THE OTHER LAWYER IN THE COURTROOM: THE PROSECUTOR IN *TO KILL A MOCKINGBIRD*

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INTRODUCTION

Set in 1930s Alabama, Harper Lee's novel *To Kill a Mockingbird* is an esteemed part of the American canon.[1] The story follows lawyer Atticus Finch as he defends a black man, Tom Robinson, against the charge that he raped a white woman, Mayella Ewell.

Atticus's defense of Tom dominates the courtroom and the story. His performance has attained mythic proportions, as reflected in teaching materials from the National Endowment for the Arts:

> Atticus Finch is a man of principles[,] . . . a defender of justice[,] . . . a courageous man. . . . [T]oo courageous and righteous to abide by the norms of the . . . white people in his town[,] . . . [whose] consistency makes him an ideal father[,] . . . [who] represents a good model of a professional lawyer[,] . . . [and whose] defense of the color-blind justice and . . . belief that law should be free from any prejudices have set him as an ideal lawyer.[2]

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[1] HARPER LEE, TO KILL A MOCKINGBIRD (40th anniv. ed., HarperCollins 1999) (1960) [hereinafter MOCKINGBIRD]. The story of *To Kill a Mockingbird* has recently been enriched by the publication of a sequel. *See* HARPER LEE, GO SET A WATCHMAN (2015) [hereinafter WATCHMAN].

[2] Hend Fathy, A Character Sketch of Atticus Finch 1-4 (2009) (unpublished essay) (on file with the Bibliotheca Alexandrina), http://www.bibalex.org/libraries/bigread/attachments/essays/20090728123343800 84.pdf [http://perma.cc/2AQR-YPK4]. Other examples abound. *See, e.g.*, Elder Lance B. Wickman, In Search of Atticus Finch, Address Before the J. Reuben Clark Law Society (Feb. 10, 2006), *in* CLARK MEMORANDUM, Spring 2006, at 2, 10, http://www.jrcls.org/clark_memo/issues/cmS06.pdf [http://perma.cc/UAV6-XX8Q] ("Standing for goodness is something that should just be part of who we are. Like Atticus Finch."); Brett McKay & Kate McKay,

However, Atticus is not alone in the courtroom; there is also a prosecutor. If Atticus is larger than life, his opposite number is smaller. Probably few readers will remember who he is; his name is not uttered in the film,[3] and he is often omitted from serious discussions of the story.[4]

It is worthwhile to take a closer look at the prosecutor in light of two criticisms of him that have been made. The first is that he knowingly prosecutes an innocent person. The second is that his courtroom performance is inappropriate with respect to race. The first criticism relates to an unvarying duty of prosecutors: it is always wrong to prosecute one known to be innocent. The second criticism, however, is bound to the time and place of the prosecution. The duty of the prosecutor to refrain from inappropriate racial commentary is heightened in a situation where racial discrimination is already a dominant feature of the society. The conduct of the prosecutor in *To Kill a Mockingbird* grounds a discussion of the range of heightened duties of lawyers involved in a racially charged case in 1930s Alabama.

Lessons in Manliness from Atticus Finch, THE ART OF MANLINESS (Feb. 2, 2011), http://artofmanliness.com/2011/02/02/lessons-in-manliness-from-atticus-finch/ [http://perma.cc/3NRN-N2SE] ("When it comes to manly characters in literature, my thoughts always return to one man: Atticus Finch.").

[3] *See* HORTON FOOTE, TO KILL A MOCKINGBIRD: FINAL SCREENPLAY (1962), https://singleadelman.pbworks.com/w/file/fetch/71379795/To%20Kill%20a%20Mockingbird%20Screenplay.pdf [https://perma.cc/Z9X7-VPDL]; TO KILL A MOCKINGBIRD (Universal Home Video 1998) [hereinafter MOCKINGBIRD film]. A reference by Dill to Horace Gilmer does occur at scene 251 of the Foote screenplay, but that scene does not appear in the film. The character of Horace Gilmer does not appear in the sequel. *See generally* WATCHMAN, *supra* note 1.

[4] For example, the prosecutor does not appear anywhere in the National Endowment for the Arts' teaching materials on *To Kill a Mockingbird*. *See* NAT'L ENDOWMENT FOR THE ARTS, *TO KILL A MOCKINGBIRD* LESSON PLAN, http://neabigread.org/teachers_guides/lesson_plans/mockingbird/Lee_TG2014.pdf [http://perma.cc/4ASZ-C7QA]. The prosecutor's name appears only once in passing in Steven Lubet's landmark article. *See* Steven Lubet, *Reconstructing Atticus Finch*, 97 MICH. L. REV. 1339, 1344 (1999). A Lexis search of the prosecutor's name in the secondary materials database produces only a handful of articles. *See, e.g.*, Steven C. Day, *Of Atticus Finch, Abraham Lincoln, and the Art of Setting the Trap*, LITIG., Winter 2011, at 28, 29 (passing reference to prosecutor by name); Gregg Mayer, *Prosecutors in Books: Examining a Literary Disconnect from the Prosecution Function*, 19 LAW & LITERATURE 77, 86 (2007).

After introducing the prosecutor,[5] this Article considers the criticism that he knowingly tries an innocent person.[6] The Article then turns to the criticism that the prosecutor "plays to the racist sentiments of a white Alabama jury."[7] Next, the discussion identifies four other heightened obligations of lawyers involved in racially charged cases in 1930s Alabama and considers whether the lawyers in *To Kill a Mockingbird* fulfilled those duties.[8] The Article concludes with a discussion of an actual case from that time and place in which real lawyers fulfilled their heightened obligations in ways that deserve our remembrance and praise.[9]

I. THE PROSECUTOR

His name is Horace Gilmer, and he does not appear in Harper Lee's book until Chapter 17:

> The solicitor, a Mr. Gilmer, was not well known to us. He was from Abbottsville; we saw him only when court convened, and that rarely, for court was of no special interest to Jem and me. A balding, smooth-faced man, he could have been anywhere between forty and sixty. Although his back was to us, we knew he had a slight cast in one of his eyes which he used to his advantage: he seemed to be looking at a person when he was actually doing nothing of the kind, thus he was hell on juries and witnesses. The jury, thinking themselves under close scrutiny, paid attention; so did the witnesses, thinking likewise.[10]

In both the book and the film, Gilmer appears in only four courtroom vignettes. He conducts direct examinations of Sheriff Heck Tate,[11] the complainant's father Bob Ewell,[12] and the

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[5] *See infra* Part I.
[6] *See infra* Part II.
[7] Mayer, *supra* note 4, at 86; *see also infra* Part III.
[8] *See infra* Part IV.
[9] *See infra* Part V.
[10] MOCKINGBIRD, *supra* note 1, at 190.
[11] *Id.* at 190-91.
[12] *Id.* at 196-200.

complainant Mayella Ewell.[13] Gilmer also conducts the cross-examination of the defendant Tom Robinson.[14]

The story changes in some significant ways in the transition from the book to the film. For example, one of the most powerful scenes in both the book and the film is when Atticus, with the unsolicited assistance of Jem, Scout and Dill, confronts a mob from Old Sarum seeking to lynch Tom Robinson. Atticus is able to save Tom and, in the film, the scene ends with a soft-spoken exchange between Tom and Atticus:

> "Mr. Finch. They gone?"
>
> . . . .
>
> "They've gone. Get some sleep, Tom. They won't bother you any more."[15]

The scene then fades to black. In the book, however, the scene continues to a rather different conclusion:

> From a different direction, another voice cut crisply through the night: "You're damn tootin' they won't. Had you covered all the time, Atticus."
>
> Mr. Underwood and a double-barreled shotgun were leaning out his window above *The Maycomb Tribune* office.[16]

Mr. Underwood is one of the book's characters who does not appear in the film. Others who are present in the book but not the film include Aunt Alexandra, Uncle Jack Finch, Lula, Link Deas, Dolphus Raymond, Nathan Radley, and Francis. Their absence from the film changes the story is some important ways. The character of prosecutor Horace Gilmer makes the transition from the book to the film, but he is different in the film in several respects. Most importantly, much of Gilmer's courtroom dialogue is lost in the transition to the screen.

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[13] *Id.* at 204-07.
[14] *Id.* at 224-26.
[15] FOOTE, *supra* note 3, at 97.
[16] MOCKINGBIRD, *supra* note 1, at 176-77.

Horace Gilmer's performance raises two criticisms. First, that he knowingly prosecutes an innocent person. It is said that he "represents much more about the prosecution function, including a flaw that has been disturbing from its origins: the prosecution of an innocent man."[17] Second, it is alleged that Gilmer's prosecution contains elements that are inappropriate with respect to race, and "[i]n his critical cross-examination of Robinson, . . . Gilmer . . . plays to the racist sentiments of a white Alabama jury."[18]

II. DOES THE PROSECUTOR KNOWINGLY TRY AN INNOCENT PERSON?

The first criticism is that Gilmer's prosecution of Tom Robinson is wrongful because he knows Tom is innocent. Of course, the prosecution of a defendant the prosecutor knows to be innocent is always completely improper. The rule is that "[t]he prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."[19]

Is the prosecution of Tom Robinson supported by probable cause? Gilmer has the statement of Mayella that she and Tom were together in her house on a particular day,[20] and Tom's confirmation that they were.[21] He has the statements of both Tom and Mayella that some physical contact between the two of them took place, although they differ as to the nature of the contact.[22] He has Mayella Ewell's complaint that Tom raped her.[23] He has the physical evidence that Mayella was beaten, evidence which admits several readings but which is nevertheless consistent with her claim.[24] He has the statement of Bob Ewell that Bob saw Tom Robinson sexually assaulting Mayella.[25] Atticus explains, "Her father saw it . . . . What did her father do? . . . We do know in part

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[17] Mayer, *supra* note 4, at 85.
[18] *Id.* at 86.
[19] MODEL RULES OF PROF'L CONDUCT r. 3.8(a) (AM. BAR ASS'N 2011).
[20] MOCKINGBIRD, *supra* note 1, at 205-06.
[21] *Id.* at 225-26.
[22] *Compare id.* at 206, *with id.* at 221-22.
[23] *Id.* at 206.
[24] *Id.* at 192-93.
[25] *Id.* at 197.

what Mr. Ewell did: he did what any God-fearing, persevering, respectable white man would do under the circumstances—he swore out a warrant . . . ."[26]

Gilmer has both a complaint in the form of Mayella's testimony and corroboration in the form of Bob Ewell's statement that he saw Tom "ruttin' on [his] Mayella."[27] Neither Bob nor Mayella is a facially non-credible witness.

By any standard, Gilmer has probable cause to proceed with the prosecution. In addition, he apparently takes the case to the grand jury and receives their agreement that there is probable cause, admittedly not a robust protection against prosecutorial misconduct in any circumstances, even less so in this case.

However, Atticus advances two counter-narratives. The first narrative is that Tom Robinson could not have beaten and raped Mayella because of his withered left arm. The second narrative is that the pattern of Mayella's wounds about her face suggests that she was beaten by a left-handed person; while Tom cannot use his left hand, Bob Ewell is left-handed.

As to the first narrative, it is undisputed that Tom Robinson's left arm was horribly injured when he was a child.[28] If the injury left him incapable of beating and raping Mayella, then he is innocent, there is no probable cause, and Gilmer's prosecution of Tom is improper. There is some question about whether Gilmer knows about Tom's injury before Atticus demonstrates it during the trial.[29] Either way, if Tom's injury destroys probable cause, Gilmer is obligated to stop the prosecution.[30]

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[26] *Id.* at 232-33.

[27] *Id.* at 197.

[28] *Id.* at 212.

[29] One commentator thinks it is clear than neither Gilmer nor Mayella knew of Tom's injury:

> Atticus had a big surprise in store for both Mayella and the prosecutor, Horace Gilmer. Unknown to them (and it's clear from the context of both the book and the movie that they didn't know), Tom had suffered an injury in a cotton gin when he was 12 years old, leaving him without the use of his left hand.

Day, *supra* note 4, at 28-29. Tom's terrible and obvious injury is described in the book:

> He rose to his feet and stood with his right hand on the back of his chair. He looked oddly off balance, but it was not from the way he was standing. His

There is a fundamental problem with this first defense narrative. It is not clear that Tom's condition renders him incapable of beating and raping Mayella. On cross-examination, Gilmer gets Tom to admit that, even with his injury, he is "[s]trong enough to choke the breath out of a woman and sling her to the floor."[31] If Tom might have been able to assault Mayella even with his condition, it certainly is not improper for the prosecution to proceed.

As to the second narrative that Mayella's wounds suggest that she was beaten by a left-handed person, the facts are equally troublesome. The defense depends on a left-handed person being the assailant and upon Bob Ewell being left-handed. Neither, it turns out, is indisputable.

As to Mayella Ewell's wounds requiring a left-handed assailant, Atticus relies on the testimony of Sheriff Tate that Mayella's wounds were predominantly on the right side of her face.[32] He implies that the wounds could have not been struck with the back of the right hand, but offers no proof for that proposition.[33]

As to Bob Ewell being left-handed, in the book the undisputed testimony is that he is ambidextrous—"I can use one hand good as the other"—even though he does not know what the term means.[34]

One commentator addresses both questions, and in doing so suggests that Horace Gilmer evidences more skill than is generally acknowledged. His analysis revolves around Atticus's

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> left arm was fully twelve inches shorter than his right, and hung dead at his side. It ended in a small shriveled hand, and from as far away as the balcony I could see that it was no use to him.

MOCKINGBIRD, *supra* note 1, at 212. It is difficult to imagine that Gilmer—and necessarily Sheriff Tate—does not know of his condition before the trial. It completely strains credulity to imagine that Mayella Ewell, who has lived close to Tom her entire life, is unaware of his condition.

[30] *See* MODEL RULES, *supra* note 19 (stating that prosecutors have a duty to refrain from prosecuting a charge not supported by probable cause and a duty to timely disclose exculpatory information).

[31] MOCKINGBIRD, *supra* note 1, at 224.

[32] *Id.* at 192-93.

[33] *Id.* at 213 ("He blacked your left eye with his right fist?").

[34] *Id.* at 203.

cross-examination of Mayella Ewell and the defense theory that Tom could not have raped Mayella because he has only one good hand.[35] Atticus starts by having Mayella recount how Tom grabbed her around the throat and hit her.[36]

> And then Atticus sprang the trap, showing Mayella that Tom's left hand was useless. Clearly, he hoped she would recant her story, but she didn't. Instead, when pressed as to how Tom could physically have carried out the attack, she barked: "I don't know how he done it, but he done it. . . ." There is no debating that this exchange provided a dramatic plot twist for Harper Lee's story. From the standpoint of effective trial advocacy, however, it was an awful blunder.[37]

Atticus blunders, the commentator claims, because Mayella escapes without his proving clearly and cleanly that she is lying.[38] This leaves room for Gilmer to handle Tom's injury:

> Nothing [Mayella] had said was directly inconsistent with Tom's disability. In fact, as prosecutor Gilmer was later able to demonstrate during his cross-examination of Tom, it is far from unreasonable to think that Tom might have been strong enough to beat and rape Mayella even with his bad left hand and arm.[39]

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[35] Day, *supra* note 4, at 29.

[36] *Id.* ("[Atticus] started by taking her back through the story. She said again that Tom had gotten her 'around the neck cussing and saying dirt.' He'd caught her, choked her, and taken advantage of her. When asked if Tom had hit her, she became confused at first, saying, 'No, I don't recollect if he hit me.' But she quickly came roaring back, screaming, 'I mean yes, he hit me, he hit me.'").

[37] *Id.*

[38] *Id.* ("When you have the goods on an adverse witness, the way Atticus did with Mayella, the last thing you want is for that witness to be able to wiggle loose when you spring the trap. But that's what happened to Atticus. Mayella's testimony may not have been the most credible ever given, but in terms of the risk of getting caught flat out in a lie, she got away clean. Nothing she had said was directly inconsistent with Tom's disability. . . . And while Atticus made much of the fact that Mayella's facial injuries were predominantly to the right side, there's actually no reason why blows from the right hand couldn't have caused these injuries. For Atticus, the winning move wasn't to prove Tom had a bad arm and therefore couldn't have committed the crime; it was to prove that Mayella was a liar. And he needed to prove it so clearly that even a jury stacked against him couldn't miss the point.").

[39] *Id.*

The weakness of the two narratives advanced by Atticus undermines the argument that Horace Gilmer knowingly prosecutes an innocent person. There is probable cause for the prosecution and nothing suggested by Atticus eliminates it. Therefore, while it is certainly clear that the underlying racism of the time and place makes a fair trial impossible, it is nothing of Gilmer's doing.[40] The prosecution is not itself improper.

III. DOES THE PROSECUTOR PLAY TO THE JURY'S RACIST SENTIMENTS?

The second criticism of Horace Gilmer is that he "plays to the racist sentiments of a white Alabama jury."[41] *To Kill a Mockingbird* is set in 1930s Alabama. Bigotry and racism are pervasive. It would be remarkable if Gilmer, an elected official, was not bigoted and racist. For example, the following jury argument in the trial of Tom Robinson was clearly, by our lights, bigoted and racist:

> She has committed no crime, she has merely broken a rigid and time-honored code of our society, a code so severe that whoever breaks it is hounded from our midst as unfit to live with. . . .
>
> . . . What did she do? She tempted a Negro.
>
> She was white, and she tempted a Negro. She did something that in our society is unspeakable: she kissed a black man. Not an old Uncle, but a strong young Negro man. No code mattered to her before she broke it, but it came crashing down on her afterwards.[42]

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[40] Atticus acknowledges that it is highly unlikely that he will be able to win the case. MOCKINGBIRD, *supra* note 1, at 86 ("'Atticus, are we going to win it?' 'No, honey.'"). This is because a jury will not take the word of a black witness over that of a white witness. *Id.* at 100 ("It couldn't be worse, Jack. The only thing we've got is a black man's word against the Ewells'. The evidence boils down to you-did—I-didn't. The jury couldn't possibly be expected to take Tom Robinson's word against the Ewells' . . . .").

[41] Mayer, *supra* note 4, at 86.

[42] MOCKINGBIRD, *supra* note 1, at 232.

While this statement is clearly bigoted and racist, the speaker is not the prosecutor, Horace Gilmer; the speaker is the hero of the story, Atticus Finch.

To be sure, Gilmer's language is occasionally racially offensive to modern readers. Although he refers to Bob Ewell as "Mr. Ewell,"[43] he refers to Tom Robinson as "Robinson"[44] or "boy."[45] However, this type of racially insensitive language is not limited to Gilmer. Atticus also addresses Bob Ewell and Tom Robinson differently, using "Mr. Ewell"[46] and "Tom."[47]

In the book, but not in the film,[48] Gilmer uses racially offensive language, as evidenced by the usage of the word "nigger."[49] However, the same language is used by Atticus,[50] Jem,[51] Scout,[52] Calpurnia,[53] Miss Stephanie,[54] Mrs. Dubose,[55]

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[43] *Id.* at 196-97.

[44] *Id.* at 224.

[45] *Id.*

[46] *Id.* at 200.

[47] *Id.* at 218.

[48] This offensive language is almost completely sanitized in the film. *See generally* FOOTE, *supra* note 3 (including the word "nigger" only six times). Bob Ewell says to Atticus: "Cap'n, I'm sorry they appointed you to defend that nigger that raped my Mayella." *Id.* at 30. Bob Ewell screams "Nigger lover" at Atticus, Scout, and Jem twice as they leave the Robinson's house. *Id.* at 60. At school, Cecil Jacobs, a schoolmate of Scout's, shoves her and says: "Don't play with her. Her daddy defends niggers." *Id.* at 63. This leads Scout to ask her father: "Atticus, do you defend niggers?" *Id.* at 64. Atticus responds: "Of course, I do. And don't say 'nigger,' Scout." *Id.*

[49] *See* MOCKINGBIRD, *supra* note 1, at 224 ("What'd the nigger look like when you got through with him?"). This question refers to the fight, which resulted in Tom Robinson's misdemeanor conviction for disorderly conduct.

[50] *See id.* at 119 ("Son, I have no doubt that you've been annoyed by your contemporaries about me lawing for niggers, as you say . . . .").

[51] *See id.* ("She said you lawed for niggers and trash.").

[52] *See id.* at 75 ("'Jem, I ain't ever heard of a nigger snowman,' I said."); *id.* at 85 ("Do you defend niggers, Atticus?"); *id.* at 86 ("Then why did Cecil say you defended niggers?"); *id.* at 98 ("A nigger-lover."); *id.* at 117-18 ("Jem had probably stood as much guff about Atticus lawing for niggers as had I . . . ."); *id.* at 124 ("'Atticus, . . . what exactly is a nigger-lover?'" . . . 'You aren't really a nigger-lover, then, are you?'"); *id.* at 143 ("Cal, . . . why do you talk nigger-talk to the—to your folks when you know it's not right?").

[53] *See id.* at 135 ("Stop right there, nigger.").

[54] *See id.* at 60-61 ("Shot in the air. Scared him pale, though. Says if anybody sees a white nigger around, that's the one. Says he's got the other barrel waitin' for the next sound he hears in that patch, an' next time he won't aim high, be it dog, nigger, or–Jem *Finch*!").

Heck Tate,[56] Cecil Jacobs,[57] Bob Ewell,[58] Mayella Ewell,[59] Francis,[60] Lula,[61] and Tom Robinson.[62] Moreover, Atticus's criticism of the word is merely that it is "common."[63]

To be meaningful, the criticism of Gilmer on racial grounds must be more than that he reflects the bigotry and racism of his time and place. It must be that he makes choices in the presentation of his case that are affirmatively intended to play to the jury's racism. Although the criticism is cast in terms of Gilmer's cross-examination of Tom Robinson, it is helpful to review all of Gilmer's performance to see if there are indications of racially inappropriate conduct.

A. The Direct of Sheriff Tate

Gilmer's direct examination of Sheriff Heck Tate in the book is unexceptional. The Sheriff is essentially asked to supply a narrative of the events at issue:

"[I]n your own words, Mr. Tate," Mr. Gilmer was saying.

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[55] *See id.* at 117 ("Your father's no better than the niggers and trash he works for!"); *id.* at 124 (featuring Scout quoting Mrs. Dubose as to "our father's nigger-loving propensities").

[56] *See id.* at 191 (featuring Sheriff Tate quoting Bob Ewell's statement that "some nigger'd raped his girl").

[57] *See id.* at 87 ("My folks said your daddy was a disgrace an' that nigger oughta hang from the water-tank!").

[58] *See id.* at 197 ("I seen that black nigger yonder ruttin' on my Mayella!"); *id.* at 200 ("nigger-nest"); *id.* at 203 ("Nothing Atticus asked him after that shook his story, that he'd looked through the window, then ran the nigger off, then ran for the sheriff."); *id.* at 249 ("Too proud to fight, you nigger-lovin' bastard?"); *id.* at 287 ("I ain't touched her, Link Deas, and ain't about to go with no nigger!").

[59] *See id.* at 206 ("I said come here, nigger . . . ."); *id.* at 210 ("There was several niggers around."); *id.* at 214 ("That nigger yonder took advantage of me . . . .").

[60] *See id.* at 94-96 (repeated use of the phrase "nigger-lover").

[61] *See id.* at 135 ("I wants to know why you bringin' white chillun to nigger church.").

[62] *See id.* at 226 ("Like I says before, it weren't safe for any nigger to be in a—fix like that.").

[63] *Id.* at 85 ("Don't say nigger, Scout. That's common."); *see also id.* at 124 ("'Scout,' said Atticus, 'nigger-lover is just one of those terms that don't mean anything—like snot-nose. It's hard to explain—ignorant, trashy people use it when they think somebody's favoring Negroes over and above themselves. It's slipped into usage with some people like ourselves, when they want a common, ugly term to label somebody.'").

> "Well," said Mr. Tate, touching his glasses and speaking to his knees, "I was called—"
>
> "Could you say it to the jury, Mr. Tate? Thank you. Who called you?"
>
> Mr. Tate said, "I was fetched by Bob—by Mr. Bob Ewell yonder, one night—"
>
> "What night, sir?"
>
> Mr. Tate said, "It was the night of November twenty-first. I was just leaving my office to go home when B—Mr. Ewell came in, very excited he was, and said get out to his house quick, some nigger'd raped his girl."
>
> "Did you go?"
>
> "Certainly. Got in the car and went out as fast as I could."
>
> "And what did you find?"
>
> "Found her lying on the floor in the middle of the front room, one on the right as you go in. She was pretty well beat up, but I heaved her to her feet and she washed her face in a bucket in the corner and said she was all right. I asked her who hurt her and she said it was Tom Robinson—"[64]

There is at this point a good hearsay objection, which the Judge seems to invite but which Atticus declines to make.[65] Sheriff Tate continues with his narrative:

> "[I] asked her if he beat her like that, she said yes he had. Asked her if he took advantage of her and she said yes he did. So I went down to Robinson's house and brought him back. She identified him as the one, so I took him in. That's all there was to it."
>
> "Thank you," said Mr. Gilmer.[66]

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[64] *Id.* at 190-91.
[65] *See id.* at 191.
[66] *Id.*

On his cross-examination of Sheriff Tate, Atticus goes into great detail with the witness about Mayella's injuries—a tactical move on his part to set up the narrative that Bob Ewell could have been the perpetrator.[67] Gilmer does not object and declines to ask the Sheriff any questions on redirect.[68]

Gilmer's direct examination of Sheriff Tate is somewhat abbreviated in the film.[69] The viewer is left with the Sheriff's narrative of Bob Ewell's comments and the Sheriff's observations of Mayella Ewell. Gilmer's only line is to thank the Sheriff for his testimony.[70]

There is nothing gratuitous or especially inflammatory in Gilmer's examination of Sheriff Tate. He does not dwell on the race of the individuals nor does he have the Sheriff describe in graphic terms of what Tom Robinson is being accused. He does not have the Sheriff repeat his responses for emphasis. In the hands of a prosecutor intent on inflaming the racial bigotry of the jury, this could have been a very different direct examination.

B. The Direct of Bob Ewell

Gilmer's direct examination of Bob Ewell does not go particularly well, but one senses that it goes badly because Gilmer loses control of his witness, and not as a result of a calculation by the prosecutor. From the start of his testimony, Bob Ewell proves to be a difficult witness and is admonished by the Judge:

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[67] *See id.* at 191-93.

[68] *See id.* at 193.

[69] *Compare* FOOTE, *supra* note 3, at 100, *with* MOCKINGBIRD, *supra* note 1, at 190-91.

[70] FOOTE, *supra* note 3, at 100:

> Tate: On the night of August 21st I was just leaving my office to go home when Bob—Mr. Ewell—came in. Very excited he was, and said to get to his house quick, that his girl had been raped. . . . I got in my car and went out there as fast as I could. She was pretty well beat up. I asked her if Tom Robinson beat her like that, she said yes, he had. Asked her if he took advantage of her and she said yes he did. So I went down to the Robinson's house and brought him back. She identified him as the one, so I took him in. That's all there was to it.
>
> Gilmer: Thank you.

> "Mr. Robert Ewell?" asked Mr. Gilmer.
>
> "That's m'name, cap'n," said the witness.
>
> Mr. Gilmer's back stiffened a little, and I felt sorry for him. . . .
>
> "Are you the father of Mayella Ewell?" was the next question [from Mr. Gilmer].
>
> "Well, if I ain't I can't do nothing about it now, her ma's dead," was the answer.
>
> Judge Taylor stirred. He turned slowly in his swivel chair and looked benignly at the witness. "Are you the father of Mayella Ewell?" he asked, in a way that made the laughter below us stop suddenly.
>
> "Yes sir," Mr. Ewell said meekly.
>
> Judge Taylor went on in tones of good will: "This the first time you've ever been in court? I don't recall ever seeing you here." At the witness's affirmative nod he continued, "Well, let's get something straight. There will be no more audibly obscene speculations on any subject from anybody in this courtroom as long as I'm sitting here. Do you understand?"
>
> Mr. Ewell nodded, but I don't think he did. Judge Taylor sighed and said, "All right, Mr. Gilmer?"[71]

Gilmer then continues his examination of Bob Ewell, and seemingly invites further difficulty with this uncontrolled witness by asking open-ended questions calling for narrative answers:

> "Mr. Ewell, would you tell us in your own words what happened on the evening of November twenty-first, please?"
>
> . . . .
>
> "Well, the night of November twenty-one I was comin' in from the woods with a load o'kindlin' and just as I got to the fence I heard Mayella screamin' like a stuck hog inside the house—"

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[71] MOCKINGBIRD, *supra* note 1, at 196-97.

> . . . .
>
> "What time was it, Mr. Ewell?"
>
> "Just 'fore sundown. Well, I was sayin' Mayella was screamin' fit to beat Jesus—" . . . .
>
> "Yes? She was screaming?" said Mr. Gilmer.
>
> Mr. Ewell looked confusedly at the judge. "Well, Mayella was raisin' this holy racket so I dropped m'load and run as fast as I could but I run into th' fence, but when I got distangled I run up to th' window and I seen—" Mr. Ewell's face grew scarlet. He stood up and pointed his finger at Tom Robinson. "—I seen that black nigger yonder ruttin' on my Mayella!"[72]

When Bob Ewell uses that particularly inflammatory turn of phrase, the courtroom erupts and the Judge has to gavel the proceedings back to order.[73] Atticus makes a request that the courtroom be cleared, which the Judge denies and follows with a caution to the gallery and an admonition to the witness: "Mr. Ewell, you will keep your testimony within the confines of Christian English usage, if that is possible. Proceed, Mr. Gilmer."[74]

While Gilmer calls the disruptive witness, and it could be argued that his failure to control his witness causes the disruption, Gilmer plays no affirmative part in the disruptive behavior. Scout confirms Gilmer's passive role in the narrative following the admonition:

> Mr. Gilmer and Atticus exchanged glances. Atticus was sitting down again, his fist rested on his cheek and we could not see his face. Mr. Gilmer looked rather desperate. A question from Judge Taylor made him relax: "Mr. Ewell, did you see the defendant having sexual intercourse with your daughter?"

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[72] *Id.* at 197.

[73] *Id.*

[74] *Id.* at 199.

"Yes, I did."[75]

Following the disruption, Gilmer's direct examination of Bob Ewell is more tightly controlled and less narrative.

"You say you were at the window?" asked Mr. Gilmer.

"Yes sir."

"How far is it from the ground?"

" 'bout three foot."

"Did you have a clear view of the room?"

"Yes sir."

"How did the room look?"

"Well, it was all slung about, like there was a fight."

"What did you do when you saw the defendant?"

"Well, I run around the house to get in, but he run out the front door just ahead of me. I sawed who he was, all right. I was too distracted about Mayella to run after'im. I run in the house and she was lyin' on the floor squallin'—"

"Then what did you do?"

"Why, I run for Tate quick as I could. I knowed who it was, all right, lived down yonder in that nigger-nest, passed the house every day. Jedge, I've asked this county for fifteen years to clean out that nest down yonder, they're dangerous to live around 'sides devaluin' my property—"

"Thank you, Mr. Ewell," said Mr. Gilmer hurriedly.[76]

Atticus's cross-examination of Bob Ewell proceeds without interruption from Gilmer for some time, until the prosecutor

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[75] *Id.*

[76] *Id.* at 199-200.

makes a relevancy objection to Atticus's inquiry as to whether Ewell is literate:

> "Mr. Ewell, can you read and write?"
>
> Mr. Gilmer interrupted. "Objection," he said. "Can't see what witness's literacy has to do with the case, irrelevant'n'immate -rial."
>
> Judge Taylor was about to speak but Atticus said, "Judge, if you'll allow the question plus another one you'll soon see."
>
> "All right, let's see," said Judge Taylor, "but make sure we see, Atticus. Overruled."
>
> Mr. Gilmer seemed as curious as the rest of us as to what bearing the state of Mr. Ewell's education had on the case.[77]

Atticus then shows that Bob Ewell writes with his left hand, establishing the factual predicate for him to argue that Mayella's injuries were caused by her father, not Tom Robinson.[78] On re-direct, Gilmer attempts to undermine Atticus's point: "Mr. Gilmer asked him one more question. 'About your writing with your left hand, are you ambidextrous, Mr. Ewell?' 'I most positively am not, I can use one hand good as the other. One hand good as the other,' he added, glaring at the defense table."[79]

Gilmer's direct examination of Bob Ewell in the film was substantially shortened from the account in the book, in ways that make understanding the prosecutor more difficult.[80] The film mirrors the book in one respect: Gilmer addresses the witness as "Mr. Ewell,"[81] and as in the book, his direct in the film is open-ended, asking Bob, "Mr. Ewell, will you tell us just in your own words what happened August 21st?"[82] Bob's narrative takes him to the point where he claims he saw Tom Robinson with "my

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[77] *Id.* at 202.

[78] *Id.* at 202-03.

[79] *Id.* at 203.

[80] *Compare* FOOTE, *supra* note 3, at 102-04, *with* MOCKINGBIRD, *supra* note 1, at 196-200.

[81] FOOTE, *supra* note 3, at 103.

[82] *Id.*

Mayella."[83] Gilmer asks a second open-ended question: "What did you do when you saw the defendant?"[84] Following Bob's second narrative, Gilmer concludes by thanking him for his testimony: "Thank you, Mr. Ewell."[85]

The differences between the two versions, however, are significant. The book's initial interplay with Gilmer, in which Bob Ewell establishes himself as a difficult witness and is admonished by the Judge, is omitted from the film.[86] Bob's narrative is similar, with the important exception that the book's construction, "—I seen that black nigger yonder ruttin' on my Mayella!"[87] becomes "I seen him with my Mayella"[88] in the film. Importantly, from the standpoint of understanding the role of Horace Gilmer, the book's narration, in which Scout observed that Gilmer "looked rather desperate,"[89] is omitted from the film.[90] The film also omits Bob's concluding remarks, which in the book cause Gilmer evident discomfort. [91] It should also be noted that throughout his examination of Bob Ewell in the film, Horace Gilmer's body language is at odds with the portrayal in the book. [92] Gilmer stands next to the witness throughout the testimony in a posture that suggests rapt attention.[93] At the conclusion of the testimony, Gilmer turns to the jury as if to suggest agreement, before he concludes, "Um huh, thank you Mr. Ewell" in a way that conveys the impression of a lawyer who has gotten what he needs from a witness to make the case, not, as in the book, a lawyer whose witness has just made a statement that is unhelpful. [94] The prosecutor in the film looks anything but desperate.[95]

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[83] *Id.*
[84] *Id.* at 104.
[85] *Id.*
[86] *See id.* at 103-04.
[87] MOCKINGBIRD, *supra* note 1, at 197.
[88] FOOTE, *supra* note 3, at 103.
[89] MOCKINGBIRD, *supra* note 1, at 199.
[90] *See* FOOTE, *supra* note 3, at 103-04.
[91] *Compare id.* at 104, *with* MOCKINGBIRD, *supra* note 1, at 200.
[92] *See* MOCKINGBIRD film, *supra* note 3.
[93] *See id.*
[94] *See id.*
[95] *See id.*

The film also changes the cross-examination of Bob Ewell in some significant ways. The prosecutor's relevancy objection to Atticus's inquiry about Ewell's literacy is omitted,[96] as is Scout's observation that "Mr. Gilmer seemed as curious as the rest of us as to what bearing the state of Mr. Ewell's education had on the case."[97] These omitted elements are potentially important to the argument that the prosecutor knew that Bob, not Tom, was guilty, as Bob was left-handed and Tom was injured.

Further, the film omits Gilmer's redirect in which he casts significant doubt on Atticus's theory by suggesting that Bob Ewell is not left-handed, but rather ambidextrous, even if Ewell does not know the meaning of the term.

As the book makes clear, Horace Gilmer loses control of Bob Ewell's testimony and is discomforted by elements of it. Had he wished to appeal to the racial prejudice of the jury, the direct examination would have proceeded quite differently.

C. The Direct of Mayella Ewell

Gilmer's direct examination of Mayella Ewell in the book is more controlled and tighter than that of her father, in part because Mayella does not respond to Gilmer's request for narrative:

> Mr. Gilmer asked Mayella to tell the jury in her own words what happened on the evening of November twenty-first of last year, just in her own words, please.
>
> Mayella sat silently.
>
> "Where were you at dusk on that evening?" began Mr. Gilmer patiently.
>
> "On the porch."
>
> "Which porch?"
>
> "Ain't but one, the front porch."

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[96] *See id.*

[97] MOCKINGBIRD, *supra* note 1, at 202.

> "What were you doing on the porch?"
>
> "Nothin'."
>
> Judge Taylor said, "Just tell us what happened. You can do that, can't you?"
>
> Mayella stared at him and burst into tears.[98]

There ensues an exchange between Mayella and Judge Taylor about Mayella's fear that Atticus will attack her on cross-examination.[99] After Judge Taylor's reassurances, Mayella returns to her testimony:

> Mollified, Mayella gave Atticus a final terrified glance and said to Mr. Gilmer, "Well sir, I was on the porch and—and he came along and, you see, there was this old chiffarobe in the yard Papa'd brought in to chop up for kindlin'—Papa told me to do it while he was off in the woods but I wadn't feelin' strong enough then, so he came by—"
>
> "Who is 'he'?"
>
> Mayella pointed to Tom Robinson. "I'll have to ask you to be more specific, please," said Mr. Gilmer. "The reporter can't put down gestures very well."
>
> "That'n yonder," she said. "Robinson."
>
> "Then what happened?"
>
> "I said come here, nigger, and bust up this chiffarobe for me, I gotta nickel for you. He coulda done it easy enough, he could. So he come in the yard an' I went in the house to get him the nickel and I turned around an 'fore I knew it he was on me. Just run up behind me, he did. He got me round the neck, cussin' me an' sayin' dirt—I fought'n'hollered, but he had me round the neck. He hit me agin an' agin—"
>
> Mr. Gilmer waited for Mayella to collect herself: she had twisted her handkerchief into a sweaty rope; when she opened

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[98] *Id.* at 204-05.

[99] *See id.* at 205.

> it to wipe her face it was a mass of creases from her hot hands. She waited for Mr. Gilmer to ask another question, but when he didn't she said, "—he chunked me on the floor an' choked me'n took advantage of me."
>
> "Did you scream?" asked Mr. Gilmer. "Did you scream and fight back?"
>
> "Reckon I did, hollered for all I was worth, kicked and hollered loud as I could."
>
> "Then what happened?"
>
> "I don't remember too good, but next thing I knew Papa was in the room a'standin' over me hollerin' who done it, who done it? Then I sorta fainted an' the next thing I knew Mr. Tate was pullin' me up offa the floor and leadin' me to the water bucket."[100]

Gilmer concludes his direct examination of Mayella by confirming the most basic elements of the charge:

> "You say you fought him off as hard as you could? Fought him tooth and nail?" asked Mr. Gilmer.
>
> "I positively did," Mayella echoed her father.
>
> "You are positive that he took full advantage of you?"
>
> Mayella's face contorted, and I was afraid that she would cry again. Instead, she said, "He done what he was after."
>
> Mr. Gilmer called attention to the hot day by wiping his head with his hand. "That's all for the time being," he said pleasantly, "but you stay there. I expect big bad Mr. Finch has some questions to ask you."[101]

Gilmer's questioning does not seem calculated to overemphasize the inflammatory aspects of the case, racial or otherwise.

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[100] *Id.* at 205-06.
[101] *Id.* at 206-07.

Atticus's cross-examination of Mayella Ewell is difficult. At the start, Mayella accuses Atticus of mocking and making fun of her.[102] Atticus then leads Mayella through questions concerning her family life.[103] Next, he questions her about her allegations against Tom Robinson, leading to his theory that Tom could not physically have choked Mayella while beating her.[104]

Throughout the potentially devastating cross-examination of Mayella, Gilmer is silent.[105] He interposes only one ineffective objection, which comes right after the dramatic moment when Atticus has Tom Robinson stand up to show his withered arm:

> Atticus said, "Is this the man who raped you?"
>
> "It most certainly is."
>
> Atticus's next question was one word long. "How?"
>
> Mayella was raging. "I don't know how he done it, but he done it—I said it all happened so fast I—"
>
> "Now let's consider this calmly—" began Atticus, but Mr. Gilmer interrupted with an objection: he was not irrelevant or immaterial, but Atticus was browbeating the witness.
>
> Judge Taylor laughed outright. "Oh sit down, Horace, he's doing nothing of the sort. If anything, the witness's browbeating Atticus."[106]

Although Gilmer finds an opportunity to develop his points on re-direct, he is thwarted by Mayella's refusal to answer any more questions.[107] At that point, the prosecution rests.

Gilmer's lengthy direct examination of Mayella Ewell in the book is significantly changed in the film.[108] It is reduced to a

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[102] *Id.* at 207.

[103] *Id.* at 208-10.

[104] *Id.* at 210-14.

[105] *See id.*

[106] *Id.* at 212.

[107] *Id.* at 214-15 ("She answered no more questions, even when Mr. Gilmer tried to get her back on the track.").

[108] *Compare* FOOTE, *supra* note 3, at 106, *with* MOCKINGBIRD, *supra* note 1, at 204-06.

single question: "Now, Miss Mayella, you just tell us what happened."[109] After Mayella's response, the prosecutor hands the witness off to Atticus: "Thank you. Your witness, Atticus."[110]

An interesting visual cue in the film, which is not suggested in the book, occurs when Mayella is called to the stand. Clearly she is nervous, and, as she makes her way to the front of the courtroom, Gilmer briefly puts his hand on her arm as if to reassure her.[111] Then, as Mayella takes the oath, the prosecutor glances from Mayella to the Bible, then to the clerk administering the oath, and nods to Mayella as she answers in the affirmative.[112]

There are also differences between the book and the film as to Gilmer's role while Atticus cross-examines Mayella. The film omits Gilmer's objection that Atticus was browbeating the witness when Atticus asks Mayella how Tom could have raped her with his injured left arm.[113] The film similarly excludes Gilmer's attempt at redirect examination.[114] After the examination and cross-examination of Mayella, Gilmer simply says "The State rests, Judge."[115]

One can hardly imagine a situation into which racist overtones could be injected more easily than a 1930s Alabama courtroom where a prosecutor is examining a white woman who has accused a black defendant of rape. However, the direct examination by Horace Gilmer in this case contains none of the racist imagery one might expect if the prosecutor were appealing to the racist sentiments of the jury.

D. The Cross of Tom Robinson

The final vignette involving prosecutor Horace Gilmer is the cross-examination of Tom Robinson, in which he is accused of "play[ing] to the racist sentiments of a white Alabama jury."[116]

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[109] FOOTE, *supra* note 3, at 106.
[110] *Id.*
[111] MOCKINGBIRD film, *supra* note 3, at 1:15:44.
[112] *Id.* at 1:16:03.
[113] *See* FOOTE, *supra* note 3, at 109-11.
[114] *See id.* at 111.
[115] *Id.*
[116] Mayer, *supra* note 4, at 86.

Gilmer starts his cross-examination of Tom Robinson by reviewing his prior disorderly conduct conviction,[117] which Atticus originally raises.[118] When Gilmer raises the conviction, Atticus makes a "tired"[119] objection that is not sustained:

> Atticus raised his head. "It was a misdemeanor and it's in the record, Judge." I thought he sounded tired.
>
> "Witness'll answer, though," said Judge Taylor, just as wearily.[120]

This is appropriate argument and not racially charged.

Without objection, Gilmer next establishes, by Tom's own admission, that Tom could have physically overpowered Mayella.

> "Robinson, you're pretty good at busting up chiffarobes and kindling with one hand, aren't you?"
>
> "Yes suh, I reckon so."
>
> "Strong enough to choke the breath out of a woman and sling her to the floor?"
>
> "I never done that, suh."
>
> "But you are strong enough to?"
>
> "I reckon so, suh."[121]

Although this evidence is damaging, it is neither inappropriate nor racially charged.

Thereupon Gilmer attempts, without success and without objection, to establish premeditation and motive.

> "Had your eye on her a long time, hadn't you, boy?"
>
> "No suh, I never looked at her."

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[117] MOCKINGBIRD, *supra* note 1, at 224.
[118] *Id.* at 217.
[119] *Id.* at 224.
[120] *Id.*
[121] *Id.*

"Then you were mighty polite to do all that chopping and hauling for her, weren't you, boy?"

"I was just tryin' to help her out, suh."

"That was mighty generous of you, you had chores at home after your regular work, didn't you?"

"Yes suh."

"Why didn't you do them instead of Miss Ewell's?"

"I done 'em both, suh."

"You must have been pretty busy. Why?"

"Why what, suh?"

"Why were you so anxious to do that woman's chores?"

Tom Robinson hesitated, searching for an answer. "Looked like she didn't have nobody to help her, like I says—"

"With Mr. Ewell and seven children on the place, boy?"

"Well, I says it looked like they never help her none—"

"You did all this chopping and work from sheer goodness, boy?"

"Tried to help her, I says."

Mr. Gilmer smiled grimly at the jury. "You're a mighty good fellow, it seems—did all this for not one penny?"

"Yes suh. I felt right sorry for her, she seemed to try more'n the rest of 'em—"

"*You* felt sorry for *her*, you felt *sorry* for her?" Mr. Gilmer seemed ready to rise to the ceiling.

The witness realized his mistake and shifted uncomfortably in the chair. But the damage was done. Below us, nobody

> liked Tom Robinson's answer. Mr. Gilmer paused a long time to let it sink in.[122]

Certainly, there are racial elements to this exchange. For Tom to say that he feels sorry for Mayella is especially prejudicial in that time and place because Tom is black and Mayella is white. However, it is unclear whether Gilmer expects Tom's response, for he seems surprised by Tom's statement. Gilmer's response—"*You* felt sorry for *her*, you felt *sorry* for her?"[123]—can be seen as the product of surprise, not calculation.

Gilmer finishes the part of his cross-examination to which the reader is privy—Scout leaves the courtroom with Dill before Gilmer is finished[124]—by mounting without objection a fairly straightforward comparison of Mayella's testimony with that of Tom.

> "Now you went by the house as usual, last November twenty-first," he said, "and she asked you to come in and bust up a chiffarobe?"
>
> "No suh."
>
> "Do you deny that you went by the house?"
>
> "No suh—she said she had somethin' for me to do inside the house—"
>
> "She says she asked you to bust up a chiffarobe, is that right?"
>
> "No suh, it ain't."
>
> "Then you say she's lying, boy?"
>
> Atticus was on his feet, but Tom Robinson didn't need him. "I don't say she's lyin', Mr. Gilmer, I say she's mistaken in her mind."

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[122] *Id.* at 224-25.
[123] *Id.* at 225.
[124] *Id.* at 226.

> To the next ten questions, as Mr. Gilmer reviewed Mayella's version of events, the witness's steady answer was that she was mistaken in her mind.[125]

It is not unusual for a prosecutor to question a defendant intensely about conflicts between the testimony of other witnesses and that of the defendant. However, it is also true that getting a black male defendant in that setting to accuse a white woman of lying would have special meaning.

Gilmer concludes the cross-examination of Tom by reviewing the circumstances under which Tom fled from the Ewell house:

> "Didn't Mr. Ewell run you off the place, boy?"
>
> "No suh, I don't think he did."
>
> "Don't think, what do you mean?"
>
> "I mean I didn't stay long enough for him to run me off."
>
> "You're very candid about this, why did you run so fast?"
>
> "I says I was scared, suh."
>
> "If you had a clear conscience, why were you scared?"
>
> "Like I says before, it weren't safe for any nigger to be in a—fix like that."
>
> "But you weren't in a fix—you testified that you were resisting Miss Ewell. Were you so scared that she'd hurt you, you ran, a big buck like you?"
>
> "No suh, I's scared I'd be in court, just like I am now."
>
> "Scared of arrest, scared you'd have to face up to what you did?"
>
> "No suh, scared I'd hafta face up to what I didn't do."
>
> "Are you being impudent to me, boy?"

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[125] *Id.* at 225-26.

"No suh, I didn't go to be."[126]

This exchange has a clear racial overlay, but not one that Gilmer seems to emphasize.

Gilmer's cross of Tom in the film is less extensive than in the book, but is nevertheless longer than the other parts of his performance.[127] The film omits the initial exchange between Gilmer and Tom about Tom's disorderly conduct conviction.[128] As to the critical question of whether Tom could have physically overpowered Mayella, the dialogue in the film is nearly identical to that in the book.[129] Gilmer's most problematical statement—where he expresses surprise that Tom felt sorry for Mayella—is somewhat less damaging in the film than in the book.[130]

The remainder of Gilmer's cross-examination of Tom in the book—where he attempts and fails to get Tom to say that Mayella is lying, asks why Tom ran, and accuses Tom of being "impudent"—is omitted from the film.[131]

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[126] *Id.* at 226.

[127] *See* MOCKINGBIRD film, *supra* note 3.

[128] *See* FOOTE, *supra* note 3, at 115.

[129] *Compare* MOCKINGBIRD, *supra* note 1, at 224, *with* FOOTE, *supra* note 3, at 115.

> "Robinson, you're pretty good at bustin' up chiffarobes and kindlin' with one hand, aren't you? Strong enough to choke the breath out of a woman and sling her to the floor?"
>
> "I never done that, suh."
>
> "But you're strong enough to."
>
> "I reckon so, suh."

FOOTE, *supra* note 3, at 115.

[130] *Compare* MOCKINGBIRD, *supra* note 1, at 224-25, *with* FOOTE, *supra* note 3, at 115.

> "Why were you so anxious to do that woman's chores?"
>
> "Looks like she didn't have nobody to help her, like I says—"
>
> "With Mr. Ewell and seven children on the place. You did all this choppin' and work from sheer goodness, boy? You're a mighty good fellow it seems. Did all this for not one penny?"
>
> "Yes, suh. I felt right sorry for her, she seemed—"
>
> "You felt sorry for her, a white woman . . . you felt sorry for her?"

FOOTE, *supra* note 3, at 115.

[131] *See* FOOTE, *supra* note 3, at 115-17.

Readers should come to their own conclusions as to whether Gilmer's questioning of Tom Robinson is inappropriate because of the racial overlays. Taken as a whole, however, Gilmer examines his witnesses and cross-examines the defendant in a potentially explosive case without being especially unfair or overly theatrical. He seems, as Scout observes, reluctant in his role.[132]

In the end, the same commentator who suggests that Gilmer's cross-examination of Tom Robinson "plays to the racist sentiments of a white Alabama jury"[133] allows that "even his racist-impassioned cross-examination would have been commonplace in the deep South in the 1930s, probably more brutal in the hands of a more vicious individual."[134]

IV. THE HEIGHTENED DUTIES OF TIME AND PLACE

The underlying problem of *To Kill a Mockingbird* is that, for reasons of racial prejudice, the justice system in Alabama in the 1930s was incapable of giving a fair trial to a black man accused of raping a white woman.[135] Beyond not playing to the racist sentiments of the jury, what are the heightened duties of prosecutor Horace Gilmer, Judge John Taylor, and defense counsel Atticus Finch when faced with such a deeply flawed justice system?

It is a question of contemporary relevance, for if Alabama in the 1930s was something of a limiting case, it is also true that our current justice system contains elements of pervasive racial

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[132] MOCKINGBIRD, *supra* note 1, at 215 ("There had been no lengthy debates between Atticus and Mr. Gilmer on any points; Mr. Gilmer seemed to be prosecuting almost reluctantly; witnesses had been led by the nose as asses are, with few objections.").

[133] Mayer, *supra* note 4, at 86.

[134] *Id.* (footnote omitted).

[135] The sequel contains a reference to a case tried by Atticus, which is apparently the original version of the Tom Robinson case in *To Kill a Mockingbird*, with one surprising twist. *See* WATCHMAN, *supra* note 1, at 109-10. The narrative indicates the near impossibility of getting a fair trial of a black man accused of raping a white woman. *Id.* "Atticus took his career in his hands, made good use of a careless indictment, took his stand before a jury, and accomplished what was never before or afterwards done in Maycomb County: he won an acquittal for a colored boy on a rape charge." *Id.* Of course, in *To Kill a Mockingbird* Tom Robinson is convicted, not acquitted.

inequality. How we ought to respond to those elements may be informed by how we believe the lawyers in *To Kill a Mockingbird* should have responded, and how lawyers in real cases in 1930s Alabama actually responded, to the much greater racial inequalities of their time.

What are the additional heightened obligations of Judge John Taylor, prosecutor Horace Gilmer, and defense counsel Atticus Finch? I would suggest there are four: (1) to ensure the physical safety of black defendants, (2) to ensure black defendants have competent legal representation, (3) to challenge the mechanisms of racial bias within the justice system, and (4) to strive to secure individual justice for black defendants even at personal cost to themselves.

A. To Ensure the Physical Safety of Black Defendants

Surely the initial heightened obligation of the lawyers in *To Kill a Mockingbird* is to ensure the physical safety of the defendant Tom Robinson. At that time and place, protecting a black defendant accused of sexually assaulting a white woman from lynching was not an idle concern. In 1930, twenty-one people were lynched in the United States, and all but one of them were black.[136] Almost half were accused of rape or attempted rape.[137] One black man, Esau Robinson, was lynched in Alabama.[138]

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[136] ARTHUR F. RAPER, THE TRAGEDY OF LYNCHING 3 (1933).

[137] *Id.* at 4. Of the twenty-one, eight were accused of rape and two of attempted rape. *Id.* Five were accused of murder. *Id.*

[138] *Id.* at 59. Robinson was lynched near Emelle, Alabama, in Sumter County on July 4, 1930, in a way very different from the subdued events in the book and film. *Id.* at 59-61. Esau had a disagreement with Clarence Boyd over a used $3.50 automobile battery. *Id.* at 59-60. A melee between the Boyd and Robinson families left Clarence's uncle dead, although not at the hand of Esau. *Id.* at 60. Nevertheless, Esau was seized by a mob and tied to a post. *Id.* at 61. The Sheriff, having been informed that Esau was not the killer, abandoned him to a mob of almost fifty people, who shot and lynched him. *Id.* An editorial in a local newspaper placed blame for the events surrounding the lynching of Esau Robinson:

> The Robinson family that started the trouble over the small debt for a motor car battery is composed of blue-eyed mulattoes, a class that do not have the sympathy and coöperation of the full blooded Negroes. One of the Robinsons recently took a trip to Chicago where he became acquainted with gangster

The special obligation to ensure the defendant's safety is acknowledged initially when Tom is moved away from Maycomb for the period before trial.[139] It becomes an important element in the story when a group of farmers from Old Sarum comes to the jail where Tom Robinson is being held with the intention of lynching him. It is a remarkably subdued attempted lynching.[140]

The group confronts Atticus late at night in front of the county jail in which Tom Robinson is asleep. Speaking "in near-whispers" the men speak with Atticus:

> "He in there, Mr. Finch?" a man said.
>
> "He is," we heard Atticus answer, "and he's asleep. Don't wake him up."
>
> . . . .
>
> "You know what we want," another man said. "Get aside from the door, Mr. Finch."[141]

The confrontation ends when Jem, Scout, and Dill appear at the jail and Scout engages Mr. Walter Cunningham in conversation.

> "Don't you remember me, Mr. Cunningham? I'm Jean Louise Finch. You brought us some hickory nuts one time, remember?" . . . .

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operations, and later returned home with the evident intention of putting them in practice.

Id. at 66. "As a matter of fact, none of the Robinsons, the investigator was assured, had ever been in Chicago." *Id.* at 66 n.1.

139 MOCKINGBIRD, *supra* note 1, at 166.

140 *See id.* at 172-77; FOOTE, *supra* note 3, at 92-97. An oddity in the lynching scene in *To Kill a Mockingbird* is that the task of resisting the lynch mob is left to the defense attorney and his children, and not the prosecutor and judge. Both the book and the film indicate that Sheriff Tate would have been involved in defending Tom Robinson but that he had been lured by the lynch mob to another part of the county. *See* MOCKINGBIRD, *supra* note 1, at 173; FOOTE, *supra* note 3, at 93-94.

141 MOCKINGBIRD, *supra* note 1, at 172-73; *see also* FOOTE, *supra* note 3, at 93:

> "He in there, Mr. Finch?"
>
> "He is. And he's asleep. Don't wake him."
>
> "You know what we want. Get aside fro [sic] the door Mr. Finch."

> "I go to school with Walter," I began again. "He's your boy, ain't he? Ain't he, sir?"
>
> Mr. Cunningham was moved to a faint nod. He did know me, after all.
>
> "He's in my grade," I said, "and he does right well. He's a good boy," I added, "a real nice boy. We brought him home for dinner one time. Maybe he told you about me, I beat him up one time but he was real nice about it. Tell him hey for me, won't you?"
>
> . . . .
>
> "I'll tell him you said hey, little lady," he said.
>
> Then he straightened up and waved a big paw. "Let's clear out," he called. "Let's get going, boys."
>
> As they had come, in ones and twos the men shuffled back to their ramshackle cars. Doors slammed, engines coughed, and they were gone.[142]

Although Tom Robinson is saved from lynching, he is ultimately shot and killed while in police custody after the trial.[143]

If the initial heightened obligation of lawyers in 1930s Alabama was to ensure the physical safety of black defendants, the lawyers of *To Kill a Mockingbird* deserve credit for being fortunate, if not especially conscientious.

B. To Ensure Black Defendants Have Competent Legal Representation

The second heightened obligation of lawyers in a racially discriminatory system is to ensure that black defendants have competent counsel. In *To Kill a Mockingbird*, Judge Taylor asks Atticus to take Tom Robinson's case and Atticus agrees. Although he does not want the case, Atticus sees it as his duty to undertake

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[142] MOCKINGBIRD, *supra* note 1, at 175-76; *see also* FOOTE, *supra* note 3, at 96-97.

[143] MOCKINGBIRD, *supra* note 1, at 269-70.

the defense.[144] Judge Taylor grants a continuance at Atticus's request, giving him time to prepare for trial.[145]

Atticus receives praise for accepting the appointment to represent Tom Robinson. The praise is deserved, given the record of actual cases in that time and place where black defendants were denied competent counsel.[146]

If the second heightened obligation of lawyers in 1930s Alabama was to ensure that black defendants had competent counsel, the lawyers of *To Kill a Mockingbird* deserve credit for providing Tom Robinson excellent counsel. Judge Taylor could have appointed an incompetent attorney to defend Tom Robinson, but he did not.[147] Atticus could have declined Judge Taylor's request, but he did not.

C. To Challenge the Mechanisms of Racial Bias Within the Justice System

The third heightened obligation of lawyers in a racially discriminatory system is to challenge the mechanisms of racial bias within the justice system. In *To Kill a Mockingbird*, Atticus explains to his brother why Tom Robinson cannot possibly be acquitted: "It couldn't be worse, Jack. The only thing we've got is a black man's word against the Ewells'. The evidence boils down to you-did—I-didn't. The jury couldn't possibly be expected to take Tom Robinson's word against the Ewells' . . . ."[148]

Unstated by Atticus is the reason a jury couldn't be expected to take a black's word against a white man's: Alabama juries at that time systematically excluded blacks. There is no indication in the story that Atticus plans to appeal Tom's conviction based on the racially exclusionary jury pool, and there is certainly nothing in the story about Atticus preserving the jury pool error for appeal.

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[144] *Id.* at 86; *see also id.* at 100 ("You know, I'd hoped to get through life without a case of this kind, but John Taylor pointed at me and said, 'You're It.'").

[145] *Id.* at 86.

[146] *See infra* Part V.B.

[147] MOCKINGBIRD, *supra* note 1, at 247. Miss Maudie asks Jem, "Did it ever strike you that Judge Taylor naming Atticus to defend that boy was no accident? That Judge Taylor might have had his reasons for naming him?" *Id.*

[148] *Id.* at 100.

Indeed, in the sequel to *To Kill a Mockingbird*, Atticus connives to keep the issue of the exclusion of blacks from juries from being raised. This happens when a young black man, the grandson of Calpurnia and son of Zebo, drives recklessly and kills a white man. Atticus agrees to take the case, and explains to his law partner and Scout why he is willing:

> "Hank, I suspect when we know all the facts in the case the best that can be done for the boy is for him to plead guilty. Now, isn't it better for us to stand up with him in court than to have him fall into the wrong hands?"
>
> A smile spread slowly across Henry's face. "I see what you mean, Mr. Finch."
>
> "Well, I don't," said Jean Louise. "What wrong hands?"
>
> Atticus turned to her. "Scout, you probably don't know it, but the NAACP-paid lawyers are standing around like buzzards down here waiting for things like this to happen . . . ."[149]

Atticus then explains why he does not want the NAACP lawyers to have the case. It is not directly because they are black; it is because of what he fears they would do instead of his plan to plead guilty:

> "You mean colored lawyers?"
>
> Atticus nodded. "Yep. We've got three or four in the state now. They're mostly in Birmingham and places like that, but circuit by circuit they watch and wait, just for some felony committed by a Negro against a white person—you'd be surprised how quick they find out—in they come and . . . well, in terms you can understand, they demand Negroes on the juries in such cases. They subpoena the jury commissioners, they ask the judge to step down, they raise every legal trick in their books—and they have 'em aplenty—they try to force the judge into error. Above all else, they try to get the case into a Federal court where they know the cards are stacked in their favor. It's already happened in our next-door-neighbor circuit,

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[149] WATCHMAN, *supra* note 1, at 148-49.

> and there's nothing in the books that says it won't happen here."
>
> Atticus turned to Henry. "So that's why I say we'll take his case if he wants us."[150]

If the third heightened obligation of lawyers in 1930s Alabama was to challenge the mechanisms of racial bias within the justice system, the lawyers of *To Kill a Mockingbird* failed because they did not challenge the exclusion of blacks from the jury rolls.

D. To Strive to Secure Individual Justice for Black Defendants Even at Personal Cost

The final heightened obligation of lawyers in a racially discriminatory system is to strive for individual justice for black defendants even at personal cost to themselves. In *To Kill a Mockingbird*, there are indications that Atticus may suffer personal injury for accepting Judge Taylor's request that he defend Tom Robinson. His children are harassed by their contemporaries.[151] His friends suggest his representation of Tom Robinson could cost him everything.[152] His children worry about his physical safety.[153] These fears are well-grounded; in the climax of the book, Bob Ewell attempts to murder Jem.[154]

If the final heightened obligation of lawyers in 1930s Alabama was to strive to secure individual justice for black defendants even at personal cost, the lawyers of *To Kill a Mockingbird* fulfilled their duty.

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[150] *Id.* at 149.

[151] *See* MOCKINGBIRD, *supra* note 1, at 119 ("Son, I have no doubt that you've been annoyed by your contemporaries about me lawing for niggers, as you say . . . .").

[152] *See id.* at 166 ("'[I] don't see why you touched it in the first place,' Mr. Link Deas was saying. 'You've got everything to lose from this, Atticus. I mean everything.'").

[153] *See id.* at 168. Jem admits to Scout, "[I'm] [s]cared about Atticus. Somebody might hurt him." *Id.*; *see also id.* at 250 ("Atticus discovered how deeply frightened we were. . . . 'What's bothering you, son?' Jem came to the point: 'Mr. Ewell. . . . We're scared for you, and we think you oughta do something about him.'").

[154] *Id.* at 301-03.

V. FULFILLING THE HEIGHTENED DUTIES OF TIME AND PLACE: SCOTTSBORO

The lawyers in *To Kill a Mockingbird* fulfilled some, but by no means all, of their heightened obligations. There is an actual case from the same time and place, with the same racially charged elements, in which the lawyers made a better showing. In the Scottsboro case, nine black teenagers were accused of raping two white women in Alabama in 1931.[155]

The Scottsboro case arose from an incident that allegedly occurred in March of 1931 when groups of black and white youths fought on board a moving freight train on the Tennessee-Alabama border.[156] Some of the whites were forced from the train and reported the incident to a railroad official.[157] He wired ahead and a deputized group of armed white men stopped the train and took nine black youths into custody.[158] The situation changed when two white girls who had been on the train claimed that the black youths had raped them.[159] After summary trials with incompetent defense counsel, eight of the nine black defendants were convicted—a mistrial was declared in the case of one twelve-year old when one juror held out for life imprisonment instead of the death penalty.[160]

The convictions and death sentences were upheld by the Alabama Supreme Court,[161] but overturned by the United States Supreme Court.[162] New trials with competent defense counsel supplied by the Communist Party, through its legal arm, the International Labor Defense (ILD), started with the retrial of

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[155] The accused were Clarence Norris (19 years old), Andy Wright (18), Haywood Patterson (18), Olin Montgomery (17), Ozie Powell (16), Willie Roberson (17), Charlie Weems (20), Eugene Williams (15), and Roy Wright (14). HOLLACE RANSDELL, ACLU, REPORT ON THE SCOTTSBORO, ALA. CASE 5, 7-8 (1931).

[156] Faculty Project, Douglas O. Linder, *The Trials of "The Scottsboro Boys,"* UMKC (1999) [hereinafter Linder, Faculty Project], http://law2.umkc.edu/faculty/projects/FTrials/scottsboro/SB_acct.html [http://perma.cc/FV9R-VQTY] (last visited Apr. 4, 2016).

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] Powell v. State, 141 So. 201, 214 (Ala. 1932).

[162] Powell v. Alabama, 287 U.S. 45, 73 (1932).

Haywood Patterson before Judge James Horton.[163] At the conclusion of the evidence, the jury found Patterson guilty and imposed the death penalty.[164] In an unexpected development, Judge Horton set aside the verdict and ordered a new trial.[165]

Two of the defendants were again tried in summary trials before a different judge, in which they were convicted and sentenced to death.[166] A second appeal to the United States Supreme Court resulted in the reversal of the two convictions on the grounds that the Alabama system of jury selection unconstitutionally excluded blacks from juries.[167] Ultimately, charges against four of the defendants were dropped; four were pardoned.[168] Haywood Patterson was convicted of rape in the Scottsboro case for the fourth time in 1936, but was sentenced to life in prison and not death. He escaped from the Alabama prison in 1947 and made his way to Michigan. The Governor of Michigan refused to extradite him to Alabama.[169]

Unlike the case in *To Kill a Mockingbird*, there was no serious doubt that the black defendants were innocent of the rape charges.[170] It is instructive to trace how various lawyers in the

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[163] Linder, Faculty Project, *supra* note 156.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*; *see also* Norris v. Alabama, 294 U.S. 587, 599 (1935).

[168] Linder, Faculty Project, *supra* note 156.

[169] *Id.*

[170] One of the women on the train, Ruby Bates, later recanted her rape allegation in court. Ruby Bates, Excerpts from Testimony in the Case of *Alabama v. Patterson* (1933), http://law2.umkc.edu/faculty/projects/FTrials/scottsboro/Batestestimony.html [http://perma.cc/Z7QY-CDHA]. Evidence that cast doubt on the rape charge was suppressed at trial. Matthew C. Heise, *The Scottsboro Boys Trials and Judge Horton's* Ex Parte *Meeting: History's Verdict*, 7 DARTMOUTH L.J. 208, 214 (2009). Scottsboro defendant Clarence Norris was pardoned by Alabama Governor George C. Wallace in 1976. Albin Krebs, *Clarence Norris, The Last Survivor of 'Scottsboro Boys,' Dies at 76*, N.Y. TIMES, Jan. 26, 1989, at B21, http://www.nytimes.com/1989/01/26/obituaries/clarence-norris-the-last-survivor-of-scottsboro-boys-dies-at-76.html [http://perma.cc/4TDK-2C2C]. In 2013, the Alabama Board of Pardons and Paroles pardoned Scottsboro defendants Haywood Patterson, Charles Weems and Andy Wright. Alan Blinder, *Pardons for the Last 'Scottsboro Boys,'* N.Y. TIMES, Nov. 22, 2013, at A14, http://www.nytimes.com/2013/11/22/us/with-last-3-pardons-alabama-hopes-to-put-infamous-scottsboro-boys-case-to-rest.html?_r=0 [http://perma.cc/7GPP-BLD3].

Scottsboro case fulfilled the heightened duties of their time and place.

A. To Ensure the Physical Safety of Black Defendants

The initial heightened obligation of lawyers in 1930s Alabama was to assure the physical safety of black defendants. During the second trial of Scottsboro defendant Haywood Patterson, reports reached Judge Horton that a lynch mob was intent on murdering the accused.[171] Judge Horton's response was forceful and direct. He started by noting his obligation to protect the accused and his resources to accomplish that end:

> This court wishes to make an announcement: The court has been conducting this trial, and the audience has generally been orderly. I think they have given respectful attention. It is said that these prisoners did not have protection at Scottsboro, but this court has the Sheriff's force and the National Guards to protect them; also the court wants to protect them and will protect them, just as it will any one else engaged in this trial. Whether or not there is the slightest danger the court does not know; sometimes rumors come that may be absolutely untrue, but occasionally we reach that point where the court feels that there should be something said along this line.[172]

Having noted that the question of guilt or innocence was one for the jury, and that it would have been wrong for anyone who had not heard all the testimony to come to a conclusion as to the ultimate question, the Judge spoke directly to the threat of a lynching[173]:

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[171] Douglas O. Linder, *Without Fear or Favor: Judge James Edwin Horton and the Trial of the "Scottsboro Boys*,*"* 68 UMKC L. Rev. 549, 564 (2000) ("Judge Horton began a whispered consultation with [National Guard Commander Captain] Burleson and [Attorney General] Knight. Burleson told Horton of the potential threat of mob violence against Liebowitz [sic] or his clients.").

[172] James Horton, Transcript of Remarks in the Case of *Alabama v. Patterson*: Judge Horton's Warning to Potential Lynchers (1933), http://law2.umkc.edu/faculty/projects/FTrials/scottsboro/hortonwarning.html [http://perma.cc/YK4V-3L8U].

[173] *Id.* ("The jury is not in here now, and the court is conscious of this fact, that it is trying to sift out the truth in this case. No unbiased man that has listened to this evidence can say it is not a question for the careful consideration of the jury. Their guilt

> Now gentlemen this is for the audience, and I want it to be known that these prisoners are under the protection of this court. The Sheriff and his deputies, and members of the National Guards are under the direction and authority of this court. This court intends to protect these prisoners, and any other persons engaged in this trial. Any man or group of men that attempts to take charge outside of the law, are not only disobedient to the law, but are citizens unworthy of the protection of the State of Alabama, and unworthy of the citizenship which they enjoy. I say this much, that the man who would engage in anything that would cause the death of any of these prisoners is not only a murderer, but a cowardly murderer, and a man whom we should look down upon with all the contempt in our being; and I am going to say further that the soldiers here and the Sheriffs here are expected to defend with their lives these prisoners, and if they must do it, listen gentlemen you have the authority of this court, and this court is speaking with authority, the man who attempts it may expect that his own life be forfeited, or the guards that guard them must forfeit their lives. If I were in command, and I will be there if I know it, I will not hesitate to give the order to protect with their lives these prisoners against any such attempt.[174]

Judge Horton linked the "mob spirit" with a threat to the sanctity of law and to civilization, before putting in very concrete terms what he intended to do:

> I am speaking with feeling, and I know it, because I am feeling it. I absolutely have no patience with mob spirit, and that spirit that would charge the guilt or innocence of any being without knowing of their guilt or innocence. Your very civilization depends upon the carrying out of your laws in an

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or innocence is a matter which should be determined, and should be determined after most careful consideration. If these defendants are guilty of the crime charged, of course the law should be vindicated, and they should be punished; if they are not guilty they should be acquitted of the charge against them. That is for the jury to determine after they have carefully heard the evidence. Any man on the outside who has not heard the testimony, and who would try the case from rumor, without hearing it, has no right to say whether or not they are guilty or innocent, and whether or not this jury should turn them loose or not turn them loose.").

[174] *Id.*

> orderly manner. I am here listening to this case trying to sift the truth or not the truth of it, and I am going to strengthen that guard if necessary, and I am going to let everyone know that any attempt, and I believe these boys understand, that you have got to kill them before you get these prisoners. That is understood, and they have told me they would, and they will do it. Those are the instructions and orders given to the guards.[175]

He then concluded:

> I will say this much; so far as I am concerned I believe I am as gentle as any man in the world; I don't believe I would harm anyone wrongfully, but when it comes to a question of right and wrong, when it comes to the very civilization, men no matter how quiet they are, or how peaceful they are, there comes a time when they must take a stand either right or wrong. Now, gentlemen I want that understood, and I will say this much; if there is any meeting in this town where such matters are discussed, where such thoughts are brought forward, the men that attend such a meeting should be ashamed of themselves; they are unworthy citizens of your town, and the good people of this town look down on them.
>
> Now gentlemen I have spoken straight words; I have spoken harsh words, but every word is true, and I hope we will have no more of any such conduct. Let the jury return.[176]

The physical safety of the Scottsboro defendants in Judge Horton's court was thus assured.[177] If the initial heightened obligation of lawyers in 1930s Alabama was to ensure the physical safety of black defendants, Judge Horton deserves praise for acting decisively to fulfill his duty.

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[175] *Id.*

[176] *Id.*

[177] Linder, *supra* note 171, at 564 ("Captain Joe Burleson, commander of the National Guard troops stationed in Decatur, promised [Judge] Horton that the defendants and their attorneys would be protected 'so long as we have a piece of ammunition or a man alive.'").

B. To Ensure Black Defendants Had Competent Legal Representation

The second heightened obligation of lawyers in 1930s Alabama was to ensure that black defendants had competent counsel. In the initial Scottsboro trials, the defendants were quickly indicted and entered not guilty pleas.[178] As to counsel, the trial judge claimed to have appointed *all the members of the bar* to represent the capital defendants:

> There is a . . . recital to the effect that upon the arraignment they were represented by counsel. But no counsel had been employed, and aside from a statement made by the trial judge several days later during a colloquy immediately preceding the trial, the record does not disclose when, or under what circumstances, an appointment of counsel was made, or who was appointed. During the colloquy referred to, the trial judge, in response to a question, said that he had appointed all the members of the bar for the purpose of arraigning the defendants and then of course anticipated that the members of the bar would continue to help the defendants if no counsel appeared.[179]

The defendants were divided into four groups; their trials commenced a week after the indictments, and were concluded within two days with all the defendants having been found guilty and all but one—a fourteen year old—being sentenced to death.[180]

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[178] Powell v. Alabama, 287 U.S. 45, 49 (1932).

[179] *Id.*

[180] The indictments were handed down on March 31, 1931. *Id.* at 49. Although the defense was reportedly willing to have all nine defendants tried together, the prosecution opted to have four trials. RANSDELL, *supra* note 155, at 5. The two "oldest" defendants, nineteen-year-old Clarence Norris and twenty-year-old Charlie Weems, were tried on April 7—nearly a week after the indictments—convicted that afternoon, and sentenced to death. *See id.* at 4-5, 7. The next day, eighteen-year-old Haywood Patterson was tried, convicted, and sentenced to death. *Id.* at 7. That afternoon, the third trial involved five defendants—seventeen-year-old Olin Montgomery, eighteen-year-old Andy Wright, fifteen-year-old Eugene Williams, seventeen-year-old Willie Roberson, and sixteen-year-old Ozie Powell. *Id.* The case went to the jury late the afternoon of April 8, and the jury returned a guilty verdict with the death penalty the next morning. *Id.* at 8. The final trial was that of fourteen-year-old Roy Wright, in which the jury agreed on guilt but deadlocked eleven for the death penalty and one for life imprisonment. *Id.* at 8-9.

In a telling moment at the start of the first trial, the judge "inquired whether the parties were ready for trial. The state's attorney replied that he was ready to proceed. *No one answered for the defendants or appeared to represent or defend them*."[181]

Each trial was completed in a day, and every defendant was found guilty and sentenced to death.[182] Following the trials, the defendants received competent legal counsel through the International Labor Defense, a Communist organization active in the fight for racial justice in the American South.[183]

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[181] *Powell*, 287 U.S. at 53 (emphasis added). Thereafter there ensued an Alphonse and Gaston routine in which a "Mr. Roddy, a Tennessee lawyer not a member of the local bar," stated that he was willing to assist appointed counsel, and local counsel stated that the were willing to assist Mr. Roddy:

> Mr. Roddy: . . . [I]f I was paid down here and employed, it would be a different thing, but I have not prepared this case for trial and have only been called into it by people who are interested in these boys from Chattanooga. Now, they have not given me an opportunity to prepare the case and I am not familiar with the procedure in Alabama, but I merely came down here as a friend of the people who are interested and not as paid counsel, and certainly I haven't any money to pay them and nobody I am interested in had me to come down here has put up any fund of money to come down here and pay counsel. If they should do it I would be glad to turn it over—a counsel but I am merely here at the solicitation of people who have become interested in this case without any payment of fee and without any preparation for trial and I think the boys would be better off if I step entirely out of the case according to my way of looking at it and according to my lack of preparation for it and not being familiar with the procedure in Alabama . . . ."

Id. at 53, 55.

There were serious doubts about the competency of the two lawyers who represented the defendants: "[Stephen] Roddy was an out-of-state real estate attorney who, on the first day of trial, 'was so stewed he could scarcely walk straight,' while sixty-nine-year-old [Milo] Moody was a 'doddering, extremely unreliable, senile individual' who was 'losing whatever ability he once had.'" Linder, *supra* note 171, at 552 (quoting DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 22, 18 (1979)).

[182] *Powell*, 287 U.S. at 50.

[183] The International Labor Defense (ILD) was founded in 1925 by the Communist Party. REBECCA N. HILL, MEN, MOBS, AND LAW: ANTI-LYNCHING AND LABOR DEFENSE IN U.S. RADICAL HISTORY 213-14 (2008); *People & Events: International Labor Defense*, PBS: SCOTTSBORO: AN AMERICAN TRAGEDY (1999-2000) [hereinafter *ILD*], www.pbs.org/wgbh/amex/scottsboro/peopleevents/p_ild.html [http://perma.cc/NB4N-NN9Y] (last visited Apr. 4, 2016). It defended alleged criminal syndicalists, anarchists Nicola Sacco and Bartolomeo Vanzetti, and a wide range of labor agitators. HILL, *supra*, at 197-98, 215; *ILD*, *supra*. The ILD was active in the late 1920s and 1930s in the fight for racial justice in the South, including the anti-lynching and anti-chain gang movements and in the representation of black defendants. HILL, *supra*, at 229-30. The

All but one of the initial Scottsboro cases were affirmed six to one by the Alabama Supreme Court, over the vigorous dissent of Chief Justice John C. Anderson.[184] Chief Justice Anderson advanced two reasons that the convictions should be reversed: the defendants had ineffective assistance of counsel, and the atmosphere in which the trials took place made a fair trial impossible.[185]

Because of the haste with which the trials occurred, the defendants had to rely upon local, court-appointed counsel.[186] Chief Justice Anderson noted that "[t]he court did not name or designate particular counsel, but appointed the entire Scottsboro bar," and that "the Chattanooga lawyer, Roddy, . . . declined to appear as employed counsel and only did so as an amicus curiae."[187] He attempted to avoid being harsh in his criticism,[188] but concluded that "the record indicates that the appearance was rather pro forma than zealous and active."[189]

The other justices of the Alabama Supreme Court noted the rights guaranteed the defendants under the Federal and Alabama constitutions, including the rights to an impartial jury and the assistance of counsel, finding that "the record shows that every such right of the defendants was duly observed, and accorded

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ILD was engaged by the Scottsboro defendants in preference to the NAACP. Robin D.G. Kelley, *The Case of the "Scottsboro Boys,"* U. PENN. (July 18, 2007, 4:28 PM), http://www.writing.upenn.edu/~afilreis/88/scottsboro.html [http://perma.cc/72PT-62NL]; *ILD*, *supra*. It retained Walter Pollak for the appeal of the original cases to the Supreme Court and Samuel Leibowitz for the subsequent trials and appeals. *ILD*, *supra*. After ILD agents were accused of attempting to bribe one of the original complainants to recant, oversight over the Scottsboro litigation shifted to the American Scottsboro Committee and later the Scottsboro Defense Committee, a collaboration of the ILD with, among others, the ACLU and the NAACP. Kelley, *supra*; *ILD*, *supra*.

184 Powell v. State, 141 So. 201, 214-15 (Ala. 1932) (Anderson, C.J., dissenting).

185 *Id.*

186 *Id.* at 214.

187 *Id.*

188 *Id.* ("Another pertinent suggestion, and which is not intended as a harsh criticism of the local counsel that did attempt to represent the defendants throughout the trial, as we can appreciate the position of a lawyer appointed to defend an indigent defendant whom he may feel is guilty and as against whom public sentiment is at fever heat . . . .").

189 *Id.*

them."[190] However, the majority opinion noted at least seven significant failures on the part of defense counsel, including a failure to timely challenge the sufficiency of the indictment,[191] a failure to timely request separate trials,[192] a failure to make evidentiary objections, [193] a failure to make objections to demonstrations or applause in the courthouse,[194] a failure to move for a continuance to allow preparation for trial,[195] a failure to request that prospective jurors be questioned as to race prejudice,[196] and a failure to object to the exclusion of blacks from the jury.[197]

In his dissent, Chief Justice Anderson looked to the speed and atmosphere of the trials as justification for new trials. His starting point discussed the Constitutional right to a fair trial: "While the Constitution guarantees to the accused a speedy trial, it is of greater importance that it should be by a fair and impartial jury, ex vi termini, a jury free from bias or prejudice, and, above all, from coercion and intimidation."[198]

He suggested, with a reference presumably to the ILD lawyers who subsequently took over the representation, that a reasonable delay in the trials would have given the defendants an

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[190] *Id.* at 211 (majority opinion).

[191] *Id.* at 204 ("The sufficiency of this indictment was not tested by demurrer or otherwise, at any time before or during the trial.").

[192] *Id.* at 205. ("The complaint of appellants at this action of the court can avail them nothing. And besides, no objection was made thereto and no exception was reserved.").

[193] *Id.* at 209 ("During the progress of the trial only two exceptions were reserved by the defendants to the rulings of the court on admissions of evidence.").

[194] *Id.* ("Certain it is also that defendants never, at any time, made any objection or reserved any exceptions to anything that occurred with reference to demonstrations or applause.").

[195] *Id.* at 210 ("No motion for a continuance appears in the record. Therefore, this contention cannot avail defendants, made for the first time after verdict.").

[196] *Id.* ("No doubt, had counsel for the defendants assumed such [racial prejudice] to exist, and had, acting upon such assumption, requested the court to interrogate the jurors on that subject, the court would have complied with their request.").

[197] *Id.* ("It should suffice to say that the defendants made no objection whatever to the venire upon any such ground . . . . By failing to object to the personnel of the jury, the defendant must be held to have waived *all* objections *thereto*.").

[198] *Id.* at 214 (Anderson, C.J., dissenting).

opportunity to secure more zealous and effective counsel.[199] The majority summarily dismissed the claim that the defendants were forced to trial with insufficient time to prepare a defense:

> The appellants complain of the speed of the trial. There is no merit in the complaint. If there was more speed, and less of delay in the administration of the criminal laws of the land, life and property would be infinitely safer, and greater respect would the criminally inclined have for the law.[200]

Chief Justice Anderson also pointed to the atmosphere of the trials, characterizing it as a "fever heat."[201] Although he acknowledged the popular sentiment as to origins of the public mood,[202] he noted that "[e]very step that was taken from the arrest and arraignment to the sentence was accompanied by the military" and "this fact alone was enough to have a coercive influence on the jury."[203] The majority found no problem with pre-trial publicity creating a fever heat[204] and dismissed the possibility of mob violence.[205]

Chief Justice Anderson cited the defendants' right to "a jury free from bias";[206] however, the majority rejected the argument

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[199] *Id.* ("[T]ime has demonstrated that they could or would have been represented by able counsel had a better opportunity been given by a reasonable delay in the trial of the cases judging from the number and activity of counsel that appeared immediately or shortly after their conviction.").

[200] *Id.* at 211 (majority opinion).

[201] *Id.* at 214 (Anderson, C.J., dissenting).

[202] *Id.* ("[T]he prejudice aroused, if any existed, was due largely to the nature of the crime and which was of such a revolting character as to arouse any Caucasian county or community, but the indictment was found and the trial had within a few days after the alleged commission of the offense and when the entire atmosphere was at fever heat.").

[203] *Id.*

[204] *Id.* at 206 (majority opinion) ("Most people, of fair judgment, are honest in their convictions, and do not arrive at convictions, where life and death are at stake, until after due consideration of the facts of the case. And we may also add that, under the laws of Alabama, only such classes are permitted in the jury boxes of the state.").

[205] *Id.* at 208 ("[T]he defendants at no time were in danger of mob violence, and it wholly fails to show that the court, jurors, or officers were inflamed against the defendants. To the contrary, considering the nature of the crime and its revolting features, the people seem to have conducted themselves with a commendable spirit and a desire to let the law take its due course.").

[206] *Id.* at 214 (Anderson, C.J., dissenting).

that it was error not to question prospective jurors on racial prejudice because it would be wrong to assume that racial prejudice existed in Alabama:

> It is . . . urged that the defendants are entitled to a new trial because the court erred in not interrogating, and in failing to qualify, the trial jurors as to race prejudice, and as to whether or not they could and would, in view of the fact that the defendants were negroes, and the complainant and prosecuting witness a white woman, give the defendants a fair, impartial, and unprejudiced trial, etc. *It should suffice to say that the court will not be put in error for not assuming that there exists here in Alabama . . . racial prejudices*.[207]

Chief Justice Anderson properly framed the question before the Alabama Supreme Court: "As to whether or not these defendants are guilty is not a question of first importance, the real one being, Did they get a fair and impartial trial as contemplated by the bill of rights?"[208] His conclusion was that the record

> must collectively impress the judicial mind with the conclusion that these defendants did not get that fair and impartial trial that is required and contemplated by our Constitution. Therefore, in justice to the defendants and to the fair name of the state of Alabama, . . . these cases should be retried after some months of cooling time have elapsed and by their vigilant employed counsel.[209]

On appeal to the United States Supreme Court, Justice Sutherland chronicled the "casual fashion the matter of counsel in a capital case was disposed of" and stated that

> the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were

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[207] *Id.* at 210 (majority opinion) (emphasis added).

[208] *Id.* at 215 (Anderson, C.J., dissenting).

[209] *Id.*

> as much entitled to such aid during that period as at the trial itself.[210]

Justice Sutherland also summarized the lack of counsel argument:

> The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.[211]

The Supreme Court reversed the convictions and remanded the cases for new trials.[212] During the retrials of the Scottsboro defendants, the situation with respect to counsel was very different. The ILD recruited New York attorney Samuel Leibowitz to defend the second Scottsboro cases, assisted by Joseph Brodsky. Leibowitz, who was not a Communist, worked on the cases for four years without compensation and without reimbursement for most of his expenses.[213] He was a genuine hero.

If the second heightened obligation of lawyers in 1930s Alabama was to ensure that black defendants had competent counsel, Chief Justice Anderson deserves credit for his finding that, in the initial trials, the defendants' combination of the pro forma representation and the environment in which the trials took place denied them a fair trial. In the later Scottsboro proceedings, the lawyers provided by the ILD deserve great credit; they exemplified fulfillment of the second heightened obligation.

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[210] Powell v. Alabama, 287 U.S. 45, 56-57 (1932).

[211] *Id.* at 58.

[212] *Id.* at 73.

[213] Faculty Project, Douglas O. Linder, *Biographies of Key Figures in "The Scottsboro Boys Trials": Samuel Leibowitz*, UMKC (1999), http://law2.umkc.edu/faculty/projects/ftrials/scottsboro/SB_bLieb.html [http://perma.cc/PCH7-72UF] (recounting how Leibowitz, who was not a Communist, was recruited by the ILD, that he was assisted by Joseph Brodsky, the ILD's chief attorney, and that he "would work for the next four years on the cases without pay or reimbursement for most of his expenses").

C. To Challenge the Mechanisms of Racial Bias Within the Justice System

The third heightened obligation of lawyers in 1930s Alabama was to challenge the mechanisms of racial bias in the justice system. Again, the Scottsboro case provides an illustration worthy of consideration. In that case, ILD lawyers pressed the issue, and the United States Supreme Court reversed and remanded for further proceedings based on the exclusion of blacks from the Alabama jury pools.[214]

In *Norris v. Alabama*, the Supreme Court considered the exclusion of blacks from the grand and petit jury rolls in the case of Clarence Norris, one of the Scottsboro defendants.[215] Early in his opinion, Chief Justice Hughes cited the *Carter v. Texas* standard for the exclusion of blacks from juries:

> Whenever by any action of a state, whether through its Legislature, through its courts, or through its executive or

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[214] In *Norris v. Alabama*, one of the Scottsboro defendants, Clarence Norris, based a claim upon the exclusion of blacks from the jury pool. 294 U.S. 587, 588-89 (1935). The Court reversed the judgment and remanded for further proceedings. *Id.* at 599. The exclusion of blacks from the jury roll was also raised in *Powell v. Alabama*, which involved the claims of seven of the Scottsboro defendants (Olin Montgomery, Clarence Norris, Haywood Patterson, Ozie Powell, Willie Roberson, Charley Weems, and Andy Wright) that "[t]hey were not given a fair, impartial, and deliberate trial," that "they were denied the right of counsel," and that "they were tried before juries from which qualified members of their own race were systematically excluded." *Powell*, 287 U.S. at 50. The Court limited its consideration to the right of counsel argument and, on that basis, reversed the convictions and remanded for further proceedings. *Id.* at 50, 73. The exclusion of blacks from the jury roll was also raised in *Patterson v. Alabama* by one of the Scottsboro defendants, Haywood Patterson. 294 U.S. 600, 601-02 (1935). The Alabama Supreme Court struck the defendant's bill of exceptions as not timely filed, but the United States Supreme Court vacated the judgment and remanded the case for further proceedings. *Id.* at 602, 607. Noting the common background between *Norris* and *Patterson*, the Supreme Court suggested that its ruling on the substantive issue in *Norris* might cause the Alabama Supreme Court to reconsider its timeliness ruling in *Patterson*. *Id.* at 606-07 ("We are not satisfied that the [Alabama Supreme C]ourt would have dealt with the case in the same way if it had determined the constitutional question as we have determined it.").

[215] *Norris*, 294 U.S. at 588-89. In the second trial of Haywood Patterson, Judge James Horton denied defense motions relating to the exclusion of blacks from the pools from which the grand jury and trial jury members were drawn. Linder, *supra* note 171, at 555-57. The issue was rendered moot when Judge Horton set aside the guilty verdict. *Id.* at 576.

> administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States.[216]

The Court first reviewed the history of Jackson County, where the grand jury had been convened. The testimony was that "in a long number of years no negro had been called for jury service in that county."[217] A jury commissioner "who was a member of the commission which made up the jury roll for the grand jury which found the indictment, testified that he had 'never known of a single instance where any negro sat on any grand or petit jury in the entire history of that county.'"[218] Despite the testimony of a local newspaper editor "as to the lack of 'sound judgment' of the 'good negroes' in Jackson county," the Supreme Court found "that there were negroes in Jackson county qualified for jury service."[219]

There was a question as to whether blacks were included in the jury roll. The Supreme Court was presented with jury rolls upon which the names of a small number of blacks were included, but it appeared the proffered jury rolls were forgeries.[220] The Supreme Court concluded that the defendant "established the discrimination which the Constitution forbids" and held that the motion to quash the indictment should have been granted.[221]

The Court also reviewed the history of Morgan County, where the trial was held. The evidence established that "there were a large number of negroes in the county who were qualified for jury service"; nevertheless, "[w]ithin the memory of witnesses, long

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[216] *Norris*, 294 U.S. at 589 (quoting Carter v. Texas, 177 U.S. 442, 447 (1900)). The opinion cites *Strauder v. West Virginia* and *Martin v. Texas* for the proposition that "[t]he principle is equally applicable to a similar exclusion of negroes from service on petit juries." *Id.* (citing Martin v. Texas, 200 U.S. 316, 320-21 (1906); Strauder v. West Virginia, 100 U.S. 303, 308 (1879)).

[217] *Id.* at 591.

[218] *Id.*

[219] *Id.* at 592.

[220] *Id.* at 592-93.

[221] *Id.* at 596.

resident there, no negro had ever served on a jury in that county or had been called for such service."[222] The Court concluded that "[f]or this long-continued, unvarying, and wholesale exclusion of negroes from jury service we find no justification consistent with the constitutional mandate."[223] The Court quoted one of the Morgan County jury commissioners who, tracking the applicable statute, testified:

> I do not know of any negro in Morgan County over twenty-one and under sixty-five who is generally reputed to be honest and intelligent and who is esteemed in the community for his integrity, good character and sound judgment, who is not an habitual drunkard, who isn't afflicted with a permanent disease or physical weakness which would render him unfit to discharge the duties of a juror, and who can read English, and who has never been convicted of a crime involving moral turpitude.[224]

The Court reversed the trial judgment and remanded for further proceedings.[225]

If the third heightened obligation of lawyers in 1930s Alabama was to challenge the mechanisms of bias in the justice system, the defense lawyers and the Supreme Court majority led by Chief Justice Hughes in the Scottsboro cases deserve credit for having challenged and rejected the Alabama exclusion of blacks from juries.

D. To Strive to Secure Individual Justice for Black Defendants Even at Personal Cost

The final heightened obligation of lawyers in 1930s Alabama was to strive to secure individual justice for black defendants even at personal cost. In the second trial of defendant Haywood Patterson, Judge James Horton—who had so eloquently stood up to the threat of lynching—fulfilled his heightened duty when he set aside Patterson's jury verdict and death sentence. Judge

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[222] *Id.* at 596, 597.
[223] *Id.* at 597.
[224] *Id.* at 598-99.
[225] *Id.* at 599.

Horton started by rejecting the prosecution's corroborating evidence.[226] He then rejected the testimony of the complainant, Victoria Price.[227] He concluded by setting aside the jury verdict:

> The Court will not pursue the evidence any further.
>
> As heretofore stated the law declares that a defendant should not be convicted without corroboration where the testimony of the prosecutrix bears on its face indications of improbability or unreliability and particularly when it is contradicted by other evidence.
>
> The testimony of the prosecutrix in this case is not only uncorroborated, but it also bears on its face indications of improbability and is contradicted by other evidence, and in addition thereto the evidence greatly preponderates in favor

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[226] Circuit Judge James Horton, Transcript of Remarks in the Case of *Patterson v. Alabama*: Judge Horton Orders a New Trial in the Case of Haywood Patterson (June 22, 1933), http://law2.umkc.edu/faculty/projects/FTrials/scottsboro/SB_hor33.html [http://perma.cc/Z979-33QF].

> This is the State's evidence. It corroborates Victoria Price slightly, if at all, and her evidence is so contradictory to the evidence of the doctors who examined her that it has been impossible for the Court to reconcile their evidence with hers. . . .
>
> . . . .
>
> The Court has heretofore devoted itself particularly to the State's evidence; this evidence fails to corroborate Victoria Price in those physical facts; the condition of the woman raped necessarily speaking more powerfully than any witness can speak who did not view the performance itself.

Id.

[227] *Id.*

> Next, was the evidence of Victoria Price reasonable or probable? Were the facts stated reasonable? This is one of the tests the law applies.
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> . . . .
>
> Her manner of testifying and demeanor on the stand militate against her. Her testimony was contradictory, often evasive, and time and again she refused to answer pertinent questions. The gravity of the offense and the importance of her testimony demanded candor and sincerity. In addition to this the proof tends strongly to show that she knowingly testified falsely in many material aspects of the case. All this requires the more careful scrutiny of her evidence.

Id.

> of the defendant. It therefore becomes the duty of the Court under the law to grant the motion made in this case.
>
> It is therefore ordered and adjudged by the Court that the motion be granted; that the verdict of the jury in this case and the judgment of the Court sentencing this defendant to death be set aside and that a new trial be and the same is hereby ordered.[228]

Judge Horton knew that there would be a price to pay if he set aside the guilty verdict in the Haywood Patterson case. One commentator has noted that between the end of the trial and the announcement of his decision to set aside the verdict, Judge Horton was approached by "an emissary from Montgomery . . . [who] remarked to the judge that if he were to annul the jury's verdict, he would have little or no chance of being re-elected. Horton smiled. 'What does that have to do with the case?' he asked."[229]

As to the final heightened obligation, to strive to secure individual justice for black defendants even at personal cost, the Scottsboro cases provide examples of lawyers fulfilling this heightened duty. Alabama Supreme Court Chief Justice Anderson deserves credit for his dissent in the appeals of the initial cases. The ILD lawyers deserve plaudits for their tireless work on behalf of their clients under the most difficult of circumstances.[230] Judge James Horton fulfilled his heightened obligation both by taking a stand against lynching and by setting aside the jury verdict and death sentence.

CONCLUSION

His name is Horace Gilmer, and he is not really a bad man. Scout is correct; he is simply doing his job. As prosecutor, he is

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[228] *Id.*

[229] Linder, *supra* note 171, at 574 (citing DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 264 (1979)).

[230] Samuel Leibowitz, Excerpts from Remarks in the case of *Patterson v. Alabama* (1933), http://law2.umkc.edu/faculty/projects/FTrials/scottsboro/li-summations.html [http://perma.cc/5C97-WFMG] ("Mobs mean nothing to me. Let them hang me: I don't care. Life is only an incident in the Creator's scheme of things, but if I can contribute my little bit to see that justice is served, then my mission is fulfilled. . . .").

presented with an allegation of rape corroborated by a second witness and with substantial physical evidence consistent with the complaint. He takes the matter to the grand jury, gets an indictment, and tries his case. It does not appear that he knowingly prosecutes an innocent person or that his prosecution of Tom Robinson contains elements that are inappropriate with respect to race.

The problem is that, in Alabama in the 1930s, a jury hearing a case of a black man accused of raping a white woman is not going to weigh the evidence; it is going to convict. The social and economic constructs of the place and time inappropriately frame matters of race, not the efforts of Horace Gilmer.

The question thus becomes whether the prosecutor, the judge, and the defense attorney fulfill the heightened obligations created by the flawed justice system. Here is where the lawyers in *To Kill a Mockingbird*, including Horace Gilmer, fall short. They are fortunate that the physical safety of Tom Robinson is not compromised, and they do ensure that he has competent legal representation. However, they fail to challenge the mechanisms of racial bias within their justice system, and it may be that they fail to secure individual justice for Tom Robinson.

Horace Gilmer is not really a bad man, but he is a lawyer who fails to fulfill the heightened duties arising from the prevailing social and economic conditions of his time and place. Those duties, and his imperfect response, make him an interesting character, one worthy of greater attention than he is customarily given.

With the publication of *Go Set a Watchman* come the revelations that Atticus Finch was once briefly a member of the Klan,[231] and that, in the aftermath of *Brown v. Board of Education*,[232] he was the head of the local white citizens'

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[231] The story is that Atticus was briefly a member of the Klan "[a] long time ago [when] the Klan was respectable, like the Masons," and that Atticus joined "[t]o find out exactly what men in town were behind the masks." WATCHMAN, *supra* note 1, at 229.

[232] 347 U.S 483 (1954).

council.[233] That he is a segregationist is illustrated by a conversation he has with Scout:

> "Then let's put this on a practical basis right now. Do you want Negroes by the carload in our schools and churches and theaters? Do you want them in our world?"
>
> "They're people, aren't they? We were quite willing to import them when they made money for us."
>
> "Do you want your children going to a school that's been dragged down to accommodate Negro children?"
>
> "The scholastic level of that school down the street, Atticus, couldn't be any lower and you know it. They're entitled to the same opportunities anyone else has, they're entitled to the same chance . . . ."[234]

Atticus Finch and Horace Gilmer disappoint our expectations. There were, however, real lawyers in actual cases in 1930s Alabama who fulfilled the heightened duties of their time and place. Their stories provide important examples of how the best members of the legal profession respond to the challenges of a flawed justice system.

* * *

At the start of Haywood Patterson's second trial, Judge James Horton charged the pool of prospective jurors, speaking of his confidence in them and of the obligations they were about to undertake:

> I have been judge of your court for a number of years and I feel I can say, with a degree of gratification, to the jurors of

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[233] *Id.* at 103-04. When Scout tells Atticus, "That citizens' councilin' you're doing. I think it's disgusting," Atticus attempts to distinguish the Maycomb white citizens' council from the others: "Jean Louise, you've been reading nothing but New York papers. I've no doubt all you see is wild threats and bombings and such. The Maycomb council's not like the North Alabama and Tennessee kinds. Our council's composed of and led by our own people." *Id.* at 238. Finally, Atticus explains why he is on the white citizens' council: "I can tell you the two reasons I was there. The Federal Government and the NAACP." *Id.*

[234] *Id.* at 245-46.

> this county . . . that so far as I have been able to see, all the jurors who ever sat before me have tried each case as far as they were able according to the law and the evidence, and to render a true verdict in every case. I have every confidence that this venire will do the same. . . .
>
> . . . .
>
> So far as the law is concerned, it knows neither native nor alien, Jew or Gentile, black or white. This case is no different than any other. We have only our duty to do without fear or favor. . . .
>
> . . . .
>
> If any among you are tempted, remember that they would consider it a disgrace and a shame upon the fair name of this and the other counties of our State to have anything happen here to reflect upon the administration of justice in our courts. I expect from you proper restraint and a fair decision according to the law and the evidence. We must be true to ourselves, and if we be true to ourselves we can't be false to any man.[235]

Judge Horton's confidence in the jury was misplaced. The jury unanimously voted to convict within minutes of the start of their deliberations.[236] Their deliberations continued for eleven hours, as all but one of the members who wanted Patterson put to death overwhelmed the sole holdout who favored life imprisonment.[237] As counsel waited for the court to convene to receive the jury's verdict, the sound of laughter came from the jury room.[238]

Based upon his review of the evidence, Judge Horton set aside the jury verdict and ordered a new trial.[239] He did so having spoken of the effect of deliberate injustice on society:

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[235] Linder, *supra* note 171, at 557-58.
[236] *Id.* at 571.
[237] *Id.*
[238] *Id.*
[239] *Id.* at 573.

> Social order is based on law, and its perpetuity on its fair and impartial administration. Deliberate injustice is more fatal to the one who imposes it than to the one on whom it is imposed. The victim may die quickly and his suffering cease, but the teachings of Chrisitanity [sic] and the uniform lesson of all history illustrate without exception that . . . its perpetrators not only pay the penalty themselves, but their children through endless generations . . . .[240]

Judge Horton knew that his act of setting aside the guilty verdict of Haywood Patterson would engender opposition. With his six-year judicial term ending in 1934, he decided to not seek re-election; however, the entire bar of his hometown petitioned him to run for re-election:

> It is axiomatic that a democracy can not exist without an independent and fearless judiciary that moment the decisions of our judges are colored or influenced by political considerations that moment free governments begin to totter and commonwealths begin to fall.
>
> We, who comprise the entire bar of Athens, Ala., your home town, . . . recognize in you a judge of unimpeachable character and integrity; we know you are untrammeled by political considerations in the exercise of judicial functions; unflinching in the faithful discharge of your duties as judge, and recognizing the fact that you have the fortitude to do right, as an incorruptible judge is given the power to see what is right, we are unwilling to see you leave the bench.[241]

Judge Horton acceded to their request and ran for re-election.[242] However, the confidence of the Athens bar in the electorate was misplaced. Judge Horton survived the primary but was decisively defeated in the general election and never served in public office again.[243] He was a lawyer in 1930s Alabama who

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[240] *Id.* at 574.

[241] *Id.* at 578 (quoting *Athens Lawyers Petition Judge Horton* (advertisement) (on file with the Horton Files, Records of Judge Horton, Samford University, Birmingham)).

[242] *Id.* at 579.

[243] *Id.* at 579-80, 582.

fulfilled the heightened duties of a lawyer in that time and place and paid a price for his fidelity.