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PROFESSIONALISM IN THE AMERICAN ADVERSARY SYSTEM

*Monroe H. Freedman**

In order to understand either lawyers' ethics or the meaning of "professionalism" for lawyers, it is necessary first to appreciate our constitutionalized adversary system, in which the American lawyer functions.¹

In its simplest terms, an adversary system is one in which disputes are resolved by having the parties present their conflicting views of fact and law before an impartial and relatively passive judge and/or jury, who decides which side wins what. In the United States, however, the phrase "adversary system" is synonymous with the American system for the administration of justice, as that system has been incorporated into the Constitution and elaborated by the Supreme Court for two centuries. Thus, the adversary system represents far more than a simple model for resolving disputes. Rather, it 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 personal autonomy, the effective assistance of counsel, equal protection of the laws, trial by jury, the rights to call and to confront witnesses, and the right to require the government to prove guilt beyond a reasonable doubt and without the use of compelled self-incrimination.

These rights, and others, are also included in the broad and fundamental concept that no person may be deprived of life, liberty, or property without due process of law — a concept which itself has been substantially equated with the adversary system.² The cluster of rights that comprise constitutional due process of law have an obvious importance when the individual stands alone against the state as an accused criminal. The fundamental characteristics of the adversary system also have a constitutional source, however, in the administration of civil justice. Just as a judge in criminal litigation must be impartial,³ a judge in a civil trial

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¹ See generally MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* (1990) (especially chs. 1-3).

² GEOFFREY C. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 122 (1978).

³ See *United States v. Marzano*, 149 F.2d 923, 926 (2d Cir. 1945) (L. Hand, J.).

“best serves the administration of justice by remaining detached from the conflict between the parties.”⁴ Also, proper representation in civil as well as criminal cases demands that attorneys take an active role in investigating, analyzing, and advocating their clients’ cases. This is “the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients’ interests.”⁵

The Supreme Court has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as plaintiffs attempting to redress grievances or as defendants trying to maintain their rights.⁶ Due process in civil cases is not identical, of course, to due process in serious criminal cases. For example, as in criminal cases not involving imprisonment, the individual’s right to an opportunity to be heard does not necessarily mean that the state has an obligation to provide counsel to a civil litigant at state expense.⁷ The Supreme Court has recognized, however, that in civil cases as well as criminal, due process would be denied if a court were arbitrarily to refuse to hear a party through retained counsel.⁸ Also, the right to trial by jury in the traditional common law manner is guaranteed in civil actions at law by the Seventh Amendment⁹ and by similar state constitutional provisions.¹⁰

It is misleading to suggest, therefore, that the adversary system is part

⁴ *Gardiner v. A.H. Robins Co., Inc.*, 747 F.2d 1180, 1192 (8th Cir. 1984).

⁵ *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (Jackson, J., concurring).

⁶ *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). See also James R. Pielemeier, *Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigation*, 63 B.U. L. Rev. 383, 397-401 (1983).

⁷ *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981). *But cf.* *Santosky v. Kramer*, 455 U.S. 745 (1982) (requiring a high standard for due process in case severing parental rights).

⁸ See *Powell v. Alabama*, 287 U.S. 45, 69 (1932); see also *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970). A plurality in *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985), upheld a 120-year-old statute that put a \$10 limit on lawyers’ fees in applications for benefits before the Veterans Administration. The plurality found the procedures consistent with due process because (among other reasons) veterans’ groups make trained advocates available to veterans free of charge, the veterans’ applications are unopposed by any adversary, and the veterans’ burden of proof is less than a preponderance of the evidence. *Id.* at 327-34. Despite those unique factors, Justice Stevens is correct in concluding that the plurality opinion “does not appreciate the value of individual liberty.” *Id.* at 372 (Stevens, J., dissenting).

⁹ *Sartor v. Arkansas Natural Gas Co.*, 321 U.S. 620, 627 (1944); see also *Stevens v. Howard D. Johnson Co.*, 181 F.2d 390, 394 (4th Cir. 1950).

¹⁰ See, e.g., GA. CONST. of 1982 art. I, § 1, para. 11.

of our constitutional tradition in the administration of criminal but not civil justice. In fact, the adversary system in civil litigation has played a central role in fulfilling the constitutional goals "to . . . establish Justice, insure domestic Tranquility, . . . promote the general Welfare, and secure the Blessings of Liberty . . ." ¹¹ This has been recognized by the Supreme Court in its holdings that civil litigation is part of the First Amendment right to petition, through the courts, for redress of grievances. ¹² That right is not limited to political issues or litigation against the government, but embraces "any field of human interest" and any controversy, including even personal injury cases between private parties. ¹³

An essential function of the adversary system, therefore, is to maintain a free society in which individual rights are paramount. As Professor Geoffrey Hazard has said, the adversary system "stands with freedom of speech and the right of assembly as a pillar of our constitutional system." ¹⁴ It is within this constitutionalized adversary system, in which individual rights are central, that American lawyers carry out their traditional and essential role. The right to counsel has thus been called "the most pervasive" of rights, because it affects the ability of individuals in society to avail themselves of all other rights. ¹⁵

This is equally true, moreover, in non-litigation settings. Any lawyer who counsels a client, negotiates on a client's behalf, or drafts a legal document for a client must do so with an actual or potential adversary in mind. When a contract is negotiated, there is a party on the other side. A contract, a will, or a form submitted to a government agency may well be read at some later date with an adversary's eye, and could become the subject of challenge and litigation. The advice given to a client and acted upon today may strengthen or weaken the client's position in negotiations or litigation next year. In short, all lawyers, and not just the advocate in the courtroom, necessarily function in the adversary system.

¹¹ U.S. CONST. pmbi.

¹² *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967).

¹³ *United Mine Workers*, 389 U.S. at 223 (quoting *Thomas v. Collins*, 323 U.S. 516, 531 (1945)).

¹⁴ See HAZARD, *supra* note 2, at 123.

¹⁵ Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956).

It follows that the ethical responsibilities of lawyers within such a system must be rooted in the same civil libertarian values that are embodied in the Constitution,¹⁶ and a meaningful definition of lawyers' professionalism must similarly derive from those same values.

My own definition of professionalism, therefore, goes like this:

In a free society that emphasizes each individual's dignity and the right to due process and equal protection under the law, professionalism means that a lawyer should:

first, help members of the public to be aware of their legal rights and of the availability of legal services to achieve those rights;

second, advise each client fully and candidly regarding the client's legal rights and legal and moral obligations; and

third, zealously and competently use all lawful means to protect and advance the client's lawful interests as the client determines those interests to be;

further, the fact that the lawyer is earning a living through the legal profession is immaterial.¹⁷

I welcome, therefore, the insightful contribution of Timothy P. Terrell and James H. Wildman in their essay on *Rethinking "Professionalism."*¹⁸ Particularly important is their locating the source of professionalism in "the law as a functioning social institution."¹⁹ Lawyering, they say, "is a distinctive occupation with unique moral requirements because lawyers have established a special relationship to a fundamental aspect of our culture."²⁰ They explain:

Law, for Americans in particular, is not simply a set of rules and

¹⁶ See FREEDMAN, *supra* note 1, at 6-8, 13-14.

¹⁷ Monroe H. Freedman, *The Golden Age of Law That Never Was*, LEGAL TIMES, Dec. 17, 1990, reprinted in THE LAWYER AS PROFESSIONAL (T.W. Floyd & W.F. Newton eds., 1991).

¹⁸ Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism,"* 41 EMORY L.J. 403 (1992). I am disappointed, though, that the authors seem to accept uncritically some of the conventional but unfounded assumptions of the "professionalism" movement — that there is a "troubling decline in the esteem in which lawyers are held"; that there is a "decline in common decency, attitudes, and standards" resulting from the "growing moral diversity" within the Bar; that there are significant "new demands on lawyering caused by a heightened 'rights consciousness' among the citizenry"; that "clients exercise [increasing control] over lawyers' conduct"; and that self-regulation is preferable to democratic control of lawyers' conduct. *Id.* at 403-04. All of these propositions are, I believe, demonstrably false or, at least, not demonstrably true. See, e.g., Freedman, *supra* note 17.

¹⁹ Terrell & Wildman, *supra* note 18, at 422.

²⁰ *Id.*

regulations that guides our behavior from time to time. It is far more central to our lives: the legal system embodies our last remaining vestige of a sense of "community" — of shared values and expectations. All the other dimensions of our lives — race, religion, education, the arts, regional loyalty, and so on — divide us as much as they join us together because they are based on matters of "substance" on which we so often disagree. . . . The traditions, heritage, and perspectives of Americans are now so disparate and isolated within ever smaller subcommunities that no common purpose, direction, or moral values connect us fundamentally.²¹

"Except," they note, "our system of law."²² Not any particular law, but "the system as a whole that embodies the 'rule of law' in our society."²³ Citizens of the United States, "almost uniquely in the world, have come to respect the regularity, consistency, and basic justice over time of the officially promulgated rules and principles that regulate our conduct and redress our grievances."²⁴ Thus, "the lawyer's special pledge is that he or she will help the legal system remain the centerpiece of our fragile sense of community, help it continue to function within our culture as the crucial mechanism for social cohesion and stability."²⁵ Accordingly, Terrell and Wildman conclude: "That promise is the true essence and foundation of the concept of professionalism. Our heritage as lawyers — the 'living faith' that links us with our predecessors, and that we must in turn teach to our successors — is the responsibility to recognize, honor, and enhance the rule of law in our society."²⁶

What is implicit in this analysis, but which I would want to see given more emphasis, is that the way in which lawyers recognize, honor, and enhance the rule of law in our society is by serving individual clients. That is, in a free society, lawyers enhance the rule of law by enhancing the autonomy of each individual. We do this by counselling our clients about their lawful choices and by helping them to achieve the lawful goals that *they* choose in accordance with *their* interests as *they* perceive them to be.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 423.

²⁶ *Id.*

This does not mean that counselling with regard to moral as well as legal responsibilities is inappropriate. On the contrary, it is an essential element of the lawyer's responsibility. "In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for [the lawyer]."²⁷

CONCLUSION

In order to appreciate the importance of the contribution of Professor Terrell and Mr. Wildman, it is only necessary to compare it with the fatuous discussion of the ABA's Commission on Professionalism. The Commission acknowledges that the term "professionalism" is "so important to lawyers that at least a working definition seems essential."²⁸ However, they find the term to be "an elastic concept the meaning and application of which are hard to pin down."²⁹ Ultimately, they fall back on the vacuous phrase, "in the spirit of a public service."³⁰ What Professor Terrell and Mr. Wildman have done is to think well below the surface of the issue and to give us a definition of professionalism that can enhance our understanding of the lawyer's role in our constitutionalized adversary system. For that, we are in their debt.

²⁷ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1980). For a fuller discussion of this central professional responsibility, see FREEDMAN, *supra* note 1, ch. 3.

²⁸ ABA COMM. ON PROFESSIONALISM, ". . . IN THE SPIRIT OF PUBLIC SERVICE": A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 10 (1986), *reprinted in* 112 F.R.D. 243, 261 (1987).

²⁹ *Id.*

³⁰ *Id.* Thus, when the Commission calls upon lawyers to "[r]esolve to abide by higher standards of conduct than the minimum required by the Code of Professional Responsibility and the Model Rules," *id.* at 15, we cannot know what they consider to be "higher." For example, should lawyers be more or less zealous than required? Should they respect confidences more or less? Should they advertise more or less? My own answers would be "more," but I suspect that the Commission means "less." It is impossible, however, to derive an answer from their definition of professionalism.