Justice Thomas and Bigger Thomas

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I

My Grandfather’s Son – the book Justice Clarence Thomas wrote in 2007 chronicling his improbable ascent from poverty to power – is the most literary memoir a Supreme Court Justice has ever written. The term *literary* here applies to Thomas’s volume in at least two distinct senses. First, Thomas’s engaging use of language far surpasses the mundane writing that typically appears in Justices’ books, allowing the finest passages in *My Grandfather’s Son* to attain the status of literature. Beginning with Thomas’s arresting first sentence, it becomes unmistakably clear that his book contains significant literary ambitions. “I was nine years old when I met my father,” he begins. This grim opening – comprised of plain, almost exclusively monosyllabic words – succeeds both in transporting readers into Thomas’s young mind and setting the stage for the familial and material privations that plagued his early childhood in Pinpoint, Georgia. The sentence’s lone multisyllabic word (“father”) arrives at the very end, leaving the impression that Thomas uses it only because the informal, one-syllable counterpart (“dad”) would convey an inaccurate intimacy. Thomas did not, however, merely craft a first-rate overture as an effort to draw in browsing readers. More than two hundred pages later, Thomas offers a poetic account of the media’s reaction when it became apparent that President George H.W. Bush had emerged from his vacation home in Kennebunkport, Maine to nominate Thomas to the Supreme Court in 1991. “At two o’clock we walked through the front door together,” Thomas writes. “The press corps gasped. ‘It’s Thomas,’ someone blurted out. The clicking of cameras sounded like rain falling on the tin roof of our hand-built house in Liberty County, the individual drops blurring together in a steady pitter-patter.” Apart from Thomas’s concentrated use of onomatopoeia (“blurted,” “gasped,” “clicking,” “pitter-patter”), this passage is notable for its deft comparison of two superficially incongruous events: the pomp of a Supreme Court nomination in privileged New England alongside a downpour in the decidedly unprivileged Deep South. This inspired aural association, occurring toward the memoir’s close, has the effect of bringing readers full circle, almost demanding contemplation of this ending’s extreme unlikelihood given the author’s exceptionally modest origins.

The second sense in which *My Grandfather’s Son* is notably literary appears in its abundant references to fictional works. As befitting the former undergraduate English major at Holy Cross, Thomas consistently cites – and periodically even quotes – several novelists that made impressions on him over the years. Some of these literary references are hardly surprising. Few readers, for instance, will be shocked to discover that Ayn Rand’s *Atlas Shrugged* and *The Fountainhead* occupy positions of prominence on the Thomas bookshelf. But other references seem at least somewhat less predictable, including Franz Kafka’s *The Trial*, Harper Lee’s *To Kill a Mockingbird*, and Ralph Ellison’s *Invisible Man*. From more recent decades, Thomas briefly invokes *Midnight in the Garden of Good and Evil*’s depiction of Savannah, Georgia, as a counterpoint to the Savannah that he came to know during his youth. In addition to these novels, Thomas
also cites the poetry of Robert Frost, and – by entitling his final chapter “Going to Meet the Man” – alludes to the short stories of James Baldwin.

No literary work, however, figures more conspicuously in Justice Thomas’s memoir than *Native Son* – the Richard Wright novel from 1940 that introduced the world to his indelible creation, Bigger Thomas. It would seem that, in Justice Thomas’s view, he and Bigger have considerably more in common than their surname. In a book that spans fewer than three hundred pages, Justice Thomas expressly identifies himself with Bigger on three separate occasions. Justice Thomas’s reliance on *Native Son* merits sustained examination not least because it sheds significant light on how: readers impose their own agendas on literary works, particular historical moments shape those agendas, and interpretations driven by those agendas can prove surprisingly durable. Examining Bigger Thomas through the eyes of Justice Thomas, moreover, appears to confound the notion holding that judges’ opinions will reflect the lessons of the novels that they hold dear.

Bigger Thomas, it would seem, is a man that only a mother could love. Given his mother’s withering attitude toward Bigger when the novel begins, moreover, that maternal love appears to have been no sure thing.iii Even admirers of *Native Son* concede that its protagonist is basically unlikeable. As Professor Arnold Rampersad has written: “[I]t is hard to think of a central character in all of literature who is less likeable than Bigger Thomas. With other blacks, Bigger is bullying, surly, treacherous, and cowardly; with whites—understandably, to be sure—he is wary and deceitful.”iv In a similar vein, some of *Native Son*’s most distinguished critics can be understood as faulting Richard Wright’s novel for selecting a protagonist with whom desperately few readers would readily identify. In “Everybody’s Protest Novel,” James Baldwin in 1949 contended that *Native Son* – like *Uncle Tom’s Cabin* – failed as literature because it was less interested in accurately depicting the human condition than it was in reducing actual people into abstract symbols of suffering. “The failure of the protest novel lies in its rejection of life, the human being, the denial of his beauty, dread, power, in its insistence that it is his categorization alone which is real and which cannot be transcended,” Baldwin wrote.v In 1963, Ralph Ellison echoed this critique of Bigger as a character lacking emotional depth, and attributed the shortcoming to what he regarded as Wright’s mistaken elevation of politics over art. “In *Native Son*, Wright began with the ideological proposition that what whites think of the Negro’s reality is more important than what Negroes themselves know it to be,” Ellison contended. “Hence Bigger Thomas was presented as a near-subhuman indictment of white oppression. He was designed to shock whites out of their apathy and end the circumstances out of which Wright insisted Bigger emerged.”vi

Given these persistent criticisms asserting Wright’s protagonist evinces little in the way of a likeable or relatable human being, Justice Thomas’s close self-identification with Bigger Thomas is striking. Even many sympathetic readers would surely view Bigger as a particularly grotesque example of how racial oppression in the United States can disfigure its most vulnerable targets. On this account, Bigger presents a cautionary tale of the profound psychological damage that the nation inflicts on impoverished racial minorities who possess neither the education required to achieve even meager
professional goals, nor the socialization necessary to nurture mutually supportive interpersonal relationships. It should hardly be surprising, of course, that an individual growing up in Bigger’s severely limited circumstances turned to lawlessness and violence. But comprehending the circumstances that shaped Bigger does not turn him into anything other than a charmless rogue. According to Wright’s own account, Bigger is a man to be feared, not a man to befriend. But where others might view Bigger as an antisocial menace, Justice Thomas appears to see largely himself.

Justice Thomas has periodically entertained the distinct possibility that he could have ended up on the wrong side of the law instead of interpreting the law. During his Supreme Court confirmation hearings, before Anita Hill’s allegations became public, then-Judge Thomas offered gripping testimony noting that he confronted this possibility on nearly a daily basis in his chambers at the D.C. Circuit. “[O]n my current court, I have occasion to look out the window that faces C Street, and there are converted buses that bring in the criminal defendants to our criminal justice system, busload after busload,” Thomas explained. “And you look out, and you say to yourself, and I say to myself almost every day, But for the grace of God there go I.” In My Grandfather’s Son, Justice Thomas briefly returns to this theme, and details how his criminal potential could have materialized:

In Pinpoint I was a little Negro boy growing up among hardworking but uneducated people. From there I moved to the confusion and squalor of a run-down tenement in Savannah, where I led a life of being cold and not knowing when I would feel warmth again, of constant, gnawing hunger and not knowing when I would eat again, a life which knowledge trickled in by the thimbleful when I yearned for floods of truth. To stay there would have doomed me to a dismal life of ignorance, perhaps even of crime—a life lost before it started.

Precious few other Supreme Court Justices in the nation’s history would be able to write those sentences or sincerely contemplate their lives descending into criminality. One might be tempted to attribute Justice Thomas’s identification with Bigger Thomas to his intimacy with a community where turning to a life of crime represents a familiar, well-traveled path. Yielding to that particular temptation, however, turns out to be incorrect. Justice Thomas identifies with Bigger Thomas not because he views him as a criminal, but precisely because he does not.

II

The first – and most significant – time My Grandfather’s Son draws on Native Son occurs when Justice Thomas describes his rediscovery of the novel during the early 1970s. The passage merits quoting at length because it contains, I will contend, a substantial misreading of the novel:

In the last semester of my senior year [in college], I took an independent-study course on black novelists. Richard Wright’s Native Son had already made a deep impression when I’d read it in high school, but now it meant even more to me. As I reentered the nightmare world of Bigger Thomas, the innocent young black man who finds himself caught up in a chain of circumstances that spins out of control and causes him to commit an act of violence that leads inexorably to his own
death, I envisioned myself slipping into a similar vortex of self-destructive behavior.\textsuperscript{xii}

Here, Justice Thomas views Bigger Thomas as a fundamentally passive character, one whom events act upon and one who holds little – if any responsibility – for the fate that befalls him. Justice Thomas’s language captures this passivity well, as Bigger “finds himself” “caught up” “in a chance of circumstances.” Those circumstances, in turn, “spin[…] out of [Bigger’s] control” and “cause[] him to commit” a violent act. On this account, it seems less accurate to find “mistakes were made by Bigger,” than “mistakes were visited upon Bigger.” The subject of how much autonomy Bigger should be viewed as possessing is a central – perhaps the central – question \textit{Native Son} poses.\textsuperscript{xii} That Justice Thomas sees Bigger as overwhelmingly a product of his environment may be at least somewhat surprising to those familiar with his generally austere treatment of criminal defendants at the Supreme Court. But many \textit{Native Son} readers over the years have undoubtedly shared Justice Thomas’s assessment of Bigger as a figure largely lacking any meaningful sense of autonomy. Although this fatalist analysis may encounter difficulty explaining why some individuals raised in circumstances similar to Bigger’s (or conditions more dire still) lead lives that turn out very differently, it cannot be labeled a misreading – let alone a substantial misreading. Rather, the quantum of Bigger’s autonomy is an interpretive matter upon which reasonable readers can differ.

What seems considerably less open to interpretation in this passage, though, is Justice Thomas’s classifying Bigger as “the innocent young black man” at the center of \textit{Native Son}. While Bigger is undeniably a “young black man,” Justice Thomas’s description of him as “innocent” misses the mark. The beginning of \textit{Native Son} establishes that Bigger is part of a crew that forcibly robs black shop owners with some regularity. When his crew conspires to commit a robbery against a white-owned business for the first time, Bigger becomes so overcome with dread at the prospect of robbing a white man that he scuttles the plan by physically assaulting Gus, one of his coconspirators. Bigger brandishes his knife, and humiliates Gus by forcing him to lick the knife’s blade in exchange for sparing him greater physical harm. When Bigger takes in a film at a local movie theater, he opts to supplement the visual experience with a tactile one, by – in his terminology – “polishing [his] nightstick.”\textsuperscript{xiii} Bigger spent some time in a reformatory school for the crime of stealing automobile tires. During his job interview with Mr. Dalton, Bigger asserts that he did not commit this particular crime. And it is certainly plausible that Bigger did not actually steal the tires, as racial minorities – then and now – are particularly susceptible to receiving sanctions for crimes that they did not commit. But it is also quite plausible that Bigger’s protestation to Mr. Dalton is simply one of the many lies that he utters throughout the novel.

Perhaps, though, Justice Thomas intends to suggest that Bigger is “innocent” in a narrower sense – innocent of the rape and the first-degree murder of Mary Dalton, the crimes for which he is executed. Bigger did not, after all, rape Mary. Nor did Bigger intend to kill Mary when he used a pillow to smother her; he sought merely to silence her so as to avoid having Mrs. Dalton detect his presence – a black man’s presence – in the bedroom of a young white woman. On this account, Bigger’s actions can be viewed as stemming from a racialized panic that, as assessed by contemporary standards, was not
only perfectly understandable but was downright sensible. Even if Bigger can accurately be viewed as committing some lesser homicide offense (say, manslaughter), it was not first-degree murder.

But if Justice Thomas views Bigger as “innocent” on this narrow understanding, his notion encounters serious analytical trouble when one steps back for a moment to contemplate what transpired immediately before the Mary’s death and what occurred in the days that followed. After Bigger drives Mary home, he notes that she is severely inebriated, verbally nonresponsive, incapable of standing on her own two feet, and seems to have lost consciousness. Mary’s incapacitated state does not prevent Bigger from repeatedly kissing her or from placing his hands firmly on her breasts after he has lifted her into bed. It seems impossible to understand Bigger’s conduct as constituting anything other than sexual assault, and anything but innocent. Indeed, after Bigger places Mary in bed, his train of thought strongly suggests he is contemplating having sex with Mary – which given the context is to say raping her – before Mrs. Dalton enters the bedroom:

[Bigger] lifted her and laid her on the bed. Something urged him to leave at once, but he leaned over her, excited, looking at her face in the dim light, not wanting to take his hands from her breasts. She tossed and mumbled sleepily. He tightened his fingers on her breasts, kissing her again, feeling her move toward him. He was aware only of her body now; his lips trembled. Then he stiffened. The door behind him had creaked.xiv

If this passage leaves some lingering doubt about his intentions, Bigger subsequently erases it, informing his attorney Max that he was preparing to rape Mary before Mrs. Dalton’s interruption. Had Bigger had actually followed through and raped Mary, it seems quite conceivable that he would have subsequently felt compelled to end her life. After Bigger entered Mary’s bedroom, thus, it may have been a question only of when her dead body would enter the Dalton’s furnace not whether it would do so. In the cold light of the following day, it is true that Bigger regrets Mary’s death. But Bigger’s regret, alas, appears to stem principally, if not exclusively, from his failure to secure financial gain for the act – an oversight that he aims to remedy by concocting a kidnapping and ransom scheme.

There can be little question that Bigger possesses the capacity to rape and to murder, of course, because Bigger rapes and murders his girlfriend Bessie when he is on the run from the police. After Bessie realizes the full extent of Bigger’s involvement with the Dalton case, she clearly communicates her aversion to having sex with him both verbally and physically. But Bigger ignores Bessie’s refusals because – in language calling back his feelings shortly before Ms. Dalton intruded – “[h]e was conscious of nothing now but her and what he wanted.”xv Wright notes that Bessie howls in protest and tries to push Bigger away, and continues: “He had to now. don’t Bigger don’t He was sorry, but he had to.”xvi Almost immediately after Bigger climaxes, he begins plotting how best to kill Bessie because he concludes that he cannot take her on the lamb with him: “He remembered that he had seen two bricks lying on the floor of the room as he had entered.”xvii Bigger uses one of those bricks to strike Bessie in the head repeatedly, and then throws what he presumes is her dead body down an airshaft. (Bigger would subsequently learn that Bessie died not from the blunt trauma but from
hypothermia.) Thus, when Justice Thomas writes that Bigger committed “an act of violence,” he conveniently disregards the brutally violent acts that Bigger inflicts on Bessie. Those crimes were neither accidental nor required to maintain his freedom. Whatever the range of words appropriate to describe Bigger Thomas, Justice Thomas’s invocation of the term “innocent” seems bewildering.

If Justice Thomas can be understood as misreading Bigger Thomas, the question then becomes: why did that misreading occur? No one other than Justice Thomas himself can know the precise set of reasons that answer this question (and even he may not fully know the answer or be able to articulate it). It seems likely, though, that a good portion of Justice Thomas’s mistaken portrayal of Wright’s protagonist is attributable to the specific time and social milieu in which he had his most meaningful encounter with Native Son.

As Justice Thomas recounts in his memoir, when he re-read Native Son as a college senior in the spring of 1971, he was in the midst of a period when he identified – however provisionally – with notions of Black Power. “[T]he more I read about the black power movement,” Thomas writes in My Grandfather’s Son, “the more I wanted to be a part of it.”

During that same era, some prominent proponents of Black Power rediscovered Native Son and held up its protagonist as an early exemplar of black masculinity and black resistance in the face of white oppression. In 1966, Eldridge Cleaver wrote an essay in Ramparts that compared James Baldwin’s recent work unfavorably – and with unmistakable antigay sentiment – to Native Son. Referring to the gay Baldwin as “Sugar,” Cleaver contended that “Rufus Scott, the weak, craven hearted ghost of Another Country” could not hold a candle to “Bigger Thomas of Native Son, the black rebel of the ghetto and a man.”

In weighing against the Civil Rights Movement’s nonviolence, Cleaver asserted that black citizens should remember Bigger as “a man [engaged] in violent . . . rebellion against the stifling, murderous, totalitarian white world. There was no trace in Bigger of a Martin Luther King-type self-effacing love for his oppressors.”

The Black Power movement’s veneration of Bigger would eventually find expositors within academia. Professor Addison Gayle, Jr.’s The Way of the New World: The Black Novel in America offers an extended analysis of Bigger in a chapter called “The Black Rebel” that both resonates with Cleaver’s interpretation and nicely anticipates Thomas’s reading. Amplifying Cleaver’s focus on black masculinity, Gayle suggests that within Native Son the white subordination of blacks serves to invert standard values, meaning “murder is not a mark of man’s inhumanity, but of his humanity, not an act denoting the degenerate, but the hero, not an effort at self-
destruction, but an attempt to validate manhood.” Gayle then summarizes: “In short, one must understand, that the murderer of Mary Dalton is a young man of great sensibility.” Preceding Justice Thomas’s reading of Bigger Thomas as “innocent” by more than three decades, Gayle contended in similar (if slightly more conceptual) language that Mary’s death “move[d] Bigger from a state of innocence to one of maturity, that unleashed the man within the boy.” Yet, Gayle arrives at this declaration of Bigger’s innocence only after offering a severely sanitized account of the events in Native Son that preceded Mary’s death. “Everything before [Mary’s death] is prelude,” Gayle writes: “the altercations between Bigger and his family; plotting robbery with neighborhood friends; the job as chauffeur to the Dalton family, where he is subjected to the obsequious behavior of Mary and her friend Jan.” Among the other incidents omitted from this account are: Bigger’s aggravated assault of Gus; Bigger’s sexual assault of Mary; and Bigger’s public masturbation. Indeed, Gayle’s rendering almost manages to make “plotting robbery with neighborhoods friends” sound like a wholesome afterschool activity. Never mind that Bigger and his pals do not typically stop with mere plotting. In order to elevate Bigger Thomas into a serviceable hero, it would seem that the Black Power movement needed to buff out some of his rougher edges, and in the process transform the deeply flawed character that Wright actually delivered.

Justice Thomas’s recollections of his views from this time demonstrate clear compatibility with the Black Power sensibilities that extolled Bigger Thomas as a model of racial resistance. After proclaiming his affinity with the Black Power movement in My Grandfather’s Son, Thomas sounds much like Cleaver in allowing that he harbored serious reservations about the wisdom of nonviolent protest and the utility of “working within the system.” Echoing Gayle’s doubts about using traditional values to confront racial injustice, Thomas notes that he viewed his relatives “and the millions of other, self-deluded blacks who played by the rules” as naïve. “Might it be that those rules were nothing more than a sinister invention devised by the white man to fool blacks into cooperating with the oppressive machinery of American life,” he asks. For Justice Thomas, this question then seemed that it could elicit only two valid responses: “Yes,” and “Hell, yes!” Most pertinent of all, though, Justice Thomas discloses that, even when he worked in the Missouri Attorney General’s office during the mid-1970s, he was “bothered . . . that [as] a criminal-appeals attorney, [he] would have to argue in favor of keeping blacks in jail.” Justice Thomas found advancing such arguments troublesome because, he writes: “I still thought of most imprisoned blacks as political prisoners. I had no facts to back up this opinion, a reflex response left over from my radical days, and didn’t need any; I knew that anything ‘the man’ did to black people was oppression, pure and simple.” This statement vividly encapsulates the mindset with which Justice Thomas approached Bigger Thomas as an undergraduate, and why he may have felt such kinship toward the character.

It is not exactly a secret that Justice Thomas no longer views most black inmates as political prisoners. Intriguingly, the triggering event that Justice Thomas identifies as prompting him to reject this view arose in one of his Missouri criminal cases that featured facts bearing at least passing resemblance to one aspect of Bigger Thomas’s narrative.
“What changed my mind [about black inmates] was the case of a black man convicted of raping and sodomizing a black woman in Kansas City after holding a sharp can opener at the throat of her small son,” Justice Thomas explains. “He was no political prisoner—he was a vicious thug. Perhaps he and the woman he’d brutalized had both been victims of racism, but if that were so, then she’d been victimized twice, first by ‘the man’ and then by the thug.”xxxii Bigger’s sexual violation of Bessie, of course, also involved a black man raping a black woman. Despite this significant overlap, Justice Thomas reaches starkly contrasting appraisals of the two figures. Where Bigger Thomas is an “innocent young black man,” the unnamed criminal defendant is “a vicious thug.” It is certainly true that the two narratives contain differences. But it is also far from clear that those differences redound to Bigger’s benefit. Although Bigger did not threaten a small child with a kitchen device before raping Bessie, the Kansas City rapist evidently did not bash in his victim’s brains before leaving her for dead. Perhaps if the Kansas City rapist had the good sense to assault a white person first, he would have risen in Justice Thomas’s estimation. Such a suggestion is nothing less than absurd, and Justice Thomas would certainly reject it. The suggestion does serve to highlight, though, how Justice Thomas arrives at his sanguine assessment of Bigger by effectively erasing the treatment of Bessie. It also underscores how the difference between “an innocent young black man” and “a vicious thug” sometimes lies in the eye of the beholder.

It hardly seems extravagant to maintain that if Justice Thomas somehow encountered Bigger Thomas today as a party in a Supreme Court case that he would more readily see a vicious thug than an innocent man. That Justice Thomas continues to cling to his early reading of Bigger Thomas, long after he has abandoned the ideological commitments that yielded that reading, offers powerful testament to the durability of literary interpretations. After literary characters form deep impressions in readers’ minds, those impressions harden and prove exceedingly difficult to dislodge. Many people alter their political attitudes quite dramatically during the course of their lives; attitudes toward characters from literature, however, remain remarkably constant. We change. Fictional characters stay exactly the same. And we seldom change our minds about fictional characters.

III

Justice Thomas’s frequent invocations of Bigger Thomas in his memoir succeed in complicating a central aspiration for the field of Law and Literature. If only judges had access to the correct creative works, this aspiration runs, then their legal opinions would be improved because they would be grounded in the sorts of humanist considerations that dominate lasting literature.xxxiii Under this theory, great fiction leads to great law. Although scholars do not generally spell out the underlying premise that this literarily informed jurisprudence will be a more liberal jurisprudence, the implication is unmistakable. It would be truly astonishing, after all, if many professors writing in an overwhelmingly liberal field within the overwhelmingly liberal legal academy aimed to move the law in a more conservative direction.xxxiv Yet Justice Thomas’s repeated appeals to Native Son make it quite clear that judges can simultaneously extol a literary work and prove impervious to the lessons that the work seems to propound. Novels, even more than most written texts, contain ample indeterminacy, and that is probably a good
thing. (If you show me a novel featuring a clear thesis statement, I will show you a bad novel.) But the indeterminacy of novels allows readers with different normative commitments to walk away from the same book with starkly different conclusions.

Indeed, readers at least sometimes seem capable of deriving lessons from a novel that approach precisely the opposite of what the novelist likely would have intended. When My Grandfather’s Son first invokes Native Son, for instance, Justice Thomas reflects upon a protest against the Vietnam War that he participated in as a college student in Harvard Square. According to Justice Thomas, the protest spiraled out of control, with police firing tear gas into the crowd. That event led Justice Thomas to conclude that he needed to avoid future protests because, like Bigger Thomas, such events could “cause him to commit an act of violence” that resulted in his own death. “Something like that, I realized, could have happened to me in Harvard Square,” Thomas writes. “I resolved to lead my life in such a way to steer clear of such potentially deadly situations.”xxxv Had Native Son’s author been available to advise a young Clarence Thomas, it seems dubious Richard Wright would have encouraged him to drop antiwar protests. When Wright produced Native Son in 1940, after all, he was a member of the Communist Party, an organization that is not primarily known for its aversion to political protest or for its approval of America’s military engagement in Vietnam.

It also merits contemplating whether Wright – and Bigger Thomas, for that matter – would find My Grandfather’s Son other two invocations of Native Son availing. After discussing Anita Hill’s allegations of sexual harassment, Justice Thomas invokes Bigger Thomas twice in rapid succession. “What had happened to Bigger Thomas, I knew, could happen to any black man, including me,” Justice Thomas writes. “To hint that he had committed a sex crime was to pronounce a death sentence. . . .” This was why I’d gone out of my way to avoid the very behavior of which I was now being accused.”xxxvi A few pages later, Thomas describes feeling “wild-eyed and desperate” and “half-crazed with fear” because, “[a]fter a lifetime of struggle and achievement, I’d been thrust back into Bigger’s world, a dark, cramped, hell devoid of hope.”xxxvii Without diminishing the importance of a Supreme Court justiceship or the feelings of humiliation associated with Hill’s allegations (regardless of their veracity), it seems highly doubtful that Bigger Thomas would recognize Justice Thomas’s world as bearing any meaningful relationship to his own. For Bigger Thomas, the question is life or death. For Clarence Thomas, the question is life on the Supreme Court or life on the D.C. Circuit. The inappositeness of comparing these two existences is well captured by the idea that Justice Thomas expresses immediately after he offers an extended, dreary quotation from Native Son. “I was spent by the time the U.S. marshals drove me home from the White House,” Justice Thomas writes. xxviii If this sentence captures even a small part of a “hell devoid of hope,” Bigger Thomas would be only the first in a long line of people eager to sell their souls to the devil. In the heat of the moment, of course, we all tend to distort our problems out of proportion. But Justice Thomas wrote these lines more than fifteen years after these allegations became public, and – not incidentally – more than fifteen years after he had won confirmation to the Supreme Court. The heat should have long since cooled, allowing Justice Thomas to appreciate that, even in his hour of desperation, he and Bigger occupied utterly distinct domains. At its best, literature affords readers a
window onto a world that we may otherwise not know, and in the process offers us new insight into our own existence. Here, however, Justice Thomas’s appeals to literature do not illuminate reality; they obscure it.

If Justice Thomas’s extractions from *Native Son* cannot be found among the novel’s more pressing lessons, what can? Perhaps the most striking legal lesson found in *Native Son* is its treatment of racial profiling. Although the novel will mark its seventy-fifth anniversary in 2015, its depiction of police officers who view people with dark skin as criminals unless proven otherwise presents an all-too-familiar tale to modern readers. When Bigger arrives at the Dalton home for his job interview, Wright provides a vivid snapshot of the toll that profiling can impose on racial minorities. Bigger is uncertain whether the Daltons would expect him to knock at the front door or the back door, and he walks along the house’s perimeter to assess whether entering through the back is even an option (which Bigger discovers it is not). Wright presents Bigger’s heartbreaking interior monologue as he returns to the front door:

> Suppose a police saw him wandering in a white neighborhood like this? It would be thought that he was trying to rob somebody. He grew angry. Why had he come to this god-damn job? . . . This was not his world; he had been foolish in thinking that he would have liked it. He stood in the middle of the sidewalk with his jaws clamped tight; he wanted to strike something with his fist. . . .
> Godamn!

Bigger’s rage at the police surveillance that accompanies his blackness is, of course, completely justifiable. The scene skillfully illustrates how black citizens are unable to escape the shadow of surveillance, and the way that it breeds emotions (anger, resentment, defeatism) that are unlikely to be availing in a job interview and in many other settings besides.

A closely-related lesson from *Native Son* that again, alas, contains distressing contemporary resonance appears in the book’s depiction of the propensity for using a single black person’s guilt as an occasion to upend a city’s entire black population. When Bigger is on the run from authorities, the ensuing manhunt adversely touches Chicago’s black citizenry as a whole and demonstrates scant respect for their individual rights. During the criminal trial, Bigger’s lawyer Max emphasizes “[t]he hunt for Bigger Thomas served as an excuse to terrorize the entire Negro population.” This statement is not mere attorney bluster, as Max offers a bill of particulars, including “the hundreds of innocent Negro homes invaded, the scores of Negroes assaulted upon the streets, the dozens who were thrown out of their jobs, the barrage of lies poured out from every source against a defenseless people—all of this was something unheard of in democratic lands.” When he is on the lamb, Bigger reads various newspaper articles about the search that support Max’s claims. According to one media report: “Police and vigilantes, armed with rifles, tear gas, flashlights, and photos of the killer, began at 18th Street this morning and are searching every Negro home under a blanket warrant from the Mayor.” Another article noted that “several Negro men were beaten in various North and West Side neighborhoods,” and that Hyde Park and Engelwood had also witnessed the formation of “vigilante groups” who were working in concert with the police. This same article disclosed that “several hundred Negroes resembling Bigger Thomas” had
been “rounded up from South Side ‘hot spots’” and were being held pending investigation.\textsuperscript{xlvii} That such indiscriminate searches, detentions, and even beatings occurred on the basis of race is bad enough. That these tactics seem to have received the government’s imprimatur is worse still, as the official support encourages racial minorities to reject law’s legitimacy.\textsuperscript{xlvii}

Justice Thomas’s jurisprudence at the intersection of race and policing evinces little trace of these potential legal lessons from \textit{Native Son}. There are many available cases that one could draw on to demonstrate that Justice Thomas’s jurisprudence pays insufficient attention to the hazards of racially inflammatory policing practices.\textsuperscript{xlviii} In the context of an essay analyzing \textit{Native Son}, however, Justice Thomas’s dissenting opinion in \textit{Chicago v. Morales} demands discussion.\textsuperscript{xlix} In \textit{Morales}, after all, the Supreme Court entertained a constitutional challenge to an anti-gang ordinance, a measure that can helpfully be understood as targeting latter-day Bigger Thomases in his hometown of Chicago.

In response to persistent violence, the Chicago City Council in 1992 enacted the Gang Congregation Ordinance, a measure prohibiting “criminal street gang members” from “loitering.”\textsuperscript{l} The ordinance defined loitering as “remain[ing] in any one place with no apparent purpose.”\textsuperscript{li} The measure further empowered police officers to identify suspected gang members who were loitering, and to instruct these individuals – and any other persons present, whether suspected gang members or not – to disperse and vacate the area.\textsuperscript{lii} Failure by anyone to heed the officer’s dispersal instruction resulted in a criminal offense, punishable by a fine and up to six months’ imprisonment.\textsuperscript{liii} In a 6-3 decision, the Court in \textit{Morales} invalidated the ordinance, with various Justices citing various constitutional infirmities, including its vague definition of loitering and its absence of any \textit{mens rea} requirement.\textsuperscript{liv}

It requires no great insight into either modern racial realities or modern policing practices to apprehend that the weight of Chicago’s ordinance would have fallen disproportionately on black and brown men. The measure afforded officers seemingly boundless discretion – discretion not only to determine who looks like a gang member (and who does not), but also who hanging out in public has a sense of purpose (and who does not). As Professor William Stuntz emphasized, (police) discretion and (racial) discrimination are constant traveling companions.\textsuperscript{lv} If Bigger and Gus and their buddies were hanging out on the South Side of Chicago during the early 1990s, it is exceptionally easy to envision police officers ordering them to disperse pursuant to the Gang Congregation Ordinance. A police officer would need to take only one glance at Bigger and his associates to conclude that they were up to no good. At least some percentage of the time, it seems essential to note, this officer’s conclusion would be correct. Bigger and his friends appear to congregate on a semi-regular basis to plan and then to execute robberies. Given the incredibly elastic way that authorities use the term “gang” today, moreover, officers would have no difficulty so designating Bigger’s recurrent criminal enterprise. Yet there would be other instances when the officer’s conclusion would prove unwarranted, when Bigger and his friends were not up to no good, but instead up to nothing at all. Police officers ordering young black men to disperse and vacate the area
when they are doing nothing more sinister than shooting the breeze in their own neighborhood seems unlikely to inspire even the most reluctant and smalltime of gangsters to mend their ways. If anything, those orders seem likely to send such people only further down the path of the crooked and broad.

Of even greater significance, though, police officers would on occasion – even if unintentionally – misidentify a law-abiding citizen as a gang member. Officers would, that is, look at Clarence Thomas but see Bigger Thomas. One might expect a student of *Native Son* to realize that the Gang Congregation Ordinance would in effect amount to a license to engage in racial profiling, as a number of upstanding black citizens would be drawn into unwanted interactions with police officers that could quickly grow acrimonious. The law-abiding black person who is informed by a police officer that he must vacate the area because he is suspected of a gang affiliation might wonder – not without reason – whether following the law is pointless because police officers view him only as a criminal. If the law disrespects me, the question might run, why should I respect the law? Chicago’s anti-gang ordinance, in sum, seemed poised to take an already toxic relationship between racial minorities and police officers, and to make it only worse.

Justice Thomas wrote a dissenting opinion in *Morales* voting to uphold the Chicago ordinance. That vote rests in evident tension with some of the more prominent legal lessons *Native Son* can be understood to contain. Moreover, in contrast to the generous reading of the term “innocent” that Justice Thomas employs with Bigger in *My Grandfather’s Son*, he displays a parsimonious understanding of the term “innocent” in *Morales*. Responding to the Justices who expressed concern that the ordinance could inappropriately be used to prohibit “innocent conduct,” Justice Thomas expressed sharp disagreement: “It is . . . anomalous to characterize loitering as ‘innocent’ conduct when it has been disfavored throughout American history. When a category of conduct has been consistently criminalized, it can hardly be considered ‘innocent.’”

Although Justice Thomas’s opinion in *Morales* seems to clash with *Native Son*’s lessons, this argument should not be misunderstood as suggesting that racial considerations played no role in his resolution of the case. To the contrary, concerns about race appear to have played a significant role in animating Justice Thomas’s thought in *Morales*. Some unsophisticated critics may concede that Justice Thomas’s vote in *Morales* was racially motivated, but only in the sense that he enjoys casting votes that he believes will harm racial minorities. Such assessments, which disparage Justice Thomas as some sort of a racial traitor, enjoy distressingly wide circulation in the press and in academia. There is no reason to doubt, however, that Justice Thomas voted as he did in *Morales*, at least in part, because he believed doing so would help black citizens not hurt them. To be sure, Thomas’s opinion carefully avoids appealing overtly to race, but he unmistakably seems to understand himself as articulating the views of law-abiding black people who live in poor urban areas that have been overrun by gang activity. “Today, the Court focuses extensively on the ‘rights’ of gang members and their companions,” Justice Thomas writes. “It can safely do so—the people who will have to live with the consequences of today’s opinion do not live in our neighborhoods. Rather,
the people who will suffer from our lofty pronouncements are people like Ms. Susan Mary Jackson. . . .” Justice Thomas identifies Ms. Jackson as an eighty-eight year old woman who testified in favor of the ordinance before the City Council by noting that she feared leaving her house during the day, and saying: “At my age if they look at me real hard, I be ready to holler.” Justice Thomas explains that the Ms. Jacksons of the nation are “people who have seen their neighborhoods literally destroyed by gangs and violence and drugs. They are good, decent people who must struggle to overcome their desperate situation, against all odds, in order to raise their families, earn a living, and remain good citizens.” In addition to offering the quotation from Ms. Jackson, Justice Thomas proceeded to quote two other Chicagoans who expressed their support for the ordinance by noting the extreme measures that they either employed or at least contemplated employing in an effort to feel physically secure. The gang presence in Ms. D’Ivory Gordon’s neighborhood left her terrified of commuting to work, prompting her to testify: “I have even come to the point now that I carry a meat cleaver to work with me . . . .” Another fearful Chicago resident, whom Justice Thomas does not name, seriously entertained the question: “Do I put my ax in my briefcase?”

For close readers of Native Son, these harrowing statements may bring to mind an earlier Chicagoan who carried a weapon to ensure that he arrived at a professional obligation unharmed. As Bigger prepares to travel to the Daltons for his interview, he decides to bring his firearm for personal safety reasons, as “[h]e was going among white people.” “[I]n order to get the Dalton place,” Wright explains, “he had to go through a white neighborhood. He had not heard of any Negroes being molested recently, but he felt that it was always possible.” At times, it would seem, the line separating the D’Ivory Gordons of the world from the Bigger Thomases of the world may not be quite so bright as is commonly supposed.

Native Son’s opening line reproduces the sound of an alarm clock clanging in the cramped apartment that Bigger Thomas shares with his mother and two siblings: “Brrrrrriiiiiiiiiiiiiiiiiiiiiiiiiiiinng!” Arnold Rampersad, along with many of the novel’s interpreters, has suggested that this beginning contained significance quite apart from the plot: “The sound of the alarm that opens Native Son was Richard Wright’s urgent call in 1940 to America to awaken from its self-induced slumber about the reality of race relations in the nation.” For his part, Irving Howe suggested that Wright’s book had its intended effect. “The day Native Son appeared, American culture was changed forever,” Howe wrote. “It made impossible a repetition of the old lies [and] 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.” Since Richard Wright issued Native Son, the percentage of Americans who are either incarcerated or otherwise subjects of the criminal justice system has increased exponentially. A staggeringly large portion of those subjects, moreover, look something like Bigger Thomas. On few issues today is there greater need for a talented novelist to rouse a slumbering public than regarding the national commitment to mass incarceration and that system’s woeful racial dimensions. If only it could be guaranteed that legislators and judges who read the novel would actually heed the wakeup call.
*I received helpful feedback on this project from William Baude, Emily Buss, Laura Ferry, Julius Getman, Pratheepan Gulasekaram, Randall Kennedy, Alison LaCroix, Sanford Levinson, Saul Levmore, Jonathan Masur, Richard McAdams, Martha Nussbaum, John Rappaport, Caleb Smith, Kenneth Warren, and Laura Weinrib. I also benefited from exemplary research assistance provided by Trevor Lovell and Adam Weiner.

† MGS, at 1.
‡ MGS, at 214.
§ The preceding two sentences are meant to evoke B.B. King’s essential blues number, “Nobody Love Me But My Mother.” The relevant lyrics run:
   Nobody loves me, but my mother,
   And she could me jivin’ too.
B.B. King, Nobody Loves Me But My Mother, on INDIANOLA MISSISSIPPI SEEDS (MCA Records 1970).


vii Richard Wright, How Bigger Was Born, 1940, reprinted in RICHARD WRIGHT, NATIVE SON 433, 434 (Harper Perennial edition) (discussing the deep fear that Wright felt when he encountered one of the people on whom he modeled Bigger).

viii Justice Thomas is not alone in seeing parallels between his own life and Bigger Thomas. For an elaborate argument in this vein, see Edith Efron, Native Son, REASON, Feb. 1, 1992, at 22-32.


x MGS, at 24.
xi MGS, at 63.

xii For an insightful treatment of this central question, see Dan M. Kahan & Martha C. Nussbaum, Two Conceptions of Emotion in Criminal Law, 96 COLUM. L. REV. 269, 370-72 (1996).

xiii NS, at 30.
xiv NS, at 84-85.
xv NS, at 234.
xvi NS, at 234.
xvii NS, at 234.
xviii MGS, at 48. I have been benefited immensely from several insightful pieces that analyze various intersections of Justice Thomas’s judicial and racial identities. See, e.g., Mark Tushnet, Clarence Thomas’s Black Nationalism, 47 HOW. L.J. 323 (2004); Angela Onwuachi-Willig, Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us about the Influence of Racial Identity, 90 IOWA L. REV. 931 (2005); Eric L. Muller, Where, but for the Grace of God, Goes He?: The Search for Empathy in the

MGS, at 48.

Eldridge Cleaver, Notes on a Native Son, RAMPARTS, June 1966, at 55.

Eldridge Cleaver, Notes on a Native Son, RAMPARTS, June 1966, at 55.

Eldridge Cleaver, Notes on a Native Son, RAMPARTS, June 1966, at 55.


MGS, at 48.

MGS, at 48.

MGS, at 48.

MGS, at 94-95.

MGS, at 94-95.

MGS, at 94-95. Thomas proceeds to explain that this case awakened him to the realities of intraracial crime rates. “Until then I’d ignored the obvious implications of black-on-black crime rates,” Thomas writes. “After I worked on that case, I knew better than to assume that whites were responsible for all the woes of blacks . . . I also grew more wary of unsupported generalizations and conspiracy theories, both of which had become indispensable features of radical argument.” MGS, at 94-95.

For the most influential and sophisticated articulation of this idea, see MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND THE PUBLIC LIFE (1995).


MGS, at 63.

MGS, at 245 (ellipsis in original).

MGS, at 251-252.

MGS, at 252.

See RANDALL KENNEDY, RACE, CRIME, AND THE LAW 159 (1997) (contending that profiling is a sort of “racial tax”).

NS, at 44.


NS, at 385.
Justice Thomas joined two opinions decided in 1996 – Whren v. United States and United States v. Armstrong – that made it extraordinarily difficult for an individual to prevail on a claim of racial profiling or racially selective prosecution. I believe that future generations will look back on the Court’s opinions in those two cases as shameful. If that prediction is vindicated, Justice Thomas will have lots of colleagues with whom to share the blame; Whren was unanimous and Armstrong drew one solitary dissent.


City of Chicago v. Morales, 527 U.S. 41, 113 (Thomas, J., dissenting).

See Randall Kennedy, Sellout: The Politics of Racial Betrayal 87-90, 137 (2008) (collecting some of the more prominent articulations of such sentiments).

For an insightful treatment that ultimately rejects the charge that Justice Thomas is a racial traitor, see Kennedy, supra note __, at 87-143.

Morales, 527 U.S. at 114-115 (Thomas, J., dissenting).

Morales, 527 U.S. at 101 (Thomas, J., dissenting) (internal quotation marks omitted).

Morales, 527 U.S. at 115 (Thomas, J., dissenting).

Morales, 527 U.S. at 100 (Thomas, J., dissenting) (internal quotation marks omitted).

Morales, 527 U.S. at 101 (Thomas, J., dissenting) (internal quotation marks omitted).

NS, at 43.

NS, at 43.

NS, at 3.
