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QUESTIONS AND ANSWERS ON LLOYD WEINREB'S AND MARY DALY'S ARTICLES

QUESTIONER #1: Hi, my name is Kathleen Clark. I just wanted to ask Professor Weinreb about his last comment, to make sure that I understood it. You said that we should look skeptically on any system where there is a wide separation between ethics, generally, and professional ethics. Did I understand you correctly?

LLOYD L. WEINREB: Yes

QUESTIONER #1: And you then would look skeptically on any system of role-differentiated ethics by that same standard.

LLOYD L. WEINREB: I don't know how generally you would like for me to respond. I will respond as generally as your latter question. Yes, my general impression, which is not confined to the legal profession, is that so-called professional ethics are a means of helping practitioners in that profession to justify a role that, in some respects, is violative of ordinary ethics. I believe very strongly that if one looked closely at the justifications for those special professional ethics, one would find that the justifications would serve the profession more than they serve the objectives which the process is intended to serve.

QUESTIONER #1: Okay, let me just (for what it's worth) throw out an idea there. I think there have been some very cogent defenses of role-differentiated effects. There is a book from about 1980 on Professional Ethics by someone named Goldman; I believe he's a philosopher, not a lawyer or anything. But for what it's worth, I think there are out there in the literature strong defenses of the role differentiation that you are skeptical about.

LLOYD L. WEINREB: Yes, I am not unaware of those books. I happen to disagree with them quite generally. But I do think it's fair to say that the kind of comment I just made, and I think also the kind of comment you just made, can't really be tested except concretely and in detail. So one would have to ask about a particular practice in its concrete context.

QUESTIONER #1: Good enough.

QUESTIONER #2: It would seem to me that the proof in the pudding is in the tasting, so to speak, and I would be interested in the comparative outcomes analysis. First of all, our system is so often called the adver-

sary system, referring to the exceptional method of processing criminal defendants. The real method is to induce self-incrimination by offering the prospect of prolonged incarceration. If you don't, presumably that might cause people to self-incriminate who didn't even do it. Is there any empirical evidence that the adversary system works better than, or worse than, the magisterial system, and would it be possible to perform such studies? I know that there has been one study that was published by the Justice Department a couple of years ago looking at DNA evidence which exonerated people who were convicted by the usual eyewitness and forensic stuff, and showed that quite a few people were slipping into jail through our adversary system, some of them even pleading guilty. But I wonder if there has been any thought to a comparative study, and if you would favor moving away from the adversary system, even if it turned out empirically to do a better job of separating the sheep from the goats?

LLOYD L. WEINREB: The answer to the latter question is easy. No, if another system would do a better job, let's use it.

QUESTIONER #2: But you said that the adversary system had certain ethical issues for you in terms of professional ethics.

LLOYD L. WEINREB: Let me try to practice what I preach and respond in a little bit of detail. First, I think what you were saying at the outset was that we have the privilege against self-incrimination and the other countries don't. That's simply not accurate as a concrete matter. In the United States, although we protect the privilege against compulsory incrimination, and against compulsory self-incrimination very strongly at trial, there is no system in the world that puts as great pressure on a defendant to acknowledge his guilt. That is simply the fact. In other countries, although theoretically, you can be compelled to incriminate yourself, the real risk is only that people will look adversarial; the judges will look adversely at your refusal to speak. It is the case that if a witness simply insisted on not speaking that would be the end of the matter. In this country, you can be put in jail, as we know from some recent events, for refusing to testify against your father, your son, your sister, or your brother, all of that. It startles me that we are so insistent on the apparent virtues of our system and pay no attention to what happens in the vast majority of cases. In the vast majority of cases the defendant pleads guilty, subject to enormous pressure to do so. I don't know if that's compulsory self-incrimination or not. Constitutionally, of course, it's not. But as a practical matter, I don't understand why we talk only about one side of it. Similarly, although we reject the *dossier* system that

Professor Daly explains so well, the fact of the matter is that in the one portion of the process that concerns most defendants, namely sentencing, we have something very like the *dossier* system. We don't talk about that; we talk about all this adversary process. It's bologna in a very large majority of the cases.

QUESTIONER #3: Can I come up?

PROFESSOR DALY: Absolutely, step up.

QUESTIONER #3: I'm Steve Pepper from the University of Denver. I just wanted to follow up on Kathleen Clark's question about ordinary morality versus roles and specific morality. I am curious as to whether you think there ought to be confidentiality in regard to physicians and lawyers, and if you do, whether you think that's role-differentiated morality or just a specific application of ordinary morality?

LLOYD L. WEINREB: I do think there should be confidentiality because I think the lawyer's role is very, very important. I wasn't suggesting with Shakespeare that first we kill all the lawyers. That is role differentiation. I wasn't intending to suggest that there is no appropriate role differentiation or that there aren't professional roles. As I said, I think one has to ask in each case whether that particular aspect of the profession is one that serves us well.

QUESTIONER #2: You have been criticizing the adversarial model in the criminal justice system. My question is a little bit broader. I think that the adversarial role of the lawyer in legal ethics pollutes other areas of practice which have nothing to do with criminal justice, like corporate and securities law. You've also been talking about the differences between reality and rhetorical flourishes or justifications for the position. Do you believe that the model rules are a significant advancement from the model code in terms of looking at more than just an adversarial system? Or do you think it's really a matter of just window dressing to talk about roles other than the adversarial one but then truncate them so completely that it remains just as adversarial.

LLOYD L. WEINREB: Model Rules now?

QUESTIONER #2: As opposed to Model Code.

LLOYD L. WEINREB: I think that what the Model Rules Code of Ethics mostly do is to permit a lawyer not to have to answer, in each case or many times within a case, exceedingly difficult questions. Do I try to make this witness look bad when I know that what she's testifying to is the truth? That's a very difficult question, if you are committed, and I'll

put in parenthesis (paid by the other side). Those questions come up over and over and over. I think the Canons of Ethics and Model Rules and so forth permit a lawyer not to confront those questions.

QUESTIONER #4: My question concerns the difference between the criminal and civil models in the United States. It is somewhat curious to me, Professor Weinreb, that you chose the criminal model to use as an attack (I don't know whether that's overstating it) on the adversarial nature of the process. So I have two questions. First, do you see a distinction between the criminal and the civil model in the United States in terms of the adversarial nature in the proceeding? Is it easier to make the case that you are attempting to make by using the civil model? The second one is this. In France, as Mary Daly put it, the standards are that once you get to trial in those few cases, it is preponderance of the evidence. Yet in the United States, it's proof beyond a reasonable doubt. And if we are going to adhere to the proof beyond a reasonable doubt standard, how do you exercise that standard, test that standard, if it's not by vigorous advocacy, given the fact that the standard is so high? And if the state has to prove its case by that amount of evidence, is it not the obligation of the defense lawyer to ensure that the state is put to that proof as Justice Wright said in *Roe v. Wade*, and in his other Supreme Court cases and elsewhere?

LLOYD L. WEINREB: I didn't choose the criminal process; the organizers of the conference did. That's what I was asked to talk about. I could talk about the civil process but with not nearly so much conviction. For that I would turn to my friend, David Wilkins. I'm just much more familiar with the criminal process. I certainly would not abandon the requirement of proof beyond a reasonable doubt for all sorts of reasons that we all understand. We don't want to convict someone who is even possibly not guilty. I wasn't suggesting that we eliminate advocacy; I don't want to say "let's kill or abandon all the lawyers." Reserving the advocacy role of a lawyer does not entail all of the other attributes of adversariness, for example, lawyers selecting the jurors. Simply do away with lawyers roaming around the courtroom as if it is a stadium. Tell them to sit down; that would accomplish a lot. Everyone else has to stay seated; try telling the lawyers to stay seated and so-forth. I would reserve for the lawyers the right to argue, to take the evidence, pull it together, and make an argument. That's different from choosing which witnesses to present. Choosing the order in which to present them. But all of this is exceedingly difficult because one can't do all this without something of the

dossier that Professor Daly spoke of. So I would talk about details rather than a global change.

QUESTIONER #4: Can I just ask you one further question? I note, of course, that Monroe isn't here with us this afternoon. As a former criminal defense lawyer, I wonder how I could possibly test the prosecution's case beyond a reasonable doubt if I can't call the witnesses that I choose to call and ask them the questions that I choose to ask them? I would note also that in most jurisdictions in the United States trial judges currently have the power to question witnesses and do so. It's a matter of their discretion and that at least in many jurisdictions, including California, jurors with the judge's permission currently have the power to ask questions. In some California courts they do. So given that, why change the role of the advocate by limiting his or her ability to present the evidence in a way which truly tests the strength of the prosecution's case?

LLOYD L. WEINREB: Insofar as it does, I'd keep it. We talked about jurors and judges asking questions. We all know that they do that very seldom. Most judges get to the bench having been lawyers. They respect the lawyer's role. There is no special magisterial training in this country. Jurors who ask questions are not loved by anyone in the courtroom, but that role ought to be developed. I won't give you a resting place. I don't see why only a lawyer is capable of testing a witness' testimony. I don't see why someone who is not committed to twisting that witness' testimony toward a particular result is the only person who can ask a probing question. It just doesn't seem so to me.

MARY DALY: I assume you anticipated being on the hot seat with Monroe being on the panel. The most persuasive argument Monroe makes, I believe, joined by Steve Pepper for the adversary system, is the one grounded in human dignity. Using the idea of the example you gave, cross-examining the truthful witness with the intention, clear intention of conveying an impression that the testimony is false. To me it is consistent with common morality. The lawyer has been entrusted in the criminal proceeding with a tremendously personal and important aspect of the defendant's personality as well as their future freedom and, in my State of Texas, their life on occasion. Therefore, common morality it seems to me, would in fact impose upon me the obligation to act on behalf of that client in the way that the client would direct me to act. That's what I see the professional rules doing. Where there are questions that are deeply disputed or contested, that common morality would allow that person who will bear the burden of the decision most commonly to, in fact,

direct the action. That's what the lawyers' ethics codes do. Do you dispute that?

LLOYD L. WEINREB: I do dispute it on both counts. First, that our system preserves the defendant's dignity and, second, that common morality indicates that a lawyer should do what lawyers do. What common morality requires is that no person be convicted unless that person is proved guilty beyond a reasonable doubt. It does not require that someone be in the courtroom trying to distort truth, questioning yes, but not deliberately distorting it. It's a fair question to what extent can a neutral official serve the objective that a defense counsel serves? I don't think a neutral official can serve it entirely, and so I would reserve the role of defense counsel. In some respects this is as you describe it. But let me address the matter of human dignity because I quite disagree that our process protects the defendant's dignity. In our process the defendant is a thing required to sit there silently, and not speak. If she becomes angry and interrupts, the judge will say sit down. If she speaks again the judge will say "quiet or you'll be taken out. If you want to speak, you can speak as the witness." We deny the defendant any dignity as a person. The person is there to be identified, to be spoken about as a thing. If you saw the defendant in a French trial, you would understand what it is to assert yourself as an individual, that we deny in our trial.

QUESTIONER #5: I just wanted to comment on treating the defendant as a thing. It happened that I was in the court room in Judge Julius Hoffman's court when Bobby Seal was carried into the courtroom bound and gagged, tied to a chair, (speaking as if he was gagged, not distinctly). The judge said, "Mr. Seal if you don't stop misbehaving in this court room you will soon be ejected." It was the ultimate thingness of a defendant; it was a shocking thing to see.

LLOYD L. WEINREB: But it happens in all trials. What dignity is there in sitting there being spoken about, unable to speak? The only time we give the defendant an opportunity to speak is at allocation which is supposed to be his opportunity to speak for himself at sentencing. By then, of course, it's too late. Even the sentence has been decided. So it's just an altogether phony opportunity to assert yourself as an individual.

QUESTIONER #5: But isn't the constitutional protection in the criminal proceeding to confront witnesses as well as to testify or decline to testify and the protection of not being forced to testify except through a lawyer in a highly formalized and complicated system where you can compromise important legal points and political rights by misstep. Is that not affirmation of dignity?

LLOYD L. WEINREB: I am not questioning the defendant's right to remain silent. I never said anything to suggest that he is required to speak. If she wants to be silent, of course, she should. That's her role, but that is being converted into preventing her from speaking, which seems to be quite a different matter.

ROY SIMON: This will have to be our last question and then we will move directly on to our final program.

QUESTIONER #6: I first have to plead guilty for engaging my whole life in obfuscation and twisting and parading around a courtroom. It took me a little time to recover from the onslaught. I am not sure I agree that that is the process in which we engage. I actually take great offense at what I consider to be sort of a smear of all trial lawyers because I don't think that is what we do. I do think that you're wrong about one critical aspect. No neutral will dedicate the time and effort that we lawyers dedicate to developing a case. The time that lawyers dedicate to thinking about a case is entirely different. We may or may not get a neutral who does that, but with a lawyer at least we have some assurance, given enough resources, of course, to do that. But the thing that troubles me the most about your presentation is the thing I think we deliver the best. My clients don't want to participate. They want me to participate. You may think that that's giving me an opportunity to be the great gladiator, and maybe something in the air convinces them of that. But almost without exception, my clients are very happy; the less they get to participate, the happier they are. They are not looking for an opportunity to show their stuff. They are looking for me to stand between them and whatever the process is. Whether that's good or bad I don't know, but that's what real clients are telling us everyday. Often we have to persuade them to participate a lot more than they do. They are scared to death of this process; it's intimidating for whatever reasons, many of which have nothing to do with the fact that it's an adversary process. They want us to do it, and that's the service that we lawyers provide. I don't think you've answered that particular aspect of what is happening in real life. You come to my office tomorrow or whenever I get back to work, and I will sit down and we will go through with clients. You do an empirical study of what clients want. They don't want to participate.

LLOYD L. WEINREB: I am sorry. Let me just say, I'm sorry if it seemed like a smear or an undiluted attack. I didn't mean it to be that. But it seems to me very difficult to make the arguments against what we take for granted without making them pounding the table a little bit. It does seem to me that all the difficulties of the adversary system you stated

within parenthesis while you were making your argument, providing there are enough funds, of course. Well, there aren't. There aren't equally good lawyers for every case. We need to think about the dominance of the lawyers in that context, and so forth. Much of what you say is, of course, true. The question is whether what's good and valuable about the process requires what's not so good and not so valuable.

ROY SIMON: As an organizer of the conference, I note the difficult position into which we have cast Professor Weinreb. We promised him an adversarial debate and, instead of appearing as a neutral, he appeared as an advocate for the neutral system.

Yes, just say your name please.

QUESTIONER #6: Thank you; my name is Doust, and I am a lawyer from Vancouver, Canada. I have been a trial lawyer for both the prosecution and defense for over 30 years. Professor, I sat here and listened, and it strikes me that in our system of justice, you know we value the protection of innocent people to the point that, as I am sure you know, there is an old maxim, "We'd rather let nine guilty go free than to convict one innocent one." I rather like the proposition in the same terms that I like to be able to put my head on the pillow every night in my country and feel that if I am innocent I will never be convicted of having done something that I didn't do. And in that vein, my experience tells me that in my over 30 years, there is no tool more effective for ferreting out the truth than a well-prepared, intense, and I'll say, biased cross-examination when a witness is lying. Now within the context of our system, it's inconceivable to me that any objective individual could conduct a lengthy cross-examination structured from a particular point of view, designed to demonstrate that evidence ought not to be accepted even if the witness at the end does not scream out, "Yes I'm lying; you demonstrate the falsity of it." It takes time; it takes considerable effort, and it takes a perspective. Now, having said that, I will concede that I have on occasion seen lawyers try to obfuscate in the sense of taking a witness whose evidence they may believe to be true. One wonders how you (as you put it) know it's the truth because, frankly, I don't know whether we get into deciding whether it's true or not. But even if that does happen from time to time in the context of the adversarial system, I, for my part, accept that there are certain flaws in the system. I accept that we do have to live to a degree with problems of that type within the context of a system that recognizes that we are not going to achieve perfect justice. We are never going to achieve trust at all costs. We are, after all, as I said at the outset, trying to ensure a reasonable degree of order by ensuring

that we will convict those who are guilty as often as we can. But not at the cost of convicting any that are innocent. So we accept that some of the flaws you refer to exist. Finally, I want to say that I frequently compare our system and the English system, to which we are much closer than you are, I think, to the American system. Our judges won't let us wander around. Our picking of a jury consists of knowing their name and their address and deciding instantly, having gotten that information that morning whether we accept or reject those witnesses. Some of the flaws to which you make reference, it seems to me, are merely cosmetic. The more fundamental attack you make, I think, is on the proposition that the adversary system doesn't always work. Nobody says it does.

LLOYD L. WEINREB: I think you have to keep the goal in mind.

MARY DALY: Thank you.

LLOYD L. WEINREB: Let me just go back to what I said at the beginning. There aren't two systems, an adversary system and an inquisitorial system. I quite agree with you. I quite agree that there is much about the process of adversarial questioning, and so forth, that's good. You mentioned for example having a voir dire that doesn't involve our endless game playing by lawyers psyching out the jurors. You are quite right. That's exactly the sort of improvement that we ought to have. We ought to adopt your procedure in that respect. It seems to me that it is, as I said, at the beginning, the question of looking at each of our particular procedures and deciding which is worth preserving and which is not. You are much closer to what I think we would end up with than we are ourselves.

QUESTIONER #6: But we are adversaries.

LLOYD L. WEINREB: I am not opposing the adversary process.

ROY SIMON: I congratulate Mary Daly and Professor Weinreb on a program that drew comments from about 20% of the audience. So we will move directly on to our next program. If I could invite Tony Kronman, Amy Mashburn, Judge Walker, and Burnele Powell up to the podium, we will move on directly.

