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ATTICUS FINCH, IN CONTEXT

*Randolph N. Stone**

One summer night in 1955, Emmett Till, a fourteen-year-old Chicago boy visiting relatives in Mississippi, was abducted by two white men, beaten, and shot; his body was tied to a fan from a cotton gin and thrown in a river.¹ Emmett's "crime": being black and allegedly whistling at a white woman.² Through the early 1970s, hundreds of black men had been "legally" executed after being convicted, usually by all white juries or white judges, of sexually assaulting white women;³ hundreds more were lynched and otherwise extrajudicially executed.⁴ This is the historical context of white supremacy essentially ignored by Professor Lubet in his cleverly written critique of Atticus Finch.

Lubet's review contains a number of other discrepancies and flaws, but space limits my discussion to the most obvious. First, despite Lubet's repeated assertions, Tom Robinson's defense to the rape charge was never consent.⁵ The consent defense admits sexual intercourse but denies the use of force. Even if true, such a defense was not a practical alternative for a black man accused of raping a white woman in 1930s Alabama or anywhere else in the United States. In fact, Robinson's defense was that no sexual intercourse of any kind had occurred, that the charge of rape was a lie.⁶

The importance of understanding the defense is critical to debunking Lubet's next exaggeration: that Mayella Ewell was "tortured" on the witness stand by Atticus Finch.⁷ I suppose the term torture is needed to justify the shaky premises supporting the thin theoretical possibility that Finch was a hired gun employing every sexist stereotype at his disposal to destroy the complaining witness. In reality, however, Mayella was not tortured (Emmett Till was tortured); she was simply cross-examined, vigorously but with courtesy

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1. See STEPHEN J. WHITFIELD, *A DEATH IN THE DELTA: THE STORY OF EMMETT TILL* 20 (1980); Ronald Turner, *Remembering Emmett Till*, 38 *How. L.J.* 411, 417-20 (1995).

2. See Turner, *supra* note 1, at 415.

3. See MARY F. BERRY & JOHN W. BLASSINGAME, *LONG MEMORY: THE BLACK EXPERIENCE IN AMERICA* 125 (1982).

4. See 1 GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 560-61 (1944).

5. See Steven Lubet, *Reconstructing Atticus Finch*, 97 *MICH. L. REV.* 1339, 1345 (1999).

6. See HARPER LEE, *TO KILL A MOCKINGBIRD* 215 (1960).

7. Lubet, *supra* note 5, at 1348.

and respect, in contrast to the prosecutor's racism-soaked cross-examination of Robinson.⁸ Although Mayella may have been embarrassed, she was quite feisty and combative on the stand.⁹ Contrary to Lubet's protestations, her status, if any, in the community was probably unaffected by the cross-examination.

Lubet postulates three alternative prisms through which to view Finch's trial tactics: Robinson was truthful, Robinson was lying, or Finch didn't know or care about the truth.¹⁰ As Lubet points out, there was no medical evidence of rape, and Mayella's injuries were inconsistent with Robinson's disability.¹¹ Of course, under Lubet's anything-is-possible theory, perhaps, the one-armed Robinson could have held Mayella around the neck and choked her while striking her in the face at the same time. Although Robinson is married with three children, employed, churchgoing, clean-living, and as respected as a black man could be by white people in that era, Lubet's musings require a suspension of reality and a descent into fantasy in order to raise questions of Finch's ethics. Nonetheless, despite Lubet's misapprehension and misinterpretation of the facts required to complete the descent, the journey is still unsatisfactory even to Lubet himself, for he declares: "I do not sponsor this version; I am not arguing that Tom Robinson was a rapist."¹²

Instead, Lubet posits that his third theory, Finch did not care about the relative truth of the charge and defense, is the most likely explanation for "dragg[ing] Mayella through the mud" and for what Lubet catalogues as Finch's resort to a defense built on sexist stereotype, prejudice, and oppression of women.¹³ While some defense lawyers may focus more on whether the state can prove its case beyond a reasonable doubt regardless of the "truth," Finch hardly fits that category. He was a general practitioner, a state legislator, and a lawyer who had avoided cases like this all his professional life. The much more plausible scenario is that Finch believed his client; if not, Finch probably would have expended his energies on negotiating a sentence for Robinson in order to save him from the

8. The prosecutor, Mr. Gilmore, repeatedly referred to Robinson as "boy" or "a big buck" and to other blacks as "nigger[s]." LEE, *supra* note 6, at 208-10. He invoked the jurors' and courtroom observers' imbedded feelings of racial superiority by emphasizing Tom's expression of pity for Mayella: "You felt sorry for her, you felt sorry for her?" *Id.* at 209. Mr. Gilmore then ended his cross-examination by reminding Robinson and the jury of Robinson's subservient status, asking "[a]re you being impudent to me, boy?" *Id.* at 210.

9. Mayella refused to answer many of Finch's questions and ultimately called the jury "yellow stinkin' cowards." *Id.* at 200. Judge Taylor even overruled an objection by the prosecution during Mayella's cross-examination on the grounds that Finch was not browbeating her: "If anything, the witness's browbeating Atticus." *Id.* at 198.

10. See Lubet, *supra* note 5, at 1345.

11. See *id.* at 1346.

12. *Id.* at 1348.

13. See *id.* at 1349.

electric chair. Finch was never optimistic about the jury verdict, knowing that the all white jury was incapable of accepting a black man's testimony as truth.¹⁴

But to indulge Lubet's fantasy, suppose Finch ignored the possibility that Tom was guilty and "rel[ie]d] upon cruel stereotypes, to play the gender card."¹⁵ (I am not sure what Lubet thinks the "gender card" is, but I assume he refers to his list of "misconceptions and fallacies about rape": fantasy, spite, shame, sexuality, and confusion.)¹⁶ Was he ethical? Moral? Does the answer depend on how you value human life? Does the answer pit black men against white women or racism versus sexism? In the context of defending someone facing the death penalty for rape, does it matter whether the stereotype is true or false?

Here is what I think. In a society where approximately 1.6 million people are incarcerated (a tripling in the past twenty years),¹⁷ where one out of three young black men is under the control of the criminal justice system,¹⁸ where racism permeates the administration of criminal justice, and where black life is devalued, vigorous and zealous advocacy is not an option but a requirement. Witnesses (even rape complainants and the police) lie and are mistaken; the United States Department of Justice recently reported more than two dozen cases of innocent men convicted in sexual assault cases but freed by DNA evidence.¹⁹ Just a few months ago, at Professor Lubet's law school, a National Conference on Wrongful Convictions and the Death Penalty revealed that seventy-four innocent people had been sentenced to death.²⁰ How many more innocent people are languishing in prison or on death row because their lawyers were more concerned about the possibility of their guilt rather than pursuing a vigorous and zealous defense? Moreover, given the often inadequate level of representation provided to the poor, Lubet's critique of Finch is, in my opinion, misguided. In an era of racial profiling, prosecutorial overcharging, discriminatory jury selection practices, disproportionate sentencing and confine-

14. See LEE, *supra* note 6, at 233.

15. Lubet, *supra* note 5, at 1362.

16. See *id.* at 1351-53.

17. See BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 494 (Kathleen Maguire et al. eds., 1997).

18. See MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1 (1995).

19. See EDWARD CONNORS ET AL., U.S. DEPT. OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 12 (1996).

20. See Steve Chapman, *74 Problems with the Death Penalty*, CHI. TRIB., Nov. 8, 1998, at C23, available in LEXIS, News Library, CHTRIB File.

ment policies, and wrongful convictions, vigilant and aggressive defense lawyers must be encouraged.

So, what do I think of Atticus Finch, “a paragon of honor or an especially slick hired gun?”²¹ He accepted a difficult and unpopular case, saved his client from a lynch mob, and tried to do an effective job in court. Did he harbor racist and sexist stereotypes? Yes, but for a fifty-ish white man in 1930s small-town Alabama, he was probably ahead of the curve. Like most of us, he was a work in progress.

21. Lubet, *supra* note 5, at 1362.