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Lucia A. Silecchia

The Catholic University of America, Columbus School of Law

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Things Are Seldom What They Seem: Judges and Lawyers in the Tales of Mark Twain

LUCIA A. SILECCHIA

I. INTRODUCTION


Although modern American literature—and the movies and television shows it spawns—is filled with characters who are lawyers and judges, this fascination is not new. Judges and lawyers have long captivated the minds

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1 The line "Things are seldom what they seem" is borrowed from the song of the same name that is sung in Act II of W.S. Gilbert and Sir Arthur Sullivan's comic operetta, H.M.S. Pinafore, first performed on May 25, 1878. The song laments: "Things are seldom what they seem, Skim milk masquerades as cream. Highlows pass as patent feathers, Jackdraws strut in peacock's feathers."

2 Associate Professor of Law, The Catholic University of America, Columbus School of Law. I am very grateful to the law library staffs of The Catholic University of America and Yale University for their assistance with this project, with particular thanks to Catholic University's reference librarian, Steve Young. I also wish to thank Anthony Capobianco, Catholic University Law School '04, for his research assistance. Finally, I acknowledge with much appreciation the thoughtful comments I received from Dr. A.G. Harmon on an earlier draft of this article.

3 It is well known that "Mark Twain" was the pen name for Samuel Langhorne Clemens, a name which Clemens adopted and used to sign his writings. Throughout this Article, Clemens will be referred to as "Mark Twain" both because that is the name by which he is best known and because that is the name under which he wrote the literature which is the subject of this discussion. Twain noted that this name came from "the Mississippi leadsman's call, 'Mark Twain' (two fathoms—twelve feet)." MARK TWAIN, THE AUTOBIOGRAPHY OF MARK TWAIN 105 (Charles Neider ed., 1959) [hereinafter AUTOBIOGRAPHY]. He first used this nom de plum to sign his colorful letters to the editor of the Virginia City Enterprise in 1862 or 1863. Id. at 104-05.

4 The long-term fascination of literature with law is oft-noted. Indeed, "[i]n the nineteenth century, English lawyers wrote about the depiction of the legal system by Shakespeare, Dickens, and other
and the talent of authors, and Mark Twain was a prolific creator of such jurisprudential characters. Nearly a century after his death—and in a legal environment much changed from the one he knew—there is much to be learned by reflecting on the lawyers and judges Twain brought to life in his work. By examining the “snapshots” of these fictional men, their characters, and their conduct, we can gain valuable—and unsettling—insights into the workings of the legal process. The pages that follow will explore these characters and the lessons that they can teach.

Mark Twain was, if anything, a man of startling contrasts. He cultivated an image of himself as a wild, irreverent frontiersman. Nevertheless, he married into a genteel, wealthy family and lived in the heart of famous writers.” Richard A. Posner, Law and Literature: A Misunderstood Relation 12 (1988) [hereinafter Misunderstood Relation]. See also Anne McGillivray, Recherche Sublime: An Introduction to Law and Literature, in Adversaria: Literature and Law i (Evelyn J. Hinz ed., 1994) (“Linkages between law and literature are not new.”); TALL STORIES?: READING LAW AND LITERATURE 1 (John Morrison & Christine Bell eds., 1996) [hereinafter TALL STORIES] (“The links between law and literature have a long history dating back as far as the metaphors and parables of Socrates on matters of justice, or the poet judges of the Irish Brehon law system.”); Theodore Ziolkowski, The Mirror of Justice: Literary Reflections of Legal Crisis 5 (1997) (“Law as the foundation of civil society and as the embodiment of a people’s ethical values resides explicitly or implicitly at the core of many of the world’s greatest literary works, either as their theme or as their condition of being.”).

5 Careful examination of Twain’s work reveals no evidence that any of his attorneys or judges were female. The only possible exception to this rule can be found in Mark Twain, Personal Recollections of Joan of Arc by the Sieur Louis de Conte 83 (1989) [hereinafter Joan of Arc], in which Joan represented herself pro se at her trial. While she might, in fact, have played the role of an attorney at her trial, however, she was really a saint, soldier, and seamstress—but not a lawyer.

6 See, e.g., Louis J. Budd, Mark Twain: Social Philosopher 109 (1962) (“More than most men, Twain is hard to pin down neatly; he had the habit of dropping an opinion for several years and then suddenly taking it on again.”); id. at 212 (“Obviously both conservatives and radicals can claim him if they merely look for what they want to find.”); Andrew Hoffman, Inventing Mark Twain: The Lives of Samuel Langhorne Clemens x (1997) (ambivalently describing Mark Twain as “[a] fool, a tyrant, a philosopher, a humorist, an unschooled literary genius, a friend to revolution, a confidante of presidents and industrialists, an insatiable and sophisticated reader of history, a glad-hander, a sham, a self-destructive narcissist . . .”); id. at xiii (“He became two people occupying the same body: the brilliant, though acerbic, public man of letters known as Mark Twain; and the cowed, uncertain, and underdeveloped boy-man Sam Clemens.”); id. at xvii (“Sam Clemens lived in an uneasy alliance with Mark Twain.”); Shelley Fisher Fishkin, Lighting Out for the Territory: Reflections on Mark Twain and American Culture 11 (1997) (“There is something for everyone in Mark Twain’s opus: moral outrage, scintillating silliness, materialism, antimaterialism, nostalgia, antinostalgia, conformity, iconoclasim, technophilia, technophobia, exuberance, and bleak despair.”); id. at 127 (“Was he Jester or Jeremiah? Funny man or moral fabulist? Illusion master or delusion blaster? Was he an escapist or an escapee? Poor man’s pal or rich man’s pet? Boat rocker or captain of the ship?”); James M. Cox, Life on the Mississippi Revisited, in Mark Twain, A Collection of Critical Essays 62, 63 (Eric J. Sundquist ed., 1994) (“[There is] a host of divisions Mark Twain has both represented and excited. There are the embattled arguments about whether he is Western or Eastern, vernacular or genteel in identity; whether he is a journalist or an artist, a writer or performer, a confident voice of the people or an embittered misanthrope; and finally whether he is an author or a businessman.”).
highbrow northeastern intellectual and social life.\(^7\) He prided himself on his lack of formal education, yet he delighted in his honorary degrees from Yale and Oxford Universities.\(^8\) He presented himself as a bold, untamable writer, yet, by most accounts, he submitted much of what he wrote to the scrutiny of his beloved—and far more proper—wife, Olivia "Livy" Langdon.\(^9\) He is remembered as America’s consummate comedian, yet his life and his poignant private writings are filled with deep sorrow as he mourned the premature deaths of his father, three siblings, Livy, and three of his own four children.\(^10\)

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\(^7\) See Allan Carlson, *What Would They Think of the 90s?*, AM. ENTERPRISE, Nov./Dec. 1999, at 40-41 ("Despite his surface flouting of social convention, Twain was actually a strict Victorian moralist."). Twain had, among his social circle, some of the best known public figures of his time. See Roy Blount Jr., *The Twain You’ll Meet*, N.Y. TIMES, Jan. 17, 2002, at A29 ("In his day Mark Twain made Sigmund Freud, Ulysses S. Grant and Rudyard Kipling laugh, and presumably, because he was friendly with them, Frederick Douglass, Helen Keller and the president of Standard Oil.").

\(^8\) Twain was awarded an honorary Master of Arts degree from Yale in 1888, and an honorary Doctor of Literature from Yale in 1901. *AUTOBIOGRAPHY*, *supra* note 3, at 348-49. Oxford awarded him an honorary Doctorate in 1902. *Id.* Similarly, in 1902, the University of Missouri awarded Twain an honorary Doctor of Law degree. In response to this honor, he commented:

> People will be saying now, “What does he know about doctoring laws?” But that’s all right. We won’t borrow trouble. It is perfectly right that I be made a Doctor of Laws. People who doctor the laws and the people who make the laws do not have to obey them.

*COLUMBIA [Mo.] HERALD*, June 6, 1902, at 15, quoted in Kim M. Roam, *Mark Twain: Doctoring the Laws*, 48 MO. L. REV. 681, 682 (1983). Twain has also commented:

> Now then, to me university degrees are unearned finds, and they bring the joy that belongs with property acquired in that way. . . . It pleased me beyond measure when Yale made me a Master of Arts, because I didn’t know anything about art; I had another convulsion of pleasure when Yale made me a Doctor of Literature because I was not competent to doctor anybody’s literature but my own, and couldn’t even keep my own in healthy condition without my wife’s help. I rejoiced again when Missouri University made me a Doctor of Laws. . . . And now at Oxford I am to be made a Doctor of Letters—all clear profit because what I don’t know about letters would make me a multi-millionaire if I could turn it into cash.

*AUTOBIOGRAPHY*, *supra* note 3, at 348-49.

\(^9\) In his effusive praise of his wife, Twain remarked:

> Perfect truth, perfect honesty, perfect candor, were qualities of my wife’s character which were born with her. Her judgments of people and things were sure and accurate. Her intuitions almost never deceived her. . . . I have compared and contrasted her with hundreds of persons and my conviction remains that hers was the most perfect character I have ever met.

*AUTOBIOGRAPHY*, *supra* note 3, at 185.

Additionally, Twain commented that “[s]he was the most beautiful spirit, and the highest and the noblest I have ever known.” *Id.* at 345. He lamented that his wife’s death in 1904 was “the disaster of my life.” *Id.* at 325.

\(^10\) Indeed, this paradox was remarked on by a source none other than Twain’s adolescent daughter, Susy Clemens, who noted: “He is known to the public as a humorist, but he has much more in him that is earnest than that is humorous.” SUSY CLEMENS, *PAPA: AN INTIMATE BIOGRAPHY OF MARK TWAIN* 206 (1985) [hereinafter *PAPA*]. Mark Twain noted, with pleasure, his daughter’s decision, at age thirteen, to begin this biography of him:

> I had had compliments before but none that touched me like this; none that could approach it for value in my eyes. It has kept that place always since. . . . As I read it now, after all these many years, it is still a king’s message to me and brings me the
same dear surprise it brought me then—with the pathos added of the thought that the eager and hasty hand that sketched it and scrawled it will not touch mine again . . . .

AUTOBIOGRAPHY, supra note 3, at 201. Indeed, it was the sudden death of twenty-four year old Susy, "our wonder and our worship," id. at 324, in 1896 that inspired some of Twain's most anguished reflections on life, death, and the human condition. As he reflected:

It is one of the mysteries of our nature that a man, all unprepared, can receive a thunder-stroke like that and live. There is but one reasonable explanation of it. The intellect is stunned by the shock and gropingly gathers the meaning of the words. . . . The mind has a dumb sense of vast loss—that is all. It will take mind and memory months and possibly years to gather together the details and thus learn and know the whole extent of the loss.

Id. at 323. See also id. at 371-80 (describing in poignant terms the sudden death of Twain's youngest daughter, Jean, at age twenty-nine on Christmas Eve, 1909); Ken Ringle, Ken Burns's "Mark Twain": Sepia Portrait of a Master, WASH. POST, Jan. 14, 2002, at C1 (noting that "Samuel Clemens was a man of deep passions and beliefs that darkened as he aged; Mark Twain was the humorist face he hid behind, masking the bite of his increasing disillusionment with man, God and society").

Twain's role as representative American author has been claimed—and, perhaps at times, overstated—by many. See, e.g., MARK TWAIN: BLOOM'S MAJOR NOVELISTS 9 (Harold Bloom ed., 2000) [hereinafter BLOOM] ("Twain and Whitman between them best define what is uniquely American about American literature."); MARK MY WORDS: MARK TWAIN ON WRITING xii (Mark Dawidziak ed., 1996) ("[T]he few would deny Twain's place as one of America's greatest and most influential writers."); EVERETT EMERSON, MARK TWAIN, A LITERARY LIFE 299 (2000) [hereinafter A LITERARY LIFE] ("A household name, Mark Twain resides at the center of our concept of what the world views as American literature."); EVERETT EMERSON, THE AUTHENTIC MARK TWAIN: A LITERARY BIOGRAPHY OF SAMUEL L. CLEMENTS ix (1984) [hereinafter AUTHENTIC MARK TWAIN] ("Mark Twain is America's favorite writer and a world favorite as well."); FISKIN, supra note 6, at 7 ("He has been called the American Cervantes, our Homer, our Tolstoy, our Shakespeare, our Rabelais."); HOFFMAN, supra note 6, at 330 ("Mark Twain had become the nation's leading literary man by acclamation. . . . Mark Twain embodied the American soul."); id. at ix ("Mark Twain is the most recognizable figure in American letters. After Shakespeare, he is perhaps the most widely known writer this world has yet produced."); MARLENE BOYD VALLIN, MARK TWAIN: PROTAGONIST FOR THE POPULAR CULTURE 4 (1992) ("Twain's popularity as a public speaker made him one of the most influential men of the nineteenth century. . . . Twain's rhetoric of identification resulted in his emergence as the Representative American."); Eric J. Sundquist, Introduction, reprinted in MARK TWAIN, A COLLECTION OF CRITICAL ESSAYS 1 (Eric J. Sundquist ed., 1994) [hereinafter CRITICAL ESSAYS] ("He remains a giant in the canon of American letters and cultural history. . . ."); George Anastaplo, Law, Education, and Legal Education: Explorations, 37 BRANDEIS L.J. 585, 685 (1998-1999) (noting that Twain was "except perhaps for Lincoln, the most American of the prominent writers of his day"); id. ("Twain is emphatically American in his notion about politics and law."); Bernard Devoto, Mark Twain's America, reprinted in MARK TWAIN: CRITICAL ASSESSMENTS, VOL IV TWENTIETH CENTURY OVERVIEW 71 (Stuart Hutchinson ed., 1993) ("No other writer of his time touched the life of America at so many places."); Alvin Waggoner, A Calendar of Mark Twain's Celebrated Causes, 13 TENN. L. REV. 211 (1935) (praising Twain as "among our greatest native literary geniuses"); Raymond Seitz, Some Gratified, the Rest Astonished, THE TIMES, June 19, 1997, at 39 (claiming "Clemens through Twain came as close as anything in American literature to a truly national voice. . . . Clemens and Twain together launched the burgeoning new America into an eternal quest for its own national culture and identity"); Gary Scharnhorst, A Literary Lincoln, DALLAS MORNING NEWS, Apr. 4, 1993, at 8J ("Much as Honest Abe forever altered the country's political dynamics, Mark Twain permanently changed the American literary landscape."); Ringle, supra note 11, at C1 (claiming that Twain "encapsulated the national character at the very moment the country was moving from a collection of disparate regional cultures to a national identity").
abroad. His work often reflects deep rebellion against and even disdain toward religion and faith, yet his favorite work and the only one he called “written for love” was his “biography” of Saint Joan of Arc.

His novels poke fun at those who pursue “get-rich-quick” schemes, yet Twain dissipated his own fortune—and ultimately bankrupted his family—by speculative investments in disastrous innovations. His most famous works have often been branded as insensitive to racial equality, yet underneath the surface, Twain’s books and his actions during his life forcefully attacked the inhumanity of slavery and its degrading aftermath.

12 Twain was an avid traveler, and an active participant in global cultural and political matters. As Twain once remarked on the United States’ global obligations: “For good or for evil we continue to educate Europe. We have held the post of instructor for more than a century and a quarter now. We were not elected to it, we merely took it.” AUTOBIOGRAPHY, supra note 3, at 345; see also FISHKIN, supra note 6, at 8 (“Twain took on the challenge of interpreting the social and cultural life of the United States for those outside its borders as well as for those who were living the changes he discerned.”); JOHN LAUBER, THE INVENTIONS OF MARK TWAIN 77 (1990) (“By the time of his death in 1910, he would surely be the most famous writer in the world—perhaps the most widely known private citizen.”); see also Herbert Feinstein, Mark Twain and the Pirates, HARV. L. SCH. BULL. 6, 18 (hereinafter Pirates) (noting that in 1960 “the Soviet Union issued a forty kopeck stamp commemorating the 125th anniversary of Mark Twain: Huck, Tom, a log cabin, and Mark Twain all appear on the stamp”); Blount, supra note 7, at A29 (claiming Twain “discovered a great deal more of America than Columbus did”).

13 JOAN OF ARC, supra note 5. In an 1895 letter to Henry Rogers, Twain said of Joan of Arc, “Possibly the book may not sell, but that is nothing—it was written for love.” Letter from Mark Twain to Henry Rogers (1895), reprinted in MARK MY WORDS: MARK TWAIN ON WRITING, supra note 11, at 148. Twain reiterated this view in a 1902 letter to Helene Picard where, in response to her question he replied: “My favorite? It is Joan of Arc. My next is Huckleberry Finn, but the family’s next is The Prince and the Pauper.” Id. See also A LITERARY LIFE, supra note 11, at 213 (“Clemens looked back at Joan as his favorite book and his best.”); Anastaplo, supra note 11, at 694 (calling Joan of Arc “Twain’s favorite among his books”).

14 Twain’s major failed investment was his financing the creation of the ill-fated Paige typesetting machine. MARK TWAIN: BUSINESS MAN 171 (Samuel Charles Webster ed., 1946) [hereinafter BUSINESS MAN]. This financial disaster led to his bankruptcy and necessitated many of his fund-raising lecture tours. It is said of the Paige invention that “[y]ear after year it swallowed money and demanded more. It consumed $300,000 before he was through with it. It was one of the major tragedies of Mark Twain’s life.” Id.; see also A LITERARY LIFE, supra note 11, at 158 (calling the Paige typesetter “the disappointment of his life”); LAUBER, supra note 12, at 226 (“Concerning the typesetter, Mark Twain would take no advice.”); FISHKIN, supra note 6, at 4 (describing the Paige typesetter as “a strange, complicated machine that was designed to set type automatically but never quite did what it was supposed to and somehow ate all of Twain’s money instead”); id. at 173 (noting that, in addition to the Paige typesetter, “Twain had put about twenty-five or thirty thousand dollars into each of several previous business ventures, including a steam pulley, an engraving process, a patented steam generator, and a new method of marine telegraphy. . . . [He was] intrigued by the potential that inventions held as eventual financial bonanzas.”).

15 See Roam, supra note 8, at 717 (calling Twain “an important civil rights leader”). Indeed, Twain supported an African-American law student through his studies at Yale Law School in 1885-87. See CLARA CLEMENS, MY FATHER MARK TWAIN 34 (1931) [hereinafter MY FATHER] (“As to little bags of money, plenty of those were handed to students in need of more education . . . .”); see also Edwin McDowell, From Twain, a Letter on Debt to Blacks, N.Y. TIMES, Mar. 14, 1985, at D20 (“In a diary entry in 1887, Twain proclaimed his intention to support another black student at Yale Law School, but that student chose not to attend.”); id. (quoting Professor Fishkin who reports that “[i]n
Not surprisingly, Twain’s depictions of lawyers and judges suffer from—or are enlivened by—similar inconsistencies. A careful study of Twain’s fictional work reveals a disturbing pattern of inconsistency be-

1892, for example, he paid the tuition of an undergraduate at Lincoln University, A.W. Jones. . . . In the 1880’s he supported the European apprenticeship of Charles Ethan Porter, a black American sculptor. And he successfully interceded with President James A. Garfield when Frederick A. Douglass was about to be dismissed as marshall of the District of Columbia.”); HOFFMAN, supra note 6, at 314 (“[Twain] helped a particularly brilliant young black man earn his law degree at Yale.”); A LITERARY LIFE, supra note 11, at x (noting “Mark Twain’s support of a black student at Yale Law School”); LAUBER, supra note 11, at 189 (noting that Twain “did not know the man personally, but that made no difference”).

This student, Warren T. McGuinn, was born in Virginia in 1862, on the cusp of the Civil War. He graduated Lincoln University, a segregated college in Pennsylvania, and then enrolled in Yale Law School. FISHKIN, supra note 6, at 103. McGuinn met Twain briefly at the railroad station when he came to speak to the Law School’s Kent Club. Twain was quite impressed and began to support McGuinn’s study—a study which culminated in academic success. See id. at 104 (quoting October 1, 1887 letter from Yale University Dean Francis Wayland to Mark Twain in which a favorable report of McGuinn’s progress is given). Following his graduation from Yale Law School, McGuinn’s professional success continued:

McGuinn went on to win a major graduation prize and had a distinguished career practicing law in Baltimore, Maryland. In fact, McGuinn won a federal court victory against segregation in 1917. He also became an important mentor for a young lawyer who worked in the office next door: Thurgood Marshall. Quiet, unheralded engagement also can be quite a vital form of rebellious leadership.

Aviam Soifer, Symposium, The Equitable Distribution of Injustice: Raising Twain, 32 CONN. L. REV. 1565, 1575 (2000) (citation omitted). In a similar vein, Shelly Fisher Fishkin noted:

McGuinn set up a law practice in Baltimore, where he won a major civil rights victory in federal court, helped found the local branch of the NAACP, served as counsel to the Baltimore Afro-American, was elected to the city council, and became a mentor to a young attorney in the office next door, Thurgood Marshall.

FISHKIN, supra note 6, at 104-05 (noting that Thurgood Marshall once remarked that McGuinn, his former mentor, “was one of the greatest lawyers who ever lived”); see also Soifer, supra, at 1575; LAUBER, supra note 12, at 189; Guy D. Garcia, People, TIME, Mar. 25, 1985, at 69 (calling McGuinn “a mentor and idol” of Justice Marshall). McGuinn died on July 10, 1937, and it is said of him and Twain that “[t]heir friendship endured until the death of the author.” McDowell, supra, at A21.

For a detailed discussion of this incident, see FISHKIN, supra note 6, at 99-108, 228 nn.101-04 (describing research verifying the McGuinn/Twain connection). Indeed, it was Professor Fishkin, a noted Twain scholar, who authenticated the letter written by Twain to the Yale Law School Dean making the offer to fund McGuinn’s studies. That letter generated a great flurry of attention because it was seen by Fishkin and others as a strong rebuttal to persistent charges that Twain was a racist author of racist literature. See generally Letter Belies Twain Racism, BERGEN REC., Mar. 14, 1985, at D20; Jerome Weeks, Shelly Fisher Fishkin: Seeking a Place Where the Twain Shall Meet Over Huck Finn, DALLAS MORNING NEWS, June 29, 1997, at 1E (discussing Shelly Fisher Fishkin’s examination of race in The Adventures of Huckleberry Finn); Mark Twain’s Letter on Blacks Revealed, 1985 FACTS ON FILE, Aug. 23, 1985, at 633 (describing the controversy surrounding charges of racism in Twain’s works); Despite Writings, Twain No Racist, Scholar Says, SAN DIEGO UNION-TRIB., May 15, 1985, at A14; Garcia, supra, at 69 (addressing the renewed controversy over The Adventures of Huckleberry Finn as a result of recent stage productions); “Huck” Speaks for Itself, CHICAGO TRIB., Mar. 17, 1985, at A1 (explaining why Mark Twain was not a racist); McDowell, supra, at A1 (discussing how The Adventures of Huckleberry Finn has been under sharp attack in recent years by teachers, parents, and school boards in many communities). Fishkin referred to the letter as a “brutally succinct comment on racism” and “a rare non-ironic statement of the personal anguish Twain felt regarding the destructive legacy of slavery.” Id. In his letter, Twain said of slavery that “the shame is ours, not theirs, and we should pay for it.” Id. This was the “only indirect, unequivocal indictment of slavery that we have in Samuel Clemens’ own hand.” Weeks, supra, at 1E.
tween the conduct of his attorneys and judges and the quality of justice that their actions bring about.

Defining "justice" is, naturally, a difficult task, and one well beyond the scope of this Article. Nevertheless, a preliminary agreement as to what justice will mean for purposes of this discussion is essential. For purposes of this Article, "justice" will be used to mean those fixed principles of justice that are knowable to the human heart and mind and yet, not always in harmony with human laws. This seems to be an apt definition of justice for purposes of discussing Mark Twain's work because it is the model of justice that he himself presents in one of the most touching fictional scenes he created in his *Adventures of Huckleberry Finn* ("Huckleberry Finn"). In this scene, Huck is alone awake on his raft, determined to write a note to Miss Watson, the owner of the slave Jim. He wants to write the note because, according to the law and public opinion, it was Huck's moral obligation to do so. Failure to do so was both a sin and a crime in Huck's society. He prays for guidance, saying:

I kneeled down. But the words wouldn't come. Why wouldn't they? It warn't no use to try and hide it from Him. Nor from me, neither. I knowed very well why they wouldn't come. It was because my heart warn't right. You can't pray a lie—I found that out.

Ironically, the uneducated Huck prays to do the evil act he was taught was right, but his heart will not let him do it. Believing that he will pay a high price in this life and the next for doing what his conscience calls him to do, Huck looks at his letter and recounts:

I happened to look around, and see that paper. It was a close place. I took it up, and held it in my hand. I was atrembling, because I'd got to decide, forever, betwixt two things, and I knowed it. I studied a minute, sort of holding my breath, and then says to myself: "All right, then, I'll go to hell"—and tore it up. It was awful thoughts, and awful words, but they was said. And I let them stay said. . . .

Thus, the uneducated and unsophisticated Huck was able to understand that there is a justice that transcends law and that may not always be en-

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16 For an excellent introduction to this inquiry, see generally WHAT IS JUSTICE?: CLASSIC AND CONTEMPORARY READINGS (Robert C. Solomon & Mark C. Murphy eds., 1990) (containing well-selected anthology of philosophical, theological, historical, judicial, and political sources that grapple with this question).

17 See infra text accompanying notes 401-02, 419-24.

18 MARK TWAIN, ADVENTURES OF HUCKLEBERRY FINN 270 (1996) [hereinafter HUCKLEBERRY FINN].

19 Id. at 271-72.
shrined in or protected by law. Indeed, Huck was willing to pay a very high price for doing that justice and refusing to return Jim to his “legal” owner. Using Huck’s example, the “justice” spoken of in this Article is that justice that is discerned not by looking first at legality, but by taking an objective look at the perceived wrong and determining, like Huck, whether in that wrong “the heart warn’t right.”

In an ideal world, those who serve the legal system are charged with advancing justice of the kind that Huck’s heart knew how to pursue. The presumption that underlies sound legal regimes is that the legal process will achieve just results if the rules of that process are respected. Conversely, it is logical to assume that when lawyers and judges disobey those rules, injustice will result. This is not true, however, in Mark Twain’s fiction. This Article will explore this dichotomy between the conduct of Twain’s legal characters and the justice they achieve or fail to achieve. It will also reflect upon what lessons for our time may be drawn from Twain’s troubling portrayals of law’s agents.

Part II of this Article will discuss why fictional characters brought to life over a century ago can assist us in understanding the role of and challenges for real lawyers and judges in our own day. After all, if examining fictional lawyers and judges yields no relevant insight into modern legal practice, then such inquiry is, at best, just a fascinating pastime. For many reasons, however, examining lawyerly and judicial conduct in the fictional setting has much to contribute to our understanding of the modern legal system and its function. Part II will discuss those reasons and demonstrate why the lens of fiction can be a helpful one through which to examine the legal process.

Next, Part III of the Article will explain why Mark Twain’s lawyers and judges are particularly instructive in understanding the foibles of the legal system. Many authors have created lawyers and judges as some of their most memorable characters. Twain’s creations, however, are particularly useful. In part, this is because Twain himself—although not a lawyer—possessed a high degree of familiarity with the legal world. He interacted with the legal system often, as both a willing and unwilling participant. These experiences, and his astute reflections on them, shaped the characters he created. Thus, understanding the biographical background that influenced Twain can be useful in both evaluating the characters he called to the bench and bar and understanding why study of them has modern relevance.

With this discussion as background, the Article will then introduce the relevant “cast of characters”—the lawyers and judges who played both major and minor roles in the tales told by Twain. These characters, and the transactions in which they participated, can be divided into three categories, and the Article will explore each category in turn.

Part IV of the Article introduces Twain’s “paradigm cases,” which are
the predictable ones—the works that demonstrate the way things “should” be. Most notably, in *The Adventures of Tom Sawyer* (“Tom Sawyer”), good conduct by lawyers and judges yields just results. Conversely, in *The Personal Recollections of St. Joan of Arc* (“Joan of Arc”), evil conduct by lawyers and judges yields injustice and tragedy. This is how it ought to be.

Works in which this neat, predictable, and symmetrical pattern occurs, however, are highly uncharacteristic of the judges and lawyers that populate Twain’s tales. Part V of the Article will turn to the second group of Twain’s fictional works and grapple with those Twain stories in which this simple and logical symmetry does not exist. In these “paradox cases,” there is an unsettling discrepancy between the conduct of legal characters and the attainment of a just result. In these tales, true “justice” is far more likely to be achieved only in those circumstances where judges and lawyers violate legal rules through deception, ignorance, or disregard for basic procedural or substantive rules. The converse is also true. Twain’s lawyers and judges who do follow the substantive and procedural letters of the law so often become parties to great injustices.

Part VI of the Article will then explore the third category of Twain’s writings—those “chaos cases” in which there is a mix of good and bad conduct on the part of Twain’s legal characters and morally ambiguous conclusions to their legal work. This set of works includes, perhaps, some of Twain’s most frustrating and thought-provoking writings of all.

Finally, Part VII of the Article will turn its attention to its most important task: Discussing the lessons to be learned from Twain’s paradoxical portrayal of the effect of legal action. Hopefully, the discomfort that Twain’s legal characters generate may inspire in his readers the desire to view legal conduct critically to ensure that, unlike in Twain’s work, there is no dichotomy between following the rules of the legal system and achieving of real, true, and lasting justice.

## II. Drawing Legal Lessons from Fiction

Newspaper headlines and television broadcasts inundate today’s public with accounts of the misdeeds, good deeds, inexplicable deeds, and brilliant deeds of real-life lawyers and judges. With access to such information at an all time high, there is no shortage of exposure to the exploits of

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20 MARK TWAIN, *THE ADVENTURES OF TOM SAWYER* (Oxford Univ. Press 1996) [hereinafter *TOM SAWYER*].  
21 *JOAN OF ARC*, supra note 5.  
22 Indeed, often other non-legal characters violate rules in Twain’s novels to achieve just ends. While a discussion of those characters is beyond the scope of this Article, it is worth reflecting upon the way in which this challenges all people—not only those involved in the legal process—to consider how their actions can impact justice.
genuine jurists and advocates. In light of this, why is it necessary or desirable to turn to fictional creatures and creations for insights on the legal process?\footnote{A full discussion of law and literature and the debate about its relevance is beyond the scope of this Article. Many excellent books and articles in this field, however, have been written recently. They are worth exploring in order to understand the context of any discussion of the intersection between law and literature. See, e.g., Kieran Dolin, Fiction and the Law, Legal Discourse in Victorian and Modernist Literature (1999) (discussing how the relationship between law and literature has emerged as a vital new area of study); The Literature of the Law, A Thoughtful Entertainment for Lawyers and Others (Brian Harris ed., 1998) (examining judicial pronouncements from around the world); Literature and Legal Problem Solving: Law and Literature as Ethical Discourse (Paul J. Heald ed. 1998) (describing literature and law in making ethical choices); Ian Ward, Law and Literature, Possibilities and Perspectives (1993) (discussing the various ambitions of law and literature); Marijane Camilleri, Lessons in Law from Literature: A Look at the Movement and a Peer at Her Jury, 39 Cath. U. L. Rev. 557 (1990) (proposing that the law and literature movement emerged in part as a response to the widely proclaimed inadequacies of current legal education, as well as to the perceived limitations in legal analysis); C.R.B. Dunlop, Literature Studies in Law School, 3 Cardozo Stud. L. & Lit. 63 (1991) (examining literature study in law faculties); Richard A. Posner, Law and Literature: A Relation Rearranged, 72 Va. L. Rev. 1351 (1986) (hereinafter A Relation Rearranged) (considering why academic lawyers are interested in literature and what the field of law and literature can be expected to contribute to the understanding of either law or literature); Richard H. Weisberg, Three Lessons from Law and Literature, 27 Loy. L.A. L. Rev. 285 (1993) [hereinafter Three Lessons] (discussing Richard A. Posner's book Law and Literature: A Relation Rearranged); Robin West, The Literary Lawyer, 27 Pac. L.J. 1187 (1996) [hereinafter Literary Lawyer] (discussing a survey the author undertook to determine which law schools offered some version of a law and literature course); Robin West, Communities, Texts and Law: Reflections on the Law and Literature Movement, 1 Yale J.L. & Human. 129 (1988) [hereinafter Communities] (examining the forming of communities and the role of the law in the process); James Boyd White, Law as Language: Reading Law and Reading Literature, 60 Tex. L. Rev. 415 (1982) (examining how the lawyer and the literary critic, as readers of texts, face the same difficulties and enjoy the same opportunities). For excellent bibliographies of reading materials in the law and literature field, see, for example, Paul J. Heald, Guide to Law and Literature for Teachers, Students, and Researchers (1998) (a comprehensive guide to assist someone in becoming more familiar with law and literature); David R. Papke, Law and Literature: A Comment and Bibliography of Secondary Works, 73 Law Libr. J. 421 (1980) (discussing the use of literature in legal education); Harold Suretsky, Search for a Theory: An Annotated Bibliography of Writings on the Relation of Law to Literature and the Humanities, 32 Rutgers L. Rev. 727 (1979) (examining the increasing interest in the relationship between law and literature). Although not formally a bibliography, Elizabeth Villiers Gemmette, Law and Literature: Joining the Class Action, 29 Val. U. L. Rev. 665 (1995), is replete with useful citations to leading works in the law and literature field.)

Many critics, in fact, caution against looking too eagerly to fiction in order to understand legal reality.\footnote{One of the harshest critics of over-emphasis on the law/literature connection has been Judge Richard Posner. See generally A Misunderstood Relation, supra note 4. Judge Posner cautions readers about the dangers in failing to recognize the differences between the law and literature enterprises and warning that "there is no central theory of literature that can be taken and applied to a body of law." Id. at 1. For two replies to Judge Posner's argument, see generally Stanley Fish, Don't Know Much about the Middle Ages: Posner on Law and Literature, 97 Yale L.J. 777 (1988) (examining Judge Posner's Law and Literature: A Relation Rearranged); James Boyd White, What Can a Lawyer Learn From Literature?, 102 Harv. L. Rev. 2014 (1989) (reviewing Judge Posner's Law and Literature: A Misunderstood Relation).} Some, indeed, "fear for the rigor of legal reasoning [while] others [fear] for the integrity of literary interpreta-
Observers point out, quite correctly, that there are significant differences between the enterprise of law and that of literature. The goals are clearly different, and the rhetoric of each discipline is geared toward a different audience and uses different language and style. This leads many to be wary of the degree to which literature can provide sound insights into real-life lawyering.

Furthermore, the depictions of law and the work of lawyers and judges found in literature may often be inaccurate or unrepresentative. They may be incorrect on critical matters of substantive law or procedure, or they may focus solely on the sensational aspects of law practice, thus offering a skewed perception of what the legal process is about. This may simply be due to the authors’ understandable lack of intricate legal knowledge. While many who write fiction starring lawyers and judges may be law-trained, many are not. Thus, some of the flaws and inaccuracies result from the authors’ lack of information. Alternatively, distortions in the depictions of lawyers and judges may result from the authors’ justifiable desire to add drama, suspense, or entertainment at the expense of realism. More intentionally, inaccurate representations of lawyers and judges may result from an author’s bias as he or she attempts to use fictional creations.

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26 See, e.g., A Relation Reargued, supra note 23, at 1361 (“I believe that there are too many differences between works of literature and enactments of legislatures or constitutional conventions to permit fruitful analogizing from literary to legal interpretation.”).

27 But see Darcy O’Brien, Reflections on Literature and the Law 5 (1987) (“That literature and the law are both of them based on the written and the spoken word and therefore natural siblings ought to be more obvious than it is, and better appreciated and exploited.”); Richard Weisberg, Poetics and Other Strategies of Law and Literature 252 (1992) [hereinafter PoETHICS] (boldly asserting that “law and literature, for all their disparities, are one”); Harold Leventhal, Law and Literature: A Preface, 32 Rutgers L. Rev. 603, 604 (1979) (“Although obvious and critical distinctions can be drawn between the way the two fields approach and examine life, major and interesting areas of contact between the two can also be identified. Law and literature do not touch each other fleetingly, like tangents to circles, but richly, like overlapping circles, with a huge sector in common.”).

28 See David Ray Papke, Conventional Wisdom: The Courtroom Trial in American Popular Culture, 82 Marq. L. Rev. 471, 487 (1999) (“After reflecting on the courtroom trial in American popular culture, law students, law professors, and lawyers might be inclined to comment first on how little this portrayal has to do with ‘reality.’”); id. (“Various lawyers and legal commentators have written on the ‘inaccuracy’ of courtroom trials in American fiction, film, and television, and their writings often border on indictments.”).

29 See Robert A. Ferguson, Law and Letters in American Culture 5 (1984) (“Lawyers . . . wrote many of the country’s first important novels, plays, and poems. No other vocational group, not even the ministry, matched their contribution.”); id. at 291 (“Men trained in the law utterly dominated Southern literature between 1830 and 1870.”).
to make a political, moral, or social point.

Conversely, there is also fear that lawyers lack the expertise in literary critique to draw worthwhile conclusions from literary reflection. This is connected to fears about the differences between the two disciplines and the concern that dilettantes in the literary arena may reach conclusions not justified by the text. Particularly when the legal issues do not comprise a major element of the fiction at hand, it may be unwise to attach too much meaning to the portrayal of legal events and characters.

Yet, in spite of these cautions, there is much to learn from the study of the lawyers and judges brought to life in fiction. At its most basic level,

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30 See A MISUNDERSTOOD RELATION, supra note 4, at 353 ("In general, the lawyer's training and experience do not equip him to read imaginative literature—even that nominally 'about' law—with greater insight than specialists in literary criticism. . . . "). But see TALL STORIES, supra note 4, at 1-2 (noting that not only is it not problematic that lawyers are not trained in literary criticism, but indeed, that "[t]he proper mission of the Law and Literature movement is to read literature, not as ('wannabe') literary critics but as lawyers seeking to pursue the legal themes of power, authority, order, adjudication, penalty, justice and so on") (emphasis added). WARD, supra note 23, at ix ("[A]n appreciation of literature can better educate lawyers and, indeed, non-lawyers, precisely because it is fresh and enjoyable, whilst at the same time it is capable of broadening the learning experience."); John Wigmore, Introduction to JOHN MARSHALL GEST, THE LAWYER IN LITERATURE vii (1913) ("Can a lawyer—I mean one of self-respect, of aspiration, of devotion to his art and science—can he afford to ignore his profession as it is glassed in the literature of life?"); ZIOLKOWSKI, supra note 4, at xi ("Issues of law are so central to human society that they dominate many of the landmark works of Western literature and thereby have a claim on the attention of all educated people.").

31 Legal education is responding to this recognition with increased attention to law and literature as an academic discipline. See, e.g., Fish, supra note 24, at 789-90 (observing that "recent years have seen an unprecedented traffic between legal and literary studies, with the former borrowing and appropriating far more than the latter, and to considerable effect"); Thomas Morawetz, Ethics and Style: The Lessons of Literature for Law, 45 STAN. L. REV. 497, 497 (1993) (reviewing RICHARD WEISBERG, POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE (1992)) ("A growing cohort of legal scholars claims to be practitioners of law and literature."); POETHICS, supra note 27, at ix ("Law and Literature now provides fertile soil to many teachers and thinkers."); id. at 3 ("[L]iterature provides unique insights into the underpinnings of law. . . . "); DOLIN, supra note 23, at 8 ("[T]he law and literature movement has, since the 1970s, sought to reconnect its theoretical base and teaching practices with the humanities."); Dunlop, supra note 23, at 63 ("Literature study in law faculties is a growth industry."); Three Lessons, supra note 23, at 285 (noting "how important the literary disciplines have become for law over the past fifteen to twenty years").

Interstingly, however, there are those who argue—with validity—that this movement is not an entirely new phenomenon, but, in fact, harkens back to past expectations of the well-rounded lawyer as well versed in the humanities. See, e.g., The Literary Lawyer, supra note 23, at 1190. West noted that in the eighteenth and nineteenth centuries:

"[T]he elite, well-trained lawyer viewed the literary and cultural canon as a part of the foundation—the bedrock—of the social order he celebrated and served. To answer deep questions of law, then, required recourse to insights gleaned from the culture's literary and philosophical traditions. The man of law was the man of letters, and the man of letters was the man of law."

Id.

Perhaps the most extensive discussion of law and literature in the legal academy may be found in Elizabeth Villiers Gemmette's Law and Literature: Joining the Class Action, which provides a comprehensive discussion of law and literature courses in American law school curricula, including the results of the author's survey regarding the works read in such courses. Gemmette, supra note 23. With regard to the works of Mark Twain, Gemmette found that five syllabi included Pudd'nhead Wil-
this enterprise offers insight into the way the “outside” world views lawyers and judges.\textsuperscript{32} When legal fiction is written by those outside the legal profession, the authors’ creations are shaped by their perceptions—accurate or not—about lawyers and judges. Where these perceptions are accurate, readers are treated to a realistic depiction of legal proceedings in which they themselves may never be involved. Where these perceptions are inaccurate, they may be even more useful. In their inaccuracy, they convey to lawyers and judges how their work may be viewed by the “outside” world—a perspective well worth having. Although that presentation may not be flattering,\textsuperscript{33} the insights it offers allow readers to reflect on the kernels of truth that may underlie the exaggerated, stereotypical, or biased portrayals of legal characters.

Second, the presentation of lawyers and judges in literature allows a reader access to information unavailable in real life accounts of legal proceedings—the thought processes and motives of the legal characters presented. Because the author of a piece of fiction has breathed life into the creations in that work, the author is uniquely able to narrate not only what the character does and says, but also what the character thinks, hopes, fears, believes, and hides from public view. This allows the reader of a fictional work to reflect upon the thoughts behind the actions and to evaluate.

\textsuperscript{32} See POETHICS, supra note 27, at 4 (“[W]hen a novel represents a legal process, or a lawyer in action, it ‘teaches’ about law in [two] ways. First, the manner of the representation . . . evokes uniquely the thing represented. And, at the same time, the matter . . . uniquely conveys deep structural insights about many legal practices.”) (citation omitted).

\textsuperscript{33} Unfortunately, in the case of fiction’s judges and lawyers, the portrait presented is not universally flattering. Even a century ago it was observed that:

\textsuperscript{32} IRVING BROWNE, LAW AND LAWYERS IN LITERATURE iii (1883). It is in this “earnest” element of the author’s characterizations that wisdom may be found. Id. at v (noting that lawyers “have oftener been the subject of animadversion and ridicule on the stage than any other class and profession”); Henry B. Cushing & Ernest F. Roberts, Law and Literature: The Contemporary Image of the Lawyer, 6 VILL. L. REV. 451, 452 (1961) (“That the lawyer has not appeared in the best of possible lights whether literary or other, is something of a commonplace, especially to the lawyer who has perhaps ruminated over literary pieces generally considered among the classics.”); Dunlop, supra note 23, at 70 (“Law may be pictured as a malevolent, life-destructive force, lawyers as frauds, and judges as fools.”). Interestingly, one commentator suggests that there is a benefit to be gained through this tendency toward a negative representation of law and lawyers in literature and elsewhere. Dunlop, supra note 23, at 72 (“The long tradition of anti-law sentiment in literature helps to provide a systematic counterbalance to the pro-law rhetoric pervasive in most legal writing and teaching.”).
ate motives and attitudes. In contrast, this insight is necessarily missing from trial transcripts, judicial opinions, and journalistic accounts of legal proceedings. The reader is left to draw conclusions and make assumptions that may have no basis in fact other than the reader's subjective beliefs, suspicions, and prejudices. In contrast, a writer of fiction can reveal the inner thoughts of characters to the reader, thus freeing readers from the burden and folly of speculation. This can help readers to “contemplate the human condition and human relations by supplying that which is left out of judicial opinions” and other strictly legal writings.

More broadly, the writer of fiction is not bound to the constraints of reality. Certainly, in “real life,” lawyers and judges do concern themselves with weighty issues and serious problems. They do, indeed, weigh profound moral issues and contribute greatly to the resolution of major human conflict. Judges and lawyers, however, do not pick and choose these issues. Rather, the legal system is based upon the requirement that they respond to actual cases and controversies. This is particularly true in litigation, where the existence of a case or controversy is legally required. Jurists must wait, almost passively, until cases ripen for resolution. For each case that raises momentous questions of justice, judges and lawyers grapple with many other cases where the issues are mundane, where the stakes are not particularly high, and where the moral issues are obscured by procedural and technical issues that detract attention from the important

34 In a different but compatible commentary, Richard Weisberg suggests that reading legal literature can afford the reader insights into four different issues:
1. How a lawyer communicates.
2. How a lawyer treats people and groups outside the power structure.
3. How a lawyer reasons.

POETHICS, supra note 27, at 35.

35 Often, this subjective task is particularly difficult because we are frequently ambivalent about how lawyers should behave in a particular circumstance. One reason for this may be that we are still making up our minds about a matter. Another is that an answer we have purported to accept suddenly does not sit well when unpredictable consequences are confronted or as our assumptions about the world begin to change.


36 For a wise caution against accepting all that is expressed by lawyer-protagonists, see Richard H. Weisberg, Text Into Theory: A Literary Approach to the Constitution, 20 GA. L. REV. 939, 981-82 (1986) ("Incapable of, or disinterested in, sustaining the text-desired inquiry into detail . . . readers all too often swallow whole the perspective of lawyers or lawyer-figures within these same texts who offer articulate interpretations of what has occurred. Resistance to strong interpretations, while textually mandated, requires great care."); see also id. at 983 ("Caught up in a self-serving system of narrative and form, even the ostensibly neutral lawyer or judge in literature may violate the anteriorism he is charged with uncovering. . . . The reader is specifically asked to become skeptical. . . . Acting as jurors, we must suspend our belief in the lawyer-figure.").

37 Gemmette, supra note 23, at 672.

38 An element of this can also be seen in transactional work where a lawyer responds to particular goals of a particular client at a particular time.
issues. The writer of fiction, however, enjoys great luxury in this regard. Such authors can employ the jurists of their creation in the service of the issues of their creation. Thus, the issues addressed by fiction’s lawyers and judges tend to be carefully selected because of their importance as matters of justice. It has been aptly observed that “literary art about law is richer, if not necessarily more important, than most other jurisprudential sources.” This “richness” occurs precisely because the writers of fiction have unlimited discretion in the selection of their battles. They may, therefore, grapple with those cases that are representative of recurring or perennial legal or moral disputes and invite the reader to draw grander conclusions.

Fiction also allows a wider exposure to different characters than is possible or convenient in real life. John Wigmore reflected:

39 See, e.g., GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 3 (2000) (“Many scholars have contended that reading great literature addressing legal problems can expand and enhance the moral sensibility with which we approach questions of justice.”).

40 POETHICS, supra note 27, at 189; see also TALL STORIES, supra note 4, at 1 (opining that “key legal issues can be not only brought to life in literary texts but explored there in ways that orthodox legal materials can not [sic] rival”).

41 MISUNDERSTOOD RELATION, supra note 3, at 74. Almost by definition, “good” and enduring literature will take timeless matters grounded in a particular historic and legal context as themes, and yet not depend solely on that context for its relevance to human life. Judge Posner observes: For literature to survive, it must deal with things that do not change much over time—must deal with the perennial concerns of humankind and hence with the general and permanent features of the human condition. Like love, death, war, and ambition, the law has been a permanent feature of human experience. Specific doctrines and procedures have changed a great deal, but the broad features of law have changed little since distinct legal institutions first emerged in Western society. Id. (citation omitted); see also A Relation Reargued, supra note 23, at 1369 (“Works are called great because they transcend boundaries of period and culture, because they have a certain generality and even universality, which is to say they mean different things to different people.”); WARD, supra note 23, at 24 (claiming that “[l]iterature can present the student with a real-life situation, and concentrate the mind on the realities of case-resolution”).

42 But see Text Into Theory, supra note 36, at 981. Professor Weisberg argues that readers of fiction should treat their task in the same way as one contemplating “real life” legal affairs: Much like a juror in a complicated trial, the reader is asked to focus upon detail, sometimes at the expense of grandiose statements or human dramas. Unlike the trial scene in theater or popular culture, the narrative form of investigation in novels like Crime and Punishment, The Brothers Karamazov, Billy Budd, or The Stranger does not produce tension or even resolution; rather it produces narrative .... The reader is not only symbolically a juror, weighing evidence as to textual meaning; in procedural narratives, he is overtly asked to play that role, and his response to the data presented ... in fact tests the very theory that the structure uniquely is producing. Many readers have failed in their role as jurors.

43 The value of literature for furthering one’s circle of “acquaintances” has been noted in, for example, McGillivray, supra note 4, at iii (“Literature offers a plurality of visions of the operations and constitution of law equally accessible to lawyers and non lawyers.”); see also David Ray Papke, CONVENTIONAL WISDOM: THE COURTROOM TRIAL IN AMERICAN POPULAR CULTURE, 82 MARQ. L. REV. 471, 471 (1999) (“The courtroom trial takes place not only in actual courthouses but also in literature, film, and television. And indeed, while only a minority of Americans have participated in or even watched a real trial, nearly all have read or watched multiple trials in the courthouses of popular culture.”).
[L]iterature, and especially the novel, is a catalog of life’s characters. And human nature is what the lawyer must know. He must deal understandingly with its types, its motives. These he cannot find—all of them—close around him; life is not long enough, the variety is not broad enough for him to learn them by personal experience . . . . For this learning, then, he must go to fiction, which is the gallery of life’s portraits.

. . .

[T]he work of the novelist is to provide a museum of human characters, traits, and motives—just as we may go to a museum of zoology to observe an animal which we desired to understand but never had yet seen alive.44

If Oliver Wendell Holmes was right when he said that “[t]he life of the law has not been logic: it has been experience,”45 then the vicarious experiences derived from great legal literature have much to contribute to thoughts about the life of the law. The vicarious experience that Twain’s fictional characters give readers has much to teach about legal life, and modern lessons can be drawn from Twain’s accounts of all that is good and bad about that life.

III. MARK TWAIN AS THE AUTHOR OF LEGAL FICTION

"[Y]ou should have been a lawyer—there is where your talents lie; . . . try the law—you will certainly succeed."46

Such was the advice purportedly given to Mark Twain by Madame

44 Wigmore, supra note 30, at ix-x; see also Christine Bell, Teaching Law as Kafkaesque, in TALL STORIES, supra note 4, at 17 ("[L]iterature not ‘about law’ can be used to inject a broader life experience than the lawyer can hope to achieve otherwise."); Heald, supra note 23, at 4 (calling fiction "an undeniably rich collection of studies in the appropriateness of human action" and "a unique repository for information capable of enriching legal decision making"); Henry B. Cushing & Ernest F. Roberts, Law and Literature: The Contemporary Image of the Lawyer, 6 VILL. L. REV. 451, 451 (1961) ("[T]he portrait offered in literature often has a compelling, affecting, and evocative force; and if various literary works are more often encountered than are lawyers and the courts, it may be reasonably suspected that the former play a considerable part in the formation of the image."); Dunlop, supra note 23, at 69 ("Fiction is a repository of ideas about and images of the law, a storehouse of alternative visions which comment on the lawyer’s idea of the world."); LENORA LEDWON, LAW AND LITERATURE: TEXT AND THEORY x (1996) ("[A] reason for all the excitement over Law and Literature is the human factor. This human factor concerns the desire to regain that which has been relinquished in much of our law studies: a recognition of the felt, lived, experiences of ourselves and others under systems of law.").

45 OLIVER WENDELL HOLMES, THE COMMON LAW I (1881).

46 D.M. McKeithan, Court Trials in Mark Twain and Other Essays 3 (1958) (citation omitted).
Caprell, a well-known New Orleans fortune teller. Fortunately for the world of literature, young Twain did not take her advice. Nevertheless, his life and his writings were inextricably intertwined with the law—from his earliest years as a lawyer’s son to his late life request to his daughter: “Clara, when I am dead, continue to employ my lawyers . . . at $1,000 a year.” In between, he created a memorable cast of legal characters with much to teach us a century later.

One critic has aptly noted that “[l]aw has been a prominent theme in . . . literature. Virtually every major writer . . . has found law to be a compelling focal point for the narrative.” This is particularly true of Mark Twain. There are many reasons that Twain’s portrayals of judges and lawyers may be more worthy of study than those of many other American writers. Indeed, one writer has praised Twain as “the most faithful delineator of courts and lawyers that we have had among us.” The reasons for this praise are linked both to Twain’s personal experience with and knowledge of law, as well as to the nature of the legal debates that raged during the times in which he lived.

As Twain’s *A Connecticut Yankee in King Arthur’s Court* (“Connecticut Yankee”) observed, the king “knew his own laws just as other people so often know the laws: by words, not by effects. They take a meaning, and

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47 Id.

48 A LITERARY LIFE, supra note 11, at 298.

49 BARRY R. SCHALLER, A VISION OF AMERICAN LAW: JUDGING LAW, LITERATURE AND THE STORIES WE TELL 1 (1997); see also id. at 147 (“Literary works, which have drawn heavily upon legal ideas and events, have helped to shape the public discussion of issues and to stimulate thinking about solutions. Because law has played a vital role in the development of American society, legal stories are also part of the cultural core.”); RICHARD H. WEISBERG, THE FAILURE OF THE WORD 177 (1984) (“[T]he appearance of legality in the novels of writers as disparate as Thackery, Trollope, Tolstoi, Dickens, Kafka, Twain, Faulkner, Doctorow, Melamud, and Barth is no coincidence. Clearly, generic rumbles are taking place, and . . . law has its structural place in both the self-criticism and the change.”) (emphasis added); DOLIN, supra note 23, at 3 (“Despite the separation of the professions, the law continued to contribute to the intellectual and political formation of writers, and, perhaps less affirmatively, to their imaginative and aesthetic concerns.”); POETHICS, supra note 27, at 7 (noting “the disproportionate interest of fictional works in legal themes, lawyer figures, and the process of legal investigation”); Heald, supra note 23, at 7 (calling fiction “filled with overtly legal characters and themes”); id. (noting “prominent role played by lawyers and courtroom scenes in famous novels and plays”); Cushing & Roberts, supra note 44, at 455 (“The literary dimensions of the lawyer . . . can be considered worth the special attention of the lawyer in his professional capacity as they are part of the context in which he carries on his craft or sullen art.”).

50 Waggoner, supra note 11, at 212; see also id. at 216 (claiming “no other American writer has dealt so fully with the drama of the court room as has Mark Twain”).

51 For an excellent discussion of Mark Twain’s literature and its biographical connections to events in his life, see generally Roam, supra note 8. It has been aptly observed that “one can understand virtually all of Mark Twain’s works better if one can read them in their biographical context.” A LITERARY LIFE, supra note 11, at ix; see also BUDD, supra note 5, at vi (noting that in Twain’s “long life, society changed with at least average speed and his ideas made responsive shifts”).
get to be very vivid, when you come to apply them to yourself.”

Similarly, Twain and the young country in which he lived, had much opportunity to apply the law to themselves. They did so, with both just and unjust results. These opportunities enriched Twain’s works and enhanced their value as learning devices for those who would come to understand more about the legal system.

Mark Twain never studied law formally. He learned a great deal about it, however, and even the briefest of glimpses at his life demonstrate that “he was not a stranger to the law.”

He claimed, with pride, to be descended from:

[O]ne Clemens—who did something; something which was very creditable to him and satisfactory to me, in that he was a member of the court that tried Charles I and delivered him over to the executioner. . . . I had a very real respect for that ancestor and this respect has increased with the years, not diminished.

Un fortunately, Mark Twain’s immediate family was not full of successful jurists like the distant ancestor he idolized. His father, John Marshall Clemens, was a “sometime lawyer and judge.”

Although named for the leading jurist of his day, John Marshall Clemens was widely regarded as a failure in his legal career.

Twain described his father’s life in Florida, Missouri as a place where he “had no luck except that I was born to him. He presently removed to Hannibal and prospered somewhat; rose to the dignity of justice of the peace and had been elected to the clerkship of the Surrogate Court when the summons came which no man can disregard.”

Nevertheless, exposure to his father’s life and work introduced

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52 MARK TWAIN, A CONNECTICUT YANKEE IN KING ARTHUR’S COURT 346 (Mark Twain Library ed., 1979) (emphasis omitted) [hereinafter CONNECTICUT YANKEE].
53 Roam, supra note 8, at 683; see also Pirates, supra note 12, at 8 (“Clemens’ knowledge of law, and legal procedures, was huge—surely beyond what an education to the age of fourteen in the frontier town of Hannibal, Missouri, justifies.”).
54 AUTOBIOGRAPHY, supra note 3, at 28.
55 CRITICAL ESSAYS, supra note 11, at 2.
56 However, another discussion of the senior Clemens’ legal career is a bit more optimistic: “John Clemens started his own store in 1837, and his law practice began to prosper. On November 6, 1837, he reached the peak of his professional life when he took office as a judge of the Monroe County Court. From that office he acquired the permanent title of ‘Judge.’” Id. at 685.
57 AUTOBIOGRAPHY, supra note 3, at 23. See also Mark Twain, Morals and Memory, Speech Given at Barnard College (Mar. 7, 1906), in MARK TWAIN, SPEECHES 231 (Shelley Fisher Fishkin ed., 1996) [hereinafter SPEECHES], which provides an expansive view of his father’s profession and suggests that life as the son of John Marshall Clemens offered young Twain a holistic view of the legal process:

[M]y father was justice of the peace, and because he was justice of the peace he was coroner; and since he was coroner he was also constable; and being constable he was sheriff; and out of consideration for his holding the office of sheriff he was likewise county clerk and a dozen other officials I don’t think of just this minute.
young Twain to the law and legal themes at a very young age.\textsuperscript{58}

In addition, the fact that Twain’s father was a slave owner helped influence young Twain’s early views on the legal system.\textsuperscript{59} Indeed, John Marshall Clemens gained local approval when he sat on a jury that convicted three abolitionists for assisting slaves in obtaining freedom:

In September, 1841, [Mark Twain’s father] sat on a jury . . . at a trial of three abolitionists who had ushered a handful of slaves north to freedom. The slaves had returned on their own and turned in their liberators . . . . The jury quickly returned a guilty verdict, with a stiff sentence of twelve years in the state penitentiary. The rhetoric surrounding this trial, along with the ongoing debate about the place of slavery . . . made the trial a community referendum on slavery, and Judge Clemens returned to Hannibal amid cheers. This dramatic foretaste of the coming Civil War ripened Sam’s attitude toward race: His father had received his greatest accolade for his unyielding support of slavery.\textsuperscript{60}

Twain recalled that during his “schoolboy days, I had no aversion to slavery . . . [and] I was not aware that there was anything wrong about it.”\textsuperscript{61} In spite of this early ambivalence, Twain then experienced one incident that caused him to rethink the inhumanity of the practice:

There was, however, one small incident of my boyhood days which touched this matter, and it must have meant a good deal to me or it would not have stayed in my memory, clear

\textit{Id.; see also} HOFFMAN, supra note 6, at 3 (“[John Marshall Clemens] opened a store and dispensed legal advice . . . . [A]fter settling some early land disputes, Clemens got very little legal work.”). As a judge, Clemens “once restored order in his court by striking a contestant on the head with a mallet.” \textit{Id.} at 16. This colorful incident is also described in Roam, supra note 8, at 687 n.40 (noting that “Judge Clemens proved that he was both the justice and the dispenser of the peace”).

\textsuperscript{58} One commentator correctly points out that Judge Clemens’ career in law “is a major component of an analysis of Mark Twain’s view of the law.” Roam, supra note 8, at 689. Her optimistic assessment of the impact of that role may warrant further examination. \textit{See id.}

\textsuperscript{59} This is believed by critics to have greatly shaped the anti-slavery opinions of the young Mark Twain. \textit{See} FISHKIN, supra note 6, at 20-21 (describing the impact on Twain of his family’s slaveholding and his father’s sale of a slave); HOFFMAN, supra note 6, at 6 (describing slavery in Mark Twain’s boyhood home); AUTOBIOGRAPHY, supra note 3, at 2 (“At first my father owned slaves, but by and by he sold them and hired others by the year from the farmers.”).

\textsuperscript{60} HOFFMAN, supra note 6, at 12; \textit{see also} FISHKIN, supra note 6, at 53. Another incident impacting Twain’s attitude toward race was when:

[Two theology students from the Mission Institute in Quincy and a mechanic who had long been active on the Underground Railroad crossed the Mississippi from Illinois by canoe and came ashore between Hannibal and Palmyra to help some Missouri slaves gain their freedom. Before the day was done, the three men from Illinois had lost their own. George Thompson, James Burr, and Alanson Work were sent to the Missouri Penitentiary by a jury that included John Marshall Clemens.]

\textit{Id.}

\textsuperscript{61} AUTOBIOGRAPHY, supra note 3, at 6.
and sharp, vivid and shadowless . . . . We had a little slave boy . . . . He was from the eastern shore of Maryland and had been brought away from his family and friends halfway across the American continent and sold. He was a cheery spirit . . . and the noisiest creature that ever was, perhaps. All day long he was singing . . . . [I]t was maddening, devastating, unendurable. At last, one day, I lost all my temper and went raging to my mother and said Sandy had been singing for an hour . . . and wouldn’t she please shut him up. The tears came into her eyes and her lip trembled and she said something like this:

“Poor thing, when he sings it shows that he is not remembering and that comforts me; but when he is still I am afraid he is thinking and I cannot bear it. He will never see his mother again . . . . If you were older you would understand me; then that friendless child’s noise would make you glad.”

It was a simple speech and made up of small words but it went home, and Sandy’s noise was not a trouble to me anymore.62

The influence of Twain’s slave-owning family was later counter-balanced by his father-in-law, Jervis Langdon, a committed abolitionist and key player in the Underground Railroad in Elmira, New York.63 As he confronted the abolitionist activism of his in-laws, “[t]he heritage of proud antislavery activism Langdon embodied helped goad Twain to raise the questions he had never asked as a child.”64 Although a discussion of Mark Twain’s views on slavery is beyond the scope of this Article, his early observation of the injustice in his society and in his own family had a deep effect on his views concerning the law’s ability to defend justice and to enshrine injustice.

Twain’s nomadic older brother, Orion, also dabbled in the practice of law. Alas, Orion’s legal career was even less distinguished than his father’s. He spent his days “waiting for clients who never came.”65 In a letter to his mother and sister,66 Twain conveyed displeasure over his

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62 Id. at 6-7.
63 HOFFMAN, supra note 6, at 140 (“Ardent abolitionists, the Langdons had made their home a stop on the Underground Railroad, helping writer and orator Frederick Douglas to freedom.”).
64 FISHKIN, supra note 6, at 75; see also id. at 79-81 (describing, in fuller detail, Jervis Langdon’s abolitionist activities).
65 LAUBER, supra note 12, at 130.
66 Letter from Mark Twain to Jane Clemens and Pamela Moffett (1874), in THE SELECTED LETTERS OF MARK TWAIN 85 (Charles Neider ed., 1982) [hereinafter SELECTED LETTERS]. Mark Twain
brother's legal pursuits:

Would you encourage Orion in the glaring insanity of studying law? If he were packed and crammed full of law it would be worthless lumber to him, for his is such a capricious and ill regulated mind that he would apply the principles of the law with no more judgment than a child of ten years. I know what I am saying. I laid one of the plainest and simplest of legal questions before Orion once, and the helpless and hopeless mess he made of it was absolutely astonishing.  

Another time, however, Twain attributed Orion's failure as a lawyer to his fair-minded character. In so doing, and by praising his brother's fair-mindedness, Twain delivered a stinging indictment of the stereotypical

was heavily influenced by his mother, Jane Lampton Clemens. In contrast to his description of his father and brother, Twain's portrayal of his mother paints her as almost the ideal lawyer, although he never used that term to describe her. Twain wrote:

When her pity or her indignation was stirred... she was the most eloquent person I have heard speak. It was seldom eloquence of a fiery or violent sort, but gentle, pitying, persuasive, appealing; and so genuine and so nobly and simply worded and so touchingly uttered, that many times I have seen it win the reluctant and splendid applause of tears.

SELECTED LETTERS, supra note 66, at 85. Twain described the inauspicious beginning of Orion's career by noting that "Orion thought he would like to become a lawyer. Mr. Bates encouraged him, and he studied law nearly a week, then of course laid it aside to try something new." AUTobiography, supra note 3, at 84. Later on, however, Orion took on Blackstone again. He also put up a sign which offered his services to the public as a lawyer. He never got a case in those days, nor even an applicant, although he was quite willing to transact law business for nothing and furnish the stationery himself. He was always liberal that way.

Mark Twain, Hellfire Hotchkiss, in HUCK FINN AND TOM SAWYER AMONG THE INDIANS AND OTHER UNFINISHED STORIES 109, 117 (Dahlia Armon et al. eds., 1989).

Interestingly, although raised in the same slave-holding society as Mark Twain, Orion was observed by his brother to have been "an abolitionist from his boyhood to his death." FISHKIN, supra note 6, at 53.
lawyer:

He put up his sign as attorney at law but he got no clients. It was strange. It was difficult to account for. I cannot account for it—but if I were to guess at a solution I should guess that by the make of him he would examine both sides of a case so diligently and so conscientiously that when he got through with his argument neither he nor a jury would know what side he was on. I think that his client would find out his make in laying his case before him and would take warning and withdraw it in time to save himself from probable disaster.69

Orion provided his literary brother with excellent fodder for his legal novels. More importantly, Orion indirectly introduced Mark Twain to the legal world—and the legal world to Mark Twain. Twain headed west when Orion took a position as a government Secretary in the Nevada Territory. While there, young Twain became a lobbyist before the Nevada legislature. This exposed him to the process by which laws are passed, thus generating his initial skepticism of law which would resurface in his writings. As Twain recalled:

Orion was soon very popular with members of the legislature because they found that whereas they couldn’t usually trust each other, nor anybody else, they could trust him. He easily held the belt for honesty in that country but it didn’t do him any good in a pecuniary way because he had no talent for either persuading or influencing legislators. . . . I was an influence. I got the legislature to pass a law requiring every corporation doing business in the territory to record its charter in full, without skipping a word, in a record to be kept by the Secretary of the Territory—my brother. . . . For this record service he was authorized to charge. . . . The record service paid an average of one thousand dollars a month in gold.70

Unfortunately for him, Mark Twain had to flee Nevada as a fugitive from the law. He had sent a challenge to a duel, which was a felony in the Nevada Territory.71 While this brush with the law might have been unfor-

69 AUTOBIOGRAPHY, supra note 3, at 107. Twain notes that clients did avoid “probable disaster” by declining Orion’s services: “[H]e had secured only two cases. Those he was to try free of charge—but the possible result will never be known because the parties settled the case out of court without his help.” Id. at 219. Thus, Orion remained “only a lawyer in name and had no clients.” Id. at 221.

70 Id. at 105.

71 Id. at 115-18. As Twain recalled, this offense “would entitle us to two years apiece in the penitentiary, according to the brand-new law. Judge North was anxious to have some victims for that law
tunate for Twain himself, it was a fortunate development for the literary world. Twain went west to San Francisco, and there became quite a prolific newspaper reporter. Indeed, it can be said that there his literary career began in earnest. Most relevant here, it was in San Francisco that he was exposed again to law as a reporter of legal events:

I was a reporter on the Morning Call of San Francisco. I was more than that—I was the reporter. There was no other . . .

. . . I had to be at the police court for an hour and make a brief history of the squabbles of the night before. . . . Each day's evidence was substantially a duplicate of the evidence of the day before, therefore the daily performance was killingly monotonous and wearisome. . . . Next we visited the higher courts and made notes of the decisions which had been rendered the day before. All the courts came under the head of "regulars." They were sources of reportorial information which never failed. During the rest of the day we raked the town from end to end gathering such material as we might, wherewith to fill our required column—and if there were no fires to report we started some.

More importantly, Mark Twain's life was marked with extensive interactions with lawyers in his own affairs. He claimed that he did not understand legal affairs and described, in highly self-deprecating terms, his conversations with his secretary over legal matters:

I cannot get far in the reading of the commonest and simplest

and he would absolutely keep us in the prison the full two years." Id. at 117-18. Thus, Twain fled the Nevada Territory. Id. at 119.

Id. at 119. Twain wrote a more sinister view of Police Court in a series of cynical sketches, purportedly written from the perspective of a Chinese immigrant in San Francisco:

[After several dreary hours of waiting, after this, we were all marched out into the dungeon and joined there by all manner of vagrants and vagabonds, of all shades and colors and nationalities, from the other cells and cages of the place; and pretty soon our whole menagerie was marched upstairs and locked fast behind a high railing in a dirty room with a dirty audience in it. And this audience stared at us, and a man seated on high behind what they call a pulpit in this country, and at some clerks and other officials seated below him—and waited. This was the police court. The court opened. Pretty soon I was compelled to notice that a culprit's nationality made for or against him . . . Now this gave me some uneasiness, I confess. I knew that this state of things must of necessity be accidental because in this country all men were free and equal, and one person could not take to himself an advantage not accorded to all other individuals. I knew that, and yet in spite of it I was uneasy.

Mark Twain, Goldsmith's Friend Abroad Again, in LIFE AS I FIND IT: A TREASURY OF MARK TWAIN RARITIES 85-84 (Charles Neider ed., 1961) [hereinafter LIFE AS I FIND IT].

An excellent dissertation analyzes Mark Twain's personal legal affairs in a depth and breadth not possible here. See generally Herbert Charles Verscheisser Feinstein, Mark Twain's Lawsuits (1968) (unpublished Ph.D. dissertation, University of California Berkeley) [hereinafter Twain's Lawsuits].
contract—with its “parties of the first part” and “parties of the second part” and “parties of the third part”—before my temper is all gone. Ashcroft comes up here every day and pathetically tries to make me understand the points of the lawsuit we are conducting . . . . [B]ut daily he has to give it up. It is pitiful to see, when he bends his earnest and appealing eyes upon me and says after one of his efforts, “Now you do understand that, don’t you?”

I am always obliged to say, “I don’t, Ashcroft. I wish I could understand it but I don’t. Send for the cat.”

This feigned ignorance belies the fact that Twain, fiery and opinionated by nature, was frequently involved in litigation and was an eager plaintiff.

To his credit, Twain could show some restraint in his legal pursuits. In a letter to his nephew, Charles Webster, he asked: “American Publishing Company swindled me out of only $2,000? I thought it was five. It can’t be worth it to sue for $2,000 can it? If we gain it will it pay the lawyer’s fees?”

In spite of this occasional restraint, however, as Twain managed

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74 AUTobiography, supra note 3, at 205. See also id. at 245-46 (“I never could understand any contract.”).

75 Twain has also been described as “[h]ot-tempered, litigious, and often vengeful.” LAUBER, supra note 12, at 60. However, at least one commentator justifies this litigiousness. See Twain’s Lawsuits, supra note 73, at 2 (“Knowing that Clemens was by nature hot-tempered and combative, we might be tempted to see in this propensity for litigation simply an expression of his fiery temperament. But such a judgment would leave out of account the audacious and repeated provocations which he suffered from literary pirates.”).

76 See HOFFMAN, supra note 6, at 313 (describing Twain’s “contradictory habit of asking favors from people he wanted to take to court”); BUSINESS MAN, supra note 14, at 285 (“About once a week, he wanted a lawsuit started against somebody.”); Roam, supra note 8, at 696-97 (claiming that while “James Fenimore Cooper is the only American author to initiate more suits, Clemens spent more time, money, and energy in his litigations”); Susan K. Gillman & Robert L. Patten, On Twinning and Identity Confusion in Twain’s Works, in BLOOM, supra note 11, at 91 (“Bedeviled throughout his life by foreign publishers pirating his books, by unauthorized use of his name in print, and sometimes even by ‘deadbeats’ lecturing as ‘Mark Twain,’ Clemens retaliated by initiating numerous litigations.”); Waggoner, supra note 11, at 215 (“Twain had plenty of personal litigation in his own exciting life”); Pirates, supra note 12, at 6 (“Twain’s career does show a pretty crowded calendar. As far as we can tell, Mark Twain went to court in at least nine different lawsuits and he was eight times the plaintiff.”); id. at 9 (noting that Twain had a “long, distinguished career as litigant”); id. at 10 (“As for . . . those suits Mark Twain threatened to bring and those threatened against him I could give you their number, but I haven’t brought along my adding machine.”) (emphasis added); Twain’s Lawsuits, supra note 73, at 313 (noting that “[w]ithin thirteen years—1875-1886—he prosecuted eight major actions in six different tribunals. During his most creative period—1882-1886—the writer brought seven actions.”).

77 Letter from Mark Twain to Charles Webster (Aug. 8, 1882), reprinted in BUSINESS MAN, supra note 14, at 192. See also Twain’s Lawsuits, supra note 73, at 197 (acknowledging that “[o]n occasion, mercy tempered Clemens’ zest for hard justice”).
his highly complex business affairs, "[t]here were lawsuits to be threatened or prosecuted—Twain’s correspondence with Alexander & Green, his New York law firm, was regular and voluminous." He "looked at his times not only through a window but in a mirror as well." Likewise, he was able to view the legal process through the mirror of his own varied legal affairs.

Throughout his life, "Mark Twain was the lawyer’s best friend and severest critic." Even a brief overview of Twain’s legal adventures is sufficient to illustrate the range of issues with which he obtained first hand litigation experience. Early in his career he had a legal squabble with the Alta newspaper, sued a New York City cab driver who overcharged his servant, and frequently sued to prevent Canadian piracy of his works. In a

78 LAUBER, supra note 12, at 134.
79 Justin D. Kaplan, Introduction to The Gilded Age, reprinted in MARK TWAIN: CRITICAL ASSESSMENTS VOL III 141-58 (Stuart Hutchinson, ed., 1993) [hereinafter CRITICAL ASSESSMENTS VOL III] at 144. See also AUTOBIOGRAPHY, supra note 3, at 133 ("[M]y private and concealed opinion of myself is not of a complimentary sort. It follows that my estimate of the human race is the duplicate of my estimate of myself.").
80 BUSINESS MAN, supra note 14, at 197. Twain’s criticism often flowed from his dissatisfaction with the attorneys who served him. See, e.g., HOFFMAN, supra note 6, at 298 (reporting Mark Twain’s remark that his early contract attorney, Charlie Perkins, was “the monumental fool of the nineteenth century”). In the aftermath of erroneous legal advice, Twain was also said to comment: “What cheap, cheap material one can make a New York lawyer of.” Id. at 401 (describing attorney’s erroneous advice over the New York courts’ jurisdiction over Twain). See also Mark Twain, Information for the Million, reprinted in MARK TWAIN, THE COMPLETE HUMOROUS SKETCHES AND TALES OF MARK TWAIN 33 (Charles Neider ed., 1996) [hereinafter SKETCHES AND TALES] (describing ranches in Nevada as “very scattering—as scattering, perhaps, as lawyers in heaven”). More mildly, Twain once remarked: “I have always kept a lawyer ... though I have never made anything out of him. It is a service to an author to have a lawyer. There is something so disagreeable in having a personal contact with a publisher. So it is better to work through a lawyer—and lose your case.” Mark Twain, Address at the Dinner Given by the Authors’ Club in Honor of Mr. Clemens (June 1899), reprinted in SPEECHES, supra note 57, at 216.
81 Twain recalled with indignation:

[T]he thrifty owners of that prodigiously rich Alta newspaper had copyrighted all those poor little twenty-dollar letters and had threatened with prosecution any journal which should venture to copy a paragraph from them.

And there I was! I had contracted to furnish a large book concerning the excursion to the American Publishing Co. of Hartford, and I supposed I should need all those letters to fill it out with. I was in an uncomfortable situation—that is, if the proprietors of this stealthily acquired copyright should refuse to let me use the letters. That is just what they did ...

AUTOBIOGRAPHY, supra note 3, at 148. This dispute was ultimately settled by compromise, not litigation. Id.
82 MY FATHER, supra note 15, at 219. This incident is described by Mark Twain’s daughter, Clara, who noted that “when this case came up in court, there was general interest shown, aside from the fact that Mark Twain was the plaintiff. The cabman was convicted of extortion and deprived of his license.” Id. However, Clara Clemens also points out her father’s sympathy for the man he sued. Several days after Twain’s victory in court, he assisted the cab driver in getting his license restored. In spite of Twain’s outrage over the incident, “Father had not wished the court to give the man so severe a punishment in the first place, and was glad of the opportunity to assist in having the miscreant’s means of livelihood restored to him.” Id. For further discussion of the cab litigation, see HOFFMAN, supra
"brash defense of his Mark Twain persona," he sued to get a trademark on his *nom de plume.* He brought suits to prevent unauthorized production of his plays. He handled the legal ramifications of his personal bankruptcy. He brought suit against a man who tried to rob his home (a suit called his "special amusement"). He brought numerous suits against Isabel Lyons, the woman who became his personal secretary after the death of his wife. He plotted potential suits, which were never filed, in response to critics’ doubts about the authenticity of the Ulysses Grant memoirs that

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Note 6, at 434 ("Grandly pursuing this trivial matter through the courts, Sam pointed out that public good in a democracy depended on the daily practice of citizenship.").

See generally LAUBER, supra note 12, at 99-101 (discussing suits initiated by Twain to guard against Canadian piracy); Twain’s Lawsuits, supra note 73, at 1-69 (illustrating Twain’s various legal actions over the course of his lifetime).

HOFFMAN, supra note 6, at 211, 236.

See Clemens v. Belford, Clark & Co., 14 F. 728 (C.C. N.D. Ill. 1883) (determining legal status of "Mark Twain" *nom de plume"); HOFFMAN, supra note 6, at 211 (providing a discussion of this litigation); LAUBER, supra note 12, at 99-101 (detailing Twain’s suit for copyright violations against certain Canadian publishers that falsified his name on some of his novels that had been pirated); BUSINESS MAN, supra note 14, at 315 (describing the registration of "Mark Twain" as a trademark); Twain’s Lawsuits, supra note 73, at 4, 94-128 (highlighting Twain’s lawsuits against copyright violations by foreign publishers particularly those in England and Canada).

See HOFFMAN, supra note 6, at 362 (describing how Twain’s outrage at these productions "began a wild series of lawsuits, counterclaims, and midnight raids"). In particular, he was incensed by unauthorized productions of *The Prince and the Pauper.* Id.

See id., at 394. Interestingly, however, this was one time in which Twain chose not to use the law to protect his rights against his creditors. Id. Although his earlier transfer of assets into his wife’s name could have helped Twain in avoiding his creditors, his wife, and ultimately Twain himself, “believed that separating their assets into his and hers had law but not morality on their side and felt that their first obligation was to their creditors.” Id. See also, Mark Twain, Address at the Dinner in His Honor at the Lotus Club (Nov. 10, 1990), reprinted in SPEECHES, supra note 57, at 351.

Before leaving on a lecture tour on which he hoped to raise the funds to pay his debts, Twain commented: “I am not a businessman, and honor is a harder master than the law. It cannot compromise for less than one hundred cents on a dollar, and its debts are never outlawed.” Id. at 351. See also AUTOBIOGRAPHY, supra note 3, at 31, 339-46 (discussing Twain’s bankruptcy in detail); id. at 341 (“When the publishing house of Webster and Company failed, in the early ’90s, its liabilities exceeded its assets by 66 percent. I was morally bound for the debts, though not legally.”). See Roam, supra note 8, at 686-87 (discussing the financial woes of John Marshall Clemens and indicating that in electing to pay his debts out of honor, Mark Twain was following in the footsteps of his father who had sold all his possessions to pay his debts when he faced bankruptcy). Twain himself described his father’s bankruptcy with a tinge of bitterness:

[My father] did the friendly office of ‘going security’ for Ira Stout, and Ira walked off and deliberately took the benefit of the new bankrupt law—a deed which enabled him to live easily and comfortably until death called for him, but a deed which ruined my father, sent him poor to his grave, and condemned his heirs to a long and discouraging struggle with the world for a livelihood.

Id.

HOFFMAN, supra note 6, at 486.

Id. at 492-94.
he published. He brought suit to prevent the premature advertising of *Huckleberry Finn* by a Boston bookstore.

Mark Twain’s litigious adventures were not confined to the United States. In Italy, for example, he brought suits against the Italian countess who was his landlady in Florence, and filed suit against his wife’s Italian physician who “had submitted what Sam felt was an inflated and outrageous bill.”

Many of Twain’s legal affairs stemmed from his misadventures with the Webster Publishing Company. These disputes arose from his excessive trust in his nephew, Charlie Webster, whom he set up to run the publishing company. Twain described Webster and Webster’s lawyer, Whitford, with both his characteristic humor and deep skepticism:

Whitford was privileged to sign himself “of the firm of Alexander and Green.” Alexander and Green had a great and lucrative business and not enough conscience to damage it. . . . He was good-natured, obliging, and immensely ignorant, and was endowed with a stupidity which by the least little stretch would go around the globe four times and tie.

. . . .

It was a happy combination, Webster and his lawyer. The amount that the two together did not know was to me a much more awful and paralyzing spectacle than it would be to see the Milky Way get wrecked and drift off in rags and patches through the sky. When it came to courage, moral or physical, they hadn’t any. Webster was afraid to venture anything in the way of business without first getting a lawyer’s assurance that there was nothing jailable about it.

In addition to his personal legal adventures, Twain also studied trials
voraciously, and this study is apparent in his work. In addition to keeping current on the leading legal cases of his own day, he also studied the history of ancient laws. A large portion of Twain’s *A Connecticut Yankee* and *The Prince and the Pauper* was dedicated to criticizing the harshness of these ancient rules. In the Preface to *Connecticut Yankee*, he remarked:

> The ungentle laws and customs touched upon in this tale are historical, and the episodes which are used to illustrate them are also historical. It is not pretended that these laws and customs existed in England in the sixth century; no, it is only pretended that inasmuch as they existed in the England and other civilizations of far later times, it is safe to consider that it is no libel upon the sixth century to suppose them to have been in practice in that day also.

In addition, Twain enjoyed a friendship with jurist Oliver Wendell Holmes. Ironically, this friendship arose from Holmes’ gracious forgiveness of Twain’s “unconscious plagiarism” of Holmes’ work. Twain’s interactions with Holmes and other leading social thinkers of his day doubtlessly exposed him to a range of insights and knowledge regarding the legal system and the issues with which it grappled.

Out of his studies and personal interest, Mark Twain also became a law reform advocate in his day on matters both procedural and substantive. On

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96 See MCKEITHAN, *supra* note 46, at ix (“Twain’s interest in court trials extended throughout his writing career”); LAUBER, *supra* note 12, at 119 (noting that the well-read Twain “preferred fact to fiction, delighting in books that seemed to reveal human nature in the raw—collections of famous trials, histories, autobiographies, diaries, and memoirs.”); Roam, *supra* note 8, at 700 (“He was especially interested in sensational trials, and he followed newspaper accounts of them. His private library contained volumes detailing both current and historical prosecutions.”); id. at 701 (“He had observed many trials as a working reporter, a simple spectator, and even a litigant.”); Gillman & Patten, *supra* note 76, at 91 (“Drawing directly on life...his focus on spectacular fictional trials reflected contemporary interest in several celebrated legal cases: the Laura D. Fair murder trials in 1871-1872, the perjury trial of the Tichborne claimant in England in 1873, and the Beecher-Tilton adultery trial in 1874-1875.”)

97 *CONNECTICUT YANKEE*, *supra* note 52, at PREFACE. Twain also suggested that it was only by “becoming” a member of the lowest classes could one truly understand the full impact of unjust laws:

> My idea was to disguise myself as a freeman of peasant degree and wander through the country for a week or two on foot. This would give me a chance to eat and lodge with the lowliest and poorest class of free citizens on equal terms. There was no other way to inform myself perfectly of their every-day life and the operation of the laws upon it.

*Id.* at 228.

98 See AUTOBIOGRAPHY, *supra* note 3, at 193–206 for Twain’s description of this incident. This is particularly ironic because, of course, Twain was continuously concerned about the piracy of his own works. See also Mark Twain, Speech Delivered at the Dinner Given by the Publishers of *The Atlantic Monthly* to Oliver Wendell Holmes, in Honor of His Seventieth Birthday (Aug. 29, 1879), reprinted in *SPEECHES*, *supra* note 57, at 56-58 (describing Twain’s gratitude to Holmes for his gracious conduct in the plagiarism matter).
a procedural level, Mark Twain became a consistent and outspoken critic of the jury system, a regime he called “a colossal, practical joke upon the world.” The exact origin of or reason for his disdain of the jury system is unclear. However, there can be no doubt as to his passion on the issue. Perhaps his most stinging criticism of the jury system can be found in notes for a speech he wrote in 1872 that was never delivered: “We have a criminal jury system which is superior to any in the world; and its efficiency is only marred by the difficulty of finding twelve men every day who don’t know anything and can’t read.” In his literature, he best tackled the perceived defects in the jury system in Roughing It. Twain called the jury system “the most ingenious and infallible agency for defeating justice that human wisdom could contrive.” Thereafter, Twain described the jury selection process in a sensational murder trial:

When the peremptory challenges were all exhausted, a jury of twelve men was impaneled—a jury who swore that they had neither heard, read, talked about nor expressed an opinion concerning a murder which the very cattle in the corrals... were cognizant of! It was a jury composed of two desperadoes, two low beer-house politicians, three barkeepers, two ranchmen who could not read, and three dull, stupid, human donkeys. The verdict rendered by this jury was, Not Guilty. What else could one expect? The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury.... Why could not the jury law be so altered as to give men of brains and honesty an equal chance with fools and miscreants?

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99 See BUDD, supra note 6, at 47 (“Before he started coming around to a more humane stand, he also got excited about juries that helped to pamper the sinners against property rights and personal safety.”); McKEITHAN, supra note 46, at 4 (“Certain aspects of the administration of justice in the United States in his day were targets of Twain’s satire. Throughout his career he protested against the methods whereby juries were often selected—the preference being for illiterates who had never read about the case...”); Roam, supra note 8, at 701-02 (commenting upon Twain’s antipathy for the jury system); Anastaplo, supra note 11, at 686 (“Twain’s writings exhibit familiarity with legal processes. He can be particularly caustic about the way trial by jury may mock justice.”).

100 Mark Twain, Letter to the Editor of the New York Tribune (Mar. 7, 1873), reprinted in LIFE AS I FIND IT, supra note 72, at 166-67.

101 Mark Twain, Text of Undelivered Speech (July 4, 1872), reprinted in MARK TWAIN AND THE GOVERNMENT 55 (Svend Petersen ed., 1960) [hereinafter Petersen].

102 MARK TWAIN, ROUGHING IT (Oxford Univ. Press 1996) (1872) [hereinafter ROUGHING IT].

103 Id. at 341 (emphasis omitted).

104 Id. at 342-43 (emphasis original).
In fact, Twain’s stinging criticisms of the jury system still appear in the opinions of modern courts and commentators, although with less of the passionate humor that Twain himself employed.

Twain directed similar venom toward the insanity plea which was, during his time, becoming more widely used as a defense in criminal trials. In a fit of bitter sarcasm, he said of the fratricidal Cain that it was his “misfortune to live in a dark age that knew not the beneficent Insanity Plea,” and expressed his view that the plea was merely a lawyer’s trick used for “cutting every gallows rope and picking every prison lock.” He went on to remark that the insanity plea can be “a rather far-fetched compliment to pay the prisoner, inasmuch as one must first have brains before he can go crazy.”

Twain was perhaps at his sarcastic best when he simultaneously attacked both the jury system and the insanity plea.

In substantive law as well, Mark Twain was an advocate of law reform, particularly in the area of copyright law. He believed that “no important
American or English statutes are uncompromisingly and hopelessly idiotic except the copyright statutes of these two countries.\footnote{113}{This should not come as a surprise given Twain’s self-interest in reforming this area of the law,\footnote{114}{and his complaint that he “suffered pretty heavily in temper and pocket from imperfect copyright laws.”\footnote{115}{Burned by actual and anticipated abuses of his own intellectual property rights, Twain was a fervent advocate for two primary copyright reforms. Domestically, he pursued legislation that would extend the copyright protection granted to his works beyond the mere forty-two years then afforded so that his children could continue to be supported by the income from those earnings.\footnote{116}{On the global level, he advocated stringent international copyright protection to prevent transboundary piracy of original works. Even his young daughter, Susy, thought his concern with this issue was important enough to write that “Papa has long wanted us to have an international copyright in this country, so two or three weeks ago, he went to Washington to see what he could do to influence the government in favor of one.”\footnote{117}{Beyond his personal involvement with the law, lawyers, and judges, Twain’s exposure to the rule of law and the role of its agents was profoundly shaped by the era during which he lived. Mark Twain was born in 1835—a time when the county was still young and the American experiment was still new. He died in 1910—a time by which the character of the young nation had been sorely tested by the fundamental socio-legal and}

his belief in the importance of this issue, it was “[l]ate in 1906, at copyright hearings in Washington, D.C., [that] Clemens made his first winter public appearance in the white suit that was to become habitual.”\footnote{113}{A LITERARY LIFE, supra note 11, at 291.}

See AUTOBIOGRAPHY, supra note 3, at 366. See also id. at 365-72 (elaborating on Twain’s criticism of the copyright regime).\footnote{114}{See LAUBER, supra note 12, at 144 (noting that Twain advocated copyright reform “[o]n grounds of both principle and profit”).}

Mark Twain, American Authors and British Pirates: A Private Letter and a Public Postscript in \textit{Life as I Find It}, supra note 72, at 220.\footnote{115}{Mark Twain, \textit{American Authors and British Pirates: A Private Letter and a Public Postscript in Life as I Find It}, supra note 72, at 220. See Mark Twain, \textit{Open Letter to The Register of Copyrights}, in \textit{Life as I Find It}, supra note 72, at 260-66 (arguing against the temporal limitations on copyright protection); \textit{Id.} at 261 (calling failure to provide enduring copyright protection “microscopic petty larceny” committed by the government upon authors); Mark Twain, Speech Before the Copyright Committee (Dec. 6, 1906), reprinted in \textit{Speeches}, supra note 57, at 314-15 (expressing support for an amendment to the copyright law that would create an “extension of copyright life to the author’s life and fifty years afterward [because] it would take care of his children. That would take care of my daughters, and after that I am not particular.”); Mark Twain, \textit{Petition Concerning Copyright}, reprinted in \textit{Sketches and Tales} 280, supra note 80, at 280 (recounting burlesque argument in favor of extending copyright protection beyond forty-two years). Surely Twain would approve of the Supreme Court’s recent decision in \textit{Eldred v. Ashcroft}, 123 S. Ct. 769 (2003) (upholding the Copyright Term Extension Act, which extended the term of most copyrights to the author’s life plus seventy years). See generally, Roam, supra note 8, at 698-99 (providing a discussion of Twain’s efforts in domestic copyright reform).}

PAPA, supra note 10, at 190. See also Mark Twain, \textit{International Copyright}, in \textit{Life as I Find It}, supra note 72, at 214-15 (discussing consequences of having no international copyright); HOFFMAN, supra note 6, at 238 (discussing Twain’s lobbying activity on behalf of an international copyright).\footnote{117}{PAPA, supra note 10, at 190. See also Mark Twain, \textit{International Copyright}, in \textit{Life as I Find It}, supra note 72, at 214-15 (discussing consequences of having no international copyright); HOFFMAN, supra note 6, at 238 (discussing Twain’s lobbying activity on behalf of an international copyright).}
moral dilemmas of the nineteenth century. During his lifespan, "Mark Twain's life touched on many famous episodes in American history: slavery in the Southern border states, life on the Mississippi, sectionalism, the settlement of the West, the Civil War, Reconstruction, the rise of the common man, the Industrial Revolution, and the Gilded Age." This was a vibrant time for legal issues to brew. If it is true that "[w]hat many masterpieces of world literature mirror are not simply the workings of the law but, more compellingly, the moments of crisis when society discovers that its laws have become problematic," then Twain's lifetime gave him plenty of fodder for rich narratives of the law and its agents. Because he lived in an age fraught with such "moments of crisis," it was natural that Twain's fiction would reflect and wrestle with legal problems.

Mark Twain was no passive observer of these legal and moral dilemmas. Perhaps his public stature would not have allowed him to be a passive observer even if he had wanted to be. Given that he was both well-informed and passionate about the affairs of his day, it is doubtful that he would have wanted to shrink from debate. Indeed, his daughter Clara remarked: "It always puzzled me how Mark Twain could manage to have an opinion on every incident, accident, invention, or disease in the world." He had strong (negative) opinions on such diverse issues as capital punishment, the outlawing of osteopathy, imperialism, the

legislative process,\textsuperscript{127} lynching,\textsuperscript{128} bullfighting,\textsuperscript{129} and the problems in the Congo.\textsuperscript{130} He strongly favored an efficient system of patent law.\textsuperscript{131} He
death until they swing from the gallows." Mark Twain, \textit{Lionizing Murderers, reprinted in SKETCHES AND TALES, supra note 80, at 224 n.1 [hereinafter Lionizing Murderers].}
\textsuperscript{125} See BUDD, supra note 6, at 201 ("[H]e joined a campaign to make osteopathy legal in New York."); Mark Twain, Speech before the New York State Assembly (Feb. 27, 1901), \textit{reprinted in SPEECHES, supra note 57, at 252-55 (advocating, with humor, a bill legalizing osteopathy).}
\textsuperscript{126} See generally BUDD, supra note 6, at 168-90 (providing numerous examples of Twain’s opposition to American and European imperialism); AUTHENTIC MARK TWAIN, supra note 11, at 238-40; John Carlos Rowe, \textit{On Twain’s Anti-Imperialism, in BLOOM, supra note 11, at 67.} According to Rowe:

Twain is famous for his jeremiads against European imperialism and the fledgling efforts of the United States at colonial expansion in the Philippines. As scholars have pointed out, most of Twain’s anticolonial zeal dates from the late 1890s and early 1900s, provoked by such international crises as the Spanish-American War (1898), the Boxer Rebellion in China (1900), and the Boer War in South Africa (1899-1902).

\textit{Id.}\textsuperscript{127} See Petersen, supra note 101, at 57 (quoting a December 18, 1887 letter written by Twain to H.C. Christianity in which Twain ranted: "The departmental interpreters of the laws in Washington, ... can always be depended on to take any reasonably good law and interpret the common sense all out of it"); FISHKIN, supra note 6, at 133-34 (describing Twain’s frequent barbs directed at Congress); Roam, \textit{supra} note 8, at 692-96 (exploring origins of Twain’s antipathy toward legislators); Mark Twain, Address to the Redding (Conn.) Library Association (Oct. 28, 1908), \textit{reprinted in SPEECHES, supra note 57, at 213-14 (saying of burglars, “they kept straight on in their immoral ways and were sent to jail. For all we know, they may next be sent to Congress.”); Mark Twain, Undelivered Address Prepared for a Gathering of Americans in London (July 4, 1872), \textit{reprinted in SPEECHES, supra note 57, at 414 (“I think I can say, and say with pride, that we have some legislatures that bring higher prices than any in the world.”); Mark Twain, \textit{The Facts Concerning the Recent Resignation, reprinted in SKETCHES AND TALES, supra note 80, at 83-88 (satirizing legislative bureaucracy by chronicling the career of a fictional, long-suffering “clerk of the Senate Committee on Conchology”); Mark Twain, \textit{Lionizing Murderers, supra note 124, at 223-26.} Twain recounts the telling of a fortune in which the fortune-teller explains:

Yours was not, in the beginning, a criminal nature, but circumstances changed it. At the age of nine you stole sugar. At the age of fifteen, you stole money. At twenty you stole horses. At twenty-five, you committed arson. At thirty, hardened in crime, you became an editor. You are now a public lecturer. Worse things are in store for you. You will be sent to Congress.

\textit{Id. at 224.} See also ROUGHING IT, supra note 102, at 191 (“I think I might have developed into a very capable pickpocket if I had remained in the public service a year or two.”).

In addition, Twain once criticized the legislative process in conjunction with the jury system, resulting in this stinging commentary in \textit{The Gilded Age}:

[T]he newspapers came out with exposures and called Weed and O’Riley “thieves,”—whereupon the people rose as one man (voting repeatedly) and elected the two gentlemen to their proper theatre of action, the New York legislature. The newspapers clamored, and the courts proceeded to try the new legislators for their small irregularities.

Our admirable jury system enabled the persecuted ex-officials to secure a jury of nine gentlemen from a neighboring asylum and three graduates from Sing-Sing, and presently they walked forth with characters vindicated.

\textsuperscript{128} See generally, \textit{THE AUTHENTIC MARK TWAIN, supra note 11, at 237-39 (describing a literary work by Twain on the history of lynching).}
\textsuperscript{129} \textit{Id. at 260-61.}
\textsuperscript{130} \textit{Id. at 252-55.}
opined often on the legal and political question of women's suffrage as well, but his true views on this issue are difficult to discern.\footnote{132}{Most likely, Twain's interest in the patent system sprang from his own forays into the role of inventor. \textit{See Fishkin, supra note 6, at 172-75} (describing Twain's career as an inventor and noting his creation of such diverse articles as "a gadget to attach sheets and blankets to beds, a self-adjusting vest strap, a spiral hatpin, a perpetual-calendar watch charm, and a self-pasting scrapbook, the latter being the only invention of his that made any money"). Twain carried his interest in patents over into his fiction. He had his character, the "Yankee," note that in \textit{Carmelot}: 
\begin{quote}
the very first official thing I did, in my administration—and it was on the very first day of it too—was to start a patent office; for I knew that a country without a patent office and good patent laws was just a crab, and couldn't travel any way but sideways or backwards.
\end{quote}
\textit{Connecticut Yankee, supra note 52, at 72.}}

Thus, in spite of his self-deprecating claim that he was a man "not knowing anything about laws except how to evade them and not get caught,"\footnote{133}{\textit{See Critical Assessments Vol. III, supra note 79, at 128} (claiming that Twain became "a staunch advocate of women's suffrage"); \textit{The Facts in the Case of the Senate Doorkeeper, in Life As I Find It, supra note 72, at 5-9} (presenting Twain's contrary and complex views of this issue); Mark Twain, \textit{Female Suffrage, in Life As I Find It, supra note 72, at 9-21} (reprinting letters to the editor written by Twain on behalf of fictional characters debating suffrage issue); Mark Twain, \textit{Votes for Women, A Speech Given at the Annual Meeting of the Hebrew Technical School for Girls (Jan. 20, 1901), reprinted in Speeches, supra note 57, at 101-03.}} Mark Twain was not the naif that he claimed to be when it came to legal affairs. Instead, he had extensive personal knowledge and experience with the field. This is readily apparent when one examines the depth with which the legal characters are developed in his works.\footnote{134}{\textit{See Autobiography, supra note 3, at 456} (recounting Twain's comment that was made in response to receiving a honorary Doctor of Laws degree from University of Missouri). Indeed, in addition to depth, there is an astonishing \textit{volume} of legal characters and situations in Twain's work. \textit{See Waggoner, supra note 11, at 212} (noting that the "calendar of lawsuits and legal proceedings [Twain] has described is fairly amazing"). Mr. Waggoner then provides a very useful list of the litigation in which Twain's characters engaged. \textit{Id. at 212-15. See also Pirates, supra note 12, at 8} (noting that there are "six authentic trials in Twain's canon: the trial of Laura Hawkins in \textit{The Gilded Age}, the trial of Muff Potter in \textit{Tom Sawyer}, the trial of Liugi Capello in \textit{Pudd'nhead Wilson}, the trial of Silas Phelps in \textit{Tom Sawyer Detective}, the trial of Father Peter in \textit{The Mysterious Stranger}, and the trial of Joan of Arc in \textit{Joan of Arc}"); \textit{See also Mckean, supra note 46, at 5-6} (listing Twain's major trial scenes).}} This makes the study of those characters fruitful and productive.

\section{IV. Twain's "Paradigm Cases": The Way Things Ought to Be}

The legal system—and the authority of its judges and lawyers—is based on the ideal that a just system of procedural and substantive law exists, and that this system is capable of yielding justice as long as lawyers and judges respect it. Should they fail to do so, then injustice and even tragedy, will be the necessary result. This paradigm is well illustrated in two trials that form a significant part of two Twain tales, \textit{Tom Sawyer} and \textit{St. Joan}. Unfortunately, these neat, tidy cases are in the clear minority of
Twain fiction. It is wise, however, to begin the study of Twain’s legal characters with these “paradigm cases” since they illustrate the way things should be.

In *Tom Sawyer*, Twain presents the case of Muff Potter, an innocent man unjustly accused of murder. Careful analysis of the conduct of the lawyers and the judge in Muff Potter’s trial reveals conduct that is honorable, intelligent, and professional. The result is a just one: The innocent Potter is released and the identity of the true killer is disclosed. Good conduct yields a verdict in which the legal profession can take pride because this tale presents judges and lawyers who act honorably and competently and achieve honorable and just results.136

In *Tom Sawyer*, the trial scene—called “the best known trial in Mark Twain”137—is the capital murder trial of Muff Potter, falsely accused of murder.138 The actual killer was “Injun’ Joe,” but Joe had cleverly and effectively framed the hapless Potter so that by the time of the trial Potter himself actually believed that he had, indeed, committed the murder.139 Joe was to be the star witness against Potter.140 Unbeknownst to both Potter and Joe, however, Tom Sawyer and Huckleberry Finn, in pursuit of a boyish prank, were hiding at the scene of the murder and witnessed the entire event.141 A just result of the trial would be the acquittal of the innocent Potter and the identification of Joe as the guilty party.142 This is precisely what occurred, and it was the result of honorable and effective conduct by the judges and attorneys involved in the case.143

Judge Thatcher—perhaps better known as the father of Tom Sawyer’s fickle romantic interest, Becky Thatcher—presided over the trial.144 The initial introduction of Judge Thatcher did not necessarily bode well, for it portrayed a man who enjoyed an exaggerated sense of his own self-

135 See generally *Tom Sawyer*, supra note 20.
136 Id. at 184-87. For a general discussion of law and lawyers in *Tom Sawyer*, see MCKEITHAN, supra note 46, at 21-25 (describing the trial of Muff Potter as establishing a pattern, followed in later court trials, in which an innocent man falsely accused of a crime is dramatically found innocent through a series of events at trial); Roam, supra note 8, at 710-12 (discussing the trial of Muff Potter and the evolution of the court in Twain’s literature from a setting for practical jokes to a place “where truth is discovered and justice is rendered”).
137 MCKEITHAN, supra note 46, at 21. See also Roam, supra note 8, at 710 (calling Muff Potter’s trial “the best known trial in Twain’s literature”).
138 *Tom Sawyer*, supra note 20, at 102-04.
139 Id. at 90-92, 183-84.
140 Id. at 185.
141 Id. at 87-92.
142 Id. at 184-89.
143 Id. at 186-87.
144 Id. at 48-51. At least one commentator has suggested that the character of Judge Thatcher was based on Twain’s father. See BLOOM, supra note 11, at 16.
The middle-aged man turned out to be a prodigious person—no less a one than the county judge—altogether the most august creation these children had ever looked upon—and they wondered what kind of material he was made of—and they half wanted to hear him roar, and were half afraid he might, too. He was from Constantinople, twelve miles away—so he had traveled, and seen the world—these very eyes had looked upon the county court house—which was said to have a tin roof. The awe which these reflections inspired was attested by the impressive silence and the ranks of staring eyes. This was the great Judge Thatcher, brother of their own lawyer. . . . [T]he great man sat and beamed a majestic judicial smile upon all the house, and warmed himself in the sun of his own grandeur—for he was 'showing off' too.145

Nevertheless, as he presided over Muff Potter's trial, Judge Thatcher acted nobly. Although the sensational trial attracted the interest of the entire town,146 Judge Thatcher ensured that the proceedings were conducted with dignity and order.147 At one point, "[t]here was a ripple of mirth, which the court checked,"148 evidencing the judge's desire that, in spite of intense local interest, the proceedings be respected as serious and consequential, and not as a source of cheap entertainment.

The conduct of Muff Potter's unnamed defense counsel was also highly professional and skilled. Tom Sawyer had gone to him the night before and confessed his knowledge of the true facts.149 Potter's attorney vowed to keep Tom's secrets safe, and encouraged him to spill the complete truth about the matter at the trial when he was called to the witness stand.150

Armed with the knowledge that Tom Sawyer had the information needed to win the case, the defense did not feel compelled to badger the witnesses called by the prosecutor.151 Most likely, this was difficult be-

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145 TOM SAWYER, supra note 20, at 49.
146 Id. at 184 ("All the village flocked to the Court house . . . ").
147 Id. at 185. ("[T]he judge arrived and the sheriff proclaimed the opening of the court. The usual whisperings among the lawyers and gathering together of papers followed. These details and accompanying delays worked up an atmosphere of preparation that was as impressive as it was fascinating.").
148 Id. at 187.
149 Id. at 190.
150 Id.
151 Id. at 185.
cause the crowd in the courtroom was visibly dissatisfied with his perceived passivity. Indeed, as he refused to question the prosecutor's witnesses, "[t]he faces of the audience began to betray annoyance. Did this attorney mean to throw away his client's life without an effort? ... The perplexity and dissatisfaction of the house expressed itself in murmurs and provoked a reproof from the bench." Pride and the desire to win the respect of his fellow citizens might have compelled a less scrupulous defense attorney to engage in dramatic, self-serving "grandstanding" at the trial. Instead, however, he did not waste the court's time with such actions. Because he knew his witness would destroy the prosecution's case in due course, he was willing to bide his time and patiently endure the ridicule of the public rather than to delay the proceedings with cross-examination of false witnesses.

Potter's defense counsel recognized that Tom Sawyer—despite all his easy-going bravado—was also a scared young boy testifying in open court in the presence of a cold-blooded killer. Thus, when it was Tom's turn to speak, the attorney handled him with a solicitous and comforting manner that placed truth and courage at the center of the proceedings. He counseled Tom:

"Don't be afraid." ...

... ...

"Speak up—just a trifle louder." ...

... ...

... "Never mind mentioning your companion's name. We will produce him at the proper time." ...

... ...

"Speak out my boy—don't be diffident. The truth is always respectable." ...

... ...

... "Now my boy, tell us everything that occurred—tell it in your own way—don't skip anything, and don't be afraid."154

As a result, Potter's attorney achieved, and Judge Thatcher presided
over, an outcome in which truth triumphed as a result of the correct functioning of the judicial process and the laudable, professional, and compassionate conduct of its agents. Joe was found guilty, and Muff Potter was rightfully acquitted. As has been observed:

The trial contains no satire, no attacks on the jury system, and no theatrical lawyers. The defense attorney is presented as a skilled practitioner, an officer of the law whose objective is to see that justice is done. He is understanding in his handling of his scared young witness and is totally prepared to prove each point. He even produces the carcass of the dead cat Tom and Huck took to the graveyard.¹⁵⁵

Thus, the dramatic conclusion to Tom Sawyer¹⁵⁶ demonstrates the effectiveness of a legal proceeding in which the judge and the attorney act ethically and competently. High praise for the legal profession comes when we are told at the novel’s end that “Judge Thatcher hoped to see Tom a great lawyer or a great soldier some day.”¹⁵⁷

In contrast, in Joan of Arc, Mark Twain presented Cauchon, a judge who presided over the heresy trial of St. Joan in an underhanded, deceitful, and corrupt way.¹⁵⁸ The result of his treachery was the unjust conviction and brutal execution of St. Joan.¹⁵⁹ Although reprehensible as a moral matter, this trial actually casts the work of judges and lawyers in a favorable light. The message implicit in reviewing Cauchon’s conduct and its result is that the injustice to St. Joan was brought about by the actions of an evil judge and the denial to Joan of an attorney who could have protected her and saved her life. Thus, a brief examination of Joan of Arc will reveal that it is quite consistent with Tom Sawyer. Together they stand for the proposition that the outcome of the legal process is consistent with the conduct of its officers, and that attorneys and judges will achieve just outcomes if they act in good faith and in compliance with the highest of ethical standards. Likewise, their failure to do so will, as Joan of Arc illustrates, lead to disastrous results.

¹⁵⁵ Roam, supra note 8, at 711 (citation omitted).
¹⁵⁶ MCKEITHAN, supra note 46, at 24 (“Potter’s lawyer finally came to life and it was soon obvious that he had been holding a sensation in reserve and intended to present it dramatically.”); Roam, supra note 8, at 711 (“The Muff Potter Trial established a pattern that Twain later followed, with slight variations. First, an innocent man is falsely accused of a crime. Next, all evidence introduced seemingly proves his guilt. Finally, the late discovery of new evidence or a surprise witness saves the innocent defendant and identifies the unsuspecting criminal.”); id. (“Twain staged the scene perfectly, building an insurmountable barrier while holding the sensational evidence in reserve, then presenting that evidence in dramatic fashion.”).
¹⁵⁷ TOM SAWYER, supra note 20, at 269.
¹⁵⁸ See JOAN OF ARC, supra note 5, at 311.
¹⁵⁹ Id. at 434.
Twain's *Joan of Arc* was unique among his works. Unlike Twain's other pieces, it is not truly fiction. Although he created a fictional narrator through whom the tale of St. Joan was told, the story itself was based on the historical figure of St. Joan, a renowned and popular fifteenth-century French saint. The book was the result of Twain's exhaustive research into the trial transcripts from her heresy trial.

In the tale, the devout Joan was called to lead the French armies to defeat France's English oppressors and to restore the exiled French Dauphin to his rightful position as King of France. The teen-aged Joan, in fact, accomplished all this. In doing so, alas, she aroused the ire of Pierre Cauchon, a corrupt French ecclesiastical official with great personal ambition and allegiance to the English side, despite his name and professed loyalties. He believed that it would serve his political interests to have Joan convicted of heresy and executed for it. He also knew that the French Dauphin, who owed the restoration of his throne to St. Joan, was a weak and cowardly man who would not rush to her aid. Thus, Cauchon set out to try and convict the nineteen year old "Maid of Orleans" for heresy—the penalty for which was execution through burning at the stake. Because "Judge" Pierre Cauchon knew that Joan was, in fact, innocent of the crime for which she was charged, he set out to mastermind the thoroughly immoral trial proceedings which were the only way to obtain the "conviction" necessary to achieve Joan's death. The great majority of the book is

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160 For a general discussion of the legal process in *Joan of Arc*, see McKeithan, supra note 46, at 40-90 (recounting the trial of Joan of Arc and how Twain's "idealism" and "love of truth and justice" shine through his retelling of this historical trial); Roam, supra note 8, at 712-13 (discussing the differences between the trial of Joan of Arc and the others found in Twain's literature).

161 See Hoffman, supra note 6, at 380 (describing Twain's research into books about Joan, "including some that reprinted her actual trial transcript"); McKeithan, supra note 46, at 9 ("The trial of Joan of Arc belongs in a separate category. . . . In the others Mark Twain was writing fiction . . . . In the trial of Joan he was striving for historical accuracy and he follows the records of Joan's trial with remarkable fidelity."); id. at 45 ("Twain's account of Joan's trial must be regarded as his attempt to write history rather than fiction."); Roam, supra note 8, at 712 ("Most of Twain's other trials are works of fiction—stories told to achieve dramatic effects. In the trial of Joan, however, he strove for historical accuracy and followed all the records of her trial with remarkable fidelity."). One commentator notes, however, that this historical accuracy was not necessarily without cost. See Anastaplo, supra note 11, at 694 (claiming that *Joan of Arc* was "evidently too dependent upon historical research, not enough upon Mark Twain's own experience, to become popular").

162 *Joan of Arc*, supra note 5, at 77.

163 Id. at 252.

164 Id. at 310-11.

165 Id. at 310, 375-76.

166 Id. at 310-11.

167 Id. at 311.

168 McKeithan aptly summarizes the defects in the trial of St. Joan:

For over two months before the trial [Pierre Cauchon] gathered every scrap of evidence, suspicion, rumor, and lie that could be used against her. He denied her request that she be allowed to have legal counsel; he ignored her request that a half of
devoted to exploring in intricate detail, and with great emotional indignation, Cauchon's unjust actions in conducting Joan's trial.169

The procedural defects began when it became clear that Cauchon actually had no legal jurisdiction over the matter.170 He overcame this problem through the use of force to silence the honest people who objected.171 Then, in the process of selecting those who would sit in judgment, "Cauchon had been busy packing his jury for the destruction of the Maid—weeks and weeks he had spent in this bad industry . . . [H]e was able to construct a formidable court numbering half a hundred distinguished names. French names they were, but their interests and sympathies were English."172 The net result was a body of jurors composed of "men of deep learning, veterans adept in strategy and casuistry, practised setters of traps for ignorant minds and unwary feet . . . gathered here to find just one verdict and no other."173

As the preparations for the trial were made, the assembly of evidence was also accomplished in ill faith, with blatant disregard for the procedural rights Joan possessed. In the weeks leading up to the trial, "Cauchon had been raking and scraping everywhere for any odds and ends of evidence or suspicion or conjecture that might be made usable against Joan, and carefully suppressing all evidence that came to hand in her favor."174 In the

the court be priests of the French party. She had no friends to advise her . . . . She was not allowed to call a single witness, and a verdict of death was resolved upon before the trial began. Cauchon and every other member of the court knew that they were there for one purpose only: to condemn Joan to death . . . not to search for truth, not to dispense justice.

MCKEITHAN, supra note 46, at 43.

169 This applies to the court being priests of the French party. She had no friends to advise her . . . . She was not allowed to call a single witness, and a verdict of death was resolved upon before the trial began. Cauchon and every other member of the court knew that they were there for one purpose only: to condemn Joan to death . . . not to search for truth, not to dispense justice.

Ironically, when Mark Twain describes Joan herself, he portrays her as possessing many of the attributes of a good and just lawyer or judge. Although he himself does not draw that parallel, he praises Joan by stating:

She was truthful when lying was the common speech of men; she was honest when honesty was become a lost virtue; she was a keeper of promises when the keeping of a promise was expected of no one; she gave her great mind to great thoughts and great purposes when other great minds wasted themselves upon pretty fancies or upon poor ambitions; she was modest, and fine, and delicate when to be loud and coarse might be said to be universal; she was full of pity when a merciless cruelty was the rule; she was steadfast when stability was unknown, and honorable in an age which had forgotten what honor was; she was a rock of convictions in a time when men believed in nothing and scoffed at all things; she was unfailingly true in an age that was false to the core; she maintained her personal dignity unimpaired in an age of fawnings and servilities; she was of dauntless courage when hope and courage had perished in the hearts of her nation; she was spotlessly pure in mind and body when society in the highest places was foul in both.

JOAN OF ARC, supra note 5, at 19. These virtues failed to generate any just outcome because they were not possessed by those with control over the conduct of Joan's trial. Nevertheless, this description stands in striking contrast to the portrayal of the legal characters in the piece.

170 Id. at 317-18.
171 Id. at 318.
172 Id. at 317.
173 Id. at 323.
174 Id. at 319.
lowest point in his quest for ill-gotten evidence against Joan, Cauchon sent an ally—disguised as a priest—to Joan’s prison on the eve of her trial.\textsuperscript{175} The man offered to hear her confession, an offer that she readily accepted.\textsuperscript{176} The man, however, was not a priest at all but a mere spy, and the wily Cauchon positioned himself to hear all that was said during the confidential conversation.\textsuperscript{177} The seriousness of using such false and flimsy evidence is highlighted by a remark made by Joan herself, who once said of the legal process:

\begin{quote}
I think there is no sense in forming an opinion when there is no evidence to form it on. If you build a person without any bones in him he may look fair enough to the eye, but he will be limber and cannot stand up; and I consider that evidence is the bones of an opinion.\textsuperscript{178}
\end{quote}

Nevertheless, as preparations for the trial continued, the evidentiary and procedural violations continued. Joan was denied her right to counsel of her own—a particularly problematic matter since Joan’s ignorance of law and her status as a minor entitled her to such representation.\textsuperscript{179} She was not able to call any witnesses in her defense, even if she had been sophisticated enough in legal matters to do so.\textsuperscript{180}

Once the trial began, the judge’s violation of the legal rules did not abate, but increased in frequency and seriousness. There was no \textit{proces verbal} presented in defense of Joan’s character as required by procedural rules,\textsuperscript{181} the record of the case was distorted by falsifying the clerks’ notes,\textsuperscript{182} the number of judges was arbitrarily increased or decreased to ensure that only jurists sympathetic to Cauchon’s cause were allowed to preside;\textsuperscript{183} Joan was repeatedly asked irrelevant questions in efforts to trap her in a heretical statement;\textsuperscript{184} Joan was subjected to exhaustion and discomfort on the witness stand in an effort to weaken her defenses during the trickery of her cross-examination;\textsuperscript{185} the public—who was growing sympa-

\begin{footnotes}
\item[175] ld. at 320.
\item[176] ld. at 321.
\item[177] ld. at 320-21.
\item[178] ld. at 34 (emphasis omitted).
\item[179] ld. at 319-20.
\item[180] ld. at 319 (“She could not call a single [witness] in her defence; they were all far away, under the French flag, and this was an English court.”).
\item[181] ld. at 320.
\item[182] ld. at 330.
\item[183] ld. at 330, 364.
\item[184] ld. at 354.
\item[185] ld. at 365.
\end{footnotes}
thetic to Joan’s cause—was banned from the proceedings; Joan was not told of her right to appeal the case to Rome, a move which would have resulted in her acquittal; and Joan was offered the sham of "legal representation" from the biased bench (which she wisely declined). Ultimately, Joan was given a false confession that, in her confusion, exhaustion, and illiteracy, she eventually signed.

Through these and other tricks, Joan was convicted by the ecclesiastical court and then turned over to the secular court for sentencing. Ironically, at the very end, "[t]he secular judge who should have delivered judgment and pronounced sentence was himself so disturbed that he forgot his duty, and Joan went to her death unsentenced—thus completing with an illegality what had begun illegally."

Thus, as Twain presents the actions of the corrupt judges in this trial, he condemns their conduct and decry the miscarriage of justice that inevitably resulted from that conduct. Yet, in a backhanded way, this book staunchly defends the role that the legal profession can play to prevent such miscarriages of justice. A reader can reasonably believe that the tragedy of St. Joan could have been avoided if those responsible for her trial had behaved justly.

If there were nothing more to the lawyer novels of Mark Twain, his view would be disappointingly simplistic and stunningly one-dimensional. Predictably, in *Tom Sawyer*, adherence to the legal rules yields just results, while in *Joan of Arc*, the abandonment of legal rules results in precisely the

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186 Id. at 364 (noting Cauchon’s decrees that “[t]he sittings should be secret hereafter, and no spectators admitted”).
187 Id. at 374.
188 Id. at 376-77.
189 Id. at 413.
190 Id. at 400.
191 Id. at 432-33.
192 See McKeithan, supra note 46, at 45 (“[I]t is not Joan of Arc but her judges who are on trial. . . . [M]ost of them stand convicted of cowardice, ignorance, malice, lying, treachery, and almost every other dishonor.”); id. at 56 (“[T]he judges’) dignity was hurt too because they knew that the whole town was laughing at their failure.”); A LITERARY LIFE, supra note 11, at 212 (“The trial scenes are potent melodrama, with Joan’s goodness struggling against the arch villain Cauchon’s deceitful malice.”).
193 McKeithan, supra note 46, at 6 (“It is notable that of the major court trials in Twain only that of Joan of Arc results in a miscarriage of justice.”), Roam, supra note 8, at 712 (“Consequently, Joan’s trial is different from Twain’s other trials in another way: it is the only trial in Twain’s literature where a miscarriage of justice occurs.”).
194 One commentator noted:
Joan was denied rights considered fundamental by nineteenth-century American standards. Twain’s story illustrates the importance of those rights. The trial was presented strictly on a dramatic level, with no satire. It is perhaps Twain’s most effective appeal for humanity, simply because her execution was so clearly unjustified. In essence, the tragedy was a perpetuation of his idealism, his love of truth and justice.
Roam, supra note 8, at 713.
injustice those rules should have averted. Twain’s presentation of legal actors, however, is far more complex than these two paradigms would suggest. The more complex and disturbing reality is that in the rest of Twain’s legal presentations, the link between compliance with legal rules and achievement of justice is not as neat. Instead, Twain’s judges and lawyers often achieve the goals of true justice only when they are willing to abandon legal rules; conversely, those who do cling to the rules and follow correct legal processes often end up participating in miscarriages of justice. These paradoxical situations comprise the second set of cases presented by Twain.

V. TWAIN’S “PARADOX CASES”: THINGS ARE SELDOM WHAT THEY SEEM

In his tales, Mark Twain presents many scenarios in which a just result—conviction of a guilty party, freedom for an innocent party, mitigation of an overly harsh penalty, etc.—is achieved only by those judges and lawyers who depart from the rule of law. Conversely, some of the law’s most devoted followers achieve or advance tragic injustice through careful adherence to the strict letter of the law. These “paradox cases” depart from the neat models in Tom Sawyer and Joan of Arc and raise disturbing questions about the correlation—or lack thereof—between compliance with the legal regime and the ability to achieve just results.

A. Just Ends After Lawless Means

“Mark Twain advocated justice, but justice to him was founded more on moral duty than on law.”

Despite Twain’s ominous preface to Huckleberry Finn, in which he warns that “[p]ersons attempting to find a motive in this narrative will be prosecuted; persons attempting to find a moral in it will be banished; persons attempting to find a plot in it will be shot,” this novel well illustrates the dichotomy between the justice of the legal ends Twain’s characters achieve, and the means used by them to accomplish those ends. The novel’s early pages are occupied with a dubious legal transaction that in-

\[\text{id. at 716.}\]

\[\text{For a general discussion of law in Huckleberry Finn, see, for example, Schaller, supra note 49, at 124-30; Peter C. Myers, ‘Civilization’ and its Discontents: Nature and Law in The Adventures of Huckleberry Finn, 22 Legal Stud. F. 557 (1998); Teresa Goodwin Phelps, The Story of the Law in Huckleberry Finn, 39 Mercer L. Rev. 889 (1988) [hereinafter Story of the Law]; Ward, supra note 23, at 37; Communities, supra note 23, at 132-41; Literary Lawyer, supra note 31, at 1207-28. Huckleberry Finn has been called ‘perhaps the most written about and discussed novel in the American literary tradition.’ Story of the Law, supra, at 889.}\]

\[\text{Id. at 1.}\]
volves the same Judge Thatcher of *Tom Sawyer* fame. As the novel begins, Huck Finn possessed a large sum of money that he received as a result of his collaboration with Tom Sawyer to solve the mystery that ended *Tom Sawyer*.  However, Huck Finn’s abusive father returned to the scene in the opening pages of *Huckleberry Finn*, and Huck correctly assumed that his father would try to force him to surrender the money so that he could spend it on alcohol and other unsavory purposes.

Huck’s first reaction was to run to Judge Thatcher, who was not only a legal authority, but also the custodian of his funds. The following awkward transaction took place between the frightened boy and the clever judge:

I was at Judge Thatcher’s as quick as I could get there. He said:

"Why my boy, you are all out of breath. Did you come for your interest?"

...  

"No sir," I says, I don’t want to spend it. I don’t want it at all—nor the six thousand, nuther. I want you to take it; I want to give it to you—the six thousand and all."

He looked surprised. He couldn’t seem to make it out. He says:

"Why, what can you mean, my boy?"

I says, "Don’t you ask me no questions about it, please. You’ll take it—won’t you?"

He says:

"Well, I’m puzzled. Is something the matter?"

"Please take it," says I, "and don’t ask me nothing—then I won’t have to tell no lies."

He studied a while, and then he says:

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198 *Id.* at 2.
199 *Id.* at 41–42. Elmer M. Million, *Sawyer et al v. Administrator of Injun Joe*, 16 Mo. L. Rev. 27 (1951) (discussing legal implications related to Huck’s funds).
200 *Story of the Law, supra* note 196, at 895 (“Two things—the appellation ‘Judge’ and the caretaking of money—put Judge Thatcher into the most prominent position of authority in the town and in the book.”).
"Oho-o. I think I see. You want to sell all your property to me—not give it. That’s the correct idea."

Then he wrote something on a paper and read it over and says:

"There—you see it says, 'for a consideration.' That means I have bought it of you and paid you for it. Here’s a dollar for you. Now, you sign it."

So I signed it, and left.201

This odd conveyance202 helped attain a just result. Huck’s instincts were right. His father later “went for Judge Thatcher in the courts to make him give up that money. . . . That law trial was a slow business; appeared like they warn’t ever going to get started on it.”203 The net result, however, was that Huck’s father could not get the funds from Huck because, of course, Huck no longer legally possessed them. The transfer of the funds from Huck to Judge Thatcher prevented them from falling into the hands of an undeserving, abusive man who would dissipate them for his own ends. Judge Thatcher knew this, and perceptively read between the lines when Huck told him the scant details about the problem.

Hence, the actions of Judge Thatcher achieved a result that most observers would believe is just. A brief examination of the transaction, however, reveals a disturbing array of legal violations. Judge Thatcher was holding funds for a minor child. He transferred them to himself, which immediately raises the scepter of self-dealing when he says, “You want to sell all your property to me—not give it.”204 One who is the custodian of funds for another should not engage in such a transaction. Furthermore, the consideration for the transaction was woefully inadequate. Exchanging $3,000 for $1 is not fair payment. Thus, not only is Judge Thatcher, the guardian, self-dealing, but he is self-dealing to the tune of a $2,999 profit. In reply, it could be argued that, obviously, Judge Thatcher did not intend to keep the money, but only intended to shield Huck from his father’s monetary demands. Yet, if this is true, then the alleged exchange is nothing but a fraudulent transaction—itself a violation of law.

In addition, Judge Thatcher expressed willingness to manipulate the legal process itself to keep Huck’s father from challenging this maneuver.

201 HUCKLEBERRY FINN, supra note 18, at 35-36.
202 The discussion about the money is successful, but awkward. See WARD, supra note 23, at 109 ("Huck’s discussion with Judge Thatcher is a discussion between someone who is comfortable with legal language, and someone who is not. Huck can only transfer his money to the Judge for ‘consideration,’ a term that has to be explained to him.").
203 HUCKLEBERRY FINN, supra note 18, at 45.
204 Id. at 36.
in court. Huck observed:

[Pap's] lawyer said he reckoned he would win his lawsuit and get the money, if they ever got started on the trial; but then there was ways to put it off a long time, and Judge Thatcher knew how to do it.\textsuperscript{205}

While few would argue that the result is unjust, the shady means used to achieve that just result are problematic.\textsuperscript{206} Yet, in the circumstances, it appears as if violating the legal rules was the only possible way to achieve a result that was substantively just.\textsuperscript{207}

Similarly, in The Prince and the Pauper, another judge seeking protection for a child broke fundamental legal rules to achieve an ultimately just conclusion. A child, the starving prince in disguise as a pauper, fell on hard times and stole a pig.\textsuperscript{208} The pig's owner brought the child before a court of law to prosecute him for theft.\textsuperscript{209} The following transpired at his

\textsuperscript{205} Id. at 47.

\textsuperscript{206} This is in sharp contrast to Huck’s later interaction with a “new judge” regarding his guardianship. Id. at 42, 44. Although an effort was made to take Huck away from his abusive, alcoholic father, “[i]t was a new judge that had just come, and he didn’t know the old man; so he said courts mustn’t interfere and separate families if they could help it; said he’d druther not take a child away from its father.” Id. at 42. The new judge’s strict adherence to the rule as he knew it, rather than the facts as he could have found them, led to an unjust result. With time, the new judge got to know “Pap” better and concluded that “he reckoned a body could reform the old man with a shot-gun, maybe, but he didn’t know no other way.” Id. at 44. However, by this point his realization was too late to help Huck Finn.

\textsuperscript{207} Nevertheless, in a touch of irony that would either amuse or horrify Mark Twain, it was discovered that Tom Blankenship, the real-life character on whom Twain based Huck Finn, “did go out West and become a judge. BUSINESS MAN, supra note 14, at 265; see also Weeks, supra note 15, at 1E (“It’s long been known that in his general character, Huck Finn was based on Tom Blankenship, a poor white friend whom . . . Twain knew as a boy in Hannibal, Mo.”).

\textsuperscript{208} Id. at 200.
The judge meditated, during an ominous pause, then turned to the woman, with the question—"What dost thou hold this property to be worth?"

The woman curtsied and replied—

"Three shillings and eightpence, your worship—I could not abate a penny and set forth the value honestly."

The justice glanced around uncomfortably upon the crowd, then nodded to the constable and said—

"Clear the court and close the doors."

It was done. None remained but the two officials, the accused, the accuser, and Miles Herndon. . . . The judge turned to the woman again, and said, in a compassionate voice,—

"Tis a poor ignorant lad, and mayhap was driven hard by hunger . . . ; mark you, he hath not an evil face—but when hunger driveth—Good woman! dost know that when one steals a thing above the value of thirteen pence ha'penny the law saith he shall hang for it!"

The little king started, wide-eyed with consternation, but controlled himself and held his peace; but not so the woman. She sprang to her feet, shaking with fright, and cried out—

"O, good lack, what have I done? God-a-mercy, I would not hang the poor thing for the whole world! Ah, save me from this, your worship—what shall I do, what can I do?"

The justice maintained his judicial composure, and simply said—

"Doubtless it is allowable to revise the value, since it is not yet writ upon the record."

"Then in God's name call the pig eightpence, and heaven bless the day that freed my conscience of this awesome thing!"
As a result, the penalty imposed on the prince for the theft was a far milder one, and one more in keeping with the nature of his offense. All would agree that hanging a hungry child for stealing a mere pig is cruelly excessive. The judge knew this, and his wisdom was recognized as he was privileged to "grow in the public esteem and become a great and honored man." Yet, the way that this result was achieved was by convincing the witness to perjure herself, and then condoning her when she did. Honesty before legal tribunals is a well-respected foundation of any legal system whose courts endeavor to search for truth. Yet, here, the unnamed but merciful judge realized that only by sanctioning the sin of deception could he save the life of the young thief.

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211 Id. at 204 ("The justice wrote a while longer, then read the king a wise and kindly lecture, and sentenced him to a short imprisonment in the common jail, to be followed by a public flogging.").

212 Id. at 188.

213 In another scene in The Prince and the Pauper, an unjust trial proceeding ultimately led to a just result, but purely by accident and not by any particular planning. In that case, a man was convicted of a murder he did not commit and sentenced to die by being boiled alive. Id. at 128. The convict saw Tom Canty, dressed as king, and pleads with him for mercy:

O my lord the king, an' thou canst pity the lost, have pity upon me!—I am innocent—neither hath that wherewith I am charged been more than but lamely proved—yet I speak not of that; the judgment is gone forth against me and may not suffer alteration; yet in mine extremity I beg a boon.

"Give commandment that I be hanged!"

Id. at 128-29. Fortunately for the convicted man, his alibi was that at the time of the alleged murder, he was rescuing a drowning boy. Because Canty happened to witness this event, he recognized the man and ordered him to go free, saying, "It enrageth me that a man should be handed upon such idle, harebrained evidence." Id. at 129. Thus, the unjust punishment that would have taken place as a result of an unjust trial was averted. The ultimate conclusion—the release of the innocent man—was just, but purely by accident.

Tom Canty, again disguised as the King, intervened in a similar way to prevent injustice later in The Prince and the Pauper when a woman and her young daughter were unjustly convicted of and sentenced to death for witchcraft and having "sold themselves to the devil." Id. at 131. When "King" Canty learned of the slim evidence behind these convictions, he told the woman to make a storm to save her life and the life of her child. Id. at 133. When she was not able to do so, he took this as evi-
In *Tom Sawyer, Detective*, another just result came from a deeply flawed process that featured incompetence on the part of an attorney representing an innocent man accused of murder.\(^{214}\) The defendant was Rev. Silas Phelps, Tom Sawyer's uncle. He had been falsely accused of killing Jubiter, his neighbor and employee. Phelps had, admittedly, struck Jubiter a mild blow earlier on the day of the alleged murder. After that, Jubiter staggered away and met his long-lost-and-presumed-dead twin brother, Jake. Hoping to frame Phelps for his own murder, Jubiter killed Jake, switched clothes with him, and put on a disguise. Thus, when Jake's body was found, it was presumed to be Jubiter's, and Phelps was successfully framed. With time, and through the work of an overly sensitive conscience, Phelps came to believe that he was, indeed, guilty of cold-blooded murder.\(^{215}\)

The Phelps' family, alas, retained an incompetent defense attorney.\(^{216}\) As described by Huck Finn, the lawyer "was only a mud-turtle of a back-settlement lawyer and didn’t know enough to come in when it rains, as the saying is."\(^{217}\) The prosecution in the case got off to a good start, and as Huck reported, "made a terrible speech against the old man."\(^{218}\) The witnesses for the prosecution committed perjury and swore that Phelps had killed and buried "the deceased."\(^{219}\) During an ineffective cross-examination, Huck lamented that, "Tom and our lawyer asked them some questions; but it warn’t no use, they stuck to what they said."\(^{220}\)

Unfortunately, the efforts of Phelps' attorney to muddle through were ineffectual and incompetent. Alas for Phelps, "the mud-turtle he tackled the witness, but it didn’t amount to nothing; and he made a mess of it . . . The lawyer for the prostitution looked very comfortable, but the judge looked disgusted."\(^{221}\) Phelps' attorney fared no better when he interviewed dence that she was not a witch because, if she was, she surely would have used her powers to save the life of her innocent child. *Id.* at 132. Hence, again, pure accident and the convict's chance encounter with Canty was all that prevented grave injustice from taking place.

\(^{214}\) This trial is reportedly "based on Steen Steenson Bilcher's novel *The Minister of Veilby* (1829), a fictionalized account of a famous seventeenth-century Danish murder." John C. Gerber, *Foreword to Mark Twain, Tom Sawyer Abroad & Tom Sawyer, Detective* xi (Mark Twain Library ed. 1980) [hereinafter *Tom Sawyer, Detective*]. For a general discussion of the legal scenario found in *Tom Sawyer Abroad & Tom Sawyer, Detective*, see *McKeithan*, supra note 46, at 91-103.

\(^{215}\) *Tom Sawyer, Detective*, supra note 214, at 155-77.

\(^{216}\) *Id.* at 159. See *McKeithan*, supra note 46, at 94 ("Silas's lawyer . . . did not know much."); *id.* at 96 (lamenting that Silas's lawyer "blundered stupidly through the cross-examination").

\(^{217}\) *Tom Sawyer, Detective*, supra note 214, at 159.

\(^{218}\) *Id.*

\(^{219}\) *Id.* at 160.

\(^{220}\) *Id.* at 161.

\(^{221}\) *Id.* at 162.
his own witnesses. In Huck's words, "our lawyer took the witness and
done the best he could, and it was plenty poor enough."222

Not only was the attorney for the hapless Phelps incompetent, but he
let Tom Sawyer, a young and foolish boy, join him in presenting the case.
"Tom he set by our lawyer, and had his finger in everywheres, of course.
The lawyer let him, and the judge let him. He most took the business out
of the lawyer's hands sometimes . . . ."223 Huck tried to put readers at ease
by claiming that such a "partnership" was a usual and highly acceptable
occurrence:

You see, Tom was just the same as a regular lawyer, nearly,
because it was Arkansaw law for a prisoner to choose any-
body he wanted to help his lawyer, and Tom had had uncle
Silas shove him into the case, and now he was botching it and
you could see the judge didn't like it much.224

Thus, Tom Sawyer, Detective offers readers the bizarre spectacle of a
capital murder trial featuring an incompetent, confused defense attorney,
asisted by an unsophisticated, daydreaming young boy suffering from
chronic illusions of grandeur.225 This clearly was not a representation of
legal conduct that would inspire confidence. The problems were com-
pounded by the fact that the trial was overseen by a judge whose ability to
maintain order in his courtroom was questionable at best. At one point, he
was driven to "pulling his bowie and laying it on his
pulpit."226 Soon
thereafter, he became "so astonished and mixed up he didn't know what he
was about hardly."227

This would seem to be a surefire recipe for a miscarriage of justice.
Yet, Tom Sawyer—who should not have been acting as an attorney, should
not have been allowed to dominate the courtroom, and should not have
controlled the evidence—happened to solve the riddle of the murder
through crafty deductions, careful observations, and a good deal of luck.
As the judge noted, the result of Tom Sawyer's "lawyering" was "lifting a
wronged and innocent family out of ruin and shame, and saving a good and
honorable man from a felon's death, and for exposing to infamy and the
punishment of the law a cruel and odious scoundrel and his miserable crea-
tures!"228 Yet, this just result was achieved in spite of all the poor conduct

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222 Id. at 164.
223 Id. at 159.
224 Id. at 162.
225 See McKethan, supra note 46, at 103 (noting "[t]here is at least mild satire . . . in the com-
ments on the ignorant back-settlement lawyer, the noisy spectators in this frontier court of justice, and
the Roy Bean type of judge who displays a bowie knife to maintain respect for his decisions").
226 Tom Sawyer, Detective, supra note 214, at 163.
227 Id. at 168.
228 Id. at 176.
by the legal actors, and not through any skillful employment of the legal process by them. It also put Tom Sawyer in the triple role of lawyer, detective, and star witness—an improbable and flawed combination of roles. Yet, if these irregularities had not existed, the just result might not have been achieved.

A more sinister example of unjust means leading to a just (albeit harsh) end can be found in the sea trial contained in Roughing It, a semi-autobiographical account of Twain's early adulthood, particularly of his stay in Nevada. He remarks that: “In Nevada, for a time, the lawyer, the editor, the banker, the chief desperado, the chief gambler, and the saloon-keeper, occupied the same level in society, and it was the highest.” This negative view of the profession is reflected in the conduct of the nautical trial of Bill Noakes. It was uncontested that Bill Noakes had committed murder and that Captain Ned Blakely had the right and duty to see that he was punished for the offense. Unfortunately, Captain Blakely “had all a sailor’s vindictiveness against the quips and quirks of the law, and steadfastly believed that the first and last aim and object of the law and lawyers was to defeat justice.”

Thus, Blakely pursued a course of conduct that, like the trial of St. Joan, was directed toward achieving a pre-ordained outcome by any means possible, legal or illegal. As the captain of the ship, Blakely was acting in the capacity of judge, with a frightening disregard for the rudiments of legal process. At first, he objected to having a trial. When convinced it was necessary, he had the following conversation that clearly illustrates his disregard for the legal process:

“Mind you, I don’t object to trying him, if it’s got to be done to give satisfaction; and I’ll be there, and chip in and help, too; but put it off till afternoon . . . for I’ll have my hands

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229 MCKEITHAN, supra note 46, at 102 (noting that Tom Sawyer played the “role of both witness and defense attorney”).
230 ROUGHING IT, supra note 102, at 318.
231 This trial is discussed generally in Roam, supra note 8, at 704-05. As this commentator points out, Twain’s inclusion of this trial, among other things, advances his criticisms of the jury system: The Noakes trial is a sham. Yet the tale demonstrates that there are persons who not only distrust juries but see no need for them. The Captain and Twain share a sense of justice. . . . The Captain believed that if a jury was necessary for tradition’s sake, it was his duty to make sure the verdict was just. Twain apparently approved the Captain’s actions . . . .
Id. at 705.
232 ROUGHING IT, supra note 102, at 334.
233 Id. at 331.
234 See Roam, supra note 8, at 704-05 (“[Captain Blakely] agreed to a trial, as long as it took place after the hanging.”). Naturally, this trial is different in substance from that in Joan of Arc because the accused (Noakes) was guilty of the crime and the outcome was based on this fact. Id.
235 ROUGHING IT, supra note 102, at 334.
middling full till after the burying—"

"Why, what do you mean? Are you going to hang him *any-* how—and try him afterward?"

"Didn’t I *say* I was going to hang him? I never saw such people as you. What’s the difference? You ask a favor, and then you ain’t satisfied when you get it. Before or after’s all one—*you* know how the trial will go."

. . . The captains came in a body and pleaded with Capt. Ned not to do this rash thing. . . . They pleaded hard. Capt. Ned said:

"Gentlemen, I’m not stubborn and I’m not unreasonable. I’m always willing to do just as near right as I can. How long will it take?"

"Probably only a little while."

"And can I take him up the shore and hang him as soon as you are done?"

"If he is proven guilty he shall be hanged without unnecessary delay."

"*If* he’s proven guilty. Great Neptune, *ain’t* he guilty? This beats my time. Why you all *know* he’s guilty."

. . . .

. . . They finally convinced him that it was necessary to have the accused in court.236

With this inauspicious beginning, the trial of the murderous Noakes begins. In a clear affront to the rules governing the independence of juries, however, Captain Ned Blakely

turned a searching eye on the jury, and detected Noakes’s friends, the two bullies. He strode over and said to them confidentially:

"*You’re* here to interfere, you see. Now you vote right, do you hear?—or else there’ll be a double-barreled inquest here when this trial’s off, and your remainders will go home

\[236\] *Id.* at 334-35.
in a couple of baskets."

The caution was not without fruit. The jury was a unit—the verdict, "Guilty."

Clearly, this was a trial conducted with little respect for the law, and the jurymen were threatened with physical harm if they failed to achieve the preordained verdict. In spite of all these legal violations, the proceedings resulted in the correct conclusion—a verdict of "guilty" for the guilty party.

In his two-page story, The Judge's "Spirited Woman," Twain again presented an example in which justice was ultimately achieved only after the blatant violation of numerous legal rules. The guilty defendant had been charged, correctly, with killing the husband of a woman with young children who "had loved her husband with all her might." The penalty for such a murder was death. Unfortunately, the judges and the lawyers seemed to do all in their power to violate the rules of sound legal practice. The judge himself, through whose eyes the tale was told, admitted that "[n]one of us took any interest in the trial . . . ." In contemptuous disregard for the dignity of the occasion, the judge bragged that he "had [his] coat off and [his] heels up, lolling and sweating, and smoking . . . ." and recalled that the lawyers "all had their coats off, and were smoking and whittling, and the witnesses the same, and so was the prisoner." The jury promptly acquitted the truly guilty prisoner because they were "expecting him to do as much for them some time."

At first, this is a result that seems to be consistent with that in Joan of Arc where poor conduct by a judge led to an unfair result. The only difference is that here the unjust result is the release of a guilty party rather than the execution of an innocent party as occurred in Joan of Arc. However, the proceedings did not end here. After the unjust acquittal, the grieving widow asked "Judge, do I understand you to say that this man is not guilty that murdered my husband without any cause before my own eyes and my little children's, and that all has been done to him that ever justice and the

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237 Id. at 336.
239 See Roam, supra note 8, at 707-08 (describing Twain's critique of the judge).
240 Spirited Woman, supra note 238, at 136.
241 See id. (indicating that the wife "seemed to have her heart set on hanging [the defendant]")
242 Id.
243 Id.
244 Id.
245 Id.
law can do?" Once she verified that this was true, she pulled out a gun and killed the defendant in the courtroom herself. The judge admired this and "went out and took up a collection for her and her cubs, and sent them over the mountains to their friends."

Here, the ultimate result is fair in that the guilty party received the penalty that the law prescribed for his act, the party who administered the penalty was not prosecuted, and the impoverished widow was given assistance in starting her life over. Yet, this scenario is rife with legal wrongs. As a judge, the unnamed jurist was unjust in that he condoned a biased jury and took no professional care toward the proceedings in his chamber. As a citizen who aided and abetted the escape of the widow, he violated the law with impunity.

In another short sketch, Some Rambling Notes of an Idle Excursion, Twain presents another more frivolous example of a scenario in which poor judicial conduct in Bermuda led to a just result. The defendant in this suit, from whose perspective the sketch is told, was sued for the trapping death of two cats, named Sir John Baldwin and Hector G. Yelverton. The defendant's defense was that "the cat was of a low character and very ornery, and warn't worth a canceled postage-stamp, anyway, taking the average of cats here." Nevertheless, he lost the case and was held liable for the cats' demise.

He blamed his loss on the conduct of the magistrate who was inclined to act in his own self-interest rather than in the interest of justice. The defendant lamented that:

[T]hey give the magistrate a poor little starvation salary, and then turn him loose on the public to gouge for fees and costs to live on. What is the natural result? Why he never looks

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246 Id. at 136-37.
247 Id. at 137. This is not the only incident in Twain's fiction where the losing party to a lawsuit took the law into his or her own hands. As one commentator notes, "[s]ometimes, [Twain] seems to suggest, people must take the law into their own hands to prevent the wicked from escaping the punishment they deserve." Anastaplo, supra note 11, at 686 (emphasis added). Indeed, Huck Finn appears to believe that this is perfectly normal conduct. HUCKLEBERRY FINN, supra note 18, at 147. As he describes the long-standing family feud between the Grangerfields and the Shepardsons, young Huck comments that the dispute began when "[t]here was trouble 'bout something and then a lawsuit to settle it; and the suit went agin one of the men, and so he up and shot the man that won the suit—which he would naturally do, of course. Anybody would." Id. For a fuller discussion of the Grangerfield/Shepardson dispute, see Myers, supra note 196, at 581-82 (discussing in particular how the two families would bear firearms while attending the same church).
248 SPIRITED WOMAN, supra note 238, at 137.
249 MARK TWAIN, Some Rambling Notes of an Idle Excursion, in SKETCHES AND TALES, supra note 80, at 308-42 [hereinafter RAMBLING NOTES].
250 Id. at 331.
251 Id. at 331-32.
252 Id. at 332.
into the justice of a case—never once. All he looks at is which client has got the money. So this one piled the fees and costs and everything on to me. I could pay specie, don’t you see?253

This is an unjust way for a magistrate to do business. The dispensation of true justice requires that the one rendering decisions do so in a way that is not clouded by self interest or financial concern. As the defendant lamented, the result appeared to be “trouble and . . . destruction of confidence in the purity of the bench on account of a seven-shilling lawsuit about a cat!”254 Yet, the result was not truly unjust. The defendant did kill the cats in question. Thus, he should have been held liable for their demise, as he was here. What is lamentable, as he correctly notes, is that the legal process appears to be driven by self-interest and favor for the wealthy. 255 In this particular scenario, however, justice for the late Sir John Baldwin and Hector G. Yelverton required the imposition of sanctions on the felines’ unrepentant killer.256 This was exactly the result achieved at the end of the unjust process.

Another example of a just result after questionable legal conduct can be found in an early minor trial scene in Joan of Arc.257 Long before the tragic trial that forms the focus of the book, Joan was sued by the Paladin, who charged her with unlawfully breaching a contract to marry him, although no such engagement existed. Joan “declined to have counsel and elected to conduct her case herself,”258 even though she was an “ignorant peasant girl of sixteen . . . in [the] presence of the practised doctors of the law, and surrounded by the cold solemnities of a court[.]”259 This is clearly not a procedure that the judge should have allowed a minor child to pursue. In addition, the court was unfair to the Paladin. When his counsel attempted to respond to Joan’s well presented self-defense, “the court declined to hear it and threw out the case,”260 yet provided little explanation

253 Id.
254 Id.
255 This is not the only time that Mark Twain noted the perception, or reality, that wealth influenced the outcome of judicial proceedings. In The Gilded Age, one of the characters, Philip, had a complaint about the conduct of a railroad conductor. THE GILDED AGE, supra note 127, at 211. Although quite mild-mannered, Philip was inclined to bring legal action. He was advised against taking action by a justice of the peace, however, who lamented, “I hain’t a mite of doubt of every word you say. But suin’s no use. The railroad company owns all these people along here and the judges on the bench too. . . . ‘[L]east said’s soonest mended.’ You hain’t no chance with the company.” Id.
256 Rambling Notes, supra note 249, at 332.
257 JOAN OF ARC, supra note 5, at 82-83 (recounting Joan’s trial for breaching a contract to marry).
258 Id. at 83.
259 Id.
260 Id.
as to the reason.

As a result of this proceeding, Joan and her innocence were vindicated. She did not suffer the harsh consequences for a woman accused of unlawfully breaking an engagement to marry and the Paladin went on to become one of her most loyal supporters. There was little in the judicial conduct, however, that was praiseworthy. A young child was allowed to represent herself, a judge did not allow the Paladin to make his case at all, and the Paladin’s counsel was less than vigorous in pursuing his client’s interests before the tribunal. The result was, indeed, just. But the conduct of the legal actors left much to be desired.

Hence, as these cases illustrate, just results in Twain’s legal fiction often flow from unlikely circumstances. All too often, violations of legal rules are required, or, at a minimum, allowed to be employed in the pursuit of an ultimately just outcome. While readers are understandably gratified by the just results, the problematic conduct that gives rise to them should raise concerns.

B. Lawful Means and Unjust Ends

“They keep inside of the letter of the law all the time, and there ain’t no way to git hold of them.”

So said Huck Finn in Tom Sawyer Abroad when he observed an unrepentant swindler who continually and cleverly escaped punishment by using the intricacies of the law in his favor. Huck understood, in his simple way, that compliance with legal rules is not always synonymous with achieving a just result. Huck’s creator, Mark Twain, felt the same way. Thus, in the scenarios already discussed, Twain allowed fair results to spring from unjust actions by lawyers and judges. In some more unfortunate examples, however, he allowed compliance with legal rules and procedures to result in, or even cause, greatly unjust results.

For example, in stark contrast to the mercy shown to the pig stealer in The Prince and the Pauper, an impoverished cloth stealer in A Connecticut Yankee in King Arthur’s Court did not fare so well. In Connecticut Yankee, an eighteen year old girl with an infant was sentenced to death because she stole “a piece of linen cloth of the value of a fourth part of a cent, thinking to sell it and save her child.” The girl was starving because, by law, the husband who had been supporting her and their baby

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261 Id.
262 MARK TWAIN, TOM SAWYER ABROAD in TOM SAWYER, DETECTIVE, supra note 214, at 1, 74.
263 Id.
264 See supra note 208-13 and accompanying text.
265 CONNECTICUT YANKEE, supra note 52.
266 Id. at 356.
was inscripted to go to sea. This took from her the family’s only means of financial support.

At her trial, the girl’s case was conducted in full compliance with all applicable rules and according to an orderly process. The judge and the prosecuting officers had a healthy respect for law, and they followed it dutifully—with dreadful results. At the trial, the aggrieved owner of the stolen cloth testified to the facts, and then

[a] plea was made for [the girl], and her sorrowful story was told in her behalf. She spoke, too, by permission, and said she did steal the cloth, but that her mind was so disordered as of late, by trouble, that when she was overborne with hunger all acts, criminal or other, swam meaningless through her brain and she knew nothing rightly, except that she was so hungry! For a moment all were touched, and there was disposition to deal mercifully with her, seeing that she was so young and friendless, and her case so piteous, and the law that robbed her of her support to blame as being the first and only cause of her transgression; but the prosecuting officer replied that whereas these things were all true, and most pitiful as well, still there was much small theft in these days, and mistimed mercy here would be a danger to property . . . and so he must require sentence.

As was true in the stolen pig case, the owner of the property was horrified to learn the deadly consequence of his decision to bring the case to trial:

When the judge put on his black cap, the owner of the stolen linen rose trembling up, his lip quivering, his face as gray as ashes; and when the awful words came he cried out, “Oh poor child, poor child, I did not know it was death!” and fell as a tree falls. When they lifted him up, his reason was gone; before the sun was set, he had taken his own life. A kindly man; a man whose heart was right, at bottom.

Unlike the case in The Prince and the Pauper, however, the unjust result was not altered by allowing perjury or unsanctioned departure from the clear rule of law. The procedures appeared to be proper, the girl had representation, and she was allowed to be a witness on her own behalf. Nevertheless, in spite of—or because of—the full compliance with the law, the
starving girl was executed for her petty theft, and her infant was left motherless. The priest who comforted the girl at the gallows and into whose care she gave her child lamented, “Law is intended to mete out justice. Sometimes it fails. This cannot be helped. We can only grieve, and be resigned, and pray for the soul of him who falls unfairly by the arm of the law, and that his fellows may be few.” Thus, Connecticut Yankee leaves readers with a perfectly well conducted trial that, in the interest of compliance with the law, yielded an inherently unjust result about which readers “can only grieve and be resigned.”

In yet another example of misguided respect for the law in the same novel, the Yankee encounters his fellow humans held in slavery. Justice would have required defying the law that held them bound. However, the Yankee follows the law to the letter. He reasons, “I wanted to stop the whole thing and set the slaves free, but that would not do. I must not interfere too much and get myself a name for riding over the country’s laws and the citizens’ rights roughshod.” Thus, again, Connecticut Yankee allows the legal rules to be followed perfectly, at the expense of real justice.

In his sketch of the Clayton Case, Twain presents another scenario in which judges ensure that the letter of the law is carried out, even if the re-

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271 Id. at 355. The priest goes on to say: “A law sends this poor young thing to death—and it is right. But another law had placed her where she must commit her crime or starve, with her child—and before God that law is responsible for both her crime and her ignominious death!” Id.

272 Id. In yet another example from the same novel, Twain demonstrates again the callous attitude of legal actors to the plight of defendants on trial for their life. One condemned man said of his sentencer: “He ended by condemning me to die at noon on the 21st; and was so little concerned about it that he stopped to yawn before he named the date.” Id. at 32.

There is yet another brutal outcome in Connecticut Yankee when a hapless prisoner had been accused of entering the royal preserve lands and killing a stag. Id. at 153. The accused had, indeed, killed the stag and the penalty was death. The accusation was made by an anonymous informer, however, and as the narrator lamented: “Anonymous testimony isn’t just the right thing. . . . It was fairer to confront the accused with the accuser.” Id. Because the prisoner had not been convicted and had not confessed to the crime, he was tortured to force a confession from him prior to his death. Id. at 157. The prisoner was being tortured to confess because if he died unconfessed, those administering justice feared for their souls. In spite of torture, however, the man refused to confess, because if he confessed to the crime before he died, the law required that his property would be taken and his wife and son would starve. Id. Conversely, the prisoner’s wife, meanwhile, pleaded with her husband to confess so that he could die quickly without torture. Id. The narrator praised the selflessness of both husband and wife as he exclaimed:

Oh, heart of gold, now I see it! The bitter law takes the convicted man’s estate and beggars his widow and his orphans. They could torture you to death, but without conviction or confession they could not rob your wife and baby. You stood by them like a man; and you—true wife and true woman that you are—you would have brought him release from torture at cost to yourself of slow starvation and death.

Id. at 157. Here, the legal process may have justly determined that the prisoner had killed the stag, but the harsh consequences of this seemingly minor crime are morally reprehensible.

273 Id. at 200.

274 See id. This example differs significantly from the others. Here it was not a lawyer or a judge who was following the law to an unjust end. The Yankee’s attitude, however, is illustrative of the graver problems that arise when attorneys and judges share his attitude toward legal compliance.

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suit is unjust. As the tale began, Clayton was charged with killing Szczepanik. Although Clayton honestly "swore that he did not commit the murder, and that he had nothing to do with it," he was convicted and condemned to death. Just before Clayton ascended the gallows, it was discovered that Szczepanik, the alleged victim, was in fact still alive. Thus, Clayton was pardoned and all appeared to be well.

However, a man was killed. As it turned out, the man was not Szczepanik, but it was now necessary to try Clayton for the murder of the now-unnamed deceased. As evidenced by the trial transcript, the judges were very respectful of their office, knowledgeable in the law, and diligent in applying the law. As the chief justice, Lemaitre, opened the case, he presented the applicable legal rules:

> It is my opinion that this matter is quite simple. The prisoner at the bar was charged with murdering the man Szczepanik; he was tried for murdering the man Szczepanik; he was fairly tried, and justly condemned and sentenced to death for murdering the man Szczepanik. It turns out that the man Szczepanik was not murdered at all. By the decision of the French courts in the Dreyfus matter, it is established beyond cavil or question that the decisions of courts are permanent and cannot be revised. . . . The prisoner at the bar has been fairly and righteously condemned to death for the murder of the man Szczepanik, and, in my opinion . . . he must be hanged.

Then, however, the judges took up the complexity of blind adherence to the rules, and it became clear that Clayton would suffer the effects of such strict adherence:

> Mr. Justice Crawford said:

> "But your Excellency, he was pardoned on the scaffold for that."

> "The pardon is not valid, and cannot stand because he was pardoned for killing a man whom he had not killed. A man cannot be pardoned for a crime which he has not com-

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275 MARK TWAIN, From the "London Times" of 1904, in SKETCHES AND TALES, supra note 80, at 664.
276 Id.
277 Id.
278 Id. at 668.
279 Id.
280 Id. at 669.
281 Id.
282 Id. at 670.
mitted; it would be an absurdity."

"But our Excellency, he did kill a man."

"That is an extraneous detail; we have nothing to do with it. The court cannot take up this crime until the prisoner has expiated the other one."

Mr. Justice Halleck said:

"If we order his execution, your Excellency, we shall bring about a miscarriage of justice; for the governor will pardon him again."

"He will not have the pardon. He cannot pardon a man for a crime which he has not committed. As I observed before, it would be an absurdity."

After a consultation, Mr. Justice Wadsworth said:

"Several of us have arrived at the conclusion, your Excellency, that it would be an error to hang the prisoner for killing Szczepanik, but only for killing the other man, since it is proven that he did not kill Szczepanik."

"On the contrary, it is proven that he did kill Szczepanik. By the French precedent, it is plain that we must abide by the finding of the court."

"But Szczepanik is still alive."283

Alas for Clayton, the Court was strictly following the respect for the law which required that the earlier conviction stand. As a result, "it was found impossible to ignore or get around the French precedent. . . . Clayton was delivered over to the executioner. . . . The governor issued the pardon, but the Supreme Court was in duty bound to annul it, and did so, and poor Clayton was hanged yesterday."284 Thus, Clayton was hung for a murder he did not commit, and yet not prosecuted for a murder he did commit. Some might say that it all "evens out" and thus on some level the result is just. This is not the "justice," however, that is admired in a legal system.

In a final example of good lawyering that could not prevent an ultimately unjust outcome, Mark Twain offers the trial of Father Peter in The

283 Id. at 670-71.
284 Id. at 671.
Mysterious Stranger. In that work, the good-hearted, impoverished Father Peter finds a sack of gold coins in the road. Shortly after his find, Father Peter is falsely accused by the town astrologer of stealing those coins. He is quickly imprisoned, and a young lawyer, Wilhelm Meidling, prepares to defend him. Meidling took the case because he believed in Father Peter’s innocence, and because he loved Father Peter’s niece, Marget. He feared, however, that “a weak case on his side and all the power and prejudice on the other made the outlook bad.” Indeed, in the weeks and months leading up to the trial “[t]he astrologer was going around inflaming everybody against Father Peter,” and the outcome was grim. However, Meidling prepared diligently and professionally:

[Wilhelm Meidling] began his preparations with diligence. With more diligence than hope, in fact, for it was not a promising case. He had many interviews in his office with [the witnesses] and threshed out [their] testimony pretty thoroughly, thinking to find some valuable grains among the chaff, but the harvest was poor, of course.

This careful preparation was matched by a careful and thoughtful presentation at the trial. Although the spectators in the court laughed at Wilhelm Meidling, “he was doing as well as he could.” In addition, although he was deceived by the astrologer and tempted to present “a sarcastic little speech” in court, the opposing counsel also “finished quite seriously, and with dignity.” Ultimately—albeit with some supernatural intervention—Wilhelm Meidling won the case for Father Peter by offering the court rational, clever, and calm evidence that the astrologer could not have been the owner of the coins in question, because although the astrologer claimed that he found the coins two years prior to the time of Father Peter’s alleged theft, the date on the coins was the year of the theft. This was logical, sound factual proof of exactly the sort that an attorney should introduce in court to vindicate the innocent and shatter the false claims of

286 Id. at 618.
287 Id. at 619.
288 Id. at 618.
289 Id.
290 Id. at 619.
291 Id. at 665.
292 Id. at 667.
293 Id.
294 Id. at 668.
295 Id.
the guilty.

The court itself behaved in a similarly appropriate matter. Following the acquittal of Father Peter through Wilhelm Meidling’s sound arguments, the court resolved the case in an apparently just way: “The court tenders its sincere sympathy to the accused, and its deep regret that he, an innocent man, through an unfortunate mistake, has suffered the undeserved humiliation of imprisonment and trial. The case is dismissed.”

If The Mysterious Stranger had ended here with Father Peter’s acquittal, it would clearly be a wonderful example of good legal conduct leading to an outcome that is substantively just. However, the novella does not end here. The messenger who runs from court to prison tells Father Peter, “The trial is over, and you stand forever disgraced as a thief—by verdict of the court!” Told this false information, “[t]he shock unseated the old man’s reason... Marget flung herself on his breast and cried, and indeed everybody was moved almost to heartbreak.” Thus, readers are left with an example of good legal conduct that is, alas, powerless to prevent an ultimate miscarriage of justice. Although the legal system appears to work, it is impotent in preventing the wrong to Father Peter—a wrong that could not have been worse if, in fact, an unjust verdict had been delivered.

VI. TWAIN’S “CHAOS CASES”: MORAL AMBIGUITY

“Some works of literature may have their value in replicating chaos rather than in giving order.”

What conclusions, then, can be drawn from this? It is disturbing that Twain’s work suggests that there is little connection between the actions of judges and lawyers and the achievement of results recognized as just. He first establishes a paradigm that suggests that good results in good, and evil results in evil, but then he systematically destroys that paradigm in so many of his tales. Two final novels, however, are well worth exploring. They present outcomes which are morally dubious. In one, the conduct of the attorney and judges is good. In another, the conduct of the trial is bad. Both, however, have outcomes difficult to classify as truly “just” or “unjust.” These morally doubtful outcomes complicate the mix even more.

In Pudd’nhead Wilson, perhaps the most discussed lawyer novel in the Twain canon, Twain presented lawyers and judges who behaved rea-
reasonably well, but achieved a result that is morally questionable. This tale is "half melodramatic detective story, half bleak tragedy" and it has been called "Twain's best courtroom presentation." A sad tale of race and law, this is also the last of Twain's novels to deal with the South.

Twain began the tale with a curious "Whisper to the Reader" in which he noted the seriousness with which he approached the legal subject matter that he tackled in the novel:

A person who is ignorant of legal matters is always liable to make mistakes when he tries to photograph a court scene with his pen; and so, I was not willing to let the law-chapters in this book go to press without first subjecting them to rigid and exhausting revision and correction by a trained barrister—if that is what they are called.

With this "Whisper" in mind, the story began in the small, pre-Civil War, southern town of Dawson's Landing. The plot revolved around Roxy, a slave woman who gave birth to a son, Valet de Chambers, on the same day that her master's wife also gave birth to a son, Tom Driscoll. Because Roxy feared that she and her son might someday be separated if either she or he is ever "sold down the river," she made the desperate deci-
sion to switch the infants so that her son would grow up as the heir to privilege while the true heir lived the harsh life of a slave.\footnote{308}

Three major legal figures inhabited the small world of Dawson's Landing—Judge York Leicester Driscoll and lawyers Pembroke Howard and David Wilson. Judge Driscoll, whom some critics believe was modeled on Twain's own father,\footnote{309} enjoyed an exalted status as “the town's leading citizen”\footnote{310} although he was not always a likeable character.\footnote{311} When the novel opened, Driscoll was:

about forty years old, Judge of the county court. He was very proud of his old Virginian ancestry, and in his hospitalities and his rather formal and stately manners he kept up its traditions. He was fine, and just, and generous. To be a gentleman . . . was his only religion, and to it he was always faithful. He was respected, esteemed, and beloved by all the community. He was well off, and was gradually adding to his store.\footnote{312}

Driscoll “could be a freethinker and still hold his place in society because he was the person of most consequence in the community, and therefore could venture to go his own way and follow out his own notions.”\footnote{313} More importantly, Judge Driscoll was also the uncle of the real Tom Driscoll, and believed himself to be the uncle of the “fake” Tom Driscoll, Valet de Chambers, on whom he doted.\footnote{314}

The lawyer Pembroke Howard was the town's “second citizen.”\footnote{315} He was, at the novel's start, “a lawyer and bachelor, aged about forty, [who] was another old Virginia grandee with proved descent from the First Families. He was a fine, brave, majestic creature, a gentleman according to the nicest requirements of the Virginian rule, a devoted Presbyterian, an authority on the ‘code.’ . . . He was very popular with the people, and was the Judge's dearest friend.”\footnote{316}

Howard and Judge Driscoll enjoyed a close friendship. “Although Driscoll was a free-thinker and Howard a strong and determined Presbyte-
rian, their warm intimacy suffered no impairment in consequence. They were men whose opinions were their own property and not subject to revision and amendment, suggestion or criticism, by anybody, even their friends. 317

Into this staid legal community of Dawson’s Landing entered David Wilson, an outsider. 318 As Twain describes it:

[Wilson] had wandered to this remote region from his birthplace in the interior of the State of New York, to seek his fortune. He was twenty-five years old, college-bred, and had finished a post-college course in an eastern law school . . . . But for an unfortunate remark of his, he would no doubt have entered at once upon a successful career at Dawson’s Landing. 319

Alas, in his early years in Dawson’s Landing, Wilson made a joke about wanting to have half a dog. 320 The joke went over the heads of the townspeople and earned him his derogatory nickname, “Pudd’nhead,” and twenty years of exclusion from the community. 321 However, Wilson was industrious and was proud of the fact that although he might never get a case or a client:

... I did fit myself well for the practice of law. ... I never got a chance to try my hand at it, and I may never get a chance; and yet if I ever do get it I shall be found ready, for I have kept up my law-studies all these years. 322

During his long years as an outsider to Dawson’s Landing society,
Wilson made a living surveying land, and pursued his hobby of fingerprinting. He fingerprinted his fellow citizens and, importantly, took a set of prints of the two infants, Tom Driscoll and Valet de Chambers, before Roxy switched them. Thus, for twenty years Wilson had hidden evidence of their true identities.

Meanwhile, two Italian twins moved to the tranquil world of Dawson’s Landing and livened up the staid southern town. In particular, one of the twins, Luigi, challenged the false Tom to a duel. Rather than fight to protect the family honor, “Tom” took Luigi to court. Judge Driscoll was outraged that the young man he believed was his nephew had challenged Luigi in court rather than fight him. Judge Driscoll raged, “You cur! you scum! you vermin! Do you mean to tell me that blood of my race has suffered a blow and crawled to a court of law about it? Answer me!”

This aspect of Wilson’s character was influenced by the late nineteenth century interest in fingerprinting. See A LITERARY LIFE, supra note 10, at 194 (“[Twain] had been reading Sir Francis Galton’s just-published book, Finger Prints, and was fascinated by this newly discovered technique for crime detection. Its pages suggested to him a climactic murder trial.”). Interestingly, Twain’s fascination with fingerprints as a tool for catching culprits was cited recently by scholars drawing analogies between fingerprints and DNA identification:

One wonders if a modern-day version of Twain’s vivid character [Wilson] would have the same affinity for collecting samples of DNA for law enforcement purposes. As law enforcement agencies the world over have been amassing huge collections of fingerprints since the closing days of the nineteenth century, so too have they recently begun to collect, organize, analyze, and store collections of DNA samples for forensic purposes.


Ironically, even Tom’s mother, Roxana, adopted the old Virginia code of honor. When she learned that her son sued rather than fight, she began “glowering down upon him with measureless contempt written in her face.” In another one of his works, Mark Twain had a different character express a similar perspective on going to the law to avenge wrongs. In the short story, A Dying Man’s Confession, a man discovered that his wife and child were murdered. Mark Twain, A Dying Man’s Confession, in SHORT STORIES, supra note 285, at 229. In his despair, he decided to avenge the murders himself and cried out:
is ironic, of course, that this negative view of law as the tool for resolving disputes was held by the town’s leading judicial figure—something that does not bode well for confidence in the legal system.

Sadly, one night, Judge Driscoll was found murdered. Although the false Tom (Valet de Chambers) had actually killed Driscoll, all the circumstantial evidence pointed to Luigi because he was found near the scene of the crime on the night of the murder and his bloodied knife was found near the body. Furthermore, the earlier duel created a presumed motive for a violent outbreak between Luigi and the ashamed “uncle.”

Luigi retained Wilson as his defense counsel, thus giving him legal employment at long last. Wilson took the case for a noble end. He was convinced of Luigi’s innocence, and told the guilty “grieving nephew,” “I can’t believe Luigi killed your uncle, and I feel very sorry for him. It makes me blue.”

The first day of the trial demonstrated that this proceeding would, by and large, feature lawyers and judges behaving admirably. The prosecuting attorney was Pembroke Howard. Although he could be accused of excessive drama, he generally acted in accord with legal rules and the expectations for a competent, ethical lawyer. Although the man he accused was innocent of the crime, the circumstantial evidence did favor Howard’s

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Did I appeal to the law — I? Does it quench the pauper’s thirst if the king drink for him? Oh, no, no, no! I wanted no impertinent interference of the law. Laws and the gallows could not pay the debt that was owing to me! Let the laws leave the matter in my hands and have no fears: I would find the debtor and collect the debt.

_id._

330 See Fiedler, _supra_ note 301, at 493 (“The real demonstration of the unworthiness of the false Tom is his running to the courts for redress in preference to facing a duel.”); West, _supra_ note 300, at 231 (“Upon being assaulted, a gentlemen responds on the field of honor, and not in a court of law.”).

331 _PUDD’NHEAD WILSON, supra_ note 305, at 95.

332 _Id._ at 106.

333 _Id._

334 _Id._ at 96.

335 _Id._ at 103.

336 For example, the crowd witnessing the trial was repeatedly kept in order. At one point, “a thunder-crash of applause followed and the house sprang to its feet, but was quickly repressed by official force and brought to order again.” _Id._ at 111. One scholar notes that:

The trial contains none of the satire found in Twain’s earlier literature. The lawyers, judges, and jury all serve an intelligent, efficient function in the trial. Even the courtroom spectators are not satirized. They do forget themselves sometimes and have to be called to order, but they serve primarily to reflect the jury’s reaction to developments in the trial. . . . The legal process is as much a hero as Pudd’n’head, for it provides a formal, fair demonstration of innocence. The trial also evidences a change in Twain’s attitude toward lawyers and the law. His prior satire indicated that he believed that the legal process interfered with the administration of justice, but [here] Twain used the legal process as the best means of obtaining justice.

Roam, _supra_ note 8, at 715-16.


338 _Id._ at 4, 58.
Howard set out to show by a chain of circumstantial evidence without break or fault in it anywhere, that the principal prisoner at the bar committed the murder; that the motive was partly revenge, and partly a desire to take his own life out of jeopardy. . . . a crime which was the basest known to the calendar of human misdeeds—assassination; that it was conceived by the blackest of hearts and consummated by the cowardliest of hands; a crime which had broken a loving sister’s heart, blighted the happiness of a young nephew . . . brought inconsolable grief to many friends, and sorrow and loss to the whole community. 340

As Howard’s case gained strength, “[p]eople were sorry for Pudd’nhead; his budding career would get hurt by this trial.” 341 It seemed as if “the poverty and weakness of Wilson’s case lay exposed to the court.” 342

The evening after the first day of the trial, the despondent Wilson headed home and tried to consider what strategy might save his client, in whose innocence he still trusted. 343 Later that evening, the guilty, false Tom visited Wilson and gloated over the hapless attorney’s futile efforts. 344 While Wilson looked through his fingerprint collection trying to find one that matched the bloody print on the knife used to kill Judge Driscoll, “Tom” made a snide comment about Wilson’s hobby. 345 In the course of doing so however, he left his own fingerprint behind. 346 Wilson soon realized to his horror that: (a) it was the same fingerprint as the one found on the murder weapon; (b) it was not the same fingerprint as that of the infant Tom Driscoll; and (c) it was the same fingerprint as that of the infant Valet de Chambers. 347

Now Wilson had the evidence he needed to prove that his client, Luigi, could not have been the murderer since his fingerprints did not match those found on the knife. So, when Wilson returned to court the next day, he began with what appeared to be—and in fact, was—a well-reasoned, logical argument. 348 He then pulled out his fingerprints to make his case for
Luigi’s innocence. Initially, when the trial spectators saw the fingerprints, “the tense and funereal interest vanished out of their faces and the house burst into volleys of relieving and refreshing laughter.”

Undeterred, however, Wilson remained steadfast and calm even in the face of the crowd’s ridicule. He diligently proceeded to demonstrate that Luigi was innocent because his fingerprints did not match the fatal fingerprints on the knife. This proof made Wilson a hero in Dawson’s Landing. His hard work allowed the truth to come to light and set an innocent man free from unjust punishment. Thus far, this would suggest that good legal behavior resulted in a good legal result. Wilson’s contribution was “placing law in Dawson’s Landing on a less subjective basis than before. His fingerprinting procedures put an end to the legality of sheer emotion.”

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349 Id. at 108
350 Id.; see also MCKEITHAN, supra note 46, at 36 (lamenting that “[w]hen he turned to his collection of fingerprints, the people were amused, for they had often made fun of this childish hobby of his”).
351 PUDD’NHEAD WILSON, supra note 305, at 111.
352 See also West, supra note 300, at 240-41. West notes:
The case for his heroism (endorsed by nineteenth-century critics far more consistently than twentieth) is straightforward: Pudd’nhead is smart, even a genius. He is inventive, clever, and legalistic . . . . He understands the community and the community’s foibles better than do its members. He is shunned for twenty years, but perseveres, and finally comes into his own. He goes from town fool to town mayor, and he does so through the honorable means of success in the law. He is neither materialistic nor greedy. He is funny. He rises in popularity as he brings Tom, the villain, down. He brings both law and science to a relatively lawless and superstitious community. He is respectful of the community he seeks to reform. He knows human nature, he is insightful, and finally, of course, he is successful.

Id.

353 See POETHICS, supra note 27, at 56 (“Pragmatism, hard work, personal magnetism, verbal acumen, and, above all, the appearance of superior knowledge . . . . allow Pudd’nhead, a ‘nice’ lawyer, to win.”); Gillman & Patten, supra note 76, at 90 (“. . . Mark Twain, champion of the subversive, also championed the law . . . . that resolves confusions about identity, restoring and enforcing the fundamental distinctions of society.”).
354 Some critics, however, are less complimentary of Wilson’s role as a lawyer and view him as a mere machine. See Henry Nash Smith, Pudd’nhead Wilson as Criticism of the Dominant Culture, in PUDD’NHEAD WILSON, supra note 305, at 253-54 (noting Mark Twain’s comment to his wife that “I have never thought of Pudd’nhead as a character, but only as a piece of machinery—a button or a crank or a lever, with a useful function to perform in a machine, but with no dignity above that”); West, supra note 300, at 241 (“Twain himself referred to Wilson’s role in the novel as a mere ‘machine.’ Surely author’s intent should count for something.”). This mechanistic view of Pudd’nhead is consistent with the view of those who believe that the legal process as a whole was represented in a mechanical way. See id. at 242 (“Disputes are resolved in court, advocated by lawyers, decided by neutral judges, according to agreed upon rules.”).
355 John M. Brand, The Incipient Wilderness: A Study of Pudd’nhead Wilson, in PUDD’NHEAD WILSON, supra note 305, at 323. See also MISUNDERSTOOD RELATION, supra note 3, at 354 (noting that in the novel “a trial is used to provide a dramatic confrontation between rational methods of inquiry and the nonrational side of human nature”).
At this point, however, the case becomes questionable. Wilson’s obligation was to defend his client. He successfully did so, and thus he could have ended his representation once he got Luigi “off the hook.” Besides showing that Luigi’s fingerprints were not the ones on the knife, however, Wilson disclosed two additional facts: (1) The fingerprints belonged to the man known for twenty years as Tom Driscoll, believed to be the nephew of the deceased Judge Driscoll, and (2) Tom Driscoll was really Valet de Chambers, and vice versa.

These disclosures are morally ambiguous. On the one hand, through these disclosures, Wilson ensured that the guilty party would not go unpunished. He also freed the man who suffered for years as a slave known as Valet de Chambers. Both of these noble ends advance justice. Viewed in this light, it might be said that this case is like the paradigm in *Tom Sawyer* where a good lawyer—practicing good law or good science or both—used the legal system to bring truth to light.

On the other hand, Wilson’s disclosures as to Tom’s true identity led to the novel’s ultimately tragic end. Wilson’s disclosure that Tom was the true murderer and the real slave, resulted in both justice and injustice. The just result was that “[t]he false heir made a full confession and was sentenced to imprisonment for life.” The unjust result, however, was that when Driscoll’s estate was found to be insufficient to pay his creditors, “Tom” was declared to be slave property who could therefore be sold as

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356 See *MISUNDERSTOOD RELATION*, supra note 3, at 85 (“The novel ... places no emphasis on Wilson’s legal skills, or his acculturation as a lawyer; he owes his great success in the Italians’ trial to his scientific hobby. He is the American as garage tinkerer, not as lawyer.”); Porter, *supra* note 311, at 164 (“His intelligence is proven, and his ascension to authority indicated at the end, but only after what amounts to Twain’s extended humiliation of him as a detective who is remarkably dull-witted when it comes to reading his evidence.”); Fiedler, *supra* note 301, at 496 (“[T]he false heir made a full confession and was sentenced to imprisonment for life.”)

357 Others have suggested that Wilson’s role as lawyer was merely secondary to his role as detective:

Pudd’nhead is presented not only as a conscientious lawyer, but as a detective; he discovers the truth through his relentless preparation, creative deductions, and clever guesses. Pudd’nhead methodically proves or disproves one point after another, until it is clear to everyone in the courtroom that his client is innocent and “Tom” is guilty. This creative presentation is successful ... for it contains the logic, pacing, and drama that are the marks both of experienced trial lawyers and skilled storytellers.

Roam, *supra* note 8, at 715. It has also been suggested that Pudd’nhead wins only when he can play by the rules that have been established by the community in which he finds himself:

Pudd’nhead does not achieve his legal triumph by convincing the community to abandon its noxious noble and racial codes in favor of the morally preferable legalistic code of individual responsibility. ... Pudd’nhead triumphs at the book’s conclusion, not by transforming the community’s sense of law so as to match the liberal norms with which it has come into conflict, but rather through a masterful, even Herculean, act of interpretation, Pudd’nhead reads the legal text through the prism of the community’s norms.

West, *supra* note 300, at 227-28 (emphasis omitted).
such. Twain wrote:

[The creditors] rightly claimed that "Tom" was lawfully their property and had been so for eight years; that they had already lost sufficiently in being deprived of his services during that long period, and ought not to be required to add anything to that loss; that if he had been delivered up to them in the first place, they would have sold him and he could not have murdered Judge Driscoll, therefore it was not he that really committed the murder, the guilt lay with the erroneous inventory. Everybody saw that there was reason in this. Everybody granted that if "Tom" were white and free it would be unquestionably right to punish him—it would be no loss to anybody; but to shut up a valuable slave for life—that was quite another matter.

Thus, "[a]s soon as the Governor understood the case, he pardoned Tom at once, and the creditors sold him down the river." Hence, the trial ultimately ends with the exact tragedy that Roxy had sought to prevent: the tragedy of her son's sale "down the river." Alas, it is Wilson, the hero-protagonist, who sends him to that journey.

Immediately after the exoneration of Luigi and the disclosure of the true identity of Tom and Valet de Chambers, Wilson became the fickle town's hero. "Troop after troop of citizens came to serenade Wilson, and require a speech... for all his sentences were golden, now, all were marvelous. His long fight against hard luck and prejudice was ended; he was made a man for good." Yet, it is unclear whether the conduct of the trial—fully in compliance with the goals of rationality, order, complete disclosure, and scientific proof—yielded a just result. On the one hand, it could be said that the unjust part of the outcome was not the direct result of

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358 Id. at 114-15.
359 Id.
360 Id. at 115.
361 The tragic irony of this outcome has been noted by commentators. See, e.g., West, supra note 300, at 241 ("[T]here is something wrong with the idea that Mark Twain—who gave us Huckleberry Finn, Jim, the Mississippi River, and the journey up the Mississippi River as a powerful symbol of freedom and salvation—would create a hero who sends a slave down the river... no matter how evil the slave.") (emphasis omitted); id. at 244 ("What Wilson doesn't gain is a more just community, and what Tom doesn't gain, of course, is justice.").
362 MCKEITHAN, supra note 46, at 38 ("Pudd'nhead's long fight for recognition was over; he was the hero of the town."); West, supra note 300, at 242 (noting that at the novel's end, Pudd'nhead "achieves the popularity he had so long craved—he becomes successor to the title 'first citizen' previously held by the murdered judge").
363 PUDD'NHEAD WILSON, supra note 305, at 113-14.
Wilson's conduct, but, instead, it was the result of the slave system enshrined in law that allowed the sale of human beings. Yet Wilson did not have to disclose the switch which led to this tragic outcome. On the other hand, had Wilson not disclosed the false Tom's status, it is also likely that Tom would have been executed for the crime of murder. It also would have meant that the real Tom Driscoll would have lived the rest of his life as a slave. These ambiguities tinge with tragedy that which might have been a triumph of justice.

Twain's The Gilded Age also presents a trial with a morally ambiguous result. Unlike Pudd'nhead Wilson, however, the entire trial in The Gilded Age is full of misconduct by lawyers and judges. Co-authored with Charles Dudley Warner, a lawyer and journalist, this novel allowed Twain to present an outrageous attack on his two legal pet peeves—the jury system and the insanity plea. The results are both humorous and disturbing.

The beginning of the novel illustrated the questionable status of judges and lawyers. An unsophisticated country character remarked:

Well, I wisht I knowed [the judge's schedule.] I got a prime sow and pigs in the cotehouse, and I hain't got no place for to put 'em out. If the jedge is a gwyne to hold cote, I got to roust 'em out, I reckon. But tomorrer'll do, I suspect.

West, supra note 300, at 242-43 ("Pudd'nhead himself does not sell Tom down the river. Pudd'nhead simply supplies the most coherent, most correct, and most powerful interpretation of the community's texts. It was those texts that sold Tom down the river. The law did it, not the lawyer.").

West wrote:

Wilson does sell Tom down the river.... All Wilson has to do to show who killed the victim is to prove that the fingerprints on the knife are Tom's. Although it has escaped notice of most commentators on this novel, there is no reason either in law or liberal logic that this "heroic" lawyer-protagonist has to go the extra step and expose Tom as a slave. He chooses to. And it is because he chooses to that Tom is delivered downstream.

Id. at 243.

For general discussions of the legal representations in The Gilded Age, see, for example, MCKEITHAN, supra note 46, at 10-20 (discussing the Laura Hawkins's trial); Roam, supra note 8, at 708-10 (describing the courtroom performance of Laura's defense attorney). For background as to the circumstances surrounding the writing of The Gilded Age, and the relationship between Twain and Warner, see Marvin Felhein, Introduction to The Gilded Age, supra note 127, at viii-xviii.

For discussion of the division of authorship responsibilities between Twain and Warner, see MCKEITHAN, supra note 46, at 7 (describing Twain's reliance on Warner's legal experience).

See infra notes 384-95 and accompanying text.

The Gilded Age, supra note 127, at 25. However, at slight inconsistency with the disrespect for the office of judge, see id. at 55 (noting that Sir Hawkin's "title of 'Squire' came into vogue again, but only for a season, for, as his wealth and popularity augmented, that title, by imperceptible stages, grew up into 'Judge;' indeed, it bade fair to swell into 'General' bye and bye"). Lawyers, too, get a bad rap early on when we are told the reasons why Philip, a likeable, upright character, abandons a career in law:
Clearly, “jedges” were not well respected, consequential people in this town!

Against this backdrop, the drama unfolded. Laura Hawkins, a beautiful young Washington socialite, was charged with first-degree murder in the death of Selby. It was uncontested that Laura murdered Selby when she shot him with a pistol at close range. She did this, presumably, in retribution for the fact that many years earlier he had “married” her and then left her, disclosing that he was, in fact, married to another all along. When Laura discovered Selby’s whereabouts, she followed him from Washington to New York to kill him. From the beginning, the legal proceedings in Laura’s trial were peppered with buffoons. At the grand jury inquest, for example, the grand jury heard irrelevant testimony from muddling physicians:

Dr. Puffer insisted that the man died from the effects of the wound in the chest. Dr. Dobb as strongly insisted that the wound in the abdomen caused death. Dr. Golightly suggested that in his opinion death ensued from a complication of the two wounds and perhaps other causes. He examined the table waiter, as to whether Col. Selby ate any breakfast, and what he ate, and if he had any appetite. The jury finally threw themselves back upon the indisputable fact that Selby was dead, that either wound would have killed him (admitted by the doctors), and rendered a verdict that he died from pistol-shot wounds inflicted by a pistol in the hands of Laura Hawkins.

Laura was comforted by Colonel Sellers, her ally, who assured her: “[D]on’t you be down. We’ll get you off—the best counsel, the lawyers in New York can do anything; I’ve read of cases.” At this point, the tainted characters of New York’s lawyers and judges were introduced. As Laura awaited her trial, she was “doing her best, by the help of able counsel, to corrupt the pure fountain of criminal procedure in New York.” Part of this “corruption” involved efforts by Laura’s attorney to win public opinion

Philip took the advice of friends and read law. Law seemed to him well enough as a science, but he never could discover a practical case where it appeared to him worth while to go to law, and all the clients who stopped with this new clerk in the anteroom of the law office where he was writing, Philip invariably advised to settle—no matter how, but settle—greatly to the disgust of his employer who knew that justice between man and man could only be attained by the recognized processes, with the attendant fees. Besides Philip hated the copying of pleadings, and he was certain that a life of ‘whereases’ and ‘aforesaid’ and whipping the devil around the stump, would be intolerable.

Id. at 97.

370 THE GILDED AGE, supra note 127, at 325.
371 Id. at 329.
372 Id. at 348.
over to her side and to delay the trial proceedings so that the lurid details of the murder could fade from the public’s memory. They succeeded on both of these fronts. The press reported sympathetically on the young, beautiful defendant. More importantly, the trial was postponed, leading the ebullient Colonel to exclaim, “Bless my life, what lawyers they have in New York! Give them money to fight with, and the ghost of an excuse, and they would manage to postpone anything in the world, unless it might be the millennium or something like that.”

Lawyers and judges were presented, from the start, as money-hungry sportsmen in pursuit of a game rather than as honorable guardians of the law diligently intent on discovering truth. Indeed, the whole trial process was viewed as a sport in which:

[T]here is no enjoyment so keen to certain minds as that of looking upon the slow torture of a human being on trial for life, except it be an execution; there is no display of human ingenuity, wit and power so fascinating as that made by trained lawyers in the trial of an important case, nowhere else is exhibited such subtlety, acumen, address, eloquence. . . . How the quick eyes of the spectators rove from the stolid jury to the keen lawyers, the impassive judge, the anxious prisoner. Nothing is lost of the sharp wrangle of the counsel on points of law, the measured decisions of the bench, the duels between the attorneys and the witnesses. . . . Nothing delights it more than the sharp retort of a witness and the discomfiture

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For a general discussion of female killers in law and literature, see Marie Fox, *Crime and Punishment: Representations of Female Killers in Law and Literature*, in *TALL STORIES*, supra note 4, at 145-78. It is unclear what role Laura’s gender played in her acquittal, although the text of *The Gilded Age* asserts that, “the woman who lays her hand on a man, without an exception whatsoever, is always acquitted by the jury.” *THE GILDED AGE*, supra note 127, at 96.

Laura Hawkins’ lawyer directed much of his efforts toward public relations, whether ethical or not:

Her friends . . . retained for her the most distinguished criminal lawyer in New York. Through the management of Braham, Laura’s lawyer, public sympathy for her was gradually born, and in order to give it time to grow he secured two postponements of the trial . . . on the pretext that some needed evidence had not been obtained . . . [H]e saw to it that the newspapers carried stories from time to time concerning Laura’s beauty, her languishing in prison . . . and her works of charity.

*McKeithan*, supra note 46, at 11.

*THE GILDED AGE*, supra note 127, at 359-60. This was not the last time that Captain Sellers would “compliment” the ability of New York attorneys to achieve any result desired — for a sufficient fee. See *id.* at 393, noting Sellers’ boast that:

To-morrow we can send a million to New York and set the lawyers at work on the judges; bless your heart they will go before judge after judge and exhort and beseech and pray and shed tears. They always do; and they always win, too. And they will win this time. They will get a writ of habeas corpus, and a stay of proceedings, and a supersedeas, and a new trial and a nolle prosequi, and there you are! That’s the routine, and it’s no trick at all to a New York lawyer. That’s the regular routine.

*Id.*
of an obnoxious attorney.\(^{376}\)

As the trial approached, attorney and judicial behavior declined rapidly. The state’s attorney appeared to have behaved properly.\(^{377}\) Indeed, he did not capture the attention of the crowds when he entered the court.\(^{378}\) Alas, the same cannot be said of the other two players in the scenario. In contrast to the low-keyed arrival of the state’s attorney, the entrance of Laura’s defense counsel was described quite dramatically:

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\text{[E]verybody in the courtroom knew Mr. Braham, the great criminal lawyer, and he was not unaware that he was the object of all eyes as he moved to his place, bowing to his friends in the bar. A large but rather spare man, with broad shoulders and a massive head, covered with chestnut curls which fell down upon his coat collar and which he had a habit of shaking as a lion is supposed to shake his mane... Mr. Braham wore a brown frock coat buttoned across his breast, with a rose-bud in the upper button-hole, and light pantaloons. A diamond stud was seen to flash from his bosom, and as he seated himself and drew off his gloves a heavy seal ring was displayed upon his white left hand. Mr Braham, having seated himself, deliberately surveyed the entire house, made a remark to one of his assistants, and then taking an ivory-handled knife from his pocket began to pare his finger nails, rocking his chair backwards and forwards slowly.}^{379}
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This image is accompanied by an equally unflattering portrait of the judge in the case. Although the portrait of Judge O’Shaunnessy initially appears to be an ode in praise of a self-made man, it is also clear that he has grown into a self-serving political operative. He was:

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a \text{gentleman in black broadcloth, with sandy hair, inclined to curl, a round, reddish and rather jovial face, sharp rather than intellectual, and with a self-sufficient air. His career had nothing remarkable in it. He was descended from a long line of Irish Kings, and he was the first one of them who had ever come into his kingdom—the kingdom of such being the city of New York... [H]e had ambition and native shrewdness, and he speedily took to boot-polishing, and newspaper hawk-}
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\(^{376}\) Id. at 371.
\(^{377}\) McKethan, supra note 46, at 18 (noting that in contrast to the flowery oratory of Laura Hawkins’ defense counsel, the State’s attorney “poured out enough cold facts to worry the friends of Laura”).
\(^{378}\) The Gilded Age, supra note 127, at 371.
\(^{379}\) Id. at 372.
ing, became the office and errand boy of a law firm, picked up knowledge enough to get some employment in police courts, was admitted to the bar, became a rising young politician, went to the legislature, and was finally elected to the bench . . . Judge O'Shaunnessy never had a lucrative practice nor a large salary, but he had prudently laid away money—believing that a dependent judge can never be impartial—and he had lands and houses to the value of three or four hundred thousand dollars. Had he not helped to build and furnish this very Court House? Did he not know that the very "spittoon" which his judgeship used cost the city the sum of one thousand dollars?  

The account of the judicial proceedings was presented with great sarcasm, beginning with the indictment. As he was fond of doing, Twain used this occasion to mock the legal profession's verbosity, as he reported that Laura was charged

with the premeditated murder of George Selby, by shooting him with a pistol, with a revolver, shot-gun, rifle, repeater, breech-loader, cannon, six-shooter, with a gun or some other weapon; with killing him with a slingshot, a bludgeon, carving knife, bowie knife, pen knife, rolling pin, car hook, dagger, hair pin, with a hammer, with a screw-driver, with a nail, and with all other weapons and utensils whatsoever, at the Southern Hotel and in all other hotels and places wheresoever, on the thirteenth day of March and all other days of the Christian era whensoever.

The attorney's behavior in the selection of the jury and the stinging sarcasm with which it was described, provides one of the comical high points of the novel. Moreover, it also previews Mr. Braham's poor behavior that will follow. The following colloquy is typical:

Ethan Dobb, cart-driver.

"Can you read?"

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380 Id.

381 MCKEITHAN, supra note 46, at 19 ("[T]he satire of the judge, the jury and the method of its selection, the use of sex and the insanity plea to obtain acquittal, and the conduct of the spectators is very effective.").

382 This was not Twain's only attack on such language. For example, he wrote a piece in The Enterprise entitled Ye Sentimental Law Student that described in a "comically legalistic description" the less than romantic love letter exchanged between "the party of the second part" and "Mary, the peerless party of the first part." A LITERARY LIFE, supra note 10, at 21.

383 THE GILDED AGE, supra note 127, at 373.

384 Id. at 373-76.
"Yes, but haven't a habit of it."

"Have you heard of this case?"

"I think so—but it might be another. I have no opinion about it."

_Dist. A._ "Tha-tha-there! Hold on a bit? Did anybody tell you to say you had no opinion about it?"

"N-n-o, sir."

"Take care now, take care. Then what suggested it to you to volunteer that remark?"

"They've always asked that, when I was on juries."

"All right, then. Have you any conscientious scruples about capital punishment?"

"Any which?"

"Would you object to finding a person guilty of murder on evidence?"

"I might, sir, if I thought he wasn't guilty."

The district attorney thought he had a point.

"Would this feeling rather incline you against a capital conviction?"

The juror said he hadn't any feeling... Accepted and sworn.  

In the end, Braham was pleased with the jury selection because "[h]e had kept off all those he did not know," and "[s]o far as Mr. Braham knew, only two could read. . . . [S]ome had a look of animal cunning, while the most were only stupid."  

The initial presentation of the state's case by Mr. McFlinn, the prosecutor, appeared to have been made with the seriousness and professionalism that the occasion warranted. He made a logical, law and fact-based

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385 _Id._ at 374-75.
386 _Id._ at 375.
387 _Id._ at 376.
argument that Laura Hawkins was guilty of murder and the audience correctly found his argument convincing.\textsuperscript{388} "Calmly and without malice or excitement he reviewed the testimony. As the cold facts were unrolled, fear settled upon the listeners. There was no escape from the murder or its premeditation . . . Mr. McFlinn made a very able speech, convincing the reason without touching the feelings."\textsuperscript{389} If a criminal prosecution is to be a rational search for truth, then Mr. McFlinn appeared to have been a model attorney.

In contrast, when Mr. Braham took the stand, he began an utterly shameless representation of his client. Although he had purposely selected the jurors for their dimwittedness, he opened his case by declaring that "he trembled at the responsibility he had undertaken; and he should altogether despair if he did not see before him a jury of twelve men of rare intelligence, whose acute minds would unravel all the sophistries of the prosecution, men with a sense of honor . . . men with hearts."\textsuperscript{390} Then, with a blatant appeal to drama and emotion,\textsuperscript{391} Mr. Braham presented the jury and his "audience" with his theory that Laura Hawkins should be found not guilty because she was insane at the time of the murder. He acted with dramatic effect as he "[took] out his handkerchief, unfold[ed] it slowly, crushe[d] it in his nervous hand, and [threw] it on the table."\textsuperscript{392} This reduced the spectators to tears, and "[t]he jury looked scared."\textsuperscript{393}

As Mr. Braham tried to convince the jurors that Laura was, indeed, insane, he did not limit himself to his own overly dramatic acting.\textsuperscript{394} Braham

\textsuperscript{388} Id. at 380 ("At first, it appeared that the case for the defense was strong" and the "public who read the reports of the evidence saw no chance for the prisoner's escape.").

\textsuperscript{389} Id. at 390.

\textsuperscript{390} Id. at 380.

\textsuperscript{391} MCKEITHAN, supra note 46, at 12 (describing Laura's attorney as "dressed for the dramatic role he was to play"); id. at 16 (noting that "the audience burst into applause" when the legal arguments were over); Roam, supra note 8, at 710 (observing that Laura's counsel "was more a great actor than a great lawyer").

\textsuperscript{392} THE GILDED AGE, supra note 127, at 381.

\textsuperscript{393} Id. at 382.

\textsuperscript{394} Id. at 224-25. This is not the only time that Twain mocked the overly dramatic conduct engaged in by some attorneys. In \textit{Roughing It}, a prank was played on General Buncombe, a pompous man who "was shipped out to Nevada . . . to be United States Attorney. He considered himself a lawyer of parts, and very much wanted an opportunity to manifest it." \textit{ROUGHING IT}, supra note 102, at 241. Buncombe was approached by Dick Hyde who told Buncombe the unlikely story that the ranch belonging to his neighbor, Tom Morgan, had slid down the hill and landed on top of his own farm. \textit{Id.} At 242. Not realizing that the claim was completely fabricated, Buncombe readily agreed to represent Hyde because "[N]ever in all the world, perhaps, were a man's feelings as outraged as [his]. He said he had never heard of such high-handed conduct in all his life as this Morgan's." \textit{Id.} At 243. Once the trial began, so did General Buncombe's dramatic performance—a performance much like that of the inflated Braham:

\textsuperscript{Presently the General elbowed his way through the crowd of spectators, with his arms full of law-books, and on his ears fell an order from the judge which was the
also asked leading questions of the witnesses to advance his theory. In addition, he rounded up medical experts to testify as to his fraudulent theory regarding Laura's insanity. Although "[i]t afterwards came out that the chief expert for the defense, was paid a thousand dollars for looking into the case," at the time of the case these frauds were quite persuasive.

Later on, Mr. Braham surpassed even himself with a speech "still remembered as the greatest in the criminal annals of New York." In his closing remarks he said:

I do not ask mercy of you who are the guardians of society and of the poor waifs, its sometimes wronged victims; I ask only that justice which you and I shall need in that last dreadful hour, when death will be robbed of half its terrors if we can reflect that we never wronged a human being. Gentlemen, the life of this lovely and once happy girl, this now stricken woman, is in your hands.

To his credit, the judge charged the jury without bias. This led to a verdict of "not guilty." The pompous and victorious Mr. Braham basked in the adoration of the female spectators. Moreover, as a result of Mr. Braham's actions, Laura Hawkins, who did murder Selby with malice aforethought was released. Thus, as with Pudd'nhead Wilson, this case

\[\text{first respectful recognition of his high official dignity that had ever saluted them, and it trickled pleasantly through his whole system:}
\]
\['\text{Way for the United States Attorney'...}
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\['\text{The General, with exultation in his face, got up and made an impassioned effort; he pounded the table, he banged the law-books, he shouted, and roared, and howled, he quoted from everything and everybody, poetry, sarcasm, statistics, history, pathos, bathos, blasphemy, and wound up with a grand war-woop for free speech, freedom of the press, free schools, the Glorious Bird of America and the principles of eternal justice! [Applause].}
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\[\text{Id. at 244-45. Alas, however, after all this, the General slowly realized that the entire proceeding had been a joke and "at the end of two months, the fact that he had been played upon with a joke had managed to bore itself, like another Hoosac Tunnel, through the solid adamant of his understanding." Id. at 227. For a further discussion of this legal prank, see generally Roam, supra note 8, at 705-06 (discussing Twain's fondness for targeting "the overzealous lawyer who is too busy with the law to verify the facts").}
\]
\[\text{395\ THE GILDED AGE, supra note 127, at 389.}
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\[\text{396\ Id.}
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\[\text{397\ Id. at 390.}
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\[\text{398\ Id.}
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\[\text{399\ Id. at 399. Twain writes:}
\]
\['\text{And now occurred one of these beautiful incidents which no fiction-writer would dare to imagine, a scene of touching pathos, creditable to our fallen humanity. In the eyes of the women of the audience, Mr. Braham was the hero of the occasion; he had saved the life of the prisoner; and besides he was such a handsome man. The women could not restrain their pent-up emotions. They threw themselves upon Mr. Braham in a transport of gratitude; they kissed him again and again... This beautiful scene is still known in New York as 'the kissing of Braham.'}
\]
\[\text{Id.}
\]
involved dubious attorney conduct, and a morally questionable outcome. The judge, while not perfect and suffering from an inability to control his courtroom, acted with a minimum of competence. Furthermore, the prosecutor acted exactly as one would expect and hope that an attorney in his position would act. It is the underhanded conduct of Mr. Braham, however, that is deeply problematic.

This world of mixed conduct generates a morally complex outcome. After all, Selby had done a grievous wrong to Laura and she had justifiable anger toward him. Furthermore, if Laura had been found guilty of the premeditated murder with which she was charged, the harsh penalty would have been death. Yet, by all accounts and her own admission, Laura Hawkins did kill Selby; she had planned it in advance, and she was sane at the time she committed the murder. Yet, she walked out of the courtroom a free woman. This acquittal is unjust, but so too would have been a conviction. Thus, the conduct of the attorneys, whether good or bad, seems to be irrelevant to whether a just outcome can be achieved since there was simply no just outcome available under the legal regime in which the parties found themselves.

VII. TWAIN'S LEGAL LESSONS FOR OUR TIMES

*I couldn't call to mind a written law of any kind that had been promulgated in any age of the world that... wasn't a violation of the law of Nature, which I regarded as the highest of laws, the most peremptory and absolute of all laws--Nature's laws being in my belief plainly and simply the laws of God, since He instituted them, He and no other, and the said laws, by authority of this divine origin, taking precedence of all the statutes of man.*

Alas, this quotation illustrates Twain's oft-expressed opinion that human law—in its substance, in its execution, or in its inefficacy—does not always conform to moral notions of true, absolute justice. The actions of
Twain's fictional lawyers and judges illustrate a disturbing problem and speak with direct relevance to modern participants in the legal system. The disjunction between the quality of conduct by Twain's lawyers and jurists and the quality of the ultimate justice they achieve is striking. It is, at the very least, an invitation to today's legal analysts to reflect carefully on the quality of the justice system and the roles played by the actors who participate in its processes. Twain's fiction invites readers to reflect on what is essential to ensuring that a just legal system is in place and that such a legal system is able to lead directly to just results. As one commentator has suggested, "[t]he study of literature injects into legal studies questions about the nature of law and order, the complexity of issues such as justice, and the human context of law." This is precisely what Twain's fiction invites readers to do.

By exploring what went wrong in Twain's fiction—such as why violation of rules was essential to achieve justice; why following rules led to injustice; why moral ambiguity was the all-too-frequent result—it may be possible to understand more clearly what is required to ensure that what failed in fiction will not fail in "real life." An analysis of the problems faced by Twain's judges and lawyers demonstrates important lessons for those who desire that the "real life" legal system not operate with the same defects as Twain's.

First, Twain's depiction of judges and lawyers seems to caution against giving too much sway to the power of public opinion. Often, when the justice system fails for Twain it is because the weight of emotional public opinion outweighs the calm and rational search for truth. Twain's fiction is a cautionary tale, warning against the public pressure on attorneys and judges to "perform" and entertain and against the public opinion that urges

403 This pessimistic view of law, however, is not a problem unique to modern time. At least one commentator has suggested that Twain himself lived in an era confronting its own pessimism about law's efficacy. See SCHALLER, supra note 49, at 80 (noting that in the era following the Civil War, "developments in society contributed to a general loss of confidence in law as a means of solving society's problems").

404 TALL STORIES, supra note 4, at 2-3.

405 Interestingly, in Elizabeth Chambliss, Professional Responsibility: Lawyers, A Case Study, 69 FORDHAM L. REV. 817, 818 (2000), the author discusses the use of Mark Twain's writings to teach professional responsibility to law students. Perhaps Twain, the ardent lawyer's critic, would be amused to know that he was part of a curriculum for educating more ethical lawyers. Or, perhaps, he would be disappointed to know that it was not one of his lawyer novels but, instead, his Life On The Mississippi that was employed.
courts to be unduly harsh or overly lenient. A democratic society prides itself—and, often, correctly so—on being ruled by the expressed will of a rational majority. In its positive light, this allows the public to avoid being tyrannized by a powerful minority bent on exerting unjust influence. It also can help ensure that the many rather than merely the few have a say in public affairs. Yet, Twain warns that the legal system can be tyrannized by the majority as well. 406

Indeed, in many of Twain’s works, “the public,” “the townspeople” or “the audience” seem to be characters in their own right. As characters, they often exert great influence over the legal system and often urge it toward ignoble conclusions. Thus, for justice to be achieved, Twain’s fiction seems to suggest that the power of the nameless, faceless “crowd” be limited, lest it overpower a legal system that can often only perform justly when it operates against the will of the majority and resists popular pressure. 407 This is not necessarily to suggest that the majority is always wrong or always plays a villainous role. 408 However, the worst of Twain’s out-

406 See CRITICAL ESSAYS, supra note 11, at 176 (observing that the characters of “Pudd’nhead Wilson translates mob opinion into the rule of law”). The challenge in keeping majority rule from degenerating into mob rule is, perhaps the greatest challenge for democracies. Creating successful mechanisms for doing so is the genius of a successful democracy—but, as Twain fears, this is not always an easy balance to achieve and maintain.

407 Interestingly, Twain himself made a similar argument when he was describing what he believed to be the proper, impartial role of Supreme Court justices. See Roam, supra note 8, at 695 n.86 (citing Letter from Samuel Clemens to San Francisco Alta California, Jan. 12, 1868). Twain is quoted as stating:

I cannot conceive it possible that a man could occupy so royal a position as a Supreme Judge, and be base enough to let his decisions be tainted by any stain of his political predilections.... The Judges have the Constitution for their guidance; they have no right to any politics save the politics of rigid right and justice when they are sitting in judgment. . . .

Id. (emphasis added).

Although he was discussing political biases, the analogy is apt. Whether political bias or the desire for majority approval is the motive, in both cases the participant in the legal process is swayed by the desire for public popularity and approval rather than by adherence to strict principles of morality and justice.

408 Indeed, in The Mysterious Stranger, Twain suggests a different, and more sympathetic way of viewing majorities—and a more suspicious way of looking at small factions. He observes, through his narrator, that “[i]n any community, big or little, there is always a fair proportion of people who are not malicious or unkind by nature, and who never do unkind things except when they are overmastered by fear, or when their self-interest is greatly in danger.” Mark Twain, The Mysterious Stranger, in SHORT STORIES, supra note 285, at 636. This theme was developed more fully when he has the devilish “Stranger” explain:

I know [the human] race. It is made up of sheep. It is governed by minorities, seldom or never by majorities. It suppresses its feelings and its beliefs and follows the handful that makes the most noise. Sometimes the noisy handful is right, sometimes wrong; but no matter, the crowd follows it. The vast majority of the race, whether savage or civilized, are secretly kindhearted and shrink from inflicting pain, but in the presence of the aggressive and pitiless minority they don’t dare to assert themselves.
comes often occur when the guardians of justice do not resist the will of the majority because those very guardians desire to win the approval of the majority more than they desire to do justice.

In his *Those Extraordinary Twins*, Twain presented a judge who, despite his obvious faults in some areas, enjoyed freedom from the tyranny of public opinion. In describing Justice Robinson, Twain said:

Mr. Justice Robinson had been in office only two months, and in that short time had not had many cases to try, of course. He had no knowledge of laws and courts except what he had picked up since he came into office. He was a sore trouble to the lawyers for his rulings were pretty eccentric sometimes and he stood by them with Roman simplicity and fortitude; but the people were well satisfied with him, for they saw that his intentions were always right, that he was entirely impartial, and that he usually made up in good sense what he lacked in technique, so to speak.

This rare detachment is, in many respects, precisely what is needed for a just result to occur. Yet, it is present in very few of Twain’s characters. Particularly in modern times when legal advocacy is often done under the glare of television spotlights and as judges and lawyers face temptations to be admired by the public and the media, Twain’s warning is particularly apt.

In a more blatant critique, Twain also urges vigilance against legal actors—particularly judges—who are influenced not only by the desire for intangible public approval but by direct, tangible financial or personal interest in the outcome of their cases. This undercurrent in many of Twain’s tales parallels much of the self-interest he observed in his real-life observations of the legal system. Twain provides no suggestions as to how this problem is to be avoided. He does alert his readers, however, to the dan-

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409 Id. at 666-67. This offers a different explanation for the conduct of majorities, and attributes their action to cowardice rather than villainy. However, in both circumstances the will of the majority can lead to injustice.


411 Id. at 148. In a continued effort, perhaps to advertise his independence, Justice Robinson explained that his court “is not run on any plan but its own. It has a plan of its own; and that plan is, to find justice for both State and accused, no matter what happens to be practice and custom in Europe or anywhere else. . . . It has not been the custom of this court to imitate other courts . . . and we will not begin now.” Id. at 149; see also id. at 269 (calling Justice Robinson “a judge little learned in the law but committed irrevocably to plain truth”).

412 Although Twain appears to have saved his fiercest wrath for corrupt judges, he was none too tolerant of lawyers’ self-interests either. *See Pirates*, supra note 12, at 10 (commenting that “[i]n his work, Mark Twain portrayed lawyers as ringleaders of the official culture, two-faced pilgrims, as vested interests, the naysayers and tyrannical they who dominate community opinion; boldly put, Twain’s lawyers are hypocrites who rarely are what their masks crack them up to be”).
gers posed when the justice system is administered by those whose self-interest may cloud their vision and objectivity. Twain understood, all too well, that those in the positions of greatest authority are often those subject to the most serious temptations. These temptations—for money, influence, praise, or position—often overpower any underlying desire to do good. These temptations troubled Twain and are the subject of a strong caution for modern times.\footnote{Twain's fiction also warns against a legal system that is based entirely on law with no provision for equity. Often, the characters in Twain's fiction—particularly the judges—pursue unjust results because the laws themselves leave no possibility for an equitable remedy. Judges are not given the power to protect children, or to fashion a novel remedy, or to prevent unjust, yet legal, conduct from occurring. This puts legal actors in the position of either following the law honestly or pursuing justice dishonestly through the exercise of understandable but unsanctioned equity. The former is a detriment to justice; the latter is an affront to the legal system. Lack of equitable remedies lies behind much of the injustice laid out in Twain's fiction. This fiction demonstrates how a legal system devoid of an equity regime is nearly pre-programmed for injustice or the evasion of legal rules.}

Twain's fiction also warns against a legal system that is based entirely on law with no provision for equity. Often, the characters in Twain's fiction—particularly the judges—pursue unjust results because the laws themselves leave no possibility for an equitable remedy. Judges are not given the power to protect children, or to fashion a novel remedy, or to prevent unjust, yet legal, conduct from occurring. This puts legal actors in the position of either following the law honestly or pursuing justice dishonestly through the exercise of understandable but unsanctioned equity. The former is a detriment to justice; the latter is an affront to the legal system. Lack of equitable remedies lies behind much of the injustice laid out in Twain's fiction. This fiction demonstrates how a legal system devoid of an equity regime is nearly pre-programmed for injustice or the evasion of legal rules.

Naturally, the greater the role of equity, the greater the authority of judges to exercise discretion in a broad range of situations. By definition, equity involves "the recourse to principles of justice to correct or supplement the law as applied to particular circumstances."\footnote{Given Twain's reservations about judges, this may not be an entirely risk-free proposition since "correcting" and "supplementing" the law require restraint, wisdom, sound judgment and impartiality. A judge lacking in those qualities can do great harm with this increased flexibility. Yet, the alternative approach leads to unjust results so often that the risk seems well worth taking.} Given Twain's reservations about judges, this may not be an entirely risk-free proposition since "correcting" and "supplementing" the law require restraint, wisdom, sound judgment and impartiality. A judge lacking in those qualities can do great harm with this increased flexibility. Yet, the alternative approach leads to unjust results so often that the risk seems well worth taking.

In addition, Twain's legal characters—and the results of their actions—make a strong case for the necessity of discretion in sentencing those who admittedly break the law. All too often, Twain confronts his readers with circumstances in which there is an admitted or proven violation of the law. However, in these cases the prescribed punishment is often so grave and excessive that a judge is placed in a position without an acceptable outcome. To find the honest verdict of "guilty" would lead to an unjust penalty that would far exceed the seriousness of the crime. Yet, to administer a fair penalty would require dishonesty in the pronouncement of
guilt. Faced with two unattractive options, the participants in the legal system must choose between justice and legality, because there is no honest way to pursue both. In *The Prince and the Pauper*, Twain’s protagonist suggests that “[t]he world is made wrong; kings should go to school in their own laws, at times, and so learn mercy.” Naturally, kings will not “go to school in their own laws.” However, the same goal can, perhaps, be accomplished if judges are given a system in which justice and mercy can be balanced honestly, openly, effectively, and proportionately.

Twain also cautions readers against over-reliance on the legal system without resort to factual study. All too often, Twain criticizes the legal regime for failing to take into account information readily ascertainable and easily learned in the real world, as opposed to the narrow, more theoretical confines of the legal world. Naturally, this method of judicial decision-making places no premium at all on an accurate perception of the facts. Very often in Twain’s fiction, when the facts are ignored, injustice occurs. Yet there is no sound mechanism in place for fact-finding and no

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414 THE PRINCE AND THE PAUPER, supra note 208, at 238. Indeed, in addition to his educational plan for kings, Twain also expressed quite a novel theory on legal education. He remarked: [W]e make a lawyer study Blackstone and statute law and common law, and we try him before a jury and see what his skill as an orator is, but we never ask him the crucial question—have you ever committed a crime? Have you ever undergone a term of imprisonment? Because that has not been done, a man is not fit to sit in judgment upon his fellow creatures.

Mark Twain, Of Course I Am Dying, reprinted in LIFE AS I FIND IT, supra note 72, at 324.

415 In another short tale, Twain demonstrates the tragic outcome that may follow a failure to pay any attention to ascertaining facts. In *The Esquimau Maiden’s Romance*, the hapless Kalula, the beau of the Esquimau Maiden, was falsely accused of stealing a fish hook from his future father-in-law. The Esquimau Maiden’s Romance, in SHORT STORIES, supra note 285, at 295-308. For this perceived offense, he was brought to trial before a court of elders where he pleaded, “I may have dropped one, but I stole none.” Id. at 307. The Maiden testified in her beloved’s defense that he probably would not have stolen the hook since he would have inherited it through marrying her. Id. Rather than make a complete factual inquiry, however, the young man was “subjected to the trial by water,” a heartless process by which it was believed that a guilty party would survive being plunged into the depths of the water while an innocent party could prove his innocence if he drowned. Id. at 307. A high price indeed! Yet, the Esquimau Maiden praised this mockery of judicial “fact-finding.” Id. She exclaimed:

> Before . . . our fathers used augury and other unsure methods of trial, and doubtless some poor, guilty creatures escaped with their lives sometimes, but it is not so with trial by water, which is an invention by wiser men than we poor ignorant savages are. By it, the innocent are proved innocent, without doubt or question, for they drown; and the guilty are proven guilty with the same certainty, for they do not drown.

Id. at 307-08. Shortly after this “trial,” the Maiden found the missing fishhook caught in her own hair. Id. Fortunately for the innocent young man, the “trial by water” did not work well, and he actually did not drown. Id. This was only through sheer luck and not through any trial measure that would have prevented injustice. Id.

416 Perhaps one of the most glaring examples of a scenario in which theory overran fact occurred in Twain’s short comic tale, Science v. Luck in SHORT STORIES, supra note 285, at 64-66. In that tale, a law prohibited gambling and games of luck. Id. Twelve boys were indicted by a grand jury for gambling on a game of “Old Sledge” and they were defended by attorney Jim Sturgis. Id. Alas, “[t]he more he studied over the matter, and looked into the evidence, the plainer it was that he must lose a case at last—there was no getting around that painful fact. Those boys had certainly been getting
deep appreciation for its value. A legal system that does not put a premium on fact-finding is a legal system in which the search for truth is not possible, and the quest for justice is stymied. Twain seems quite inclined to adopt a positive view of science and its role in advancing justice. Perhaps this enthusiasm merely reflects the optimism about technological progress that marked the times in which he lived. More likely, however, this positive view of science stemmed from Twain’s realization that hard facts can often be the most effective weapon available against injustice.

Finally, and perhaps most passionately, Twain, through his characters and their actions, pleads with readers to consider the justice of the underlying substantive law that judges and lawyers are asked to serve. Regardless of whether the legal process is sound or flawed, judges and lawyers are woefully incapable of both following legal rules and achieving just results if the underlying legal rules are fundamentally unjust. In *The Gilded Age*, the character Philip is described as one who “knew that no country can be well governed unless its citizens as a body keep religiously before their minds that they are guardians of the law, and that the law officers are only the machinery for its execution, nothing more.” The notion that lawyers and judges are “only the machinery” for the execution of laws is a narrower view of their roles than many would take or should take. However, this remark suggests in a powerful way that judges and lawyers are primarily charged with implementing laws. To the extent that those laws are just, there is no conflict between the pursuit of the law and the pursuit of justice. Conversely, a law that is unjust, immoral, unwise, or unsound places lawyers and judges in the unenviable position of irreconcilable conflict. In executing the law they may either perform their roles well, with unjust

money on a game of chance.” *Id.* at 64. However, Mr. Sturgis then came upon the inspired idea of arguing that "old sledge was not a game of chance!" *Id.* at 65. Initially, "[t]he judge smiled with the rest . . . [but then] lost a little of his patience, and said the joke had gone far enough." *Id.* Although it is factually obvious that an illegal game of chance was involved, a jury was impaneled to decide whether a game of chance or science was involved. They “deliberated” by being allowed to spend the evening playing the prohibited game—for money no less! *Id.* After their games, they reported that “the ‘chance’ men are all busted, and the ‘science’ men have got the money.” *Id.* at 66. As a result, the verdict was a unanimous finding that “the game commonly known as old sledge or seven-up is eminently a game of science and not of chance.” *Id.* Naturally, this ignores the facts in favor of the theory—and a guilty dozen go free. However, before judging Twain’s jury too harshly, see Stephanie Warsmith, *Lawyers Put Chips on Poker as Skill*, AKRON BEACON J., June 29, 2001, at D1 (describing argument made by Ohio attorneys that “poker is a game of skill, not chance”). The litigation described by Ms. Warsmith focused on a misdemeanor charge brought under an Ohio law prohibiting gambling on games of chance, including poker. This case will be supported by testimony from “an expert from Las Vegas and a statistician from the University of Akron.” *Id.*

See supra notes 351-355 and accompanying text (discussing how Pudd’nhead Wilson’s factual inquiry into fingerprinting was derided and viewed as inferior to legal analysis and argument).

A similar perspective is expressed by Professor Richard Weisberg who notes that, “[l]awyers seem to learn right away—at least the good ones who fill literary texts—that their gift of gab must be tempered and disciplined by the superior power of silent observation.” *Poetics*, supra note 27, at 89.

*Twain & Warner*, supra note 366, at 212.
results, or achieve a just result by acting poorly. Neither result is a good one.

This reality, then, should challenge all those who care about the way in which the legal system advances or threatens justice to care even more about the morality of the underlying laws that those judges and lawyers are asked to administer. Mark Twain lived during and through an era plagued by laws that required, or at least, condoned injustice. Alas, the same criticism can be made of nearly every time and place. Because the law is the most human of institutions, it is all too often plagued by the most human of flaws. Twain's writings should, if anything, inspire his readers to examine the legal rules under which their legal regimes labor, and to be vigilant in ensuring that there is nothing in them that could make the pursuit of law and the pursuit of justice conflicting goals. Indeed, in The Gilded Age, Philip also remarked that "neither he nor any citizen had a right to consult his own feelings or conscience in a case where a law of the land had been violated before his own eyes." Yet, Twain's true message is the complete opposite of Philip's reasoning. It is only in consulting the conscience that the morality of law can best be ascertained.

VIII. CONCLUSION

Whether we read fictional law or lawful fiction, it is our imagination, our fears, and our deepest aspirations that will

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420 See Soifer, supra note 15, at 1574 (noting "Twain's underscoring of the need to act and to act now in the pursuit of justice); id. at 1574-75 (claiming that, for Twain, "[t]he core obligation is to pursue justice, albeit with full knowledge that justice actually will never be accomplished on this earth, no matter what the century").

421 This fact also influenced many of Twain's literary contemporaries: the great storytellers of the mid nineteenth century—Melville, Stowe, Cooper, Hawthorne—saw in the legal mindset a world view profoundly antithetical to, and hostile to, their own humanistic and utopian urgings. What we see in the great writing of the time is a denunciation, not a celebration of and certainly not participation in the law and the ideals which inform the legal mindset.

The Literary Lawyer, supra note 23, at 1203.

422 Indeed, in the Prince and the Pauper, set in a time many centuries removed from Twain's lifetime, law is called "the common enemy" of those from many walks of life and social circumstances. The Prince and the Pauper, supra note 208, at 197.

423 Professor Teresa Godwin Phelps makes a similar point when discussing the need for reform as presented in Huckleberry Finn. In discussing the immorality of the then-legal slave laws, she writes, "[i]n Huck Finn, we see the change of perception and change of heart that occurred before a change in the law became possible, although the change in perception was neither absolute nor universal." Story of the Law, supra note 196, at 905. See also Schaller, supra note 49, at 127 (warning that "[c]hanges in legal language can always follow changes of heart, but changes in legal language cannot, alone, produce changes in heart").

424 TWAIN & WARNER, supra note 366, at 211-12.
be touched by this effort to link our culture's two most central narrative endeavors.\textsuperscript{425}

After reviewing Mark Twain's fiction, then, it becomes apparent that when he paints the image of a lawyer or a judge, things indeed are seldom what they seem. While at times the lawyers and judges Twain created achieve just results by following legal rules, that is the exception rather than the rule. For readers who examine Twain's writings over a century after he brought them to life, this phenomenon can be a source of frustration, entertainment, discontent or humor. It can lead to frustration with the legal system, a lowered opinion of lawyers and judges, or even discomfort with the work of the author who reminds readers of this dichotomy. More than anything, though, the works of Twain, and the characters brought to life in them, should challenge readers. They should challenge those who would learn from fiction to work for a legal system in which there is no longer a conflict between respect for law and true justice.

\textsuperscript{425} POETHICS, supra note 27, at xiv. See also id. at ix (classifying as two major human enterprises the tasks of establishing justice and telling stories).