Rape Victims as Mockingbirds: A Law and Linguistics Analysis of Cross-Examination of Rape Complainants

Sara D. Schotland
Georgetown University Law Center

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/bjglsp

Part of the Criminal Law Commons, Law and Gender Commons, and the Litigation Commons

Recommended Citation
Available at: https://digitalcommons.law.buffalo.edu/bjglsp/vol19/iss1/2

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Journal of Gender, Law & Social Policy by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
Rape Victims as Mockingbirds:
A Law and Linguistics Analysis of Cross-Examination of Rape Complainants

SARA D. SCHOTLAND†

INTRODUCTION

This year marks the fiftieth anniversary of publication of Harper Lee's enormously popular novel *To Kill a Mockingbird.* I reexamine the trial scene in *To Kill a Mockingbird* from a sociolinguistics perspective. This article attempts to fill a gap in law and literature scholarship by focusing on linguistic analysis of the cross-examination conducted by Atticus Finch, and then on actual examinations from real-life rape trials in which trial lawyers skillfully manipulate the exchange in order to frame the witness in a negative light.

I first examine the quasi-conversational cross-examination tactics that Atticus uses with key witnesses at Tom Robinson’s trial, including the alleged rape victim, Mayella Ewell. Paul Grice’s landmark theory of conversational maxims emphasizes the centrality of the “cooperative principle”—the axiom that participants in a conversation normally cooperate with one another. Under Grice’s matrix, the category of *quantity* requires that a

† Sara D. Schotland is an Adjunct Professor of Law and Literature at Georgetown University Law Center and Senior Counsel at Cleary, Gottlieb, Steen & Hamilton LLP. She also teaches courses on law and literature, the death penalty, and other topics at the Honors College of the University of Maryland and in Georgetown University’s B.A in Liberal Studies program. Mrs. Schotland gratefully acknowledges the excellent contribution that she received from research assistant Michael Kawi in the preparation of this article.


speaker make a contribution as informative as necessary, but no more informative than is required. The category of quality requires that the speaker's contribution should be true. The category of relation contains a maxim mandating that a contribution be relevant. Finally, the category of manner requires that the speaker be clear, brief, and orderly. Participants in a conversation implicitly promise to follow these maxims, but, of course, the maxims can be flouted, as when the speaker makes a statement that is untrue or deceptive. A skillful cross-examiner like Atticus Finch can undermine the credibility of a witness by portraying her as flouting the ordinary conversational maxims of cooperation and thereby undermine the witness in the eyes of the jury. Atticus strips Mayella of what little dignity she possesses through his cross-examination, undermining her credibility and suggesting that she and her father live like swine, possibly in an incestuous relationship.

In the second part of this article, I offer linguistic analysis of scorch-and-burn cross-examinations in three trials as examples of trial counsel's "meta-framing strategies": the 1930s rape trial of the "Scottsboro boys" which inspired Harper Lee's novel, Daniel Petrocelli's cross-examination of O.J. Simpson in his civil murder trial in 1995, and the 2001 rape trial of William Kennedy Smith. I next compare the position of the rape complainant under cross-examination in a civil trial with participation in an ordinary conversation where participants can more readily evade questions and exit the conversation. Given the compulsory nature of cross-examination and the relative vulnerability of most rape complainants who are unrepresented by counsel in criminal trials, this essay advocates that rape complainants be provided with standing to allow full participation and independent counsel—not only out of concern for rape victims but to encourage testimony of future rape complainants.

3. Id.
4. Id.
5. Id.
6. Id.
7. Id.
I. ATTICUS FINCH’S CROSS-EXAMINATIONS IN TO KILL A MOCKINGBIRD

In Harper Lee’s novel, a young girl from the lowest rung of rural Alabama society makes a devastating charge: that a young black worker, Tom Robinson, has raped her. Our attention focuses on the trial scene. We begin with Atticus’s cross-examination of Sheriff Heck Tate. On direct examination of Sheriff Tate, the prosecution established that the Sheriff found Mayella lying on the floor in the middle of the room with her face “pretty well beat up,” and that she told the Sheriff that Tom Robinson beat her up and “took advantage of her.” Three times Atticus asks the Sheriff whether a doctor was called; three times he repeats the Sheriff’s answer for the jury to hear, that no doctor was called. Then, he asks the Sheriff which side of Mayella’s face was beaten. At first, the Sheriff says on the left side; then he corrects himself and says that it was the right side. Once again, Atticus repeats and draws attention to the Sheriff’s answer, because it is critical to the defense. Atticus’s goal is to establish to the jury that there is no evidence that anyone raped Mayella and that her beating was likely done by a man with two functioning arms—Robinson, as he will later show, has a withered left arm.

Next, Bob Ewell, a man whom we regard as odious because of his neglect of his children, his slovenliness, and his bigotry, takes the stand. Ewell’s answer to the first question that he is asked, whether he is the girl’s father, flouts Gricean maxims. Ewell answers: “Well if I ain’t I can’t do nothing about it now, her ma’s dead.” One would expect Ewell’s full cooperation with the prosecuting attorney, but in fact his answers embarrass the prosecution. This disrespectful response is unsuitable in quality and

8. Lee, supra note 1, at 178.
9. Id.
10. Id.
11. Id. at 179.
12. Id.
13. Id. at 179-80.
14. Grice, supra note 2, at 45; Lee, supra note 1, at 183.
15. Lee, supra note 1, at 183.
manner: Ewell's daughter has complained that she was raped, and the defendant is on trial for his life. By responding with a joke that makes fun of a deceased spouse, Ewell shows a lack of family values and respect for womanhood that undercuts any pretense of parental concern. Ewell reports that on the day of the rape, he returned home to hear Mayella "screamin' like a stuck hog" and "raisin' this holy racket," and that he entered the house to find Robinson "ruttin' on my Mayella." He describes Mayella as "lyin' on the floor squallin'." Clearly this is a man more at home with pigs than human beings; his speech treats his daughter as if she were a farm animal. There is a violation of schema here: a father refers to a daughter who has been beaten and claims to have been raped the way that one would refer to a pig.

Atticus's cross-examination reinforces Ewell's abysmal reputation in the community. Atticus begins by asking Ewell whether he called for a doctor. Ewell responds that "he never thought of it, he had never called a doctor to any of his'n in his life, and if he had it would have cost him five dollars." Atticus then elicits Ewell's agreement with the Sheriff that Mayella was beaten on the right side of her face. Atticus now asks Ewell if he can write. Ewell volunteers that he signs to receive his relief checks. When Atticus asks to see Ewell sign his name, the jury sees that Ewell is left-handed. Atticus's cross-examinations of Tate and Ewell follow textbook cross-examination protocol. He focuses on two key points—the lack of a medical exam and the fact of beatings on the right side of the girl's face—to cast doubt on whether any rape occurred, to show that the

16. Grice, supra note 2, at 45; LEE, supra note 1, at 183.
17. LEE, supra note 1, at 183.
18. Id. at 184.
19. Id.
20. Id. at 186.
21. See id. at 187.
22. Id.
23. Id.
24. Id. at 188.
25. Id.
26. Id. at 189.
beating must have been done by a man with a good left arm, and to point out that the girl could have been beaten by her own father.

Mayella comes to the witness stand crying and fearful; she admits that she is afraid of Atticus Finch.27 After the judge stiffens her backbone, she begins her testimony.28 According to Mayella’s account, she offered Robinson a nickel to “bust up” a chiffarobe:

‘fore I knew it he was on me. Just run up behind me, he did. He got me round the neck, cussin’ me an’ sayin’ dirt—I fought ‘n’ hollered, but he had me round the neck. He hit me agin an’ agin.29

She “reckons” that she screamed, kicked, and hollered, but she was overcome.30 The next thing she knows her father had arrived:

I don’t remember too good, but next thing I knew Papa was in the room a’standin’ over me hollerin’ who done it, who done it? Then I sorta fainted an’ the next thing I knew Mr. Tate was pullin’ me up offa the floor and leadin’ me to the water bucket.31

In response to the prosecutor’s leading questions, the girl affirms that she fought Tom as hard as she could but that the black man took “full advantage” of her.32 “He done what he was after.”33

Atticus begins his cross-examination with Mayella by striking an informal conversational tone: “Miss Mayella,” he said, smiling, ‘I won’t try to scare you for a while, not yet. Let’s just get acquainted. How old are you?’34

Atticus accomplishes several goals: he underlines that Mayella is afraid of what he will do to her in cross-examination, or afraid of her father’s reaction to her testimony, or both. Atticus puts the girl off her guard by

27. Id. at 191.
28. See id.
29. Id. at 191-92.
30. Id. at 192.
31. Id.
32. Id.
33. Id.
34. Id. at 193.
appearing friendly, and he disarms the expectation that he will bully her. Atticus apologizes for making Mayella repeat her previous testimony that she was nineteen: “[S]o you did, ma’am. You’ll have to bear with me, Miss Mayella, I’m getting along and can’t remember as well as I used to. I might ask you things you’ve already said before, but you’ll give me an answer, won’t you? Good.”

To borrow Gricean terminology, Atticus expects that Mayella will provide answers that are relevant, truthful, and appropriate in quality and quantity. Mayella interjects with a complaint that Atticus is “making fun” of her by calling her “Miss Mayella” and “ma’am.” Mayella here marks herself as “white trash;” she is unaccustomed to receiving the courtesy title routinely afforded to white Southern women. Mayella has been so poorly raised (another strike against Bob Ewell) that she is surprised to be addressed as “miss” and “ma’am.” When the judge reassures Mayella that Atticus is not trying to mock her, but just “trying to be polite,” there is an implicit approval of Atticus and his gentility in contrast to the unwashed, semi-literate Ewell family.

Atticus continues in a conversational style, asking Mayella apparently insignificant personal details about the number of children in her family, how long her mother has been dead, how much schooling she has had. Mayella’s unguarded responses reveal that she “[d]on’t know” how long her mother has been dead and that she doesn’t know exactly how many (or how few) years that she was in school. When Atticus asks how many friends she has, the girl looks “puzzled,” and she seems equally nonplussed when Atticus asks if she loves her father: “Love him,

---

35. Id.
36. See Grice, supra note 2, at 45.
37. LEE, supra note 1, at 193.
38. Id.
39. Id.
40. Id. at 194.
41. Id.
whatcha mean?”\(^{42}\) The best she can say for him is that he “does tollable” except when he’s drinking.\(^{43}\)

Having established the circumstances of Mayella’s miserable life, Atticus turns to the main topic. He asks Mayella if she ever asked Robinson to come inside the fence of her family home.\(^{44}\) When Mayella replies, “I did not, I certainly did not,” Atticus calls attention to the oddity of her answer. “One [‘I did not’s[‘] enough.”\(^{45}\) In Gricean terms, the nervous girl has violated the maxim of quantity.\(^{46}\) Mayella admits that she “mighta” asked Tom to do odd jobs before.\(^{47}\) Atticus reminds Mayella of her testimony that Robinson caught her and took advantage of her. Then he asks her, “Do you remember him beating you about the face?”\(^{48}\) In another departure from conversational expectation, Mayella simply does not respond.\(^{49}\) Atticus insists on a response to this “easy question” and gets a confused reply.\(^{50}\) “No, I don’t recollect if he hit me. I mean yes I do, he hit me . . . . I just don’t remember ... it all happened so quick.”\(^{51}\) This is of course a devastating hesitation; she is unable to respond “in quality” to the key question whether she was beaten; she appears at best confused, at worst untruthful.\(^{52}\) Now Atticus spends the ammunition that he has been saving: he has Robinson open his shirt and reveal his withered, useless left limb.\(^{53}\) Asked point blank, “Is this the man who raped you?”\(^{54}\) Mayella replies: “I don’t know how he done it, but he done it—I said it all happened so fast I—.”\(^{55}\)

---

42. Id. at 195.
43. Id.
44. See id. at 196.
45. Id.
46. Grice, supra note 2, at 45.
47. LEE, supra note 1, at 196.
48. Id.
49. Id.
50. Id. at 197.
51. Id.
52. Grice, supra note 2, at 45.
53. LEE, supra note 1, at 197.
54. Id. at 198.
55. Id.
The exchange between Mayella and Atticus has lost its conversational patina; it is aggressive cross-examination designed to undermine the girl’s veracity. Atticus challenges Mayella why the other children did not hear her supposed screams. There is “no answer”\textsuperscript{56}—an obvious violation of conversational maxims:

“You were screaming all this time?”

“I certainly was.”

“Then why didn’t the other children hear you? . . .”

No answer.

“Where were they?”

“Why didn’t your screams make them come running? . . .”

No answer.

“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.

“Did you scream first at your father instead of at Tom Robinson? Was that it?”

No answer.

“Who beat you up? Tom Robinson or your father?”

No answer.\textsuperscript{57}

It is unacceptable that Mayella can give no answer to all of these questions. As a matter of legal procedure, Mayella, as the complaining witness, is compelled to answer relevant and properly formulated questions.\textsuperscript{58} Similarly, under the rules of conversational expectation, it is untenable to leave unanswered a series of pointed questions about one’s reaction to a rape.\textsuperscript{59}

\textsuperscript{56} Id. at 199.

\textsuperscript{57} Id.

\textsuperscript{58} Fed. R. Evid. 401.

\textsuperscript{59} Grice, supra note 2, at 45.
Mayella is humiliated not only because her testimony has been discredited but also because she feels that she is mocked by courtesy titles and fancy unfamiliar language:

I got somethin' to say an' then I ain't gonna say no more. That nigger yonder took advantage of me an' if you fine fancy gentlemen don't wanta 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.  

Southern speech includes pervasive use of “superordinate ‘evidential’ predicates” such as “You reckon,” “I can’t say,” “I don’t believe” and similar phrases that reflect insecurity about facts. Mayella describes key events surrounding the alleged rape by evidentials such as “I reckon” and “I don’t remember too good.” Mayella’s use of evidentials suggests that she is either confused about the rape incident or, more likely, lying. As Barbara Johnstone comments, evidentials, especially negative evidentials, show deference and “protect [the] speakers from the social embarrassment that would result if the assertion turned out to be false.” Mayella has been humiliated her whole life and is painfully aware of her low socioeconomic status. Mayella’s English errors mark her as a denizen of the lowest rung of white society. Crawford Feagin’s study of speech patterns in Anniston, Alabama found that lower class individuals were far more likely to use “ain’t,” multiple negation, errors in agreement, and nonstandard past tense forms.

Atticus’s cross-examination of Mayella is so effective because it plays off of juror expectations of the life style of “poor white trash.” Working class jurors would differentiate themselves from whites of the lowest stratum. In his study of lower-class southerners, Poor but Proud, Wayne Flynt

60. LEE, supra note 1, at 200.
62. LEE, supra note 1, at 192.
63. Johnstone, supra note 61, at 195.
quotes a dirt-poor white who contrasted his family's status with that of a more disparaged neighbor: "We ain't got nothin' but a shirt tail an' a prayer, but we ain't low down. We ain't like them Ellisons over at the Kingdom. They ain't never tried to do nothin' but beat people outa ever'thing they could, an' they'd steal th' handles off'n a coffin."

Matt Wray applies "boundary theory" to his study of white trash and the stigmatizing of this group. Wray documents a persistent denigration of poor white southerners as lazy, imbecilic, sexually degenerate, and disease-ridden. Wray's boundary theory helps to explain the dark side of Atticus's cross-examination. As the novel's narrator Scout (a younger version of Harper Lee) explains:

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.

The Ewells belong to an unchanging nether category outside of the proper law-abiding community and hence Mayella's testimony is inherently suspect. Mayella is the epitome of powerlessness, and it is no wonder that Atticus looks sick to his stomach as she leaves the witness stand. In

66. Id.
67. Id.
69. Id. at 17-20.
70. Lee, supra note 1, at 181.
71. Teresa Phelps comments that the Ewells down by the dump can "never move from the margins of Maycomb into the world of the Finches and their neighbors." Teresa Phelps, The Margins of Maycomb: A Rereading of To Kill a Mockingbird, 45 ALA. L. REV. 511, 522 (1994). At the end of the novel, when Bob Ewell attacks Atticus's son Jem Finch and the Finches' reclusive neighbor Boo Radley stabs Ewell to save Jem, the Sheriff persuades Atticus that Radley should not stand trial. Lee, supra note 1, at 290-91. Radley is a member of "our crowd," and thus shielded from the stress of a judicial inquiry that would have caused him pain and stress. In all likelihood Radley would have been exonerated, but he is exempt from the dangerous tentacles of the court system by virtue of his class membership.
a world where male/educated/professional/well-connected/affluent/well-spoken are on top, Mayella is female/barely literate/low-class/outcast/poor/inarticulate.

After Mayella leaves the stand, Atticus calls Robinson to the stand and begins direct examination of his witness. Tom Robinson's responses to Atticus's questions are relevant and fit Gricean expectations in terms of quality, quantity, and manner. Tom admits that he has had trouble with the law when he got into a fight with another man. Tom testifies that as a cotton picker, he must pass by the Ewells each day on his way to work and on the way home there is no other way. He also testifies that Mayella often summoned him to come "inside the fence" and gave him chores, and on each of these occasions, there were children present. Tom testifies that he refused payment for the chores. Tom insists that he never set foot on the property without an invitation. He tells his story without flinching or hesitating. Tom's testimony about the events of the evening of November 21 is riveting. He responded to Mayella's request that he enter the house to do some work for her, but found that the reason for her request, that a door needs fixing, made no sense. He told her that the door "looks all right" and then asked where the other children were, since the house seemed strangely quiet. Tom testifies to her response: "[S]he says—she was laughin', sort of—she says they all gone to town to get ice creams. She says, 'Took me a slap year to save seb'm nickels, but I done it. They all gone to town.'

72. LEE, supra note 1, at 202.
73. Grice, supra note 2, at 45.
74. LEE, supra note 1, at 202.
75. Id. at 203.
76. Id.
77. See id.
78. Id. at 204.
79. Id. at 205-10.
80. Id. at 205.
81. Id.
82. Id.
At this juncture, Tom begins to exhibit discomfort. He testifies that when he turned to leave, Mayella grabbed him and “hugged” him “round the waist.” Tom swallows hard and continues his testimony:

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 nigger. She says what her papa do to her don’t count. She says, ‘Kiss me back, nigger.’ 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 hollered through th’ window.

Ewell screamed at his daughter: “You goddamn whore, I’ll kill ya.” Terrified, Tom ran for his life. He calmly responds to each of Atticus’s questions, “[D]id you rape Mayella Ewell? ... Did you harm her in any way?” by saying “I did not, suh.”

It is telling to contrast Robinson’s responses to the tough questions he faced from the prosecutor with the uncertain, shifty responses that Mayella provided to Atticus’s cross-examination. Unlike Mayella, Robinson’s straightforward responses comply with the conversational Cooperative Principle. The prosecutor questions Robinson aggressively, in an effort to establish that Robinson can be violent and is a powerful man even with only one good arm. First, he asks the defendant to acknowledge that he was once convicted for disorderly conduct. Robinson provides a straightforward response “Yes suh.” Then the prosecutor asks Robinson to admit that he is a strong man, capable of busting up chiffarobes, chopping kindling, and even choking a woman with one hand. Robinson’s reply—”I never done that, suh” is appropriate in terms of relevance, quality,
quantity, and manner. Playing on old racist stereotypes that black men lust after white women, the prosecutor charges: "Had your eye on her a long time, hadn't you, boy?" Again Robinson's response fits our expectations for a straightforward denial: "No suh, I never looked at her." Next the prosecutor expresses disbelief that Robinson would do so many chores for Mayella out of the goodness of his heart, after a long workday, without accepting a penny. Robinson provides an honest answer, but it is an answer that plays poorly with the jury. Tom felt pity for Mayella: "[Sihe didn't have nobody to help her . . . I felt right sorry for her." Here we have a series of violations of schema: the black man, far from desiring the white woman, feels pity for her plight. The prosecutor asks Robinson point blank "[y]ou say she's lying, boy?" In his understated decent way, Tom is a gentleman: he does not claim that Mayella is lying, but only that she is "mistaken in her mind." The prosecutor finishes strongly: "If you had a clear conscience, why were you scared?" Robinson's response is again germane and suitable in quantity and quality: it is candid and ought to be convincing: "[l]ike I says before, it weren't safe for any nigger to be in a—fix like that."

The initial response to Atticus Finch's defense of Tom Robinson in Harper Lee's bestseller, To Kill a Mockingbird, was one of unqualified admiration. Atticus risks his own life, his family's safety, his precarious law practice, and his community reputation to defend a black man accused of the most notorious crime—raping a white woman. Atticus preaches empathetic awareness to his children, repeatedly admonishing them to consider what it is like to walk in

91. Id. at 209; Grice, supra note 2, at 45.
92. LEE, supra note 1, at 209.
93. Id.
94. Id.
95. Id.
96. Id.
97. Id. at 210.
98. Id.
99. Id.
100. Grice, supra note 2, at 45.
101. LEE, supra note 1, at 210.
someone else’s shoes. For most readers, Atticus is an unblemished hero: “He is a good lawyer, a good father, a good neighbor, a good legislator, and a good shot: in other words, a good man.”\textsuperscript{102} After decades of adulation and testimony by dozens of trial lawyers (including F. Lee Bailey) that they chose their career based on Atticus Finch (or his film equivalent Gregory Peck), dissenting views began to be expressed.\textsuperscript{103} Steven Lubet offers the most devastating critique when he raises the possibility—not a certainty—that Mayella might have been telling the truth when she claimed that she had been raped by Tom Robinson.\textsuperscript{104} Lubet points out that a strong man, even one with a withered left arm, could still overcome a small and weaker woman.\textsuperscript{105} Lubet places Atticus’s cross-examination in the context of age-old stereotypes that sexually frustrated women are “asking for it.”\textsuperscript{106}

I am highly skeptical that the reasonable reader will conclude that Robinson raped Mayella. Lubet plausibly posits that a strong young man can overcome a woman even if he has only one functioning arm, yet the narrator tells us that Mayella is sturdy, toughened by hard work, with a thick body.\textsuperscript{107} The novel sends a clear message that Tom Robinson is a mockingbird, whose death results from Mayella’s perjury and racism. Yet when Atticus is finished with his cross-examination, “he looked like his stomach hurt . . . he had hit her hard . . . but it gave him no pleasure to do so.”\textsuperscript{108} It is not just that Atticus humiliated Mayella by


\textsuperscript{103}Monroe Friedman criticized Atticus for limiting his opposition to racism to the court-appointed defense of Tom Robinson, rather than devoting his life to eradicating racism root and branch. “Finch never attempts to change the racism and sexism that permeate the life of Maycomb, [Alabama]. On the contrary, he lives his own life as the passive participant in that pervasive injustice.” Monroe Friedman, \textit{Atticus Finch, Esq., R.I.P.}, \textit{LEGAL TIMES}, Feb. 24, 1992 at 20, 21.


\textsuperscript{105}Id.

\textsuperscript{106}Id. at 1344.

\textsuperscript{107}See \textit{LEE}, \textsuperscript{1} supra note 1, at 190; Lubet, \textsuperscript{supra} note 104, at 1347.

\textsuperscript{108}\textit{LEE}, \textsuperscript{2} supra note 1, at 199-200.
uncovering the falsity of the charge, but that he exposed her to further beating by her father, a beast of a man. In my view, the single greatest ethical question posed by Atticus’s cross-examination is not the aggressiveness of cross-examination designed to exculpate Tom Robinson, but the suggestion that Mayella is the victim of incest. Atticus has a duty to his client to “hit hard” in his cross-examination, especially in the context of pervasive prejudice in Maycomb. However, there is scant support for the charge of incest, and Atticus’s knowledge of Bob Ewell’s temperament raises the possibility that Mayella will face harsh physical reprisal for her ineffective performance on the witness stand.

As it turns out, both Mayella and Tom Robinson will find their lives destroyed at the end of the trial. Tom Robinson is convicted and dies in an attempt to escape. Similarly, the reader infers that Mayella’s “life,” such as it was, will be virtually destroyed when she returns home to her furious father. Mayella was at the mercy of Atticus Finch; he not only undermined the veracity of her story, but also stripped her of her self-respect.

The issue for the rape complainant—whether her story is true or false—is that she is vulnerable to cross-examination intended to undermine her credibility. Even if she is not “poor white trash,” she stands alone in the discovery process and on the witness stand.

II. EXAMPLES OF “META-FRAMING” LINGUISTIC TECHNIQUES IN CROSS-EXAMINATION FROM ACTUAL TRIALS

A law and linguistics approach helps to illustrate how and why cross-examination is so effective in undermining the credibility of witness testimony. The important point is that the effectiveness of the technique is largely independent of the veracity of the witness. I will provide three examples: (i) cross-examination of the rape complainant in the trial of the “Scottsboro Boys,” the infamous rape case on which To Kill a Mockingbird was based; (ii) cross-examination of O.J. Simpson in the wrongful death case involving his alleged murder of Nicole Brown Simpson and Ronald Goldman; and (iii) cross-examination of the complainant and her key witness at the rape trial of William Kennedy Smith.
In the notorious Scottsboro Case, nine young African-Americans were arrested in March 1931 and charged with the rape of two white women. The rape allegedly occurred on a moving train as it entered Paint Rock, Alabama. Victoria Price, the complainant, was a woman of (charitably) dubious morals. One of the men accused of raping her was an invalid who could barely walk; another was half blind. The initial trial was held only twelve days after the arrest. The court-appointed defense counsel would have been inadequate for the job even if they had the benefit of adequate time to prepare. The jury convicted eight of the nine defendants of capital rape. In November 1932, the U.S. Supreme Court vacated the original convictions for lack of adequate assistance of counsel.

The case was re-tried before Judge James Horton, a profile in judicial courage. In an address to potential jurors in March 1933 he commented: “So far as the law is concerned, it knows neither native nor alien, Jew or Gentile, black or white. This case is not different from any other. We have only our duty to do without fear or favor.” When one of the young men (Haywood Patterson) was again convicted, Judge Horton took the extraordinary step of reversing the jury’s verdict. The alleged crime took place out in the open.

109. A detailed examination of the Scottsboro Case is outside of the scope of this article. For thorough discussion of the panoply of procedural history of the case, see generally, Douglas O. Linder, Without Fear or Favor: Judge James Edwin Horton and the Trial of the 'Scottsboro Boys,' 68 UMKC L. REV. 549 (2000); see also CLAUDIA DURST JOHNSON, UNDERSTANDING TO KILL A MOCKINGBIRD: A STUDENT CASEBOOK TO ISSUES, SOURCES, AND HISTORIC DOCUMENTS (1994).
110. Linder, supra note 109, at 550.
111. Id. at 561.
112. Id. at 575.
113. JOHNSON, supra note 109, at 17.
114. Id.
115. Id.
117. See Linder, supra note 109, at 549.
118. JOHNSON, supra note 109, at 32.
119. Id. at 53.
in a gondola car, not a likely place for a rape. Judge Horton noted that Victoria Price’s testimony was uncorroborated because the other alleged rape victim, Ruby Bates, admitted that she had lied about the rapes in an earlier trial to avoid arrest for a Mann Act violation. The judge found it significant that eight potential witnesses were not called to the stand, that the doctors saw no evidence of bleeding from the head of the pistol or jagged rock that supposedly subdued her, that there was little semen and no bleeding, and that when examined by doctors, she was calm. Judge Horton concluded that there was insufficient evidence that a rape had occurred to convict Patterson. Horton was punished by the voters for reversing the conviction and lost his elected judgeship.

A second trial was conducted before a new judge, and two of the defendants were convicted. The U.S. Supreme Court again overturned these convictions because the jury was all white—not a jury of the defendants’ peers. A third trial was conducted before a jury that included a few “token” black jurors. Some of the defendants were convicted to terms as long as 99 years. The last Scottsboro defendant, who had fled the state in violation of parole, was pardoned in 1976 by Governor George Wallace.

120. Id. at 58.
121. Id. at 67-68.
122. Id. at 17.
123. Id. at 19. Judge Horton movingly observed:

Social order is based on law, and its perpetuity on its fair and impartial administration. Deliberate injustice is more fatal to the one who imposes than to the one on whom it is imposed. The victim may die quickly and his suffering cease, but the teachings of Christianity and the uniform lessons of all history illustrate without exception that its perpetrators not only pay the penalty themselves, but their children through endless generations.

Id. at 53-54
124. Id. at 19.
125. Id. at 69.
127. JOHNSON, supra note 109, at 74.
128. Id.
129. Id.
Samuel Leibowitz, known as the Clarence Darrow of his
day, conducted an aggressive cross-examination of Victoria
Price, whom he painted as a prostitute. Illustrative is the
following excerpt from the retrial of Clarence Norris in
December 1933:

Q: (by MR. LEIBOWITZ). ... [Y]ou ever been convicted of a crime?

MR. KNIGHT: We object to that.

THE COURT: Sustained. . .

Q: Weren't you convicted of a crime involving moral turpitude—
Look this way please, not over that way!

THE COURT: Now Mr. Leibowitz, don't proceed along that line
any more.

Q: Were you ever convicted of a crime involving moral turpitude,
under the name of Victoria Presley, in the year 1927?

MR. KNIGHT: I object to that.

THE COURT: I doubt whether this witness knows what moral
turpitude is; I doubt whether half the lawyers know it or not.

Leibowitz went on to ask Price whether she had been
convicted of adultery, fornication, public drunkenness, or
other crimes. Although most of the questions were
objected to by the defense and the defense's objections were
sustained by the judge, the practical effect of the cross-
examination was to drum home to the jury that Price was
unable to refute questions asking if she had—repeatedly—
committed crimes of moral turpitude. Here there is a mis-
match between Gricean expectations of co-operation in a
conversation and the reality of cross-examination in a
trial. A witness is instructed not to answer a question
propounded to her if counsel's objection is sustained but her
failure to answer implies the truth of the question or her
personal evasiveness.

130. Id. at 62-68.
131. Id at 62.
132. Id. at 63.
133. See Id.
134. Grice, supra note 2, at 45.
Steven Lubet argues against the ethics of this cross-examination and states that it was intended to degrade Victoria Price.\textsuperscript{135} Had the case involved a debate over whether the woman consented, her loose morals might have been relevant. However, the defense’s theory of the case was that no penetration occurred.\textsuperscript{136} Yet, Lubet complains, Leibowitz attacked Price’s personal life and sexual mores hammer and tong.\textsuperscript{137} I disagree with Lubet: Leibowitz had an ethical obligation to use all tools in his arsenal to discredit the witness, including the fact that she had a long criminal record. Leibowitz had to attack Price’s personal morality to defend his client—especially in the context of an Alabama courtroom in the 1930s where white jurors might otherwise be inclined to favor a white woman’s word over the testimony of a black man.

Although it is not a rape case, the civil trial of O.J. Simpson is worth examination as a paradigmatic example of meta-framing strategies. Daniel Petrocelli, who represented Fred Goldman, was a master of the art. Petrocelli attempted to influence jury perceptions regarding the adequacy, clarity, relevance, and truthfulness of Simpson’s responses.\textsuperscript{138} As Richard Janney has observed, Petrocelli’s framing strategies, while apparently directed towards procedural requests, reminders and objections, in fact attempt to steer or “manage” the jury’s perceptions of the witness’s testimony.\textsuperscript{139} Petrocelli’s cross-examination was designed to create an impression of the defendant-witness’s cooperative failures.\textsuperscript{140} Standard jury instructions recognize two types of admissions of culpability in witness testimony: “statements with self-incriminating implications made about material facts of the case,” and “intentional failures to answer questions with incriminating implications.”\textsuperscript{141} The cross examiner took advantage of the interplay between

\textsuperscript{135} Lubet, supra note 104, at 1358.
\textsuperscript{136} Id.
\textsuperscript{137} Id. at 1357-58.
\textsuperscript{138} Richard Janney, ‘So your story now is that...’: Metapragmatic Framing Strategies in Courtroom Interrogation, in METAPRAGMatics in USE 223 (Wolfram Bublitz & Axel Hubler, eds., 2007).
\textsuperscript{139} Id. at 224.
\textsuperscript{140} Id. at 230.
\textsuperscript{141} Id. at 225.
Gricean principles and standard jury instructions to encourage an inference of guilt where the defendant does not answer relevant and properly formulated questions.\textsuperscript{142}

O.J. Simpson was an affluent, well-coached defendant who had the benefit of excellent trial counsel. Janney suggests six ways in which Simpson framed his answers in order to evade responsibility:

(1) a \textit{valence} dimension, in which lexical substitutions weaken the negative connotations of referenc[e] to [the incident]; (2) a \textit{proximity} dimension, in which [responses suggest that incidents are remote in time and space]; (3) a \textit{specificity} dimension, in which lexical substitutions . . . weaken the clarity of references to [the incident]; (4) an \textit{evidentiality} dimension, in which modal substitutions weaken the implied reliability, validity, or truth value of references to [the incident]; (5) "a \textit{volitionality} dimension, in which . . . substitutions weaken the speaker's implied responsibility for or volitional connection to [the incident]; and (6) "a \textit{degree} dimension in which substitutions of adverbs and adjectives reduce the . . . duration, measure, or intensity of [the incident].\textsuperscript{143}

For example, when asked "That was a lie, wasn't it, sir?" Simpson replies, "I think it was morally dishonest of me, yes. I don't know if I would call it a lie."\textsuperscript{144} When asked whether he has black gloves Simpson replies:

\begin{quote}
A: I had numerous gloves, light brown—

Q: Including black.

A: —brown and off-browns, and various gloves.\textsuperscript{145}
\end{quote}

Simpson carefully insists on lessening the degree or intensity of accusations that he argued with Nicole:

\begin{quote}
Q: Now, around this time . . . you had another argument with Nicole . . .
\end{quote}

\begin{flushright}
\textsuperscript{142} Grice, \textit{supra} note 2, at 45.
\end{flushright} 
\begin{flushright}
\end{flushright} 
\begin{flushright}
\textsuperscript{144} \textit{Id.} at 265.
\end{flushright} 
\begin{flushright}
\textsuperscript{145} \textit{Id.} at 267.
A: Slightly. I can’t say we had an argument.

Q: And during that time, there were some good times and bad times, right?

A: Mostly good.\textsuperscript{146}

The well-counseled defendant can deflect even the most probing cross-examination. But the typical rape complainant lacks sufficient training and resources to resist meta-framing strategies: she is quite literally defenseless against cross-examination whether or not she is testifying truthfully.

In the rape trial of William Kennedy Smith, Smith’s attorney, Roy Black, conducted a devastating cross-examination of a principal defense witness, Ann Mercer.\textsuperscript{147} Smith was accused of raping Patricia Bowman in Palm Beach in 1991.\textsuperscript{148} Black asked Mercer about an unexpected action that Mercer took on the night after the alleged rape: she went to the Kennedy home to retrieve Bowman’s shoes:

Q: You say you went to the Kennedy home on the early morning hours of March 30? Is that correct[?]

A: Yes.

Q: Your friend says that she was raped? Is that right[?]

A: Yes.

Q: But what she tells you is that she wants her shoes. Is that correct?

A: Yes.

Q: Several times she was worried about her shoes.\textsuperscript{149}

Here, Black suggests a violation of schema: Bowman’s preoccupation about finding her shoes. Through repetition

\begin{footnotes}
\item[146.] Id. at 269.
\item[148.] Id. at 9-13.
\item[149.] Id. at 55 (emphasis omitted).
\end{footnotes}
of his questions, Black implies that this is not a likely concern of a woman who has been raped.

Black engages in repetition and irony as he drums home the fact that although it was pitch black, Mercer had no hesitation in entering a house to search for Bowman’s shoes with William Kennedy Smith:

Q: So you went into the house, is that correct[?]
A: Yes.

Q: Into the [house] where the rapist is[,] right?
A: I guess you could say that yes.

Q: It’s dark in there.
A: Yes.

Q: You go through the kitchen[,] right?
A: Yes.

Q: Into this little hallway.
A: Yes.

Q: It’s dark in this hallway, isn’t it[?]
A: Right.150

Black points out the incongruity of relying on a man whom you believed raped your friend to search for a pair of shoes in a dark isolated space.

Q: [M]y question is did you meet this man who your friend says is the alleged rapist?
A: Yes.

... Q: And you ask him to [help]—you ask the rapist to help you find her shoes[,] is this correct?
A: Yes.

150. Id. at 72.
... 

Q: It's dark in that house[,] right[?]
A: Yes.

Q: You're walking through the dining room with this man[,] is that correct?
A: Yes.

Q: The man who's allegedly a rapist[,] right?
A: Yes.

Q: You go out the door of the dining room, don'chu? [I]nto a little patio area[?]
A: Correct.

Q: With this man who's the alleged rapist[,] is that right[?]
A: That's right.

... 

Q: It's dark out, isn't it?
A: Right.

Q: With this man who's the alleged rapist?
A: Yes.\(^{151}\)

Black continues to ask a lengthy series of questions about Mercer's solitary nighttime search with Smith to find Bowman's shoes:

Q: An[d] you're still with this man who's the alleged rapist, is that right[?]
A: Yes.

Q: You get to a dark stairway, isn't that correct[?]
A: Mm', Yes.

Q: There're no lights in that stairway, is there[?]

---

\(^{151}\) Id. at 72-74.
Black supplements his earlier suggestion of a violation of schema (if a rape had occurred, would Bowman or Mercer be concerned to retrieve a trivial object like a shoe?) with a second and related violation of schema: If Mercer believed that a rape had occurred, would she blithely and confidently follow Kennedy Smith in the dark? It violates every expectation of customary behavior that a young woman would voluntarily go into the dark alone with a man whom she believes to be a sexual predator.

Gregory Matoesian comments that in the Kennedy Smith trial, Black "transforms the victim [Patricia Bowman] into a nonvictim" by applying "patriarchal logic of sexual rationality." Matoesian may overstate his argument: like any top-tier trial lawyer, Black uses all the tools at his disposal to obtain acquittal whatever the offense and whether his client is male or female. Moreover, it would be ill-advised for defense counsel to pursue patriarchal framing strategies too blatantly lest they antagonize female jurors. However, Black does pursue a gender-driven strategy when he portrays Bowman as having a sexual interest in Smith, a man whom she had just met for the first time in a bar:

Q: And you were interested in him as a person?
A: He seemed like a nice person.

Q: Interested enough to give him a ride home?
A: I saw no problem with giving him a ride home . . .

Q: You were interested enough that you were hoping that he would ask for your phone number?
A: That was later.

Q: Interested enough that when he said to come into the house you went into the house with him?

---

152. Id. at 74.
153. Id. at 51.
154. See id.
A: It wasn't necessarily an interest with William. It was an interest in the house.\textsuperscript{155}

Inevitably, cross-examinations in rape cases paint the rape complainant as someone who is lax in her dating behavior, loose in her morals, or otherwise “wanted it.”\textsuperscript{156} Defense lawyers interpret and classify rape in a way that makes the victim’s experience appear as a normal consensual encounter than a sexual assault.\textsuperscript{157}

It is difficult to know today from reading the trial transcript whether Patricia Bowman was raped. While the truth of those charges in any particular case can be debated, there is no denying that the rape complainant faces daunting obstacles, especially in the case of the scenario of acquaintance rape. It is more difficult for the woman to prove charges of rape where she knows the aggressor, as opposed to “aggravated, jump-from-the-bushes rape.”\textsuperscript{158} The tragedy is that where the woman was raped she is actually “assaulted twice—once by the offender and once by the criminal justice system.”\textsuperscript{159}

While the witness is expected to be cooperative and to follow Gricean maxims such as providing relevant and truthful responses,\textsuperscript{160} defense counsel is under no obligation to return the courtesy by asking her to explain her side of the story. Conversational expectations are a one-way street: the cross-examiner can compel yes-no responses. Black was not obligated, or even expected, to give Bowman (or Mercer) a chance to tell her narrative. Whether the rape complainant will have the opportunity to tell her story depends on the skill of the prosecutor on direct and redirect examination. It is chancy whether the prosecutor will have


\textsuperscript{156} GREGORY M. MATOESIAN, REPRODUCING RAPE: DOMINATION THROUGH TALK IN THE COURTROOM 222 (William M O'Barr & John M. Conley eds., 1993) [hereinafter MATOESIAN, REPRODUCING RAPE].

\textsuperscript{157} Id.

\textsuperscript{158} See SUSAN ESTRICH, REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO 52 (1987).

\textsuperscript{159} State v. Sheline, 955 S.W.2d 42, 44 (Tenn.1997).

\textsuperscript{160} Grice, supra note 2, at 45.
that skill or inclination as the prosecutor represents the state, not the rape victim or the witness.

III. WHY THE RAPE COMPLAINANT IS AT RISK: THE CUMULATIVE IMPACT OF CROSS-EXAMINATION FRAMING STRATEGIES AND CONVERSATIONAL EXPECTATIONS

Lay jurors bring to the courtroom ordinary expectations of conversational exchange. As a result, jurors are suspicious of blatant failure by a witness to co-operate with questions posed by a trial attorney conducting cross-examination.\(^{161}\) At the same time, subtle attorney framing strategies can also influence jurors' perceptions of witness testimony.

Mattoesian summarizes the syntax of questions by which domination of the witness is achieved.\(^ {162}\) These include (with examples that I provide):

(i) WH interrogatives (Why did you go off alone with a man whom you barely knew?)

(ii) Polar interrogatives (yes-no questions: Before you went off with John in the car, did you know his last name? Did you know where he worked? Had you ever seen him before you met in the bar? Did he use physical force to get you into the car?)

(iii) Declaratives with pre-posed truth clauses [that assume the truth of the proposition] (As a matter of fact, you went off alone with a man who was a total stranger?)

(iv) Declarative with a confirmatory tag (Isn't it correct that ...?)

(v) Reverse polarity tags (That was a risky thing to do, wasn't it?)

(vi) Legalistic "doubt markers" (Is this where the "alleged" rape occurred?)\(^ {163}\)

Because of the rules of conversational exchange, damage is done when a witness fails to answer an apparently pertinent question, even if the judge has

\(^{161}\) Mattoesian, Reproducing Rape, supra note 156, at 144.

\(^{162}\) Id. at 148-49.

\(^{163}\) Id. (examples in parenthesis).
sustained an objection to the question.\footnote{164} Recall that when Leibowitz cross-examined Victoria Price about her lengthy criminal past, the prosecutor interposed a series of objections that were sustained by the court.\footnote{165} Because the court sustained the objections, the questions were presumptively improper. However, the effect of the objections was to silence the witness, allowing the jury to infer that she was a prostitute with a long criminal history and that the prosecutor interposed the objections to avoid testimony to this effect.

Unlike ordinary conversation, cross-examination is an exercise in power dynamics. Returning to Lee's novel, the exchange between Atticus and Mayella illustrates several ways in which Atticus was able to exercise the dominant power position:

(i) The lawyer is inherently more powerful than the witness in the courtroom setting, because he or she is authorized to conduct an examination of the witness and compel responses to all proper and relevant questions.

(ii) Inherently, there is a power imbalance between lawyer and lay witness due to the lawyer's professional training, but in addition, Atticus had all the advantages in terms of education, social status, and language skill. By virtue of her limited education and social class, Mayella is undoubtedly more cowed by courtroom parlance than would be a more sophisticated, better-educated lay plaintiff.

(iii) Atticus was a male leader of Maycomb's establishment, while Mayella was considered "trash," the lowest stratum of the white community.

(iv) The goal of cross-examination is witness control. Atticus's cross-examination of Mayella exhibited his mastery of the techniques of cross-examination that, far from resembling ordinary conversation, rely on power and control. Ultimately, cross-examination techniques are calculated to privilege the examiner and subordinate the witness.

(v) Because of the nature of a rape case, the complainant is more vulnerable to cross-examination than witnesses in other trial settings where the dispute is less personal.

\footnote{164} Grice, \textit{supra} note 2, at 45.
\footnote{165} Johnson, \textit{supra} note 109, at 63.
In ordinary conversation, we are of course free to volunteer whatever explanation we wish to explain our behavior. However, the cross-examining attorney is allowed to demand “yes-no” answers to questions susceptible of a binary response.\textsuperscript{166} Moreover, questions can be asked in “machine-gun” style, a rapid-fire mode of questioning that differs greatly from ordinary conversation. The witness is likely to feel pressured, to hurry her responses, and is probably more likely to answer without thinking. She may be too intimidated to provide explanations that would help her. The cross-examining attorney is also entitled to probe and insist. In polite conversation, we give subtle or not-so-subtle indications if we believe that a questioner is too probing or too insistent. We can terminate discussion that is disagreeable or if we have provided all of the information we wish to give. If the conversation involves a continuing relationship (family, friends, business associates, classroom), the questioner is likely to “back off” when we send these clues. In contrast, the cross-examining attorney may never see the witness again and has no reason or duty to be polite: rather, the attorney’s duty of loyalty requires that (s)he take all ethical steps to secure acquittal. The cross-examining attorney has a great deal of latitude to continue a line of questioning notwithstanding witness resistance. In a rape case, there is an even greater deviation from the rules of polite conversation. Few of us ask about another’s dating habits or sexual history, but if we do, our question can be rebuffed by the response that the subject matter is “none of your business,” and the conversation can be terminated. In the rape trial, especially in the acquaintance rape scenario, the complainant is vulnerable to personal questions about her lifestyle and dating behavior.

CONCLUSION

Today, rape shield statutes have been enacted in most jurisdictions in an effort to limit the circumstances in which inquiry may be made about a rape plaintiff’s sexual history.\textsuperscript{167} Out of concern for the cross-examination rights of

\textsuperscript{166} \textit{Fed. R. Evid. 611(c)}.

\textsuperscript{167} See Richard Klein, \textit{An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness}, 41 \textit{Akron L. Rev.} 981, 998 (2008).
rape defendants, rape shield statutes have significant exceptions permitting the judge in his discretion to allow cross-examination.\textsuperscript{168} For example, Federal Rule of Evidence 412 recognizes three exceptions:

(1) allowing evidence that a person other than the accused was the source of semen or injury, (2) allowing evidence that the rape complainant had a prior sexual relationship to prove consent, and (3) an ill-defined "safety-net" exclusion that provides for admitting evidence about the rape complainant's sexual history and propensities where failure to admit such evidence "would violate the constitutional rights of the defendant."\textsuperscript{169}

Frequently a judicial decision allowing the prosecution to cross-examine the rape complainant about her sexual history results in withdrawal of the complaint.\textsuperscript{170} When a ruling abrogating the rape shield statute is well-publicized, that ruling—even if fair in the context of an individual defendant's right to cross examination—may deter future rape complainants from pressing charges.

Tom Lininger proposes several reforms to mitigate the chilling effect on the filing of future rape cases.\textsuperscript{171} Lininger suggests that the rape complainant should be provided with her own counsel since the prosecution does not represent her interests.\textsuperscript{172} Lininger also proposes that accusers should be allowed to tell their story in narrative form without repeated interruption.\textsuperscript{173} Allowing narrative testimony would lessen the vulnerability of the rape complainant to cross-examination questions that require:

the witness to affirm or deny the proposition set forth by counsel, not to tell the story in her own words. . . . The victim simply needs to use her own voice at trial, and a rule change is necessary to

\textsuperscript{168} See id.

\textsuperscript{169} See Fed. R. Evid. 412; see generally, Klein, supra note 167 (discussing the application of exceptions to rape shield statutes).

\textsuperscript{170} See Klein, supra note 167, at 990.

\textsuperscript{171} See Tom Lininger, Bearing the Cross, 74 FORDHAM L. REV. 1353, 1358-59 (2005).

\textsuperscript{172} Id. at 1394.

\textsuperscript{173} Id. at 1409.
make her voice heard during cross-examination. Two hours of answering "yes" or "no" is not testimony; it is subjugation.¹⁷⁴

Lininger offers several proposals for systematic change, but the one that relates most closely to the linguistic and class-based problems analyzed here is the proposal to re-envision criminal justice as a tri-lateral system, in which the victim receives independent counsel to represent their interests alone.¹⁷⁵ Lininger argues that the interests of the prosecutor and the victim diverge in so many areas and to such an extent that "they are closer to being adversarial than coextensive."¹⁷⁶ Prosecutors are generally less sensitive to the complainant's privacy, and they frequently have a different measure of success. For the rape victim, not only conviction and length of sentence but also emotional recovery matters.¹⁷⁷ As Lininger puts it: "[t]he two-legged stool that is our present criminal justice system requires a third leg to prevent it from crashing to the ground."¹⁷⁸

Others have also called for victim standing in the courtroom, both generally and with specific reference to rape victims. Douglas Beloof argues that victims’ rights in general are illusory and that lack of standing before the court turns the judicial hierarchy upside down by sometimes enforcing rights at trial level but denying the right to appeal.¹⁷⁹ While the state sometimes has an interest in protecting privacy and other rights “[w]ithout victim standing, victims’ rights can only be contested on review by parties that have no personal stake in the right."¹⁸⁰

Although it is still rare that rape complainants retain counsel in criminal cases, and that such counsel have

¹⁷⁴. Id. at 1410-11.
¹⁷⁵. Id. at 1394-96.
¹⁷⁶. Id. (listing the prosecutor’s impeachment of victims, their fear that objections will cause the jurors to doubt the government’s case or create grounds for appeal, and their need to maintain good relationships with repeat players in the criminal courts).
¹⁷⁷. Id.
¹⁷⁸. Id. at 1396.
¹⁸⁰. Id. at 332.
standing before the court,\textsuperscript{181} some courts have both appointed independent counsel and given them standing to appeal. The Fourth Circuit took up the question when a complainant attempted to file an appeal of a pre-trial decision.\textsuperscript{182} The court first noted that while the rape shield rule makes no mention of the complainant's right to appeal, “this remedy is implicit as a necessary corollary of the rule’s explicit protection of the privacy interests Congress sought to safeguard.”\textsuperscript{183} The court supported this argument with the assertion that “[n]o other party in the evidentiary proceeding shares these interests to the extent that they might be viewed as a champion of the victim's rights.”\textsuperscript{184}

Returning to the trial scene in \textit{To Kill a Mockingbird}, the prosecutor sought a conviction of Tom Robinson; he did not care about the past, present, or future of Mayella Ewell. Of course Atticus’s professional responsibility is to do all he can to acquit his client of the rape charge. At the end of the day the reader does not know for sure if Mayella was raped by her father or beaten by him for initiating sexual contact with a black man. She never has a chance to tell her own story because cross-examination is a one-way street: if a witness's narrative is not elicited by her own counsel on direct examination it is unlikely to come out on cross.

Since the enactment of rape shield laws alone have not been enough to guard the privacy interests of rape complainants, I advocate that they be allowed to select counsel with standing to object, file motions, and appeal, and that such counsel be appointed if they are indigent. While the prosecutor’s interest in obtaining a conviction may sometimes coincide with the rape complainant’s concerns, their otherwise divergent interests, specifically with respect to privacy rights, leaves the rape complainant’s interests largely unrepresented. Not all rape complainants tell the truth, but it is important to safeguard the interests of those who do not as well as those who do to encourage future rape complainants to come forward and bring rapists to justice.

\textsuperscript{181} Lininger, \textit{supra} note 171, at 1398.
\textsuperscript{182} Doe v. United States, 666 F.2d 43 (4th Cir. 1981).
\textsuperscript{183} Doe, 666 F.2d at 46.
\textsuperscript{184} \textit{Id.}; see also United States v. Stamper, 766 F.Supp. 1396 (W.D.N.C. 1991) (basing its decision to appoint independent counsel on the reasoning in \textit{Doe}).