POIN TS OF VIEW

OPINION AND COMMENTARY

By Monroe Freedman

A new ethical role model for lawyers is being promoted in scholarly books, law reviews, and bar journals. His name is Atticus Finch. He looks a lot like Gregory Peck. He is a gentleman. He has character.

"For me," writes a California trial lawyer in the October 1991 issue of the ABA Journal, "there was no more compelling role model than Atticus Finch.

Finch ... Fine citizen, parent and lawyer, Finch ... would remind us that this burden [of meeting a higher standard of behavior and truth] is never too much to bear.

Another commentator, in a November 1990 essay in the Stanford Law Review, eulogizes Atticus Finch in a different fashion, but with much the same sense of admiration: "There is no longer a place in America for a lawyer like Atticus Finch. There is nothing for him to do here—nothing he can do. He is a moral character in a world where the role of moral thought has become at best highly ambivalent."

And so on. Atticus Finch, the hero of Harper Lee's novel To Kill a Mockingbird, has become the ethical exemplar in articles on topics ranging from military justice to moral theology. If we don't do something fast, lawyers are going to start taking him seriously as someone to emulate. And that could be a bad mistake.

The whole business begins with the idea that understanding and abiding by the rules of ethical conduct is not enough. Rather, it is said, a crucial element that is too often overlooked is "character." The notion of character traces back to what Aristotle called "virtue." The quality of virtue or character is not directly concerned with doing the right thing, but rather with being the right type of person. That is, the person of character will "naturally" follow the right principles.

The Appointed Model

Atticus Finch is a lawyer in the small town of Macomb, Ala., in the 1930s. As most readers will remember, in the course of a novel, a black man, Tom Robinson, is falsely accused of raping a white woman, who, in fact, had been trying to seduce him. Finch is appointed to defend Robinson.

Finch would prefer not to have been appointed but, recognizing his duty as a member of the bar, he carries out the representation zealously. He even risks his own life to protect Robinson from a lynching mob. As we are told in the book, as well as in recent commentaries on lawyers' ethics, Finch acts as he does because he is a gentleman.

Is Atticus Finch, then, a role model for lawyers? I think not.

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Atticus Finch, a k a Gregory Peck: Lawyers are taking him seriously as a role model—and that's a "bad mistake."

In risking his life to save Robinson, Finch is undeniably admirable. But am I really expected to tell my students that they should emulate Finch by putting themselves between a lynching mob and a client? I may be a staunch proponent of zealous representation, but I can't sell what I won't buy.

It's true that Finch, having been appointed by the court to defend an unpopular client, gives him effective representation. That's an important ethical point, but it is also a relatively small one. And a refusal to accept a court's appointment is punishable by imprisonment for contempt.

What seems much larger for me is Atticus Finch's entire life as a lawyer in Macomb (which, ironically, is what "character" is all about).

Down With Gentlemen?

Let's go back to the idea of the gentleman. Part of my problem with it is that too many people who have carried that title have given it a bad name. Gentlemen tend to congregate together and to exclude others from their company and from their privileges on grounds of race, gender, and religion. In short, the gentleman has too often been part of the problem of social injustice and too seldom part of the solution. Aristotle himself was an elitist who taught that there is a natural aristocracy and that some people are naturally fit to be their slaves.

Consider Finch. He knows that the administration of justice in Macomb, Ala., is racist. He knows that there is a segregated "colored balcony" in the courthouse. He knows, too, that the rest rooms in the courthouse are segregated—if, indeed, there is a restroom at all for blacks inside the courthouse.

Finch also goes to segregated restaurants, drinks from segregated water fountains, rides on segregated buses, and sits in a park that may well have a sign announcing "No Dogs or Colored Allowed." Finch is not surprised when Robinson, having been convicted by a bigoted jury, is later shot to death with no less than 17 bullets while making a hopeless attempt to escape from prison to avoid execution.

Even more telling, Atticus Finch instructs his children that the Ku Klux Klan is "a political organization more than anything." (David Duke, can you use a campaign manager who looks like Gregory Peck?) Finch also teaches his children that the leader of the lynching mob is "basically a good man" who "just has his blind spots."

In this respect, Finch is reminiscent of Aristotle.

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Sen. Howell Heflin (D-Ala.), for example, has introduced a bill that would require legislators, before they pass a statute, to review several fundamental matters that, when not addressed, ultimately spawn countless lawsuits in federal court. The checklist of necessities would include the appropriate statute of limitations, whether a private cause of action is contemplated, when pre-emption of state law is intended, the conditions for any award of attorney fees, and, yes, the definition of key terms. Addressing up front this recurring litany of statutory insufficiencies would free additional capacity for the beleaguered federal judiciary. (President George Bush has instructed executive-branch agencies to perform a similar review in their drafting of proposed legislation.)

It is significant that the federal courts have moved vigorously in the past year in strategic and long-range planning through the creation of both a Judicial Conference committee and a division of the Administrative Office of the U.S. Courts that will study and evaluate case load trends and court operations. In doing so, the third branch has shown that it wants to assert primary responsibility, to the degree possible in a politicized environment, for the planning and operation of a resilient court system. The courts have signaled that they do not intend to be passive and reactive in grappling with capacity limitations and the potential impact of future caseloads.

But very little is achievable unless Congress is receptive to a modest, rational curtailment of federal jurisdiction and exercises restraint in adding new causes of action. At stake is access to the federal courts, public confidence in the system, and the ability of federal courts to achieve their central task, that of protecting federal rights and dispensing justice.

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A Gentleman—But No Model for Lawyers

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of Henry Drinker, author of the first book on the American Bar Association's Canons of Professional Ethics, which governed from 1908 until 1970. In his 1953 book, Legal Ethics, Drinker wrestled with what he considered a particularly difficult ethical conundrum: If a lawyer has been convicted of lynching a black man, is the lawyer guilty of a crime involving moral turpitude and therefore subject to disbarment?

Finch also is capable of referring to Eleanor Roosevelt not as a great humanitarian or even as the First Lady but, mockingly, as "the distaff side of the Executive branch in Washington" who is "fond of hurling" the concept of human equality. Finch's daughter, Scout, is at least as intelligent as his son, Jem, but it is Jem who is brought up to understand that, following his father, he will be a lawyer. Scout understands that she will be some gentleman's lady. Toward that end, she is made to put on her pink Sunday dress, shoes, and petticoat and go to tea with the ladies—where she is taunted with the absurd proposition (which she promptly denies) that she might want to become a lawyer.

Beyond Noblesse Oblige

Atticus Finch does, indeed, act heroically in his representation of Robinson. But he does so from an elitist sense of noblesse oblige. Except under compulsion of a court appointment, Finch never attempts to change the racism and sexism that permeate the life of Macomb, Ala. On the contrary, he lives his own life as the passive participant in that pervasive injustice. And that is not my idea of a role model for young lawyers.

Let me put it this way. I would have more respect for Atticus Finch if he had never been compelled by the court to represent Robinson but if, instead, he had undertaken voluntarily to establish the right of the black citizens of Macomb to vote freely in their county courthouse. That Atticus Finch would, indeed, have been a model for young lawyers to emulate.

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.

Rather, the lawyers we should hold up as role models are those who earn their living in the kinds of practices that most lawyers pursue—corporate, trusts and estates, litigation, even teaching—but who also volunteer a small but significant amount of their time and skills to advance social justice. That is the cause that Atticus Finch, a gentleman of character, chose to ignore throughout his legal career.