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“THINKING LIKE A LAWYER” OR ACTING LIKE A JUDGE?: A RESPONSE TO PROFESSOR SIMON

*David N. Yellen**

Professor William Simon argues that the principal professional responsibility of all lawyers should be to “seek justice.”¹ He defines this as pursuing the client’s rights, but not the client’s interests, if those interests are incompatible with the “truth.” As a concrete example of this approach, Professor Simon states that it would normally be inappropriate for a lawyer to subject a vulnerable, but accurate, witness to cross-examination intended to create the impression that the witness’ testimony was mistaken.²

In my view, Professor Simon’s position would not really further “justice” at all. In these brief comments, by focusing on the likely impact of his ideas on criminal defense practice (from which many of the compelling examples in the debate about lawyers working against the truth are drawn), I suggest that Professor Simon’s ideas are misguided. Even if enacted as binding rules, they would likely be evaded or ignored. To the extent that his suggestions had effect, however, Professor Simon would force lawyers to think like judges, assessing the evidence for and against their clients and modifying their “style of advocacy” accordingly. We should reject this pseudo-judicial role in favor of the traditional role of zealous advocate.

I. TRUTH-SEEKING AS A CHOICE

Professor Simon is not explicit about whether he is making a moral appeal to lawyers to follow his advice, or is recommending that the rules of professional responsibility be rewritten. Under one conception

* Professor of Law, Hofstra University School of Law. I would like to thank Monroe H. Freedman for his helpful comments and for his example and friendship as a colleague for the past decade.

1. See William H. Simon, “Thinking Like a Lawyer” About Ethical Problems, 27 HOFSTRA L. REV. 1, 6 (1998).

2. See *id.* at 2.

of Professor Simon's position, lawyers would be free to choose where to locate themselves on the zealousness and truth-seeking spectrum. Each lawyer's personal values would define the parameters of their zealousness. Some would choose to be "Simon Lawyers." They would seek truth, regardless of their client's narrowly conceived interests. Simon Lawyers would not, as he points out, use cross-examination to draw attention to an accurate witness' poor eyesight. At the other end of the spectrum, "Freedman Lawyers" would use all permissible means to achieve the client's goals.³ Other lawyers might adopt middle positions or vary their positions depending on the case or client.⁴

With such truth-seeking as a choice, it is hard to imagine that Professor Simon's ideas would be very influential. Lawyers would almost certainly be under an obligation to disclose their approach to prospective clients. Only the most gifted Simon Lawyers would get much business. In fact, Simon Lawyers could expect to see an exodus of clients to the more zealous Freedman Lawyers. Even innocent defendants would prefer Freedman Lawyers. While facing a criminal prosecution, most defendants would not want to be worried whether their lawyer remained convinced of their innocence, lest the lawyer feel obliged to become less zealous.

Another problem with making truth-seeking a choice would be posed by indigent defendants, who make up the majority of all criminal defendants.⁵ Indigent defendants do not get to choose their lawyers, whether public defenders or court appointed counsel. However, an indigent defendant is entitled to representation that is as zealous as the law allows,⁶ unless, of course, the defendant chooses otherwise. An indigent

3. Referring to Professor Monroe H. Freedman, who argues that "[o]nce a lawyer has chosen to accept responsibility to represent a client, . . . the zealousness of that representation cannot be tempered by the lawyer's moral judgments of the client or the client's cause." MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 50 (1990).

4. This decision is often determined in the inquiry of whether one can be a good person and a good lawyer at the same time. Or whether the lawyer forfeits her conscience when she represents a client. Or whether the lawyer is nothing more than a hired gun. Essentially, these questions ask whether the lawyer, in her role as a lawyer, is a moral being.

Monroe H. Freedman, *The Lawyer's Moral Obligation of Justification*, 74 *TEX. L. REV.* 111, 116 (1995).

5. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 9 (1997) (reporting that by 1992, almost 80 percent of all criminal defendants were given appointed counsel).

6. This is not to suggest, however, that indigent defendants receive the same degree of zealous representation as do defendants with sufficient financial resources. Cf. Jay S. Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 *VAND. L. REV.* 339, 358 (1994) (suggesting that client perjury is most often revealed in cases involving indigent

defendant, then, might be constitutionally entitled to a Freedman Lawyer.

At least in the world of criminal defense, Professor Simon's ideas would fail on philosophical, as well as practical and economic grounds. In my experience, virtually all criminal defense lawyers believe fiercely in their obligation to defend their clients as zealously as possible.⁷ They would choose to be Freedman Lawyers proudly, even if it were not in their financial interest to do so.

II. TRUTH-SEEKING AS AN OBLIGATION

As a set of aspirations, then, Professor Simon's proposal would likely be largely ignored. In order to effect the changes in lawyers' behavior that he seeks, Professor Simon would have to support imposing on lawyers an enforceable obligation to seek "truth" and "justice." Disciplinary actions could be brought for employing the traditional tools of the lawyer's craft in a manner inconsistent with those goals. For example, a lawyer who engaged in "misleading" cross-examination could be suspended or disbarred unless there were extraordinary circumstances justifying such steps. But that is just the beginning. Let us pursue for a moment the broad implications of Professor Simon's policies on criminal defense (and other) lawyers.

Defense lawyers often probe the credibility of prosecution witnesses.⁸ A witness may have been convicted of a crime, perhaps even

defendants).

7. See Jamil N. Alibhai et al., *Zealous Advocacy and the Search for Truth*, 61 TEX. B.J. 1009, 1010 (1998) (explaining a widespread practitioner's view that in spite of "historical criticism" of zealous representation, "fundamentally altering the lawyer's role from that of a zealous advocate to that of a truth seeker would be unworkable and counterproductive").

8. Defense lawyers have been cross-examining prosecution witnesses since colonial times. See Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 137-40 (1995). Professor Jonakait details the role of lawyers in the trials held to prosecute those individuals responsible for the Boston Massacre. Professor Jonakait reports that, unlike the English system at that time, "both prosecution and defense counsel were full advocates for their respective sides," and defense counsel "cross-examined prosecution witnesses." *Id.* at 137. The role of the defense lawyer was not limited to arguing points of law. Rather, they acted as an advocate for their client, and examined witnesses as such. "Prosecution witnesses were not just accepted or simply asked to clarify ambiguous points. Their stories were probed by challenging and skeptical questions. Contradictions with other witnesses were highlighted." *Id.* at 138 (footnotes omitted).

In addition, the right to cross-examine prosecution witnesses has been recognized by the Supreme Court. See *Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."). Furthermore, the Court in *Davis* held that a restriction on the right to cross-examine a prosecution witness is a violation of the Confrontation Clause of the of the Sixth Amendment. See *id.* at 318

perjury. A witness may have received a large benefit in exchange for testifying against the defendant. A witness might be clearly biased against the defendant because of their prior relationship. In Professor Simon's view, I suppose, it would be improper for the defense lawyer to raise these issues if the witness were testifying accurately against the defendant. Even though the lawyer would not be presenting untrue facts, the lawyer would be suggesting that the trier of fact draw an incorrect inference—that the witness' lack of credibility raises doubts about the testimony. In fact, this might be a more serious violation of Professor Simon's rules than cross-examining the visually impaired witness. In that case, the lawyer would merely be suggesting that the witness was mistaken; in raising a credibility challenge, the lawyer would be suggesting that the witness lied.

Other traditional means of defending criminal defendants would also seem to be prohibited. A defense lawyer seeking truth would be unable to argue for the suppression of evidence obtained in violation of the Fourth Amendment or confessions obtained in violation of *Miranda*.⁹ Sloppy investigative techniques could not be challenged as long as the physical evidence derived was accurate. A lawyer seeking justice might not be able to argue for an interpretation of law that, while plausible and to the benefit of the lawyer's client, would not serve the interests of justice as perceived by the lawyer. Perhaps the lawyer would even be under some obligation to assist the prosecution. A prosecution witness implicating the defendant might testify correctly in all respects except for the time of the offense, mistakenly suggesting a time for which the defendant has an alibi. Not only could the defense lawyer not present that "alibi," but why should the lawyer not be required to help guide the witness toward the true time of the offense?

Taken to its logical conclusion, the apparent implication of Professor Simon's proposal is that a lawyer who knows his client to be guilty may do almost nothing to attempt to gain an acquittal. Defense lawyers will resist this dramatic restriction of their role and are likely to find ways around Professor Simon's rules. For example, Professor Simon would recognize an exception authorizing the full use of the defense lawyer's arsenal if necessary to "avert substantial injustice."¹⁰ Left to their own devices, lawyers will define this exception broadly. Why

(finding a Confrontation Clause violation when defense counsel was not permitted to cross-examine prosecution witness on possible prejudice and bias, thereby resulting in faulty identification of the defendant).

9. *Miranda v. Arizona*, 384 U.S. 436 (1966).

10. Simon, *supra* note 1, at 6.

should factual innocence be the only measure of a potentially unjust conviction? Suppose the lawyer believes that the law unduly restricts the insanity defense or fails adequately to address the problem of battered women who kill their abusers: May the lawyer "pull out all the stops" in such circumstances to avert injustice? Or what if the defendant is admittedly guilty of a minor drug offense, but faces a sentence that the lawyer deems to be unconscionably long?

In addition, the Simon view is deeply flawed in its assumption that the lawyer will "know" the truth. But what does that mean?¹¹ Surely a defense lawyer will not be precluded from full zealousness merely upon a suspicion that the client is guilty. What about a strong suspicion or a belief that the client is probably guilty? Perhaps Professor Simon would restrict the lawyer's advocacy only when the lawyer knows, not merely suspects, that the client is guilty. In cases where the truth is ascertainable, the lawyer's knowledge would come either from the client or from the lawyer's own assessment of the available evidence. But artful lawyers could easily arrange matters so the client's words never force them into adopting a less zealous form of advocacy. Under Professor Simon's regime, lawyers would say to their clients something like, "Look, if I think you are innocent, or even if I think there is some chance you are innocent, I will defend you as zealously as I can. However, if I 'know' that you are guilty, I will have to hold back on what I can do for you. Now, tell me what happened."¹²

Absent an easily avoided admission by the client,¹³ the only way Professor Simon's rules would have effect would be if the lawyer were required to make an independent assessment of the evidence. Suppose that, against the overwhelming weight of the evidence, the client insists

11. Professor Carrie Menkel-Meadow proposes that "truth is illusive, partial, interpretable, dependent on the characteristics of the knowers as well as the known, and, most importantly, complex." Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 5 (1996).

In addition, Professor Freedman has commented that, in the context of litigation, "truth can be known only in degrees of probability. Also, interests and biases of the parties and their witnesses, and even the fact finder(s), can complicate the search for truth. In the end, we rarely will know for certain that we have found the truth." Monroe H. Freedman, *The Trouble with Postmodern Zeal*, 38 WM. & MARY L. REV. 63, 65 (1996). Professor Freedman has also written about this very issue in connection with the client perjury problem. See FREEDMAN, *supra* note 3, at 119, 139-41.

12. This technique is similar to how some defense lawyers avoid being precluded from allowing the client to testify in his own defense if the lawyer suspects the client may commit perjury. See FREEDMAN, *supra* note 3, at 119, 139-41.

13. Incidentally, even if a client "confesses" to his lawyer, what happens if he later recants? If the remaining evidence creates some doubt, may the lawyer now go all out, or must the lawyer make a credibility judgment about the client's statements?

that he was not at the scene and that several eyewitnesses are mistaken. Should the lawyer then vigorously cross-examine the witnesses for bias, faulty eyesight, etc., or should the lawyer conclude that the client is lying and refuse to go forward with that line of questioning? Perhaps Professor Simon is not troubled by the spectacle of lawyers judging their clients even before all of the evidence is presented, but I am.

If the standard is that the defense lawyer may be fully zealous as long as he has a reasonable doubt about the matter in question, this will not be much of a restriction. Take the classic example of the accurate witness with poor eyesight.¹⁴ A defendant might admit to his lawyer that he was present at the scene of the crime, but the lawyer might doubt whether the witness could have made a positive identification from her vantage point without police coaching. Under these circumstances, the lawyer would seem to be justified in cross-examining the witness about her eyesight (as well as her discussions with the police). Defense lawyers are very good at seeing reasonable doubt and would find all sorts of ways to legitimately be as zealous as possible.

Even if Professor Simon's proposal could be made more truly binding by closing what he would see as loopholes, his position should be rejected. Professor Simon cannot escape the fact that his proposal would compel lawyers to be judges of their clients—to make credibility assessments, to weigh the evidence—and to alter their advocacy based on their conclusions. He would effectively transform the lawyer into part advocate, part inquisitor. It is puzzling that Professor Simon sees himself as “thinking like a lawyer” about these ethical questions. Most of his examples reflect abstract, academic thinking, more than lawyerly analysis based on experience and common sense.¹⁵ There is nothing

14. See Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1474 (1966); see also R. George Wright, *Cross-Examining Legal Ethics: The Roles of Intentions, Outcomes, and Character*, 83 KY. L.J. 801, 802 (1995) (placing such a hypothetical ethical dilemma into one of two categories, either: (1) a situation which involves the “cross-examination of a truthful witness in a manner intended to abuse, intimidate, or destroy the witness’ credibility without casting light on a genuine issue in the case”; or (2) where the defense lawyer engages in a “deceptive cross-examination of a witness whom the cross-examiner knows, through a confidential disclosure, is telling the truth”).

15. Perhaps the most striking example of the unreality of Professor Simon's views is his statement that if a lawyer believes that the other side is not “adequately represented,” the lawyer should adopt a “a more moderate style of advocacy.” Simon, *supra* note 1, at 8. This proposal would be a nightmare to administer. Would the other side be “adequately represented” if they did not have as many lawyers on the case, or could not afford the same scientific tests or expert witnesses? And what would this more moderate style of advocacy entail? Would a lawyer be precluded from asking questions or making arguments that the other side was not skillful enough to duplicate? Ironically, however, criminal defense lawyers might actually like this proposal if it could be used to mandate more equal resources for the prosecution and defense.

lawyerly in deciding that based on his own view of the evidence, a lawyer must refuse to be a zealous advocate.

III. CONCLUSION

By assigning to defense lawyers the role of inquisitor, Professor Simon fails to give sufficient weight to the role of zealous advocacy, even “misleading” advocacy, in furthering justice. Judges, prosecutors, juries, even defense lawyers can sometimes mistakenly reject a defendant’s claim of innocence. The growing number of convictions overturned because of DNA evidence demonstrate this.¹⁶ Society as a whole, not just guilty defendants, is well served by requiring the government to prove guilt beyond a reasonable doubt, with the evidence tested vigorously by a fully adversarial system.¹⁷

According to the well-known adage, two things that should never be viewed in the making are laws and sausages.¹⁸ The point, I believe, is that even if one appreciates the result, there may be aspects of the process of creation that are disturbing or even repugnant. Perhaps the same should be said of zealous advocacy. There are morally troubling aspects to being a hired advocate. Viewed in isolation, some aspects of zealous advocacy seem at odds with a search for justice. But in the end, zealous advocacy, unencumbered by Professor Simon’s restrictions, is the better course.

16. See generally EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996) (detailing the growing number of convictions later overturned by DNA testing); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317 (1997) (examining the causes of convictions of innocents in conjunction with later DNA exonerations); see also Derrick Augustus Carter, *A Restatement of Exceptions to the Preservation of Error Requirement in Criminal Cases*, 46 U. KANSAS L. REV. 947, 981 n. 181 (1998) (detailing the success of the “Innocence Project,” a New York organization which uses DNA evidence to reopen old cases to free wrongly convicted felons).

17. See Freedman, *supra* note 14, at 1470 (stating the modern adversary system is “based upon the presupposition that the most effective means of determining truth is to present to a judge and jury a clash between proponents of conflicting views”); see also Monroe H. Freedman, *Professionalism in the American Adversary System*, 41 EMORY L.J. 467, 467 (1992) (commenting that the modern adversary system “consists of a core of basic rights that recognize and protect the dignity of the individual in a free society. The rights that comprise the adversary system include . . . the effective assistance of counsel [and] . . . the [right] to call and to confront witness[es]”).

18. See RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 190 (Suzy Platt ed., 1989) (noting that the quote is generally attributed to Otto von Bismarck, but unverified, and reporting it: “If you like laws and sausages, you should never watch either one being made.”).

