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The Zealous Lawyer: Is Winning the Only Thing?

To make its research readily available to a broad audience, the Center for Philosophy and Public Policy publishes a quarterly newsletter: *QQ—Report from the Center for Philosophy and Public Policy*. Named after the abbreviation for “questions,” *QQ* summarizes and supplements Center books and working papers and features other selected work on public policy questions. Articles in *QQ* are intended to advance philosophically informed debate on current policy choices; the views presented are not necessarily those of the Center or its sponsors.

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Famous football coaches have given us proverbs like “Winning’s not the best thing, it’s the only thing” and “Show me a good loser and I’ll show you a loser.” Sports fans are by and large not impressed by the putative distinction between winning and some other sense of “playing well” (as in the lame parental adage “It’s not whether you win or lose but how you play the game”). Playing the game better than the other team is precisely how you win and, more, the team that plays enough better than its opponents to score that extra point deserves to win. “May the better team win” is at some level a tautological wish universally granted, since winning can be thought of as defining the better team. Now, on any given occasion a generally excellent (i.e., winning) team may disgrace itself with sloppy, shoddy playing. But over time the best team will be the team that wins the most. Thus, Vince Lombardi and Woody Hayes have a point when they tell us that nothing else counts.

Lawyers within an adversary system of justice, such as ours, have been thoroughly schooled in the Lombardi-Hayes philosophy of competition. They are steeped in it in law school and held to its standards by their codes of professional obligation. For the cornerstone of the adversary system is the lawyer’s duty of zealous partisanship on behalf of his client. The ABA’s Code of Professional Responsibility dictates, “The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law.” Murray L. Schwartz, professor of law at UCLA, explains the lawyer’s zeal in this way:

"When acting as an advocate, a lawyer must, within the established constraints upon professional behavior, maximize the likelihood that the client will prevail." Prevail, as in *win*.

To ensure that the lawyer's zeal is undiluted by any personal moral scruples, our legal system also holds, in Schwartz's words, that "a lawyer is neither legally, professionally, nor morally responsible for the means used or the ends achieved" in his adversary representation of the client. Whatever the client's (arguably legal) ends, the lawyer must employ all (arguably legal) means to achieve them. He can't bribe the jury, just as the coach can't bribe the referees. But

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the lawyer can, and on some accounts *should*, dazzle the jury with every dubious trick in a bulging bag of legal shenanigans, from humiliating truthful witnesses under the guise of cross-examination to unleashing a torrent of frivolous objections whenever his opponent tries to address the court. In our legal system, as in Monday night football, playing well is playing to win, and lawyers are not permitted to play any other way.

At least two things disturb us about this analogy between zealous legal advocacy and no-holds-barred athletic competition. First, we do not think that winning defines legal merit, the way that winning defines excellence in sports. We have an independent standard of legal merit and desert—imprecise though it may be—which allows us to ask whether the side that did win *should* have won. The client who *should* prevail is the client with truth and justice on her side, and it disturbs us that lawyers are supposed to defend with equal zeal both deserving and undeserving clients, as if the merits of the client's cause were irrelevant.

Second, legal battles are not games where everybody plays hard for two hours and then goes home to a "real life" unaffected by the results of the competition. People's lives—the lives of actual human beings—can be radically changed by what happens to them in courts of law. People don't usually wind up in court unless something of value to them is at stake. So it matters whether zealous partisanship by adversary attorneys is a good way of uncovering truth, defending legal rights, or upholding human dignity. It matters greatly.

Is zealous advocacy by lawyers on behalf of their clients a good way of serving these goals? What is zealous advocacy good for and what limits, if any, should be placed upon it? In what arenas does the lawyer's zeal serve legal justice? In what arenas is such zeal inappropriate or even destructive of the values our legal system is intended to protect and promote?

Criminal Justice

Most justifications of zealous advocacy center on the defense attorney's properly (we feel) heroic efforts on behalf of the criminal accused. In most criminal cases a lone individual faces an extremely serious charge brought by the impersonal and powerful state that carries with it severe and stigmatizing sanctions. The attorney's zeal may be all that stands between the defendant and a wrongful conviction that will exact irrevocable penalties: to lose one's liberty is to lose a part of one's life. Even where the defendant is guilty, the attorney's zeal may be the only check on the state's abuse of its massive powers in administering justice, and great power, as we all know, is subject to great abuse.

The vast majority of lawyers in our adversary system, however, are not involved in criminal defense, and the vast majority of those who seek legal services are not accused of any crime. Can a justification of zealous advocacy in criminal justice be extended to cover lawyerly zeal applied elsewhere in the legal system?

It seems not. David Luban, Research Associate at the Center for Philosophy and Public Policy, argues that "Criminal justice is a very special case in which the zealous advocate serves atypical social goals. . . . The goal of zealous advocacy in criminal defense is to curtail the power of the state over its citizens. We want to handicap the state in its power even legitimately to punish us. And so [zealous advocacy] is justified, not because it is a good way of achieving justice, but because it is a good way of hobbling the government and we have political reasons for wanting this. . . . Criminal defense is an exceptional part of the legal system, one that aims at protection rather than justice."

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These atypical goals of criminal justice are embodied in certain unique features of the criminal trial that create an asymmetry between the two parties—the defense and the prosecution—not found anywhere else in American law. Numerous provisions are designed specifically to curtail the zeal of the prosecution, so that full-steam adversary advocacy is limited to one side. The state must appoint counsel, at its own expense, to assist its opponent in preparing a criminal defense; the defendant is presumed innocent until proved guilty; and the burden of proof placed on the prosecution is the heaviest one found in the law, proof beyond

a reasonable doubt. Moreover, public prosecutors are held to a standard of candor in dealing with their adversaries that is not mirrored in the duties of defense counsel. The prosecuting attorney is required to turn over to the defendant evidence that she has uncovered and does not intend to introduce; the defense has no comparable obligation.

Murray Schwartz concludes, "These functional and structural differences between criminal and civil trials and between the roles of the opposing advocates seriously undermine holding out the criminal defense lawyer as the archetype of the advocate within the adversary system. . . . What emerges from this analysis is the surprising conclusion that the model of the adversary system is significantly different from the very proceeding most often referred to as its prime illustration: criminal trials." A defense of zealous advocacy in other arenas of the law, then, can draw little support from its defense in the very special arena of criminal justice.

Civil Litigation

In civil cases, where one private party brings suit against another, there is no systematic asymmetry in wealth and power between the two parties that would require rules curbing the zeal of one side for the sake

of the other. Furthermore, what one side gains as the outcome of a civil contest the other side loses—every dollar awarded to A comes right out of B's pocket. Thus lawyers for both sides, it seems, should be equally zealous. Does this mean that both lawyers should press their case with zeal unabated? To answer this question, we, again, must look at the ends this area of law is intended to serve.

Two of the ends of civil law, certainly, are to uncover the truth and to vindicate legal rights. These are of course not unrelated. As Schwartz points out, "The judicial answer to the question, 'What should now happen?' depends on and is often resolved entirely by the answer to the question, 'What did happen?'" So our question becomes: Is zealous partisanship by two adversary attorneys a good way of achieving truth and justice?

Defenders of zealous advocacy argue that truth is best sought by a wholehearted dialectic of assertion and refutation: if each side attempts to prove its case as energetically as possible, with the other side trying as energetically as possible to assault the steps of the proof, it is more likely that all of the aspects of the situation will be uncovered than in a less adversarial investigation.

However plausible such a theory may be, Luban observes that its empirical validity is, in fact, impossi-



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"Perhaps you gentlemen would help me assure Mr. Elliot N. Talbert III that although this may not exactly seem to be a 'noble' way of doing business, it is nevertheless a perfectly legal way of doing business."

ble to assess. "One does not, after a trial is over, find the parties coming forth to make a clean breast of it and enlighten the world as to what *really* happened. A trial is not a quiz show with the right answer waiting in a sealed envelope." The arguments for—and against—zealous advocacy as a means to finding out the truth are merely "untested speculations from the armchair."

But Luban doubts whether zealous advocates themselves seriously believe their own justificatory theory. "No trial lawyer believes that the best way to get at the truth is through the clash of opposing points of view. If a lawyer did believe this, the logical way to prepare a case for trial would be to hire two investigators, one taking one side of every issue and one taking the other." Indeed, the rival investigators should be urged to prevent the introduction of evidence unfavorable to their side of the issue, minimize the importance of any unfavorable facts that do come to light, and turn all their rhetorical skill to swaying and preying upon the trial lawyer's sympathies. "That no lawyer would dream of such a crazy procedure should tip us off" that something is amiss with zealous partisanship as an investigative technique.

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Nor have we any reason to think that the clash of two zealous adversaries is the best way to guarantee that a client's legal rights are protected. "Every skill an advocate is taught is bent to winning cases no matter where the legal right lies," Luban reminds us. "If the opponent manages to counter a lawyer's move with a better one, this has precisely nothing to do with legal rights." The wordplay of two fast-talking modern attorneys is hardly more relevant to the establishment of legal rights, on Luban's view, than the swordplay of two fast-stepping medieval duellers sent out to settle suits on behalf of their employers. Luban concludes, "We have no reason at all to believe that when two overkillers slug it out the better case, rather than the better lawyer, wins."

Murray Schwartz recommends that the rules governing the scope and limits of adversary advocacy be revised to circumscribe lawyerly zeal by a greater commitment to finding out the truth, since any determination of legal right must be grounded in the facts of the case. A good start in this direction, he suggests, would be to adopt rules that "would require a lawyer to report to the court and opposing counsel the existence of rele-

vant evidence or witnesses the lawyer does not intend to offer; prevent or, when prevention has proved unsuccessful, report to the court and opposing counsel the making of any untrue statement by client or witness or any material omissions; and question witnesses with the purpose and design to elicit the whole truth." Such revised rules, he believes, would serve the ends of civil justice better than current exhortations to pursue the client's interest to the farthest legal limits.

Who Is the Client?

Unbridled zeal appears even less justified when we look beyond litigation to other areas of legal practice. In business law, for example, the lawyer's duty of undivided loyalty to the client grows not out of any crusade for truth and justice, but from the less lofty fear that employees may divert some of their zeal to benefitting themselves at the employer's expense. The worry motivating the duty is that agents will compete with their principals, thus defeating the purpose of agency. But the agent competing on behalf of the principal seems bound to keep his competitive zeal within the recognized moral constraints that govern economic competition generally in our society.

In administrative law and public interest law, the problem is not that the lawyer may compete with the client, but that it isn't clear who exactly the client is supposed to be. Attorney Daniel Schwartz, observing the administrative law bar, points out that you can't advance the client's cause until you know who the client is. "For the government attorney, this question may receive a variety of responses. Various candidates for the 'client' role include the agency employing the attorney and/or its administrators, the federal government, or the 'public interest.' . . . In many cases, the lawyer is the client; that is, he or she is at least an initial decision-maker concerning what kind of cases to bring and what issues to raise."

Even lawyers practicing before administrative agencies on behalf of private-sector clients face the same problems to a large extent. Although the client may be clearly defined, the client's interests often are not. Schwartz explains that the "client's perception of its interests may be shaped to a more-than-usual extent by the expert advice of its 'specialist' law firm, whose expertise consists in large part in its ability to 'read' the regulatory climate within the agencies." Thus, "administrative lawyers are not constrained by independent clients; [and] clients are not constrained by the judgment of independent lawyers." Zeal in administrative proceedings is therefore subject to few moderating influences.

Public interest lawyers, who bring litigation aimed at righting institutional wrongs and making far-reaching changes in the law, are also unable to maintain a strictly adversarial role. Like the administrative lawyer, the public interest lawyer cannot take her clients' interests as given and proceed straightforward-

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"Perhaps 'unethical' was the wrong word; I meant sort of complex — legally complex . . ."

ly to further them with zeal. Furthermore, the interests of the parties, once defined, may conflict with one another, and it falls to the lawyer to decide which of the conflicting interests should be represented. Thus, philosopher Andreas Eshete argues, "the [public interest] lawyer cannot sidestep a deliberation on the merits of the interests at stake in the specific institutional wrong he aims to correct."

The best remedy for righting the institutional wrong of racial discrimination in schools, for example, is a matter of deep and divisive controversy, even among its victims. Parents of minority children in some districts would prefer to see the schools improved, rather than integrated—their goal is a decent education for their children, and this may be hindered rather than furthered by disruptive and bitterly contested busing programs. But the interests of future generations of schoolchildren, and the future of American society generally, may not be best served by perpetuating racially divided educational institutions. "Hence, in deciding what institutional reform to advocate," Eshete concludes, "the lawyer does not have ready-made interests to champion. And a responsible lawyer must look beyond the conflicting interests to the underlying public values of the legal system."

Beyond Adversariness

We have been asking what zealous advocacy is good for; the answer seems to be that it is good for criminal defense, but that in civil law, business law, administrative law, and public interest law zeal must be tempered by a respect for truth and justice and adversariness must often give way to a thoughtful and sensitive attempt to explore large and difficult questions about where the public interest lies.

Murray Schwartz and Daniel Schwartz both criticize current codes of professional responsibility for holding up adversarial zeal as the dominant standard of lawyerly excellence. They recommend amending the code to show a clearer recognition of the limits of such

zeal. But Eshete asks whether lawyers trained and drilled in adversarial techniques and attitudes will be able to move beyond these to meet the broader demands of the lawyer's role. Education, professional training, and years of practice, on Eshete's view, "must leave their trace on a person"; the adversarial lawyer develops an adversarial character that he cannot shed at will when placed in situations where aggressiveness and combativeness are no longer appropriate.

Robert Condlin, Associate Professor of Law at the University of Maryland Law School, argues that law schools should be conducting a rigorous reexamination of their educational practices. Adversarial skills certainly have their place in law practice, and so students do need to be trained in techniques that will allow them to go out and win cases without agonizing over whether every case should be won. They need to learn how to manipulate clients, witnesses, and decision-makers, how to think on their feet, how to get their clients what they want. But Condlin worries that in law schools today these behaviors are "learned unself-consciously, as a set of disembodied means, not as part of a larger moral system that includes constraints on the use of such means. . . . The problem is one of teaching habits with limited and specific uses as if they were appropriate responses to all legal practice relationships."

Law schools do not and cannot simply teach students law. They inescapably teach their students as well what kind of lawyer they should become, and what kind of person. And it seems that the kind of lawyer they should *not* become is one who wins any case at any cost. For when lawyers like that win, the rest of us lose.

The views of Murray Schwartz, David Luban, Daniel Schwartz, Andreas Eshete, and Robert Condlin are drawn from their essays in The Good Lawyer: Lawyers' Roles and Lawyers' Ethics, edited by David Luban, Maryland Studies in Public Philosophy (Totowa, N.J.: Rowman and Allanheld, 1984). To order The Good Lawyer, see page 15.