JUSTICE FORMATION FROM
GENERATION TO GENERATION: ATTICUS
FINCH AND THE STORIES LAWYERS
TELL THEIR CHILDREN*

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I begin with a story.
Two years ago, I was working on an article about lawyers who believed in, and litigated for the preservation of, white supremacy in the American Deep South.1 One night, I was reading The Story of Ruby Bridges2 to my eight-year-old son. I bought the book to explain what I was doing at work when I was not teaching or otherwise working with students. As I read about how six-year-old Ruby Bridges faced vicious white mobs that opposed the desegregation of William Franz Elementary School in New Orleans, I became teary-eyed and a bit overwhelmed. As my son nervously watched me, I explained why I had become emotional: “This is what my article is about; it’s about lawyers who tried to stop Ruby Bridges and other children like her from going to school with the white kids. It’s about people who used their skills to do the wrong thing.” My son nodded in understanding. I regained my self-possession, we read and talked about the book, and I kissed my son goodnight. As I finished my article, I kept thinking about that night, and I resolved to continue to tell my children stories about the ways lawyers have promoted injustice as well as justice.

The article I was working on began with an intent to write an essay about a story: To Kill a Mockingbird.3 This Pulitzer-Prize-winning novel recounts several years in the lives of Scout and Jem Finch, children of a widowed lawyer in Depression-era Alabama. The story is told from the perspective of a reminiscing Jean Louise

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2 Robert Coles, The Story of Ruby Bridges (Scholastic 2004).

“Scout” Finch. Scout recounts the events of three years, during which her lawyer-father, Atticus Finch, represented a black man named Tom Robinson, who had been accused of raping a white woman named Mayella Ewell. In the first part of the novel, Scout remembers how she, her brother, and their friend, Dill Harris, became morbidly fascinated with a reclusive neighbor named Boo Radley. The novel’s second part focuses on her father’s representation of Tom Robinson, and the repercussions of that representation upon the entire family and town. Throughout the novel, it is clear that Scout’s father—Atticus Finch—regards this case as “the one . . . in his lifetime that affects him personally.”

It is also clear that the small town in which the Finch family resides largely subscribes to the racial codes and stereotypes of the day, thereby complicating the representation and subjecting the family to opprobrium.

To Kill a Mockingbird has been widely read. Many people first encounter the novel in school, and a 1990 survey of English teachers indicated it is among the most frequently required books in high schools. Among lawyers, To Kill a Mockingbird has a special influence, and Atticus Finch is “arguably the most praised lawyer, real or fictional, in American legal lore.” Lawyers see Atticus as a hero to be emulated; some even say the book or movie inspired them to become lawyers, or inspires their practice of law. They say that “Atticus Finch knew” what it means “to be a lawyer,” “people like Atticus Finch made me want to be a lawyer,”

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4 Id. at 86.
6 Id. at 14.
8 See e.g. Johnson, supra n. 5, at 17–20 (discussing how lawyers have written about the inspiration they find in Atticus Finch); Richard Pena, What Would Atticus Do? 62 Tex. B.J. 14 (Jan. 1999) (reporting that in remarks at new lawyer induction ceremony, state bar president suggested that lawyers measure their conduct by reference to Atticus Finch).
9 See e.g. Morris Dees, Foreword, in Mike Papantonio, In Search of Atticus Finch: A Motivational Book for Lawyers 7 (Seville Publg. 1995) (Atticus Finch and Clarence Darrow inspired Dees to become a lawyer); Gene Schabath, Lawyer Gives His All for Clients, Det. News 5C (July 9, 2000) (chronicling influence of Atticus Finch on prominent Detroit-area attorney in his decision to enter legal profession).
10 Carla T. Main, What Does It Mean to Be a Lawyer? Atticus Finch Knew, N.Y. L.J. 9 (June 5, 2000).
and “I had hoped I might become a lawyer very much like Atticus.”

To start an essay on the novel, I perused back issues of the *Alabama Lawyer* to get a feel for the profession in the place and nearly the time of Atticus Finch. What I found was a succession of supremacist articles—spanning decades—in the state’s bar journal. That discovery set me off on a journey to learn what lawyers across the Deep South said, wrote, and did to promote white supremacy in twentieth-century America. When I finished that journey, I had a full-blown article with only a passing reference to Atticus Finch.

This Article comes full circle by entwining the story of *To Kill a Mockingbird* with the supremacist stories I uncovered as I researched and wrote my essay-turned-article. Juxtaposing these stories reveals how race narratives have been deliberately used to “affect [the] hearts and minds” of children “in a way unlikely ever to be undone.” The shaping of a generation’s hearts and minds, through stories told to socialize and educate its children, produces in those children a vision of what a racially just world looks like. Or, in other words, the stories form children’s notions of justice based on the tales they learn. I call this process “justice formation.” When a generation reaches adulthood, the stories its parents tell their children replicates the vision anew. This process of intergenerational justice formation through storytelling affects the justice system itself, because each generation’s lawyers and judges have the power to inscribe their vision of justice into the law. Thus, storytelling’s power over justice formation poses dangers to justice: if the dominant story is one that promotes a vision of justice that is in fact unjust, the law will fall prey to that vision. In that situation, creating a truly just system depends upon the telling of counterstories—tales that challenge the existing justice system and its formative stories—to promote renewed justice formation.

To explore this thesis, I will begin by addressing the power of stories. I will discuss their powerful influence upon children, their possible role in justice formation, and the ways lawyers and the legal system have used stories to perpetuate white supremacy and promote it as just and fair. Such stories fueled lawyers’ involvement in massive resistance to *Brown v. Board of Education* and

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12 Papantonio, *supra* n. 9, at 23.

opposition to the civil rights movement. Juxtaposing these stories against *To Kill a Mockingbird*, Part II will argue that Harper Lee wrote her novel in response to massive resistance turmoil, creating a counterstory to supremacist rhetoric. Specifically, Atticus Finch tells stories to his community and his children in the hopes that his listeners will form new conceptions of justice and render true his assertion that “in our courts all men are created equal.” Part III will conclude by reflecting upon the value and necessity of telling counterstories about the legal profession that reveal lawyers’ opposition to, as well as promotion of, the progress of civil rights in America.

I. STORIES AND JUSTICE FORMATION

Education scholar Frank Smith has said that “[t]hought flows in terms of stories—stories about events, stories about people, and stories about intentions and achievements. The best teachers are the best storytellers. We learn in the form of stories. We construct stories to make sense of events.” Because stories are so powerful, they shape our world view. As this section will explore, stories have an especially powerful influence on how children come to see the world. I further suggest that stories may well shape our template for what a “just” world looks like, a process I refer to as “justice formation.” Finally, this section explores the role that stories have played in justice formation on race questions in the American Deep South, and how lawyers absorbed and re-told those stories over many generations.

A. Stories and Visions of Justice

Stories have an especially powerful impact upon children. Darlene Witte-Townsend and Emily DiGiulio, writing about the moral and spiritual impact reading can have on children, propose that stories can mark out pathways for children. Specifically, they suggest that children can sharpen their awareness of and empathy with others through reading. *To Kill A Mockingbird* itself em-

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14 Lee, supra n. 3, at 234.
16 As Smith puts it, “Our stories are the vantage points from which we perceive the world and the people in it.” *Id.* at 64.
17 Darlene L. Witte-Townsend & Emily DiGiulio, *Something from Nothing: Exploring*
emphasizes the significance of empathy in moral development. Atticus repeatedly emphasizes the importance of empathy for others. Atticus even urges empathy for Bob Ewell, the vicious father of the woman who falsely accused his client of rape. To Kill A Mockingbird closes with Atticus reading to a drowsy Scout, who tells her father that the story is about “Stoner’s Boy,” who was thought to be a villain, but, “when they finally saw him, why he hadn’t done any of those things . . . Atticus, he was real nice. . . .”

As engines for moral development, stories can influence how children learn and act upon the social construct of race. The story of race has intergenerational power; it replicates not only itself, but also social and legal systems based upon it. This power can work for both good and evil.

Because we produce and communicate stories within a social context, the stories we tell reflect and reproduce existing social relations. While stories about race and racism may derive from individual experiences, they also communicate cultural assumptions and habits of thinking that transcend the individual and are idiosyncratic. As such, stories are a bridge between individual experience and systemic social patterns.

In the Deep South, stories about race not only transmitted Jim Crow, but also intensified it as successive generations grew up with Jim Crow as a social norm. Thus, white Georgia native Rollin Chambliss wrote in 1933: “At the age of ten I understood full well that the Negro had to be kept in his place, and I was re-

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18 See Lee, supra n. 3, at 33 (Atticus advising Scout on the importance of empathy).
19 Id. at 250.
20 Id. at 323.
21 There is a massive volume of literature on how and why race is a social construct, but it suffices here to concur with historian Jennifer Ritterhouse that “race is a man-made distinction meant to secure and explain material and social inequalities . . . .” Jennifer Ritterhouse, Growing up Jim Crow 9 (U.N.C. Press 2006); see also Grace Elizabeth Hale, Making Whiteness 3–7 (Vintage Bks. 1999).
23 See Ritterhouse, supra n. 21, at 16. “Jim Crow” is the term that refers to the all-encompassing web of laws and customs mandating separation of the races throughout the American South. See generally David R. Goldfield, Black, White, and Southern 2, 11 (L.S.U. Press 1990) (describing the broad reach and message of segregation laws and custom). The term’s origins trace back to a nineteenth-century minstrel act, and came to refer to “the legal, quasi-legal, or customary practice of disfranchising, physically segregating, barring, and discriminating against black Americans.” See Jerrold M. Packard, American Nightmare: The History of Jim Crow 14–15 (St. Martin’s Griffin 2002).
signed to my part in that general responsibility.”24 For their part, African-American parents schooled their children in caution.25 Ralph Abernathy’s father taught him that the safest course in dealings with whites was to pretend to be mute.26 If whites insulted their parents, black children dared not react.27

Can stories influence how we think about justice?28 Not just in the abstract, but, to paraphrase Bell, can they be a bridge between individual experience and how the justice system is constructed and operates? At first blush, the answer to this question seems simple: “why not?” Yet law is complex and abstract. Perhaps our operational concepts of justice, the ones we use as lawyers, are not formed until we get to law school. The problem with that theory is that law schools generally do not teach courses in “justice.” There is scant “big picture,” abstract talk about justice in law school. As Benjamin Sells says in his book *The Soul of the Law*: “Early on a distinction is drawn between justice as an altruistic goal and the law’s work-a-day procedures and practices.”29 A wonderful anecdote about Justice Holmes underscores this distinction: Learned Hand recalled driving Holmes to work at the Court one day, and seeing him off with the words “[D]o justice,” to which Holmes retorted that applying the rules of law, not doing justice, was his job.30

Abstract statements about justice seem resounding, yet vague. For example, the Bible discusses justice. Deuteronomy counsels: “Justice, and only justice, you shall pursue . . . .”31 The prophet Amos exhorted: “[L]et justice roll down like waters, and righteousness like an ever-flowing stream.”32 Philosophers and statesmen

24 Ritterhouse, supra n. 21, at 167 (quoting Chambliss’s master’s thesis, entitled *What Negro Newspapers of Georgia Say about Some Social Problems* (1933)).
25 See Goldfield, supra n. 23, at 6–8.
26 Id. at 10.
27 See id. at 6 (quoting novelist Ernest Gaines, who said “we had all seen our brother, sister, mama, daddy insulted once and didn’t do a thing about it”).
28 I do not wish to engage in deeply complex arguments about the validity or nature of a law/justice distinction. My claim is simply that lawyers, judges, laypeople, and even children, form some sort of sense of whether matters are “just” or not, and use that sense to decide whether particular laws or social arrangements are fair and ought to be maintained, or are unfair and ought to be abolished.
31 Deuteronomy 16:20 (New Oxford Ann.).
32 Amos 5:24 (New Oxford Ann.).
have spoken of justice. Francis Bacon declared: “The place of justice is a hallowed place.”

Benjamin Disraeli described justice as “truth in action.” An inscription above a Department of Justice building entrance in Washington proclaims that “justice in the life and conduct of the State is possible only as first it resides in the hearts and souls of the citizens.” These are all memorable statements, but they are, at best, vaguely descriptive. They tell us to pursue justice, and they stress its importance, but they do not provide a blueprint for visualizing or producing it, let alone a world view for determining whether a particular practice is just.

One could conclude that lawyers do not form or draw upon a sense of justice at all; perhaps we merely operate in the Holmesian manner and ignore notions of pursuing “justice.” Moreover, it may be unrealistic or unwise to operate in any other way. In Holmes’s dissent in Abrams v. U.S., he stated, “[e]very year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge,” suggesting that he feared pinning his jurisprudence upon flawed conceptions of justice. Indeed, he explicitly warned of “evil effects of the confusion between legal and moral ideas.”

Nonetheless, even Justice Holmes operated (at least sometimes) from an innate sense of justice rooted in stories. For example, his Abrams dissent rests upon the story of our Constitution’s creation, which he referred to as “an experiment, as all life is an experiment.” Moreover, he rejected “the argument of the Government that the First Amendment left the common law as to sedi-

36 Benjamin Sells persuasively explains this problem. He says, “The Law simply doesn’t know what to do with Big Ideas that escape analytic definition.” Sells says this is true of all fields—“[a]ll founding and generative ideas are ambiguous—that is why they are founding and generative.” See Sells, supra n. 29, at 37.
37 Justice Holmes reportedly said, “I hate justice.” Mendelson, supra n. 30, at 329. His famous dissent in Lochner v. New York can be read as an elaboration on this statement. See 198 U.S. 45, 75–76 (1905). Holmes’s statement that “[g]eneral propositions do not decide concrete cases” seems particularly pointed. Id. at 76; see also Noble St. Bank v. Haskell, 219 U.S. 104 (1911). Such statements make Holmes a figurehead for proponents of the “Separation Thesis,” which distinguishes the law from any value system, like justice or morality. See Herz, supra n. 30, at 113.
39 Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 458 (1897).
tious libel in force” because “[h]istory seem[ed] to [him] against the notion.”

Holmes’s own harrowing Civil War experience left him telling tales of “the snowy heights of honor . . . for us to bear the report to those who come after us,” and certain at least of what he called “the soldier's faith” of “obedience to a blindly accepted duty.” This theme surfaces in Holmes's judicial rhetoric. In Schenck v. U.S., he admitted: “When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and . . . no Court could regard them as protected by any constitutional right.” In Buck v. Bell, Holmes called on Civil War memory to uphold Virginia’s forced sterilization law in terms reminiscent of “the soldier's faith.” He wrote:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for the entire world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.

As Holmes’s writing inadvertently reveals, stories strongly influence justice formation. Unfortunately, Buck v. Bell demonstrates that justice formation stories can “be as authoritarian, reactionary, closed-minded, and self-satisfied as any other form of discourse.”

Justice Holmes’s “soldier’s faith” story led him to deny Carrie

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40 Abrams, 250 U.S. at 630 (Holmes, J., dissenting).
41 See David W. Blight, Race and Reunion 96 (Belknap Press 2001) (Holmes was “[w]ounded at Antietam, horrified by what he called ‘an infamous butchery’ at the battle of Fredericksburg in 1862, and worried for his own sanity during his experiences of the Wilderness campaign in 1864 . . . .”).
42 Id.
43 Id. at 208–210.
Buck’s humanity.47 Other stories—some told from the same well of Civil War experience—led lawyers of the twentieth-century Deep South to deny the humanity of African Americans in ways that shaped the region’s justice system.

B. Justice Formation and the Dominant Story of Race

The stories we tell about history and race play a role in the social construction of race and the legal system’s operation upon it. The power of stories is particularly apparent in how lawyers and others used them to justify white supremacy in the post-Civil War American Deep South. These stories conflated racial constructs with justice formation to produce a dominant story that said segregation and inequality were desirable and just. By “dominant story,” I mean one that “shapes the ‘mindset’ from which we observe and interpret the world, excluding other possible interpretations and making current social arrangements seem natural and fair.”48

The Deep South’s dominant story of race and justice generally encompassed four key points:

(1) Portrayal of the antebellum South as a genteel paradise in which white slaveholders were refined, their wives cultured, and slaves content with their lot;

(2) Portrayal of Reconstruction as disastrous proof that African Americans should not exercise any political or economic power;

(3) Insistence that both races preferred segregation, or “our way of life,” and that nobody wanted “mixing” except troublemaking “mixers,” who desired “amalgamation,” which was also called “mongrelization”; and

(4) The belief that political and legal equality for African Americans would inevitably lead to amalgamation and thereby halt American progress and soil American purity.

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48 Bell, supra n. 22, at 5. “Dominant story” is Ms. Bell’s phrase. Id.
After the war, whites were determined to preserve as much of the old social hierarchy as possible.49 Once Reconstruction ended, white political and economic hegemony returned, in a consciously supremacist form. Several cultural strands fed and reinforced the dominant story of race that produced and justified White Supremacy.

One strand was eugenics. Eugenics is “‘the science of improving stock . . . especially in the case of man.’”50 The field arose in the late nineteenth century, and its adherents included northern academics and foundations.51 The field’s persistence is reflected in *Buck v. Bell’s* affirmation of a eugenics-based sterilization law.52 In the race context, eugenicists deemed segregation and miscegenation laws necessary to forestall race degeneration.53

The popular54 “plantation novel” genre reinforced both the historiographical and eugenicist strands of supremacist thought. Although plot particulars varied, such novels typically depicted ante-bellum plantations as places of genteel grace, peopled with noble proprietors and happy slaves. Not only were slaves portrayed as happy, their characters were drawn in terms that emphasized black inferiority and white supremacy; for example, a white woman’s memoirs of plantation life described her “dear black Mammy” as a woman whose “skin was black, but . . . heart was white.”55 Grace Elizabeth Hale aptly describes the picture such novels painted as a “plantation pastorale.”56 To complete the romanticized picture, “the faithful slave, and his or her older cousin, the unfortunate freedman, were the star characters of sentimental

49 Professor Leon Litwack has documented this effort in great detail. See generally Leon F. Litwack, *Trouble in Mind* (Knopf 1998).
51 See id. at 18–21, 30.
52 274 U.S. 200 (1927) (upholding statute that “recite[d] that the health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives . . .”). The lower court referred to the statute as the “Virginia sterilization act,” citing 1824 Virginia Acts, chapter 394. *See Buck v. Bell, 130 S.E. 516 (Va. 1925), aff’d, 274 U.S. 200 (1927).*
54 Blight, *supra* n. 41, at 216 (Turn-of-the-century American culture was “awash in sentimental reconciliationist literature . . .”).
55 See Litwack, *supra* n. 49, at 186. Professor Litwack’s elaborations on the genre and the impulses behind it suggest that plantation nostalgia reflected antipathy to a new generation of African Americans who had not known slavery. *Id.* at 184–189.
56 See Hale, *supra* n. 21, at 52–53.
planted fiction.” Similarly, in Thomas Nelson Page’s novels depicting post-bellum life, ex-slaves spoke warmly of “good ole times.” Professor Leon Litwack reveals the effect and purposes of such depictions:

As filtered through Page’s translation and predilections, the reader had no way of knowing the circumstances under which [the ex-slave] memorialized slavery or the extent of his duplicity, the degree to which he might be masking his genuine feelings. What Page wanted to remember and celebrate in his ... stories was that “relation of warm friendship and tender sympathy” between the races. And he wanted to memorialize that relationship in the early twentieth century because it was being undermined by “Afro-Americans” with their “veneer of a so-called education.”

Although the genre’s popularity waned in the new century, Thomas Dixon’s blatantly supremacist novel *The Clansman* channeled its supremacist impulses into a more brutal form. *The Clansman* celebrated and romanticized the establishment of the Ku Klux Klan to “save” civilization from “barbarism.” One of the novel’s protagonists puts it this way: “for a thick-lipped, flat-nosed, spindle-shanked negro, exuding his nauseating animal odour, to shout in derision over the hearts and homes of white men and women is an atrocity too monstrous for belief. Our people are yet dazed by its horror.” Such passages prompted one reviewer to praise the book as “the best apology for lynching.” In 1915, D.W. Griffith’s film *The Birth of a Nation* adapted (and slightly softened) Dixon’s novel to the silent screen and was widely seen.

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57 Blight, supra n. 41, at 220.
58 Id. at 222.
61 Brown, supra n. 59, at 35 (quoting Dixon’s book). Dixon believed “God ... anointed the white men of the south ... to demonstrate to the world that the white man must and shall be supreme.” Blight, supra n. 41, at 394.
62 Merritt, supra n. 60, at 35–36.
63 See id. at 35 (quoting Thomas Dixon, *The Clansmen* 290–292 (Doubleday, Page & Co. 1905)).
64 See Hale, supra n. 21, at 78–79.
65 See Merritt, supra n. 60, at 37–39.
66 See id. at 27, 27 n. 2 (estimates of total attendance range from 200–300 million).
The film celebrated “a white manly nation”; its “black villain, Silas Lynch, . . . summed up the Black Peril in his impudence, venality, and lust for white women.”

Literature more critical of the pre- and post-war South arose throughout the remaining twentieth century, but the plantation pastorale endured. In 1929, best-selling Pennsylvania author Joseph Hergesheimer penned *Swords and Roses*. A passage in the book declared:

Women were pale, delicate, in delicate pale muslins. They knew they were superior to others less lovely. Certainly beautiful women are more momentous than women who are plain. That is where democracy, the theory that all men and women are equal, is absurd. The old South knew better. There are more plain women than beautiful, more undistinguished than distinguished men, and their vast multiplication over-threw a state which, naturally, they envied and condemned.

The same year Hergesheimer published his novel, Claude Bowers published *The Tragic Era*, which popularized “the dark and bloody ground of reconstruction historiography” with “zestful . . . imagination.” Bowers's book was a widely read Literary Guild selection. If readers rejected it as too coarse for serious consideration, there was much of the same—albeit in more muted tones—in scholarly works. In the twentieth century’s first half,

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67 See Hale, supra n. 21, at 267.
68 Litwack, supra n. 49, at 443.
69 See id. at 43.
74 Id.
75 Bowers was a journalist, not a professional historian. See Brown, supra n. 71, at 135.
historians depicted Reconstruction as a mistake that proved White Supremacy’s necessity. For example, Professor E. Merton Coulter of the University of Georgia described Reconstruction “as a ‘diabolical’ time ‘to be remembered, shuddered at, and execrated.’” Both North and South accepted this story for the purposes of smoothing over sectional reunion. As Gunnar Myrdal put it in his groundbreaking 1944 study of race in America: there was a “popular demand of the American whites for rationalization and national comfort” in how they remembered the Civil War and Reconstruction; in particular, southerners “need to believe that when the negro voted, life was unbearable.” Myrdal concluded: “[T]he myth of the horrors of Reconstruction [was a] false [belief] with a purpose.”

One group that purposively told Reconstruction and “plantation pastorale” stories was the United Daughters of the Confederacy (“UDC”). Founded in the 1890s, this influential group was determined to “instruct and instill into the descendants of the people of the South a respect for the Confederate past and its principles.” Most of the UDC’s work occurred between 1900 and 1920. UDC members installed Confederate monuments across the South, made speeches honoring Confederate soldiers, and produced and circulated essays that touted Southern culture and idealized slavery as a benevolent system.

The UDC focused particularly on shaping children’s views of southern history. UDC leaders thought of their work as a project to influence the mindset of young southerners, reminding them-
selves that “[t]hought is power.” They worked “to control America’s memory of slavery, the Civil War, and Reconstruction . . . laying down for decades (within families and schools) a conception of a victimized South, fighting nobly for high Constitutional principles, and defending a civilization of benevolent white masters and contented African slaves.”

Children were always prominently included in monument unveiling ceremonies, and monuments were placed where children would see them. UDC chapters placed Confederate flags and portraits of Confederate heroes in southern classrooms, visited classrooms, and ran children’s chapters. At children’s chapter meetings, young members recited a “catechism” that characterized slaveholding as a right and asserted that slaves were treated “[w]ith great kindness and care in nearly all cases, a cruel master being rare.”

These assertions elided the stark, dehumanizing reality of chattel slavery. The 1838 Louisiana Code puts things more clearly, stating: “A slave is one who is in the power of a master to whom he belongs. The master may sell him, dispose of his person, his industry and his labor: he can do nothing, possess nothing, nor acquire any thing but what must belong to his master.”

85 See Blight, supra n. 41, at 277.

86 Id. at 278.

87 See id. at 63–65, 68.

88 See id. at 121, 127–134, 138–139.

89 Cox, supra n. 82, at 138–139 (quoting Cornelia Branch Stone, U.D.C. Catechism for Children 11 (Veuve Jefferson Davis Ch. UDC 1904)). Professor Leon Litwack’s discussion of lynching and its origins sheds some helpful light on the realities. He explains,

During slavery, blacks had been exposed to violence on the plantations and farms where they worked and from the patrollers if they ventured off those plantations. The financial investment each slave represented had operated to some degree as a protective shield for blacks accused of crimes, but in the event of an insurrection—real or imagined—whites had used murder, decapitation, burning, and lynching to punish suspected rebels and impress on all blacks the dangers of resistance.

Litwack, supra n. 49, at 285. Such reprisals for resistance were legally permissible. See Dave v. State, 22 Ala. 23, 33 (1853) (“[T]he master is entitled to the absolute dominion and control over the slave. The slave owes absolute and unconditional submission to the master.”).

90 James B. White, The Legal Imagination 434–435 (Little, Brown & Co. 1973) (quoting Louisiana Natural and Juridical Persons Code Ann. Art. 35 (1838) (superseded 1870)). The Code states, “[T]he slave is entirely subject to the will of his master, who may correct and chastise him, though not with unusual rigor, nor so as to maim or mutilate him, or to expose him to the danger of loss of life, or to cause his death.” Id. at 435 (quoting Louisiana Master and Servant Code Ann. Art. 173 (repealed 1990)). A recurring problem for antebellum courts was the degree of latitude permitted owners who physically mistreated their slaves. See e.g. State v. Jones, 1 Miss. 83, 84–85 (1820) (masters can be subjected to indictment for murdering their slaves); State v. Hoover, 20 N.C. 365, 369 (1839) (masters can
The UDC’s curricular influence was not limited to classroom decorations and schoolhouse visits. Pro-Confederate UDC materials were sent to schools for instructional use, and the UDC was heavily involved in textbook selection for southern schools.91 “[O]n the matter of textbook control, . . . [UDC] women . . . engaged in all manner of indoctrination of youth in the service of forging a white supremacist society.”92 Even a UDC book glorifying the Klan was adopted in 1913 as a supplemental text in Mississippi.93

The UDC’s curricular efforts were part of a larger movement before and at the turn of the century to indoctrinate youth and schoolchildren in the dominant story.94 Through censorship, pressure tactics, and production of pro-South histories, the movement worked to ensure that children and young people would be instructed with “blatant apologies praising antebellum southern culture, justifying the Confederate cause, and perpetuating the aristocratic ethos into the twentieth century.”95 This movement successfully ensured that school textbooks portrayed elite southern whites as “brave and true men and pure and noble women.”96 Slavery was “boldly proclaimed . . . a virtuous institution.”97 One text told children that “while an occasional ‘master was cruel to his darkies; . . . for the most part, he was kind and lenient to them. They in turn loved their master.”98 In contrast, textbooks portrayed African Americans as inferior beings content with slavery who later turned from docility to savagery under Reconstruction and carpetbagger influence.99

Such themes echoed in memoirs written for young people, which told of ex-slaves longing for the pre-war past.100 Ironically,
the memoirs’ purpose often was to provide “a warning to future
generations against the dangers of forgetting or misremembering
the past.”101 As one memoirist wrote to her granddaughter, “Those
memories are a legacy to the new generation from the old, and it
behooves the old to hand them down to the new.”102 Plantation
genre writer Thomas Nelson Page distilled the legacy in these
terms: “The Old South was a civilization of ‘the purest, sweetest
life ever lived. . . . [I]t has left its benignant influence behind it to
sweeten and sustain its children.”103

C. The Law’s Retelling of the Dominant Story

At the turn of the century, Deep South states successively
adopted constitutions designed to keep the vote solely in white
hands.104 For example, the 1901 Alabama Constitutional Conven-
tion was convened for the precise purpose of disfranchising Afri-
can-American voters with minimum impact on white voters. As
the Convention’s president stated: “What is it that we want to do?
Why it is within the limits imposed by the Federal Constitution to
establish white supremacy in this State.”105

This aim was rooted in the dominant story, well-known to all
of the Alabama convention-goers. Thus, one delegate, a former
slaveholder, urged that the new constitution should “go to the ut-
most limit allowed us [under the Federal Constitution]” because
enfranchised African Americans were “a menace to our civiliza-
tion, our happiness and prosperity.”106 He disclaimed prejudice as
the reason for his thinking; instead, he justified disfranchisement
with a telling of the dominant story on the convention floor. Nearly
uninterrupted, he spoke at length of his plantation and his loyal,
trusted slaves who assisted him in wartime. The story turned from

101 Id. at 118.
102 Id. (quoting Nancy Bostick De Saussure, Old Plantation Days: Being Recollections of
Southern Life before the Civil War 9–10 (Duffield & Co. 1909)).
103 Id. at 126 (quoting Thomas Nelson Page, The Old South 184–185 (Chautauqua
Press 1919)).
104 Maatman, supra n. 1, at 7–13.
105 Ala. St. Leg., Official Proceedings of the Constitutional Convention of the State of
Alabama 8, http://www.legislature.state.al.us; path Constitution of 1901, path Official Pro-
ceedings, path Day Two, May 22nd (May 22, 1901).
2710, http://www.legislature.state.al.us; path Constitution of 1901, path Official Proceed-
ings, path Day Fifty-Two, July 23rd (July 23, 1901).
“the history of the negro, as a slave,” to Reconstruction, when “[t]he race which had been quiet so long converted this whole country into pandemonium... Here was a peaceable race of people, obedient in law, and here was pandemonium raised when they were no longer retrained [sic] by law, and were inflamed and led.” He recounted lurid tales of violence and misrule. Then he concluded,

See what condition we were in when the negro predominated in this State, and made our laws for us, and enforced them, and see our condition when it passed from them back into the hands of the white men. Can anybody look upon those two pictures and come to any conclusion other than that the negro, as a race, is incapable of self-government? and has no appreciation of the duties and obligations of a citizen of a Republican form of government or that the white man, by reason of belonging to the white race, or his education, or some other characteristic, is competent to rule and can be trusted with the State’s government with perfect safety.109

The transcript of the proceedings reveals that no one spoke a word of disagreement.110

Within legal circles, such sentiments were repeated as truths by generations to come. In 1929, a speaker at a Birmingham Bar Association event rendered post-Reconstruction history a tale of white triumph:

Defeated, exhausted, impoverished, the South found in its own unyielding soul the resources for its preservation... instead of thirteen Haiti’s or San Domingo’s, backward, barbaric, mongrelized,... impeding the progress of civilization and corrupting the national life, there are thirteen splendid Anglo-Saxon commonwealths, whose citizenship is worthy of the proud traditions it inherits. They... carry forward in the van of progress the Anglo-Saxon civilization which our fathers gave us.111

Another speaker at the same event, Mississippian D.W. Houston, invoked Claude Bowers’s The Tragic Era and his pride that his
ancestors “bravely battled on, for years with a determination as strong as the strength of the hills, that white supremacy should be re-established, that racial integrity should be maintained, and that the Anglo-Saxon race should reign and rule in Mississippi again.”112 The event in question was a dinner honoring a Birmingham lawyer who had been named President of the ABA.113

Thirty-one years later, at a 1960 bar event, a Georgia lawyer named Charles J. Bloch said: “[T]he States of the South emerged from the ravages of War[,] . . . [S]tep by step they and the magnificent men and women who formed them laboriously climbed the steps from the abyss into which war and its might, reconstruction and the illegality which created it, had plunged them . . . .”114

Charles Bloch was an elite lawyer. He was prominent in the Georgia Bar Association, was a leader in bench and bar relations, and served on the University of Georgia Board of Regents. He was considered one of the region’s finest lawyers and had a sophisticated practice.115 He also—as one adversary put it—could “spin legally respectable arguments upholding segregation as easily as a carnival vendor spun cotton candy.”116

Starting in the mid-1940s, Mr. Bloch embarked on a two-decades-long body of legal work defending laws that kept the vote from African-American hands and segregated African Americans in all spheres of life. In the course of his efforts, he—like many other skilled, well-educated lawyers of the Deep South—told and used the dominant story to courts, lawyers, and society at large. Importantly, the latter audience included children, to whom Bloch and his compatriots directed materials specifically designed to influence justice formation in the next generation of white southerners and prospective lawyers.

Doubtless Bloch—born in 1893117—and his compatriots had themselves learned the dominant story from books and speeches

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112 D.W. Houston, Address, Address of Honorable D.W. Houston of Mississippi (Birmingham, Ala.), in 5 Ala. L.J. (Tuscaloosa) 151, 154 (1929–1930).
113 The lawyer’s name was Henry Upson Sims. Educated at Harvard Law School, Sims had lectured at the University of Alabama Law School, held numerous state bar positions including the state bar presidency, was a member of the American Law Institute, authored numerous legal treatises and articles, and was elected ABA president in 1929. See Our New President: Henry Upson Sims, 15 ABA J. 744, 744 (Dec. 1929).
114 Charles J. Bloch, One Hundred Years Ago, 21 Ala. Law. 318, 323 (1960).
115 See Maatman, supra n. 1, at 34–35.
117 See Maatman, supra n. 1, at 34.
touting eugenics, glorifying the Lost Cause, and vilifying Reconstruction. Bloch and other lawyers used this story in attempts to keep the south’s “way of life”—which depended on its legal systems—free from interference. Just as stare decisis and appeals to precedent can produce recursive, self-reinforcing strands of law, Deep South lawyers used the dominant story to produce a recursive, self-reinforcing defense of White Supremacy.

1. Justice Formation According to the Dominant Story

When D.W. Houston praised the battle for White Supremacy at the 1929 Birmingham dinner, he also sounded more familiar bar-dinner themes. Specifically, he exhorted lawyers to “lead, and help to hand along the avenues of time the lamp of liberty and the torch of truth,—hold aloft the banner of justice and right, and keep the fires of freedom burning.”118 He probably saw no conflict between his praise of White Supremacy and his exhortations, for the Deep South’s legal order and sense of justice were built upon the dominant story.

As E.B. Reuter once put it, “The law articulates and the institutional structures embody the formal racial dogmas.”119 These structures included segregation, which was an unrelenting means of “performing”120 the tenets of White Supremacy. The ways in which physical spaces were divided and maintained told a story: “For whites . . . . African Americans were . . . most publicly inferior because they sat in inferior waiting rooms, used inferior restrooms, sat in inferior cars or seats, or just stood.”121

From the onset of Jim Crow into the modern civil rights era, courtrooms were no different.122 There were separate Bibles for black and white witnesses to swear their oaths.123 Attorneys addressed white witnesses with titles, but an African-American witness who in the 1960s asked a lawyer to address her as “Miss Hamilton” instead of “Mary” earned a contempt citation. The ap-

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118 Houston, supra n. 112, at 157.
120 Hale, supra n. 21, at 284.
121 Id.
122 My inspiration for recognizing the symbolic power of this point is Judge Leon Higginbotham’s powerful and extensive analysis of it. See A. Leon Higginbotham, Jr., Shades of Freedom 131–151 (Oxford U. Press 1996).
123 See Diane McWhorter, Carry Me Home 202 (Simon & Schuster 2001).
The appellate court affirmed the citation, holding: “The record conclusively shows that petitioner’s name is Mary Hamilton, not Miss Mary Hamilton.”

Courtroom segregation was the norm and was considered unremarkable. Thus, considering the 1948 appeal of an African-American defendant convicted of murder in a segregated Mississippi courtroom, the Mississippi Supreme Court remarked that the arrangements were “pursuant to a custom whose immemorial usage and sanction has made routine . . .” As late as 1963, the Louisiana Supreme Court rejected an argument that courtroom segregation rendered a civil rights demonstrator’s trial unfair. It reasoned that “[i]t has not been made to appear that the segregation resulted in a miscarriage of justice to this defendant. . . . If it were otherwise, it would result that every Negro convicted in that court in the past would be entitled to have his conviction set aside.”

After the Supreme Court prohibited courtroom segregation in 1963, remnants of the practice remained. In 1964, a Louisiana courtroom door still bore the words “witnesses” and “colored”; as the room was used to store air conditioning equipment, the Louisiana Supreme Court regarded the signage as “a meaningless relic of former years.” As for the rest of the facility, “segregation in the House of Detention and the Parish Prison and rest room facilities” admittedly continued. In Mississippi, the federal courthouse likewise bore reminders of White Supremacy, for a Works Progress Administration artist had painted on one of its courtroom walls a large mural depicting a plantation scene complete with master, lady, and slaves.

In what amounted to storytelling through use of space, courtroom segregation proclaimed a supremacist vision of justice. Per-

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129 Id.
130 Higginbotham, *supra* n. 122, at 132 (quoting Jack Bass, *Unlikely Heroes* 13 (Simon & Schuster 1981)). When Fifth Circuit Chief Judge Elbert Tuttle expressed his dislike of the mural, it was covered, Bass, *supra* n. 130, at 167, but the question of covering it or leaving it visible continued to be debated. *See id.* at 329 (noting at least one African American thought it should be visible as a reminder of Mississippi’s fraught history).
haps the clearest expression of this attitude came during the 1961 trial of the New York Times v. Sullivan case, over which Alabama Circuit Court Judge Walter Burgwyn Jones presided. Judge Jones, an ardent segregationist, asserted his “right and power . . . to direct [and segregate] the seating of spectators in the courtroom.” Thus, Jones announced, “[T]he XIV Amendment has no standing whatever in this Court, it is a pariah and an outcast, if it be construed to hold and direct the Presiding Judge of this Court as to the manner in which proceedings in the Court, . . . shall be conducted.” In contrast, Jones praised Alabama’s laws as the “full flower[ing] of ‘the [w]hite man’s justice . . . brought over to this country by the Anglo-Saxon Race.’”

The notion that “the white man’s justice” actually imparted justice was a fiction. The fiction on which this victory was built ran so deep that it seemed real to the mainstream white imagination. When nine African-American young men, ranging in age from thirteen to nineteen—“the Scottsboro boys”—were arrested in 1931 for the alleged rape of two white women, the Scottsboro Progressive Age predicted: “The general temper of the public seems to be that the negroes will be given a fair and lawful trial in the courts and that the ends of justice can be met best in this manner . . . .” Instead of a “fair and lawful trial,” defendants were tried without real counsel, for no one was willing to represent them. In four days, all nine defendants were convicted, and all but one sentenced to death. As for the defendant not sentenced to death, thirteen-year-old Roy Wright, some jurors wanted the death penalty though the prosecution sought only life imprisonment. The mainstream press generally thought justice had been fairly done; as the Huntsville Times headline put it: “DEATH PENALTY PROPERLY DEMANDED IN FIENDISH CRIME OF NINE BURLY NEGROES.” Yet when the Supreme Court ruled on appeal that defendants in capital cases must be provided counsel, it had little trouble seeing the injustice of the trials, which “from beginning to

131 See Maatman, supra n. 1, at 30.
132 Id.
133 Id.
137 See id. at 18.
end, took place in an atmosphere of tense, hostile and excited public sentiment.”\textsuperscript{138}

In short, most Deep South whites looked at the legal system they had created, and even when they saw its realities, they did not see those realities as injustices. Even blatant disregard for basic rights could seem unexceptional. An example is \textit{Brown v. Mississippi},\textsuperscript{139} a mid-1930s murder case in which three African Americans were convicted for the murder of a white man. The African American defendants’ confessions comprised the only evidence supporting a conviction.\textsuperscript{140} Yet the confessions followed severe whippings, and even, for one defendant, a mock hanging. The majority of the Mississippi Supreme Court rejected their appeals, simultaneously proclaiming that “[a]ll litigants, of every race or color, are equal at the bar of this court . . . .”\textsuperscript{141} As the dissenters pointed out, the reality of the case rendered that assertion a lie. The Mississippi Supreme Court had repeatedly ruled that coerced confessions were inadmissible, and the trial court judge knew the confessions were coerced yet still admitted them into evidence. The deputy even admitted on the stand to whipping the defendants but testified “in response to the inquiry as to how severely [the defendant] was whipped . . . ‘Not too much for a negro; not as much as I would have done if it were left to me.’”\textsuperscript{142}

Dissenting Justices Griffith and Anderson recognized the fiction of calling such proceedings just. They admonished:

\[\text{[N]o court shall by adoption give legitimacy to any of the works of the mob, nor cover by the frills and furbelows of a pretended legal trial the body of that which in fact is the product of the mob, and then, by closing the eyes to actualities, complacently adjudicate that the law of the land has been observed and preserved.}^\textsuperscript{143}\]

This case was no anomaly. Nine years earlier, the Mississippi Supreme Court had considered a case in which a defendant’s confession was coerced through “the water cure, a species of torture

\begin{footnotesize}
\textsuperscript{138} \textit{Powell}, 287 U.S. at 51.
\textsuperscript{139} See generally 297 U.S. 278, 279 (1936); Richard C. Cortner, A “Scottsboro” Case in Mississippi: The Supreme Court and \textit{Brown v. Mississippi} (U. Press Miss. 1986).
\textsuperscript{140} \textit{Brown}, 297 U.S. at 279.
\textsuperscript{142} \textit{Id.} at 471 (Griffith, J., dissenting).
\textsuperscript{143} \textit{Id.} at 472.
\end{footnotesize}
well known to the bench and bar of the country.”

This “cure” consisted of pouring water into the nose of a suspect while he lay prostrate and restrained on the floor.

True, the court overturned the conviction, but its recitation of three prior Mississippi cases overturning convictions based on confessions obtained by torture—including one in which a young African-American male was whipped into confessing the theft of a diamond pin—suggests that such rulings mouthed fictions honored more in the breach than the observance.

Even setting aside fictions surrounding the use of coercion, “the full flowering of the white man’s justice” produced a system in which a Mississippi district attorney argued, in 1906, that “mulattos” such as the defendant

were negroes, and that as long as one drop of the accused blood was in their veins they have to bear it; that these negroes . . . thought they were better than other negroes, but in fact they were worse than negroes; that they were . . . a race hated by the white race and despised by the negroes, accused by every white man who loves his race, and despised by every negro who respects his race.

The Mississippi Supreme Court overturned the conviction, stating that “mulattoes, negroes, Malays, whites, millionaires, paupers, princes, and kings, in the courts of Mississippi, are on precisely the same exactly equal footing.”

The next sixty-odd years of Mississippi and Deep South legal history belied that assertion. Although some white lawyers and judges challenged it from time to time—including the lawyers who challenged the 1935 coerced confessions in Brown v. Mississippi at great personal costs—the fiction endured. It was spread by law-

144 Fisher v. State, 110 So. 361, 362 (Miss. 1926).
145 See id. at 363. This practice appears quite similar to water boarding. See White v. State, 91 So. 903, 904 (Miss. 1922) (stating the water cure was intended to “strangle . . . causing pain and horror, for the purpose of forcing a confession”).
146 Fisher, 110 So. at 363–364.
147 Hampton v. State, 40 So. 545, 546 (Miss. 1906).
148 Id.
149 One of the attorneys, John Clark, “suffered a physical and mental collapse” from the strain of attempting to appeal the case; in addition, his political career was ruined. He never recovered his health and retired from his law practice in 1938. Cortner, supra n. 139, at 155–156. After Mr. Clark left the case, his wife approached her friend, ex-Governor Earl Leroy Brewer, to take the case. She warned him not to expect a fee because the defendants were impoverished sharecroppers whose families “could not raise five dollars if all their lives depended upon their so doing.” Id. at 64–65. Brewer took up the appeal and personally
yers and judges who “had been reared entirely in a legally mandated, almost wholly segregated society. They generally knew little else but a white supremacist social order, and few had been given reason to question its existence.” They proclaimed the law to be just but defined justice in strictly supremacist terms. As civil rights historian David J. Garrow explains, the southern judiciary was “determined to have its way and willing to dissemble in doing so.”

2. **Lawyers and Massive Resistance to Justice Reformation**

After the United States Supreme Court held in 1954 that segregated schools violated the Constitution’s Equal Protection Clause, lawyers were active in the organization of so-called “Massive Resistance” to desegregation. They helped found the Citizens’ Council movement and contributed to the production of its rhetoric. Perhaps most significantly, they helped to give the movement an aura of legitimacy by cloaking race hatred in legal arguments. Some did so in their roles as state government officials and judges.

An important founder of the council movement was Judge Tom P. Brady of the Mississippi Circuit Court and later the Mississippi Supreme Court. Shortly after the Supreme Court decided *Brown v. Board of Education* in 1954, Judge Brady turned a speech into a ninety-two page paperback entitled *Black Monday*. The book shrilly recited the dominant story in terms reminiscent of Dixon’s *The Clansman*, complete with a passage declaiming “[t]he loveliest and the purest of God’s creatures, the nearest thing

underwrote many of the considerable expenses involved with an appeal to the United States Supreme Court. He was partially reimbursed through fundraising efforts by the NAACP, the Committee for Interracial Cooperation, the Association of Southern Women for the Prevention of Lynching, and individual contributors moved by reading about the case in *The Nation*. Id. at 89–105.

Robert J. Norrell, *Law in a White Man’s Democracy: A History of the Alabama State Judiciary*, 32 Cumb. L. Rev. 135, 154 (2001–2002). As late as 1956, a candidate for the Alabama Supreme Court declared he was “the grandson of a Confederate cavalryman” and that he was “for segregation of the races, always have been and will continue to be, as have members of my family down through the years.” Id. at 155 (quoting *Mayhall Opens Court Campaign*, Birmingham News A-14 (Apr. 8, 1956)).


to an angelic being that treads this terrestrial ball is a well-bred, cultured Southern white woman or her blue-eyed, golden-haired little girl." 153 Another passage warned: “Whenever and wherever the white man has drunk the cup of black hemlock, whenever and wherever his blood has been infused with the blood of the Negro, the white man, his intellect and his culture have died.” 154 The council movement treated Brady's book as a generative document, and it sold well. 155 Brady repeated his ideas in hundreds of speeches at Citizens' Council organizational meetings. 156

Local councils formed in towns and cities across the Deep South, with the avowed purpose of blocking desegregation. As a council pamphlet entitled “Why Does Your Community Need a Citizens' Council?” explained: “The citizens' council is the South's answer to the mongrelizers.” 157 Council tactics included intimidation and “mak[ing] it . . . impossible . . . for any Negro who advocates desegregation to find and hold a job, get credit or renew a mortgage.” 158

The council movement attracted many lawyers. They fit easily with a group whose speakers addressed “small town and county seat service clubs,” and whose membership drew from “the ranks of the Lions and Kiwanis, Exchange and Rotary clubs.” 159 For example, the leadership of Alabama’s first council organization included prominent businessmen, state legislators, and several lawyers. 160 The council “line” appeared often in The Alabama Lawyer, a bar journal automatically mailed to all Alabama attorneys. Articles such as “I Speak for the White Race,” 161 “All Men Are Not

154 Id. at 7.
156 See supra n. 155, at 16.
160 See id. at 87–88.
Equal,”162 and “Origin of the Races and Their Development for Peace (Separate but Equal)”163 all appeared in the journal.

Council members, following the example of their United Daughters of the Confederacy and other “Lost Cause” forbearers, repeated and used the dominant story. As contemporaneous observer Dan Wakefield put it, council “leaders and orators never fail to mouth a firm dedication to law and order at every public gathering, [but] they also . . . deliver soul-searing declamations on the sacred cause of white supremacy.”164 Indeed, the council members and like-minded segregationists embellished on the story with a new twist: they argued that the civil rights movement was the product of a communist plot to weaken the United States by diluting the “purity” of the white race.165

The council movement focused particularly on telling the dominant story to children. The communications wing of the movement’s national umbrella entity serially produced materials for elementary school students entitled A Manual for Southerners. Statements in these materials—sent to schools with the suggestion that they be used in the classroom—included these passages:166

“God put the white people off by themselves. He put the yellow, red, and black people by themselves. God wanted the white people to live alone. And He wanted the colored people to live alone. That is why He put them off by themselves.”

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“We do not live side by side. The Negro has his own part of town to live in. This is the Southern Way of Life. This is the way Negroes and whites can live in the same land. We do not live together. . . . [D]id you know our country will grow weak if we mix our races? It will.”

•     •     •

“You understand now why the races should not mix and why we Southerners want to keep our own Way of Life. And you must learn your lessons well so that you can help keep your race and

162 R. Carter Pittman, All Men Are Not Equal, 17 Ala. Law. 252 (1956).
164 Dan Wakefield, Revolt in the South 23 (Grove Press 1960).
165 See Bartley, supra n. 159, at 185.
166 All of the quoted passages (and more) are provided in Muse, supra n. 155, at 173–175.
nation pure. . . . We do not want the Race-Mixers and Communists to take our country from us.”

Materials suggested for Mississippi fifth and sixth graders stated,

God made different races and put them in different lands. He was satisfied with pure races so man should keep the races pure and be satisfied. BIRDS DO NOT MIX. CHICKENS DO NOT MIX. A friend had 100 white chickens and 100 reds. All the white chickens got to one side of the house, and all the red chickens got on the other side of the house. You probably feel the same way these chickens did whenever you are with people of a different race. God meant it to be that way.167

Councils and segregationists also pressed the dominant story upon older students. In the late 1950s, Citizens’ Council speakers toured high schools to give speeches and distribute selected textbooks. Some schools sponsored essay contests on the topic of “racial integrity,” requiring students to read one of three segregationist texts.168 The Mississippi Citizens’ Council sponsored an essay contest in which over eight thousand high school students submitted essays on topics such as “Why I Believe in Social Separation of the Races of Mankind.”169 In 1961, a law-trained airline executive named Carleton Putnam published Race and Reason: A Yankee View.170 Putnam’s book was an unabashed recitation of the Deep South’s dominant story, dressed up in pseudo-scientific clothes. Louisiana’s legislature mandated it for high school reading, and Virginia’s legislature debated doing so.171

Counterstories were excluded. School libraries were “purged,” and teachers were discouraged from advocating integration.172 In Mississippi, an Anti-Defamation League film was removed from curricula under pressure from Council and Sovereignty Commission members who felt it “was unfit for showing to Mississippi

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171 See Maatman, supra n. 1, at 36.
172 See Muse, supra n. 155, at 170–171 (saying some state laws even required dismissal of teachers advocating integration).
school children...”173 Pro-segregation activist Florence Sillers Ogden suggested resisting desegregation by “adopting such textbooks in Mississippi schools as we see fit.”174 The Mississippi DAR took up her strategy. The textbooks deemed inappropriate “g[ave] evidence that Negro people have done much to develop themselves,” or suggested that “our world is really one great community.”175 When Governor Ross Barnett took office in 1960, this campaign tangibly affected textbook selection for Mississippi schools.176 In Alabama, the Montgomery Citizens’ Council criticized a children’s book entitled The Rabbits’ Wedding, which had drawings depicting the marriage of a black rabbit to a white one, on the grounds that it promoted integration. The book was withdrawn from the open shelves of the agency serving Alabama’s public libraries. For one Alabama state senator, that was not enough; he wanted the book burned.177

II. UNDERSTANDING TO KILL A MOCKINGBIRD AS A COUNTERSTORY

Counterstories are what Lee Anne Bell calls “back talk” that “challenge the mainstream story or master narrative that constitutes the public script.”178 While the dominant story closes off alternatives, counterstories resurrect them. The dominant story in the Deep South pared alternatives to race relations down to “our way of life.”179 The fact that the law worked hand-in-hand with the dominant story made other possibilities all the more remote,180 and the absence of felt alternatives replicated the system from generation to generation.181 In contrast, a teller of counterstories “bear[s] witness to social relations that the dominant culture tends

173 Silver, supra n. 167, at 12.
174 See McRae, supra n. 169, at 189.
175 Id. at 189.
176 See id. at 190.
179 See Ritterhouse, supra n. 21, at 150.
181 See id. at 45; see also Ritterhouse, supra n. 21, at 161.
to deny or minimize.”\textsuperscript{182} Specifically, a counterstory—whatever its content or mode of operation—reveals, by one means or another, the lies and uncomfortable truths of the dominant story.\textsuperscript{183} Thus, for example, Gunnar Myrdal believed in 1941 that the best hope for change in southern race relations would be to eradicate white ignorance of the realities of African-American life by “force-feeding the rest of the nation a diet so loaded with stories about the cruelty of racism that it would have to rise up in protest.”\textsuperscript{184} Whatever a counterstory’s form, this revelatory function is the key to its nature.

\textit{To Kill a Mockingbird} is a counterstory, within which a lawyer tells counterstories to his family and community. Harper Lee wrote \textit{To Kill a Mockingbird} while the southern legislatures and judiciary were still defying the Supreme Court by engaging in “massive resistance” to the realization of true justice and civil rights for African Americans.\textsuperscript{185} She set her story in 1930s Alabama, a world in which practices such as the water cure defined the white man’s justice. The novel shies from such hard realities and focuses more on the era’s prejudices than its practices. In the story, Atticus Finch “talks back” to that world in a way that reached into the future and spoke to the era in which she wrote.

This section identifies the massive resistance era stories that Harper Lee countered. It then examines the Finch family’s race relations, and the counterstories Atticus told on that subject, before Tom Robinson’s trial. It concludes with Tom Robinson’s trial, at which Atticus tells his most important counterstory of all.

\textsuperscript{182} Bell, \textit{supra} n. 22, at 8.

\textsuperscript{183} There is no reason to assume counterstories take a single form or mode of making their point. For instance, Mark Twain’s \textit{Huck Finn} is likely to have been meant as a counterstory about race even though its protagonist outwardly ascribes to the racial mores of his day. See Toni Morrison, \textit{Playing in the Dark} 54–57 (Vintage Bks. 1992) (analyzing how Twain’s novel critiques and explores white racism). Langston Hughes used poetry about Scottsboro to provide a counterstory to the south’s dominant story about “white man’s justice,” writing, “The Law’s a Klansman with an evil will.” See Langston Hughes, \textit{Ballad of Ozie Powell}, in \textit{The Collected Poems of Langston Hughes} 188–189 (Arnold Rampersad ed., Vintage Classics 1994). Even a performative act can serve as a counterstory, such as the decision of a black mother to have an open casket display the body of her son who had been kidnapped and murdered for whistling at a white woman. See Roberts & Klibanoff, \textit{supra} n. 168, at 86–89 (discussing the Emmett Till case).

\textsuperscript{184} See \textit{id.} at 5–6 (stating that use of the northern press and the national press would be the best means to disseminate the realities of racism and bringing awareness to the rest of the nation).

\textsuperscript{185} See generally Bartley, \textit{supra} n. 159.
Harper Lee set *To Kill a Mockingbird* in 1935 Alabama, but it is most likely a reaction to the events of the 1950s in her native Alabama and neighboring Mississippi. The most significant of these events—all of which made nationwide news—were the murder of fourteen-year-old Emmett Till for whistling at a white Mississippi woman; white rioting at the prospect of desegregating the University of Alabama; and vicious, white demonstrations and the presence of the National Guard to desegregate Central High School in Little Rock, Arkansas. The backdrop for all of these events was the rhetoric generated by the White Citizens’ Councils as they told the dominant story that had shaped and sustained the region’s legal system. The events themselves can be regarded as performative counterstories that acted out the rhetoric of the dominant story.

Fourteen-year-old Emmett Till was murdered in 1955, as revenge for reportedly flirting with, and whistling at, a white woman named Carolyn Bryant. Carolyn’s husband, Roy Bryant, and his half-brother, J.W. Milam, kidnapped, beat, and killed Emmett, then dumped his body in the Tallahatchie River by fastening a large metal cotton gin fan to him with barbed wire. After Till’s brutalized body was found, local papers called for justice, and Bryant and Milam were arrested.186

In between their arrests and the trial, however, white public opinion turned in favor of the accused after the NAACP and the African-American Chicago community characterized Till’s case as a manifestation of systemic ills in Mississippi and the Deep South. Ironically, an important white reaction to these characterizations was the conclusion that “this was not a simple murder, but Mississippi and ‘our way of life’ against the outside agitators.”187

The power of the dominant story hung over the trial. Although prosecutors vigorously argued for conviction, one let slip that Emmett might have “needed a whipping” if he had done wrong.188 A defense lawyer argued that “every last Anglo-Saxon one of you has the courage to free these men... [and that the jurors’] forefathers... [had] done the same.”189

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187 *Id.* at 197–199 (quoting an interview with J.J. Breland, Dean of Defense Attorneys, Sumner, Miss. (Aug. 15, 1962)).
would turn over in their graves” if these boys were convicted on such evidence as this. An all-white jury found Bryant and Milam not guilty after deliberating a little over an hour.\footnote{Id.; see also Whitaker, supra n. 186, at 210–11.} Months later, \textit{Look} magazine published an article in which J.W. Milam fully described how he and Roy Bryant killed Emmett Till.\footnote{See William Bradford Huie, \textit{The Shocking Story of Approved Killing in Mississippi}, in 1 \textit{Reporting Civil Rights} 232–240 (Lib. Am. 2003) (reprinting a January 24, 1956 \textit{Look} magazine article).}

In 1956, mobs rioted at the University of Alabama on the eve of Atherine Lucy’s attempt to desegregate it. Rioters pelted her with eggs, charged her car, fired guns, and yelled, “[l]et’s kill her, let’s kill her!”\footnote{See McWhorter, supra n. 123, at 98.} This was not an isolated incident. In February 1956, Montgomery, Alabama saw a rally of 15,000 persons who opposed Ms. Lucy’s admission to the University.\footnote{See McMillen, supra n. 158, at 44.} All of these events were widely reported.\footnote{See Roberts & Klihanoff, supra n. 168, at 130–132.}

The next year saw the Little Rock crisis. In 1957, a federal court ordered the desegregation of Central High in Little Rock, Arkansas. After a standoff with Arkansas’s Governor Faubus, who left the African-American students exposed to jeering mobs, President Eisenhower sent federal troops to Little Rock. They escorted the students to school for the rest of the year. The papers reported every step of the weeks-long crisis.\footnote{See Muse, supra n. 155, at 122–145.} In the meantime, \textit{Birth of a Nation} played in Little Rock theaters.\footnote{See id. at 41.}

\section*{B. The Finch Family’s Race Relations before the Trial of Tom Robinson}

With the backdrop of her own time in mind, Ms. Lee gave Atticus Finch a biography typical of a small-town Alabama lawyer in the mid-1930s. Atticus was Alabama born, raised, and educated.\footnote{See Tony A. Freyer & Paul M. Pruitt, Jr., \textit{Reaction and Reform: Transforming the Judiciary under Alabama’s Constitution, 1901–1975}, 53 Ala. L. Rev. 77, 83–84 (2001) (“Most Alabama firms had only two or three partners and were geared towards handling the problems of farmers, storekeepers, and small-scale industrialists.”).} He is a solo practitioner in a small town, like most of his fellow Alabama lawyers.\footnote{Lee, supra n. 3, at 3–5.} He is a generalist,\footnote{See id. at 41.} handling a variety of
small matters in local courts, again like the majority of Alabama’s lawyers of his time.199 His family had once been prosperous and owned a small number of slaves.200 As a child born in the 1880s, he would have known former slaves; in adulthood, a black woman, Calpurnia, worked for him in domestic service. Calpurnia, who likely was descended from his family’s slaves,201 keeps house and helps the widowed Mr. Finch raise Scout and Jem.

Although Atticus refers to Calpurnia as a member of the family and instructs his children to obey her, they well know she is a servant even as they follow her strict rules. When Jem turns twelve, Calpurnia (who was older than Atticus)202 begins to call him “Mister Jem.”203 In contrast, the children refer to the woman who raises them only as “Calpurnia,” or “Cal,” reserving the appellations “Miss” or “Mister” for white adults. This habit comported with the customs of white supremacy; as Willie Morris has put it, “you would never call a Negro woman a ‘lady’ or address her as ‘ma’am,’ or say ‘sir’ to a Negro man.”204 Indeed, this was one of the most pervasive lessons taught children in the Deep South; one young woman interviewed in 1944 recalled her mother saying “call them colored women. There are no colored ladies.”205

The Finch children are well-versed in the behavioral expectations for Calpurnia’s race. Jem and Scout accept servile gestures of respect from black adults as an unquestioned norm;206 like Willie Morris, they took it “for granted . . . that Negro adults . . . would

198 Scout’s references to her father’s legal practice reveal that he worked on a variety of small matters, including criminal cases, property problems, and will preparations. See Lee, supra n. 3, at 5, 22, 127.
199 Freyer & Pruitt, supra n. 197, at 87 (most attorneys were content to practice in state courts despite burgeoning claims in federal courts).
200 Lee, supra n. 3, at 4.
201 Calpurnia, the black housekeeper who managed the Finch household and largely raised Scout and Jem, grew up near the Finch family property, and had always worked for the white families who lived nearby. See id. at 142. She left her childhood home to continue working for Atticus. Id. She was older than Atticus, id. at 141, so it is undoubted that her parents were former slaves. Given her childhood home’s proximity to that of Atticus, it is likely that either the Finches or their neighbors, the Bufords, owned her parents.
202 See id. at 141.
203 See id. at 131.
205 See Quinn, supra n. 180, at 42.
206 See e.g. Lee, supra n. 3, at 135–136 (adult members of Calpurnia’s church accorded the children “gestures of respectful attention” and minister led them to front seats); id. at 187 (adult blacks yielded front row seats in their section of the courtroom to Scout and Jem).
treat [them] with generosity and affection." This assumption, which arose from strict limitations on how African Americans could interact with whites of any age, was a common reinforcement in the lessons of white supremacy; “[a] child who is constantly treated with deference by members of a group visibly distinguishable from himself on physical grounds can hardly escape the conclusion that he is superior to members of that group.”

They know that blacks were not supposed to enter a white family’s house through the front door; indeed, Scout sees consistency with this custom as a point of pride and cultivation for blacks. Thus, she says of Tom Robinson that “[h]e seemed to be a respectable Negro, and a respectable Negro would never go up into somebody’s yard of his own volition.”

Atticus attempts to tell counterstories to his children and community that will promote justice formation and undercut the dominant story. For example, his sister Alexandra, like tellers of the dominant story, constantly stressed the Finch family’s background and “breeding” to the children. Atticus found himself unable to follow this “party line,” and told the children to forget about how Finches were supposed to behave. When his sister told him to fire Calpurnia because she could bring up the children, he refused to do so and told her Calpurnia was a member of the family. Alexandra objected to conversing about race matters in front of Calpurnia; Atticus remonstrated that “[a]nything fit to say at the table’s fit to say in front of Calpurnia.” When business leaders of his community question his decision to represent Tom, he flatly rejects community attitudes, saying his client “might go to the chair, but he’s not going till the truth is told. . . . And you know what the truth is.”

Atticus’s most famous lesson for his children is “[y]ou never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it.” They did not readily absorb his meaning. They knew little of the practical consequences of Jim Crow; thus, they were startled to

207 Morris, supra n. 204, at 33.
208 Quinn, supra n. 180, at 45.
209 Lee, supra n. 3, at 220.
210 See id. at 151–153.
211 See id. at 156–157.
212 Id. at 179.
213 See id. at 167.
214 Id. at 33.
learn that Calpurnia and her son were two of the only four members of Maycomb’s African-American community who knew how to read, even though there had been no school for them in Maycomb.215 It never occurred to the children that the social customs and laws of Jim Crow were meant and felt as humiliations. Far from Scout’s assumption that “respectable” blacks preferred to follow Jim Crow customs,

“[n]othing is quite as humiliating, so murderously angering, as to know that because you are black you may have to walk a half mile further than whites just to urinate; that because you are black you have to receive your food through a window in the back of a restaurant or sit in a garbage-littered yard to eat.”216

In their ignorance, the children did not fully understand the implications of their father’s representation of Tom Robinson. They knew their father was unpopular for representing a black man accused of rape, yet they were not sophisticated enough to fully understand the sources and scope of the town’s hostility.217 Scout’s initial reaction to her father’s representation of Tom Robinson was negative; she was all too willing to accept local opinion that such work was a “disgrace.”218 Even as Atticus counseled her to “keep your head high and . . . fists down,”219 she had difficulty accepting his role as Tom’s lawyer and got into fights with children who criticized Atticus for representing Tom.220 As for Jem, he naively thought that Atticus could win the case.221

C. The Trial as Turning Point: The Most Important Counterstory

The trial of Tom Robinson was an important turning point for the children and their father. Atticus dreaded the trial because he knew the outcome of a rape case, in which the accuser was white

215 See id. at 141–142.
216 Goldfield, supra n. 23, at 11–12 (quoting John Williams).
217 See Lee supra n. 3, at 186–187 (Scout puzzling over the town’s attitude).
218 Id. at 87.
219 See id. at 86.
220 See id. at 94–96 (fight with a cousin who said Atticus was ruining the family), 279–280 (dealing with classmates after the trial), 283–284 (trying to understand her teacher’s racism).
221 Id. at 237 (Jem assumes the jury will acquit Tom Robinson.).
and the defendant black, was a foregone conclusion. 222 He wanted to get the children through the trial “without bitterness, and most of all, without catching Maycomb’s usual disease” of racism. 223 As for his representation of Tom, he fully expected to lose the case, but “intend[ed] to jar the jury a bit” and have a “reasonable chance on appeal.” 224

Atticus put his greatest effort into “jarring” the jury with his closing argument at Tom Robinson’s trial. In it, he argued: “in this country our courts are the great levelers, and in our courts all men are created equal.” 225 Should we conclude he means it in the way the Mississippi Supreme Court meant it when it said much the same thing in 1906? Can we read To Kill A Mockingbird and believe Atticus Finch sincerely means this? After all, he speaks those words in a segregated courtroom, his physical surroundings rendering his words obviously false. Perhaps his character is too simply drawn, 226 but he is surely not so stupid that he cannot see the contradiction between his words and his physical surroundings.

I think Atticus is telling the most important of his counterstories. From the standpoint of justice formation, in his closing Atticus “talks back” to the “white man’s justice” by reminding the jury and all the listeners in the packed courtroom of the alternative of treating all parties as equals before the law. Scout, Jem, and their friend Dill are among the listeners. The children were forbidden from attending the trial, 227 but Atticus has every reason to suspect they are among his listeners. Not only does he know they are keenly interested in the trial, 228 but Atticus has a way of knowing when they disobey him, overhear him speak with adults, or turn up where they are not supposed to be. 229

The closing was as much a counterstory for the future as it was for his client. When Atticus was finishing his closing argu-

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222 See id. at 100.
223 Id.
224 Id.
225 Id. at 234.
226 See generally Thomas Mallon, Big Bird, New Yorker 79 (May 29, 2006) (reviewing biography of Harper Lee and commenting critically on To Kill a Mockingbird).
227 See Lee supra n. 3, at 180 (Atticus telling the children he doesn’t want them in town that day).
228 As the trial approaches, the children discuss the case or some aspect of its impact on the family in nearly every chapter of the novel.
229 See e.g. id. at 45, 54–55 (Atticus knows they play games acting out Boo Radley’s rumored life even though he has told them not to), 100–101 (Atticus knows Scout is eavesdropping), 173 (the children show up as Atticus confronts a mob outside the jail where Tom Robinson is held).
ment and came to his counterstory, he paused to unbutton his vest and collar, and took off his coat. Scout tells us that “this was the equivalent of him standing before us stark naked.” If such nakedness can be compared to an absence of pretense and truth-covering, then perhaps his removal of his watch may also be compared to stepping out of time to tell his counterstory to the future. The future he speaks to is the world in which his children will be adults, and one of them—Jem—will be a lawyer.

Before hearing his father’s closing, future lawyer Jem Finch is untroubled by the prosecutor’s unsanctioned references to Tom Robinson as a “big buck” and “boy,” whose testimony is “impe dent.” Whether or not he recognizes the racism in such talk, Jem believes Tom will be acquitted. After hearing the closing and believing his father’s counterstory of equality before the law, the unanimous guilty verdict stuns Jem like a stab in the back. Walking home from the courthouse with his father, Jem says, “[i]t ain’t right, Atticus,” His father replies, “[n]o son, it’s not right.” Jem has learned what Atticus knew all along: the system is not fair.

Days later, Atticus confirms this lesson. He tells Jem, “[i]n our courts, when it’s a white man’s word against a black man’s, the white man always wins.” Agreeing that Tom’s conviction was unfair, he says that “[t]he one place where a man ought to get a square deal is in a courtroom.” Atticus predicts that Jem will “see white men cheat black men every day of your life, but . . . whenever a white man does that to a black man, . . . that white man is trash.” In effect, he is telling Jem—and an eavesdropping Scout—that the supremacist legal system is “trash.”

Why does Atticus tell such a startling counterstory to his children? Before the trial, he counseled acceptance even while he told counterstories. His bluntness about the legal system’s flaws is a

\[230\] Id. at 231.
\[231\] Id.
\[232\] See id. at 225–229 (Jem sends Scout and Dill out of the courtroom because Dill is so upset by the prosecutor’s treatment of Tom Robinson.).
\[233\] Id. at 230.
\[234\] Id. at 241.
\[235\] Id. at 243–244, 252.
\[236\] Id. at 252.
\[237\] Id. at 253.
\[238\] See id.
\[239\] See e.g. id. at 128 (Atticus refers to a blatantly racist old woman as a “great lady,” while acknowledging her views differ from his).
marked turn for him; I think he takes this turn because he is a father, and because he is a lawyer aware of the imperatives of time and history.

As a father, Atticus realizes that his children must learn to cope with the Deep South’s dominant story. Before the trial, his worry regarding how his children would cope with the display of racism it would prompt, and his hope “that Jem and Scout come to [him] for their answers instead of listening to the town,” reflected his anxiety over the possibility that they would heed the dominant story of race and justice. After the trial, when Atticus’s sister Alexandra tells him it was unwise to let the children see the trial and verdict, Atticus responds: “[t]his is their home, sister . . . [w]e’ve made it this way for them, they might as well learn to cope with it.”

As a lawyer who knows his son wishes to study law, Atticus has another reason to tell his counterstories. Lawyers of Atticus’s generation grew up with the invention of Jim Crow. As youths, they lived in a world in which lynchings could generate a “carnival” atmosphere, and children played “lynching” by reenacting with dolls what they had seen done to humans. These lawyers oversaw the “[elaboration] and . . . expansion” of Jim Crow laws throughout the 1920s and 1930s. Jem’s generation would take up the law after the mid-1940s. Atticus, therefore, needs to “speak now against the day” when Southern people must decide whether to resist or “accept . . . with dignity and goodwill” the end of “the Southern way of life.” He says as much by telling his children that “it’s all adding up and one of these days we’re going to pay the bill for it.”

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240 Id. at 101.
241 Id. at 243.
242 Hale, supra n. 21, at 203.
243 See Litwack, supra n. 49, at 288.
246 Lee, supra n. 3, at 253. Atticus goes on to say, “I hope it’s not in your children’s time’; however, I interpret that to mean that he hopes resistance to change and accompanying strife will not occur in his children’s times. Given the evolving attitudes of Harper Lee’s father during the 1950s, when he came to believe justice required change, it is unlikely that a character modeled after him would hope for continuation of Jim Crow law in his children’s adult lifetimes. See Charles J. Shields, Mockingbird 125–126 (Henry Holt 2006) (biography of Harper Lee).
In particular, Atticus speaks to the day when an attorney named Jem Finch must decide whether the justice system he saw as a child is one that should be defended or challenged. Some attorneys, such as Charles Bloch, decided to defend it. Others—fewer—were agents for change. For some of these, counterstories dislodged old conceptions of justice. For instance, Judge J. Skelly Wright of the Louisiana District Court—the very Judge who ordered desegregation of Ruby Bridges’s school—was deeply affected by watching sighted people segregate blind arrivals at the New Orleans Light House for the Blind. For him, this became a kind of living story that “‘[ate] at [him]. And . . . [i]t began to make me think more of the injustice of it, of the whole system that I had taken for granted.’”

The views of Judge Richard Rives of the Fifth Circuit Court of Appeals evolved under the influence of his beloved son, who studied law at the University of Michigan and discussed his progressive racial views with his father. Under the influence of his son’s counterstories, Judge Rives became an important jurist who rendered many decisions favorable to civil rights because he “‘wanted to live the new South his son talked about.’”

What would Jem Finch have chosen if he had practiced law in the era of massive resistance? Would he have joined a Citizens’ Council chapter and championed segregation? Or, would the memory of Tom Robinson’s trial and conviction, and all the counterstories his father told before and after that trial, have prompted him to join the slender ranks of progressive white attorneys who fought for civil rights against the tides of massive resistance? In 1950s Alabama, the most prominent local civil rights lawyers—Arthur Shores and Fred Gray—were black. Clifford Durr, a New Deal lawyer of Atticus’s generation, was the rare, white Alabama lawyer who assisted movement lawyers, but even he did so behind the scenes, advising Fred Gray and Rosa Parks during the Montgomery bus boycott.

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247 See Bass, supra n. 130, at 112–113.
248 See id. at 69–70.
249 See id. at 16–17 (describing Rives as having a passion for reacting to injustice and commitment to “racial justice and equality under law”). Rives’s son died in a car accident; pro-segregationists trashed and defaced his grave to protest a decision Judge Rives had authored. Id. at 79.
250 Id. at 74 (quoting an interview with Douglass Cater (Sept. 18, 1979)).
251 See McWhorter, supra n. 123, at 64, 175.
In the 1960s, when Jem Finch would have been a seasoned lawyer, the Commonwealth of Virginia prosecuted Richard and Mildred Loving for marrying and then living in Virginia in violation of Virginia’s miscegenation laws prohibiting interracial marriage. They ultimately pled guilty. Judge Leon Bazile gave them the lightest sentence possible—one year in jail—and suspended the sentence, with the caveat that neither could return to Virginia for twenty-five years; even then, they could never simultaneously be in the Commonwealth. In a subsequent opinion declining to set aside the sentence, Bazile repeated the dominant story, writing: “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix.”

On appeal to the United States Supreme Court, Virginia’s lawyers had Charles Bloch’s assistance when they wrote their brief. In it, they argued in part,

> [I]t is the exclusive province of the legislature of each State to make the determination for its citizens as to the desirability, character and scope of a policy of permitting or preventing such alliances . . . . The Virginia statutes here under attack reflect[ ] a policy which has obtained in this Commonwealth for over two centuries . . . .

Richard Loving sent his lawyers to oral argument before the Court with his own counterstory: “[t]ell the Court I love my wife, and it is just unfair that I can’t live with her in Virginia.” His lawyer did just that, and the Court agreed.

In this counterstory—at last turned a dominant one in the law—I hear an echo of Jem Finch telling his father that Tom’s conviction was unfair. Jem reaches that conclusion because he believes the counterstory of justice his father recounted in his closing argument at Tom’s trial: all persons are equal before the courts.

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253 Richard was white, and Mildred was African American. See *Loving v. Va.*, 388 U.S. 1, 2 (1967).
255 See Maatman, *supra* n. 1, at 87.
257 See Wallenstein, *supra* n. 254, at 428.
258 Id.
III. CONCLUDING REFLECTIONS

Just as we throw ourselves into the future with our children, we throw our children into the future with our stories. Charles Bloch knew the power of stories told to the next generation. In 1963, he told an audience: “We are supposed to read, to learn, and then to teach . . . . We lawyers of the South—of all America—have a great heritage—a great privilege—to . . . save our families, our neighbors, our children, our children’s children, ourselves.”259 If we do not talk back to stories like those Charles Bloch and his compatriots tried to embed in American law and culture, we risk “bolster[ing] the status quo by minimizing racism, avowing White goodness and innocence, and focusing on an exaggerated sense of forward progress.”260

Ironically, for lawyers this means that we must tell our children that Atticus Finch is not real. We must explain this is not merely because To Kill A Mockingbird is a novel; instead, we must tell them of Robert Coles’s recollection that his friends doing civil rights work in the South expressed “incredulity” over the character of Atticus Finch as “they’d yet to meet this kind of lawyer.”261

Pride in the legal profession is a part of our self-regard. It is easy and inspirational to say that “Atticus Finch knew” what it means “to be a lawyer,”262 “people like Atticus Finch made me want to be a lawyer,”263 and “I had hoped I might become a lawyer very much like Atticus.”264 As Professor Steven Lubet has said,

Atticus Finch saves us by providing a moral archetype, by reflecting nobility upon us, and by having the courage to meet the standards that we set for ourselves but can seldom attain. And even though he is fictional, perhaps because he is fictional, Atticus serves as the ultimate lawyer. His potential justifies all of our failings and imperfections. Be not too hard on lawyers, for when we are at our best we can give you an Atticus Finch.265

260 Bell, supra n. 22, at 14.
262 Main, supra n. 10, at S9.
263 Duncan, supra n. 11, at 3 (quoting news reporter and lawyer Joel Daley).
264 Papantonio, supra n. 9, at 23.
265 Steven Lubet, Classics Revisited: Reconstructing Atticus Finch, 97 Mich. L. Rev. 1339, 1340 (1999) (citations omitted). As Nancy B. Rapoport has stated, “To Kill a Mockingbird . . . is trotted out every time we need an example of a good lawyer.” Nancy B. Rapoport,
In fact, if we focus long enough on Atticus Finch we can forget altogether that most lawyers in the Deep South came very late to the civil rights cause, if they came at all. Indeed, we largely have forgotten that fact.266

Upon the fiftieth anniversary of the Brown v. Board of Education decision, many bar associations designed materials and websites for educating youth about Brown.267 The ABA, in particular, prepared an extensive Law Day 2004 Planning Guide,268 and a set of lesson plans entitled “Dialogue on Brown v. Board of Education.”269 Impressive as these materials are, they consistently portray or refer only to lawyers who represented the plaintiffs. As for the legal system, the ABA’s exhortation to “Join the Law Day Team” states that “[i]n the law has been instrumental in . . . changes in the nation’s attitudes and values. . . . By commemorating . . . Brown, Law Day can help illuminate . . . , the role of law, advocates, and courts in establishing and protecting our rights.”270 A “Sample 2004 Law Day Proclamation” refers to “the work of dedicated lawyers in Brown . . . and in hundreds of other cases challenging segregation demonstrated the highest standards of advocacy in the service of a great cause,” but says nothing about segregationist lawyers.271 A “talking points” section refers to segregation laws, but uses passive voice and identifies no actor in connection with the implementation, enforcement, or defense of the laws; lawyers are mentioned only as those who “chipped away at the legal structure of segregation.”272 The Dialogue materials include a focus question that refers to “fierce” reaction to Brown “in the Southern states,” but specifies only newspaper editorialists as proponents for resistance.273 Illinois materials detailing “myths and


266 See Maatman, supra n. 1, at 3–4.


271 Id. at 17.

272 Id. at 39.

273 ABA, Dialogue on Brown, supra n. 269, at 4.
truths” about Brown do not mention the role played by segregationist lawyers in making Brown necessary, and in resisting its mandate.\textsuperscript{274}

Telling counterstories about our profession can be difficult; nonetheless, it is necessary. Dan Bar-On is an Israeli Behavioral Scientist who interviewed German adults whose parents had participated in ways large and small in facilitating the Holocaust. When his stepson asked Bar-On why this difficult work was so important to him, Bar-On said that “the quest for hope has to do with confronting the truth.”\textsuperscript{275} Bar-On saw his “quest for hope” as “a ‘working through’ process that involves a gradual movement away from the euphemisms and distortions of the parents, which project a false reality, and toward an acknowledgement of what happened and what meaning those events have.”\textsuperscript{276}

The legal profession must engage in such a process to begin to renew justice formation in our children, our students, and new lawyers. The story of Atticus Finch has influenced millions of readers over two generations; a 1991 survey “found that among the books mentioned by its 5,000 respondents, Harper Lee’s TKM [To Kill A Mockingbird] was second only to the Bible in being ‘most often cited as making a difference’ in people’s lives.”\textsuperscript{277} In general, the book’s influence is a positive force; however, it is a double-edged sword for the legal profession. The image of Atticus Finch seeking justice for Tom Robinson inspires many people to become lawyers, and can even inspire their practice. Yet this image allows us to use a fictional character to avoid confronting our profession’s uses of the dominant racial narrative to produce, perpetuate, and defend white supremacy and segregation. Exploring how the dominant story influenced, and was perpetuated by, the profession is vital to understanding how justice formation in lawyers can perpetuate injustice. Only if we teach our children to question dominant stories, and heed the call of counterstories, will we realize the opportunity for justice formation reflected in this ancient Jewish saying: “with each child, the world begins anew.”\textsuperscript{278}

\textsuperscript{276} Id. at 331.
\textsuperscript{277} Johnson, supra n. 5, at 14.