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REPLY TO COMMENTS ON *RECONSTRUCTING ATTICUS FINCH*

Steven Lubet*

*Reconstructing Atticus Finch*¹ was intended to be provocative, so I am not surprised at the strength of the responses. Neither should I be surprised by the continuing reverence engendered by the fictional Atticus Finch; as I pointed out in my original essay, he is our moral archetype. Indeed, it was the accepted nobility of the character that made my question worth asking in the first place. *What if Mayella had been attacked by Tom Robinson? Would Atticus still be a hero?* To ask that question about a lesser figure would inevitably invite stock responses. Champions of the adversary system would support the defense; detractors would rail against it. I hoped to place the inquiry in a setting that would inspire a more textured debate, especially since it would be impossible to dismiss the efforts of Atticus Finch in the racially charged atmosphere of Depression-era Alabama.

Dean Burnele Powell and Professor William Simon each take the question head on, concluding more or less (more in Powell's case, somewhat less in Simon's) that the posited guilt of Tom Robinson would not diminish the stature of Atticus Finch. As Dean Powell put it, Atticus succeeds not because he defends the innocent, "but because he insists, as must every lawyer, on the freedom to make the arguments within the bounds of law that are necessary for the full ventilation of issues in a criminal case."² Fair enough.

Disappointingly, Professor Rob Atkinson chooses not to address the question at all, arguing instead that my premise is implausible.³ Since my point of departure was, after all, a "what if"

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1. Steven Lubet, *Reconstructing Atticus Finch*, 97 MICH. L. REV. 1339 (1999) (book review).

2. Burnele V. Powell, *A Reaction: 'Stand Up, Your Father [a Lawyer] Is Passing,'* 97 MICH. L. REV. 1373 (1999).

3. *To Kill a Mockingbird* is not *Rashomon*, he says. See Rob Atkinson, *Comment on Steven Lubet, Reconstructing Atticus Finch*, 97 MICH. L. REV. 1370 (1999). On the other hand, maybe it is closer to *Rashomon* than we think. Professor Simon's response attributes an ending to the book that is at odds with the common understanding. Simon says that Sheriff Tate and Atticus conspired to make the death of Bob Ewell look like an accident in order to spare Jem the risk of claiming self defense. See William H. Simon, *Moral Icons, A*

question, it seems to me rather beside the point that “Lee gives us no hint of Scout’s being anything other than right about Tom Robinson’s innocence and Atticus’s wisdom.”⁴

Professor Ann Althouse provides a significant insight into an important additional question, accepting the validity of using the “she wanted it” defense in “Lee’s simplified moral world.”⁵ One wishes she had gone further, however, since real lawyers must struggle with unending moral complexity. May one use that defense — and the attendant techniques of cross-examination — only for the innocent?⁶ And if so, how can the lawyer know who is guilty (and should counsel purposely avoid learning too much)? As I asked originally, “Can any rule of legal ethics . . . depend upon the lawyer’s faith in the particular client who, after all, must by law be presumed innocent in every case?”⁷

Finally, I must admit that I am taken aback by the vehemence of Professor Randolph Stone’s response, which criticizes me for “essentially ignor[ing]” the “historical context of white supremacy.”⁸ Fair minded readers can decide for themselves whether I committed that omission in my essay which, *inter alia*, pointed out that *To Kill A Mockingbird* was “a story about race and racial oppression”⁹ and which contained an extended discussion of the Scottsboro case, describing it as a “racially motivated frame-up.”¹⁰

Professor Stone’s ultimate position is that “[i]n an era of racial profiling, prosecutorial overcharging, discriminatory jury selection practices, disproportionate sentencing and confinement policies, and wrongful convictions, vigilant and aggressive defense lawyers

Comment on Steven Lubet’s Reconstructing Atticus Finch, 97 MICH. L. REV. 1376 (1999). Just about everyone else thinks the Sheriff persuaded Atticus to go along in order to spare the reclusive Boo Radley.

4. Atkinson, *supra* note 3, at 1370.

5. See Ann Althouse, *Reconstructing Atticus Finch? A Response to Professor Lubet*, 97 MICH. L. REV. 1363 (1999).

6. I am persuaded by Professor Althouse and Professor Stone that it was probably too strong to say that Atticus “tortured” Mayella on cross-examination. See *id.* at 1369; Randolph N. Stone, *Atticus Finch, In Context*, 97 MICH. L. REV. 1378, 1378-79 (1999). I am hard pressed, however, to come up with an alternative that will clearly convey the intended meaning — inflicting pain without taking pleasure in it. Perhaps “tormented,” or simply “harmed,” would do — at least from Mayella’s perspective.

7. Lubet, *supra* note 1, at 1358.

8. Stone, *supra* note 6, at 1378.

9. Lubet, *supra* note 1, at 1355.

10. *Id.* at 1357.

must be encouraged.”¹¹ “[M]isguided”¹² as I might be, I do not disagree with Stone’s conclusions. I am fairly certain, however, that public support for the adversary system is strengthened by uninhibited discussion and, if anything, weakened by unconditional insistence that all advocacy is for the better.

11. Stone, *supra* note 6, at 1380-81.

12. *Id.* at 1380. Professor Stone additionally faults me for “descent into fantasy” and claims that I erred in my characterization of Tom Robinson’s defense as “consent.” *Id.* at 1378. As to the former, Professor Stone has simply chosen not to engage the premise of my essay, that the *possible* guilt of Tom Robinson can lead to a fuller understanding of criminal defense ethics. As to the latter, it is difficult to understand why Professor Stone insists that “[t]he consent defense admits sexual intercourse but denies the use of force.” *Id.* at 1378. That is probably the most common form of the defense, but certainly not the only one. As every reader surely knows, and as I clearly pointed out, Atticus’s claim was that Mayella had been the sexual aggressor, obviously a variant of the consent defense. See Lubet, *supra* note 1, at 1345.