2003

Professional Identity: Comment on Simon

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PROFESSIONAL IDENTITY: COMMENT ON SIMON

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Lord Brougham – the icon of zealous advocacy, who saw it as his duty to "save [his royal] client by all means and expedients and at all hazards and costs to other persons and, among them, to himself"[1] – would not last long in a Cuban criminal court today.[2] The question is, how comfortable would he be in a drug treatment court? Could he do his job? How well would he do it? Would he want to? And should we care if he couldn't and wouldn't?

These are all questions raised by William Simon's trenchant exploration of the challenges that drug courts, and community courts more generally, pose for traditional conceptions of lawyering.

When defining the "key components" of drug courts, the Justice Department's Drug Court Program Office noted, "To facilitate an individual's progress in treatment, the prosecutor and defense counsel must shed their traditional adversarial courtroom relationship and work together as a team."[3] After ensuring that, before entering a treatment program, a defendant understands his rights, the nature of the program, and the consequences of his failure,[4] defense counsel's main job is to ensure that, once signed up, he stays until graduation.

While they don't deny the relief that drug courts offer from the rote and seemingly futile narcotics dispositions in regular criminal courts, defense counsel familiar with drug courts have had ethical qualms (at the very least) about the roles they are expected to play in these innovative regimes. Particularly in those jurisdictions in which an eligible defendant cannot enter the program until he has

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1. TRIAL OF QUEEN CAROLINE 8 (Joseph Nightingale ed., 1821), *quoted in* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 n.1 (1976); *see* Abbe Smith, *Promoting Justice Through Interdisciplinary Teaching, Practice, and Scholarship: The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. 83, 89-90 n.27 (2003) (citing sources addressing Brougham's canonical statement).

2. *See* Gerard J. Clark, *The Legal Profession in Cuba*, 23 SUFFOLK TRANSNAT'L L. REV. 413 (2000) Clark comments on the role of the Cuban lawyer:

> The Cuban lawyer has studied from childhood that the socialist state is the respository of all good for each individual. One guilty of an act that is violative of the law has acted in an antisocial manner and thus needs to be redirected, either forcibly by punishment or voluntarily by reeducation.

Id. at 434-35.

3. DRUG COURT PROGRAM OFFICE, U.S. DEP'T OF JUSTICE, DEFINING DRUG COURTS: THE KEY COMPONENTS 11 (1997), *available at* http://www.ncjrs.org/html/bja/define/dfdpdf.pdf (last visited Nov. 19, 2003).

4. *Id.* at 12.

entered a guilty plea,[5] defenders face an enormous counseling challenge. To raise or even take the time to investigate legal claims may foreclose the client's entry into the program. But to advise a client ill-suited to the program's rigors to waive any potential legal claims and expose himself to sanctions and ultimately a stiff sentence is also irresponsible.[6] And knowing a client's suitability at this early juncture may be difficult indeed.[7]

Another ethical dilemma, we are told, arises once a client enters the program. A client is alleged to have failed several drug tests and is threatened with a sanction. In her role as team-player seeking to further an ultimate therapeutic goal, the defense lawyer is expected to encourage her client to be truthful when inquiry is made at the status hearing. But as one defender has noted, providing such advice and "allowing the court to impose whatever sanction it chose" "would seem to be less than satisfactory" under the ethical rules.[8]

Before one confronts the ethical issues relating to drug court defense work, one should ask: "Compared to what?" The reality (however regrettable) of our criminal justice system is that the alternative to therapeutic monitoring after a quick guilty plea is not a full-blown trial, but just a quick guilty plea. From his nineteenth-century vantage point,[9] Lord Brougham would doubtless find scant difference between ordinary twenty-first-century criminal courts and innovative twenty-first-century drug courts (and little difference between either of these and Cuban courts). Yet the dissonance between professional ideology and drug court practice bears special attention because the very premises of drug courts are said to be at odds with standard notions of zealous advocacy.

Simon first stays within Lord Brougham's framework to address these ethical concerns. Even within this conventional model, Simon suggests, the zealous advocate can comfortably (and ethically) function within the drug treatment court regime. The key is to avoid falling victim to the Warren Court's blind allegiance to process and confusing the duty of zealous advocacy with the "duty" to assert every

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5. Of the 212 drug courts responding to a 1999 survey, 43% work with postadjudication populations, 22% with diversionary populations, and 34% with both pre- and postadjudication populations. ELIZABETH A. PEYTON & ROBERT GOSSWEILER, NAT'L TREATMENT ACCOUNTABILITY FOR SAFER COMMUNITIES, TREATMENT SERVICES IN ADULT DRUG COURTS: REPORT ON THE 1999 NATIONAL DRUG COURT TREATMENT SURVEY, NCJ 188085, (2001), *available at* http://www.ncjrs.org/pdffiles1/bja/188085.pdf (last visited Nov. 18, 2003).

6. *See* Mae C. Quinn, *Whose Team Am I On Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 54-55 (2000-01); Lisa Schreibersdorf, *The Pitfalls Of Defenders as "Team Players,"* INDIGENT DEF., Nov./Dec. 1997, ¶ 3, *at* http://www.nlada.org/DMS/Documents (last visited Jan. 9, 2004) ("Clients are required to plead guilty before they enter treatment, leaving them vulnerable if they ultimately fail treatment.").

7. *See* Quinn, *supra* note 6, at 62 (explaining that it is "hard to know whether the client presents a good 'risk' for treatment and to provide her with meaningful advice about whether to accept the plea offer").

8. *Id.* at 71.

9. *The International Miscellany: Lord Brougham*, 1 INT'L MAG. LITERATURE, ART & SCI. 306, 306-09 (1850) (effusive profile of Lord Brougham on eve of a visit to the United States), *available at* http://cdl.library.cornell.edu/moa/moa_browse.html (last visited Nov. 19, 2003).

possible legal right regardless of the client's interests. Defendants have simply been given an expanded range of choices, and "the lawyer's role remains to help him make the choice that best serves his interests among the options open to him."[10]

Simon has two answers to those who complain that they cannot ethically counsel a client about the drug treatment court option in the absence of fuller information: "[I]t's not unusual for lawyers to advise clients in highly uncertain situations." And, in any event, this uncertainty should diminish over time, as drug courts develop longer track records. Though beleaguered defenders ill-equipped to assess a client's treatment prospects at all – let alone in the short time they have to do so – may not be satisfied with these responses, Simon has a point. The sad reality is that much of what goes on in our criminal courts occurs at high speed, under conditions of frightful uncertainty. Perhaps the drug court calculus now seems more indeterminate than that in other courts, but that may change. On the other hand, given that the human frailties of a non-repeat player (as opposed to a court's sanctioning norms) may be the determining factor in case outcomes, Simon's confidence seems overstated.[11]

Simon's response to concerns about confidentiality once a client has entered the program is to suggest that, at least in the drug court context, information control may not be a fundamental part of the lawyer's duty of zealous advocacy. That duty can appropriately be re-envisioned in this context as a charge to hold the program to its commitments and to force it "to justify actions adverse to the client in terms of the program's values and experiences."[12]

I suspect that many defenders imbued with traditional conceptions of zealous advocacy would not be persuaded by this. Drug treatment courts – particularly those with post-adjudication populations – operate in the shadow of criminal sanctions, and often quite harsh ones. Indeed, shadow is probably the wrong word since in many jurisdictions (to switch metaphors) those harsh sanctions are always on the table. And to the extent that they are, a vision of advocacy that would strive simply to make sure the state explained its recourse to such sanctions is quite a departure from traditional conceptions.

Simon makes only a tentative effort to harmonize the role for defenders envisioned by many drug court proponents with traditional conceptions of advocacy. Rightly so. Diversity in program specifics is too great and the whole

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10. William H. Simon, *Criminal Defenders and Community Justice: The Drug Court Example*, 41 AM. CRIM. L. REV. 1595, 1599 (2004).

11. The uncertainty faced by the defender giving advice about whether to plead guilty and enter a treatment regime thus seems greater than that faced, for example, by the defender advising a client about whether to enter into an agreement with the government. *See* Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L. J. 69, 109-11 (1995) (discussing how defense counsel's knowledge of the government's track record for rewarding cooperation can play a critical role in reducing the uncertainty associated with the decision of whether to enter into an agreement).

12. Simon, *supra* note 10, at 1600.

enterprise too new for him to press this point. In any event, it would be odd for someone who has so cogently pressed us to think beyond traditional conceptions[13] to stay within that frame.

Simon's key move is to remind us that in many cases, but particularly in the therapeutic drug court context, some degree of paternalism is not only unavoidable, but appropriate. To exalt client "autonomy" for its own sake, and to think of the lawyer's role as trying to make the client master of his own fate at every single moment in time, is to be willfully blind to the disabilities under which clients labor, and the role that a well-designed program can play in enhancing clients' long-term ability to make choices for themselves. Having made this move away from a narrow conception of client autonomy, Simon recognizes that he has imposed on the defender a greater personal moral responsibility for her actions than is envisioned by traditional notions of advocacy. Indeed he embraces this responsibility, making a virtue out of necessity – since defenders will inevitably have to make rationing choices that optimally will rest on some assessment of the community's interest.[14] And then another critical move: Conceptions of public values need not rest on the Warren Court paradigm of the defender confronting the state. If state power is exercised and tempered by community-controlled courts, institutional accountability can replace zealous advancement of a client's legal rights as the means by which public values are advanced. To the extent that drug courts are catch-basins for "quality of life" policing policies imposed on communities, this move does not work. But where these courts are organically situated in and responsive to the communities they serve, Simon's move has considerable allure.

Having replaced Lord Brougham's notion of zealous advocacy with one more situated in the collaborative experimentalism of community courts, Simon concludes by turning from professional role to professional identity. To what extent can the community court defense lawyer (having resolved her ethical issues) still see herself as a lawyer and draw sustenance from this identification? Here again, Simon sees no conflict. Just as law has "coercive and facilitative dimensions," so do the skills associated with the legal profession. By developing the transactional skills that facilitate collaboration, while maintaining ties to legal organizations outside the community court movement that are committed to combating abuses of the state's coercive power, community court defenders can draw on both "strands" of legal professionalism and exist comfortably within it.

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13. *See* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYER'S ETHICS 7-9 (1998) (contrasting "Dominant" ethical perspective, which permits or requires a lawyer to pursue any goal of her client through any arguably legal course of action, with his own "Contextual View," under which "the lawyer should take such actions as . . . seem likely to promote justice."). *See generally* William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993) (arguing that criminal defense attorneys should not be excused from new conceptual views of legal ethics).

14. *But see* Miranda v. Clark County, Nevada, 319 F.3d 465, 469-70 (9th Cir. 2003) (en banc) (examining allegation that public defender had policy of administering a polygraph test to all defendants and allocating minimal defense resources to those clients that failed).

In so arguing, Simon provides the basis for a nice response to those who wonder why the person at the side of the drug court defendant as he moves through his therapeutic regime should be a lawyer, and not some other sort of professional. To be sure, the short and sufficient answer to this question is that criminal defendants get lawyers, and the state will pay for them if (as is usually the case) the defendant is indigent. Drug courts just find a more useful role for those lawyers to play, and one that the state probably would not adequately fund if left for other professionals. But this short answer doesn't suggest why lawyers are well suited to play this role, as opposed to, say, social workers.[15] Simon does suggest why. At its best, the team that monitors a defendant's progress will not simply be a selection of people with therapeutic expertise, one of whom is assigned to look after the defendant particularly. It will, like all optimal teams, draw on the "mutually complementary" capacities of a diverse set of professionals[16] and will be more effective for the rich deliberations that the interaction of different disciplines will produce.[17] Tied to a profession committed to discovering and opposing abuses of power, the drug court defender will bring a unique and helpful perspective to the problem-solving team.

Simon thus gracefully brings us to see the defender working in a problem-solving team as acting in the finest traditions of the legal profession, and benefiting from an association with the more adversarial elements of that profession. But the harmonization of role and professional identity that Simon envisions may be frightfully hard, and perhaps impossible, to institutionalize. Just as drug treatment courts exist (and flourish) in the shadow of a highly coercive system, so must defenders in drug courts work, far more than Simon admits, in the shadow of the adversarial ideology that keeps their colleagues going in regular criminal court.[18]

In the Bronx Treatment Court, for example (according to a recent report), defendants must enter a guilty plea before they will be admitted into the program. "In agreeing to the plea charge, the defendant also agrees to an alternative incarcerative sentence if he or she fails to complete treatment."[19] These alternative sentences are typically for one to three years, but are two to six years for

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15. *See* Mark H. Moore, Alternative Strategies for Public Defenders and Assigned Counsel 7-8 (April 2001) (unpublished paper, prepared for the Executive Session on Public Defense, Kennedy School of Government Program in Criminal Justice Policy and Management) (noting that some public defenders object to drug treatment courts by claiming "I didn't join this office to be a social worker."), *available at* http://www.ksg.harvard.edu/criminaljustice/publications/alt_strat.pdf (last visited Nov. 18, 2003).

16. EUGENE BARDACH, GETTING AGENCIES TO WORK TOGETHER: THE PRACTICE AND THEORY OF MANAGERIAL CRAFTSMANSHIP 117 (1998).

17. *See* Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 544 (2002) ("When groups start with mixed initial preferences, the individual attitudes of group members actually depolarize.").

18. *See* Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1275-77 (1993) (discussing "heroic" motivations of public defenders).

19. Rachel Porter, Treatment Alternatives in the Criminal Court: A Process Evaluation of the Bronx County Drug Court 12 (unpublished paper) (Vera Institute of Justice, Apr. 2001), *available at* http://www.vera.org/publication_pdf/bronxdrugcourt.pdf (last visited Nov. 18, 2003).

defendants pleading guilty to B-level felonies. "These alternative sentences are fairly long" because, we are told, "the district attorney's office considers the treatment court more lenient with offenders, so that failing in the court implies consistent disregard for the court's authority and should be punished more severely."[20]

It is thus not simply that the defender's contribution is enhanced by her professional connection to those ready to take up the adversarial arms forged by the Warren Court. She must also be ready at short notice to take up those arms herself. While in the context of a treatment program, certain sanctions may have obvious (or at least possible) therapeutic value, the same cannot be said about the criminal penalties faced by defendants who do not make it through the program.[21] It may be, as Simon and Bill Stuntz have suggested,[22] that the harshness of those criminal penalties owes something to the Warren Court's libertarian jurisprudence. But the defender must operate in the world created by this "arms race," and be ready to fend off harsh penalties with the very adversarial tools that may have provoked them.

Where does this leave us? The defender in drug treatment court should strive to play the facilitative role necessary for therapeutic collaboration. But she will have to be ready to embrace her inner Lord Brougham. This sounds like a bad Halloween skit, or at least a recipe for professional and personal confusion. Yet translated to an institutional context it is rather a suggestion that the experimentalism so characteristic of the drug court project[23] be pursued as much in defender organizations as in the drug courts they serve.

Conclusions about what salience each of the two professional strands Simon has identified should have to the way a defender approaches her job will obviously vary greatly from program to program and even from time to time. But from those conclusions should flow answers to some basic organizational questions: Should a relatively small number of defenders exclusively handle all the cases in that drug court? If so, for how long should defenders keep this assignment, before being rotated back into the regular criminal courts? How one measures the gains from the development of expertise and collaborative relationships against the possible diminution in adversarial zeal will turn on the heaviness and frequency with which the state deploys its coercive powers in the treatment court.

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20. *Id.*

21. *See* PEYTON & GOSSWEILER, *supra* note 5, at 43 ("Surveys by the Drug Court Clearinghouse indicate that in June 2000, retention rates in drug courts were about 67 percent."); Steven Belenko, The Nat'l Center on Addiction and Substance Abuse, Research on Drug Courts: A Critical Review 51-52 (June 2001) (unpublished manuscript), *available at* http://www.drugpolicy.org/docUploads/2001drugcourts.pdf (last visited Nov. 18, 2003) ("Program graduation rates averaged 47% in the eight studies that reported such data.").

22. Simon, *supra* note 10, at 1598; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 4, 56-59 (1997).

23. *See* Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 833-51 (2000).

Defender organizations may not be able to fully embrace Simon's vision of transactional lawyering. But, to be fair, he isn't asking them to. He may be somewhat underestimating the role that Lord Brougham may have to play in drug treatment courts. Nevertheless, by situating the non-adversarial aspects of the defender's drug court role in notions of legal professionalism he does a service both to the defenders and to the profession.