

White Slavery and the Crisis of Will in the Age of Contract

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ABSTRACT: Recognizing human freedom is never as simple as acts of legal pronouncement might suggest. Liberal abstractions like freedom and equality; legal formulations of personhood, free will, and contract; the constructed divisions between public and private, self and other, home and market on which the former are predicated—these are often inadequate to understanding, let alone realizing, the shared aspirations they supposedly define. By the same token, the dense and dynamic relations of power that characterize any liberal society overwhelm and exceed our critical vocabulary. “Racism,” “sexism,” and “capitalism” powerfully name structures of inequality, but they fail to capture the full spectrum of social relations, practices, and exchanges that reproduce inequality—deep structures of feeling, unspoken common sense, the stories we tell ourselves about the world and our places in it. Focusing on an early twentieth-century case involving an immigrant convicted of “white slavery,” accused of “mesmerizing” his secretary, this Article explores the ways in which the white slave panic and spiritualist practices reflect a set of anxieties about the nature of agency and consent obscured by the universalizing and formalist abstractions of contract law and theory. Through a close reading of competing narratives surrounding the case, this Article seeks to investigate some of the ways in which the rhetorical distortions of law affect the lives of its most vulnerable subjects.

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INTRODUCTION

Late one evening in the summer of 1925, Dinshah Ghadiali was walking back to his hotel room in Portland, Oregon when he had the distinct feeling that he was being followed. He had just completed a demonstration of his invention before a small audience. Ghadiali was the inventor of a popular healing system. Any disease, he claimed, could be cured by simply casting colored lights on the body. His invention, a therapeutic light box, had been a phenomenal success, though it attracted voluble skeptics. That night, Ghadiali dragged his unsold instruments back to his hotel room without the assistance he needed—his young secretary having disappeared the day before. At his hotel room, he was met by a federal officer pointing a gun. Several other officers flooded the room. One ordered him to strip. Ghadiali spent the night in jail. It wasn't until the following morning that he learned he had been arrested for the crime of "white slavery."¹

The White Slave Traffic Act of 1910, better known as the Mann Act, criminalized interstate travel with white women for "any immoral purpose."² The

1. DINSHAH P. GHADIALI, RAILROADING A CITIZEN 84-85 (1926).

2. White Slave Traffic Act, 36 Stat. 825. (June 25, 1910). Though the phrase "white slavery" may sound odd, insensitive, or unsettling to contemporary readers, I use the phrase—usually to refer to forced prostitution among white women—because it was the phrase used to shape so many aspects of social life in the late nineteenth and early twentieth centuries, including apprehensions of race, gender, freedom and coercion. Six years before it made its way into U.S. federal legislation, the phrase appeared in the title of the International Agreement for the Suppression of White Slavery, a treaty signed by more than twenty countries. The U.S. law itself was spurred by a massive investigation undertaken by a Congressional Commission (though the Commission itself found little evidence of the phenomenon). KATHERINE BENTON-COHEN, *INVENTING THE IMMIGRATION PROBLEM AND ITS LEGACY* 151-158 (2018). However exaggerated, concerns about white slavery played an extraordinary role in expanding the capacities of what is now the Federal Bureau of Investigation. JESSICA R. PLILEY, *POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI* 1-8 (2014). The white slave panic found expression in print media and popular film, including one of the first, and most successful, feature-length films. In other words, "white slavery" was everywhere.

Quotation marks around words like "white slavery" or "mulatto" variously signal historical authenticity, epistemic doubt, rhetorical embarrassment, or shared skepticism. Quotation marks were once used to add emphasis or signal authority; lately, writers use them more often to signal a break from ordinary language, to disclaim or disavow certain language or ideas. See Marjorie Garber, "" (*Quotation Marks*), *CRITICAL INQUIRY* 653, 662 (1999). In the remainder of this Article, rather than enclose white

express purpose of the law was to protect white women from being forced into prostitution. Its notoriously expansive wording, though, allowed police and prosecutors to selectively punish men—especially black and brown men—involved in all manner of consensual behavior with white women. Ghadiali was accused of having sex with his secretary, a twenty-three-year-old woman named Geraldine McCann, on three occasions: once while vacationing with Ghadiali and his family in Atlantic City, New Jersey; and twice, while traveling cross-country to promote his inventions. At Ghadiali’s trial, when his attorneys asked McCann why she continued to work for Ghadiali, why she didn’t quit or run away after the first alleged incident, the young woman testified that she had been mesmerized.³

Ghadiali immigrated to the United States from India in 1910. He became a citizen in 1917, the same year that Congress barred further immigration from all of Asia. He had been arrested several times during his career for violating laws regulating the practice of medicine, but it was after he married a white woman, in 1923, that he became the target of increasingly racialized persecution. In his voluminous autobiographical writing, much of it devoted to documenting his many encounters with police officers and prosecutors, Ghadiali boasts that he *was* a mesmerist, as well as a theosophist, metaphysician, telepathist, and “spellbinding speaker.”⁴ He, like many others at the turn of the century, found in spiritualist counterpublics a form of entertainment, a community of free thinkers, opportunities to investigate capacities of the mind and interpersonal exchange. And like many others excluded from the more respectable professions—women, immigrants, black Americans—Ghadiali found in spiritualist circuits a way to earn a living.

Ghadiali first met McCann in 1924, when she and her aunt attended one of his scientific demonstrations in Portland, Oregon. According to the prosecuting attorney, Ghadiali lured the young woman away from the protective gaze of her family by promising exciting work and a good salary. Ghadiali asked her to sign what the prosecutors referred to as a “curious contract,” before inviting her to live and work with his family at their Institute in New Jersey. As soon as Ms. McCann arrived, the prosecutor argued, Ghadiali brought her “under his mental domination.”⁵ “He absorbed her personality until he addicted her will.”⁶

During their cross-examination of her, Ghadiali’s attorneys reminded McCann that her employer had given her a bicycle; he taught her how to drive;

slavery in quotation marks, as if to distance myself and the reader from the words’ meaning, I have chosen to do without the typographical offset—precisely because the phrase, the spurious phenomena it designates, and its haunting legacies cannot be so neatly contained. Nor should we assume that our ordinary language is pure of the sorts of corruptions that quotation marks are used to isolate.

3. GHADIALI, *supra* note 1, at 122-127.

4. DINSHAH P. GHADIALI, TRIUMPH OF SPECTRO-CHROME 231-2 (2d ed. 2002); *Dinshah P. Ghadiali, “Says X-Rays Are Not New,”* N.Y. TIMES (Mar. 11, 1896).

5. GHADIALI, *supra* note 1, at 124.

6. GHADIALI, *supra* note 1, at 123.

the two had travelled by rail together all over the country. If she wanted to escape her employer's control, why didn't she flee when she had the opportunity? McCann insisted that she had been "under some trance"—during the entire eleven months of her employment:

I had no will power of my own, and somehow or other, whenever I had the desire to get away, I felt that something was drawing me back. I did not have any will power to act and stand on my own feet. All my personality was gone. I felt a weak feeling, as if I had no control over my movements. Somebody else was controlling me.⁷

Evidently persuaded by McCann's testimony, the Oregon jury concluded that Ghadiali had transported the young woman in interstate commerce "for the purpose of prostitution," in violation of the White Slave Traffic Act. He was sentenced to five years in prison.

Ghadiali appealed his conviction, arguing that the evidence presented at his trial could not possibly support the jury's finding. Much of the testimony offered by his accuser remained entirely uncorroborated. Ghadiali argued that the trial had been so rushed that he himself had been given no opportunity to prepare an adequate defense.⁸ So many miles from home, the only witnesses he was able to bring forward—his wife and daughter—were discredited as conspiring procurers. Only after the trial was he able to collect some fifty affidavits contradicting his accuser's testimony, which he later reproduced in a self-published book about his trial, *Railroading a Citizen* (1926).

The Ninth Circuit upheld the conviction. Deferring to the jury's finding of fact, Judge Neterer explained that the jury was better positioned to evaluate the credibility of witnesses, "to observe their demeanor, the reasonableness of the story," and to determine "where the truth in the case lay"; "[i]f there is any evidence upon which rational minds might arrive at a like conclusion," he concluded, "this court cannot reverse the finding."⁹ There is nothing particularly extraordinary about this recitation of the court's standard of review. But it leaves unanswered the question: how could so many rational minds arrive at such a conclusion, "the defendant exercised an influence over the girl, which, in effect, if not in fact, amounted to mesmeric control," that Ghadiali exercised supernatural power?¹⁰ What about the contract between Ghadiali and his secretary seemed so unusual, so "curious" that jurors concluded that the contract memorialized not consent, but its opposite?

7. *Ghadiali v. United States*, 17 F.2d 236, 238 (9th Cir. 1927).

8. GHADIALI, *supra* note 1, at 119-20.

9. *Ghadiali*, 17 F.2d at 237.

10. *Id.*

These, at least, are some of the questions that motivate my reading of Ghadiali's case and prompt a broader inquiry into the ways legal discourse often betrays how law is lived. Patricia Williams has observed that law operates within a broader "system of formalized distortion of thought," arguing that law preserves its own sense of rationality and fairness by sustaining practices of epistemic exclusion, historical amnesia, and affective denial—all of which tend to obscure the law's violent effects, suffered disproportionately by racialized others, women, and the poor.¹¹ Taking cues from Williams, this Article examines the relationship between the abstracting habits of legal discourse—its universalizing mythologies, its partializing constructions of human experience, its repression of historical knowledge—and the complex social worlds that law sets in motion, worlds that become all the more difficult to apprehend with only the conceptual resources found in legal discourse. Liberal abstractions like freedom and equality, legal formulations of personhood, agency and consent, and the conceptual divisions of public and private, self and other, the home and the market—these are wholly inadequate to understanding how law is lived, particularly by its most vulnerable subjects. By the same token, the dense and dynamic relations of power that characterize any society, and have always frustrated the United States' realization of its self-image, often exceed our critical vocabulary. Words like "racism," "sexism," and "capitalism" powerfully name species of structural inequality but fail to capture the full spectrum of social relations, habits, and exchange that reproduce and entrench inequality. They invoke the "monumental social architecture" of inequality, but do not describe the deep structures of feeling, the inarticulate common sense of embodied knowledge accrued by moving through landscapes that shape our varying notions of what is or is not true, what may or may not be possible, the stories that we tell ourselves about our world and our place in it.¹²

This Article begins by exploring the role that theories of contract law have played in creating a capitalist economy that remains thoroughly racialized and gendered—the abstracting and universalizing rhetoric of 'contractual freedom' notwithstanding. In the aftermath of the Civil War and Emancipation, the idea of contractual freedom had become charged with the promise of ushering in a new era of freedom and equality. But during the same period, that promise was soon betrayed by a style of legal formalism which, in the name of 'contractual freedom,' advanced the interests of expanding markets, often at the expense of the working class, women, and racialized others. Writing of the formalism that revised contract law principles at the turn of the century, Lawrence Friedman

11. Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 151 (1987); PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 156, 160 (1992). See generally Patricia J. Williams, *On Being the Object of Property*, 14 SIGNS 5 (1988).

12. AVERY GORDON, *GHOSTLY MATTERS: HAUNTING AND THE SOCIOLOGICAL IMAGINATION* 4 (2008); RAYMOND WILLIAMS, *THE LONG REVOLUTION* 165 (1961).

observes, “contract law is an abstraction—what is left in the law relating to agreements when all the particularities of persons and subject matter are removed,” rendering real persons and their real grievances extrinsic to legal analysis.¹³ As he and other critics have argued, contractual form would come to evacuate and replace the very agency and autonomy that the contract was supposed to represent and protect. Slavery, decades after it was abolished, would continue to shape legal and public conceptions of contract and consent, perversely, in that almost any agreement—absent obvious coercion, fraud, or duress—was recognized as willing consent.

If the recent memory of slavery and the failed promise of contract law raised anxieties about the nature of free will, autonomy, and consent, these anxieties seemed to find expression in popular spiritualist practices.¹⁴ In the early twentieth century, spiritualist practices (séances, mesmerism, etc.) and contract theory engaged a common set of questions—about the nature of human agency, the fragility of mutual exchange, and the elusive forces that bind us to one another. In his autobiographical writing, Ghadiali proudly confessed to being a mesmerist, “well known,” interested in experimenting with powers of perception and influence. But “mesmerism” enters the narrative of his trial more darkly as a metaphor for the contract itself—or its failure—appearing at times as a critique of the employment contract, at times as a parody of the marriage contract, always conjuring the specter of anti-will that haunts the modern contract.¹⁵

This Article then turns to track the figure of the white slave in its movement across the landscape of nineteenth and twentieth century American history. The term first appeared during the antebellum period to describe the horrors of mistaken identity, racial instability, and the anxiety that the violence of slavery could never be contained, demographically or morally. The white slave panic of the early twentieth century—the widespread but unfounded fear that white women were forced into prostitution, often by black and brown men—synthesized a set of anxieties about emerging forms of social violence and coercion. Labor activists used the term to characterize the exploitation authorized by the labor contract; feminists, to disenchant the unequal relationship sanctioned by the marriage contract; and others, as the white slave panic itself suggests, to decry the erosion of traditional distinctions of race and gender before the leveling forces of the market economy.

In the second half of this Article, we return to Ghadiali’s narrative. Ghadiali’s case, unlike most white slavery cases, *did* involve a kidnapping, but in his account, it was not Ghadiali who kidnapped his secretary.

13. LAWRENCE FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 20 (1965).

14. See Christopher Buccafusco, *Spiritualism and Will(s) in the Age of Consent* (2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1096367 [<https://perma.cc/B8LT-2LXF>].

15. See Williams, *On Being the Object of Property*, *supra* note 11, at 5, 13-16.

STATUS IN THE AGE OF CONTRACT

In the United States in the late nineteenth century, the idea of contract had become charged with the promise of delivering the nation from its history of slavery and ushering in a new era of freedom and equality. As Amy Dru Stanley has observed, after the abolition of slavery in the United States, “contract was above all a metaphor of freedom,” representing a release from the old bonds of dominion and dependence.¹⁶ In the second half of the nineteenth century, what Brooks Thomas has called the “the age of contract,”¹⁷ the liberatory potential of contract was associated with Henry Maine’s famous declaration: “the movement of the progressive societies has hitherto been a movement *from Status to Contract*.”¹⁸ In traditional societies, the argument went, individual obligations were determined by inherited status; in modern societies, they were more freely assumed through negotiation and exchange. And where status-bound societies perpetuated formal hierarchy, conceived as “natural” and unchanging, contractual societies were continuously remade to reflect the collective desires of free and equal individuals. A social order determined by free exchange among equals would be dynamic rather than static, continuously improving. This promise, Thomas writes, “radically conceived,” is one of an “immanent, rather than transcendental ordering of society.”¹⁹

After the Civil War, promises of freedom and equality were announced more boldly in the Thirteenth and Fourteenth Amendments, which abolished the status of enslavement and extended to black Americans the rights of citizenship, including due process and equal protection. But by the early twentieth century, those same protections had been eroded by a Court that elevated contractual freedom to a right of sacred inviolability and routinely struck down laws intended to protect workers. In *Lochner v. New York*, for instance, the Court struck down a labor law limiting the number of hours bakers were required to stand on their feet, finding the regulation an “unreasonable” and “artificial” interference with the individual autonomy, or “freedom of contract,” guaranteed by the due process clause of the Fourteenth Amendment.²⁰ At the same time, the Court invested contract with extraordinary power, not only to express the shared intentions of employer and employee, but to transform social unequals into formal equals. “The right of a person to sell his labor,” the Court explained in a subsequent case, “is in its essence, the same right as the right of the purchaser of

16. AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 2 (1998).

17. BROOK THOMAS, *AMERICAN LITERARY REALISM AND THE FAILED PROMISE OF CONTRACT* 1 (1997).

18. HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 141 (1861).

19. *Id.* at 3.

20. 198 U.S. 45, 56 (1905).

labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it.”²¹ In other words, by trick of formalism, employer and employee were rendered equal through their exercise of an equivalent right—the right to contract without legislative interference. Contemporary observers railed at the Court for appealing to an abstract and largely “illusory” form of equality while shielding plainly unequal and increasingly exploitive relationships from judicial scrutiny.²²

The equalizing promise of contract notwithstanding, residues of status would persist in the form of naturalized difference—gender and race. The *Lochner* Court routinely struck down state laws that interfered with the “contractual freedom” of laborers and their employers. But one remarkable exception to pattern involved a law limiting the number of hours *women* were permitted to work.²³ In *Muller v. Oregon*, the Court upheld the law, though it interfered with contractual autonomy, finding that the state had a legitimate interest in protecting the reproductive health of women:

That woman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious [B]y abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.²⁴

The Court distinguished its ruling in *Lochner* from its ruling in *Muller* in terms of sex difference: “the difference between the sexes [justifies] a different rule.”²⁵

In *Plessy v. Ferguson* (1896), similarly, it was racial difference that rendered a Louisiana law requiring “separate but equal” accommodations consistent with constitutional guarantees. The Court acknowledged that the Thirteenth Amendment abolished both slavery and its correlate markers of legal status, but not racial distinction—“a distinction which is found in the color of the two races and which must always exist.”²⁶ Likewise, the Court reasoned, the object of the Fourteenth Amendment “was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social [equality],

21. *Adair v. United States*, 208 U.S. 161, 175 (1908).

22. *See, e.g.*, Roscoe Pound, *Liberty of Contract*, 18 *YALE L.J.* 454 (1909).

23. *Muller v. Oregon*, 208 U.S. 412 (1908).

24. *Id.* at 421.

25. *Id.* at 419.

26. *Plessy v. Ferguson*, 163 U.S. 537, 543-44 (1896).

or a commingling of the two races.”²⁷ Racial distinctions, abstracted from histories of subordination, expropriation, and enforced separation is reified simply as the appearance of color, “physical difference,” and “racial instinct.”²⁸ The equalizing promise of contract, even as it failed the working classes, was never intended to eliminate rank of race or gender.

The contractual ideal celebrated by the *Lochner* Court, in other ways, seemed to have come loose from the practical and everyday administration of contract law, as Morton Horwitz argues.²⁹ When the Court struck down laws aimed at improving the working conditions of laborers and equalizing the employment relation, it did so by appealing to the notion that employment contracts expressed the free will of the employer as well as employee. Contract law drew its political legitimacy and claim to economic rationality from the notion that contracts represented individual desires and the shared intentions of consenting parties.³⁰ According to the nineteenth-century “will theory,” a contract was enforceable because it represented the shared intentions of free individuals. A contract represented a convergence of will, a “meeting of the minds.” As long as contracts were freely entered into, without evidence of fraud or coercion, enforcing judges were merely carrying out the intentions of contracting parties.³¹

But judges and juries can never really determine whether a contractual exchange is accompanied by an actual “meeting of the minds.” If a cunning buyer knows the real value of a piece of jewelry sold by a naïve seller, how can a judge determine that the buyer and seller have reached an agreement not only with respect to the price of the jewelry, but its value, or the nature of the thing itself? The idealism of the will theory—its sensitivity to the idiosyncrasies of individual intent and the essential fragility of consent—was ultimately strained by its practical administration. The will theory demanded that judges and juries search the minds of others to determine their true intentions. But this was an impossible task. Consequently, the will theory was quickly unraveled by a paradox: will, or intention, resides in the inner recesses of the individual, but is known to others only through the world of social forms. As the will theory gave way to contractual formalism, the power and privilege invested in the contractual form came to displace and evacuate the very agency, will, and consent that it was supposed to represent.

In his canonical essay, *Consideration and Form*, Lon Fuller argued that judges should abandon the metaphysical search for a meeting of the minds and instead apply “a simple and external test” to determine whether an agreement

27. *Id.* at 544.

28. *Id.* at 551.

29. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 33-51 (1994).

30. Randy E. Barnett, *A Consent Theory of Contract*, in *PERSPECTIVES ON CONTRACT LAW* 207 (Randy E. Barnett ed. 1995).

31. *Id.* at 35. *See also* Buccafusco, *supra* note 14, at 9.

had been reached.³² He argued that judges were more likely to honor “private autonomy” of contracting parties by enforcing, without too much meddling, the explicit terms of a carefully constructed agreement.³³ Fuller enumerated the administrative and pedagogical virtues of a formalist approach to contractual enforcement: a well-formalized contract supplies the judge with evidence of the exchange; besides memorializing agreement, the formal contract also “channels” or encourages the parties to exercise precaution before taking “inconsiderate action.”³⁴ As Fuller recognized, form, like language itself, stabilized communication and exchange—but not without sacrificing authenticity, spontaneity, and something of a human character.³⁵ The trend towards formalism required that disputes over the meaning of contractual terms be resolved not through a judicial refereeing of discrepant views, but increasingly, with reference to an impersonal “reasonableness” standard.³⁶ Contract, in Fuller’s account, should play an important role, not merely in realizing the intentions of free and equal people, but in disciplining rational market actors participating in a rapidly expanding economy.

Thus, in the late nineteenth century, Horwitz demonstrates, contract law took a turn away from an earnest inquiry into parties’ “subjective” or real intentions and towards an “objective” interpretation of parties’ formalized agreements. This general shift—from substance to form, from subjective to objective—was part of a “broader tendency to create formal, general theories that would provide uniformity, certainty, and predictability of legal arrangements” to a growing industrial economy.³⁷ After the Civil War, formalism and objectivism tended to standardize commercial transactions, facilitating the expansion and national integration of labor and consumer markets. Notwithstanding its promises to promote freedom and equality, the emerging regime of contract often sacrificed an “individualized sense of justice” to the smooth functioning of an increasingly ruthless economy.³⁸ As judicial enforcement veered away from entertaining the eccentric understanding of individual actors, it tended to recognize the real intentions of individuals only insofar as they seemed to reproduce a set of economic norms or conform to a set of market conventions. Though it was the free will of individuals that supposedly animated the machine of industrial capitalism, the machine itself had begun to operate independently of individual will.

Legal realists at the time protested that these developments were not the result of any natural progression or inevitable self-correction. Instead, they were

32. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801 (1941).

33. *Id.* at 806-10.

34. *Id.* at 800-01.

35. See, e.g., Nathan Isaacs, *The Standardization of Contracts*, 27 YALE L.J. 34 (1917).

36. HORWITZ, *supra* note 29, at 42-45.

37. *Id.* at 36.

38. *Id.*

an imposition of highly motivated proponents of a particular economic theory. In his dissent from the decision in *Lochner*, for instance, Justice Oliver Wendell Holmes, Jr. complained that his colleagues were pushing an “economic theory that a large part of the country does not entertain.”³⁹ Likewise, a young Felix Frankfurter complained of a mechanical jurisprudence, by which courts had come to base their decisions upon “a priori theories” and “abstract assumptions,” in wild disregard for the “actualities of modern life.”⁴⁰ Roscoe Pound argued that Henry Maine’s famous maxim had no place in the Anglo-American tradition which, in his view, was “progressing backward.”⁴¹ The notion that liberty of contract promoted equality, he argued, was entirely illusory. “Why then,” he asked, “do courts persist in this fallacy? Why do so many of them force upon legislation an academic theory of equality in the face of practical conditions of inequality? . . . Why is the legal conception of the relation of employer and employee so at variance with the common knowledge of mankind?”⁴²

SPIRITUALISM AND THE CONVERGENCE OF WILL

The questions posed by legal realists were remarkably resonant with the speculations of spiritualists during the same period. Pound and others observed that a powerful set of economic abstractions had begun to transform not only the material conditions of life and labor, but the conceptual means by which those conditions were understood or apprehended. Spiritualism provided ordinary men and women opportunities to explore the “common knowledge” to which Pound seemed to refer—a common knowledge shared by the alienated and dispossessed, one routinely obscured by economic theory and liberal invocations of freedom and equality.

By the late nineteenth century, spiritualism—and associated experiments in mesmerism, hypnotism, mediumship, and electro-biology—had become an enormously popular pastime in Europe and the United States, perhaps because it offered ordinary men and women alternative vocabularies and rituals with which to make sense of their lives. Popular forms of spiritualism—from theatrical displays of mesmerism or somnambulism before mass audiences to the séances held in the intimacy of respectable homes—allowed men and women of every rank to explore the limits of free will, their capacity for inter-personal influence and exchange, and the experiences of both powerlessness and control.⁴³

39. *Lochner*, 198 U.S. at 75.

40. Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 364 (1916).

41. Pound, *supra* note 22 at 219.

42. *Id.* at 454.

43. See, e.g., RUSS CASTRONOVO, *NECRO CITIZENSHIP: DEATH, EROTICISM, AND THE PUBLIC SPHERE IN THE NINETEENTH CENTURY UNITED STATES* (2001); R. LAURENCE MOORE, *IN SEARCH OF WHITE CROWS: SPIRITUALISM, PARAPSYCHOLOGY, AND AMERICAN CULTURE* (1977); ALEX OWEN, *THE*

Spiritualism thus seemed to address the failed promise of contract law by encouraging people to undertake their own investigations into the character of agency, the various media through which we communicate our intentions, and the forces that bind us to one another. As individuals found themselves adrift in increasingly automated economies of exchange, spiritualism would offer its enthusiasts more vital opportunities for exploring the contours of individual agency and the possibilities of concerted action.

Spiritualism owed something of its appeal to the social upheavals which had begun to transform American life beginning in the mid-nineteenth century: a deadly war, increased social mobility, urbanization and industrialization, and the arrival of new immigrants.⁴⁴ It also addressed a growing crisis of faith among its enthusiasts who, wearied of sectarian division and overweening stricture, found in spiritualism a set of practices that were affirming of personal experience, amateurism and experimentation, on the one hand, and defiant of existing forms of authority, expertise, and hierarchy, on the other.⁴⁵ Ghadiali's color therapy—a compelling blend of spiritualism, popular science, and franchise entrepreneurship—was embraced by more than ten thousand Americans during the half century before it was finally suppressed.⁴⁶ His practitioners consisted mostly of working class men and (especially) women—people denied entry to the medical profession and alienated by the impersonality of the emerging medical marketplace.⁴⁷ Student-practitioners often treated themselves and their family members and were encouraged to think of themselves as scientific researchers, create communities, and collaborate in their investigations. Ghadiali's enemies in the American Medical Association and federal Food and Drug Administration pursued him for decades, recognizing him as a threat to the medical establishment and its culture of expertise.⁴⁸

The egalitarian and experimental ethos of spiritualist counter-publics attracted a number of creative thinkers and activists, as respectable as William Lloyd Garrison and George Bernard Shaw.⁴⁹ For the same reason, it had become aligned with the radical edge of social movements on both sides of the Atlantic—movements to abolish slavery, reform marriage, and end imperialism, among

DARKENED ROOM: WOMEN, POWER, AND SPIRITUALISM IN LATE VICTORIAN ENGLAND (2004); ALLISON WINTER, MESMERIZED: POWERS OF MIND IN VICTORIAN BRITAIN (1998); Emily Ogden, *Beyond Radical Enchantment: Mesmerizing Laborers in the Americas*, 42 CRITICAL INQUIRY 815 (2016).

44. R. Laurence Moore, *Spiritualism and Science: Reflections on the First Decade of the Spirit Rappings*, 24 AM. Q. 474, 476 (1972).

45. See ANN BRAUDE, RADICAL SPIRITS: WOMEN'S RIGHTS AND SPIRITUALISM IN NINETEENTH-CENTURY AMERICA (1989); Gauri Viswanathan, *The Ordinary Business of Occultism*, 27 CRITICAL INQUIRY 1 (2000).

46. See Matthew Lavine, *The Science of Automatic Precision: The Rise and Fall of Spectro-Chrome Therapy*, 44 HISTORICAL STUDIES IN THE NATURAL SCIENCES 140, 157 (2014).

47. *Id.* at 149, 155.

48. *Id.* at 164-172.

49. Braude, *supra* note 45, at 17; Viswanathan, *supra* note 45, at 5.

others.⁵⁰ Of course, not all spiritualists were interested in social reform. Many found in spiritualist demonstrations a form of entertainment; others, hoping sincerely to communicate with the dead, sought consolation after the loss of a loved one. But as Russ Castronovo insists, “[w]rapped up with any communication with the dead ... are questions about the relation of the present to the past, specifically ones involving a politics of memory that incorporates and represses New World racial encounters.”⁵¹ Dead presidents were frequent guests at séances, but so were vanished Indians and the ghosts of mulatto girls, all returning to attest to historic crimes.⁵² In the American South, where law was invested with the extraordinary power to turn people into things, it might not have been difficult to imagine that things, in turn—tipping tables and tambourines—might be animated by aggrieved spirits.⁵³

For others, drawn to what they conceived of as the more “philosophical” or even “scientific” aspects of spiritualism, experiments with mesmeric mind control were part of a much broader inquiry into the nature of individual agency and inter-personal exchange. Anton Mesmer, the eighteenth-century physician who originated mesmerism, claimed to have discovered an invisible force that emanates from and surrounds the body of every living creature.⁵⁴ This universal substance, which he called “animal magnetism,” connected living creatures with other natural processes. Through it, individuals could pass thoughts and sensations from one to another. Other spiritualists attributed similar effects to “magnetic fluids” or “electro-biology,” but they generally shared an intuition that influence was a substantive rather than transcendental phenomenon. The discovery that a universal medium was the source of interpersonal connectivity, many spiritualists believed, had implications for understanding the ways in which individuals were bound to one another. In the words of one American spiritualist, for instance, humanity was bound together

by a thousand silken cords girded around by a magnetic belt of subtle sensibilities—which communicate an injury done to or by the remotest person to all other members of the living whole.⁵⁵

50. Braude, *supra* note 45, at 117-141; Viswanathan, *supra* note 45, at 1-4.

51. Russ Castronovo, *The Antislavery Unconscious: Mesmerism, Vodun, and “Equality,”* 53 *MISS. Q.* 41, 43 (2000).

52. See Patrick A. Polk, “He Will Remember Me”: *Anglo-American Spiritualists, Slavery, and the Ghosts of Miscegenation*, 47 *SOUTHERN Q.* 24 (2010); Bridget Bennet, *Sacred Theaters: Shakers, Spiritualists, Theatricality, and the Indian in the 1830s and 1840s*, 49 *DRAMA REV.* 114 (2005).

53. *Id.*

54. Emily Ogden, *CREDULITY: A CULTURAL HISTORY OF US MESMERISM* (2018), 25-27; WINTER, *supra* note 43, at 1-2.

55. See Sally Morita, *Unseen (and Unappreciated) Matters: Understanding the Reformatory Nature of 19th-Century Spiritualism*, 40 *AM. STUD.* 99, 113 (1999) (quoting Andrew Jackson Davis, *The Great Harmonia, Concerning the Physiological Vices and Virtues, and The Seven Phases of Marriage*, 4 *THE REFORMER* 409 (1857)).

Thus, spiritualists entertained an understanding of reciprocal obligation that radically differed from those held by proponents of contractual freedom. For William Graham Sumner, nineteenth century social scientist and exponent of classical liberalism, “free man in a free democracy has no duty whatever to men of the same rank and social standing except courtesy, respect, and good-will.”⁵⁶ He distinguished modern contractual societies from traditional status-bound societies by arguing that, in contractual societies, “the free man cut off all the ties that might pull him down, [and] severed also all the ties by which might have made others pull him up.”⁵⁷ Sumner’s image of freedom is independence from others. Sumner’s “free man” is an “isolated man,” loosened from the burdens and benefits of mutual obligation.⁵⁸ Only by entering into contractual arrangements with others does the free man forfeit his original freedom to assume any obligation towards others. Spiritualists, by contrast, by abandoning fantasies of perfect independence and focusing instead on the “substance”—material conditions, historical embeddedness, inescapable interdependence—recognized freedom to reside not in self-sovereign isolation but in the shared realm of experience. Unlike the contracting agent of classical liberalism, the mesmerist and his subject are born already swimming in the substance and circumstance of others.

Mesmerists, in their efforts to activate the “chemistries” that connect human beings, experimented with the power of collective action. The twentieth-century political philosopher Hannah Arendt locates the source of individual freedom not in a mythic state of nature but the “phenomenal space created by men.”⁵⁹ This power is not the natural property of any individual but a collective achievement, the fragile culmination of a plurality of actors achieving momentary consensus. In *The Human Condition*, Arendt writes, “the only indispensable material factor in the generation of power is the living together of people Whenever people gather together, it is potentially there, but only potentially, not necessarily and not forever.”⁶⁰ The generative power that Arendt ascribes to collective action in public, or what she calls the “space of appearance,” is perhaps easier to recognize in the legacies of those who moved beyond their flirtation with spiritualism to devote themselves to focused political reform—in Victoria Woodhull’s campaign for marital reform, in Annie Besant’s challenge to British imperialism, in Mohandas Gandhi’s satyagraha, or movements of truth-force—than in the practices of commercial spiritualists.⁶¹ But even in the average mesmeric demonstration or table-turning exercise, ordinary men and women suspended

56. WILLIAM GRAHAM SUMNER, WHAT SOCIAL CLASSES OWE TO EACH OTHER 34 (1974).

57. *Id.*

58. *Id.* at 34.

59. HANNAH ARENDT, ON REVOLUTION 155 (2d ed. 1965).

60. HANNAH ARENDT, THE HUMAN CONDITION 199 (2d ed. 1998).

61. Braude, *supra* note 45, at 191-192; Viswanathan, *supra* note 45, at 3.

disbelief, in trust of one another, to experiment with the potentialities of collective power.

Part of what drew social reformers to spiritualism in the late nineteenth century was the notion that a universal substance, however described, flowed among human beings without regard to status, or distinctions of race, class, or gender. But scholars suggest that the egalitarianism of popular spiritualism was perhaps less radical than appearances might lead us to believe.⁶² Russ Castronovo argues, for instance, that the imagined equality of the spirit world, in which social differences are dissolved in a universal medium, too closely resembles the well-worn fantasies of liberal universalism, within which equality is imaginable only among abstract, disembodied, and ahistorical “persons.”⁶³ Castronovo’s persuasive critique notwithstanding, spiritualist practices seem to have engaged and troubled the impulses of liberal audiences, invoking the essential sameness among people by presencing their material differences.⁶⁴ The thrill and scandal of the mesmeric demonstration was the spectacle of role reversal: accented foreigners made puppets of well-born women; illiterate girls held forth before juries of learned men.⁶⁵ Writing of spiritualism in colonial India, Gauri Viswanathan observes that in spiritualist counter-publics, colonizer and colonized could participate in reimagining colonial relations in terms that were non-hierarchical, though nonetheless racialized.⁶⁶ Ghadiali’s scientific demonstrations, similarly, offered participants opportunities to test social boundaries and imagine alternative arrangements, as doctors and surgeons submitted to his authority, referring to him as “master,” and white women bared their shoulders so that he could paint their skin with colored lights.⁶⁷

Thus, spiritualism engaged another tension constitutive of the contractual ideal—the tension between freedom and embodiment. Within the liberal imaginary, the contract drew its authority from the perfect freedom individuals supposedly enjoyed in the state of nature. But this imagined freedom is essentially a disembodied freedom. Freedom confers legitimacy upon the contractual bond, but freedom itself terminates in the contract. A factory girl, for instance, expresses her freedom by consigning her body to work. In her case, the abstract and immaterial self, the subject of contractual rights, makes itself known only by binding the body.

Popular demonstrations of mesmerism and hypnotism seemed to mock this predicament by spectacularizing forms of contractual mastery and possession. In a typical demonstration, a powerful mesmerist would overcome the will of his subject, replacing his intentions with hers, evidenced by his control over her

62. See Castronovo, *supra* note 51; Moore, *supra* note 44; Viswanathan, *supra* note 45.

63. See Castronovo, *supra* note 51, at 51.

64. Terry M. Parssinen, *Mesmeric Performers*, 21 VICTORIAN STUD. 87, 102 (1977).

65. WINTER, *supra* note 43, at 2; Moore, *supra* note 44 at 200.

66. Viswanathan, *supra* note 45, at 1-2.

67. Telephone interview with Darius Dinshah, Dinshah Ghadiali’s son (Oct. 10, 2010).

body. Before mesmerism became a form of popular entertainment in American cities, Emily Ogden has shown, it was proffered as a technique for controlling laborers, conditioning their bodies to the rhythms and rigors of automated factory work.⁶⁸ Factory girls were assumed to be especially susceptible to mesmeric techniques. Charles Poyen, the owner of a Caribbean sugar plantation credited with introducing mesmerism to the United States, first recommended the techniques to northern factory owners seeking to improve the efficiency of their workers. Poyen claimed to have known many “rich and intelligent planters” who made use of certain powers to control enslaved Africans.⁶⁹ Mesmerism was never adopted in the manner Poyen had suggested, but to turn-of-the-century audiences, the spectacle of a woman being puppeted by a mesmerist may have appeared as a kind of satire, throwing up for amusement a mode of subordination already familiar to workers and wives. The sight of a person reduced to a body without will also more darkly conjures the specter of anti-will that connects slavery, rape, and modern contract law.

SPECTERS OF WHITE SLAVERY

In the early twentieth century, various anxieties about the loss of freedom and control seemed to converge in the phantasmic figure of the white slave. Most scholars agree that, global panic notwithstanding, there was no real “traffic” in white women.⁷⁰ The Mann Act was passed for the purported purpose of protecting white women from forced prostitution, but the broad wording of the law allowed police and prosecutors to selectively punish men involved in all manner of consensual behavior, especially black and immigrant men who enjoyed premarital, extramarital, and cross-racial intimacy with white women.⁷¹ But here, rather than review the notorious record of racist enforcement, I want to suggest that the figure of the white slave appears as the specter of anti-will that would continue to haunt the institution of contract in the early twentieth century, decades after the Emancipation Proclamation. In the return of this figure we can

68. Ogden, *supra* note 43, at 818-19.

69. *Id.* at 830. Not surprisingly, around the same time in the early nineteenth century, British mesmerists claimed to have honed their discoveries in colonial India, where experimental subjects succumbed easily to the influence of Western physicians. WINTER, *supra* note 43, at 187-93.

70. See e.g., Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1489 (2015); Brian Donovan & Tori Barnes-Brus, *Narratives of Sexual Consent and Coercion: Forced Prostitution Trials in Progressive Era New York City*, 36 LAW & SOC. INQ. 600 (2011); Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3016 (2016); JESSICA R. PLILEY, *supra* note 2, at 9-31 (2014).

71. Soon after the law's passage, black and brown men in sexual relationships with white women were the primary targets of enforcement. Jack Johnson, the first black heavyweight boxing champion and perceived threat to male white supremacy, was one of the first person to be prosecuted under the Act. See Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J. OF L. & FEMINISM 31, 33 (1996); TERESA RUNSTEDLER, JACK JOHNSON: BOXING IN THE SHADOW OF THE GLOBAL COLOR LINE 132-163 (2018).

trace the itineraries of racialized form and sexual discipline that elude or are routinely effaced by the language and idiom of “contractual freedom.”

Through much of the nineteenth century, as one scholar observes, the figure of the white slave moved across the American landscape like “a restless, aggrieved ghost, a fugitive symbol, a reminder that slavery was not morally or even physically containable.”⁷² During the antebellum period, the figure of the white slave circulated, primarily as hyperbole, to describe the degraded condition of indentured immigrants or poor women fallen into prostitution. But it also spoke of another set of anxieties: in these early narratives, whiteness appeared to be an unreliable safeguard against the dehumanizing forces of the marketplace, as the racial identity of the kidnapped person was itself transformed by the loss of paperwork or by his or her entry into the stream of commerce. The transformation was not merely figurative, as the confessions of a nineteenth-century slave catcher would suggest. Slavery had unleashed a violence that could break and liquidate anyone: “Just catch a stray Irish or German girl and sell her . . . She turns into a n— at once . . .”⁷³

White slavery figured powerfully in abolitionist rhetoric, often to elicit the horrors of mistaken identity. The abolitionist Henry Beecher rose to celebrity in 1848 after staging a mock auction of two mulatto girls, daughters of an enslaved mother and white master who had escaped a slave dealer in New Orleans. Before a congregation of New Yorkers, he asked, “[s]hall this girl—almost as white as you are—be sold for money to the first comer to do as he likes with?”⁷⁴ The girls’ complexion presumably invited an identification which the darker appearance of most other enslaved children presumably foreclosed. Underscoring Beecher’s appeal was a sentimentality that played upon a sense of both patriarchal and racial duty, to protect daughters not only from the sexual whims of white masters but from contamination by black men. Writing about the trials of fugitive slaves, Ariela Gross has shown that fugitive women often succeeded in claiming that they had been mistakenly captured and remanded to slavery—the cost of erroneously enslaving a white woman was evidently unbearable to juries of white men.⁷⁵

If the sight of an enslaved white woman confronted spectators with the unbearable thought of miscegenation, then the changing pallor of the enslaved surely confronted white Americans with the repressed knowledge that slavery was itself perpetuated through sexual violence—that the Southern plantation was also a harem. Moreover, the appearance of the pale slave undermined the supposed certainty and stability of racial identity in general, after more than a

72. STEPHEN TALTRY, *MULATTO AMERICA: AT THE CROSSROADS OF BLACK AND WHITE CULTURE*, *A SOCIAL HISTORY* 9 (2003).

73. Stephen Taltry, *Spooked: The White Slave Narratives*, 85 *TRANSITION* 48, 58 (2000).

74. *Id.* at 51.

75. ARIELA GROSS, *WHAT BLOOD WON’T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* 58-63 (2008).

hundred years of illicit intimacy, voluntary and coerced, had blurred the color line, often rendering black and white virtually indistinguishable.

During the antebellum period, Southerners defended the institution of black bondage by arguing that, as an economic arrangement, it was preferable to the white slavery practiced in the industrial North.⁷⁶ Labor advocates in the North, in turn, adopted the phrase to challenge triumphalist narratives of emancipation and the market conditions under which “free labor” was exchanged.⁷⁷ By comparing the conditions of industrial wage labor to slavery, labor advocates insisted that working conditions were not merely coercive and exploitive, but racially degrading. For instance, one labor advocate argued that vagrancy laws, which were used to force unemployed men into penal servitude, had reduced to “white slavery an army of men who do not belong to a servile race.”⁷⁸ Thus, labor advocates recognized the double-edged danger introduced by the ideology of ‘free labor.’⁷⁹ ‘Free labor’ was contrasted with enslaved labor. But the abstraction of ‘free labor,’ with its partializing recognition of human beings as commodified labor, was itself a vestige of slavery, one that, after emancipation, facilitated the absorption of black, immigrant, and women workers into an expanding industrial economy. ‘Free labor’ lacked individuality and was infinitely interchangeable. But because it was so indifferent to status, the market for ‘free labor’ augured a loss of status for white men.

Feminists also appealed to the rhetoric of white slavery. Feminists advocating for marriage reform often argued that the marriage contract reduced women to a form of bondage. Elizabeth Cady Stanton argued, “If the contract be equal, whence come the terms ‘marital power,’ ‘marital rights,’ ‘obedience and restraint,’ ‘dominion and control’? . . . According to man’s idea, as set forth in his creeds and codes, marriage is a condition of slavery.”⁸⁰ Radical feminists like Charlotte Perkins Gilman and Emma Goldman sought to disenchant the institution of marriage by describing it as a form of sexual commerce. As Gilman wrote, “She gets her living by getting a husband. He gets his wife by getting a living. It is to her individual economic advantage to secure a mate. It is to his individual sex-advantage to secure economic gain. The sex-functions have to become economic functions.”⁸¹ Goldman similarly described marriage as

76. STANLEY, *supra* note 16, at 86.

77. For instance, in an essay published in 1886, one such advocate wrote, “They say slavery is abolished in the United States now, but I say no. True, the colored people are free, but how many thousands of white slaves are there all over the country? What do you call men, women, and children that work in a mill or factory fourteen and fifteen hours a day?” *Id.*

78. *Id.* at 121. Stanley suggests that “race sometimes figured into the imagery,” but “the dominant metaphor was not *white* slavery but *wage* slavery.” *Id.* While labor advocates may have used the word “wage” more than “white,” the word “slavery” cannot be so easily disentangled from either race and/or its associations with servitude.

79. *Id.* at 122.

80. *Id.* at 176.

81. PAMELA HAAG, CONSENT: SEXUAL RIGHTS AND THE TRANSFORMATION OF THE AMERICAN LIBERALISM 90 (1999).

“primarily an economic arrangement, an insurance pact.”⁸² A prostitute differs from a wife only in that a prostitute “sells her body *out of wedlock*.”⁸³ While radical feminists argued that marriage was no different from any other form of commercial exchange, bourgeois reformers sought to rectify marriage by heightening the division between the home and the market. In the words of one Progressive Era reformer, “[T]he highest form of human relationship is the association of one man with one woman on a basis of loyalty and love within the circle of a family that they have created, developing intimate and individual life in contrast with a larger world [and] unsubmerged by it.”⁸⁴

While metaphors of white slavery failed to advance the causes of labor activists and feminists, as Amy Dru Stanley has shown, the term ‘white slavery’ eventually became synonymous with the prostitution of white women. Stanley writes,

[W]ith slavery’s downfall prostitution came to appear as a singularly wrong sale of self—a form of bondage as peculiar as the Old South’s had been, one that validated wage labor and marriage as falling within the bounds of contract freedom despite the dispossession of self entailed in these relations. Not labor but sex represented the human essence whose sale as market commodity transformed its owners from free persons to slaves.⁸⁵

The limits of contractual freedom were marked not by labor exploitation or the formal subordination of women. Instead, the absolute limit of contractual freedom was represented by prostitution—specifically, paid sex with white women.

The white slave panic of the early twentieth century also had a global dimension. Before it reached the United States, it had already seized much of Western Europe, reflecting anxieties about unregulated intimacies and exchange in the colonies. By the early twentieth century, prostitution had become a regular feature of colonial outposts across the globe.⁸⁶ When the United States, through its acquisition of Spanish territories in 1898, joined the community of modern empires, its military established “tolerance zones” in Cuba, Puerto Rico, and the Philippines, where prostitution was regulated.⁸⁷ In the United States, as in parts

82. *Id.*

83. *Id.*

84. *Id.* at 89.

85. STANLEY, *supra* note 16, at 263.

86. Paul A. Kramer, *The Darkness that Enters the Home: The Politics of Prostitution During the Philippine-American War*, in *HAUNTED BY EMPIRE: GEOGRAPHIES OF INTIMACY IN NORTH AMERICAN HISTORY* 366, 369 (Ann Laura Stoler ed. 2006).

87. Laura Briggs, *Familiar Territory: Prostitution, Empires, and the Question of U.S. Imperialism in Puerto Rico, 1849-1916*, in *FAMILIES OF A NEW WORLD: GENDER, POLITICS, AND STATE DEVELOPMENT IN A GLOBAL CONTEXT* 40, 42-43, 51 (Lynne Haney & Lisa Pollard eds. 2003).

of Europe, these regulatory projects quickly gave rise to abolition movements, led by coalitions of feminists and anti-imperialists.⁸⁸ The principal motivation for reform was not concern for the colonized women who were engaged in prostitution, but imperial stability, threats of racial contamination, and the growing realization that a number of white women were apparently drawn to the sex trade in colonial outposts. Paul A. Kramer writes that U.S. officials were increasingly alarmed by the “cosmopolitan harlotry” gathering at ports in the American Philippines at the start of the twentieth century. The largest number of foreign prostitutes in the Philippines were from Japan, but they were joined by women from the United States, Spain, Italy, Russia, and Australia.⁸⁹

Writing about the British imperial context, Philippa Levine suggests that white women’s participation in the colonial sex trade presented officials with a particular embarrassment.⁹⁰ Colonial officials believed prostitution among Asians to be determined by a patriarchal despotism, endemic to the East, and the essential slavish character of Asian women.⁹¹ A British official in Singapore, for instance, suggested that “Chinese and probably Malay women . . . are regarded by men as inferior beings and . . . do not exercise any independence of will.”⁹² The essential willlessness of Asian women provided justification for the regulation of prostitution and colonial domination more broadly. But white women who left home to become prostitutes in the colonies could not have been understood in the same terms, as so essentially slavish. White women involved in colonial prostitution, Levine suggests, were instead seen as either criminal entrepreneurs or victims of coercion.⁹³

In the United States, too, the white slavery panic synthesized a broad set of anxieties generated by varieties of cross-racial intimacy made possible by colonial settlement and new migration. Critics have long recognized the twentieth-century narrative of sexual coercion to reprise colonial-era captivity narratives.⁹⁴ Curiously, the notoriously expansive wording of the White Slave Traffic Act, banning interstate travel with women for “any immoral purpose,” appeared decades earlier in the Page Act of 1875, a federal law restricting immigration from “China, Japan, or any Oriental country,” to individuals

88. Jessica R. Pliley, *The FBI’s White Slave Division: The Creation of a National Regulatory Regime to Police Prostitutes in the United States, 1910-18*, in *GLOBAL ANTI-VICE ACTIVISM, 1890-1950*, 221, 224 (Jessica R. Pliley et al. eds. 2016).

89. Kramer, *supra* note 86, at 370.

90. Philippa Levine, *The White Slave Trade and the British Empire*, in *CRIME, GENDER, AND SEXUALITY IN CRIMINAL PROSECUTIONS* 133, 140-41 (Louis A. Knafla ed. 2002).

91. *Id.*

92. *Id.*

93. *Id.*

94. See Anne M. Coughlin, *Of White Slaves and Domestic Hostages*, 1 *BUFF. CRIM. L. REV.* 109, 109 (1997); FREDERICK K. GRITTNER, *WHITE SLAVERY: MYTH, IDEOLOGY, AND AMERICAN LAW* (1990); RENISA MAWANI, *COLONIAL PROXIMITIES: CROSSRACIAL ENCOUNTERS AND JURIDICAL TRUTHS IN BRITISH COLUMBIA, 1871-1921*, at 77 (2009).

traveling of their “free and voluntary consent.”⁹⁵ The express purpose of the law was to prevent “involuntary migration” of two categories of people: contract laborers (generally men) and prostitutes, or anyone entering the country for “lewd or immoral purpose” (generally women).

The ban on contract labor did little to stop the flow of male laborers; the ban on prostitution, however, was so vigorously enforced that it prevented most wives from joining their husbands.⁹⁶ As scholars have shown, through the late nineteenth century, many Asian women migrating to the Pacific Northwest *were* prostitutes, finding work among the predominantly male ‘bachelor’ communities at the frontier.⁹⁷ But they were not forced into prostitution, as lawmakers implied. Rather, immigration restrictions, which produced a gender imbalance within Asian communities, together with anti-miscegenation laws, which discouraged Asian men from sharing intimacy with white women, effectively created the flourishing market for Asian prostitution.⁹⁸ Thus, while the Page Act, through its uneven enforcement, played a role in promoting prostitution in the Pacific Northwest, rhetorically, it transformed a practice of consensual commercial exchange into a species of coercion.

Enforcement of the ban on Asian prostitutes also confronted legislators and immigration officials with the sort of category crisis into which radical feminists had thrown the institution of marriage. How would immigration officials distinguish between a “real” wife and a prostitute passing for one? In 1907, under pressure from nativist groups, Congress convened a committee to investigate, among other things, “The Importation and Harboring of Women for Immoral Purposes.”⁹⁹ The Dillingham Commission, as it was called, generated a report describing the various difficulties immigration officials encountered while administering the prostitution ban. One problem was that a woman might enter the country as a prostitute then marry her pimp or procurer. “The detection of these frauds is extremely difficult,” according to the report; but, in fact, the problem of passing into marriage discloses the fluidity between prostitution and marriage, and the reality that marriage itself houses all manner of coercive and

95. Page Act, 18 Stat. 477 (1875).

96. The number of Chinese men entering the United States during the period of Page Act enforcement exceeded that of any over seven-year period before the passage of the Chinese Exclusion Act in 1882. EITHNE LUIBHÉID, *ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER* 31-54 (2002). *See also* GEORGE PEFFER, *IF THEY DON’T BRING THEIR WOMEN HERE: CHINESE FEMALE IMMIGRATION BEFORE EXCLUSION* 72 (1999); ROLAND TATAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* 40 (rev. ed. 1998).

97. MAWANI, *supra* note 94, at 107; Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 653-55 (2005).

98. Abrams, *id.* at 653-656.

99. *See* Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 778-79 (2006); BENTON-COHEN, *supra* note 2; *see also* U.S. IMMIGRATION COMM’N, *IMPORTING WOMEN FOR IMMORAL PURPOSES: A PARTIAL REPORT FROM THE IMMIGRATION COMMISSION ON THE IMPORTATION AND HARBORING OF WOMEN FOR IMMORAL PURPOSES*, S. Doc. No. 61-196, at 3 (2nd sess. 1909).

illiberal conduct.¹⁰⁰ Another problem identified by the report: Chinese women often entered the country “appearing as wives or daughters of the Chinese men . . . are then sold to keepers of houses.”¹⁰¹ Given the difficulty of enforcing immigration laws restricting entry of prostitutes, the Dillingham Commission recommended continued surveillance of Chinese women after entry. The commission report includes not only cases of immigration officials finding that women traveling as “wives” and “nieces” were really prostitutes, but also cases of immigration officials embarrassed to have mistaken virtuous women and wives for prostitutes.

The difficulties associated with detection were not limited to problems of passing or mistaken identity, but of distinguishing between a respectable marriage and “slavish” sexual arrangements. The marital customs of Chinese and Japanese immigrants in particular seemed to confront United States officials with this particular challenge. The Dillingham Commission regarded the marital customs of Asian immigrants—inter-marriage generally, arranged marriages, and especially the traffic in Japanese “picture brides”—with suspicion, as these seemed to blur the line between intimacy and commerce, romantic love and convenience. If these boundary disturbances struck at an ambivalence already at the heart of the modern institution of marriage, the ban on “oriental” prostitution would allow Americans to resolve that ambivalence by distinguishing their own sexual progressivism from the slavishness of others, and projecting the origins of the disturbance far beyond their own borders.

UNVEILING NARRATIVES

In December of 1925, Dinshah Ghadiali stood by his attorneys as the jurors filed into the Oregon courtroom, the judge took his seat, and the clerk began reading the verdict. The jury had found Ghadiali guilty as charged. He was sentenced to prison for a term of five years. Several local newspapers, having followed his trial with bemused horror, reported the verdict on their front page, in tall headlines. From *The Portland News*:

Col. Dinshah convicted on all 6 counts. Zoroastrian Religion, used as a cloak against his victims, revolts jurors.... His face immutable as the Sphynx, Colonel Dinshah Ghadiali, Parsee, head of the Spectro-Chrome Institute at Malaga, N.J., heard a federal jury Wednesday pronounce him guilty of all six counts of an indictment charging Mann Act violations. This means imprisonment in a federal penitentiary, but Colonel Ghadiali's gaze, riveted on the clerk who read his fate, did not waver.¹⁰²

100. S. Doc. No. 61-196, at 10.

101. *Id.* at 19.

102. GHADIALI, *supra* note 1, at 202.

The *Oregon Journal* contrasted the highly-charged performance of the other courtroom actors with the apparent impassivity of the defendant: “As the clerk, in slow tones, read the world ‘guilty’ after each count, not a muscle in the weazened little dark-skinned face of the defendant moved He showed no sign of emotion.”¹⁰³ The *Portland Telegram* observed that “the stoical Colonel Ghadiali received the blow without batting an eye.”¹⁰⁴

The reporters, perhaps like the others who filled the balustrades, searched Ghadiali’s appearance for signs of guilt or innocence, shame or indignation at having been accused of committing the most infamous crime. Not only did Ghadiali fail to produce any intelligible or sympathetic response, but in the eyes of his observers, his “impassivity” seemed to read as a kind of insolence and intransigence. Ghadiali’s apparent opacity revealed to his observers not the limits of their own hermeneutic, but a form of racial concealment—“Zoroastrian religion used as a cloak,” “face as immutable as the Sphynx.”

For reasons never made entirely clear to Ghadiali, the Oregon federal court in which he was tried provided no court reporter and no stenographer. Ghadiali usually represented himself in court, but this time he relied on the representation of two court-appointed attorneys. At the beginning of the trial, they recommended to Ghadiali that he remove his *topi*, his religious head-covering, to avoid “prejudice.”¹⁰⁵ Ghadiali reflected, “I could have done everything to please them and the judge and the jury to avoid this specter of ‘prejudice’ but how could I change my face? That was the biggest ‘prejudice.’”¹⁰⁶ Ghadiali’s attorneys, apparently well-meaning individuals, agreed and recommended that perhaps Ghadiali should avoid facing the judge and jury altogether, lest anyone mistake his gaze for more “mesmerizing.”¹⁰⁷ For much of the trial, Ghadiali would keep his head down anyway, taking meticulous notes of arguments and testimonies presented before the jury. Ghadiali’s attorneys worried that even note taking would attract prejudice, but Ghadiali insisted on maintaining a record of “the terrible insults and perjuries” hurled against him.¹⁰⁸

The result of Ghadiali’s obstinacy is his two-volume *Railroading a Citizen*, an aggressive counter-narration of the events leading up to his conviction for white slavery. If the features of his life had been distorted and deranged to conform to the lurid imagination of jurists, yellow journalists, and the promoters of the white slave panic, then in his counter-narrative, Ghadiali would strenuously try to set things right. He meticulously cross-references versions of events, interrupts transcriptions of testimony to declare perjuries, and appeals to

103. *Id.*

104. *Id.*

105. *Id.* at 126.

106. *Id.*

107. *Id.*

108. *Id.*

his readers to arrive at a better judgment. *Railroading*, in this sense, reads as the defense Ghadiali was never able to present to the Oregon jury: an extra-judicial appeal.

In legislative reports, journalistic exposés, popular literature, and film, the white slave panic took the form of a standard narrative in which white women, leaving the protective gaze of their families to find employment in large urban centers, found themselves suddenly abducted by men—often immigrant men, assumed to be the agents of international sex-trafficking syndicates.¹⁰⁹ Tropes of veiling and unveiling had been made conventional in legal cases as well as popular film in the 1910s.¹¹⁰ In the film, *Traffic in Souls* (1913), for instance, what appears to be a winning suitor is unveiled to be a kidnapper; what appears to be a Swedish benevolent society turns out to be a brothel; and what appears to be a progressive anti-vice campaigner turns out to be the leader of a vast network of pimps and prostitutes.¹¹¹ The prosecutors in Ghadiali's case made great use of this plot device, insinuating that Ghadiali was not merely an inventor but a criminal seducer, that this home in New Jersey was, in fact, a "harem." His wife and daughter, the only witnesses he was able to produce at his hurried trial, were discredited as co-conspiring prostitutes and pimps.¹¹²

In his counter-narrative, Ghadiali also exploited the trope of unveiling made so conventional in white slave narratives. For instance, early in Ghadiali's counter-narrative, a few suspicious characters begin to show up at his lectures. He suspects some of them to be Klansmen. Another eventually reveals himself to be the author of an unflattering story about Ghadiali, published in the *Dearborn Independent*, known to reflect anti-Semitic and xenophobic leanings of its owner, Henry Ford.¹¹³ Soon after that, Ghadiali's home is visited by a woman claiming to sell hosiery, while inquiring about the women in his household and inspecting his bookshelves. She is later revealed to be an Agent of the Department of Justice.¹¹⁴ Ghadiali would use the trope of unveiling to dramatic effect, but also to undermine the authority of standard social and legal

109. See, e.g., *TRAFFIC IN SOULS* (Universal Film Manufacturing Co. 1913).

110. For instance, the Dillingham Commission Report reported a number of cases in which supposed prostitutes were able to slip past immigration authorities by disguising themselves as respectable people. In its report, the Commission noted: "It is often extremely difficult to prove the illegal entrance of either women or procurers. The inspector has to judge mainly by their appearance and the stories they tell." MARTHA GARDNER, *THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP, 1870-1965*, at 70 (2005) (citing U.S. IMMIGRATION COMM'N, *supra* note 99, at 19.).

111. See *TRAFFIC IN SOULS*, *supra* note 109.

112. The prosecution called a witness, one of Ghadiali's former students, who testified that Indian men kept many wives to improve "vitality." GHADIALI, *supra* note 1, at 61, 128.

113. *Id.*; see also Morgan Robert, *Colored Glass Now Cures All Our Ills*, *DEARBORN INDEP.* (Mar. 15, 1924); Lavine, *supra* note 46, at 167.

114. According to Ghadiali, she testified that she had seen copies of the Quran in Ghadiali's library. He observed wryly, "Of all the books on Religion, Business Law, Glass-Blowing, Obstetrics, and so on, her eyes settled on this one." *Id.* at 61, 125.

scripts and to assert his own.¹¹⁵ In moments, it reads as a pedagogical text, teaching white Americans to become better interpreters of their worlds, recognize racist hermeneutics, bear witness and responsibility. By explaining to his readers that he avoided the gaze of courtroom observers, Ghadiali confirms that what the reporters recognized to be a form of emotional withholding was precisely that. But his apparent impassivity was not a reflection of inner indifference, as the reporters suggested, but their own “prejudice.” What the newspapermen saw in Ghadiali’s demeanor was their own projection.

RACE, GENDER, AND CONTRACTUAL FORM

In the opening sections of *Railroading a Citizen*, Ghadiali offers a sketch of his early life, devoting considerable energy to describing his two marriages—the first to an Indian woman named Manek, the second to an American woman named Irene Grace. Both of these marriages, Ghadiali is at great pains to characterize as consensual.

From the beginning, Ghadiali writes, he was “American at heart.”¹¹⁶ As a young man, he was eager to escape the parochialism of his parents’ home to “establish a separate domicile where I could be free to work as I pleased.”¹¹⁷ By taking on odd jobs, he was able to rent an apartment and quietly pursue the “scientific research” of which his father, a humble watch repairman, disapproved. When Ghadiali’s landlord offered him a daughter for marriage, Ghadiali “declined it with thanks.”¹¹⁸ He writes, “I had not seen the girl, but I was informed she was beautiful.”¹¹⁹ Ghadiali does not explicitly disapprove of arranged marriages—which opponents to Indian immigration and independence described as evidence of slavishness—but suggests that he was simply too busy.¹²⁰ He spent the next several years traveling to the United States and Europe with the British Merchant Marine.¹²¹ But amazingly, nearly a decade later, he ended up marrying the very same woman his landlord had first offered. This time the young woman, Manek, had been introduced to Ghadiali by his friend.

I saw her . . . There was the girl and she was the one I had declined in 1895 without seeing her. I fell in love with her. She was certainly a beautiful personality. On November 22, I married her, without any

115. See Robert Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 196, 200 (1987).

116. GHADIALI, *supra* note 1, at 16.

117. *Id.*

118. *Id.*

119. *Id.*

120. See KATHERINE MAYO, *MOTHER INDIA: SELECTIONS FROM THE CONTROVERSIAL 1927 TEXT* (Mrinalini Sinha ed. 2000); GHADIALI, *supra* note 1, at 16.

121. GHADIALI, *supra* note 1, at 8.

dowry. For my nation, it was a novelty, but I was born at heart an American. I just married her.¹²²

In this tale of startling coincidence, Ghadiali recasts what might have otherwise appeared to be a traditionally arranged marriage—a trade in women, brokered among men—as something more romantic, modern, and essentially “American.” He uses the language of contract to emphasize, besides their shared commitment to vegetarianism and temperance, social equality and mutuality of exchange: “I gave Manek the total abstinence pledge against meat-eating and alcohol; she shared my views of non-slaughter and mercy. She became my constant pal and we planned a glorious life ahead.”¹²³

Ghadiali’s opening declarations of independence and companionate marriage conjure what Brook Thomas describes as the “radical promise” of contractual freedom—the abandonment of old hierarchies in pursuit of associational freedom. But Ghadiali’s account of his own marriage is far more equivocal in that, although Ghadiali fashions himself a romantic hero moved only by his own desire, his desire happens to coincide rather neatly with the original brokered arrangement. Ghadiali seems to have avoided an arranged marriage, only to enter into something like a twice-arranged marriage—arranged the second time by some transcendent power. Ghadiali writes that, while visiting Madras in 1894, an “astrologer had sketched the kind of wife I would have.”¹²⁴ The sketch happened to reveal the face of Manek. As if by an alignment of the stars, an old Indian tradition is made to converge with a modern American mystification of marriage. Less the agent of his own romance, the hero is a servant of fate; less freely-chosen than preordained, Ghadiali’s first marriage gestures not at the open-ended proliferation of romantic freedom, but more modestly at his own willingness to yield to naturalized order.

In 1910, Ghadiali came to the United States with his wife and their two children. He eventually established a home and a business in rural New Jersey. In 1917, he became a naturalized citizen. But that same year, for reasons left somewhat opaque in Ghadiali’s account, Manek left the United States to return to India, alone.¹²⁵ Five years later, after Ghadiali had divorced his first wife, he married a 19-year-old woman of “Germanic decent” named Irene Grace.¹²⁶

This second marriage would generate its own representational dilemma. By marrying Irene Grace, Ghadiali entered the fold of white middle-class respectability, gaining membership in the extended American family. But his marriage also raised the dreaded specter of miscegenation. In *Railroading*,

122. *Id.* at 16.

123. *Id.*

124. *Id.*

125. *Id.* at 27.

126. *Id.* at 38.

Ghadiali does not rhapsodize about the beauty or fateful meeting of his second wife. In his brief and muted descriptions of Irene Grace, he is careful to distance her from the image of the flapper, the ‘new woman,’ white women who flouted social convention, consorted freely with ‘colored men,’ and generally threatened social order. (Ghadiali would associate that sort of recklessness with his secretary, Geraldine McCann.¹²⁷) As he wrote of his first meeting with Irene, it was her “simplicity in dress, non-following of the foolish fashions . . . so dear to the average flapper [that] were so to my liking that I began to consider her qualifications as a wife.” As with his first marriage, Ghadiali was insistent that the marriage was based on equality, mutuality, and companionship:

That civil marriage of March 14, 1923, was unique in its simplicity. There was no ceremonial farce, no fuss, no false ‘obey’ or ‘bestow’ promise, no useless expense, no foolish paraphernalia. Not a gift was exchanged, not even the usual old ring, which I look upon as a sign of subordination of the bride. We were joined not only in the material, but in true companionship, eternal friendship and cordial affection, engendered by mutual respect and admiration for one another.¹²⁸

Notwithstanding Ghadiali’s insistence upon the consensual nature of his marriage, he and his wife must have been met with suspicion. As Lon Fuller understood, consent is critical to the legitimacy of contract, but consent is essentially elusive.¹²⁹ Inner will, intention, can be made known only by expression or externalization. But in Ghadiali’s experience, even ordinary attempts to make himself known, to clarify his intentions, were clouded by his external appearance. As Ariela Dubler has shown, the institution of marriage has long been held to sanctify the most unequal of bargains and to “cure” the most sordid of arrangements.¹³⁰ But in Ghadiali’s case, marriage did not lend his ordinary arrangement the sheen of respectability. Instead, it only confirmed the overwhelming power of his “malevolent influence.”¹³¹

For Ghadiali, marriage lent no safety of form.¹³² He avoided the exchange of rings to avoid any “sign of subordination of the bride,” but felt compelled to formalize his marriage—not just with a civil filing, but, a few months after their marriage, with a pair of notarized affidavits.¹³³ His wife signed an affidavit attesting that she had both married Ghadiali and converted to his religion,

127. *Id.* at 69-71, 78.

128. *Id.* at 39.

129. See Fuller, *supra* note 32.

130. See Dubler, *supra* note 99, at 756-7.

131. GHADIALI, *supra* note 1, at 123.

132. For relevant discussion about the relationship between identity and legal form see Jessica A. Clarke, *Identity and Form*, 103 CAL. L. REV. 747 (2015).

133. GHADIALI, *supra* note 1, at 48.

Zoroastrianism, “of my own free will and accord.”¹³⁴ Ghadiali signed an affidavit attesting that he was Zoroastrian and “white.”¹³⁵

Ghadiali makes no mention of the affidavits at his trial, perhaps because the prosecution had argued that Ghadiali’s extravagant use of legal forms displayed, rather than mutuality of intent, excess of control. But he submitted the affidavits into evidence at his denaturalization trial to prove that he was ‘white’ and thus eligible for citizenship. As he argued then, “my wife is a White woman; if I were a Hindu, she would never have married me.”¹³⁶ Referring the judge to the affidavit, Ghadiali argued, “what must have been in our mind was affirmed at that time before a Philadelphia Notary Public.”¹³⁷

The affidavit and accompanying testimony evidence not just racial identity, as Ghadiali argued, but the understanding that, no matter how exhaustively Ghadiali and his wife documented the mutuality of their intentions, their relationship was shadowed by doubt: how could a white Christian woman have chosen to marry an Indian immigrant without having succumbed to some malevolent influence?

Though the prosecution focused on the suspicious character of the employment contract into which Ghadiali and McCann entered—the “curious contract”—neither the prosecution nor the defense submitted the actual contract into evidence. Instead, in his self-published account, Ghadiali explained that he simply wanted to reach an understanding with his new secretary.

Before hiring McCann, Ghadiali had fired two previous secretaries. The first, he fired in 1923, while touring the west coast. As Ghadiali writes, “we gathered from her inadvertent remarks the real motive of her signing with us—she was aiming for Hollywood—she would have left us flat in California!”¹³⁸ (The “us” referred to here, includes Ghadiali’s new wife, Irene Grace, his teenaged daughter, Kashmira, and his driver, Harry Saunders.¹³⁹) Ghadiali, having made promises to the secretary’s mother, had the unpleasant duty of sending her back home. He paid for her train ticket.¹⁴⁰

A few days later, in Seattle, Ghadiali placed an advertisement for a new secretary.¹⁴¹ To his surprise several young women responded. But none of these agreed to follow his family’s strict regimen—no cigarettes, meat, alcohol, hosiery, or perfume. Eventually, he hired a young woman, “approaching 30, had

134. DINSHAH P. GHADIALI, *DINSHAH NATURALIZATION CASE CLEARING CONTESTED CITIZENSHIP* 35 (1944).

135. *Id.*

136. *Id.* at 45.

137. *Id.*

138. GHADIALI, *supra* note 1, at 43.

139. *Id.*

140. *Id.*

141. *Id.* at 45.

served in the war, was an expert stenographer.”¹⁴² But she, too, proved to be a disappointment. As Ghadiali wrote,

We told her [on the morning of our departure] that she should leave all paints, powders, rouges, and similar artificialities at home prior to joining us, as she would be with my daughter and we would not have anything like that on our premises. It was all according to the agreement and there could be no misunderstanding. She comprehended thoroughly all the service requirements.¹⁴³

But the next evening, Kashmira complained that the secretary had smuggled into the hotel room they shared “all forbidden odorous paraphernalia.”¹⁴⁴ Ghadiali, with regret, fired her, too.

After his lecture in Portland, Geraldine McCann and her aunt, Mary Hayes, approached Ghadiali. Mrs. Hayes introduced herself as a Theosophist, spiritualist, and “deep student of the occult . . . dissatisfied with the worldly life she was leading.”¹⁴⁵ Her niece, McCann, ambitious and eager to travel, asked if she might join Ghadiali and his family as a traveling secretary. Mrs. Hayes granted her niece permission.¹⁴⁶ It was then that Ghadiali’s wife, Irene Grace, drafted the “curious contract” that McCann signed. As Ghadiali wrote,

We explained the reasons for each clause. Why the supervision over the mail? Because of my bad experience with the less trustworthy people and my fights with the Medical Trust. Why the cap? Because of the effects of higher power electrical oscillations, chemical vapors, sunlight and the like on the head; we lived in a laboratory atmosphere. Why the vegetarian diet? Because of the practicing what I preach: mercy, healthfulness and consistency of principle. Why no gifts or presents? Because of our absolute graftlessness to maintain strict integrity. There was nothing kept back.¹⁴⁷

In one sense, there was nothing unusual about the contract. Then, as now, courts routinely enforce contractual terms that limit the communication of employees for the purpose of protecting an employer’s trade secrets and reputational interests. Ghadiali may have been unusually paranoid about scrutiny from the medical establishment, but he was probably not unlike most other inventors and patent physicians at the time who thrived within the medical marketplace by keeping their practices secret. And suspicions about the postal

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 48.

146. *Id.*

147. *Id.*

service might not have been entirely misplaced: the United States postal service played a critical role in eventually removing Ghadiali's inventions from the stream of interstate commerce.¹⁴⁸

The contract was perhaps "curious," though, in that it was not limited to terms of employment but rather seemed to embrace more personal sartorial and dietary restraints. The contract was less concerned with the exchange of value for labor than it was in compelling recognition, if not respect, for his way of life. In Ghadiali's account, he had invited McCann to become not just his employee but a member of his household, his family. But having failed to compel her predecessors to respect his household customs, he demanded as much by having her sign a contract. Above all else, it seems, he wanted her to cover her head—probably for religious reasons as well as hygienic—and to observe vegetarianism.¹⁴⁹

During the trial, McCann maintained that she had been in a "trance" during the eleven months of her employment, drained of will.¹⁵⁰ Her characterization of work resonates with that of labor advocates, who argued that modern industrial labor often reduced individuals to somnambulists and automatons—bodies without will. But the suspended animation that McCann describes also reflected the legal status of women in marriage. The traditional marriage contract was different from the employment contract in that, by entering into a marriage, freely contracting parties were returned to status-like positions—husband and wife. According to Blackstone's famous account of the doctrine of marital unity, "by marriage, the husband and wife are one... the very being or legal existence of the woman is suspended during the marriage."¹⁵¹ The doctrine of marital unity rendered rape an impossibility, as a woman who agrees to marry "hath given up herself in this kind unto her husband, which she cannot retract."¹⁵² Laws expanding the right of married women to control property gradually undermined the doctrine of "marital unity," but even until the mid-twentieth century, in many parts of the United States, by agreeing to marry, a woman seemed to agree to

148. Ghadiali's was not the only color therapy device on the market in early twentieth century, but his seemed to have been singled out for investigation. Christopher Turner writes of the great lengths to which FDA went to pursue Ghadiali in 1938:

FDA agents tracked down newspaper advertisements placed by people selling secondhand Spectro-Chromes, in order to try and identify dissatisfied customers. Agents posed as patients; doctors conducted independent trials. The post office provided the addresses of every Spectro-Chrome consignee, whom FDA agents visited and interviewed (their names, collected in the McCarthy era, read something like a blacklist: Walter Chandler, Anna Cabaj, Dorothy Westphol, Stella Hitkowosk.) Finally, in October 1946, Ghadiali appeared in court charged with introducing a misbranded article into interstate commerce, a violation of the criminal code.

Christopher Turner, *The Kingpin of Fakers*, 18 CABINET MAG. (2005), <http://www.cabinetmagazine.org/issues/18/turner.php> [<https://perma.cc/CMA5-X58Z>].

149. *Id.* at 42.

150. *Ghadiali v. United States*, 17 F.2d 236, 238 (9th Cir. 1927).

151. 1 WILLIAM BLACKSTONE, COMMENTARIES 442 (1765).

152. 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 629 (Robert H. Small ed. 1847).

everything else—to have sex with her husband as he desired, bear his children, and otherwise do as he willed.

What the prosecution referred to as the “curious contract” thus returns us to the tension between autonomy and embodiment that nags at the claim of contractual freedom. In Ghadiali’s case, the question that seemed to overshadow the curious contract was this: did a woman’s consent mean the same thing in marriage as it did in the marketplace?

RECAPTURING WHITE WOMEN

Proponents of the Mann Act claimed to be concerned about protecting innocent white women from the corrupting influences of the marketplace and the predations of traffickers. Ghadiali himself was suspicious of the myth of pure white womanhood, observing that American women seemed eagerly complicit in transforming themselves into sexual commodities. In Ghadiali’s narrative, the primary threats to feminine virtue were not black or brown men, but intemperance, consumerism, powders and perfumes, which he regarded as unwelcome intrusions of the market into the home, and commercialization of the body.¹⁵³ Ghadiali also resisted the bourgeois—and racialized—distinction between “women” and “ladies.” Complaining of his difficulty finding a good secretary, Ghadiali wrote:

One after another, various types and temperaments came to work for the Spectro-Chrome Institute and our household. It was difficult to retain any longer because of our vegetarian diet, hard business life and aloofness from social tanglements.... Our night work extended into the next morning, and it was very difficult to find coworkers. The girls expected us to treat them like ‘ladies.’ We bluntly told them there were no ‘ladies’ in America, only workers and women.¹⁵⁴

An improvement over previous secretaries, McCann seemed to accommodate herself to Ghadiali’s terms of employment. As Ghadiali wrote, his young secretary “went to work in earnest and grew in confidence.”¹⁵⁵ McCann herself seemed eager to shed the restraints of sentimentalized female incapacity. McCann arrived at Ghadiali’s institute wearing “ordinary female clothes,” but asked if she could wear the more mannish uniform worn by Ghadiali’s wife and daughter.¹⁵⁶

153. GHADIALI, *supra* note 1, at 45.

154. *Id.*, at 38.

155. *Id.* at 42.

156. *Id.* at 52.

At her own request, they bought for her knickerbockers until proper serge suits might be tailored. Miss McCann liked the smart, comfortable and business-like serge suits of coat and breeches worn all the year round by my wife and daughter and persuaded them to have her similarly outfitted.¹⁵⁷

In Ghadiali's account, McCann seemed to enjoy her new independence and discovering her capacity for work. And Ghadiali, in turn, seemed to identify with McCann as a fellow traveler, eager to leave behind the constrictions of origin. McCann did often travel with Ghadiali and his family because she wanted to.¹⁵⁸

McCann began writing for Ghadiali's newsletter.¹⁵⁹ As a number of students explained, in testimonials collected by Ghadiali, McCann spoke before Ghadiali's classes, at times, offering surprisingly eloquent testimonials.¹⁶⁰ After the birth of the Ghadiali's new son, Geraldine assumed new responsibility and "became attached [to the baby] like a mother." Ghadiali describes his institute, like his home, as a collaborative venture, absorbing and uplifting others on the move, including his own wife and daughter, his black driver and his wife, entrepreneurial young women.¹⁶¹ But Ghadiali's terrifically irregular enterprise, even as it seemed to epitomize the radical promise of contractual freedom, drew constant scrutiny.

His home was visited by an officer inquiring into the well-being of the women in his home.¹⁶² Then came a series of letters, one after another, imploring McCann to come home. From her Aunt Hayes: "since your mother is very ill and you are actually needed at home with the children [McCann's nieces and nephews], I am now asking you on both your mother's behalf and mine to come at once."¹⁶³ McCann replied,

I certainly will not be held back in career for the whims of my relatives. I send mother a check of \$30.00 every month. I can do nothing more for her than I am doing. In my position I am happy, contented, well taken care of and respected by the public and I do not intend to leave my duties.¹⁶⁴

At his trial, the government argued that McCann's refusals to return home evidenced nothing of her own intention, only Ghadiali's overwhelming influence.

157. *Id.*

158. *Id.* at 53, 59.

159. *Id.* at 65.

160. *Id.*

161. *Id.*

162. *Id.* at 54, 61.

163. *Id.* at 83.

164. *Id.*

McCann received a more agitated letter from her Aunt, expressing worry of an Uncle Mickey's "plan of putting your mother into a home or back into an asylum again... Now I think it's a crime for you & Mickey to do that to your darling mother. I hate to ask you to give up your career, if there is one there for you, but your mother is first."¹⁶⁵ Then, McCann's brother sent a letter reminding McCann that the cost of becoming a career girl was loss of domestic privilege.

Don't forget the kiddies are growing older and the longer you are away the easier it is to forget and no one wants that to happen after what you did for them when they were young... regarding your giving up your position, of course it is perfectly natural that you should not want to do so, but in my estimation a daughter's first consideration is her mother.¹⁶⁶

According to Ghadiali, McCann remained entirely unmoved by her family's entreaties.¹⁶⁷

Then Ghadiali himself received an alarming letter from a former student and "well-wisher" in Oregon, reporting that McCann's relatives had begun spreading malicious rumors about Ghadiali in Portland.¹⁶⁸ The letter read:

She started in by saying that you were running a Harem, and that you had schemed for her niece to go away with you under the pretext of acting as your private secretary... That you lied when you said the two ladies you had here with you were your wife and daughter... asserted that she had proof they were your prisoners and part of your Harem... Claimed to have reason that you were an impostor and a man of the lowest type of the underworld—snaring innocent girls into your 'Harem' and holding them prisoners on a 30 acre farm at Malaga out of hearing and reach of every one.... That you resorted to bringing them under your power by hypnotic means and satisfying your devilish desires in a most horrid unnatural way.¹⁶⁹

Incredibly, none of this seemed to alarm Ghadiali who ignored the letters and retreated into the quiet of his laboratory. So close, he was, to completing his latest invention—the It-is-o-meter—a medical instrument designed to locate in any sufferer precisely what the disorder is, where it is, and how to correct it. "If I could do it," Ghadiali reflected, "I would be taking the longest stride of any in the Healing Arts."¹⁷⁰ He seemed to have missed the clear signs of coming

165. *Id.* at 87.

166. *Id.* at 60.

167. *Id.*

168. *Id.* at 58.

169. *Id.* at 60.

170. *Id.* at 75.

disaster, having fallen under the spell of a machine that promised to render visible every hidden source of misery.

A few months later, in the summer of 1925, Ghadiali began planning another tour—this time, to promote his new invention. McCann offered to accompany Ghadiali as his travelling secretary. She even outfitted herself in her new naval uniform. Ghadiali gave a polite nod of approval, but, as he explained in his own writing, he was extremely reluctant to bring her along. McCann persisted—he had promised, she had been so dutiful, it wasn't fair to punish her for the actions of her relatives, and yet wouldn't it be a great opportunity to visit them—and Ghadiali, against his better judgment, relented.¹⁷¹

McCann proved to be a more vexing travel companion than Ghadiali had anticipated. She sang loudly in the parlor car and drew strangers into suggestive games of "I spy." Ghadiali begged McCann to behave herself and otherwise kept his eyes trained on his beloved instruments.¹⁷²

If it was a challenge for someone of Ghadiali's complexion to travel by train in the era of *Plessy*, Ghadiali does not expressly say. But he took a few telling precautions. At his trial, Ghadiali submitted into evidence letters he sent to train companies, explaining his situation—that he was traveling not with family, but with a secretary, and that he hesitated to engage a private drawing room, but was arranging to do nonetheless so because it was impossible to travel with "delicate electrical apparati" otherwise.¹⁷³ For the convenience of his co-traveler, he asked that the train companies "supply the necessary curtains to insure her privacy and at the same time give me the convenience of leaving the door wide open day and night."¹⁷⁴ He added, "If you will do anything to smooth my above stated situation so that I may not have any probable complication or legal trouble, I shall feel it a personal favor."¹⁷⁵

Finally, after the two had arrived in Portland, Ghadiali sensed that something was amiss. "Being trained to a life of highly concentrative meditation and accustomed to mental absorption in research work, I am prone to feel human etheric oscillations like a tuned radio."¹⁷⁶ Indeed, by the next morning, Ghadiali discovered that McCann had vanished.

Ghadiali made his usual progress through the long day. He concluded his lecture late in the evening and dragged his instruments back to his hotel.¹⁷⁷ As he wrote, he had the unmistakable impression that he was being followed. As Ghadiali unlocked the door to his room, a man lunged behind. Ghadiali raced for

171. *Id.* at 71, 74.

172. *Id.* at 93.

173. *Id.* at 84.

174. *Id.* at 84-85.

175. *Id.*

176. *Id.* at 97.

177. *Id.* at 100.

his revolver.¹⁷⁸ (Having been threatened before, Ghadiali always slept with a loaded revolver.) Ghadiali claimed he had no intention of shooting, but was prepared to defend himself against the unpardonable intrusion. When Ghadiali raised his gun, the other man did the same, shouting, “Federal Officer. Put down your gun.”¹⁷⁹ Then the room filled with armed men. “I’ve been following you for three years,” one of them said. Another ordered him to strip. Ghadiali protested but removed his clothes, as told. One of the officers laughed, another stepped on Ghadiali’s toes, and another prodded his genitals with the barrel of his gun. Ghadiali writes,

My blood tingled in my ears. Such an obscene monstrosity would have been resented any other time, but I was in their clutches, I was undefended, I was among strangers, I had no physical means to secure help—there I was standing naked before five huskies all armed with guns and apparently meaning no good to me.¹⁸⁰

Ghadiali spent the night in jail. McCann had been dragged home by her family.¹⁸¹

At the trial, the government adopted Mary Hayes’ lurid image of Ghadiali and his household—characterizing Ghadiali as a seducer, his wife and daughter as procurers, his home as a harem.¹⁸² In Ghadiali’s counter-narrative, the letters from Mary Hayes and McCann’s brother suggest the real motivation underlying the charge of white slavery. As Ghadiali writes of the brother’s letter, “Aha! Here was an industrious sister working her way in life; there was a less industrious brother trying to trample on his sister’s career, because he wanted her to drudge as a housekeeper.”¹⁸³ Apart from petty rivalry, what the McCann family’s letters reveal is sudden regret about losing the value of Geraldine’s domestic labor and family prerogative. In Ghadiali’s narrative, the charge of white slavery was the device families used to remand ambitious women to household drudgery.

POSTSCRIPT: INCREDULITY

We can never really know what happened between Dinshah Ghadiali and Geraldine McCann. In retelling the story of Ghadiali’s arrest and conviction, I have relied, in great measure, on his own reporting.

In his *Lives of Infamous Men*, Michel Foucault observes that the historical archives are full of obscure figures, unimportant men and women who, but for

178. *Id.*

179. *Id.*

180. *Id.* at 100-1.

181. *Id.* at 99.

182. *Id.* at 127.

183. *Id.*

one fateful encounter with the law, would have followed the billions of others who leave the world without a trace of their existence.¹⁸⁴ The irony, for Foucault, is that these odd individuals enter the archive only to announce their infamy; in the worst cases, these lives enter the historical record just as they are extinguished by power. Having come across so many “singular lives,” reduced to “strange poems,” Foucault explains, he felt compelled to make a study of them.¹⁸⁵

I considered the texts in their dryness, trying to determine their reason for being... seeking to understand why it had suddenly been so important in a society like ours to ‘stifle’ (as one stifles a cry, smothers a fire, or strangles an animal) a scandalous monk or a peculiar and inconsequential usurer?¹⁸⁶

Why, we might wonder, in twentieth-century America, was it so important to contain someone like Ghadiali? The appearance of infamous men in the historical archives, Foucault suggests, tells us less about the individuals themselves than the societies that struck them down.

Rarely do individuals with Ghadiali’s life experience enter the historical record; even more rarely do they enter legal scholarship. When they do, their stories are generally told by others, often enemies or adversaries, often to justify their suppression. Rarely are the stories of such individuals told by themselves, in their own voices. When they are, we should listen. Not because those who have been historically silenced or subordinated have special access to ‘what really happened’, or ‘the truth’, but because they have the potential to disrupt the regimes of silencing, subordination, and truth-making that reinforce one another. When we listen to the voices of the historically silenced and subordinated, we begin to reshape public meaning, our shared institutions, and the narratives that hold us in place.¹⁸⁷

Those are some of the reasons that I have chosen to take seriously Ghadiali’s counter-narrative of the events leading to his conviction. For separate reasons, I have been inclined to believe Ghadiali’s account over the prosecutor’s. Scholars agree that the overwhelming purpose of the Mann Act, as I suggested above, was to restrict the sexual freedom and social movement of white women in an era of unprecedented change.¹⁸⁸ Black and brown men were routinely figured as the primary threat to the status quo, which in turn, had become conflated with

184. MICHEL FOUCAULT, *Lives of Infamous Men*, in *POWER* (James D. Faubion ed., Robert Hurley trans. 2000).

185. *Id.* at 158.

186. *Id.*

187. Gayatri Chakravorty Spivak, *Ethics and Politics in Tagore, Coetzee, and Certain Scenes of Teaching*, 32.3-4 *DIACRITICS* 17, 24 (2002).

188. See *supra* notes 70-1 and accompanying text.

preserving the purity of white womanhood.¹⁸⁹ The prosecution's case against Ghadiali follows that familiar script.

Moreover, Ghadiali's life story, which he wrote and rewrote compulsively, is one of continuously outrunning false scripts and racist misrepresentation. Before he was arrested for violating the Mann Act, Ghadiali was accused of violating laws governing the practice of medicine—laws intended to police the boundaries of an emerging profession that would remain segregated, and condone segregation, until the civil rights era.¹⁹⁰ Ghadiali's was not the only color therapy device sold in the United States in the first half of the twentieth century, but his seemed to become the target of obsessive scrutiny among defenders of the medical establishment.¹⁹¹ Their attempts to discredit Ghadiali often assumed a racist tone.¹⁹² After he was released from prison, the federal government sought to cancel Ghadiali's citizenship, asserting that he was racially ineligible.¹⁹³

And still, I remain uncertain. Victims of racial violence are also capable of committing acts of gendered violence. The prosecution's theory—that Ghadiali mesmerized women, that he forced them into prostitution—seems both incredible and disingenuous. But the particular events that anchor both the prosecution's narrative and Ghadiali's counter-narrative may be entirely consistent with a pattern of sexual abuse. The isolation from family, the imposition of rules, the surveillance of letters—all of it might be consistent with what survivors of sexual abuse and their advocates describe as grooming, gaslighting, Stockholm syndrome, and trauma. Both the prosecution and Ghadiali reference encounters between Geraldine and others which raise more questions than they answer.¹⁹⁴ Moreover, in Ghadiali's two-volume narrative,

189. *Id.*

190. Harriet A. Washington et al., *Segregation, Civil Rights, and Health Disparities: The Legacy of African American Physicians and Organized Medicine, 1910-1968*, 101 J. NAT'L MED. ASS'N 513 (2009).

191. See Lavine, *supra* note 46; Turner, *supra* note 148.

192. The 1924 article published in the *Dearborn Independent* ridiculed the shortcomings of Ghadiali's therapeutic device but also raised unflattering questions about Ghadiali's commercial motivations, referring to him as a "Semetic wanderer" who has "come out of the Orient to heal the ills of mortal man." Morgan, *supra* note 113. Matthew Lavine, who has written about the rise and fall of Ghadiali's spectrochrome therapy, describes a televised interview with Oliver Field of the AMA:

The program opened with a sketch in which Gus [a cartoonish naïve hypochondriac susceptible to medical fraud] is worked over by a turbaned and gleefully unscrupulous quack named 'I. M. Sikh.' Afterwards, [the interviewer] prompted Field to elaborate on the 'swami stuff' just portrayed. Without using Dinshah [Ghadiali's] name, Field [spoke] about 'the old fellow who came over from India

Lavine, *supra* note 46, at 172.

193. See Sherally Munshi, "You Will See My Family Became So American": *Race, Citizenship and the Visual Archive*, in *LAW AND THE VISUAL: REPRESENTATIONS, TECHNOLOGIES, AND CRITIQUE* 161 (Desmond Manderson ed. 2018).

194. More specifically, the prosecution references a vaginal exam performed by Ghadiali. Ghadiali, who fashioned himself a physician, suggested that McCann had been afflicted by some sort of ailment for which she appealed to Ghadiali for help. Ghadiali insinuated that McCann may have been sexually active and that she may have been involved in a sexual relationship with his black driver, Harry Saunders. Though Ghadiali himself was often cast in an unforgiving haze of racial suspicion, he was not above

McCann is never really allowed to speak for herself. Ghadiali argues that McCann's testimony is not really her own, that the prosecution uses her—but perhaps Ghadiali does, too.

Uncertainty weighs more heavily as I draft this postscript, a few days after the Senate concluded a pair of confirmation hearings by advancing a man who was credibly accused of sexually assaulting at least one woman to a seat on the Supreme Court. Christine Blasey Ford first contacted her representatives and the *Washington Post* earlier this summer, soon after she learned that the person who had assaulted her decades before was now being considered for a vacancy on the Supreme Court.¹⁹⁵ “Brett Kavanaugh physically and sexually assaulted me during high school in the early 1980s,” she wrote in a letter addressed to a member of the Senate Judiciary Committee.¹⁹⁶ Her story was corroborated by session notes kept by her therapist and conversations recalled by her husband.¹⁹⁷ She passed a polygraph test.¹⁹⁸ Though she wished to remain anonymous, once reporters learned of her identity, Ford felt she had no choice but to make her accusations public.¹⁹⁹

Immediately overwhelmed by both public support and death threats, a reluctant Ford agreed to testify before Congress, but asked that the Senate Judiciary Committee order an FBI investigation first, to “ensure that the crucial facts and witnesses in this matter are assessed in a non-partisan manner, and that the Committee is fully informed before conducting any hearing or making any decisions.”²⁰⁰ Refusing to order a thorough FBI investigation, to subpoena other witnesses, or even to slow down the pace of events, the Senate Judiciary

exploiting anti-black racism to direct suspicion away from himself and towards others. GHADIALI, *supra* note 1, at 123, 135-37.

195. Jessica Contera, et. al., *Kavanaugh accuser Christine Blasey Ford moved 3,000 miles to reinvent her life. It wasn't far enough*. WASH. POST (Sept. 27, 2018), https://www.washingtonpost.com/local/christine-blaysey-ford-wanted-to-flee-the-us-to-avoid-brett-kavanaugh-now-she-may-testify-against-him/2018/09/22/db942340-bdb1-11e8-8792-78719177250f_story.html?utm_term=.272b9874f8fe [<https://perma.cc/8MNG-7L2P>].

196. Letter from Christine Blasey Ford to Sen. Dianne Feinstein (D-Cal.) (July 30, 2018), <https://www.judiciary.senate.gov/imo/media/doc/2018-09-20%20Feinstein%20to%20Grassley%20-%20July%2030%20Letter%20from%20Ford.pdf> [<https://perma.cc/4355-HBWQ>].

197. Christal Hayes, *Here's the Polygraph Test Christine Blasey Ford Took on Her Allegations Against Kavanaugh*, USA TODAY (Sept. 26, 2018), <https://www.usatoday.com/story/news/politics/2018/09/26/christine-blaysey-fords-polygraph-test-brett-kavanaugh-sexual-assault-allegations/1434270002/> [<https://perma.cc/9VQL-33C8>].

198. *Id.*

199. Emma Brown, *California Professor, Writer of Confidential Brett Kavanaugh Letter, Speaks Out About Her Allegation of Sexual Assault*, WASH. POST (Sept. 16, 2018), <https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b> [<https://perma.cc/SE8A-3F4T>].

200. Irin Carmon, *Read the Letter from Christine Blasey Ford Requesting an FBI Probe of Her Kavanaugh Allegation*, N.Y. MAG. INTELLIGENCER (Sept. 18, 2018), <http://nymag.com/intelligencer/2018/09/christine-blaysey-ford-letter-fbi-investigation.html> [<https://perma.cc/57MV-97Q7>] (citing Letter from Debra S. Katz & Lisa J. Banks, Attorneys for Dr. Christine Blasey Ford, to Sen. Charles E. Grassley, Chairman, S. Comm. on the Judiciary (Sept. 18, 2018)).

Committee effectively orchestrated the very “he said, she said” they denounced as pointless.²⁰¹

In late September, Ford offered her account of the incident.²⁰² In the summer of 1982, when she was fifteen years old, she attended a house party in suburban Maryland. She left the company of her friends to go to the bathroom upstairs. Upstairs, she was pushed into a bedroom by two boys, obviously drunk. Kavanaugh, as she recalled, pushed her onto a bed, pinning her there with the weight of his body, grinding and groping; while Kavanaugh’s friend, Mark Judge, watched and laughed. Struggling to breathe as he covered her mouth, Ford worried that Kavanaugh might inadvertently kill her. When Judge jumped onto the bed, toppling the other two, she managed to leave the room and then the party. Ford delivered her testimony with earnest cooperation, restrained emotion, disarming candor—careful to acknowledge what she could and could not recall thirty years later. When asked how she could be so certain that it was Kavanaugh and not someone else who attacked her, Ford, a professor of psychology, explained that certain details might be seared in one’s memory even as others faded away. When asked what she remembered most clearly about that night, Ford recalled the pleasure the boys took in her humiliation. “Indelible in the hippocampus is the laughter . . . the uproarious laughter between the two . . . I was . . . underneath one of them, while the two laughed.”²⁰³

Kavanaugh’s testimony, which followed later in the afternoon, consisted of howling accusations, implausible denials, willful dissembling, and petty insults aimed at Senators who dared question him. Hardly addressing Ford’s claims, he implied that they were the conjury of some political conspiracy.²⁰⁴ He boasted of his academic achievements, as though elite schooling and good grades should insulate individuals against accusations of wrongdoing.²⁰⁵ Where her testimony was meticulous, his was petulant. Where she was compliant, he was rageful. While it is obvious that both Kavanaugh and Blasey Ford suffered terribly through the public ordeal, she suffered death threats, loss of privacy, and the pain of publicly reliving a humiliating memory with heroic composure. In contrast, he suffered death threats, loss of reputation, and calls to accountability with tears of self-pity. A number of times over the course of his testimony, Kavanaugh, who certainly knows the difference, characterized others’ lack of recollection as

201. Burgess Everett & Elana Schor, *Trump Says He’s OK with the FBI Interviewing Kavanaugh*, POLITICO (Oct. 1, 2018), <https://www.politico.com/story/2018/10/01/mitchell-ford-kavanaugh-accusation-854433> [<https://perma.cc/6JPA-5US3>]

202. *Kavanaugh Hearing: Transcript*, WASH. POST (Sept. 27, 2018), https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/?utm_term=.9121f6bb076c [<https://perma.cc/7FRZ-FTY2>] (full transcript of *Nomination of Brett M. Kavanaugh to be an Associate Justice of the Supreme Court, Day 5, Focusing on Allegations of Sexual Assault: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2018)).

203. *Id.*

204. *Id.*

205. *Id.*

refutations.²⁰⁶ The explanations that Kavanaugh offered under oath for the language he had written in his own high school page—“ralph,” “boofed,” “devil’s triangle,” “Renate alumnus”—were so incredible that they prompted several former classmates to come forward, expressing fresh doubt about Kavanaugh’s fitness as a judge.²⁰⁷

Here, too, we can never really know what happened. It is impossible to determine with any certainty what did or did not happen in a suburban home in Maryland some thirty-six years ago. But it is also clear that the confirmation hearings were never really about determining what did or did not happen. By agreeing to participate in the committee’s proceedings, Ford bound herself to the committee’s unyielding authority to control meaning, to determine what did or did not happen.²⁰⁸ Before the Ford-Kavanaugh hearing, Senator Mitch McConnell promised a room full of supporters, “we’re going to plow right through.”²⁰⁹ Before hearing her, Senator Lindsey Graham announced that Ford’s testimony would not change his vote: “I’m not going to ruin Judge Kavanaugh’s life over this.” He went on to say, incredibly, that Ford should nonetheless “have her say, she will be treated respectfully.”²¹⁰ One reporter in the room during the hearing observed that Republican committee members, with one exception, avoided looking Ford in the eyes as she spoke.²¹¹

To so many of us who watched, the fair hearing that Ford had been promised quickly became a public demonstration of willed ignorance. Twenty-eight years ago, during the Anita Hill-Clarence Thomas hearings, a committee, composed of all white men, attacked the woman who accused the nominee of sexual

206. Mike McIntire et al., *At Times, Kavanaugh’s Defense Misleads or Veers Off Point*, N.Y. TIMES (Sept. 28, 2018), <https://www.nytimes.com/2018/09/28/us/politics/brett-kavanaugh-fact-check.html> [<https://perma.cc/X2NU-49RP>].

207. Kate Kelly & David Enrich, *Kavanaugh’s Yearbook Page is ‘Horrible, Hurtful’ to a Woman It Named*, N.Y. TIMES (Sept. 24, 2018), <https://www.nytimes.com/2018/09/24/business/brett-kavanaugh-yearbook-renate.html> [<https://perma.cc/7LVR-BYHD>]; Clark Mindock, *More Yale Classmates Come Forward Claiming Brett Kavanaugh Has Been Lying*, INDEPENDENT (Oct. 2, 2018), <https://www.independent.co.uk/news/world/americas/us-politics/kavanaugh-yale-classmates-chad-ludington-kerry-be-rham-beer-drunk-liz-swisher-a8565261.html> [<https://perma.cc/4PQ7-D5V8>].

208. I am indebted to Kathryn Pogin for these words and insights.

209. Eliza Collins, *McConnell: We’re Going to ‘Plow Right Through’ and Get Kavanaugh Confirmed Despite Assault Allegation*, USA TODAY (Sept. 21, 2018), <https://www.usatoday.com/story/news/politics/2018/09/21/mitch-mcconnell-were-going-plow-right-through-ford-allegation/1380905002/> [<https://perma.cc/9KWK-DMMZ>].

210. Ann Telnaes, *Graham’s Mind Has Been Made Up*, WASH. POST (Sept. 23, 2018), https://www.washingtonpost.com/news/opinions/wp/2018/09/23/grahams-mind-has-been-made-up/?utm_term=.453b9aaca385 [<https://perma.cc/U8FU-J6D9>]; Chris Cillizza, *Lindsey Graham’s Depressing and Disappointing Admission About Thursday’s Brett Kavanaugh Hearing*, CNN (Sept. 26, 2018), <https://www.cnn.com/2018/09/25/politics/donald-trump-lindsey-graham-brett-kavanaugh/index.html?no-st=1546398805> [<https://perma.cc/ZCK7-SEK9>].

211. Dahlia Lithwick et al., *The Waves: Gender, Relationships, Feminism: The Rage at Brett Edition*, SLATE (Oct. 4, 2018), http://www.slate.com/articles/podcasts/doublex_gabfest/2018/10/the_hosts_of_the_waves_discuss_male_entitlement_female_rage_and_what_comes.html [<https://perma.cc/AD4S-4NP8>] (last visited Jan. 1, 2019) (Dahlia Lithwick commentary starting at 40:00).

harassment, relentlessly challenging her credibility.²¹² Careful to avoid the same mistakes this time around, many Republicans on the committee—still composed largely of white men—acknowledged that Ford seemed credible. While Hill was discredited as a liar, Ford was discounted as “pleasing” but perhaps confused.²¹³ Kavanaugh’s supporters seemed to converge upon the same unlikely theory: something terrible happened to poor Ford, but Kavanaugh had nothing to do with it. Of course, the mistaken identity theory is the one theory that would allow Senators to reconcile her apparent credibility with his aggressive denials. There is at least one other possibility: he did it, but he could not remember, either because he was too drunk—as many former classmates publicly assumed—or because what she experienced as terror was, for him, another unremarkable night of fun.

President Donald Trump, who was voted into office after he was caught boasting of sexual assault in a recorded conversation, was among the few who dared to suggest that Ford might be making a false accusation.²¹⁴ “And you know why?” he explained at a press conference. “Because I’ve had a lot of false charges made against me.”²¹⁵ More than a dozen women have accused Trump of sexual impropriety; Trump has dismissed them as opportunists taking advantage of famous and powerful men.²¹⁶ He later added, “My whole life, I’ve heard, ‘you’re innocent until proven guilty,’ but now you’re guilty until proven innocent. It’s a very scary time for young men in American when you can be guilty of something that you may not be guilty of.”²¹⁷ Of course, as some were quick to point out, there *is* indeed a long history of false accusation in this country. But it’s not famous white men who have been particularly vulnerable to false accusations, presumptions of guilt, and lack of due process, but black and brown men.²¹⁸ Trump has shown far more concern for the “due process” rights

212. See Toni Morrison, “Introduction: Friday on the Potomac,” in *RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY* i-xxx (1992).

213. Deborah Epstein & Lisa A. Goodman, *Discounting Credibility: Doubting the Testimony and Dismissing the Experience of Domestic Violence Survivors and Other Women*, 167 U. PENN L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3133066 [<https://perma.cc/MNF5-BA4S>]; *Sen. Hatch Calls Ford ‘Attractive,’ ‘Pleasing’*, PBS (Sept. 27, 2018), <https://www.pbs.org/newshour/politics/sen-hatch-calls-ford-attractive-pleasing> [<https://perma.cc/E5WB-3AWL>].

214. *President Donald Trump: ‘I’ve Had a Lot of False Charges Made Against Me*, USA TODAY (Sept. 26, 2018), <https://www.usatoday.com/videos/news/politics/2018/09/26/president-donald-trump-ive-had-lot-false-charges-made-against-me/1438263002> [<https://perma.cc/X7NN-T5DP>] (last visited Jan. 1, 2019).

215. *Id.*

216. *Id.*

217. Amanda Arnold, *Donald Trump Thinks It’s a ‘Very Scary Time for Young Men in America’*, THE CUT (Oct. 2, 2018), <https://www.thecut.com/2018/10/donald-trump-thinks-its-a-very-scary-time-for-young-men.html> [<https://perma.cc/CBJ2-EKXU>].

218. Petula Dvorak, *Black Men—Not White Guys—Face False Allegations and a Presumption of Guilt*, WASH. POST (Oct. 8, 2018), https://www.washingtonpost.com/local/black-men--not-white-guys--face-false-allegations-and-a-presumption-of-guilt/2018/10/08/a397fb44-cb06-11e8-a3e6-44daa3d35ede_story.html?utm_term=.c3d6aea224c5 [<https://perma.cc/96MM-AT9V>].

of a judge who stands only to lose a seat on the Supreme Court than, for instance, the Central Park Five, black and brown men wrongly convicted and imprisoned for raping a white woman when they were teenagers.²¹⁹ In 2016, Trump announced his campaign for the presidency by calling (all but “some”) Mexican immigrants rapists and murders.²²⁰ As President, he has shamelessly exploited the same racist fantasies, defining of white slave panic, to promote anti-black and anti-immigrant policies.

We can never really know what happened in either case, but Kavanaugh was given the benefit of a far more searching standard than Ghadiali—and perhaps most criminal defendants. Before and after the hearings, Kavanaugh’s supporters, like Trump, insisted that the judge was entitled to a presumption of innocence.²²¹ Judicial confirmation hearings are job interviews, not criminal trials, as many pointed out.²²² His supporters complained about a lack of “due process,” but voting against a Supreme Court nominee is not the same as convicting him of a crime.²²³ A negative vote would have sent Kavanaugh not to prison, but back to the D.C. Circuit.

The Kavanaugh controversy was often framed in terms of evidence, matters of fact, what can or cannot be proven. But the real division exposed by the controversy has less to do with what actually happened than with who decides—who is authorized to participate in shaping public meaning and the norms of social exchange; who is accountable to whom and for what; who gets to decide what we collectively recognize as consent, as violence, as right or wrong. This became clear soon after Kavanaugh began to testify. Republicans on the committee had hired a “female assistant,” a federal prosecutor, to question Ford, but quickly dispensed with her and her questioning.²²⁴ Instead, they took turns bellowing at their Democratic counterparts, accusing them of turning the hearings into a political circus.²²⁵ To Kavanaugh, they assured, you don’t have to answer to this. What the rest of us were made to witness that afternoon was a

219. In 1989, Trump spent \$85,000 placing full-page advertisements calling for their execution. Astonishingly, in 2016, long after the Central Five had been exonerated by DNA evidence, Trump maintained that the men were guilty. Sarah Burns, *Why Trump Doubled Down on the Central Park Five*, N.Y. TIMES (Oct. 17, 2016), <https://www.nytimes.com/2016/10/18/opinion/why-trump-doubled-down-on-the-central-park-five.html> [https://perma.cc/B9NR-QT4B].

220. Wash. Post Staff, *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?utm_term=.b75a4bcf9930 [https://perma.cc/P8C4-4HFB].

221. Arnold, *supra* note 217.

222. See e.g., Dvorak, *supra* note 218.

223. Caprice Roberts, *Kavanaugh’s Senate Hearing Isn’t a Trial. The Standard Isn’t ‘Reasonable Doubt,’* WASH. POST (Sept. 21, 2018), https://www.washingtonpost.com/outlook/kavanaughs-senate-hearing-isnt-a-trial-the-standard-isnt-reasonable-doubt/2018/09/20/1eb1ee34-bd15-11e8-b7d2-0773aa1e33da_story.html?utm_term=.64101535d057 [https://perma.cc/GH5T-TNGS].

224. Matthew Rozsa, *Republicans Hire a “Female Assistant” to Grill Brett Kavanaugh’s Accuser: Who is Rachel Mitchell?*, SALON (Sept. 26, 2018), <https://www.salon.com/2018/09/26/republicans-hire-a-female-assistant-to-grill-brett-kavanaughs-accuser-who-is-rachel-mitchell/> [https://perma.cc/8RMJ-LEW9].

225. *Kavanaugh Hearing*, *supra* note 202.

closing of ranks. If, in the past decades, historically subordinated communities—black people, immigrants, sexual minorities, women—had been asserting their collective power to reshape public meaning and shared institutions, then a handful of white men would stop it. Not by appealing to good faith, reason, or credulity, but by wielding power.