RESPECTING ATTICUS FINCH, AND SCOUT

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[This informal essay is written for the ABA Professional Responsibility program June 2, 2011. Attached are citations to some works that expand on these themes, and also some material I have written on this subject.]

Mary Murphy's magnificent documentary shows us many different ways in which to see To Kill a Mockingbird. Women identify with Scout, and her struggle to find and be who she knows she can be, in a mid-century Alabama town. Some lawyers and some men identify with Atticus, and in different ways. Those of us who have tried cases that excite community sentiment see him as an example of what lawyers ought to do. But even those who are not lawyers can identify with his quiet dignity and courage, a kind of echo of Raymond Chandler's encomium to the hero of noir detective fiction:

> Down these mean streets a man must go who is not himself mean, who is neither tarnished nor afraid. The detective must be a complete man and a common man and yet an unusual man. He must be, to use a rather weathered phrase, a man of honor. He talks as the man of his age talks, that is, with rude wit, a lively sense of the grotesque, a disgust for sham, and a contempt for pettiness.

Most people at this ABA conference on professional responsibility were not of age, or not even born, when the novel was published in 1960. I was in college, already set on a career path that has led me to where I am today. I had read all I could by and about Clarence Darrow.

But we do well to recall what was going on in 1960, and where it was leading. On February 1, students began the sit-in movement, which spread throughout the South and led to sympathy picketing in the North. Freedom Rides, freedom marches, voter registration – a civil rights movement moved, from the courts and into the streets. Summer 1964 was Freedom Summer in Mississippi. White racists responded with murder and arson – more than 100 black churches were set afire, and three white civil rights workers were killed by Klan members who were also in "law enforcement." One symbol of those times was that the iconic artist Norman Rockwell left the Saturday Evening Post and did covers for Look, bringing us his unique and compelling view of racism in America. At the same time, the women's movement and student movement stirred. The Vietnam war was being escalated as were protests it and against conscription to fill the ranks.

To Kill a Mockingbird succeeds because it captures something about the time it describes, the time "just before" the world began the change in so many ways.

Scout's Epiphanies – And Ours

Scout is struggling to be herself. But who is she? She refuses to fit the mold in which others see young white women of her class. She is not, however, immune from her own fears and prejudices about people who are different. She sees Boo Radley as "the other." She hardly sees and appreciates the situation in which African-Americans find themselves. So one lesson of this book is to see the dangers of typecasting people who are different from ourselves and then basing our actions towards them on our own fears. We have seen and are seeing fear-mongering about African-Americans, non-citizens, Muslims and those accused of crime. As lawyers we have a special responsibility to understand the harm that this fear-mongering can do to the search for justice.

We also have a special responsibility to acknowledge that the organized bar has been responsible for fostering its own set of exclusionary values and rules. Those at this conference are concerned with "professional responsibility" and "ethics." Note that the codes by which we live now bear the first of these names. In the early 20th century, when the ABA was formulating "ethics," it did so in a conscious effort to define the profession as composed of white Christian men. African-Americans and women were generally excluded. And such ABA luminaries as Henry Drinker and Walter George Smith spoke openly of how "the ancient race" and "Russian Jew-boys" were sullying

the profession's image.

Scout's epiphanies about racism and fear remind us that the bar has never had “ethics,” properly so-called. As Barrows Dunham has explained:

> Ethical theory differs from moral codes. The codes are lists of admonitions, with little or no account of why they are binding. But ethical theory undertakes to explain in some detail the principle of right decision, of how one ought to make up one's mind. Throughout this enterprise moves an effort to escape bias. Mathematics and other sciences assert, or try to assert, what is the case, regardless of what anyone wishes were the case. Similarly, ethical theory asserts, or tries to assert, what ought to be chosen and done, regardless of what anyone wishes were chosen and done. For, just as the darkling flow of appetite and apprehension can dim awareness of the world we act in, so also it can dim awareness of what and how to decide. To pierce the shell of the self is, in ethics or the sciences, a primary task, so that the self, emerging, may know the world and what to do about it.
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> There are rules for all of this, and since they are still debated, I suppose we must regard them as tinged with doubt. But the odd fact is that there is less doubt about the rules than there is doubt about our recognizing when the rules have been successfully applied.

A set of rules about how the profession sees the profession is inevitably solipsistic.

Atticus the Lawyer

Atticus represents an African-American for very little if any compensation. Lawyers salute him because he accepts and discharges his obligation to serve his community. Yet no professional responsibility rules of which I am aware impose on lawyers an enforceable duty to perform pro bono service. When a court appoints a lawyer in a criminal case, there is a duty to serve, but absent such an appointment, there are only aspirational statements of hope.

In Mallard v. United States District Court, the Supreme Court heard and sustained a challenge to the district judge appointing a lawyer to serve in a civil case involving constitutional rights. The Justices hoped that lawyers would respond to such requests, but denied district judges the power to compel. The California Bar, in an amicus by Morrison and Foerster, argued that it was not only wrong but unconstitutional to compel lawyer service. The Association of the Bar of the City of New York, in an eloquent brief by John Koeltl and Ogden Lewis, argued that judges do and should have that power. All of these briefs can be read on-line. So one ethical or professional responsibility question in this book is whether the organized bar should put some teeth in its proclamation that lawyers defend liberty and seek justice, or else amend the statement to add “but only for money.”

Put more clearly into the context of today's program, should the bar's rule have put a duty on Atticus?

Even if the rules do not compel lawyers to act, the bar's leaders should surely act swiftly and emphatically to support lawyers who are doing as Atticus did. Lawyers who take on representation of the hated “other” are bound to suffer pubic obloquy and even financial harm. We all know this to be so. I have endured it over the years, in case after case.

Recently, lawyers defending those held at Guantanamo and similar facilities have been the targets of abuse from influential voices. These courageous lawyers are speaking up for victims of torture, unlawful detention, denial of judicial review and a host of other crimes. And yet we see the Chief Judge of the United States Court of Appeals for the Second Circuit mocking and deriding their efforts. Judge Dennis Jacobs also opines that the military commission trials are probably fair, although he admits he does not know much about this subject and he cites only an old and irrelevant quip from F. Lee Bailey to support his view. One wonders when is the last time a judge quoted F. Lee Bailey as an authority on anything. The attacks on lawyers are also an attack on the rule of law, and on the basic idea of peremptory norms that forbid such things as torture. One undercurrent of To Kill a Mockingbird

is that the established voices of the white community fail in their obligation to uphold the law in all the meanings of that phrase.

At Tom Robinson's trial, Atticus deploys his skill as advocate and cross-examiner. He dares to suggest that a white woman could desire sex with an African-American man. In Alabama at mid-century, Atticus was speaking against a social consensus reflected in legal rules. At that time, ambiguous behavior by African-American men in the vicinity of white women was very likely to be charged as attempted rape. And jurors would be told that African-American men naturally desired to ravish white women, who in turn would naturally be horrified at any sexual liaison with "the other." It was 1967 before the Supreme Court struck down laws criminalizing marriage between the races.

So Atticus presents us the inspiring picture of an ordinary country lawyer using the arsenal of adversary system weapons as courageously as could be. This is a lawyer in the image of Lord Brougham, who was warned that his defense of the Queen might imperil the monarchy:

> I once again remind your lordships, though there are some who do not need reminding, 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 at all hazards and costs to all others, and among all others to himself, is his first and only duty. And in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Nay, separating the duty of patriot from that of an advocate, he must go on, reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

A More Prosaic Side to Atticus's Work

In 1986, the ABA Journal published an article on lawyer discipline. 15% of lawyer suspensions and disbarments were occasioned by lawyer failure to "follow through" with cases, and another 8% dealt with so-called "simple" failures to communicate. The article focused some attention on the problem of the overworked solo and small firm lawyer, and even quoted a solo practitioner who complained that in a busy practice "the volume of work is almost impossible to keep up with." By coincidence, the quoted lawyer was the target of an ineffective assistance of counsel motion several decades ago. Chief Judge Bazelon of the D.C. Circuit appointed me to represent the client, and I had this solo practitioner on the stand for a few hours.

Here, I dare to suggest, is the point where Atticus's courage and the life of every lawyer meet. Almost every client of every lawyer is "the other," in the sense that the client confronts a strange system of rules and procedure in which obtaining justice is possible only with help of an educated professional. The lawyer, himself or herself, is the only bridge between the alienated client and that system. The lawyer suffers from the perceived difficulty of being part of the foreign system, and so faces the dual obligation not only of tracing a path for the client, but of acting in a way that convinces the client that justice is at least being sought, even if it will not be "done" at the end of the day.

I have written about this idea of alienation in my submissions to the Inter-American Commission on Human Rights, in the case of an African-American sentenced to death. I append those observations, for they contain citations to work showing that the problem is not limited to capital cases or those involving race.

If we accept this idea that the client is "the other," then the responsibility of those who enforce the disciplinary rules becomes clearer. The lawyer must take every case seriously, seeking to understand the ways in which the client might have a chance at justice. (This after all, is or should be the distinguishing feature of all societies since World War II ended. As Camus remarked to a friend, "Qu'est-ce sauver l'homme? Mais je vous le crie de tout moi-même, c'est de ne pas le mutiler et c'est donner ses chances à la justice, qu'il est le seul à concevoir." That is, in a sort of free translation, What is it that will save humanity? I cry out with all my being, that it is that we not mutilate it, and that we give it a chance to achieve justice, which it is the only race of beings to have imagined.

The lawyer must not only take this obligation seriously, but must show by word and deed that he or she is doing so. If this is indeed a lesson of To Kill a Mockingbird, then the bar would be especially vigilant about complaints of lawyer indolence or unconcern. Many of these complaint may indeed be unjustified dissatisfaction at results, but that should not deter.

The True "Ethics" of Atticus and Scout

A true code of ethics cannot be self-referential, for ethics consists in thinking outside own's self and self-interest. Moreover, to regard ethical choices as unverifiable value choices ignores that the choices we make are the product of our own historical, cultural and social circumstances. The question is how much we will trouble ourselves to listen to, study, and act upon the compelling evidence of human need that surrounds us.

Atticus Finch is a good person. The qualities that make him so are well beyond his being a lawyer, but those qualities made him the lawyer whose work we respect and whose example we may wish to follow. He is a respected voice in his community. He gets home for dinner almost every night, with his daughter. He lives his life, and is seen to live his life. Like all of whose lives and work are visible to others, he is condemned to signify. He is, in George Winthrop's words, the city upon the hill.

Law professors: can we offer to our students the prospect of a life of community respect, action for justice, and personal fulfillment? Bar activists: can we honestly describe a profession in which these are the norms? Lawyers: is that what you are doing and seeing your colleagues do? In the ABA book, Raising the Bar, I wrote an essay collecting the evidence of professional dissatisfaction its causes. I offered some suggestions. I noted that billable hour expectations of 2000 hours and more are at war with developing a meaningful personal life. I observed that respect for and encouragement of pro bono efforts by young lawyers if far from the norm.

Since I wrote that chapter, the economic landscape for lawyers has become even more dismal. The consequences are being visited most harshly upon young lawyers, as associates are being laid off in record numbers and law students finding job opportunities shrinking. In the public service and public interest sectors, the long curve of declining funding has become steeper.

Can a profession be expected to serve its clients well, and to take on the responsibility to seek justice for the unrepresented, when it is visibly engaged in devouring its own? What would Atticus say?

CITATIONS

Books from ABA Press:

Michael E. Tigar, Nine Principles of Litigation and Life (2009)

Michael E. Tigar, Fighting Injustice (2003)

Essay, The City Upon the Hill, in book RAISE THE BAR: REAL WORLD SOLUTIONS FOR A TROUBLED PROFESSION (Lawrence J. Fox ed. 2007)

Other Books:

Trial Stories (Tigar & Davis eds.)(2008) This Foundation Press book contains chapters about many iconic trials and includes my chapter on the Nichols case.

Robert A. Ferguson, The Trial in American Life (2007). Robert Ferguson holds a dual appointment at Columbia. This is a magnificent study of important trials, beginning with the Aaron Burr case.

Roland Barthes, Mythologies. This book is available in English and French under the same title. The essay on the trial of Domenici is a classic.

Other materials:

Levine, REDISCOVERING JULIUS HENRY COHEN AND THE ORIGINS OF THE BUSINESS/PROFESSION DICHOTOMY: A STUDY IN THE DISCOURSE OF EARLY TWENTIETH CENTURY LEGAL PROFESSIONALISM, 47 Am. J. Leg. His. 1 (2005).

Essay, Lawyers, Jails and the Law's Fake Bargains, Monthly Review, July/August 2001. This article

deals with the issues in appointed counsel representation.

Two Trials in and about Chattanooga – Lynching and Federal Judicial Power, Litigation, Spring 2000, p. 49. This is a review of Mark Curriden's superb book on the Shipp trial

The Most Impertinent Question, Litigation, Spring 2003. More on lawyer duties.

APPENDIX

An excerpt from my IACHR affidavit:

In exhorting jurors to impose death, prosecutors must try to make them feel that doing so is just and right. At bottom, the prosecutor asks each juror to endorse with her name an order directing the State to tie down a human being and put poison in his veins until he is dead. Most jurors will not take that step unless they are convinced that this particular human -- the defendant -- has become the "other," the not-human, unfit to remain in human society.

Capital defense attorneys sometimes speak of "humanizing" the defendant, a phrasing that reflects the dominant cultural narrative that regards crime as an evil act by an autonomous individual. No defendant needs "humanizing," as he is quite human already. I would say instead that defense counsel's task is to *reclaim* and *assert* the defendant's humanity *in its fullness*. Counsel must lead the jurors not simply in pursuit of some sensible understanding of how the defendant could have come to commit murder, but also so that they come to see the defendant as more than just the author of his crime – as a person with strengths and frailties, and whose life has value that makes it worth sparing.

Mr. Hall's trial attorneys carried with them the attitudes and experiences of the *dominant culture*: they were Anglo men, educated professionals, in positions of authority, commanding respect. But those very traits separated them sharply from Mr. Hall, an African-American man who emerged from poverty and deprivation, raised in a turbulent household in a racially striated community, his opportunities for self-transformation constrained by a culture marked by generations of loss and hopelessness. Trial counsel were part of the same dominant culture reflected in the court and jury, and they did almost nothing to overcome their lack of information.

To put this issue in context, it is well to reflect that this is a commision on "human" rights. The American Declaration reflects the historical truth that the struggle of the Americas has largely been that of indigenous and minority peoples against the dominant culture. Every State in the Americas was at one time a colony. Particularly with respect to the African-Americans who were brought to the Americas as slaves, the Commission has commendably recognized the special obligations of member states. The papers before you cite some of these efforts.

The lawyer's role in bridging the gap between her client and the "deciders" in the dominant culture has been recognized as fundamental for centuries. In my own work, I have documented this concern going back to the 13th Century in the work of Philippe de Beaumanoir, and one finds a discussion of the issue as early as the Roman satirist Petronius, in the *Satyricon*. The Commission has recognized counsel's obligation in, for example, the Castillo case that arose in Cuba.

Applying these principles to the present case, Mr. Hall's trial attorneys had a duty to pursue a far-reaching investigation into their client's character and background not simply because a long-settled consensus in our professional community requires it – as reflected in the guidelines adopted since 1989 by the American Bar Association regarding the proper defense of capital cases, which the Commission has acknowledged in its earlier decisions – but because the *audience* to which they would *appeal* for Mr. Hall's life, the jury, was likely to be as different from Mr. Hall as counsel themselves. Reasonably competent counsel in 1994 would have anticipated the need to assemble every piece of evidence that might persuade a single juror to turn towards life as a result of having seen Mr. Hall's humanity "up close" and in rich, anecdotal detail. That is even more true where, as here, the jury was all-white.

From my post-hearing affidavit:

The prosecutor, as I noted, is trying to convince the jury that this defendant is the "other," unfit to live in human society. Defense counsel must present evidence and argument that makes the human connection between the jurors and the accused. The lawyer representing Orlando Hall – or any "Orlando Hall" – must convey both the universal message that the jury and the defendant share a common humanity, while painting the particular struggle of this black American who grew up in this particular way, in this particular place, under these specific conditions. Only thus can counsel help the

jury avoid what Du Bois described a century ago: the majority society's reflexive tendency to measure the African-American soul "by the tape of a world that looks on in amused contempt and pity." W.E.B. Du Bois, THE SOULS OF BLACK FOLK (1903).

For millennia, lawyers have understood how different cultures and experiences shape expectations and conduct. One important thread of legal development in the West is how to accommodate the strands of continuity, diversity, and change. The Roman legal tradition, and later the canon law, sought such accommodation through restatements, "institutes" and collections of commentary. Indeed, Roman law in the classical period sought to accommodate the differing legal traditions of the various peoples within the Empire as part of a *ius gentium*, or law of all peoples, administered by a *praetor peregrinus* appointed to that task. The common law tradition moved differently, but faced the same challenges. Such institutions as the "personality of laws," which prevailed in Europe for centuries, reflected this aspect of lawyers' work. The competing secular, religious, feudal and royal jurisdictions also showed us how social, cultural and political differences may operate in civil society. This historic role of lawyers forms an important shared tradition. I have discussed this at some length in my book LAW AND THE RISE OF CAPITALISM (1977).

With specific reference to advocacy on behalf of the accused, in the earliest records we have, we see a developing idea of presenting a "stranger" to the deciders. The stranger may be someone who lives in the same community as the jurors, but whose profession, race or other characteristics set him apart from them. See my discussion of Cicero's *Pro Murena* in my book PERSUASION: THE LITIGATOR'S ART (1999) at 21. This issue has been brilliantly captured in Roland Barthes' essay *Dominici ou la Triomphe de la Litterature*, discussed in PERSUASION at 4-5, and contained in Roland Barthes, MYTHOLOGIES (Editions de Seuil 1957) at 50. I do not dwell at length on this history, for modern developments shed more light on the topic. It is worth noting that Philippe de Beaumanoir, in 1283, remarked in his treatise *Coutumes de Beauvaisis*, of the gap between the life experiences and modes of expression of the common man versus the lawyer, and the latter's need to seek to understand his client's situation. The Church canonized Ivo of Brittany – St. Ives (1253-1303) – in 1347 because he was a relentless advocate for the poor.

Let me turn, however, to the developments since World War II, which show an international consensus that is reflected in *opinio juris*, state practice, international custom, and relevant treaties. To save time, I refer to my colleague Richard J. Wilson's magnificent book DEFENSE IN INTERNATIONAL CRIMINAL PROCEEDINGS: CASES, MATERIALS AND COMMENTARY (2006) (Michael Bohlander and Roman Boed, co-editors), particularly Chapter 2, "Procedural Safeguards for the Defense in International Human Rights Law." Professor Wilson traces relevant history and notes the role and responsibilities of counsel from the Nuremburg tribunals, through the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. He also discusses the American Declaration, and reminds us of the issues that Petitioner confronts in this hearing. One should also review the sentiments in Chapter 1 of the book, by Michael Bohlander, reminding us of the special dangers when a person on trial is regarded as a "stranger," the "other." See also my discussion in PERSUASION at 25-27.