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A REACTION: “STAND UP, YOUR FATHER [A LAWYER] IS PASSING”

*Burnele V. Powell**

Professor Steven Lubet’s review examines in the lawyering context the truth of Duc de La Rochefoucauld’s observation that “[o]ur virtues are mostly but vices in disguise.”¹ His question — one going to the very heart of what lawyering is about — asks readers of *To Kill a Mockingbird* whether they would be equally prepared to accept the fictional Atticus Finch as the personification of the good lawyer if his black client, defendant Tom Robinson, actually committed the rape of the white woman, Mayella Ewell, for which he was charged. If Robinson was a rapist, how then does one square Atticus’s aggressive blame-the-victim defense with his heroic, defender-of-the-innocent personae?

Asked this way, the issue is essentially the one posed rhetorically some time ago by Professor Wasserstrom: Why is it so plausible to talk about the amorality of the lawyer who represents all clients irrespective of their moral character?²

One answer, of course, is the one that is scoffed at as little more than a rationalization by Wasserstrom³ and marginalized as belonging to the “adversary system purist” by Professor Lubet⁴. In the harshest view, what is said to be involved is a willingness of lawyers, like actors cast in leading roles, to play the role of advocates. Like Gregory Peck, Robert Duvall, Harrison Ford, Richard Gere, or Ian McGlathlen, lawyers are amoral participants in a theatrical social production called a criminal trial. The play is the thing. They are divorced from moral, ethical, or social accountability for their amoral soliloquies. Their courtroom posturing is tolerated because under our system, the lawyer’s duty is, by definition, to play the role of the zealous advocate for his clients.⁵

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1. THE MAXIMS OF THE DUC DE LA ROCHEFOUCAULD 31 (Constantine Fitt Gibbon trans., Allan Wingate Ltd. 1957) (1678).

2. See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RTS. 1, 2-15 (1975).

3. See *id.*

4. Steven Lubet, *Reconstructing Atticus Finch*, 97 MICH. L. REV. 1339, 1355 (1999).

5. “We have all heard it said that, ‘an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons . . . is his first and only duty; and in

More sympathetically stated, a close variant of this view does not deny the moral, ethical, and social dilemma in which lawyers who defend the “indefensible” must find themselves. In this view, however, lawyers who commit to the representation of the unholy criminal defendant know in their heart of hearts that they are doing wrong, but accept a sort of social pass. They are not to be held answerable for their hypocritical advancing of arguments that serve their clients, regardless of the conflicts posed by their personal moral, and ethical views, because, as a society, we have asked them, and ourselves, to refrain from such condemnations.⁶

Lubet’s critique of Atticus Finch, however, prompts a third, and I think ultimately more satisfying answer. Whether Atticus is seen through his daughter’s loving eyes or Lubet’s reconstruction through cross-examination, an underlying truth remains: There is simply nothing immoral, amoral, or hypocritical about good people advancing interests that are incidentally shared by bad people. Moreover, to the extent that a good person would be a good lawyer, attorneys must, by definition, maintain fealty to a code of professional behavior that is uniquely demanding. That code, in large part because it has been established through open and critical public debate, however, leaves little room to maneuver on many of the most important moral and social concerns of the day. Thus, the challenge is that it commands adherence by lawyers to demanding and often intentionally self-critical standards. In this sense, the lawyer, like Atticus Finch, who continuously acts to uphold principle — especially in the face of public disapprobation — has by any worthy definition acted heroically on behalf of his client, the judicial system, and the larger society.

This is not to argue that the lawyer who satisfies this — shall we say, *democratic* — description of heroic lawyering obviates the possibly related need to answer for his or her *moral* obligations. It concedes only that whatever the strength of the moral claims, they rest on a priori assumptions that would necessarily force any examination of a lawyer’s ethics outside the practical range of public discussion.⁷

Confronted, though, as an issue of public discussion — one in which we can confront head-on the kinds of questions that Lubet raises precisely because the democratic process has, or has not, anticipated their interjection — our critique can be as starkly stated

performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.” *Id.* at 1355-56. (quoting TRIAL OF QUEEN CAROLINE 8 (1821)).

6. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. 3 (1997); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-27 (1980).

7. See Burnele Venable Powell, *Risking the Terrible Question of Religion in the Life of the Lawyer*, 66 FORDHAM L. REV. 1321 (1998) (exploring the possible tension between a lawyer’s professional ethical duty and the moral obligations imposed by his or her religion).

as his concerns. We must admit, as Lubet seems ultimately prepared to do, that the “she wanted it” defense, the “pig farmer’s daughter suspicion,”⁸ the invocation of the imagery of lynching (“high-tech,” or otherwise), and the myriad of other fancy and fanciful defenses and prosecutions that may be available have a place in our system of criminal justice. We must constantly remind ourselves, however, that theirs is a limited place.

In taking the measure of Atticus Finch, therefore, our analysis must begin with an effort to take a measure of ourselves. Atticus, or any lawyer for that matter, begins that larger examination by first asking himself whether he is up to the expectation that the lawyer’s oath commits him.

Lubet has aided the cause of societal and self-examination by deftly showing the plausibility of an alternative reading of Harper Lee’s classic. Not to be missed, however, is that what makes Lubet’s challenge to weigh the virtues of Atticus Finch plausible is Lee’s initial willingness to infuse her work with the particulars and imagery of the flawed society that she shows us through Scout — one steeped in racism, sexism, classism, and virtually every other negative “ism” imaginable.

In this context, the issue of Atticus Finch’s heroism, basic goodness, and professionalism can only be resolved in one way. For if we accept, as Lubet would have us do, that Atticus, like Scout and like the reader, is capable of recognizing the biases — good and bad — that permeated his society, we must be equally capable of understanding why his heroism and standing as the paradigmatic lawyer is not diminished regardless of the guilt or innocence of his client. Atticus does not succeed because he sets an innocent man free, but because he insists, as must every lawyer, on the freedom to make the arguments within the bounds of law that are necessary for the full ventilation of issues in a criminal case. In other words, Atticus is not a hero because he won for Tom Robinson, but because, in providing Tom Robinson the kind of defense that we, as a society, have defined as desirable, he won for all of us.

8. See MARY FRANCES BERRY, *THE PIG FARMER’S DAUGHTER AND OTHER TALES OF AMERICAN JUSTICE: EPISODES OF RACISM AND SEXISM IN THE COURTS FROM 1865 TO THE PRESENT* (1999).