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RESPONSIBILITIES OF A CRIMINAL DEFENSE ATTORNEY

*Gerald B. Lefcourt**

Our perspective as criminal defense lawyers is often based on a pivotal experience. Mine was as a law school honors program participant, sent to work with Legal Aid Society lawyers—New York City’s public defenders. I was assigned to help a young lawyer handling arraignments. In New York City that meant a daily crush of cases. His job was to seek bail as each defendant entered the system. In disgusting pens holding as many as forty prisoners, I would interview clients. I was the first person many prisoners saw after they had spent up to four days waiting to appear before the court.

The holding pens were filled with huddling defendants, most of whom were standing because there was only one bench. Virtually the entire population of the pens was nonwhite and poor, without the resources or stable families to allow them bail. Most were in shock or panic, yelling questions and begging for help. “What am I charged with?” “When will I ever get out?” “Can you call my mother?” “What if I didn’t do it; will they still keep me?” “Will you call my boss because if I don’t show up I’ll lose my job?”

I came to see that most of them were not really represented at all. Not only would they not make bail, but most would ultimately plead guilty to something, anything, just to move out of the system. I realized that with a lawyer who had a few days to spend with the client instead of a few minutes, a proper fight could be waged, both to get the defendant out on bail and ultimately, to get a favorable disposition. In many cases defendants would not have ended up with criminal records, a millstone that serves to keep the underclasses as underclasses.

I realized that the Legal Aid attorneys, like their counterparts across the country, were not properly trained, had no resources, and were, frankly, overwhelmed. The number of defendants was

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so great that there was no time for the niceties of an interview long enough to establish any relationship, much less one of trust.

So, there were two systems operating, one for the wealthy who had the resources to seek vindication of their rights and one for the rest of society, left haphazardly to lawyers who could ensure entirely less predictable results.

It was obvious that a system promising the right to counsel was a farce. As a result of this experience, I abandoned my intention to use my law degree in some lucrative enterprise and instead chose to focus on the criminal justice system. I became involved in the successful effort to unionize Legal Aid Society lawyers, which resulted in a revolution in the quality of representation of the poor in New York and spread across the nation as well. Notwithstanding success in other matters over the years, I feel this was the most important contribution of my life.

In twenty-five years of practice, I have seen all sides of the criminal defense bar. I have represented indigent defendants accused of killing police officers, college protesters accused of violating student codes, politicians accused of corruption, and wealthy professionals accused of sophisticated financial crimes. The fact is, in some ways, it is always the same. I truly believe that my responsibility as a lawyer to a client is the same no matter who the defendant and no matter what the crime, and I endeavor to discharge that responsibility as zealously as possible for all.

Society expects a lot from us, all the while bashing us in every possible way. Under the Sixth Amendment we are expected to provide the criminal defendant with a rigorous defense undivided by conflicts.¹ At the same time, in many cases we must fight with judges and prosecutors just to get paid out of frozen funds. We have to worry about whether we will be subpoenaed or have our law offices searched. We have to worry about whether the government is secretly courting our clients to turn against us. And we are told by our friends and by the media that we should not be representing guilty defendants.

These are all situations that drive wedges between our clients and our solemn responsibilities. How do we handle this? What are our fundamental obligations?

1. See U.S. CONST. amend. VI; FED. R. CRIM. P. 44(c); *Glasser v. United States*, 315 U.S. 60, 76 (1942) (holding that a defendant's right to counsel includes protection from attorney's conflicts of interest).

I. RESPONSIBILITIES TO THE CLIENT

First and foremost, defense attorneys must zealously and uncompromisingly represent the client.² They must do so with all their ability and creativity, within the bounds of law. Defense attorneys must accept this duty as sacrosanct and be prepared to do whatever it takes to improve the client's position. That means they may have to offend. They may have to do the uncomfortable thing. They may have to have prosecutors and judges think of them as "the other," not one of them.

Of course, paramount is making use of one's own good judgment. While defense attorneys must take into consideration what the client wants, it is the lawyer's judgment that is being offered to the client, and the lawyer must not be afraid to use it. Defense counsel must be both an advisor and an advocate with courage and devotion. Indeed, some have described the role as a "learned friend," often the only one to whom a criminal defendant may turn in total confidence. The defendant needs counsel to evaluate the risks and advantages of alternative courses of action. But the defendant also needs a broad and comprehensive approach to the predicament.

Devoted service to the client does raise the issue of whether the attorney must do whatever the client wants. I believe that we must allow the client to make informed decisions about all matters, including strategy. An informed and participating client is a critical component of discharging our responsibilities.³ That is not the same thing as doing something illegal, and a lawyer should leave a case if a serious conflict arises. If defense counsel is truly repulsed by the client, the lawyer should not represent the individual. Lawyers are not busses, and they are not obligated to stop at every stop.

We often hear that there must be "emotional detachment" from a client. This is impossible to achieve. An "emotionally detached" lawyer winds up supporting the government's view of the defendant as a guilty and revolting person. Indeed "Wall Street" lawyers identify with IBM and Microsoft, and prosecutors see themselves as personally allied with the government, so why should we not be expected to form the same attachment?

Representing an innocent client is an easy situation for the

2. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1994).

3. *Id.* Rule 1.4 cmt.

public to support. In practice it is the hardest because of the overwhelming fear of loss. A factually guilty client, where guilt is apparent, raises society's challenge to the defense attorney: "How can you go into court knowing your client is guilty and try to get him or her off?" If this is a problem for you, you should not be a defense attorney. The committed defense attorney must be prepared to ensure that before the government takes away the client's liberty, the process of doing so is fair and true. Defense attorneys are not advocates for crime. They are as interested as anyone in a safe environment in which to live and raise their families. But they are, or should be, overwhelmingly interested in making sure that the government deprives no one of liberty without doing so consistent with the law. Otherwise, the government is just another thug interfering with a citizen's freedom.

There are many situations that cause the "factually guilty" defendant to seek a trial. Alternatives to trial are often unacceptable, particularly where the potential penalty is so harsh that trial is solely an effort to avoid a life or even death sentence. In that situation, or where the client refuses to seek an alternative and wants his or her day in court, the trial is an opportunity for the defense to passionately "keep the government honest." Justice White described the role of defense counsel this way in *United States v. Wade*:⁴

[D]efense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. . . . Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. *Our interest in not convicting the innocent* permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is

4. 388 U.S. 218 (1967).

telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.⁵

Defense attorneys are meant to test the reliability and veracity of the government's evidence, ensuring that the client's rights are protected. This is healthy for a system that desires guilty convictions only on substantial evidence professionally obtained, which comfortably reaches the level of proof beyond a reasonable doubt.

II. RESPONSIBILITY TO THE BILL OF RIGHTS

Responsible defense attorneys must take as their obligation the role of champion of constitutional rights. It is unfortunately true that only those who are close to criminal law understand the effect such policies as the "war on drugs" have on the Bill of Rights. From this involvement, one can see the threat such policies pose to our Fourth, Fifth, Sixth, and Eighth Amendments to the Constitution and learn just how precarious those rights really are.

There is a cynical joke among defense lawyers that a "liberal" is a conservative who has been accused of a crime. Time and time again, I have seen the transformation of former conservatives—bankers, stockbrokers, lawyers, accountants, successful businessmen—who, having been charged with a crime, are amazed and amazed again at the system. At every step, from arrest through jail term, the prosecution and the police now have undue control over the entire process. With sentencing guidelines, which render judicial discretion a thing of the past, authority to seek Racketeer Influenced and Corrupt Organizations⁶ charges or money laundering charges, and the ability to seek forfeiture of all assets—including attorneys fees—are both now with the prosecutor, not the judge.

Nor do I believe that the legislatures ever intended this state of affairs. What made sense in one context has simply been pushed beyond anyone's expectations. Take, for instance, the for-

5. *Id.* at 256-58 (White, J., concurring in part and dissenting in part) (emphasis added) (footnotes omitted).

6. 18 U.S.C. §§ 1961-1968 (1994).

feiture laws. In the 1970s the idea emerged that convicted defendants should not be able to serve their sentences and then enjoy their "ill gotten gains." Today, we have in excess of 100 federal forfeiture statutes. Instead of taking away the "ill gotten gains" from those convicted of crimes, three-quarters of all forfeitures are civil, with no underlying criminal conviction.⁷ And what is being taken? Recently, the Supreme Court approved the forfeiture of a woman's automobile because her husband had sex with a prostitute in the car.⁸ Here is a reasonable notion run out of control because of a failure to remember basic rights. Laurence Tribe once wrote of the "tyranny of small decisions."⁹ Ten years ago the car forfeiture case would never have been decided as it was. But, after years of small steps urged by prosecutors, the perverse seems reasonable.

Another example is what has become of the Federal Bail Reform Act of 1984.¹⁰ Although the Eighth Amendment guarantees freedom from "excessive bail,"¹¹ the law was a response to cries that defendants who were clearly a danger to the community were being released on bail awaiting trial.¹² Now, any defendant a prosecutor wants detained, often in order to exact the defendant's cooperation, is detained. That is very far from the Framers' intent.

The Fourth Amendment's exclusionary rule,¹³ developed by the Supreme Court more than eighty years ago to deter agents from acting illegally,¹⁴ has been chipped away by judicial exceptions. It has eroded to the point where courts issue so few suppression orders that most defense attorneys believe suppression hearings are a hoax where courts pretend to be following the Constitution but really look the other way. In one four-year pe-

7. *Sedima, S.P.R.L. v. Imprex Co.*, 473 U.S. 479, 499 n.16 (1985).

8. *Bennis v. Michigan*, 116 S.Ct. 994 (1996). The automobile subjected to forfeiture in this case was jointly owned by the husband and wife. *Id.* at 996.

9. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-20, at 381 (2d ed. 1988).

10. 18 U.S.C. §§ 3141-3156 (1996).

11. U.S. CONST. amend. VIII.

12. The Bail Reform Act of 1984 permits the judicial officer to detain a criminal defendant, for a period of not more than ten days, if "such person may flee or pose a danger to any other person of the community." 18 U.S.C. § 3142(d)(2).

13. U.S. CONST. amend. IV.

14. Anne Clark, *The Exclusionary Rule*, 84 GEO. L.J. 873 (1996); Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 COLUM. L. REV. 1365, 1372 (1983).

riod the Second Circuit did not affirm a single suppression order. Given the current practice of attacking judges who issue such orders, few judges will chance public disgrace.

Defense attorneys must be vigilant in identifying those cases that will result in encroachment on our liberties and result in the expansion of government powers. We must accept the basic tenet that government power will occupy any opening it gets. We therefore must be there with amicus briefs, lobbying and educating.

There is no other natural lobby for the protection of our rights. Criminal defendants are neither interested nor in a position to do it. Politicians will not do it. Journalists do not understand how to do it. It is criminal defense attorneys who must keep track over time of where we started, what our fundamental rights are, and how they are threatened daily.

III. RESPONSIBILITY TO THE PUBLIC INTEREST

Defense attorneys must assume an activist role in the education of the public. They must participate in the public debate of cases, proposed statutes, and the system. The public is deluged daily with stories that feed harsh laws and violations of fundamental rights. Defense attorneys must remind the public of the importance of the adversarial process. The public must understand that defendants are entitled to the highest quality defense. Lawyers in the United States are, in fact, more involved with great social and political issues than are lawyers in almost any other country. In England, for example, the Bar is a "club," remote from the concerns and passions of ordinary life. Here, lawyers have fueled civil rights causes and antiwar efforts. Many lawyers now work for the public interest. Many large firms undertake significant pro bono efforts on behalf of a variety of issues and causes.¹⁵ But there must be more.

Today, the nature of communications media—the way we communicate with the public—is very complex. There is so much going on, and so much information out there, that it is difficult to engage in meaningful debate on any one issue. Keeping the public focused on a particular proposal, while politicians spouting clever

15. ROBERT A. KATZMANN, *THE LAW FIRM AND THE PUBLIC GOOD* (1995); Tom Shoenberg, *The Ups and Downs of Pro Bono*, *LEGAL TIMES*, June 24, 1996, at S37; Vera Titunik, *Big-Firm Pro Bono, All Over the Map*, *THE AMERICAN LAWYER*, July-Aug. 1995 (Supp.), at 24.

sound bites seem to make it all so simple, is a daunting task. But we must fight the pandering to the legitimate fears of the public and continue to participate in the debate.

Recently Republican presidential candidate Bob Dole asserted that "[t]he president must be on the side of victims."¹⁶ It sounds great, but what does it mean? In response President Clinton hastily proposed a constitutional amendment for "Victims Rights."¹⁷ It contains an array of clauses seriously changing the system as we know it. For example, a victim should have the right to address the jury.¹⁸ What of cross-examination? What of the rules of evidence? How will hysterical spectacles keep juries focused on their solemn duty of requiring proof beyond a reasonable doubt? No one but defense counsel cares.

To capitalize on the public's fear of crime, proposals are hastily made. Both parties support them in an effort to look "tough on crime." The notions that we must protect against the innocent being convicted and that proceedings must be solemn searches for justice and fairness are lost. We cannot rely on the media to explain this phenomenon. Defense attorneys must come forward and disclose the dangers that this political pandering can cause to the concepts of justice, which we embrace as a nation.

That innocent people are convicted commonly, even for serious crimes, is no longer anecdotal. Earlier this year the Justice Department's National Institute of Justice published a pamphlet entitled *Convicted by Juries, Exonerated by Science*.¹⁹ It reports on twenty-eight recent instances where it was shown by convincing scientific tests that convicted defendants were absolutely excluded from the class of potential perpetrators of the crimes.²⁰ Indeed, in one recent case four defendants, two on death row, who had been

16. Fred Brown, *Dole Talks Tough in Aurora: Crime Program Outlined*, DENV. POST, May 29, 1996, at A01.

17. S.J. Res. 52, 104th Cong. (1996); see 142 CONG. REC. S3795 (daily ed. Apr. 22, 1996) (Senator Kyl introducing the joint resolution); see also John M. Broder, *Clinton Calls for Victims' Rights in Constitution*, L.A. TIMES, June 26, 1996, at A1; John F. Harris, *Clinton Backs Crime Victims' Amendment*, WASH. POST, June 26, 1996, at A1.

18. S.J. Res. 52, 104th Cong. (1996); see 142 CONG. REC. S3795 (daily ed. Apr. 22, 1996) (Senator Kyl introducing the joint resolution).

19. EDWARD CONNERS ET AL., *CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL* (1996).

20. *Id.* at 2.

in prison for eighteen years, were all found to be innocent.²¹ Under recent changes in the law of habeas corpus, two of the defendants would long ago have been executed.²²

To be effective in this new era of Democrats and Republicans trying to outdo each other on how "tough on crime" they can be, defense lawyer associations must consider a new approach to dealing with the media and the legislatures. Laws are enacted quickly and slyly. The defense bar must acquire media skills to change bad laws and educate the public.

A case in point was the prosecution of John W. Hinckley, Jr., for shooting President Reagan.²³ Hinckley was acquitted by reason of insanity.²⁴ That caused a public uproar. Politicians used the opportunity to garner media attention and earn points. They fought each other for media attention, each one screaming louder than the other that Hinckley "got off" because of the insanity defense, and that it had to be changed. Hinckley would escape punishment because of a "legal technicality." No one mentioned that the acquittal bought Hinckley a life sentence in a secure facility for the criminally insane. Politicians demanded a shifting of the burden of proof to the defendant claiming insanity, rather than the prior rule that the prosecution was obliged to disprove it. A tidal wave changed the insanity defense in both federal and many state courts.²⁵ And no one remembers that Hinckley remains to this day in a prison hospital.

The nature of how evidence is gathered for prosecution has been seriously threatened by the increase in sentences in the last ten years. For example, by increasing the length of sentences, routine cases now result in sentences of twenty years or more

21. Andrew Fegelman, *3 Convicted of Murders Are Finally Exonerated—No Apology as Judge Dismisses 1978 Case*, CHI. TRIB., July 3, 1996, § 1, at 1, 14; Don Terry, *DNA Tests and a Confession Set Three on the Path to Freedom in 1978 Murders*, N.Y. TIMES, June 15, 1996, § 1, at 6. The fourth defendant had been released on bond earlier in 1996 when the Illinois Supreme Court overturned his conviction and ordered a new trial because a witness had committed perjury. *Id.*

22. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 1996 U.S.C.C.A.N. (110 Stat.) 1214.

23. *United States v. Hinckley*, 525 F. Supp. 1342 (D.D.C. 1981).

24. *United States v. Hinckley*, Crim. No. 81-306 (D.D.C. June 21, 1982) (order acquitting Hinckley by reason of insanity); see *United States v. Hinckley*, 721 F. Supp. 323, 323 (D.D.C. 1989).

25. See JOHN KAPLAN & ROBERT WEISBERG, *CRIMINAL LAW* 909-10 (2d ed. 1991).

without parole.²⁶ Not only has this dramatic sentencing inflation swelled prison populations, it has also threatened the concept of a fair trial, or any trial at all.

To avoid these virtual life sentences, defendants have learned that the only salvation is "playing the game." The "game" is to help the government by "cooperating" against others. The game must be played, even when there is no cooperation to provide. Instead, in case after case, witnesses provide untruthful testimony in order to gain favor with the prosecutor who controls their freedom. Indeed, shading the truth to impress the prosecutor is only the tip of it—outright perjury is now the order of the day.

What is the bottom line? It is the process that is important. If the procedures we put in place to decide whether to take freedom, and even life, from an accused are not fair and just, then the system becomes the wrongdoer. We should want the same for others that we would for ourselves and our children if we were accused of a crime: a competent defense lawyer, a smart and fair judge, a prosecutor who has been trained to seek justice and not just to win, and rules that are fair so that we can honestly live with the result, whatever it is.

Unfortunately the union at the Legal Aid Society I helped form twenty-six years ago is under attack. Under the contract theory of defense, New York, like other locales, is attempting to save money by contracting out defense work. One hundred thousand dollars for 100 cases sounds good, but that is only \$1000 per case. The quality of defense counsel for the indigent and for all is up to us.

26. Michael G. Turner et al., "Three Strikes and You're Out" Legislation: A National Assessment, *FED. PROBATION*, Sept. 1995, at 16.