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November 27, 2015

Inherent Racial Biases Woven Into America’s Criminal Justice Institutions: A Reexamination of To Kill a Mockingbird

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Inherent Racial Biases Woven Into America’s Criminal Justice Institutions: A Reexamination of To Kill a Mockingbird

JOSHUA BRIAN LANPHEAR

This is article considers the concept of inherent racial biases woven into America’s criminal justice institutions as reflected in Harper Lee’s novels To Kill a Mockingbird and Go Set A Watchman. Mockingbird—published in 1960, but set in the 1930s, in the fictitious racist-south of Maycomb, Alabama—portrays this concept through the trial of Tom Robinson, a sympathetic African American accused of raping the white Mayella Ewell. Key representatives of Maycomb’s institutions—Officer Heck Tate, Judge John Taylor, Mr. Gilmer, Atticus Finch, and Tom’s jury—perpetuate these inherent racial biases throughout Tom’s experience with the criminal justice system until he is ultimately killed under the sentence of the jury. Watchman—published in 2015, but set in the 1950’s—provides further insight into the inherent racial biases undermine our American criminal justice system, specifically through Lee’s final portrayal of Atticus. I intend to use Lee’s portrayals to rebut the assertion that African Americans receive colorblind justice in contemporary America. Ultimately, this article will affirm the notion that America’s criminal justice system is not colorblind; that inherent racial biases do in fact undermine various institutions within the American system.

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But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.¹

I. INTRODUCTION

If there is one thing the majority of Americans can agree upon, it is that our contemporary criminal justice system revolves around the notion of justice. To take it one step further, a majority of that majority would likely agree that our criminal justice system revolves around the notion of colorblind justice.² And why shouldn’t they? Our countries’ history is packed with monumental turning points regarding racial issues, such as the Civil War, Reconstruction and the alleged demise of Jim Crow laws, the United States Supreme Court’s decision in Brown v. Board of Education,³ and Dr. Martin Luther King’s “I Have a Dream” speech at the peak of the Civil Rights Movement, all of which purportedly paved the road to this post-racial society. Yet, even after these turning points, our media outlets continue to plaster countless stories across our television screens portraying events that seriously bring this notion into question. Accordingly, there is a growing minority of Americans that believe that the criminal justice system, from first police interaction to verdict, is infected with a racial bias that taints the notion of colorblind justice.⁴

¹ Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
⁴ As this article will discuss, this minority posits that in the case of racial biases in America’s criminal justice system, there is an unbroken thread extending back to the era of Jim Crow coupled with institutional discrimination that rejects this notion of colorblind justice. See, e.g., MICHELLÉ ALEXANDÉR, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 20-58 (2012) (linking Jim Crow and mass incarceration "to illustrate the ways in which systems of racialized social control have managed to morph, evolve, and adapt to changes in the political, social and legal context over time"); Kevin R. Johnson, How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly
Consider the following story: Two unarmed African American male teenagers are walking down the middle of the street. A white police officer pulls up in his squad car and asks the two men to step to the sidewalk. When the officer’s request is refused, an altercation ensues. Shots are fired, resulting in one of the men lying face down, in the middle of the street, dead. The event prompts protests. The case is presented to a grand jury; however, the officer walks free.

The likely reaction to this scenario is that of confusion, discomfort, and maybe even disgust: Why did the altercation escalate so quickly? Was it because the teenager was black and the officer was white? Does race matter? Should race matter? If your immediate response was anything along these lines, you’re not alone considering the story tells us protests followed the death. Maybe adding some meat to the bones can address these concerns.

Consider the following tragedy: It is August 9, 2014. It is early in the day, let’s say, 11:54a.m. The temperature is fairly warm, like any other summer afternoon in Ferguson, Missouri. While working the day shift, Officer Darren Wilson, a white male police officer, receives a dispatch call regarding a “stealing in progress” at a local corner store.5 All Wilson knows is that the suspect is wearing a black shirt and that a box of Cigarillos was stolen.6

In pursuing the dispatcher’s call, Wilson observed two African American male teenagers, Michael Brown and Dorian Johnson, walking along the double yellow line in single file order.7 Wilson pulled his police cruiser in front of the two men and asked, “[w]hy don’t you guys walk

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6 Id. at p. 202.
7 Id. at p. 207.
on the sidewalk?™ Brown’s response: “[f]uck what you have to say.” Wilson’s attention was immediately drawn to Brown. The first thing Wilson noticed about Brown was the full box of Cigarillos in his right hand. Since Johnson was wearing a black shirt, Wilson determined Brown and Johnson were the suspects from the stealing in progress call.

Wilson called for backup and repositioned his police cruiser ahead of Brown and Johnson in order “to kind of cut them off [and] keep them somewhat contained.” Wilson signaled Brown to come over while simultaneously trying to get out of his vehicle. Brown responded, “what the fuck are you going to do about it,” and slammed the cruiser door shut. Here is when the altercation ensues and quickly escalates.

According to Wilson, he sensed Brown was going to enter the cruiser, so he turned away and shielded his face. Brown then delivered a blow and struck Wilson in the side of the face. Brown continued to keep the cruiser door shut, trapping Wilson inside. Brown delivered another blow. Worried that a third blow would knock him unconscious, Wilson decided his non-lethal weapons were not a viable option so he drew his gun.

Subsequently, Wilson shouted, “get back or I’m going to shoot you,” but Brown ignored him and grabbed Wilson’s gun. While both men are fighting over the gun, Wilson managed to pull the trigger roughly five times; however, the gun only discharged twice. After the second

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8 Id. at p. 208.
9 Id.
10 Grand Jury Testimony of Darren Wilson, supra note 5, at p. 209.
11 Id. at p. 209.
12 Id.
13 Id.
16 Id. at p. 212.
17 Id. at p. 213.
18 Id. at p. 213-14.
19 Id. at p. 214.
discharge, Brown started to run away from the cruiser, allowing Wilson to get out. Brown turned around, ignored Wilson’s request to get on the ground, and started running towards Wilson. Wilson discharges a round of shots. Brown is still running. More shots fired. Brown is now roughly eight feet away from Wilson. One last shot is fired, and as Wilson described it, “I remember looking at my sites and firing, all I see is his head and that’s what I shot.” Brown was dead.

Although Wilson encountered and killed the un-armed Brown within minutes, confrontations between protesters and law enforcements officers lasted for weeks. If these protests did not succeed in pitting the predominantly black community against the nearly all-white police force, then the grand jury’s decision to not indict Officer Wilson in connection with the shooting of Michael Brown surely exacerbated the conflict. After the decision was released, civil unrest turned violent: dozens of buildings were set on fire, several businesses were looted, and physical altercations and gunfire occurred among protesters and officers in riot gear.

No one disputes—at least no one should—that what occurred in Ferguson was tragic. Nor should anyone be surprised that protests and riots ensued; after all, “a riot is the language of the unheard.” But one wonders why these “us versus them” confrontations occur between civilians

21 Id.
22 Id. at p. 227.
23 Id. at p. 228.
24 Id.
25 Grand Jury Testimony of Darren Wilson, supra note 5, at p. 228.
26 Id. at p. 229.
27 Id.
29 Of the fifty-three commissioned police officers in the Ferguson Police Department, four are black. See id.
30 The grand jury was made up of nine whites and three blacks. See id.
31 See id.
and the criminal justice system well into the twenty-first century. Is Michael Brown dead because he was a young, black male? Or was Brown an aggressive “demon” who caused his own death? Although Wilson firmly states he is not a racist cop, did some inherent underlying racial gap between young, black males and white police officers cause him to address Brown in a disrespectful way, thus antagonizing him and triggering the altercation? Are the events in Ferguson illustrative of an overall contemporary racial gap in our society? Did Brown receive justice? Did Wilson?

In the aftermath of Ferguson, Mark O’Mara, the criminal attorney who defended the man who shot Trayvon Martin, recognized the inherent racial biases within our criminal justice system and proposes an explanation for the continued disparities. According to O’Mara, the criminal justice system (in every aspect this article presumes) doesn’t measure up to the ideal definition of colorblind justice. Admitting the issue of racial biases do in fact exist, O’Mara cautions:

[I]t's not simply a black and white issue. It's rare to find an overtly racist cop, or an overtly racist judge. The bias is nuanced; it's woven into the system, and it builds with each interaction with the system until, at last, it results in unequal justice.

33 As Republican Senator Rand Paul stated, “[g]iven the racial disparities in our criminal-justice system, it is impossible for African Americans not to feel like their government is particularly targeting them.” See David Von Drehle & Alex Altman, The Tragedy of Ferguson, TIME (Aug. 21, 2014), http://time.com/3153326/inside-the-tragedy-of-ferguson/. Moreover, a poll conducted by the Pew Research Center for the People and the Press: 80% of black respondents said Brown’s death “raises important issues about race,” but among whites, a strong plurality dismissed the race angle as exaggerated. See id.

34 After the first shot was fired, Officer Wilson testified that Michael Brown “looked up at [him] and had the most intense aggressive face. The only way I can describe it, it looks like a demon, that’s how angry he looked.” Grand Jury Testimony of Darren Wilson, supra note 5, at p. 224-25.

35 The federal investigation into the Ferguson Police Department’s records seems to reveal that the department itself is guilty of racism. See Lauren McCauley, As Darren Wilson Walks Free, DOJ Reveals Blatant Racism at Ferguson Police Department, COMMON DREAMS (Mar. 4, 2015), http://www.commondreams.org/news/2015/03/04/darren-wilson-walks-free-doj-reveals-blatant-racism-ferguson-police-department (citing The Department of Justice Pattern or Practice Investigation of the Ferguson, Missouri, Police Department, https://app.box.com/s/swg8wdixtysymrmd2hw1jwpw9uu8ti).


37 Id.
As District Court Judge Mark Bennett explains, “[i]mplicit biases are the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgement.”

Although most American’s will reject the existence of these biases, “we unconsciously act on such biases even though we may consciously abhor them.”

Ferguson is yet another peg in the series of events that has given rise to the inherent racial biases in the context of a black v. white debate. When one places this peg on the spectrum of race in American history, it trails the monumental racial turning points stated above and years of legislative and judicial attempts to achieve equality. Yet, Ferguson will happen again, just as fast and easily as it occurred on August 9, 2014. This begs the question, what’s wrong with America’s criminal justice system?

This article will question whether America’s criminal justice institutions are truly colorblind. Ultimately, this article will affirm the notion that the American criminal justice system is not colorblind; that inherent racial biases do undermine various institutions within our system. To do so, this article will turn back the dial and analyze the inherent racial biases as portrayed in Harper Lee’s beloved To Kill a Mocking Bird.

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38 Mark W. Bennett, Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions, 4 Harv. L. & Pol’y Rev. 149, 149 (2010).
39 Id.
41 It is “th[is] racial frontier separating whites from blacks where the difficulties have proven hardest to overcome.” RANDALL KENNEDY, RACE, CRIME, AND THE LAW xii (Pantheon Books, 1997).
42 Due to “the distinctiveness of the African American experience, the unique and overwhelming obstacles blacks have faced, and the indignities, humiliations, and violence they were forced to endure,” this article—while cognizant that other racial minority groups face similar inequalities—will focus solely on the treatment African Americans receive from America’s criminal justice institutions. LEON F. LITWACK, HOW FREE IS FREE? THE LONG DEATH OF JIM CROW 5 (Harvard University Press, 2009).
Although such a critique is nothing new to the common *Mockingbird* reader, this article will analyze the novel through a Critical Race Theory lens with the intention of shedding light on the racial biases woven into America’s *institutions*, not necessarily in America’s *people*. This article will also consider the inherent racial biases portrayed in Lee’s recently published, controversial Go Set A Watchman (hereinafter “*Watchman*”). Lee’s original manuscript—a black cloud hovering over *Mockingbird* and leaving a bitter taste in the mouths of *Mockingbird* enthusiasts—was released in the midst of the growing awareness of America’s racial gap and provides a refreshing insight into America’s criminal justice institutions.

Part II will introduce Critical Race Theory and discuss what the theory has to offer to an analytical interpretation of *Mockingbird* and *Watchman*. Part III will begin with a quick digression into the era of Jim Crow, and will lay the foundation that the “death” of Jim Crow failed to address, and so did not change, the conditions in America’s criminal justice institutions that created America’s racial gap in the first place. Next, Part III will analyze the inherent racial biases woven into our criminal justice institutions as represented by key figures in Lee’s novels: the police officer, the judge, the prosecutor, the defense attorney, the jury, and the prison system. A critical look at these institutions will reveal that inherent racial biases do in fact undermine America’s

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44 HARPER LEE, GO SET A WATCHMAN (HarperCollins 2015) [hereinafter *WATCHMAN*].
45 See supra Part II.
46 See supra Part III.A.
47 See supra Part III.B.1.
48 See supra Part III.B.2.
49 See supra Part III.B.3.a.
50 See supra Part III.B.3.b.
51 See supra Part III.B.4.
52 See supra Part III.B.5.
criminal justice system and prevent African Americans from receiving colorblind justice. Part IV briefly concludes.53

II. WHAT A CRITICAL RACE THEORY LENS HAS TO OFFER

One of the most significant contemporary developments among legal scholars on issues of race and the law is the development of Critical Race Theory (hereinafter “CRT”). Broadly speaking, CRT arose as a challenge to the emergence of a colorblind ideology in the law.54 This notion of colorblindness in the law finds its roots in Justice Harlan’s dissenting opinion in Plessy v. Ferguson,55 the epigraph of this article, and tracks its way through the white-fabricated outcomes of the Civil Rights Movement.56 CRT, then, stands in stark contrast to any notion that African Americans receive colorblind justice within the American criminal justice system.57

Receiving it’s name from scholars such as Gary Peller, Neil Gotanda, and Kimberle Crenshaw,58 this school of thought represents “a racial analysis, intervention and critique of traditional civil rights theory on the one hand, and of Critical Legal Studies insights on the

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53 See supra Part IV.
55 163 U.S. 537 (1896).
56 See generally DERK BELL, RACE, RACISM, AND AMERICAN LAW, 115 (5th ed. 2004).
57 CRT scholars tend to focus on context and history and therefore it has been suggested that a rule or principle may mean different things in different contexts and historical periods:

For example, it can be argued that the idea of colorblindness, first expressed in Justice Harlan’s 1896 dissent in Plessy v. Ferguson, can be understood at that time as a progressive idea in the context of a society in which law sanctioned the explicit and systematic oppression of blacks after slavery. However, a colorblind approach to race in the current era, when the subordination of blacks is no longer explicit but remains systematic, is no longer a progressive approach.

Mutua, supra note 54, at 355.
other.” At its very core, CRT stands for the proposition that “race and racism are endemic to the American normative order and a pillar of American institutional and community life.” Furthermore, CRT charges the law with constituting, constructing, and producing race, not only in domains where race is unspoken and unacknowledged, but in a way that supports the status quo of white racial power and black subordination.

One of the unique strands of CRT consists of “CRT scholars listen[ing] to and scrutinize[ing] voices, understandings and experiences of [the oppressed] to situate, test, and inspire the examination of particular . . . approaches to law.” Thus, CRT scholars have successfully employed narrative to explore alternative meanings, insights, and perspectives on racial issues. Accordingly, this article sets out to analyze *Mockingbird* and *Watchman* through the lens of CRT in order to consider the inherent racial biases undermining America’s institutions. As this article dispels into a discussion of *Mockingbird*, *Watchman*, and whether our criminal justice institutions are truly colorblind, CRT will serve as a sharp vantage point.

III. RACE, JUSTICE, AND *MOCKINGBIRD* WITH A HINT OF *WATCHMAN*

*To Kill a Mockingbird* is consistently considered, and justifiably so, a great American novel: “on one level, it is a tender family narrative; on another level, a poignant depiction of the slow and painful emergence of the New South from the ashes of its slave-holding past.”

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59 Mutua, supra note 54, at 333 (discussing Crenshaw, supra note 54, at 9-31).
60 Id.; see Bell, supra note 56, at 1 (arguing that racism is pervasive in the American social order, that law is imbued wit it, and that racism is a permanent feature of American society including its legal system).
61 See Mutua, supra note 54, at 333-34; Cheryl I. Harris, Critical Race Studies: An Introduction, 49 UCLA L. Rev. 1215, 1216-1218 (2002). The school of thought known as Critical Race Theory is subject to interpretation; however, as Jerome Culp states, “there is a common belief in an opposition to oppression.” Jerome McCristal Culp, Jr., To the Bone: Race and White Privilege, 83 Minn. L. Rev. 1637, 1638 (1999).
62 Mutua, supra note 54, at 355.
63 See, e.g., Derrick Bell, And We Are Not Saved: The Elusive Quest For Racial Justice (1987); Derrick Bell, Faces at the Bottom of the Well (1993); Richard Delgado The Rodrigo Chronicles: Conversations about America and Race (1996); Richard Delgado, When Equality Ends: Stories About Race and Resistance (1999).
64 Teresa Godwin Phelps, The Margins of Maycomb: A Rereading of To Kill a Mockingbird, 45 Ala. L. Rev. 511 (1994).
Despite the dark racism and societal violence present within *Mockingbird*, it has been read, studied, loved, and cherished by students and scholars of all ages since it was published in 1960. *Watchman*, on the other hand, did not receive the standing ovation *Mockingbird*-lovers were preparing to give it after being left in the dark for nearly half a century.\(^{65}\) However, *Mockingbird*-lovers must resist the urge to view *Watchman* as a sequel to *Mockingbird* in order to rationalize their separation of the two novels, but rather view *Watchman* in the context of the creation of *Mockingbird*.\(^{66}\) It will be interesting to observe the attention, or lack thereof, *Watchman* receives over the course of time from the public and critical scholars.

The majority of *Mockingbird* enthusiasts consider Atticus Finch, the white lawyer appointed to represent the black Tom Robinson, an all-American lawyer who delivers justice in the criminal justice system through his moral character.\(^{67}\) Atticus has been described as “the opponent of oppression, the paradigm of propriety, the dean of decent citizens and the core of his community.”\(^{68}\) However, where there is a majority, there is a minority. As Monroe Freedman points out, Atticus “knows about the grinding, ever-present humiliation and degradation of the

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\(^{66}\) As one *Watchman* reviewer put it:

> Because readers have been clamoring for more of Lee’s work since the publication of ‘Mockingbird,’ many feel the need to view ‘Watchman’ as a sequel. However, it’s impossible for a rejected first draft to ever measure up to one of the great American novels. ‘Watchman’ should be viewed and analyzed as a stepping stone in the creation of ‘Mockingbird’ instead of an individual work.


black people of Maycomb; he tolerates it; and sometimes he even trivializes and condones it.”

And just when we thought the majority view of Atticus had put the minority to rest, *Watchman* came out and delivered a hard blow to the beloved character: Atticus is, and always has been, a (permissive) racist.

While *Mockingbird* depicts change in one facet of law and society, it reinforces the status quo in other troubling aspects. Set in the 1930s in the fictitious town of Maycomb, Alabama, *Mockingbird* accurately depicts different aspects of the American criminal justice system from that era. Though *Watchman*—again set in Maycomb, but later in the 1950s—does not encompass America’s institutions nearly as thorough as *Mockingbird* does, it reinforces the same status quo that *Mockingbird* revealed. A careful analysis of *Mockingbird*’s institutions will reveal this status quo that has left America’s contemporary criminal justice institutions in shambles: inherent racial biases.

**A. A Digression: The Era of Jim Crow**

Justice is a relative term. Indeed, justice is relative to social meanings. Thus, in order for the following discussion to be meaningful, the reader must have a basic understanding of the

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69 Monroe Freedman, *Atticus Finch—Right and Wrong*, 45 ALA. L. REV. 473, 478 (1994); see Malcolm Gladwell, The Courthouse Ring: Atticus Finch and the limits of Southern liberalism, *THE NEW YORKER* (Aug. 10, 2009) (arguing that Atticus is not nearly as invested in bringing equality to the races as he should be since he wants to treat the symptoms of racism, instead of the underlying disease, that he is an accomplice to the status quo, and that he is an enabler, standing in the way of progress); Steven Lubet, *Reconstructing Atticus Finch*, 97 MICH L. REV. 1339, 1340 (1999) ("This review considers the possibility that Atticus Finch was not quite the heroic defender of an innocent man wrongly accused").


71 See generally Arnold Brecht, *Relative and Absolute Justice*, reprinted in *SOCIAL RESEARCH*, Vol. 6, No. 1 pp. 58-87 (Feb. 1939) (“What is just, what is unjust? Sometimes a voice within us claims to know. Whether or not we are trained as lawyers, that voice likes to announce . . . this is just, this is unjust”).

72 As Nicola Henry asserts, “Justice is elusive, subjective, and even impossible. Justice is much broader than the prosecution of a few offenders; it involves not simply legal justice but social and political justice, including both practical and symbolic forms of security, safety, and stability.” NICOLA HENRY, *WAR AND RAPE: LAW, MEMORY, AND JUSTICE* 125 (2011) (emphasis added); see Jared Silverman, “How to define ‘social justice’: It’s all relative,” *N.J. JEWISH NEWS*, (June 9, 2010), http://njjewishnews.com/article/1 453/how-to-define-social-justice-its-all-
backdrop Lee wrote *Mockingbird* (and *Watchman*) against, and how that backdrop has influenced our perception of justice. As mentioned, *Mockingbird* is set in the deep southern state of Alabama during the 1930s. This time and place was known to be in the deadly clutch of “Jim Crow.” In order to minimize the effects of the Civil War and the enactment of the Thirteenth Amendment, Jim Crow laws codified discrimination against African Americans, thus giving authority to the irrational prejudice felt by many white southerners. This, in turn, generated the “separate but unequal” treatment throughout the criminal justice system.

The fictitious trial of Tom Robinson in *Mockingbird* exposes the operation of Jim Crow laws. Describing Jim Crow laws as “[u]nwritten, based on experience and custom,” one scholar states, “[p]olice officers, judges, lawyers, and jurors, understood that in the daily enforcement of the law, some statutes applied to both races, some only to whites, and some only to blacks.” Moreover, African Americans were not only excluded from juries during this era, but their testimony was often disregarded and they received sentences “based less on the evidence than on the race of the defendant.”

This repressive era in the history of race relations was also accompanied by blatant violence. The white people in charge consistently used violence and the threat thereof to solidify the subordination of black men and women during this period. “Sometimes in small groups,

relative?source=njjn related#.VTZqzhPF9XY (“Can anyone give me a cogent definition of “social justice”? The operative word, justice, is subjective, not objective. One person’s justice can be another’s injustice”).

73 The fictitious, “ancient” town of Maycomb, Alabama, we are told, “was ignored during the War Between the States, [but] Reconstruction rule and economic ruin forced the town to grow.” Moreover, Maycomb’s “primary reason for existence was government.” MOCKINGBIRD, supra note 43, at 149-50. It is also worth noting that Lee wrote *Mockingbird* after the Montgomery Bus Boycott, a protest where African Americans challenged the segregated public transportation policies in Montgomery, Alabama from 1955 to 1956. A clear outgrowth of Jim Crow, Lee may have had this seminal event in mind when writing about the inherent biases and unconstitutional segregation found in her fictitious Maycomb, Alabama.

74 For a detailed account on just how prevalent Jim Crow was in the context of legislative and judicial action, see Cheryl I. Harris, *The Story of Plessy v. Ferguson: The Death and Resurrection of Racial Formalism*, reprinted in CONSTITUTIONAL LAW STORIES 181-222 (Michael C. Dorf ed., Foundation Press 2004).

75 LITWACK, supra note 42, at 18.

76 *Id.*
sometimes in massive numbers, white mobs combined the roles of judge, jury, and executioner." Even if a man was wholly innocent of any crime, they were lynched because they were black and in the wrong place at the wrong time. For example, of the many infractions of Jim Crow, none were perceived as more threatening than a black man’s desire for sex with a white woman. Anxiety about this perceived threat was channeled into the institutions of the criminal justice system. However, as Randall Kennedy explains:

In many instances, mobs did away entirely with even the form of due process by simply lynching Negroes accused of raping white women. In the event that a suspect escaped a real lynching, he often faced the prospect of a ‘legal lynching’: an execution sanctioned by the forms of judicial process absent the substance of judicial fairness.

Mockingbird integrates these fears and anxieties into the trial of Tom Robinson. After Tom is accused of raping a white woman, a lynch mob emerges from the dark corners of Maycomb and the disease it spreads becomes clear. Although the lynch mob was unsuccessful in their attempts to reach Tom, he became subject to a “legal lynching” when he was ultimately shot and killed in prison awaiting his appeal.

It is not surprising that the fictitious trial of Tom Robinson is often paralleled next to real cases in order to illustrate these violent realities. For instance, it is often stated that Tom’s trial reflects the case of the Scottsboro Boys: nine African American teenagers accused of raping two white women on a train in Scottsboro, Alabama in 1931. When asked about the Scottsboro

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77 Id. at 19.
78 Id.
79 See KENNEDY, supra note 41, at 88.
80 See id.
81 Id.
82 See infra notes 95-98 and accompanying text.
case, Lee replied that while not thinking of it specifically, “it will more than do as an example—albeit a lurid one—of deep-South attitudes on race vs. justice that prevailed at the time.”

With the Supreme Court handing down its decision in Brown, the Civil Rights Movement, and the outlawing of obvious examples of antidiscrimination laws and policies, one would think the era of Jim Crow is dead and therefore offers no legitimate basis for a critique of race relations in contemporary America. However, this would be an unfortunate assumption. This article contends that while Brown and the Civil Rights Movement may have effectuated the obvious change that the law would no longer tolerate unequal treatment, it failed to address, and so did not change, the conditions that created America’s racial gap in the first place: the institutions. Striking down antidiscrimination laws that represented explicit manifestations of racism may have provided some evidence that institutions were now fair to all, but it did so “without disturbing the structural and systematic manifestations . . . of that same deeply embedded racism.” Accordingly, let us observe the inherent racial biases undermining Mockingbird’s institutions.

84 Id. The basis for Mockingbird and the trial of Tom Robinson has also been said to source from the Emmett Till case of the 1950s, or from the 1933 Lett/Lowery rape case in Monroeville, Alabama, or from the fact that Lee’s own father defended two black men accused of murder in Monroeville, whom were found guilty and were hanged in jail. See Alice Hall Petry, On Harper Lee: Essays and Reflections xx-xxi (The University of Tennessee Press, Knoxville 2007).

85 While discussing the aftermath of Brown, Derrick Bell stated, “[t]he Court voided ‘Jim Crow’ policies in streetcars and buses, public parks, beaches and bathhouses, municipal golf courses, cafeterias, auditoriums, and courtroom seating.” Derrick Bell, Race, Racism and American Law 92 (2nd ed. 1980).

86 In rejecting this notion, one scholar has posited:

In the 1860s and in the 1960s, . . . the United States government made legislative, executive, and judicial commitments to black freedom and civil rights that would in time be compromised, deferred, and undone. And in the late nineteenth century, at the height of the Jim Crow era, and in the late twentieth century, in the aftermath of the Civil Rights Movement, new struggles were waged over problems unresolved by the first and second Reconstructions, struggles over the persistence of racism in a nation that remained separate and unequal, despite court decisions and legislation, despite agitation, marches, and confrontations.

87 Matua, supra note 54, at 344-45.
B. Racial Biases Woven in Mockingbird’s Criminal Justice Institutions

1. The Police Officer

Nothing has poisoned race relations in America more than racially biased law enforcement in which African Americans are “watched, questioned, and detained more than whites.”\textsuperscript{88} “Defended on the grounds that blacks commit a disproportionate share of street crimes relative to their share of the population, the race line in policing creates cycles of resentment.”\textsuperscript{89} As Gunnar Myrdal asserted while writing in 1944 about conditions in the South, the police officer “stands not only for civic order as defined in formal laws and regulations, but also for ‘White Supremacy’ and the whole set of social customs associated with this concept.”\textsuperscript{90} The police officer, as the initial contact representative of the criminal justice system, was historically motivated by racial biases and white supremacy ideals. While blatant discriminatory practices and procedures were reformed over the past century, what, if any, racial biases are left to undermine the police officers role to serve and protect? Let’s see if Officer Heck Tate can answer that question.

Officer Tate is Sheriff of Maycomb County whose uniform consisted of “high boots, [a] lumber jacket, and [a] bullet-studded belt.”\textsuperscript{91} As any police officer should, Tate appears at crisis points in the novel: before the attempted lynching of Tom,\textsuperscript{92} at Tom’s trial,\textsuperscript{93} and after Boo

\textsuperscript{88} KENNEDY, supra note 41, at x.
\textsuperscript{89} Id.
\textsuperscript{90} MYRDAL GUNNER, AN AMERICAN DILEMMA 535-41 (Vol. II ed. 1962). (“Probably no group of whites in America . . . have a lower opinion of the [black] people and are more fixed in their views than Southern policemen. To most of them . . . practically every [black] man is a potential criminal. They usually hold, in extreme form, all other derogatory beliefs about [blacks]; and they are convinced that the traits are ‘racial’”).
\textsuperscript{91} MOCKINGBIRD, supra note 43, 190.
\textsuperscript{92} See id. at 165-67.
\textsuperscript{93} See id. at 190-93.
Radley kills Bob Ewell. Though Officer Tate doesn’t flaunt his prejudices, subtle instances of racial bias do appear to tarnish his badge.

For example, Officer Tate reveals the unfortunate lapse in authority law enforcement has when a lynch mob gets involved. When visiting Atticus at his home the weekend before the trial, Tate warns, “. . . movin’ [Tom] to the county jail tomorrow . . . I don’t look for any trouble, but I can’t guarantee there won’t be any.” Atticus pushed back, “you’re not scared of that crowd, are you?” Displaying his lack of authority, Tate responds, “. . . know how they do when they get shinned up.” A mob subsequently shows up in front of the jail, but Tate is nowhere to be found even though he knows of the plans to lynch Tom. If the local sheriff can’t protect the accused while detained in jail from a cohesive racist mob then who can? Well, Scout Finch of course. But it’s unfortunate that the institution charged with maintaining peace and order shifts that burden to an adolescent girl to bring a lynch mob to their senses.

Additionally, Officer Tate demonstrates Maycomb’s prejudices when he paraphrases Bob Ewell’s evidence as “some nigger’d raped his girl” while testifying in open court. Tate further testifies that when he responded to Bob Ewell’s allegation, his daughter, Mayala Ewell, made the same allegation coupled with an identification “so [he] took him in . . . [t]hat’s all there was to it.” Apparently pointing the finger and yelling rape is enough to establish the necessary requirement of probable cause to arrest Tom. Moreover, on cross-examination, Atticus asks Tate whether he called a doctor that night, which Tate responds, “[i]t wasn’t necessary . . . she

94 See id. at 305-318.
95 Id. at 166.
96 Id.
97 Id.
98 See id. at 172-77 (“Hey, Mr. Cunningham . . .”).
99 Id. at 191.
100 Id.
101 This is a clear example of law enforcement implicitly associating African Americans with the attribute of criminality, which, in turn, permits police officers to act in a manner consistent with the implicit stereotypes associated with criminality.
was mighty banged up[, s]omething sho’ happened, it was obvious.”102 Not only did Officer Tate escort Tom to jail based on shallow allegations, but he also failed to gather and preserve any evidence, arguably the most important aspect in a rape case.

Furthermore, since the justice system failed to silence the racist accusations of Bob Ewell, which resulted in an innocent man’s death, Officer Tate brings it upon himself to serve justice when he convinces Atticus to fabricate a story regarding the death of Bob Ewell.103 As Tate declares:

I never heard tell that it’s against the law for a citizen to do his utmost to prevent a crime from being committed . . . , but maybe you’ll say it’s my duty to tell the town all about it and not hush it up. Know what’d happen then? All the ladies in Maycomb includin’ my wife’d be knocking on [Boo Radley’s] door bringing angel food cakes. To my way of thinkin’, Mr. Finch, 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. It’s a sin and I’m not about to have it on my head. If it was any other man it’d be different. But not this man, Mr. Finch . . . I may not be much, Mr. Finch, but I’m still sheriff of Maycomb County . . . .104

Tate’s authoritative decision, however, does not relieve the fact that Maycomb’s institutions are plagued by racial bias. Boo Radley is white. He killed a white man, albeit a racist one, for attacking two white children. Tate describes it as a sin to hold Boo Radley accountable for his actions, but does not recognize the sin he committed while exposing Tom to the inherently biased criminal justice system on nothing more than circumstantial, racist evidence. This fabricated moral dilemma and subsequent decision does not alleviate Tate’s prior encounter with Tom. This instance of “just retribution” only frustrates the racial gap in Maycomb since Tate demonstrates that he has the authority and the discretion to bypass the criminal justice system entirely in order to protect the white Boo Radley. Thus, Officer Tate, as a representative of the

103 While trying to persuade Atticus that Boo Radley killed Bob Ewell, Officer Tate asserts, “It ain’t your decision, Mr. Finch, it’s all mine. It’s my decision and my responsibility. For once, if you don’t see it my way, there’s not much you can do about it. If you wanta try, I’ll call you a liar to your face.” *Id.* at 317.
104 *Id.* at 317-18.
criminal justice system, gets it wrong again and, in doing so, maintains the status quo by helping the white man while harming the black.105 He protects the shy, white Boo Radley from the rigors of the criminal justice system, but ignores the fact that he perpetuated black subordination under Jim Crow.

2. The Judge

Once one enters the institution of the judiciary, judges “are the officials upon whom society most relies to protect the integrity of criminal law as it is administered in courtrooms, our houses of justice.”106 The judge plays a crucial role in various aspects of the courtroom, such as presiding over and exercising discretion throughout a trial, and maintaining control of the attorneys, witnesses, and the jury. Most importantly, the judge is said to be the neutral arbiter of the courtroom.107 However, this is an unfortunate misconception as there is no inherent reason to think that judges are immune from implicit biases.

The judge presiding over the case against Tom Robinson is Judge John Taylor. Scout tells us that Judge Taylor looks “like a sleepy old shark,” and “he was a man who ran his court with an alarming informality.”108 Moreover, “he gave the impression of dozing, an impression dispelled forever when a lawyer once deliberately pushed a pile of books to the floor in a desperate effort to wake him up.”109 To his credit, however, Scout tells us that Judge Taylor “was a man learned in the law, and although he seemed to take his job casually, in reality he kept a firm grip on any proceedings.”110 But does he?

105 When confronted with an allegedly racist policy or institution in his book Race, Crime, and the Law, Randall Kennedy seeks to determine whether, or for whom, a given disparity is helpful or harmful. See KENNEDY, supra note 41, at 10-11.
106 Id. at ix.
107 See generally KEITH J. BYBEE, ALL JUDGES ARE POLITICAL—EXCEPT WHEN THEY ARE NOT: ACCEPTABLE HYPOCRISIES AND THE RULE OF LAW 13 (Stanford University Press, 2010).
108 MOCKINGBIRD, supra note 43, at 188.
109 Id.
110 Id.
To hypothesize: If judges are required to remain completely neutral at all stages of judicial proceedings, such neutrality, in turn, impedes the ability of a judge to be a proactive, strategic thinker. Consequently, the role of the judge can become passive and dull. Since Judge Taylor is unable to act as a proactive strategic thinker, this article contends that Judge Taylor suffers from “cluelessness.”\textsuperscript{111} To explain this diagnosis, Judge Taylor simply suffers from “status maintenance: a higher-status person is not supposed to think about the intentions of a lower-status person, and risks blurring the status distinction if [he] does.”\textsuperscript{112}

To illustrate: Officer Tate began his direct examination by characterizing Bob Ewell’s evidence as “some nigger’d raped his girl.”\textsuperscript{113} Why didn’t Judge Taylor restrain Tate from talking in such a racist tone in front of the jury? Because the white, high-status character of Judge Taylor does not understand that the negative implications of such a characterization—of the black, lower-status Tom—unconsciously penetrates the jury box and prejudices Tom in open court. Furthermore, as will be discussed, while the prosecutor Mr. Gilmer is cross-examining Tom, he is subject to the discriminatory badgering of Mr. Gilmer’s line of questioning.\textsuperscript{114} Judge Taylor does nothing to protect Tom from this belittling nor does he protect the jury from being further prejudiced. Again, Judge Taylor is simply clueless.

By not recognizing his ailment in a system undermined by inherent racial biases, Judge Taylor justifies not entering the defendant’s mind because it inevitably leads toward empathy. Any sign of empathy on behalf of the judge toward a defendant—nonetheless an African American defendant—might threaten the basis of unequal treatment towards this racial group.

\textsuperscript{111} See MICHAEL SUK-YOUNG CHWE, JANE AUSTIN, GAME THEORIST 188 (Princeton University Press, 2013) (“Sometimes people do not understand that other people make their own decisions according to their own preferences. I call this ‘cluelessness’ . . . .”).

\textsuperscript{112} Id.

\textsuperscript{113} MOCKINGBIRD, supra note 43, at 191 (“Judge Taylor, who had been concentrating on his fingernails, looked up as if he were expecting an objection, but Atticus was quiet”).

\textsuperscript{114} See infra notes 120-24 and accompanying text.
Thus, since Tom “has the handicap of the color of his face,” Judge Taylor refuses to empathize with him despite the fact that there is no credible, non-circumstantial evidence lodged against him. Although emotion can be said to cloud one’s judgment in certain contexts, emotions emanating from the bench do not hinder as much as drive judicial decision-making. When the only instance Judge Taylor shows any emotion occurs when he looked at Bob Ewell on the witness stand “as if he were a three-legged chicken or a square egg,” it is not surprising that Judge Taylor is ultimately powerless to prevent the jury from finding Tom guilty. Judge Taylor’s cluelessness not only slays another African American male, but it passively perpetuates the inherent racial biases in his courtroom.

Additionally, though judges are charged with upholding the integrity of our criminal justice system, Judge Taylor demonstrates the limitations of this duty when clueless decisions are made in an institution inundated by systematic racial biases. For example, Judge Taylor appoints Atticus as Tom’s defense attorney even when the job should have gone to Maxwell Green, “Maycomb’s latest addition to the bar, who needed the experience.” Arguably, this would help Tom since a seasoned, experienced attorney would defend him in front of an all-white jury; however, Judge Taylor’s decision can also be viewed as harmful to Tom since a younger, less experienced attorney might not have been as complacent as the seasoned Atticus, and would have been much more zealous in the courtroom. Judge Taylor knew Atticus would do a sufficient job in upholding Tom’s procedural due process rights, but he also knew Atticus wouldn’t go as far as to confront the inherent racial biases undermining the institution and risk

115 “And there is no handicap more terrible than that.” The Closing Argument of Clarence Darrow in the case of People v. Henry Sweet (May 11, 1926), available at http://law2.umkc.edu/faculty/projects/ltrials/sw eet/darrowsummation.html [hereinafter “The Closing Argument of Clarence Darrow”].
117 MOCKINGBIRD, supra note 43, at 288.
118 Id. at 247.
119 See infra Part III.B.3.b.
being reversed on appeal. It is also significant that Judge Taylor never asks Tom if he is satisfied with his representation, or if he would prefer to be represented by the younger Maxwell Green. Thus, from this perspective, Judge Taylor passively appointed Atticus, without inquiring into Tom’s wishes, rather than intentionally appointing Atticus because he regarded him as a champion of racial justice.

3. The Attorneys

a. The Prosecutor

The attorney prosecuting Tom Robinson is Mr. Gilmer. The character of Mr. Gilmer doesn’t necessarily serve as a strong example of inherent biases within Maycomb’s institutions, but his racist tone in the courtroom supports the argument that Maycomb’s judiciary was complacent and thus infused with discriminatory practices.

For example, during his cross-examination of Tom, Mr. Gilmer repeatedly refers to Tom as “boy.” “Boy” was historically used to refer to a male slave, but the term continues today to refer to African American men.\textsuperscript{120} Despite the fact that Tom is twenty-five years old, married, and a father of three children, thus not a boy, Mr. Gilmer appends “boy” to the end of almost every question he asks Tom: “You did all this chopping and work from sheer goodness, boy?”\textsuperscript{121} “Then you say she’s lying, boy?”\textsuperscript{122} Didn’t Mr. Ewell run you off the place, boy?”\textsuperscript{123} “Are you being impudent to me, boy?”\textsuperscript{124}

The effect of Mr. Gilmer using this term, coupled with his tone and practice of cutting Tom’s answers short, demonstrates such racial prejudice that Dill “started crying and couldn’t

\textsuperscript{120} See Ash v. Tyson Foods, Inc., 546 U.S. 454, 456 (2006) (“Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker’s meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage”).

\textsuperscript{121} MOCKINGBIRD, supra note 43, at 225.

\textsuperscript{122} Id.

\textsuperscript{123} Id. at 226.

\textsuperscript{124} Id.
stop.” When Scout inquires into what’s wrong with him, Dill explains, “[i]t was just him I couldn’t stand . . . [t]hat old Mr. Gilmer doin’ him thataway, talking so hateful to him.” The following conversation then takes place:

Scout: “Dill, that’s his job. Why if we didn’t have prosecutors—well, we couldn’t have defense attorneys, I reckon.”
Dill: “I know all that, Scout. It was the way he said it made me sick, plain sick.”
Scout: “He’s suppose to act that way, Dill, he was cross—”

. . .
Dill: “The way that man called him ‘boy’ all the time and sneered at him, an’ looked around at the jury every time he answered—”
Scout: “Well, Dill, after all he’s just a Negro.”

Throughout Mr. Gilmer’s entire cross-examination, he is neither objected to for his use of the derogatory term nor reprimanded for his badgering. Judge Taylor and Atticus allow Mr. Gilmer’s interrogation to continue in front of the jury. Thus, Tom is hurt because he is infantilized despite being a grown man and discriminated against while on the stand, which, in turn, prejudices the jury. Judge Taylor is also hurt from this clear example of a judge losing control of his courtroom and allowing this line of questioning to prejudice the jury.

Arguably, the only party helped in this situation is the jury. Essentially, the jury’s hand is being held toward the realm of “guilty of being black.” The belittling of Tom on the stand assures each juror that he’s not worthy of an objective, neutral determination of guilt or innocence. When these subtle instances of racial bias go unconstrained by the institution as a whole, the individual representatives present are perpetuating racial

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125 Id.
126 Id. at 227.
127 Id.
128 Why this is so makes much more sense when one considers Atticus’ statement in Watchman, “Honey, you do not seem to understand that the Negroes down here are still in their childhood as a people.” WATCHMAN, supra note 44, at 246.
discrimination and the guarantees of due process and equal protection in and out of the courtroom become contaminated.

b. The Defense Attorney

The character of Atticus Finch, *Mockingbird*’s protagonist yet *Watchman*’s antagonist, has become even more famous than the story itself. Prior to *Watchman*, Atticus became known as the all-American lawyer for his courageous stance on justice as depicted through his representation of a black man accused of raping a white woman. Yet, Atticus becomes Tom’s defense attorney in *Mockingbird* not because he is deeply moved by the prospect of an innocent man being falsely accused of rape or because he is a civil rights crusader, but rather because he is ordered to do so. Although one can impulsively argue that Atticus zealously represented Tom, the reader should not forget that Atticus was very reluctant to defend Tom in the first place. As Atticus admitted to his brother, “. . . I’d hoped to get through life without a case of this kind, but [Judge] John Taylor pointed at me and said, ‘You’re it.’” As Monroe Freedman points out, one reason why Atticus defends Tom is because to refuse Judge Taylor’s appointment as Tom’s defense attorney “is punishable by imprisonment for contempt.”

*Mockingbird* Atticus never attempts to change the racism that permeates life in Maycomb; he is complacent with the fact that Tom is being tried in a segregated courthouse. For instance, when Atticus is trying to explain to Scout that he’s defending a black man in court,

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129 “If there were a Mount Rushmore for American fiction, Atticus Finch would surely be on it . . . .” Thane Rosenbaum, *Atticus Finch Is My Law Students’ Hero: We need him more than ever*, SLATE (Feb. 9, 2015 11:44 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/02/atticus_finch_hero_worship_law_students_love_to_kill_a_mockingbird_anticipate.html.

130 See Kakutani, *supra* note 70 (“We remember Atticus Finch . . . as that [Mockingbird]’s moral conscience: kind, wise, honorable, an avatar of integrity who used his gifts as a lawyer to defend a black man falsely accused of raping a white woman in a small Alabama town filled with prejudice and hatred in the 1930s.”).


132 *MOCKINGBIRD*, *supra* note 43, at 100.

Scout inquires, “Atticus, are we going to win it?” Atticus immediately responds, “No, honey.” Later, when Atticus’ brother, Uncle Jack inquires “how bad is [the trial] going to be[.]” Atticus responds, “It couldn’t be worse, Jack. The only thing we’ve got is a black man’s word against the Ewells’. The evidence boils down to you-did—I-didn’t. The jury couldn’t possibly be expected to take Tom Robinson’s word against the Ewells’.” Whatever optimism Atticus may have had going into trial, an attitude like this only harms Tom since he is deprived of any notion of “innocent until proven guilty,” and harms the defense attorney trying to push forward toward racial equality.

This complacency unfortunately demonstrates how limited the role of a defense attorney is in an inherently biased institution. As Atticus acknowledges, Tom’s case is not unique. Referring to the jury’s conviction of an innocent black man, Atticus says, “They’ve done it before . . . and they’ll do it again.” Atticus is telling the reader here that no matter how well represented a black defendant may be, the defense attorney is incapable of connecting the jury with the truth.

But this shouldn’t have been the case. As the non-fictional defense attorney Clarence Darrow once argued in a closing argument, lawyers are meant to be seekers of the truth in the

\[\text{\underline{\text{MOCKINGBIRD, supra note 43, at 86.}}\]
\[\text{\underline{\text{Id.}}\]
\[\text{\underline{\text{Id. at 100.}}\]
\[\text{\underline{\text{As Jane Smiley asserts:}}\]

We can see why the civil rights movement in the United States had to be instigated and led by black people themselves—even the most well-meaning white people (Atticus Finch is the model) didn’t have the understanding and the will to break up the status quo and reimagine American life as socially, culturally, and politically as well as legally egalitarian. The virtue that Atticus represents—respect, and especially respect for privacy and eccentricity—is a virtue that makes change more difficult because it fails to question social forms that, Lee shows, are a significant part of racism.

\[\text{\underline{\text{JANE SMILEY, 13 WAYS OF LOOKING AT THE NOVEL (2006).}}\]
\[\text{\underline{\text{MOCKINGBIRD, supra note 43, at 244.}}\]

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courtroom rather than mere rational advocates. In defending a client one truly believes to be innocent in a capital offense case, as Atticus purported to believe, the lawyer must instill emotions rather than reason into the jury in order to weed through the inherent racial biases present and seek out the truth. Atticus was well aware that reason was not going to penetrate the jury, but his complacency failed to inure to the emotions of the jury. Thus, twelve white men, unable to place their racial biases aside and seek out the truth on their own, but able to hide behind the cloak of a jury, cast their racial biases over the fate of the black defendant despite whatever botched reason Atticus tried to communicate. And what does Atticus get in return: a sense of triumph and white redemption. The black community, confined to the balcony by Jim Crow, stands in respect as he walks out of the courtroom. Defending Tom Robinson redeems Atticus for living in a society and working in an institution plagued by inherent racial biases.

Outside of the courtroom, Atticus is also complacent with the presence of a lynch mob in his community. In fact, when Scout wants to discuss the lynch mob in front of the jail and raises the question, “I thought Mr. Cunningham was a friend of ours,” Atticus mutters, “Mr. Cunningham’s basically a good man . . . he just has his blind spots along with the rest of us.” Atticus demonstrates not only that he carries on as a passive participant in the pervasive racial injustice present within Maycomb, but also that he’s content with passing this complacency to

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139 See The Closing Argument of Clarence Darrow, supra note 115 (“How hard it was to pry out of [the witnesses] that they went there on account of the colored people who had moved in across the way! You people are not lawyers. You do not know how hard it was to make them admit the truth. It is harder to pull the truth out of a reluctant witness than to listen to them lie.”).

140 For example, while addressing a jury for seven hours, Clarence Darrow asserted, “Now, gentlemen, I say you are prejudiced.” Id.

141 As discussed above, Mr. Gilmer’s cross-examination of Tom surely inured to the emotions of the jury; however, Mr. Gilmer struck the emotional chords of racial bias among the jurors rather than striking the equality and justice chords. See supra notes 120-28 and accompanying text.

142 MOCKINGBIRD, supra note 43, 179-80. This is not the last time Atticus misjudges another man’s character. In Watchman, Atticus tries to console Scout when she interrogates him about the guest speaker at the Maycomb citizens’ meeting: “Mr. O’Hanlon’s not prejudiced, Jean Louise. He’s a sadist.” WATCHMAN, supra note 44, at 250. Because it makes sense that being a sadist is somehow more acceptable than, and distinguishable from, being a prejudiced man.
his children. Thus, while *Mockingbird* Atticus affirms the notion that the common defense attorney is powerless to the massive institution permeating racial bias, he hurts his children by teaching them that this institution is imperfect, but there’s nothing they or anyone else can do about it.

*Watchman* upholds this. The internal struggle that Scout grapples with in *Watchman* is her relationship with her beloved father and his passive, if not condoning, bigoted reaction to the Supreme Court’s decision in *Brown*. Unbeknownst to Atticus, Scout witnesses him attend a citizens’ council meeting and listen to the racist guest speaker—a Mr. O’Hanlon—who’s “main interest [in speaking to the council] was to uphold the Southern Way of Life” because “no niggers and no Supreme Court was going to tell him or anybody else what to do.”\[^{143}\] After a moment of listening to Mr. O’Hanlon’s ignorance, Scout’s gut realizes what’s going on: “She stared at her father sitting to the right of Mr. O’Hanlon, and she did not believe what she saw . . . she knew that her father’s presence at the table with a man who spewed filth from his mouth—Did it make it less filthy? No. It condoned [it].”\[^{144}\]

Once Scout confronts Atticus, his true colors shine. According to Scout, the Supreme Court had to rule in favor of desegregation: “It was put under their noses and they had to do it. Atticus, the time has come when we’ve got to do right [and g]ive ‘em a chance.”\[^{145}\] Atticus responds, “The Negroes? You don’t think they have a chance?”\[^{146}\] *Watchman* Atticus is not only complacent with the status quo, he defends it. To Atticus, African Americans were doing

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\[^{143}\] *Watchman*, *supra* note 44, at 107-111. Scout continues to listen to Mr. O’Hanlon preach: “. . . not the question of whether snot-nosed niggers will go to school with your children or ride the front of the bus . . . it’s whether Christian civilization will continue to be or whether we will be slaves of the Communists . . . .” *Id.* at 110.

\[^{144}\] *Id.* at 110-111.

\[^{145}\] *Id.* at 241.

\[^{146}\] *Id.*
just fine prior to the highest Court’s decision in Brown.\textsuperscript{147} His stance on the decision becomes clear when one recognizes that Atticus vehemently opposes desegregation. We know this based upon the “plain truths” he rationalizes to his daughter:

- “Have you ever considered that you can’t have a set of backward people living among people advanced in one kind of civilization and have a social Arcadia?”\textsuperscript{148}
- “Honey, do you not seem to understand that the Negroes down here are still in their childhood as a people.”\textsuperscript{149}
- “[I]f the Negro vote edged out the white you’d have Negros in every county office . . . Use your head. When they vote, they vote in blocs.”\textsuperscript{150}
- “I’m a sort of Jeffersonian Democrat . . . Jefferson believed full citizenship was a privilege to be earned by each man, that it was not something given lightly nor to be taken lightly. A man couldn’t vote simply because he was a man, in Jefferson’s eyes. He had to be a responsible man. A vote was . . . a precious privilege a man attained for himself in a—a live-and-let-live economy.”\textsuperscript{151}
- “Do you want Negroes by the carload in our schools and churches and theaters? Do you want them in our world?”\textsuperscript{152}

But Scout doesn’t let her father control her moral compass: “You’re a coward as well as a snob and a tyrant, Atticus.”\textsuperscript{153} Finally, Scout brilliantly crushes Mockingbird Atticus, and not a single Mockingbird-lover was ready for it:

When you talked of justice you forgot to say that justice is something that has nothing to do with people. . . . I remember that rape case you defended, but I missed the point. You love justice, all right. Abstract justice written down item by item on a brief—nothing to do with that black boy, you just like a neat brief. His cause interfered with your orderly mind, and you had to work order out of disorder. It’s a compulsion with you, and now it’s coming home to you[.].”\textsuperscript{154}

It’s here the true Atticus is found out. Atticus is, and always has been, a permissive bigot in the American criminal justice system. He never had any interest in defending Tom Robinson against

\textsuperscript{147} You can almost picture Atticus sitting back in his office chair and reminiscing about the time before Brown: “They’ve made terrific progress in adapting themselves to white ways, but they’re far from it. They were coming along fine, traveling at a rate they could absorb, more of ’em voting than every before.” \textit{Id.} at 246-47.
\textsuperscript{148} \textit{Id.} at 242.
\textsuperscript{149} \textit{Id.} at 246.
\textsuperscript{150} \textit{Id.} at 243.
\textsuperscript{151} \textit{Id.} at 244.
\textsuperscript{152} \textit{Id.} at 245.
\textsuperscript{153} \textit{Id.} at 247.
\textsuperscript{154} \textit{Id.} at 248.
the inherent racial biases infiltrating Maycomb’s institutions. Rather, Atticus welcomes the “systematic denial that [African Americans are] human.”

In attempting to reconcile Watchman Atticus with Mockingbird Atticus and questioning whether either Atticus should be considered the all-American lawyer, this article urges the reader not to forget one salient fact about Mockingbird: in the end, Tom Robinson is dead and Atticus is not the least bit surprised. Atticus cannot, as an individual or as a representative of the criminal justice system, bring his client back to life. Although Atticus, depending on the reader’s interpretation, may have zealously defended Tom in the courtroom, it was also his duty to challenge the inherent racism that initially brought Tom to trial, conviction, and death. But now that we have Watchman, we know why Atticus never challenged those inherent racial biases: “[I]n [Atticus’] experience, white is white and black’s black.”

4. The Jury

Generally speaking, jurors of one race tend to show bias against defendants who belong to another race. For instance, “jurors may unintentionally and automatically misremember facts in racially biased ways during all facets of the legal decisionmaking [sic] process.” Additionally, a recent analysis of laboratory juror studies, performed by Tara Mitchell, found that the fact that a juror was of a different race than the defendant influenced both verdicts and sentencing. Arguably, the average juror is uneducated in the law and unable, or unwilling, to sympathize with the defendant in front of them. Yet, the American criminal justice system grants the tremendous, and nearly unchecked, authority to these laypersons to determine the fate of defendants.

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155 Id. at 252.
156 See generally Theodore R. Hovet & Grace-Ann Hovet, “Fine Fancy Gentlemen” and “Yappy Folk:” Contending Voices in To Kill a Mockingbird, Southern Quarterly 40.1, 72 (Fall 2001).
157 WATCHMAN, supra note 44, at 246.
of one accused of a crime. Though clear sources of racial biases are filtered out through jury selection, sources of inherent, dormant racial biases are not and therefore infiltrate the institution of the jury system.\textsuperscript{160}

The all-white jury in the case against Tom Robinson evidences the inherent racial biases undermining the institution of America’s jury system.\textsuperscript{161} For instance, while Jem is struggling with Tom’s conviction, he tells Atticus “. . . the jury didn’t have to give him death—if they wanted to they could’ve gave him twenty years.”\textsuperscript{162} But as Atticus argues, the sentence is based not on the evidence, but on Tom’s race: “Tom Robinson’s a coloured [sic] man, Jem. No jury in this part of the world’s going to say, ‘We think you’re guilty, but not very,’ on a charge like that. It was either straight acquittal or nothing.”\textsuperscript{163} Atticus’ answer doesn’t sit well with Jem: “No, sir, they oughta do away with juries. He wasn’t guilty in the first place and they said he was.”\textsuperscript{164} Complacent with the inherent racial biases undermining the institution of the jury system while simultaneously recognizing the accompanying violence of the times, Atticus responds:

> Those are twelve reasonable men in everyday life, Tom’s jury, but you saw something come between them and reason. You saw the same thing that night in front of the jail. When that crew went away, they didn’t go as reasonable men, they went because we were there.\textsuperscript{165}

Atticus is comparing the jury in Tom’s case to the lynch mob headed by Mr. Cunningham. It is here where the remedies available to Tom become apparent. Once the jury finds Tom guilty of

\textsuperscript{160}For a thorough discussion on America’s history of racism in the jury box, see BELL, supra note 85, at 235-77.

\textsuperscript{161}This article does not focus on the fact that Tom was tried by an all-white jury in order to establish evidence of inherent racial biases undermining the jury system. Conversely, this article is in agreement with Randall Kennedy:

> As long as the process of choosing the jury has been kept free of racial selectivity and care is taken to exclude from jury service anyone, regardless of race, whose judgment is likely to be unfair, there is nothing wrong with an all-white jury deciding the fate of a black defendant or an all-black jury deciding the fate of a white defendant.

KENNEDY, supra note 41, at xi.

\textsuperscript{162}MOCKINGBIRD, supra note 43, at 251.

\textsuperscript{163}\textit{Id}.

\textsuperscript{164}\textit{Id}., at 252.

\textsuperscript{165}\textit{Id}.
raping the white Mayala Ewell, he will either die at the hands of the lynch mob or under the sentence of the jury. Unfortunately for Tom, Scout tells us that “[a] jury never looks at a defendant it has convicted, and when this jury came in, not one of them looked at Tom Robinson.”\textsuperscript{166} Moreover, as Jem comprehends, not even “Christian judges an’ lawyers [can] make up for heathen juries.”\textsuperscript{167}

Atticus tells us that the men in Tom’s jury were “reasonable” while serving in open court, but these same men weren’t “reasonable” when they appeared in front of the jail as a mob. This blatantly evidences the fact that subtle, dormant sources of racial biases slither their way into the jury box. These men are considered “reasonable” if their racial biases are masked by the institution of the jury system rather than understood as individual personal flaws. As Clarence Darrow once addressed a jury: “Still none of us want to be prejudiced. I think not one man of this jury wants to be prejudiced. It is forced into us almost from our youth until somehow or other we feel we are superior to these people who have black faces.”\textsuperscript{168} In the context of the jury institution, according to Clarence Darrow, racial prejudice is not viewed as personal flaw; rather it is inherent in the world we live in, and it is carried into our criminal justice institutions that are created by humans with these inherent biases. As Atticus confesses, “[t]he one place where a man ought to get a square deal is in a courtroom, be he any color of the rainbow, but people have a way of carrying their resentments right into a jury box.”\textsuperscript{169} The emotions and inherent biases of these “reasonable” men—intertwined into this rational institution incapable of portraying such emotions—materialize in the insidious verdicts and sentences carried out by jurors, just as in the

\textsuperscript{166} \textit{Id.} at 241.
\textsuperscript{167} \textit{Id.} at 247.
\textsuperscript{168} \textit{The Closing Argument of Clarence Darrow, supra} note 115; see \textsc{Albert Memmi}, \textsc{Racism} 3 (Steve Martinot ed., 2000) (“There is a strange kind of tragic enigma associated with the problem of racism. No one, or almost no one, wishes to see themselves as racist; still, racism persists, real and tenacious.”).
\textsuperscript{169} \textit{Mockingbird, supra} note 43, at 253.
case against Tom Robinson. As the young Scout comes to understand, “Atticus had used every
tool available to free men to save Tom Robinson, but in the secret courts of men's hearts Atticus
had no case. Tom was a dead man the minute Mayella Ewell opened her mouth and
screamed.”

5. The Prison System

It is undisputed that, during the era of Jim Crow, the overwhelming majority of criminals
imprisoned in the South were African American. Although whites were also imprisoned,
white inmates enjoyed racial privilege over black inmates. Accordingly, southern prisons
were highly segregated by race, and blacks received much harsher treatment than their white
counterparts did.

Although a comprehensive discussion of race and America’s mass-incarceration problem
is beyond the scope of this article, Mockingbird vaguely pries into Maycomb’s institution of
the prison system when Atticus tells us, “Tom’s dead.” After the jury convicts Tom, he is sent
to Enfield Prison Farm where his wife and children are not allowed to visit him. While there,
Tom is shot—seventeen times—killing him within the confines of the prison. The following
conversation takes place between Atticus and his sister, Aunt Alexandra, giving the reader a
glimpse into the dark realities of life inside for the black man:

Atticus: “They shot him . . . He was running. It was during their exercise period.
They said he just broke out into a blind ravage charge at the fence and started
climbing over. Right in front of them—”

170 Id. at 256.
171 See Edward L. Ayers, VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH–CENTURY AMERICAN
172 KENNEDY, supra note 41, at 128-29.
173 See generally Desmond King, SEPARATE AND UNEQUAL: BLACK AMERICANS AND THE U.S. FEDERAL
174 For such a comprehensive discussion, see ALEXANDER, supra note 4; Kennedy, supra note 4.
175 MOCKINGBIRD, supra note 43, at 269.
176 Id. at 251.
177 Id. at 269-70.
Aunt Alexandra: “Didn’t they try to stop him? Didn’t they give him any warning?”
Atticus: “Oh yes, the guards called to him to stop. They fired a few shots in the air, then to kill. They got him as he went over the fence. They said if he’d two good arms he’d have made it, he was moving that fast. Seventeen bullet holes in him. They didn’t have to shoot him that much.”

. . .
Aunt Alexandra: “This is the last straw, Atticus . . . .”
Atticus: “Depends on how you look at it . . . What was one Negro, more or less, among two hundred of ‘em? He wasn’t Tom to them, he was an escaping prisoner.”

Although “Atticus assured [his children] that nothing would happen to Tom Robinson until the higher court reviewed his case,” his prediction that Tom would die under the sentence of the jury becomes a reality. No matter what may have really happened inside the prison yard, Tom was killed by the infectious, insidious cycle of America’s criminal justice institutions: The unreliable Officer Tate, clueless Judge Taylor, snide Mr. Gilmer, passive Atticus Finch, and unreasonable jury perpetuated the inherent racial biases within Maycomb’s institutions. Such perpetuation ultimately led to the death of an innocent man. An innocent man who was no longer considered a human being when confined with Enfield Prison Farm. As Atticus explains, he was just another “Negro.”

IV. CONCLUSION

Inherent racial biases against African Americans are pervasive and well documented, in all frameworks and time periods, as evidenced by Ferguson, *Mockingbird*, and *Watchman*. These implicit biases are "perpetuated within [our] culture in subtle, yet highly effectual, ways." To be blunt, they are so intrinsically woven into the fabric of American culture that they are invisible within America’s criminal justice institutions.

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178 *Id.*
179 *Id.* at 251.
180 *Id.* at 270.
Although this article, through a critical race theory analysis of *Mockingbird* and *Watchman*, rejects the notion of a colorblind justice, it does recognize the significance of Justice Harlan’s dissent quoted above in the epigraph of this article. Justice Harlan’s sole dissent in *Plessy* denounced the majority endorsement of de jure segregation as a “thin disguise” through which the suppression of African Americans was legitimated and maintained.\(^{182}\) Many will argue that we have achieved Justice Harlan’s vision for our society since *Plessy* has been overruled, but such a conclusion would be entirely too naïve. This “thin disguise” is just as real in contemporary America as it was in 1896.

Any contemporary notion of colorblind justice is unfortunately nothing more than a rhetorical gloss: the racial biases that undermined our criminal justice institutions from the years of Jim Crow unfortunately prevent any such legitimate notion of colorblindness from flourishing today. America’s institutions—then and now—are very different, but very much the same. In the early twenty-first century, “it is a different America, and it is a familiar America.”\(^{183}\) While differences are more symbolic than real, one constant familiarity is that any notion of contemporary America abiding by colorblind justice must be rejected.

After Tom Robinson’s death in *Mockingbird*, Jem comes to a realization about people:

“You know something, Scout? I’ve got it all figured out, now . . . 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.”\(^{184}\) While Jem tries to convince Scout of this epiphany, she counters: “Naw, Jem, I think there’s just one kind of folks. Folks.”\(^{185}\) Jem strikes back: “If there’s just one kind of folks, why can’t they

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\(^{182}\) *Plessy*, 163 U.S. at 562 (Harlan, J., dissenting).

\(^{183}\) LITWACK, supra note 42, at 143.

\(^{184}\) MOCKINGBIRD, supra note 43, at 258-59.

\(^{185}\) *Id.* at 260.
get along with each other? If they’re alike, why do they go out of their way to despise each other?"\textsuperscript{186} Whether there are four kinds of folks or just one, Jem’s rebuttal that folks just can’t seem to get along remains true today, as evidenced by the tragic events in Ferguson. To justify, Atticus seems to think “[t]he one thing that doesn’t abide by majority rule is a person’s conscience.”\textsuperscript{187} As \textit{Mockingbird} highlights, America’s criminal justice institutions consist of folks, folks with all kinds of unsympathetic racial biases preserved in their consciences. And as long as these folks’ consciences remain filled with inherent racial biases, Ferguson makes lot more sense and will continue happening.

\textsuperscript{186} \textit{Id.}

\textsuperscript{187} \textit{Id.} at 120.