
**THE RHETORIC OF BIGOTRY
IN LAW, LIFE, AND LITERATURE:
ON LINDA MCCLAIN’S *WHO’S THE BIGOT?***

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INTRODUCTION

You never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it.—Atticus Finch¹

Reflecting on the rhetoric of bigotry and its relation not only to civil rights and same-sex marriage but also to conscience, prejudice, and tolerance are the main aims of Professor McClain's *Who's the Bigot? Learning from Conflicts over Marriage and Civil Rights Law*.² It is worth mentioning that the book traces the rhetoric of bigotry not only in earlier debates about interfaith, interracial, and even intercultural marriages but also in later—very current—disputes on same-sex marriages, including religious exemptions to antidiscrimination laws as exemplified in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.³

The title and topic of my Essay, *The Rhetoric of Bigotry in Law, Life, and Literature*, generally owe their genesis to a previous draft of McClain's book; to her keynote address at a conference on the book and my commentary on it; and to the ease with which the charge of bigotry rhetorically and surprisingly (or not) backfires on one denouncing it in law, life, and literature. Additionally, the approach is indebted to McClain, particularly with regard to her article *Justice and Elegance for Hedgehogs*, in which she compared a book and a novel.⁴ In this case, I will be comparing and contrasting two novels to *Who's the Bigot?* Both novels were written by Harper Lee: one is the classic Pulitzer Prize-winning *To Kill a Mockingbird*⁵ and the other is its infamous "sequel," *Go Set a Watchman*.⁶

In order to advance my main claim, I commence by quoting the core of McClain's position:

¹ HARPER LEE, *TO KILL A MOCKINGBIRD* 33 (Harper Collins 2006) (1960) [hereinafter LEE, *MOCKINGBIRD*].

² LINDA C. MCCLAIN, *WHO'S THE BIGOT? LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW* (forthcoming 2020) (manuscript at 13) (on file with the Boston University Law Review) (reviewing "how people understood and spoke about 'bigots' and 'bigotry' in a series of past and present controversies over marriage and civil rights"). Page references to *Who's the Bigot?* in this Essay refer to the penultimate version of the book (indicated as "manuscript").

³ 138 S. Ct. 1719, 1723 (2018) (balancing ability of government to protect against discrimination against same-sex couples with rights of individuals to freely exercise their religion).

⁴ See Linda C. McClain, *Justice and Elegance for Hedgehogs—in Life, Law, and Literature*, 90 B.U. L. REV. 863, 864 (2010) (comparing MURIEL BARBERY, *THE ELEGANCE OF THE HEDGEHOG* (Alison Anderson trans., Europa Editions 2008) (2006), with RONALD DWORIN, *JUSTICE FOR HEDGEHOGS* (2011)).

⁵ LEE, *supra* note 1.

⁶ HARPER LEE, *GO SET A WATCHMAN* (2015) [hereinafter LEE, *WATCHMAN*].

The turn to bigotry to identify repudiated and unreasonable views explains the heavy moral condemnation and strong emotional charge the term “bigotry” arouses. To call someone a bigot may stop a conversation because it marks someone as “beyond the pale,” not reachable through dialogue or persuasion. The rhetorical retort of complaining that someone has been “branded a bigot” can be as much a conversation stopper as actual charges of bigotry. I conclude that the rhetoric of bigotry is sometimes necessary and appropriate, but at other times, there are more constructive ways to talk about prejudice, intolerance, and discrimination. Rhetoric matters. Particularly if we care about moral learning and coming to new understandings about injustice and justice, we should pay careful attention to the rhetoric of bigotry.⁷

While I counsel everyone to follow McClain and “pay careful attention to the rhetoric of bigotry,” I have a small, “turnip-sized,”⁸ but very important caveat: for her, “the rhetoric of bigotry is sometimes necessary and appropriate,” but for me it is a false necessity.⁹ The rhetoric of bigotry can never be appropriate, unless you are the one coming with a rejoinder. Moreover, I concur with her that “there are more constructive ways to talk about prejudice, intolerance, and discrimination” than by pointing fingers at one another and, consequently, stopping the conversation.¹⁰ We need more “dialogue or persuasion” rather than less or none at all. Hence, in the following parts, I intend to reflect upon some perennial questions: Who is a bigot? What is bigotry? Why do prejudice, intolerance, and discrimination persist? And—most importantly—what can (and cannot) we do about it? In contemplation of these questions, Part I compares the rhetoric of bigotry in Lee’s and McClain’s books—i.e., in fiction and in real life. Part II complements McClain’s answers to these questions with responses from Lee’s books. Finally, I conclude by contrasting the previous parts with the rhetoric of bigotry in law as exemplified by *Masterpiece Cakeshop*.

I. REFLECTIONS ON LEE’S AND MCCLAIN’S BOOKS ON BIGOTRY IN FICTION AND IN REAL LIFE

Regarding the pervasive presence of the rhetoric of bigotry and how it boomerangs in real life, let me begin by quoting McClain on two incidents from the 2016 U.S. presidential campaign:

When Democratic nominee Hillary Clinton placed “half of Trump supporters” into a “basket of deplorables” because of their many prejudices—“racist, sexist, homophobic, xenophobic, Islamophobic—you

⁷ MCCLAIN, *supra* note 2 (manuscript at 13-14) (endnote omitted).

⁸ LEE, WATCHMAN, *supra* note 6, at 266.

⁹ MCCLAIN, *supra* note 2 (manuscript at 14); *see also* ROBERTO MANGABEIRA UNGER, 2 SOCIAL THEORY: ITS SITUATION AND ITS TASK 48-64 (1987) (arguing for restructuring society by rejecting false necessities).

¹⁰ MCCLAIN, *supra* note 2 (manuscript at 14).

name it”—and added that some were “irredeemable,” she drew on the idea of the bigot as a fixed type. She swiftly apologized for grossly generalizing, clarifying that what was “deplorable” was Trump’s building his campaign on “prejudice and paranoia” and “retweeting fringe bigots.” In rallies, Trump announced his shock at hearing Clinton “attack, slander, smear, demean [and] demonize[]” the “wonderful, amazing people” supporting him.” But some commentators countered that, while Clinton’s statement may have been “politically incorrect,” it was factually correct—whatever the specific percentage, “a genuinely deplorable cadre of bigots” had gained “real, outsized influence within the Republican Party.” Some Trump supporters related Clinton’s remark to liberal “bullying” that branded as bigots good people whose opinions had been ruled out of bounds by “political correctness.”

...

In the second incident, candidate Clinton drew on the newer social science about implicit bias. In answering a question by debate moderator Lester Holt about whether police have racial bias, she described implicit bias “as a problem for everyone, not just police.” However, some critics (including Trump’s running mate, Governor Mike Pence) construed her remark as a charge that we are all racists and bigots.¹¹

Here is McClain on the relevance of the rhetoric of bigotry and the rationale behind the puzzles in past and present controversies over marriage and civil rights, which McClain’s main claim faces:

These incidents confirm the strong moral blame attached to a charge of bigotry, leading to the rejoinder that one is a good person, not a bigot. The move to equate discussion of implicit bias with a charge of bigotry also suggests how charged public discussions about bias are, even when they avoid the language of bigotry. They raise questions about whether it is useful to refer to bigotry to discuss problems of prejudice. The contemporary study of prejudice suggests that focusing on “the bigot” as a fixed type is less fruitful than focusing on why people develop and hold prejudices and whether their beliefs can be changed. Similarly, some caution against conflating a person’s racist belief or action with a person being a racist. This is a “hate the sin, not the sinner” approach. What is more, equating racism only with overt bigotry, which is now publicly condemned and less pervasive than half a century ago, misses institutional and unconscious racism. In the context of LGBTQ rights, drawing a sharp contrast between the homophobic bigot—akin to the segregationist—and the decent, sincere religious believer obscures that government may need to put limits on acting even on sincere beliefs when doing so interferes with the right of others.¹²

¹¹ McClain, *supra* note 2 (manuscript at 12-13) (endnotes omitted).

¹² *Id.* (manuscript at 13) (endnotes omitted).

The appearance of *Go Set a Watchman* fifty-five years after the release of *Mockingbird* recently ignited controversy over one of the greatest fictional characters of all time: Atticus Finch.¹³ Atticus is a hero and role model not only for young Jean Louise “Scout” Finch but also for generations of lawyers¹⁴ and legal philosophers.¹⁵ Due to his “moral character” and even “moral theology,” Atticus has been characterized as the champion of justice—the champion of “*equal rights for all, special privileges for none.*”¹⁶ As Atticus states famously in his closing remarks at Tom Robinson’s trial:

“We know all men are not created equal in the sense some people would have us believe—some people are smarter than others, some people have more opportunity because they’re born with it, some men make more money than others, some ladies make better cakes than others—some people are born gifted beyond the normal scope of most men.

“But there is one way in this country in which all men are created equal—there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein, and the ignorant man the equal of any college president. That institution, gentlemen, is a court. It can be the Supreme Court of the United States or the humblest J.P. court in the land, or this honorable court which you serve. Our courts have their faults, as does any human institution, but in this country our courts are the great levelers, and in our courts all men are created equal.

¹³ See Alexandra Alter, *Some Are Shocked, Others Find Nuance in a Bigoted Atticus Finch*, N.Y. TIMES, July 12, 2015, at A1 (describing Atticus’s new role as “explosive plot twist”); Michiko Kakutani, *Kind Hero of ‘Mockingbird’ Is Cast as Racist in New Book*, N.Y. TIMES, July 11, 2015, at A1 (“Shockingly, in Ms. Lee’s long-awaited novel, . . . Atticus is a racist who once attended a Klan meeting . . .”); Jonathan Mahler, *Invisible Hand that Nurtured an Author and a Literary Classic*, N.Y. TIMES, July 13, 2015, at C1 (asking what connected *Go Set a Watchman*’s “dark tale of a young woman’s disillusionment with her father’s racist views . . . to [*To Kill a Mockingbird*]’s redemptive one of moral courage and human decency”); Sam Sacks, *Dark Days in Maycomb*, WALL STREET J., July 13, 2015, at A13 (noting that “Atticus Finch, standard-bearer of justice and integrity and one of the few unambiguously heroic figures in American literature,” is a segregationist in *Go Set a Watchman*).

¹⁴ See Timothy L. Hall, *Moral Character, the Practice of Law, and Legal Education*, 60 MISS. L.J. 511, 519 (1990) (“Atticus is what our grandparents would have called a man of character.”); Thomas L. Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT. L. REV. 181, 188 (1981) (“Atticus Finch’s story is the story of a hero who is an American, a Southerner, and a lawyer . . .”).

¹⁵ See W.J. WALUCHOW, A COMMON LAW THEORY OF JUDICIAL REVIEW: THE LIVING TREE 97-99, 103-06, 109-15 (2007) (naming hypothetical “man of principle” after Atticus Finch); Imer B. Flores, *The Living Tree Constitutionalism: Fixity and Flexibility*, PROBLEMA. ANUARIO DE FILOSOFÍA Y TEORÍA DEL DERECHO [PROBLEMA], no. 3, 2009, at 37, 47 n.14 (Mex.) (describing Atticus Finch as “a lawyer, brutally honest, highly moral, and a tireless crusader for good causes—even hopeless ones”).

¹⁶ LEE, WATCHMAN, *supra* note 6, at 108.

“I’m no idealist to believe firmly in the integrity of our courts and in the jury system—that is no ideal to me, it is a living, working reality. Gentlemen, a court is no better than each man of you sitting before me on this jury. A court is only as sound as its jury, and a jury is only as sound as the men who make it up. I am confident that you gentlemen will review without passion the evidence you have heard, come to a decision, and restore this defendant to his family. In the name of God, do your duty.”¹⁷

Bear in mind that by defending a black man who was wrongly accused and convicted, Atticus was painted as a “n—lover” in *Mockingbird*,¹⁸ by attending a Ku Klux Klan reunion, he was portrayed as a “n—hater” in *Watchman*.¹⁹ The latter portrayal, of course, represents a shift, as exemplified by an exchange between Scout and Atticus in *Mockingbird*. Scout asks Atticus, “You aren’t really a n—lover, then, are you?”²⁰ He responds without any hesitation: “I certainly am. I do my best to love everybody . . . I’m hard put, sometime—baby, it’s never an insult to be called what somebody thinks is a bad name. It just shows you how poor that person is, it doesn’t hurt you.”²¹

And so Atticus, who was once a paragon of legal virtue, lacking bias, prejudice, and intolerance, is now—or at least seems to be—biased, prejudiced, and intolerant in *Watchman*:

“Listen, Scout, you’re upset by having seen me doing something you think is wrong, but I’m trying to make you understand my position. Desperately trying. This is merely for your own information, that’s all: so far in my experience, white is white and black’s black. So far, I’ve not yet heard an argument that has convinced me otherwise. I’m seventy-two years old, but I’m still open to suggestion.”²²

In other words, “[Scout’s] father, the great Atticus Finch, is a bigot.”²³ This charge is made by no other than Atticus’s disappointed daughter, Scout: “I don’t care what it is, Uncle Jack, if you’ll only tell me what’s turned my father into a n—hater.”²⁴ Although her Uncle Jack—also known as Dr. Finch—tries to make a case for her father’s actions, she lashes out and runs away without even trying to listen:

“Baby,” he said, “all over the South your father and men like your father are fighting a sort of rearguard, delaying action to preserve a certain kind of philosophy that’s almost gone down the drain—”

¹⁷ LEE, *MOCKINGBIRD*, *supra* note 1, at 234; *id.* at 253 (“The one place where a man ought to get a square deal is in a courtroom, be he any color of the rainbow . . .”).

¹⁸ *Id.* at 94-96, 98, 124, 249.

¹⁹ LEE, *WATCHMAN*, *supra* note 6, at 188.

²⁰ LEE, *MOCKINGBIRD*, *supra* note 1, at 233.

²¹ *Id.* at 124-25 (omission in original).

²² LEE, *WATCHMAN*, *supra* note 6, at 246.

²³ Mahler, *supra* note 13, at C1.

²⁴ LEE, *WATCHMAN*, *supra* note 6, at 188.

“If it’s what I heard yesterday I say good riddance.”

Dr. Finch looked up. “You are making a bad mistake if you think your daddy’s dedicated to keeping the Negroes in their places.”

Jean Louise raised her hands and her voice: “What the hell I am to think? It made me sick, Uncle Jack. Plain-out sick—”

Her uncle scratched his ear. “You no doubt, somewhere along the line, have had certain historical facts and nuances placed in front of you—”

“Uncle Jack, don’t hand me that kind of talk now—fightin’ the War has nothing to do with it.”

“On the contrary, it has a great deal to do with it if you want to understand.”²⁵

Later on, as the following passage demonstrates—and most importantly for the purposes of my argument regarding the rhetoric of bigotry and its dual nature—her uncle turns the tables on her:

Dr. Finch chuckled. “You know,” he said. “You’re very much like your father. I tried to point that out to you today . . . you’re very much like him, except you’re a bigot and he’s not.”

“I beg your pardon?”

Dr. Finch bit his under lip and let it go. “Um hum. A bigot. Not a big one, just an ordinary turnip-sized bigot.”

Jean Louise rose and went to the bookshelves. She pulled down a dictionary and leafed through it. “‘Bigot,’” she read. “‘Noun. One obstinately or intolerably devoted to his own church, party, belief, or opinion.’ Explain yourself, sir.”

“I was just tryin’ to answer your running question. Let me elaborate a little on that definition. What does a bigot do when he meets someone who challenges his opinions? He doesn’t give. He stays rigid. Doesn’t even try to listen, just lashes out. Now you, you were turned inside out by the granddaddy of all father things, so you ran. And how you ran.”²⁶

By now it should be clear that *Watchman* is not properly a follow-up to—but rather a preliminary draft of—*Mockingbird*, because several passages overlap almost word-for-word.²⁷ Nevertheless, I suggest reading *Watchman* as a chronological sequel taking place twenty years after *Mockingbird*. In short, I am taking sides with those who believe “it’s a sin to kill a mockingbird”²⁸—and that

²⁵ *Id.* at 188-89.

²⁶ *Id.* at 266-67.

²⁷ See Keith Collins & Nikhil Sonnad, *See Where ‘Go Set a Watchman’ Overlaps with ‘To Kill a Mockingbird,’ Word-for-Word*, QUARTZ (July 14, 2015), <https://qz.com/452650/harper-lee-revisions/> [<https://perma.cc/3TDL-5FQG>].

²⁸ LEE, *MOCKINGBIRD*, *supra* note 1, at 103.

it would be a sin to kill *To Kill a Mockingbird*²⁹ just because of an uncomfortable development. In my opinion, *Mockingbird*'s legacy is best embodied in Atticus's little piece of advice to his daughter:

“First of all,” he said, “if you can learn a simple trick, Scout, you’ll get along a lot better with all kinds of folks. You never really understand a person until you consider things from his point of view—”

“Sir?”

“—until you climb into his skin and walk around in it.”³⁰

Atticus's legacy manifests similarly in *Watchman* when Henry, Atticus's employee and an old friend of his daughter, recounts to Scout her father's counsel: “He swung around in his chair and looked out the window and said he always tried to put himself in his client's shoes”³¹

Atticus is “nearly fifty” years old in *Mockingbird*³² and is seventy-two years old in *Watchman*.³³ Scout is a young girl in *Mockingbird* who “ain't nine yet”³⁴ and is a young woman in *Watchman* who appears to be twenty-six—though thirty-one would be a better fit for the narrative sequence.³⁵ Both novels are set in the Deep South in fictional Maycomb, Alabama, with *Mockingbird* taking place in 1935³⁶ and *Watchman* taking place in 1957.³⁷ Atticus was once a very progressive character, but later on—much like the nation at large—he appeared more conservative. Two major historical events that occurred between the time-

²⁹ See Jonathan A. Rapping, *It's a Sin to Kill a Mockingbird: The Need for Idealism in the Legal Profession*, 114 MICH. L. REV. 847, 849 (2016) (“While [Atticus] is certainly not the only role model for the next generation of lawyers, as a profession we have not arrived at a point where we can discard a symbol that has the potential to inspire young lawyers to make the world a little more just.”).

³⁰ LEE, *MOCKINGBIRD*, *supra* note 1, at 33.

³¹ LEE, *WATCHMAN*, *supra* note 6, at 224; *see also* LEE, *MOCKINGBIRD*, *supra* note 1, at 322.

³² LEE, *MOCKINGBIRD*, *supra* note 1, at 102.

³³ LEE, *WATCHMAN*, *supra* note 6, at 3, 246.

³⁴ LEE, *MOCKINGBIRD*, *supra* note 1, at 256.

³⁵ LEE, *WATCHMAN*, *supra* note 6, at 34 (“Hurry? I’m twenty-six, Aunty, and I’ve known Hank forever.”); *see also infra* note 37 (describing sequencing discrepancies further).

³⁶ LEE, *MOCKINGBIRD*, *supra* note 1, at 234.

³⁷ Harper Lee (1926-2016) was born in 1926 and finished *Watchman* in 1957, making her nine in 1935—the year in which *Mockingbird* was set—and thirty-one when she finished *Watchman*. Her father, Amasa Coleman Lee (1880-1962), who is said to have inspired Atticus Finch's character, was fifty-five in 1935 and seventy-seven in 1957. In 1952—the year in which *Watchman* takes place—Harper Lee was twenty-six and her father was seventy-two. But placing *Watchman* in 1952 creates major inconsistencies. For instance, if Atticus Finch is nearly fifty in *Mockingbird* in 1935, he could only be sixty-seven in 1952 and certainly would have been seventy-two by 1957. But if Jean Louise was nine in 1935, she should have been thirty-one and not twenty-six by 1957.

setting of the novels might help explain this shift: the Second World War (1939-1945) and the Supreme Court's 1954 decision in *Brown v. Board of Education*.³⁸

In a criticism that foreshadowed the controversy over *Watchman*, Monroe Freedman sparked a clash when, in his column on professional ethics in the *Legal Times*, he disputed the orthodox view of Atticus by acknowledging Atticus's failure to take any action toward social justice until the court appointed him to a role that required it of him.³⁹ His assessment spurred an instantaneous and defensive reply in *The New York Times*.⁴⁰ Freedman responded, initially insisting that Atticus be demythologized⁴¹ before later reassessing his position in a law review article.⁴² Additional discussion of Freedman's position by other scholars followed.⁴³ In his reassessment, Freedman argued that Atticus not only practices law within a system of institutionalized "apartheid" but also "tolerates it[,] and sometimes he even trivializes and condones it."⁴⁴ In that sense, Freedman seems to suggest that Atticus is not only a racist but also a hypocrite. Actually, in *Watchman*, Jean Louise makes a similar charge:

"I remember that rape case you defended, but I missed the point. You love justice, all right. Abstract justice written down item by item on a brief—nothing to do with that black boy, you just like a neat brief. His cause interfered with your orderly mind, and you had to work order out of

³⁸ 347 U.S. 483 (1954).

³⁹ Monroe Freedman, Opinion, *Atticus Finch, Esq., R.I.P.*, LEGAL TIMES, Feb. 24, 1992, at 20, 20.

⁴⁰ See David Margolick, *To Attack a Lawyer in 'To Kill a Mockingbird': An Iconoclast Takes Aim At a Hero*, N.Y. TIMES, Feb. 28, 1992, at B7 (acknowledging that Atticus had imperfections, but crediting limits of society in which he existed to explain these shortcomings).

⁴¹ See Monroe Freedman, Opinion, *Finch: The Lawyer Mythologized*, LEGAL TIMES, May 18, 1992, at 25 (responding to Margolick's arguments against his view of Atticus by emphasizing that Atticus "characterized the rabble-rouser who led a lynch mob as basically a 'good man,'" at time when "hundreds of blacks were murdered and many thousands were terrorized by the Klan").

⁴² See Monroe H. Freedman, *Atticus Finch—Right and Wrong*, 45 ALA. L. REV. 473, 477 (1994) (clarifying that although Atticus has many admirable qualities, as a lawyer role model he falls short by taking no voluntary action, despite his legal skill and political power, to change conditions of segregation and violence in his community).

⁴³ See Michael L. Boyer, *Atticus Finch Looks At Fifty*, 12 U. MD. L.J. RACE RELIGION GENDER & CLASS 356, 357 (2012) (arguing that Atticus is true professional within historical context because he was poverty lawyer who provided legal services to farmers impacted by Great Depression); Steven Lubet, *Reconstructing Atticus Finch*, 97 MICH. L. REV. 1339, 1349 (1999) (book review) (contextualizing Atticus's tactics within gender and class inequality that permeated 1930s Maycomb); Peter Zwick, Comment, *Rethinking Atticus Finch*, 60 CASE W. RES. L. REV. 1349, 1352 (2010) (arguing that Atticus's profession imbued him with pragmatic view that foreclosed efforts toward social transformation unlikely to succeed).

⁴⁴ Freedman, *supra* note 42, at 477, 479.

disorder. It's a compulsion with you, and now it's coming home to you"⁴⁵

However, Atticus provides a perfect comeback: "Hypocrites have just as much right to live in this world as anybody."⁴⁶ Nevertheless, Freedman urges readers to follow Atticus's advice to Scout:

Let's get inside the skin of the black people of Maycomb and walk around in an ordinary day of their lives. They endure, and their children grow up experiencing minute-by-minute reminders of separateness premised upon their innate inferiority. They are compelled to live in a ghetto near the town garbage dump. They cannot use the white only rest rooms, the white only water fountains, the white only lunch counters, or the white only parks. If their children go to school, their segregated schools, like their churches, have few if any books. They are even segregated in the courtroom in which Finch practices law. The jobs allowed to them are the most menial. And they face the everyday threat of lawless but condoned violence for any real or imagined stepping out of line.⁴⁷

In my opinion, Freedman misrepresents Atticus's capacity to make an impact when Freedman writes: "Here is a man who does not voluntarily use his legal training and skills—not once, ever—to make the slightest change in the pervasive social injustice of his town."⁴⁸ Consider that Atticus is not a social activist but a lawyer; he is not in a position to bend or even change the law, even if it is convenient for him or his client.⁴⁹ He is expected to follow the existing rules and play by them and, thus, has no other option than to take Tom Robinson's case and provide "zealous representation."⁵⁰ In Atticus's words, "Simply because we were licked a hundred years before we started is no reason for us not to try to win."⁵¹

At Robinson's trial, Atticus begins his closing remarks by acknowledging the impact on the defendant of the racial geography of the case: "To begin with, this case should never have come to trial. This case is as simple as black and white." But he then goes further, acknowledging not only the impact on the defendant but also the impact on the victim, stating: "She is the victim of cruel poverty and ignorance, but I cannot pity her: she is white."⁵² In Atticus's telling, the guilt rests not with Robinson but with the alleged victim.

⁴⁵ LEE, WATCHMAN, *supra* note 6, at 248.

⁴⁶ *Id.* at 235.

⁴⁷ Freedman, *supra* note 42, at 477-78 (footnotes omitted).

⁴⁸ *Id.* at 481.

⁴⁹ LEE, MOCKINGBIRD, *supra* note 1, at 33-34.

⁵⁰ Freedman, *supra* note 42, at 481.

⁵¹ LEE, MOCKINGBIRD, *supra* note 1, at 87; *id.* at 128 ("It's when you know you're licked before you begin but you begin anyway and you see it through no matter what. You rarely win, but sometimes you do.").

⁵² *Id.* at 231-32.

Paradoxically, the problem with Freedman's reassessment is that he expected too much from Atticus precisely because of Atticus's many positive qualities:

He is a loving, patient, and understanding father, successfully coping with the burden of being a single parent. In his personal relations with other people, black and white, he unfailingly treats everyone with respect. Professionally, he is a superb advocate, a wise counsellor, and a conscientious legislator. A crack shot, he never touches a gun, except to protect the community from a rabid dog. Even when he heroically waits for and faces down the lynch mob, he arms himself only with a newspaper.⁵³

Even Atticus was expecting much more of the court and jury systems. That probably explains why he remains calm throughout the trial and even when he confronts the lynch mob.⁵⁴ Even after the verdict, Atticus is confident that the appeal will save his client: "Not time to worry yet, Scout. We've got a good chance."⁵⁵

Actually—and conflicting with Freedman's charge—Atticus considered the social injustices of the legal system and its potential reforms. First, Atticus addresses the potential injustices of evidentiary standards in response to Jeremy "Jem" Finch, his son, suggesting "maybe rape[] shouldn't be a capital offense."⁵⁶ Atticus "didn't have any quarrel with the rape statute, none whatever, but he did have deep misgivings when the state asked for and the jury gave a death penalty on purely circumstantial evidence." As he explains, "The law says 'reasonable doubt,' but I think a defendant's entitled to the shadow of a doubt. There's always the possibility, no matter how improbable, that he's innocent."⁵⁷ Second, in the follow-up, Atticus considers an alternative to jury penalties:

"Then it all goes back to the jury, then. We oughta do away with juries."
Jem was adamant.

Atticus tried hard not to smile but couldn't help it. "You're rather hard on us, son. I think maybe there might be a better way. Change the law. Change it so that only judges have the power of fixing the penalty in capital cases."

"Then go up to Montgomery and change the law."

"You'd be surprised how hard that'd be. I won't live to see the law changed, and if you live to see it you'll be an old man."⁵⁸

Third, Atticus contemplates that to change *the* law is more complicated than merely changing *a* law (i.e., the rape statute). Atticus is realizing that, in the end, it may be easier to change stateways but harder to change folkways: "There's

⁵³ Freedman, *supra* note 42, at 482 (footnotes omitted).

⁵⁴ See LEE, *MOCKINGBIRD*, *supra* note 1, at 120, 172-76.

⁵⁵ *Id.* at 251.

⁵⁶ *Id.*

⁵⁷ *Id.* at 251-52.

⁵⁸ *Id.* at 252.

something in our world that makes men lose their heads—they couldn't be fair if they tried. In our courts, when it's a white man's word against a black man's, the white man always wins. They're ugly, but those are the facts of life."⁵⁹

Then, he provides a double warning: First,

“As you grow older, you'll see white men cheat black men every day of your life, but let me tell you something and don't you forget it—whenever a white man does that to a black man, no matter who he is, how rich he is, or how fine a family he comes from, that white man is trash.”⁶⁰

And second, “There's nothing more sickening to me than a low-grade white man who'll take advantage of a Negro's ignorance. Don't fool yourselves—it's all adding up and one of these days we're going to pay the bill for it. I hope it's not in you children's time.”⁶¹

In any event, it was not just in Atticus's children's time but later in his own when, in *Brown*, the Supreme Court finally overruled *Plessy v. Ferguson*,⁶² ending—at least on paper—the era of “separate but equal.”⁶³ Regardless of Jean Louise's specific age in *Watchman*, she is clearly beyond her childhood years and cognizant of these changes. Indeed, Atticus asks her, “Jean Louise, what was your first reaction to the Supreme Court decision?”⁶⁴ Her response is telling of her age. After noting that she was “furious” about how the federal government and the NAACP were “tellin' us what to do again,” she opines that “in trying to satisfy one amendment, it looks like they rubbed out another one. The Tenth. It's only a small amendment, only one sentence long, but it seemed to be the one that meant the most, somehow.”⁶⁵ The core of Jean Louise's complaint is this:

“[T]hat to meet the real needs of a small portion of the population, the Court set up something horrible that could—that could affect the vast majority of folks. Adversely, that is. . . . [A]ll we have is the Constitution between us and anything some smart fellow wants to start, and there went the Court just breezily canceling one whole amendment, it seemed to me. We have a system of checks and balances and things, but when it comes down to it we don't have much check on the Court, so who'll bell the cat?”⁶⁶

For her, there was clearly an alternative: “[I]nstead of going about it through Congress and state legislatures like we should, when we tried to do right we just made it easier for them to set up more hallways and more waiting.”⁶⁷ At some point, through dialogue and persuasion, Atticus and Jean Louise almost appear

⁵⁹ *Id.*

⁶⁰ *Id.* at 253.

⁶¹ *Id.*

⁶² 163 U.S. 537 (1896), overruled by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁶³ *Brown*, 347 U.S. at 495.

⁶⁴ LEE, WATCHMAN, *supra* note 6, at 238.

⁶⁵ *Id.* at 238-39.

⁶⁶ *Id.* at 239-40.

⁶⁷ *Id.* at 240.

to agree. In Atticus's words, "Now that I've adjusted my ear to feminine reasoning, I think we find ourselves believing the very same things. . . . As you say, Jean Louise, there's only one thing higher than the Court in this country, and that's the Constitution."⁶⁸ However, immediately afterwards their apparent agreement falls apart, with Jean Louise, exasperated, saying "I'm so sick of this moral double-dealing."⁶⁹ After accusing Atticus of denying black Americans any hope and of considering them subhuman, she says to him:

"You are using frightful means to justify ends that you think are for the good of the most people. Your ends may well be right—I think I believe in the same ends—but you cannot use people as your pawns, Atticus. You cannot. Hitler and that crowd in Russia've done some lovely things for their lands, and they slaughtered tens of millions of people doing 'em. . . ."⁷⁰

Atticus smiles at Jean Louise's reference to Hitler. The only thing left is her recrimination to him: "Don't you give me any more double-talk! You're a nice, sweet, old gentleman, and I'll never believe a word you say to me again. I despise you and everything you stand for."⁷¹

II. REFLECTIONS ON BIGOTRY, CONSCIENCE, PREJUDICE, AND (IN)TOLERANCE

A. *Who Is the Bigot?*

The word "bigot" is a noun used to refer to "a person who is obstinately or intolerantly devoted to his or her own opinions and prejudices[,] especially[] one who regards or treats the members of a group (such as a racial or ethnic group) with hatred and intolerance."⁷² Its first known use dates back to 1660 in French as a synonym for a hypocrite who, as in Molière's *Tartuffe*, ostensibly and exaggeratedly feigns virtue—especially religious virtue—in his or her own beliefs and opinions while denying any virtue in others' beliefs and opinions.⁷³

⁶⁸ *Id.* at 241.

⁶⁹ *Id.* at 241-42.

⁷⁰ *Id.* at 251-52 (omission in original).

⁷¹ *Id.* at 252-53.

⁷² *Bigot*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/bigot> [<https://perma.cc/Q4S8-R6NM>] (last visited Nov. 24, 2019) [hereinafter *Bigot*, MERRIAM-WEBSTER]; see also MCCLAIN, *supra* note 2 (manuscript at 8) (noting definition of bigot as "person who has strong unreasonable ideas, especially about race or religion, and who thinks anyone does not have the same beliefs is wrong" (quoting *Bigot*, CAMBRIDGE ENG. DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/bigot> [<https://perma.cc/PN3N-Q8K9>] (last visited Nov. 24, 2019))). A similar definition appears in *Go Set a Watchman*. See LEE, WATCHMAN, *supra* note 6, at 267 ("One obstinately or intolerably devoted to his own church, party, belief, or opinion.").

⁷³ See *Bigot*, MERRIAM-WEBSTER, *supra* note 72 (dating origin of term); see also MCCLAIN, *supra* note 2 (manuscript at 7 n.39) ("The association with insincerity may have roots in an earlier understanding of bigotry as religious hypocrisy.").

Apparently, “bigot” has its origins in religious hypocrisy: while the English used the phrases “By God” and “Goddam,” the French used as equivalent terms “Bigot” and “Godon.”⁷⁴

Although the origin of the term “bigot” is associated with religious beliefs and opinions, it now refers to all forms of beliefs and opinions that can lead to any form of hatred or intolerance.⁷⁵ It is not surprising to find so many synonyms for the term: biased or prejudiced; hateful or intolerant; narrow-minded or small-minded; chauvinist, classist, dogmatist, extremist, fundamentalist, racist, sexist, or supremacist; fanatic, partisan, or sectarian; Islamophobic or anti-Semitic; homophobic, misogynistic, or xenophobic—the list goes on and on. Nor is it surprising to find so many antonyms to “bigot”: unbiased or unprejudiced; loveable or tolerant; broad-minded or open-minded, etc.

Moreover, as Professor Stephen Eric Bronner has pointed out, “The bigot is a relativist but not a pluralist.”⁷⁶ Although “[b]oth pluralism and relativism may militate against the idea that any single truth will show us the way to paradise,” the concepts are distinguishable by the institutions with which each aligns.⁷⁷ On the one hand, “pluralism assumes liberal [(or non-totalitarian)] institutions and universal ideals: it allows individuals to make reasoned judgments about other cultures and it is accepting of different lifestyles.”⁷⁸ On the other hand, relativism—at least the version that the bigot endorses—assumes nonliberal (or totalitarian) institutions and parochial ideals: it does not allow individuals to make reasoned judgments about other cultures and so rejects lifestyles different from their own. To be clear, the bigot can have several interests and prejudices. But bigots recognize only their own interests and prejudices as legitimate. However, “[t]he bigot can [and does] shift his views so easily because, ultimately, he has no views—only interests and prejudices that are mutually reinforcing.”⁷⁹

As McClain recalls, Professor Gordon W. Allport cautioned that “a significant battle [is] being waged” between two types of characters, “the bigoted and the democratic,” and noted that we have “always had bigots in our midst and probably [always] shall” because of racial and religious tensions.⁸⁰ McClain

⁷⁴ “Godon” is an old archaic French insult that refers to an English person. *Les Insultes Adressées aux Anglais*, DESIDERIO, <http://monsu.desiderio.free.fr/curiosites/anglais.html> [<https://perma.cc/LKT2-7TCX>] (last visited Nov. 24, 2019) (“Le juron anglais *Goddam (God damn me)* est devenu en français *Godon* dès le moyen français.”). Because of its pejorative nature, it is no longer in use. *Godon*, DICTIONNAIRE REVERSO, <https://dictionnaire.reverso.net/francais-definition/godon> [<https://perma.cc/SHL4-TL7L>] (last visited Nov. 24, 2019).

⁷⁵ See *Bigot*, MERRIAM-WEBSTER, *supra* note 72.

⁷⁶ STEPHEN ERIC BRONNER, *THE BIGOT* 10 (2014).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 11.

⁸⁰ McCLAIN, *supra* note 2 (manuscript at 24) (quoting Gordon W. Allport, *The Bigot in Our Midst*, COMMONWEAL, Oct. 6, 1944, at 582, 583-85).

recalls Allport's discussion of the bigot's character structure: "The bigot lacked 'insight' and was unable 'to take another's perspective or correct one's misinterpretations based on new information about a group.' Those traits made the bigot vulnerable to a 'demagogue,' who 'justifies' the person's 'hatreds' by blaming various minority racial and religious groups of his misfortunes."⁸¹ McClain further explains, "As the example of [Nazi] Germany illustrated, the bigot may readily follow a 'demagogue' who 'justifies his hatreds for him, and through blandishments makes him feel smug and self-satisfied.'"⁸²

So far, it is clear that a bigot is a person "uttering hurtful or hateful remarks."⁸³ I suggest, however, that what makes a person a bigot is neither the *motivation* for a belief nor the *content* of a belief but the particular *character* embodied in being not only biased or prejudiced but also intolerant of the other. A bigot is not someone merely "*feeling* prejudice" but "*acting out* prejudice"—or even exploiting the prejudice and intolerance of others.⁸⁴

Furthermore, Allport describes the "mental dynamics of bigotry": "[A bigot] is a person who, under the tyranny of his own frustrations, tabloid thinking and projection, blames a whole group of people for faults of which they are partially or wholly innocent."⁸⁵ A bigot is "entitled to choose his friends . . . and to marry according to his taste, . . . but he is not entitled to prevent social inter-mingling among those who do not share his prejudices."⁸⁶ Keep in mind that sociologist Gunnar Myrdal observed how opponents of racial integration took the matter personally, noting how they asked, "Would you like to have your sister or daughter marry a Negro?"⁸⁷ In his classic *The Nature of Prejudice*, Allport rephrased this question: "[W]ould you want a Negro to marry your sister?"⁸⁸ Similarly, in *Watchman*, Atticus asks Jean Louise: "Do you want Negroes by the carload in our schools and churches and theaters? Do you want them in our world? . . . Do you want your children going to a school that's been dragged down to accommodate Negro children?"⁸⁹

⁸¹ *Id.* (manuscript at 11) (quoting Allport, *supra* note 80, at 582, 583-85).

⁸² *Id.* (manuscript at 25) (quoting Allport, *supra* note 80, at 583-84); *see also* DON'T BE A SUCKER (U.S. Dep't of War 1947), <https://www.youtube.com/watch?v=23X14HS4gLk> (cautioning against prejudice, racism, and fascism).

⁸³ MCCLAIN, *supra* note 2 (manuscript at 1).

⁸⁴ Allport, *supra* note 80, at 585 ("Prejudices kept to ourselves harm no one but ourselves.").

⁸⁵ *Id.* at 583.

⁸⁶ *Id.* at 584.

⁸⁷ GUNNAR MYRDAL, AN AMERICAN DILEMMA 55 (1944); *see also* MCCLAIN, *supra* note 2 (manuscript at 25 n.29) (discussing Myrdal).

⁸⁸ GORDON W. ALLPORT, THE NATURE OF PREJUDICE 377 (1954).

⁸⁹ LEE, WATCHMAN, *supra* note 6, at 245-46.

In any event, as McClain points out—referencing Martin Luther King Jr.—“segregation harms ‘both the segregator and the segregated.’”⁹⁰ Comparably, “[d]iscrimination is debasing, not just to those discriminated against but to those who discriminate.”⁹¹ And correspondingly, bigotry debases and harms both the bigot and those who suffer the bigot’s bigotry. Therefore, I agree completely with McClain in “cautioning to hate the sin (‘segregation, racial prejudice, and injustice’), not the sinner.”⁹² We must move away from the person and its personalization (who is the bigot?) and focus on the action (what is bigotry?).

B. *What Is Bigotry?*

The word “bigotry” is a noun used to refer to an “obstinate or intolerant devotion to one’s own opinions and prejudices” or “acts or beliefs characteristic of a bigot,”⁹³ while the word “bigoted” is an adjective that means “blindly devoted to some creed, opinion, or practice” or “having or showing an attitude of hatred or intolerance toward the members of a particular group (such as a racial or ethnic group).”⁹⁴ Nonetheless, as I have suggested, a bigot is neither defined by the *motivation* for a belief nor by the *content* of a belief but rather by a particular *character* (i.e., a prejudiced and even intolerant person who acts out of prejudice and intolerance toward others). In that sense, bigotry is a prejudiced and intolerant action and, as such, is unjustifiable.

1. What Is Prejudice?

The word “prejudice” derives from the Latin word *praejudicium* and refers to a “preconceived judgment or opinion”⁹⁵ (i.e., a prejudgment) as well as “an injury or damage resulting from some judgment or action of another in disregard of one’s rights.”⁹⁶ As Bronner indicates,

Prejudice makes every judgment simple and insulates it from criticism or reflection. The bigot’s moral cognition and his intellectual outlook are constituted within a parochial life-world that is neither accountable nor

⁹⁰ McCLAIN, *supra* note 2 (manuscript at 93) (quoting MARTIN LUTHER KING, JR., *Stride Toward Freedom*, and *The Power of Nonviolence*, in *A TESTAMENT OF HOPE* 478 (James M. Washington ed., 1986)).

⁹¹ *Civil Rights—Public Accommodations: Hearings on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 620 (1963) (statement of Sen. Clifford P. Case).

⁹² McCLAIN, *supra* note 2 (manuscript at 93) (discussing sermons and speeches post-Brown).

⁹³ *Bigotry*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/bigotry> [<https://perma.cc/AF4S-LCPE>] (last visited Nov. 24, 2019).

⁹⁴ *Bigoted*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/bigoted> [<https://perma.cc/BNU6-VBLE>] (last visited Nov. 24, 2019).

⁹⁵ BRONNER, *supra* note 76, at 7 (“The word *prejudice* derives from the Latin *praejudicium*: a judgment made in advance of a trial.”).

⁹⁶ *Prejudice*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/prejudice> [<https://perma.cc/E2BD-VWR3>] (last visited Nov. 24, 2019).

transparent. . . . The bigot's prejudices rest on pre-reflective assumptions that become fixed, finished, and irreversible in the face of new knowledge, and thus shut down discourse.

Almost by definition, the bigot's prejudice is hostile, destructive, and malignant. It crystallizes myriad forces that are learned (consciously or unconsciously) and then internalized.⁹⁷

Indeed, as Dr. Finch recognizes, "Prejudice, a dirty word, and faith, a clean one, have something in common: they both begin where reason ends."⁹⁸ In my opinion,⁹⁹ the only feasible way of controlling prejudices requires adopting something like John Rawls's "reflective equilibrium" and his "veil of ignorance"¹⁰⁰ or even H.L.A. Hart's "reflective critical attitude,"¹⁰¹ and, in so doing, avoiding forming or acting out of any prejudgment. As Bronner concluded, "Prejudice is not confined by what people feel or say but what they actually do."¹⁰²

As McClain notes, Allport had already located a "root of prejudice" in normal human tendencies.¹⁰³ For Allport, the root could be traced to categories: "The human mind must think with the aid of categories. . . . Once formed, categories are the basis for normal prejudgment. We cannot possibly avoid this process."¹⁰⁴ In that sense, prejudice can be viewed as "stemming from normal cognitive process or from an irrational hatred and weak personality structure,"¹⁰⁵ though the two views are seemingly contradictory. The problem is that whenever we make a categorization or even a generalization, we might end up making—under an evil assumption—a false generalization (i.e., a stereotype). Atticus, in *Mockingbird*, again captures the issue well:

"[T]he assumption—the evil assumption—that *all* Negroes lie, that *all* Negroes are basically immoral beings, that *all* Negro men are not to be trusted around our women, an assumption one associates with minds of their caliber.

" . . .

"You know the truth, and the truth is this: some Negroes lie, some Negroes are immoral, some Negro men are not to be trusted around women—black

⁹⁷ BRONNER, *supra* note 76, at 7 (footnote omitted) (citing ALLPORT, *supra* note 88, at 9).

⁹⁸ LEE, WATCHMAN, *supra* note 6, at 270-71.

⁹⁹ Imer B. Flores, *Legisprudence: The Role and Rationality of Legislators—Vis-à-Vis Judges—Towards the Realization of Justice*, MEXICAN L. REV., Jan.-June 2009, at 91, 99 (discussing methods to prevent oneself from acting out of prejudice).

¹⁰⁰ JOHN RAWLS, A THEORY OF JUSTICE 20-21, 48-51 (1971).

¹⁰¹ H.L.A. HART, THE CONCEPT OF LAW 57 (2d ed. 1994).

¹⁰² BRONNER, *supra* note 76, at 12.

¹⁰³ See MCCLAIN, *supra* note 2 (manuscript at 27) (discussing ALLPORT, *supra* note 88).

¹⁰⁴ ALLPORT, *supra* note 88, at 20.

¹⁰⁵ MCCLAIN, *supra* note 2 (manuscript at 27) (describing tension between two views of source of prejudice in individuals).

or white. But this is a truth that applies to the human race and to no particular race of men. There is not a person in this courtroom who has never told a lie, who has never done an immoral thing, and there is no man living who has never looked upon a woman without desire.”¹⁰⁶

Even worse, stereotyping is bi-directional. As Allport himself explained, stereotypes play a double role in “rationalizing [both] positive prejudice in favor of some groups and negative prejudice against others.”¹⁰⁷ Any form of stereotyping or stigmatization, including segregation, not only separates two groups but also casts one group as inferior to another and, thus, implies subordination of one group to another. Consider the following assertion in *Mockingbird*: “[B]ecause all men are created equal, educators will gravely tell you, the children left behind suffer terrible feelings of inferiority.”¹⁰⁸

2. What Is (In)Tolerance?

The word “tolerance” is a noun used to refer to a certain “sympathy or indulgence for beliefs or practices differing from or conflicting with one’s own.”¹⁰⁹ “Intolerance,” its antonym, refers to the quality or state of being “intolerant,”¹¹⁰ which is itself an adjective referring to an “unwillingness to grant equal liberties and rights to others, especially in religious matters.”¹¹¹ Due to the unfortunate experience of hatred or intolerance and the impossibility of always guaranteeing mutual respect, it is necessary to secure tolerance in general and religious tolerance in particular. According to John Locke,

[N]o private person has any right in any manner to prejudice another person in his civil enjoyments, because he is of another church or religion. All the rights and franchises that belong to him as a man, or as a denison, are inviolably to be preserved to him. These are not the business of religion. No violence nor injury is to be offered him, whether he be Christian or pagan.¹¹²

¹⁰⁶ LEE, *MOCKINGBIRD*, *supra* note 1, at 233.

¹⁰⁷ ALLPORT, *supra* note 88, at 189-91; *see also* MCCLAIN, *supra* note 2 (manuscript at 30) (exploring various stereotypes and their origins).

¹⁰⁸ LEE, *MOCKINGBIRD*, *supra* note 1, at 234.

¹⁰⁹ *Tolerance*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/tolerance> [<https://perma.cc/45MZ-HU6T>] (last visited Nov. 24, 2019).

¹¹⁰ *Intolerance*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/intolerance> [<https://perma.cc/RRK6-8AUQ>] (last visited Nov. 24, 2019).

¹¹¹ *Intolerant*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/intolerant> [<https://perma.cc/XJ6X-UVA5>] (last visited Nov. 24, 2019).

¹¹² JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 27 (Prometheus Books 1990) (1689).

C. *Why Do Prejudice, Intolerance, and Other Forms of Discrimination and Hatred Persist?*

Allport is correct that we have “always had bigots in our midst and probably [always] shall,” due to our human nature and the brute fact that we are not angels but imperfect human beings.¹¹³ Instead of focusing on our human dignity and our other commonalities, we tend to stress our differences—for example, by emphasizing race, class, gender, sexual orientation, and so on.¹¹⁴ Therefore, there will always be conflicts, including racial and religious tensions. Worse yet, there will always be someone willing to exploit these differences by disseminating prejudice and intolerance to others: “You see, we, human beings, are not born with prejudices; always, they are made for us, by someone who wants something . . . somebody who is going to get something out of it.”¹¹⁵

As we have seen in Lee’s *Mockingbird* and *Watchman*, the main point of contention was the racial tensions in the Deep South in the mid-1930s and mid-to late-1950s. Additionally, *Mockingbird* includes some sexist remarks, for instance, by Scout herself—“Boys don’t cook”¹¹⁶—and by Calpurnia—“[M]en can’t remember as well as women.”¹¹⁷ Also, when Jem wonders if Miss Maudie ever sat on juries, Atticus explains that women were not allowed to do so, adding: “I guess it’s to protect our frail ladies from sordid cases like Tom’s. Besides . . . I doubt if we’d ever get a complete case tried—the ladies’d be interrupting to ask questions.”¹¹⁸

Analogous tensions over differences abound today in real life. For example, three years ago in Mexico, Juan Gabriel, a very famous Mexican folk songwriter and singer whose sexual ambiguity led many to believe that he was gay, died suddenly.¹¹⁹ Nicolás Alvarado, an intellectual and literary critic who was, at the time, the director of TV UNAM, hesitated to schedule a program as a tribute to the popular performer.¹²⁰ In an op-ed, he tried to justify his reluctance.¹²¹ He

¹¹³ Allport, *supra* note 80, at 583.

¹¹⁴ See generally Imer B. Flores, *Taking (Human) Dignity and Rights Seriously: The Integrated Legal, Moral, and Political Philosophy of Ronald Dworkin*, in *DIGNITY IN THE LEGAL AND POLITICAL PHILOSOPHY OF RONALD DWORKIN* 101 (Salman Khurshid, Lokendra Malik & Veronica Rodriguez-Blanco eds., 2018) (commenting on Dworkin’s integrated theory based on human dignity and rights).

¹¹⁵ See *DON’T BE A SUCKER*, *supra* note 82.

¹¹⁶ LEE, *MOCKINGBIRD*, *supra* note 1, at 93.

¹¹⁷ *Id.* at 142.

¹¹⁸ *Id.* at 253.

¹¹⁹ Kate Linthicum, *A Gay Icon Who Never Spoke of His Sexuality; Juan Gabriel Was an Unlikely Superstar in a Country Known for Its Machismo*, *L.A. TIMES*, Aug. 30, 2016, at A4.

¹²⁰ See Nicolás Alvarado, *Opinion, No Me Gusta ‘Juanga’ (lo que le Viene Guango)*, *MILENIO.COM* (Aug. 30, 2016, 12:34 AM), <https://www.milenio.com/opinion/nicolas-alvarado/fuera-de-registro/no-me-gusta-juanga-lo-que-le-viene-guango> [https://perma.cc/3GZY-SLMP].

¹²¹ See *id.*

argued that his action was not a form of bigotry because he was not homophobic, but in his defense he openly admitted that he was classist—almost as if it was a justifiable excuse without realizing it was yet another form of prejudice and intolerance:

My rejection of Juan Gabriel’s work is a classist one: I am irritated by his sequins not for being gay [i.e., jotás] but cheap [i.e., nacas]; his hysteria not for being melodramatic but elemental; his syntax not for being little literary but illiterate. And I know that the loss is real and that it is entirely mine. But conditioned as I am by my circumstance, I cannot avoid reacting as I react.¹²²

D. *What We Can (and Cannot) Do About It*

If it is true that some people cannot avoid reacting as they do, this limits what we can and cannot do to fight bigotry. McClain explores at length different ways to liberate ourselves from bigotry, such as through conscience (or insight), education, and social interaction. I would like to heighten the importance of toleration. If there are extreme cases of bigots for whom such liberation might not be possible, the only option left is to tolerate them.

1. Conscience

As McClain acknowledges:

Bigotry clearly has a complex relationship to conscience and religious belief. In these historical battles, some people appealed to conscience to indict bigotry and to help people overcome it, but other people invoked conscience to rebut charges of bigotry. Pioneering social scientists recognized long ago the paradox that religion both “makes and unmakes”—supports and condemns—bigotry and prejudice.¹²³

McClain subsequently revisits two moments in the scientific study of prejudice: the classic and the contemporary. On the one hand, Allport—along with Bernard M. Kramer—accentuated the role of conscience, insight, and shame in emancipating people from bigotry.¹²⁴ On the other hand, Mazharin R. Banaji and Anthony G. Greenwald emphasized the role of “discomfort” and

¹²² *Id.*

¹²³ MCCLAIN, *supra* note 2 (manuscript at 8) (endnotes omitted); *see also* ALLPORT, *supra* note 88, at 444 (“The role of religion is paradoxical. It makes prejudice and it unmakes prejudice.”); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 2516, 2560-61 (2015) (recognizing uses of traditional ideas about morality derived from religion to oppose same-sex marriage).

¹²⁴ Gordon W. Allport & Bernard M. Kramer, *Some Roots of Prejudice*, 22 *J. PSYCHOL.* 9, 33 (1946) (“Shame is thus one step toward emancipation from bigotry.”).

“cognitive dissonance” in coming to terms with one’s implicit bias and learning to outsmart “mind bugs.”¹²⁵

“Allport believed,” McClain highlights, “that the scientific study of important and enduring human problems like prejudice could—and should—contribute to law reform.”¹²⁶ Further, he even challenged the argument that “[y]ou cannot legislate against prejudice”—a modern version of William Graham Sumner’s assertion that “stateways cannot change folkways.”¹²⁷ In any event, as Congress debated new civil rights legislation to broaden World War II-era prohibitions on employment, Allport and other social psychologists argued that prior laws prohibiting discrimination and fostering integration in such areas as employment and housing had led to a reduction not only in discriminatory conduct but also in prejudicial attitude about the previously excluded minorities. On the eve of *Brown*, he—and thirty-one social scientists and medical doctors—coauthored a consensus document titled *The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement*.¹²⁸

I am skeptical that conscience itself and legislating against prejudice will prove to be enough. Certainly, a change in stateways can contribute to a change in folkways, but as a legislator quoting Martin Luther King Jr. in *Who’s the Bigot?* said, “Morality cannot be legislated; but behavior can be regulated. The law may not change the heart, but it can restrain the heartless.”¹²⁹ Besides, as McClain points out, “[P]assing [the Civil Rights Act of 1964] was not enough: ‘firm enforcement’ was necessary to ‘close the gap between the principle and practice of nondiscrimination.’”¹³⁰ My skepticism is due mostly to the problem of legal enforcement of morals (i.e., legislating morality),¹³¹ which might be a

¹²⁵ MAZHARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE 58-60, 145-65 (2016).

¹²⁶ MCCLAIN, *supra* note 2 (manuscript at 22).

¹²⁷ *Id.* (manuscript at 36) (quoting ALLPORT, *supra* note 88, at 469); *see also* Elliot Aronson, *Stateways Can Change Folkways*, in HATRED, BIGOTRY, AND PREJUDICE 227, 227 (Robert M. Baird & Stuart E. Rosenbaum eds., 1999) (“What Sumner meant, of course, is you can’t legislate morality . . .”).

¹²⁸ *See generally* Appendix to Appellants’ Brief, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 8, 101, 191), *reprinted in* 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 41 (Philip B. Kurland & Gerhard Casper eds., 1975) (presenting consensus amongst social scientists regarding effects on individuals of racial segregation).

¹²⁹ MCCLAIN, *supra* note 2 (manuscript at 112) (quoting *Civil Rights—Public Accommodations: Hearings on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 652 (1963) (statement of Sen. Harrison A. Williams)).

¹³⁰ *Id.* (quoting *Civil Rights—Public Accommodations: Hearings on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 1179 (1963) (statement of Governor George Romney, Michigan)).

¹³¹ *See* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 2 (1965) (“[A] law that appears to be arbitrary and illogical, in the end and after the wave of moral indignation that has put it on the statute book subsides, forfeits respect.”); H.L.A. HART, LAW, LIBERTY, AND MORALITY

form of the tyranny of the majority.¹³² This skepticism is shared by both Atticus Finch in *Mockingbird* and Dr. Finch in *Watchman*. In *Mockingbird*, Scout says, “Atticus you must be wrong.” Atticus then interrupts, “How’s that?” Scout replies:

“Well, most folks seem to think they’re right and you’re wrong. . . .”

“They’re certainly entitled to think that, and they’re entitled to full respect for their opinions,” said Atticus “but before I can live with other folks I’ve got to live with myself. The one thing that doesn’t abide by majority rule is a person’s conscience.”¹³³

In *Watchman*, Dr. Finch notes, “Every man’s island, Jean Louise, every man’s watchman, is his conscience. There is no such thing as a collective conscious.”¹³⁴ However, because conscience is individual, it might rightfully appear on both sides of the equation: my conscience against yours.

To clarify, social change through law and legislative reform is necessary most of the time, but it will not be sufficient if it is not accompanied by a deeper transformation of our structures and their incentives, both positive and negative. The only way to combat hidden or implicit biases—including bigotry, prejudice, and other forms of discrimination—is via education and social interaction.

2. Education

On the one hand, following Rawls’s reflective equilibrium, after taking the Implicit Association Test (“IAT”), we can

“use [our self-knowledge] to move beyond dismay and to find ways to understand hidden biases and, if desired, to neutralize them before they translate into behavior.” . . . The “self-knowledge achieved by taking the IAT” provides “power,” for the “reflective, conscious side of the brain” is “more than capable of doing the necessary work” to seek change.¹³⁵

1-6 (1963) (questioning whether punishing conduct because such conduct is immoral by common standards is justified).

¹³² See Imer B. Flores, *Law, Liberty and the Rule of Law (in a Constitutional Democracy)*, in *LAW, LIBERTY, AND THE RULE OF LAW* 77, 79 (Imer B. Flores & Kenneth E. Himma eds., 2013) (criticizing majoritarian rule and recognizing “harm principle” as limiting majoritarian liberty); Imer B. Flores, *The Problem of Democracy in Contexts of Polarization*, in *PHILOSOPHICAL PERSPECTIVES ON DEMOCRACY IN THE 21ST CENTURY* 103, 111 (Ann E. Cudd & Sally J. Scholz eds., 2014) (“I claim that the logic of head counting reinforces the ‘majoritarian’ conception and may lead to the tyranny of the majority, which in some cases is a minority after all, including not only the oppression of the minority, numerical or not, but also due to the opposition between majority and minority to even more polarization . . .”).

¹³³ LEE, *MOCKINGBIRD*, *supra* note 1, at 120 (omission in original).

¹³⁴ LEE, *WATCHMAN*, *supra* note 6, at 264-65.

¹³⁵ MCCLAIN, *supra* note 2 (manuscript at 45) (quoting BANAJI & GREENWALD, *supra* note 125, at 70).

Consider how often Scout and Jem in *Mockingbird* confront racial tension and the role that education plays in reshaping Scout:

“Do you defend n—s, Atticus?” I asked him that evening.

“Of course I do. Don’t say n—, Scout. That’s common.”

“s what everybody at schools says.”

“From now on it’ll be everybody less one—”

“Well if you don’t want me to grow up talkin’ that way, why do you send me to school?”¹³⁶

Afterwards, Atticus continues:

“You might hear some ugly talk about it at school, but do one thing for me if you will: you just hold your head high and keep those fists down. No matter what anybody says to you, don’t you let ‘em get your goat. Try fighting with your head for a change . . . it’s a good one, even if does resist learning.”¹³⁷

He concludes:

“[N]—lover is just one of those terms that don’t mean anything—like snot-nose. It is hard to explain—ignorant, trashy people use it when they think somebody’s favoring Negroes over and above themselves. It’s slipped into usage with some people like ourselves, when they want a common, ugly term to label somebody.”¹³⁸

Ironically, then, white supremacy created a structure of dual ignorance: while whites denied blacks access to books, whites are ignorant despite having access to books.¹³⁹

3. Social Interaction

On the other hand, achieving Dworkin’s partnership conception of democracy¹⁴⁰—or even the principle of equal concern and respect—requires

¹³⁶ LEE, *MOCKINGBIRD*, *supra* note 1, at 85.

¹³⁷ *Id.* at 86 (omission in original).

¹³⁸ *Id.* at 124.

¹³⁹ As Calpurnia explains in reference to blacks lacking access to books, “They can’t read.” *Id.* at 141.

¹⁴⁰ See RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE?* 143-47 (2006) (arguing that laws of partnership democracy must show equal concern for all within its jurisdiction); DWORKIN, *supra* note 4, at 384 (arguing that democracy can be a partnership “if the members accept that in politics they must act with equal respect and concern for all the other partners”); Imer B. Flores, *Ronald Dworkin’s Justice for Hedgehogs and Partnership Conception of Democracy (with a Comment to Jeremy Waldron’s “A Majority in the Lifeboat”)*, *PROBLEMA*, no. 4, 2010, at 65, 77 (Mex.) (describing Dworkin’s “partnership conception of democracy” as “an authentic or true ‘democracy’”).

“more than a simple commitment to equality.”¹⁴¹ As McClain explains, “It requires changing one’s life to encounter minorities on a regular basis, so that ‘when you want to meet, hire, date or talk with a member of a minority, you aren’t betrayed by your hesitation and discomfort.’”¹⁴² Consider again that Jean Louise “was born color blind,” or, more precisely, raised colorblind.¹⁴³ As she recalls in *Watchman*:

I was taught never to take advantage of anybody who was less fortunate than myself, whether he be less fortunate in brains, wealth, or social position; it meant anybody, not just Negroes. I was given to understand that the reverse was to be despised. That is the way I was raised, by a black woman and a white man.¹⁴⁴

Notably, Calpurnia never loses her faith in Atticus, insisting “He always do his best. He always do right.”¹⁴⁵

4. Toleration

Because the solution of conscience and a unified common faith that respects everyone seems unreachable and unrealizable, at least for the time being, and because, if as advanced, there are extreme cases of bigots for whom liberation through education and social interaction is impossible, the only option left is toleration—even of the intolerant bigot—while strongly condemning and rejecting bigotry.¹⁴⁶ In order to emphasize the importance of both respect and tolerance, I would like to return to Atticus’s advice to Scout in *Mockingbird* and to Henry in *Watchman*: in a few words, “climb into his skin and walk around in it,” and, in one, empathy.¹⁴⁷

¹⁴¹ MCCLAIN, *supra* note 2 (manuscript at 46) (quoting MALCOLM GLADWELL, *BLINK* 97 (2005)).

¹⁴² *Id.* (quoting GLADWELL, *supra* note 141, at 97).

¹⁴³ LEE, *WATCHMAN*, *supra* note 6, at 122.

¹⁴⁴ *Id.* at 179.

¹⁴⁵ *Id.* at 159 (describing Calpurnia’s response to Jean Louise’s uncertain promise that Atticus will assist her grandson).

¹⁴⁶ See generally RONALD DWORKIN, *RELIGION WITHOUT GOD* 8 (2013) (“The zealots have great political power in America now, at least for the present. The so-called religious right is a voting bloc still eagerly courted. The political power of religion has provoked, predictably, an opposite—though hardly equal—reaction. Militant atheism, though politically inert, is now a great commercial success.”); Linda C. McClain, *Can Religion Without God Lead to Religious Liberty Without Conflict?*, *PROBLEMA*, no. 9, 2015, at 81, 144 (Mex.) (“The brevity of *Religion without God* leaves a reader wanting to know how Dworkin might address the explosion of evident conflicts, as more states change their civil marriage laws, between religious liberty and marriage equality.”).

¹⁴⁷ LEE, *MOCKINGBIRD*, *supra* note 1, at 33; see also LEE, *WATCHMAN*, *supra* note 6, at 224 (recounting conversation in which Atticus tells Henry that “he always tried to put himself in his clients’ shoes”).

It is necessary not only to respect those who we like and to tolerate even those who we dislike but also to adopt their perspective and hear both sides of the story without prejudice. To this end, Atticus argues that it is important to never stop the conversation, especially with a child. An exchange between Scout and her uncle Jack from *Mockingbird* demonstrates this point. On one side, Scout recriminates Jack for preventing her from telling her story:

“Well, in the first place you never stopped to gimme a chance to tell you my side of it—you just lit right into me. When Jem an’ I fuss Atticus doesn’t ever just listen to Jem’s side of it, he hears mine too, an’ in the second place you told me never to use words like that except in extreme provocation”¹⁴⁸

On the other, Jack cuts off his own conversation when Scout asks him, “What’s a whore-lady?”¹⁴⁹ Atticus consequently reproaches him for evading the question:

“Jack! When a child asks you something, answer him, for goodness’ sake. But don’t make a production of it. Children are children, but they can spot an evasion quicker than adults, and evasion simply muddles ‘em. . . . Bad language is a stage all children go through, and it dies with time when they learn they’re not attracting attention with it.”¹⁵⁰

In contrast to Jack, Atticus is unsparing in the answers he provides to Scout. For example, when Scout asks Calpurnia, “[W]hat’s rape, Cal?” Calpurnia responds knowingly, “It’s somethin’ you’ll have to ask Mr. Finch about.”¹⁵¹ When Scout remembers to ask Atticus, he is brutally honest and straightforward: “He sighed, and said rape was carnal knowledge of a female by force and without consent.”¹⁵²

CONCLUSION

To conclude, let me say something about the rhetoric of bigotry and its backfiring nature in a recent case. In *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Commisison*,¹⁵³ baker Jack Phillips argued that Colorado’s antidiscrimination law violated his religious liberty and freedom of speech by not exempting him from creating wedding cakes for same-sex couples.¹⁵⁴ Phillips claimed that those who denied business owners like him a religious exemption from state civil rights laws were the *real* bigots because they were “intolerant” of or “disrespectful” toward his conscientious objection and his

¹⁴⁸ LEE, *MOCKINGBIRD*, *supra* note 1, at 97.

¹⁴⁹ *Id.* at 99.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 141.

¹⁵² *Id.* at 154.

¹⁵³ 138 S. Ct. 1719 (2018).

¹⁵⁴ *Id.* at 1725-26.

sincere religious beliefs and convictions.¹⁵⁵ The Court in turn suggested that rhetoric matters, concluding that remarks by one commissioner about the appeal to religion to justify discrimination showed “hostility” toward Phillips’s religion instead of tolerance and respect,¹⁵⁶ and some justices reversed the charges of bigotry to apply to the “intolerant” or “disrespectful” civil rights commissioner.¹⁵⁷

The public-private divide is helpful in solving these sorts of cases. In general, once a facility is open to the public, as Masterpiece Cakeshop was, the private beliefs and opinions of its owner must remain in the private realm. The problem is that not only Phillips’s private beliefs came into play here but also those of at least one of the civil rights commissioners. In *Masterpiece Cakeshop*, the Supreme Court neither reversed rulings in favor of same-sex marriages nor granted a free-speech or religious exemption (i.e., conscientious objection) to the baker; the majority merely acknowledged that the baker was paradoxically subjected to bigotry by at least one of the civil rights commissioners.¹⁵⁸ In my opinion,¹⁵⁹ the right answer—given the facts of the case—would have been to remand it to the lower court to review if there was a free-speech or religious exemption at play or not. If there was no exemption, the baker, as a business open to the public and providing goods and services, should have been sanctioned under the Civil Rights Act of 1964 for refusing to sell a wedding cake to the same-sex couple. But if there *was* an exemption, Phillips was justified in acting as he did, and the civil rights commission and the Court of Appeals of Colorado were wrong.

In actuality, as Justice Kennedy (the opinion’s author) acknowledged, Jack Phillips did not refuse to *sell* a wedding cake to the same-sex couple; he refused to create a wedding cake for them *ex profeso*¹⁶⁰ based on his sincere religious beliefs and convictions. In addition, “[a]t that point, Colorado did not recognize

¹⁵⁵ *Id.* at 1730.

¹⁵⁶ *Id.* at 1731.

¹⁵⁷ *See id.* at 1737 (Gorsuch, J., concurring) (“The real explanation for the Commission’s discrimination soon comes clear, too—and it does anything but help its cause.”).

¹⁵⁸ *See id.* at 1732.

¹⁵⁹ *See* Imer B. Flores, *Constitutional Interpretation, Intelligent Fidelity, and (Im)Perfection: On James E. Fleming’s Fidelity to Our Imperfect Constitution*, PROBLEMA, no. 11, 2017, at 31, 37-39, 44-45 (Mex.) (highlighting connections between Fleming’s and Dworkin’s arguments for moral reading of Constitutional and constructive constitutional interpretation); Imer B. Flores, *The Legacy of Ronald Dworkin (1931-2013): A Legal Theory and Methodology for Hedgehogs, Hercules, and One Right Answers*, PROBLEMA, no. 9, 2015, at 157, 181-84 (Mex.) (explaining that under Dworkin’s “one right answer” thesis, judges do not act indeterminately or illegitimately when deciding “hard cases” but rather engage in constructive interpretation by applying underlying principles and existing law to arrive at the one right answer).

¹⁶⁰ *Masterpiece Cakeshop*, 138 S. Ct. at 1723 (“If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all.”).

the validity of gay marriages performed in its own State,”¹⁶¹ and “[a]t the time, state law also afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive,”¹⁶² as in the case of three other bakers that “acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages.”¹⁶³

On the other hand, “[i]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.”¹⁶⁴ Nevertheless, the Court found that “[t]he neutral and respectful consideration to which Phillips was entitled was compromised here The Civil Rights Commission’s treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.”¹⁶⁵ Bear in mind the statement of one of the commissioners:

Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.¹⁶⁶

The clear and impermissible hostility is self-evident.¹⁶⁷ What’s more, “[a]nother indication of hostility is the difference in treatment between Phillips’[s] case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.”¹⁶⁸ In that sense, the Court is absolutely right in concluding:

The Commission’s hostility was inconsistent with the First Amendment guarantee that our laws be applied in a manner that is neutral toward religion. Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert

¹⁶¹ *See id.* at 1728.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1732 (Kagan, J., concurring) (second alteration in original).

¹⁶⁵ *Id.* at 1729 (majority opinion).

¹⁶⁶ *Id.* (quoting Transcript of Record at 11-12, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111)).

¹⁶⁷ *See id.* (“To describe a man’s faith as ‘one of the most despicable pieces of rhetoric that people can use’ is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere.”).

¹⁶⁸ *Id.* at 1730.

it in all of the circumstances in which this case was presented, considered, and decided.¹⁶⁹

Finally, two concurring opinions in this case reinforce my main claim regarding the rhetoric of bigotry. Justice Kagan's concurring opinion relied heavily on *Newman v. Piggie Park Enterprise, Inc.*¹⁷⁰: "A vendor can choose the products he sells, but not the customers he serves—no matter the reason."¹⁷¹ Then again, Justice Gorsuch's concurring opinion contrasted Phillips's case and the cases of the other bakers:

[I]n both cases the bakers refused service intending only to honor a personal conviction. . . . But there's no indication the bakers actually *intended* to refuse service *because of* a customer's protected characteristic.

In both cases, it was the kind of cake, not the kind of customer, that mattered to the bakers.¹⁷²

At the end of the day, as Justice Thomas, in his own concurring opinion, suggested by quoting Chief Justice Roberts's dissent in *Obergefell v. Hodges*¹⁷³: "It is one thing . . . to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share [that view] as bigoted' and unentitled to express a different view."¹⁷⁴

¹⁶⁹ *Id.* at 1732.

¹⁷⁰ 390 U.S. 400, 402 n.5 (1968) (per curiam) ("As this Court has long held, and reaffirms today, a vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait.").

¹⁷¹ *Masterpiece Cakeshop*, 138 S. Ct. at 1733 n.* (Kagan, J., concurring).

¹⁷² *Id.* at 1735-36 (Gorsuch, J., concurring).

¹⁷³ 135 S. Ct. 2584 (2015).

¹⁷⁴ *Masterpiece Cakeshop*, 138 S. Ct. at 1747 (Thomas, J., concurring in part and concurring in the judgment) (omission and alteration in original) (quoting *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting)).