

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

2018

The Cross-Examination of Mayella Ewell

Richard H. McAdams

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Richard H. McAdams, "The Cross-Examination of Mayella Ewell," 69 *Alabama Law Review* 579 (2018).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

THE CROSS-EXAMINATION OF MAYELLA EWELL

*Richard H. McAdams**

Shortly after Atticus Finch begins his cross-examination of Mayella Ewell, Scout asks: “What on earth was her life like?”¹ Scout’s narration provides some of the answer, but not all that we should discern. To know the whole story of Mayella in *To Kill a Mockingbird*, or all that we can know, we must make inferences that exceed the grasp of the eight-year-old Scout. In so doing, we necessarily rely heavily on the trial testimony Atticus Finch elicits in his direct examination of Tom Robinson and his confrontational cross-examination of Mayella. In this short essay, I examine these courtroom scenes in detail to see what more they can tell us of Atticus and what light they shed on the otherwise obscure life of Mayella Ewell.

The reconstruction of Mayella’s story requires empathy and imagination. As is well understood, empathy plays an important role in *Mockingbird*.² Atticus Finch exhibits strong empathic understanding of others. He famously expresses the point, as President Barack Obama quoted shortly before leaving office: “You never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it.”³ When people quote this part of *Mockingbird*, they usually have in mind that empathetic *understanding* of someone will trigger an *emotion* similar to what they are experiencing and then some compassionate *behavior* helpful to the person better understood. The understanding, the emotion, and the behavior, I contend, are distinct but

* Bernard D. Meltzer Professor of Law, University of Chicago Law School. Over time, I have benefited from many valuable conversations and exchanges on the topics discussed in this essay. I thank Will Baude, Alfred Brophy, Judy Cornett, Mary Anne Frank, Randy Kennedy, Mike Klarman, Saul Levmore, Steven Lubet, Anna Marshall, Allegra McLeod, Naomi Mezey, Chris Schmidt, Abbe Smith, Robin West, and Heather Whitney.

1. See HARPER LEE, *TO KILL A MOCKINGBIRD* 207 (HarperCollins Harper Perennial Modern Classics ed.) (1960).

2. See, e.g., Richard H. McAdams, *Empathy and Masculinity in Harper Lee’s To Kill a Mockingbird*, in *AMERICAN GUY: MASCULINITY IN AMERICAN LAW AND LITERATURE* 239 (Saul Levmore & Martha C. Nussbaum eds., 2014); Note, *Being Atticus Finch: The Professional Role of Empathy in To Kill a Mockingbird*, 117 HARV. L. REV. 1682, 1697 (2004).

3. LEE, *supra* note 1, at 33; see Spencer Kornhaber, *Obama’s Ingenious Mention of Atticus Finch*, ATLANTIC (Jan. 11, 2017), <https://www.theatlantic.com/entertainment/archive/2017/01/obamas-atticus-finch/512789/>.

frequently conflated.⁴ Without getting bogged down in a terminological debate, clarity requires distinguishing the empathetic cognition of inferring what another person experiences, feels, and thinks; the compassionate emotion of concern for the well-being of others; and the helpful or altruistic behavior such emotion may generate.⁵ The famous quotation refers most directly to the cognitive—what it takes to *understand* a person—though of course understanding often motivates empathetic emotion and compassionate behavior.

In any event, *Mockingbird* is full of all these elements of empathy. Atticus Finch is a paragon of empathetic understanding and compassionate behavior. We see this in his conduct putting at ease Scout's classmate Walter Cunningham when he visits the Finch house.⁶ We see empathy and compassion when Atticus aids Mrs. Dubose as she struggles to end her morphine addiction.⁷ Atticus tries at various points to reign in his children's obsession with Boo Radley, to protect Boo from unwanted attention. Most obviously, Atticus is a good father to Scout and Jem; he is attentive to their moods and concerns and is patient and affectionate.

Atticus is not alone in his empathy. We see Boo Radley figure out that Scout and Jem are cold as they watch men fight the fire across the street, and so he places a blanket on them without their noticing.⁸ Calpurnia is frequently understanding and compassionate towards Scout and Jem, and again when she explains to Scout not to call attention to Walter Cunningham's excessive use of syrup.⁹ Jem is even compassionate towards a roly-poly when he asks Scout not to kill it for no reason.¹⁰

But the novel doesn't just praise empathy and illustrate how empathy inspires compassion, it draws the reader into the exercise of imaginative or cognitive empathy. Of course, to some degree, every good novel does this. A reader gets more out of any story by climbing into the skin or shoes of the fictional characters and walking around in them. But one is really

4. See McAdams, *supra* note 2, at 247 (“In a typical case, (1) cognitive empathy allows someone to recognize and understand another person’s psychic suffering, which might produce (2) empathetic concern for their suffering, which might produce (3) compassionate behavior. But the connection between these three steps is at most a mere tendency, not a necessity.”). My discussion of Mayella in this essay draws upon this book chapter.

5. See C. DANIEL BATSON, *ALTRUISM IN HUMANS* 11–19 (2011); PAUL BLOOM, *AGAINST EMPATHY: THE CASE FOR RATIONAL COMPASSION* (2016).

6. When Scout brings Walter home, he is awkward in this wealthier environment, but Atticus understands the boy sufficiently that they converse “like two men” talking “about crops,” though Atticus is not a farmer. LEE, *supra* note 1, at 26–27.

7. *Id.* at 127. Atticus sends Jeb to read to Mrs. Dubose. Jeb thinks this is only a matter of punishment for destroying Mrs. Dubose’s flowers, but finds out after she dies that the reading distracted her while she broke the addiction.

8. *Id.* at 81–82.

9. *Id.* at 27.

10. *Id.* at 273.

compelled to do this in *Mockingbird* because the novel employs an unreliable narrator to tell the story, the eight-year-old Scout. At times, we sense that it is the adult Scout narrating the story but only as she understood things at the time as a child, while the adult Scout knows that the child Scout didn't understand things all that well.¹¹ So the novel challenges the reader to figure out what the child Scout is missing, to make the inferences she can't make, so we might see the story like the adult Scout looking back.

I want to do that for the character of Mayella Ewell, to figure out what the eight-year-old Scout misses. I believe there is enough in the novel to tell her story, but just barely and only if we make a serious effort to walk around in her shoes.

Part of that story is the cross-examination of Mayella. And here we see what we might call the dark side of cognitive empathy. The ability of one person to understand what another person experiences, feels, and thinks is not always a tool for compassionate behavior; it is also a tool for strategic behavior *against* the person. A competitor gets inside the head of an adversary in order to better predict the adversary's next move and thus to counter it. This is notably true when the competitor is a lawyer. The lawyer's job is sometimes to prove or make it seem that a witness is lying. To defend Tom Robinson, Atticus needs to prove that Mayella is lying. Part of his cross-examination technique is using imaginative empathy to unmask her motivation for lying. It is not an exercise of compassion, but of necessary cruelty, as we shall see.

If we take up the novel's call for stepping into the shoes of others, the first thing we should notice is that Scout is not the center of the story. She is the center of her own child-like world, as every child is, and she is the narrator, who occupies a special position in any narrative. But she is not the center of Maycomb or the events she describes.

Nor is Atticus, though he is (arguably) the protagonist and Scout thinks he is the center of everything. For all he does in the novel, Atticus is not the prime mover, the ultimate cause of the story that unfolds. That designation belongs to two "minor" characters: Tom Robinson and Mayella Ewell. One day, they have an encounter. From that encounter, the story unfolds: Mayella accuses Tom of rape; the prosecutor charges Tom; Atticus accepts the assignment of defense counsel; Scout and Jem are taunted about their

11. Consider the first and fifth sentences of the novel: "When he was nearly thirteen, my brother Jem got his arm badly broken at the elbow. . . . *When enough years had gone by to enable us to look back on them*, we sometimes discussed the events leading to his accident." LEE, *supra* note 1, at 3 (emphasis added). Or the last sentences of Chapter 13: "I know *now* what he [Atticus] was trying to do . . ." *Id.* at 152 (emphasis added). After Boo Radley saves Scout and Jem's life from Bob Ewell's attack, Scout reports: "I never saw him again." *Id.* at 320. We are supposed to believe this meant not only that she never saw him again during her childhood, but ever.

father's role; a lynch mob forms and disbands; a jury hears testimony and renders a verdict; Scout and Jem learn uncomfortable truths about their community; Tom is convicted and shot dead by prison guards; Bob Ewell seeks revenge against Atticus by attacking Jem and Scout; Boo Radley kills Bob.

All of this because of an encounter between Mayella and Tom, two characters at the margins of Maycomb society because of their class and, in Tom's case, race. And, as we shall see, Mayella, the lower-class woman, is the prime mover of that encounter, the one who planned it. With an omniscient narrator, this is how the story might begin. Aaron Sorkin is working on a play of the story¹² and one could imagine it starting with this scene and this stage direction: "Mayella stands on the front porch looking out expectantly from her ramshackle house; Tom walks by."

That's the part Tom and Mayella agree on. After that, their accounts diverge. There have been a few contrarian readings of *To Kill a Mockingbird* in which Tom is possibly guilty of the rape,¹³ in which case we should question or reject much of his testimony. I think this is an exceedingly strange way to interpret the novel and, like most readers, I reject it. I won't pause to rehash old debates except to note a new reason to think Tom is telling the truth: only from that assumption can we learn some distinguishing aspects of the character of *Mayella*, which assist us in understanding her tragic story. Ironically, if we accept Mayella's account, the event tells us very little about her life; her story is a generic one of an attack and rape. I want to accept Tom's story, and then to imagine as best we can how this fateful encounter took place.

Accepting that Tom is telling the truth, the issue for Atticus is how to persuade the jury of that fact, which primarily means how to examine Tom and cross-examine Bob and Mayella Ewell effectively. Of course, in 1935 in a small Alabama town, this was really impossible. It was never likely to matter how good a job Atticus did, given that the informal code of Jim Crow compelled white jurors to take the word of white witnesses—here, Bob and Mayella—over black witnesses—here, Tom—and particularly to believe white women accusing black men of rape. As he sometimes admits to himself, Atticus was beaten before he began.¹⁴ And yet he felt he had to make the attempt, and so he tried the case as if it were possible to win.

12. Gordon Cox, *Jeff Daniels to Star in Aaron Sorkin's 'To Kill a Mockingbird' on Broadway*, VARIETY (Feb. 15, 2018), <http://variety.com/2018/legit/news/jeff-daniels-to-kill-a-mockingbird-cast-broadway-1202700568/>.

13. See Steven Lubet, *Reconstructing Atticus Finch*, 97 MICH. L. REV. 1339, 1346–55 (1999) (book review) (sections analyzing the possibility that Tom Robinson lied or that Atticus did not know or care whether he was guilty); Malcolm Gladwell, *The Courthouse Ring: Atticus Finch and the Limits of Southern Liberalism*, NEW YORKER (Aug. 10, 2009), http://www.newyorker.com/reporting/hoo9/08/Jo/0908wfa_fact_gladwell (recounting Lubet's arguments against Robinson's innocence).

14. LEE, *supra* note 1, at 87, 128.

A major part of his effort comes in the cross-examination of Mayella. Here, Atticus's trial strategy begins with the fact that the jury, even if persuadable, would be inclined to believe Mayella because Tom's story seems implausible. Even if the jury cares what really happened, these white men of 1930s Alabama will find it believable that a black man raped a white woman, but not so credible that a white woman tried to break the taboo against interracial sex and against adultery (Tom being married). The white men of the jury would expect Mayella to be repulsed by Tom, but Tom's story requires believing she initiated an encounter and kissed him. To convince them of Tom's story, Atticus needs to explain and motivate her surprising behavior.

That is part of what he accomplishes in his cross-examination. It begins simply and quietly enough with some biographical questions. Part of it develops the theme that Bob Ewell was the one who inflicted the injuries on Mayella that the prosecution attributes to Tom Robinson. Atticus emphasizes that Mayella's right eye was blackened, that Bob is left handed, and that Tom's left arm is useless. He presses the point that Tom could not have easily both held Mayella down and beaten her with his one good arm.

But I want to focus on the part of his examination that elicits facts to explain her motivation. To begin, Atticus asks a series of questions that reveal nothing more than the fact that Mayella's life is miserable. Her mother died when she was young. Atticus implies that she was left with a vile and violent father, Bob, who spends much of the family money on alcohol. The Ewells live next to the town dump and fashion shoes from old tires. Mayella is the oldest child and dropped out of school to mother her seven siblings.¹⁵ Earlier in the novel, we meet one brother, Burris, on the first day Scout goes to school, where his parting words to his teacher are "Ain't no snot-nosed slut of a schoolteacher ever born c'n make me do nothin'!"¹⁶ We can then understand why Mayella thinks that Atticus mocks her when he uses polite terms such "ma'am" and "Miss."¹⁷

Atticus suggests by his questions that Bob Ewell physically abuses Mayella. There is some reason to think that the abuse includes incest. Here is where the direct examination of Tom matters greatly. When he describes their encounter, he quotes Mayella as saying that she had "never kissed a grown man before . . . She says what her papa do to her don't count."¹⁸ The words "to her" loom large. Bob also seems an unlikely source of affectionate fatherly kisses. When the prosecutor asks him on direct examination the simple question, "Are you the father of Mayella Ewell?,"

15. *Id.* at 207.

16. *Id.* at 31.

17. *Id.* at 206.

18. *Id.* at 221.

his answer immediately seizes on the sexual component of fatherhood: “Well, if I ain’t I can’t do nothing about it now, her ma’s dead.”¹⁹ It seems odd that Mayella would contemplate her father’s kisses during her encounter with Tom, much less feel the need to distinguish them from the passionate kisses she is asking Tom for, unless there was something sexual about them.

Earlier in the story, we hear from Atticus that the Maycomb authorities do not always require the Ewells to obey law.²⁰ Although the examples mentioned are only truancy and poaching, Miss Maudie reminds us at one point: “The things that happen to people we never really know. What happens in houses behind closed doors, what secrets”²¹ Some commentators think the incest is obvious.²² I regard the issue as not definitively settled, one of the horrors “we never really know.”²³

Returning to the cross-examination, Scout begins to narrate Atticus’s specific questions on this theme, and the first one is remarkable: simple, brilliant, and deceptively cruel. Atticus asks: “Miss Mayella, . . . a nineteen-year-old girl like you must have friends. *Who are your friends?*”²⁴ The question appears to violate two simple rules of effective cross-examination. First, such questions should ordinarily be leading, implying a specific answer (often just “yes” or “no”). The point is to avoid giving the witness latitude for a long or inapposite answer, one that volunteers facts helpful to her position, but to force a simple, narrow concession. Yet “who are your friends” is open-ended, suggesting no particular answer. A second canon of cross-examination is not to ask a question to which you don’t know the answer. You only ask the questions that will help your side and you can only know that in advance by knowing what the answers are (or can be proven to be).

Yet Atticus *did* know the answer. Mayella, Atticus knew, has no friends. He does not want to frame a leading question that suggests the answer—as by asking, “You have no friends, Miss Ewell, isn’t that right?”—because that would make the cruelty of his question transparent. Given the reality, Mayella painfully responds only with: “Friends?” Atticus plays innocent and tries again: “Yes, don’t you know anyone near your age, or older, or younger? Boys and girls? Just ordinary friends?”²⁵ This time

19. *Id.* at 195.

20. *Id.* at 34.

21. *Id.* at 51.

22. See, e.g., Iris Halpern, *Rape, Incest, and Harper Lee’s To Kill a Mockingbird: On Alabama’s Legal Construction of Gender and Sexuality in the Context of Racial Subordination*, 18 COLUM. J. GENDER & L. 743, 768 (2009).

23. LEE, *supra* note 1, at 51.

24. *Id.* at 208 (emphasis added).

25. *Id.*

her hostility “flared again” and she replies: “You makin’ fun o’me agin, Mr. Finch?”²⁶

The purpose of the question is to demonstrate what is, for Atticus’s purposes, the most important feature of Mayella’s misery, which is loneliness. She is possibly the loneliest person in Maycomb, lonelier than Boo Radley, a crucial fact for explaining why she would risk so much on the fantasy that Tom was sexually interested in her, why she would break her community’s taboo. Showing the jury her desperation is necessary to make Tom’s story credible.

Atticus knows how cruel the question is. He is a master of imaginative empathy, of walking around in the skin of others. Preparing for trial, after hearing Tom’s story, Atticus had to ask himself what could have motivated Mayella. He would have imagined her life, and grasped the significance of this question and answer. Knowing this, he proceeded anyway. In front of the packed courthouse, a big part of the town, the zealous advocate asks a friendless person the devastating question, “Who are your friends?” He exposes that an uneducated, impoverished, overworked, beaten, possibly sexually abused young woman lacks any romantic partner or ordinary companion.

But there is more than this to the life of Mayella Ewell. Besides being pitiable, my contention is that Mayella was, before her final encounter with Tom, surprisingly resilient—disciplined, persistent, and hopeful. We might expect her to be overwhelmed and despairing, but she is not. The geraniums are one clue. Earlier in the book we learn that the area around the Ewell cabin is littered with junk gleaned from the dump, such a large assortment of broken and rusted items that it made the yard “look like the playhouse of an insane child.”²⁷ But there is an exception that “bewildered Maycomb.”²⁸ In one corner, “[a]gainst the fence, in a line, were six chipped-enamel slop jars holding brilliant red geraniums, cared for as tenderly as if they belonged to Miss Maudie Atkinson People said they were Mayella Ewell’s.”²⁹ On direct examination, Tom testifies: “She watered them red flowers every day”³⁰ A hopeless and resigned person would presumably not bother to create a small thing of beauty in such an ugly setting, not when she is barely eking out a life. Mayella has not let miserable circumstances defeat her.

The real proof of this fact is the optimistic and self-reliant (if misguided) way that Mayella acts on her attraction to Tom (but, again, only

26. *Id.*

27. *Id.* at 194.

28. *Id.*

29. *Id.*

30. *Id.* at 218.

if we believe Tom's testimony). She should be deterred by the monumental barriers of the Jim Crow racial taboo and Tom's married status. But she instead focuses on the more immediate obstacle. She cannot successfully seduce Tom under the watchful eyes of her siblings, so she plans to get them out of the way. She saves money so that, on the day she will ask Tom inside, she can send all her siblings into town to get ice cream. From the testimony of Tom, we learn that it takes her an entire year. He testifies: "She says, 'Took me a slap year to save seb'm nickels, but I done it.'"³¹ It required extraordinary determination and sacrifice for a poor person to save during the Depression, especially when she faced the added complication of hiding the money from her father. There must have been many temptations to spend it along the way, but she resisted them all. A stereotype of the poor is that they are lazy and impulsive. Mayella is obviously neither. For a time, she perseveres.

If we continue our imaginative enterprise, we arrive at the day when Mayella put her daring plan into motion, the time and place of the central event where an omniscient narrator might begin the story. Here, we should walk around in Mayella's skin. Doing so, we cannot doubt that there was a moment on this day that was the happiest of Mayella's life. We can be unsure of only which moment it was: Perhaps when her seven siblings first departed for ice cream, leaving her alone in a strangely quiet home. Or when Tom first appeared on the road, proving that she had not wasted a year saving the seven nickels she just gave her siblings. (There was always a chance Tom wouldn't walk by before her siblings were due back home, so it must have been an enormous relief when he appeared.) Yet possibly the happiest moment was when Tom accepted her invitation to enter the house, or when she hugged and kissed him, the first time she had ever kissed a man she wanted to kiss. Her patience apparently rewarded, it seems inevitable that Mayella experienced an unfamiliar sense of life's possibilities, the good ones.

Harper Lee leaves it to us to conjure the moment. As Atticus must have imagined it before the trial and Scout after she became an adult. And also this: after the emotional high, Mayella experiences a shocking turn of events as the two worst things that could happen do happen. First, Tom rejects her. Despite all her planning, the only man ever to show her any respect, a good-looking, slightly older man whose kindness she mistook for romantic interest, spurns her advance. Ironically, the same racial norms that encouraged him to show respect and courtesy to Mayella, thus prompting her attraction, also compelled him to avoid her advance. (Not that we can assume he wanted to reciprocate; like Mayella, we have no good reason to think he was attracted to her.)

31. *Id.* at 220.

Second, just as Tom rejects her, her father appears at the window. Again, if we believe Tom (as we should), he reveals that Bob called Mayella a “goddamn whore” and threatened her life.³² Tom runs away and Bob delivers a beating. Mayella experiences no romantic affection or sexual interlude, but her father beats her as if she had. One assumes the punishment will never stop. If her nine-year-old brother Burris is willing to call his teacher a slut at school, one can imagine the kind of taunting Mayella must endure from her brothers and father for the foreseeable future.

For Mayella, these events must be annihilating. *Mockingbird* is a story of how racism kills Tom Robinson, but there is a parallel tragedy of Mayella and the death of hope.

The final segment of the cross-examination provides a little more support for this reading. Eventually, Mayella stops answering Atticus, and he keeps asking questions that tell his side of the story, letting her silence sit as a confession. And then Mayella breaks her silence with “I got somethin’ to say.”³³ Atticus holds out hope that she might tell what really happened, but she restates her accusation against Tom, referring to him by a racial epithet. She then challenges the white manhood of the jury, suggesting they are “fine fancy gentlemen” like Atticus, and will be “yellow stinkin’ cowards” if they fail to do what the informal code requires and convict the black man she accuses.³⁴ She then breaks down into angry sobs.

Possibly Atticus should have seen this coming and not given her the opening. But consider: what inquiry pushed Mayella over the edge so that she stopped answering? It is a second devastating question Atticus poses. Mayella says she had been screaming the whole time of the rape and Atticus asks: “Then why didn’t the other children hear you? Where were they? At the dump?”³⁵ This last part of the question implies the answer—“the children were at the dump”—which might appear to make it leading, but that is all misdirection. Atticus knows the answer is *not* “at the dump”; Mayella couldn’t say they were at the dump because it was too close for the children not to hear screams, and they would have come running had they heard her scream. She also could not admit that they were not at the dump because that would prove she knew they were all somewhere farther away, consistent with Tom’s testimony that she sent them for ice cream.

Shrewdly, Atticus has snuck up on this point. He did not just ask: “Weren’t the children in town getting ice cream with the money you gave

32. *Id.* at 221.

33. *Id.* at 213.

34. *Id.*

35. *Id.*

them?” Instead, he gets her to say she screamed and then asks why the children did not come running. Not only is she trapped, but the answer hits her again with the enormity of her failure, that she successfully and improbably saved money for nearly a year only to be rejected, humiliated, and beaten; that her clever and arduous sacrifice brought only punishment. That’s when she stops answering questions.

No wonder that Scout reports: “When Atticus turned away from Mayella he looked like his stomach hurt.”³⁶ And later:

Somehow, Atticus had hit her hard in a way that was not clear to me, but it gave him no pleasure to do so. He sat with his head down, and I never saw anybody glare at anyone with the hatred Mayella showed when she left the stand and walked by Atticus’s table.³⁷

Scout doesn’t understand, but the hatred is well earned. Atticus has just exposed Mayella as a perjurer, a woman beaten by her father, a violator of the racial taboo of her community, and one who saved money to be alone with the man who immediately rejected her. In public, he connects all of these humiliating secrets to the fact that she has no friends.

So let us turn to Atticus. What more do we learn about him that we do not already know from the rest of the novel? A few critics have inferred from his harsh cross-examination that Atticus is indifferent to Mayella’s suffering, or the Ewells generally, out of disregard for or insensitivity to lower-class whites.³⁸ My view is different. If a lawyer must ask a pitiless question, it is easier to be without pity. But that does not describe Atticus. Given his abundant empathy throughout the novel and his understanding of why she misinterpreted Tom’s kindness as sexual interest, he is likely the person in the courtroom who best understands Mayella’s misery and desperation and who best imagines how Tom’s rejection destroyed her. Given his demonstrated compassion toward others, he is likely to feel some of Mayella’s pain. Later, Atticus refuses to react to the provocation of Bob Ewell hurling tobacco spit in his face, saying that his passivity was worth it if it would save Mayella “one extra beating.”³⁹ But he is determined to give

36. *Id.*

37. *Id.* at 214. The “not clear to me” point makes sense only if we are thinking of the child Scout. It would be clear to an adult for the reasons given in the text. So here is an example of what I previously noted, that the narrator seems to be the adult Scout but she tells the story only as she perceived it as a child.

38. See Rob Atkinson, *Liberating Lawyers: Divergent Parallels in Intruder in the Dust and To Kill a Mockingbird*, 49 DUKE L.J. 601, 665–73 (1999); Maureen E. Markey, *Natural Law, Positive Law, and Conflicting Social Norms in Harper Lee’s To Kill a Mockingbird*, 32 N.C. CENT. L. REV. 162, 202–03 (2010); Teresa Godwin Phelps, *The Margins of Maycomb: A Rereading of To Kill a Mockingbird*, 45 ALA. L. REV. 511, 525 (1994); Note, *supra* note 2, at 1686–88.

39. LEE, *supra* note 1, at 249.

Tom a real defense, so he uses his empathetic understanding to destroy Mayella. That is why he sits down looking to Scout like his stomach hurt.

This is a conundrum of the trial lawyer. Having cognitive empathy will make one a better lawyer because it will allow one to get inside the head of adversaries (witnesses, jurors, opposing counsel, etc.). But for the decent and compassionate lawyer, the job will often require suppression of the empathetic concern that one's cognition inspires. In legal combat, the lawyer's imagination is a tool for attack, damaging a person who, one may believe, deserves compassion. And this is the conundrum of Atticus: there is no way to defend Tom Robinson except to be merciless on the desperate woman whose testimony threatens to send him to the electric chair. As Atticus says to his sister, he is "in favor of Southern womanhood as much as anybody, but not for preserving polite fiction at the expense of human life."⁴⁰ So he exposes Mayella as a liar, a violator of the racist and sexual taboos of her community, and a loser rejected by the black man she seeks to seduce.

And yet, while I have defended Atticus from the charge of classism, I have to join with others who raise a different concern. Might Atticus have been motivated, in part, not by his disapproval of Mayella's class, but from his disapproval of Mayella's actions? Consider his closing argument, which in part drives home his account of the events:

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, a code so severe that whoever breaks it is hounded from our midst as unfit to live with. . . . 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 was white, and she tempted a Negro. She did something that in our society is unspeakable: she kissed a black man. . . . No code mattered to her before she broke it, but it came crashing down on her afterwards.⁴¹

40. *Id.* at 167.

41. *Id.* at 231–32.

In the time and place, this was the argument to make in order that the defense have any chance at convincing the white male jury to acquit, but did Atticus Finch himself believe it? Perhaps he was merely appealing to the jury's belief in the code, only pretending to share it himself.

The answer is no, Atticus was not just pretending. He is very much a part of the community that enforces the code. In making this assessment, I am not relying on the depiction of a reactionary Atticus Finch in *Go Set a Watchman*.⁴² One need not look outside of *To Kill a Mockingbird*. There is a tendency to think that Atticus's opposition to the conviction of an innocent black man, his opposition to lynching, and his cordiality to the black people of his town—in short, his being a 1930s white southern liberal on race—demonstrates that he had the racial attitudes of late twentieth- or early twenty-first century racial liberals, which means he would also reject Jim Crow segregation, including the prohibition that social segregation places on interracial romance and sex. Yet this view is false; it is an anachronism to attribute to Atticus the racial views of liberals a half century later. Southern race liberals of the 1930s were *not* opposed to Jim Crow segregation; they were liberals just because they opposed lynching and supported fair criminal processes (and perhaps voting rights and reduced racial disparities in public spending).⁴³

A good example for comparison is Mark Ethridge, a white liberal journalist from Kentucky who fought against lynching in the 1930s alongside black political organizations and who President Roosevelt appointed to chair the Federal Employment Practices Committee during World War II.⁴⁴ He once wrote that white supremacy was “a complete denial of the democratic process and a complete humiliation of all people

42. HARPER LEE, *GO SET A WATCHMAN* (2015). In what follows, I draw occasionally from my book review. See Richard H. McAdams, *Past Perfect: Review of Go Set a Watchman, by Harper Lee*, NEW RAMBLER (Aug. 24, 2015), <http://newramblerreview.com/book-reviews/fiction-literature/past-perfect>.

43. See, e.g., MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 106 (2004) (“[In the interwar period,] Southern white ‘liberals’ limited their racial agenda to enacting state (but not federal) antilynching legislation, making the legal system fairer for blacks, reducing disparities in education spending, and securing minimal public services for blacks. Almost no southern whites were yet prepared to challenge segregation.”); see also *id.* at 168 (in the late 1930s, southern white liberals move to endorse federal antilynching laws, and a few years later, federal voting laws). Klarman identifies one organization, the Southern Conference for Human Welfare, founded in Birmingham in 1938, that opposed segregation. *Id.* But it suffered immediately from a purported association with communism—with “radicals”—and in 1947 the House Un-American Activities Committee labelled it a “deviously camouflaged communist-front organization.” *Id.* at 192.

44. See Jane Dailey, *The Sexual Politics of Race in World War II America*, in *FOG OF WAR: THE SECOND WORLD WAR AND THE CIVIL RIGHTS MOVEMENT* 145, 165 (Kevin M. Kruse & Stephen Tuck eds., 2012).

who profess any faith in democracy.”⁴⁵ Ethridge was at least as much a race liberal as Atticus Finch, and quite a bit more politically active.

Yet Ethridge vehemently rejected “social equality” and integration, repeatedly reassuring other whites that black Americans did not seek the freedom of interracial intimacy and marriage.⁴⁶ After World War II, however, the pace of racial change increased and various African-Americans started to publicly demand for the first time the complete repudiation of Jim Crow, including all rights of social equality. As the historian Jane Dailey describes, Ethridge and other white civil rights activists were pushed from left to right without ever altering their position: “Ethridge . . . moved from the front of the revolution in race relations to the rear just as the real battle was heating up.”⁴⁷ It is always easy to imagine that history was simpler than it was, but the white liberals of the 1930s South did not support social integration. Those who did were “radicals.”

This historical point is indispensable background to an illuminating exchange between Atticus and Scout near the end of *Mockingbird*. Scout asks Atticus if he is, as her classmate Cecil claims, a “[r]adical.”⁴⁸ Atticus is extremely amused by this question and replies, “You tell Cecil I’m about as radical as Cotton Tom Heflin.”⁴⁹ Heflin was the U.S. Senator from Alabama from 1920 to 1931, a flamboyant and staunch segregationist who ardently opposed black voting and supported the controversial practice of “convict leasing.”⁵⁰ Heflin once wrote a letter to *Time* magazine decrying a particular interracial marriage that occurred in New York.⁵¹

Aside from *Watchman*, there was never any reason to doubt the sincerity of Atticus’s statement comparing himself to J. Thomas “Cotton Tom” Heflin. Nothing in *Mockingbird* suggests that Atticus was a radical. He was born in the 1880s, lived entirely in Alabama, read local newspapers, and was tightly knit into his community, the white part of which continued to reelect him to the state house even after the trial. It would have been highly unusual for such a person to find an ideological path to radicalism and impossible for a town like Maycomb to reelect a

45. See Mark F. Ethridge, *Journalist, Dies at 84*, N.Y. TIMES (Apr. 7, 1981), <http://www.nytimes.com/1981/04/07/obituaries/mark-f-ethridge-journalist-dies-at-84.html> (noting that he “championed economic opportunity for blacks, sought an end to poll taxes and assailed the abuses of farm tenancy”).

46. See Dailey, *supra* note 44, at 164–65; see also KLARMAN, *supra* note 43, at 180 (noting that Ethridge wrote during the war that “there is no power in the world . . . which could now force the southern white people to the abandonment of the principle of social segregation”).

47. See Dailey, *supra* note 44, at 165.

48. LEE, *supra* note 1, at 287.

49. *Id.*

50. See DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 122, 196, 222, 230 (2008).

51. See *Again, Heflin*, TIME, Feb. 17, 1930, at 14.

person remotely suspected of being a race radical. Atticus would literally be too good to be believed if he transcended his racist culture so completely despite being so much a part of it.

The common reaction to *Go Set a Watchman*—that the 1950s Atticus Finch was shockingly different from the 1930s one—shows that many readers missed this simple historical point. A segregationist in the 1930s was probably a segregationist in the 1950s. I do not claim it was inevitable that Atticus Finch would oppose *Brown v. Board of Education*,⁵² as he does in *Watchman*. When he says in *Mockingbird* that he is “about” as radical as Cotton Tom, that might leave a little room for him to be a liberal who questioned some narrow aspects of segregation, such as education, or at least recognized the federal judicial authority to desegregate schools. Also, some people changed with the times. Notably, Justice Hugo Black joined the decision in *Brown* despite having been born in roughly the same time and place as the fictional Atticus and despite having once belonged to the Ku Klux Klan.⁵³ But there is nothing particularly surprising about the *Watchman* Atticus opposing *Brown*. Only if you took Atticus to be a late twentieth-century liberal, like the actor Gregory Peck who played him in the film, would you be taken entirely off guard by the Atticus of *Watchman*.⁵⁴

Like the best fictional heroes, the believable ones, Atticus Finch was seriously flawed. His flaw was that we have every reason to assume that he believed in the code that Mayella violated. And this fact causes me to clarify my point above. Anyone committed to zealous advocacy on behalf of Tom Robinson would have asked Mayella the cruel questions Atticus asked, had they understood her. The questions themselves are evidence of cognitive empathy and not evidence that Atticus lacked compassion for Mayella or poor whites generally. But it is unclear exactly how much Atticus suffered in the long run from rendering Mayella even more of a social outcast. Perhaps one reason Atticus could bring himself to inflict harm on Mayella while pursuing a lost cause for Tom Robinson was that he seriously disapproved of her for what he saw as her racial transgression. As he says in closing: she would deserve to be “hounded from our midst as unfit to live with.”⁵⁵ He may have been especially willing to say this because he believed she should be branded in this way.

52. 347 U.S. 483 (1954).

53. Justice Black was born in 1886 in a small Alabama town. See STEVE SUITTS, HUGO BLACK OF ALABAMA 20–22 (2005). Atticus was “nearly fifty” in *Mockingbird*, LEE, *supra* note 1, at 102 (italics omitted), which occurred in the mid-1930s (the trial took place in 1935, *id.* at 233), meaning that he was born in the mid 1880s, also in a small Alabama town.

54. See McAdams, *supra* note 42.

55. LEE, *supra* note 1, at 231.

Let me conclude with a final point about the novel's critical encounter between Mayella and Tom. *To Kill a Mockingbird* is about empathy, not only because many characters succeed in understanding others, but also because in this central moment, the ultimate cause of all the action, we experience the antithesis of empathy. Tragically, Mayella and Tom do not remotely understand one another.⁵⁶ Mayella does not understand Tom well enough to anticipate his rejection of her, or she would never have invited him into her house, and that would have saved her from transcendent humiliation and ostracism. Tom is totally right when he testifies, "I don't think she understood what I was thinkin'."⁵⁷ In return, however, Mayella could say exactly the same about Tom. He did not comprehend Mayella's intentions. If he had, he would have never agreed to enter her house, and that would have saved his life. In this racist setting, it was exceedingly difficult to understand people across the color divide. When these characters failed to understand each other, they were doomed.

56. The other major failure of cognitive empathy is Atticus's dangerous failure to anticipate that Bob Ewell would seek revenge on him by murdering or maiming his children. He admits this failure—he "can't conceive" of the evil involved—though Boo Radley apparently could. *Id.* at 305, 308.

57. *Id.* at 220.