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REPLY: FURTHER REFLECTIONS ON LIBERTARIAN CRIMINAL DEFENSE

William H. Simon

Since David Luban's is the work on legal ethics that I admire and agree with most, there is an element of perversity in my vehement critique of his arguments on criminal defense. I am therefore especially thankful for his gracious and thoughtful response. Nevertheless, I remain convinced that Luban is mistaken in excepting criminal defense from much of the responsibility to substantive justice that we both think appropriate in every other sphere of lawyering.

I. LIBERTARIANISM V. LIBERALISM

Luban takes exception to my characterization of his position as libertarian, rather than liberal.¹ It is clear why he prefers the term liberal. Libertarianism is a term associated with doctrines that, outside the sphere of legal ethics, mainstream discourse treats as extreme and marginal. Yet the hallmark of these doctrines is precisely the privileging of the danger of state violations of rights over the danger of private violations of rights upon which Luban's analysis depends.

Luban argues that liberalism starts with the idea of checking state abuse of rights.² I think it is more plausible to assert that liberalism starts with the idea of rights. You cannot derive aggressive defense from this notion of rights because aggressive defense often aims to achieve goals that are inconsistent with rights: either to help the defendant achieve a result to which she is not substantively entitled or to help her escape the consequences of her violation of the victim's rights. The traditional public ambivalence or hostility toward aggressive defense is solidly grounded in the liberal conception of rights.

A basic problem for libertarians is the possibility that the enforcement of the substantive rights to which they are committed may require a more powerful state than they can tolerate. Their broad, categorical proposals to limit the state's power to abuse rights also limit its power to enforce them. Luban denies this paradox. He appears to argue that whether there is a trade-off — between the protec-

1. David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1730 (1993).

2. *Id.* at 1749-52.

tion against state abuse that aggressive defense affords and the enforcement of the substantive criminal law — is an empirical question. He also seems to suggest that I have the burden of proof on this issue, and that I have failed to carry the burden.³

Recall, however, that I defined aggressive defense in terms of conduct that increased the probability of acquittal without tending to facilitate adjudication on the merits.⁴ Thus, if aggressive defense has *any* effect at all on outcomes, it will almost necessarily frustrate substantive enforcement.

Whether aggressive defense *has* any impact on outcomes *is* an empirical question, and I am inclined to agree with Luban's intuition that, from the point of view of the whole system, its impact is probably slight. But this fact seems far more damaging to Luban's position than mine. As I will elaborate below, I do not believe that the only harm of aggressive defense is to contribute to wrongful outcomes; I think the principal harm it causes is to distort the normative understanding of criminal defense and the moral self-conception of its practitioners. On the other hand, Luban thinks the unique benefit of aggressive defense is to check the power of the state, and I do not see how it could have such an effect unless it also had an effect on outcomes.

II. IMBALANCE

Luban's comparative analysis of funding and personnel suggests that there is some substance to the ritual claim that the prosecution has a resource advantage. I will suggest in a moment that this fact is beside the main point of my argument, but I note here that there are some reasons why one might expect the prosecution to have more resources even in a fair system.

First, not all the activities of prosecutors involve prosecution. Prosecutors spend a substantial amount of time investigating and analyzing cases that they never file. There is no general counterpart to the prosecutor's "screening" activity on the defense side. Although a few wealthy individuals occasionally consult defense lawyers before they are charged or in situations where charges are never filed, nearly all defense work is performed after charging.

Second, prosecutors labor under a procedural disadvantage that dwarfs all the advantages Luban emphasizes. They have the burden of

3. *Id.* at 1730-31.

4. William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1705-06 (1993).

proof, and it is a high one. In general I would expect the party with the burden of proof to require a resource advantage.

Third, some prosecution activities benefit the defense because of the *Brady* rule requiring the prosecutor to make exculpatory material available to the defense. By contrast, defense activities typically benefit only the defense.

Luban also mentions a series of procedural rules that he thinks support the claim that there is an "inherent inequality of litigating position" in favor of the state and against the defendant.⁵ I agree that the rules he mentions — such as the defendant's limited right to discovery of the prosecution's case — are unsound. I do not think, however, that such a list can be summed into a general conclusion about inequality. There is no metric that can measure these disadvantages against the prosecution's advantages and, even if there were, there is no intelligible standard of procedural equality to apply to the measures. Surely equality can not mean that the prosecution and the defense have equal probabilities of winning. The fact that prosecutors win disproportionately says little about fairness until we know something about how often they deserved substantively to win.

The fact that there are unsound procedures that disadvantage defendants is a matter for concern. The reason for concern, however, is not that the situation violates some abstract notion of procedural equality, but that it creates a risk of substantively unjust conviction. That risk is not present in all cases, however. In cases where we can reliably determine that there is no risk of substantively unjust conviction, the presence of some unsound procedures ought not to warrant aggressive defense.

Moreover, even where abuse is manifest, justifying aggressive defense as a counterweight to specific bad rules and practices is quite different from justifying it as a response to some general potential for state abuse. The potential for state abuse is eternal, but the bad rules and practices could, and some day might, be specifically reformed.

III. CATEGORICAL V. CONTEXTUAL JUDGMENT

Most of Luban's arguments are simply irrelevant to the main thrust of my critique, which focused on the *categorical* quality of aggressive defense. If the defendant is factually guilty and the prospective punishment is just, why should the potential for state abuse in

5. Luban, *supra* note 1, at 1736 (quoting Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1199 (1960)).

some other situation justify the lawyer in, say, impeaching the truthful witness?

Luban responds that discretionary judgments under contextual standards are inappropriate because defenders are overwhelmed and underfunded. These facts in themselves, however, are not objections to discretionary judgment. On the contrary, if resources are insufficient to represent adequately all cases, then it is important to focus them on the cases where they can do the most good. This type of *triage* decision (to use the term employed in the medical context) is a quintessentially discretionary decision, one that necessarily operates on presumptions but discards them when unpredictable circumstances make it appropriate to do so.

Luban apparently believes that lawyers will respond to discretionary norms not by reallocating their efforts to cases that they can benefit most, but by using the norms as excuses for an across-the-board slackening of effort. I am not sure why he expects this result. Luban's own discussion suggests that, even if lawyers abandoned aggressive defense entirely, they would still be unable to perform consistently basic tasks that almost anyone would agree should be performed, such as counseling the client carefully and interviewing witnesses. Although my argument would sometimes give lawyers an excuse for failing to engage in aggressive defense, it would leave untouched a panoply of defense standards that are, given existing practical constraints, quite demanding. My argument might encourage a shift in resources from aggressive defense toward these less controversial activities, but that strikes me as generally desirable. I do not see how it could encourage a general reduction in effort.

One interpretation of Luban's argument focuses on the effect of the ad hoc nullification approach upon defense lawyer morale. He might be saying that urging a lawyer to use less than all his technical abilities for some clients would subvert professional pride in the same way that authorizing a blacksmith to turn out an occasional shoddy horseshoe would do so. But this assumes that the lawyer considers her ultimate product acquittal, rather than justice. In fact, there is reason to believe that some defenders are demoralized when they are forced to use their advocacy skills in ways that subvert substantively just resolutions.⁶ It seems at least as likely that a move to my ad hoc nullification approach would improve morale.

Note also that the function of ethical standards is not simply to

6. See, e.g., Randy Bellows, *Notes of a Public Defender*, in *THE SOCIAL RESPONSIBILITIES OF LAWYERS* 69 (Philip B. Heymann & Lance Liebman eds., 1988).

accommodate existing dispositions but to constitute them. Defense lawyers' conceptions of what is worthwhile and satisfying about their work are shaped by the standards they are taught. Thus, to the extent Luban's argument is correct, it is partly self-fulfilling.

On another interpretation, Luban's claim might be that it is easier for supervisors or regulators to review or monitor defense lawyers when the standards are categorical than when they are contextual. This may be true, but the ease of review is purchased at the cost of reduced efficacy in the behavior being reviewed.⁷ Whether it is worth making this trade-off depends on the quality of judgment of the defense lawyers under review. If they are capable of good contextual judgments, then the use of categorical standards that force them to take undesirable actions in order to facilitate review is very costly. Although we cannot know what the general quality of defense lawyers would be under a regime of ad hoc nullification, the use of contextual standards of performance is common in professional practice; indeed it is often spoken of as the hallmark of professional status. In the context of malpractice and ineffective assistance, standards of professional judgment and review are routinely assumed to be contextual.⁸ Finally, monitoring difficulties do not explain why a blanket requirement of aggressive defense should be preferred to a blanket prohibition of it.

IV. PRACTICAL IMPORTANCE

Many of the facts Luban cites about the shoddiness of defense practice suggest that the issue of aggressive defense is academic, since few defense lawyers have the energy, resources, or competence to engage in such tactics even where they believe them warranted. Certainly these facts support the claim that several defense lawyers have made in response to drafts of my article that the real problem is not aggressive defense but insufficiently aggressive defense; most defendants do not get even the attention and effort to which they would be entitled under far more conservative theories of defense.

This is an important point. But the importance of the issue of aggressive defense does not depend only on current practices. It is also relevant to how we assess the system for the purposes of reform and

7. See my critique of the use of categorical standards to facilitate monitoring and review in the context of welfare administration, William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983).

8. See *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984) (refusing to formulate categorical standards to define effective assistance of counsel under the Sixth Amendment: "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.").

popular legitimation. Whether we can secure agreement and support for an increase in defense resources will depend in part on for what people think the resources should and would be used. If the extra resources fund efforts to substantiate ostensibly good faith factual defenses, many will feel quite differently about them than if they fund efforts to uncover evidence to impeach truthful witnesses. If aggressive defense is of trivial practical importance, the arguments for it are simply a posture, but that posture has important effects on the popular view of the system. Luban expresses amazement that polls show most citizens believe to such an implausible extent that guilty defendants are going free.⁹ But that belief strikes me as a perfectly reasonable inference from arguments like Luban's that portray aggressive defense as a potent bulwark against the rapacious state.

Another important stake in the argument concerns the moral self-conception of defense lawyers. The ideology and practice of aggressive defense subjects defense lawyers to a kind of moral alienation. It leads them to defend their work in terms removed from their deepest motivations and, to the extent they engage in aggressive defense in practice, it occasionally requires them to take actions that promote results that are inconsistent with their most basic moral commitments. My approach would lead defense lawyers to express more directly and consistently their deepest motivations and commitments. That ought to be counted as an important benefit.

9. See Luban, *supra* note 1, at 1742 (noting that "83% of Americans believe that courts do not deal harshly enough with criminals, while 79% are more worried that criminals are let off too easily than that constitutional rights of some people accused of committing a crime are not being upheld").