

Having previously sung praises of Bruce Jacob, I will note here but a minor one: as dean, he was unusually open to innovative course offerings. During my term as his associate dean, he rarely turned down the new classes I proposed, and when I came to him, asking to teach a Law and Literature course, he was not only agreeable, but downright enthusiastic. So I offer the following amalgam of law, literature, and film commentary (with a Stetson connection!) as a tribute to the man who allowed me to roam this pleasurable, and hopefully enlightening, path.*

CLARENCE AND BIGGER, AND RICHARD AND MALCOLM

Robert Batey**

I. INTRODUCTION

Anyone who has spent time in the presence of Justice Clarence Thomas off the bench is sure to feel the contradiction. He seems such a genuinely nice man, but this side of his personality never ever shows in his judicial opinions. Of course, the classic judicial stereotype supposedly lacks personality, but one can cite lots of counterexamples—Justices Holmes, Brandeis, Cardozo, Frankfurter, Black, Douglas, Harlan, Marshall, and Scalia (personality on stilts, R.I.P.). Further, a good case can be made that the attitudes that constitute personality are fundamentally important in a Supreme Court Justice, whose decisions in close cases (and almost all of those in the Supreme Court are) usually turn on intangibles like reverence for the Founders or sympathy for the little guy. In person, Thomas exudes such sympathy, but it never shows in his opinions—why not?

* Robert Batey, *Bruce Jacob: An Appreciation*, 21 STETSON L. REV. 299 (1992).

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For me, part of the answer lies in his lifelong affinity with Bigger Thomas, the protagonist in Richard Wright's *Native Son*. Bigger yearned for a dogma that would help him understand his role in the perplexing world, and in a far more sophisticated way, so does Clarence. He finds that dogma in an originalism so severe that even its protagonists question his version.¹ Yet he persists, even though this makes him less and less relevant to the Court's continuing dialogue—for which his famous lack of participation in Supreme Court oral argument is an apt metaphor.²

There seems no way out of this blind alley, and Justice Thomas may end his days as professionally bitter and burnt out as Richard Wright was after a career that never again reached the heights of his early successes. But a hint of salvation may come from the example of another embittered black man, Malcolm X, as portrayed by the director Spike Lee. In the years immediately before Malcolm's assassination, he seemed to soften his dogma and allowed more range to the benign aspects of his personality. I think such a turn would make Clarence Thomas a better justice—but I do not give it much chance of happening.

II. THE CONTRADICTION

Justice Clarence Thomas visited Stetson University College of Law in February 2010; the local newspaper reported his two-day stay with the headline, *Silent Thomas Holds Court*, and an article that detailed his “passion for reaching out to law students.”³ Reach out he did, with two large sessions open to questions and several meetings with students in smaller settings.⁴ Other Supreme Court justices have visited Stetson, but none made the effort to engage with law students that Justice Thomas did. In these encounters, he was unfailingly gracious, with an easy humor that disarmed those of us who disagree strongly with his opinions. One of my more liberal colleagues, a bit astonished, publicly labeled the

1. See *infra* text accompanying notes 43–44 (discussing legal originalist viewpoints).

2. See generally Jeffrey Toobin, *Clarence Thomas's Disgraceful Silence*, NEW YORKER (Feb. 21, 2014), <https://www.newyorker.com/news/daily-comment/clarence-thomass-disgraceful-silence> (discussing that, as of February 22, 2014, Justice Clarence Thomas had not asked a question in oral argument for eight years).

3. Jamal Thalji, *Silent Thomas Holds Court*, ST. PETERSBURG TIMES, Feb. 3, 2010, at 1B.

4. Clarence Thomas, Assoc. Justice, U.S. Supreme Court, Address at Stetson University College of Law (Feb. 1–2, 2010) [hereinafter Thomas, 2010 Address at Stetson].

justice a genuinely nice, good, and decent person.⁵ Justice Thomas' affability emerged in joking references about being dragged to the opera⁶ and to his love for college football, detective novels, and country western music.⁷ His humility surfaced in accounts of how difficult he found law school and the search for a job afterward, in his identification with the recreational vehicle community (which he joins every summer),⁸ and in his self-description as "an ordinary person to whom extraordinary things have happened."⁹ And his humanity shone when he spoke haltingly about casting a vote that would cause a man to die, and when he referred to the Haitian refugee cases as the most difficult ones he has faced: "Haiti always has had a special place in my heart. . . . Your heart just breaks"¹⁰

But Justice Thomas was able to overcome the pull of his humanity in these cases, and in almost every other case he has faced. He overwhelmingly votes against the claims of the less fortunate—socially, economically, and racially.¹¹ He gives the standard judge-as-umpire defense (most famously employed by Chief Justice Roberts at his confirmation hearings)¹² for

5. This and other quotations in this section are from my contemporaneous notes of Justice Thomas' public presentations on February 1 and 2, 2010. For a similar view from one of Thomas' circuit court colleagues, see David B. Sentelle, *Remarks—Justice Thomas, The Person*, 4 N.Y.U. J.L. & LIBERTY 482, 483, 490, 492 (2009) (describing Justice Thomas' good character and resulting impact on the law); see also KEVIN MERIDA & MICHAEL FLETCHER, SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS 26 (2007) ("Thomas can be charming and warm in person. . . . His manner surprises the uninitiated and sometimes softens even those not predisposed to like him.").

6. Thalji, *supra* note 3, at 1B.

7. Thomas, 2010 Address at Stetson, *supra* note 4.

8. See MERIDA & FLETCHER, *supra* note 5, at 4 (illustrating Thomas' love of "RV-ing").

9. Thomas, 2010 Address at Stetson, *supra* note 4.

10. *Id.* He must have been referring to *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993). For background on the case, see Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391, 2392–96 (1994).

11. His academic defenders, predominantly former clerks who of course have interacted extensively with his genial side, try to belie this view, but the voting record is undeniable. See, e.g., Nicole Stelle Garnett, "*But for the Grace of God There Go I*": Justice Thomas and the Little Guy, 4 N.Y.U. J.L. & LIBERTY 626 (2009) (explaining Thomas' views); Stephen F. Smith, *Clarence X?: The Black Nationalist Behind Justice Thomas' Constitutionalism*, 4 N.Y.U. J.L. & LIBERTY 583 (2009) (clerking for Thomas in the 1993 term). See generally MERIDA & FLETCHER, *supra* note 5, at 9 (stating that many of Thomas' law clerks remain close with Thomas). For a relatively early assessment, see Eric L. Muller, *Where, but for the Grace of God, Goes He? The Search for Empathy in the Criminal Jurisprudence of Clarence Thomas*, 15 CONST. COMMENT. 225, 227–29 (1998); see also *infra* note 47 (discussing Thomas' legal views).

12. See Roberts: 'My Job is to Call Balls and Strikes and Not to Pitch or Bat,' CNN (Sept. 12, 2005, 4:58 PM EDT), <http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/>

subordinating his personal views. At Stetson, Justice Thomas repeatedly emphasized “my role as a judge,” saying that he puts his personal views on the table and then ignores them, adding that people “have no idea the discipline it takes.”¹³

At least at the Supreme Court level, this standard view of judging is honored more in its breach than in its observance. Long ago, the legal realists,¹⁴ and even more conservative voices like Benjamin Cardozo,¹⁵ exploded the myth of the judge as neutral arbiter. Even John Roberts, whose extensive career as a Supreme Court advocate schooled him in how to influence justices, must have known that it was hokum¹⁶ when he uttered it. Experiences, views, sympathies, and antipathies are an inevitable part of judging.¹⁷ Most agree that Justice Thomas’ experience of affirmative action and his antipathy for liberal elites affect his judicial decision-making.¹⁸ Why will he not let his manifest

(comparing the role of judges to baseball umpires to stress judicial impartiality in his opening statement at the Senate nomination hearings).

13. Thomas, 2010 Address at Stetson, *supra* note 4. Justice Thomas expresses the same conception of judging in his autobiography. See CLARENCE THOMAS, MY GRANDFATHER’S SON: A MEMOIR 204, 238–39 (2007) [hereinafter THOMAS, MY GRANDFATHER’S SON] (describing his judicial impartiality).

14. See, e.g., JEROME FRANK, LAW AND THE MODERN MIND (1930) (explaining and discussing the ideas of legal realism).

15. See, e.g., BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) (discussing legal realism).

16. For criticism of the judge-as-umpire analogy, see Michael J. Gerhardt, *Constitutional Branding*, 40 HOFSTRA L. REV. 655, 656 (2012) (discussing how constitutional branding influences judicial nominations); Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 701–02 (2007) (criticizing Robert’s judge-as-umpire analogy); Vaughn R. Walker, *Moving the Strike Zone: How Judges Sometimes Make Law*, 2012 U. ILL. L. REV. 1207, 1207 (discussing how judges do not simply apply the law, but rather make law); Kim McLane Wardlaw, *Umpires, Empathy, and Activism: Lessons from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629, 1633 (2010) (discussing judicial decision-making).

17. See generally RICHARD A. POSNER, HOW JUDGES THINK (2008) (discussing what influences judicial opinions); BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2009), reviewed in Stanley Fish, *Styles of Judging: The Rhetoric and the Reality*, N.Y. TIMES: OPINIONATOR (June 14, 2010), <https://opinionator.blogs.nytimes.com/2010/06/14/styles-of-judging-the-rhetoric-and-the-reality/>. See, e.g., Sheryl Gay Stolberg, *Justice Anthony Kennedy’s Tolerance Is Seen in His Sacramento Roots*, N.Y. TIMES, June 22, 2015, at A1, <https://www.nytimes.com/2015/06/22/us/kennedys-gay-rights-rulings-seen-in-his-sacramento-roots.html> (describing how Kennedy’s past potentially shaped his decision making).

18. See, e.g., Garnett, *supra* note 11, at 638 (describing Thomas’ dislike of affirmative action); Calvin J. TerBeek, *Write Separately: Justice Clarence Thomas’s “Race Opinions” on the Supreme Court*, 11 TEX. J. ON C.L. & C.R. 185, 204–05 (2006) (discussing Thomas and affirmative action). For roughly parallel views, see generally STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991) (discussing the negative consequences of affirmative action). The protagonist of Carter’s first novel, a Yale law

humanity play a role as well? The example of Bigger Thomas provides a clue.

III. CLARENCE AND BIGGER

Most of Clarence Thomas' biographers,¹⁹ including himself,²⁰ reference his youthful identification with Bigger Thomas, the central figure in Richard Wright's 1940 novel *Native Son*.²¹ The affinity is remarkable for a would-be seminarian like Clarence Thomas because Bigger is an uneducated, black youth sentenced to death for the murder and rape of Mary, a wealthy white girl.²² He committed neither crime: Bigger kills Mary accidentally, and while he thinks of having sex with her while she is virtually unconscious from intoxication, he is interrupted before he can act.²³ But Bigger is far from innocent: before he is captured, he rapes and kills his black girlfriend Bessie,²⁴ crimes for which he is never even prosecuted.

Their life circumstances differed, but Bigger's story captured Clarence's imagination. Years later he was asked:

professor like him, expresses similar opinions, which the novel itself displays by making its chief villain a white liberal Supreme Court Justice. See, e.g., STEPHEN L. CARTER, *THE EMPEROR OF OCEAN PARK* (2002). The protagonist's father, a retired federal judge whose suspicious death triggers the novel's action, has attitudes and experiences similar to Justice Thomas'. See *The Emperor of Ocean Park*, WIKIPEDIA, https://en.wikipedia.org/wiki/The_Emperor_of_Ocean_Park (last modified Nov. 9, 2018, 10:27 PM) (summarizing the Emperor of Ocean Park).

19. See KEN FOSKETT, *JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS* 82 (2004) (describing Thomas reading *Native Son*); JOHN GREENYA, *SILENT JUSTICE: THE CLARENCE THOMAS STORY* 46 (2001) (stating that Wright's *Native Son* "woke" Thomas up); MERIDA & FLETCHER, *supra* note 5, at 102 (presenting how Thomas compared himself to the main character of *Native Son*); ANDREW PEYTON THOMAS, *CLARENCE THOMAS: A BIOGRAPHY* 92 (2001) (describing Thomas' identification with the fictional Bigger Thomas).

20. See THOMAS, *MY GRANDFATHER'S SON*, *supra* note 13, at 63 (remembering reading *Native Son*). See also Justin Driver, *Justice Thomas and Bigger Thomas*, in *FATAL FICTIONS: CRIME AND INVESTIGATION IN LAW AND LITERATURE* 159, 160 (Alison L. LaCroix, Richard H. McAdams & Martha C. Nussbaum eds., 2017).

21. RICHARD WRIGHT, *NATIVE SON* (HarperCollins Publishers, Inc., HarperPerennial ed. 1993) [hereinafter WRIGHT, *NATIVE SON*].

22. *Id.*

23. *Id.* at 91–100. For a legal analysis of Bigger's acts, see Robert Batey, *Atticus Finch, Boris A. Max, and the Lawyer's Dilemma*, 12 *TEX. WESLEYAN L. REV.* 389, 405 nn.111–12 (2005) (giving a legal analysis of Bigger's acts); Driver, *supra* note 20, at 164 (commentating on Bigger Thomas' crime).

24. See WRIGHT, *NATIVE SON*, *supra* note 21, at 269–76 (noting that Bigger was never prosecuted for the rape and murder of his black girlfriend, Bessie). See also Driver, *supra* note 20, at 164–65 (discussing the irony in Justice Thomas' "invocation of the term innocent" to describe Bigger Thomas, even though he raped and murdered his girlfriend Bessie).

Reason: Are there any writers who were really influential to you when you were young, and still are?

Thomas: Richard Wright. I would have to put him number one, numero uno. Both *Native Son* and *Black Boy* really woke me up. He captures a lot of the feelings that I had inside that you learn how to repress.²⁵

Seizing on this response, Edith Efron, writing in the wake of the tumultuous hearings that preceded the Senate's narrow "consent" to Justice Thomas' Supreme Court appointment,²⁶ underlined Wright's lifelong relevance to Thomas:

Richard Wright, "number one, numero uno"—until this very day? Richard Wright, one of the most powerful black writers ever to have appeared in America? How could that have been overlooked by [the senators] who were trying, as his interrogators claimed to be trying, to understand this particular man? How could they have overlooked the observation that Wright "captures a lot of the feelings that I had inside that you learn how to repress." How could they have missed the switch to the present tense?²⁷

After lengthy quotations from *Native Son* (including Bigger's defiant cry to his police interrogators, "You can't make me do nothing but die!"),²⁸ Efron interpreted Anita Hill's sexual harassment allegations against Justice Thomas, like those against Bigger, as invoking "the oldest and most murderous racist stereotype directed at the black male: the black male as sexual beast."²⁹ Clarence Thomas' searing response to his senatorial interrogators—that he was being subjected to a "high-tech

25. Edith Efron, *Native Son: Why a Black Supreme Court Justice Has No Rights White Men Need Respect*, REASON (Feb. 1, 1992), <http://reason.com/archives/1992/02/01/native-son>. *Black Boy* is the autobiography of Wright's early years. Thomas was undoubtedly referring to the "Southern Night" section of the work, detailing Wright's childhood in the deep South, which was published separately as *Black Boy* in 1945. The second, lesser-known part of the original work, "The Horror and the Glory," was about Wright as a young Communist in Chicago, which was not available until it was published in 1977 under the title *American Hunger*. See Jerry W. Ward, Jr., *Introduction to Richard Wright*, in RICHARD WRIGHT, *BLACK BOY* xi (HarperPerennial, Library of America ed. 1993) (originally published 1945) [hereinafter WRIGHT, *BLACK BOY*] (introducing *Black Boy*).

26. See generally MERIDA & FLETCHER, *supra* note 5, at 171–209 (discussing the controversy of Thomas' Supreme Court confirmation).

27. Efron, *supra* note 25.

28. *Id.* (quoting WRIGHT, *NATIVE SON*, *supra* note 21).

29. Efron, *supra* note 25; WRIGHT, *NATIVE SON*, *supra* note 21, at 389.

lynching”—according to Efron, came “[f]rom the depths of his Richard Wright-infused subconscious”: “Somewhere inside Clarence Thomas was the unmistakable voice of Bigger Thomas, refusing in extremis to submit to the white man’s power: ‘You can’t make me do nothing but die!’”³⁰

This deep identification with Wright’s character has been endorsed by the Justice himself, according to two of his biographers:

Of all the Thomas critiques over the years, there is only one that Thomas himself has fully embraced. . . . [Efron’s article] was so dead-on that Thomas recommended it to friends as a way of understanding him. Nearly a decade later, the article had not left his consciousness when he met Efron’s editor by chance after a speech in Washington. No one else, Thomas told Virginia Postrel, had been able to see so clearly into his mind.³¹

In 2007, these authors wrote that “the [J]ustice has always identified with Wright’s roiling, misunderstood character,”³² affirming Efron’s earlier prediction “that every single day that this particular [J]ustice sits on that Court will be a silent requiem for Bigger Thomas, the fictional slum boy . . . who is engraved on Clarence Thomas’ heart.”³³

Efron tellingly related the lives of Bigger and Clarence Thomas, and there is another connection, in their thoughts, which can illuminate the perceived disruption between Justice Thomas’ humanity and his jurisprudence. How might the ramblings of a

30. Efron, *supra* note 25. For one opinion about the truth between Hill and Thomas, see Robert Batey, *Toward a New Role for the Senate in the Supreme Court Nomination Process*, 4 STETSON L.J. 17, 20 (1991):

[W]hat if . . . once upon a time [Clarence Thomas] had behaved like a jerk to Anita Hill, but that he had tried to make it up to her (by being a supportive boss, by writing strong letters of recommendation on her behalf, by remaining her friend), and now behavior that he considered relatively innocuous could perhaps deny him the Supreme Court seat that was nearly his? I think that a man in this frame of mind . . . would totally deny the alleged behavior.

See also id. at 17 (contending that Thomas had already lied at his confirmation hearing by saying that he had never formed an opinion about *Roe v. Wade*); Jill Abramson, *Do You Believe Her Now?*, NEW YORK MAG. (Feb. 19, 2018), <http://nymag.com/daily/intelligencer/2018/02/the-case-for-impeaching-clarence-thomas.html> (explaining the controversial re-arranging of various sexual harassment charges against Thomas).

31. MERIDA & FLETCHER, *supra* note 5, at 357.

32. *Id.* at 358.

33. Efron, *supra* note 25.

barely literate unfortunate like Bigger connect with the now almost thirty-year intellectual arch of Justice Thomas? The evidence provided in *Native Son* is thin, but persuasive.

After accidentally killing Mary and then incinerating her body in her family's furnace, Bigger has time to reflect on his acts, and surprisingly, embraces them.

The thought of what he had done . . . formed for him for the first time in his fear-ridden life a barrier of protection between him and a world he feared. He had murdered and had created a new life for himself. It was something that was all his own. . . .³⁴

With this acceptance of heightened criminality—"murder" instead of the negligent homicide that it was—comes a new ruthless slant on his own behavior: "The thing to do was to act just like others acted, live like they lived, and while they were not looking, do what you wanted. . . . All one had to do was be bold, do something nobody thought of."³⁵

It does not take long for these new attitudes to assume a political tone. While riding a streetcar the morning after killing Mary, Bigger muses about the "fear and shame" that imprisons blacks in 1940s America and their need for a ruthless leader: "Of late he had liked to hear tell of men who could rule others, for in actions such as these he felt that there was a way to escape from this tight morass of fear and shame that sapped at the base of his life."³⁶ His examples are fascists and their allies—Hitler, Mussolini, the Japanese—and it does not matter "whether the[ir] acts were right or wrong; they simply appealed to him as possible avenues of escape."³⁷ Wright expanded on this point in his 1940 essay, *How "Bigger" Was Born*, imagining Bigger yearning for a "true leader," "a leader like Marcus Garvey,"³⁸ the subsequently

34. WRIGHT, *NATIVE SON*, *supra* note 21, at 118–19.

35. *Id.* at 120.

36. *Id.* at 130.

37. *Id.* In his autobiography, Wright admits, "In order to escape the racial attack that went to the roots of my life, I would have gladly accepted any way of life. . . . I would have agreed to live under a system of feudal oppression. . . ." WRIGHT, *BLACK BOY*, *supra* note 25, at 265.

38. Richard Wright, *How "Bigger" Was Born*, in WRIGHT, *NATIVE SON*, *supra* note 21, at 505, 519, 520. *See also* WRIGHT, *BLACK BOY*, *supra* note 25, at 286–87 (acknowledging that the Garveyites "enthralled" him).

imprisoned and exiled leader of a 1920s back-to-Africa movement, complete with militaristic trappings and hierarchies.³⁹

Fascist-style regimentation⁴⁰ promises to Bigger an escape from the fear and shame that accosts him daily. A mind like Clarence Thomas', so much more sophisticated than Bigger's, might transmute the yearning for regimentation⁴¹ into an abnegation of humanity, an obeisance to authority even when it hurts—as with the death penalty and in the Haitian cases.⁴² So Justice Thomas reveres the authority of the founding documents (not just the Constitution and the Bill of Rights, but the Declaration of Independence as well),⁴³ applying a version of originalism that made Justice Scalia, its modern avatar, wince.⁴⁴ Even Justice Thomas' distaste for *stare decisis*,⁴⁵ which one would

39. See generally *Universal Negro Improvement Association and African Communities League*, WIKIPEDIA, https://en.wikipedia.org/wiki/Universal_Negro_Improvement_Association_and_African_Communities_League (last modified Oct. 1, 2018, 7:27 PM) (stating this black nationalist fraternal organization with the slogan “Africa for the Africans, at home and abroad” helped arrange for African Americans to move to Liberia and influenced many supplementary organizations in the United States and around the world). See also Arnold Rampersad, *Notes*, in WRIGHT, *NATIVE SON*, *supra* note 21, at 578, 593–94 (“Uniforms, titles, medals, flags, and parades also played a crucial role in the recruiting effort of Garvey and the Association.”).

40. See generally ERICH FROMM, *ESCAPE FROM FREEDOM* 153 (1941). “The frightened individual seeks for somebody or something to tie his self to; he cannot bear to be his own individual self any longer, and he tries frantically to get rid of it and to feel security again by the elimination of this burden: the self.” *Id.* at 152.

41. Professor Mark Tushnet remarks that “Thomas’s own biography . . . demonstrated a striking fluidity of identity, searching for one with which he was most comfortable,” and mentions his changes in religion, in politics as an undergraduate, and even in the race of his wives. Mark Tushnet, *Clarence Thomas’s Black Nationalism*, 47 *HOW. L.J.* 323, 335–36 (2004).

42. See *supra* text accompanying note 10 (explaining how difficult it was for Justice Thomas to hear those cases).

43. See Matthew J. Franck, *Declaration Man: How Justice Clarence Thomas Earned His Enemies*, *THE PUBLIC DISCOURSE* (Mar. 18, 2014), <http://www.thepublicdiscourse.com/2014/03/12899/> (“For [Justice Thomas], the foundation of all our law lies in the self-evident truths of the Declaration of Independence, beginning with human equality.”).

44. “Look, I’m an originalist, but I’m not a nut.”—Justice Antonin Scalia, when asked to compare his judicial philosophy to that of Justice Clarence Thomas.” Joe Patrice, *Scalia Calls Thomas ‘A Nut,’ ABOVE THE LAW* (July 11, 2014), <https://abovethelaw.com/2014/07/scalia-calls-thomas-a-nut/>. See also MERIDA & FLETCHER, *supra* note 5, at 333 (noting that when compared to Justice Scalia, Justice Thomas is much more likely to stick to his originalist views, regardless of the effects on American society).

45. See Adam Liptak, *Thomas Is Getting a New Chance to Break Precedent (If Not Silence)*, *N.Y. TIMES* (Feb. 24, 2014), <https://www.nytimes.com/2014/02/25/us/another-test-of-precedent-no-not-thomass-silence.html> (noting that the Supreme Court should be more open to overturning its precedent because the only other way they can be overruled is by constitutional amendment). See also MERIDA & FLETCHER, *supra* note 5, at 333–34. (describing Justice Thomas’ beliefs that the benefits of *stare decisis* are outweighed by the original meaning of the Constitution).

expect a self-abnegator to embrace, bespeaks his reverence for the documents themselves: mere men, themselves subject to the dictates of their own personalities, may have read the sacred documents wrongly.⁴⁶ Such thinking dooms one to extremism,⁴⁷ as the lone dissenter⁴⁸ or the author of the concurrence that would have gone further than the majority⁴⁹—roles Justice Thomas

46. “Stare decisis doesn’t hold much force for you?” Judge Sykes asked. ‘Oh, it sure does,’ Justice Thomas responded. ‘But not enough to keep me from going to the Constitution.’ Liptak, *supra* note 45 (from a “public conversation” at a Federalist Society dinner). See also Smith, *supra* note 11, at 585 (Justice Thomas has voted to overrule Supreme Court precedent an average of 2.07 times per term; the rest of the Justices average less than half of that).

47. For characterizations of Thomas’ legal views as extreme, see *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 247 n.5 (1995) (Stevens, J., dissenting); Jason A. Abel, *Balancing a Burning Cross: The Court and Virginia v. Black*, 38 J. MARSHALL L. REV. 1205, 1224 (2005); Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793, 801 (1996); Vikram David Amar, *Morse, School Speech, and Originalism*, 42 U.C. DAVIS L. REV. 637, 650 (2009); Byron Dailey, *The Five Faces of Federalism: A State-Power Quintet Without a Theory*, 62 OHIO ST. L.J. 1243, 1265 (2001); Daniel A. Farber, *Justice Stevens, Habeas Jurisdiction, and the War on Terror*, 43 U.C. DAVIS L. REV. 945, 958–59 (2010); Steven I. Friedland, *On Treatment, Punishment, and the Civil Commitment of Sex Offenders*, 70 U. COLO. L. REV. 73, 104 (1999); Lani Guinier, *[E]racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 122 (1994); David L. Hudson, Jr., *Justice Clarence Thomas: The Emergence of a Commercial-Speech Protector*, 35 CREIGHTON L. REV. 485, 499 (2002); Mark S. Kende, *Justice Clarence Thomas’s Korematsu Problem*, 30 HARV. J. RACIAL & ETHNIC JUST. 293, 308 (2014); Robert F. Nagel, *The Term Limits Dissent: What Nerve*, 38 ARIZ. L. REV. 843, 853 (1996); Martin A. Schwartz, *Constitutional Litigation Under Section 1983 and the Bivens Doctrine in the October 2008 Term*, 26 TOURO L. REV. 531, 543 (2010); James F. Shekleton, *Strangers at the Gate: Academic Autonomy, Civil Rights, Civil Liberties, and Unfinished Tasks*, 36 J.C. & U.L. 875, 909 n.96 (2010); Christopher E. Smith, *Brown v. Plata, the Roberts Court, and the Future of Conservative Perspectives on Rights Behind Bars*, 46 AKRON L. REV. 519, 531 (2013); John Paul Stevens, Kelo, *Popularity, and Substantive Due Process*, 63 ALA. L. REV. 941, 952 (2012); TerBeek, *supra* note 18, at 209; Alexander “Sasha” Volokh, *The Shadow Debate over Private Nondelegation in DOT v. Association of American Railroads*, 2014 CATO SUP. CT. REV. 359; Note, *Lasting Stigma: Affirmative Action and Clarence Thomas’s Prisoners’ Rights Jurisprudence*, 112 HARV. L. REV. 1331, 1333 (1999).

48. See, e.g., *Smith v. Cain*, 565 U.S. 73, 77 (2012) (Thomas, J., dissenting) (not a *Brady* violation for state to fail to disclose sole eyewitness’ previous statement that he probably could not make an identification).

49. See, e.g., *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 480 (2010) (Thomas, J., concurring in part and dissenting in part) (right of anonymous speech protects all contributors to political action committees from required disclosure); *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 264 (2003) (Thomas, J., concurring in part, concurring in result in part, concurring in judgment in part, and dissenting in part) (same). For a more recent example, see *Trump v. Hawaii*, 138 S. Ct. 2392, 2424–29 (2018) (Thomas, J., concurring) (doubting a federal court’s power to issue a nationwide injunction).

frequently assumes.⁵⁰ One set of biographers concludes, “[h]e seems happiest when playing the lone wolf.”⁵¹

Such extremism did not work for Bigger. His confident view of his role in the world—to “act just like others acted, live like they lived, and while they were not looking, do what you wanted”⁵²—comes to ruin pretty rapidly. His attempt to extort money from Mary’s parents is laughable, and he is soon on the run from the police. The state then catches him, tries him, and is about to kill him as the novel closes. An interaction between Bigger and his family early in this legal process, during a break in the inquest prior to his trial, portrays the failure of his worldview in starkly personal terms.

In a scene of operatic proportions, Bigger, at first alone in a courtroom antechamber, confronts in turn a black preacher, his victim’s Communist boyfriend and her classic white liberal parents, the prosecutor and defense attorney (also a Communist), a few friends from the pool hall, and finally his mother, brother, and sister. The gaze of the white people makes Bigger feel ashamed,⁵³ which in turn sparks his defiance, a feeling that the blacks in the room “ought to be glad! . . . Had he not taken fully upon himself the crime of being black? Had he not done the thing

50. Chief Justice John Roberts has disparaged this approach to judging. See Jeffrey Rosen, *Roberts’ Rules*, THE ATLANTIC (Jan.–Feb. 2007), <https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/>. “Roberts said, judicial temperament involves a judge’s willingness to ‘factor in the Court’s institutional role,’ to suppress his or her ideological agenda in the interest of achieving consensus and stability.” *Id.* Professor Rosen adds that “it [is] hard not to think of Clarence Thomas” as he hears this criticism. *Id.*

51. MERIDA & FLETCHER, *supra* note 5, at 9; see *id.* (“Thomas isn’t much of a politician in this body [the Supreme Court]. Rarely willing to compromise, . . . Thomas is . . . not much of a player in his workplace.”). His affinity for Ayn Rand’s iconoclastic novel *The Fountainhead*, the film version of which he has asked his clerks to view, see *id.* at 163 (innovative architect “struggle[s] to preserve his integrity against the voices of conformity”), also speaks to Justice Thomas’ “lone wolf” status. See also Driver, *supra* note 20, at 160–61 (pointing out why Justice Thomas identifies more with Bigger Thomas than his colleagues). A rough analogy might be William O. Douglas’ latter years on the Court, when his increasingly idiosyncratic opinions earned him both isolation and scorn. See generally David J. Garrow, *The Tragedy of William O. Douglas*, THE NATION (Mar. 27, 2003), <https://www.thenation.com/article/tragedy-william-o-douglas/> (collecting criticisms from two biographers, Ronald Dworkin, Richard Posner, and others). Justice Thomas apparently shares the scorn; he reportedly kept a sign in his office ridiculing one of Douglas’ most famous lines. *Id.* (“Please don’t emanate in the penumbras.”).

52. See *supra* text accompanying note 36 (explaining his new-found realization of the world around him and how he fit within it).

53. “He felt that all of the white people in the room were measuring every inch of his weakness. He identified himself with his family and felt their naked shame under the eyes of white folk.” WRIGHT, *NATIVE SON*, *supra* note 21, at 341.

which they dreaded above all others? Then they ought . . . [to] look at him and go home, contented, feeling that their shame was washed away."⁵⁴ This defiant feeling leads to a moment of false bravado, when he astoundingly announces, "Aw, Ma, don't you-all worry none, . . . I'll be out of this in no time."⁵⁵ The reaction—"Bigger knew that no one in the room . . . believed him"⁵⁶—unmans him, and he feels "lost":

He was ashamed of what he had done; he should have been honest with them. It had been a wild and foolish impulse that had made him try to appear strong and innocent before them. Maybe they would remember him only by those foolish words after they had killed him.⁵⁷

So, Bigger's defiance fails, just as it fails over the long course of *Native Son*.

This failure is portentous for Justice Thomas, because Bigger's motivation for defying "white folks" could easily be seen as the rationale for Clarence's judicial extremism: "[H]e tried to think of words that would defy them, words that would let them know he had a world and life of his own in spite of them."⁵⁸ Justice Thomas' extreme conservatism is a defiant gesture that all those—especially white liberals⁵⁹—who would expect him to conform to their view of what a black Supreme Court Justice should be.⁶⁰ But is it also a foolish gesture of false bravado doomed to failure? The sad life of Richard Wright, after the phenomenal success of *Native Son*, might provide an answer.

IV. RICHARD AND MALCOLM

When *Native Son* appeared in 1940, Richard Wright was a largely unknown thirty-one-year-old writer with only a volume of

54. *Id.* at 342 (emphasis in original).

55. *Id.* at 343.

56. *Id.* The sole exception is Buddy, Bigger's admiring younger brother.

57. *Id.* at 343, 344.

58. *Id.* at 342.

59. See *supra* text accompanying note 18 (discussing Justice Thomas' antipathy towards affirmative action).

60. See generally Smith, *supra* note 11 (illustrating Justice Thomas' belief in independent thought as opposed to conforming to how others assert he should think being a black man).

short stories and a few poems in obscure journals to his credit.⁶¹ Born in Mississippi to a sharecropper family, he quit school after the ninth grade, at age seventeen,⁶² he read extensively though,⁶³ especially after relocating with family members to Chicago in 1927.⁶⁴ There, he also became interested in the Communist Party, joining officially in 1934.⁶⁵

In the words of one critic, “[t]he importance of Wright’s involvement with communism cannot be overemphasized, because it supplied him with what he would later call ‘the first emotional commitment of my life.’”⁶⁶ The largely sympathetic Communist characters in *Native Son*—Mary’s activist boyfriend Jan and Bigger’s lawyer Boris A. Max⁶⁷—support this judgment. Another commentator suggests that “Wright needed the security of an intellectual superstructure,”⁶⁸ so the conflicts Wright had with party members in Chicago rankled him⁶⁹ and perhaps formed part of his resolve to relocate to New York City in 1937.⁷⁰

Even today it is remarkable to think *Native Son*, with its unknown black author, violent protagonist, and crusading Communist characters, became a Book-of-the-Month Club

61. See Arnold Rampersad, *Chronology*, in WRIGHT, *NATIVE SON*, *supra* note 21, at 541, 548–52 [hereinafter Rampersad, *Chronology*] (describing life before Wright had *Native Son* published).

62. *Id.* at 541–44.

63. For the poignant story of how Wright’s reading career began, see WRIGHT, *BLACK BOY*, *supra* note 25, at 244–53 (noting he had to give the librarian a note saying that “*this n****r boy*” was checking out books for a white man) (emphasis in original). *But cf.* Michael Anderson, *A Native Son in Exile*, N.Y. TIMES (Aug. 26, 2001), <https://www.nytimes.com/2001/08/26/books/a-native-son-in-exile.html> (reviewing HAZEL ROWLEY, *RICHARD WRIGHT: HIS LIFE AND TIMES* (2001)) (doubting the accuracy of *Black Boy*’s factual accounts: “Like many a memoir writer, Wright gave his fidelity to feelings rather than to facts.”).

64. See Rampersad, *Chronology*, *supra* note 61, at 545, 547, 548–49 (listing many of the books Wright read after relocating to Chicago).

65. See WRIGHT, *BLACK BOY*, *supra* note 25, at 390 (deciding to join based on the party’s position on racial discrimination).

66. ROBERT BUTLER, *NATIVE SON: THE EMERGENCE OF A NEW BLACK HERO* 5–6 (1991) (quoting Richard Wright, *I Tried to Be a Communist*, in *THE GOD THAT FAILED* 105 (Richard Crossman ed., 1952)). See also WRIGHT, *BLACK BOY*, *supra* note 25, at 317 (explaining his early experience in the party).

67. For criticism of Max’s lawyering, see Batey, *supra* note 23, at 402 (discussing the failures of Max’s ethical duties to his client). See generally Bennett Capers, *The Trial of Bigger Thomas: Race, Gender, and Trespass*, 31 N.Y.U. REV. L. & SOC. CHANGE 1–8 (2006) (illustrating Wright’s involvement with communist ideology from a young age).

68. See Anderson, *supra* note 63 (discussing how Wright turned to writing his works after breaking from the Communist Party).

69. See generally WRIGHT, *BLACK BOY*, *supra* note 25, ch. 17–20 (discussing Wright’s rise and fall with the Communist Party).

70. See Rampersad, *Chronology*, *supra* note 61, at 550–51 (providing an account of Wright’s life in 1937).

selection.⁷¹ As such, it sold over 200,000 copies in three weeks⁷² and made Richard Wright an overnight sensation.⁷³ In the next few years, he would see *Native Son* become a Broadway play produced by John Houseman and directed by Orson Welles⁷⁴ and would publish another bestseller, the autobiographical *Black Boy*.⁷⁵ And yet he was souring on the American experience.

Not surprisingly, racism in New York was just as bad as in Chicago, and his conflicts with the American Communist Party also followed him there. The party's tolerance for segregation in the United States military, assertedly necessary to turn back the Nazis (now that they had invaded the Soviet Union), was the last straw, and he quit in 1942.⁷⁶ The absence of this "intellectual superstructure" was destabilizing: "After I broke with the Communist Party, I had nowhere else to go," Wright wrote to his protégé, Ralph Ellison.⁷⁷ He set sail for France in 1946, relocating there permanently in 1947,⁷⁸ in "self-imposed exile."⁷⁹

Wright lived in Europe until his death in 1960, visiting the United States only occasionally.⁸⁰ Thus isolated, both from America and from Communism, the final thirteen years of his life were a downward spiral. He dabbled unsuccessfully in psychology, existentialism, and anticolonialism.⁸¹ At age forty-two, he starred

71. A prissy editor got Wright to soften some scenes (in particular, a brief early sequence in which Bigger and his friend masturbate in a movie theater), see WRIGHT, *NATIVE SON*, *supra* note 21, at 32–33. See Arnold Rampersad, *Note on the Texts*, in WRIGHT, *NATIVE SON*, *supra* note 21, at 573, 574 (referencing the editor's letter to Wright). Wright took this opportunity to make several other changes; the "restored" edition relegates these to endnotes, but some of them improve the novel. See, e.g., *id.* at 587, 588–89, 591 (foreshadowing, and reflecting on, the finding of Mary's ashes in the furnace of her family home).

72. Rampersad, *Chronology*, *supra* note 61, at 554.

73. See Anderson, *supra* note 63 (calling Wright "the first best-selling black writer in the country's history"). Anderson begins his review with the famous quip of sociologist Robert Park on meeting Wright: "HOW in hell did you happen?" *Id.* (emphasis in original).

74. See Rampersad, *Chronology*, *supra* note 61, at 554, 555 (discussing the aftermath of the success of *Native Son* being published).

75. See generally WRIGHT, *BLACK BOY*, *supra* note 25 (describing the publication history of *Black Boy*).

76. See Rampersad, *Chronology*, *supra* note 61, at 557 (illustrating his breakup with the Communist party). See also WRIGHT, *BLACK BOY*, *supra* note 25, chs. 17–20 (suggesting several other motivations for Wright's disaffection with the party).

77. Anderson, *supra* note 63.

78. See Rampersad, *Chronology*, *supra* note 61, at 560–61 (discussing Wright's decision to permanently move to Europe).

79. Anderson, *supra* note 63.

80. See, e.g., Rampersad, *Chronology*, *supra* note 61, at 561–72.

81. See Anderson, *supra* note 63 (noting that Wright's later life was filled with everyday failures). In *Native Son*, Bigger, while in jail, encounters a black writer who "says he's got

as the teenage Bigger in a weebegone film version of *Native Son*.⁸² From Europe, he published seven more books, “to decreasing sales and increasing critical disdain. . . . His last novels . . . fail, and fail embarrassingly. . . . His nonfiction was no better.”⁸³ His protégés not only eclipsed him (James Baldwin, in addition to Ralph Ellison) but also criticized Wright’s work explicitly.⁸⁴ He spent his last days writing despondent haiku—“Several carry the refrain, ‘How lonely it is’”—and died “[d]eserted by his family, nearly penniless, . . . alone in a Paris hospital, felled by a heart attack at the age of 52.”⁸⁵

Given his personality, Justice Thomas is not likely to die “deserted” or “alone.”⁸⁶ But like Richard Wright, Justice Thomas has exiled himself from his colleagues, staking out extreme

to the bottom of why colored folks are treated bad,” but who has been driven mad by the realization, WRIGHT, *NATIVE SON*, *supra* note 21, at 396–99, a fate Wright might have feared for himself. See Wright, *How “Bigger” Was Born*, *supra* note 38, at 524 (“I must write this novel, not only for others to read, but to free *myself* of this sense of . . . fear.”) (emphasis in original). Instead of this ending, Wright in his last years more closely resembled his character Boris A. Max, prattling on about his beliefs while the lawyer’s client is far more focused on his imminent execution. See WRIGHT, *NATIVE SON*, *supra* note 21, at 497–99 (describing Max and Bigger’s interaction as Bigger knows he will die soon); see *infra* text accompanying note 102 (referencing Max and Bigger’s last conversation before the execution).

82. “When Richard Wright went wrong.” *Native Son (1951)*, ROTTEN TOMATOES, https://www.rottentomatoes.com/m/native_son/ (last visited May 28, 2018) (quoting *Film Threat* critic Phil Hall). See also Rampersad, *Chronology*, *supra* note 61, at 564 (noting Wright’s “performance is deemed sincere but awkward”). Wright’s screen test for the role is available at Beinecke Library. *Screen Test for Native Son: Richard Wright as Bigger Thomas*, VIMEO, <https://vimeo.com/22026727> (last visited June 4, 2018).

83. Anderson, *supra* note 63. See also Elizabeth Bennett, ‘Richard Wright: The Life and Times’ by Hazel Rowley, POST-GAZETTE (Aug. 26, 2001), <http://old.post-gazette.com/books/reviews/20010826review829.asp> (reviewing HAZEL ROWLEY, *RICHARD WRIGHT: HIS LIFE AND TIMES* (2001)) (stating that after moving to France “he continued to write, but nothing had the impact of his earlier work.”). *A Father’s Law*, unfinished at Wright’s death, appeared in 2008; it was panned in the *Boston Globe*, the *Los Angeles Times*, and the *New York Times Book Review*. See *A Father’s Law by Richard Wright*, BOOKMARKS MAG. (Apr. 23, 2008, 1:57 PM), <http://www.bookmarksmagazine.com/book-review/fathers-law/richard-wright> (showing the general critical ambivalence to *A Father’s Law*).

84. See BUTLER, *supra* note 66, at 15–16 (noting that both Baldwin and Ellison wrote essays condemning Wright’s vision of black life and lamenting the one-dimensionality of his characters); Driver, *supra* note 20, at 161 (describing Baldwin’s and Ellison’s censorious evaluations of *Native Son* and its protagonist Bigger Thomas).

85. Anderson, *supra* note 63. See also Bennett, *supra* note 83 (“‘I’m so lonely,’ he wrote a friend the year before he died at 52 in Paris. ‘. . . I wish I was a dog so I could go up to the top of a high hill at night and howl at the moon. It would ease my soul.’”)

86. See *supra* text accompanying notes 4–10 (discussing Thomas’ charm). Given the money generated by his autobiography, see *supra* note 14, Thomas is also unlikely to die “penniless.” See Debra Cassens Weiss, *Justice Thomas’ Book Royalties Now Total \$1.5M*, ABA J. (June 8, 2009, 2:24 PM CDT), http://www.abajournal.com/news/article/justice_thomas_book_royalties_now_total_1.5m/ (describing the relative wealth of various Supreme Court members).

positions that alienate even fellow judicial conservatives.⁸⁷ He may find himself increasingly alone, espousing a jurisprudence as irrelevant, embarrassing, and dispiriting as Wright himself became in his final years. The novelist could not find a way out of his downward spiral, but the example provided by the last years of Malcolm X, as depicted in Spike Lee's classic film, might offer Justice Thomas an escape route.

Malcolm X,⁸⁸ a movie Justice Thomas reportedly admires,⁸⁹ captures the full sweep of the life of the controversial Black Muslim leader, from his zoot suit days as Malcolm Little to prison to his years in the Nation of Islam.⁹⁰ But for the Justice, who in his younger days had a poster of Malcolm X on his wall,⁹¹ the most relevant part of the movie might be its last section, detailing Malcolm's break with his church's leadership and his pilgrimage to Mecca before his 1965 assassination.⁹² In the last months of his life, the militant softened his message, becoming more welcoming to those he had previously scorned.

Alienated from the Nation of Islam by hints of corruption and chastised publicly by its leaders for his impolitic comments, the film's Malcolm sets out on a hajj, visiting first Egypt and then

87. See *supra* text accompanying notes 43–47 (noting that Thomas' rigid originalism has even given conservative jurists like Antonin Scalia pause).

88. MALCOLM X (40 Acres and a Mule Filmworks 1992).

89. See MERIDA & FLETCHER, *supra* note 5, at 283 (noting that Thomas enjoyed Spike Lee's early works). His admiration for Spike Lee is not reciprocated. See *id.* (referencing Lee's belief that if Malcolm X were alive he would not identify with Justice Thomas).

90. See Ashley Clark, *Malcolm X: Spike Lee's Biography Is Still Absolutely Necessary*, THE GUARDIAN (Feb. 19, 2015, 8:00 PM EST), <https://www.theguardian.com/us-news/2015/feb/19/malcolm-x-spike-lee-biopic-black-cinema-selma-the-butler> (describing the major parts of the film). These portions of the movie are remarkably faithful to *The Autobiography of Malcolm X* (1965) ("as told to" Alex Haley), with the exception of a few characters telescoped for dramatic effect. See *id.* (noting that Lee takes some creative license). But cf. MANNING MARABLE, MALCOLM X: A LIFE OF REINVENTION 7–10 (2011) (questioning the autobiography's accuracy).

91. See MERIDA & FLETCHER, *supra* note 5, at 108; Jon Wiener, *Judging Thomas*, THE NATION (Nov. 8, 2007), <https://www.thenation.com/article/judging-thomas/> (noting the conspicuousness of the Malcolm X poster on Thomas' dorm room wall). Another journalist contends that as a young man, Thomas committed to memory several of Malcolm's speeches. See Corey Robin, *Clarence Thomas's Counterrevolution*, JACOBIN MAG. (May 9, 2014), <https://www.jacobinmag.com/2014/05/clarence-thomass-counterrevolution/> (describing Thomas' fondness for Malcolm X). Thomas' toned-down version of this affinity asserts that he "never went along with the militant separatism of the Black Muslims, but [he] admired their determination to 'do for self, brother,' as well as their discipline and dignity." THOMAS, MY GRANDFATHER'S SON, *supra* note 13, at 62; see MERIDA & FLETCHER, *supra* note 5, at 133, 266–67, 371 (exploring the similarities between Thomas' and Malcolm X's social and political visions).

92. MALCOLM X, *supra* note 88.

Saudi Arabia, where he interacts with Muslims of many races and nations.⁹³ The Internet Movie Database summarizes this segment: “The hajj changes Malcolm’s outlook and he experiences a spiritual re-awakening, realizing that exclusion of races other than African-Americans from Islam cannot accomplish anything.”⁹⁴ This more ecumenical approach continues on his return to America, “where he declares that his days of preaching for African-American separation from white America are over.”⁹⁵ This change of heart helps Malcolm to accept with majestic stoicism⁹⁶ the fate ordained by his enemies, a gunning-down at his last speaking engagement.⁹⁷

In his last months, Malcolm X recognized that he needed to reach beyond his narrow worldview, as Richard Wright apparently could not, to make a connection with those whose perspectives differed from his. Although some recent commentators have suggested an affinity between Clarence Thomas and Malcolm X,⁹⁸ one questions whether the Justice is capable of such a reach.

93. See *Malcolm X Plot*, IMDB, <https://www.imdb.com/title/tt0104797/plotsummary#synopsis> (last visited May 29, 2018) (providing a synopsis of the movie).

94. *Id.* Professor Stephen F. Smith confirms the factual accuracy of these scenes, writing of Malcolm’s “life-changing pilgrimage to Mecca.” Smith, *supra* note 11, at 588–89.

95. *Malcolm X Plot*, *supra* note 93; see Smith, *supra* note 11, at 588–89. Otherwise vigorous enthusiasts still cringe over this change of views: “Malcolm’s x-ray vision, which had never failed to see through the hypocrisy of American bourgeois politics, went myopic on him in Africa.” *Malcolm X: What’s Missing from Spike Lee’s Movie*, SPARTACIST, Feb. 1993, at 3, 7, https://www.marxists.org/history/etol/document/icl-spartacists/black-question/10_MalcolmX.pdf. The article takes a similar view of the movie: “You’d think Malcolm was ready to link arms with the Kennedys and sing ‘We Shall Overcome!’” *Id.* at 6.

96. Denzel Washington’s portrayal, powerful throughout (“a performance of enormous breadth,” according to Roger Ebert, *Malcolm X*, ROGEREBERT.COM (Nov. 18, 1992), <https://www.rogerebert.com/reviews/malcolm-x-1992>), is most moving in these scenes, aided by Sam Cooke’s “A Change Gonna Come,” as background music. See rgtowns, *Sam Cooke – A Change Gonna Come (Malcolm X)*, YOUTUBE (Oct. 22, 2013), <https://www.youtube.com/watch?v=zsT9wDBXyJE>.

97. See *Malcolm X Plot*, *supra* note 93 (describing the assassination of Malcolm X).

98. See Smith, *supra* note 11, at 586 (“To anyone who cares to listen, Justice Thomas’ opinions thunder with the strong black-nationalist voice typically associated with one of Thomas’ personal heroes, Malcolm X.”); see also Damon Root, *What Clarence Thomas Learned from Malcolm X*, REASON (Feb. 23, 2015, 4:46 PM), <https://reason.com/blog/2015/02/23/clarence-thomas-americas-most-influentia> (describing how Malcolm X influenced Justice Thomas’ views on race); Juan Williams, *After 20 Years Justice Clarence Thomas Has Made His Imprint on the Supreme Court, Conservatism and the Black Experience in America*, FOX NEWS (Oct. 22, 2011), <http://www.foxnews.com/opinion/2011/10/22/after-20-justice-clarence-thomas-has-made-his-imprint-on-supreme-court.html> (“Malcolm X on the Supreme Court might look a lot like Justice Thomas. . .”). *But cf.* Tushnet, *supra* note 41, at 336–37 (questioning Justice Thomas’ black nationalism).

V. RESOLUTION?

After a cathartic pretrial conversation with his lawyer—“he had spoken to Max as he had never spoken to anyone in his life”⁹⁹—Bigger has a vision of sorts, “a dark vast fluid image” while alone in his cell:

[H]e saw a black sprawling prison full of tiny black cells in which people lived; each cell had its stone jar of water and its crust of bread and no one could go from cell to cell and there were screams and curses and yells of suffering and nobody heard them, for the walls were thick and darkness was everywhere. Why were there so many cells in the world?¹⁰⁰

Moved by this vision, Bigger wonders “if he reached out with his hands and touched other people, reached out through these stone walls and felt other hands connected with other hearts—if he did that, would there be a reply?”¹⁰¹ This powerful image of human disconnection was prescient for Wright, for it well describes the miserable end of his “lonely” life.¹⁰² There is controversy over how successful Wright’s protagonist is in avoiding a similar denouement, for in Bigger’s last conversation prior to execution he is fundamentally misunderstood by his lawyer,¹⁰³ but asserts a tenuous connection with Jan, Mary Dalton’s Communist boyfriend, even though Jan is not present.¹⁰⁴ It is clearer that Spike Lee sees Malcolm X as having made such a connection, and as having

99. WRIGHT, *NATIVE SON*, *supra* note 21, at 416–17.

100. *Id.* at 419; see Arthur Austin, *Race and Gender Exclusivity in Legal Scholarship*, 4 U. CHI. L. SCH. ROUNDTABLE 70, 79 (1996–1997) (noting the “despair” in this passage).

101. WRIGHT, *NATIVE SON*, *supra* note 21, at 419. Wright’s autobiography expresses similar thoughts: “[W]ithout a common bond uniting men, without a continuous current of shared thought and feeling circulating through the social system, like blood coursing through the body, there could be no living worthy of being called human.” WRIGHT, *BLACK BOY*, *supra* note 25, at 374.

102. See *supra* text accompanying notes 81–85 (describing Wright’s bitter loneliness later in life).

103. See Batey, *supra* note 23, at 410 (reflecting on the lawyer’s inability to provide comfort to Bigger before his death); BUTLER, *supra* note 66, at 54–55, 108–09 (discussing the various social, emotional, and ideological barriers that prevent Bigger’s lawyer from understanding who he is).

104. On the novel’s last page, Bigger asks Max to tell Jan “hello,” first referring to him as “Mister” but then correcting to his first name. WRIGHT, *NATIVE SON*, *supra* note 21, at 502.

“reached out through [his] stone walls”¹⁰⁵ to many of those he had previously spurned.¹⁰⁶

Will Clarence Thomas be able to reach out of his jurisprudential prison? His open and friendly personality suggests he has the tools to do so.¹⁰⁷ I hope he has the willingness, for it would begin to resolve the contradiction between his humanity and his opinions.¹⁰⁸ But, I would not bet on it. After all, he is known for telling his clerks, “I ain’t evolving.”¹⁰⁹ With such bravado, he may continue in his cell for a long time.

It is tempting here to juxtapose the life of Bruce Jacob, to say that he “evolved” from being on the wrong side of Gideon v. Wainwright.¹¹⁰ The truth is quite different, however. Bruce Jacob always was, and is, an open, friendly man, whose view of law was, and is, consistent with his humanity. It was, and is, a pleasure to work with him and learn from him. He is, in every sense, the “good person” he long urged every Stetson graduate to be.¹¹¹

105. *Supra* text accompanying note 101.

106. *See supra* text accompanying notes 91–95 (reflecting on the movie’s account of Malcolm X’s reconciliatory efforts near the end of his life).

107. *See supra* text accompanying notes 4–10 (describing Thomas’ jovial disposition). In this respect, he is more like Spike Lee’s Malcolm X than like Richard Wright’s Bigger Thomas—or like Richard Wright himself.

108. It is possible that any abandonment of his adopted intellectual construct might destabilize Justice Thomas, a bit like leaving America and the Communist Party set Richard Wright adrift. *See supra* text accompanying notes 77–79 (chronicling Wright’s despondency in Europe). But it would be better to reach out, even if it risks failure.

109. MERIDA & FLETCHER, *supra* note 5, at 379; Garrett Epps, *Clarence Thomas’s Unusual Evolution*, THE ATLANTIC (June 14, 2015), <https://www.theatlantic.com/politics/archive/2015/07/clarence-thomas-unusual-evolution/398471/>. But Professor Epps holds out hope: “But whether made by a lover or a jurist, that oath—I will always feel this way—is always eventually broken.” *Id.*

110. 372 U.S. 335 (1963).

111. At each semiannual graduation when he was dean, Bruce would quote George Sharswood, *An Essay on Professional Ethics* 168 (5th ed. 1884). The nineteenth-century professor and jurist encouraged each student to be “a good man,” but Bruce, in his goodness, amended it, reaching out to his female listeners.