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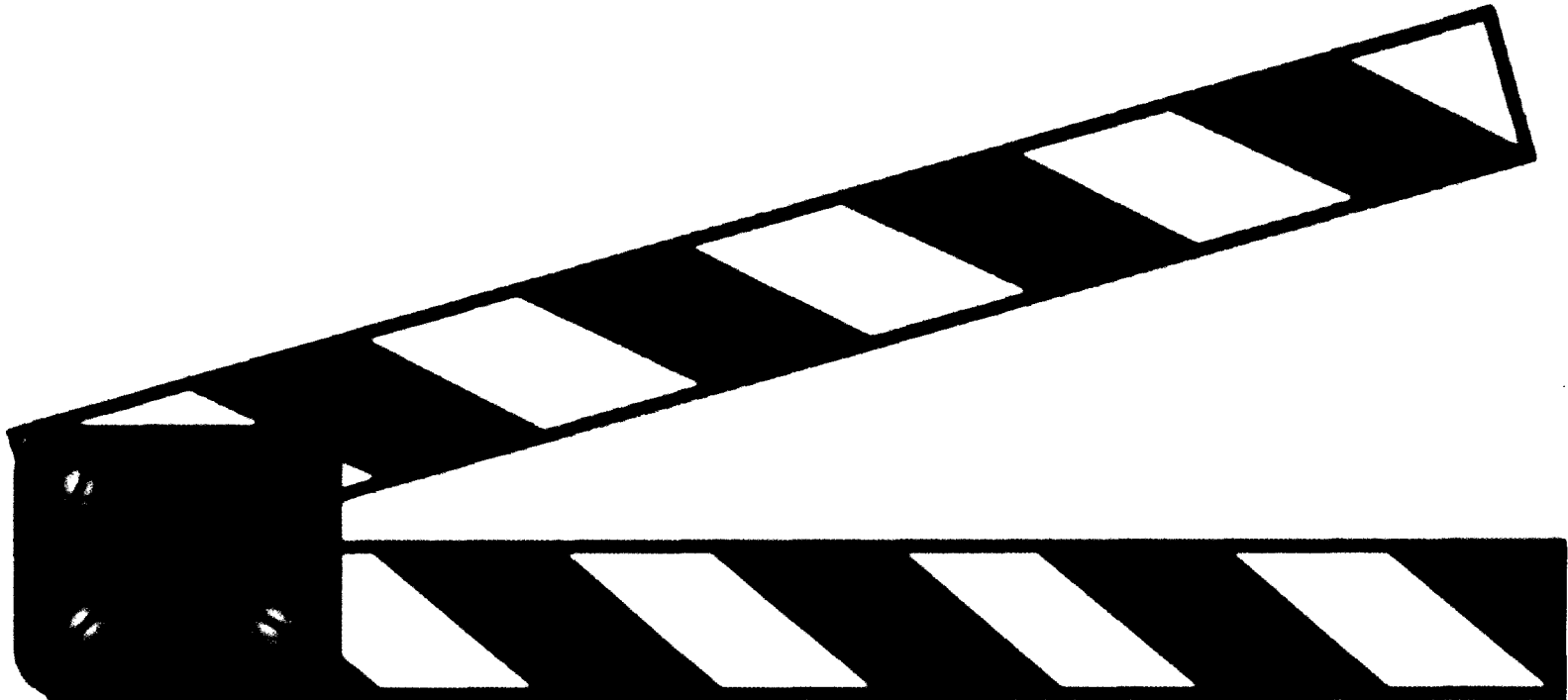
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ABSTRACT

Collectively, the charges and convictions of nine black youths in Scottsboro in 1931 became a symbol of corruption and oppression for those interested in reshaping America's political and legal landscapes. Scottsboro instigated a decade of trials and retrials, two landmark United States Supreme Court opinions, countless dramatic interpretations, and various artistic responses. In particular, *Scottsboro, Limited* by Langston Hughes and *They Shall Not Die* by John Wexley were cultural revisions of the trials in 1931 and 1933, respectively. While both works supported the defendants, they were distinguished by their form, production and ultimate statement about the meaning of Scottsboro. These dramatic reproductions help outline a negotiation between pop-culture and legal culture in the early years of the Great Depression. Ironically, as the legal community showed signs of incorporating social concerns within the parameters of legal reasoning, the cultural productions of Scottsboro grew less radical and more in line with "mainstream America."

I certify that I have read this thesis and find that, in scope and quality, it satisfies the requirements for the degree of Master of Arts.



Ilka Saal, Thesis Advisor



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THE POLITICS OF THEATER AND THE THEATER OF LAW:
THE LEGAL AND CULTURAL IMPLICATIONS IN
LANGSTON HUGHES AND JOHN WEXLEY'S DRAMATIZATIONS OF THE
SCOTTSBORO TRIALS

By

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B.A., Princeton University, 1998

A Thesis

Submitted to the Graduate Faculty

of the University of Richmond

in Candidacy

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&

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I. INTRODUCTION

In the spring of 1932, Langston Hughes arrived in Los Angeles to participate in a mass meeting for the “Scottsboro Nine,” where he watched the first production of his play, *Scottsboro, Limited*,¹ written just after the first trial in 1931. Propelled by *Limited*’s climactic shouts of “Fight, Fight, Fight,” Hughes led the working-class crowd in a follow-up protest chant of his political poem, *Tom Mooney*, praising a radical accused of a 1916 San Francisco bombing. The festivities represented the power of living poetry and drama to incite a unified voice of protest. Two years later, John Wexley wrote another rendition of the Scottsboro trials, *They Shall Not Die*, and the production also ended in a shout; however, the united voices of audience/actor, black/white that concluded the Hughes performance in Los Angeles, were transformed into the solitary, white, male voice of a northeastern criminal defense attorney fighting for, rather than with, the black defendants of Scottsboro. *They Shall Not Die*, offered by the Guild Theatre to a Broadway audience, marked a sharp contrast from *Limited* in audience, form, and ultimately, in its interpretation of the meaning of Scottsboro.

The transformation from the “We” of Hughes to the “I”/“They” of Wexley serves as a symbol for a broader shift in American culture between 1931 and 1934. Both plays function as political theatre, and have ties to the radical left, but their divergent styles and forms reveal more than a mere difference in playwright or audience; rather, the fissure between *Limited* and *They Shall Not Die* reveals an evolution of American political theatre, a revolution in constitutional law (from which their subject is taken), and a

¹ *Scottsboro, Limited* will be referred to as *Limited* as opposed to *Scottsboro* in order to distinguish the play from other uses of the word “Scottsboro” (i.e., place, trial, appellate opinions).

developing definition for American culture itself. The use and meaning of Scottsboro serves as a mediator for these three seemingly disparate, but inseparable, changes.

This paper will explore the Scottsboro trials, and the American political and legal cultures surrounding them. It will discuss the form and meaning of the two Scottsboro-based plays, *Limited* and *They Shall Not Die*, and relate each to the constitutional shift that began, in part, with the Supreme Court decision of *Powell v. Alabama* (1932).² The trials, the appellate opinions, and the plays themselves are tied to the cultural change spurred by the early years of the Great Depression. Ultimately, a comparison of *Limited* and *They Shall Not Die* illustrates a conservative shift in the radical movement that arose out of the crash of 1929 and links this shift to the liberalization of constitutional law. This paper does not attempt to argue a cause-and-effect relationship between political theatre and American jurisprudence, but rather argues that theatre about the law provides a unique and powerful opportunity to explain the interconnectedness of legal and cultural responses to social crisis.³

This paper will be organized as follows: Part II provides a brief summary of the Scottsboro trials and a discussion of the shifting American constitutional interpretation of the 1930s that enabled the landmark decisions of Scottsboro; Part III discusses the Scottsboro trials outside of the legal context and analyzes the way in which Langston Hughes reconstructs the first set of Scottsboro trials for political theater; Part IV returns to the law of Scottsboro, exploring the concept of trial as spectacle, linking this to concepts of political theater, and tracing these conceptions to the Supreme Court's

² 287 U.S. 45 (1932).

³ For further discussion of the distinction between a "legal" and "cultural" responses, see L. Friedman 1579-93 and Yngvesson 1689-93. This paper will distinguish between "legal culture" and "popular culture," see *supra*, 6-8.

decision, *Powell v. Alabama*; Part V addresses John Wexley's play in terms of a cultural shift from earlier representations of Scottsboro.

II. DEFINING SCOTTSBORO & CULTURE IN THE THIRTIES

Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do not more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.

Holmes, *The Path of the Law*

The Scottsboro trials began in 1931 and did not ultimately resolve until 1937; spanning nearly the entire decade, they came to represent an emerging struggle in constitutional law between the states and the federal government over the power to protect the rights of individuals. The first set of trials ended in death sentences for eight of nine defendants on the verdicts of Alabama jurors.⁴ The Supreme Court overturned these convictions in 1932⁵ and remanded the case for a retrial on the holding that the defendants were tried without adequate representation. The decision was one of the first times the Court used the Due Process Clause to overturn a state interpretation of its own criminal procedure.⁶

⁴ The jury convicted all 9 defendants, but could not decide on the sentencing of Roy Wright, a thirteen-year old boy. Despite the fact that the prosecution had only asked for life imprisonment for Wright due to his age, seven of the jurors insisted on the death penalty. Because the jury recommended death for Wright, the judge ordered a mistrial in his case, but sentenced the remaining defendants to death (Carter 48).

⁵ Powell, *ibid.*

⁶ The Fourteenth Amendment was drafted by the 39th Congress in 1866 following the Civil War, and guaranteed that no one within the jurisdiction of a state would be “deprived of life, liberty or property without due process of law” (the “Due Process Clause”) or denied “equal protection of the laws.” Dennis Hutchinson highlights the fact that the Due Process Clause became the “weapon” to discourage “exertions of state authority in conflict with the fundamental rights protected by the Fourteenth Amendment” (Hutchinson 808). Lawrence M. Friedman elaborates on the nature of Due Process:

Freedom and democracy, in the minds of lawyers, in contrast with the public at large, tend to be conceived of largely in procedural terms. Lawyers are taught and trained to regard “due process” as the very essence of fairness and the rule of law. . . . On the whole, the layman thinks of justice, freedom, and democracy in markedly substantive terms. A fair trial is a nice thing; but if an innocent person ends up with his neck in a noose, fair process is not much consolation (L. Friedman 1603).

For further discussion of due process, the relevance of the Scottsboro decisions and the importance of Constitutional dignity, see Baker 127-138 and Wolfram 67.

The first remanded Scottsboro trial took place in the summer of 1933 in Decatur, Alabama, a town just a few miles from Scottsboro. Judge James E. Horton⁷ presided, and a jury found Haywood Patterson guilty of rape and sentenced him to death. Horton threw out the verdict holding it had no basis in fact. After granting the defendant's motion to dismiss, Horton attempted to get the prosecutor to drop the charges for the remaining defendants. The prosecution refused and instead went to the Alabama legislature—Horton was removed from further Scottsboro trials, but his decision marks a commonly overlooked feature of many cases involving rights—that the stands taken by individual state judges at the trial and appellate levels often laid the foundations for constitutional change.⁸

Horton resigned under political pressure from the Alabama legislature,⁹ and was replaced by Judge William W. Callahan (Carter 272-73).¹⁰ The Scottsboro defendants were once again found guilty and once again sentenced to death. The Supreme Court once again remanded the verdicts in another landmark case, *Norris v. Alabama*.¹¹ The *Norris* decision focused on the flawed jury selection procedures in Alabama and, unlike *Powell*, explicitly recognized systematic racial discrimination as the root of injustice. Nevertheless, the issue remained one of procedure, and the case was remanded for further action by the Alabama legal system.

⁷ For a full discussion of Judge Horton's role in the Scottsboro trial, see Linder 549-83.

⁸ For further discussion on how state judges instigated reform of criminal justice in the Thirties and beyond, see Lewis 575-78 and Hutchinson 807-08.

⁹ See Carter 269-74. Horton ended up losing his judgeship in the following election as a result of his decision to sustain the defendant's motion to dismiss.

¹⁰ Judge Callahan, nicknamed "speedy Callahan" by reporters, did not allow the defense leeway to cross examine the prosecution's witnesses the way Horton had allowed. In addition, Callahan made several rulings on motions that crippled the defense, see Carter 290-303.

¹¹ 294 U.S. 587 (1935).

Undeterred by the Supreme Court's second opinion—or perhaps spurred on by it—the state prosecutor tried the Scottsboro defendants for a final time in late 1936 and early 1937. This time, jurors found four defendants guilty, though they sentenced them to prison terms rather than death; in a strange twist, the prosecution agreed to drop the charges against four others who walked out of the courtroom free men. The ninth, Ozie Powell, was charged with a separate assault on a police officer that had occurred while in custody.¹² To conclude the saga, the last of the Scottsboro defendants was released from prison in 1950, nearly 20 years after the “Scottsboro Boys” were arrested. The release of the final defendant came at the hands of a politician in the form of a pardon. What began as a trial in a court of law ended with a political act beyond the realm of judge or jury. The law in the Scottsboro trials had become almost completely external, guided primarily by the political mood of Alabama and possibly America as a whole. This practice of external forces¹³ acting on the legal fate of the Scottsboro defendants was not limited to the last pardon—the case went up and down the judicial system and offered ample opportunities for judges to act, for observers to react, and for judges to act again. This relationship between the legal community and the broader cultural community requires further investigation in order to articulate the meaning and impact of Scottsboro on legal and non-legal developments.

Lawrence Friedman defines and uses the terms “legal culture” and “popular culture” to differentiate between legal and non-legal realms in his essay, “Law, Lawyers

¹² In 1936, Powell slashed the throat of deputy Edgar Blalock while in transport to the Birmingham Jail. Sheriff J. Street Sandlin, who had been driving, stopped the car and fired his pistol into the backseat, hitting Powell in the side of his head. Miraculously, Powell survived the gun wound. The state dropped the rape charge against Powell, but he was sentenced to 20 years by the court after pleading guilty to assault (Carter 349-50).

¹³ For a further explanation of the meaning of “external” with regard to law, see *supra* 8.

and Popular Culture.” For Friedman, legal culture consists of “ideas, attitudes, values, and opinions about law held by people in a society” (1579). This paper will use the term in a more limited sense: rather than representing opinions by all people in society, “legal culture” for our purposes will consist of the ideas, attitudes, values, and opinions held by judges, lawyers, law professors and other members of the legal community.¹⁴ In other words, legal culture here will consist of the shared premises and values of decision-makers, practitioners, and scholars schooled in the language and operation of law. As for popular culture, Friedman defines the term in two senses: first, as the “norms and values held by ordinary people”; second, as “works of imagination whose intended audience is the public as a whole” (1579). This paper will use popular culture in both senses, but I will argue that “works of imagination” (i.e., Hughes and Wexley’s plays about Scottsboro) serve as litmus for the norms and values held by ordinary Americans.¹⁵ The danger of these terms is that they create a clean dichotomy between popular and legal cultures where one may not exist. In fact, Friedman’s central thesis is that “social theory must go beyond the simple-minded equation that joins together particular social and legal events or changes, and find a process or mechanism that actually links the two together” (1583). Before discussing the way in which the Scottsboro case became a kind of process linking social and legal events of the 1930s, one must question whether the legal and social really exist in separate spheres in the first place.

¹⁴ Babara Yngvesson uses the term “legal elite” to describe those who are legal professionals, see Yngvesson 1691-92.

¹⁵ This is not to argue that Hughes and Wexley’s plays represent the majority views of Americans during the 1930s. Following Warren I. Susman, I will make the point later in the paper that Americans became self-conscious of the very concept of popular culture in the 1930s, and that an important part of this self-consciousness grew out of the work of poets and scholars with liberal sympathies. Hughes and Wexley’s plays are representative works of the era, and thus serve as one avenue into understanding the nature of the popular culture.

Law professor Barry Friedman writes, “We expect judges will decide cases based on the facts and existing precedents, rather than on the preferences of those in power” (B. Friedman 148). This expectation is derived from the ideal of impartiality in a court of law. The notion of impartiality manifests itself allegorically through the image of Justice, operating under blindfold and through the objective process of the balancing of scales: “any notion that law is legitimate when it meets with public approval, and illegitimate otherwise, seems to threaten the notion of the rule of law, and the separation of law and politics.” (B. Friedman 1060). The argument continues that law has, and must maintain, a degree of autonomy, and that when reviewing interpretations of the law, we should not substitute “the language of political science” for the “legal language” of judicial opinions (Cushman 206). Historian Duncan Kennedy finds:

legal consciousness [is] an entity with a measure of autonomy . . . a set of concepts and intellectual operations that evolves according to a pattern of its own, and exercises an influence on results distinguishable from those of political power and economic interest (qtd. in Cushman 256).

Yet, there is something wanting in the image of Justice, blindfolded and operating scales in some autonomous realm of legal consciousness. As law professor Moglen writes, “Neither a purely internalist nor a purely externalist perspective will produce the most plausible narrative reconstruction of our constitutional tradition” (274-75). The question becomes one of degree. How much of an externalist perspective should we allow when attempting to understand the nature of historical legal events such as the Scottsboro trials? The answer would seem to depend on the nature of the particular legal event that we are trying to understand. For example, appellate opinions are quite different modes of legal production than trials; in addition, certain trials are “more political” than other trials, creating a greater impetus, and perhaps thus potential, for

outside influence. The beauty of Scottsboro as a source of study is that over its six-year run it incorporated appellate opinions and legal trials, political questions and questions of law, internal arguments and external works of art. Not only was Scottsboro a product of the Thirties, it helped develop the Thirties. To understand how this was achieved, one must explore in greater depth and with greater particularity the nature of “popular culture” and “legal culture” during that decade.

For historians Warren I. Susman and Michael Denning, the notion that popular culture in America merited serious attention as a point of discussion and of academic scholarship blossomed during the era of the Great Depression.¹⁶ For example, the publication of Ruth Benedict’s book in 1934, *Patterns of Culture*, popularized the notion that cultural patterns could be analyzed both as particular phenomena and as causes of individual behavior (cited in Susman 153). The cultural shift in America in the early twentieth century can be measured by the rise of organized labor, the development of mass entertainment, the fallout from the economic crash of 1929, and reactions to the growing threat of Fascism (Denning 4-5; Susman 153). As the country struggled economically through the Great Depression, American institutions were reorganized to facilitate governmental systems of support (Susman xx-xxi). With the development of mass bureaucracy came technological advancements that facilitated the widespread distribution of means of mass communication such as radio. Susman argues that both the developments in communication and the nationalization of goods and services helped

¹⁶ This paper adopts Susman’s position that the Thirties marked a radical shift in the understanding of American popular culture. In addition, Denning’s ideas concerning the consistency of the “cultural front” are used to examine the nature of the legal culture of the time. While Denning mentions both the Hughes and Wexley plays, he does not discuss them in any detail. Furthermore, Denning does not connect the plays to their legal counterpart productions. Susman discusses neither the plays nor the legal climate of the Thirties.

mold a “special community of all Americans,” increasing cultural awareness by creating a unity of response and action: “In this connection, it is possible to see how these developments also heightened a growing interest among social and political thinkers in the role of symbol, myth, and rhetoric” (Susman 160).

The recognition and advancement of cultural patterns, as identified by Susman, facilitated a popular culture during the Depression era that manifested itself through Scottsboro: “Besides unemployment and poverty, the Scottsboro case became the most important issue in the eyes of America’s left-wing activists” (Cosgrove 201).¹⁷ The spread of the Scottsboro “issue” was facilitated by the spread of mass communication described above, and also by the ability of activists to use Scottsboro as a rallying point through “symbol, myth, and rhetoric.” From a cultural point of view in terms of movies, visual art, poems, plays and the like, Scottsboro proved a furious muse.¹⁸ Artist Loin Shi Khan and author Toni Perez depicted the Scottsboro trials through a series of linoleum cuts in 1931, beginning with the rape of Africa, depicting black Americans on the trains of mass production and ending their journey in the jails of Alabama (Khan 1-16). Langston Hughes not only wrote *Limited* in 1931, but published several poems of protest for *New Masses* and other left-leaning journals on the subject from 1931 to 1935. The Workers Film and Photo League created the film, *Scottsboro* (Denning 56);¹⁹ in 1933, the National Association for the Advancement of Colored People (NAACP) published a one-act play in their journal, *The Crises*, titled *It Might have Happened in Alabama* (Crises

¹⁷ As Denning argues, the cultural front guided artistic productions of popular culture throughout the Thirties, and emerged from an avant-garde, radical backdrop, see 64-65.

¹⁸ Hugh Murray argues that literature about the Scottsboro trials has served as a kind of pulse for the state of the nation. Rather than focusing on the Thirties, Murray does a broad sweep of the thirties, fifties, sixties and seventies (82).

¹⁹ The film is lost, though records of it still exist. For discussions on the work and influence of the Film and Photo League, see generally Alexander and Campbell.

227). The influential American-based agitprop theater troupe, Prolet Buehne, produced a play in the German language in 1931 titled *Scottsboro*. John Wexley's play for Broadway recreated one of the Scottsboro trials in 1934 from the trial transcripts. Collectively, these and other responses were part of a larger "cultural formation" of the early to mid-Thirties, defined as "that union of an artistic form and a social location" (Denning 229). As such, these artistic productions became "part of the mythology of the United States, part of the national-popular imagination" (229). Specifically, artists looked to Scottsboro as a way of challenging the dominant social institutions capable of perpetuating injustices by reformulating the narrative of the trial.

What is particularly fascinating about the Great Depression is that the social institution of law was simultaneously reformulating its own narrative in terms of constitutional interpretation. From the point of view of legal theory, American jurisprudence was primed to develop sensitivity to social change by the school known as the American New Realists. Some of the more influential New Realists included the Supreme Court Justice Oliver Wendell Holmes, Jr., drafter of the U.C.C. Karl Llewellyn,²⁰ and the legal theorist Jerome Frank (Tebbit 22). According to Philosopher Mark Tebbit, the New Realists were most influential during the Twenties and Thirties,²¹ and were held together by the belief that theories of justice had moved too far from the way in which law was actually practiced (Tebbit 22). They viewed the courtroom and the

²⁰ Uniform Commercial Code. The U.C.C. has been adopted in some form by every state in the United States. Article 1 of the U.C.C. contains general provisions that operate for the entire code. One of Llewellyn's contributions to this article was to allow for commercial business transactions as they actually occurred, without the burden of formulaic considerations such as the placement of seals that would foil an otherwise legitimate "meeting of the minds." In other words, the idea was to incorporate "real world" business practices when interpreting the legal meaning of contracts.

²¹ Oliver Wendell Holmes Jr. and John Chipman Gray initiated the movement at the turn of the century. Karl Llewellyn, Jerome Frank and Judge Joseph Hutcheson published throughout the 1930s, see Tebbit 22-23.

presiding judge as the central source for law rather than some universal natural law.²² However, unlike empirical theorists,²³ the New Realists were willing to acknowledge the connection between morality and legality. Thus, New Realist Jerome Frank argued that law was formulated by the conscious exercise of judicial discretion with regard to individualized cases (Frank 141). Likewise, Justice Holmes wrote that “judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage” (Holmes 40). By considering the “social advantage” as part of legal reasoning, the New Realists made the argument for the court’s role as a medium for social change. Once the argument was made, it took the crash of 1929 and subsequent New Deal legislation to test its implications.

The New Deal promised to inspire faith in federal institutions and stimulate the economy, but was consistently scuttled during Roosevelt’s first term (1933-1937) by Supreme Court decisions narrowly construing the federal government’s ability to regulate in areas traditionally controlled by the states.²⁴ In 1937, the Court reversed itself through *NLRB v. Jones & Laughlin Steel Corp.*,²⁵ upholding the pro-labor Wagner Act by reformulating the meaning of the Commerce Clause of the Constitution: *Laughlin Steel*

²² Natural law is “a system of legal and moral principles purportedly deriving from a universalized conception of human nature or divine justice rather than from legislative or judicial action” (Black’s 1049).

²³ In general, positivists followed the empirical philosophical traditions of Locke and Hume and rejected an intrinsic nature of law beyond what humans constructed. Thus, John Austin argued against conceptions of natural law in favor of a conception of law as rules “laid down for the guidance of an intelligent being by an intelligent being having power over him.” With this claim came the idea that law was morally neutral (qtd in Tebbit 34).

²⁴ In the famous case dubbed the “Sick Chicken,” the Court struck down the minimum wage/maximum hour requirements of Roosevelt’s National Industrial Recovery Act: “Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority” (*ALA Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). The decision of *United States v. Butler*, 297 U.S. 1 (1936), destroyed an Agriculture Adjustment Act tax meant to balance production and consumption of agricultural commodities, and *Carter v. Carter Coal*, 298 U.S. 238 (1936), affirmed “Sick Chicken,” holding that Congress could only regulate industries that had a direct, not indirect, effect on the economy.

²⁵ 301 U.S. 1 (1937).

essentially allowed the federal government to set minimum wage and maximum hours standards. What is not immediately obvious is that this shift in the interpretation of the Commerce Clause was facilitated by the Court's earlier decisions in *Scottsboro*. Hutchinson describes the process whereby the Supreme Court finally acted against the "stench" of Jim Crow:

One petition for certiorari after another recounted allegations of coerced confessions, casual brutality in custody, manufactured evidence and juror misconduct. Yet case after case was precluded from review by procedural default, inept counsel or no counsel at all. *Scottsboro* and *Brown v. Mississippi*²⁶ were the Supreme Court's vehicles for condemning a system whose corruption was evidenced daily. (Hutchinson 808)

Scottsboro marked a sea change in legal culture. As Edward Purcell notes, due process and Commerce Clause jurisprudence were intertwined and "their relationship generated an internal potential . . . for sanctioning substantial increases in governmental regulatory powers" (Purcell 281). In other words, once the federal judiciary found the constitutional authority to interrupt state power for purposes of civil rights, it was reasonable and perhaps inevitable that the Court would allow federal regulation of commerce that was once solely within the realm of the states.²⁷ These specific constitutional interpretations of the 1930s were the "seeds of the constitutional revolution we identify with the 1950s and 1960s" (Hutchinson 807).

Near the turn of the 20th century Justice Holmes wrote, "We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind" (49). Thirty years later, the legal and popular culture of America underwent

²⁶ 297 U.S. 278 (1936). *Brown* invalidated convictions of black tenant farmers who had confessed to the murder of a white planter after several rounds of brutal whippings.

²⁷ Moglen follows this line of argument, stating that "the legal history of the New Deal is the story of wholesale change in personnel and organizational technology, as—in perfect Marxian theory—the quantitative changes in the government legal sector became qualitative ones" (270).

sweeping changes, and Scottsboro became a medium through which the law and the “public mind” intersected. The importance of Scottsboro was due, in part, to the newfound self-consciousness of popular culture that developed in the 1930s that took into consideration the nation’s relationships with social institutions and, in part, to the application of ideas championed by American New Realists that argued for a system of law recognizing the judiciary’s role in instituting social change.²⁸ With this conception of legal and popular culture of the 1930s in place, we will turn now to Langston Hughes’s *Limited* to explore the specific relationship between this piece of popular culture, the legal culture from which it derived, and the play’s possible effect on subsequent legal episodes.

²⁸ For a discussion on the idea of popular legal culture and the influence of local setting on law in recent decades, see Yngvesson 1689-93.

III. AGITATION AND GOOD VIBRATION: HUGHES'S POLITICAL SCOTTSBORO

The legal system invests, inhabits, and flows out of the same society that produces and sustains popular culture. That society has its structure, its traditions, its norms and ideologies. In society, there are general ideas about right and wrong, about good and bad; these are templates out of which legal norms are cut, and they are also ingredients from which song- and script-writers craft their themes and plots. As general social norms shift over time, themes of the legal systems shift with them; and so too of popular culture. Art, sub-art, and law move in parallel directions—more or less (L. Friedman 1589).

Hughes wrote *Limited* in 1931, only a few months after the convictions and death sentences were handed down from the first Scottsboro trial. Hughes's mediation between "race" and "labor" allows his play to move beyond a simple agitprop slogan both structurally and thematically. If the New Realists were arguing for legal culture to acknowledge the role of the shifting "public mind," Hughes's *Limited* was an effort in expanding that public mind, the popular culture, to recognize Jim Crow, to condemn the exploitation of labor, and to specifically free the Scottsboro defendants.²⁹ Before the Supreme Court had made the connection between due process and the Commerce Clause, between individual liberty and federal regulation of private mega-corporations like Jones & Laughlin Steel, *Limited* made the connection aesthetically and thematically using political theatre to express a desire for change within what has been termed America's "cultural front."³⁰

²⁹ For further discussion of techniques used by Hughes in his works for theatre, see Sanders 4-11. Sanders argues that Hughes was heavily influenced by productions he saw when he traveled to the Soviet Union in the mid-thirties; however, *Limited* was written before his trip to Russia, and many of the qualities that Sanders attributes to Hughes' travels—formal experimentation, use of folk forms, incorporation of rhythms—were already evident in *Limited*. While a discussion of Hughes's trip to Russia is outside the scope of this paper, the relationship between Hughes and dramatists such as Meyerhold and Oklopkov deserves further exploration—perhaps there was more of a dialogue than Sanders suggests.

³⁰ "The cultural front was a common metaphor of the time, combining two meanings of the word 'front': the military metaphor designating a place, a site of struggle or battlefield; and the political metaphor designating a group, a coalition with a common purpose. Thus, the 'cultural front' referred both to the

The first image of *Limited* is of “eight BLACK BOYS, chained by the right foot” (*Limited* 117, capitalization the author’s). Black bondage begins the action: before any words are uttered, race literally takes center stage: “As they approach the middle of the house . . . the WHITE MAN rises in the audience” (117, capitalization author’s). Despite the presence of the Scottsboro defendants at the play’s genesis, Hughes gives the white man the first speaking role. In the first few lines, the audience is exposed to the nameless Man’s shouts, his demands of the “Boys” to stop talking, and his racial slur, e.g., “you coon!” (117). But the “Boys” are not silenced—they “speak poetry,” and they physically displace the Man who must sit “jauntily on the edge of stage” (*ibid.* 117). In other words, the play serves as a kind of blueprint for subversion.

Susan Duffy astutely points out that the collective protagonists do not simply form a faceless mass protest, but that Hughes “maintains the individuality of the Scottsboro defendants with lines revealing their individual ethos” (28).³¹ She further notes that the white actor plays multiple roles and thus becomes “the entire white race” melded into a single white face. Yet, as the Boys move to center stage, there is a subtle shift in focus from the white/black dialectic: “Not supposed to read or write,” the Man says, “You work better without it” (*Limited* 117). This moment signals a variation from the original racial “ground beat.” The variation is rooted in the first image of the play—the chain gang of Black Boys that refers the audience/reader to the image of slavery, of a slave economy, and of what Hughes views as the root of racial oppression: cheap labor.

cultural industries and apparatuses—a ‘front’ or terrain of cultural struggle—and to the alliance of radical artists and intellectuals who made up the ‘cultural’ part of the Popular Front” (Denning xix).

³¹ Duffy’s article is an introduction to *Limited* given in her anthology of Hughes’s political plays. As such, the main point of her article is to give the reader background on the writing and production of the play. Duffy does a limited critique of *Limited*, focusing mainly on its source as agitprop.

The oscillation between racial and economic strife propels the play forward. Hughes's merger of the two social issues with regard to Scottsboro contains implicit historical tensions that give the play increasing urgency. For one, the accusers in the Scottsboro trials were white laborers. The two women traveled the rails to a neighboring town to supplement their income as mill workers. In addition, Hughes's play was produced at a time when the very public battle for representation of the Scottsboro defendants was heating up between the Marxist ILD and the NAACP.³² The Association, slow to come to the defense of the Scottsboro defendants,³³ eventually condemned the ILD in its struggle to wrest control of the case. Walter White, executive secretary for the Association, went so far as to point out that the ILD was a "working class mob of whites" who wanted to lynch the defendants when they were first arrested (Carter 93), thus severing the efforts of the white laborers as represented by the ILD from the interests of black Americans.

Finally, the conflict between racial efforts and labor efforts touched Hughes personally, as he had ties to both camps. His father, Rev. F.A. Cullen, supported the NAACP's rejection of the ILD, holding a mass meeting in competition to a Communist rally in June of 1931; White, himself, had served as a mentor for Hughes (Rampersad 218). However, Hughes was also actively involved in the John Reed Club, the American

³² While the ILD made a point of representing black defendants, their mode of agitation was tied to the Communist party with the ultimate goal of mobilizing the working class: "ILD officers professed independence from the Communist Party, but this was only a convenient fiction which aided in the recruitment of prominent non-Communists to the national committee" (Carter 66-67). Thus, the ILD was tied to Stalin's "Third Period" where the duty of international Communist parties was to "take the offensive in demonstrations, strikes, and—ultimately—revolution" (Carter 64). The NAACP, on the other hand, was concerned primarily with the social advancement of black Americans, rather than a working class revolution, and relied on its traditional base of conservative black ministers and church members. (Rampersad 216).

³³ "The last thing they wanted was to identify the Association with a gang of mass rapists unless they were reasonably certain the boys were innocent or that their constitutional rights had been abridged" (Carter 52-53).

Negro Labor Congress, and other groups that leaned to the left (Duffy 25). Rampersad writes of Hughes in the early 30's: "he was becoming at least three different writers—radical, as in the *New Masses*; commercial, as in the *Kaj Gynt* musical; and genteel, if also racial, as in the poems proposed to Prentiss Taylor" (Rampersad 221). Writing about Scottsboro required Hughes to wear all three hats, but more importantly, Scottsboro offered Hughes an opportunity to connect politically disparate racial and labor issues that he saw as fundamentally linked.

The effort of formulating a blueprint for subversion in the dual realm of race and labor is articulated in the very structure of *Limited*. At its most basic, *Limited* is an agitprop piece. If the cultural front began as an avant-garde culture as Denning suggests, the form of agitprop was the primary medium for its early revolutionary expression as participant Earl Robinson exclaimed:

We took it out on the goddamn streets . . . Agitprop, that was an honourable word. We never even thought of anything else in the world except that, agitation and propaganda (qtd. in Denning 66).

During his "communist years," which ran from the commencement of the Scottsboro case in 1931 and ended with the Nazi-Soviet Pact of 1939, Hughes argued that the black artist should write functional literature—a literature committed to "discernible action" (Jemie 105). In general, the structure of agitprop plays was designed to create in the audience just such a "discernible action" (Duffy 26). Techniques to mobilize viewers included planting actors in the audience to shout reactions, demonizing the opposition to create a sense of solidarity among viewers, and "a conclusion that prompts the audience to rise in mass, shouting slogans or singing songs" (Duffy 26-27).

More than mere mobilization, agitprop was specifically designed to disseminate Marxist propaganda (Cosgrove 201). The German-speaking Prolet Buehne ushered in a brief explosion of agitprop companies and performances in the early 30s.³⁴ The Communist party established other groups in New York for the sole purpose of producing agitprop plays (Duffy 27).³⁵ As Stuart Cosgrove argues, agitprop was *the* vehicle for Marxism in the same way that mystery plays were the vehicle for Christianity in the Middle Ages: “It presented class issues in a clear-cut, indisputable manner and simplified political theory for an audience who were often illiterate or uneducated” (202). *Limited* is just such a Marxist “morality play,” designed to instigate action. In her introduction to the play, Susan Duffy imagines the actors designated as racist “Mob Voices” and pro-defendant “Red Voices” battling verbally amid the viewing audience until the Reds prevail and join hands both on and off the stage. The final shouts of “Fight!” are reinforced by a rendition of “The Internationale” and a red flag that descends from above (Duffy 28).

But the strength of agitprop—its ability to present a clear-cut, unambiguous message—is also the form’s greatest limitation. As the name suggests, it is an instrument of agitation rather than subversion. Even radical reviewers of the Prolet Buehne’s agitprop productions recognized the limitations of the form as a means for social reform. *The Partisan Review*, for example, published an essay entitled “Problems and Perspectives in Revolutionary Literature,” in which the authors warned against the form’s tendency to simplify and polarize:

³⁴ Under the leadership of Hans Bohn, the theatre troupe that had facilitated social gatherings for a small community of German immigrants was transformed into an activist group whose productions of agitprop thrived in America following the crash of 1929 (Cosgrove 201-02).

³⁵ Such groups multiplied in number in America from around 200 in 1931 to a peak of over 400 in 1933 (Cosgrove 207, 210).

The measure of a revolutionary writer's success lies not only in his sensitiveness to proletarian material, but also in his ability to create new landmarks in the perception of reality; that is, his success cannot be gauged by immediate agitational significance, but by his recreation of social forces in their entirety.

(Phelps 185)

As suggested earlier, Hughes was playing a subtle balancing game between racial and labor issues in *Limited*. The force of the agitprop form speeds *Limited* to its fiery, pro-labor conclusion—the last spectacle of Communist song, color, and voice structurally satisfies the agitprop Marxist agenda; however, the “ground beat” of racial oppression ultimately remains, giving the production an extra dimension. Rather than simply taking to the “goddamned streets,” as exclaimed by Robinson above, *Limited* surges beyond Marxist materialism and into something more transcendent—a kind of universal thump existing beyond the economic and physical limitations that plague the defendants and workers alike.

American vernacular musical form and substance become the tools by which Hughes wrenches the subjects of his one-act play from the reduction of single-tracked propaganda to a more ambiguous work of art.³⁶ Hughes first uses poetry and music to build solidarity among the characters at the beginning of *Limited*. One of the first commands of Man to the Boys is to “Stop talking poetry and talk sense” (117). The line is a subtle reference to the perceived disconnect between the world of popular culture,

³⁶ Hughes's use of music in his poetry has been thoroughly explored by Larry Scanlon and Lynette Reini-Grandell. Scanlon argues that Hughes uses music in his poetry not only as an aesthetic model, but to “redefine the very nature of cultural expression itself” (511). This paper borrows heavily from Scanlon's explanation of rhythm in Hughes's poetry in order to explore the particular use of rhythm in *Limited*. While Scanlon focuses on poetry, this paper is interested in looking the implications of music in the dramatic setting. Reini-Grandell examines the paradox of using the vernacular for black artists—Hughes in particular—during the 1920s and 30s. On the one hand, the vernacular allowed the Black artist to expand in ways that could “dismantle the status quo” (114). On the other hand, the some feared conceptions of “primitivism” threatened to undermine the social progress of Black Americans by perpetuating stereotypes (Ibid.). Finally, Joseph McLaren explores the use of music in Hughes' Gospel Plays. While McLaren studies Hughes's drama, he focuses exclusively on plays written after 1950, and limits his discussion to the influence of gospel music rather than jazz or blues.

symbolized by the defendants, and the world of cold law, symbolized by figures of authority in the law. Later, Hughes describes his stage directions in musical terms, building on this dichotomy: “The trial is conducted in jazz tempo: the white voices staccato, high and shrill; the black voices deep as the rumble of drums” (121). In blues, this structure is called the “ground beat” (the black voices) and the “melodic line” (the white staccato)—a defining characteristic of the blues (Scanlon 526). This ground beat structure highlights the musical elements of Hughes’ style in *Limited*. In terms of propaganda, the musicality of *Limited* provides an additional stimulus to guide the audience’s perception and facilitate the agitprop goal. This “phenomenal fusion” was not particular to Hughes—the Marxist Berlin theater of the 1920s regularly juxtaposed “satire, music, jazz-gymnastics, acrobatics and propaganda” (Cosgrove 202). However, Hughes’s specific structural use of black vernacular music to facilitate tense racial/labor thematic undertones created a new twist on the dominant proletarian politics of agitprop: “the grounding the blues offers the black working class is not some unchanging stability but an unending process of give and take, of rupture producing continuity, an abiding source of transformative energy” (Scanlon 526-27).

Thus, the white man’s early utterance to silence the poetry of the Boys represents the larger “silencing” of the disempowered, facilitated by events like the Scottsboro trials. The command continues the repression of Black voices in favor of the contradictory and racist testimonies of the two white women claiming rape. The fact that they are known collectively as the “Scottsboro Boys” reaffirms their collapsed identities and voicelessness. This is a point not lost on Hughes who adds “Limited” to his title, not only as a reference to the train from which the defendants were dragged, but also

indicating the nature of justice and voice that these defendants can expect from their ordeals. More than representing silencing, though, the command to stop speaking poetry is an ironic testament to the power of poetry. This is the weapon the defendants will use throughout the play to expand their shrinking spaces, to subvert the dominant voice of authority and to reclaim their destinies: “We won’t argue with you. / tonight there’s / too much else to do” (*Limited* 117).

The invocation of musical form, established early in the play, reverberates by the time the trial begins. The judgment of the defendants is put together like a jazz piece. Thurston recognizes that Hughes “employs an almost incantatory repetition at crucial moments, especially the trial, to highlight white fabrication of a racist ‘truth’” (*Limited* 8). Thurston supports this statement by pointing out the dialogue between the judge and the defendants where each defendant singularly denies having raped the girls. “No” is repeated 8 times, and then followed by a question/answer from judge to accusers who insist they were raped: “The single line successfully overcomes the defendants’ repeated answer” (*Limited* 8). In terms of the blues structure, the melodic line (the accusers) threatens to usurp the ground beat (the defendants). However, Hughes maintains the rhythm, reinforcing the ground beat and thus the cause of the oppressed over the “white fabrication.” However, the scene implodes when the mob, playing in the audience, shouts, “Kill the niggers!” The mob is then joined by the defendants themselves, who shout, “Kill the niggers!” collapsing the ground beat and the melodic line. Though they have joined the mob, the defendants circle to destroy the symbol of oppression—the electric chair.

It is crucial that the chair is threatened, but not destroyed, at this point in the play. Up through the trial, the play has not fully integrated the racial struggle with labor's fight. Early on, as mentioned above, Hughes articulates the common threat to both race and labor, but it is not until the Boys fail to destroy the electric chair that he begins to formulate a united solution to that threat. Once the trial concludes, the "Murmur of Red Voices" begins in the audience: "We'll fight for you, boys. We'll fight for you." (*Limited* 123). At this point, the audience is transformed from hanging jury to fighting Reds, and Hughes states what is by now the obvious point of the play: "Not just black—white and black" (*Limited* 124).

Despite the triumphant smashing of the electric chair that follows the union of Black and Red, Hughes's merger of race and labor is tenuous at best. Always, the rhythm of his poetry and choreography threaten to overpower any stabilizing force or effort on the part of the group. The Boys themselves are clearly shown to have limited control of their freedom, as demonstrated by the hanging judge, the chains, and the need for outside help. Powerlessness is reiterated by the "link" between the chains of bondage and the chain of freight cars carrying product across the country. The freight train symbolizes the mass industrial culture, shuttling nameless goods from town to town, from factory to factory, from place of production to place of consumption. The Boys—nameless themselves—are caught up in this machinery of production. It is fitting that the Boys meet their accusers on this commodity shuttle. For Hughes, the chain and the train are one in the same.

Furthermore, there is an irony here because the trial and the breaking of the chair are both given in flashback. This pushes the introduction of the play temporally later

than the hopeful utterance, “Fight,” that actually concludes the play. As such, there is a certain ambiguity in the agitprop ending. Yes, the Boys have received aid from the Reds, but their plight threatens to continue despite the help. Aid churns constantly back into the culture of formless production, undermining the possibility of having an individual voice and thus a true “day in court.” In other words, the individual rights of the defendants seem appropriated by the white laborers whose primary interest is in the “fight,” and who have only a secondary interest in the freedom of the defendants.

Does this ambiguity create in Hughes’s *Limited* the ability to escape the trap of agitprop mentioned above? In other words, does musical structure really move the play from purely material themes to spiritual ones? After all, the musical structure of *Limited* is finally reduced to an orchestrated singing of “The Internationale.” The vernacular music that Hughes seems to promote by creating the blues-structured ground beat and melodic line tension is ultimately reduced to a musically uninteresting³⁷ chant of political propaganda: “Debout les damnés de la terre / Debout les forçats de la faim . . . Le monde va changer de base / Nous ne sommes rien, soyons tout” (Pottier). The answer to this question is found in the rhythm that underscores the entire production of *Limited*.

For Hughes, rhythm is more than simply a useful structural technique—it is a means of resistance and a symbol for perseverance. Larry Scanlon points out that

37

The image shows a musical score for 'The Internationale' in G major (one sharp). It consists of two staves of music. The first staff has the lyrics: 'Tis the fin - al con - flict; Let - each stand in his place. The'. The second staff has the lyrics: 'In - ter - na - tion - a - le shall be the hu - man race.' Above the notes are various chord symbols: A, A#, D, F#7, C#, Bm7, Bm7, A, E7, G#, E7, A, E7 on the first staff; and A, E7, G#, F#m7, C#7, F, D, B7, D#, E, E7 on the second staff.

(Degeyter)

Hughes employs rhythm in his poetry as both an “actual residue of an originary past” and, more importantly, as a “self-conscious reconstruction in the present” (517). Despite the loose allegiance of the vernacular musicians to changing the political status quo,³⁸ jazz and blues certainly served to revolutionize American music and thus American popular culture. Furthermore, the very idea of rhythm functions beautifully as the central adhesive for the multiple aspects of Scottsboro because it is a mode articulated as much by the gaps between beats as the beats themselves. The invocation of rhythm is a tacit acknowledgement of the reliance of the “voice” on the “voiceless,” the powerful on the powerless. Scanlon’s insightful essay on the paradox of Hughes’s musical influences articulates the use of rhythm in cultural terms:

Rhythm for Hughes is nothing less than an alternate mode of cultural articulation: material, embodied, oral, musical . . . [R]hythm’s persistence within African-American culture as its ultimate source of continuity has as much to do with conditions of white oppression as with its African origins. White slave-owners successfully severed that culture’s linguistic ties to Africa, displacing African languages . . . As that part of African culture not directly dependent on language, African musical traditions proved more durable. This durability exposes a blindness which Hughes’s broadened notion of rhythm attempts to illuminate.

(Scanlon 518)

Rhythm is more than simply a symbol within *Limited*—rhythm is the actual non-verbal articulation of spirit, conjuring the strength of survival in support of unity among

³⁸ Rhythm found in vernacular American music formed one of the many instruments of organization for the Popular Front. Hughes himself helped organize a benefit for the Scottsboro Nine that featured the jazz bands of Benny Carter and Fletcher Henderson, using music to raise money for the defendants. Furthermore, the benefit was put together with the help of Louise Thomson, who later married an ILD lawyer and was instrumental in creating American dance and music events as well as a Marxist study group (Denning 334). But while music had vast potential for organization, its power was not limited to the service the Popular Front. Denning points out that jazz musicians themselves rarely subscribed to or promoted a particular political stance or radical ideology: “As virtually all the memoirs and interviews make clear, the jazz musicians were primarily interested in their craft, and their ‘political’ statements usually dealt with injustices faced by musicians, the day-to-day exploitation, petty tyrannies, and color line of the music industry” (333).

individual members of the audience while simultaneously subverting any claims of authority—including that of Marxist ideology—over the “voices” of the defendants and the audience members alike. Rhythm provides the structural and thematic means by which *Limited* might “go beyond” the basic form of agitprop.

This reading does not mean that *Limited* is politically ambivalent. While the form and meaning of *Limited* move beyond traditional agitprop to include the dynamic negotiations between race and labor, the play is ultimately tied to its subject—the defendants of Scottsboro. Like an appellate opinion, *Limited* ultimately makes a judgment on the legitimacy of the trials themselves. *Limited* flows both from the body of productions of the cultural front of the early 1930s and from the legal cultural production, i.e., the first Scottsboro trials.

Ronald Sokol argues that “what is involved in the genuine political trial is not a mere devaluation of the legal currency but an outright rejection of it, a refusal to accept it as good specie” (Sokol 507). The first Scottsboro trials were not political trials in this sense because they were readily accepted by the local community in which they were decided. Instead, the trials were viewed as unusual,³⁹ but not completely beyond the norm for Jim Crow. In addition, the defendants were not “political” in the sense that they attempted to “use the courtroom as a stage to dramatize [their] views” (Sokol 500-01). However, news of the Scottsboro convictions and death sentences spread quickly: “across the nation, dozens of ‘workers’ organizations’ . . . sent messages of protest to Governor Miller [of Alabama] and court officials” (Carter 49-50). *Limited* helped formulate the social protest against Scottsboro; it semiotized the “we” that turned the local rape trial of

³⁹ “In what he intended as a postscript to his story, the correspondent for the *Birmingham Age-Herald* remarked that the sentencing of eight persons to death on the same day for the same crime was ‘without parallel in the history of the nation, and certainly in Alabama’” (Carter 48-49).

Scottsboro into a political trial for the nation. As noted at the beginning of this section, L. Friedman argues that “[a]s general social norms shift over time, themes of the legal systems shift with them” (1589). He continues, “Art, sub-art, and law move in parallel directions” (1589). *Limited* suggests that art and law are sensitive to general social shifts, but that they do not necessarily move in parallel directions. In fact, *Limited* and the first Scottsboro trial form more of a dialectic. In the Hegelian sense, such dialectic would instigate some kind of synthesis. The next section of this paper will turn to *Powell v. Alabama*, which critically reviewed Scottsboro and came on the heels of Hughes’s play, and the social movement his play represented. The “we” of Scottsboro is the spiritual “we” of the cultural front; it would be followed by the institutional “we” of the Supreme Court—an entirely different “we” altogether.

IV. FROM STAGE TO PAGE: THE SUPREME COURT AS CRITIC

Political protest is placed in the liminal zone between reality and spectacle, being not only an expression of certain political demands but also a countercultural event (Jestrovic 42).

Silvija Jestrovic's illuminating essay on political protest in Serbia as theatre recognizes a "liminal zone between reality and spectacle" (Jestrovic 42). Jestrovic's description for political protest can be applied to the legal trial—ironically like protests, the trial, too, exists "between reality and spectacle." Having illustrated the review of Scottsboro by the cultural front via *Limited*, this section turns to the legal culture's review of the trial, which by the time it reached the Court in *Powell*, had itself become a political trial, and thus a kind of political theatre.

Milner Ball taps into the idea of trial as spectacle. Ball contends that, unlike the production of goods, neither the performance of a play nor the live presentation of a case to a judge or jury can be streamlined. Nor should we try. While the verdict is essential for justice, "The live presentation of cases in the courtroom, although a means to the end of judgment, is also an end in itself" (Ball 82). The elements of space, audience and staging essential to theater are also essential to the ultimate dispensing of justice. In his essay, "The Play's the Thing," Ball creates a paradigm for examining the dramatic elements of a court of law. I will take a moment to outline these three elements and their relationship to the first set of Scottsboro trials.

For Ball, the space of a courtroom creates a "dramatic aura" (83). The costuming and the ceremony of courtroom procedures become integral pieces of this space. Nunn, another critic interested in the dramatics of trial, argues that the "imposing architectural

designs” and “symbols of state authority and power” create a distinct atmosphere (782-83). For Nunn, this space is dictated by the state, thus giving the prosecution a distinct advantage over the defendant: “The very structure and design of the courtroom works to legitimate the prosecution . . .” (83). Nunn, in turn, stresses the need to counterbalance the state’s authority when attempting to obtain just verdicts, but more on this later. The Supreme Court of the United States has spoken on the issue through the words of Chief Justice Warren. As quoted by Ball, Warren insists the courtroom:

is more than a location with seats for a judge, jury, witnesses, defendant, prosecution, defense counsel and public observers; the setting . . . is itself an important element in the constitutional conception of trial, contributing a dignity essential to ‘the integrity of the trial process (381 U.S. 532, 561 (1965, Warren, C.J., concurring)).

For the theater of the court, the stage facilitates the negotiations between the confluence of state power and rights of the individual defendant. The structure is implicated in the kind of justice that is dispensed. The promise of this relationship guides political theater of the 1930s as well.

The audience—a second link between popular theater and trial—serves to legitimate the production of justice. Ball reminds us that the right to a public trial is protected by the Constitution: “The public not only monitors what happens in the courtroom but may also help the active participants keep their perspective, thereby prompting them to perform their proper roles” (86). Commentators such as Ball and Gerhard O. W. Mueller recognize the entertainment value of the trial; however, both discuss the communal aspect of justice as represented by community participation: “Popular justice is public justice—it is play with popular emotions while doing or restoring right” (Mueller 6-7). In the trial, the audience also includes the jury, a

representation of community that makes the ultimate determinations of fact for the trial. The right to a jury is a fundamental aspect of Anglo-American law and like the public courtroom, the trial by jury is another constitutionally protected right for the criminal defendant, further legitimizing the presence of the community as part of the production of justice (U.S. Const. Art. III, §2; amend. VI; amend. VII). Ball points out that the jury serves both as passive observers and as agents in the “trial event” (87).

Finally, American jurisprudence is founded on the notion of an adversarial system whereby “protagonist and antagonist confront one another, present conflicting versions of the past and establish a problem to be solved” (88). Nunn focuses heavily on this aspect of the trial, which he terms “staging” (789). For him, staging a trial between a protagonist and antagonist always places the government as the former, giving the state an advantage over the antagonistic defendant: “Throughout the trial, the defense must labor to contradict this established version of events, a version cloaked with the credibility of the state” (798). Staging goes to the heart of the dramatic nature of the trial because like the characters of a play, the roles have been established for the prosecution, the defendant, and the judge. For Nunn, this structure will always produce justice that is substantively flawed because guilt is defaulted. However, like any performative work, the roles are not realized, and thus functionally non-existent, until the actors play out the performance in space and time. It is this “production of justice” that creates or destroys legitimacy for the court, structured by law but understood through a kind of dialectic.

Turning now to the first Scottsboro trials, this understanding of the legal process as a theatrical one highlights how procedural shortcomings undermined the production of justice. The “theater of Scottsboro” served to destroy rather than support the legitimacy

of the trial. This is not to say that the dramatic aspect of Scottsboro led to injustice, but that there is a central instability inherent in the relationship of form to substance, of the structure of the trial to the performance of justice. Each of the theatrical elements, which are also constitutional elements, serves the purpose of establishing that fair trial, while simultaneously creating the potential to subvert a fair trial in the course of production.

For example, the Scottsboro courthouse, the “stage” of the trial, was a “classical-revival structure” with a protruding clock steeple and a set of stairs leading to a columned entrance (Carter 12, 242). The building was set on a well-tended lawn apart from other buildings and framed by “giant water oaks” (Carter 12, 242). Whether the imposing structure served to advantage the prosecution or instill the dignity of justice is debatable; Nunn, however, would argue that this stage immediately stacked the cards in favor of the prosecution, legitimizing the state’s power through imposing architecture and state-sponsored monuments. More important, though, is that the stage was not limited to the structure: the physical presence of the townspeople became an integral part of the set:

By 7 A.M. there were several thousand people clamoring for admission through the National Guard picket lines . . . the throng became so packed that many moved to the roofs of surrounding buildings in order to get a better view . . . Four machine guns guarded the doors of the building and gave the scene the appearance of a fort under siege.

(Carter 22)

Machine guns, guardsmen, and the “sea of white faces” described by one of the defendants “decorated” the stage of the trial. Nevertheless, a petition for change of venue was denied (Carter 24). The aesthetics of this stage do not comport with Justice Warren’s “integrity of the justice process.” Rather, Nunn’s fear that “the very structure and design of the courtroom works to legitimate the prosecution” seems to have manifested itself through the Scottsboro stage.

Proceeding from this ominous setting, the audience of the trial failed in its critical function of checking the authority of the state. The crowd outside—doubling both as setting and audience—satisfied the constitutionally protected “public trial” requirement ironically because of the historical context of populist justice that had run rampant in the deep South prior to World War I and continued to lurk in the Thirties. Legal professor Michael J. Klarman cites examples of law enforcement officers convincing lynch mobs to cease and desist in exchange for the promise of quick trials and executions: “Prosecutors sometimes appealed to juries on similar grounds, urging them to convict in order to reward the mob for its good behavior and thus to encourage similar restraint in the future” (Klarman 56). Thus, the audience supervised the state trial, but not in the way anticipated by the Constitution. Likewise, the jury in Scottsboro was not a “jury of peers.” The defendants were black, out of work and young, while “eight of the jurors were farmers, three merchants and one a mechanic—all were white” (Carter 24). L. Friedman’s description of *San Benito* quoted in a footnote of Ball’s article is fitting:

No doubt citizens had ideas about fair trials and fair play and some pride in their legal system; at the same time, they knew it cynically as a powerful weapon of social control, a magnificent instrument for insuring power and wealth.

(Ball 87)

The audience in Scottsboro usurped the play by overstepping its role as observer and as agent for dispensing justice. Instead, the audience *fashioned* justice through its forceful presence and through verdicts unrelated to facts. For example, in the case of defendant Roy Wright, the state did not seek the death penalty but asked only for life imprisonment. Despite this, seven of the jurors still insisted on the death penalty (Carter 48). Circling back, an internal conception of the law is simply not available with regards to the Scottsboro trials. As Carter aptly points out, “The nine Negro boys had already been

tried, found guilty, and sentenced to death by the news media” (20). The first Scottsboro trials are an argument for both the inability of law to enjoy autonomy and a mandate for attempting to maintain some form of legal autonomy.

The staging of the trial flowed naturally from the established stage and audience. The prosecution, following the scripted procedure, began its case by calling Victoria Price, one of the alleged victims of rape. Clothed in a new dress and “minus her usual dip of snuff,” Price gave a gruesome account of rape, following the prosecution’s gentle leash of questions (Carter 25). When the defense rose to cross-examine, the prosecution’s script remained intact. The defense intended to discredit Price by showing that she was a prostitute, but the court sustained objections to his line of questioning (Carter 26-27). After just two sustained objections, the defense rested (Carter 27). As the trial progressed, the prosecution presented the problem (rape) to be solved (conviction and death of defendants). The defense, on the other hand, back-pedaled from sustained objections. When it came time to present its own witnesses, the defense offered defendant Weems to give his denial (Carter 33). The defense then offered defendant Norris to buttress Weems’ testimony; instead, Norris told the court that the other defendants had raped the girls and that he alone was innocent. Not only had the defense done nothing to contradict the prosecution’s version of the events, they had added support to that version. As the jury left to deliberate, “a selection of a venire to try the next case began and within less than an hour, Haywood Patterson went on trial alone” (Carter 34). The staging was furiously paced.

Reactions to the trial came in the form of legal and social commentary. Most directly, the decision was appealed to the Alabama Supreme Court and then the United

States Supreme Court. The decision of *Powell v. Alabama*⁴⁰ “started a revolution in criminal procedure that eventually led . . . to the incorporation into state law nearly all of the criminal procedural protections set forth in the Bill of Rights” (Ross 592). The United States Supreme Court began its opinion referring to the defendants as “Negroes” and the victims as “white girls,” thus immediately establishing the racial overtones. The Court moved on to describe the procedural events, noting that the judge appointed “all the members of the bar” of Scottsboro to represent the defendants, and that “each of the three trials were completed within a single day” (*Powell* 49, 50). A lengthy summary of the facts followed, and then the Court moved into its argument, “whether the defendants were in substance denied the right of counsel, and if so, whether such denial infringes the due process clause of the Fourteenth Amendment.” At this point, the Court’s argument split into two parts.

One part of the analysis discussed the legal precedent and historical motivations involved in the constitutionally protected right to adequate counsel with regards to actions by the state, but the second part of the analysis reviewed the theater of the trial. In this part, the Court responded to each element set forth above. It condemned the setting: “the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces” (*Powell* 71). It then turned to the audience: “the fact that their friends and families were all in other states and communication with them was necessarily difficult” (*Powell* 71). However, it was with the process that the Court spent most of its time: “they stood in deadly peril of their lives” and “the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process” (*Powell* 71).

⁴⁰ 287 US 45 (1932)

In defending its decision to remand the case, the Court took pains to describe the drama by which the defendants' counsel was selected, transcribing several pages from the actual trial transcript, reproducing a "mini-drama" in its opinion. Reciting the dialogue between the trial court and the potential lawyers, it became clear that the lawyers neither expect to be sole counsel nor are prepared to act. The court concludes: "And in this casual fashion the matter of counsel in a capital case was disposed of" (*Powell* 56). The court continued its critique by contrasting the dramatic element—the casual fashion—with the imperative of constitutional due process: "There are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard" (*Powell* 71-72). For the Court, due process was just such a principle.

The Court recognized "representation" as a "fundamental right." The term "representation," functioned as a synonym for legal counsel, but also functioned through its broader definition "to stand for." Counsel became the initial signifier to the jury for the defendant's innocence. The performance of that representative was key to the actual production of the trial, and as such, was essential. The Court recognized the structural deficiencies of the Scottsboro trial as deficiencies in the production of justice. The Court declared, "The judgments must be reversed and the causes remanded for further proceedings not inconsistent with this opinion," cementing the link between the Court's judgment of the structure of the first Scottsboro trial, the concept of justice impaired by that structure, and the formulation of the law (*Powell* 72). As Ross notes, "*Powell* was one of several decisions during the 1920s and 1930s that marked the transition of the

Supreme Court from its old role as primarily a protector of property rights to its modern role as a guardian of personal liberties” (593).

V.
**THEY SHALL NOT DIE:
OLD PROBLEM, NEW RESPONSE**

. . . [T]here was in the discovery of the idea of culture and its wide-scale application a critical tool that could shape a critical ideal, especially as it was directed repeatedly against the failures and meaninglessness of an urban-industrial civilization. Yet often it was developed in such ways as to provide significant devices for conserving much of the existing structure. A search for the "real" America could become a new kind of nationalism; the idea of an American Way could reinforce conformity. (Susman 164).

When the Scottsboro defendants returned to the Alabama courts, the stage, its players and the scope of the trials themselves had all changed. The I.L.D. had secured top criminal defense attorney, Samuel Liebowitz, to head the case; police had seized a letter from Ruby Bates, one of the accusers, admitting the defendants were innocent;⁴¹ Judge Hawkins⁴² granted a motion for change of venue, removing the trial from the town where the defendants had first been prosecuted; and finally, Judge Horton, the new trial judge, set a sobering tone by warning vigilante groups against disturbing the trial proceedings.⁴³ In addition, the trial court was aware that it worked under the gaze of the Supreme Court, while national pressure grew for the release of the defendants.⁴⁴ Ironically, as the trial of Scottsboro spread from the elite legal culture to a larger percentage of the popular culture, the theatre of Scottsboro moved from protest rallies

⁴¹ Dearest Earl

I want to make a statement to you Mary Sanders is a goddam [sic] lie about those negrose [sic] jassing [sic]me those police man [sic] made me tell a lie. . . those negros [sic] did not touch me . . . i [sic] hope you will belive [sic] me (Carter 186-87).

⁴² Judge Hawkins presided over the first Scottsboro trials.

⁴³ "I say this much, that the man who would engage in anything that would cause the death of any of these prisoners is not only a murderer, but a cowardly murderer, and a man whom we should look down upon with all the contempt in our being; and I am going to say further that the soldiers here and the Sheriffs here are expected to defend with their lives these prisoners, and if they must do it, listen gentlemen you have the authority of this court, and this court is speaking with authority, the man who attempts it may expect that his own life be forfeited, or the guards that guard them must forfeit their lives" (Linder, *Famous*).

⁴⁴ For example, a group of marchers carried a petition with the signatures of 200,000 people to Washington the previous spring (Brunner).

and the agitprop stage to the more exclusive Broadway. This shift in the political theatre of Scottsboro anticipates a conservative swing not only in the techniques of American theatre⁴⁵ but also more generally in American popular culture. As national institutions started the process of reform championed by the New Deal and culminating,⁴⁶ at least for the institution of law, in the constitutional revolution of 1937, America's political theatre actually "developed in such ways as to provide significant devices for conserving much of the existing structure," articulating avenues by which the "idea of an American Way could reinforce conformity" (Susman 164). This paper concludes with a look at how Wexley's *They Shall Not Die* serves to "reinforce conformity" despite its effort to instigate political change.

Unlike the rhythm-driven approach of *Limited*, Wexley employs naturalistic docudrama in *They Shall Not Die*. Wexley seems familiar with the goals outlined by Zola several decades earlier: "To increase the reality of our corpus of drama, to progress towards truth, to sift out more and more of the natural man and impose him on the public" (368). *They Shall Not Die* gives stage directions that recreate the Alabama setting using "real" props to give the illusion of reality—for example, the office space contains a crank phone, a table fan, a medicine cabinet, and a water cooler (Wexley 155). More importantly, Wexley uses lines from the actual transcripts of the trial under Judge Horton, giving the play the "endorsement" of "official reality." Through the use of naturalistic docudrama, the play gives the impression that it will "sift out more and more

⁴⁵ Ilka Saal describes the "aesthetic turn in proletarian literature," noting that the return to naturalism, the use of empathy rather than alienation, and the return to Aristotelian conceptions of theatre marked "the abandonment of high modernist techniques and the return to the mimetic principles of critical realism" (326). For Saal, the conservative shift in American political theatre is marked by the Writers' Congress of April 1935.

⁴⁶ For a discussion on how the New Deal inspired additional reforms in terms of labor and free speech, see Berman 291-321.

of the natural man,” as well as the corrupt system of justice prevalent in the South. Wexley aims for a political effect by recreating the injustice of Scottsboro and forcing the audience to observe passively while terrible-yet-preventable events unfold.

While the play is infused with naturalistic depictions and dialogue, Wexley simultaneously highlights his recreation of the trial with the broad strokes of good and evil, forcing the audience to align itself with the “good.” This melodramatic deployment of courtroom drama is exemplified in the conclusion of the play:

RUBIN: No, we’re not finished. We’re only beginning. I don’t care how many times you try to kill this Negro boy . . . I’ll go to the Supreme Court up in Washington and back here again, and Washington and back again, if I have to do it in a wheel-chair! And if I do nothing else in my life, I’ll make the fair name of this State stink to high heaven with its lynch justice . . . These boys, they shall not die! (Wexley 152).

In this scene, defense attorney Rubin is not merely speaking for his client. The moment marks the culmination of Rubin’s transformation from the private criminal defense attorney to the politically charged and radical spokesman for the Popular Front. Wexley’s ending deconstructs the trial in order to reconstruct a quasi-legal production or “retrial.” The conclusion is an effort to undermine institutionalized law through the reformulation of the system on the stage of the cultural front: thus, the legal system, rather than the Scottsboro defendant, is deemed guilty.

Yet, the conclusion marks a troubling paradox prevalent throughout *They Shall Not Die* that serves to undermine the political call for reform. While the play arises from the struggle of the Popular Front,⁴⁷ it actually segregates the American population in terms of race and class, ultimately championing the individual over the collective. To

⁴⁷ Denning defines Popular Front in the United States as the “the social democratic electoral politics, the politics of international solidarity, and the campaigns against lynching and labor repression” (14).

begin, the passage cited above linguistically reinforces a transformation from “we” to “I” that has larger, symbolic implications. The solitary voice of the white defense attorney reaffirms the traditional power structure whereby this “paternal figure” becomes the agent of power while the black defendant becomes the object of charitable action. The lawyer’s diatribe against the court begins with the inclusive, “we’re not finished,” but quickly transforms into the first person: “I’ll go to the Supreme Court . . .,” “if I have to do it in a wheel-chair . . .,” “if I do nothing else . . .,” and “I’ll make the fair name . . .” (Wexley 152). The final “They shall not die” cements the separation between “we” and “they,” maintaining a fissure not between the Popular Front and corrupt institutions, but between members of the Popular Front, themselves. The paramount struggle becomes Rubin’s struggle—he emerges heroically alone and sympathetically coupled with the melodramatic image of the wheelchair. This is not the same fight as the one shouted in Hughes’s *Limited*—Rubin’s shout is a retreat from that utopian reenactment of the trial.

The conservative disposition is further realized by the audience of *They Shall Not Die*. First, the conclusion does not demand action from the audience as in *Limited*; rather, as mentioned above, the fight is contained in the actions of a single player. Wexley maintains the “fourth wall” condemned by proponents of more radical theatre in the early part of the century, thus maintaining a physical, if not emotional, separation between stage and audience.⁴⁸ Second, the fact that the play was a Broadway production no doubt limited the number people who could have afforded to attend such an expensive

⁴⁸ Meyerhold and Brecht, for example, argued against theatrical techniques that disconnected the audience from the production: “It is of course necessary to drop the assumption that there is a fourth wall cutting the audience off from the stage and the consequent illusion that the stage action is taking place in reality and without an audience” (Brecht 136).

affair in 1934. As playwright Clifford Odets wrote, "What's the sense in writing plays for a few bourgeois intellectuals on Broadway at \$3.30 a head?" (qtd. in Herr 75).

This paradox for political theatre operating on Broadway became a central problem for groups like the Theatre Guild, who produced Wexley's play: "How [could] a theatre produce high-quality drama if it was forced to operate on Broadway principles, and how it could afford to survive if it didn't" (Herr 72). A more fundamental distinction was emblemized by this "financial/quality" problem of Broadway. The question of source of theatre proved a point of contention for players who eventually broke away from the Guild to form the Group Theatre:

The Group was founded, moreover, on a significantly different concept of democracy than was the Guild, as suggested by the names. The Guild, with its conscious associations of a small collective of talented craftspeople producing a useful object for others, is in striking contrast to the Group, which suggests a conscious effort at unity rather than separation. (Herr 73-74).

They Shall Not Die seems to reflect the fundamental philosophy implicit in Guild productions that promotes the elitist notion of "talented craftspeople" over an "effort at unity." In struggling with the political relevance of Broadway theatre in the 1930s, Herr argues that the paradox implicit in such theatre does not necessarily destroy its legitimacy as an instrument of social change. For Herr, the duality of Broadway drama harkens back to a duality fundamental to American democracy: the combination of a Puritan individualism jealous of its personal rights, and a collective "folk spirit,"⁴⁹ manifested in the poems of writers such as Walt Whitman (66-67). Broadway, then, became a place where the theatre negotiated between these seemingly conflicting norms.

⁴⁹ For further discussion of the concept of "folk" as an inspiration for American artists between World War I and II, see Reini-Grandell 120-23.

Ultimately, though, Wexley's play suppresses the "folk spirit" in favor of a more individualistic portrayal of democracy that reduces the "group" to particular stereotypes. For example, Wexley employs spellings and phrasings such as "outpopulated an' beat up them hobo kids," "These heah girls," and "Whut yuh tryin' tuh say" in order to recreate the exact speech patterns and phrasings of a "Southerner." Yet, his characterizations become caricatures. A stage direction calls for the scenery to give the audience "the impression of a warm spring afternoon, of flies buzzing, of roaches and dirt, of sloth and laziness" (14). At another point, he has a character "taking a bite of his tobacco plug" in reaction to the comment "fifty niggers" (17). Another scene depicts a moment where the solicitor's help is needed, but he is "sleepin'" (20). Finally, in the same act, the mob speaks as a single voice: "Are the wimmin hurt bad, Sheriff? / We oughta git the Klan together" (28). The signals meant to place the play in the South function by reducing a group to a stereotype, ultimately leading to the condemnation of individuals of an entire region based on those stereotypes. The irony is that Wexley employs the same pattern of thinking in the service of justice that he ostensibly condemns in terms of racism. Furthermore, his repetition of racial slurs serves to perpetuate their use.

It is difficult to see how this mode of thinking is problematic when used to describe groups like the Klan. But Wexley's reductive "naturalism" is not limited to his play's antagonists. In a particular scene, a deputy brutally questions and intimidates several defendants, and Wexley uses the moment to isolate his central theme of racial hate and social injustice. The first defendant is kicked in the shin when he proclaims his innocence, highlighting the farce of his arrests; a second defendant tells the deputy he was on the way to Memphis to get surgery for his failing vision, creating empathy for this

character (and anger at the deputy who summarily dismisses this explanation); a third defendant gives his correct age of thirteen, but is forced by physical intimidation to give a false age of sixteen, thus allowing him to be tried as an adult. The message is clear about the corrupt nature of these arrests and the inhuman treatment of the defendants. However, when the defendants speak they too fall into the stereotypical patterns that pervade Wexley's text. Their words react to the deputy, but also serve to monolithically define through phrases like "suh," and "Yassuh," and "Chattanoogie" instead of "Chattanooga." The defendants are the "victims" of the play: a characteristic that serves Wexley's political agenda by demanding that *Rubin* insist "They shall not die!" Yet, this mode of writing immediately disempowers the defendants and lumps their identities into the single unit of "Poor Black Southerner."

This is not to claim that the play's agenda of freeing the Scottsboro defendants is not steeped in a kind of "folk spirit." There is a fundamental principle of justice at work in the movement to "fight for Scottsboro" that invokes equality. However, where Hughes invokes the folk spirit through vernacular music and maintains equality by giving the black defendants agency, Wexley re-establishes the system of inequality through his very efforts to fight it.

Ultimately, *They Shall Not Die* is "necessarily detached from reality, because it negates its differences from reality"⁵⁰ (Adorno 77). For Adorno, "The moment of intention is mediated solely through the form of the work, which crystallizes into a likeness of an Other that ought to exist" (93). Wexley's form threatens to destroy his liberal stance in much the same way that the original Scottsboro trials destroyed their

⁵⁰ Quotation is from Adorno's essay "Commitment," and refers to the dilemma of committed works of art. I recognize that the quote is taken slightly out of context in this essay, but it touches on a paradox inherent in Wexley's project.

legitimacy before the popular culture and ultimately before the United States Supreme Court. By the summer of 1934, Scottsboro had once again moved through the trial court, and the convictions of the defendants had been sustained by Alabama's Supreme Court.⁵¹ The United States Supreme Court once again reversed the convictions, this time finding that the jury selection committee systematically excluded black Americans from being jurors. In other words, the Court once again reversed Jim Crow on procedural grounds, and it did so based on a culturally informed conception of fundamental rights. The mid-Thirties marked a progression toward a social middle ground: as Wexley's play suggests, political theatre grew more conservative after the first fervent years of the Great Depression in order to cater to a more middle class audience; conversely, the tradition-minded Court modified its strict-interpretational approach to the Constitution to give the federal government greater flexibility in engineering social welfare.

L. Friedman argues that "the starting point of social change can be located in the outer context: material and technological changes, natural disasters, and the like" (1585). The social change implicit in the Scottsboro saga can likewise be measured by the outer structure of both the legal procedures and cultural productions that the event inspired. Changes in structure become clues to changes in popular and legal culture. Christopher A. Bracey implicitly recognizes this idea in his brief review of the American criminal process:

⁵¹ *Norris v. State*, 229 Ala. 226 (1934). Holding that defense did not meet their burden of proving that the jury commissioners had discriminated based on race in selection of the jury list. In making this decision, the court stated that the defendant had put "some farmers, others plasterers, dry cleaners, porters, janitors, and some in the mercantile business, and others preachers," who possessed the necessary skills to be jurors (Carter 233). Court argued that close examination showed their skill level to be merely opinion. The court continued, quoting a white newspaper man who said "he knew some good negroes, with good reputations, yet he would not be willing to say there were any that possessed the necessary qualifications for jury service" (*Norris* 233-34). The court treated his statement with greater authority than the several witnesses for the defense while simultaneously arguing race had not been a factor in jury selection.

In absence of a legitimate moral authority to speak self-consciously about a commitment to racial equality, in the vacuum of trust generated by exposure of the lie of American democracy, American institutions sought moral redemption through structural changes that would place strong limits on the ability of majoritarian society to abuse authority and further compromise an already morally suspect regime (Bracey 705)

Bracey continues, arguing that the changes instigated by the Supreme Court in criminal procedure helped to “re-establish institutional legitimacy” (705). Thus, structural modifications allowed the Court to strengthen the institutional status quo incorporating more aggressive approaches to civil and economic rights. The shift from Hughes’s structurally radical agitprop to Wexley’s more conservative and traditional Broadway production suggests that traditional institutions were, in fact, re-establishing legitimacy from a cultural standpoint by the mid-thirties. It is true that Wexley condemns the injustice of the Alabama court; however, his spokesman, Rubin, promises to fight not through some revolutionary overthrow of the entire legal system, but by using the established appellate structure to institute change: “I’ll go to the Supreme Court up in Washington and back here again, and Washington and back again . . .” (Wexely 152). Rather than the destruction of the electric chair and the singing of the *Internationale*, Wexley tacitly embraces a traditional mode for change, thus recognizing the moral legitimacy of the general structure of the American legal system, if not the specific Alabama legal institutions.

An important lesson from the Scottsboro trials is that merely the recognition of structural flaws is never enough. The legacy of the Scottsboro trials continued to undermine the American criminal justices system for decades following the Courts final reversal in *Norris*. While the structural changes that allowed the federal courts to review state decisions involving human rights eventually highlighted the path for reforming

American jurisprudence, a true reformation was only possible decades after the
Scottsboro trials through concerted substantive efforts on legal, political and cultural
fronts.

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