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THE TROUBLE WITH POSTMODERN ZEAL

MONROE H. FREEDMAN*

I have always admired the adversarial advocacy with which Professor Carrie Menkel-Meadow attacks adversarial advocacy. Also, given her postmodern skepticism that there can be any certainty in truth, I respect her certainty about her own version of truth. She exhibits both of these qualities in her Article, *The Trouble with the Adversary System in a Postmodern, Multicultural World*.¹

I premise my own system of lawyers' ethics on individual dignity and autonomy.² Accordingly, I believe that people should be able to choose how to resolve their disputes. It is possible, therefore, that I have no disagreement with Professor Menkel-Meadow. If she means only that parties to a dispute should be allowed to use whatever nonviolent means they choose, we are in complete accord. In fact, though, such choice is widely available. I assume, therefore, that Professor Menkel-Meadow calls for displacement of the adversary system with some institutionalized alternative(s).³

* Lichtenstein Distinguished Professor of Legal Ethics, Hofstra University Law School. Author, UNDERSTANDING LAWYERS' ETHICS (Matthew Bender, 1990). I had the benefit of hearing N.Y. Supreme Court Justice Phyllis Gangel-Jacob's comments on the same paper at the Hofstra Law School Conference on Legal Ethics: The Core Issues, March 10-12, 1996 (but I do not speak for Judge Gangel-Jacob).

1. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996). Professor Menkel-Meadow presented substantially the same paper at the Hofstra Law School Conference on Legal Ethics: The Core Issues, March 10-12, 1996.

2. See, e.g., MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 6-10, 13-17, 43-64 (1990).

3. As she says:

[T]he adversary system may no longer be the best way for our legal system to deal with all of the matters that come within its purview. . . . [O]ur epistemology has sufficiently changed in this era of poststructural, postmodern knowledge so that we need to reexamine the attributes of the adversary system as the 'ideal type' of a legal system, and also reexamine the practice based on the premises of that system.

To understand Professor Menkel-Meadow's "postmodern" criticisms of the adversary system, one must understand what she means by postmodernism. In her own words: "If late-twentieth-century learning has taught us anything it is that truth is illusive, partial, interpretable, dependent on the characteristics of the knowers as well as the known, and, most importantly, complex."⁴ She also believes that we have recently learned that "every 'text' has its ambiguity, its negation, its opposition, its 'silence'."⁵ From this she concludes that the "epistemological system" upon which the adversary system is premised is "crumbling as we speak."⁶ She implies that those who wrote the Bill of Rights, which constitutionalized the adversary system,⁷ would never have done so if only they had had the advantage of this postmodern enlightenment.

As these quotes show, Professor Menkel-Meadow's analysis ignores history, including the history of philosophy. The notion of truth's illusiveness would not have surprised the British empiricists of two and three centuries ago.⁸ Plato, earlier than 300 B.C., held that we can capture only the "meaningless illusion" of reality.⁹ Further, for two millennia, textual ambiguity has been manifest to anyone who has observed how Roman Catholics, Eastern Orthodox, and a multitude of Protestant sects have given radically different meanings to the same gospel truths. As Shakespeare noted four centuries before the discoveries of postmodernism, even "[t]he devil can cite Scripture for his purpose."¹⁰

It is not surprising, therefore, that those who devised the ad-

Menkel-Meadow, *supra* note 1, at 5.

4. *Id.*

5. *Id.* at 20.

6. *Id.* at 44.

7. See FREEDMAN, *supra* note 2, at 13-26.

8. Cf. THE COLUMBIA ENCYCLOPEDIA 866 (5th ed. 1993) ("According to the empiricist, all ideas are derived from experience; therefore, knowledge of the physical world can be nothing more than a generalization from particular instances and can never reach more than a high degree of probability.").

I happen to know more than I ever wanted to know about the British Empiricists, having taken a course bearing that title in my first year of college. I selected the course because I thought it was going to be about British imperialists.

9. PLATO, THE REPUBLIC 229 (Francis M. Cornford trans., 1945).

10. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, act 1, sc. 3, line 93 (J.P. Brown ed., 1955) (1600); cf. Matthew 4:6.

versary system took account of the illusive nature of truth—particularly the elusive kind of truth that is sought in resolving a dispute between two or more contesting parties. A scientist, searching for a cure for cancer, will know when she has found it. But when each of two parties blames the other for an automobile accident (with one perhaps also blaming the manufacturer of the car and/or a repair shop), truth can be known only in degrees of probability. Also, interests and biases of the parties and their witnesses, and even of 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. The adversary system was designed in substantial part to deal with precisely this sort of elusiveness and uncertainty.¹¹ Indeed, as noted in the *New York Times*, even scientists are learning the importance of adversarial “checks and balances” to “control subjectivity.”¹²

Demonstrating her adversarial skills, Professor Menkel-Meadow uses the familiar stratagem of shifting the burden of proof.¹³ Note how cleverly she does it: “For those who cleave to the adversary system [here citing Freedman, *Understanding Lawyers’ Ethics*], I want to shift the burden of proof for them to *convince* us that the adversary system continues to do its job better than *other methods* we might use [here citing nothing].”¹⁴ In addition to shifting the burden, Professor Menkel-Meadow imposes on her opponents a burden to “convince” (not simply to persuade)

11. See FREEDMAN, *supra* note 2, at 28-39 for a discussion of this point.

12. John N. Wilford, *Customs Check: Leave Your Ideological Baggage Behind*, N.Y. TIMES, Feb. 6, 1983, at 8E (quoted in FREEDMAN, *supra* note 2, at 35).

Something interesting happened at the William & Mary conference. Shortly before Professor Menkel-Meadow’s talk, I told her that I was going to be “very mean” in my comments on her paper. At least three people who had heard Professor Menkel-Meadow give a very similar paper at Hofstra Law School noted that Professor Menkel-Meadow was considerably less confrontational and dogmatic in her talk at William & Mary than she had been two weeks earlier at Hofstra. One could draw an inference that awareness of an adversarial response caused the speaker to present her views in a *less* adversarial manner. See FREEDMAN, *supra* note 2, at 33 (“[T]he opponent of an adversarial lawyer transmits more facts that are unfavorable to her own client. Apparently, awareness that one has an adversarial counterpart is a significant inducement to candor.” (citing results of a study published in E. Allen Lind et al., *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 91 MICH. L. REV. 1129, 1136 (1993))).

13. Menkel-Meadow, *supra* note 1, at 6.

14. *Id.* (emphasis added).

everyone else that the adversary system does its job better than other systems.¹⁵

Professor Menkel-Meadow also suggests that I have never attempted to defend the adversary system.¹⁶ In fact, however, I accepted her challenge at least six years before she issued it. In *Understanding Lawyers' Ethics* I noted that "[i]n recent years, attacks upon the adversary system have been unprecedented in their breadth and intensity,"¹⁷ and that "the adversary system has become a battleground on which fundamental issues of lawyers' ethics are being fought out."¹⁸ Accordingly, I devote Chapter 2 of the book to explaining and justifying the adversary system. Here are the topic headings in that chapter:

Criticisms of the Adversary System
The Adversary System and Individual Dignity
The Adversary System and Individual Rights
The False Metaphor of Warfare
The Adversary System in Civil Litigation
The Civil Trial and the Constitution
The Jury as an Aspect of the Adversary System
The Search for an Alternative System
Effectiveness in the Search for Truth
The Flawed Analogy to Non-Litigation Settings
A Paradigm of the Inquisitorial Search for Truth
The Sense of Having Been Treated Fairly
The Problem of Socio-Economic Unfairness.¹⁹

Professor Menkel-Meadow may find the analysis in that chapter unpersuasive (and, if so, she might explain why), but she chose instead to omit any citation to it.

Somewhat more subtly, Professor Menkel-Meadow demands that we demonstrate the superiority of the adversary system to all other methods that might be used²⁰—although omitting to

15. *Id.*

16. *See id.*

17. FREEDMAN, *supra* note 2, at 14.

18. *Id.* at 15.

19. *Id.* at 13-42.

20. Menkel-Meadow, *supra* note 1, at 6.

specify what those methods are. I do not mind shooting at a moving target, but Professor Menkel-Meadow, as a "postmodern, multicultural thinker,"²¹ is at pains to present no target at all. As she says:

After I critique the adversary system, you will wonder what I would substitute for it. It should be obvious that as a postmodern, multicultural thinker I have no one panacea, solution, or process to offer—instead, I think we should contemplate a variety of different ways to structure process in our legal system to reflect our multiple goals and objectives.²²

Indeed, she acknowledges that "[s]ome of the postmodern attacks on knowledge would reject any legal system" at all.²³

Professor Menkel-Meadow does "envision" a "greater multiplicity of stories [or narratives] being told, of more open, participatory and democratic processes, yielding truths that are concrete but contextualized, explicitly focused on who finds 'truth' for whose benefit."²⁴ As I suggested at the outset, if people want to narrate at each other, they should be free to do so. I wonder, however, what it means to resolve a dispute by inviting an open, participatory multiplicity of narratives. One can only imagine. Because Professor Menkel-Meadow has referred to the O.J. Simpson trial,²⁵ consider whether resolution of that dispute would have been improved if it had been opened up to the narratives of the members of Nicole Brown's family, Ron Goldman's family, Kato Kaelin (whose testimony was limited by rules of evidence to several days), and Faye Resnick (who, reportedly, was all too willing to narrate to the world). Indeed, we easily could have had a multiplicity of narratives from half of Los Angeles.

21. *Id.* at 11.

22. *Id.* at 11-12.

23. *Id.* at 16 n.54. Among other unexplained suggestions, Professor Menkel-Meadow urges us to become "lawyers for the situation." *Id.* at 43. On the emptiness of this phrase, see Monroe H. Freedman, *Brandeis' Lawyer for the Situation*, *LEGAL TIMES*, Apr. 1, 1996, at 21.

24. Menkel-Meadow, *supra* note 1, at 23-24.

25. *Id.* at 8 n.14, 9 n.17.

One reason I remain skeptical about alternative dispute resolution (ADR) is that it received its lift-off during the 1960s and early 1970s, coinciding with the opening of access to the legal system to people who earlier had been virtually excluded—people like tenants, consumers, poor people, and others who are similarly disadvantaged. ADR seems to be an effort, therefore, on the part of some, to shunt these downtrodden people aside once again. Moreover, according to my anecdotal evidence, those who most strongly favor ADR do not, themselves, rely on it when they have something important at stake.

For example, a good friend, who fervently advocates the use of ADR, came to me a few years ago. He wanted my help in finding the toughest litigator in New York to handle a difficult and complex case. He did not consider ADR as an option for himself. Even Professor Menkel-Meadow admits that in three recent disputes, in all of which she was both plaintiff and counsel, she resorted to old-fashioned litigation.²⁶ Characteristically, however, Professor Menkel-Meadow does not present this admission as an admission. Rather, in good adversarial style, she argues it to prove that she is not “an ADR romanticist”²⁷—that is, to persuade the reader that she is free of any bias on the issue. She fails to discuss, however, how and why the adversary system proved more desirable to her in the roles of plaintiff and counsel.

Finally, what does all this have to do with teaching professional responsibility—the subject of this conference? Professor Menkel-Meadow tells us that she no longer teaches trial advocacy.²⁸ If she is merely relating her personal teaching preference, we may, again, have nothing to disagree about. Certainly choosing not to teach trial advocacy is her prerogative. Professor Menkel-Meadow’s point, however, may be that law schools should not teach trial advocacy at all, or that law schools should omit instruction in what she calls the “dragon”-like ethic of zeal.²⁹ Such an omission would, I believe, seriously disserve our students and their future clients.³⁰

26. *Id.* at 33 n.134.

27. *Id.*

28. *Id.* at 41 n.170.

29. *Id.* at 41. For a different view of the ethic of zeal, see FREEDMAN, *supra* note 2, at 65-86 (“Zealous Representation: The Pervasive Ethic”).

30. See FREEDMAN, *supra* note 2, at 65-86 (“Zealous Representation: The Pervasive

I have litigated a variety of cases involving civil liberties and civil rights—litigation on behalf of minority groups, political dissidents, institutionalized children, victims of police brutality, and lawyers representing unpopular clients and causes. My adversaries were powerful, skillful, and intractable. In quite a few cases I was able to negotiate amicable settlements that satisfied my clients. Such successful negotiation never happened, however, until my clients could, figuratively, push the other side up against a wall, making it clear that we could hold them there until they decided to discuss the matter amicably. Unquestionably, law schools should, and do, teach negotiating skills.³¹ But after a serious dispute has arisen it is always better to negotiate from a position of strength. Teaching future lawyers any other lesson would be educational malpractice.

In sum, although I do not admire the ideas that Professor Menkel-Meadow presents in her paper, I continue to admire her formidable skills as a zealous advocate. I suspect that I will see more evidence of those skills in the future.³²

Ethic”).

31. See, e.g., HOFSTRA UNIVERSITY, HOFSTRA LAW 42, 46 (describing courses entitled “Alternatives to Litigation” and “Dispute Settlement”); James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 107-10 (1996) (describing William & Mary’s Legal Skills program, which teaches negotiation skills in the context of simulated client service).

32. Another participant at the William & Mary conference told me that after my comments on her paper, Professor Menkel-Meadow remarked that she would have to add a discussion of “testosterone and the adversary system.” If the report is true, her remark was below the belt.

