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RALPH ELLISON AND THE LAW

FOREWORD: RALPH ELLISON AND THE LAW

ALFRED L. BROPHY*

As we approach the fiftieth anniversary of the publication of *Invisible Man*, we are gaining the distance that is necessary to evaluate dispassionately the novel and the civil rights revolution that surrounds it. Following the initial, warm embrace of the novel, Ralph Ellison was seen as a conservative in the 1960s and early 1970s; and consequently—given the political double standard applied to African-American intellectuals—he was viewed with suspicion.¹ In more recent times, we have been able to

* Professor of Law, University of Alabama. I would like to thank my friends at Oklahoma City University, particularly Phyllis Bernard, Arthur LeFrancois, and Von Creel, for nurturing my interest in Ellison. More recently, Mary Sarah Bilder, Scott Ellsworth, Shubha Ghosh, Steven Hobbs, Lucas Morel, Werner Sollors, and especially Dedi Felman have helped me to understand Mr. Ellison and his Oklahoma world. John Callahan, first through his writings and more recently through correspondence, has taught me much about Ellison's affection for law and the myth and reality of history.

1. See, e.g., Robert Butler, *Introduction* to *THE CRITICAL RESPONSE TO RALPH ELLISON*, at ix, xxvii-xxviii (Robert Butler ed., 2000) (discussing the shifting attitude toward *Invisible Man*). Even now he is claimed by some scholars and journalists on the right. See, e.g., SHELBY STEELE, *A DREAM DEFERRED: THE SECOND BETRAYAL OF BLACK FREEDOM IN AMERICA*, at ix (1998) (using a paragraph from RALPH ELLISON, *SHADOW AND ACT* (1964), as an epigraph); JOHN H. MCWHORTER, *LOSING THE RACE: SELF-SABOTAGE IN*

view his accomplishments more accurately. The *Oklahoma City University Law Review* is honored to present these essays, which reflect and celebrate the triumph of Ellison's reputation in literary and cultural circles.

Perhaps part of the explanation for the criticism of Ellison was his faith in the idea of law to overcome inequality.² Many others, faced with laughably biased mechanisms of law enforcement, did not share Ellison's optimism in law. At times even Ellison could not share that optimism. For, as he tells in his often-overlooked meditation on law and literature, *Perspective of Literature*,³ as a young man he had little respect for law. He recalled from his youth, spent in Oklahoma City, that law meant the arbitrary dictates of law enforcement officers (known as "laws"). Those white men and judges and legislators followed their own caprice and left the black community with unequal schools, little protection against violence, and little opportunity to participate in democracy. They even participated in lynchings on occasion.⁴ Thus, there were two concepts about "law" in Progressive-era Oklahoma: the rule of law as imposed by white society upon African Americans, and the rule of law as it ought to exist. In his notes on *Juneteenth*, Ellison distinguished between the truth and how law defined African Americans:

The law deals with facts, and down here the facts are that we are weak and inferior. But while it looks like we are what the law says we are, don't ever forget that we've been put in this position by force, by power of numbers, and the readiness of those numbers to

BLACK AMERICA 160-61 (2000) (quoting Ellison's statement that "[t]he need to control and transcend mere anger has been our lot throughout our history, and for many years failing to do so, as the saying goes, got you dead"). I think that those on the right who wish to claim Ellison have mis-characterized his thought. See Alfred L. Brophy, *Losing [an Understanding of the Importance of] Race*, 80 TEX. L. REV. (forthcoming 2002) (discussing McWhorter and Ellison).

2. That was a faith that many others had, even those who were outside of the elite hierarchy of people whose natural affinities would lie with respect for law. See, e.g., Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1390, 1481-94 (1998) (discussing appeals to the idea of community and law made in early America).

3. RALPH ELLISON, *Perspective of Literature*, in THE COLLECTED ESSAYS OF RALPH ELLISON 766, 768 (John F. Callahan ed., 1995) [hereinafter COLLECTED ESSAYS].

4. See, e.g., *Investigation of Claude Chandler*, Att'y Gen. File 1018 (Aug./Sept. 1920) Oklahoma State Archives, Oklahoma City (discussing evidence that the sheriff was involved in the lynching of Chandler, who was taken from Oklahoma County jail).

use brutality to keep us within the law. Ah, but the truth is something else. We are not what the law, yes and custom, says we are and to protect our truth we have to protect ourselves from the definitions of the law. Because the law's facts have made us *outlaws*. Yes, that's the truth, but only part of it; . . . we're outlaws in Christ and Christ is the higher truth.⁵

In Ellison's Oklahoma, there was the notorious Judge Estes, who said from the bench something like, "[A] Model T Ford full of Negroes ranging at large on the streets of the city was a more devastating piece of bad luck than having one's path crossed by a squad of thirteen howling jet-black tomcats."⁶ With such statements, there could be little respect for law. So it fell to jazz musicians—those representatives of a society based on some principle other than law—to provide role models for the young Ellison and his friends.⁷

There were other, more personal reasons for him to lack faith in the law. There was segregation in housing and schools, and . . . the Tulsa Race Riot of 1921.⁸ An older cousin lived in Greenwood, the African-American section of Tulsa, which was destroyed in that tragic riot. Ellison had visited Greenwood shortly before the riot as his mother was moving the family to

5. RALPH ELLISON, *JUNETEENTH* 354 (John F. Callahan ed., 1999) [hereinafter *JUNETEENTH*].

6. ELLISON, *Perspective of Literature*, *supra* note 3, at 768. See also RALPH ELLISON, *INVISIBLE MAN* 510 (2d Vintage Int'l ed. 1995) [hereinafter *INVISIBLE MAN*] ("Hadn't I grown up around gambler-politicians, bootlegger-judges and sheriffs who were burglars; yes, and Klansmen who were preachers and members of humanitarian societies? Hell, and hadn't Bledsoe tried to tell me what it was all about?").

7. John F. Callahan, *Introduction to Shadow and Act*, in *COLLECTED ESSAYS*, *supra* note 3, at 49, 52. Cf. John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2133 (1992) (suggesting jazz as a model of "reconceptualization and reformulation"). Ellison gives us in *Juneteenth* such a hero: the jazz musician-turned minister, Alonzo Hickman. Hickman is able to overcome his anger that his brother had been lynched after a false accusation that he raped a white woman. Hickman takes in the woman when she has nowhere else to turn. Then, he agrees to raise her child. Despite the complete failure of law, Hickman—left with "rites" but not rights—is able to find the power to take in the child, Bliss. See *JUNETEENTH*, *supra* note 5, at 286-309.

8. RALPH ELLISON, *Roscoe Dunjee and the American Language*, in *COLLECTED ESSAYS*, *supra* note 3, at 449, 451. I discuss the Tulsa riot and Dunjee's ideas about justice for its victims, as well as African American ideas about law in Progressive-era Oklahoma, in detail in ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921—RACE, REPARATIONS, AND RECONCILIATION* (2002).

Gary, Indiana, where she expected there would be work. And then, shortly after the riot, when Gary proved to have few jobs, the family moved back to Oklahoma. On the way home, they passed through Tulsa again. So young Ellison, then about seven years old, saw the destructive force of race hatred.⁹ The image was so powerful—and his attachment to the community so strong—that he made Greenwood the home of the Invisible Man.¹⁰

And yet somehow Ellison, like the Oklahoma black community more generally, found an optimism in the idea of justice.¹¹ Perhaps that optimism came from Roscoe Dunjee, editor of Oklahoma City's *The Black Dispatch*. Dunjee had a faith (usually) in the Constitution and the rule of law—if properly administered—to remake American society. In editorials beginning in 1917, Dunjee advanced the idea of equal treatment under law: that people should be able to vote regardless of their race, that everyone had the right to adequate schools, and that the police should protect all communities. Such elegant ideas, advanced in periodicals like *The Black Dispatch*, held out the hope that Americans, bound together by a covenant, might remake their world.¹²

9. ELLISON, *Roscoe Dunjee and the American Language*, *supra* note 8, at 451.

10. See INVISIBLE MAN, *supra* note 6, at 29. The Invisible Man (and presumably his grandfather) lived in a proud community named after Greenwood, Oklahoma, a community which took action to prevent a lynching. I imagine that the Invisible Man was someone like A.J. Smitherman, the editor of the *Tulsa Star*, whose editorials talked about the importance of taking life if necessary to prevent a lynching, or J.B. Stradford, the lawyer who cooperated with Smitherman in urging the community to take action to protect itself against mob violence. Stradford fled to Chicago after the riot to avoid prosecution for inciting riot. At least those are the Invisible Man's roots.

There is, I suspect, a great deal that one could do with the references to Greenwood in *Invisible Man* and in *Juneteenth*. See John F. Callahan, *infra* p. 841-43. Some have noted Ellison's concern with the riot. See, e.g., JERRY GAFIO WATTS, HEROISM AND THE BLACK INTELLECTUAL: RALPH ELLISON, POLITICS, AND AFRO-AMERICAN INTELLECTUAL LIFE 34 (1994). And John Callahan has emphasized the larger complexity of an open, fluid Oklahoma for Ellison. See JOHN F. CALLAHAN, ELLISON'S INVISIBLE MAN 10-11 (2001).

11. RALPH ELLISON, *Remembering Jimmy*, in COLLECTED ESSAYS, *supra* note 3, at 273:

[T]here was an optimism within the Negro community and a sense of possibility which, despite our awareness of limitation (dramatized so brutally in the Tulsa riot of 1921), transcended all of this, and it was this rock-bottom sense of reality, coupled with our sense of the possibility of rising above it, which sounded in Rushing's voice.

Id. at 274.

12. ELLISON, *Roscoe Dunjee and the American Language*, *supra* note 8, at 455-56.

We should avoid too much of a temptation to read subsequent history back onto the novel, but it seems that some of Ellison's optimism in the Constitution's possibilities appears in *Invisible Man*, particularly in its call for a recognition of humanity and individuality. Ellison was working on the novel at the same time that the decisions¹³ that brought us to *Brown v. Board of Education* (several of the most important of which arose in Oklahoma, largely through the efforts of Roscoe Dunjee) were being written. *Invisible Man* and the Supreme Court drew upon the common reservoir of cultural opposition to group identity and racial caste.¹⁴ At long

13. See *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950). In that case, the Supreme Court emphasized the personal nature of the claims. *Id.* at 641-42 ("We conclude that the conditions under which this appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws."). See also *Sweatt v. Painter*, 339 U.S. 629, 635 (1950) ("It is fundamental that these cases concern rights which are personal and present."); *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) ("The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.") (footnote omitted); cf. *Sipuel v. Bd. of Regents, Univ. of Okla.*, 332 U.S. 631 (1948) (implying personal rights at stake).

At the same time, the lower courts understood that denial of the personal rights of an entire class was equally unconstitutional. See, e.g., *Kansas City v. Williams*, 205 F.2d 47, 51 (8th Cir. 1953) (striking city's regulation segregating public pool and invoking *McLaurin's* reference to personal rights); *Beal v. Holcombe*, 193 F.2d 384, 387 (5th Cir. 1951) (striking Houston ordinance segregating public golf course, stating, "This is denying to a negro, because he is a negro, his personal, his individual, his personal, right as a citizen to use and enjoy a facility furnished at the public expense while permitting a white man, because he is white, to use and enjoy it."); *Sweeney v. City of Louisville*, 102 F. Supp. 525 (W.D. Ky. 1951); *Harris v. City of Daytona Beach*, 105 F. Supp. 572 (S.D. Fla. 1952) (striking Daytona Beach ordinance segregating public theater performances); *Gray v. Univ. of Tenn.*, 97 F. Supp. 463 (E.D. Tenn. 1951) (integrating University of Tennessee's law school, with the recognition that opportunities had to be equal for each individual). The lower courts were also realizing that the social basis for segregation was losing its legitimacy as a proper governmental function. See *Lonesome v. Maxwell*, 123 F. Supp. 193 (D. Md. 1954). The recognition that rights were personal, rather than collective, meant that states could no longer say that on average facilities were equal. Each individual had to have equivalent opportunities.

14. On the Supreme Court's background and the cultural reservoir it drew upon, see generally MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE: A CRITICAL ISSUE* 18-20 (1998); Lawrence M. Friedman, *Brown in Context*, in *RACE, LAW, AND CULTURE: REFLECTIONS ON BROWN V. BOARD OF EDUCATION* 49-73 (Austin Sarat ed., 1997); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA.

last, the Court awoke to the realities of segregation and allowed African Americans to have a legal status other than that of invisible people. Maybe Ellison's most important contribution comes in his shaping of a humanity that undermined the segregation mentality. It also helped us understand that our destiny is to "become one, and yet many," as *Brown* sought that same goal through law.¹⁵ Thus, a non-legal document, concerned about people who are left outside the law, has implications for law.¹⁶ The courts finally shattered what had been (almost) reality, that African Americans could "obey or break laws, but not make or interpret them."¹⁷ In more recent years, the novel has come to stand for the image of opposition to legalized discrimination.¹⁸

L. REV. 7, 10 (1994). While Ellison's opposition to group identity stayed the same, American culture began to embrace group classification in the 1960s. This partly accounts for the perception that Ellison was conservative.

15. *INVISIBLE MAN*, *supra* note 6, at 577.

16. Perhaps that is appropriate, since so much of Ellison's work is devoted to showing that African Americans are more than the sum of their oppression. That humanity, which negotiates society outside (or at least without regard to) law, is a central part of the triumph of *Invisible Man*. It is also part of the recovery of the possibilities of a democratic America. So a democratic America might come about through the polls, but even more importantly through voting of Americans in the kind of history and culture they select.

17. *ELLISON, Perspective of Literature*, *supra* note 3, at 766. I say "almost reality," because there were always people who lived their life with their head in the mouth of the lion and remade white law while doing so. Ellison tells us about J.D. Randolph, an African-American man who while working in the state's law library gave legal advice to legislators. *Id.* at 766-67. More recently, legal historians have demonstrated the complex accommodation of black and white values that took place in the era of segregation. *Cf.* Kenneth W. Mack, *Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875-1905*, 24 L. & SOC. INQUIRY 377 (1999) (exploring the development of *de jure* segregation as part of the process of accommodation between black and white norms of segregation).

18. *See, e.g.,* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1271 n.137 (1993) (drawing on imagery of *Invisible Man*); Note, *Invisible Man: Black and Male Under Title VII*, 104 HARV. L. REV. 749, 750 (1991); *see also* RACIAL VIOLENCE IN THE UNITED STATES 128 (Allen D. Grimshaw ed., 1969) ("As is not infrequently the case, the fictional treatment seems to illuminate the objective event far more clearly and meaningfully than does objective social science research.").

The imagery of invisible people pervaded Justice Herd's dissenting opinion in *Woods v. Midwest Conveyor Co.*, 648 P.2d 234, 247 (Kan. 1982) (Herd, J., dissenting): "Segregation became worse than during slavery. The states passed voter qualification statutes which successfully eliminated the black man's vote. He had no power. He had no hope for economic betterment. His schools were inferior. He was truly an 'invisible man.'"

The opening scene, which is so full of images of legal culpability, seems at the same time, strangely wrong, at least to modern readers. The Invisible Man seems immune from liability for assaulting a man he bumps into on the street.¹⁹ While our government may care very little about some minorities, it seems that one of the few times minorities are certainly visible is when they commit crimes involving affluent white victims. There is a strange asymmetry about a legal system that ignores people until they commit crimes, then focuses extraordinary attention on them. But people visible for some reasons still may not be *seen*; their humanity may be completely ignored, as Ellison reminds us in his 1981 introduction to *Invisible Man*. Lynching victims, for instance, can be "illuminated by flaming torches and flashbulbs," but they are mere objects, not humans.²⁰ The Invisible Man understands that principle of remaining invisible to the police. Right after the riot begins, he is told, "The longer you remain unknown to the police, the longer you'll be effective."²¹ Group identity also benefitted Brother Tarp, at one point. He was serving a prison sentence for resisting a white man who wanted to steal from him.²² While working on a levee, there was a flood and Tarp was able to escape. No one pursued him because "[t]hey thought [he] was one of them who got drowned when the levee broke."²³

In other places, too, law appears. The law of eviction causes an elderly couple, born in the era of slavery, to lose their apartment, while

Judge Gartenstein began his opinion in *In re Carlos P.*, 358 N.Y.S.2d 608, 609 (N.Y. Fam. Ct. Kings County 1974), with a quotation from the first paragraph of *Invisible Man* and then followed it with the observation: "Perhaps a history of our time will someday define the function of the law and its courts as the intervenor between an individual struggling to be recognized as human and the vast bureaucracy which tends to dehumanize him."

The novel even made it into an argument of counsel, *see Griffin v. Burns*, 431 F. Supp. 1361, 1364 (D. R.I. 1977); in another instance, it was part of a list of books that the court required be added to a prison library! *See Taylor v. Perini*, 413 F. Supp. 189, 216 (N.D. Ohio 1976) (listing books related to "black experience, culture, history, and art" owned by correctional facility). The list of books is itself illuminating of what prisoners might read in constructing their knowledge of the black experience. But that is a story for another time.

19. INVISIBLE MAN, *supra* note 6, at 4-5 (describing attack on man, for which Invisible Man was not—and never would be—punished).

20. *Id.* at xv.

21. *Id.* at 284.

22. *Id.* at 387.

23. *Id.* at 388.

"laws"—police officers—failed to protect the community. Ellison sets up two conflicts in the eviction scene: between law and religion, and between eviction (dispossession) law as enforced by "laws" and "The Great Constitutional Dream Book."²⁴ The Invisible Man's refrain was, "[W]e're a law abiding people." But the elderly couple was being evicted and how could that be consistent with law? Well, it was what was demanded by the police officers:

[L]ook up there in the doorway at that law standing there with his forty-five. Look at him, standing with his blue steel pistol and his blue serge suit, or one forty-five, you see ten for every one of us, ten guns and ten warm suits and ten fat bellies and ten million laws. *Laws*, that's what we call them down South! *Laws!*²⁵

There could be a life outside of the framework constructed by law, it seemed. Religion offers that hope. The couple "don't want the world, but only Jesus. . . . How about it, Mr. Law? Do we get our fifteen minutes worth of Jesus? You got the world, can we have our Jesus?"²⁶ Conflict with "laws" appears again when Brother Clifton is shot by a police officer.²⁷

24. See *id.* at 278-80.

25. *Id.* at 278.

26. *Id.* at 279.

27. *Id.* at 435-37. Brother Clifton died "resisting reality in the form of a .38 caliber revolver in the hands of the arresting officer, on Forty-second between the library and the subway." *Id.* at 458.

The conflict between "laws" and humanity, which appears in both the eviction and the shooting of Brother Clifton, tracks Ellison's treatment of the conflict between myth and history. See *id.* at 439 ("[I]t is only the known, the seen, the heard and only those events that the recorder regards as important that are put down, those lies his keepers keep their power by. . . . Where were the historians today? And how would they put it down?"). See also John F. Callahan, *Chaos, Complexity, and Possibility: The Historical Frequencies of Ralph Waldo Ellison*, in *SPEAKING FOR YOU: THE VISION OF RALPH ELLISON* 125 (Kimberly W. Benston ed., 1987). For there is an "actual" history, full of complexity, and a "mythic" history, which tells the story in ways that serve the powerful. See RALPH ELLISON, *Going to the Territory*, in *COLLECTED ESSAYS*, *supra* note 3, at 591, 594. The mythic history is simpler; it draws clear lines between the races and frequently places blame squarely on African Americans. Cf. *Grand Jury Blames Negroes for Inciting Race Rioting, Whites Exonerated*, *TULSA WORLD*, June 26, 1921, at 1. That mythic history constrains our behavior and conditions us to expect certain behavior of others. When Tod Clifton tried to break free of the mythic history—when he tried to live outside of history—he was killed. *INVISIBLE MAN*, *supra* note 6, at 377, 457. Yet both actual and mythic history exist

The legal framework of segregation is the background, and then the Invisible Man lives out his life around and against that background. We see that same pattern of law (both statutory law and the law as applied on the streets by law enforcement officers) providing the basic framework within which people live in *Juneteenth* as well. For example, Reverend Hickman is prevented from seeing Senator Sunraider by a "law" (a law enforcement officer) who stands guard outside the Capitol building. Much of the rest of the novel is shaped by Hickman's inability to warn Sunraider of an impending assassination attempt. We also have a replacement for the invisibility trope, which draws upon the Constitution's three-fifths compromise—and the more recent restrictions on African-American voting. When asked by Senator Sunraider's secretary whether they are his

alongside each other and both influence behavior. So the history of Emancipation exists alongside the betrayal of Reconstruction. See *JUNETEENTH*, *supra* note 5, at 352-53. We see some of that complex history in the elderly couple's possessions, which have been put out on the street: their emancipation papers, a score card from a (negro league) baseball game, a breast pump, a greeting card . . . the stuff of life, which reminds us that the days of slavery were not so long ago. *Id.* at 272.

The problem, as Ellison tells us in *Juneteenth* through Senator Sunraider, is reconciling the past and the future. Sunraider's speech on the floor of the Senate, which at points seems to be Bliss speaking through the mask of racism, asks, "How can the future deny the Past?" *JUNETEENTH*, *supra* note 5, at 19. The answer, which is reminiscent of Ralph Waldo Emerson, is that

given the nature of our vision, of our covenant, to remember is to forget and to forget is to remember selectively, creatively! Yes, and let us remember that in this land to create is to destroy, and to destroy—if we will it so and *make* it so, if we pay our proper respect to remembered but rejected things—is to make manifest our lovely dream of progressive idealism."

Id. at 19-20. Sunraider is concerned, as Emerson was in *The American Scholar*, with ways that Americans can break from the past. Sunraider—like Ellison and Dunjee—sought a way to achieve the promise of the ideals of the Constitution.

We are a nation born in blood, fire and sacrifice. Thus we are judged, questioned, weighed—by the revolutionary ideals and events which marked the founding of our great country. It is these transcendent ideals which interrogate us, judging us, pursuing us, in terms of that which we do or do *not* do.

JUNETEENTH, *supra* note 5, at 14. Those ideals change, are transformed, and the past as well as the needs of the present intersect. *Id.* at 16-17.

Just as there are two histories—actual and mythic—there are two versions of law—justice and law as applied on the streets and in courts by prejudiced judges. The two versions of histories are the cultural analogs of the versions of law. And just as the mythic and actual histories interact, so do the two visions of law.

constituents, Hickman answers for the group, "No, miss, . . . the Senator doesn't even have anybody like us in *his* state. We're from down where we're among the counted but not among the heard."²⁸ The lynching at the center of *Juneteenth* led Alonzo Hickman to become a minister, and led him to bring up Bliss as someone who might "share the forgiveness [African Americans'] life has taught [them] to squeeze from it."²⁹ The lynching represented the lack of justice, but Hickman was able to control his anger and to make something positive out of it. It was "transformed into something deeper and more meaningful than its surface violence."³⁰

In Ellison's first published short story, *Slick Gonna Learn*, Slick faced the conflict between dignity and law. After he lost his job, then his little remaining money in a dice game, Slick was told by a loan shark that his wife should work as a prostitute to make money. In anger, he hit the man, then a police officer nearby. Brought before a judge, Slick had to listen to a demeaning speech. Then he was turned loose, a sign that perhaps Slick could escape the system—at least after the system had humiliated him. But police officers trail him, then beat him up.³¹

In *Cadillac Flambé*, Ellison portrays another way that law reacts to race. Jazz musician Lee Willie Minifees becomes enraged by Senator Sunraider's race-baiting speech proposing a bill to rename Cadillac "Coon Cage Eight." The affluent Minifees drives his Cadillac onto Sunraider's front lawn, then sets it afire. Minifees is committed to a hospital—not prison, because any black person who would burn his car must be crazy. So we have standards of sanity and criminal punishment determined by race.³²

So Ellison pays great attention, as do legal historians more generally, to how the whole system fits together: the way that the legal system provides a framework for actors, the way it constrains them, and the ways

28. JUNETEENTH, *supra* note 5, at 4; U.S. CONST. art. I, § 2 (counting slaves as three-fifths of a free person for purposes of apportionment of representation in Congress).

29. JUNETEENTH, *supra* note 5, at 308.

30. INVISIBLE MAN, *supra* note 6, at xvii.

31. Ralph Ellison, *Slick Gonna Learn*, 2 DIRECTION 10-16 (Sept. 1939).

32. See Ralph Ellison, *Cadillac Flambé*, 16 AM. REV. 249-69 (1973); ROBERT G. O'MEALLY, THE CRAFT OF RALPH ELLISON 120 (1980) (discussing Ellison's explanation of why Minifees is committed to a hospital). See also Brent Staples, *Indivisible Man*, N.Y. TIMES, May 12, 1996, § 7, at 6.

that they work around those constraints.³³ Law, Ellison tells us, "ensures the conditions, the stage upon which we act; the rest of it is up to the individual."³⁴ Through those insights, we are able to see in *Invisible Man* how African Americans created lives despite segregation, how they overcame law and how they were more pious because of their struggles—and how their story was at the center of American history.³⁵

The *Oklahoma City University Law Review*, located just a few miles from Ellison's old neighborhood on East Second Street and even closer to

33. See, e.g., Mack, *supra* note 17. Mack provides a modern interpretation of the accommodation that took place between legal and cultural values as the Jim Crow system emerged. He points, in Ellison-like fashion, to the ways that African American values operated within (and helped shape) the legal framework of segregation. Indeed, as we are now seeing, African Americans' ideas of justice taught Americans more generally the value of equal protection. See Mark V. Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. DuBois, and Charles Hamilton Houston*, 74 J. AM. HIST. 884-903 (1987). Ariela Gross has taken a somewhat different approach recently, looking to the ways that law constructs the responses of those governed by it. See Ariela Gross, *Beyond Black And White: Cultural Approaches to Race And Slavery*, 101 COLUM. L. REV. 640 (2001).

Ellison is concerned with many of the same questions that motivated the social novel published one hundred years before *Invisible Man: Uncle Tom's Cabin*. Where Harriet Beecher Stowe portrayed in *Uncle Tom's Cabin* and her later novel, *Dred: A Tale of the Great Dismal Swamp*, how the legal system constrained humanity, Ellison focuses on ways that people achieve humanity even under harsh laws. See Alfred L. Brophy, *Humanity, Utility, and Logic in Southern Legal Thought: Harriet Beecher Stowe's Vision in Dred: A Tale of the Great Dismal Swamp*, 78 B.U. L. REV. 1113 (1998). Uncle Tom, like the *Invisible Man*, achieved humanity despite the harsh laws surrounding him. One is tempted to wonder whether the *Invisible Man* is related to Uncle Tom.

34. ELLISON, *Perspective of Literature*, *supra* note 3, at 781.

35. Ellison articulated his optimism that African Americans were something more than the sum of their oppression (and his anger at the inability of others to see that) in a 1944 review of Gunnar Myrdal's *An American Dilemma*:

But can a people (its faith in an idealized American Creed notwithstanding) live and develop for over three hundred years simply by reacting? Are American Negroes simply the creation of white men, or have they at least helped to create themselves out of what they found around them? Men have made a way of life in caves and upon cliffs; why cannot Negroes have made a life upon the horns of the white man's dilemma?

RALPH ELLISON, *An American Dilemma: A Review*, in COLLECTED ESSAYS, *supra* note 3, at 328, 339.

the Douglass school, which he attended, is pleased to present the following essays on the multiple connections between Ellison and legal thought. We are honored that the distinguished authors have permitted us to publish their work.

We have grouped the articles into several, somewhat arbitrary categories: Ellison's Cultural and Political Thought and Context; *Invisible Man* and Other Ellison Texts; and Ellison's Expanding Circle: Legal and Psychological Ramifications of Invisibility.

ELLISON'S CULTURAL AND POLITICAL THOUGHT AND CONTEXT

John Callahan, whose work has been so important in recovering for the nation Ellison's unpublished work, teaches us much about Ellison's faith in the Constitution. Callahan places Ellison's ideas into the context of the Oklahoma City of the 1910s and 1920s, where men like J.D. Randolph influenced Oklahoma's legislation by giving advice from his position in the state law library. Randolph's is yet another of those many stories about history as it actually existed, and the way whites remember it. It is an example of what Ellison wrote in *Going to the Territory* of the mythic history, with its clean racial divides and true history. Both versions of history exist in parallel, and each continues to exercise an influence over our current actions.

Callahan also introduces us to Roscoe Dunjee, editor of *The Black Dispatch*, whose editorials as early as the 1910s called for a new view of the Equal Protection Clause. Mr. Dunjee, famous for the banner on his newspaper, "All men up, no man down," later was instrumental in the integration of the University of Oklahoma School of Law, by encouraging Aida Sipel to file suit.

Danielle Allen looks at Ellison's political thought after the publication of *Invisible Man*. She focuses on the sacrifices that African-American parents in Little Rock, Arkansas, made and those they asked their children to make. Like Callahan, Allen focuses on the positive good that law confers on society (and individuals). She asks, through Ellison's celebration of sacrifice in African American culture, when is it proper to compel sacrifices from individual citizens?

Richard Stern's eulogy is a personal portrait of Mr. Ellison. We learn why Ellison cared so much about shoes, how his knowledge (in true American fashion) spanned not just literature and music, but technical diagrams, too. Stern's discussion of Ellison's insights on Henry James reminds me of Ellison's insights on law. I have learned much from

Perspective of Literature. It came into my consciousness just as I was struggling for a way to talk about the different conceptions of justice in African-American and white Oklahoma in the years before the Tulsa riot.

Phyllis Bernard's article portrays in rich detail African-American life in Ellison's Oklahoma. Reading her descriptions of African Americans who built all-black towns like Boley, Oklahoma, and who would not abide a lynching, we understand more fully how Ellison's world differed so dramatically from that portrayed in white accounts of Oklahoma, especially from accounts in white courts. Ellison saw the mixture of African-American, Native American, and white cultures, and Bernard recovers that mixture—and that optimism for us. As a legal historian, Bernard is particularly interested in how the Oklahoma courts at the time of Ellison's childhood approached issues of race. She demonstrates how the courts structured a world of restraints on African Americans, although the courts also protected property rights of African Americans. So Bernard presents a subtle story of how African Americans negotiated with Jim Crow.

INVISIBLE MAN AND OTHER ELLISON TEXTS

Steven Hobbs' monograph explores Ellison's storytelling narratives across *Invisible Man* and Ellison's essays and short stories. Hobbs identifies Ellison's storytelling methods and then shows the multiple ways that Ellison uses those methods to remake our understanding of society—and of law in particular. Hobbs recovers for us the multiple ways that Ellison critiques—even destabilizes—our notions of law. In the process, Ellison replaces American society's outmoded ideas about arbitrary law with a better idea of law based on the idea of equal treatment. Further, as Hobbs states it, Ellison's recognition of oral storytelling traditions inspires us to tell stories about equality, democracy, and human dignity.

In an essay with one of the most engaging titles I have ever seen regarding Ellison, Marcy Tanter addresses a tangled question: Why do we sympathize with the Invisible Man when he steals power from Monopolated Light and Power? He is committing a crime that the New York legislature is concerned about.³⁶ Tanter uses that question, moreover, as the entry point

36. I cannot resist a reference to a 1927 New York case, *New York v. Ashworth*, 220 A.D. 498 (N.Y. App. Div. 1927), which involved the prosecution of a mill's employees for using the mill's equipment to spin wool without their employer's permission. The court had to decide the scope of larceny, so it looked to definitions of larceny involving electricity.

for an extended meditation on lightness and darkness in the prologue.

We also have two essays that provide close reads of several Ellison short stories. Gordon Hylton focuses on the haunting, posthumously published story about a lynching in a small Alabama town. The story, which John Callahan has called *A Party Down at the Square*, is narrated by a young white man. Through the story, we see the inhumanity of lynching, as well as the ways it corrupts the entire community. But Ellison also leaves us wondering about whether poor whites were beginning to see through the lynching ritual. Where they beginning to be unsatisfied with their place in Southern society? Would there be some greater connection between white and black workers? Ellison concluded *Slick Gonna Learn* with a similar question. Ellison returned to the violence of lynching—and its power to transform sentiments—in *Juneteenth*.

Arthur LeFrancois provides a close read of *Cadillac Flambé*, which is also narrated by a white man. LeFrancois shows how Senator Sunraider's use of social norms constrained jazz musician Lee Willie Minifees. Much as Chief Justice Warren recognized in *Brown* that segregating African Americans from whites stamped them as inferior, Minifees is hurt in important ways by Sunraider's speech regarding renaming the Cadillac, even though it had no necessary effect on him financially or legally. LeFrancois applies the most recent legal theory to the story to suggest how norms function independent of, as well as in conjunction with, the legal system.

ELLISON'S EXPANDING CIRCLE: LEGAL AND PSYCHOLOGICAL RAMIFICATIONS OF INVISIBILITY

James Reibman's article explores an important, but little-known story about the Lafargue Psychiatric Clinic in Harlem, which occupied an important role in *Brown*. Reibman's detailed article reminds us that African Americans were invisible to the healthcare system, as well as to schools, the polls, and the courts. Yet, some people moved mountains to change that. Reibman, like Callahan, recovers a hidden history. We see a multi-racial circle of people, including Ellison, who worked to improve Harlem.

And then it speculated about the possible expansion of larceny to include . . . radio waves! "Electricity and gas have been held to be the subject of larceny. . . . Perhaps some court may soon hold that a property right, through a license in a radio wave length, may be stolen." *Id.* at 501-02 (citation omitted). One wonders, then, whether someone might attempt to make property rights of radio frequencies and in that way limit access to them?

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Through their efforts, people who otherwise never could have afforded psychiatric care received it, as the professionals who worked at the clinic conducted studies to push back the frontiers of social science knowledge.

Cassandra Jones Havard shows the usefulness of the concept of invisibility for rigorous analysis of discriminatory lending practices. She demonstrates that hidden practices—lending on unfavorable terms in minority communities—led to unjust, racially discriminatory results. In short, the rules allow “the market to legitimately treat marginally qualified borrowers in ways that undercut a fair and efficient creditworthiness evaluation.”³⁷ Havard’s article is a model of integrating legal and literary analysis and is the perfect capstone to our issue. It looks intensely at Ellison’s text and outward to a meticulous legal analysis and connects them both in a way we seldom see in law and literature scholarship. It is testimony, as are the other articles in our symposium, about the many ways that Ellison continues to teach us about the role of legal institutions in American life—and how to remake those institutions.

37. Cassandra Jones Havard, *infra* p. 1075.