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2016

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THE TRIAL OF TOM ROBINSON

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I. INTRODUCTION

Atticus Finch is a modern day saint. Ever since the publication of *To Kill a Mockingbird*¹ in 1960, followed by the release of the movie in 1962,² the fictional character of Atticus Finch has been lavishly praised and widely admired.³ This is especially so for many lawyers, who regard Atticus as a role model and cite him as an antidote against those who would denigrate the legal profession. Mike Papantonio, a trial lawyer, wrote: “Atticus Finch represents what I believe to be the best of what being a lawyer is all about. If we understand Atticus, we will better understand ourselves.”⁴ Scott Turow, an author and lawyer, said “it’s true that there aren’t many human beings in the world like Atticus Finch, perhaps none. But that doesn’t mean that it’s not worth striving to be like him.”⁵ Morris Dees, the well-known civil rights lawyer wrote:

Atticus helped change my life. I graduated from law school in 1960 and, within three years, I had over a hundred open files, had lost my sense of humor and was seeking another way to make a living. I had dreamed of being a lawyer . . . helping people win justice and making my self a good living, but I was not pleased with what law practice was doing to me as a person.

On a warm June night in 1966, I saw *To Kill a Mockingbird* at a local drive-in theater. The Civil Rights Movement was happening all around me and I was sitting it out. When Atticus Finch walked out of the empty courtroom after the jury ruled against his client and the upper gallery, still packed with black folks, rose in his honor, tears were streaming down my face. Why couldn’t I be a lawyer like Mr. Finch?⁶

The list of tributes goes on and on.⁷ The list extends to luminaries, such as Tom Brokaw, who praises Atticus’s wisdom shown in talking with his daughter about

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1. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

2. *TO KILL A MOCKINGBIRD* (Universal Studios 1962).

3. See, e.g., HEY BOO: HARPER LEE & *TO KILL A MOCKINGBIRD* (First Run Features 2011) [hereinafter HEY BOO].

4. MIKE PAPANTONIO, *IN SEARCH OF ATTICUS FINCH* 10 (1995).

5. HEY BOO, *supra* note 3, at Ch. 6 (Atticus).

6. Morris Dees, *Foreward* to PAPANTONIO, *supra* note 4, at 6-7.

7. See generally Thomas L. Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT. L. REV. 181 (1981); Thomas L. Shaffer, *Growing Up Good in Maycomb*, 45 ALA. L. REV. 531 (1994); Lance

why he must defend Tom Robinson,⁸ and Andrew Young, who sees Atticus as representative of the white lawyers who helped bring about the civil rights revolution in the courts,⁹ and Oprah Winfrey, who is in awe of the powerful scene where Atticus walks out of the courtroom after the verdict has been rendered.¹⁰

But there has been some resistance to the canonization of Atticus Finch. Professor Monroe Freedman, whose own advice for lawyers was to “make a difference,”¹¹ argued that on many levels, Atticus failed to make a difference. Atticus served in the state legislature, yet did nothing for civil rights.¹² He was an important figure in the legal community, yet did not fight for desegregation of the courthouse, nor did he represent pro bono clients or voluntarily undertake a death penalty appeal. In fact, he only took on the defense of Tom Robinson pursuant to a court order.¹³ As a citizen, he was tolerant of the oppression practiced against his African American neighbors, downplayed the role of the Ku Klux Klan, and was apologetic for those whose meanness and bigotry went much further than privately-held beliefs.¹⁴ Professor Stephen Lubet has written critically of Atticus’s performance as a lawyer in the case.¹⁵ He considered the defense of Tom Robinson from several different angles, including the possibility that the defendant was indeed guilty, and found Atticus to be less than a moral and ethical paragon.¹⁶ Lubet was most critical of Atticus’s closing argument that put the blame on the complaining witness, Mayella Ewing.¹⁷ In 2009, author Malcolm Gladwell reached a wider, non-legal audience with his

McMillian, *Atticus Finch as Racial Accommodator: Answering Malcolm Gladwell*, 77 TENN. L. REV. 701 (2010); William J. Chriss, *The Noble Lawyer Paradigm*, 75 TEX. B.J. 50 (2012); *Who Is Your Atticus Finch?*, 73 TEX. B.J. 483 (2010); Talmage Boston, *Who Was Atticus Finch?*, 73 TEX. B.J. 484 (2010); Bill Haltom, *The Trial of Atticus*, 45 TENN. B.J. 34 (2009); Carla T. Main, *Learning From Atticus Finch*, 43 ADVOC. (IDAHO), Oct. 2000, at 24; Hon. W. Erwin Spainhour, *I Found Atticus Finch*, 46 R.I. B.J. 17 (1998); Marie Failingier, *Gentleman as Hero: Atticus Finch and the Lonely Path*, 10 J.L. & RELIGION 303 (1994); Cynthia L. Fountaine, *In the Shadow of Atticus Finch: Constructing a Heroic Lawyer*, 13 WIDENER L.J. 123 (2003); Robert W. Mayhue, Jr., *Crisis of Conscience: Lessons Learned From Legal Literature Through an Analysis of To Kill a Mockingbird and Intruder in the Dust*, 46 S.D. L. REV. 813 (2000-01).

8. HEY BOO, *supra* note 3, (“The small town, the personal relationships, the place of a lawyer, the place of race in the South, it’s all encapsulated in that. And, again, [Atticus] wasn’t mounting some altar to give her a sermon.”).

9. *Id.* (“For me, [Atticus] represents a generation of intelligent, white lawyers, who eventually in the 50s and 60s became the federal judges that changed the South. Really, without them, we would not have had a civil rights movement.”).

10. *Id.*

11. Andrew E. Berman, *The Passing of Prof. Monroe H. Freedman, Hofstra’s 2nd Dean*, HOFSTRA LAW NEWS (Feb. 26, 2015), <http://lawnews.hofstra.edu/2015/02/26/the-passing-of-prof-monroe-h-freedman-hofstra-laws-2nd-dean/>.

12. Monroe H. Freedman, *Atticus Finch—Right and Wrong*, 45 ALA. L. REV. 473, 481 (1994).

13. *Id.* at 480.

14. *Id.* at 479-80.

15. See Steven Lubet, *Reconstructing Atticus Finch*, 97 MICH. L. REV. 1339, 1362 (1999) (concluding that Atticus improperly relied on “cruel stereotypes” and played “the gender card”).

16. *Id.* at 1347-50.

17. *Id.* at 1351 (“It was against this backdrop of wariness and condescension that Atticus Finch, rightly or wrongly, designed his defense to exploit a virtual catalog of misconceptions and fallacies about rape, each one calculated to heighten mistrust of the female complainant.”).

iconoclastic essay in *The New Yorker*, echoing many of the concerns articulated by Professor Price and Professor Lubet.¹⁸ Gladwell took down the popular hero in this summary:

Finch wants his white, male jurors to do the right thing. But as a good Jim Crow liberal he dare not challenge the foundations of their privilege. Instead, Finch does what lawyers for black men did in those days. He encourages them to swap one of their prejudices for another.¹⁹

There are now several other critical accounts that have emerged in the academic writings, taking on Atticus and finding him wanting from the various perspectives of race, class, and gender.²⁰ One might even conclude that the matter is “trending” against Atticus, at least in academia.

The trial of Tom Robinson is important because it raises serious questions, both then and now, about race and justice in America. How does one represent a client whose very identity seems to preclude an honest consideration of the facts by those who are deeply invested in a non-factual narrative? How is the duty of zealous representation to be weighed against other concerns that might restrain certain types of advocacy? What is the larger duty of a lawyer within the community, especially when that community has serious moral problems? What do we learn when justice does not prevail? These questions go to the core of what it means to be a lawyer and also how one is to live as a good citizen in a less than perfect society. This article addresses these questions in the context of this remarkable novel.

II. THE SETTING

In the opening of *To Kill a Mockingbird*, the narrator, Atticus Finch’s daughter, Scout, recalls an incident that occurred near the end of the novel: “When he was nearly thirteen, my brother Jem got his arm badly broken at the elbow.”²¹ This leads to a discussion of how this injury came about. Scout said it started with the Ewells. Jem maintained, however, that it started three years earlier when their friend, Dill, proposed to make a recluse, Boo Radley, “come out.”²² Scout replied that, if you take the long view, then it started with Andrew

18. Malcolm Gladwell, *The Courthouse Ring*, THE NEW YORKER (Aug. 10, 2009), <http://www.newyorker.com/magazine/2009/08/10/the-courthouse-ring>.

19. *Id.*

20. See Robert Baley, *Atticus Finch, Boris A. Max, and the Lawyer’s Dilemma*, 12 TEX. WESLEYAN L. REV. 389, 391, 394-96, 399, 411 (2005); Michael L. Boyer, *Atticus Finch Looks at Fifty*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 356, 358 (2012); Teresa Godwin Phelps, *Atticus, Thomas, and the Meaning of Justice*, 77 NOTRE DAME L. REV. 925, 931 (2002) (reconsidering the traditional characterization of Atticus due to his different treatment of African Americans based on their social class); Peter Zwick, *Rethinking Atticus Finch*, 60 CASE W. RES. L. REV. 1349, 1355 (2010). See generally Teresa Godwin Phelps, *The Margins of Maycomb: A Rereading of To Kill a Mockingbird*, 45 ALA. L. REV. 511 (1994) (discussing themes of African American class inequality as found in the novel).

21. LEE, *supra* note 1, at 3.

22. *Id.*

Jackson, whose Indian fighting eventually led the Finch ancestor, Simon Finch, to homestead in Alabama.²³ Atticus settled this dispute by saying they were both right.²⁴

Any account of the trial of Tom Robinson must deal with the question of where to begin. In the narrow sense, it began with the accusation that Tom Robinson, a black man, raped a white woman, Mayella Ewell. But, one cannot make sense of the trial that followed without some understanding of the context in which this played out in rural Alabama in 1935. If you take the long view, the trial of Tom Robinson started much earlier.²⁵ One might say it started when the first slaves were transported to the “New World.” Aptly described as America’s “original sin,”²⁶ this matter simply will not go away. Nor should it.

America has been, and still is, deeply conflicted about race.²⁷ By the time it asserted itself for independence against the English Crown that had long treated it as a colony, America was no longer a blank slate. Although it may not have been as encumbered with the limits of custom and culture as Europe, it had well over a century of experience with slavery within the colonies. The “peculiar institution”²⁸ was well entrenched, although far less so in the northern regions.²⁹ The conflict between slavery and assertions of American ideals may be seen in the founding documents.

The Declaration of Independence opens with the great statement of first principles:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on

23. *Id.*

24. *Id.*

25. Atticus himself had no illusions about the chances of winning:

[Scout]: Atticus, are we going to win it?

[Atticus]: No, honey.

[Scout]: Then, why—

[Atticus]: Simply because we were licked a hundred years before we started is no reason for us not to try to win

Id. at 86-87 (internal quotation marks omitted).

26. See George M. Fredrickson, *America's Original Sin*, THE NEW YORK REVIEW OF BOOKS (March 25, 2004), <http://www.nybooks.com/articles/archives/2004/mar/25/americas-original-sin/>; Scott Rohter, *The Scars of Slavery - America's Original Sin: The Crippling Legacy of Slavery and How America's Original Sin Still Affects Us Today* (last updated March 2014), <http://lessgovisthebestgov.com/crippling-legacy-slavery-americas-original-sin.html>.

27. See generally RICHARD KLUGER, *SIMPLE JUSTICE, THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1975).

28. See generally KENNETH STAMPP, *THE PECULIAR INSTITUTION* (1956).

29. KLUGER, *supra* note 27, at 30.

such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.³⁰

Wonderful statement, but what is to be made of the fact that the author of those lines was himself a slaveholder?³¹ Thomas Jefferson's own circumstances show the moral trap in which he found himself. He could not maintain his estate, consisting of over 10,000 acres, without the "assistance" of as many as 100 slaves.³² Yet he was deeply troubled by the practice of slavery.³³ The original draft of the Declaration also contained a denunciation of the Crown for having fostered the slave trade, but this was stricken through the insistence of others in the final version.³⁴

If the Declaration was primarily the product of a single mind, the Constitution was clearly the product of compromise among political players with widely divergent interests.³⁵ There was a shared interest in a stronger union, but there were many issues to be worked through, with give and take occurring all throughout the deliberations.³⁶ There were certain things that the South had to have regarding the issue of slavery. Foremost was the protection of the slave trade, but the North balked at protection of it in perpetuity. Ultimately, they settled on a period of twenty years in which Congress could not prohibit the slave trade.³⁷ They also sealed that deal with a limitation on constitutional amendments, which made the provision protecting the slave trade unamendable

30. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), *reprinted in* DOCUMENTS OF AMERICAN HISTORY TO 1898, at 100, 100 (Henry Steele Commager ed., 9th ed. 1973).

31. KLUGER, *supra* note 27, at 29.

32. *Id.*

33. Later, Jefferson wrote:

And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with His wrath? *Indeed I tremble for my country when I reflect that God is just; that his justice cannot sleep forever*; that considering numbers, nature and natural means only, a revolution of the wheel of fortune; an exchange of situation is among possible events; that it may become probably by supernatural interference! The Almighty has no attribute which can take side with us in such a contest.

THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (1782), *reprinted in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 187, 278-79 (Adrienne Koch & William Peden eds., 1944) (emphasis added).

34. KLUGER, *supra* note 27, at 29-30.

35. Jefferson himself later downplayed his role in the drafting of the Declaration, intimating in a letter written shortly before his death, that it was not intended to be original and represented instead "an expression of the American mind." Letter from Thomas Jefferson to Henry Lee (May 8, 1825), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, *supra* note 33, at 719, 719.

36. See, e.g., John P. Roche, *Constitutional Convention of 1987*, in 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 360, 360-66, 379-86 (Leonard W. Levy, Kenneth L. Karst & Dennis J. Mahoney eds., 1986); Leonard W. Levy, *Constitutional History, 1776-1789*, in 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, *supra*, at 376, 379-86.

37. U.S. CONST. art. I, § 9, cl. 1. This clause states:

The migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

Id.

for that same twenty-year period.³⁸ The other provision that the South insisted upon was a specific application of what became known as the Full Faith and Credit Clause. The South wanted the North to assist in the return of runaway slaves, and thus it required a process by which slaves could be returned, notwithstanding laws in the "Free Soil" states or local attitudes to the contrary.³⁹

The most controversial part of the Constitution is the infamous "three-fifths" provision, which has served as "Exhibit A" for the argument that the Constitution is irredeemably racist.⁴⁰ The provision counted slaves (non-free persons who were not bound for a term of years) as three-fifths of a person for purposes of representation in the House.⁴¹ The provision could be viewed as a statement about value or status of a slave in comparison to free citizens. However, this argument does not account for the politics of the situation. It is important to recall what was at issue. The question concerned representation in the House of Representatives. There was agreement on the principle of proportional representation, but here is where the interests become counter-intuitive. The South wanted to count all persons, including slaves, for purposes of determining how many House seats would be allocated to Southern states. The North, understanding as did everyone, that slaves would not be voting, argued against counting non-voters. The resulting compromise had nothing to do with a judgment about slaves as human beings, but about the allocation of political power. It was not about respect. The South did not respect slaves, yet it wanted to count them fully. The North was ambivalent on the status of slaves, but did not want to accede to greater political power in the South. The resulting three-fifths compromise led to less power for the slave holding states, as everyone at the time understood, but the symbolism was indeed horrible.⁴²

On the whole, the resulting Constitution, with all its compromises, could be defended. The North could justifiably argue on the issue of slavery that it cut the best deal it could while achieving the important goal of creating a stronger

38. U.S. CONST. art. V ("Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article . . ."). It should be noted that Congress did indeed prohibit the slave trade at the first opportunity to do so. See William M. Wiecek, *Prohibition of Slave Trade Act: 2 Stat. 426 (1807)*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, *supra* note 36, at 1483, 1483.

39. U.S. CONST. art. IV, § 2, cl. 3. This clause provides:

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Id.

40. KLUGER, *supra* note 27, at 32-33.

41. U.S. CONST. art. I, § 2, cl 3. This clause states:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

Id.

42. KLUGER, *supra* note 27, at 33.

union. The slave trade would eventually be cut off, and it was anticipated that the practice of slavery would ultimately be overcome by market forces. It was the judgment of many anti-slavery advocates that the compromises were justified because they stopped the growth of slavery and put it on a course of ultimate extinction.

How did the compromises work out? Not so good on the slavery issue, although it was not entirely the fault of the delegates at the Constitutional Convention. First, the twenty-year window for the slave trade was exploited like it had never been before. The importation of slaves increased more than three times over prior practices.⁴³ Second, technological innovation provided a game changer—the cotton gin. While it had seemed that slavery would eventually wither and die under the pressure of market forces, the cotton gin's efficiency in extracting the seed from the cotton ball made wide scale cotton production economically feasible once again. The revitalized Southern economy kept the political balance of power between the North and South alive and representation in the Senate became an important issue. From the Missouri Compromise of 1820 to the Kansas-Nebraska Act of 1850, attention was focused on the issue of new states entering the Union and whether they would be slave or free. Meanwhile, the conditions of slaves and the basic morality of slavery went unaddressed, at least in the halls of power.⁴⁴

The gap between the ideal expressed in the Declaration of Independence and the reality of slavery remained. In 1852, Frederick Douglass, a former slave, gave a Fourth of July oration that is unmatched in its power:

What to the American slave is your Fourth of July? I answer, a day that reveals to him more than all the other days of the year, the gross injustice and cruelty to which he is the constant victim. To him your celebration is a sham; your boasted liberty an unholy license; your national greatness, swelling vanity; your sounds of rejoicing are empty and heartless; your denunciation of tyrants, brass-fronted impudence; your shouts of liberty and equality, hollow mockery; your prayers of hymns, your sermons and thanksgivings, with all your religious parade and solemnity, are to him mere bombast, fraud, deception, impiety, and hypocrisy—a thin veil to cover up crimes that would disgrace a nation of savages. There is not a nation of the earth guilty of practices more shocking and bloody than are the people of these United States at this very hour.⁴⁵

Douglass's argument appeared to be confirmed by the United States Supreme Court's decision in *Dred Scott v. Sanford*.⁴⁶ Chief Justice Taney's

43. *Id.* at 35.

44. *Id.* at 35-37.

45. *Id.* at 37. This speech is probably the greatest antislavery speech ever delivered. See WHAT COUNTRY HAVE I? POLITICAL WRITINGS BY BLACK AMERICANS 28-38 (Herbert J. Storing ed., 1970); see also WILLIAM S. MCFEELY, FREDERICK DOUGLASS 172-73 (1991) (describing Douglass's preparation and the audience's reaction to his speech).

46. 60 U.S. 393 (1856).

opinion specifically denied that African Americans were intended to be included within the Declaration's statement that all men are created equal and added words that have left a permanent stain on the reputation of the Court: African Americans had for more than a century before been regarded as "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."⁴⁷ This reading undid Jefferson's great words and put the shameful stamp of white supremacy on that magnificent document. As horrifying as the *Dred Scott* opinion was, however, it served to strengthen the antislavery movement and propelled the newly formed Republican Party to success in the 1860 presidential election.⁴⁸

The conflict over race and slavery was part of a larger political struggle that could not be resolved short of a Civil War, which led to, in effect, a second American revolution. President Lincoln reflected on this transformation at Gettysburg, even as the War had not yet produced a definitive result. The new nation had been "conceived in Liberty, and dedicated to the proposition that all men are created equal."⁴⁹ The War was testing whether the nation, or any nation so conceived and dedicated, could long endure. It was Lincoln's hope that the outcome would be "a new birth of freedom—and that government of the people, by the people, for the people, shall not perish."⁵⁰ In his Second Inaugural Address, Lincoln also speculated that the Civil War may have come as the price for America's offense of slavery and that all wealth accumulated, as a result of slavery, might eventually be forfeited.⁵¹

47. *Id.* at 407.

48. See, e.g., DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW & POLITICS* 439 (1978).

49. Abraham Lincoln, *The Gettysburg Address* (Nov. 19, 1863), in *DOCUMENTS OF AMERICAN HISTORY TO 1898*, *supra* note 30, at 428, 428.

50. *Id.* at 429. The words of the Gettysburg Address specifically invoke the Declaration of Independence. See Eva Brann, *A Reading of the Gettysburg Address*, in *ABRAHAM LINCOLN, THE GETTYSBURG ADDRESS, AND AMERICAN CONSTITUTIONALISM*, at 15, 22 (Leo Paul S. De Alvarez ed., 1976). See also Glen E. Thurow, *The Gettysburg Address and the Declaration of Independence*, in *ABRAHAM LINCOLN, THE GETTYSBURG ADDRESS, AND AMERICAN CONSTITUTIONALISM*, *supra*, at 55. They also echo the rhetoric in the fifth verse of Julia Ward Howe's *Battle Hymn of the Republic*:

In the beauty of the lilies Christ was born across the sea,
With a glory in His bosom that transfigures you and me:
As He died to make men holy, let us die to make men free,
While God is marching on.

BATTLE HYMN OF THE REPUBLIC, <http://www.cyberhymnal.org/htm/b/h/bhymnotr.htm> (last visited Sept. 14, 2015).

51. Abraham Lincoln, *Second Inaugural Address* (Mar. 4, 1865), in *DOCUMENTS OF AMERICAN HISTORY TO 1898*, *supra* note 30, at 442, 442-43. President Lincoln stated:

The Almighty has His own purposes. . . . If we shall suppose that American slavery is one of those offenses which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South this terrible war as the woe due to those by whom the offense came, shall we discern therein any departure from those divine attributes which the believers in a living God always ascribe to Him? Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be

Not only did the Civil War transform the political landscape, it brought a legal end to slavery. Starting with the Emancipation Proclamation⁵² in 1863 (arguably the most important executive order in our history) and culminating in 1868 with the adoption of the Thirteenth (abolition of slavery), Fourteenth (overturning *Dred Scott*, establishing equal protection of the laws, and expanding due process), and Fifteenth (abolishing voting restrictions on account of slavery) Amendments to the Constitution, the legal landscape was fundamentally changed. Even the assassination of President Lincoln, on Good Friday, did not slow the momentum, at least for a while. Following adoption of the constitutional amendments, Congress passed civil rights legislation to establish the supremacy of federally guaranteed rights and to protect those rights against infringement by the states.⁵³

The second American revolution was derailed, however. Although the post-war Reconstruction temporarily changed the political landscape in the South, the attempt to deal with the effects of slavery proved to be a bridge too far for those times.⁵⁴ The collapse of the Reconstruction strategy was confirmed by the political compromise brought about by the election of 1876, and the South was left to its own devices. Whatever gains had been made for equal treatment under the law were lost.⁵⁵ This brutal history is well described by Richard Kluger in his magnificent book, *Simple Justice*. The same history from the opposite point of view is described in the movie, *The Birth of a Nation*.⁵⁶ Racism incorporated into state law was confirmed by the United States Supreme Court's decision in *Plessy v. Ferguson*,⁵⁷ which adopted the "separate, but equal" doctrine as the authoritative reading of the Equal Protection Clause of the Fourteenth Amendment.⁵⁸ The effect of this decision was to institutionalize the "Jim Crow" laws throughout the South (and, ultimately, to encourage its spread to many private businesses in the North, as well).⁵⁹ By 1915, an observer from

paid by another drawn with the sword, as was said three thousand years ago, so still it must be said, "The judgments of the Lord are true and righteous altogether."

Id.

52. See *id.* at 420-21. See generally ERIC FONER, NOTHING BUT FREEDOM: EMANCIPATION AND ITS LEGACY (1983).

53. KLUGER, *supra* note 27, at 57.

54. *Id.* at 58-61. See generally HERMAN BELZ, EMANCIPATION AND EQUAL RIGHTS: POLITICS AND CONSTITUTIONALISM IN THE CIVIL WAR ERA (1978).

55. KLUGER, *supra* note 27, at 61-62, 65-66.

56. *The Birth of a Nation* (1915) [HD] – Lillian Gish, YOUTUBE (May 20, 2015), <https://www.youtube.com/watch?v=ubFfoFIHOpy>. If one has any doubt about how deeply embedded racism was at the time, watch this movie. Regarded as an important film in the historical development of motion pictures, it unintentionally documented the racism that pervaded Southern society after the collapse of Reconstruction. I first saw this film at UCLA in the late 1960s and was horrified by the content of the story. The showing almost triggered a riot, and it was the only time at UCLA that I feared for my personal safety.

57. 163 U.S. 537 (1896). See KLUGER, *supra* note 27, at 72-83.

58. *Plessy*, 163 U.S. at 548-49.

59. KLUGER, *supra* note 27, at 84-88.

South Africa could justifiably conclude that conditions in the South, with respect to race relations, were essentially the same as under apartheid in South Africa.⁶⁰

Professor C. Vann Woodward, speaking in the midst of the Civil Rights era in 1960, fashioned a compelling metaphor to describe the relation between law and morality throughout this period:

The Union fought the Civil War on borrowed moral capital. With their noble belief in their purpose and their extravagant faith in the future, the radicals ran up a staggering war debt, a moral debt that was soon found to be beyond the country's capacity to pay, given the undeveloped state of its moral resources at the time. After making a few token payments during Reconstruction, the United States defaulted on the debt and unilaterally declared a moratorium that lasted more than eight decades. The country was only nominally spared the formality of bankruptcy by the injunction of the Supreme Court that cast doubt on the validity of the debt. In the meantime, over the years, interest on the debt accumulated. The debt was further augmented by the shabby treatment of the forgotten creditors, our own Negro citizens.

Then in the middle of the twentieth century conscience finally began to catch up with commitment. Very suddenly, relatively speaking, it became clear that the almost forgotten Civil War debt had to be paid, paid in full, and without any more stalling than was necessary. As in the case of the commitment to emancipation during the Civil War, amoral forces and pressures such as the exigencies of foreign propaganda, power politics, and military necessities exercised a powerful influence upon the recommitment to equality. But also as in the case of emancipation, the voices of conscience, of national creed, and of religious conviction played their parts. In the second instance the demands of the Negroes themselves played a more important part in the pressure than before. Equality was at last an idea whose time, long deferred, had finally come.

Once again there was a lag between popular conviction and constitutional interpretation. Only this time the trend ran the

60. C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 111 (2nd rev. ed. 1966). The author articulated:

In the second year of the First World War, Maurice S. Evans, an Englishman who made his home in South Africa, wrote a book on race relations in the South that, according to the subtitle, was written "From a South African Point of View." He found conditions in the South "strikingly similar" to those he had left behind at home. "The separation of the races in all social matters," he wrote, "is as distinct in South Africa as in the Southern States. There are separate railway cars . . . and no black man enters hotel, theatre, public library or art gallery." There were also in his homeland the same separate schools, the same disenfranchisement, and the same political and economic subordination of the black man. "How often," he exclaimed, "the very conditions I had left were reproduced before my eyes, the thousands of miles melted away, and Africa was before me."

Id.

opposite way, and it was the Constitution that dawdled behind conviction. Again it proved unfeasible to close the gap by statutory or amendatory procedures, and again it became the embarrassing task of the Supreme Court to effect an accommodation, a rationalization. Once more the justices scrutinized the words of the Fourteenth Amendment, and this time they discovered that those words really meant what they said, and presumably had all along. The old debt that the court had once declared invalid they now pronounced valid.

Although this was acknowledged to be a national debt, in the nature of things it would have to be paid by a special levy that fell with disproportionate heaviness upon one section of the country. The South had been called on before to bear the brunt of a guilty national conscience. It is now called on a second time.⁶¹

This extended metaphor takes us beyond the time of *To Kill a Mockingbird*, which is set in the 1930s, in the town of Maycomb, Alabama.⁶² Although lawyers like Atticus provide reason for hope, it is well before the dawn of the Civil Rights era. We might say that this was part of the pre-dawn. But it is still night. The near lynching of Tom Robinson on the eve of trial is grim evidence of that. But we should not discount the importance of Atticus's all-night vigil at the jail, armed only with a newspaper. Regardless of his chances of winning the case, he risked his life so that Tom Robinson could be tried in court, and not on the street.

III. THE TRIAL

The trial itself was relatively short.⁶³ There were four witnesses—three called by the prosecution and one called by the defense. Atticus's daughter, Scout, remained the narrator for these events as she viewed the trial from the balcony reserved for the blacks. Using her powers of recall, she set the scene in the courtroom, commenting on the judge's appearance and demeanor. Judge Taylor was "amiable, white-haired, slightly ruddy-faced, he was a man who ran his court with an alarming informality."⁶⁴ That informality was not to be taken for lack of control, as one lawyer had quickly learned when he thought the judge may have been dozing.⁶⁵ Judge Taylor was "learned in the law" and "kept a firm grip on any proceedings that came before him."⁶⁶

61. C. VANN WOODWARD, *THE BURDEN OF SOUTHERN HISTORY* 84-86 (1960).

62. Maycomb is a fictional town, modeled after the author's own home town of Monroeville, Alabama. HEY BOO, *supra* note 3.

63. The following section contains several excerpts from the book. These excerpts have been altered to read like a trial transcript.

64. LEE, *supra* note 1, at 188.

65. *Id.*

66. *Id.*

A. SHERIFF TATE

Sheriff Tate was called by the prosecution to lay the foundation of the case through the eyes of a more or less neutral observer. As Scout settled in upstairs, Sheriff Tate was already on the stand.⁶⁷ He was describing how, on November 21, Bob Ewell had come to his office very excited and told him to go to the Ewell house. When the sheriff arrived, he saw Ewell's daughter, Mayella, lying on the floor: "She was pretty well beat up, but I heaved her to her feet and she washed her face in a bucket in the corner and said she was all right. I asked her who hurt her and she said it was Tom Robinson."⁶⁸ He asked her if Robinson took advantage of her and she said yes he did.⁶⁹ The sheriff went to Robinson's house and brought him back. Mayella identified Robinson as the one who had attacked her, and so he was arrested. "That's all there was to it."⁷⁰

On cross-examination, Atticus asked if Tate had called a doctor or if anyone had called a doctor? "No, sir." Atticus asked Tate to describe her injuries.

[Tate]: Well, she was beaten around the head. There was already bruises comin' on her arms She had a black eye comin'.

[Atticus]: Which eye?⁷¹

After some prompting, Tate stated, "Oh yes, that'd make it her right. It was her right eye, Mr. Finch. I remember now, she was bunged up on that side of her face."⁷² Atticus asked Tate to repeat his testimony.

[Tate]: It was her right eye, I said.

[Atticus]: No. . . .⁷³

The court reporter read back his testimony that it was the right side of her face (i.e., not just the eye).

[Atticus]: Which side again . . . ?

[Tate]: The right side, Mr. Finch, but she had more bruises—you wanta hear about 'em?⁷⁴

Having let the witness get away here, Atticus obliged with the follow up, "Yes, what were her other injuries?"

[Tate]: [H]er arms were bruised, and she showed me her neck. There were definite finger marks on her gullet—

[Atticus]: All around her throat?

[Tate]: I would say all around, Mr. Finch.

67. *Id.* at 189.

68. *Id.* at 191.

69. *Id.*

70. *Id.*

71. *Id.* at 192.

72. *Id.*

73. *Id.* at 193.

74. *Id.*

[Atticus]: You would?

[Tate]: Yes sir, she had a small throat, anybody could'a reached around it with—⁷⁵

Atticus cut off the rest of the answer before it could get any worse. With that, Sheriff Tate stepped down from the witness stand.

B. BOB EWELL

Through the eyes of Scout, Harper Lee drew her villain well and she was not kind.⁷⁶ Blissfully unaware of how he appeared in court, Bob Ewell seemed pleased to be there. His initial cocky attempt at humor, however, was cut short by Judge Taylor's admonishment to behave.⁷⁷ The prosecutor asked Ewell to describe in his own words what happened on the evening of November 21. After several more crude attempts at humor, Ewell finally made the charge:

"Well, Mayella was raisin' this holy racket so I dropped m'load and run as fast as I could but I run into th' fence, but when I got distangled I run up to th' window and I seen—" Mr. Ewells' face grew scarlet. He stood up and pointed his finger at Tom Robinson.

"—I seen that black n***** yonder ruttin' on my Mayella!"⁷⁸

Judge Taylor took several minutes to quiet the courtroom while Ewell watched smugly. He did not appear to mind another lecture from the judge.⁷⁹ For perhaps the only time in his life, he was the center of attention.

75. *Id.* Atticus seemed to have been caught by surprise by the bruises around the neck testimony and so his habitual technique of asking the witness to repeat an answer did not serve him well. The repetitions were increasingly damaging until Atticus cut off the witness. It certainly dissipated the strategy of focusing on the right side of the victim's face. *Id.*

76. As Scout narrates:

'... Robert E. Lee Ewell!'

In answer to the clerk's booming voice, a little bantam cock of a man rose and strutted to the stand, the back of his neck reddening at the sound of his name. When he turned around to take the oath, we saw that his face was as red as his neck. We also saw no resemblance to his namesake. A shock of wispy new-washed hair stood up from his forehead; his nose was thin, pointed, and shiny; he had no chin to speak of—it seemed to be a part of his crepey neck.

'—so help me God,' he crowed.

Every town the size of Maycomb had families like the Ewells. No economic fluctuations changed their status—people like the Ewells lived as guests of the county in prosperity as well as in the depths of a depression. No truant officers could keep their numerous offspring in school; no public health officer could free them from congenital defects, various worms, and the diseases indigenous to filthy surroundings.

Id. at 194. The description goes on, but this is enough for our purposes.

77. *Id.* at 197.

78. *Id.* I apologize for the language quoted here, but I believe it is necessary in order to convey how openly racist Ewell was in this public setting. The reaction in the courtroom was not on account of the racist language, but to his description of what the defendant was doing. Racism was not shocking, but talk of sex was. And, in comparison, the language used by Chief Justice Taney, speaking for the Supreme Court of the United States, is far more offensive than the epithets of a mean-spirited fictional character. Both should be quoted in order to understand what we are dealing with.

79. *Id.* at 199.

The prosecutor, Mr. Gilmer, tried to keep a close rein on the witness as he led him through the scene, but Ewell still managed to get in another racist comment in response to the question of how he knew it was Robinson who had done the deed.⁸⁰ Tom Robinson passed by his house everyday and, he added without a trace of irony, that his black neighbors were “devaluin’ my property.”⁸¹ Ewell quickly left the stand when Mr. Gilmer finished, only to run into Atticus as he rose for cross-examination, providing everyone with a brief moment of levity.

Atticus first secured agreement from Ewell that he had not called a doctor that evening. He also got Ewell to affirm Sheriff Tate’s testimony regarding Mayella’s injuries. “I holds with Tate. Her eye was blacked and she was mighty beat up.”⁸² Then Atticus seemed to go off on a tangent. His next question was: “Mr. Ewell, can you read and write?”⁸³ This drew an objection from the prosecutor, but Judge Taylor allowed Atticus some leeway. Not seeing what was ahead, Scout thought Atticus “had gone frog-sticking without a light.”⁸⁴ Atticus asked if Ewell could demonstrate his ability to write his name and Ewell obliged, signing his name with his left hand. This was noted on the record by Judge Taylor.⁸⁵ Without quite realizing what had happened, but sensing that Atticus had somehow made a point, Ewell finished with one more racist outburst before Atticus dismissed him.⁸⁶

C. MAYELLA EWELL

While Bob Ewell was a cocky and defiant witness, Mayella Ewell was reserved and tentative. Mr. Gilmer patiently took her through the events of the evening and she responded very reluctantly.⁸⁷ As the story haltingly came out, Mayella was sitting on the front porch at dusk when Tom Robinson walked by. She asked him to help with chopping up an old dresser, a chiffarobe, for kindling.⁸⁸ Robinson entered the yard and when Mayella went into the house to fetch payment, he attacked and raped her.⁸⁹ Mr. Gilmer reinforced her accusation: “You are positive that he took full advantage of you?”⁹⁰ “He done what he was after[,]” she replied.⁹¹

Clearly intimidated by the cross-examination of her father, Mayella was even less forthcoming when it was Atticus’s turn. He tried to defuse the

80. *Id.* at 200.

81. *Id.*

82. *Id.* at 201.

83. *Id.* at 202.

84. *Id.*

85. *Id.* at 203.

86. *Id.*

87. *Id.* at 204-05.

88. *Id.* at 205.

89. *Id.* at 206.

90. *Id.*

91. *Id.*

situation by starting with safe questions, like “[h]ow old are you?”, but she resisted at every step.⁹² Eventually, with Judge Taylor’s help, Atticus began to fill out a narrative of Mayella’s home life. The oldest of eight children, with no mother and a father who was often absent, Mayella essentially ran the household, living off the relief check, to the extent that their father did not drink it up.⁹³

[Atticus]: Who are your friends?

[Mayella]: Friends?

[Atticus]: Yes, don’t you know anyone near your age . . . ?

Mayella’s hostility, which had subsided to grudging neutrality, flared again. “You makin’ fun o’ me agin, Mr. Finch?”

Atticus let her question answer his.

[Atticus]: Do you love your father, Miss Mayella?

[Mayella]: Love him, whatcha mean?

[Atticus]: I mean, is he good to you, is he easy to get along with?

[Mayella]: He does tollable, ‘cept when—

[Atticus]: Except when?

Mayella looked at her father, who was sitting with his chair tipped against the railing. He sat up straight and waited for her to answer.

[Mayella]: Except when nothin’. . . I said he does tollable.

Mr. Ewell leaned back again.

[Atticus]: Except when he’s drinking?

Atticus asked so gently that Mayella nodded.

[Atticus]: Does he ever go after you?

[Mayella]: How you mean?

[Atticus]: When he’s—riled, has he ever beaten you?

Mayella looked around, down at the court reporter, up at the judge. “Answer the question, Miss Mayella,” said Judge Taylor.

“My paw’s never touched a hair o’ my head in my life,” she declared firmly. “He never touched me.”⁹⁴

Atticus then moved the questioning to the case at hand. Atticus asked if Mayella knew Tom Robinson.

[Mayella]: I knowed who he was, he passed the house every day.

[Atticus]: Was this the first time you asked him to come inside the fence?

[Mayella]: Yes, it was.

[Atticus]: Didn’t you ask him to come inside the fence before?

[Mayella]: I did not, I certainly did not.⁹⁵

92. *Id.* at 207.

93. *Id.* at 208.

94. *Id.* at 209-10.

95. *Id.* at 210.

Atticus then went over her testimony about the attack.

[Atticus]: You said Tom Robinson was behind you in the room when you turned around?

[Mayella]: Yes.

[Atticus]: You said he “got you around the neck cussing and saying dirt—is that right?

[Mayella]: ‘t’s right.’

[Atticus]: You say “he caught me and choked me and took advantage of me.”

[Mayella]: That’s what I said.⁹⁶

Mayella was less certain about whether Robinson hit her on the face. “No, I don’t recollect if he hit me. I mean yes I do, he hit me.”⁹⁷ Atticus then made her do an in-court identification, a task usually undertaken with relish by the prosecutor. Atticus’s purpose, however, was to have Tom Robinson stand so that the jury could see his withered left arm.⁹⁸ This visual was powerful and Atticus did not fear another repetition of the charge.

[Atticus]: Is this the man who raped you?

[Mayella]: It most certainly is.⁹⁹

[Atticus]: How?¹⁰⁰

After further sparring with Mayella over the details of the attack, Atticus then launched into a series of questions:

[Atticus]: You were screaming all this time?

[Mayella]: I certainly was.

[Atticus]: Then why didn’t the other children hear you? Where were they? At the dump?

No answer.

[Atticus]: Where were they? Why didn’t your screams make them come running? The dump’s closer than the woods, isn’t it?

No answer.

[Atticus]: Or didn’t you scream until you saw your father in the window? You didn’t think to scream until then, did you?

No answer.

96. *Id.* at 210-11.

97. *Id.* at 211.

98. *Id.* at 212.

99. *Id.*

100. *Id.* This visual alone makes the defense apparent to everyone in the courtroom. Jem could see from the balcony that Tom’s withered left arm was about twelve inches shorter than his right and hung dead at his side. *Id.* In the movie version, the screenwriter makes the point by having Atticus throw a glass to Tom, which Tom catches with his right hand. When Atticus asks him to catch the glass next time with his left hand, Tom says he cannot do it. *TO KILL A MOCKINGBIRD* (Universal International Pictures 1962).

[Atticus]: Did you scream first at your father instead of at Tom Robinson? Was that it?

No answer.

[Atticus]: Who beat you up? Tom Robinson or your father?

No answer.

[Atticus]: What did your father see in the window, the crime of rape or the best defense to it? Why don't you tell the truth, child, didn't Bob Ewell beat you up?¹⁰¹

Atticus turned away from the witness and sat down. Mayella then said: "I got somethin' to say."¹⁰² Atticus looked up. "Do you want to tell us what happened?"¹⁰³ Mayella responded in anger:

"I got somethin' to say an' then I ain't gonna say no more. That n***** yonder took advantage of me an' if you fine fancy gentlemen don't wanna do nothin' about it then you're all yellow stinkin' cowards, stinkin' cowards, the lot of you. Your fancy airs don't come to nothin'—your ma'amin' and Miss Mayellerin' don't come to nothin', Mr. Finch."¹⁰⁴

With that, Mayella burst into tears and had nothing more to say. She refused to answer any more questions from Mr. Gilmer and eventually left the witness stand, glaring with hatred at Atticus as she passed him by.¹⁰⁵ The prosecution rested and Judge Taylor called a recess.

D. TOM ROBINSON

The defendant's testimony began with a visual:

Thomas Robinson reached around, ran his fingers under his left arm and lifted it. He guided his arm to the Bible and his rubber-like left hand sought contact with the black binding. As he raised his right hand, the useless one slipped off the Bible and hit the clerk's table. He was trying again when Judge Taylor growled, "That'll do, Tom." Tom took the oath and stepped into the witness chair.¹⁰⁶

After introducing Tom to the jury, Atticus started the examination with Tom's conviction once for disorderly conduct. "Got in a fight with another man, he tried to cut me."¹⁰⁷ He served his sentence, thirty days, and that was it.

[Atticus]: Were you acquainted with Mayella Violet Ewell?

101. LEE, *supra* note 1, at 213-14.

102. *Id.* at 214.

103. *Id.*

104. *Id.* at 214.

105. *Id.* at 215.

106. *Id.* at 217.

107. *Id.*

[Tom]: Yes suh, I had to pass her place goin' to and from the field every day. . . .

[Atticus]: [D]id she ever speak to you?

[Tom]: Why, yes suh, I'd tip m'hat when I'd go by, and one day she asked me to come inside the fence and bust up a chiffarobe for her.¹⁰⁸

Tom did so, refused to accept any payment, and left. Tom further explained when this communication occurred.

[Tom]: [W]ay last spring, way over a year ago.

[Atticus]: Did you ever go on the place again?

[Tom]: Yes . . . lots of times. . . . Seemed like every time I passed by yonder she'd have some little somethin' for me to do—choppin' kindlin', totin' water for her.

[Atticus]: Were you paid for your services?

[Tom]: No suh, not after she offered me a nickel the first time. I was glad to do it, Mr. Ewell didn't seem to help her none, and neither did the chillun, and I knowed she didn't have no nickels to spare.

[Atticus]: Where were the other children?

[Tom]: They was always around, all over the place. . . .

[Atticus]: Would Mayella talk to you?

[Tom]: Yes. . . .

[Atticus]: Did you ever . . . go on the Ewell property without an express invitation . . . ?

[Tom]: No suh, Mr. Finch, I never did. I wouldn't do that, suh.¹⁰⁹

Atticus then asked Tom about the events of November 21. Tom said, "I was goin' home as usual that evenin', an' when I passed the Ewell place Miss Mayella were on the porch, like she said she were."¹¹⁰ She asked him to come inside the fence. She said, "I got somethin' for you to do in the house."¹¹¹ She said the old door was off its hinges and motioned for him to come inside. Tom went inside and looked at the door, but there was nothing wrong with it. He wondered why the children were not there and Mayella told him they had all gone to town for ice cream. She said, "Took me a slap year to save seb'm nickels, but I done it. They all gone to town."¹¹²

In that awkward moment, Tom tried to excuse himself because there was nothing he could do for her. But Mayella said that he could step on a chair and

108. *Id.* at 217-18.

109. *Id.* at 218-19.

110. *Id.* at 220.

111. *Id.*

112. *Id.*

retrieve for her a box on top of a tall chiffarobe. As he did so, she grabbed him around his legs.

[Atticus]: What happened after that?

[Tom]: Mr. Finch, I got down offa that chair an' turned around an' she sorta jumped on me.

[Atticus]: Jumped on you? Violently?

[Tom]: No suh, she—she hugged me. She hugged me round the waist. . . .

[Atticus]: And then what did she do?¹¹³

[Tom]: She reached up an' kissed me side of th' face. She says she never kissed a grown man before an' she might as well kiss a n*****. She says what her papa do to her don't count. She says, "Kiss me back, n*****." I say Miss Mayella lemme outa here an' tried to run but she got her back to the door an' I'da had to push her. I didn't wanta harm her, Mr. Finch, an' I say lemme pass, but just when I say it Mr. Ewell yonder hollowed through th' window.

[Atticus]: What did he say?

Tom Robinson swallowed again, and his eyes widened.

[Tom]: Something' not fittin' to say—not fittin' for these folks'n chillun to hear—

[Atticus]: What did he say, Tom? You *must* tell the jury what he said.

Tom Robinson shut his eyes tight.

[Tom]: He says you goddamn whore, I'll kill ya.¹¹⁴

At that point, Tom ran.

[Atticus]: Why did you run?

[Tom]: I was scared, suh.

[Atticus]: Why were you scared?

[Tom]: Mr. Finch, if you was a n***** like me, you'd be scared, too.¹¹⁵

Cross-examination started with the prior conviction for disorderly conduct and then went to the question of Tom's strength.

[Gilmer]: [Y]ou're pretty good at busting up chiffarobes and kindling with one hand, aren't you?

[Tom]: Yes. . . .

[Gilmer]: Strong enough to choke the breath out of a woman and sling her to the floor?

113. *Id.* at 221-22.

114. *Id.* at 222.

115. *Id.* at 223.

[Tom]: I never done that, suh.

[Gilmer]: But you are strong enough to?

[Tom]: I reckon so, suh.¹¹⁶

Gilmer turned around Tom's story of generosity and insinuated that Tom may have had an ulterior motive for helping out.

[Gilmer]: Why were you so anxious to do that woman's chores?

[Tom]: Looked like she didn't have nobody to help her. . . .

[Gilmer]: With Mr. Ewell and seven children on the place, boy?

[Tom]: It looked like they never helped her none—

Mr. Gilmer smiled grimly at the jury.

[Gilmer]: You're a mighty good fellow, it seems—did all this for not one penny?

[Tom]: Yes suh. I felt right sorry for her, she seemed to try more'n the rest of 'em—

[Gilmer]: *You* felt sorry for *her*, you felt *sorry* for her?

Mr. Gilmer seemed ready to rise to the ceiling.

The witness realized his mistake and shifted uncomfortably in the chair. But the damage was done. Below us, nobody liked Tom Robinson's answer. Mr. Gilmer paused a long time to let it sink in.¹¹⁷

Mr. Gilmer finished with the flight issue:

[Gilmer]: Didn't Mr. Ewell run you off the place, boy?

[Tom]: No suh, I don't think he did.

[Gilmer]: Don't think, what do you mean?

[Tom]: I mean I didn't stay long enough for him to run me off.

[Gilmer]: You're very candid about this, why did you run so fast?

[Tom]: I says I was scared, suh.

[Gilmer]: If you had a clear conscience, why were you scared?

[Tom]: Like I says before, it weren't safe for any n***** to be in a—fix like that.

[Gilmer]: But you weren't in a fix—you testified that you were resisting Miss Ewell. Were you so scared that she'd hurt you, you ran, a big buck like you?

116. *Id.* at 224.

117. *Id.* at 225. It seems that Tom's mistake was to imply a superior position to a white woman. So stratified were racial relations that even a simple act of kindness toward a white woman could be viewed as impertinent. An unfortunate example of "the personal is political."

[Tom]: No suh, I's scared I'd be in court, just like I am now.

[Gilmer]: Scared of arrest, scared you'd have to face up to what you did?

[Tom]: No suh, scared I'd hafta face up to what I didn't do.¹¹⁸

All in all, Tom Robinson held up pretty well. With the testimony finished, it was now down to closing argument.

E. FINAL ARGUMENT

Scout missed the prosecution's close¹¹⁹ and part of Atticus's, as well. After reviewing the evidence, Atticus began his summation:

"Gentlemen," he was saying, "I shall be brief, but I would like to use my remaining time with you to remind you that this case is not a difficult one, it requires no minute sifting of complicated facts, but it does require you to be sure beyond all reasonable doubt as to the guilt of the defendant. To begin with, this case should never have come to trial. This case is as simple as black and white.[""]

"The state has not produced one iota of medical evidence to the effect that the crime Tom Robinson is charged with ever took place. It has relied instead upon the testimony of two witnesses whose evidence has not only been called into serious question on cross-examination, but has been flatly contradicted by the defendant. The defendant is not guilty, but somebody in this courtroom is.[""]¹²⁰

With this, Atticus moved to the heart of the case—his view of what actually happened in the house and the reasons why:

"I have nothing but pity in my heart for the chief witness for the state, but my pity does not extend so far as to her putting a man's life at stake, which she has done in an effort to get rid of her own guilt.[""]

"I say guilt, gentlemen, because it was guilt that motivated her. She has committed no crime, she has merely broken a rigid and time-honored code of our society She knew full well the enormity of her offense, but because her desires were stronger than the code she was breaking, she persisted in breaking it. She persisted, and her subsequent reaction is something that all of us have known at one time or another. She did something every child has done—she tried to put the evidence of her offense away from her. But in this case she was no child hiding stolen contraband: she

118. *Id.* at 226.

119. Jem explained to Scout that it was "[n]othing new, just the usual. Hush now." *Id.* at 231.

120. *Id.* at 231-32.

struck out at her victim She must destroy the evidence of her offense.["]

"What was the evidence of her offense? Tom Robinson, a human being. She must put Tom Robinson away from her. Tom Robinson was her daily reminder of what she did. What did she do? She tempted a Negro.["]

"She was white, and she tempted a Negro. She did something that in our society is unspeakable: she kissed a black man. Not an old Uncle, but a strong young Negro man. No code mattered to her before she broke it, but it came crashing down on her afterwards.["]

"Her father saw it, and the defendant has testified as to his remarks. What did her father do? We don't know, but there is circumstantial evidence to indicate that Mayella Ewell was beaten savagely by someone who led almost exclusively with his left . . . and Tom Robinson now sits before you, having taken the oath with the only good hand he possesses—his right hand.["]¹²¹

Atticus then addressed the credibility issue and the underlying assumption that had to be identified openly:

"And so a quiet, respectable, humble Negro who had the unmitigated temerity to 'feel sorry' for a white woman has had to put his word against two white people's. I need not remind you of their appearance and conduct on the stand—you saw them for yourselves. The witnesses for the state, with the exception of the sheriff of Maycomb County, have presented themselves to you gentlemen, to this court, in the cynical confidence that their testimony would not be doubted. . . .["]¹²²

Atticus closed with an appeal to core values, rightly understood. That is, he had to appeal to the jurors' own values and show that a not guilty verdict would be consistent with those values:

"One more thing, gentlemen, before I quit. Thomas Jefferson once said that all men are created equal, a phrase that the Yankees and the distaff side of the Executive branch in Washington are fond of hurling at us. There is a tendency in this year of grace, 1935, for certain people to use this phrase out of context, to satisfy all conditions. . . . We know all men are not created equal in the sense some people would have us believe—some people are smarter than others, some people have more opportunity because they're born with it, some men make more money than others, some ladies make better cakes than others—some people are born gifted beyond the normal scope of most men.["]

"But there is one way in this country in which all men are created equal—there is one human institution that makes a pauper

121. *Id.* at 232-33.

122. *Id.* at 233.

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

"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.'"

Atticus's voice had dropped, and as he turned away from the jury he said something I did not catch. He said it more to himself than to the court. I punched Jem "What'd he say?"

"'In the name of God, believe him,' I think that's what he said."¹²³

Atticus's argument sought to show how "all men are created equal" furthered the community interest. In appealing to the better part of their nature, he also appealed to their self-interest. Making the decision based on the evidence, not on assumptions tied to centuries-old prejudice, affirms the rule of law that protects all members of the community. The appeal to the better part of the jurors' nature, of course, assumed that such better nature existed. I think it did exist, although it was still latent and not strong enough to overcome centuries of prejudice at that point. But it was there, and Atticus's appeal to them reflected a cautious optimism that prejudice could be overcome with a principled application of the rule of law.

F. THE VERDICT AND AFTERMATH

The crowd hardly stirred while everyone waited with anticipation on the jury's decision. After more than three hours of deliberations, the answer finally came: guilty. What followed seemed almost anti-climactic, until the scene quietly closed with the story's most powerful image:

I saw Atticus pushing papers from the table into his briefcase. He snapped it shut, went to the court reporter and said something, nodded to Mr. Gilmer, and then went to Tom Robinson and whispered something to him. Atticus put his hand on Tom's shoulder as he whispered. Atticus took his coat off the back of his

123. *Id.* at 233-34.

chair and pulled it over his shoulder. Then he left the courtroom, but not by his usual exit. He must have wanted to go home the short way, because he walked quickly down the middle aisle toward the south exit. I followed the top of his head as he made his way to the door. He did not look up.

Someone was punching me, but I was reluctant to take my eyes from the people below us, and from the image of Atticus's lonely walk down the aisle.

"Miss Jean Louise?"

I looked around. They were standing. All around us and in the balcony on the opposite wall, the Negroes were getting to their feet. Reverend Syke's voice was as distant as Judge Taylor's:

"Miss Jean Louise, stand up. Your father's passin'."¹²⁴

If there is any hope to be drawn from this story of a crushing, soul-numbing defeat, it is in the nobility of that lonely walk and the respect offered by the community whose life-long experience with manifest injustice had not yet snuffed out the expectation that justice would someday come. "We shall overcome someday."¹²⁵ Indeed. That is what the scene expresses without words or music. Atticus's appeal to the jury had resonated with the observers and they gave him their deeply-felt respect.

"It ain't right, Atticus," said Jem. "No son, it's not right."¹²⁶ Later, Atticus talked about it with Jem:

"Those are twelve reasonable men in everyday life, Tom's jury, but you saw something come between them and reason. You saw the same thing that night in front of the jail. When that crew went away, they didn't go as reasonable men, they went because we were there. There's something in our world that makes men lose their heads—they couldn't be fair if they tried. In our courts, when it's a white man's word against a black man's, the white man always wins. They're ugly, but those are the facts of life."

"Doesn't make it right," said Jem stolidly. He beat his fist softly on his knee. "You just can't convict a man on evidence like that—you can't."

"You couldn't, but they could and did. The older you grow the more of it you'll see. The one place where a man ought to get a square deal is in a courtroom, be he any color of the rainbow, but people have a way of carrying their resentments right into a jury box.[""]¹²⁷

124. *Id.* at 241-42.

125. See Pierva, *Joan Baez—We shall overcome*, YOUTUBE (Dec. 29, 2007), <https://www.youtube.com/watch?v=RkNsEH1GD7Q>; Kortland Whalum, *Morehouse College—We Shall Overcome*, YOUTUBE (Jun. 26, 2009), <https://www.youtube.com/watch?v=Aor6-DkzBJ0>.

126. LEE, *supra* note 1, at 243.

127. *Id.* at 252-53.

Carrying resentments is a two-way street and Atticus recognized that one day there would be a reckoning: “Don’t fool yourselves—it’s all adding up and one of these days we’re going to pay the bill for it. I hope it’s not in you children’s time.”¹²⁸

For Bob Ewell, affirmation by the jury had not been enough. He was angry that he had been exposed. He stopped Atticus on the post office corner, spat in his face, and told him he would get him if it took the rest of his life.¹²⁹ Ewell’s life ended shortly thereafter, however, as he was taken out by the recluse, Boo Radley, who saved Scout and Jem from a vicious attack.¹³⁰

And so, Atticus began preparation for the appeal. But that was not to be, as Tom Robinson was killed in prison, shot while trying to escape.¹³¹ Up to that point, he had waited patiently for justice. Despite misgivings, he had trusted Atticus. He ran out of both, and immediately paid the price. But Tom’s fictional death was not in vain. There is much that we can learn from this story.

IV. WHAT THE TRIAL OF TOM ROBINSON TEACHES US

Stories connect characters and events with deeply held beliefs.¹³² The immediate success of *To Kill a Mockingbird* is evidence of that. In the 1960s, amidst the Civil Rights struggle, this novel and, later, the movie, found an appreciative audience. Why? This was not a happy story. There was overt racism and other moral ugliness, violence, and injustice. The moral infrastructure of this community, seemingly decent as the story of the Finch family in Maycomb unfolded, was revealed to have deep flaws. The legal system failed in the most fundamental sense. Although it may have delivered procedural fairness, albeit with a close call the night before the trial, the end result was horrific. Yet this is a story of hope and, ultimately, triumph. The triumph could not be fully realized within the story, but the course of race relations in America was irrevocably altered by this fictional trial for the good.

Trials are moral stories, often pushing both participants and observers to consider the nature of good and evil. Trials can teach us about ourselves and about others. They instruct us about the exercise of judgment. They are highly

128. *Id.* at 253. Without necessarily providing justification for actions taken later in Ferguson, Missouri, for example, Atticus’s words here are prophetic.

129. *Id.* at 249. “‘I wish Bob Ewell wouldn’t chew tobacco,’ was all Atticus said about it.” *Id.* Actually, there was more. Atticus was always careful in instructing his children, and he gave them this most charitable construction of the situation:

“[Bob Ewell] meant it when he said it,” said Atticus. “Jem, see if you can stand in Bob Ewell’s shoes a minute. I destroyed his last shred of credibility at that trial, if he had any to begin with. The man had to have some kind of comeback, his kind always does. So if spitting in my face and threatening me saved Mayella Ewell one extra beating, that’s something I’ll gladly take. He had to take it out on somebody and I’d rather it be me than that houseful of children out there. You understand?”

Id. at 250.

130. *Id.* at 312-14.

131. *Id.* at 269.

132. See Jonathan K. Van Patten, *Storytelling for Lawyers*, 57 S.D. L. REV. 239, 244-46 (2012).

revealing of character. Trials serve as a laboratory where we can view the practical consequences of ideas, both good and bad. One of those ideas is the rule of law. The rule of law, in contrast to rule by fiat, means the outcome is governed by a rule outside of the immediate parties to the dispute. In a well-ordered society, the rules have been determined in advance through a process that is fair. In less well-ordered societies, the rules may have been determined through tradition or accident. However, the rule of law still is meaningful if the rules are followed without regard to personal identity. This is what Atticus meant when he said that in the court "all men are created equal."¹³³

There are two rules of law that are very important in this case. The first is the presumption of innocence and the second is that before the government can deprive a person of life or liberty, it must prove the charge beyond a reasonable doubt. When a juror takes an oath to serve on a jury, a promise is made to follow the rules of law as instructed by the judge. And yet, as Atticus observed, the jurors could not put aside the prejudices they brought with them. They carried their resentments into the jury box.¹³⁴ When the rule of law is not followed, it is often replaced by, as it was here, what may be called tribalism. Tribalism puts aside the rule and simply arrives at a decision that either benefits a member of the "tribe"¹³⁵ or punishes one who is not a member. Here, the jurors closed ranks and backed their tribe.

Atticus was fighting another battle that many lawyers face. The parties are entitled to have the case tried on the evidence in the record. Atticus addressed this when he argued against "assumptions" rather than relying on the evidence in the case.¹³⁶ The assumption here was that in any dispute, the word of the white man (and white woman) was to be preferred over the word of a black man. This means ultimately that the identity of the speaker is more important than what is being said. This deprives the adversely affected party of the right to have the case tried on the evidence in the record.

133. LEE, *supra* note 1, at 234.

134. *Id.* at 253.

135. I am using "tribe" in the sense of a one's own group, association, company, party, team, or gang. Here, the "tribe" for these jurors is white people. They automatically supported the member of their tribe without regard to the facts. I am in no way suggesting any criticism of tribes as such, only tribalism as defined herein. Tribalism is at the root of identity politics. My country, right or wrong, would be an example.

136. LEE, *supra* note 1, at 233.

The witnesses for the state, with the exception of the sheriff of Maycomb County, have presented themselves to you gentlemen, to this court, in the cynical confidence that their testimony would not be doubted, confident that you gentlemen would go along with them on the assumption—the evil assumption—that *all* Negroes lie, that *all* Negroes are basically immoral beings, that *all* Negro men are not to be trusted around our women, an assumption one associates with minds of their caliber.

Which, gentlemen, we know is in itself a lie as black as Tom Robinson's skin, a lie I do not have to point out to you. You know the truth, and the truth is this: some Negroes lie, some Negroes are immoral, some Negro men are not to be trusted around women—black or white. But this is a truth that applies to the human race and to no particular race of men.

What do we learn from Judge Taylor's decision to appoint Atticus to defend Tom Robinson? It was no accident.¹³⁷ Only Atticus could take the trial where it needed to go—not necessarily to win the hearts and minds of the people of Maycomb—but to push (“a baby-step”) in the right direction. In that direction, Atticus relied on fundamental principles, including the rule of law and the statement from the Declaration of Independence that “all men are created equal.” These core principles were the means of persuasion. Atticus followed his own frequent admonition to his children that one must “walk in the shoes” of another in order to understand that person.¹³⁸ This did not mean pandering, but rather approaching the issue from the standpoint of shared values. The shared values were clearly not on the surface. Atticus had to dig deep to reach them. Although he was not successful with the jury, his resort to these shared values was not without effect, as illustrated by this post-trial assessment:

“Tom’s jury sho’ made up its mind in a hurry,” Jem muttered.

Atticus’s fingers went to his watchpocket. “No it didn’t,” he said, more to himself than to us. “That was the one thing that made me think, well, this may be the shadow of a beginning. That jury took a few hours. An inevitable verdict, maybe, but usually it takes ‘em just a few minutes. This time—” he broke off and looked at us. “You might like to know that there was one fellow who took considerable wearing down—in the beginning he was rarin’ for an outright acquittal.”¹³⁹

Who? One of the Cunninghams, part of the group that came to the jail with murderous intent. Jem was astonished. “One minute they’re tryin’ to kill him and the next they’re tryin’ to turn him loose . . . I’ll never understand those folks as long as I live.”¹⁴⁰

Atticus said you just had to know ‘em. He said the Cunninghams hadn’t taken anything from or off of anybody since they migrated to the New World. He said the other thing about them was, once you earned their respect they were for you tooth and nail. Atticus said he had a feeling, nothing more than a suspicion, that they left the jail that night with considerable respect for the Finches.¹⁴¹

137. Court-appointed defenses were usually given to Maxwell Green, Maycomb’s latest addition to the bar, who needed the experience. Maxwell Green should have had Tom Robinson’s case.

“You think about that,” Miss Maude was saying. “It was no accident . . . I waited and waited to see you all come down the sidewalk, and as I waited I thought, Atticus Finch won’t win, he can’t win, but he’s the only man in these parts who can keep a jury out so long in a case like that. And I thought to myself, well, we’re making a step—it’s just a baby-step, but it’s a step.”

Id. at 247.

138. *Id.* at 250.

139. *Id.* at 254.

140. *Id.* at 255.

141. *Id.*

Jem was still incredulous: “You mean you actually put on the jury a man who wanted to kill you the night before? How could you take such a risk, Atticus, how could you?”¹⁴² Atticus responded:

“When you analyze it, there was little risk. There’s no difference between one man who’s going to convict and another man who’s going to convict, is there? There’s a faint difference between a man who’s going to convict and a man who’s a little disturbed in his mind, isn’t there? He was the only uncertainty on the whole list.”¹⁴³

Atticus did not succeed, but the length of deliberation was a “shadow of a beginning.”¹⁴⁴

Although Atticus’s actions were informed by adherence to fundamental principles, they should not be taken as prescriptions for all times and all places. One always acts in the present and each situation is therefore different. The criticism of Atticus that he was too accepting of racist attitudes and customs misses this point. His inaction should not be taken as an implicit endorsement of the faults of others. We do not live in that world today. Thank God. But there is much we can learn from Atticus. He represented a client whose very identity precluded an honest consideration of the facts by those who were deeply invested in a non-factual narrative, that is, invested in their own tribe, with all the accompanying resentments. Atticus was acting in the moment. If you want to go somewhere, you have to start with where you are.¹⁴⁵ Atticus could not have won the case by attacking the jurors. Clearly. But he also could not have had any impact on the jury (which he did), or on the community (which he did), or on us (which he has), except by appealing to shared values. This small moment has had large consequences, much like the story of Uncle Tom’s Cabin did in the previous century.¹⁴⁶

Atticus fulfilled his duty of zealous representation within the ethical boundaries. His advocacy must be viewed in light of his honest conviction that Tom Robinson was innocent. He was not indifferent to the truth of the matter. He was required to test the veracity of the prosecution’s witnesses and this led to his assertion that it was Mayella who was the aggressor. I share Harper Lee’s belief in Tom Robinson’s innocence. The author’s story makes no sense if we ascribe to her a post-modern agnosticism on this issue. And the author inserted

142. *Id.*

143. *Id.*

144. This is also an example of good judgment coming from walking in another’s shoes.

145. I am indebted to Professor Michael Munger of Duke University for teaching me the significance of this principle at the Henry G. Manne Program in Law and Economics Studies, LEC Workshop of Law Professors on the Economics of the Rule of Law, December 11-14, 2015, Miami, FL.

146. HARRIET BEECHER STOWE, *UNCLE TOM’S CABIN* (Chios Classics ed. 2015). Originally appearing in serial form over nine months in an anti-slavery newspaper and published as a novel in 1852, *Uncle Tom’s Cabin* sold more than two million copies within its first decade, making it the best seller of all time in proportion to population. When President Lincoln met the author in 1862, he reportedly said: “So you’re the little woman who wrote the book that made this great war.” JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 88-90 (1988).

her belief in Tom Robinson's innocence through her presentation of the evidence. Tom Robinson's testimony about the absence of the children is compelling. Neither Bob Ewell nor Mayella mentioned this in their testimony, but it must have been so.¹⁴⁷ The children were always there, not at school, or elsewhere. They were always there. And yet it is evident that they were not there that evening. The events described by Bob Ewell and Mayella could not have happened without at least one of the kids, more likely several, being witnesses. The absence of the children strongly suggests they had been sent away, as Tom had testified.¹⁴⁸ Atticus had pity for Mayella, but not so much that he would let her charge go without challenge. He could not do otherwise.

What is the larger duty of a lawyer within the community, especially when that community has serious moral problems? Atticus was a witness. He was a witness not only at trial, but also for his children, for the legal profession, and for the community of which he was a part. Being a witness did not mean that he could not give respect for the opinions of others, even when they were wrong. Atticus remained in the community as a witness. He did not leave. And the community was better for it.¹⁴⁹

What do we learn from Atticus when justice does not prevail? While defeat is disappointing, even crushing, there are important benefits if the losing effort furthers the cause of justice in the long run. Atticus's witness has inspired lawyers to be better lawyers, and many people around the world to be better citizens. Tom Robinson's witness, too, inspires us. His courage remains as a witness, even as one reader lamented: "Tom Robinson is dead! Why am I supposed to feel good about this book?"¹⁵⁰ Defeat is built into the story. The novel most likely would have been quickly forgotten if it had a not-so-unhappy ending. Some stories are tragedies. And it is precisely because of their nature that we learn from them. We learn how character flaws, bad judgments, evil forces, and sheer bad luck lead to unfortunate consequences. Harper Lee said

147. Actually, Mayella implicitly affirmed this fact by failing to respond to Atticus's repeated questioning about where the children were at the time of the purported attack. LEE, *supra* note 1, at 213.

148. This is reminiscent of the Sherlock Holmes story in which the dog did not bark. Holmes was speaking to a Scotland Yard detective and the following exchange took place:

Detective: Is there any other point to which you would wish to draw my attention?

Holmes: To the curious incident of the dog in the night-time.

Detective: The dog did nothing in the night-time.

Holmes: That was the curious incident.

SIR ARTHUR CONAN DOYLE, *WORKS OF SIR ARTHUR CONAN DOYLE* (Longmeadow Press 1984). Holmes concluded from the fact that the dog did not bark that the dog was familiar with the intruder. The absence of the children at the crucial moment is the curious incident. It suggests that they had been sent away and their absence from Mayella's testimony seriously calls into question her account of a spontaneous, unprovoked attack by Tom.

149. Speaking to Jem and Scout, Miss Maudie said: "I simply want to tell you that there are some men in this world who were born to do our unpleasant jobs for us. Your father's one of them." LEE, *supra* note 1, at 246.

150. See Teresa Godwin Phelps, *Atticus, Thomas, and the Meaning of Justice*, 77 NOTRE DAME L. REV. 925, 929 (2002). See generally Teresa Godwin Phelps, *The Margins of Maycomb: A Rereading of To Kill a Mockingbird*, 45 Ala. L. Rev. 511 (1994); Peter Zwick, *Rethinking Atticus Finch*, 60 CASE W. RES. L. REV. 1349 (2010).

she wanted to be “the Jane Austen of south Alabama.”¹⁵¹ She succeeded well beyond anyone’s expectations with her magnificent portrayal of unforgettable characters who have given us a witness of how to live, even in the small town of Maycomb, Alabama.

V. CONCLUSION

Dr. Martin Luther King was fond of quoting the black preacher who said: “We ain’t what we should be and we ain’t what we gonna be, but thank God, we ain’t what we once was.”¹⁵² One of the reasons why we are not what we once were is because of Harper Lee. The shadow of a beginning emerged out of this very dark tale. It finally became much more than a shadow because Lee’s moral vision inspired us to want to be better. Her ability in this story to reach our deeply rooted values has helped us to make sense of our own troubled history. We, too, stand in respect, as our father, Atticus Finch, is passin’.

151. HEY BOO, *supra* note 3.

152. Karen Grigsby Bates, ‘*Thank God, We Ain’t What We Was*’, L.A. TIMES (July 9, 1998), <http://articles.latimes.com/1998/jul/09/local/me-2015>.