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Recommended Citation

Monroe H. Freedman, *Atticus Finch—Right and Wrong*, 45 Ala. L. Rev. 473 (1994)

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ATTICUS FINCH—RIGHT AND WRONG

*Monroe H. Freedman**

Leo Frank was murdered by a lynch mob in Marietta, Georgia, on August 15, 1915.¹ He had been found guilty of the murder of Mary Phagan, a thirteen-year-old girl who worked in his factory, but his sentence of death had been commuted to life imprisonment by Governor John M. Slaton, who believed him to be innocent.² Frank was unquestionably denied due process at his trial and was almost certainly innocent. But what is material here is the antisemitism that poisoned the trial and that fired up the mob that murdered him.

During the trial, crowds outside the courthouse chanted, "Hang the Jew."³ The judge and the defense attorneys were threatened that they would not leave the courtroom alive if the "damned Jew" were acquitted.⁴ There is reason to believe that jurors were subjected to similar intimidation.⁵ Witnesses swore in affidavits after the conviction that two jurors had made antisemitic remarks before the trial, including, "I am glad they indicted the God damn Jew. They ought to take him out and lynch him. And if I get on that jury I'd hang that Jew sure."⁶ The prosecutor told the jury about Jewish criminals, including "Schwartz, who killed a little girl in New York."⁷ The prosecutor also compared Frank to Judas Iscariot.⁸

The members of the mob that lynched Leo Frank were among the "best citizens" of Marietta.⁹ They included a minis-

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1. See LEONARD DINNERSTEIN, *THE LEO FRANK CASE* (1966).

2. *Id.* at 122-29.

3. *Id.* at 60.

4. *Id.*

5. *Id.*

6. DINNERSTEIN, *supra* note 1, at 77.

7. DINNERSTEIN, *supra* note 1, at 53.

8. DINNERSTEIN, *supra* note 1, at 53.

9. DINNERSTEIN, *supra* note 1, at 139.

ter, two former appellate court justices, and a former sheriff.¹⁰ The Dean of the Atlanta Theological Seminary later described the lynchers as a select group, "sober, intelligent, of established good name and character—good American citizens" and led by a man who "bore 'as reputable [a] name as you would ever hear in a lawful community . . . a man honored and respected."¹¹

Other good citizens, who later took snapshots of Frank's body as it hung from an oak tree, "milled about happily, as if at a holiday barbecue."¹² *The Marietta Journal and Courier* commented: "We are proud, indeed, to say that the body hanged for more than two hours amid a vast throng and no violence was done. Cobb county people are civilized. They are not barbarians."¹³

But Leo Frank's lynching was not the end; it was the beginning. The men who hanged Frank had been part of a group who called themselves the Knights of Mary Phagan.¹⁴ After murdering Frank, this group provided the nucleus for the revival of the Ku Klux Klan in an elaborate ritual on a mountain top just outside of Atlanta.¹⁵

Some twenty years and hundreds of lynchings later, a gang of Klansmen, in sheets and hoods, bearing crosses and torches, gathered at the home of Sam Levy and his family in Atticus Finch's Maycomb, Alabama.¹⁶ The Levys would have known what had happened to Leo Frank, and of the Klan's record of terrorism in the following years. They would also have known that the Klan had formed alliances with American Nazis during the 1930s.¹⁷ Let's take the advice of Atticus Finch, then, and do something that he failed to do. Let's climb into the skin of Sam Levy and his wife and his children, and walk around in it.¹⁸

10. DINNERSTEIN, *supra* note 1, at 139.

11. DINNERSTEIN, *supra* note 1, at 139-40.

12. DINNERSTEIN, *supra* note 1, at 143.

13. DINNERSTEIN, *supra* note 1, at 144.

14. DINNERSTEIN, *supra* note 1, at 150.

15. DINNERSTEIN, *supra* note 1, at 150. The Frank case also brought about the formation of the Anti-Defamation League of B'nai B'rith.

16. HARPER LEE, *TO KILL A MOCKINGBIRD* 157 (1960).

17. WYN C. WADE, *THE FIERY CROSS* 268 (1987). "When Hitler has killed all the Jews in Europe, he's going to help us drive all the Jews on Miami Beach into the sea," proclaimed a member of the Miami Klavern. *Id.*

18. LEE, *supra* note 16, at 36.

The Levys are alone against the hooded mob. Atticus Finch is not there for them, nor are any of the other good people of Maycomb. Recall how Tom Robinson is unable to sleep and cringes, full of dread, behind the wall of his cell in Maycomb's jail when the Maycomb lynch mob comes for him.¹⁹ In the same way, Mrs. Levy and her children would be wide awake, cowering in terror behind the wall of their home, fearing that their husband and father would be shot by the mob, or that he would be carried away and later found hung, another piece of strange fruit swinging from the branch of a Southern tree. They also would know that Klan torches are used to burn down houses with people in them. The children would be crying, muffling their sobs so that the mob could not hear them.

And Sam Levy—with his wife's and children's lives and his own life in jeopardy—Levy would know that his only chance, and a slim one, would be to try to face down the mob alone. So he stands on his porch, stomach churning, heart pounding, "and [tells] 'em things had come to a pretty pass, he'd sold 'em the very sheets on their backs."²⁰ His courageous bluff works. "Sam made 'em so ashamed of themselves they went away," Finch complacently recounted.²¹

And what of Finch's judgment on the Levys' night of terror, and the lasting trauma to the Jewish parents and to their children? The Klan, he says, "couldn't find anybody to scare."²² The Klan, in fact, wasn't in the business of scaring—much less harming—anyone. "Way back about nineteen-twenty there was a Klan, but it was a political organization more than anything."²³ Nineteen-twenty, recall, was three years after the lynching of Leo Frank. And, "[n]o, we don't have mobs and that nonsense in Maycomb. I've never heard of a gang in Maycomb."²⁴ When Jem replies, "Ku Klux got after some Catholics one time,"²⁵ Finch does not explain that Catholics were the frequent victims of Klan violence. Instead he responds evasively: "Never heard of

19. LEE, *supra* note 16, at 165.

20. LEE, *supra* note 16, at 165.

21. LEE, *supra* note 16, at 157.

22. LEE, *supra* note 16, at 157.

23. LEE, *supra* note 16, at 157.

24. LEE, *supra* note 16, at 157.

25. LEE, *supra* note 16, at 157.

any Catholics in Maycomb either . . . [Y]ou're confusing that with something else."²⁶

Is this just a father trying to quiet his children's fears with falsehoods and evasions? Not if we are to believe Finch himself: "Jack! When a child asks you something, answer him, for goodness' sake. But don't make a production of it. Children are children, but they can spot an evasion quicker than adults, and evasion simply muddles 'em."²⁷ "I just hope that Jem and Scout come to me for their answers instead of listening to the town," he adds.²⁸

And those who extol Finch as a paragon of moral character, praise him most for his truthfulness, especially to his children. "[T]ruthfulness was stamped upon his character like an Indian head on an old nickel . . ."²⁹ *To Kill a Mockingbird* . . . explores the impact of Atticus Finch's character upon . . . the moral education of his children.³⁰

Consider, then, the moral truth that he tells to the children when they experience the lynch mob outside the jail. Walter Cunningham, a leader of the mob, is "basically a good man," he teaches them, "he just has his blind spots along with the rest of us."³¹ It just happens that Cunningham's blind spot (along with the rest of us?) is a homicidal hatred of black people. And when Jem replies, with the innocent wisdom of a child, that attempted murder is not just a "blind spot," Finch condescendingly explains to him: "[S]on, you'll understand folks a little better when you're older. A mob's always made up of people, no matter what. Mr. Cunningham was part of a mob last night, but he was still a man."³²

What are we to make of this fatuousness? That a lynch mob is not a lynch mob because it's "made up of people"? That be-

26. LEE, *supra* note 16, at 157.

27. LEE, *supra* note 16, at 96.

28. LEE, *supra* note 16, at 97.

29. Timothy L. Hall, *Moral Character, the Practice of Law, and Legal Education*, 60 MISS. L.J. 511, 521-22 (1990).

30. *Id.* at 551 n.132.

31. LEE, *supra* note 16, at 168. Law students, though, would be well advised not to rely on the "basically a good man" or "blind spot" defense on the bar exam, or in a motion to dismiss an indictment.

32. LEE, *supra* note 16, at 168. Do the children remember, one wonders, their father's recent evasion that "we don't have mobs and that nonsense in Maycomb"?

cause Cunningham is "still a man," he has no moral responsibility for attempted murder? Who does have moral (and legal) responsibility for a wrongful action if not the person who commits the wrong?

One of the charges I have faced for past criticisms of Atticus Finch³³ is "presentism."³⁴ This clumsy neologism is meant to express the idea that it is unfair to hold someone in an earlier time to moral standards that we recognize today. Lest anyone miss the point, this contention is derived from cultural relativism. This is a philosophy that rejects the idea that there are any moral values that are absolute (or, at least, *prima facie*) and eternal. Instead, morality is equated with the notions of right and wrong that are recognized in the culture of a particular time and place. Slavery? Apartheid? Lynching? Sacrificing babies? Well, the cultural relativist says, we might not approve, but who are we to judge the moral standards of people in another time or place?

So let me declare myself. I do believe that there are *prima facie* principles of right and wrong (which can be called Natural Law), which each of us is capable of recognizing by the use of experience, intellect, and conscience. There may not be many such principles of right and wrong, but the terrorizing of the Levy family, the attempted lynching of Tom Robinson, and the apartheid that Atticus Finch practiced every day of his life—those things are wrong today, and they were wrong in Maycomb, Alabama, in the 1930s.

Again, let's take Finch's advice. Let's get inside the skin of the black people of Maycomb and walk around in an ordinary

33. Monroe Freedman, *Atticus Finch, Esq., R.I.P.*, LEGAL TIMES, Feb. 24, 1992, at 20; Monroe Freedman, *Finch: The Lawyer Mythologized*, LEGAL TIMES, May 18, 1992, at 25.

34. Professor Timothy Hall prefers "chronological snobbery." See David Margolick, *At the Bar*, N.Y. TIMES, Feb. 28, 1992, at B7.

Another charge is that I am unable to understand the concept of Christian charity. R. Mason Barge, *Fictional Characters, Fictional Ethics*, LEGAL TIMES, Mar. 9, 1992, at 23. As Mr. Barge explains it, Christian charity would look like this. Cunningham was a racist who acted out his irrational hatred by whipping up a mob to lynch a black man. Cunningham was dissuaded on this occasion, but never repented, never changed his hateful attitude, and was just as likely to attempt the same evil act the next time the opportunity arose. Christian charity was the act of Finch, a white man, forgiving Cunningham, another white man, for his ongoing and unrepentant hatred of Blacks and for his attempt to murder a Black.

day of their lives. They endure, and their children grow up experiencing minute-by-minute reminders of separateness premised upon their innate inferiority. They are compelled to live in a ghetto near the town garbage dump.³⁵ They cannot use the white only rest rooms, the white only water fountains, the white only lunch counters, or the white only parks. If their children go to school, their segregated schools, like their churches, have few if any books.³⁶ They are even segregated in the courtroom in which Finch practices law.³⁷ The jobs allowed to them are the most menial. And they face the everyday threat of lawless but condoned violence for any real or imagined stepping out of line.

Tom Robinson knows this, and he knows that it will cost him his life. The last thing he says to Atticus before they take him to the prison camp is: "Good-bye, Mr. Finch, there ain't nothin' you can do now, so there ain't no use tryin'."³⁸ That day, "he just gave up hope."³⁹ And, of course, Tom Robinson is right. He is shot to death—with seventeen bullets—on the claim that a gentle man with a useless arm, in a prison yard the size of a football field,⁴⁰ in plain view of guards with guns, broke into a blind, raving charge in a hopeless attempt to climb over the fence and escape.⁴¹

You can believe this improbable story, as Finch purports to do.⁴² But I believe (and Harper Lee appears to believe) that Tom Robinson was goaded into a desperate, futile run for the fence on the threat of being shot where he stood. Underwood's editorial in *The Maycomb Tribune* calls it a "senseless" killing⁴³—not what one would call a killing, with fair warning, of a raving man about to surmount a prison fence and escape. And if Finch averts his eyes from the truth, Scout faces it straight on. "Tom was a dead man," she realizes, "the minute Mayella Ewell opened her mouth and screamed."⁴⁴

35. LEE, *supra* note 16, at 182.

36. LEE, *supra* note 16, at 134-35.

37. LEE, *supra* note 16, at 174-75.

38. LEE, *supra* note 16, at 247.

39. LEE, *supra* note 16, at 247.

40. LEE, *supra* note 16, at 250.

41. LEE, *supra* note 16, at 248.

42. LEE, *supra* note 16, at 248.

43. LEE, *supra* note 16, at 254.

44. LEE, *supra* note 16, at 254.

Throughout his relatively comfortable and pleasant life in Maycomb, Atticus Finch knows about the grinding, ever-present humiliation and degradation of the black people of Maycomb; he tolerates it; and sometimes he even trivializes and condones it.⁴⁵ Nor does Finch need the presentism of a Northern liberal six decades later to tell him that these things are wrong. He himself accurately diagnoses "Maycomb's usual disease . . . reasonable people go[ing] stark raving mad when anything involving a Negro comes up."⁴⁶ "[I]t's all adding up," he recognizes, "and one of these days we're going to pay the bill for it."⁴⁷ But he hopes that the struggle for justice won't come during his children's lifetimes.⁴⁸ For Finch, the Civil Rights Movement of the 1960s is inevitable, but decades too soon.

The charge of presentism fails also when we consider that other Whites of the time—born, raised, and living in Finch's South—are able to see that the oppression of Blacks is morally wrong. Dill, nine years old, runs out of Robinson's trial, physically sickened by the prosecutor's racist baiting of Robinson.⁴⁹ "It ain't right, somehow it ain't right to do 'em that way. Hasn't anybody got any business talkin' like that—it just makes me sick."⁵⁰

Maudie Atkinson is another who recognizes the injustice against Blacks and, she tells the children, they'd be surprised how many others think the same way.⁵¹ They include prominent and respected members of the community: Judge John Taylor and Sheriff Heck Tate,⁵² the landowner Link Deas,⁵³ and the editor Braxton Underwood.⁵⁴ They include Dolphus Raymond: "Cry about the simple hell people give other people—without even thinking. Cry about the hell white people

45. See *supra* text accompanying notes 22-26, 31-32.

46. LEE, *supra* note 16, at 97.

47. LEE, *supra* note 16, at 233.

48. LEE, *supra* note 16, at 233.

49. LEE, *supra* note 16, at 211.

50. LEE, *supra* note 16, at 211.

51. LEE, *supra* note 16, at 228.

52. LEE, *supra* note 16, at 97.

53. LEE, *supra* note 16, at 207.

54. LEE, *supra* note 16, at 166, 254. Indeed, Underwood is able to distinguish right from wrong despite his own bigotry. "[I]t's a funny thing about Braxton. He despises Negroes, won't have one near him." *Id.* at 167.

give colored folks, without even stopping to think that they're people, too."⁵⁵ And Jem, in response to Finch's explanation about the "ugly facts of life" and of Southern justice, also recognizes right and wrong. "Doesn't make it right," he says, beating his fist softly on his knee.⁵⁶

What, then, do I expect of Atticus Finch *as a lawyer*? First, because there has been some misunderstanding in the past,⁵⁷ let's be clear about what I don't expect. I have never suggested that Finch should have dedicated his life to "working on the front lines for the N.A.A.C.P."⁵⁸ On the contrary, in rejecting the notion that Atticus Finch is a role model for today's lawyers, here is what I said: "Don't misunderstand. I'm not saying that I would present as role models those truly admirable lawyers who, at great personal sacrifice, have dedicated their entire professional lives to fighting for social justice. That's too easy to preach and too hard to practice."⁵⁹

In fact, part of the point of my commentary is that Finch's adulators inaccurately represent him as a paragon of social activism—"the hope of the downtrodden."⁶⁰ Also, it is Finch's adulators who insist upon rewriting the book to create a mythologized hero. Typical is a recent piece stating that Finch "decides" to represent an indigent defendant even though he thereby "incur[s] the obloquy of his friends."⁶¹ This is wrong on two counts. First, Finch does not choose to represent Tom Robinson. He accepts a court appointment, but candidly says, "You know, I'd hoped to get through life without a case of this kind, but John Taylor pointed at me and said, 'You're It.'"⁶²

Second, it is inaccurate to say that Finch's friends subject

55. LEE, *supra* note 16, at 213.

56. LEE, *supra* note 16, at 233.

57. "What Monroe really wants is for Atticus to be working on the front lines for the N.A.A.C.P. in the 1930s," said Professor Timothy Hall, "and if he's not, he's disqualified from being any kind of hero." David Margolick, *At the Bar*, N.Y. TIMES, Feb. 28, 1992, at B7.

58. See *supra* note 57.

59. Monroe Freedman, *Atticus Finch, Esq., RIP*, LEGAL TIMES, Feb. 24, 1992, at 20, 21.

60. Gary A. Hengstler, *Vox Populi*, A.B.A. J., Sept. 1993, at 60, 61.

61. Michael E. Tigar, *Setting the Record Straight on the Defense of John Demjanjuk*, LEGAL TIMES, Sept. 6, 1993, at 22.

62. LEE, *supra* note 16, at 97.

him to obloquy. It is true that many of the townspeople do, but not Finch's friends, not the people whose opinions he values. In fact, those people admire Finch for taking the case and for giving Robinson zealous representation.

Maudie Atkinson is one. She gives Finch the highest praise she can. "We're so rarely called on to be Christians," she tells Jem, "but when we are, we've got men like Atticus to go for us."⁶³ And when Jem says, "Wish the rest of the county thought that," she replies, "You'd be surprised how many of us do."⁶⁴ In addition to Maudie Atkinson, these include the most prominent people in Maycomb—Judge John Taylor, Sheriff Heck Tate, property owner Link Deas, and newspaper editor Braxton Underwood—"people like us."⁶⁵

I don't say this to disparage Finch, but for the sake of accuracy regarding presentism. Disparagement comes with my next point, which considers what it means that Finch "hoped to get through life without a case of this kind."⁶⁶ It means that Atticus Finch never in his professional life voluntarily takes a pro bono case in an effort to ameliorate the evil—which he himself and others recognize—in the apartheid of Maycomb, Alabama. Forget about "working on the front lines for the NAACP." Here is a man who does not voluntarily use his legal training and skills—not once, ever—to make the slightest change in the pervasive social injustice of his own town.

Atticus Finch is, after all, a skilled lawyer, a friend of the rich and powerful, and for many years a member of the state legislature. As a legislator, in fact, his diligence in reorganizing the tax system keeps him from his family and is a matter for respectful editorial comment in the newspapers.⁶⁷ Could he not introduce one bill to mitigate the evils of segregation? Could he not work with Judge Taylor in an effort to desegregate the courthouse? Could he not take, voluntarily, a single appeal in a death penalty case? And could he not represent a Tom Robinson just once without a court order to do so? As Finch acknowledges, Robinson's case is not unique. Referring to the jury's conviction

63. LEE, *supra* note 16, at 228.

64. LEE, *supra* note 16, at 228.

65. LEE, *supra* note 16, at 228.

66. LEE, *supra* note 16, at 97.

67. LEE, *supra* note 16, at 126.

of an innocent black man, he says, "They've done it before . . . and they'll do it again."⁶⁸

But let's assume, for the sake of discussion, that I am guilty of presentism. Assume too that anything Finch tried to do would be futile (which is a familiar justification for being a bystander to evil). Even if those contentions have merit, does that make Finch a role model for today's lawyer? As former ABA president Talbot D'Alemberte has pointed out, eighty percent of the legal needs of the poor are today going unmet.⁶⁹ Carrying out a court appointment, as Finch did, will comply with the lawyer's oath "in a technical sense," D'Alemberte reminds us, but unless more lawyers *volunteer* their services, we will not redeem our country's and our profession's pledge of "liberty and justice for all."⁷⁰

But in saying that Finch is not an adequate role model for today's lawyer, I want to avoid the over-simplification of his adulators. Finch has an enviable array of admirable qualities and, in one instance, he is truly courageous.

He is a loving, patient, and understanding father, successfully coping with the burden of being a single parent. In his personal relations with other people, black and white, he unflinchingly treats everyone with respect. Professionally, he is a superb advocate, a wise counsellor, and a conscientious legislator. A crack shot, he never touches a gun, except to protect the community from a rabid dog.⁷¹ Even when he heroically waits for and faces down the lynch mob, he arms himself only with a newspaper.⁷²

In short, Atticus Finch is both more and less than the mythical figure that has been made of him. He is human—sometimes right and sometimes wrong. And one criticizes Atticus Finch not from a position of superiority, but with respect, like a sports columnist reporting the imperfection in an athlete whose prowess he himself could never match.

68. LEE, *supra* note 16, at 225.

69. Talbot D'Alemberte, *Remembering Atticus Finch's Pro Bono Legacy*, LEGAL TIMES, Apr. 6, 1992, at 26.

70. *Id.*

71. LEE, *supra* note 16, at 97-107.

72. LEE, *supra* note 16, at 161.