

RECONSTRUCTING ATTICUS FINCH? A RESPONSE TO PROFESSOR LUBET

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“He's not an example, Dill. ... He's the same in the courtroom as he is on the public streets.”¹

In one of her childishy obtuse moments, Scout, the narrator of Harper Lee's *To Kill a Mockingbird*, denies that her father Atticus Finch is any sort of proper example of how a lawyer ought to act when cross-examining a witness. The prosecutor's cross-examination of the accused Tom Robinson has moved her friend Dill to tears:

I couldn't stand ... [t]hat old Mr. Gilmer doin' him thataway, talking so hateful to him –²

Scout, who has taken her friend out of the courtroom, explains:

Dill, that's his job. ... He's supposed to act that way.³

Atticus, on the other hand, does not turn into a lawyer stereotype when he enters the courtroom. He faces the adversities and injustices of the courtroom with the same gentlemanly manner that he uses when interacting with the various characters that populate the charming but benighted town of Maycomb.

At this point in the story, Dolphus Raymond appears to reassure Dill:

I know what you mean, boy. ... You aren't thin-hided, it just makes you sick doesn't it?⁴

Dolphus is a man reduced to feigning abject alcoholism as he stumbles through the town that cannot understand why he, a white man, “preferred the company of Negroes.”⁵ He comforts Dill with a drink from the Coca-Cola bottle that he carries around hidden in a paper bag. That is his solution, his way to get along in Maycomb, an alternative to saying

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¹ Harper Lee, *TO KILL A MOCKINGBIRD* 211-12 (1960).

² *Id.* at 211.

³ *Id.*

⁴ *Id.* at 212.

⁵ *Id.* at 204.

“the hell with them.”⁶ The reader agrees with Dolphus and Dill: the spectacle in the courtroom does sicken. *1364 The bitter racism shown in the book might move us, like Dill, to tears. But neither Dolphus nor Dill emerges as a model. The many readers inspired by the power of *To Kill a Mockingbird* want to be Atticus.

Atticus shows us how to stay in the imperfect courtroom. He does not refuse to interact with the people of Maycomb, despite their shortcomings. He knows he cannot single handedly cure all of the ills he perceives, but he does not despair or become insensitive to these wrongs. Instead, he maintains one way of behaving, which he uses in all situations. *He’s the same in the courtroom as he is on the public streets.* For those entering the legal profession, who commonly worry that they will lose themselves in an overbearing and tainted alien culture, Atticus is a model of integrity, showing us how to persevere day-to-day when our contributions may be only very modestly incremental.

It is this moderation and willingness to continue to work within the system, really living in the world he was born into, and not any high degree of legal skill, that makes Atticus a paragon. I suspect that many of those who revere Atticus remember him as a brave and idealistic man who took an unpopular case and stood up to the evils of his society, but the book does not depict him that way. Atticus takes the case Judge Taylor assigns him. He does his duty: “[S]imply by the nature of the work, every lawyer gets at least one case in his lifetime that affects him personally.”⁷ If he refuses to continue his work in a consistent manner, despite this personal burden, he loses his place in the moral order: “I couldn’t hold up my head in town, I couldn’t represent this county in the legislature, I couldn’t even tell you and Jem not to do something again.”⁸ Atticus does not make a special idealistic decision in this particular case. As a man of integrity, he cannot depart from his established way. This adherence to duty corresponds to his view of the law. His closing statement to the jury ends:

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.⁹

Atticus deeply believes in the law and as he performs his duty, he patiently waits for the day when the others who work in the *1365 system will also perform their duty. Law is not a lofty institution, but a “working reality” that necessarily depends on the routine performance of duty by good people like Atticus and the lawyers he inspires.

⁶ Another man who has withdrawn from society is Boo Radley. Boo sits in his house and keeps an eye on the little town, and is able to act at one point, also, to help the children. But he himself is childlike and unable to operate on a daily basis in the flawed world of his little town.

⁷ Lee, *supra* note 1, at 83.

⁸ *Id.*

⁹ *Id.* at 218.

Atticus accepts the Robinson case just as earlier in the book he accepts the job Sheriff Tate asks him to do: shoot a rabid dog. Indeed, his handling of the trial parallels the shooting of the rabid dog. Atticus possesses extraordinary skills – as a lawyer and as a marksman – but he does not seek occasions to display them or profit by them. The sheriff calls on Atticus when a dog must be taken down in one shot, and the judge comes to him when an inflammatory case needs a lawyer. A neighbor tries to explain the restraint of this man who had avoided using his shooting skills for thirty years:

[H]e's civilized in his heart ... I think maybe he put his gun down when he realized that God had given him an unfair advantage over most living things. I guess he decided he wouldn't shoot till he had to, and he had to today.¹⁰

Far from a hired gun,¹¹ either literally, with a rifle, or figuratively, as a lawyer, Atticus assiduously refrains from showing off his skills; he accepts his assignments through a sense of duty. He particularly dislikes the practice of criminal law and prefers a quiet office practice.¹² When the rabid dog incident makes Scout want to brag to the other children about her father's dead aim, her brother Jem forbids it and proclaims "jubilantly": "Atticus is a gentlemen, just like me."

Does Atticus depart from his gentlemanly ways when he cross-examines Mayella? Mayella may be a pitiable creature – "the loneliest person in the world"¹³ – but if she has accused an innocent man of a capital crime, she is the equivalent of the rabid dog. Now, perhaps, as Professor Lubet has described, she is not lying. Surely Atticus would have refrained from shooting the dog if he had not believed it was in fact rabid, despite the sheriff's bidding. One might say a lawyer must defend any client, but I do think Atticus forms the belief that Mayella is lying and that he must deploy his full powers in her case for this reason. By the end of the direct examination, Mayella has acquired an air of confidence "like a steady-eyed cat with a twitchy tail."¹⁴ She has become a vicious animal requiring the dead-aim shot. Atticus may feel sorry for the *1366 poor dog who has become infected with rabies, but that does not affect his duty to kill it: Mayella's testimony threatens to kill an innocent man, and his pity for her does not affect his duty to destroy her credibility. Perhaps this is what Atticus is thinking as he takes a long silent walk around the courtroom, "trying to come to a decision about something,"¹⁵ before he begins his cross-examination.

That Mayella's injuries were on her right side, that her father is left handed, and that Tom's left arm is so entirely useless it slips off the Bible as he is taking the oath, clearly establishes Harper Lee's overeagerness to assure us that Tom is innocent and to squelch any speculation to the contrary. (Professor Lubet breaks free of the author's firm hold.) The author's decision to forgo the usual subtleties of the novelist's art undermines

¹⁰ Id. at 107.

¹¹ It is amusing to suggest that Atticus is a hired gun when he is paid in turnip greens and pecans by his Depression Era clients.

¹² See Lee, *supra* note 1, at 10-11.

¹³ Id. at 204.

¹⁴ Id. at 192.

¹⁵ Id. at 193.

attempts at assessing Atticus's legal skills. Indeed, Lee's cartoonishly overdone evidence generates its own difficulties: Tom's left arm is an entire *foot* shorter than his right arm and it hangs "dead at his side" and dangles a hand so shrivelled that Scout detects its inutility from the balcony, yet Atticus is able to trap both Bob Ewell and Mayella into testifying in a way that would require Tom to have an effective left arm, as if they had never laid eyes on him.¹⁶ Given this glaring lapse in the evidence, it is not surprising that Professor Lubet can pry a number of holes in the evidence and construct an interpretation that Tom is guilty, but I would still maintain that Atticus can be credited with an absolute belief that Tom is innocent and that readers entering Lee's simplified moral world are compelled to adopt this belief as well.

Distasteful as the "she wanted it" defense is as a general matter, I think Harper Lee has set up the evidence fairly clearly to support the conclusion that in this case, Mayella quite intentionally sought a sexual encounter with Tom. Mayella, we are told, was "the loneliest person in the world" because she did not fit anywhere in society (unlike Atticus, so firmly rooted at the very center of his society):

[W]hite people wouldn't have anything to do with her because she lived among pigs; Negroes wouldn't have anything to do with her because she was white. She couldn't live like Mr. Dolphus Raymond, who preferred the company of Negroes, because she didn't own a riverbank and she wasn't from a fine old family.¹⁷

Assuming Tom does not lie under oath, she goes to pathetic lengths to set up an encounter with him. And, as Atticus puts it in the closing statement, *1367

[S]he ... broke[] a rigid and time-honored code of our society.... [S]he kissed a black man. ... No code mattered to her before she broke it, but it came crashing down on her afterwards.¹⁸

The Ewell family is berated throughout the book for ignoring the rules. They lack the integrity and sense of duty that characterizes Atticus. The town has even given up on applying the rules to this family. The children are permitted to avoid school, and Bob Ewell is allowed to hunt out of season.¹⁹ The reader is set up to think that Mayella, acting in the Ewell manner, pursued her own desires and was willing to serve her selfish ends at the expense of Tom's life. Harper Lee's didacticism requires me to read her book this way. I think it says little about rape cases in the real world to acknowledge that this *is* what happened in the fictional world of *To Kill a Mockingbird*.

Professor Lubet cites Atticus's demand for corroboration, a demand too easily used against rape victims.²⁰ Since rape usually takes place in the absence of witnesses other than the defendant and the victim, the demand for corroboration can undermine many

¹⁶ See *id.* at 187, 196-97.

¹⁷ *Id.* at 204.

¹⁸ See *id.* at 216.

¹⁹ *Id.* at 37.

²⁰ See Susan Estrich, *REAL RAPE* 42-44 (1987).

rape prosecutions. One answer here is that Harper Lee wrote at a time when problems of racial injustice demanded greater attention. It would be another fifteen years before Susan Brownmiller wrote *Against Our Will*,²¹ which focused public attention on the feminist issues involving rape. Brownmiller wrote of the resistance she met as she tried to pursue her study. One librarian responded to her inquiries this way:

I'm sorry, young lady. If you're serious about your subject you need to start with the historic injustice to black men. That must be your approach.²²

It is hardly surprising, then, that Lee, in 1960, failed to infuse her description of the rape trial with feminist sensibility.

The effect of the death penalty must not be ignored. Tom Robinson was accused of a capital offense. Atticus had a “profound distaste for the practice of criminal law” that stems from the execution of his first two clients. (They had at least committed murder – and had done so in the presence of three witnesses.²³) Atticus, conservative man that he is, does not, like his son (and the Supreme Court, in later days²⁴), object to death as the penalty for *1368 rape, but he demands a greater certainty of evidence before the death penalty is given for any crime:

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.²⁵

Atticus's demand for more evidence in Tom Robinson's case must be read in conjunction with his beliefs about the death penalty. Moreover, the demand for corroboration relates in a special way to the evidence in this case. Mayella’s failure to seek a medical examination is itself evidence that combines with other evidence to suggest that her father was the one who inflicted her injuries. Mayella was not a woman too shamed and intimidated to go to the hospital in time to preserve the evidence.²⁶ Mayella, discovered and thus already exposed to shame, avoided taking steps that might have produced exculpatory evidence, and this omission sheds light on Mayella’s credibility. Of course, what she is hiding – her father’s violence – she is intimidated into hiding. She should not have been the object of contempt, and this incident should have been resolved by rescuing her from her abusive home.

Mayella is allowed to end her testimony with an irrelevant rant and then to refuse to say any more. According to Scout (who has some strangely age-inappropriate insight into the legal system):

²¹ Susan Brownmiller, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975).

²² *Id.* at 212.

²³ See Lee, *supra* note 1, at 11.

²⁴ See *Coker v. Georgia*, 433 U.S. 584 (1977).

²⁵ Lee, *supra* note 1, at 232.

²⁶ See Estrich, *supra* note 20, at 21.

I guess if she hadn't been so poor and ignorant, Judge Taylor would have put her under the jail for the contempt she had shown to everybody in the courtroom.²⁷

But why does Atticus not seek a remedy when she refuses to testify? Perhaps he knows the judge too well: Judge Taylor disapproved of lawyers who called too much attention to the niceties of procedure.²⁸ Perhaps it was strategic: Mayella's refusal to continue to testify, like her refusal to seek medical attention, made her look even more like a person with something to hide. But had Atticus persisted in drawing out the truth about Mayella's life, evidence of Bob Ewell's crimes might have emerged. Mayella was a victim, not of rape, but of domestic violence, and by not pressing forward in extracting more evidence, Atticus (perhaps appropriately focused on his client) ends up protecting Bob Ewell, who can apparently not only hunt out of season but beat his children with impunity. This is part of the Atticus model: toleration of an imperfect world and acceptance of the limited effect of one's proper performance of one's own assigned role.*1369

Does Atticus torture Mayella as Professor Lubet writes? Again, I would point to the rabid dog incident. Dropping the dog in one shot is not torturing the dog. Indeed, to choose Atticus for the job is to choose to minimize unnecessary suffering. There is nothing of the sadist in this picture of Atticus after he finishes in cross-examining Mayella:

Atticus had hit her hard in a way that was not clear to me, but it gave him no pleasure to do so. He sat with his head down, and I never saw anybody glare at anyone with the hatred Mayella showed when she left the stand and walked by Atticus's table.²⁹

There is no glee or triumph here, just the weary completion of a task by a dutiful man with a role to play. Atticus Finch *is* an example: a man who has found a way to live and work as a good person in a deeply flawed society.

²⁷ Lee, *supra* note 1, at 200.

²⁸ See *id.* at 201.

²⁹ *Id.* at 200.