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Bennett Capers

Brooklyn Law School, bennett.capers@brooklaw.edu

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THE TRIAL OF BIGGER THOMAS: RACE, GENDER, AND TRESPASS

I. BENNETT CAPERS*

Richard Wright's *Native Son*,¹ the first novel by an African American to be featured as a main selection of the Book-of-the-Month Club,² was nothing short of groundbreaking in the annals of American literature. The novel opens with the sound of an alarm going off—Richard Wright's wake-up call to America to open its eyes and address issues of race and class³—and ends with its protagonist Bigger Thomas awaiting execution for the rape and murder of a white woman. Though considered incendiary in the South—*Native Son* was banned in Birmingham, Alabama, for example⁴—across the rest of the nation, *Native Son* debuted as a bestseller,⁵ and was lauded as an instant classic.⁶ Although Richard Wright went on to complete other works, including his two-volume autobiography *Black Boy* (1945) and *American Hunger* (1977), the existential novel *The Outsider*

* Associate Professor of Law, Hofstra Law School. B.A. Princeton University; J.D. Columbia Law School. I am grateful for the research assistance provided by the Schomburg Center for Research in Black Culture, which houses some of Wright's correspondence; to the editors of the *N.Y.U. Review of Law & Social Change* for their insightful comments and devotion; and to my colleague and friend Astrid Gloade. This article also benefited from the comments I received when I presented a version of it at the National Law, Culture, and Humanities Conference at Syracuse Law School in March 2006. Finally, the ideas expressed in this article were first crystallized in a seminar Ms. Gloade and I taught together at Brooklyn Law School in spring 2004 entitled "Law, Literature, and the Construction of Race," through which I was able to advance and test ideas with exceptional students. Accordingly, my final thanks go to the students in that seminar.

1. RICHARD WRIGHT, *NATIVE SON* (The Restored Text Established by the Library of America, Perennial Classics 1998) (1940) [hereinafter *NATIVE SON*].

2. See ROBERT BUTLER, *NATIVE SON: THE EMERGENCE OF A NEW BLACK HERO* 12 (1991).

3. Arnold Rampersad, *Introduction* to *NATIVE SON*, *supra* note 1, at ix.

4. See, e.g., *Dixie Library Bans 'Native Son': Alabama Library Won't Place 'Native Son' on Its Shelves*, PITTSBURGH COURIER, Apr. 20, 1940, at 1, 4 (reporting conflicting explanations given as to why *Native Son* was not purchased by Birmingham libraries).

5. The first printing of *Native Son* sold out within three hours of its publication, and within a few weeks sales totaled 215,000, more than any novel Harper & Brothers had published in the previous twenty years. HAZEL ROWLEY, *RICHARD WRIGHT: THE LIFE AND TIMES* 191 (2001). Some commentators have cited the novel's early commercial success as evidence of its significance. E.g., BUTLER, *supra* note 2, at 12.

6. See, e.g., Malcolm Cowley, *The Case of Bigger Thomas*, *NEW REPUBLIC*, Mar. 18, 1940, at 382, 382 (book review) (hailing *Native Son* as "the most impressive American novel . . . since *The Grapes of Wrath*"); Clifton Fadiman, *A Black "American Tragedy"*, *NEW YORKER*, Mar. 2, 1940, at 52, 52 (book review) (calling *Native Son* "the most powerful American novel to appear since *The Grapes of Wrath*, regardless of any artistic shortcomings"). In fact, the early reviews were of mixed opinion as to the artistic merits of *Native Son*. See BUTLER, *supra* note 2, at 12–15 (summarizing the initial reviews). Nonetheless, one "crucial truth" the early reviews reveal is "the importance of the novel as a landmark work in American literature." *Id.* at 12.

(1953), and the collection of essays *White Man, Listen!* (1957), it is for *Native Son* that he is best known.

Hailed by critics upon its publication, the novel was less well received by Wright's literary heirs James Baldwin and Ralph Ellison.⁷ It was embraced again during the militant period of the civil rights movement,⁸ and later denounced, unfairly I believe, as misogynistic by feminists, particularly in its portrayal of black women.⁹ Despite its turbulent history, *Native Son* remains a seminal novel. The focus of numerous essays of literary criticism,¹⁰ *Native Son* con-

7. James Baldwin criticized *Native Son* for failing to engage fully the complexities of black life. JAMES BALDWIN, *Everybody's Protest Novel*, in COLLECTED ESSAYS 11, 17–18 (1998); JAMES BALDWIN, *Many Thousands Gone* in COLLECTED ESSAYS 19, 27, 32–34 (1998). Ellison initially championed the novel in his review for *New Masses*. See Ralph Ellison, *Recent Negro Fiction*, *NEW MASSES*, Aug. 5, 1941, at 22, 22 (“[*Native Son*] possesses an artistry, penetration of thought, and sheer emotional power that places it into the front rank of American fiction.”). In later years, however, Ellison was decidedly more critical of Wright's novel. During an interview in 1968, for example, he stated, “*Native Son* is a very powerful novel, but to my mind something is missing. . . . I say this not to put down my friend, but rather to point to something about the nature of the novel as humanist expression. In it we seek not status, not class, but a reflecting consciousness—certainly in the hero who confronts the complexities of his situation.” CONVERSATIONS WITH RALPH ELLISON 139–40 (Maryemma Graham & Amritjit Singh eds., 1995). During another interview, Ellison was even less generous, opining that Wright was too concerned with sociology, and quipping that “People who want to write sociology should not write a novel.” *Id.* at 63. The literary scholar Harold Bloom has suggested oedipal wars between literary fathers and sons are inevitable. See HAROLD BLOOM, *THE ANXIETY OF INFLUENCE* 5–11 (1973) (arguing that strong poets will struggle against their precursors). Ellison, for his part, rejected the suggestion of an oedipal conflict between him and Wright as an oversimplification of his relationship to Wright. See Lawrence Jackson, *Ralph Ellison's Invented Life: A Meeting with the Ancestors*, in *THE CAMBRIDGE COMPANION TO RALPH ELLISON* 11, 20–22 (Ross Posnock ed., 2005).

8. See BUTLER, *supra* note 2, at 16 (“[W]hile earlier critics were inclined to see Bigger Thomas disapprovingly as a dangerous stereotype of the ‘bad nigger,’ critics [from the midsixties to the late seventies] were apt to hail Bigger as a prototype of the revolutionary black hero.”). This shift in reception is perhaps best illustrated by Eldridge Cleaver's denunciation of James Baldwin, and praise for Wright, in *Soul on Ice*. See ELDRIDGE CLEAVER, *Notes on a Native Son*, in *SOUL ON ICE* 122, 134–35 (1968).

9. See, e.g., Barbara Johnson, *The Re(a)d and the Black*, in *RICHARD WRIGHT: CRITICAL PERSPECTIVES PAST AND PRESENT* 149, 153 (Henry Louis Gates, Jr. & K. A. Appiah eds., 1993) (objecting to the “careless misogyny” in *Native Son*); Maria K. Mootry, *Bitches, Whores, and Woman Haters: Archetypes and Typologies in the Art of Richard Wright*, in *RICHARD WRIGHT: A COLLECTION OF CRITICAL ESSAYS* 117 (Richard Macksey & Frank E. Moorer eds., 1984) (citing numerous ways in which Wright's work and his own recollections treated women as inferior to men). Wright also vowed that his next novel would be about the “status of women in modern American society.” RICHARD WRIGHT, *How “Bigger” Was Born*, in *NATIVE SON*, *supra* note 1, at 431, 461 [hereinafter *How “Bigger” Was Born*]. That novel was never written.

10. Book-length studies of Wright's work include: *CRITICAL ESSAYS ON RICHARD WRIGHT* (Yoshinobu Hakutani ed., 1982); MICHEL FABRE, *THE WORLD OF RICHARD WRIGHT* (1985); *NEW ESSAYS ON NATIVE SON* (Keneth Kinnamon ed., 1990); *RICHARD WRIGHT: A COLLECTION OF CRITICAL ESSAYS*, *supra* note 9; *RICHARD WRIGHT: CRITICAL PERSPECTIVES PAST AND PRESENT*, *supra* note 9; *RICHARD WRIGHT'S NATIVE SON* (Harold Bloom ed., 1988); *RICHARD WRIGHT'S NATIVE SON: A CRITICAL HANDBOOK* (Richard Abcarian ed., 1970); *TWENTIETH CENTURY INTERPRETATIONS OF NATIVE SON* (Houston Baker ed., 1972). For a listing of shorter criticism of

tinues to be taught in literature courses, as well as law-and-literature courses, across the country,¹¹ and was selected by the Modern Library as number twenty on its list of the best one hundred English-language novels of the twentieth century.¹²

In part, the success that greeted *Native Son* can be traced to the significant questions it raised about the lingering effects and repercussions of racial stratification in America. The alarm that opens the novel was very real, and it was heard, if not heeded. As the critic Irving Howe noted in 1963, twenty-three years after *Native Son*'s publication:

The day *Native Son* appeared, American culture was changed forever. No matter how much qualifying the book might later need, it made impossible a repetition of the old lies. . . . Wright's novel brought out into the open, as no one ever had before, the hatred, fear and violence that have crippled and may yet destroy our culture.¹³

Moreover, the issues that *Native Son* introduced about race, poverty, and crime are still extant today. Nearly one in four blacks lives below the poverty line, a figure approximately double that of whites.¹⁴ Moreover, while there has been much discussion about the sharp decline in crime across the country since its peak in the early 1990s, the fact remains that the number of black males in the criminal justice system is still disproportionately high. As the Sentencing Project has recently noted, "black males born today have a one in three chance of going to prison during their lifetime, as opposed to a one in seventeen chance for white males."¹⁵ Indeed, at the start of the 1990s, there were more black men

Wright's work, see KENETH KINNAMON, *A RICHARD WRIGHT BIBLIOGRAPHY: FIFTY YEARS OF CRITICISM AND COMMENTARY, 1933–1982* (1988).

11. In fact, this article is in part a product of my use of *Native Son* in my own seminars. See also APPROACHES TO TEACHING WRIGHT'S *NATIVE SON* (James A. Miller ed., 1997) (suggesting various ways to teach the novel).

12. The Modern Library, 100 Best Novels, <http://www.randomhouse.com/modernlibrary/100bestnovels.html> (last visited June 24, 2006).

13. Irving Howe, *Black Boys and Native Sons*, in TWENTIETH CENTURY INTERPRETATIONS OF *NATIVE SON*, *supra* note 10, at 63. *Native Son* also had an enormous impact on other African American writers, leading to what Robert Bone called the "Wright School" of fiction. ROBERT BONE, *THE NEGRO NOVEL IN AMERICA* 157 (1958). Throughout the forties and into the sixties, numerous African American writers, from Ann Petry (*The Street*) to Eldridge Cleaver (*Soul on Ice*), embraced Wright's naturalism and used *Native Son* as a template for modeling their own work. *Id.* at 159; BUTLER, *supra* note 2, at 10–11. Indeed, Philip Auger, in his exploration of black masculinity in African American fiction, refers to authors "reWrighting" the "powerless, inarticulate versions of black manhood . . . codified by Wright in Bigger Thomas." PHILIP AUGER, *NATIVE SONS IN NO MAN'S LAND: REWRITING AFRO-AMERICAN MANHOOD IN THE NOVELS OF BALDWIN, WALKER, WIDEMAN, AND GAINES* 7 (2000).

14. U.S. CENSUS BUREAU, *PEOPLE AND FAMILIES IN POVERTY BY SELECTED CHARACTERISTICS: 2003 AND 2004*, at 1 (2005), <http://www.census.gov/hhes/www/poverty/poverty04/table3.pdf>.

15. One out of every eight African American men in their twenties is in prison or jail. "These trends have been exacerbated by the impact of the 'war on drugs,' with three-fourths of all drug offenders being persons of color, far out of proportion to their share of drug users in society." The Sentencing Project, *Racial Disparity*, http://www.sentencingproject.org/issues_07.cfm (last visited

under the control of the nation's criminal justice systems than the total number of black men in college.¹⁶ Given these figures, the collateral consequences to communities of color are particularly acute. Simply put, "crime control policies are a major contributor to the disruption of the family, the prevalence of single parent families, and children raised without a father in the ghetto, and the 'inability of people to get the jobs still available.'"¹⁷

Native Son also raises significant questions about the criminal legal system. By the last third of the novel, Bigger Thomas has been arrested and charged with the rape and murder of Mary Dalton. The bulk of the remainder of the novel is devoted to his "confession" and, following his plea of guilty, to his attorney's argument in mitigation of sentence, the prosecution's response, and the judge's exercise of what Robert Cover has described as law's ultimate violence: the imposition of a sentence of death.¹⁸ A host of legal issues arise in the course of this narrative, including the privilege against self-incrimination and the right to counsel,¹⁹ the exclusion of African Americans from juries,²⁰ the fairness of the death penalty,²¹ segregation in prisons,²² and race-based police stops,²³ concerns

June 24, 2006).

16. Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-Five Years After the Stanford Prison Experiment*, 53 AM. PSYCHOLOGIST 709, 716 (1998) (citing MARC MAUER, THE SENTENCING PROJECT, MORE YOUNG BLACK MALES UNDER CORRECTIONAL CONTROL IN US THAN IN COLLEGE (1990)).

17. William J. Chambliss, *Policing the Ghetto Underclass: The Politics of Law and Law Enforcement*, 41 SOC. PROBS. 177, 183 (1994). See also William J. Chambliss, *Crime Control and Ethnic Minorities: Legitimizing Racial Oppression by Creating Moral Panics*, in ETHNICITY, RACE AND CRIME: PERSPECTIVES ACROSS TIME AND PLACE 235, 253 (Darnell F. Hawkins ed., 1995) (describing the effects of incarceration on African American men and their families); David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction"*, 83 GEO. L.J. 2547, 2558 (1995) ("Incarceration of so many young black men contributes to the very problems that are so often pointed to as the source of higher crime rates in the black community."); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004) (tracing the harms of incarceration on African American communities).

18. See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1622–28 (1986).

19. For example, notwithstanding the fact that adversarial proceedings have commenced and Bigger Thomas is represented by counsel, the District Attorney interrogates him about Mary Dalton's death and tricks him into confessing in the absence of his lawyer. See *NATIVE SON*, *supra* note 1, at 302–10. Deliberately eliciting incriminating information from a defendant outside the presence of counsel after formal charges have commenced, and absent a knowing and voluntary waiver, was not explicitly recognized as a federal constitutional violation until 1964. See *Massiah v. United States*, 377 U.S. 201, 204–06 (1964).

20. Max tells Bigger they will plead guilty and seek leniency at sentencing because Bigger would face an all-white jury. Max tells Bigger, "Any twelve white men in this state will have already condemned you; we can't trust a jury." *NATIVE SON*, *supra* note 1, at 358. Despite Supreme Court decisions in the 1870s and 1880s outlawing the purposeful exclusion of blacks from juries, see *Neal v. Delaware*, 103 U.S. 370, 397 (1880), and *Strauder v. West Virginia*, 100 U.S. 303, 309–10 (1879), blacks continued to be systematically barred until the 1960s. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 179 (1997).

21. Max argues before the court that "[i]f anybody but a Negro boy were charged with

again that are still pertinent today.²⁴

murder, the State's Attorney would not have rushed this case to trial and demanded the death penalty." NATIVE SON, *supra* note 1, at 376. The literature on the link between race and the imposition of capital punishment is quite extensive. See, e.g., DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990); SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1989); Robert J. Hunter, Paige Heather Ralph & James Marquart, *The Death Sentencing of Rapists in Pre-Furman Texas (1942-1971): The Racial Dimension*, 20 AM. J. CRIM. L. 313 (1993). A more recent study of Maryland death-eligible cases emphasized the correlation between the race of the victim and the imposition of the death penalty. The study found that while victims in capital cases between 1978 and 1999 were roughly evenly split between blacks and whites, in eighty percent of the cases where the death penalty was imposed, the victim was white. RAYMOND PATERNOSTER & ROBERT BRAME, AN EMPIRICAL ANALYSIS OF MARYLAND'S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCE OF RACE AND LEGAL JURISDICTION 22, 46, available at <http://www.newsdesk.umd.edu/pdf/finalrep.pdf> (last visited June 24, 2006). For more on race and capital punishment, see KENNEDY, *supra* note 20, at 311-50.

22. "[E]ven here in the Cook County Jail Negro and white were segregated into different cell-blocks." NATIVE SON, *supra* note 1, at 340. Segregation in prisons was routine until the 1960s, when federal judges first began to rule that segregation by race was unconstitutional. See, e.g., KENNEDY, *supra* note 20, at 129. See also *Lee v. Washington*, 390 U.S. 333, 333 (1968) (per curiam) (affirming three-judge District Court decree that Alabama statutes segregating races in prisons and jails violated the Fourteenth Amendment); *United States v. Wyandotte County*, 480 F.2d 969, 970 (10th Cir. 1973) (citing *Lee v. Washington* to declare segregation of county jail unconstitutional); *Gates v. Collier*, 349 F. Supp. 881, 893 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974) (holding that segregation of a prison "unrelated to prison security" violated the Equal Protection Clause).

23. "Several hundred Negroes resembling Bigger Thomas were rounded up from South Side 'hot spots'; they are being held for investigation." NATIVE SON, *supra* note 1, at 244 (Bigger reading newspaper report). Rounding up black suspects in police investigations, unfortunately, is not a thing of the past. For example, in 1992, the police in Oneonta, New York, rounded up and interrogated almost every African American male in the town, including African American male students at the local university, after a seventy-seven-year-old white woman claimed that she had been attacked by a black burglar. Though several of the black men later filed a civil suit claiming the police had violated their civil rights, the Court of Appeals for the Second Circuit ruled in favor of the police on the theory that the police sweep was not based "solely" on race, but rather on a race-based "physical description" of the suspect. *Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000), *rehearing and rehearing en banc denied* 235 F.3d 769 (2000). The decision was much criticized, and Governor Mario Cuomo separately offered an apology to Oneonta's black citizens on behalf of the State of New York. See *Discriminatory Searches*, N.Y. TIMES, Nov. 5, 1999, at A32. A similar roundup occurred in South Carolina in 1994 when Susan Smith claimed that she had been carjacked by a black man who had driven off with her two toddlers. Later, it was discovered that Smith's carjacking claim was a fabrication: she herself had murdered her toddlers. See Gary Lee, *Black Residents Angered by Reaction to False Story: 'No One Has Rushed Forward to Apologize.'* WASH. POST, Nov. 7, 1994, at A10.

24. Discrimination in jury selection continues to be a problem. See, e.g., *Miller-El v. Dretke*, 545 U.S. 231 (2005) (granting habeas relief to black death row inmate after finding that prosecutors had not only engaged in purposeful discrimination by using their peremptory challenges to excuse ten of eleven black venire persons, but had a general policy of excluding black venire members from juries). In spite of *Lee v. Washington* and its progeny, *supra* note 22, segregation in prisons continues to be practiced, and the Supreme Court revisited the issue in *Johnson v. California*, No. 04-6964, slip op. (2005) (remanding for application of strict scrutiny standard of review). Racial profiling continues as well, with "brown" appearing to be the new "black" insofar as law enforcement has turned its attention to males of Arab or Muslim descent since 9/11. See Tanya E. Coke, *Racial Profiling Post-9/11: Old Story, New Debate*, in LOST LIBERTIES: ASHCROFT

Clearly, one of the reasons that *Native Son* is included in law-and-literature scholarship²⁵ and courses²⁶ is that it fits neatly into one of the two main branches of law-and-literature scholarship: “law-in-literature,” which addresses “the appearance of legal themes or the depiction of legal actors or processes in fiction or drama.”²⁷ The novel also fits neatly within the most recent branch of law-and-literature, championed by Martha Nussbaum among others, which focuses on the empathetic motivational possibilities of literature toward legal and social change.²⁸ In *Poetic Justice*, Nussbaum argues that “we should seek novels that depict the special circumstances of groups with whom we live and whom we want to understand, cultivating the habit of seeing the fulfillment or frustration of their aspirations and desires within a social world that may be characterized by institutional equalities.”²⁹ Not surprisingly, she identifies *Native Son* as “[o]ne such novel.”³⁰

AND THE ASSAULT ON PERSONAL FREEDOM 91–111 (Cynthia Brown ed., 2003). See also Deborah Ramirez, Jennifer Hoopes & Tara Lai Quinlan, *Defining Racial Profiling in a Post-September 11th World*, 40 AM. CRIM. L. REV. 1195 (2003).

25. E.g., John P. McWilliams, Jr., *Innocent Criminal or Criminal Innocence: The Trial in American Fiction*, in LAW AND AMERICAN LITERATURE: A COLLECTION OF ESSAYS 45, 98–106 (1983).

26. See Elizabeth Villiers Gemmette, *Law and Literature: Joining the Class Action*, 29 VAL. U. L. REV. 665, 685 (1995) (noting an article by Richard Delgado and Jean Stefanac observing that *Native Son* and *Invisible Man* were the only two works by minority authors on four latter twentieth-century law-and-literature bibliographies).

27. Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 1, 1 (1988). Weisberg identifies the other major branch of law-and-literature scholarship, “law-as-literature,” as involving the “parsing of such legal texts as statutes, constitutions, judicial opinions, and certain classic scholarly treatises as if they were literary works.” *Id.* Of course, this division fictitiously oversimplifies the field. For a counter-narrative of the branches of the law-and-literature movement, see Julie Stone Peters, *Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion*, 120 PMLA 442 (2005). Peters heuristically identifies three major branches of law-and-literature: humanism, dominant in the 1970s and early 1980s and characterized by its focus on the edifying effects of literary texts; hermeneutics, dominant in the late 1980s and focusing on the use of literary theory to unmoor legal texts; and narrative, dominant in the late 1980s and early 1990s and focusing on the interplay between legal cases and oppositional storytelling. *Id.*

28. See MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 53–78 (1995). Specifically, Nussbaum argues that storytelling and literary imagining should be viewed as part of public rationality and as “essential ingredient[s] of an ethical stance that asks us to concern ourselves with the good of other people whose lives are distant from our own.” *Id.* at xvi. “[N]ovel-reading will not give us the whole story about social justice, but it can be a bridge both to a vision of justice and to the social enactment of that vision.” *Id.* at 12.

29. *Id.* at 93.

30. NUSSBAUM, *supra* note 28, at 93. Ironically, one of the potential dangers in Nussbaum’s approach (which she herself acknowledges) is that it veers perilously close to Mary Dalton’s own hypocritical habit of exoticizing difference, while at once embracing its proximity. For example, as Bigger drives Mary and her companion around, Mary begins to wonder about how black people live:

“You know, Bigger, I’ve long wanted to go into these houses,” she said, pointing to the tall, dark apartment buildings looming to either side of them, “and just see how your

To my mind, neither approach—using *Native Son* as a pedagogical tool to discuss “the usual” criminal justice issues, or using *Native Son* primarily to advance an empathetic understanding of a poor, black defendant—does the novel justice. The novel is richer than that. And far more complex. In this article, I offer three interrelated close readings of *Native Son* that hopefully go beyond these approaches.³¹ By way of background, I offer in Part I a précis of the novel, its genesis, and its use of antipodes, followed by a review in Part II of the three “real life” cases that informed Wright as he was writing *Native Son*—the trial of Robert Nixon, the Scottsboro Boys case, and the prosecution of Leopold and Loeb. These cases in turn inform my close readings of the novel, which I begin in Part III, borrowing from critical race theory and penology. In Part III.A, I demonstrate that *Native Son*, more than simply problematizing criminal justice issues, foregrounds the way in which society and the law actively participate in the construction(s) of race and gender. In Part III.B, I turn to the penological concerns *Native Son* raises and argue that *Native Son* challenges the traditional utilitarian and retributive justifications for punishment. Building upon my analysis in Parts III.A and III.B, I use Part III.C to turn to the crux of my argument: that the real crime motivating Bigger’s prosecution is not murder or rape, but a violation of what I term the “white-letter law” of “trespass.”

The term “white-letter law” is particularly useful as a conceptual matter. When one thinks of black-letter law, one thinks of statutory law, the written law,

people live. . . . We know so *little* about each other. I just want to *see*. I want to *know* these people. Never in my life have I been inside of a Negro home. Yet they *must* live like we live. They’re *human*. . . . There are twelve million of them. . . . They live in our country. . . . In the same city with us. . . .” her voice trailed off wistfully.

NATIVE SON, *supra* note 1, at 69–70. Later that evening, Mary asks Jan to introduce her to some “Negroes.”

“Say, Jan, do you know many Negroes? I want to meet some.”

“I don’t know any very well. But you’ll meet them when you’re in the [Communist] Party.”

“They have so much *emotion!*”

“And their songs—the spirituals! Aren’t they marvelous?” Bigger saw her turn to him. “Say, Bigger, can you sing?”

“I can’t sing,” he said.

“Aw, Bigger,” she said, pouting. She tilted her head, closed her eyes and opened her mouth.

“*Swing low, sweet chariot,
Coming fer to carry me home. . . .*”

Id. at 77.

31. By this, I mean that my focus is not the particular legal issues I referred to earlier—i.e., the privilege against self-incrimination and right to counsel, the exclusion of African Americans from juries, the fairness of the death penalty, or race-based stops. Nor do I focus on how the novel allows an empathetic understanding of Bigger’s plight, the essentially and essentializing humanistic approach taken by Nussbaum. See NUSSBAUM, *supra* note 28, at 93–97. Rather, I hope to engage the novel on a deeper level and offer readings that are about the symbiotic relationship among law, society, and injustice, and at the same time about the process of reading itself. Perhaps this is why I offer three readings of *Native Son*. Far from pinning *Native Son* down, I hope my readings invite other readings and explications, a collective mapping of new territories to explore.

the easily discernible law set forth as black letters on a white page. By using the term “white-letter law,” I hope to suggest societal and normative laws that stand side by side with, and often undergird, black-letter law but, as if inscribed in white ink on white paper, remain invisible to the naked eye.

Similarly evocative is the term “trespass.” Rich with connotations, “trespass” suggests a line crossed, a boundary traversed, and has particular salience given this country’s ongoing history of cultural, social, and geographic segregation along racial lines. Here, I use the term to suggest that Bigger’s real crime is crossing societal and legal boundaries that work to reify race-based and gender-based hierarchies. Indeed, I contend ultimately that what is really at stake is Bigger’s trespass on a property interest in whiteness.

“Trespass” as a term is also useful in talking about literature as an art form, and law-and-literature as a discipline. For although the text that motivates this article is *Native Son*, my goal is significantly larger. Kenji Yoshino has recently described the law-and-literature enterprise as “ailing” and in need of a “cure.”³² Specifically, Yoshino posits that the law-and-literature movement is “plagued by skepticism,” and attributes this skepticism to law-and-literature’s existence as a “markedly schizophrenic discipline” lacking a clear direction.³³ What I hope to do, through my explication of *Native Son*, is to redirect such thinking about law-and-literature by suggesting that only wider landscapes, a new critical geography, will reinvigorate the discipline. I address this challenge in the Conclusion of this article.

I. NATIVE SON

Richard Wright finished the first draft of *Native Son* in 1938,³⁴ just seven years after the Scottsboro boys were first tried and sentenced to death for allegedly raping two white women,³⁵ and the same year that Robert Nixon, a young Chicago black man, was accused of entering a white woman’s bedroom and bludgeoning her to death.³⁶ Though only thirty years old and largely self-taught,³⁷ Wright was already well versed in Communist ideology³⁸ had gained

32. Kenji Yoshino, *The City and the Poet*, 114 YALE L. J. 1835, 1841 (2005).

33. *Id.* at 1836–37. Yoshino proposes a remedy in addition to the diagnosis: applying a Platonic paradigm to ensure that narrative, and the examination and use of narrative by the law-and-literature movement, “serve, rather than . . . subvert, the proper ends of the state.” *Id.* at 1839.

34. *Chronology*, in NATIVE SON, *supra* note 1, at 463, 471 [hereinafter, *Chronology*].

35. *See* discussion *infra* Part II.B.

36. *See* discussion *infra* Part II.A.

37. *See Chronology*, *supra* note 34, at 467 (Wright dropped out of high school in the tenth grade).

38. Wright himself emphasized the important role Communist ideology played in the development of *Native Son*, recalling, “[M]y contact with the labor movement and its ideology made me

an appreciation of the power of “words as weapons,”³⁹ and published his first book, *Uncle Tom’s Children*, a collection of novellas protesting racism and segregation.⁴⁰ However, he was disappointed by the reception of *Uncle Tom’s Children*. As Wright himself later put it in his essay “How ‘Bigger’ Was Born”:

When the reviews of that book began to appear, I realized that I had made an awfully naïve mistake. I found that I had written a book which even bankers’ daughters could read and weep over and feel good about. I swore to myself that if I ever wrote another book, no one would weep over it; that it would be so hard and deep that they would have to face it without the consolation of tears. It was this that made me get to work in dead earnest.⁴¹

The result was *Native Son*.⁴² To put the readings of the novel I propose in Part III in context, I offer here an extensive précis of *Native Son*.

Book I, *Fear*, begins with the dissonant sound of an alarm clock as Bigger Thomas wakes up in the rat-infested one-room tenement he shares with his mother and two siblings.⁴³ It ends with him returning to bed some twenty-one hours later, having just killed Mary Dalton, the daughter of a real-estate magnate and his blind wife.⁴⁴ Between these two events, Wright shows Bigger engaged in what would otherwise be a normal day. Bigger hangs out in a poolroom with his friends and plots to rob a local delicatessen.⁴⁵ Later, he and his friends pass

see Bigger clearly and feel what he meant.” WRIGHT, *How “Bigger” Was Born*, *supra* note 9, at 441.

39. As Wright put it in *Black Boy*, the first installment of his autobiography:

I opened [H.L. Mencken’s] *A Book of Prefaces* and began to read. I was jarred and shocked by the style, the clear, clean, sweeping sentences. Why did he write like that? And how did one write like that? I pictured the man as a raging demon, slashing with his pen, consumed with hate, denouncing everything American, extolling everything European or German, laughing at the weaknesses of people, mocking God, authority. What was this? I stood up, trying to realize what reality lay behind the meaning of the words . . . Yes, this man was fighting, fighting with words. *He was using words as a weapon*, using them as one would a club. Could words be weapons? Well, yes, for here they were. Then, maybe, *perhaps, I could use them as a weapon?*

RICHARD WRIGHT, *BLACK BOY* 217–18 (Harper & Brothers 1945) (emphases added).

40. RICHARD WRIGHT, *UNCLE TOM’S CHILDREN* (hardcover ed., Harper & Brothers 1940).

41. *How “Bigger” Was Born*, *supra* note 9, at 454.

42. As Keneth Kinnamon points out, *Native Son* served Wright’s purpose, as evidenced by the punchy sound bytes that appeared in the reviews after the publication of the novel, including:

“Shock our sensibilities,” “tremendous wallop,” “power and drama and truth,” “throbs from the opening line, with a wallop propelled to the end,” “tremendous power,” “a terrible story, a horrible story,” “its frank brutalities . . . will horrify many readers,” “powerful story,” “powerful novel,” “engrossing, terrible story,” “a super-shocker,” “grim and frightening,” “one of the most powerful novels of all time.”

Keneth Kinnamon, *How Native Son Was Born*, in RICHARD WRIGHT: CRITICAL PERSPECTIVES PAST AND PRESENT, *supra* note 9, at 110, 124.

43. *NATIVE SON*, *supra* note 1, at 3–5.

44. *Id.* at 87, 93.

45. *Id.* at 14. While petty burglary is commonplace, the owner of the targeted delicatessen, Blum, is white, with the result that an unusual degree of trepidation surrounds this robbery scheme.

the time at a movie theater.⁴⁶ What sets the day apart from a typical day, however, is that Bigger has been promised a job as a chauffeur for the Dalton family.⁴⁷ The interview goes well enough, though Bigger is decidedly uncomfortable in the affluent white home:

He had not raised his eyes to the level of Mr. Dalton's face once since he had been in the house. He stood with his knees slightly bent, his lips partly open, his shoulders stooped; and his eyes held a look that went only to the surface of things. There was an organic conviction in him that this was the way white folks wanted him to be when in their presence; none had ever told him that in so many words, but their manner had made him feel that they did.⁴⁸

Bigger gets the job and his first two assignments are to drive Mary Dalton to a lecture at the university, and then to take her trunk to the train station the following morning so that she can travel to Detroit.⁴⁹ Mary, however, has her own ideas about how to spend her last night in Chicago, and redirects Bigger to an address where they pick up her boyfriend, Jan Erlone.⁵⁰ Mary then insists that Bigger take them to a "real place . . . where colored people eat."⁵¹ Bigger drives Mary and Jan to a restaurant on Chicago's South Side, where the couple implores him to join them at their table, making Bigger again feel uncomfortable in his skin.⁵² At the end of the evening, after dropping Jan off, Bigger realizes that Mary has had too much to drink and that he will have to help her into the house, though he is terrified of how this might be interpreted.⁵³ Unfortunately, right after Bigger places Mary into her bed, he sees a "white blur . . . standing by the door, silent, ghostlike."⁵⁴ This blur, it turns out, is blind Mrs. Dalton.⁵⁵ Pan-

See infra text accompanying notes 231–33.

46. NATIVE SON, *supra* note 1, at 29–34.

47. *Id.* at 11–12, 31–34.

48. *Id.* at 47–48.

49. *Id.* at 54, 75.

50. *Id.* at 64–66.

51. *Id.* at 69.

52. NATIVE SON, *supra* note 1, at 72–74.

53. *Id.* at 81–82.

54. *Id.* at 85.

55. *Id.* Mrs. Dalton's blindness symbolizes the theme of social invisibility that Wright weaves throughout the novel. Bigger is self-aware of the phenomenon, musing that he could get away with murder:

What he had done last night had proved that. Jan was blind. Mary had been blind. Mr. Dalton was blind. And Mrs. Dalton was blind; yes, blind in more ways than one. Bigger smiled slightly. Mrs. Dalton had not known that Mary was dead while she had stood over the bed in that room last night. She had thought that Mary was drunk, because she was used to Mary's coming home drunk. And Mrs. Dalton had not known that he was in the room with her; it would have been the last thing she would have thought of. He was black and would not have figured in her thoughts on such an occa-

icked that his presence will be misunderstood, Bigger prevents Mary from calling out by covering her mouth. Because this scene drives the remainder of the novel, it is worth quoting in some detail:

He knew that Mrs. Dalton could not see them; but he knew that if Mary spoke she would come to the side of the bed and discover him, touch him. He waited tensely, afraid to move for fear of bumping into something in the dark and betraying his presence.

“Mary!”

He felt Mary trying to rise and quickly he pushed her head back to the pillow. . . .

Frenzy dominated him. He held his hand over her mouth and his head was cocked at an angle that enabled him to see Mary and Mrs. Dalton by merely shifting his eyes. Mary mumbled and tried to rise again. Frantically, he caught a corner of the pillow and brought it to her lips. He had to stop her from mumbling, or he would be caught. Mrs. Dalton was moving slowly toward him and he grew tight and full, as though about to explode. Mary’s fingernails tore at his hands and he caught the pillow and covered her entire face with it, firmly. Mary’s body surged upward and he pushed downward upon the pillow with all of his weight, determined that she must not move or make any sound that would betray him. His eyes were filled with the white blur moving toward him in the shadows of the room. Again Mary’s body heaved and he held the pillow in a grip that took all of his strength. For a long time he felt the sharp pain of her fingernails biting into his wrists. The white blur was still.

“Mary? Is that *you*?”

He clenched his teeth and held his breath, intimidated to the core by the awesome white blur floating toward him. . . . Then suddenly her fingernails did not bite into his wrists. Mary’s fingers loosened. He did not feel her surging and heaving against him. Her body was still.⁵⁶

sion. Bigger felt that a lot of people were like Mrs. Dalton, blind.

Id. at 107. This theme immediately conjures Ralph Ellison’s *Invisible Man* (1972), which responds to and develops the *topos* of blindness that Wright introduced in *Native Son*. Indeed, Robert B. Stepto has identified a call-and-response pattern in African American literature. See ROBERT B. STEPTO, *FROM BEHIND THE VEIL: A STUDY OF AFRO-AMERICAN NARRATIVE*, at xvi (1979). Julia Kristeva’s theory that each text enters a dialogue with previous texts is also applicable. See JULIA KRISTEVA, *The Bounded Text*, and *Word, Dialogue, and Novel*, in *DESIRE IN LANGUAGE: A SEMIOTIC APPROACH TO LITERATURE AND ART* 36, 64 (Leon S. Roudiez, ed., Thomas Gora, Alice Jardine & Leon S. Roudiez, trans., 1980).

56. *NATIVE SON*, *supra* note 1, at 85–86.

Bigger realizes that he has inadvertently smothered Mary, and attempts to conceal his crime by cramming Mary's body into the basement furnace,⁵⁷ using a hatchet to sever Mary's head when it does not fit.⁵⁸ Bigger also begins to "construct a case for 'them'": that he had brought Jan and Mary home in the car, that Mary had asked him to take her trunk to the train station so that she could travel to Detroit, and that he had left Mary and Jan together.⁵⁹ Bigger even plays out the scene of his disclosure in his head, including an act of expected subterfuge, a performance of blackness:

Jan and Mary were sitting in the car, kissing. They said, Good night, Bigger. . . . And he said, Good night. . . . And he touched his hand to his cap. . . .⁶⁰

With this plan in mind, Bigger goes home, and so ends Book I.

In Book II, *Flight*, Bigger continues his plan of concealment, deciding to send a ransom note to the Daltons that implicates Jan and the Communist Party, and enlisting his girlfriend Bessie Mears in the plot to collect the ransom.⁶¹ Be-

57. *Id.* at 91. Wright's use of a furnace bears further elaboration. The tradition of naturalistic novels that Wright built upon in *Native Son* was largely devoid of African Americans. Even novels which were intended to expose the harsh facts of city life, such as Dreiser's *An American Tragedy* (1925) and *Sister Carrie* (1900), were deficient in this regard. The few African American characters that did appear in naturalistic novels were marginal characters, such as the "darky" who silently tends the furnace in W.D. Howells's *The Rise of Silas Lapham* (1885), a character that Wright may have been signifyin(g) upon when he chose to task Bigger Thomas with tending the furnace. On the trope of signifyin(g), which includes using repetition to revise, in the African American literary tradition, see Henry Louis Gates, Jr., *The blackness of blackness: a critique of the sign and the Signifying Monkey*, in *BLACK LITERATURE AND LITERARY THEORY* 285 (Henry Louis Gates, Jr., ed., Routledge 1990) (1984).

58. *NATIVE SON*, *supra* note 1, at 92.

59. *Id.* at 88.

60. *NATIVE SON*, *supra* note 1, at 93. For a discussion of identity performance theory, see Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 *CORNELL L. REV.* 1259, 1260-66 (2000) (positing performance of identity in the workplace as a negotiation in which the true self is proffered as consideration for professional advancement, and arguing that this paradigm forms a species of workplace discrimination).

61. *NATIVE SON*, *supra* note 1, at 174-84. As Barbara Johnson has noted, even when Mr. Dalton receives the ransom letter, Bigger's presence in the room goes unnoticed and Mr. Dalton fails to "see" Bigger as having any involvement; he remains "unseen." Barbara Johnson, *supra* note 9, at 151-52.

The door swung in violently. Bigger started in fright. Mr. Dalton came into the kitchen, his face ashy. He stared at Peggy and Peggy, holding a dish towel in her hand, stared at him. In Mr. Dalton's hand was the letter, opened.

"What's the matter, Mr. Dalton?"

"Who. . . . Where did. . . . Who gave you this?"

"What?"

"This letter."

"Why, nobody. I got it from the door."

"When?"

"A few minutes ago. Anything wrong?"

fore the ransom can be delivered, however, Mary Dalton's body is found in the furnace, and Bigger flees to Bessie's one-room apartment.⁶² There, Bessie confronts Bigger with the inevitable interpretation of Mary Dalton's murder:

"Honey, don't you see?"

"What?"

"They'll They'll say you raped her."

Bigger stared. He had entirely forgotten the moment when he had carried Mary up the stairs They would say he had raped her and there would be no way to prove that he had not.⁶³

Bigger flees with Bessie to an abandoned building, but fearing that she will expose him to the police, he rapes and bludgeons her with a brick and then throws her body down an air-shaft.⁶⁴ The remainder of the section is devoted to Bigger's flight, with the police rounding up thousands of black men on Chicago's South Side,⁶⁵ and eventually chasing Bigger from rooftop to rooftop before capturing him.⁶⁶

Fate, the third and last section, opens shortly after Bigger's arrest. Bigger is in police custody, steadfastly refusing to speak "though they threatened him, persuaded him, bullied him, and stormed at him."⁶⁷ He is taken to the county morgue, "shackled by strong bands of cold steel to white wrists of policemen sitting to either side of him," and then to the inquest as to the rape and murder of Mary Dalton.⁶⁸ Later, Max, a Labor Defenders lawyer, volunteers to represent Bigger.⁶⁹ Notwithstanding the fact that Bigger is represented by counsel, the District Attorney, Buckley, interrogates him about Mary Dalton, and deceives Bigger into confessing.⁷⁰ Although Bigger confesses only to accidentally killing Mary, i.e., involuntary manslaughter, ultimately he is charged with both rape and murder, the latter a capital offense.⁷¹

Persuaded by Max that he should throw himself on the mercy of the court rather than risk a jury trial,⁷² Bigger pleads guilty⁷³ and Max offers an impas-

Mr. Dalton looked round the entire kitchen, not at anything in particular, but just round the entire stretch of four walls, his eyes wide and unseeing.

NATIVE SON, *supra* note 1, at 188.

62. *Id.* at 218–24.

63. *Id.* at 227.

64. *Id.* at 235–38.

65. *Id.* at 242–44.

66. *Id.* at 263–70. As he is captured, Bigger is greeted with shouts of "Kill 'im!," "Lynch 'im!" "That black sonofabitch!" and "Kill that black ape!" *Id.* at 270.

67. *Id.* at 273.

68. NATIVE SON, *supra* note 1, at 276.

69. *Id.* at 290.

70. *Id.* at 303–10.

71. *See id.* at 332–33.

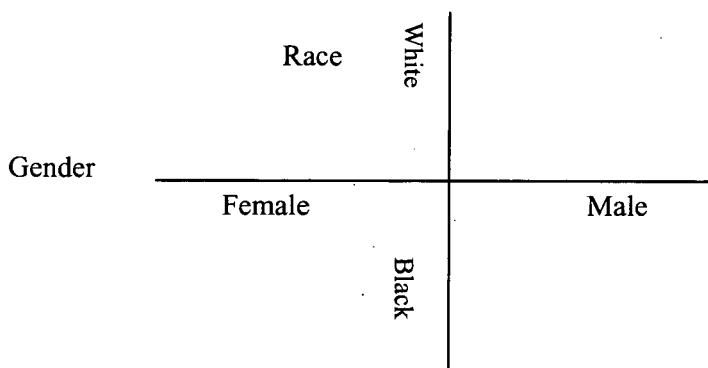
72. *Id.* at 358. *See also supra* note 20 (contextualizing Max's strategy within the systematic

sioned, but ultimately unsuccessful, plea for leniency.⁷⁴ The novel ends with Bigger alone in his cell, awaiting execution.⁷⁵

As the foregoing summary suggests, *Native Son* can be read as a series of antipodes:

Bigger Thomas (black male)	Mary Dalton (white female)
Bigger's mother (black female)	Mr. Dalton (white male)
Bigger's absent father (black male)	Mrs. Dalton (white female)
Bessie (black female)	Mary Dalton (white female)

Each character's fate is thus inextricably linked to his or her race or gender.⁷⁶ Moreover, each character's fate can be viewed as dependent on where they fit within the following tetrapolar structure:



The novel uses this series of antipodes to critique society and the law in relation to issues involving race and gender.

Take for example the scene in which Bigger rapes and then kills his girlfriend Bessie. Wright metastasizes Bigger's intrusion into Mary's room into Bigger's rape (entry) of Bessie, Bigger's inadvertent killing of Mary into Bigger's premeditated murder of Bessie, and Bigger's disposal of Mary's body in a furnace into his disposal of Bessie's body down an air-shaft. More than just con-

exclusion of blacks from juries until the 1960s).

73. WRIGHT, *NATIVE SON*, *supra* note 1, at 370.

74. *Id.* at 382-405.

75. *See id.* at 430.

76. This list is not intended to be exhaustive. Indeed, another series of antipodes can easily be imagined.

Poverty	Wealth
Deprivation	Privilege
Self-determination	Fatalism
Injustice	Justice

Wright himself noted the use of opposites: "As I wrote, for some reason or other, one image, symbol, character, scene, mood, feeling evoked its opposite, its parallel, its complementary, and its ironic counterpart." *How 'Bigger' Was Born*, *supra* note 9, at 460.

venient parallels, Wright uses the variable repetitions to draw the reader's attention to Bigger's different responses to the two crimes, which internalize the differing values society has placed on the two women. Following his murder of Mary, Bigger is "hysterical," his lips "trembling," and his chest "heaving."⁷⁷ This is because Bigger knows that society and the law implicitly place a premium on the lives of white women:

The reality of the room fell from him; the vast city of white people that sprawled outside took its place. She was dead and he had killed her. He was a murderer, a Negro murderer, a black murderer. He had killed a white woman. . . .

He stood with her body in his arms in the silent room and cold facts battered him like waves sweeping in from the sea: she was dead; she was white; she was a woman; he had killed her; he was black; he might be caught; he did not want to be caught; if he were they would kill him.⁷⁸

By contrast, after Bigger rapes and murders Bessie, whom he knows society and the law will not value, Bigger is cold and methodical. This is demonstrated by the following passage, in which he checks to make sure Bessie is in fact dead:

He lifted the flashlight to where he thought [Bessie's] head must be and pressed the button. The yellow spot sprang wide and dim on an empty stretch of floor; he moved it over a circle of crumpled bedclothes. There! Blood and lips and hair and face turned to one side and blood running slowly. She seemed limp; *he could act now*.⁷⁹

Examining the fate of the characters through this tetrapolar structure is central to my readings of the novel in Part III. But first, the three trials that informed *Native Son*, which in turn inform my readings of the novel.

II. THREE TRIALS

At least three "real life" cases informed Wright as he was drafting *Native Son*. As I detail below, however, my point is not that Wright merely borrowed elements from these cases to plot his novel, but rather, while highlighting and

77. *NATIVE SON*, *supra* note 1, at 92.

78. *Id.* at 87, 89.

79. *Id.* at 238 (emphasis added). Although feminists have pointed to this scene of Bessie's rape as evidence of Wright's misogyny, this accusation is not entirely fair since, as I have just demonstrated, this scene is crucial to Wright's aim. As the literary scholar Sabine Sielke points out, Bessie is also smart, further undermining the accusation of misogyny:

[Bessie] asks uncomfortable questions, provides unrequested analysis, questions Bigger's gangsta posture, and breaks his new "stride," holding before him a mirror that makes him remember how and what blackness means in American culture.

SABINE SIELKE, *READING RAPE: THE RHETORIC OF SEXUAL VIOLENCE IN AMERICA, 1790-1990*, at 111 (2002).

sharpening these elements, to comment on the role society and the law play in racializing particular defendants, en-gendering⁸⁰ certain victims, and policing the white-letter crime of racial trespass.

A. *The Trial of Robert Nixon*

As Wright acknowledged in his essay "How 'Bigger' Was Born," many of the plot details in *Native Son* come from the arrest and prosecution of Robert Nixon.⁸¹ The news stories of this case began with reports that Florence Johnson, a white woman, had been "beaten to death with a brick by a colored sex criminal . . . in her apartment."⁸² Although the police seized "fifteen colored men" in the investigation, the principle suspect was Nixon, a young black man found five blocks from Johnson's apartment with "bloodspots on his clothes."⁸³ Nixon was quickly charged, "voluntarily" confessed to the murder as well as several prior brick slayings,⁸⁴ and participated in a reenactment of the Johnson murder.⁸⁵ Nixon also admitted that he had initially attempted to divert suspicion from himself by scrawling on Johnson's mirror "Black Legion," the sobriquet of a northern version of the Ku Klux Klan.⁸⁶

Although Wright was living in New York at the time of Nixon's arrest, he quickly became engaged in the case, asking his friend, writer Margaret Walker, to send him newspaper accounts of Nixon's prosecution.⁸⁷ As Walker noted, Wright eventually had enough articles "to spread all over his nine-by-twelve bedroom floor and he was using them in the same way Dreiser had done in *American Tragedy*. He would spread them all out and read them over and over

80. By "en-gendering" I am referring to the process of constructing and maintaining gender differences so that they appear normal rather than as a function of socialization having social, cultural, and psychological components. The process assumes not only that there are two distinct sexes, but also two distinct genders traditionally labeled masculine and feminine.

81. SIELKE, *supra* note 79, at 455 ("Many of the newspaper items and some of the incidents in *Native Son* are but fictionalized versions of the Robert Nixon case and rewrites of news stories from the *Chicago Tribune*.").

82. *Sift Mass of Clews for Sex Killer*, CHI. DAILY TRIB., May 28, 1938, at 1.

83. *Id.* No test was ever taken to see if the blood matched that of Mrs. Johnson. *People v. Nixon*, 20 N.E.2d 789, 794 (Ill. 1939).

84. *Brick Moron Tells of Killing Two Women*, CHI. DAILY TRIB., May 29, 1938, at 1. During a hearing on the admission of his confession, Nixon denied that his statements were voluntary, and testified that he had been "beaten, hung up with his arms behind him and stripped of his clothing, and that hot electric light bulbs were pressed against his body to compel him to make a statement . . ." Twenty-three police officers testified in rebuttal that Nixon had not been beaten. *Nixon*, 20 N.E.2d at 792.

85. *Two Accuse Each Other in Brick Killing*, CHI. DAILY TRIB., May 30, 1938, at 1. *See also Nixon*, 20 N.E.2d at 792.

86. *See Black Legion Toll Now Two*, CHI. DAILY TRIB., May 24, 1936, at A1 (explaining the beliefs and membership of the Black Legion).

87. ROWLEY, *supra* note 5, at 152.

again and then take off from there in his own imagination.”⁸⁸ Wright later met with one of Nixon’s defense lawyers, and took photographs of the Cook County Jail where Nixon was incarcerated.⁸⁹

In borrowing from the case of Robert Nixon to plot *Native Son*, Wright transposed details to suit his purpose. Whereas Nixon bludgeoned a white woman with a brick, Bigger bludgeons his girlfriend. Whereas Nixon was made to reenact his entry through a fire escape into Mrs. Johnson’s home, Bigger is made to reenact his entry into Mary Dalton’s bedroom. Whereas Nixon sought to cast suspicion on the Black Legion by scrawling the group’s name on a mirror, Bigger attempts to cast suspicion on the Communist Party by signing his ransom note “Red” and drawing a hammer and sickle.

More significant to Wright than these plot details, however, was likely the way white society sexualized and racialized Nixon.⁹⁰ In a string of articles, the *Chicago Tribune* repeatedly referred to Nixon as a “colored rapist-killer,”⁹¹ a “Negro sex moron,”⁹² and as exhibiting “jungle strength.”⁹³ Indeed, parts of one *Chicago Daily Tribune* article, “Brick Slayer Is Likened to Jungle Beast,” likely provided a template for the “news coverage” of Bigger’s arrest:

The Negro youth is Robert Nixon. He is 18 years old and comes from a pretty little town in the old south—Tallulah, La. But there is nothing pretty about Robert Nixon. He has none of the charm of speech or manner that is characteristic of so many southern darkies.

That charm is a mark of civilization, and so far as manner and appearance go, civilization has left Nixon practically untouched. His hunched shoulders and long, sinewy arms that dangle almost to his knees; his outthrust head and catlike tread all suggest the animal.

He is very black—almost pure Negro. His physical characteristics suggest an earlier link in the species. . . .

. . . These killings were accomplished with a ferocity suggestive of Poe’s “Murders in the Rue Morgue”—the work of a giant ape. . . .

. . . Last week when he was taken to [Mrs. Johnson’s apartment] to demonstrate how he had slain [her], a crowd gathered and there were cries of: “Lynch him! Kill him!”

Nixon backed against a wall and bared his teeth. He showed no fear, just as he has shown no remorse. He stood in a snarling attitude until

88. MARGARET WALKER, RICHARD WRIGHT, DAEMONIC GENIUS 122–23 (1988).

89. Margaret Walker Alexander, *Richard Wright*, in RICHARD WRIGHT: IMPRESSIONS AND PERSPECTIVES 47, 61 (David Ray & Robert M. Farnsworth eds., 1973).

90. See *How “Bigger” Was Born*, *supra* note 9, at 455–56.

91. *Slayer Admits Rape, Another in Prison For It*, CHI. DAILY TRIB., June 7, 1938, at 5.

92. *Beats Slayer of Wife; Own Life Menaced*, CHI. DAILY TRIB., June 8, 1938, at 3.

93. *Id.*

police took him indoors and the crowd was ordered away.⁹⁴

Evidencing the artificial racialization at work, the *Chicago Daily Tribune's* physical description of Nixon bore no resemblance to the photograph of Nixon they had printed a few days earlier; this was apparently immaterial.⁹⁵

B. *The Scottsboro Boys Case*

"You've read about the Scottsboro boys?"

"I heard about 'em."

"Don't you think we did a good job in helping to keep 'em from killing those boys?"

"It was all right."⁹⁶

As Wright wrote *Native Son*, he was also informed by the Scottsboro Boys case, which he had covered for the Communist newspaper, the *Daily Worker*.⁹⁷

On March 25, 1931, nine black youths, between the ages of thirteen and twenty, riding onboard a freight train traveling between Tennessee and Alabama, got into an altercation with several white youths and forced them off the train.⁹⁸ The white boys ran to the stationmaster, and demanded that he "'press charges against 'em.'"⁹⁹ Before long, a sheriff had assembled an armed posse to "'capture every negro on the train and bring them to Scottsboro.'"¹⁰⁰ In Scottsboro, the posse boarded a freight car and found not only the black youths, but two white girls as well.¹⁰¹ After some hesitation, the girls, Victoria Price and Ruby Bates, offered an explanation for why they had been traveling in a freight car with the black youths: they had been raped by them.¹⁰² Their accusation set off one of the most significant cases in American legal history.

Within days, the nine youths were indicted on charges of rape, a capital offense.¹⁰³ Six days later, they were tried while a "[m]ob of 8,000, the most

94. Charles Leavelle, *Brick Slayer Is Likened To Jungle Beast*, CHI. DAILY TRIB., June 5, 1938, at A6. The news article concludes with a sheriff opining that "nothing can be done with Robert Nixon. Only death can cure him." *Id.* Compare NATIVE SON, *supra* note 1, at 279-80.

95. See *Sift Mass of Clews for Sex Killer*, *supra* note 82, at 2.

96. NATIVE SON, *supra* note 1, at 75.

97. ADDISON GAYLE, RICHARD WRIGHT: ORDEAL OF A NATIVE SON 100-101 (1980).

98. JAMES GOODMAN, STORIES OF SCOTTSBORO 3-5 (1994) (drawing from comprehensive sources including local newspapers and court records).

99. DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 4 (1969) (patching together a narrative from various contemporary news sources).

100. *Id.* at 5.

101. *Id.*

102. *Id.* at 6.

103. This was of course before *Coker v. Georgia*, 433 U.S. 584 (1977), in which the Supreme Court struck rape from the list of capital crimes.

people ever seen in . . . town,” clamored outside the courthouse.¹⁰⁴ As the same newspaper put it, “[m]ob spirit is whipped up to such a degree that it is common knowledge there will be a mass lynching of all nine if . . . a verdict [for the electric chair] is not speedily rendered.”¹⁰⁵ The defendants were severed into three groups,¹⁰⁶ and were only appointed counsel on the morning of their trials.¹⁰⁷ After a series of one-day trials before all-white juries, eight of the nine young men were found guilty and sentenced to death.¹⁰⁸ The case against the ninth defendant, the thirteen-year old, resulted in a mistrial when seven of the jurors insisted on the death penalty, notwithstanding the fact that the prosecution had asked only for life imprisonment in light of the defendant’s youth.¹⁰⁹ The Supreme Court twice ordered new trials in the Scottsboro cases. First, in the landmark case *Powell v. Alabama*,¹¹⁰ then again, in *Norris v. Alabama*.¹¹¹

Since Wright covered the case for the *Daily Worker*, he would have followed its legal developments and was likely attuned to the racial and sexual dynamics of the case as he was drafting *Native Son*. More than anything that had come before it, the case exemplified white society’s response to even a hint of interracial sex. Furthermore, the case was an example of society and the law (at least as represented by local prosecutors) racializing and sexualizing black defendants while simultaneously racializing and en-gendering white women.

Accounts given at trial and in the local media repeatedly portrayed Victoria

104. *Nine Negro Workers Face Lynch Mob in Ala. as Trial Opens on Horse Swapping, Fair Day*, THE DAILY WORKER, Apr. 7, 1931, at 1 [hereinafter *Nine Negro Workers*]. The paper noted that the “trial was deliberately set for today, because this is horse-swapping and fair day in this town, and it was known that over 500 additional persons would be in town today.” *Id.* at 1, 3. In its opinion reversing the convictions of the boys, the Supreme Court described “the attitude of the community” toward the defendants as “one of great hostility,” and noted that “[t]he sheriff thought it necessary for the militia to assist in safeguarding the prisoners.” *Powell v. Alabama*, 287 U.S. 45, 51 (1932). See also CARTER, *supra* note 99, at 8 (noting that members of the crowd shouted up to the jail: “Give ‘em to us,” “Let those niggers out,” and “If you don’t we’re coming in after them.”).

105. *Nine Negro Workers*, *supra* note 104, at 1.

106. *Powell*, 287 U.S. at 49.

107. *Id.* at 56.

108. See CARTER, *supra* note 99, at 48.

109. *Id.*

110. 287 U.S. 45, 71 (1932) (holding that “the failure of the trial court to give [the defendants] reasonable time and opportunity to secure counsel was a clear denial of due process”). The significance of *Powell* cannot be overstated. More than anything else, the case signaled the beginning of the Supreme Court’s heightened sensitivity to the treatment of African Americans in the criminal justice system. Felix Frankfurter in particular, then a law professor at Harvard, championed the case for its use of the Due Process Clause to “protect[] black men from oppressive and unequal treatment by whites.” Felix Frankfurter, *A Notable Decision*, N.Y. TIMES, Nov. 13, 1932, at E1.

111. 294 U.S. 587 (1934) (reversing because of Alabama’s intentional discrimination against blacks in jury selection). Still, the cases dragged on for years, with the defendants being tried and convicted several times. By 1950, when the last defendant was finally paroled, the nine defendants had served in aggregate more than a hundred years in jail and prison. See GOODMAN, *supra* note 98, at 393–95, 414.

Price and Ruby Bates as flowers of southern womanhood, thus deserving automatic credibility.¹¹² In fact, they were both prostitutes,¹¹³ Price's story was filled with contradictions,¹¹⁴ and Bates later recanted her story and testified for the defense.¹¹⁵ Indeed, medical evidence suggested that the rape charge was in all likelihood a complete fabrication.¹¹⁶ Furthermore, as historian Dan Carter noted, defense lawyer Samuel Leibowitz's cross-examination of Price about her inconsistencies and her professed virginity likely hardened the all-white jury *against* the defense, since his questions were viewed as an attack on a "symbol of white Southern womanhood."¹¹⁷ A spectator told a reporter that Price "might be a fallen woman, but by God she is a white woman."¹¹⁸ The locals even called a special meeting, attended by about 200 men, to protest the manner in which Leibowitz had questioned Price.¹¹⁹ The State Attorney General urged the jury to sentence one of the defendants to death, "not to avenge Victoria Price but to stop attacks upon white women by Negro marauders."¹²⁰ In keeping with this agenda, the court repeatedly limited the defense's questioning, with the effect of ensuring a chaste image of Price and Bates, the symbols of all white women to be protected.¹²¹ In one trial, the judge even instructed the jury that if they found

112. See GOODMAN, *supra* note 98, at 21–22 (describing how the women viewed the rape as an opportunity to elevate their status). As Lawrence Friedman pointed out, the law's role in protecting the "virtue and chastity" of white women "ran particularly deep in the legislation of the southern states," so that, for example:

It was an offense under the law of Alabama to use "abusive, insulting, or obscene language" in the "presence or hearing of any female," or to "willfully disturb" any women " . . . in a railroad car, steamboat, or in any other public conveyance . . ." by "rude or indecent behavior, or by profane or obscene language."

LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 220 (1993) (citing Code of Alabama, 1887, vol. 2, §§ 4031, 4032).

113. See CARTER, *supra* note 99, at 81–84.

114. See *id.* at 206–13 (describing how the defense attorney succeeded in forcing Price to contradict herself).

115. Bates testified that she had had intercourse with an individual named Lester Carter the night before she'd boarded the train, while Victoria Price had had intercourse with an individual named Jack Tiller, and that no rape, or indeed intercourse, had occurred on the train. *Id.* at 232. Lester Carter, who was also called to the stand as a defense witness, seconded this version of the events. *Id.* at 229–30.

116. One of the state's medical examiners testified that the amount of semen he found in Price's vagina was small, and therefore inconsistent with her claim that she had been raped by several youths. In addition, the semen was non-motile, indicating that it had been present at least twelve hours prior to Price boarding the train. *Id.* at 213.

117. *Id.* at 210.

118. CARTER, *supra* note 99, at 295 (citing N.Y. HERALD TRIB., Nov. 30, 1933; N.Y. TIMES, Nov. 30, 1933, at 40).

119. See CARTER, *supra* note 99, at 224–25.

120. F. Raymond Daniell, *Scottsboro Case Given to the Jury Which is Locked Up*, N.Y. TIMES, Dec. 1, 1933, at 1.

121. Among other things, the court sustained objections to defense questions about whether Price and Bates were in fact prostitutes. *Weems v. State*, 141 So. 215, 217 (Ala. 1932), *rev'd on*

the defendant had intercourse with either of the women that would be enough for a conviction since there was a presumption that no white woman would consent to intercourse with a “Negro.”¹²²

Mirroring this en-gendering of the white women, the local media repeatedly racialized and sexualized the defendants. The *Chattanooga News* described them as “savages.”¹²³ The *Huntsville Daily Times* proclaimed that the crime “savored of the jungle” and exemplified the “meanest African corruption.”¹²⁴ One of the youths was even dubbed the “ape nigger.”¹²⁵ The youths fared only slightly better in the courtroom. On many occasions, they were simply referred to as “Negroes,” as in the prosecutor’s rhetorical question to the jury: “How would you like to have your daughter on that train with nine Negroes in a car?”¹²⁶

C. *The Prosecution of Loeb and Leopold*

“Come on, honey. Tell me what you thinking.”

“It ain’t nothing much, Bigger. I used to work over in that section, not far from where the Loeb folks lived.”

“Loeb?”

“Yeah. One of the families of one of the boys that killed that Franks boy. Remember?”

“Naw; what you mean?”

“You remember hearing people talk about Loeb and Leopold.”

“Oh!”

“The ones who killed the boy and then tried to get money from the boy’s family

. . . . by sending notes to them”¹²⁷

The third criminal case that informed Wright was perhaps equally as

other grounds, Powell v. Alabama, 287 U.S. 45 (1935); Patterson v. State, 141 So. 195, 197–98 (Ala. 1932), *rev’d on other grounds*, Powell v. Alabama, 287 U.S. 45 (1935).

122. Specifically, the court gave the following instruction:

Where the woman charged to have been raped, as in this case[,] is a white woman, there is a very strong presumption under the law that she will not and did not yield voluntarily to intercourse with the defendant, a Negro; and this is true, whatever the station in life the prosecutrix may occupy, whether she be the most despised, ignorant and abandoned woman of the community, or the spotless virgin and daughter of a prominent home of luxury and learning.

Judge Callahan’s Charge to the Scottsboro Jury in the Case of Heywood Patterson, N.Y. TIMES, Dec. 1, 1933, at 15. See also CARTER, *supra* note 99, at 345 (noting that the judge gave virtually the same instruction in Patterson’s retrial); GOODMAN, *supra* note 98, at 227 (citing the charge to the jury).

123. CARTER, *supra* note 99, at 20 (quoting CHATTANOOGA NEWS, Mar. 27, 1931).

124. *Id.* (quoting the HUNTSVILLE DAILY TIMES, Mar. 27, 1931).

125. *Id.* at 45.

126. The court overruled the defense’s objection to this inflammatory remark. *Weems*, 182 So. at 4.

127. NATIVE SON, *supra* note 1, at 136.

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notorious as the Scottsboro Boys case. On May 21, 1924, two young men lured Robert Franks, a young neighborhood boy, into their car and struck him repeatedly with a chisel, killing him.¹²⁸ After stopping to eat, the young men undressed the boy, poured hydrochloric acid over his face, and hid his naked body in a culvert.¹²⁹ The men then sent the boy's father a ransom note demanding ten thousand dollars for his son's return.¹³⁰ They intended to deliver a follow-up message instructing Mr. Franks to throw the money from a train window; however, the boy's body was found before the message was received.¹³¹ The crime was traced to Nathan Leopold and Richard Loeb, recent graduates of the University of Chicago and the University of Michigan, respectively.¹³² Both were pursuing post-graduate studies at the University of Chicago.¹³³ Neither youth needed the ransom money. Leopold was the son of a millionaire box manufacturer, and Loeb was the son of a vice president at Sears Roebuck.¹³⁴ The ransom was only used to make the murder, seen as an adventure, even "more interesting."¹³⁵ The men also admitted that they had planned the kidnapping and murder for six months.¹³⁶ Not surprisingly, the case was billed the "crime of the century."¹³⁷

Represented by Clarence Darrow, Loeb and Leopold at first plead "not guilty," but eventually changed their pleas to "guilty."¹³⁸ Darrow planned to use their pleas, as well as expert testimony from psychologists, to convince the judge to spare the defendants the death penalty.¹³⁹ In front of an audience of judge and media,¹⁴⁰ Darrow delivered a masterful three-day argument¹⁴¹ that turned the

128. See *Two Rich Students Confess to Killing Franks Boy in Car*, N.Y. TIMES, June 1, 1924, at 1 [hereinafter *Two Rich Students Confess*]; *Ready to Kill Him, Leopold Wrote Loeb*, N.Y. TIMES, June 2, 1924, at 3; *Two Students Held in Franks Slaying*, N.Y. TIMES, May 31, 1924, at 1 [hereinafter *Two Students Held*].

129. See *Two Rich Students Confess*, *supra* note 128; *Kidnap Victims Often Found Slain*, N.Y. TIMES, May 13, 1932, at 4; *Student Slayers Accuse Each Other of Actual Killing*, N.Y. TIMES, June 2, 1924, at 1.

130. *Thinks Boy Died Fighting Captors*, N.Y. TIMES, May 24, 1924, at 1.

131. See *Two Rich Students Confess*, *supra* note 128 (describing plan to provide Franks with instructions for throwing the ransom money from a southbound Illinois Central train).

132. *Id.*

133. *Id.*

134. *Two Students Held*, *supra* note 128, at 1.

135. *Indict Boy Slayers for Double Crime; Confession Is Out*, N.Y. TIMES, June 6, 1924, at 1.

136. *Two Rich Students Confess*, *supra* note 128.

137. HAL HIGDON, *THE CRIME OF THE CENTURY: THE LEOPOLD AND LOEB CASE* (1975); Leslie Oelsner, *Nathan F. Leopold of 1924 Murder Case Is Dead*, N.Y. TIMES, Aug. 31, 1971, at 36.

138. *Slayers of Franks Both Plead Guilty; Judge Holds Fate*, N.Y. TIMES, July 22, 1924, at 1.

139. *Id.*

140. The judge issued 200 media tickets to the 300-person courtroom. HIGDON, *supra* note 137, at 169.

141. *Darrow Ends Plea for Franks Slayers*, N.Y. TIMES, Aug. 26, 1924, at 1.

“crime of the century” into the “trial of the century.”¹⁴² Darrow’s core argument was that Loeb and Leopold were “so mentally ill that they were not morally blameworthy.”¹⁴³ He also argued that revenge would never bring Bobby Franks back to life, while vividly reminding the judge of the fate of the young defendants if they were sentenced to death.¹⁴⁴ On September 11, 1924, Judge Caverly did spare the defendants, sentencing them to life imprisonment for the murder, plus 99 years for the kidnapping.¹⁴⁵

Richard Wright kept a copy of Clarence Darrow’s *Pleas in Defense of Loeb and Leopold* on his desk as he wrote the trial scene in *Native Son*,¹⁴⁶ and was thus able to use Darrow’s argument as a model for Max’s plea to spare Bigger’s life. Wright also relied on details from the 1924 version of Maureen McKernan’s *The Amazing Crime and Trial of Leopold and Loeb*.¹⁴⁷ The ransom plot in *Native Son*, for example, also comes directly from the Loeb and Leopold case, as Bigger thinks to himself:

Yes, Loeb and Leopold had planned to have the father of the murdered boy get on a train and throw the money out of the window while passing some spot. He leaped from bed and stood in the middle of the floor. . . . He could, yes, he could have them pack the money in a shoe box and have them throw it out of a car somewhere on the South Side.¹⁴⁸

Furthermore, Bigger’s attempt to answer the questions of reporters in a manner that implicates Jan¹⁴⁹ recalls Loeb’s meeting with reporters early in the investigation, in which he suggested leads they should follow.¹⁵⁰

But it was the popular response to Loeb and Leopold that most likely piqued Wright’s interest. The media repeatedly alluded to the fact that Loeb and Leopold were Jewish. The *Chicago Tribune*, for example, described them as sons of “Jewish mercantile millionaires”¹⁵¹ and claimed that they were members

142. Alan M. Dershowitz, *Introduction to MAUREEN MCKERNAN, THE AMAZING CRIME AND TRIAL OF LEOPOLD AND LOEB* (The Notable Trials Library 1989) (1924) (identifying Darrow’s speech as “one of the most remarkable legal arguments in the history of advocacy”).

143. See KEVIN TIERNEY, *DARROW: A BIOGRAPHY* 339 (1979).

144. *Id.*

145. *Franks Slayers Get Life Imprisonment; Youth Averts Noose*, N.Y. TIMES, Sept. 11, 1924, at 1.

146. ROWLEY, *supra* note 5, at 153.

147. *Id.* at 544–45 n.6 & accompanying text at 153 (discussing Wright’s use of the McKernan source, but incorrectly identifying the title of McKernan’s book as “The Amazing Crime of Loeb and Leopold”).

148. *NATIVE SON*, *supra* note 1, at 137.

149. *Id.* at 208–14.

150. See *Two Students Held*, *supra* note 128, at 16 (reporting Loeb’s statement to reporters regarding his “theory of the Franks case”).

151. Maureen McKernan, *Leopold Family a Big Factor in City’s Business*, CHI. SUNDAY TRIB., June 1, 1924, at 5.

of an elite and mysterious “Jewish 400.”¹⁵² The media simultaneously sexualized the defendants by noting that they were homosexual, and intimating that they were lovers.¹⁵³ The *Chicago Tribune* even published phrenological diagrams of Loeb’s and Leopold’s heads with arrows pointing out their “sensuous lips” and Loeb’s “feminine” nose,¹⁵⁴ and an accompanying analysis by an “expert” who concluded that “Leopold is the male, Loeb is the female.”¹⁵⁵ At the same time, the media conveniently downplayed the fact that the victim, Robert Franks, was also Jewish.¹⁵⁶ As cultural theorist Paul B. Franklin has noted, “while references to homosexuality and Jewishness were whispered or shrouded in innuendo, homophobia and anti-Semitism nevertheless were writ large in the public reception of the crime and trial.”¹⁵⁷ The confluence of these perceptions was that in the public imagination, Loeb and Leopold became Jewish pederasts, whereas “little Bobbie Franks” became merely white.¹⁵⁸ This public perception in all likelihood played a role in the defendants’ decision to bypass a jury and instead place their fate in the hands of a judge, just as Bigger does in *Native Son*.

The prosecution’s strategy in the Loeb and Leopold case also likely in-

152. Maurine Watkins, ‘*Dick Innocent, Loeb’s Protest; Plan Defense*, CHI. DAILY TRIB., June 1, 1924, at 5. See also Paula S. Fass, *Making and Remaking an Event: The Leopold and Loeb Case in American Culture*, 80 J. AM. HIST. 919, 926 (1993) (noting that the portrayal of Leopold included “whiffs of the Jew”).

153. See *Leopold and Loeb Sane, Judge Rules; Jury Trial Denied*, N.Y. TIMES, Aug. 6, 1924, at 1; *Notes of Two Slayers Held Vital Evidence*, CHI. DAILY TRIB., June 9, 1924, at 1. For more information on the relationship between Leopold and Loeb, see HIGDON, *supra* note 137, at 83–84, 146, 149, 214–15, 329–30.

154. *Another Study of Slayers*, CHI. DAILY TRIB., June 5, 1924, at 2.

155. John Herrick, *Loeb Followed Leopold Whims, Expert Asserts*, CHI. DAILY TRIB., June 5, 1924, at 2.

156. The Franks family was, or had been, Jewish. See HIGDON, *supra* note 137, at 33 (noting that Bobby Franks’s father was born Jewish yet had adopted the Christian Science faith); Paul B. Franklin, *Jew Boys, Queer Boys: Rhetorics of Antisemitism and Homophobia in the Trial of Nathan “Babe” Leopold Jr. and Richard “Dickie” Loeb*, in QUEER THEORY AND THE JEWISH QUESTION 121 (Daniel Boyarin, Daniel Itzkovitz & Ann Pellegrini, eds., 1983). Yet in numerous articles about Bobby Franks’s family the *Chicago Daily Tribune* fails to mention that fact. See, e.g., *Franks Without Enemies, Says Old Time ‘Pal’*, CHI. DAILY TRIB., May 25, 1924, at 3; John Herrick, *Jail Policeman in Franks Quiz: Tutors Freed*, CHI. DAILY TRIB., May 29, 1924, at 1; John Kelley, *Jacob Franks, Father of Slain Boy, Started as Pawnbroker; Made Fortune in Realty*, CHI. DAILY TRIB., May 23, 1924, at 2. The fact that Franks’s father had renounced Judaism and in fact buried his son according to the rituals of the Christian Science religion he adopted no doubt contributed to this perception. Paul Augsburg, *Jacobs Franks Thinks Slayers of Son Insane*, CHI. SUNDAY TRIB., June 1, 1924, at 4. See also Maurine Watkins, *Simple Funeral Service Is Held for Franks Boy*, CHI. DAILY TRIB., May 26, 1924, at 3.

157. Franklin, *supra* note 156, at 122 (noting that Bobby Franks was actually Loeb’s second cousin).

158. See Genevieve Forbes, *They Slew for a Laboratory Test in Emotion*, CHI. DAILY TRIB., June 1, 1924, at 3 (“[T]he end results of precocity are often perversion, at least mental and moral.”).

formed Wright. For example, in arguing for the imposition of death, the prosecutor repeatedly referred to the defendants as “perverts” engaged in “crimes against nature.”¹⁵⁹ The prosecutor even speculated that had the defendants not been caught, “Leopold would be over in Paris or some other of the gay capitals of Europe, indulging his unnatural lust with the five thousand dollars he had wrung” from Robert Frank’s father in ransom money.¹⁶⁰

What I hope I’ve pointed to in my “reading” of these three “real life” cases is that Wright was engaged in much the same process, examining these cases through a lens informed by race and gender to offer a sustained critique of the role law and society play in reifying race-based and gender-based hegemony. I turn to this critique below.

III.

NATIVE SON: RACE, GENDER, AND TRESPASS

A. Racializing/En-gendering

As demonstrated above, Wright borrowed heavily from three real life trials in plotting *Native Son*.¹⁶¹ More significantly, by incorporating these cases by reference, Wright foregrounds and critiques the way both society and the law participate not only in the construction of race but also its entrenchment, as well as in the en-gendering of individuals.

Examples of this process of racializing and en-gendering run throughout the novel. These examples are sometimes explicit, sometimes less so. The news coverage of Bigger’s prosecution, for example, recalls Cesare Lombroso’s theory that African phenotypes signify criminal tendencies:¹⁶²

Overwhelmed by the sight of his accusers, Bigger Thomas, Negro sex-slayer, fainted dramatically this morning at the inquest of Mary Dalton, millionaire Chicago heiress. . . .

“He looks exactly like an ape!” exclaimed a terrified young white girl who watched the black slayer being loaded onto a stretcher after he had fainted.

Though the Negro killer’s body does not seem compactly built, he gives the impression of possessing abnormal physical strength. He is about five feet, nine inches tall and his skin is exceedingly black. His lower jaw protrudes obnoxiously, reminding one of a jungle beast.

His arms are long, hanging in a dangling fashion to his knees. It is

159. MCKERNAN, *supra* note 142, at 317, 319.

160. *Id.* at 327.

161. *Supra* Part II.

162. See GINA LOMBROSO-FERRERO, CRIMINAL MAN, ACCORDING TO THE CLASSIFICATIONS OF CESARE LOMBROSO 10–24 (Patterson Smith 1972) (1911).

easy to imagine how this man, in the grip of a brain-numbing sex passion, overpowered little Mary Dalton, raped her, murdered her, beheaded her, then stuffed her body into a roaring furnace to destroy the evidence of his crime. . . .

All in all, he seems a beast utterly untouched by the softening influences of modern civilization. In speech and manner he lacks the charm of the average, harmless, genial, grinning southern darky so beloved by the American people. . . .

. . . He acted like an earlier missing link in the human species. He seemed out of place in a white man's civilization.¹⁶³

Wright's use of the media here is strategic. In characterizing Mary as "little Mary Dalton" and Bigger as a "Negro sex-slayer" and "jungle beast" who is "out of place in a white man's civilization," the media serves as a discursive space that participates in (re)producing and (re)presenting race, gender, and concomitant hierarchies to promulgate a "grammar of race":

[A]mongst other kinds of ideological labour, the media construct for us a definition of what *race* is, what meaning the imagery of race carries, and what the "problem of race" is understood to be. They help to classify out the world in terms of the categories of race.¹⁶⁴

Or as Sabine Sielke notes in her study of rape and narrative, "Bigger is an 'ape,' 'wordless,' 'outside of the lives of men' not because '[t]heir modes of communication, their symbols and images had been denied him,' . . . but because these modes overdetermine and position him in the realm of silence, crime, and death."¹⁶⁵

Moreover, the fact that the newspaper coverage of Bigger's "crime" coincides with police efforts to trace the crime to Bigger encapsulates what Kieran McEvoy describes as the symbiotic relationship of the media and the law in policing societal norms.¹⁶⁶ The seeming coordination of police and media also

163. NATIVE SON, *supra* note 1, at 279–80.

164. Stuart Hall, *The Whites of Their Eyes: Racist Ideologies and the Media*, in GENDER, RACE, AND CLASS IN MEDIA 89–91 (Gail Dines & Jean M. Humez eds., 2d ed. 2003) (observing the formation and persistence of race and gender hierarchies, and identifying media as "sites for the production, reproduction, and transformation of ideologies" and as "part of the dominant means of ideological production"). For more on the media and race, see Robert M. Entman, *Modern Racism and the Image of Blacks in Local Television News*, 7 CRITICAL STUD. IN MASS COMM. 332, 332–45 (1990). For more on the role of media, criminal justice, and the apparatus of social control, see Clinton R. Sanders & Eleanor Lyon, *Repetitive Retribution: Media Images and the Cultural Construction of Criminal Justice*, in CULTURAL CRIMINOLOGY 25 (Jeff Ferrell & Clinton R. Sanders eds., 1995).

165. SIELKE, *supra* note 79, at 114 (2002).

166. Kieran McEvoy, *Newspapers and Crime: Narrative and the Construction of Identity*, in TALL STORIES? READING LAW AND LITERATURE 179, 181 (John Morrison & Christine Bell eds.,

suggests that Bigger, both literally and figuratively, is traced—"traced" in the sense of located by the police in its investigation, but also "traced" in the sense of outlined, sketched, constituted, limned, and penned by society. As one scholar points out, the news coverage illustrates that "Bigger's fate is determined less by the reality of his life than by the stories told about him"¹⁶⁷—stories which are racially coded.

While the news article is an extreme example, Wright suggests that other discursive spaces equally participate in the construction and entrenchment of race and gender. Consider, for example, the *Trader Horn* scene.¹⁶⁸ Initially Wright directs the reader's attention to the newsreel that precedes the film, a newsreel that depicts "images of smiling, dark-haired white girls lolling on the gleaming sands of a beach" while a male voice intones, "*Oh, boy, don't you wish you were down here in Florida?*"¹⁶⁹ The newsreel not only sexualizes and fetishizes the women depicted, but, by spotlighting only affluent "white girls," also racializes them. As Sondra Guttman points out, white women are "cast as the desirable and inaccessible symbol of white power and culture."¹⁷⁰

The sharp contrast between the newsreel and the movie that follows underscores the societal construction of race and gender. *Trader Horn* depicts "naked black men and women whirling in wild dances and . . . drums beating."¹⁷¹ Internalizing the pejorative imagery, Bigger surmises, "It was the rich white people who were smart and knew how to treat people. . . . Yes, his going to work for the Daltons was something big."¹⁷² Wright's point in juxtaposing the news-

1996) (arguing that both law and news media participate symbiotically in policing "the major institutions of society by setting up a constant public conversation about how the classifications, values and procedures fit with the expectations of various evaluators" thereby creating and affirming "a sense of public morality . . . [b]ased on a claimed neutrality . . . that their policing function is 'in the public interest'").

167. DAVID GUEST, *SENTENCED TO DEATH: THE AMERICAN NOVEL AND CAPITAL PUNISHMENT* 84 (1997).

168. Hoping to pass the time, Bigger and his friends go to a movie theatre to see *Trader Horn*. *NATIVE SON*, *supra* note 1, at 29–34. See *supra* note 46 and accompanying text.

169. *Id.* at 31–32.

170. See Sondra Guttman, *What Bigger Killed For: Rereading Violence Against Women in Native Son*, 43 *TEX. STUD. IN LITERATURE & LANGUAGE* 169, 171 (2001).

171. *NATIVE SON*, *supra* note 1, at 33.

172. *Id.* at 34. See also James Nagel, *Images of "Vision" in Native Son*, 36 *UNIV. REV.* 109, 111 (Univ. of Mo., Kansas City) (1969) ("Bigger's view of the white world is, essentially, a simplistic re-creation of the images in the popular media."). This social construction is not lost on Max, Bigger's attorney. In seeking leniency, he comments on the role of media images in shaping Bigger, inviting the judge to consider how "advertisements, radios, newspapers and movies" would have been "tokens of mockery" to Bigger. *NATIVE SON*, *supra* note 1, at 94.

Notably, Bigger's response almost anticipates the "doll studies" that were used to such effect in *Brown v. Board of Education*, 347 U.S. 483 (1954). In their 1940 study, Kenneth and Mamie Clark found that children presented with identical black and white dolls thought of the white doll as "nice" and the black doll as the one "that looks bad." Kenneth B. Clark & Mamie P. Clark, *Racial Identification and Preference in Negro Children*, in *READINGS IN SOCIAL PSYCHOLOGY* 602 (Eleanor E. Maccoby, Theodore M. Newcomb & Eugene L. Hartley eds., 3d ed. 1958). The Warren Court relied in part on this study to conclude that segregation of African American chil-

reel with this image is that in constructing a racial and sexual image of blacks, white society has at the same time constructed a racial and sexual image of itself. In tandem, these images support a racial and sexual hierarchy.¹⁷³

Wright also foregrounds the way in which law—at various points itself metonymically represented by the white police force,¹⁷⁴ by Buckley, the white State Attorney,¹⁷⁵ by the white judge,¹⁷⁶ and perhaps most figuratively by the white Mrs. Dalton, the sole witness to Mary Dalton's death, her blindness suggesting Lady Justice herself¹⁷⁷—racializes and sexualizes Bigger, while simultaneously racializing and en-gendering Mary. Take, for example, the language of Buckley in seeking the death penalty. Buckley not only refers to Bigger as a “worthless ape,” a “cunning beast,” a “demented savage,” a “hardened black thing” with “black thoughts” who has perpetrated a deed “black and awful,” a “black crime,”¹⁷⁸ but expressly urges the court to impose death so “that the social order is kept intact.”¹⁷⁹ Although Buckley never explicitly spells

dren “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Brown*, 347 U.S. at 494–95, 494 n.11.

173. This is similar to James Snead's argument in his study of black and white imagery in films as diverse as *Birth of the Nation* and *King Kong*. Representations of black men and white men are not isolated images working independently, but rather “correlate . . . in a larger scheme of semiotic valuation.” JAMES SNEAD, *WHITE SCREEN, BLACK IMAGES: HOLLYWOOD FROM THE DARK SIDE 4* (Colin MacCabe & Cornel West eds., 1994). For a discussion of *Native Son* as a counterpoint to *King Kong*, see GUEST, *supra* note 167, at 91.

174. For example, Bigger knows that once it's discovered that he killed Mary, “[t]here would be a thousand white policemen on the South Side searching for him or any black man who looked like him.” *NATIVE SON*, *supra* note 1, at 224.

175. Buckley self-identifies as “the law.” For example, he warns Bigger not to put too much hope in “those Reds, Max and [Jan],” exclaiming, “They can't do a *damn* thing for you! You're dealing with the *law* now!” *Id.* at 303. Still later, in asking the judge to impose the death penalty, Buckley begins his plea by identifying himself as “an agent and servant of the law, as a representative of the organized will of the people.” *Id.* at 407.

176. Wright describes the judge as a “man, draped in long black robes and with a dead-white face.” *Id.* at 369.

177. Bigger accidentally suffocates Mary in his fear that Mrs. Dalton, “the white blur moving toward him in the shadows of the room,” would discover him. WRIGHT, *NATIVE SON*, *supra* note 1, at 85–86.

178. *See id.* at 410–15.

179. *Id.* at 407. Blatant appeals to racial prejudice or racial protectionism by the prosecution are not uncommon, even though such remarks will often lead to the reversal of a conviction. *See, e.g., Miller v. North Carolina*, 583 F.2d 701, 704, 707–08 (4th Cir. 1978) (“I argue to you that the average white woman abhors anything of this type in nature that had to do with a black man. It is innate within us . . .”); *Moulton v. State*, 74 So. 454, 454, 456 (Ala. 1917) (“Unless you hang this negro, our white people living out in the country won't be safe.”); *State v. Washington*, 67 So. 930, 931 (La. 1915) (“Gentlemen, do you believe she would have had intercourse with this black brute?”). *But see State v. Mayhue*, 653 S.W.2d 227, 237 (Mo. Ct. App. 1983) (holding that there was no manifest injustice when the prosecutor said, “I suggest to you . . . that no person in their right mind would want to remember three black men getting on her naked body, dumping their seed in her vagina.”); *Thornton v. State*, 415 S.W.2d 898, 903 (Tex. Crim. App. 1970) (finding no reversible error when the prosecutor asked a witness, “Would you have gotten out of this car for

out the social order he has in mind, it seems evident that he is referring to one that is based on racial and sexual hierarchy. This can be gleaned from Buckley's description of Mary Dalton as "one of the finest and most delicate flowers of our womanhood,"¹⁸⁰ a "trusting white girl,"¹⁸¹ the daughter of "a wealthy, kindly disposed white man,"¹⁸² and from his argument that a death sentence is necessary to protect "our society, our homes, and our loved ones."¹⁸³

The role Buckley plays in entrenching race is obvious. However, a close reading suggests that Max, Bigger's defense lawyer, equally entrenches race, especially in his speech arguing against the imposition of a death sentence. Although others have interpreted Max's speech, no one has read the speech as coding race.¹⁸⁴ Max, in seeking leniency for Bigger, advances a diminished capacity defense. He argues that although Bigger committed the charged crime with the requisite *mens rea*, his responsibility is lessened as a result of a mental or emotional impairment.¹⁸⁵ But the only "impairment" Max points to is race

three nigger men at night if they hadn't had guns?").

Even victims are racialized. *See, e.g., Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975) ("[T]hink about the consequences of letting a guilty man . . . go free. Because maybe the next time it won't be a little black girl from the other side of the tracks; maybe it will be somebody that you know."). The trial of Bernhard Goetz on charges relating to his shooting four black youths in a subway car is another well-known example. In claiming that Goetz acted in self-defense, the defense portrayed the black youths Goetz shot as "savages" and "vultures." *See* GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 206 (1988). Goetz's defense team also called in four black men to re-create where the shot youths were standing in relation to Goetz. *Id.* at 206–07. Although the ostensible purpose was to show the path of each bullet, the more likely purpose was to emphasize the race of the victims to support Goetz's claim that he feared for his life. *Id.*

Finally, legal standards integrate racial prejudice. For example, in *McQuirter v. State*, an Alabama case involving the charge of attempt to commit an assault with intent to rape, the court held that "in determining the question of intention the jury may consider social conditions and customs founded upon racial differences, such as that the prosecutrix was a white woman and defendant was a Negro man." *McQuirter v. State*, 63 So.2d 388, 390 (Ala. Ct. App. 1953). For an interesting discussion of appeals to race in criminal trials, see KENNEDY, *supra* note 20, at 256–310, and Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739 (1993).

180. NATIVE SON, *supra* note 1, at 409. This description of Mary Dalton recalls strategies used to imbue the accusers in the Scottsboro boys case with attributes of chastity. *See supra* notes 112–22 and accompanying text.

181. NATIVE SON, *supra* note 1, at 411.

182. *Id.* at 409.

183. *Id.* at 407. Bessie is at once visible and invisible in Buckley's arguments. In seeking the death penalty to protect "our loved ones," he clearly only has white women in mind. Sondra Guttman observes that "[t]heir whiteness coupled with the use of Bessie's body in Mary's trial make present uncounted numbers of raped black women—the women of whom Buckley will never speak unless their rapes give him some information about the violations of white women." Guttman, *supra* note 170, at 187.

184. Interestingly, early critics dismissed Max's speech as little more than a "party-line oration" reflecting Wright's Communist views. Howe, *supra* note 13, at 66. More recently, Max's speech has been read as a legal realist response to Buckley's legal formalism. *See, e.g.,* Mark Decker, "A Lot Depends on What Judge We Have:" Native Son and the Legal Means for Social Justice, 41 THE MCNEESE REV. 52, 65–70 (2003).

185. NATIVE SON, *supra* note 1, at 388–405. *Accord* Olympia Duhart, *A Native Son's*

simpliciter.¹⁸⁶ Thus, to defend Bigger, Max essentially racializes him in order to foreclose agency.

The problem with Max's approach is it requires him to both race and erase Bigger Thomas. Claiming that he must "speak in general terms," Max invokes the history of slavery, segregation and deprivation to argue that Bigger is a "poor black boy," a "powerless [pawn]."¹⁸⁷ In so arguing, Max fails to see Bigger.¹⁸⁸ Instead, Max reinscribes Bigger as a type, the "black criminal," or "a symbol, a test symbol."¹⁸⁹ For Max, "every Negro in America's on trial out there today."¹⁹⁰ Even worse, in attempting to demolish the prosecution's construction of the black male as bestial, Max merely erects another, equally race-based construction: the black male as a bestial product of societal forces.¹⁹¹ Max thus

Defense: Bigger Thomas and Diminished Capacity, 49 How. L.J. 61, 62, 77 (2005) (arguing that the two elements of a diminished capacity defense, emotional mental disturbance and a reasonable explanation for such disturbance, "are met through Bigger's status as a black man in America in 1940"). The problem with this defense is that taken to its logical extreme it suggests that all black men suffer from a diminished capacity, a claim that for obvious reasons should be untenable.

186. See NATIVE SON, *supra* note 1, at 382 (describing Bigger not just as a criminal, but as "a black criminal . . . [who] as such . . . comes into this court under a handicap, notwithstanding our pretensions that all are equal before the law").

187. NATIVE SON, *supra* note 1, at 388–90.

188. Max's blindness and unwillingness to see Bigger is revealed in multiple ways during the final exchange between him and Bigger. At first, Max cannot understand the enormity of Bigger's thoughts: "Max reached over and placed a hand on his shoulder, and Bigger could tell by its touch that Max did not know, had no suspicion of what he wanted, of what he was trying to say." *Id.* at 422. And again: "Max turned and looked at him; it was a casual look, devoid of the deeper awareness that Bigger sought so hungrily." *Id.* at 423. Once Bigger enunciates the horrifying truth that the purpose of his killing was to assert his very existence, Max purposefully avoids seeing Bigger:

Max groped for his hat like a blind man; he found it and jammed it on his head.
He felt for the door, keeping his face averted . . .
"Mr. Max . . ."
"Yes, Bigger." He did not turn around.
"I'm all right. For real, I am."
"Good-bye, Bigger."
"Good-bye, Mr. Max."
Max walked down the corridor.
"Mr. Max!"
Max paused, but did not look.

Id. at 429–30.

189. NATIVE SON, *supra* note 1, at 382–83.

190. *Id.* at 368.

191. Max argues to the court:

"Every time he comes in contact with us, he kills! It is a physiological and psychological reaction, embedded in his being. Every thought he thinks is potential murder. Excluded from, and unassimilated in our society, yet longing to gratify impulses akin to our own but denied the objects and channels evolved through long centuries for their socialized expression, every sunrise and sunset makes him guilty of subversive actions. Every movement of his body is an unconscious protest. Every desire, every dream, no matter how intimate or personal, is a plot or a conspiracy. Every

resorts to what Anthony Alfieri has described as the dominant deviance narrative.¹⁹²

Given Max's logic, it should come as little surprise that Bigger ultimately self-justifies his crimes. As Sabine Sielke notes, Bigger "reinterprets his criminalization," translating Max's argument that Bigger raped and killed because he was black "into the belief that because he was black, doing wrong was the right thing to do."¹⁹³ This reinterpretation leads to Bigger's famous exclamation of "What I killed for, I *am*!"¹⁹⁴ Hence, Bigger's conclusion, "[W]hen I think about what you say I kind of feel what I wanted. It makes me feel I was kind of right What I killed for must've been good!"¹⁹⁵

Again, Wright foregrounds the way in which society and the law, including both the prosecution and the defense, engage in racializing and en-gendering, ultimately reifying a race and gender dependent hegemony. I have discussed both subtle examples and not so subtle examples, but have saved until last the most blatant example, namely the rape and murder charges leveled against Bigger. While there is no direct evidence that Bigger raped Mary before killing her, the law assumes that because Bigger is black, and Mary is white, rape must have been Bigger's motive for entering Mary's room, and that the killing must have been intentional. Moreover, even though there is evidence that Bigger raped and intentionally murdered Bessie,¹⁹⁶ he is charged with neither her rape,

hope is a plan for insurrection. Every glance of the eye is a threat. *His very existence is a crime against the state!*"

Id. at 400. Note also the language Max uses in the passage below in arguing that Bigger, as a product of racism, is like a corpse that white society, "[o]bsessed with guilt," has attempted to bury but which is not dead:

"It still lives! It has made itself a home in the wild forest of our great cities, amid the rank and choking vegetation of slums! It has forgotten our language! In order to live it has sharpened its claws! It has grown hard and calloused! It has developed a capacity for hate and fury which we cannot understand! Its movements are unpredictable! By night it creeps from its lair and steals toward the settlements of civilization! And at the sight of a kind face it does not lie down upon its back and kick up its heels playfully to be tickled and stroked. No; it leaps to kill!"

Id. at 392.

192. See Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1324 (1995) ("The deviance narrative constructs racial identity in terms of bestiality or pathology. . . . The defiance narrative, in comparison, constructs racial identity in the language of rage and rebellion."). Alfieri notes that the use of the deviance narrative can have collateral consequences on communities of color because they are seen in terms of pathological violence. *Id.* at 1324. These images are then taken out of the courthouse and into the mainstream of popular culture and society. See Regina Austin, "The Black Community," *Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769, 1773 (1992) (noting that "deviance confirms stereotypes," because it "stigmatizes [blacks], and impedes collective progress").

193. SIELKE, *supra* note 79, at 107.

194. NATIVE SON, *supra* note 1, at 429. Barbara Johnson makes a similar point: "What the communist lawyer, Max, cannot hear is precisely Bigger's 'I am,' his ascension to the status of speaking subject." Barbara Johnson, *supra* note 9, at 149.

195. NATIVE SON, *supra* note 1, at 428-29.

196. *Id.* at 233-34. For an examination of Bigger's sexual violence against Bessie, see also Guttman, *supra* note 170, at 183-85.

nor her murder. Rather, the law treats Bigger Thomas's rape and murder of Bessie as merely "other crimes" evidence to be offered by the prosecution to prove that he in fact raped and murdered Mary Dalton.

Under the law, it is not only Bigger who is disposable and less valuable, but also Bessie.¹⁹⁷ As Bigger himself realizes during the inquest when Bessie's "raped and mutilated body" is brought in and offered in evidence as to "the exact manner of the death of Mary Dalton,"¹⁹⁸ the law's interest is only in seeking retribution for the death of the white girl in order to deter other blacks from transgressing racial boundaries:

Though he had killed a black girl and a white girl, he knew that it would be for the death of the white girl that he would be punished. The black girl was merely "evidence." And under it all he knew that the white people did not really care about Bessie's being killed. White people never searched for Negroes who killed other Negroes. He had even heard it said that white people felt it was good when one Negro killed another; it meant that they had one Negro less to contend with. Crime for a Negro was only when he harmed whites, took white lives, or injured white property.¹⁹⁹

Wright thus focuses on the role law and society play in limning race and gender and reifying race-based and gender-based hierarchies. However, as I discuss below, Wright delves even deeper, raising questions about the role punishment plays in policing racial boundaries.

B. Race and Punishment

Scholarly discussion of race and punishment has traditionally focused on whether persons of color receive more severe sentences than whites for comparable offenses.²⁰⁰ *Native Son* suggests another area for discussion: how the law polices racial boundaries through the imposition of criminal punishment. Specifically, *Native Son* raises questions about the completeness of the traditional rationales for punishment—deterrence and retribution—in cases involving black defendants and white victims. That the meaning of punishment was a particular concern for Wright is evident from his several explorations of the

197. Or as a character in Zora Neale Hurston's *Their Eyes Were Watching God* hauntingly puts it:

So de white man throw down de load and tell de nigger man tuh pick it up. He pick it up because he have to, but he don't tote it. He hand it to his womenfolks. De nigger woman is de mule uh de world so fur as Ah can see.

ZORA NEALE HURSTON, *THEIR EYES WERE WATCHING GOD* 17 (HarperCollins 2000) (1937).

198. *NATIVE SON*, *supra* note 1, at 330.

199. *Id.* at 331.

200. E.g., Max M. Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District-Level Judicial Demographics*, 34 J. LEGAL STUD. 57 (2005).

subject matter in his work. Each of the stories in *Uncle Tom's Children*, for example, explores the punishment that results when a black protagonist commits a crime against white society.²⁰¹

The standard trope of criminal law offers two justifications for punishment: Immanuel Kant's "just deserts" retributive theory,²⁰² and Jeremy Bentham's utilitarian theory of deterrence.²⁰³ Both of these rationales are alluded to in the penalty phase of Bigger's trial.²⁰⁴ However, Wright makes it clear that Buckley's invocation of the deterrence rationale as an explanation for why Bigger must die for his crime is only partly satisfactory; nor does the Kantian rationale of retribution suffice. *Native Son* invites the reader to query *why* Buckley's rationale of deterrence seems incomplete and, with respect to retribution, to query, as Max does, what "*more than revenge is being sought.*"

Recall that Bigger is not tried for having raped and murdered Bessie; so-

201. The crime in "Fire and Cloud" results in a beating; that in "Bright and Morning Star" results in a beating and execution; those in "Big Boy Leaves Home" and "Long Black Song" result in lynchings; and that in "Down by the Riverside" results in execution by gunfire. See RICHARD WRIGHT, *EARLY WORKS* (1991).

202. See IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 100–02 (John Ladd trans., Bobbs-Merrill 1965) (1797). See also EDMUND L. PINCOFFS, *THE RATIONALE OF LEGAL PUNISHMENT* 7 (1966) ("[Punishment] is not inflicted because it will give an opportunity for reform, but because it is merited."); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454–55 (1997) ("Punishment that gives an offender what he or she deserves for a past crime is a valuable end in itself and needs no further justification.").

203. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in *THE GREAT LEGAL PHILOSOPHERS: SELECTED READINGS IN JURISPRUDENCE* 262, 270 (Clarence Morris ed., 1959) (theorizing that punishment, "in itself an evil," is justified only if it promises to exclude some greater evil). See also CHARLES E. TORCIA, 1 *WHARTON'S CRIMINAL LAW* § 1, at 3 (15th ed. 1993) ("[While] the theory of retribution would impose punishment for its own sake, the utilitarian theories of deterrence and reformation would use punishment as a means to an end—the end being community protection by the prevention of crime.").

For a discussion of retribution and utilitarian theories in practice, see *Ewing v. California*, 538 U.S. 11, 29–31 (2003) (upholding the constitutionality of California's three strikes law against an Eighth Amendment challenge as justified by the State's "public-safety interest in incapacitating and deterring recidivist felons") and *United States v. Blarek*, 7 F. Supp. 2d 192, 209–11 (E.D.N.Y. 1998) (discussing the theories in decision granting a downward departure to two defendants convicted after trial of money laundering offenses).

There are less standard theories as well. An expressive theory of punishment holds that we punish individuals not just to inflict deserved harm or to deter like transgressions, but also to communicate our disapprobation of the conduct in question and commitment to prevailing norms. See, e.g., Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621 (1998) (reviewing WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* (1997)). Restorative justice theory holds we employ punishment to compensate or restore victims who have been wronged by the offender. See generally *RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE* (Heather Strang & John Braithwaite eds., 2000).

204. State Attorney Buckley claims that the imposition of the death penalty is necessary "so that others may be deterred from similar crimes." *NATIVE SON*, *supra* note 1, at 414. In contrast, Max explains, "*more than revenge is being sought upon a man who has committed a crime.*" *Id.* at 385. Retribution, of course, is frequently associated with vengeance. See CHARLES E. TORCIA, 1 *WHARTON'S CRIMINAL LAW* § 1, at 24 (15th ed. 1993).

ciety's sole concern is that Bigger be executed for raping and killing Mary.²⁰⁵ The explanation that Mary is white and Bessie is black, and thus accorded different values by society,²⁰⁶ does not end the matter. As Max points out in his argument for mitigation of punishment, other "[c]rimes of even greater brutality and horror" than Bigger's had been committed, but none "that brought forth an indignation to equal this."²⁰⁷ Rather, Bigger's punishment must be linked to the fact that he has transgressed social boundaries, that he disrupted white hegemony, that he did not stay in his place.²⁰⁸

Consider again the newsreel in the *Trader Horn* scene.²⁰⁹ When Bigger's friend Jack fantasizes about lounging on the beach with "the daughters of the rich taking sunbaths," Bigger responds that Jack is free to join the girls, "but [he]'d be hanging from a tree like a bunch of bananas."²¹⁰ The implication is not that Jack would be lynched for committing a crime, but for transgressing racial boundaries by merely socializing with white women. A similar concern for societal boundaries is apparent during the inquest, when Buckley questions Jan:

"Did you *shake hands* with that Negro?"

"Yes."

"Did you *offer* to shake hands with him?"

"Yes. It is what any decent person"

"Confine yourself to answering the questions, please, Mr. Erlone. We want none of your Communist explanations here. Tell me, did you *eat* with that Negro?"

"Why, yes."

"You *invited* him to eat?"

"Yes."²¹¹

These passages suggest that *more* than mere retribution for the rape and killing

205. See *supra* text accompanying notes 196–99.

206. As sociologist Darnell F. Hawkins has argued, there is a "hierarchy of seriousness based on the race of the victim and offender." Darnell F. Hawkins, *Beyond Anomalies: Rethinking the Conflict Perspective on Race and Criminal Punishment*, 65 SOC. FORCES 719, 724–25 (1987).

207. NATIVE SON, *supra* note 1, at 386.

208. These philosophical justifications for punishment are interconnected with the social meanings of punishment as explored by such theorists as Émile Durkheim and Michel Foucault. See, e.g., DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY (1990) (charting the various sociological accounts of punishment).

209. See *supra* notes 168–73 and accompanying text.

210. NATIVE SON, *supra* note 1, at 31–32 (emphasis omitted).

211. *Id.* at 320.

of Mary Dalton is being sought; Wright is indicating that punishment is being used to police racial boundaries.²¹²

As for deterrence, Wright suggests that Bigger's punishment will be used not only to deter other blacks from engaging in violence, or even cross-racial violence, but also to maintain a racial hierarchy.²¹³ As Bigger muses:

Though he could not have put it into words, he felt that not only had they resolved to put him to death, but that they were determined to make his death mean more than a mere punishment; that they regarded him as a figment of that black world which they feared and were anxious to keep under control. The atmosphere of the crowd told him that they were going to use his death as a bloody symbol of fear to wave before the eyes of that black world.²¹⁴

Wright invites the reader to consider the impact this technique of social control has had on Bigger himself. The literal depiction of Bigger in a holding cell in the final scene evokes the opening scene, with its own type of cell: the one-room, rat-infested apartment that Bigger shares with his mother and two siblings. The novel tracks Bigger's movement from essentially one cell of confinement to another. Moreover, in tracking this movement, the law is always present, bringing to mind Foucault's rendition of Bentham's panopticon.²¹⁵ For

212. This narrative is consistent with several studies showing harsher sentences for cross-racial crimes involving black defendants and white victims. See PATERNOSTER & BRAME, *supra* note 21, at 22–23 and fig.4; BALDUS, WOODWORTH & PULASKI, *supra* note 21, at 140–97; Hunter, Paige & Marquart, *supra* note 21, at 316–19, 334–37. Such studies were brought to the Supreme Court's attention to no avail in *McCleskey v. Kemp*. 481 U.S. 279, 286–91 (1987). Despite statistical evidence demonstrating that, in Georgia, the imposition of death often strongly correlated with the race of the defendant and the race of the victim, the Court ruled that the racial discrepancies did “not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.” *Id.* at 313.

213. Richard Delgado's fictional interlocutor and alter ego Rodrigo makes a similar argument. See Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503, 516 (1994).

214. NATIVE SON, *supra* note 1, at 276. The link between punishment and racial subordination finds its legacy in slavery. See FRIEDMAN, *supra* note 112, at 86–88. For example, in *Incidents in the Life of a Slave Girl*, when the narrator's brother is recaptured after escaping slavery, and “led through the streets in chains, to jail,” his master explains that her brother “should serve as an example to the rest of his slaves . . . [by being] kept in jail till he was subdued.” HARRIET A. JACOBS, *INCIDENTS IN THE LIFE OF A SLAVE GIRL* 21–22 (Jean Fagan Yellin ed., Harvard Univ. Press 1987) (1861). More recently, Edward P. Jones included the following scene in his Pulitzer prize-winning novel:

In [1837], a man named Jesse and four other slaves took off one night and were found two days later by a posse headed by Sheriff Gilly Patterson. The escape and the chase had put such bile in Jesse's master that he shot Jesse in the swamp where the posse found him. He had the four other escapees hobbled that night—sharp and swift knives back and forth through their Achilles' tendons—right after he cut off Jesse's head as a warning to his other fourteen slaves and stuck it on a post made from an apple-tree branch in front of the cabin Jesse had shared with three other men.

EDWARD P. JONES, *THE KNOWN WORLD* 26 (2003).

215. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 303–04, 306

example, Wright employs the imagery of the panopticon in the scene where Bigger passes “two white men in overalls” pasting a campaign poster of Buckley to a signboard:

[Bigger] looked at the poster: the white face was fleshy but stern; one hand was uplifted and its index finger pointed straight out into the street at each passer-by. The poster showed one of those faces that looked straight at you when you looked at it and all the while you were walking and turning your head to look at it it kept looking unblinkingly back at you until you got so far from it you had to take your eyes away, and then it stopped, like a movie blackout. Above the top of the poster were the tall red letters: YOU CAN'T WIN!²¹⁶

Though it is only at the end of the novel that Bigger realizes that his execution will be made into a “symbol of fear” to wave before the eyes of blacks, Wright suggests that Bigger’s execution will be only one in a long line of symbols of fear used to police racial hierarchy. Indeed, Bigger’s own subjection to such policing has brought him to this point. All along the law has used symbols of fear to confine Bigger’s movements; *Fear*, the title of the first section of the novel, has always been at hand. After all, it is fear of the law’s response that makes Bigger reluctant to even enter a predominantly white neighborhood,²¹⁷ to even squeeze past the Dalton’s housekeeper to enter the Dalton home,²¹⁸ to even talk to Mary,²¹⁹ to even shake Jan’s hand or call him by his first name,²²⁰ to even make himself physically comfortable,²²¹ to even help Mary to her room,²²² to even be found in Mary’s room.²²³ Perversely, it is the law’s role in maintaining racial boundaries that results in Bigger suffocating Mary. As Barbara Johnson puts it, “Like Oedipus, it is through [Bigger’s] efforts to *avoid* enacting the forbidden story that he inevitably enacts it.”²²⁴

(Alan Sheridan trans., Vintage Books 1979) (1975). *Native Son* has much in common with Foucault’s power-knowledge theory, and in particular with his contention that societal networks—hospitals, schools, reformatories, military systems, and factories—are modern extensions of the all-seeing panopticon mechanism of the penitentiary and emblematic of a larger “carceral society.” Indeed, given the racial dynamics at issue, it’s not hard to consider the State Attorney not only as all-seeing, a see-er, but symbolically an overseer. For additional discussion of Foucault and *Native Son*, see Virginia Whatley Smith, *Native Son as Depiction of a Carceral Society*, in APPROACHES TO TEACHING WRIGHT’S *NATIVE SON*, *supra* note 11, at 95.

216. *NATIVE SON*, *supra* note 1, at 12–13.

217. *Id.* at 43.

218. *Id.* at 45.

219. *Id.* at 51.

220. *Id.* at 66.

221. *Id.* at 68–69.

222. *NATIVE SON*, *supra* note 1, at 81–82.

223. *Id.* at 84–85.

224. Barbara Johnson, *supra* note 9, at 152.

When Bigger first realizes that “they’ll say you raped [Mary],”²²⁵ he unlayers, deconstructs, and reconfigures the very concept of rape until it becomes, as literary scholar Abdul JanMohamed puts it, both a “paradigm of all modes of crossing the racial boundary” and a “metonymy of the process of oppressive racist control.”²²⁶

They would say he had raped her and there would be no way to prove that he had not. . . . Had he raped her? Yes, he had raped her. Every time he felt as he had felt that night, he raped. But rape was not what one did to women. Rape was what one felt when one’s back was against a wall and one had to strike out, whether one wanted to or not, to keep the pack from killing one. He committed rape every time he looked into a white face. He was a long, taut piece of rubber which a thousand white hands had stretched to the snapping point, and when he snapped it was rape. But it was rape when he cried out in hate deep in his heart as he felt the strain of living day by day. That, too, was rape.²²⁷

Max is thus correct when he argues that “[Bigger’s] crime existed long before the murder of Mary Dalton.”²²⁸ At bottom, if it is the law that results in Bigger’s incarceration in a cell awaiting execution at the end of the novel, it is also the law that participates in keeping Bigger in his place, keeping Bigger in a one-room apartment in Chicago’s South Side at the start of the novel, keeping Bigger and other African Americans “on the outside of the world peeping in through a knothole in the fence.”²²⁹ As Bigger puts it in an exchange with Max, “They draw a line and say for you to stay on your side of the line. . . . [A]nd when you try to come from behind your line they kill you. They feel they ought to kill you then.”²³⁰ Understanding now the racial hegemony that forms the line, we are prepared to tackle my final point: trespass.

225. *NATIVE SON*, *supra* note 1, at 227.

226. Abdul R. JanMohamed, *Sexuality on/of the Racial Border: Foucault, Wright, and the Articulation of “Racialized Sexuality”*, in *DISCOURSES OF SEXUALITY: FROM ARISTOTLE TO AIDS* 94, 109 (Domna C. Stanton ed., 1992). See also ROBYN WIEGMAN, *AMERICAN ANATOMIES: THEORIZING RACE AND GENDER* 103 (1995) (“Bigger redefines rape itself” so that “the psychological effects of racism” become “rape.”).

227. *NATIVE SON*, *supra* note 1, at 227–28.

228. *Id.* at 392. Much has been written about the fact that the criminal justice system is biased against African Americans, whether or not they are law breakers. See, e.g., Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 *STAN. L. REV.* 781, 790–93 (1994). Tracey Meares has argued that such stigmatization undermines law enforcement “by fostering a perception of illegitimacy of government among members of the stigmatized minority group.” Tracey L. Meares, *Place and Crime*, 73 *CHI.-KENT L. REV.* 669, 678 (1998). My point here pushes further still: such stigmatization not only undermines law enforcement; it perpetuates inequality by frustrating active participation in society.

229. *NATIVE SON*, *supra* note 1, at 20.

230. *Id.* at 351.

C. Trespass

The trope of trespass in general, and racial trespass in particular, is central to the novel. Recall that early in the novel, Bigger contemplates robbing Blum, the owner of a delicatessen, a robbery he and his friends “had been long planning to do.”²³¹ Although Bigger and his friends had burglarized newsstands, fruit stands, and apartments in the past, and robbing Blum “ought not take more than two minutes, at the most,” Bigger hesitates.²³² The reason for his hesitation is critical:

[T]hey had never held up a white man before. They had always robbed Negroes. They felt that it was much easier and safer to rob their own people, for they knew that white policemen never really searched diligently for Negroes who committed crimes against other Negroes. For months they had talked of robbing Blum’s, but had not been able to bring themselves to do it. They had the feeling that the robbing of Blum’s would be a violation of ultimate taboo; it would be a trespassing into territory where the full wrath of an alien white world would be turned loosed upon them; in short, it would be a symbolic challenge of the white world’s rule over them; a challenge which they yearned to make, but were afraid to.²³³

My argument here is straightforward, even if unorthodox. For Wright, the black-letter crime of physical trespass (and burglary) is secondary. What is really at stake is the white-letter crime of racial trespass. Put differently, Wright’s focus is the crossing of societal and legal boundaries that work to perpetuate the social and legal separation of whites and blacks, and to reify a racial hierarchy.

I diverge from the standard discussion of women as property. This is because not only is gender propertied in *Native Son*, but so is race itself. Moreover, in linking race and property, *Native Son* presages the work of such critical race scholars as Cheryl L. Harris and Ian F. Haney López who have identified whiteness itself as a type of property.²³⁴ For example, Professor

231. *Id.* at 14.

232. *Id.* at 14, 25.

233. *Id.* at 14.

234. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993). Similarly, upon examining the early twentieth century racial prerequisite cases, in which courts engaged in a legal determination of “who was White enough to naturalize as a citizen,” Ian F. Haney López concluded that whiteness has long been highly valued. IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE*, xiii, 197–201 (1996). In support of the contemporary extension of the observation, López noted the results of a study by Andrew Hacker, which are worth repeating here. *Id.* at 198–99. Hacker posed a parable to white students in which they were told they were supposed to be born black and would become black at the end of the night, and remain that way for the next fifty years. Inside they would remain the same. The students were asked how much fi-

Harris, in her seminal article “Whiteness as Property,” posits:

In ways so embedded that it is rarely apparent, the set of assumptions, privileges, and benefits that accompany the status of being white have become a valuable asset that whites sought to protect and that those who passed [for white] sought to attain—by fraud if necessary. Whites have come to expect and rely on these benefits, and over time these expectations have been affirmed, legitimated, and protected by the law. Even though the law is neither uniform nor explicit in all instances, in protecting settled expectations based on white privilege, American law has recognized a property interest in whiteness that, although unacknowledged, now forms the background against which legal disputes are framed, argued, and adjudicated.²³⁵

To elaborate, whiteness itself has a currency, a value. Moreover, as *Native Son* makes clear, the property interest associated with whiteness is owned both individually and collectively. Thus, it can be said that Bigger’s perceived rape and murder of Mary Dalton functions as trespass upon her property right in whiteness *and* as a trespass upon the dominant society’s property right in whiteness. To borrow from D.A. Miller’s influential *The Novel and the Police*, it can be said that the police and society each “render[] assistance to the other, in the coherence of a single policing action”²³⁶ to police racial trespass.

Although the word “trespass” does not appear again in *Native Son*, the work, through its repeated references to property and segregated housing and skin, is in fact saturated with the idea of racial trespass. Take, for example, the alarm clock that opens the novel.²³⁷ Although the alarm is in part “Wright’s urgent call in 1940 to America to awaken from its self-induced slumber about the reality of race relations in the nation,”²³⁸ it can also be read/heard as alerting America to issues of property, space, and ownership, as Wright places the reader in a too small room immediately following the alarm.²³⁹ The first scene thus becomes one of property, depicting four family members who share one rat-infested room,²⁴⁰ an image Wright later contrasts with the spacious Dalton mansion.²⁴¹

nancial recompense they would request for the error. “[M]ost . . . felt that \$50 million or \$1 million for each coming year they would live as a black person was fair. ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 36 (1995).

235. Harris, *supra* note 234, at 1713–14 (citation omitted).

236. D.A. MILLER, *THE NOVEL AND THE POLICE* 7–8 (1988).

237. NATIVE SON, *supra* note 1, at 3.

238. Rampersad, *supra* note 3.

239. NATIVE SON, *supra* note 1, at 3–4.

240. *Id.* at 4. When Wright arrived in Chicago in 1927, it was one of the most residentially segregated cities in the nation. Ninety percent of the city’s black population lived on the South Side. This was due in part to the Chicago Real Estate Board’s use of racial covenants “to protect white areas from black residents.” ROWLEY, *supra* note 5, at 53. For a detailed discussion of legally sanctioned segregation in Chicago, see Roger Biles, *Race and Housing in Chicago*, 94 J. ILL. ST. HIST. SOC’Y 31 (2001). Despite the Supreme Court’s declaration of the unconstitutionality of racially restrictive covenants in *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948), segregation persisted

And in a very real sense, the issue of property catalyzes the novel's plot. After all, Bigger's mother's harangue, "We wouldn't have to live in this garbage dump if you had any manhood in you," leads Bigger to the Daltons.²⁴² Her dream that they "not have to live like pigs" induces Bigger into taking the job with the Daltons, a job that provides the elements of the crime leading to Bigger's execution.²⁴³

The trope of trespass also permeates Bigger's exit from the confines of the South Side and entry into the "quiet and spacious white neighborhood" of the Daltons.²⁴⁴ As Wright makes clear, even with a legitimate reason to enter the white neighborhood, Bigger senses that the neighborhood is "not his world"²⁴⁵ and that he has walked "[o]ver across the 'line.'"²⁴⁶ Moreover, Wright links this sense of trespass to Bigger's heightened physical awareness of his black skin inside of a white space. For example, when Peggy, the white maid, admits Bigger into the house, Bigger holds his breath, feeling that there is "not enough room for him to pass without actually touching her."²⁴⁷ Once inside, Bigger not only

through more surreptitious means. Biles, *supra*, at 33.

241. Bigger is uncomfortable and angry as he notices the differences between his home and the Dalton mansion:

He looked round the room; it was lit by dim lights glowing from a hidden source. He tried to find them by roving his eyes, but could not. He had not expected anything like this; he had not thought that this world would be so utterly different from his own that it would intimidate him. On the smooth walls were several paintings whose nature he tried to make out, but failed. He would have liked to examine them, but dared not. Then he listened; a faint sound of piano music floated to him from somewhere. He was sitting in a white home; dim lights burned round him; strange objects challenged him; and he was feeling angry and uncomfortable.

NATIVE SON, *supra* note 1, at 45–46.

242. *Id.* at 8.

243. *Id.* at 11.

244. *Id.* at 43.

245. *Id.* at 44.

246. *Id.* at 21. Later, as Bigger attempts to evade capture, he finds that there are few empty buildings in which to hide.

He knew that empty flats were scarce in the Black Belt . . . there were not enough houses for Negroes to live in . . . And he had heard it said that black people, even though they could not get good jobs, paid twice as much rent as whites for the same kind of flats. . . . They keep us bottled up here like wild animals, he thought. He knew that black people could not go outside of the Black Belt to rent a flat; they had to live on their side of the "line." No white real estate man would rent a flat to a black man other than in the sections where it had been decided that black people might live.

Id. at 248–49.

247. NATIVE SON, *supra* note 1, at 45. Wright makes clear that Peggy identifies with the Daltons, rather than with Bigger, though they are both hired help. She boasts to Bigger that the "last colored man who worked for us stayed ten years" and stresses how much Mr. Dalton has done for "your people . . . the colored people." *Id.* at 55–56 (emphasis added). Peggy also notes that "[s]ome people think we ought to have more servants than we do, but we get along." *Id.* at 56 (emphasis added). Later she shows him to his room, which is decorated with posters of black male athletes and white female sex symbols. *Id.* at 59.

thinks of himself as sitting “in a white home,” but becomes “conscious of every square inch of skin on his black body” when he encounters Mr. Dalton.²⁴⁸ This feeling is only exacerbated when he is made to interact with Mary Dalton and Jan:

He felt foolish sitting behind the steering wheel like this and letting a white man hold his hand. . . . He was very conscious of his black skin and there was in him a prodding conviction that Jan and men like him had made it so that he would be conscious of that black skin. . . . He felt he had no physical existence at all right then; he was something he hated, the badge of shame which he knew was attached to a black skin. It was a shadowy region, a No Man’s Land, the ground that separated the white world from the black that he stood upon.²⁴⁹

The linkage of property and race, and of race as property, is particularly evident in Wright’s figuration of Mr. Dalton. By positioning Mr. Dalton as the owner of the South Side Real Estate Company, which in turn owns the tenement where Bigger and his family live, Wright repeatedly invites the reader to make the connection between race and property, as in the following passage:

“All right, now,” said Mr. Dalton. “Let’s see what you’ve got here. You live at 3721 Indiana Avenue?”

“Yessuh.”

Mr. Dalton paused, frowned, and looked up at the ceiling.

“What kind of a building is that over there?”

“You mean where I live, suh?”

“Yes.”

“Oh, it’s just an old building.”

“Where do you pay rent?”

“Down on Thirty-first Street.”

“To the South Side Real Estate Company?”

“Yessuh.”

Bigger *wondered what all these questions could mean*; he had heard that Mr. Dalton owned the South Side Real Estate Company, but he was not sure.²⁵⁰

Not only should Bigger wonder, but so should the reader as to the connection with the underlying theme of property and ownership in the novel.

248. *Id.* at 45–46.

249. *Id.* at 67.

250. *Id.* at 48 (emphasis added).

Consider as well the scene in which Bigger attempts to carry Mary, in her inebriated state, into the Dalton mansion:

[H]e wondered what a white man would think seeing him here with her like this. Suppose old man Dalton saw him now? Apprehensively, he looked up at the big house. . . . If her father saw him here with her now, his job would be over.²⁵¹

Two things are significant about the above passage. First, once again, by having Bigger himself wonder how his act will be interpreted, or “read,” Wright invites the reader to do the same. Second, by metonymically linking Mr. Dalton to his house—“*Suppose old man Dalton saw him now? Apprehensively, he looked up at the big house*”—Wright again links the privilege of whiteness to property.

Moreover, when Bigger in fact kills Mary Dalton, her death is the result of Bigger’s fear of racial trespass. Recall that Bigger panics when, after he carries Mary to her room, he sees a “white blur . . . standing by the door, silent, ghost-like.”²⁵² Literally this blur is Mrs. Dalton; figuratively, the blur signifies the dominant society in general, just as Bigger’s presence in Mary’s room signifies a type of intrusion. It is precisely because Bigger fears that his presence will be “(mis)read” by society as an act of racial trespass that he in fact commits such an act. And indeed, this is how society views his crime.

Significantly, Bigger himself links race and property, and whiteness as property, at the crucial point when Bigger embraces criminality, and decides to carry out his ransom scheme²⁵³:

He looked round the street and saw a sign on a building: THIS PROPERTY IS MANAGED BY THE SOUTH SIDE REAL ESTATE COMPANY. He had heard that Mr. Dalton owned the South Side Real Estate Company, and the South Side Realty Estate Company owned the house in which he lived. He paid eight dollars a week for one rat-infested room. He had never seen Mr. Dalton until he had come to work for him; his mother always took the rent to the real estate office. Mr. Dalton was somewhere far away, high up, distant, like a god. He owned property all over the Black Belt, and he owned property where white folks lived, too. But Bigger could not live in a building across the “line.” Even though Mr. Dalton gave millions of dollars for Negro education, he would rent houses to Negroes only in this prescribed area, this corner of the city tumbling down from rot. In a sullen way Bigger

251. *Id.* at 81–82.

252. *Id.* at 85.

253. Until this point, Bigger’s acts have either been petty (i.e., stealing from fruit stands) or non-intentional (i.e., accidentally killing Mary Dalton, for which he would likely be guilty of involuntary manslaughter, not murder). It is only when he decides to demand ransom that Bigger embraces criminality.

was conscious of this. Yes; he would send the kidnap note. He would jar them out of their senses.²⁵⁴

In fact, it is Wright who is “jar[ring the readers] out of their senses,” drawing their attention to the linkage of property and race, and to the white-letter crime of racial trespass. And to bring home the point, Wright uses Max as a mouthpiece to articulate these linkages. During the inquest, Max cross-examines Mr. Dalton about his ownership of the South Side Real Estate Company, the segregated housing policies they enforce, and the higher rents the Company charges to blacks to live in substandard conditions.²⁵⁵ Later, in his plea to the judge to spare Bigger the death penalty, Max highlights the relationship between Bigger’s family and Mary’s family: “The relationship between the Thomas family and the Dalton family was that of renter to landlord, customer to merchant, employee to employer.”²⁵⁶ Max notes that society has told blacks that this “is a white man’s country,” and that society “marked up the earth and said, ‘Stay there!’”²⁵⁷

This is Wright’s most significant point: Bigger is a product of America, her native son, precisely because America, through its people and its laws, has shaped and constructed him, and has determined how justice will be administered with respect to him. Wright’s genius was in rendering transparent the value judgments implicit in such justice, the property value associated with lives—one can almost imagine Lady Justice’s scale, balancing Bigger on one end and Mary Dalton on the other—and law’s response when racial trespass, a crime that disturbs society’s delicate balance of racial hegemony, is at stake.

CONCLUSION

James Boyd White has argued that a verdict does not always end the narrative of the crime.²⁵⁸ One reason, according to White, is that although a judge or jury may hear certain competing stories and select one to serve as the authoritative version on which to base their verdict of guilt or innocence, the verdict ultimately depends on “community acceptance” and validation.²⁵⁹ If the community senses that justice was not done—that the story told and accepted in the courtroom was the wrong one—the legally sanctioned story may ultimately be rejected:

[A legal] judgment is always incomplete, for it always depends upon what happens in the other world of ordinary narrative and private life in

254. *NATIVE SON*, *supra* note 1, at 173–74.

255. *Id.* at 325–28.

256. *Id.* at 393.

257. *Id.* at 393–94.

258. JAMES BOYD WHITE, *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 185–86 (1985).

259. *Id.* at 185.

which it must work and which it cannot control. . . . It is not that the legal judgment has no authority, but that its authority is not absolute.²⁶⁰

Though the community at large in *Native Son* believes justice was done, Wright offers a counter-narrative which troubles this result and invites the reader not only to empathize with Bigger, but also to question the professed blindness with which society and the law mete out justice. This is not to suggest that Wright intended for the reader, as a thirteenth juror, to find Bigger not guilty. To the contrary, in creating a narrative that follows Bigger as he in fact kills Mary Dalton (however accidentally), and rapes and murders Bessie (very intentionally), Wright leaves no doubt as to the issue of moral culpability. What I am suggesting is that in removing the issue of moral culpability from the table, Wright places in its stead the issues of responsibility and empathy, of perspective and judgment, and ultimately, of justice. As those in the humanistic camp of law-and-literature scholarship might argue, Wright asks the reader to “hear the call of stories,”²⁶¹ and to reconsider law “so as to make a more just and humane social world.”²⁶²

But *Native Son* does this and more. By foregrounding the way society and the law participate in the construction of race and gender, and reify a race and gender based hegemony, *Native Son* also invites the reader to interrogate and dismantle race and gender constructions in our everyday lives, in the society we live in, and in the justice we administer. These daily constructions range from the neologism “wilding” used to describe the youths wrongfully convicted first by the media, then by a jury, in the infamous Central Park jogging case,²⁶³ to the image of Willie Horton used to rally white voters during the 1988 presidential

260. *Id.* at 191.

261. I borrow this phrase from Kathryn Abrams. See Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991).

262. ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* 10 (1993).

263. The term “wilding,” though initially attributed to the young defendants, was in fact coined by the *New York Post*. Around the same time, the *Daily News* described the youths as a “wolf-pack.” See JOEL BEST, *RANDOM VIOLENCE: HOW WE TALK ABOUT NEW CRIMES AND NEW VICTIMS* 29–31 (1999); LynNell Hancock, *Wolf Pack: The Press and the Central Park Jogger*, 41 COLUM. JOURNALISM REV. 38, 38 (2003). It was the term wilding, however, that stuck, and became indelibly linked to the youths:

All the young men were convicted, and their obligingly sullen faces were melded with a notion coined on the spot, a notion of “wilding,” that is, of rampaging so-called young black males. That’s really the point at which that vocabulary became part of our national discourse. And these young black males were taking over the city. And that picture in turn justified a degree of racial profiling on an unprecedented and now national scale.

See Patricia J. Williams, *In-Laws and Outlaws*, 46 ARIZ. L. REV. 199, 206 (2004). For a fascinating analysis of the Central Park jogger case and the role the race of the victim played in media coverage, see JOAN DIDION, *AFTER HENRY* 253–79, 296–310 (1992), and N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1315–21, 1346–65 (2004).

election;²⁶⁴ to the darkening of O.J. Simpson's face during the weeks leading up to his murder trial;²⁶⁵ to the labeling of certain black victims of Hurricane Katrina as looters of food but white victims as finders of food;²⁶⁶ and to the "racial profiling" that occurs every night on the eleven o'clock news—racial profiling that emphasizes not only black defendants,²⁶⁷ but also white, preferably female, victims.²⁶⁸ As for constructions of the law, the reader should consider blind faith in a color-blind constitution when its very ratification was predicated on color,²⁶⁹ and our refusal to acknowledge that, even today, the law continues

264. In his race against Massachusetts Governor Michael Dukakis, George H. W. Bush ran ads depicting Willie Horton, a black convicted killer who, while on a Massachusetts furlough program, raped a white woman. As Regina Austin put it, "Willie Horton symbolized the threat that black males, aided by white liberal politicians, pose to innocent whites. Playing on racial fears, the ads' signifying was not limited to the criminal element; every black man was a potential Willie Horton, rapist, and murderer." Regina Austin, *Beyond Black Demons & White Devils: Antiracial Conspiracy Theorizing & the Black Public Sphere*, 22 FLA. ST. U. L. REV. 1021 (1995). For more on this political appeal to race, see Samuel R. Gross, *Crime, Politics, and Race*, 20 HARV. J.L. & PUB. POL'Y 405, 411–12 (1997) (citing Willie Horton as the "obvious example" that "the politics of the War on Crime are deeply racial"); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 448–50 (1999) (noting that the Bush campaign's "inability to see" that this was the most "potent historical symbol of white America's racial anxieties . . . only confirmed . . . the deficiency of [the Republicans'] commitment to equality").

265. Howard Kurtz, *Time's 'Sinister' Simpson: Cover Photo Was Computer-Enhanced*, WASH. POST, June 22, 1994, at D1. See also Peter Arenella, *Forward: O.J. Lessons*, 69 S. CAL. L. REV. 1233, 1258 (1996) (noting that although the "mainstream media roasted *Time*" there was a palpable lack of "significant explanation and analysis" of the pictures beyond "fifteen second sound-bites about the court of public opinion displaying its vote as the thirteenth juror").

266. "Readers of *Yahoo News* noticed . . . [that] a pair of waterlogged whites were described in a caption as 'carrying' food while another picture . . . of blacks holding food described them as 'looters.'" Jonathan Alter, *The Other America*, NEWSWEEK, Sept. 19, 2005, at 42, 48.

267. For example, a study of news stories between 1993 and 1994 found that it was four times more likely that local news would show a mug shot of the accused when the accused was black rather than white, more than two times more likely that local news would show the accused physically restrained when the accused was black rather than white, and almost two times less likely that local news would show the name of the accused when the accused was black rather than white. See ROBERT M. ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA* 82–83 (2000).

268. In her analysis of newspaper coverage of rape, Susan Brownmiller found that "although New York City police statistics showed that black women were more frequent victims of rape than white women, the favored victim in the tabloid headline . . . was young, white, middle-class and 'attractive.'" SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 338 (1975). The Central Park jogger case is but one example of this. The case dominated the media for months. In fact, there were 3254 other reported rapes in 1989, including "one the following week involving the near decapitation of a black woman in Fort Tryon Park and one two weeks later involving a black woman in Brooklyn who was robbed, raped, sodomized, and thrown down an air shaft of a four story building." These rapes, however, were simply not newsworthy. DIDION, *supra* note 263, at 255–56 (referencing Brownmiller, *supra*). For a discussion of more recent examples, such as the coverage devoted to white women such as Natalee Holloway, Elizabeth Smart, and Laci Peterson, see *Women of Color Ignored in Media Coverage of Missing Women, Girls*, 33 MEDIA REP. TO WOMEN 1 (2005).

269. The protection of the institution of slavery was central to the Constitution, as evidenced by provisions regulating the apportionment of taxes based on the number of "other Persons," U.S. CONST. art. I, § 2, cl. 3; the limit on Congress's power to restrict the slave trade prior to 1808, U.S.

to image the usual suspect as black²⁷⁰ and the reasonable man as white,²⁷¹ to say nothing of Lady Justice.²⁷²

Native Son does all of this by rendering visible the white-letter crime of racial trespass that existed in America in the 1930s and 1940s, and thereby demanding that the reader query to what extent the white-letter crime remains extant today.²⁷³ The novel challenges the reader to identify the connection between the Scottsboro Boys case and *Loving v. Virginia*,²⁷⁴ which invalidated anti-miscegenation statutes under the Equal Protection and Due Process Clauses, and think critically about what was being policed in each case. It asks the reader to think about the 1913 prosecution of Jack Johnson, the first black heavyweight boxing champion, for violating the White Slave Traffic Act²⁷⁵ by taking a white

CONST. art. I, § 9, cl. 1; and the Fugitive Slave Clause, preserving an escaped slave's status as recoverable property, U.S. CONST. art. IV, § 2, cl. 3. For more on "color" and the ratification of the Constitution, see Paul Finkelman, *The Color of Law*, 87 NW. U. L. REV. 937 (1993) (reviewing ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992)), and DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 26–42 (1987).

270. D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 499 (1993) (noting that criminals continue to be "stereotyped as black and . . . innocent victims . . . as white."); see also Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999). On the role race continues to play in prosecutorial discretion, see Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998). Further, recent empirical research suggests that Afrocentric features play a role in sentencing, with defendants with stronger Afrocentric features receiving lengthier sentences than defendants who committed similar crimes but who have less pronounced Afrocentric features. See William T. Pizzi, Irene V. Blair & Charles M. Judd, *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & LAW 327 (2005).

271. See, e.g., CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM* 137–74 (2003) (examining self-defense and provocation cases in which the jury takes race into consideration, such as the Bernhard Goetz subway shooting case, to argue that it is members of the traditional majority culture, i.e., white men, who are most benefited by the reasonable man standard). The recent case of the Hmong refugee who was convicted of first-degree murder in the shooting deaths of six hunters—the jury rejected his self-defense claim despite uncontroverted evidence that the hunters had taunted him with racial slurs and his testimony that he feared for his life—would seem to bear out Lee's argument as well. See *Hunter Convicted of Killing Six in Wisconsin*, N.Y. TIMES, Sept. 17, 2005, at A8; Neal Karlen, *Man Accused of Killing Six Hunters Says He Feared for His Life*, N.Y. TIMES, Sept. 16, 2005, at A14.

272. Perhaps needless to say, Lady Justice is invariably figured as white. The title of a note by Tanya Coke speaks volumes. See Tanya E. Coke, *Lady Justice May Be Blind, But is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327 (1994). I have also written about the figuration of Lady Justice as white. See Bennett Capers, *On Justitia: Race, Gender, and Blindness*, 12 MICH. J. OF RACE & LAW (forthcoming 2006).

273. To put it differently, *Native Son* invites re-readings and an evolving understanding of other texts, judicial opinions, cases, and our collective (even if fractured) responses to them. Such re-readings are part of what Wayne Booth has termed "coduction." See WAYNE C. BOOTH, *THE COMPANY WE KEEP: AN ETHICS OF FICTION* 70–73 (1988).

274. 388 U.S. 1 (1967).

275. White-Slave Traffic (Mann Act), Pub. L. No. 61-277, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (2000)). For a fascinating discussion of the legislative history

woman across state lines on a date;²⁷⁶ and the recent prosecution of eighteen-year-old Marcus Dixon, a black youth, on statutory rape charges for sleeping with his white girlfriend three months shy of her sixteenth birthday.²⁷⁷ What is being policed? It asks the reader to interrogate the prosecution for vagrancy in *Papachristou v. City of Jacksonville*²⁷⁸—the “vagrants” being two black men in a car with two white women²⁷⁹—and ask what is being policed. It implores the reader to recall the prosecutions of celebrity athletes O.J. Simpson and Kobe Bryant, and to consider the prurient frenzy that accompanied them, and ask what is being policed.²⁸⁰ It demands that the reader consider the fact that the New York City Police Department houses a unit that targets rappers,²⁸¹ just as the genre is crossing racial and social boundaries. Consider as well that police of-

behind the White Slave Traffic Act, Congress’s contemporaneous unwillingness to protect black men by passing any anti-lynching legislation, and legislation that banned the interstate shipment of films showing Jack Johnson’s boxing matches following his defeat of Jim Jeffries, “The Great White Hope,” see Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31 (1996).

276. See Denise C. Morgan, *Jack Johnson: Reluctant Hero of the Black Community*, 32 AKRON L. REV. 529, 545–53 (1999). For more on Jack Johnson generally, see also GEOFFREY C. WARD, UNFORGIVABLE BLACKNESS: THE RISE AND FALL OF JACK JOHNSON (2004).

277. Andrew Jacobs, *Student Sex Case in Georgia Stirs Claims of Old South Justice*, N.Y. TIMES, Jan. 22, 2004, at A14. At the time of his arrest, Dixon had a 3.96 grade-point average and a full athletic scholarship to Vanderbilt University. He was prosecuted for rape, aggravated assault, false imprisonment, and sexual battery for having sex with a classmate who was three months shy of her sixteenth birthday. Dixon was black and the girl white. Although Dixon’s legal guardians, friends, and associates were white, he was not immunized from the “white-letter” law of racial trespass. In fact, it seems that the girl, fearing that her father would be angry if he learned that she had been with a black boy, claimed that the sex was non-consensual. Ultimately, the jury of nine whites and three blacks believed Dixon’s account and rejected the charges that were based on non-consensual sex. The jury did, however, convict Dixon of misdemeanor statutory rape based on the consensual sex, and of the felony of aggravated child molestation because of the girl’s injuries. The judge gave Dixon the minimum sentence of ten years. See *id.* See also Courtland Milloy, *Marcus Dixon Doesn’t Belong in Ga. Prison*, WASH. POST, Jan. 25, 2004, at C1. The Georgia Supreme Court eventually overturned the felony conviction, finding that the legislature intended the conduct at issue to qualify as misdemeanor statutory rape and not child molestation. *Dixon v. Georgia*, 596 S.E.2d 147, 151 (Ga. 2004). At the time of the court’s ruling, Dixon had already served more than the one-year maximum sentence for misdemeanor statutory rape. Ariel Hart, *Child Molesting Conviction Overturned in Georgia Classmate Case*, N.Y. TIMES, May 4, 2004, at A20.

278. 405 U.S. 156 (1972).

279. The facts as stipulated were that Papachristou and Calloway, white females, and Melton and Johnson, black males, were arrested for “prowling by auto” while the four of them were riding in Calloway’s car on the main thoroughfare in Jacksonville. The arresting officers denied that race was a factor in their decision to arrest. Instead they said the arrest was made because the car had stopped near a used-car lot that had been broken into several times, although there was no evidence of any breaking and entering on that particular night. *Id.* at 158–59. The Supreme Court overturned the convictions, holding the vagrancy ordinance void for vagueness. *Id.* at 162.

280. For a discussion of the role of race in the media frenzy accompanying the Simpson and Bryant cases, see *On the Media: The Color of Scandal* (NPR radio broadcast Aug. 8, 2003) (recording and transcript available at http://www.onthemedial.org/transcripts/transcripts_080803_media.html).

281. See Dasun Allah, *NYPD Admits to Rap Intelligence Unit*, Mar. 23, 2004, <http://www.villagevoice.com/news/0412,allah,52048,5.html> (last visited July 22, 2006).

ficers, in their efforts to “keep neighborhoods safe,” routinely stop and question African Americans whom they suspect of “trespass” on the ground that they seem “out of place.”²⁸² *Native Son* asks that the reader think of all of these examples and ask what is being policed.

I began by noting that trespass, with its connotations of a boundary traversed, is particularly useful in talking not only about the real crime at issue in *Native Son*, but also about literature in general, and the discipline of law-and-literature in particular.²⁸³ Rather ambitiously, I promised to suggest new directions, wider landscapes, a new critical geography for thinking about law-and-literature. Much of the criticism of law-and-literature centers around claims that it lacks discipline and boundaries. Jane Barron, for example, has lamented that the law-and-literature movement has “not been very thoughtful about its interdisciplinarity” and at the same time seems “too interdisciplinary”; as a result, it has “tended to undermine itself from within . . . [presenting] internal fragmentation [and] mixed and conflicting messages.”²⁸⁴ As Baron puts it:

If there is a single movement . . . it is certainly a fractured one. The concerns of separate strands are quite disparate. Any theme broad

282. As Sheri Lynn Johnson has pointed out, “[p]olice manuals often instruct officers to become familiar with their beat and question individuals who do not ‘belong,’” a practice which often devolves into a search for what Johnson terms “racial incongruity.” Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 226–27 (1983). The result that blacks are deterred from going to white areas “may be superficially neutral, [but] functions in practice to disadvantage minorities” with respect to their right to travel, not only because there are more white neighborhoods, but also insofar as white neighborhoods tend to have more desirable amenities. *Id.* at 245. While Sheri Lynn Johnson has written about policing against racial incongruity in the abstract, Devon Carbado has written about it from his own experience. See Carbado, *supra* note 270, at 959–65 (describing the police coming to his sister’s apartment in a predominantly white neighborhood, guns drawn, because of a neighbor’s report that he had seen several “black men,” allegedly with guns, enter an apartment). The policing of racial incongruity has also shown up in Supreme Court cases. In *Kolender v. Lawson*, 461 U.S. 352 (1983), for example, the defendant was arrested on fifteen separate occasions and convicted once for violating a California “criminal statute that requires persons who loiter or wander on the streets to provide a ‘credible and reliable’ identification and to account for their presence when requested by a peace officer.” *Id.* at 353–54. The Supreme Court held that the phrase “credible and reliable identification” rendered the statute “unconstitutionally vague within the meaning of the Due Process Clause of the Fourteenth Amendment by failing to clarify what is contemplated by the requirement” and thus encouraging arbitrary enforcement. *Id.* at 353–54, 361–62. The Supreme Court opinion omits that the defendant was a law-abiding African American male arrested while walking in a white neighborhood. Sheri Lynn Johnson, *supra* at 230.

283. In fact, the interdiscipline of law-and-literature evokes the metaphor of one discipline “trespassing” upon another, as previous law-and-literature scholars have pointed out. See Jane B. Baron, *Interdisciplinary Legal Scholarship as Guilty Pleasure: The Case of Law and Literature*, and Richard H. Weisberg, *Literature’s Twenty-Year Crossing into the Domain of Law: Continuing Trespass or Right by Adverse Possession*, in *LAW AND LITERATURE: CURRENT LEGAL ISSUES 1999*, at 21 and 47 (Michael Freeman & Andrew D.E. Lewis, eds., 1999).

284. See Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 YALE L.J. 1059, 1062 (1999).

enough to tie all the strands together can be found and stated only at a level of abstraction so high as to threaten banality.²⁸⁵

This is to say nothing of the internecine squabbling among law-and-literature scholars over the value of law-and-literature and its proper parameters.²⁸⁶ Instead of hearing “the call of stories,”²⁸⁷ these scholars seem to suggest that those of us committed to law-and-literature as a discipline should hear the call for rules, for guidelines. But doesn’t the need to delimit what constitutes the proper agenda and boundaries of law-and-literature miss the point? Isn’t literature, at its best, boundless? True literature is at once specular and transgressive, crosses boundaries, trespasses. To borrow from Maria Aristodemou, unlike law, “literature enjoys the freedom to take risks, dislocate old laws and structures, and articulate new imaginaries.”²⁸⁸ Or as Peter Goodrich states, “literature . . . presents an image of a beyond of law, a justice that exists like equity beyond the letter of legal rule.”²⁸⁹ And yet while literature is limitless in its possibilities, many in the law-and-literature movement appear to frown on the same expansiveness, the same inclusiveness, the same boundlessness, for law-and-literature. Just consider, is it possible that the remedy for law-and-literature as a discipline (assuming *arguendo* it even needs a remedy) is not more discipline, but less? So my blueprint for law-and-literature is this: just as literature crosses boundaries, just as literature trespasses, so too should our approaches to law-and-literature. Hopefully, so too does this article.

285. *Id.* at 1061–62. Although Baron’s complaint is concededly broader—that law-and-literature scholars wrongfully treat literature as oppositional to law, and law as a bounded entity, without any discussion of law’s boundedness—at bottom, her complaint seems to be that the law-and-literature movement, as a discipline, is not sufficiently disciplined.

286. For an overview of the opposing views and camps, see Ian Ward, *Introduction, in LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES* 3–27 (Ian Ward ed., 1995).

287. Abrams, *supra* note 261.

288. MARIA ARISTODEMOU, *LAW AND LITERATURE: FROM HER TO ETERNITY* 11 (2000).

289. Peter Goodrich, *Law By Other Means*, 10 *CARDOZO STUD. L. & LITERATURE* 111, 114 (1998). Similarly, Derrida argues that literature, as an institution, overflows the institution: “[it] allows one to say *everything*, in *every way* . . . to break free of the rules, to displace them, and thereby to institute, to invent, to even suspect the traditional difference between nature and institution, nature and conventional law, nature and history.” JACQUES DERRIDA, *ACTS OF LITERATURE* 36–37 (1992). See also SIMON DURIG, *FOUCAULT AND LITERATURE: TOWARDS A GENEALOGY OF WRITING* 113–18 (1992) (arguing that literature potentially transgresses existing and dominant values, interrogating them and performing a liberatory role).

