {September 1845}. While it is true that Democrats seemed to have a mania for popular elections and short terms of office, one Whig out-did even the radical Democrats. Ansel Bascom, a Whig delegate to the 1846 Convention, enthusiastically proposed to make judges serve one-year terms, as they did in Vermont. It is unclear whether he also wanted to follow Vermont's practice of electing the judges by joint ballot of both houses of the legislature, however. *Atlas Ed.*, p.586 {August 11}.

<sup>74</sup>Bronson justified this position in *Pierce v. Delameter*, 1 N.Y. 17 (1847).



## Self-(Un)Conscious Narrative of the Female Body

*Dorothea's and Rosamond's "Finger  
Rhetoric" in Eliot's Middlemarch*

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Hilary Franklin '05

Juliet: Good pilgrim, you do wrong your hand too much,  
Which mannerly devotion shows in this;  
For saints have hands that pilgrims' hands do touch,  
And palm to palm is holy palmers' kiss.

- William Shakespeare, *Romeo and Juliet*

Destiny stands by sarcastic with our *dramatis personæ* folded in  
her hand.

- George Eliot, *Middlemarch*

In the genre of the Victorian novel, the body frequently “defines the space in which narratology has traditionally described character” (Punday 186). The nineteenth-century Englishwoman idealized in Victorian literature consistently submits to an “essentially reproductive,” rather than productive, role in society. Such a woman’s morality is directly proportional to a man’s successful appropriation of her body, and successful appropriation is measured in the woman’s maternal status. Traditionally, the heroine of Victorian novels does not seek this male appropriation of her body—often called the male gaze—and instead attempts to evade it. Indeed, matrimony and childbearing are considered to reward the

heroine who successfully has engaged in polite, self-effacing seductive behaviours that may indicate future submission to a husband. Had Charlotte Brönte's reserved Jane Eyre or George Eliot's other-worldly Dorothea Brooke sought such attention, the heroine would "collid[e] with circumstances, requir[e] chastening, or ... [be] written out of the story" (Newman 3). In explicitly guiding their heroines from such collisions, Brönte and Eliot demonstrate the typical tendency of Victorian novelists to masculinize the contexts in which their heroines discover themselves and, ironically, invoke men as the "crucial figures" in their heroines' lives (Nestor 167).

Beth Newman, in *Subjects on Display: Psychoanalysis, Social Expectation, and Victorian Femininity*, argues that George Eliot is unique among Victorian novelists due to her insistence through her most prominent female characters that women "must" resist the desire to function as embodied, submissive centerpieces in male society (3, emphasis original). Within the "particular web" of Eliot's *Middlemarch*, Dorothea Brooke and Rosamond Vincy often are contrasted, respectively, as the "dark heroine" who shuns the male gaze when not oblivious to it and the "fair femme fatale" who revels in it (Eliot 170; Green 87). Eliot invokes the concept that the physical body can define moral character in the opening paragraph of *Middlemarch* and, indeed, particularly differentiates women in this respect:

Young women of such birth, living in a quiet country-house, and attending a village church hardly larger than a parlour, naturally regarded frippery as the ambition of a huckster's daughter. Then there was well-bred economy, which in those days made show in dress the first item to be deducted from, when any margin was required for expenses more distinctive of rank. (Eliot 29)

This descriptive but reductionistic dissimilarity supposed of Dorothea, a young woman "of such birth," and Rosamond, "a huckster's daughter," ignores the rejection of the idealized nineteenth-century Englishwoman's uncompromising submission that both Dorothea and Rosamond will express in subsequent pages (Eliot 29). Although acting on different motivations, Eliot's most prominent female characters in *Middlemarch* demonstrate the "peculiar centrality of [each woman's] own subjectivity" that not only thwarts the first husbands of both Dorothea and Rosamond, but

also prevents either woman's fulfilled moral potential, through matrimony and childbearing, which Middlemarch society desires (Green 87). Representations of the female body in the forms of Dorothea and Rosamond rarely encompass the entire body. The conventionally poeticized features, comprising the eyes, lips, and neck, appear slightly more often in description. Most frequent in appearance and most significant to the argument that Dorothea and Rosamond persistently reject the idealized woman's role, however, are Dorothea and Rosamond's hands—a common literary symbol of agency even before Lady Macbeth's hands bore stains (Rowe 14). Consequent of the societal belief that a woman's appearance and activities should be "repressed and redirected onto behaviors that proved [her] morality," the nineteenth-century idealized Englishwoman directed her hands to activities, such as childrearing and praying, that benefited her husband, family, and society (Shaffer 43). This intended removal of communicated self-consciousness and self-agency from the female body, however, is not present in the independence sought and embraced by Dorothea and Rosamond. Rather, Dorothea's and Rosamond's finger rhetoric in *Middlemarch* demonstrates each woman's embrace of activities that reflect her personal interests, exemplified by Dorothea's sketches of plans for new cottages for the poor and Rosamond's frequent performances at the piano.

The "finger rhetoric" in which I argue that Dorothea and Rosamond engage takes its nomenclature from one of Eliot's passages on Caleb Garth (Eliot 438). The relevance of this passage to Dorothea and Rosamond, both of whom seek their own versions of "the most honourable work that is," lies in Caleb's method of self-meditation (Eliot 438):

... [Caleb] still sat holding his letters in his hand and looking on the ground meditatively, stretching out the fingers of his left hand, according to a mute language of his own. At last he said— 'It's a thousand pities Christy didn't take to business, Susan, I shall want help by-and-by. And Alfred must go off to the engineering—I've made up my mind to that.' He fell into meditation and finger rhetoric again for a little while... (Eliot 437-438)

The initial image in Eliot's prelude to *Middlemarch* of "the little girl walking forth one morning hand-in-hand with her still smaller brother" foreshadows the manner in which Dorothea and Rosamond use their hands

to meditate on and to communicate, simultaneously, their common rejection of “the social will to interpellate them as exemplary subjects” and their subsequent pursuits of a self-determined female role (Eliot 25; Green 87). The activities each applies herself to demonstrates each woman’s consciousness or unconsciousness of her physical and empathetic selves. Thus, in individuating their roles as women, Dorothea and Rosamond establish their strong self-agency; in communicating such self-agency primarily through finger rhetoric, Dorothea and Rosamond symbolically and literally rebel against the simplistic and “essentially reproductive” physicality desired of a nineteenth-century Englishwoman (Matus 215).

### **Dorothea**

... a breathing blooming girl, whose form, not shamed by the Ariadne, was clad in Quakerish grey drapery; her long cloak, fastened at the neck, was thrown backward from her arms, and one beautiful ungloved hand pillowed her cheek, pushing somewhat backward the white beaver bonnet which made a sort of halo to her face around the simply braided dark-brown hair.

- George Eliot, *Middlemarch*

Dorothea’s chosen activities and actions reveal her limited consciousness of her physical self. Descriptions of Dorothea’s “so finely formed” hand and wrist originate outside her self-consciousness and usually from the narrative voice, which observes that Dorothea’s hands are “not thin hands, or small hands; but powerful, feminine, maternal hands” (29, 61). Naumann, a German painter of Will’s acquaintance, echoes the narrative voice’s delineation of Dorothea’s “one beautiful ungloved hand” with his own exclamation regarding “that wonderful left hand” (220). Yet in the scene in which Dorothea pays the greatest attention to her hands, she is not aware of her physical self, much less her beauty, and instead focuses exclusively on her mother’s emerald- and diamond-studded ring and bracelet:

‘They are lovely,’ said Dorothea, slipping the ring and bracelet on her finely-turned finger and wrist, and holding them towards the window on a level with her eyes. All the while her thought was trying to justify her delight in the colours by merging them in her mystic religious joy.

...  
 She took up her pencil without removing the jewels, and still  
 looking at them. She thought of often having them by her, to  
 feed her eye at these little fountains of pure colour. (36)

Even Naumann's request, as he sketches Dorothea, that she resume her original stance, "leaning so, with [her] cheek against [her] hand," does not awaken physical self-consciousness in Dorothea (249). Indeed, Dorothea complies without "affected airs and laughs" (248). Nor are Dorothea's hands engaged in an elaborate toilette each morning except in producing "the simply braided dark-brown hair," and Dorothea wears the "wedding-ring on that wonderful left hand" as a sign of personal propriety rather than as an adornment (220). Thus, Dorothea's finger rhetoric communicates her unconscious ignorance and, at times, conscious suppression of her physicality such that her self-agency is not oriented by physical self-consciousness. That the physical actions of her hands indicate extreme emotion or act out a personal code of decorum rather than demonstrate physical coquetry is best exemplified in Dorothea's unconsciously "childlike" and "impetuous" hand-clasping when she urges her uncle to improve Tipton Grange and in her formal, albeit tense, handshakes with Will (424). From her Puritanical refusal to wear jewelry in company to her sobbing outburst to Will that she "want[s] so little—no new clothes," Dorothea rejects acting as the idealized woman who, in Mr. Chichely's words, "lays herself out a little more to please [men]" (870, 115).

As if to compensate for her lack of physical self-consciousness, Dorothea displays a determined, if dilettantish, empathy for both abstract and actual others through her hands' actions and activities. Whether she takes a drawing pencil to hand or fervently folds her hands into prayer "as if she thought herself living in the time of the Apostles," her finger rhetoric reveals a personal independence tending toward empathetic extremes (31). Most often mentioned and most exemplary are Dorothea's sketches of plans for new cottages, which is an activity that, like riding, she intends to renounce upon Celia's divulgence that Sir James likely will incorporate Dorothea's interests into his courtship:

Celia could not help relenting. 'Poor Dodo,' she went on, in an amiable staccato. 'It is very hard: it is your favourite *fad* to draw plans.' *Fad* to draw plans; Do you think I only care about

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my fellow-creatures' houses in that childish way? I may well make mistakes. How can one ever do anything nobly Christian, living among people with such petty thoughts?' (60)

Pauline Nestor notes Eliot's "ambivalent" opinion of women's interrelations, here taking the characterization of "the divisive, destructive element" between Dorothea and Celia even as the former of the sisters hopes to embrace the alternate, "positive, sustaining role" available to her (167).

The poor of Tipton, Freshitt, and Lowick are not the only abstract recipients of the empathetic work of Dorothea's hands. Prior to and at the beginning of her first marriage, Dorothea abstracts Casaubon as a husband who "was a sort of father, and could teach you even Hebrew" based on her independently, rather than societally, determined belief that nineteenth-century "[w]omen's knowledge was to be relative to men's needs" (Eliot 32; Green 75). Celia's criticism of Casaubon's appearance and reticence and Mr. Brooke's singularly astute observation that Dorothea "had more of [her] own opinion than most girls" helps to create in Dorothea an almost vengeful, highly conscious empathy, causing her to take in hand a pencil to write dictations or a book to read so that she might save Casaubon's eyesight with her hands (64).

Yet the early trials of Dorothea's marriage to Casaubon sever this empathetic enthusiasm, and Dorothea's empathy for the abstracted Casaubon yields to pitying empathy for the actual man: "[I]f she were to say, 'No! if you die, I will put no finger to your work'—it seemed as if she would be crushing that bruised heart" (521). As Caleb Garth seeks to perform good work with his own hands, Dorothea wishes to render good deeds through hers. Dorothea's marriage to Will becomes the most emotionally significant of her good deeds: no longer, then, are her hands "tied from making up to him for any unfairness in his lot" (583). Indeed, in joining her hand with Will's in marriage, Dorothea does not sacrifice her self-agency but rather embraces the unity of her empathetic personal interests with her husband's in the "struggle against [wrongs]" (894). She is neither "fettered" nor "weak" (523).

### **Rosamond**

Rosamond left her husband's knee and walked slowly to the other end of the room; when she turned round and walked

towards him it was evident that the tears had come, and that she was biting her under-lip and clasping her hands to keep herself from crying.

- George Eliot, *Middlemarch*

The activities and actions in which Rosamond engages her hands reveals a hyper-consciousness of her physical self to the extent that her hands are simultaneously the means of adornment and adornments themselves. That Rosamond's hands are "small," "little," "plump," "taper," and "white" may be due to Nature rather than to Rosamond (471, 716, 125, 638, 827). However, Rosamond deliberately accentuates her hands, which are "duly set off with rings," in each of her actions (471):

But she remained simply serious, turned her long neck a little, and put up her hand to touch her wondrous hair-plaits—an habitual gesture with her as pretty as any movements of a kitten's paw. Not that Rosamond was in the least like a kitten: she was a sylph caught young and educated at Mrs Lemon's. (189)

Whether she is working on "some trivial chain-work" or performing at the piano, Rosamond displays "the executant's instinct" in showing her hands and her appearance in general to the best physical advantage (335, 190). Her hands' delicate and practiced movements indicate the degree of Rosamond's assurance of her self-agency, exemplified by how she drops her tating from her hands when her "most perfect management of self-contented grace" is disturbed by the unexpected entrance of Lydgate (335). Yet Rosamond, both the "best girl in the world" and Mr. Chichely's ideal woman, accepts the compliments but not the hands of most of her male suitors in order to preserve herself as "the graceful creature with blond plaits and with little hands crossed before her, who had never expressed herself unbecomingly, and had always acted for the best—the best naturally being what she best liked" (139-140, 716).

Despite Rosamond's success in polite seduction, however, she is nineteenth-century society's idealized woman often in appearance but never in motivation. Her conscious maintenance of her physical appearance, particularly in putting up her plaits, allows her to appropriate the hands of Lydgate—who unconsciously had "show[n] his large white hands to much advantage, as Rosamond thought"—without need to busy her own

(303). Rosamond's conscious preservation of her own physical beauty consequently conflicts with society's belief that a woman's worth was in her body and its "proper deployment," yet Rosamond consciously uses her beauty's provincial influence to reverse the typical gendered power dynamics when Lydgate's arrival in Middlemarch brings "the necessary materials ... at hand" (Shaffer 40; Eliot 305).

The actions of Rosamond's hands communicate a self-conscious empathy as well. Frequently doubled in the text, both literally as "the [nymph] in the glass, and the one out of it" and speculatively as her present self and "a romantic heroine," Rosamond empathizes with her abstracted self as if it were her actual self (139, 331). Indeed, she withdraws her hand whenever she is made uncomfortable or whenever she fears losing influence despite her attractive appearance. During her marriage to Lydgate, Rosamond rearranges her hands to maintain her own comfort as she repeatedly removes her hands from Lydgate's to her tating or to her sides, symbolizing the simultaneous removal of her affection from Lydgate to herself. When she "clasp[s] her hands to keep herself from crying," Rosamond demonstrates the self-agency and self-empathy involved in such gestures (700). When confronted after Lydgate receives Sir Godwin's letter, Rosamond retreats "with her hands folded before her ... intrenching herself in quiet passivity," invoking her former physical stance before her unworthy Middlemarch admirers (715). Although Rosamond appears to obey Lydgate's frequent summons—"Come dear, put down that work and come to me"—her apparent compliance is a formality rather than the yielding prized by Victorian society (699). Rosamond returns to activities that will flatter her abstracted idealized self the most, whether it is tating or applying for financial assistance, even when she is ill:

[Rosamond] arranged all objects around her with the same nicety as ever, only with more slowness—or sat down to the piano, meaning to play, and then desisting, yet lingering on the music stool with her white fingers suspended on the wooden front, and looking before her in dreamy ennui. (827)

Twice in the text Rosamond extends her empathy to actual others, both instances of which are expressed through hand gestures. Once, at the advent of her marriage's financial troubles, Rosamond literally reaches out to her husband as she "put his hair lightly away from his

forehead, then laid her other hand on his, and was conscious of forgiving him" (639); Rosamond and Lydgate are, in this moment, "under the power of that same past" of courtship in which the lovers' empathy is shared in "momentary touches of finger-tips" (639, 380). The second instance occurs during Rosamond's second meeting with Dorothea, which Rosamond prepares for by "wrapping her soft shawl around her" as if it were "cold reserve" (850). Yet Dorothea's approach, with her hand outstretched, evokes in Rosamond "a doubt of her own prepossessions," and the women's resulting handshake transcends mere social propriety (851); a compromise of "the divisive, destructive element" and "the positive, sustaining role" has been struck (Nestor 167). Overall, however, Rosamond's empathetic actions toward actual others do not detract from her persistent self-agency and consciously limited empathy.

#### **Dorothea and Rosamond, Née The "Dark Heroine" and "Fair Femme Fatale"**

Together, these physical and empathetic self-(un)consciousnesses define both Dorothea's and Rosamond's personal motivations to pursue an independent, self-determined role that preserves self-agency instead of accepting the idealized nineteenth-century Englishwoman's role that suppresses it. Dorothea and Rosamond engage their hands in activities that reflect personal, not societal, interests, and their resulting finger rhetoric provides significant insight into the motivation of each woman for self-agency and particularly into the apparently ironic enthusiasm of each in giving her hand in marriage—an action that nineteenth-century English society would have regarded as an ultimate surrender of self-agency. That both Dorothea and Rosamond prior to their first marriages "imagin[e] that marriage will reward [their] true worth" indicates the extent to which each has embraced her self-idealized role as a woman (Green 88).

Yet Dorothea's and Rosamond's different, if not opposite, combinations of physical and empathetic self-(un)consciousnesses differentiate the women as Eliot's "dark heroine" and "fair femme fatale" (Green 87). Such differentiation describes each woman's motivation, exemplified best, respectively, in Dorothea's desire for a supporting role in which she "learn[s] to read Latin and Greek ... as Milton's daughters did" and in Rosamond's desire to be "a romantic heroine, and [play] the part prettily" (87-88, 331); hence, Rosamond "put[s] up her hand to touch her wondrous

hair-plaits" to ensure that she looks the heroine's part, while Dorothea's "one beautiful ungloved hand pillow[s] her cheek" in empathy with the sculpture of Ariadne (189, 220). These self-determined female roles of helper and heroine demonstrate "the delusion of each about the peculiar centrality of her own subjectivity" (Green 87). That Eliot presents the former, but not the latter, role as deserving of an epic "name on the earth" emerges as perhaps the greatest irony when Dorothea's and Rosamond's motivations for securing self-agency, ultimately and ironically through marriage, are compared (896).

Equally fervent in rejecting the role of the nineteenth-century's idealized woman, Dorothea and Rosamond differ in their expressions of and motivations for this rejection. That their hands divulge their physical and empathetic self-(un)consciousnesses suggests the inexorable "centrality of [their] own subjectivity" as itself a form of self-agency (Green 87). The proverbial but self-agent "Destiny stands by sarcastic" with Rosamond's "*dramatis personæ* folded in her hand," revealed in the text to be her married life with Lydgate and again with an elderly, wealthy physician (122). Dorothea as the "new Theresa," however, finds her destiny in realizing the empathetic joining of her self-Will as that (896):

Which mannerly devotion shows in this;  
For saints have hands that pilgrims' hands do touch,  
And palm to palm is holy palmers' kiss.

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# History is What Hurts

*Exploring the effects of an 'unmasterable past'  
in 21<sup>st</sup> century Germany*

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Ross Lerner '06

## **Vorbei!<sup>1</sup> Or, Is the Past Past?**

There is a pain – so utter –  
It swallows substance up –  
Then covers the Abyss with Trance –  
So Memory can step  
Around – across – upon it –  
As one within a Swoon –  
Goes safely – where an open eye –  
Would drop Him – Bone by Bone.  
- Emily Dickinson, Poem 599

A noted German leftist intellectual in the second half of the 20th century, Professor Hans Schwerte was a literary scholar and teacher who had been renowned as a champion of *Wiedergutmachung* (reparations) and celebrated for his attempts to bring his students and readers into dialogue about the crimes of the Nazis. In April 1995, it was revealed that Professor Schwerte had formerly been Hans Ernst Schneider, an 'intellectual' SS officer and assistant to Heinrich Himmler.<sup>2</sup> Schneider was 23 when the Nazis came to power, 35 as World War II came to an end and the Nazi party collapsed. Instead of hiding out in South America, like many other SS officers and Nazi party members, Schneider furtively feigned his own death in Berlin and resurrected himself as Schwerte, remarried his wife under his new name, and eventually turned to academia. During a very

successful academic career as a Germanist and university administrator, he published books and articles on Goethe, Rilke, and German-Jewish literature; he worked to ground the study of literature within the secular humanistic tradition on which German philology had earlier flourished. Even now Schwerte is remembered as one of the few professors of his generation to support and willingly engage the students of the protest movement of the late 60s and 70s, while studying the ways in which political ideology itself can be preserved and perpetuated as well as critically engaged in cultural productions such as literature. The protest movement that he supported, in addition to contesting the war in Vietnam and struggling for civil rights, was subtended by a broader objections made by the children of Nazi perpetrators in West Germany against the crimes of their parents in WWII, which students read in the older generations' silence about the Nazi years.

The Schneider/Schwerte story was a shock to Germany. How could a Nazi, an SS officer, become such a progressive figure in the Federal Republic of Germany? Had Schwerte been living a "double life," hypocritically writing a book about Faustian ideology in Germany while surreptitiously celebrating his national socialist past? The Nazi-era was over. Germany was a relatively healthy democracy. How, then, was this figure — whether amnesiac or split personality ("Once a Nazi, always a Nazi!") — able to become such a vigorous part of a democratic movement that supposedly arose through an absolute rupture with the Nazi-period? The Nazis were a thing of another time, so how could one survive in a democratic nation through any method other than impossible dissimulation? Can such a man reform and convert?

This intriguing "parable," as Claus Leggewie has called it, is at once outstandingly exceptional and disturbingly representative in contemporary German history.<sup>3</sup> The story of Schneider-to-Schwerte is particularly instructive because, as Leggewie's book cleverly teases out, Schwerte was not the only one to have changed his name and taken up a progressive politics in post-war West Germany:

Because Germany, too, had cast off its name, the "German Reich," in 1945 and, without knowing exactly where the journey would or should have led, had gotten for itself a new name: the Federal Republic of Germany in the West; German Democratic Republic in the East. [...] The western section, in the beginning exactly as tentative, senseless and dishonest as

Schwerte, began a democratic career that was never flawless but still astonishingly successful—and was in the end, exactly like Schwerte, to be confronted again with its brown prehistory and to receive interrogations into the truth of the conversion (SS, 16).<sup>4</sup>

This parable, then, dispels two related myths that were popular in 1950s Germany and still maintain an appeal, albeit diminished, in certain conservative German circles today: the strangely-twined myths that explain 1945 and the defeat of the Third Reich as a “*Zusammenbruch*” (breakdown/collapse) or a “*Befreiung*” (liberation) (SS, 12). The former version of this myth holds that a discrete and definite break can be located at the collapse of the Third Reich in 1945: the Federal Republic that followed neither enclosed nor contained any continuity with the regime of National Socialism. The latter myth of “liberation,” a platitude which even Ronald Reagan managed to perpetuate in his 1985 Bitburg Cemetery speech, assumes that the German people were all prisoners and victims of the Nazis, rather than, variously, willing executioners, party members, complicit bystanders, and only rarely victims in the same sense as were those liberated from the death camps. There were Germans, of course, also subjected by the Nazis, and some who hid Jews and resisted. Such Germans were the exception, though. This myth tries to re-imagine them as the rule. Historically miming the nation’s own nominal and political turn, the narrative of Schneider-to-Schwerte illustrates that the ways in which Germany and Germans have represented their past are often mystifying, and the profusion of paradoxes in attempts to explain the Holocaust and National Socialism in German history, rather than forging a mode of constructive self-erasure, have insistently undercut their implicit goal: to narrativize a traumatic past.

Contradictory narratives about Germany’s troubled past spring from a disjunct between the ideality of a democratic republic and the materiality of a lingering fascism, a perennial rending of structure and event. Nazis were incorporated at the inception of a so-called new Germany. In 1947 Eugen Kogon noted, regarding the 10 million registered members of the Nazi party who survived the war, “We can only kill them or win them over” (SS, 141).<sup>5</sup> The democratic Federal Republic of Germany was founded with (ex-)Nazis in the highest positions of the political, judicial, industrial, academic, and medical realms of society. Literally, the parable of Schneider-to-Schwerte shows us that a reductive description of the

Nazi past in Germany as "*vorbei*" is exceedingly problematic. The story also metaphorizes the paradoxical nature of the temporality of a traumatic past: that it is at once forever recalcitrantly rooted in the irrecoverable past and yet always intruding and disturbing the present through modes of inheritance and unpaid debts, abject hauntings and unhealed wounds. Public officials and elites, themselves often directly complicit, received history in ways that they did not choose, and could not simply fashion a new state in a way that could negate any transmission of the past.

Historical circumstances transmitted from the past cannot just be wished away with simple policies to restructure or manipulate. What Jan Phillipp Reemtsma has called the "*terroristic presence of the past*"<sup>6</sup> weighs on the present tense in ways that make the structuring of a transformed present and future fraught with difficulties. The construction of Schneider/Schwerte's "*My name would be Schwerte*"<sup>7</sup> (SS, 15) is no less of a delusive autobiographical defacement than "*My name would be the Federal Republic of Germany.*" The crimes of the Nazis, and in particular the Holocaust, seem to resist the kind of narrativization that would be able to separate the present from the past of which it is made. This paradox – that the past can be at once absent and present—is in some sense characteristic of history in general. The contradiction is even more arresting in relation to the Holocaust's temporality. Yet one of the most amazing events is that the Federal Republic of Germany, like Schwerte, was able to maintain a relatively successful democratic character after WWII, despite its problems and the presence of its National Socialist past. This paradox stands in a complex and not unproblematic causal relation to the contradictory ways in which a traumatic past is both present and absent in contemporary Germany, with the proliferation of explanatory narratives at once illuminating and obscuring the abject traces of an impossible history.

Before we can explore Germany in the 21st century, however, a little background is required to investigate how the assumptions about the past's pastness have been reiterated among stutters of undermining complication. Several events in the history of the Federal Republic of German unsettled the public and private amnesia about events that followed WWII. The 1968 student protest movement, for example, can be read as a reproduction of the conflict between the children of Nazis and their parents within the matrix of a broader movement for reform or liberation.

Some have read this conflict itself, with the help of Freud's concept of *Nachträglichkeit* ("deferred action"), as the deferred eruption of traumatic symptoms after the event of the catastrophic historical experience of the crimes of Nazism, the Holocaust, and the silence which for over two decades had attempted to cover over such a past.<sup>8</sup> The *Historikerstreit* (historians' debate) of 1987 was also a symptom of the inability of the past to remain past: the most conservative historians, among them Ernst Nolte, attempted to balance the crimes of the Nazis by defining them as reactions to what they considered the much more enormous danger posed by Bolshevism.<sup>9</sup> That the definition of the Federal Republic in these examples was so closely intertwined with how the nation defined its dialogic relation to the Holocaust (in particular) and the NS-period (in general) concretizes some of the ways in which the past still played an ontological role within the present. Another important landmark—an erasure of a landmark or an attempted erasure of a land *marked* in wounded division – is the fall of the Berlin Wall and the reunification of 1989. In a kind of inverted historical recurrence of the 1945 changes (splitting the Third Reich into two, one part of which was the Federal Republic; *Schnieder* to *Schwerte*), the two halves became a united "Berlin Republic," as Jürgen Habermas calls it, and, not unlike the earlier change to Deutsch Marks, eventually changed currency to the Euro.

Yet, if, as Karl Marx cautions, historical events occur twice, first as tragedy and secondly as farce, then reading such significance out of the similarities or inversions that exist between 1945 and 1989 would be problematic. Centrally, though, 1989 and the EU have presented a series of conditions that question the common insistence on the past's pastness, reviving the existential, epistemological, and ethical force and relevance of such questions in Germany. How are the Nazi past and the Holocaust represented in Germany today? Is the Holocaust truly "unmasterable," or has a new German identity been forged through or around it? The second part of this paper will look at some of the ways in which the past today in Germany is at once present and absent, and will also examine a series of contemporary contradictions that figure within the impossible narrativization of the Holocaust and the Nazi period, despite the relatively stable democracy that Germany has achieved.

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**Germany Today: "Ein Neues Deutschland"**

Since then, at an uncertain hour,  
That agony returns:  
And till my ghastly tale is told,  
This heart within me burns.

- Samuel Taylor Coleridge,  
*The Rime of the Ancient Mariner*  
vv. 582-585

A popular argument in contemporary Germany, which takes different forms, is that of "a new Germany," re-sounding the assertion of a break with the past. Newspapers after WWII were named "new Germany"—and many people have used this claim to attempt to draw some kind of finish line separating the past from the present and confine the Nazi crimes to some vague 'other time' in order to undercut complicity. Obviously, this is no longer so direct a problem in Germany today as it was in the past few decades: in a real sense, all but the oldest generations of Germans are experiencing a new Germany insofar as they have no direct contact or memories of the Nazi period. These claims are delivered in such a prevalent fashion in part, though, because those who are making them are in some ways not sure of them. Part of this ambivalence is due to a ambiguous challenge in the younger generations of Germans, many members of which often wish to move away from the crimes of their grandparents by attempting to alienate themselves from all things German. There are also certain extreme examples that are unequivocally anti-Semitic, obscurantist, and borderline fascistic, as in the politician Martin Hohmann (formerly of the conservative Christian Democrat Union) who believes that Jews—themselves a "Tätervolk," or people of persecutors (the word *Täter* implying equivalence with Nazis)—recollect the Holocaust only to beat down the German people, bludgeoning them financially and morally. Hohmann does this with the most blatant of anti-Semitic clichés (e.g., Jews were all Bolsheviks and still are the fount of some international conspiracy against Germany). Hohmann's sentiments are a minority in Germany, and though there are others like him—and a number who, though quieter, manage to sit in the more conservative parties of Germany—there are enough people to vote such a man out of office.<sup>10</sup> Even in more moderate and liberal circles, however, there is an

urge to look forward and, if not to draw the same kind of absolute line between the past and the present, there is an emphasis on the need to turn away from the past that no where smacks of this kind of anti-Semitism. Though some argue for the necessity of such a rhetorical, cultural, and political turn for the re-entrance of Germany into the international political stage, such an attempt it is still shot through with contradictions and mystifications.

An instance of such a tendency to separate past ruin and present assertion was enacted at the 60th anniversary of the Normandy invasion, to which, for the first time, a German Chancellor was invited to commemorate D-Day.<sup>11</sup> At Normandy, Chancellor Schröder declared an end to the *Nachkriegszeit* (post-war period), and, though acknowledging the responsibility Germans had for their history, declared that that past was “conclusively *vorbei*”<sup>12</sup> and that “my land has found the way back into the circle of the civilized community of nations.”<sup>13</sup> Though true in a sense, this latter declaration can be understood as being weakened by Schröder’s persistent attempt to declare the past conclusively over or past. As Berthold Kohler has written,<sup>14</sup> this declaration must be understood as inscribed within political goals (e.g., sustaining German’s place in world politics), motivations that, however understandable, nonetheless depend on the specious assumption that a past can be conclusively over. Of course, there are no longer 10 million Nazi party members trying to run the country, as there were in the Federal Republic in the 50s, yet Schröder attempts to close the past off, master it within a narrative that works to distance Germany today from its wounded past without any critique of the ideology such a move benefits. David Foster Wallace has described the formation of an individual as indivisible from its past struggles: “the horrific struggle to establish a human self results in a self whose humanity is inseparable from that horrific struggle...[O]ur endless and impossible journey toward home is in fact our home.”<sup>15</sup> The same can be said of the struggle to establish a national identity, which despite its unknown origins and impossible future cannot break free from its complicity in past visions and actions. To define the past of the Holocaust or the *Nachkriegszeit* as conclusively *vorbei* is for Schröder to try to define “my land” completely in the present, relegating the past to an absent nothing. However healthy a democracy Germany may be—and though there are certainly reasons to question this health, there are relatively few to cause serious concern that another Auschwitz would be likely in the

European Union—its past cannot be conclusively over so long as it (Germany) is still here.

The paradox of historical presence and absence—of a past that is past and yet still present—is exacerbated *vis-à-vis* the Holocaust. Not only is the past at once lost and intruding, but when considering the Shoah<sup>16</sup> and the period of National Socialism we are confronted with two fundamental discursive and material truths: that on the one hand the Shoah is sheer excess, unprecedented in the forms of its messianic anti-Semitism and instrumentally scientific, medical, and industrial bureaucratic killing, too much of a historical traumatic event (a “limit event,” as LaCapra calls it) to be comfortably integrated into a linear narrative of Germany’s becoming (as Hanks Jonas puts it, “At Auschwitz more was real than is possible”<sup>17</sup>); and that, on the other hand, the Shoah is a gaping void of dreadful rents and dumb wounds, culminating in the annihilation of over 6 million Jewish lives and many others. These disturbingly anamorphic truths are also inscribed within and leave their traces throughout the historiography on the Holocaust as well as the pop culture representations that have in some ways derived from it. The Nazi genocide is at once canonized and displaced, endlessly represented and forever eluding representation in German culture and the scholarship and ways of thinking about it: as Christoph Görg puts it, “the remembrance of the annihilation of the European Jews is being raised almost to the status of a civil religion and, in doing so, removed/hidden/masked out/suppressed.”<sup>18</sup> These contradictions at once perpetuate the misunderstanding and thus the presence/absence of the Holocaust in contemporary German self-understanding (though they are certainly not confined to Germany) and are themselves perpetuated by the Holocaust’s own paradoxes, thus figuring the Holocaust as what Dan Diner calls “the negative core of European self-understanding”:

The history of the Nazi past and of World War II are currently present and felt in a way that is without precedent in the years since 1945. [...] The integration of the Holocaust into the course of history, the construction of an appropriate historical narration for an event unprecedented in its brevity and extremity, somehow disconnected from past and future, still remains an insurmountable task. It seems that the only serious attempt to deal with it historiographically is to accept its fundamental irreconcilability with the saeculum’s core narra-

tives.<sup>19</sup>

Part of this difficulty, or even impossibility, of narrativization of the Nazi past is perhaps bound up with the fact, as Primo Levi wrote, that all the “true” witnesses to the worst Nazi crimes died in the camps. For Levi, the *Muselmann*<sup>20</sup> is the “drowned victim, the only true witness, the bereft witness unable to give testimony or bear witness” (*HIT*, 161).<sup>21</sup> This kind of lack of testimony, which in Levi’s narrative always seems to subvert any pretensions to pedagogical or didactic appropriation of the experience, seems actually to have been a goal of the Nazis. We can see the importance of the effacement of testimony and destruction of evidence in the Nazi ideology within a few relevant passages from Heinrich Himmler’s Posen speech, which was given in private to upper-level SS offices on 4 October 1943, and is thus particularly telling:

I also want to make reference before you here, in complete frankness, to a really grave matter. Among ourselves, this once, it shall be uttered quite frankly; but in public we will never speak of it. Just as we did not hesitate on June 30, 1934 [the purge of Ernst Röhm and his SA leadership], to do our duty as ordered, to stand up against the wall comrades who had transgressed, and shoot them, also we have never talked about this and never will. It was the tact which I am glad to say is a matter of course to us that made us never discuss it among ourselves, never talk about it. Each of us shuddered, and yet each one knew that he would do it again if it were ordered and if it were necessary.

I am referring to the evacuation of the Jews, the annihilation of the Jewish people....Most of you know what it means to see a hundred corpses lie side by side, or five hundred, or a thousand. To have stuck this out [or endured this: *durchstehen*], and — excepting cases of human weakness — to have kept our integrity [or decency: *anständig geblieben zu sein*], that is what has made us hard. In our history this is an unwritten, never-to-be-written page of glory.<sup>22</sup>

The perpetrators never meant for their crimes (“glory”) to be able to be narrativized: they were meant to remain the stuff of myth, never told, let alone understood in some kind of rigorously theoretical or intellectual mold of narrative self-conception. Yet the amount of documentation and research that historians, sociologists, and other scholars have undertaken

to combat this mythologized and mythologizing silence on the period of National Socialism and the Holocaust is astonishing.

Nonetheless, despite the incredible amount of scholarship and feats of ritual or kitsch remembrance, the Holocaust has and can have no ultimate historian to give it a narrative meaning, as both Diner and Saul Friedlander argue.<sup>23</sup> This lack of closure even within such surfeit of disclosure results in part because, in a Levian sense, the real witnesses can neither find their final, true voice in the present nor rest in some kind of peaceful silence. And there remain, too, the inconsistencies and the insufficient understanding of the anamorphic relation of excess and lack in the contradictory ways that we think about and attempt to conceptualize the Shoah. Friedlander references Jean-François Lyotard, who writes, "The silence that surrounds the phrase 'Auschwitz was the extermination camp' is not a state of mind [*état d'âme*], it is a sign that something remains to be phrased which is not, something which is not determined."<sup>24</sup> Germany still encloses within its identity an unclosed (un-closable?) and unspeakable wound, one that is both a kind of spilling out and overflow of boundaries, an excess, and the manifestation of a lack which cannot be articulated. As Theodor Adorno has written on the way we can think of and conceptualize history after Auschwitz, "Our metaphysical faculty is paralyzed because actual events have shattered the basis on which speculative metaphysical thought could be reconciled with existence"<sup>25</sup>: one meaning of this is that plucking a metaphysical, conclusive, stable meaning from the Holocaust is impossible.

***Gegenwartsbewältigung; Vergangenheitsbewältigung*<sup>26</sup>: Past, Present, and Future; and the Politics of the Hamburger Institut für Sozialforschung**

*Soll dieser Fluch denn ewig walten? Soll  
Nie dies Geschlecht mit einem neuen Segen  
Sich wieder heben?*<sup>27</sup>

- Johann Wolfgang Goethe,  
from *Iphigenie auf Tauris*

In the face of the intractability of this past and the endlessly contradictory modes of explanation and myth that surround it even in contemporary Germany, how could one speak about or attempt to understand

the Nazi past and its relation to Germany's present and future. Reactions to this problem are intriguingly rehearsed within and illustrated by a series of interviews about two new movies concerned in some way with Hitler undertaken by Ruth Elkins in Berlin recently.<sup>28</sup> Out of nine interviews, it is remarkable how comfortably the responses to the production of two recent movies about Hitler (which none of the interviewees had yet seen) fit into two general modes of response. Five of those interviewed believed that the past must still be examined, that the films should help to provoke a dialogue that is still on-going and must continue. Four people interviewed had various reactions that are akin to Bundeskanzler Schröder's declaration of conclusive pastness, though without Schröder's diplomacy: "Hitler was a terrible man, but it is the past. [...] my tendency, like most Germans, is to concentrate on looking forward, not back" (Rainer Vogel, 63, builder); "My generation finds it easier to concentrate on feeling ashamed about our Nazi past than face up to our current challenges..." (Marcus Rosenthal, 32, political lobbyist); "The continued discussion about Hitler and why the Germans have such a terrible past annoys me. It's over 60 years ago now. I look at it as a bad episode from which lessons have been drawn" (Ben Barth, 27, security officer); "Why should we get on our knees all the time about Hitler? [...] I really do believe that it's better for Germany to look forwards, not backwards" (Christoph Hoffman, 51, consultant).

Several things are notable in this latter set of answers: The common notion that the Holocaust was an "episode," with the parlance of contemporary sitcom reality or medical-psychological discourse, ostensibly implies that the Nazi period was part of some kind of serialized work or progression, or momentary illness, which has had some kind of horizontal culmination or healing in the Germany of today, and that, as such, we should not look beyond that which is immediately in front of us but must continue with the progression. The tendency to medicalize a cultural and political problem, an oft-employed method of the Nazis themselves, persists in Germany. Posters around the country read "Don't give AIDS a chance."<sup>29</sup> Similar signs—same colors, same style, etc—replace "AIDS" with "Nazi." The displacement or equation of "AIDS" with "Nazis" tropes National Socialism as an active disease, genetically transmittable, with no ostensible cure. The tropological conflation also has a problematic implication for those who have AIDS, as if they were somehow evil.<sup>30</sup>

We can also note in these comments that the notion of 'looking back'

has been construed as somehow subversive, destabilizing the progress “forward” into the future, coeval with the assumption that what is done is done. Frustration accompanies attention to the consideration that the past is not resolved as pure, coherent and unobtrusive linear antecedent to the present.

Without a conception of history, however, there may very well be no future, as Walter Benjamin—a philosopher, literary and cultural critic who (Jew and Western Marxist) was himself a victim of the Nazis—knew well. Benjamin understood that an abundance of information (around the Holocaust, for example, about which there seems to be an infinite roar of data) does not necessarily mean something like historical understanding (or what Nietzsche might call a true historical sense). Benjamin writes, prophetically, in the shadow of WWII in the spring of 1940:

We know that the Jews were prohibited from investigating the future. The Torah and the prayers instruct them in remembrance, however. This stripped the future of its magic, to which all those succumb who turn to the soothsayers for enlightenment. [...] A Klee painting named ‘Angelus Novus’ shows an angel looking as though he is about to move away from something he is fixedly contemplating. His eyes are staring, his mouth is open, his wings are spread. This is how one pictures the angel of history. His face is turned toward the past. Where we perceive a chain of events, he sees one single catastrophe which keeps piling wreckage and hurls it in front of his feet. The angel would like to stay, awaken the dead, and make whole what has been smashed. But a storm is blowing in from Paradise; it has got caught in his wings with such a violence that the angel can no longer close them. The storm irresistibly propels him into the future to which his back is turned, while the pile of debris before him grows skyward. This storm is what we call progress.<sup>31</sup>

For Benjamin, the only way we could have a “redeemable past” and forge a “redeemable” future—which implies a kind of representability and interpretability which has not been able to narrativize the Holocaust—is to attempt to snatch the glimmers of meaning that fling up or can be sublimely exploded out of the contemplated past while we are blown backwards into the future.<sup>32</sup> Sam Durrant reflects: “Written in the spring of 1940, Benjamin’s angel seems preternaturally aware of the Holocaust

to come, even though, or rather *precisely because*, his gaze is fixed unwaveringly on the past" (*PNWM*, 8). In a radical mutation of Hegel's owl of Minerva, then, Benjamin tells us that our understanding can only come through this kind of engagement with the present/absent past of a history we did not entirely experience. Whether or not the Nazi past and Holocaust can be narrativized or redeemed, the mystifying and contradictory ways of (mis)understanding it transcended, is a question that can only be thought by studying and considering the past in ways that problematize simple notions of progress and the assumption of a past conclusively *vorbei*.

An example of how this act of fixing our gaze on the past while being propelled into the future might be done, I would like to mention the Hamburger Institut für Sozialforschung,<sup>33</sup> where I did my research for this paper while I was working as a research assistant in the summer of 2004. The idea of unqualified progress—and of having to avert one's eyes from the past in order to move forward—is, in sociological terms, a privileging of praxis above theory. The impatience toward 'theory' (and contemplation of the Nazi and Holocaust past) and the subordination of it to praxis go hand-in-hand with the insistence that the past is conclusively *vorbei* and Germany must move unequivocally into the world political stage, with the assumption that the gaze toward the past that Benjamin proposes would make Germany's 'progress' politically incongruous. But as Adorno has written,<sup>34</sup> "The leap into praxis will not cure thought from resignation so long as it is paid for with the secret knowledge that this course is simply not the right one" (*Res*, 201). As long as the contradictions and myths still surround the Holocaust and the Nazi past, we cannot simply turn away and work merely in the realm of things practical and present. A Benjaminian gaze into the past while we are projected into the future is required if we do not want to resign ourselves simply to the wrong kind of praxis. Simply to turn away and move unselfconsciously into the future is to promise that the past will never be conclusively past, and always already to be haunted by it in the very process of that turning-away's impossibility.

Many would say that the Hamburger Institut has "resigned" by fixing its gaze critically on the past itself rather than affirming a radical program of revolutionary action. One question is repeated time and again: have the Hamburg Institute's researchers, many of whom had been in-

volved directly in the protests of 1968, grown complacent, settling with “merely” academic work?

To answer this question, the recent exhibit (with accompanying lectures, discussions, and films) that the Hamburger Institut devoted to the crimes of the Wehrmacht is instructive. The exhibit was primarily meant to deconstruct one major myth in German culture surrounding the years of the Nazis, the myth of a “Wehrmacht free of moral taint.” Few Germans today would publicly claim that the SS officers did not play an instrumental role in the Nazi genocide, but a prevailing myth in Germany has for years been that the Wehrmacht, the German army that fought on the Eastern Front, battled with dignity and honor, and had no part in the crimes of the SS or the Gestapo. Historians and other scholars have argued for a long time that this was a myth lacking any historical evidence, but the German public—even in the 21st century—found it difficult to think that the Wehrmacht had committed the acts of murder, rape, pillaging and arson in which the evidence shows their collaboration. The Hamburger Institut took on the very unpopular but extremely important task of demolishing this mystifying allegory. In the face of objections and protests that such an exhibit shamed every German’s grandfathers and set the progress of the nation back 50 years, the Hamburger Institut—its eyes fixed on the past – resisted the mythologization and sought to subvert the contradictory and deluded ways in which people in 21st-century Germany conceptualize their relation to the past and that past’s relation to their (and their nation’s) present and future.

Against the grain of such mystifications, the Hamburg Institut provides a mode by which we might try to work through the past, by attempting to deconstruct ‘inauthentic’ mystifications, always complicating contradictory modes of explanation, even if we can never get conclusively beyond them. If “working through” does mean, as Maurice Blanchot writes “to keep watch over absent meaning,”<sup>35</sup> then with “a firm grasp upon possibility” (*Res*, 202), the Hamburg Institute – and all who refuse to abrogate ‘autonomous’ thinking in the face of the demands to look forward – keeps its gaze focused on the past while being projected into an unknown future. By retracing the ignored future left latent in a past of ruin, such a gaze desires to transmute the paradoxes that have (de)formed the presence/absence, excess/lack of the darkest hours in Germany’s history into what Cathy Caruth calls a “possibility of history,” “a point of departure,”<sup>36</sup> without reifying them into another chimerical narrative.

"A nation, like an individual," Terry Eagleton writes, "has to be able to recount a reasonable story of itself, one without either despair or presumption. As long as it veers between idealization on the one hand and disavowal on the other, it will behave exactly like Freud's neurotic patient, afflicted by reminiscences."<sup>37</sup> Yet forging such a narrative often demands the exclusion of other narratives, self-delusion, or false surmise. Thus that reasonable narrative—however much it must be the goals of our scholarship and (individual/national) self-conceptualization—must not bow to the kind of nationalism that demands a completely integratable narrative in the same way that it demands of each co-national an "integral personality": for, as Buruma writes, the Holocaust and crimes of the Nazis are "a portion of history that cannot be integrated" (*WG*, 190). Germany, like James Joyce's Stephen Dedalus, may think that "History is a nightmare from which I am trying to awake."<sup>38</sup> Yet "to dream that one has awoken only to discover that one hasn't is just more of the nightmare."<sup>39</sup> Chancellor Schröder's announcement of a past conclusively past, it seems, may have been a little hasty, for the ultimate abysmal ruin of genocide and mass destruction presents itself as an irrecoverable past, one which can be neither recuperated nor 'covered over'. Though there are few reasons to fear another Auschwitz in western Europe any time soon, we must keep our eyes fixed on the past while we are blown into the future in order to struggle, tirelessly, mutually, for the "reasonable" or "redeemable" narrative that will never settle for the mystificatory modes of explanation that are still present in Germany and the world today. Such modes of explanation are still very much a part of the struggles to construct a 21st-century Germany identity, one which alternatively attempts with varying degrees of urgency, pathos, and self-delusion to confront and to evade with marked ambivalence the tragic past which is its historical inheritance. We must, then, learn how to live "among the dead" without trying to fill up what Philip Gourevitch calls the "omnipresent...absences"<sup>40</sup> with narratives that would immediately be complicit in the injustice of their necessity.

### Endnotes

<sup>1</sup>*Vorbei* is a German adverb that hovers, almost untranslatable, between *over*, *past*, *finished* and *gone*. Such ambiguity (for example, something can be over but not gone, and gone but not finished, etc.) surrounding the question of whether the adverb qualifies a verb that is acting on or being enacted by something present or something absent is truly appropriate for the questions I hope to pose and deal with in this paper. [All translations from the German are mine unless otherwise noted].

<sup>2</sup>Heinrich Himmler (1900–1945) was Reichsführer of the SS, head of the Gestapo, Minister of the Interior from 1943 to 1945, and organizer of the mass murder of Jews and many other non-Aryans during the Third Reich.

<sup>3</sup>Claus Leggewie, *Von Schneider zu Schwerte: Das ungewöhnliche Leben eines Mannes, der aus der Geschichte lernen wollte* (München: Carl Hanser Verlag, 1998), 15; hereafter abbreviated SS.

<sup>4</sup>“Denn auch Deutschland hatte 1945 seinen Namen ‘Deutsches Reich’ abgelegt und sich, ohne genau zu wissen, wohin die Reise ging und überhaupt gehen sollte, neue Namen zugelegt: Bundesrepublik Deutschlands im Westen, Deutsche Demokratische Republik im Osten.[...]Der westliche Teil Deutschlands hat, anfangs genauso tastend, bewusstlos und verlogen wie Schwerte, eine demokratische Karriere begonnen, die niemals lupenrein und doch überraschend erfolgreich war – um am Ende, genau wie Schwerte, wieder mit der braunen Vorgeschichte konfrontiert zu werden und misstrauische Fragen nach der Aufrichtigkeit der Konversion gestellt zu bekommen.”

<sup>5</sup>“Man kann sie nur töten oder gewinnen.”

<sup>6</sup>“Die terroristische Präsenz der Vergangenheit.” Quoted in: Christian Schneider, Cordelia Stillke, and Bernd Leineweber, *Trauma und Kritik: Zur Generationengeschichte der Kritischen Theorie* (Münster: Westfälisches Dampfboot, 2000), 13; my italics.

<sup>7</sup>“Mein Name sei Schwerte.”

<sup>8</sup>One interesting version of an argument like this, which sees this conflict between the parents and children doubled in that between the generations of the Frankfurt School of Critical Theory, is (alluded to already): Christian Schneider, Cordelia Stillke, and Bernd Leineweber, *Trauma und Kritik: Zur Generationengeschichte der Kritischen Theorie* (Münster: Westfälisches Dampfboot, 2000). Jean-François Lyotard might call this description of delayed traumatic “effect” —without implying direct causality—the “paradox of the future anterior” (*The Postmodern Condition* [Manchester: Manchester University Press, 1984], 81). See also: Ronald Mather and Jill Marsden, “Trauma and Temporality: On the Origins of Post-Traumatic Stress,” *Theory & Psychology* (Sage Publications, 2004), Vol. 14(2): 205-219.

<sup>9</sup>This re-writing of history also implicitly affirms the unfounded Nazi banality that all Jews were Bolsheviks and all Bolsheviks Jews.

<sup>10</sup>See Jeffrey M. Peck, “You are Making it Difficult, Mr. Hohmann: Some personal thoughts on Anti-Semitism” (*American Institute for Contemporary German Studies Advisor*, November 36, 2003). Since the original writing of this paper in the summer of 2004, there has been a dark change in this corrective tendency, retroactively making it seem like a mere palliative. The NDP (National Democratic Party) won 9.2% representation in Saxony’s state parliament in elections last year, capitalizing on growing discontent (particularly in the east) with the more mainstream parties. (The NDP is an extreme right wing, all-but-nominally neo-Nazi political party. A government attempt to outlaw the NPD, which has often been accused of fomenting hate crimes against foreigners and Jews, failed in 2003 after Germany’s Supreme Court threw out the case on account of a bureaucratic technicality.) It does not look like integration into parliament has done much to bring the NDP into the mainstream political process: On January 27, 2005, a moment of silence was observed in parliament across the nation, in order to honor the victims of Nazi aggression on the 60th anniversary of the liberation of Auschwitz. The 12 representatives of the NDP party in Saxony rose and walked out of the parliamentary meeting in protest of this minute of silence.

<sup>11</sup>In the summer of 2004 the Chancellor was Gerhard Schröder who, not coincidentally, was the first Bundeskanzler without direct recollection of WWII.

<sup>12</sup>“Die Nachkriegszeit ist damit endgültig vorbei” [The post-war period is with this (the invitation he was given to attend the Normandy commemoration) conclusively over.] (*Frankfurter Allgemeine Zeitung*, Monday, 7 June 2004, Nr. 130/24 D, page 1).

<sup>13</sup>“Mein Land hat den Weg zurück in den Kreis der zivilisierten Völkergemeinschaft gefunden.” (Ibid.).

<sup>14</sup>Ibid., “Kommentar: Des Kanzlers D-Day.”

<sup>15</sup>David Foster Wallace, “Laughing with Kafka,” *Harper’s Magazine*, July 1998.

<sup>16</sup>Since contradictory explanations and meanings, myths, and problematic conceptualizations are so important here, one should note that the term *Holocaust* is itself etymologically a troublesome one. The word implies that those murdered by the Nazis were a “burnt sacrificial offering” to God, a term which many find to beg the question of a full recovery and redemption which would seem impossible, as Giorgio Agamben has argued (*Remnants of Auschwitz: The Witness and the Archive*, trans. David Heller-Rapzen (New York: Zone Books, 1999); see particularly pp. 31-40). But so, also, is the Hebrew appellation *so’ah* (or *Shoah* in English and French) dubitable—meaning devastation or catastrophe—because it is used in the Hebrew Bible often to imply a kind of divine punishment—an argument that anti-Semitic ultra-orthodox Jews have made often, referencing the death of over 6 million Jews as punishment for the secular sin of Zionism. (See “Hohmann bei Israel-Gegnern,” in *Der Spiegel*, Nr. 29, 12 July 2004, pp.16. This short article discusses, also, how such anti-Semitism among ultra-orthodox rabbis has attracted Martin Hohmann, whose idea of the Jews as a *Tätevolk* I have discussed above.) Furthermore, the alternative use of the term *extermination* is by no means blameless, as it is “a component of the discourse of pest control” that the Nazis themselves employed (Dominick LaCapra, “Approaching Limit Events: Siting Agamben” in *History in Transit: Experience, Identity and Critical Theory* (Ithaca and London: Cornell University Press, 2004), 169; hereafter abbreviated *HIT*). The labyrinthine and obstacle-fraught nature of naming this crime of the Nazis—the fact that no term is innocent or unproblematic and so many vie for priority—is doubtless a part or emblematic of the difficulty of understanding and narrativizing it. (For myself, I will agree with LaCapra and employ a multiplicity of terms (Holocaust; Auschwitz; Shoah; Nazi genocide), recognizing that I am always implicated in and by them and attempting to show the ways in which they are complicit in the presence/absence of the Nazi past in Germany even today.)

<sup>17</sup>Quoted in Geoffrey H. Hartman, “The Cinema Animal: On Spielberg’s Schindler’s List,” *The Longest Shadow: In the Aftermath of the Holocaust* (Bloomington and Indianapolis: Indiana University Press, 1996), 88.

<sup>18</sup>“Das Angedenken an die Vernichtung der europäischen Juden wird geradezu in den Status einer Zivilreligion erhoben und dabei ausgeblendet.” [The ambiguity of *ausgeblendet*—that it could signify removed, hidden, masked out, or suppressed—is indicative, again, of the ambiguity of this past’s presence and absence. Has it been removed in some kind of historical-surgical operation? merely hidden? disguised by some kind of mask?] In: Christoph Görg, “Gescheiterte Trauma-Therapie,” soon to be published online in the Trauma Research Net newsletter: [www.traumaresearch.net](http://www.traumaresearch.net), ed., Cornelia Berens (Hamburg: Hamburger Institut für Sozialforschung, 2004).

<sup>19</sup>Dan Diner, “The Destruction of Narrativity,” in *CM*, 68: 78.

<sup>20</sup>*Muselmänn* (Muslim) was a “prejudicial appellation [that] was [concentration] camp slang for the absolutely exhausted and beaten down who had given up hope in life and led a living death” (*HIT*, 157-158: 15n.).

<sup>21</sup>See Primo Levi, *The Drowned and the Saved*, trans. Raymond Rosenthal (New York: Vintage International, 1989).

<sup>22</sup>Lucy Dawidowicz, ed., *A Holocaust Reader* (West Orange, N.J.: Behrman House, 1976), 132-33.

<sup>23</sup>Saul Friedlander “Trauma and Transference,” *Memory, History, and the Extermination of the Jews of Europe* (Bloomington and Indianapolis: Indiana University Press, 1993), 117-139;

hereafter abbreviated as *TT*.

<sup>24</sup>Jean-François Lyotard, *The Differend: Phrases in Dispute* (Minneapolis: University of Minnesota Press, 1988), 56-7.

<sup>25</sup>Theodor Adorno, "Meditations on Metaphysics," in *Negative Dialectics* [1966], trans. E.B. Ashton (London: Routledge, 1973), pp. 361-365.

<sup>26</sup>Working through/coping with the present; working through/coping with the past.

<sup>27</sup>"Is this curse then to last for ever? Is / this people never to rise again / through a new blessing?"

<sup>28</sup>Quotes from these interviews were published as an appendix to an article in the British newspaper *The Independent* in an article by Steve Crawshaw, "A nation faces its demons," 13 July 2004, on some contemporary cinema in Germany that deals with the Third Reich and Hitler. It is an interesting article that optimistically avers that Germans are dealing with their past more effectively than ever because more and more taboos are broken down every day. It is an interesting argument because, though in one sense it is correct, Crawshaw also (unwittingly?) enacts the mode in which the supposed breaking down of these taboos has really been nothing of the sort and in no substantive way adds up to a greater narrative understanding of the Holocaust for Germany. What Crawshaw considers a positive "loosening up" of Germans in the ways that they think of Hitler (really Germans, he banally quotes a director, "are not so *verkrampft*, so uptight") has ostensibly led him to write an article that never mentions the Nazi genocide or the Jews and only once very indirectly quotes a theoretical "someone" who mentions the Holocaust. This process of normalizing Germany and "facing its demons" by complicity erasing its victims, however unintentional, as Ian Buruma puts it, "runs the danger of accepting the absence of the Jews, even of cannibalizing the memory of victims for the purpose of reconstructing Germany history" and, with it, identity (Ian Buruma, *The Wages of Guilt: Memories of War in Germany and Japan* (New York: Farrar Straus Giroux, 1994), 190; hereafter abbreviated *WG*.)

<sup>29</sup>"Gib AIDS keine Chance." [There is a photographic image in the final draft.]

<sup>30</sup>The notion of Nazism as a genetically transmittable disease, a congenital problem that is so far incurable, seems especially questionable, and indeed has been one of the main objections to Daniel Goldhagen's purported argument, as the Washington Post's Richard Cohen puts it, "that there is something indelibly spooky about Germans—a gene in the culture that outsiders cannot detect and that gets passed from generations to generation." (Quoted in: Peter Schneider, "For Germans, Guilt Isn't Enough," *The New York Times*, 5 December 1996. Whether Goldhagen's *Hitler's Willing Executions* actually avers as much has been a matter of much debate.)

Though the thought of Nazism as some kind of (moral/cultural/intellectual) breakdown of the (societal) immune system is at first alluring, it becomes more and more suspect upon closer examination. Because in some sense, of course, this kind of medicalization and aestheticization merely re-appropriates uncritically the Nazi diction toward and representation of Jews, homosexuals, Gypsies and other "inferior peoples." The idea of Nazism as an incurable disease contradictorily clears the carriers of responsibility: a Nazi can hardly be blamed for falling into the worst kind of instrumental reasoning if it is due to his or her genes. This interpretation of Nazism as congenital, incurable disease, then, manages to read even contemporary Germans as potentially guilty while assuring them as a nation that it is not their fault. This interpretation of Nazism, by no means marginal, has engendered further mystification, undercutting the attempt to narrativize and understand the period and the crimes of National Socialism. Like the desire to see the past as past, such a mythos offers an ineffective means of marginalizing a persistent problem rather than activating the necessity of critically engaging it.

Such an idea of Nazism as disease is not entirely new, perhaps: During the early 1960s at the Eichmann trial in Israel, Eichmann sat enclosed within a glass booth. He became known, and is known today, as "The Man in the Glass Booth." The Israelis built the booth for his protection, because they were worried that someone would preempt the trial and attempt to kill him before a ruling was made; but one cannot help but notice in the construction, also, the consideration (conscious or otherwise) that Eichmann would somehow *infect* the people in the proceedings, and thus had to be quarantined.

<sup>31</sup>Walter Benjamin, "Theses on the Philosophy of History," *Illuminations*, trans. Hannah Arendt (New York: Schocken Books, 1968), 264 (thesis XVIII, B); 257-58 (thesis IX).

<sup>32</sup>The physicist Stephen Hawking ponders something like this when he asks "Why do we remember the past and not the future?" and Sam Durrant locates a similar concern when he quotes from the book *Fugitive Pieces*, "it is your future you're remembering (21)." (Sam Durrant, *Postcolonial Narrative and the Work of Mourning* (Albany: State University of New York Press, 2004), 8; hereafter abbreviated PNWM.) Kierkegaard, too, theorized a concept of what he called "remembering forward" as repetition, which in the Danish (*Gjentagelse*) more literally means something like "taking again."

<sup>33</sup>The Hamburger Institut is actually, in complex and not entirely unambiguous ways, working in the tradition of the Frankfurter Institut für Sozialforschung, with which Benjamin himself (like his friend Adorno) was affiliated. This relation will be explored briefly here, but could prove an interesting topic for further comparative research.

<sup>34</sup>Theodor Adorno, "Resignation," *The Culture Industry* (London and New York: Routledge, 1991), 198-203; hereafter abbreviated *Res*. Readers should note that my argument about the Hamburger Institut is deeply indebted to Adorno's defense of Critical Theory and, implicitly, the Frankfurter Institut.

<sup>35</sup>Maurice Blanchot, *The Writing of the Disaster*, (Lincoln: University of Nebraska Press, 1986), 42.

<sup>36</sup>Cathy Caruth, "Unclaimed Experience: Trauma and the Possibility of History," *Yale French Studies* 79 (1991): 187.

<sup>37</sup>Terry Eagleton, *Heathcliff and the Great Hunger* (New York: Verso, 1995), ix

<sup>38</sup>James Joyce, *Ulysses* (New York: Random House, [1920] 1986), 2.377.

<sup>39</sup>Terry Eagleton, *Illusions of Postmodernism* (Oxford: Blackwell Publishers, 1996), 65.

<sup>40</sup>Philip Gourevitch. "Among the Dead." In: *Disturbing Remains: Memory, History, and Crisis in the Twentieth Century*, M. Roth and C. Salas, ed. (Los Angeles : Getty Research Institute, 2001), 63-73.



## The Crossroads

### *The "Navel" and Topography of Identity*

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Lindsey Dolich '06

In Erhard Schön's woodcut entitled "Perspective," the backdrop is a blank slate, a tunnel of transformation that demarcates an empty and infinite space. A commentary on position within a perspective plane, the blocked human figures occupy various spaces and points along the axis. Yet these intersecting diagonals are illusionistic, both conforming to the two-dimensional floor and extending into the walls as a one-dimensional line. This construction foregrounds the scenery and topography of the "stage" itself, pointing to the function of the floor as a map on which we may "plot" characters as Cartesian coordinates.

Various western dramatic texts explore and refigure the problematic of space crystallized in Schön's woodcut. Illustrating a conceptual template for the dramatic scaffold, "Perspective" provides a pictorial essay on the body's reiteration or subversion of stage space. One may craft Schön's study into three major phases embodied by three more exemplary plays of tragic-comedies, each of which will be discussed below in chronological order in accordance with the date of their first theatrical production. First, Sophocles' *Oedipus Rex* is the story of Oedipus, who is awarded the kingship of Thebes for solving the riddle of the Sphinx. Oedipus disregards numerous warnings and clues from the blind prophet Teiresias and his wife (and mother) Jocasta while advancing along his incestuous, fatal path prophesied by the oracle. Once he stumbles upon the truth, Oedipus blinds and exiles himself from his kingdom, leaving his remaining family behind. Next, Jean Racine's *Phedre*, first performed in 1677, is an adaptation of Euripides' original play Hippolytus. The inspiration behind both works, the Greek myth of Theseus and Phaedra is reenacted: after rescu-

ing Ariadne from the Minotaur in the labyrinth, Theseus abandons her for her sister, Phaedra. Racine's *Phedre* is inflamed by adulterous love for her step-son Hippolytus, and her failure to accept responsibility for her actions precipitates her shameful suicide. Finally, Samuel Beckett's seminal work, *Waiting for Godot*, is the chronicle of Vladimir and Estragon, two disoriented, seemingly homeless men. Waiting for the enigmatic Godot, these unusual characters inhabit a nonsensical world projected from their own consciousness. Beckett's concern with existentialism and mankind's never-ending search for absolute truth will offer a fitting closing to my analysis of Schön's exegesis on spatial representation.

One may view Schön's grid as the visual representation of the crossroads charted onto the narrative space and the theatrical space of the stage in Sophocles' *Oedipus Rex*, Racine's *Phedre*, and Beckett's *Waiting for Godot*. The audience is visually led into the center of these planes, which seek both to mimic and to deconstruct depth and orientation as elements of "real" landscapes. Yet this specific topography of the stage setting also symbolizes the mapping of the features of the land onto the actors and, reciprocally, the transference of the emotional and cognitive dispositions of the characters onto their surrounding environments. However, as each playwright adapts the conception of space figured in Schön's woodcut to the social considerations of their time, these landscapes become increasingly convoluted and abstracted: the trifurcated paths constituting the "crossroads" of *Oedipus Rex* are transformed into the three dimensional walled labyrinth of dead ends and entangled passages of *Phedre*, culminating in the stark road that runs alongside a tree in *Waiting For Godot*, a play in which the surroundings are stripped of their significance. All of the peripatetic characters—Oedipus, Phedre, Vladimir, and Estragon—are constantly navigating and interacting on, inside, or along these roads. Ultimately, the geometric construction of these lines converge into a single point at the "navel"; as the origin, birth, and beginning from which all seek to branch out, the crossroads marks the locus of the identities they cannot escape.

Signifying the answer to Oedipus' riddle, the three roads of Delphi, Daulis, and Thebes not only represent him as a three legged man (with one "leg" being a cane) but also as the product of his intersecting prophecies. The crossroads is the beginning and ending of Oedipus' riddled past—it is the place where he initiates the teleological chain of events that culminates in his metaphorical return to the truth of his fated ac-

tions. Jocasta, Oedipus' mother, is a necessary figure in providing her son with a moment of clarity in regard to his past; although she refers to this "chance" remembrance at the crossroads by mistake, her position as an external force generates a gradient of potential that sets events in motion. As a product of Jocasta's recollection, the road is also established as a means and as a site in which Oedipus can retrace his steps back to his memory. "Crossroads" is defined as a "critical turning point" (OED); as roads, they are "routes or ways that head towards a predictable outcome" (Word Dictionary), but they are also courses that cross over, merge, and multiply in direction and choice. Although the meeting point itself is singular and absolute, it paradoxically generates a splitting and branching out of the "truth" and identity for Oedipus. Like Schön's diagonals, Oedipus' position along this axis is ultimately what determines his lucid or convoluted perspective, or in the words of Rush Rehm, if the crossroads are "the visions of many, the vision may yet be one" (Rehm 12). Furthermore, Oedipus' landscape constructs his "as an identity built on multiplicity, the junction of the roads represents a spatial version of the riddle posed by the sphinx, where one is also three" (Rehm 224). Perhaps this multiplicity arises from the concept of the space of movement, which resists definition because it is unsettled, expanded, and altered by peripatetic action.

Indeed, Oedipus himself seems to recognize that the land "contains" the truth, yet he does not quite grasp that the path is the clue rather than a metaphorical progression towards discovering King Laius' murderer. Creon is able to identify the utility of the land, which often takes on a persona of its own—the city is figured as the barren mother, plagued and riddled with a disease that is brought about by Oedipus' incest and perversion of sexuality/fertility. Creon names this link as the "clue [that] is in this land;/that which is sought is found;/the unheeded thing escapes;/so said the God" (OR 110-3). Oedipus' origins and fate are already mapped onto and "found" in the land, yet this truth seems to escape the acuity of Oedipus. Oedipus is rooted to the concept of the Sphinx as that which constitutes his past: "For I would not/be far upon the track if I alone/were tracing it without a clue" (OR 220-2). The "trace," a residue of memory, is a less tangible "track." But as a marker left behind, as both a circuitous path and as a set of rails for vehicular purposes, the "track" itself is inherently ambiguous. Jocasta herself speaks of this "Going round" and "splitting" as juxtaposed antithetical movements—the physical layout of

the road seems to be set down by “word[s].” Landscape is also a function of private memory and language, taking on a personal meaning that is not always accessible to others:

Oedipus: I thought I heard you say  
that Laius was killed at the crossroads.  
Jocasta: Yes, that was how the story went and still  
that word goes round.  
O: Where is this place, Jocasta,  
where he was murdered?  
J: Phocis is the country  
and the road splits there, one of two roads from Delphi,  
another comes from Daulia. (OR 730-5)

The characters figure the crossroads as a “word” or a place that “goes round,” an inaccessible circle that Oedipus continually circumnavigates (“wandering” and “running mad,” OR 726) but fails to enter. As a composition of two-dimensional lines, the notion of the crossroads as a curvilinear shape contradicts scientific logic. However, the crossroads is a diffracted circle, a figure stripped to its fundamental components of the center point/intersection and (multiple) radii. Once Jocasta provides Oedipus with the correct geometric orientation, giving him the coordinates that contain both the directions and the specific location of the point or center, Oedipus’ fatal recollection is prompted.

Furthermore, what does it mean for Oedipus to be “far upon” the track when he lacks perspective and distance from the murderous event itself? Even Teiresias, who is blind, still has the ability to see that the land and crossroads are a “deadly footed, double striking course” (OR 418)—a message that points to Oedipus’ name as di-pous, two-footed and destined to violate his parentage twice over. Although the binary opposition does not directly point to the triple crossroads, it alludes to King Laius’ “two pointed goad” (OR 809) that struck Oedipus on the head, perhaps inciting him to reciprocate the action with his own “stick.” Here, the two sticks (one of which is bifurcated) merge at the crossroads. Ironically, mirroring the interlinked layout of the roads, these instruments of violence are also supplementary limbs that aid Oedipus and his father in their ambulatory movements. Despite Jocasta’s and Teiresias’ clues and ciphered messages, the word “crossroads” itself directs Oedipus onto the correct path towards discovering the meaning of the prophecies.

Although Oedipus recalls that he initially “fled” to a “somewhere” away from his prophecy, his denial of his origin and past ultimately means denying orientation and balance. Oedipus is “sad and lonely, and lonely his feet/that carry him far from the navel of the earth” (OR 479-80), yet the invisible thread of fate that pulls him towards the intersection of the crossroads is also a metaphorical umbilical cord tying him to this point of “birth.” His explosive rejection of this “navel,” where all things come together, inevitably precipitates his figurative, belated, and bloody “miscarriage” from this amniotic source. Without sight or sense, Oedipus does not follow the roads outward, but rather stumbles and circles back to the crossroads, an inarticulate “somewhere”:

—yes, I fled  
 to somewhere where I should not see fulfilled  
 the infamies told in that dreadful oracle.  
 And as I journeyed I came to the place  
 where, as you say, this king met with his death.  
 Jocasta, I will tell you the whole truth.  
 When I was near the branching of the crossroads,  
 going on foot, I was encountered by  
 a herald and a carriage with a man in it,  
 just as you tell me. He that led the way  
 and the old man himself wanted to thrust me  
 out of the road by force. (OR 796-806)

Oedipus’ account of his erroneous actions is patchy and a fragmented narrative despite his claim that it is the “whole truth.” The crossroads seem to be a construction of Jocasta’s memory and language; Oedipus explains he “came to the place where, as you (Jocasta) say” and encountered the king “just as you (Jocasta) tell me.” By acknowledging twice that Jocasta orally located the “place where” he fled, Oedipus voices Jocasta’s inherent link to the crossroads and to his tortured past. His recollection is not quite his own—it is a re-telling of Jocasta’s anecdote. Oedipus’ mental capacity will not serve him as it did with the Sphinx; rather, he must return to what is corporeal and concrete in solving his own ambulatory riddle. In addition, the critical moment when Oedipus is “thrust out of the road by force” signifies his dislocation from the topography of his identity, perhaps explaining his schizophrenic or traumatic recollection of the event not as a linear progression but as a gap and interruption. Indeed, the convergence point as the “navel” is literally a “bump” in the

teleological narrative: the event is constructed as a flashback and turning back of time, a deviation, as it were, in the road's straight path. Oedipus' crossroads is the opening out of meaning, a semiotic weaving of roads. At its very center, it is a contained microcosm of Oedipus's identity—a conflation of riddles, questions, interpretations that slowly trickle out.

Like Oedipus, Phedre generates and contains her own topography, but it is one that is built up and partitioned into room-like corridors that encapsulate Phedre's vacillation between the inside and outside. Figuratively built on the Greek foundation of Oedipus Rex's two-dimensional crisscrossing lines and Euripides' original play, Racine's *Phedre* is constructed from such layering into a three-dimensional, convoluted theatrical space. The inextricable intertwining of things, events, ideas, and emotions characterizes Phedre, and the protagonist herself is responsible for creating this world of miscommunication (dead ends) and disorientation. Phedre often seems lost, asking, "where am I?" (P 41); her eyes are dazzled by the light and clouded by the darkness, rendering her sense of space and time oblique. Ironically, Phedre's self-constructed labyrinth, in which her confusion and loss of reason also posit her within, is at the "center" of this mental maze. The labyrinth is like a "house of mirrors": "characteristic of such structures is some play with the figure of container and contained or with an inside/outside opposition which reverses itself. Inside becomes outside, outside inside, dissolving the polarity" (Miller 15). The maze is a unique landscape, one that is more reflective of the domestic interior than of a traveler's road. However, the Oedipus' and Phedre's topographies are comparable in that the characters must seek to explore their spatial areas in order to make sense of their bodies as constituents of space. Ariadne's thread is like Oedipus' predestined path, except hers is a tangible string that guides her to the center of her own road—the labyrinth. Ruskin suggests "the cunning artifice of the [play] is the house itself, just as the Daedalian labyrinth is at once an enclosure and a place of endless wandering" (Miller 15). J. Hillis Miller's corresponding point that "a labyrinth is a desert turned inside out" (15) refers directly to *Phedre*, also illuminating the maze as a foregrounding device within the play. Not only does the labyrinth demarcate the theatrical stage as a limited and enclosed space, but it also reveals the illusionistic "artifice" of the stage backdrop as that which seeks to "orient" the audience and characters in a world that is a disoriented form of reality.

Although theoretically there is a center to the labyrinth, Oedipus'

“navel” is superseded in Phedre by a space that contains the Minotaur. The impossibility of finding a true center in this structure is a conundrum in and of itself, complicated by the architectural riddle: does the starting point originate at the center or from the outside? Is the labyrinth designed to be entered or egressed? Phedre must navigate her way out not by fortune and magic (as Theseus did, aided by Ariadne’s succor), but by unraveling her hidden emotions to reveal the truth. The thread that Phedre hopes will bind her and Hippolytus as a symbol of their reciprocal love represents the veins that interlace the narrative, pulsating with blood, fire, passion, and an all-consuming love—these are the threads or vessels through which Venus ensnares mortal affections (P 47-8). Yet these vessels also symbolize the interconnected crossroads of one’s biological circulatory network, a structure in which routes both branch out and converge on important organs, or nodes.

The labyrinth represents Phedre’s “design” to reroute history, displacing her sister as Hippolytus’ lover. The maze becomes a stage-within-a stage in which Phedre can enact her fantastical whimsies.

You would have been the monster’s killer then,  
 in spite of all the windings of his maze,  
 to find your way in that uncertain dark,  
 my sister would have armed you with the thread.  
 But no! In this design I would have been  
 ahead of her

...

And I it would have been, Prince, I, whose aid  
 had taught you all the Labyrinth’s crooked ways

...

I myself have wished to lead the way,  
 And share the perils you were bound to face  
 Phaedra, into the Labyrinth, with you  
 would have descended, and with you returned,  
 to safety, or with you have perished! (P 83, 85)

The “windings of his maze” is a projected map of the Minotaur and Phedre’s twisted physicality, mental confusion, and tangled genealogy. In some respects, Phedre’s explicit reference to the “design” of the labyrinth posits her as the architect, the artist who is concerned with depth and perspective like Schön with his clever piece, “Perspective.” Within these structures are built-in roads that reroute the viewer or participant and al-

low him to create his own viewpoint. Like Oedipus, Phedre's path is off-kilter: both begin from displaced origins, with Oedipus' remembrance prompted by Jocasta and Phedre's self-reimagining as the triumphant lover. Indeed, the crossroad is an emblem of rerouting, of alternate paths to redirect one away from traffic, blockages, or accidents. Yet, rather than moving the characters away from the danger at the center, the crossroads ultimately fail to perform the function of a safe-guard.

Phedre is not shielded from the contained self-destruction within the maze of "uncertain dark" that all must dangerously traverse, but is lured in. Furthermore, Phedre's claim that she would have taught Hippolytus the "labyrinth's crooked ways" is paradoxical: not only is she unable to find her own way, but this labyrinth is a road that cannot be navigated because its "crooked ways" are fraught with dead ends. The tenuous threads woven throughout the labyrinth as a guiding paths are also multiplicitous, for a "single thread would not have been enough." But these strings would only become entangled like Oedipus' three-fold crossroads. The Oedipal or Daedalian thread and the "path recurved and curved" manifest the properties of the narrative line and "terminology of storytelling": genealogical line, crossroads, impasse, denouement, cornered, loose thread, marginal, trope, chiasmus, double bind..." (Miller 157). Likewise, Phedre cannot escape the lure of the maze, and she too returns "to the Labyrinth" not in a linear journey, but rather as a perilous "descent" into an empty space figured as her own hell. Although Oedipus' return to his beginning, the incestuous womb, is devastating in and of itself, Phedre's landscape falls out from under her as she experiences a dizzying drop to the depths of chaos. Indeed, Ariadne's attempted escape from the landscape proves fruitless, for her thread is a "mise en abyme, both a mapping of the abyss and an attempted escape from it" (Miller 122). The spiraling dissolution of the maze is appropriate in foreshadowing Phedre's death as self-generated and moves the audience closer to Beckett's deconstruction of space and time.

Beckett's stark, simple stage scenery—a purified mise-en-scène that is in some ways a return to a form of meta-Greek theater—completely obliterates Phedre's ultimate disorientation within an overly layered and complex grid. In *Waiting for Godot*, characters are seemingly restricted to a certain, invisible path, which requires the function of the three-dimensional labyrinth or pattern as a tangible marker of borders, culs-de-sac, and walls. Now, the geometric arrangement of the crossroads signifies

both everything and nothing. It engenders and circumscribes the entirety of the landscape itself, yet it illustrates the kenotic emptying out of the stage, denying meaningful space. This “negative space” is somewhat refreshing in that its two main characters, Vladimir and Estragon, are truly isolated, reliant on themselves to generate a world out of this nothingness. Although this true mental topography as a “dreamscape” would seem to be the least accessible to the audience within the tradition extending from Sophocles, Vladimir’s and Estragon’s actions and language generate the meaning of place. The familiarity with a road and tree as everyday objects are enough to constitute what Rehm describes as:

the persisting surfaces of reality [as what] provide[s] the framework of (visible) reality [...] We see surfaces, continuities, breaks, edges, obstacles, openings, paths—potential routes for movement and barriers to get around. Moving from one place to another involves the opening up of the vista ahead and the closing of the vista behind. (Rehm 13)

In *Waiting For Godot*, there is no “closing of the vista behind”; rather, movement as repetition is what reiterates the landscape and keeps it open as a site of continuity. The space is unlimited, yet there is no place to go—the mound by the tree serves as a node in time, a “moment” of infinite waiting in a suspended time and place. Indeed, the bare simplicity of the tree and road allow for transference to take place between the objects and the characters; the inversely projected anthropomorphism of objects and space onto human emotions radically alters our conception of human relations to our environs.

The minimalist stage directions in the opening of Act I in *Waiting for Godot* guide us on what is perhaps both the shortest and longest journey in the play. “A country road. A tree. Evening. (Estragon, sitting on a low mound..)” precedes the opening scene, but does this road even enter into the diegetic narrative itself? Are any characters truly conveyed on this path? Perhaps this road is the one on which Godot will arrive—a road of potentiality that never seems to actualize its function in pointing to a predictable outcome. Only Vladimir’s and Estragon’s gazes traverse and penetrate the road, not peripatetic travelers: “(Estragon) halts, gazes into distance off with his hand screening his eyes, turns, goes extreme right, gazes into distance” (WFG 7). Estragon’s gaze is one that looks at both points “A” and “B” in the road, seeking to both extend and shorten the thoroughfare

with the visual powers of his perception.

Indeed, the reiteration of this gesture, in particular in Act II, is imbued with more significance once the “gazing” emerges as a pattern that revolves around the tree itself. At the very beginning of the second scene, it is Vladimir who scans the “paranormic” landscape:

*Tree has four or five leaves. Enter Vladimir agitatedly. He halts and looks long at the tree, then suddenly begins to move feverishly about the stage. [He] comes and goes. Halts extreme right and goes into distance off, shading his eyes with his hand. Comes and goes. (WFG 62)*

The tree itself, as a fixed point on the horizon line, not only interrupts the road’s continuity, but also acts as a signifier of its function as a place for movement. Indeed, Vladimir’s gaze at the tree seems to incite his movement into a more frenetic and hyperbolic ambulation. The tree becomes a pole, a hub of activity, and an upright axis around which Vladimir’s and Estragon’s worlds revolve. Vladimir’s frequent crossing of the stage traces and creates invisible paths of diagonal movement. The tree, in short, seems to function as Oedipus’ “navel,” the center and creator of the crisscrossing, peripatetic movements around it. After singing a short song, perhaps because he is lonely without his comrade Estragon, Vladimir continues after he halts before the tree, coming and going then slowly crossing the stage [...] turn[ing] to see the entrance of Estragon (WFG 63). In all respects a pivotal sequence, Vladimir’s crossing the stage space to create his own crossroads not only returns the play to its starting point, but actually triggers an event of some significance. The tree is a marker for memory that Vladimir and Estragon can relive and reperform again and again. Yet Vladimir must constantly remind Estragon of the tree’s reliability and rootedness as what keeps them fixed to this place:

E: Was it [the tree] not there yesterday?

V: Of course it was there [...] do you not recognize the place?  
(WFG 66-7)

Initially claimed to be a “charming spot [with] inspiring prospects” (11), this place adjacent to the tree never achieves its optimistic characterization, as Estragon immediately follows his observation with “Let’s go.” The tree seems to be what orients Vladimir and disorients Estragon;

Estragon's topography belongs more to the road that moves away from the central space of the play. Even Estragon himself suggests to his friend that they "weren't made for the same road" (WFG 58); indeed, they seem to occupy two different axes of time and space that merge to create this microcosmic bubble, a world suspended between the XY plane of the tree and the road.

Estragon and Vladimir's tree is not quite Oedipus' "navel," nor is it Phedre's contained space; but it is instead a "beginning" that is signaled by both a protruding mound and a negative space. By consistently falling, and often finding themselves unable to stand on their own, the pair stumbles over this imaginary hole as a contrast to the tree and mound. The stage is an "abyssal depth" (WFG 91), described by Estragon as "a beginning of WHAT?" (WFG 72). The dramatized lacuna in the floor is a place described as "indescribable. It's like nothing. There's nothing. There's a tree" (WFG 99). Although Estragon foregrounds the tree as an object in a space of "nothing," it is perhaps the most concrete object in the play, serving almost as a stake driven into the ground to prevent everything else from slipping away. Nevertheless, the tree is not so much that which occupies the space as that which gives meaning, pointing to the infinite expanse, illustrating how much vacant, empty nothingness surrounds it. The tree also breeds space, as the "beginning," for an object signifying "nothing" cannot produce more "nothingness." Perhaps a summation of *Waiting For Godot's* minimalist landscape, the "white space" is "indescribable, like nothing," yet it is encapsulated by a single word and object—"a tree."

In *Oedipus Rex*, *Phedre*, and *Waiting for Godot*, the "navel" or the intersection of these crossroads, contain or confront a monstrosity. As heterotopic space that is different within itself, the structure of these topographies manifests and stems from a distortion at the center. Plunging back into Schön's "Perspective", which literally encapsulates the figure and function of "x-marks the spot," "X" is not only a visual cue, but also an etymologically significant letter. Miller provides us with a plethora of examples of how the letter "X" might spin out monstrosities, distortions or negations:

x is a crossroads, the figure of speech called chiasmus... an unknown, a place marked on a map, an illustration, the sign of error or erasure... the place of encounters, reversals, exchanges... the topos as gap, gape, or yawning chasm, the

undecidable, the foyer of genealogical crossings, of crossing oneself, of the x chromosome, of crisis... the sign of death. The ex means out of, besides itself, displaced. (Miller 163)

As the “foyer of genealogical crossings,” the crossroads signals Oedipus’ perverse sexuality—his incest engendering a fatal plague that saturates the land. The land is monstrous like the composite body of the Sphinx, a three-way crossing of creature and woman that signals Oedipus’ “mis-carriage,” or perhaps even a genetic mutation. Likewise, the Minotaur that occupies Phedre’s labyrinth is another figurative product of sexuality gone astray. Engendering Greek mythology as a source of the supernatural and mystical, Beckett’s “thing” is perhaps not a monster so much as an Other space that transcends reality. Obliterating the monstrosity, Vladimir and Estragon are posited as the source of the disturbance in time and space itself. Ultimately, these stages’ deconstruction of space is what generates a landscape that cannot be anything but a composite, artificial, “displaced” realm that betrays reality.

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## Diamond Matchbooks

*Development of Advertising and the Corporate Image in Early 20<sup>th</sup> Century America*

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Marisa Wilairat '05

“Phillumeny” refers to the practice of collecting match paraphernalia; yet this term meaning “the love of light” does not fully encapsulate why these artifacts have become collectibles.<sup>1</sup> The Diamond Match Company’s use of matchbooks as advertising tools in the 1890s signifies the emergence of modern industrial America. This culture gave rise to the development of advertising as an industry and the pattern of large corporations. Growing suspicions of big business and a patriotic thrust following World War I led corporations to alter their image during the first few decades of the 20th century. The patriotic advertisements on Diamond matchbooks and their boxes indicate this shifting role of corporations in American society from the 1880s to the 1930s. In the 1920s and ‘30s, Diamond capitalized on a reshaped company image—it used the nationalist trend in the political and economic climates to promote consumption of its own product as a way of defending the country against foreign forces and economic depression. Thus, a box of Diamond matchbooks not only acts as a lens through which to view the development of advertising but also illuminates the intersection of advertising, politics, and consumption during the 1920s and the Great Depression era.

In his book, *Pragmatism and the Political Economy of Cultural Revolution*, historian James Livingston asserts that until the 1880s industrial leaders were “divided by economic interest and function... and a competitive or individualistic ethic.”<sup>2</sup> The behavior of the match industry exemplifies this characterization. By the 1870s, wooden matches had become a household commodity with a high consumer demand. Accordingly,

dozens of individual, rival match firms existed throughout the United States. Involved in competitive price wars, they struggled to maintain profits. However, spearheaded by Ohio Columbus Barber, who realized that his own Ohio Match Company could not survive in this business atmosphere, the country's fifteen major match companies agreed to merge their firms. In 1881, they formed one large corporation, the Diamond Match Company (DMC).<sup>3</sup>

The DMC, a "practical monopoly," illustrates the late 19th century trend of proliferating monopolies and trusts.<sup>4</sup> The consolidation of plants located throughout the country, the combination of efficient machinery features, and the sharing of patents equipped Diamond with the resources to function as a successful modern industry. Individuals, notably John D. Rockefeller and Andrew Carnegie, and companies in industries such as railroads built fortunes by controlling all aspects of their business realms. Engaged in this process of consolidating control within an industry, the DMC bought out smaller companies and acquired any match patents of which they learned. The DMC's acquisition of Joshua Pusey's matchbook patent in 1894 resulted from this process. By the late 1890s, under the presidency of O.C. Barber, who became known as the "Match King," Diamond surfaced as a large corporation with growing monopolistic power over the American match industry.

The subsequent development of the matchbook as an advertising tool further reflects late 19th century American industrial culture and correlates to the emergence of advertising as a crucial industry. While matchbooks dominated the match industry in the 20th century, they initially lacked popularity with the public (see Appendix A). Paper matchbooks were designed to suit consumer needs in terms of convenience, affordability, and safety. They were small enough to fit in a pocket and thus easy to carry, did not ignite with an explosion of sparks, and contained 20 sticks to correspond with smokers' needs since cigarette packages contained 10 or 20 cigarettes. Yet, despite the convenience and utilitarian value offered by matchbooks, they did not generate revenues. The Diamond Match Company reshaped the matchbook's marketing value as an advertising device rather than a solely functional commodity. The small size of matchbooks and their moveability provided a lucrative medium for spreading awareness of other products, including shows, cigarettes, candy, restaurants, and hotels. Diamond reoriented itself towards businesses as its consumer audience, emphasizing the matchbook's capabili-

ties beyond simple utility.

Advertising functioned to generate mass consumption in the context of an industrialized society that needed an expanding consumer market to counter over-production. In 1893, 104 companies spent \$50,000 on advertising, and by 1915 half of these firms spent more than double this amount.<sup>5</sup> During this critical era in advertising, other print forms of advertising, such as postcards, newspapers, and magazines, burgeoned.<sup>6</sup> Advertising with millions of matchbooks, "mini billboards," required small funds yet provided desirable compact, color images.<sup>7</sup> A case of 2500 matchbooks sold for six dollars.<sup>8</sup> They were a cheap and successful method of advertising that even small businesses could afford. The availability of efficient transportation networks and the changing role of distribution, again symbolic of modern industrial America, were important features contributing to the flourishing of advertising. The booming railroad industry broadened market scales, and the DMC capitalized on wide distribution capacities. Diamond functioned as distributors for various businesses, selling matchbooks advertising products to wholesalers all over the country. Furthermore, matchbooks served as mobile advertisements in themselves.

Deborah Smith, a historian of American business culture, states that while "advertising had been around a long time... the 1890s marked a turning point."<sup>9</sup> As its relationship with consumption shifted, advertising became a crucial industry for fostering mass consumption. Smith notes the key factor of advanced "communication technology," which again signifies the emerging modern industrial society. Lithography and other advances in printing techniques enabled the use of multiple colors and mass production of images, enhancing the success of matchcovers as advertising mediums. Hundreds of businesses recognized the matchbook as a way of promoting nationwide awareness of their product. The new notion of depicting the product along with a trademark arose in this period. Since matchbook advertising remained cheap, businesses were able to create their own designs instead of following the former practice of using stock cuts that were not customized to their product.

In the late 1890s and the early 20th century, the DMC used two fledgling marketing strategies: selling advertising space and presenting free giveaways. Henry C. Traute, the head of Diamond's matchbook division, acted as Diamond's salesman; he personally traveled to businesses in an attempt to convince them to advertise on the covers of matchbooks. In

1896, Pabst Beer ordered 10 million matchbooks with covers featuring a reprint of one of their magazine advertisements.<sup>10</sup> The American Tobacco Company ordered 30 million matchbooks advertising their product. Businesses throughout the country served as a profitable clientele for the DMC. Because these businesses struggled to sell the matchbooks to the public, Diamond underscored the value of matchbooks as marketing tools by convincing wholesalers to give away the product. The use of such "giveaways" boosted sales of smoking commodities; the first tobacconist who implemented this technique in New York reported that sales of tobacco doubled.<sup>11</sup> Although the consumers often paid nothing for the matchbooks, Diamond profited from marketing advertising space on them. The advertising on the matchbooks increased sales for both the product with which they were given away (e.g., tobacco) and the product advertised on them (e.g., Pabst beer).

The use of matchbooks as free giveaways corresponds to the growing popularity of this marketing strategy, indicative of the development of advertising as an industry. In discussing the paper tradecard and their replacement by the postcard, Smith states that "small colorful paper giveaways remained effective advertising gimmicks well into the twentieth century."<sup>12</sup> The matchbook was an improved form of the tradecard which previously functioned as a successful, inexpensive advertising tool. Local businesses gave away tradecards with their name on them that often doubled as a functional object such as a ruler, calendar, or puzzle; they focused on creating a card worth saving. The matchbook employed this same idea. It remained a useful commodity until each match was used. H. Thomas Steele asserts that these books functioned as "subliminal reinforcements... making matchcovers the first of the hidden persuaders."<sup>13</sup> The matchbook reintroduced the advertised product into the consumer's mind with each match use.

The advertisements on Diamond matchbooks from the 1920s and '30s illuminate not just the economic but also the political arena taking shape around the turn of the century. Featuring a patriotic print, the matchbooks advertise an image of the Diamond Match Company as a nationalist enterprise. The DMC used its own marketing strategy to advertise itself. The matchbooks directly advertise Diamond; the brand name appears five times on each of the ten matchbooks (see Appendix B). "THE DIAMOND MATCH CO." appears in red on the bottom fold of the matchcover. "DIAMOND BOOK MATCHES" appears in blue on the top

fold and also in white below the company logo on the front of the cover. The logo, printed on the front and back of the cover, includes the name "DIAMOND MATCHES" inside a diamond graphic. This repeated appearance of the brand name ingrains awareness of the company into the mind of the consumer. Furthermore, the matchcovers remain laden with patriotic symbolism, reflecting the changing role that big business played in the U.S. after the turn of the century through the 1920s.<sup>14</sup> The matchcovers use only three colors: red, white, and blue. The Diamond logo situates the diamond graphic with the Diamond name against an American bald eagle with USA printed underneath on a blue background resembling the shape of a plaque. Both matchcover sides feature red backgrounds. Diamond therefore saturated its product with national emblems and presented itself as a patriotic company.

Diamond's patriotic matchbooks illustrate shifting notions concerning the role of corporations. The early 20th century witnessed growing suspicion of big business and a reconsideration of their position in society. People feared the close relationship between corporate economic power and political power. In response, from the turn of the century through the 1930s, large corporations renegotiated their role in society in terms of their relationship with the government and the public. The DMC's promotion of a nationalist image through its matchbooks exhibits this reshaping. As people scrutinized the foundations of capitalism, corporations sought to affirm their "social and moral legitimacy."<sup>15</sup> Corporations characterized themselves as "serving [the] nation" and as national institutions.<sup>16</sup> Herbert Hoover's support for corporate welfare as Secretary of Commerce through the 1920s and as President from 1928 to 1932 demonstrates this ideology. In 1925, Hoover proclaimed that "every time we find solutions outside of government we have not only strengthened our character but we have preserved our sense of real self-government."<sup>17</sup> He opposed direct federal aid or federal control over business and instead advocated socially responsible corporatism.<sup>18</sup> Various companies implemented plans to show concern for their workers' welfare; they created pension plans, employee magazines, and other benefits to foster company spirit. The DMC's developing image, exhibited by its 1930s matchcovers, depicted this quest for what Roland Marchand titles a "corporate soul."

Diamond had already begun to reshape its role as a corporation representative of modern industry by the second decade of the 20th century.

The DMC exemplified Hoover's ideals for a socially responsible corporation that addressed employee and public welfare, diminishing the need for federal intervention. Diamond created the image of a company that benefited and helped the country, not the image of a selfish monopoly. Even though the DMC owned lumber plants and paper mills to support its wooden and paper match production, from the 1880s to the 1930s it did not implement any significant increases in the price of matches sold to the public. In 1910, Diamond's president William Armstrong Fairburn had developed a nonpoisonous match, reducing the cases of factory workers who developed phosphorous necrosis, a condition that rotted away the teeth and jaws of people involved in match production, leading to cancer and death. Moreover, Diamond freely released its patent for this nonpoisonous match to the public with "no string tied" before Congress passed the "Esch Bill" to ease public outcry against the serious work hazard of white phosphorous.<sup>19</sup> This bill placed an extra two-cent tax on matches made with white phosphorous, which companies could not afford. Even though the DMC occupied the position to reap large benefits as the tax wiped out its competitors, the company voluntarily relinquished this monopolistic advantage. Rather, Diamond ensured the maintenance of competition within the American match industry. The company even sent its managers to other match firms to provide instruction on mixing the substitute chemicals. *Scientific American* declared the DMC a "public benefactor."<sup>20</sup> Similarly, an article in *The Outlook* labeled the DMC a "humane corporation" due to their "unselfish and human action" that voluntarily created "a revolutionary change in the public interest."<sup>21</sup> The American Safety Museum awarded the DMC the Gold Medal in 1914 and both the Grand Prize and the Gold Medal in 1916 for its achievements in protecting the safety of its workers. Diamond also received the Louis Livingston Seaman Medal for "the elimination of occupational disease" in 1915. Without federal regulatory policies in place, Diamond patriotically acted in the interests of the health of the workers and the public.<sup>22</sup>

Again corresponding to Hoover's notions of welfare capitalism, the DMC exercised its responsibilities toward its employees by implementing plans and policies in the workers' interests during the 1920s. The comments of Mary Boardman, a Diamond employee from 1927 to 1941, reveal Diamond's improved conditions. Boardman explained that she "didn't mind" the minimum wages or long hours because "it was nice

working" at Diamond, where it "was so clean... and the management was wonderful: it was just like one big happy family."<sup>23</sup> She described the big cafeteria, the "beautiful food," and free coffee, all of which Diamond offered in the late 1920s.<sup>24</sup>

In addition to altering its image, Roland Marchand explained that in the 1920s a company would shift its advertising design to "win [public] regard as an esteemed national institution;" it used clean lines and a balanced layout for an uncluttered, dignified look.<sup>25</sup> Displaying the intersection of politics and advertising, the continued nationalist trend in its advertisements echoed the jingoistic feelings resulting from World War I. This nationalism also reveals an intersection between politics and consumption specific to the Great Depression era. Diamond's box labels from the 1920s highlighted the company as ensuring safety and quality, often including the image of its American Museum of Safety award. However, the Diamond box from the middle of the Depression advertises the product's American roots. It states "MADE IN U.S.A., By American workers, Of American materials, For American home use, THE DIAMOND MATCH CO." Additionally, the patriotic Diamond logo appears next to this print.

The patriotism advertised and offered by Diamond's matchbooks indicated the desire to support the U.S. in opposition to foreign forces, such as Russia and communism, as well as the desire to support the country in the fight against economic depression. In many of his writings from the 1920s and 30s, Diamond's president, William Fairburn, heralded the merits of American democracy particularly in contrast to the "oppression" caused by Russian "dictatorship."<sup>26</sup> The nationalism embodied by the box of matchbooks reveals a window into this developing political tone. In a period of mass consumption followed by depression, intellectuals and other citizens questioned the country's ideals and values.<sup>27</sup> Fearing a slide toward communism, people such as Fairburn sought to reaffirm faith in capitalism and the United States, a country that boasted "liberty and independence... and the highest standard of living of any country in the world."<sup>28</sup>

Reflecting isolationist tendencies, and corresponding with common political notions of the era, the DMC matchbox label also advocates buying American, rather than foreign, products. Fairburn himself asserted that to maintain prosperity the U.S. "must be self-supporting; satisfied almost entirely with its own domestic market."<sup>29</sup> In the late 1920s and

1930s, Diamond responded to rising fears that American markets could become dominated by foreign industry and their supposed “camouflaged agents.”<sup>30</sup> The Diamond Match Company opposed the efforts of Ivan Krueger, whose Swedish company had expanded to dominate the European match industry, to gain a high stake in the American match industry. Through the 1920s until his suicide and his company’s collapse in 1932, Krueger bought interests in American match firms and took over control of three companies. Fairburn resisted Krueger’s offers to combine Diamond’s interests with the Swedish Match Company. Viewing Krueger’s company as a “match empire,” Fairburn acted to protect the American match industry from so-called “unscrupulous attacks.”<sup>31</sup>

In addition, in emphasizing that “American workers” made their products, Diamond encouraged the notion that buying its matchbooks was a patriotic way to combat the Depression. During a time when people yearned for jobs, the DMC provided employment. By 1932, almost 28 percent of the American households, 34 million people, were unemployed. People who still held jobs suffered reductions in wages; by 1933, Americans were earning 54% of the income they earned in 1929.<sup>32</sup> Similar to industries across the country, Diamond experienced a drop following the 1929 stock market crash. The company attributed losses to a decline in advertising business from other companies and the refusals to giveaway the matchbooks with a pack of cigarettes or other smoking commodities. Nevertheless, in the mid-1930s, Diamond maintained wages. The DMC spread its net profits from 1934, around \$2,130,000, among its stockholders. Additionally, it initiated a short-term policy of paying an extra wage dividend to its employees. Fairburn explained that the company was moved by “a patriotic desire to assist the Government of the United States in its fight for business recovery, the employment of workers, and a restoration of prosperity and national purchasing power.”<sup>33</sup> Thus, Diamond represented itself as a nationalist company and maintained its image as a public benefactor. Its matchbooks promoted the notion of supporting “American workers” and of saving the country from depression through consumption. Reflecting the political sentiments of this era, Fairburn declared in *Work and Workers* that “courageous manufactures, who will make only excellent quality goods and sell only at a fair and reasonable price, employing American labor” and people who buy “American-made” goods “can bring prosperity back to the United States.”<sup>34</sup>

Diamond’s products highlight intersections between politics and

consumption, relating to what Lizabeth Cohen calls the “citizen consumer” and the “customer consumer.”<sup>35</sup> By consuming a product made of American materials by American workers, citizens performed their political responsibility to support the nation against foreign influences and help the national economy recover. They asserted their role as citizen consumers by supporting the public good. The mere act of consumption also corresponded with a growing national identity. Mass consumption in the 1920s led to the diminishing of boundaries between social and ethnic groups as they developed a working-class identity through their consuming power.<sup>36</sup> A box of Diamond matchbooks was an affordable commodity that asserted a developing national awareness.

Additionally, as customer consumers, people attained a commodity that could serve the customer’s needs and facilitate the personal pleasure many people associated with smoking. Throughout this era, the public remained willing and eager to buy cigarettes, a luxury item that was still affordable and often considered necessary. A 1936 article in *Business* states that cigarette consumption reached “an all-time peak” in 1935.<sup>37</sup> A *Newsweek* article asserted that the DMC’s “remarkable [sales] record reflects the stability of match consumption... despite the spread of electricity, pilot lights on gas stoves, and mechanical lighters.” It notes the saving influence of “the increasing use of cigarettes and the spread of smoking among women.”<sup>38</sup> Publishing the story of Giuseppe Pucci, a man who lost his job in 1936 but paid back all his friends who loaned him money, *Printers’ Ink Monthly* defended this act of borrowing, stating that “he had to live, eat, buy cigarettes.”<sup>39</sup> The delineation of cigarettes as a basic necessity reflects tobacco’s integral role in society, thereby maintaining a consumer need for matches at a time in which they were being used less frequently for other, more traditional uses, like lighting stoves and lamps.

During the 1930s, two matchbooks were sold for one cent at newsstands, cigar shops, five and dime stores, department stores, and in dispensing machines. A Diamond box of ten matchbooks and a brass lacquered tin match safe cost 10 cents. The tin matchbook holder opened at the rounded top and had a bottom ring for attaching a chain. It also had a blank rectangle on which the owner could engrave his or her initials. The front and back were decorated with just ten groups of four vertical lines. Advertising the holder as a “match safe” recalled earlier decades when match safes were a popular decorative object for holding wooden match

sticks. These types of match safes came in different sizes and shapes and often boasted elaborate designs. They were used as status symbols or markers of wealth, similar to fancy cigarette cases and holders. At a price affordable even to the working class, consumers could obtain this symbol of elegance by purchasing a box of Diamond matchbooks. The matchbook holder reminded consumers of the glamour of smoking, and the matchbooks enabled consumers to continue this pleasurable practice. For the consumer, the commodity offered “accessible gratification” and served to satisfy individual needs.<sup>40</sup>

Today, Diamond matchbooks illuminate the story of the development of modern industrial America and the development of a mass consumer culture. Industrialization provided the foundation for the growth of the Diamond Match Company and its use of matchbooks as advertising devices. The advertisements on the Diamond box and matchbooks from the 1930s illustrate the coinciding story of the shifting political scene, particularly concerning the relationship between corporations and society. Their patriotic and nationalist message enabled the consumer to serve both public and personal interests. As a collectible still remaining in the 21st century, the box of matchbooks that became the subject of this study still has not fulfilled its utilitarian purpose, but it does fulfill an unintended function by continuing to tell historical stories through its covers.

## **Appendix A**

### **A Brief History of Matches**

Into the first decades of the 19th century, people primarily depended on flint and steel in order to create a source of fire on demand. In 1827, John Walker, an Englishman, accidentally created the first friction match, a wood splint tipped with sulfur and phosphorus, sparking the development of the match industry.<sup>41</sup> Alonzo D. Phillips obtained the first patent for the friction match in the United States, which later came into the possession of the Diamond Match Company.<sup>42</sup> During the 1830s, various people and firms created and sold this type of match, referred to as a “lucifer,” which ignited upon being pulled through folded sandpaper. In 1836, the “loco-foco” match, more commonly known as strike-anywhere matches, became popular; these wooden sticks would ignite after being struck on any rough surface. Throughout the 19th century, this type of wooden match stick represented the predominant form of creating quick

fire for various tasks such as lighting stoves or cigars. Nevertheless, people viewed matches as dangerous and inconvenient. Matches either ignited with an explosion of sparks, which could ignite users' clothing or nearby objects or gave off offensive fumes. A drawing by A.B. Frost in an 1884 issue of *Harper's Weekly* titled "The Last Match" depicts two hunters hovered over a match as they light a cigar and a pipe, reflecting the usual scarcity of an individual's match supply.<sup>43</sup> Frustrated with the bulkiness of carrying a box of wooden matches, Joshua Pusey invented the first paper matches and the first rudimentary form of the matchbook. He dipped thin strips of cardboard in sulfur and phosphorus and stapled them to another piece of cardboard, creating the first matchbook, which was patented in 1892. The DMC furthered the utilitarian and convenience demands fulfilled by the matchbook by placing 20 matches inside instead of Pusey's 50 to meet the smoker's consumer needs; cigarette packages contained ten or 20 smokes.<sup>44</sup> Additionally, the height of the match stick was designed to produce a flame that lasted long enough for a smoker to light a cigar. In the 1940s, Diamond and other companies shortened the matchbook size by 1/8 of an inch, making the match lengths more suitable for lighting cigarettes which had become more popular than cigars.<sup>45</sup> In 1895, Diamond moved the striker from the inside of the matchbook to the outside cover to prevent the entire book from igniting. Henry C. Traute, who was in charge of Diamond's matchbook section, ordered the instruction "Close Cover Before Striking" to be printed on matchcovers in order to inform the public about how to use the product because people were wary of burning their hands.<sup>46</sup> Despite these technological advances, the matchbook did not become popular until used as an advertising device.

## Appendix B

### Images of Matchbooks



## Appendix C

### Explanation Of Label Color

The green color may reflect Diamond's aim to appeal to women as consumers. Women increasingly took up the practice of smoking in the 1920s, but they often only bought packages that coordinated with their clothing. According to the Lucky Strike Company's research, women hesitated to buy this cigarette brand because of the packages' green design. Consequently, Lucky Strike hired Edward L. Bernays, who was known as "the father of public relations," to promote green as fashionable. In 1934, Bernays designed a Green Ball in New York, instructing attendees that they could only wear green. The Ball's entire theme was the color green. Green represented the "in" color of the year.<sup>47</sup>

### Endnotes

<sup>1</sup>Bill Retskin, *The Matchcover Collector's Price Guide* (Norfolk: Antique Trader Books, 1997) 291.

<sup>2</sup>James Livingston, *Pragmatism and the Political Economy of Cultural Revolution, 1850-1940* (Chapel Hill: The University of North Carolina Press, 1994) 46.

<sup>3</sup>The Diamond Match Company, *The Diamond Years: Commemorating the 75th anniversary of the Diamond Match Company, 1881-1956* (The Diamond Match Company, 1956) 4.

<sup>4</sup>"The History of Matches," *The Manufacturer and Builder* 15.4 (1883): 94.

<sup>5</sup>Deborah A. Smith, "Coaxing the Consumer: Giveaways and Gimmicks, 1890-1930," *The Consumer Culture and the American Home* (Texas: McFaddin-Ward House, 1989) 12.

<sup>6</sup>Smith 13-14.

<sup>7</sup>H. Thomas Steele, *Close Cover Before Striking* (New York: Abbeville Press, 1987) 53.

<sup>8</sup>Bill Retskin, *The Matchcover Collectors Resource Book and Price Guide* (Alexandria: The Retskin Report, 1988) 8.

<sup>9</sup>Smith 11.

<sup>10</sup>The Diamond Match Company, Untitled Document (New York: 194?) 3. Courtesy of Diamond Brands, Alltrista Corporation.

<sup>11</sup>Steele 8.

<sup>12</sup>Smith 16.

<sup>13</sup>Steele 13.

<sup>14</sup>An image of this matchbook appears in a book published in 1926. Herbert Manchester, *The Romance of the Match* (New York: The Diamond Match Co., 1926) 42.

<sup>15</sup>Roland Marchand, *Creating the Corporate Soul* (Berkeley: University of California Press, 1998) 15.

<sup>16</sup>Marchand 2.

<sup>17</sup>Joan Hoff Wilson, *Herbert Hoover: Forgotten Progressive* (Boston: Little, Brown and Company, 1975) 143.

<sup>18</sup>Wilson 150.

<sup>19</sup>Retskin, *Resource Guide* 15.

- <sup>20</sup>“The Dedication of the Diamond Match Patent to the American Public,” *Scientific American* Feb. 1911. Published in Herbert Manchester, *The Diamond Match Company: A Century of Service, of Progress, and of Growth* (New York: The Diamond Match Company, 1935) 74.
- <sup>21</sup>*The Outlook* Feb. 1911. Published in Herbert Manchester, *Matches were made in Heaven and in Barberton, Ohio: The Story of the Diamond Match Company* (Barberton: The Barberton Historical Society, 1977) 77.
- <sup>22</sup>Manchester, *Romance* 33-6.
- <sup>23</sup>Mary Boardman, interview with Renee Baskin, *Oswego County Oral History Program*, New York, 24 Mar. 1976, 8-9.
- <sup>24</sup>Boardman 14.
- <sup>25</sup>Marchand 167.
- <sup>26</sup>William Armstrong Fairburn, *Russia: The Utopia in Chains* (New York: Nation Press Printing Co., Inc., 1931) 4.
- <sup>27</sup>Robert S. McElvaine, *The Great Depression* (Toronto: Fall River Music, Inc., 1961) 202.
- <sup>28</sup>Fairburn, *Russia* 82.
- <sup>29</sup>Fairburn, *Russia* 435.
- <sup>30</sup>Manchester, *Fairburn* 137.
- <sup>31</sup>Herbert Manchester, *William Armstrong Fairburn: A Factor in Human Progress* (New York: The Blanchard Press, 1940) 136.
- <sup>32</sup>David Kyvig, *Daily Life in the United States, 1920-1939* (Westport: Greenwood Press, 2002) 177.
- <sup>33</sup>“Diamond Match to Share Profits,” *New York Times* 26 Jan. 1935, 5.
- <sup>34</sup>William Armstrong Fairburn, *Work and Workers* (New York: Nation Press Printing Co., Inc., 1933) 56.
- <sup>35</sup>Lizabeth Cohen, “Citizens and Consumers in the Century of Mass Consumption,” *Perspectives on Modern America* (Oxford: Oxford University Press, 2001) 146.
- <sup>36</sup>Lizabeth Cohen, *Making a New Deal* (New York: Cambridge University Press, 1990) 100.
- <sup>37</sup>“Cigarettes: Consumption Reaches New Peak As Leading Brands Battle to Capture Smokers’ Flavor,” *Business* 12 Sep. 1936: 28.
- <sup>38</sup>“Matches: Cigarettes Light Way For Continued Diamond Profit,” *Newsweek* 13 Jun. 1936: 36.
- <sup>39</sup>Robert Riley Mayer, “Business as Usual: American Consumer Culture and the Second World War,” diss., U Georgia, 1994, 71.
- <sup>40</sup>Kyvig 189.
- <sup>41</sup>Manchester, *Romance* 24.
- <sup>42</sup>Manchester, *Century of Service* 16.
- <sup>43</sup>*Diamond Years* 6.
- <sup>44</sup>William Franklin Fleming, *America’s Match King: Ohio Columbus Barber* (Barberton: The Barberton Historical Society, 1981) 143.
- <sup>45</sup>Andy Denes, “Matchbook Holders: The Diamond Match Company Promotion & Blecher Souvenirs,” *International Match Safe Association Newsletter*, 1.3 (1999): 3.
- <sup>46</sup>Steele 8.
- <sup>47</sup>“Daily Doc: History of Tobacco Industry Advertising,” *Chronological Notes on the History of Cigarette Advertising* (Aug 1987) <<http://www.tobacco.org/Documents/dd/ddhistoryofadv.html>>.

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