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Atticus Finch, Boris A. Max, and the Lawyer's Dilemma

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RACE & THE LIMITS OF NARRATIVE

ATTICUS FINCH, BORIS A. MAX, AND THE LAWYER'S DILEMMA†

Robert Batey‡

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I. INTRODUCTION

For as long as I have taught law and literature, I have held strong opinions about two fictional criminal defense attorneys, the world-famous Atticus Finch of the novel and film *To Kill a Mockingbird*¹ and the less celebrated Boris A. Max, Bigger Thomas's attorney in Richard Wright's *Native Son*.² Atticus and Max, both white, courageously defend black men charged with capital crimes by a racist legal system, both are vilified by the public, and both of them see their clients die at the hands of the state. But despite their courage, my opinion of each was that he failed his ethical duties as an attorney.

It took me several years to realize that these strongly felt opinions were inconsistent. I was damning Atticus for failing to be more like Max, and damning Max for failing to be more like Atticus. This article attempts to address that inconsistency, first by presenting, in parts II and III, the cases against Atticus Finch and Boris A. Max and then by exploring where the true course of ethical representation might lie, in part IV.

II. THE CASE AGAINST ATTICUS FINCH

For most of the world, Atticus Finch is an unmitigated hero. A long bookshelf details his saintliness.³ According to this tradition, he is a good lawyer, a good father, a good neighbor, a good legislator, and a

† A preliminary version of this article was presented at *The Power of Stories* conference in Gloucester, England, on July 26, 2005.

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1. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960); *TO KILL A MOCKINGBIRD* (Universal Pictures 1962).

2. RICHARD WRIGHT, *NATIVE SON* (Library of Am. ed., Perennial Classics 1998) (1940).

3. The best works in this tradition are by Thomas L. Shaffer. See Thomas L. Shaffer, *Growing Up Good in Maycomb*, 45 ALA. L. REV. 531, 545–51 (1994); Thomas L. Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT. L. REV. 181, 208–09 (1981) [hereinafter Shaffer, *Moral Theology*]; Thomas L. Shaffer, *On Living One Way in Town and Another Way at Home*, 31 VAL. U. L. REV. 879, 879 (1997).

good shot: in other words, a good man. As his most appreciative critic puts it, “The story of the Robinson case”—Atticus defends Tom Robinson, falsely accused of raping a white woman in 1930’s Alabama—“help[s] to explain how Atticus Finch is a hero, and how lawyers become heroes in America.”⁴

The movie version of *To Kill a Mockingbird* cemented this impression of heroism by bringing Atticus’s story to a much wider audience. Gregory Peck’s stirring portrayal captured the imagination of a generation of would-be lawyers (myself included),⁵ as well as of millions who had no legal aspirations, but who could appreciate a hero. For this performance, Peck won an Academy Award.⁶ I stayed up late to watch him win, a sure sign that he had struck a responsive chord among the American and worldwide movie audience.

To this drumbeat of praise there has been a persistent, if slight, counterpoint. The first of Atticus’s detractors was Monroe H. Freedman,⁷ joined more recently by Teresa Godwin Phelps,⁸ Rob Atkinson,⁹ and Steven Lubet.¹⁰ Dean Freedman, though willing to acknowledge that “Atticus Finch does, indeed, act heroically in his representation of Robinson,” criticizes him for otherwise accepting the prejudices of his society:

Except under compulsion of a court appointment, Finch never attempts to change the racism and sexism that permeate the life of Ma[y]comb, Ala. On the contrary, he lives his own life as the passive participant in that pervasive injustice. . . .

. . . .

. . . I would have more respect for Atticus Finch if he had never been compelled by the court to represent Robinson but if, instead,

4. Shaffer, *Moral Theology*, *supra* note 3, at 182.

5. I was 14 when I saw the movie and thereafter read the book. I had wanted to be a lawyer ever since I started watching *Perry Mason* and *The Defenders* on television in the late 1950’s, and *To Kill a Mockingbird* not only reaffirmed that commitment, but elevated it into something like a moral calling.

6. Academy of Motion Picture Arts and Sciences, Awards Database http://awardsdatabase.oscars.org/ampas_awards/BasicSearch (search “Nominee” for “Gregory Peck”) (last visited Sept. 2, 2005).

7. See Monroe H. Freedman, *Atticus Finch—Right and Wrong*, 45 ALA. L. REV. 473 (1994) [hereinafter Freedman, *Right and Wrong*]; Monroe H. Freedman, *Atticus Finch, Esq., R.I.P.*, LEGAL TIMES (Wash., D.C.), Feb. 24, 1992, at 20 [hereinafter Freedman, *Atticus, R.I.P.*]; Monroe H. Freedman, *Finch: The Lawyer Mythologized*, LEGAL TIMES, (Wash., D.C.), May 18, 1992, at 25 [hereinafter Freedman, *Finch Mythologized*].

8. See Teresa Godwin Phelps, *Atticus, Thomas, and the Meaning of Justice*, 77 NOTRE DAME L. REV. 925 (2002) [hereinafter Phelps, *Atticus*]; Cf. Teresa Godwin Phelps, *The Margins of Maycomb: A Rereading of To Kill a Mockingbird*, 45 ALA. L. REV. 511 (1994) (criticizing the novel, but not yet extending those criticisms to Atticus) [hereinafter Phelps, *Margins*].

9. See Rob Atkinson, *Liberating Lawyers: Divergent Parallels in Intruder in the Dust and To Kill a Mockingbird*, 49 DUKE L.J. 601 (1999).

10. See Steven Lubet, *Reconstructing Atticus Finch*, 97 MICH. L. REV. 1339 (1999).

he had undertaken voluntarily to establish the right of the black citizens of Ma[y]comb to sit freely in their county courthouse.¹¹

According to Freedman, instead of working to end racial oppression—"the apartheid that Atticus Finch practiced every day of his life"—the lawyer is frequently an apologist for that oppression to his children, playing down to them the threat of the Ku Klux Klan (it "was a political organization more than anything") and asking them to sympathize with the man who led the party that wanted to lynch Tom Robinson ("he just has his blind spots along with the rest of us").¹² So Freedman finds Atticus largely unwilling to confront the racism at the heart of his community.

Though Freedman makes passing references to concerns of class and gender,¹³ he leaves the application of these concerns in *To Kill a Mockingbird* to others. Teresa Godwin Phelps analyzes the question of class in the novel, starting from a statement by Jem, Atticus's young son, to Scout, his even younger sister (and the novel's narrator): "There's four kinds of folks in the world. There's the ordinary kind like us and the neighbors, there's the kind like the Cunninghams out in the woods, the kind like the Ewells down at the dump, and the Negroes."¹⁴ From this rudimentary account of Maycomb's class system, Professor Phelps spins out her thesis, that although "*To Kill a Mockingbird* is a valiant attempt to erase some of the barriers that exist between 'kinds of folks'[,] . . . the book fails to recognize or acknowledge the barriers it leaves erect."¹⁵

For Phelps, the novel "is essentially the[] story" of Maycomb's upper class, the Finches and their neighbors, whom Jem in his naiveté characterizes as "'ordinary.'"¹⁶ Their power is not merely socioeco-

11. Freedman, *Atticus, R.I.P.*, *supra* note 7, at 21. See also Freedman, *Right and Wrong*, *supra* note 7, at 480–82 (presenting similar arguments). Freedman also faults Finch for not using his power as a lawmaker to address racial issues: "Atticus Finch is . . . a member of the state legislature. . . . Could he not introduce one bill to mitigate the evils of segregation?" *Id.* at 481. In a brief comment on the film version of *To Kill a Mockingbird*, John Jay Osborn, Jr., goes even further than Freedman, suggesting that Atticus should have sought a federal injunction against Tom Robinson's trial and concluding that the movie "makes a convincing case that a new kind of lawyer is needed, one who will fight to eliminate the 'system' rather than participate in it." John Jay Osborn, Jr., *Atticus Finch—The End of Honor: A Discussion of To Kill a Mockingbird*, 30 U.S.F. L. REV. 1139, 1141–42 (1996).

12. Freedman, *Right and Wrong*, *supra* note 7, at 475–77. See also Freedman, *Finch Mythologized*, *supra* note 7, at 25 (presenting similar arguments). "Throughout his relatively comfortable and pleasant life in Maycomb, Atticus Finch knows about the grinding, ever-present humiliation and degradation of the black people of Maycomb; he tolerates it, and sometimes he even trivializes and condones it." Freedman, *Right and Wrong*, *supra*, note 7, at 479.

13. "Gentlemen [like Finch] tend to congregate together and to exclude others from their company and from their privileges on grounds of race, gender, and religion." Freedman, *Atticus R.I.P.*, *supra* note 7, at 20.

14. LEE, *supra* note 1, at 239.

15. Phelps, *Margins*, *supra* note 8, at 515.

16. *Id.*

nomic, but legal as well: “[W]hen this group decides that the law does not apply to other folks, . . . their decision is final.”¹⁷ It is this upper class that divides Maycomb’s poorer white citizens into two distinct groups, those that acknowledge the ascendancy of their betters and those that do not. The Cunninghams represent the former. “[P]oor but proud,” they nevertheless recognize that “it is their relationship with the aristocracy that brings them from outside the law to within it,” and so defer to the upper class.¹⁸ The Ewells, on the other hand, represent those poor whites who are contemptuous of the aristocracy—as shown by young Burris Ewell’s cussing the schoolteacher—and who thus become “the discards of society.”¹⁹ They live “on the margins of Maycomb, outside the reach of its laws[.]”²⁰ and can seek its protections only against the Negroes, as Bob and Mayella Ewell do when father and daughter cry rape against Tom Robinson. The novel, of course, champions the black underclass that Robinson represents, but as Phelps perceptively observes, “While we are sympathetic to Tom Robinson, our attention unfortunately is directed away from the tragedy of his death; instead, we seem to be led by the book’s structure to focus on Atticus’s goodness in defending him.”²¹ So the novel concentrates on Jem’s “ordinary” folks, Maycomb’s upper crust, and marginalizes the rest of its citizens.

When she first leveled this criticism, Phelps was content to aim it mostly at Harper Lee, and only obliquely at her creation Atticus Finch.²² Rob Atkinson corrected this oversight by demonstrating how Atticus himself participates in the class divisions of his society, a view Phelps later largely accepted.²³

Professor Atkinson finds “the mores of *Mockingbird* to be quite patriarchal and patriarchal,”²⁴ and Atticus is their epitome. He patronizes

17. *Id.* at 518.

18. *Id.* at 519–20. Phelps uses this deference to explain why the mob that intended to lynch Tom Robinson, led by a Cunningham, backs down in the face of opposition from Atticus and his children. *See id.* at 520–21. *See also* Note, *Being Atticus Finch: The Professional Role of Empathy in To Kill a Mockingbird*, 117 HARV. L. REV. 1682, 1697 (2004) (commenting on Atticus’s physical defense of Robinson when men come for him). As some critics have pointed out, an explanation is necessary, as the mob’s retreat goes unexplained in the novel. *See* W.J. Stuckey, *To Kill a Mockingbird Is a Good but Flawed Novel*, in READINGS ON TO KILL A MOCKINGBIRD 25, 27–28 (Terry O’Neill ed., 2000) [hereinafter READINGS].

19. *See* Phelps, *Margins*, *supra* note 8, at 521–22. *See infra* note 38.

20. *Id.* at 526.

21. *Id.* at 527.

22. *See generally id.* (discussing that it is Lee who creates the class distinctions and Atticus just fails to see them).

23. *See generally* Phelps, *Atticus*, *supra* note 8 (discussing Atticus’s acceptance of the unjust racist status quo and class divisions in Maycomb). Compared to the views of her colleague Thomas Shaffer, *see* Shaffer, *Moral Theology*, *supra* note 3, and accompanying text, Phelps is “less of an admirer of Atticus.” Phelps, *Atticus*, *supra* note 8, at 925.

24. Atkinson, *supra* note 9, at 619. *See also id.* at 731 (stating that the novel is “a paean to paternalism”).

the women of his class²⁵ and scorns those upper-class men who refuse to follow his virtuous example.²⁶ He affably condescends to the Cunningham species of poor whites²⁷ and viciously condemns the Ewell species.²⁸ Regarding the lawyer's attitudes toward his client Tom Robinson and the blacks of Maycomb more generally, Atkinson is particularly acute:

When pressed to explain his motives for taking the case, Atticus's focus is distinctly on himself, not his client. He makes clear several times that it is his own sense of personal rectitude and his need to be seen as virtuous by others that compel him to take Tom's case.²⁹

One byproduct of this attitude is a distinctly imbalanced lawyer-client relationship, with Tom as a meek supplicant to the justice-dispensing lawyer: "If you want absolution in Atticus's world . . . , you must approach the temple of justice through its self-appointed priests. If Tom's assumption of his true place [in society] is a threat to the [poor whites], it is no threat to the superiority of Atticus and his ilk."³⁰ This superiority extends not only to Atticus's client, but to all the blacks of Maycomb, who leave food at the Finch home after the guilty verdict, which Atticus might have spurned but instead accepts. Again Atkinson cuts to the social reality: "Atticus is the arbiter of order. . . [I]t is an order in which not just Tom Robinson . . . and not just Tom Robinson's immediate family, but also the entire local black community . . . [is] indebted to Atticus. For all his graciousness, Atticus keeps it that way"³¹

Viewed through the prism of class consciousness, Atticus Finch seems less than heroic. A similar criticism emerges from the perspective of gender. Though Phelps and Atkinson made this point as part of their larger analyses,³² Steven Lubet has focused on it more exclusively—though somewhat bizarrely. Professor Lubet sparked controversy by wondering whether Mayella Ewell might have been telling the truth about Tom Robinson's attack³³—a supposition flatly incon-

25. See *id.* at 653–54, 710–11.

26. See *id.* at 711–12. Atkinson attributes the following view to Finch as the lawyer complains about businessmen who shirk jury duty: "Virtuous people fail to stand together behind experienced legal professionals like him What the law needs is for its proper agents in the laity, enlightened male urbanites, to have more of what Atticus, the ideal lawyer, has: civic virtue." *Id.*

27. See *id.* at 616–19. He also doubts whether lower class whites can ever overcome their racism, as he and some other members of the upper class have. See *id.* at 672.

28. See *id.* at 620 (calling Atticus's view of the Ewells "uncharacteristically harsh").

29. *Id.* at 638. "[T]he emphasis is on Atticus's personal righteousness. That entails helping Tom, but helping Tom is in the subordinate clause." *Id.* at 639.

30. *Id.* at 627.

31. *Id.* at 645.

32. See *id.* at 647–57; Phelps, *Margins, supra* note 8, at 524–26.

33. See Lubet, *supra* note 10, at 1346–48.

sistent with the novel and roundly rejected by those who have commented on Lubet's article.³⁴ But Lubet does not need this supposition to make his basic point, that in cross-examining Mayella Ewell, Atticus used "the 'she wanted it' defense," "told a trial story that was demeaning and stereotyped," and "employed most, if not all, of the well-worn negative conventions historically used to debase and discourage rape victims."³⁵ Even if Mayella was not a victim but a liar and even if Atticus was in any event ethically bound to challenge her testimony zealously within the bounds of law, did he have "to exploit a virtual catalog of misconceptions and fallacies about rape, each one calculated to heighten mistrust of the female complainant"?³⁶ To the many who will answer this question yes,³⁷ the follow-up question should be, is a lawyer who behaves in this way properly called heroic? Pathetic would be a better characterization, for in Lubet's terms, "Atticus . . . was not able to comprehend the class and gender prejudices that suffused his work."³⁸

On issues of race, class, and gender, Atticus Finch has received serious criticism, leaving his heroism in doubt. One way to recast these criticisms—a way that has always had the most force for me—is to question how well Atticus discharged his ethical responsibility as an attorney to maintain the integrity of the justice system.³⁹ I have long

34. See, e.g., Rob Atkinson, *Comment on Steven Lubet*, *Reconstructing Atticus Finch*, 97 MICH. L. REV. 1370 (1999).

35. Lubet, *supra* note 10, at 1345, 1349.

36. *Id.* at 1351. "Atticus Finch gave his jury at least five separate justifications for believing Mayella 'wanted it.'" See *id.* at 1351–53. These justifications included fantasy, spite, shame, sexual frustration, and confusion. *Id.*

37. See William H. Simon, *Moral Icons: A Comment on Steven Lubet's Reconstructing Atticus Finch*, 97 MICH. L. REV. 1376, 1376 (1999). See also *infra* note 66.

38. Lubet, *supra* note 10, at 1359. If one assumes that Atticus is aware of what he is doing to Mayella, the appropriate characterization would still not be heroic, but tragic. See Note, *supra* note 18, at 1695 (marshaling support for this contention). See generally Tim Dare, *The Secret Courts of Men's Hearts: Legal Ethics and Harper Lee's To Kill a Mockingbird*, in *ETHICAL CHALLENGES TO LEGAL PRACTICE AND EDUCATION* 39 (Kim Economides ed., 1998). I am indebted to Kim Economides, who attended the "Power of Stories" conference, for acquainting me with Dare's work.

Regarding class prejudice, Lubet supports Phelps's analysis, see *supra* text accompanying note 18–19, that "perhaps the social structure of Maycomb actually depended on the humiliation of Mayella Ewell," because she and her family were "[s]ocial outcasts," "the very contradiction of everything the 'fine folks' of Maycomb stood for." Lubet, *supra* note 10, at 1360.

39. CANONS OF PROF'L ETHICS Canon 32 (1956), in force at the time of the trial in *To Kill a Mockingbird*, provides: "No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are . . ." Subsequently adopted ethical rules carry forward this general command: "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice . . ." MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2003); see also MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(5) (1980).

Some states have particularized this injunction in a way especially relevant to Atticus Finch's advocacy. For example, Florida adds after the "conduct . . . that is preju-

agreed with Freedman that Atticus could have done more to confront the racial prejudice that infected Tom Robinson's trial, from the courtroom segregation⁴⁰ to the race-baiting tactics of the prosecutor.⁴¹ Worse yet, the defense lawyer, rather than pointing a finger at racial prejudice in all its ugly forms, taints his own case with one of the most virulent of those forms. Though Atticus is asking the jury to believe a black man's testimony over that of a white man and his daughter,⁴² Finch deploys a frankly racist argument in his closing. Tom has testified that Mayella Ewell threw herself at him, which opens the way for the defense attorney to launch an antimiscegenationist attack on Mayella:

"[S]he has . . . broken a rigid and time-honored code of our society, a code so severe that whoever breaks it is hounded from our midst as unfit to live with She knew full well the enormity of her offense

. . . .

She was white, and she tempted a Negro. She did something that in our society is unspeakable: she kissed a black man. Not an old Uncle, but a strong young Negro man."⁴³

If racism is the central evil against which Atticus Finch must contend in defending Tom Robinson, it can do him little ultimate good to confirm a central tenet of that racism, that intercourse between the races is anathema.⁴⁴

dicial" phrase, "including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic." Rules Regulating the Florida Bar 4-8.4(d) (2005).

In invoking provisions like Florida's, I open myself to charges like those leveled against Monroe Freedman's criticism of Finch, "that it is unfair to hold someone in an earlier time to moral standards that we recognize today." Freedman, *Right and Wrong*, *supra* note 7, at 477. Freedman gives a full set of responses to this complaint, *see id.* at 477-82, but his most telling comment, and the one I would adopt in response to a similar charge, is that assuming that it is unfair to apply present-day standards to a lawyer of the 1930's South, "[D]oes that make Finch a role model for today's lawyer?" *Id.* at 482.

40. *See supra* text accompanying note 11.

41. *See LEE, supra* note 1, at 208-12 (Tom's cross-examination makes Dill, Jem and Scout's cousin, physically ill). For a discussion of this passage, *see* Atkinson, *supra* note 9, at 625-26. In the film, the prosecutor's sleaziness is brilliantly portrayed by William Windom, who dresses poorly, slouches, and cannot keep his pencil out of his mouth. *TO KILL A MOCKINGBIRD* (Universal Pictures 1962). *See also* Tom Becker, *Ten of the Louisiest Lawyers in the History of Hollywood*, <http://www.nacdl.org/public.nsf/ENews/2001e23?opendocument> (last visited Sept. 17, 2005).

42. *See LEE, supra* note 1, at 217-18.

43. *Id.* at 216. For a discussion of this passage, *see* Atkinson, *supra* note 9, at 677; Lubet, *supra* note 10, at 1352-53.

44. For a discussion of the overall weakness of Atticus's equality argument, *see* Atkinson, *supra* note 9, at 688-89.

Atticus also injects class and gender prejudice into the trial. He denigrates the Ewells as poor white trash⁴⁵ and implicitly distinguishes them in his closing from the poor whites of the Cunningham variety that make up the jury.⁴⁶

“The witnesses for the state . . . have presented themselves to you gentlemen . . . in the cynical confidence that . . . you . . . would go along with them on the assumption . . . that *all* Negroes lie, . . . an assumption one associates with minds of their caliber.”⁴⁷

The condescension of that last phrase invokes class discrimination, just as Atticus’s arguments regarding Mayella’s testimony invites gender discrimination by the all-male jury, as Lubet and others have demonstrated.⁴⁸

Even more sexist is Finch’s truly heartless cross-examination of nineteen-year-old Mayella.⁴⁹ The defense lawyer’s theory of the case is that her physical injuries came not from Tom Robinson’s supposed attack, but from the beating her father gave her after he discovered her embracing a black man.⁵⁰ So Atticus acknowledges that Mayella is a victim of her father’s physical abuse, he may agree with Teresa Godwin Phelps and others that Mayella is an incest victim as well,⁵¹

45. See LEE, *supra* note 1, at 194–95. Scout summarizes the “picture of the Ewells’ home life” that Atticus created at trial:

[T]heir relief check was far from enough to feed the family, and there was strong suspicion that Papa drank it up anyway . . . ; the weather was seldom cold enough to require shoes . . . ; the family hauled its water in buckets from a spring that ran out at one end of the dump . . . and it was everybody for himself as far as keeping clean went . . . ; the younger children had perpetual colds and suffered from chronic ground-itch; there was a lady who came around sometimes and asked Mayella why she didn’t stay in school . . . ; with two members of the family reading and writing, there was no need for the rest of them to learn

Id. For a discussion of this passage, see Phelps, *Margins, supra* note 8, at 525; Note, *supra* note 18, at 1696.

46. Scout observes of the jury: “Sunburned, lanky, they seemed to be all farmers, but this was natural: townfolk rarely sat on juries, they were either struck or excused. One or two of the jury looked vaguely like dressed-up Cunninghams.” LEE, *supra* note 1, at 175. On the unwillingness of the upper class to serve as jurors, see *id.* at 234 and *supra* note 26 and accompanying text.

47. LEE, *supra* note 1, at 217. Trying to bring himself closer to the jury as he attempts to distance the Ewells from it, Atticus dresses down for the jurors’ benefit during his closing, uncharacteristically loosening his vest, collar, and tie and removing his jacket. See *id.* at 215. For a more sanguine view of Atticus’s ploy, see Note, *supra* note 18, at 1697–98.

48. See *supra* text accompanying notes 32–38.

49. Interestingly, the film significantly softens Atticus’s cross-examination of Mayella, suggesting that even its creators felt that the book’s Atticus was too harsh on her.

50. See LEE, *supra* note 1, at 216. The injuries are primarily on the right side of Mayella’s face, suggesting a left-handed attacker. See *id.* at 179–80, 188–89. Tom has a shriveled left arm, but Bob Ewell shows that he is left-handed when Atticus asks him to prove that he can write his name. See *id.* at 189, 197.

51. See Phelps, *Margins, supra* note 8, at 524, 526 (“Tom testifies that Mayella ‘says she never kissed a grown man before She says what her papa do to her

and he must know that she faces further abuse if she fails to corroborate her father's previous testimony. But the lawyer still pounds away at her. Mayella bursts into tears just after she takes the stand, afraid of what the defense attorney will do to her—"What are you scared of?" the judge asks, and Mayella responds, "'Him,' . . . pointing at Atticus"⁵²—and when his cross-examination begins, he first toys with her—"Miss Mayella,' he said smiling, 'I won't try to scare you for a while, not yet. Let's just get acquainted.'"⁵³—and then bores in, until she is crying again,⁵⁴ at which point he "rain[s] questions on her," so much so that the judge has to restrain him.⁵⁵ When he finishes with her—"Who beat you up? Tom Robinson or your father?" No answer. "Why don't you tell the truth, child, didn't Bob Ewell beat you up?"—her "face was a mixture of terror and fury," and after a final defiant outburst, "she burst into real tears. Her shoulders shook with angry sobs."⁵⁶ One does not have to suppose that Mayella is a rape victim to feel sorry for her after this treatment.⁵⁷ She is lying about Tom Robinson, but she does so under the duress of her physically, and perhaps sexually, abusive father. A candidate for pity, she instead suffers further abuse from Atticus Finch.

It is true that Atticus shows some signs of reluctance in this performance. He seems to think twice before beginning, and at the end "looked like his stomach hurt."⁵⁸ But he doggedly goes through with it. As one commentator notes, "This is the art of cross-examination, as Atticus has perfected it: without cruelty, but also without mercy . . ."⁵⁹ Surely Mayella Ewell deserved better from the courts of justice and its officers.

Of course, Mayella is a perjurer, and one could say that she merits the treatment she receives. But for an officer of the court, Atticus has a surprisingly accommodationist view of lying under oath. In the novel's final scene, after Tom is convicted and shot to death while trying to escape, and after Bob Ewell tries to kill Jem and Scout, only to be killed himself by the neighborhood recluse Boo Radley who came to the children's defense, Atticus agrees with the sheriff to sup-

don't count.'"). See also CLAUDIA DURST JOHNSON, *TO KILL A MOCKINGBIRD: THREATENING BOUNDARIES* 7 (1994) (labeling Mayella a "victim of incest"); Osborn, *supra* note 11, at 1139 ("perhaps sexually molested by her father"); *THE SONG OF THE MOCKINGBIRD* (Universal 1998) (documentary) (Collin Wilcox implies that she played Mayella in the film as an incest victim: "She was being the mother—in more ways than one").

52. LEE, *supra* note 1, at 191.

53. *Id.* at 193.

54. *See id.* at 197.

55. *Id.* at 199.

56. *Id.* at 199–200.

57. *See supra* text accompanying notes 33–34.

58. *See* LEE, *supra* note 1, at 193, 199–200.

59. Note, *supra* note 18, at 1695. *See also id.* at 1687–88 (noting Atticus's "false empathy" for the Ewells as a whole).

press the story of Radley's actions in the inquest that will inevitably follow Ewell's death.⁶⁰ Their reason is to protect Boo from Maycomb's curiosity. "To my way of thinkin', Mr. Finch," the sheriff intones, "taking the one man who's done you and this town a great service an' draggin' him with his shy ways into the limelight—to me, that's a sin."⁶¹ Scout agrees, echoing the novel's central metaphor, "[I]t'd be sort of like shootin' a mockingbird, wouldn't it?"⁶² So Atticus conspires to perjury and obstruction of justice.

The novel portrays this decision as a triumph of good sense, but doubts abound. Beyond the shocking failure of a lawyer's ethical responsibilities, there is the questionable propriety of hushing up the actions of a mentally ill man who everyone knows is kept a virtual prisoner in his parents' home.⁶³ Perhaps the attentions of the town might have resulted in some treatment of Boo Radley's "severe, and unaddressed, psychopathology,"⁶⁴ but Atticus is content, as he told his children long before, "to mind his own business and let the Radleys mind theirs."⁶⁵ So Atticus connives in the sheriff's perjury for a dubious purpose; could he not have shown, for a much better purpose, a little mercy to the perjurious, but victimized Mayella?⁶⁶

A true believer in the heroism of Atticus Finch might protest that this picture of him contradicts the fundamental premise of the novel, that whatever his shortcomings, Atticus Finch is on the right side in the fight against racism.⁶⁷ But before accepting this claim, one ought to reevaluate that fundamental premise in light both of the novel's atmosphere and of its title metaphor. The emotional setting of the

60. The sheriff will testify instead that Ewell must have fallen on his own knife (actually the kitchen knife that Boo Radley used to defend the children), which will also require lying about the different knife, a switchblade, Ewell in fact armed himself with. See LEE, *supra* note 1, at 287–89. See also Rob Atkinson, *Lucifer's Fiasco: Lawyers, Liars, and L'Affaire Lewinsky*, 68 *FORDHAM L. REV.* 567, 592–94 (1999).

61. LEE, *supra* note 1, at 290.

62. *Id.* at 291. For a discussion of this passage, see Atkinson, *supra* note 9, at 653–54. See generally R.A. Dave, *The Mockingbird as Symbol*, in READINGS, *supra* note 18, at 49.

63. See LEE, *supra* note 1, at 15–18.

64. Atkinson, *supra* note 9, at 694.

65. LEE, *supra* note 1, at 17. For a discussion of how this behavior conforms to Atticus's overall pattern of paternalism, see Atkinson, *supra* note 9, at 693–95, 716–17. See also Osborn, *supra* note 11, at 1141 ("Atticus[] is willing to hush up a murder committed by the eccentric who has defended his children.").

66. One response to this question would involve the lawyer's duty of zealous representation, which arguably overrides any concern regarding Mayella. See CANONS OF PROF'L ETHICS Canon 15 (1956); *infra* note 98. See generally Simon, *supra* note 37. This contention sidesteps the limitation on zeal imposed by the modifying phrase "within . . . the bounds of law." CANONS OF PROF'L ETHICS Canon 15 (1956); see also MODEL RULES OF PROF'L CONDUCT pmb. (2003); MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980); *supra* text accompanying note 37. Those bounds arguably include the duty not to inject more prejudice into the trial, as Atticus did.

67. See, e.g., Ann Althouse, *Reconstructing Atticus Finch? A Response to Professor Lubet*, 97 *MICH. L. REV.* 1363 (1999).

novel, and of the film even more so,⁶⁸ is overwhelmingly nostalgic.⁶⁹ Childhood games and rituals are lovingly recreated,⁷⁰ as is the sense of small-town life in a bygone era.⁷¹ These effects not only give Atticus a mythical gauzy glow that tempts us to overlook his faults;⁷² they also lure us into yearning for a simpler time,⁷³ when for instance blacks knew their place in the social setting. So we accept Atticus's characterization of Tom Robinson to the jury as "a quiet, respectable, humble Negro"⁷⁴ without questioning whether the lawyer would have been as willing to help a black man falsely accused of rape who was neither quiet nor respectable nor humble.⁷⁵ The novel seems to have only one black who does not meet these qualifications, a certain Lula who challenges Calpurnia, the Finches' noble maid, when she brings Jem and Scout to the First Purchase African M.E. Church one Sunday,⁷⁶ but Lula is promptly squelched by the rest of the parishioners, one of whom says, "'Don't pay no 'tention to Lula, she's contentious She's a troublemaker from way back, got fancy ideas an' haughty ways'"⁷⁷ So one of the uses of nostalgia, in a work written in the

68. See generally Colin Nicholson, *Hollywood and Race: To Kill a Mockingbird, in MODERN CRITICAL INTERPRETATIONS: HARPER LEE'S TO KILL A MOCKINGBIRD* 89 (Harold Bloom ed., 1999). See also *infra* note 170.

69. "We, as readers, encounter the ghosts of ourselves, the children we once were, the simplicity of our lives in an earlier world." Atkinson, *supra* note 9, at 738. See also *id.* at 690 ("Childlike innocence . . . is the *tabula rasa* on which Lee writes us Atticus's moral message . . ."); Osborn, *supra* note 11, at 1141.

70. The child actors playing Scout and Jem, Mary Badham and Philip Alford, are especially fine, furthering this aspect of the movie.

71. See generally Roger Ebert, THE CHICAGO TRIBUNE, June 2003, <http://medialit.med.sc.edu/ebert.htm> (commenting on the film). The movie also engages in some legal nostalgia, featuring trial procedures—repeated instances of narrative testimony and a demonstration of the defendant's injured arm during the cross-examination of another witness—that would not be acceptable today.

72. Harper Lee reportedly described the work as a "love story pure and simple," Timothy Hoff, *Influences on Harper Lee: An Introduction to the Symposium*, 45 ALA. L. REV. 389, 392 (1994) (quoting a 1960 newspaper article). "It is based on a child's love for her father," A.C. Lee, a lawyer in Monroeville, Alabama, the model for Maycomb. *Id.*

73. Flannery O'Connor wrote a friend that *To Kill a Mockingbird* "is a child's book," but "the average American reads on a child's level." Atkinson, *supra* note 9, at 609 n.26 (quoting a 1961 letter).

74. LEE, *supra* note 1, at 216. For a discussion of this characterization, see Atkinson, *supra* note 9, at 622–24; Lubet, *supra* note 10, at 1360; *cf.* Phelps, *Atticus, supra* note 8, at 931 (speculating that Tom's "first name may be no accident"). In the movie, the actor Brock Peters almost infantilizes Tom Robinson, showing a childlike revulsion as he haltingly testifies about Mayella's advances (as if miscegenation revolted him too).

75. This is one of the great merits of Rob Atkinson's comparison of *Intruder in the Dust* and *To Kill a Mockingbird*, for Lucas Beauchamp, the accused black man in Faulkner's novel, may be respectable, but he is neither quiet nor humble. See Atkinson, *supra* note 9, at 628–36.

76. See LEE, *supra* note 1, at 128–29. "You ain't got no business bringin' white chillun here—they got their church, we got our'n." *Id.* at 129.

77. *Id.* at 129–30. For a discussion of this passage, see Atkinson, *supra* note 9, at 676–77; Phelps, *Atticus, supra* note 8, at 931; Phelps, *Margins, supra* note 8, at 528–30.

middle of the civil rights movement,⁷⁸ is a celebration of a time when the victims of oppression knew not to be contentious, not to make trouble, and not to get fancy or haughty—and to shut up quickly any other black who made one of these mistakes.

The novel's celebration of black passivism through its atmosphere of nostalgia is chillingly carried forward in its central metaphor, about killing mockingbirds. Atticus has told his children to "'remember it's a sin to kill a mockingbird,'" because as one of their neighbors explains, "'Mockingbirds don't do one thing but make music for us to enjoy. They don't eat up people's gardens, don't nest in corncribs, they don't do one thing but sing their hearts out for us.'" ⁷⁹ Self-effacing Negroes like Tom Robinson are similarly harmless,⁸⁰ a point made when the Maycomb newspaper editorially compares Tom's shooting "to the senseless slaughter of songbirds by hunters and children."⁸¹ And Scout herself places Boo Radley in the same category.⁸² The Toms and Boos of Maycomb deserve to be protected, as long as they do no harm. But if they or others stray, the other part of Atticus's advice becomes operative: "'I'd rather you shot at tin cans in the back yard, but I know you'll go after birds. Shoot all the bluejays you want, if you can hit 'em, but remember it's a sin to kill a mockingbird.'" ⁸³ Bluejays—and other noisy, contentious troublemakers (civil rights protestors? "outside agitators"?)—are apparently fair game.⁸⁴

The antiracism for which *To Kill a Mockingbird* stands is very tepid, applying only to blacks who know their place. Atticus Finch willingly tolerates and frequently participates in most aspects of his community's racism, as well as its class and gender prejudices. Instead of castigating the role that all these prejudices play in the trial of Tom Robinson, the defense attorney brings all three of them into the courtroom. From this perspective, he qualifies neither as a hero nor as an ethical lawyer.

III. THE CASE AGAINST BORIS A. MAX

The central character in *Native Son* is not a lawyer. The novel single-mindedly focuses on Bigger Thomas, a young black with little schooling adrift in the racist society of Chicago in the late 1930s. Big-

78. See JOHNSON, *supra* note 51, at 11–12; Atkinson, *supra* note 9, at 735–37.

79. LEE, *supra* note 1, at 98.

80. See Atkinson, *supra* note 9, at 607, 628.

81. LEE, *supra* note 1, at 254. For discussion of this passage, see Atkinson, *supra* note 9, at 641.

82. See *supra* text accompanying note 62.

83. LEE, *supra* note 1, at 98.

84. I am indebted to Jeffrey Wilkins, a student in one of my Law, Literature & Film courses, for this remarkable insight, which came in an offhand comment during class. For a different reading of the "bluejays" passage, see Adam Symkowski, *Symbology and Racism in To Kill a Mockingbird*, in READINGS, *supra* note 18, at 52, 55–56.

ger, on his first day as chauffeur in the home of the wealthy Daltons, unintentionally kills their daughter: After a surreptitious date with her Communist boyfriend Jan, Mary Dalton is so drunk that Bigger must carry her up to her bedroom; when her blind mother enters the room and Mary starts to murmur, Bigger covers her face with a pillow, so as not to be caught in a compromising position with a white girl.⁸⁵ After Mrs. Dalton leaves the room, believing her daughter is merely unconscious from drink, a horrified Bigger discovers what he has done and begins to evolve a plan that ultimately requires burning Mary's body in the family furnace (after decapitating her) and recruiting his girlfriend Bessie to help ransom ten thousand dollars from the Daltons as part of a bogus kidnapping by the Communists.⁸⁶ When traces of the body are discovered before Bigger has gotten any money,⁸⁷ he and Bessie run from what becomes a massive police hunt. The law catches him,⁸⁸ but not before he has killed Bessie (after forcing her to have sex with him), because she had become "a dangerous burden."⁸⁹ Wright narrates all this action from Bigger's perspective so that the reader gains profound insight into the welter of racial fear and pride that produced these shocking crimes.⁹⁰

Lawyers enter the plot only after Bigger's capture. Buckley, the sleazy prosecutor, appears with his underlings, as does a defense attorney, an aging Jewish Communist named Boris A. Max, whom Mary's boyfriend Jan recruits to represent Bigger.⁹¹ Max serves as Bigger's

85. See WRIGHT, *supra* note 2, at 62–86.

86. See *id.* at 86–93, 129–49.

87. See *id.* at 197–221.

88. See *id.* at 241–70.

89. See *id.* at 229, 233–41.

90. Irving Howe summarizes the power of the novel's racial analysis: "The day *Native Son* appeared, American culture was changed forever . . . In all its crudeness, melodrama and claustrophobia of vision, Richard Wright's novel brought out into the open, as no one ever had before, the hatred, fear and violence that have crippled and may yet destroy our culture." Irving Howe, *Black Boys and Native Sons*, in CRITICAL ESSAYS ON RICHARD WRIGHT 39, 41 (Yoshinobu Hakutani ed., 1982) [hereinafter CRITICAL ESSAYS]. Howe's essay generated its own controversy, which continues to this day. See Darryl Lorenzo Wellington, *Fighting at Cross-Purposes: Irving Howe vs. Ralph Ellison*, DISSENT, Summer 2005, available at <http://www.dissentmagazine.org/mentest/archives/2005/su05/wellington.htm>.

91. Jan, whom Bigger tried to frame for Mary's kidnapping and who was jailed before Mary's body was found, explains his decision nevertheless to assist Bigger:

"I was in jail grieving for Mary and then I thought of all the black men who've been killed, the black men who had to grieve when their people were snatched from them in slavery and since slavery . . . [W]hen I heard that you'd done it, I wanted to kill you. And then I got to thinking. I saw if I killed, this thing would go on and on and never stop. I said, 'I'm going to help that guy, if he lets me.'"

WRIGHT, *supra* note 2, at 288. Cf. JAMES R. GILES, *THE NATURALISTIC INNER-CITY NOVEL IN AMERICA* 82 (1995) (questioning the believability of Jan's forgiveness).

Virtually alone among the commentators on *Native Son*, Paul N. Siegel questions whether Max is in fact a Communist. See Paul N. Siegel, *The Conclusion of Richard Wright's Native Son*, 89 PUBLICATIONS MODERN LANGUAGE ASS'N 517, 518 (1974).

lawyer from the coroner's inquest, during which they first meet, through trial and appeal up to Bigger's execution. The conventional wisdom regarding Max is that he is the one white man in the novel who can see through the blinding veil of racism.⁹² Max is the only person who actually listens to what Bigger has to say and this simple act gives Bigger a new perspective on life that allows him to face his inevitable execution with equanimity.⁹³

Unfortunately, Max's representation of Bigger has not received much attention from lawyers,⁹⁴ because it is an important cautionary tale. Despite Max's devotion to his client and his deep understanding of Bigger's social situation, the lawyer significantly fails to discharge his ethical responsibilities to his client.

It is clear from the outset that ideology drives Boris A. Max's representation of Bigger Thomas.⁹⁵ During a break in the inquest, after Jan has introduced Max to Bigger, Buckley arrives and the two lawyers immediately begin to wrangle in front of the others. When Buckley asks, "'Why do you Reds take up with scum like this . . .?,'" Max tellingly responds, "'If you had not dragged the name of the Communist Party into this murder, I'd not be here.'"⁹⁶ For a lawyer to say this in front of a newly acquired client may be honest, but it hardly

92. For example, the first *New York Times* review of *Native Son* says of Max: "A Jewish Communist lawyer makes a brilliant speech in [Bigger's] defense, but there is nothing to be done save an attempt at explanation." Peter Monro Jack, *A Tragic Novel of Negro Life in America*, N.Y. TIMES, Mar. 4, 1940, at 86 available at <http://www.nytimes.com/1940/03/04/books/wright-nativeson.html>. See also Louis Tremain, *The Dissociated Sensibility of Bigger Thomas in Wright's Native Son*, 14 Stud. Am. Fiction 63, 74 (1986); John Reilly, *Afterword* to RICHARD WRIGHT, *NATIVE SON* 393, 394 (Harper & Row 1966) (1940).

While Jan Erlone becomes more enlightened as the novel progresses, see *supra* note 91, his initial, appallingly patronizing attempts to treat Bigger as an equal, see generally WRIGHT, *supra* note 2, at 66–80, place him several steps behind Max. But cf. Martha C. Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination* 62 U. CHI. L. REV. 1477, 1492 (1995) (arguing that "Jan . . . alone seems to attend to [Bigger] as a person in his own right."). See also GILES, *supra* note 91, at 82–83 (reaching a similar conclusion, but criticizing the novel for not showing enough of Jan's evolution).

93. See WRIGHT, *supra* note 2, at 344–63, 418–30; See also *infra* text accompanying notes 137–40.

94. See Barry R. Schaller, *Culturally Speaking: Equality, Responsibility and the Social Compact*, 14 QUINNIPIAC L. REV. 347, 379–81 (1994) (discussing Max's lawyering); Anthony Paul Farley, *Amusing Monsters*, 23 CARDOZO L. REV. 1493, 1508–09 (2002) (book review); Judith S. Koffler, *Reflections on Detente: Law and Literature*, 62 TEX. L. REV. 1157, 1166 (1984) (book review); Michele L. Landis, "Let Me Next Time Be 'Tried by Fire': Disaster Relief and the Origins of the American Welfare State 1789–1874," at 92 Nw. U. L. REV. 967, 1022–23 (1998); David Dante Troutt, *A Portrait of the Trademark as a Black Man: Intellectual Property, Commodification, and Redescription*, 38 U.C. DAVIS L. REV. 1141, 1202–03 (2005); Patricia Tuitt, *Law and Violence in Richard Wright's 'Native Son'*, 11 L. & CRITIQUE 201, 209 (2000).

95. James R. Giles refers to the lawyer as "Max (read Marx)." GILES, *supra* note 91, at 86.

96. WRIGHT, *supra* note 2, at 292 (ellipsis in original). See JOYCE ANN JOYCE, RICHARD WRIGHT'S ART OF TRAGEDY 103–04 (1986).

convinces him of counsel's zealous devotion to the client's cause. Max's further rebuke to Buckley makes it very clear that he has another "cause" in mind: "'I'm defending this boy because I'm convinced that men like you made him what he is If I can make the people of this country understand why this boy acted like he did, I'll be doing more than defending him.'"⁹⁷ Even at this early stage of the case, Max sees his representation of Bigger mostly as an opportunity to speak truth to power regarding racism in America (though his repeated references to Bigger as a "boy" shows that Max himself could use some consciousness-raising).

Ideological commitments like this can conflict with the lawyer's ethical obligation of zealous representation.⁹⁸ This conflict first surfaces when the coroner's inquest subsequently resumes. Max does represent Bigger's interest, asserting the defendant's right not to testify and objecting vigorously when the introduction into evidence of Bessie Mears's body produces pandemonium at the conclusion of the kangaroo-court hearing.⁹⁹ But Max is on his feet most often during Jan Erlone's examination, objecting to the contemptuous way his fellow Communist is being questioned.¹⁰⁰ Testimony far more damaging to Bigger goes unchallenged, either by objection or by cross-examination.¹⁰¹

The only witness Max chooses to question is Mr. Dalton, and the lawyer's questions of the dead girl's father dwell on the Daltons' ownership of the tenement where Bigger's family lives. When Max asks,

97. WRIGHT, *supra* note 2, at 292.

98. CANONS OF PROF'L ETHICS Canon 15 (1956), in force at the time of the trial in *Native Son*, provides: "The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied." This same duty is applicable today under the MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1; *see also* MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980).

99. *See* WRIGHT, *supra* note 2, at 328-30. Max, however, has already stumbled regarding Bigger's right to remain silent. After meeting Bigger and becoming his attorney, Max leaves his client alone with Buckley, without any advice about not talking to the prosecutor; Bigger soon confesses everything. *See id.* at 303-10.

100. *See id.* at 317-25. Any questioning that widens the circle of potential guilt beyond Bigger would, of course, be in his interest, so Max's duty to his client should have suggested that he not assist Jan.

In today's world, one might go further and argue that Max provided ineffective assistance by not discussing with Bigger whether he could offer the state evidence against Jan in exchange for a reduced charge. *Cf. id.* at 304 (Buckley hints at such a deal while interrogating Bigger). *See generally* Sigmund G. Popko & Jon M. Sands, *The Conundrum of Discussing Cooperation with Defendants*, CHAMPION, Dec. 2001 at 53 (contemplating whether defense lawyers have an affirmative duty to recommend that their clients cooperate with prosecutors).

101. For example, the coroner slyly suggests that Bigger raped Mary by asking Mrs. Dalton, "'[I]f someone had possessed your daughter sexually while she lay on that bed, could you in any way have detected it?' The room buzzed," but Max says nothing. WRIGHT, *supra* note 2, at 316.

“Why is it that you exact an exorbitant rent . . . from the Thomas family for one, unventilated, rat-infested room in which four people eat and sleep?,” the coroner tries to shout him down, and Max retorts, “You said we could question with latitude here! I’m trying to find the guilty person, too! Jan Erlone is not the only man who’s influenced Bigger Thomas! There were many others *before* him.”¹⁰² This outburst shows not only that the questioning of Jan still rankles Max, but also that his Marxist beliefs have taken over his representation. It can do his client little good to suggest in open court that Mr. Dalton’s capitalist tendencies caused his daughter’s death.¹⁰³ Yet Max goes even further, bringing up the Daltons’ considerable contributions to “‘Negro’” causes but acidly commenting, “So, the profits you take from the Thomas family in rents, you give back to them to ease the pain of their gouged lives and to salve the ache of your own conscience?”¹⁰⁴ This may be acute social criticism, but such an attack on the philanthropic father of a dead white girl ill serves the interests of the black man who is the principal suspect in her death. Max’s ideological blinders thus prevent him from adequately representing his client.

To no one’s surprise, the coroner’s inquest leads to a grand jury indictment of Bigger Thomas for the rapes and murders of both Mary Dalton and Bessie Mears. After hearing Bigger’s story, Max decides on a strategy for responding to these charges and announces it to his client:

“[W]hen the trial comes up we’ll change [the original not guilty plea] to a plea of guilty and ask for mercy . . . I’ll tell the judge all I can of how you feel and why. I’ll try to get them to make it life in prison. That’s all I can see in the circumstances . . . [A] lot depends on what judge we have. Any twelve white men in this state will have already condemned you; we can’t trust a jury.”¹⁰⁵

Max does not even ask Bigger to agree to the waiving all these rights; he simply dictates the strategy. When Bigger objects to even this—“I’m gone. They got me.”—Max ignores him, talking instead of the “‘battle[s]’” the lawyer must “‘fight.’”¹⁰⁶ Boris A. Max has cast himself as Bigger’s ideological champion, and he has a very specific conception of that role, to which his client’s wishes are largely irrelevant.

At the trial itself, Max plays this role grandly. He creates a sensation as he announces Bigger’s change of plea and then coaches his

102. *Id.* at 326–27 (emphasis in original).

103. *See id.* at 328. Max’s last question to Mr. Dalton is, “[D]o you think that the terrible conditions under which the Thomas family lived in one of your houses may in some way be related to the death of your daughter?” *Id.*

104. *Id.*

105. *Id.* at 358.

106. *Id.* at 359. Max mentions prejudice against his being Jewish at this point, furthering his self-image as an embattled warrior. *Id.*

client through it,¹⁰⁷ later loftily refuses to participate as Buckley calls sixty witnesses to testify regarding the appropriate sentence,¹⁰⁸ and finally presents his own argument as the sole evidence in mitigation: “I shall put no witnesses upon the stand. I shall witness for Bigger Thomas.”¹⁰⁹

Besides its egotism, the effectiveness of this strategy can be questioned on several counts. One wonders first about pleading Bigger guilty to the rape of Mary Dalton, when he denies any sexual intercourse with her and there is no evidence at all to contradict that statement. Even by the lax criminal justice standards of the 1930s, Max should surely have moved to dismiss this charge (or negotiated to have it dropped).¹¹⁰ There is a further question about the homicide of Mary Dalton: Bigger did not intend to kill her, so his crime can be murder only through rather inventive applications of the concept of “depraved heart” murder¹¹¹ or of the felony murder rule,¹¹² prosecution arguments that a zealous advocate should have challenged.¹¹³ In his own defense, Max contends that the state has rushed him to trial, preventing adequate preparation, but he specifically abjures filing a motion for a change of venue—“The same condition[s] of hysteria

107. *See id.* at 370–72.

108. *See id.* at 378–81.

109. *Id.* at 376 (emphasis in original).

110. The rape charge involving Bessie Mears is also vulnerable to defense attack, because though there is physical evidence of recent sexual activity, *see id.* at 307, Bessie had previously been Bigger’s voluntary sexual partner, so a claim could be made that the intercourse that immediately preceded Bessie’s death was consensual. Bigger’s confession, *see id.* at 303–10, might include the fact that Bessie objected on this occasion, but merely verbal resistance would probably not have been enough to satisfy rape law as it existed in this period. *See generally* JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 577–80 (3d ed. 2001) (discussing traditional rape law). *See infra* note 113.

111. *See generally* DRESSLER, *supra* note 110, at 512–14 (discussing “depraved heart” murder). Bigger’s killing would have to show extreme recklessness, which is arguably belied by his lack of any consciousness of the risk of causing death. In any event, it is unlikely that this form of murder was a capital crime in Illinois in the 1930s. *See generally id.* at 504–06 (discussing degrees of murder).

112. The prosecution’s contention would have to be that Bigger killed during an attempt to rape Mary Dalton, but the evidence of Bigger’s intent to have sex with Mary is questionable, *see* WRIGHT, *supra* note 2, at 349 (“I was feeling a little that way.”), and probably not in his confession, *see supra* note 99. Bigger’s acts of kissing and fondling Mary, even if in his confession, may not have been enough to satisfy the rigorous act requirement for attempt. *See generally* DRESSLER, *supra* note 110, at 389–96 (discussing the various tests and factors courts use to determine whether a criminal attempt has occurred). Mary’s responsiveness to his caresses, *see* WRIGHT, *supra* note 2, at 84–85, even while intoxicated, suggest a consent defense, especially under rape law in the 1930s. *See supra* note 110.

113. The only charge to which Bigger has no defense is his premeditated murder of Bessie Mears. But even Bigger, and certainly Max, realize that the charges involving Bessie are of minor importance: When Bessie’s body is wheeled into the inquest, Bigger “knew that it would be for the death of the white girl that he would be punished. The black girl was merely ‘evidence.’” WRIGHT, *supra* note 2, at 331. *See also supra* note 110.

exist[] all over this state.’”—which might at least have bought him some time to fashion a better strategy.¹¹⁴

Sticking instead to his original strategy, Max sits idly as Buckley parades witnesses to establish both Bigger’s guilt and his sanity: the Daltons and their employees, fifteen newspapermen who observed Bigger at the Dalton house, five handwriting experts, a fingerprint specialist, eleven doctors, a few of Bigger’s teachers, some of his friends and acquaintances, sixteen policemen who helped arrest Bigger, a juvenile court officer familiar with Bigger’s prior record, and even the owner of a movie theater where Bigger had masturbated earlier on the day of the killing.¹¹⁵ The prosecutor concludes with an avalanche of real evidence, including the bone fragments that are all that is left of Mary’s body¹¹⁶ and culminating in a courtroom reconstruction of the Daltons’ furnace and a demonstration, by a woman Mary’s size who crawls into the furnace, “‘to prove beyond doubt,’” in Buckley’s words, “‘that it could and did hold and burn the ravished body of innocent Mary Dalton and to show that the poor girl’s head could not go in and the sadistic Negro cut it off.’”¹¹⁷ Though Max questions the need for this extended presentation (but only twice¹¹⁸), his efforts are faint. Only vigorous cross-examination and repeated objections could have diminished the prejudicial effect of this circus, but such tactics do not fit in Max’s strategy, which tries to focus all attention on his “witness[ing]” for Bigger.

When Max finally does get to make his presentation on behalf of his client, it is lengthy, running close to ten thousand words,¹¹⁹ and inci-

114. WRIGHT, *supra* note 2, at 75–76.

115. *See id.* at 378–80. In addition to several of the doctors, most of the lay witnesses also render their opinion that Bigger is “sane.” *Id.*

116. *See id.* at 380. This time Bessie’s body is not included.

117. *Id.*

118. *See id.* at 375, 378–79.

119. JAMES BALDWIN, NOTES OF A NATIVE SON 41–42 (1964). James Baldwin labeled the speech “one of the most desperate performances in American fiction.” *Id.* at 38. To satisfy the Book-of-the-Month Club, Wright shortened Max’s speech by about a third (and also omitted most of the references to masturbating in the theater). These cuts have been restored in the Library of America edition. *See* WRIGHT, *supra* note 2, at 485, 486 (note on the text).

Max’s model here, indeed the model for his overall strategy is Clarence Darrow’s representation of Leopold and Loeb in Chicago in the 1920’s. *See* DAVID GUEST, SENTENCED TO DEATH: THE AMERICAN NOVEL AND CAPITAL PUNISHMENT 77–79 (1997). Darrow pled his clients guilty, suffered through the state’s lengthy presentation of evidence, and then argued for hours for a sentence other than death. Darrow’s plea, for two wealthy white boys, was successful. *See* WRIGHT, *supra* note 2, at 376, 502. *See generally* Douglas Linder, *The Trial of Leopold & Loeb*, JURIST, May 2000, <http://jurist.law.pitt.edu/trials5.htm> (telling the story of two upper-class youths who, with premeditation, killed a young boy and how their lawyer’s, Clarence Darrow, tactics and twelve-hour summation saved them from the death penalty). For a dramatization of the trial that is largely historically accurate, see *COMPULSION* (Twentieth Century Fox 1959)(directed by Richard Fleischer, written by Meyer Levin from his novel, starring Orson Wells as Jonathan Wilk, the Darrow character).

sive, exposing what racial oppression has done to all Americans, both the oppressed and the oppressors. But it is doubtful that the speech did Bigger Thomas any good at all.¹²⁰ In the lawyer's haste to pursue his ideological agenda, he loses sight of his duty to his client.

One way to fulfill the duty of zealous representation at the sentencing of a client who has suffered racial injustice is to attempt to spark sympathy for him in the judge's mind. Bigger's background provides lots of raw material for such an argument: father killed in a race riot down south, unemployed mother, two younger siblings on relief, out of school after eighth grade, and a few months in a juvenile reformatory for a crime he says he did not do.¹²¹ But Max specifically rejects this approach, noting that

"the danger of looking upon this boy in the light of injustice. If I should say that he is a victim of injustice, then I would be asking by implication for sympathy; and if one insists on looking at this boy as a victim of injustice, he [the one seeing the injustice] will be swamped by a feeling of guilt so strong as to be indistinguishable from hate."¹²²

This may be a perceptive account of the psychological reasons for the persistence of white racism. But does Max really expect an Illinois trial judge to comprehend the point, much less agree with it? It is more likely that the judge will simply accept Max's invitation not to extend any sympathy to Bigger, without buying its psychosocial underpinnings.

Rather than speak of injustice, Max insists on labeling Bigger's situation one of oppression of blacks by whites:

"What is happening here today is not injustice, but *oppression*, an attempt to throttle or stamp out a new form of life [as represented by Bigger]. And it is this new form of life that has grown up here in our midst that puzzles us, that expresses itself, like a weed growing from under a stone, in terms we call crime."¹²³

The phrase "in terms we call crime" boldly implies that the criminal justice system itself is part of the oppression. This has since become a

120. See Michael Anderson, *'Richard Wright': A Native Son in Exile*, N.Y. TIMES, Aug. 26, 2001, available at <http://www.nytimes.com/2001/08/26/books/review/26ANDERSTW.html> (deriding "the Communist attorney's interminable bleeding-heart speech").

121. See WRIGHT, *supra* note 2, at 49–50, 74.

122. *Id.* at 389. Max elaborates:

"Of all things, men do not like to feel that they are guilty of wrong, and if you make them feel guilt, they will try desperately to justify it on any grounds; but, failing that, and seeing no immediate solution that will set things right without too much cost to their lives and property, they will kill that which evoked in them the condemning sense of guilt."

Id. at 389–90. For a discussion of this passage, see Siegel, *supra* note 91, at 518–19.

123. WRIGHT, *supra* note 2, at 391 (emphasis in original).

respectable view of leftwing criminologists and others,¹²⁴ but telling a judge that he and his court are tools of racial oppression is an unlikely first step toward persuading him to show mercy to your client. The judge is far more likely just to reject the argument.¹²⁵

Max soon turns to a characterization of Bigger's crimes. One possible tactic would have been to emphasize their random, almost accidental occurrence¹²⁶—to suggest that they do not represent who Bigger Thomas truly is¹²⁷—but Max chooses the opposite tack, emphasizing instead the authenticity of Bigger's crimes:

“[R]emember that men can starve from a lack of self-realization as much as they can from a lack of bread! And they can *murder* for it, too! . . .

. . . .

. . . [W]hat Bigger Thomas did . . . was but a tiny aspect of what he had been doing all his life long! He was *living*, only as he knew how, and as we have forced him to live. The actions that resulted in the death of those two women were as instinctive and inevitable as breathing or blinking one's eyes. It was an act of *creation!*”¹²⁸

Again, this may be a brilliant explanation of the psychological sources of Bigger's crimes,¹²⁹ but it is very poor advocacy, as is shown by the argument's crescendo—“*His very existence is a crime against the*

124. See generally WILLIAM J. CHAMBLISS & ROBERT SEIDMAN, *LAW, ORDER, AND POWER* (2d ed. 1982); CRIMINAL JUSTICE IN AMERICA: A CRITICAL UNDERSTANDING (Richard Quinney ed., 1974).

125. Consider the conclusions of a sitting judge:

[A]n argument . . . claiming responsibility for the crimes on the part of society because of its indifference and oppressiveness[] was bound to fail. The plea specifically was not cast in terms of mercy or even sympathy but on the absence of responsibility because of the inevitability of the result. In a legal system generally committed to the principle of individual responsibility for the act, regardless of motivation, that plea could not prevail.

Schaller, *supra* note 94, at 380–81. See generally Malcolm Crowley, Book Review, 102 *NEW REPUBLIC* 382–83 (1940), reprinted in RICHARD WRIGHT: THE CRITICAL RECEPTION 67, 68 (John M. Reilly ed., 1978).

126. See *supra* text accompanying notes 85–89.

127. Cf. Landis, *supra* note 94, at 1022 (“Bigger's effort to obtain leniency from the judge hinged on his ability to narrate events in his own life as misfortunes of fate.”).

128. WRIGHT, *supra* note 2, at 399–400 (emphasis in original). For a discussion of this passage, see Siegel, *supra* note 91, at 520. In a dubious decision, Max even alludes to Bigger's public masturbation, see *supra* text accompanying note 115, in support of this argument: “This Negro boy, Bigger Thomas, is a part of a furious blaze of liquid life-energy He is a hot jet of life that splattered itself in futility against a cold wall.” WRIGHT, *supra* note 2, at 399. For a discussion of this passage, see Keneth Kinnamon, *Introduction*, in *NEW ESSAYS ON NATIVE SON* 1, 15–16 (Keneth Kinnamon ed., 1990).

129. See generally JACK KATZ, *SEDUCTIONS OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL* 80–113 (1988) (discussing the psychological construction of the criminal mindset).

state!"¹³⁰—which sounds much more like a prosecutor's closing argument than a defense attorney's.¹³¹

After raising the specter of a race war—"another civil war in these states is not impossible"¹³²—Max finally gets around to arguing against a death sentence for Bigger, but the damage has already been done. Having forsworn sympathy, having told the judge that he is an oppressor, and having argued that violent crime is the only way his client and others like him can express themselves, Max can hardly expect the judge to agree to a life sentence, especially for the curious reason the lawyer offers, that "[s]ending [Bigger] to prison would be the first recognition of his personality he has ever had."¹³³ Nevertheless, Max is surprised, when after Buckley skewers him for "the silly, alien, communistic and dangerous ideas advanced by the defense,"¹³⁴ the judge takes only an hour recess before announcing that Bigger should be electrocuted.¹³⁵

Max's "witness[ing]" for Bigger is thus an utter failure.¹³⁶ The lawyer spoke truth, as he saw it, to power, but there was no way power could accept that truth. The duty of zealous advocacy required much more indirection and circumspection, highlighting injustice rather

130. WRIGHT, *supra* note 2, at 400 (emphasis in original).

131. By proving that Bigger could not help but kill, Max also proves that Bigger can never be trusted not to kill, that he is inherently murderous

. . . .

. . . Max may intend this speech as part of a plea for mercy, but it seems unlikely to hasten desegregation and likely to lead to even harsher police measures.

GUEST, *supra* note 119, at 100, 102. See also Kinnamon, *supra* note 128, at 16 (referring to a similar argument by Max as "implausible and involuted speculation").

Even contemporary Communists criticized Max's performance. See Ben Davis, Jr., Book Review, SUNDAY WORKER, Apr. 14, 1940, §2, at 4, reprinted in RICHARD WRIGHT: THE CRITICAL RECEPTION, *supra* note 125, at 68, 75 ("Max represents the type of so-called legal defense which the Communist Party . . . ha[s] been fighting Some of his speech is mystical, unconvincing, and expresses the point of view held not by Communists but by those reformist betrayers who are being displaced by Communists."); see also Samuel Sillen, *The Meaning of Bigger Thomas*, NEW MASSES, Apr. 30, 1940, at 26, reprinted in RICHARD WRIGHT: THE CRITICAL RECEPTION, *supra* note 125, at 83, 85–86.

132. WRIGHT, *supra* note 2, at 403; see also *id.* at 403–04. See *infra* text accompanying note 146.

133. *Id.* at 404.

134. *Id.* at 407. Buckley's closing is as over-the-top as his sixty-witness case in aggravation, see *supra* text accompanying notes 115–17, but he skillfully parries all of Max's arguments by telling the judge, "I know of better way to discourage such thinking [as Max's] than the imposition of the death penalty upon this miserable human fiend, Bigger Thomas!" WRIGHT, *supra* note 2, at 407. See generally John M. Reilly, *Giving Bigger a Voice: The Politics of Narrative in Native Son*, in NEW ESSAYS ON NATIVE SON, *supra* note 128, at 35, 57–59 (analyzing Max's defense of Bigger); JOYCE, *supra* note 96, at 111–14 (analyzing Buckley's prosecution of Bigger).

135. See WRIGHT, *supra* note 2, at 415–17.

136. "[T]he performance of the lawyer is incredibly stupid." Dan McCall, *The Bad Nigger*, in MODERN CRITICAL INTERPRETATIONS: RICHARD WRIGHT'S NATIVE SON 5, 15 (Harold Bloom ed., 1988) [hereinafter INTERPRETATIONS].

than racial oppression and evoking pity for Bigger rather than fear of him and of others like him. But Max's ideology would not let him do that.

That same ideology stands in the way as Max tries to console Bigger in his cell on the night before his execution. Bigger wants to talk to Max, wants him to listen as he listened to Bigger once before,¹³⁷ but the lawyer does not even remember the previous conversation.¹³⁸ When Bigger reminds him and then starts to speak of life and death, Max can only point to the tall buildings visible through the cell window and mouth Marxist cant about how "[a] few men are squeezing those buildings tightly in their hands," how "[t]hey rule and regulate life" and how "the rich people don't want to change things."¹³⁹ This is not what Bigger needs and he ultimately "drown[s] out [Max's] voice," so Bigger can say what he wants to say: "What I killed for must've been good! . . . 'When a man kills, it's for something. . . . I didn't know I was really alive in this world until I felt things hard enough to kill for 'em.'"¹⁴⁰ Bigger's assertion leaves "Max's eyes . . . full of terror" and the lawyer virtually speechless for the first time in the book, as he mumbles his goodbyes.¹⁴¹ He seems shocked that Bigger has adopted the theory of self-realization Max advocated for his client;¹⁴² for all his insight, even Max has averted his gaze from the reality of Bigger's life,¹⁴³ so that when Bigger forces him to look, he is terrorized and incapacitated. Max thus fails to console his client, the last duty of the death row lawyer. Instead Bigger does it for himself.

From start to finish, Boris A. Max's ideological commitments prevent him from serving the interests of his client. Max is a good Communist and an ethical man, but by failing the duty of zealous

137. See *supra* text accompanying note 93. See generally Reilly, *supra* note 134, at 57 (analyzing the conversation between Max and Bigger).

138. See WRIGHT, *supra* note 2, at 423-24.

139. *Id.* at 427-28.

140. *Id.* at 428-29 (second ellipsis in original).

141. *Id.* at 429-30. For a discussion of this passage, see Siegel, *supra* note 91, at 521. Wright subsequently said that at this point Max was "register[ing] the moral . . . horror of Negro life in the United States." Richard Wright, *How "Bigger" Was Born* in WRIGHT, *supra* note 2, at 431, 461.

142. See *supra* text accompanying note 128.

143. See Nussbaum, *supra* note 92, at 1492 ("The lawyer is shown to be just as deaf to Bigger's personal story as many of the other white characters"). See also JOYCE, *supra* note 96, at 114-16; Yoshinobu Hakutani, *Native Son and An American Tragedy: Two Different Interpretations of Crime and Guilt*, in CRITICAL ESSAYS, *supra* note 90, at 167, 170; Kinnamon, *Introduction*, *supra* note 128, at 1, 11; McCall, *supra* note 136, at 21; James Nagel, *Images of "Vision" in Native Son*, in CRITICAL ESSAYS, *supra* note 90, at 151, 157; Reilly, *supra* note 134, at 59-60; Joseph T. Skerrett, Jr., *Composing Bigger: Wright and the Making of Native Son*, in INTERPRETATIONS, *supra* note 136, at 125, 142; Laura E. Tanner, *Uncovering the Magical Disguise of Language: The Narrative Presence in Richard Wright's Native Son*, 29 TEX. STUD. LITERATURE & LANGUAGE 412, 426-27 (1987); Craig Werner, *Bigger's Blues: Native Son and the Articulation of Afro-American Modernism*, in NEW ESSAYS ON NATIVE SON, *supra* note 128, at 117, 138.

representation (among others) he shows that as a lawyer he is neither good nor ethical.

IV. THE LAWYER'S DILEMMA

These opinions about Atticus and Max are, I eventually realized, inconsistent.¹⁴⁴ My critique of Atticus is that he is too willing to accept the prejudices of his society, while I fault Max for being too willing to confront the same prejudices. I condemn Max for not trimming his ideological sails in order to make a more persuasive argument for Bigger and Atticus for doing too much trimming in his effort to save Tom.

Atticus is too ready to bring the race, class, and gender attitudes of Maycomb into the courtroom and so fails his duty as an officer of the court. But he does so in order to best represent his client. Atticus attempts to overcome some of the jury's racism—to get them to accept Tom's word over the testimony of Bob and Mayella Ewell—by appealing to other aspects of that racism, as well as to the jury's class and gender stereotypes.¹⁴⁵ He appears to buy into some of his society's prejudices so that he can more easily persuade those who hold those prejudices. He sacrifices his duty not to sully the court with bias, in order to fulfill his duty of zealous representation to his client.

Max, on the other hand, too quickly disdains tactics and arguments that might have persuaded the judge to spare Bigger Thomas's life, thus failing to represent his client with appropriate zeal. But he does so out of a profound belief that such stratagems, while they might avail in a particular case, will ultimately wreck the society and its courts, because they are premised on an incorrect understanding of psychosocial reality. As Max tells the court, "The consciousness of Bigger Thomas, and millions of others more or less like him, . . . form the quicksands upon which the foundations of our civilization rest."¹⁴⁶ To warn the court of these quicksands and of their threat to civilization is an ethical imperative for an officer of the court arguably as important as the duty of zealous representation.¹⁴⁷

So my criticisms of Atticus and Max really reflect two sides of a dilemma: zealous representation and the lawyer's need to speak truth

144. It is embarrassing that the realization took several years. I only added *To Kill a Mockingbird*, in its cinematic version, to my law and literature course in 1999, when it became a course in "Law, Literature, and Film." Even then, the movie came at the beginning of the course and *Native Son* at the end. It was only when the vagaries of one semester's schedule pushed the film later in the course that I began to see the inconsistency in my opinions about the two lawyers.

145. See *supra* text accompanying notes 42–57.

146. WRIGHT, *supra* note 2, at 402. See *supra* text accompanying notes 121–32.

147. Of course, as a Communist Max has little commitment to the capitalist version of the American court system that he confronts in *Native Son*. But as a Communist he is fundamentally committed to the society from which that court system emanates, both of which he hopes to see develop beyond their benighted states.

to power will frequently conflict, and so the lawyer must choose which to sacrifice and by how much. How much candor must be forgone in quest of persuasion and how much persuasion in pursuit of truth?

The standard answer will be to favor Atticus's way, to commit to zealous representation, though it requires accepting some of society's biases as reflected in the legal system, and to make only modest and occasional contributions to the correction of the system's and society's problems.¹⁴⁸ The anonymous student author of a Harvard Law Review note on *To Kill a Mockingbird* discusses the analogous tension between professional ritual and human empathy, and definitely favors the former:

[S]ome form of personal ritualization . . . may be the only viable way to keep empathy at once contained within the demands of professionalism and employed in its service [E]mpathy, when given free rein, can hamper one's professional effectiveness without replacing it with anything more constructive than a solipsistic and bathetic kind of catharsis.¹⁴⁹

So professional rituals like zealous representation—with Atticus's cross-examination of Mayella as a prime example,¹⁵⁰—should be the norm, and “a straight shot to the empathic heart”¹⁵¹—which despite its attempted dispassion is a good characterization of Max's closing—the exception.

But, as Richard Weisberg has demonstrated in the context of Vichy France, this standard answer risks moral, as well as societal ruin.¹⁵² In order to function within a legal system, one may have to accept so many of its prejudices that personal integrity becomes a casualty long before those prejudices destroy the society itself. The only strategy to avoid this result is Max's way, to “witness” for the society and the legal system, to warn of the dangers before they engulf us, even though the message will be a difficult one for listeners to accept.

Native Son tries to show that race relations in 1930s Chicago made Max's speaking truth to power a necessity, by sketching various aspects of prevalent discrimination, in housing, employment, education, and retailing and especially in the criminal justice system.¹⁵³ But an-

148. See also *supra* note 66.

149. Note, *supra* note 18, at 1701.

150. See *id.* at 1694–95.

151. *Id.* at 1700.

152. See RICHARD H. WEISBERG, *VICHY LAW AND THE HOLOCAUST IN FRANCE* (Alifa Saadya ed., 1996).

153. See, e.g., WRIGHT, *supra* note 2, at 3–7 (one-room, rat-infested apartment); *id.* at 16–20 (Bigger envies jobs he cannot have); *id.* at 61 (restricted educational opportunities); *id.* at 161–62 (abusive treatment on the job); *id.* at 243–44, 257–58, 269–70 (illegal police tactics in search for Bigger); *id.* at 249, 326–28 (differential pricing in black and white neighborhoods); *id.* at 303–10, 333–36 (illegal interrogation tactics); *id.* at 318–25, 328–32 (race-baiting sensationalism at the inquest); *id.* at 407–15 (racial invective in prosecutor's closing argument).

other book by Richard Wright, the autobiographical *Black Boy*,¹⁵⁴ is even more graphic in its depiction of racism and more pertinent to this article, because it describes conditions in Mississippi, one state over from *To Kill a Mockingbird*'s Alabama, in the years leading up to that novel's time.

Beginning with Wright's earliest memories of growing up poor in Mississippi, *Black Boy* traces how racial consciousness grows in the oppressed, as his first awareness of discrimination¹⁵⁵ and of "white terror" (when his uncle is killed)¹⁵⁶ causes "[a] dread of white people . . . to live permanently in my feelings and imagination."¹⁵⁷ As a fatherless youth he becomes inured to instances of racism, selling newspapers distributed by the Ku Klux Klan,¹⁵⁸ working for white families that routinely insult him,¹⁵⁹ getting short shrift from the white owner of a brickyard when a dog there bites him ("I never saw a dog yet that could really hurt a nigger").¹⁶⁰ Wright soon starts to think of heading north to avoid "the white death, the threat of which hung over every male black in the South."¹⁶¹ Taking a series of jobs to raise the necessary travel money, he sees physical abuse of black customers in a clothing store and suffers the same when he makes store deliveries¹⁶² and then moves on to an optical company until two white employees hound him out of the job.¹⁶³

In his next two workplaces, a hotel and a movie house, Wright sees his black coworkers engage in petty crime and recognizes it as a racial con: "The southern whites would rather have had Negroes who stole [] work for them than Negroes who knew, however dimly, the worth of their own humanity."¹⁶⁴ But he falls into the same practice and quickly takes enough money to make it to Memphis.¹⁶⁵ There he finds another optical company to work for, at which the whites wage a more subtle racial campaign, engineering a feud between Wright and another black, so that the whites can stage a fight between the two and

154. RICHARD WRIGHT, *BLACK BOY* (Library of Am. ed., Perennial Classics 1998) (1945).

155. *See id.* at 46–49.

156. *Id.* at 53–55.

157. *Id.* at 73. "I had already grown to feel that there existed men against whom I was powerless, men who could violate my life at will . . . These [feelings] were no longer a reflection of my reaction to the white people, they were a part of my living, of my emotional life; they were a culture, a creed, a religion." *Id.* at 73–74.

158. *See id.* at 127–33.

159. *See id.* at 145–50. "I was quickly learning the reality—a Negro's reality—from the white world . . . They were turning out to be alike, differing only in detail." *Id.* at 148.

160. *Id.* at 161–63.

161. *Id.* at 172.

162. *See id.* at 179–82.

163. *See id.* at 186–93. "'This is a white man's work around here.'" *Id.* at 188 (emphasis in original).

164. *Id.* at 200.

165. *See id.* at 200–01, 205–07.

wager on it.¹⁶⁶ When happenstance finally delivers him out of the south (his aunt comes to Memphis, and she and Wright decide to go to Chicago¹⁶⁷), Wright has the same notion of whites he had formed a few years before: "They did not seem to be individual men, but part of a huge, implacable, elemental design toward which hate was futile. What I did feel was a longing to attack."¹⁶⁸

These are the experiences and mindset that Wright brought with him to Chicago and to the writing of *Native Son*. Perhaps more significantly, these are the experiences and mindset of someone like Tom Robinson, raised in roughly the same time period in neighboring Alabama. If one imagines this sort of back-story for Tom, it is easy to see the inadequacy of Atticus's defense, for the lawyer did almost nothing to bring the reality of Tom's life into the courtroom, either the general fear that white people undoubtedly caused in him or the very specific fear provoked by the Ewells.¹⁶⁹ It is also easy to understand why Tom decided to take his fate in his own hands and try to escape—as Richard Wright made his own escape from the prison of the south—rather than to wait for Atticus to pursue an appeal,¹⁷⁰ which he could only characterize as "a good chance."¹⁷¹ Atticus's client knew better—he "was tired of white men's chances and preferred to take his

166. See *id.* at 233–43. "To the white men we're like dogs or cocks." *Id.* at 237.

167. See *id.* at 255. Part Two of *Black Boy*, which was suppressed when the book was first published and did not appear until 1977, deals with Wright's early years in Chicago, ending with his membership in and eventual estrangement from the Communist Party. See Jerry W. Ward, Jr., *Introduction* to WRIGHT, *supra* note 154, at xi, xi–xiii.

168. WRIGHT, *supra* note 154, at 194.

169. The closest the lawyer gets is in this exchange during Tom Robinson's direct examination: "Why did you run?" "I was scared, suh." "Why were you scared?" "Mr. Finch, if you was a nigger like me, you'd be scared, too." Atticus sat down." LEE, *supra* note 1, at 207.

170. Atticus's performance as an appellate attorney also leaves much to be desired. In the novel (as opposed to the movie) some time passes between the guilty verdict and Tom's attempted escape and fatal shooting. See *id.* at 248–49. There is little evidence that Atticus has visited his client regularly, in order to keep up his spirits, so the lawyer should not be surprised when his client runs. Atticus should know that zealous representation on appeal in a capital case requires something more than just preparing a good brief.

The film sidesteps this problem by killing Tom off more quickly (and to further acceptance of its nostalgic spirit, see *supra* text accompanying notes 68–71, sanitizes his shooting by modifying the novel's "seventeen bullet holes," *id.* at 248, to a single shot by a guard who meant only to wound Tom). See Ebert, *supra* note 71. But the film's modifications occasion another representational lapse by Atticus: After he tells Tom's wife of her husband's death at their rural home, the lawyer leaves the client's wife and family in the presence of an angry Bob Ewell, who has just spat in Atticus's face. Cf. LEE, *supra* note 1, at 299 (in the novel the spitting occurs in town). Earlier in the movie, with Tom in jail before his trial, Atticus also left the Robinson home in the presence of a menacingly drunk Bob Ewell. Leaving Tom's wife and family to potential victimization by Ewell (twice) is surely not what Atticus's client would have wanted.

171. LEE, *supra* note 1, at 249.

own'"¹⁷²—and so did Scout: "Tom was a dead man the minute Mayella Ewell opened her mouth and screamed."¹⁷³ Given this reality, Max's way might have been a better course for Tom Robinson's lawyer: to let Maycomb know exactly what it had done and was doing to Tom Robinson.¹⁷⁴

There is no easy choice between the ways of Atticus and Max. Compromise between zealous representation within the extant limits of justice and speaking the truth about those limits is inevitable. But the lawyer must be aware of the tension and wrestle with it; otherwise he will be as lost as both Atticus and Max are.

172. *Id.* (these are Atticus's words, but he has the realization only after Tom's death); see also Osborn, *supra* note 11, at 1140 (Tom "sensibly rejected Atticus' advice that he should sit tight").

173. LEE, *supra* note 1, at 254.

174. Max's words for Bigger could have fit in such a speech: "[I]f we say that we must kill him, then let us have the courage and honesty to say: 'Let us kill them all. They are not human. There's no room for them.' Then let us do it.'" WRIGHT, *supra* note 2, at 405. But it is impossible to imagine the Atticus Finch we know making such a statement.