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## CORRESPONDENCE

### **Some Comments on *Our Constitutionalized Adversary System* by Monroe H. Freedman**

*Marvin E. Frankel\**

It is probably fitting at the outset to acknowledge that this critical comment is “inspired,” to choose a doubtful word, by discovering my name and some of my phrases scattered unflatteringly through the pages of Professor Freedman’s article.<sup>1</sup> I will devote only slightly excessive space to personal rejoinders. Instead, I attempt to state the issues more soundly, and propose that suggested reforms (not abolition) of the adversary system are not necessarily sacrilegious.

For openers, and most fundamentally, it should be noted that the central problem about which I have written, steadily obscured by Professor Freedman, has to do with seeking *factual truth* in litigation. My initial venture into this field of debate began with a lecture prompted by some years of observing from the bench the daily practices of obfuscation and downright perjury that often disfigure our trial proceedings. Coining a word meant to reflect the American trial judge’s odd role, somewhere between “umpire” and “referee,” I gave my piece an arch title that I would probably improve on in my now more advanced old age: *The Search for Truth: An Umpireal View*.<sup>2</sup> Be that as it may, the gist of that article was complaints about distortions of *factual truth* in the court-

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<sup>1</sup> Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57 (1998).

<sup>2</sup> Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

room, and some incipient suggestions for *reform*—not, for heaven's sake, abolition—of the adversary system. The article became a substantial portion of the little book<sup>3</sup> in which Professor Freedman finds ominous threats to the Constitution and the liberties of Americans.<sup>4</sup>

On the other hand, the Professor has a chronological jump on me in the business of adversariness and the truth. In 1966, he published one of the most debated articles in the history of law review controversy. The article was entitled *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*.<sup>5</sup> Those "three hardest questions" were the following:

1. Is it proper to cross-examine for the purposes of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth?
2. Is it proper to put a witness on the stand when you know he will commit perjury?
3. Is it proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury?<sup>6</sup>

Professor Freedman tendered affirmative answers to each of these questions. These responses presumably reflected the way he practiced as a criminal defense lawyer, and thought that everyone should. In the intervening years, the Code of Professional Responsibility, to which he now pays tribute, overruled him on the second question,<sup>7</sup> and he confessed error on the third.<sup>8</sup> I think he purports to live comfortably with his answer to the first question. The reader may judge whether it is fitting in a learned profession to pursue the trail of falsity in the manner Professor Freedman's answer proposes.

In any case, I think it makes professional sense to join issue on such specific questions, and that there is room for answers both ways. The fact of major interest for this reply, however, is that Professor Freedman has substantially abandoned the field on which his present article purports to be engaged with me and others, and has distorted the real issues about what, if anything, needs to be done to improve the adversary process as we have tended to administer it.

The most notable fact about Professor Freedman's article is that he chooses to mount a passionate defense where nobody has undertaken an attack. He cites a number of cases in which the

3 MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1980).

4 Freedman, *supra* note 1, at 64, 66, 73-75.

5 Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

6 *Id.* at 1469.

7 MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-26, DR 7-102(A)(4) (1981).

8 MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 71-76 (1975).

Supreme Court has written glorious chapters of *constitutional law* by ordering school desegregation, upholding the right to litigate in constitutional cases, sustaining the right of free speech, and otherwise elaborating treasured rights under the Constitution.<sup>9</sup> None of these cases remotely approaches the specific issues—related to *factual controversies*—between the Professor and me. The decisions he cites did not involve issues of fact or concerns about trying issues of fact. I believe it unnecessary to protest my attachment to the great constitutional rulings Professor Freedman defends against me. On the other hand, noting that he does not mention his “three hardest questions,” I find it bemusing that he now chooses to create ersatz disputes, while defining out of existence the genuine subjects of legitimate disagreement.

I should note, by the way, that the furor generated by Professor Freedman’s 1966 article included regrettable attacks upon him from places as high as the chambers of the then Chief Justice of the United States, whence proposals for his disbarment were heard to emanate.<sup>10</sup> The legitimacy of the Professor’s expressions as subjects for honest discussion should never have been doubted, and I never doubted it. What I not only doubt, but thoroughly regret, is the tendentious and intellectually bankrupt form in which he recasts the problem and distorts the genuine concerns.

The major point I want to make in this short submission is that it little profits to mount arguments whether we should “replace or radically reform the adversary system.”<sup>11</sup> Insofar as Professor Freedman poses a series of questions about whether we should preserve the right to counsel, the right to a jury trial, the right generally to be heard and to submit evidence in opposition, this is a parade of straw men that can lead to no place useful.

Finally, circling back to the provocations that led to this intervention, and before suggesting more concretely some of the real problems, let me say that Professor Freedman’s quotations from and representations of my sundry positions are not a reliable source for learning about those things. I select a couple of examples. The Professor says that I have “proposed significant restrictions on confidentiality that would subordinate clients’ interests to those of nonclients.”<sup>12</sup> For that he cites my 1980 book, without page reference. This is a broadside that lacks rudimentary fairness. I think I do recall raising the question, without stopping now to find the exact place, whether a confidence disclosing that the client committed a crime for which someone else is languish-

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<sup>9</sup> Freedman, *supra* note 1, at 66-73.

<sup>10</sup> For a brief discussion of the immediate reaction to Professor Freedman’s 1966 article, see FREEDMAN, *supra* note 8, at viii.

<sup>11</sup> Freedman, *supra* note 1, at 73.

<sup>12</sup> *Id.* at 58.

ing in prison or facing execution could be breached in a civilized system of justice. If that is the kind of subordination that worries Professor Freedman, it may merit discussion in specific terms, but not in terms of the unmanageable generality he chooses to assert.

One more example will serve to sufficiently prolong this aggravation. The Professor says that "Frankel . . . recognizes . . . that his proposals for change run counter to constitutional interests in 'privacy, personal dignity, security, autonomy, and other cherished values'."<sup>13</sup> For this he cites page 12 of my book, and I reproduce in the margin the passage from which he quotes.<sup>14</sup> If anyone can find in that passage where I made proposals running "counter to constitutional interests in privacy, personal dignity, security, autonomy, and other cherished values," I will simply plead that the passage was not meant to say—and I do not now read it to say—anything of the sort.

These examples are enough, in any event, in the way of personal protests. Outside the teapot in which academic tempests rage, there are real and difficult questions about how we undertake to deal with the factual histories that lead to legal judgments. Our methods for handling this age-old problem are no more final or eternal than was trial by ordeal or compurgation. The notion that they are sacrosanct is silly. Efforts to improve them are necessary and should be welcomed. Invocations of the Constitution and other sacred texts against would-be reformers are ill-calculated to move us toward a better legal world.

There is no meaningful practical question, though Professor Freedman purports to discern one, about abolishing the adversary system and substituting an inquisitorial system. There is no need for anyone in 1998 to be taking over 30 pages and 200 footnotes to defend "Our Constitutionalized Adversary System" against the onslaughts of those who stand "for abandoning the adversary system in favor of the inquisitorial system."<sup>15</sup> There are no such on-

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<sup>13</sup> *Id.* at 73.

<sup>14</sup> "Like any sweeping proposition, the claim that our adversary process is best for truth seeking has qualifications and limits recognized by its staunchest proponents. While it would not be essential, we have again the high authority of the Supreme Court pronouncements noting that lawyers in the process are often expected, with all propriety, to help block or conceal rather than pursue the truth. These endeavors are commonly justified in the service of interests that outweigh truth finding—interests in privacy, personal dignity, security, autonomy, and other cherished values. The problem of how to weigh the competing values is, obviously, at the heart of the concerns to be addressed in these chapters. Nobody doubts that there are ends of diverse kinds, at diverse times and places, more worthy than the accurate discovery or statement of facts; that there are even occasions, not easily defined with unanimity, when a lie is to be preferred. One way to state the thesis of this book is to say, recognizing the complex relativities of life, that the American version of the adversary process places too low a value on truth telling; that we have allowed ourselves too often to sacrifice truth to other values that are inferior, or even illusory." FRANKEL, *supra* note 3, at 12.

<sup>15</sup> Freedman, *supra* note 1, at 85.

slaughters requiring heavy defenses. The meaningful subject is not about wholesale “system” changes, but about concrete, specific, real-life issues—the kind familiar to common-law (and other) lawyers—as to whether we can find remedies for the specific defects in our adversary process that continue, after generations of debate, to create dissatisfaction, both within and outside the bar, with the way our litigation practices work. We know that there are palpable reasons for the lay impression—sometimes well founded, sometimes not—that lawyers are more prone than they should be to shade or block factual truth in the interest of winning their cases. That is the central subject for legitimate debate—not, forsooth, whether *Brown v. Board of Education*<sup>16</sup> should be overruled.

When Professor Freedman raised his three hardest questions, and gave his unsound answers, he was in the target area. He knew, and we all still know, that lawyers, in numbers, practice in accordance with his prescriptions. Comparable issues continue to plague us. Another well-known law professor proclaimed recently, from his seat near Boston, that in his frequent representations of criminal defendants, he never asks the client to say whether he did the deed. He correctly observes that his practice, in this respect, is widespread in the criminal defense bar. Think of that practice for a minute. A learned professional deliberately *avoiding* knowledge of the problem he or she is engaged to address. Picture the physician who refrains from asking where it hurts, or the engineer who chooses to be ignorant of the subsurface conditions in the place where the foundation is to be laid. Think of what these comparisons tell us about the concern for truth on the part of lawyers who say they do not want to know, and, indeed, about whether the lawyers claiming to work behind blindfolds are really being candid with themselves or you when they make that claim.

Let me suggest that the lawyers making this claim do not and cannot mean exactly what they say. Imagine the case of a defendant client who is actually innocent, as all are presumed to be. No conceivable lawyer—certainly none of the sophisticated types that we are talking about—would fail to learn everything that that client knows in order to avoid the horrible miscarriage of justice that a guilty verdict would accomplish. So what is really meant by the “don’t ask, don’t tell” variety of lawyers? They mean, as a practical matter, that they do not ask because they know, in fact, that the client is guilty, but want to remain in a state for which the ugly word “deniability” was coined not long ago.

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<sup>16</sup> *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

The lawyers that follow this course represent only one instance, if a striking one, of the games lawyers in our forms of the adversary system feel entitled to play. They have no hesitation to announce this publicly. Interestingly, this practice flies in the face of the fact that the *Model Code of Professional Responsibility* forbids a lawyer "knowingly . . . [to] make a false statement of law or fact" or to "use perjured testimony or false evidence."<sup>17</sup> The *Model Rules of Professional Conduct*, followed now in more states than the *Model Code*, contains substantially identical prohibitions.<sup>18</sup> Despite such rules, our views about privileges and zealous lawyers are thought, tacitly and openly, to countenance ambiguities that make it comfortable for lawyers to wink at the notion of pursuing truth in the courthouse. Real questions arise as to whether we could revise this kind of deception and self-deception without impairing worthwhile values of the adversary system.<sup>19</sup>

Without pursuing in detail this or comparable questions in the brief space generously given for this Comment, I simply mention that our adversary system has opened the way for a variety of debatable tactics by our public and private "officers of the court," as we lawyers are proudly labeled. Are we pleased with prosecutors who, having heard of the presumption of innocence, announce indictments as if they were convictions? Or defense lawyers, who know the difference between witnesses and counsel, proclaiming on the courthouse steps the entire innocence of their clients? Think what we have wrought with the wonderful *Miranda* warnings, under which an ignorant suspect can waive his or her way into prison, while a knowledgeable hood pays no attention, knowing and confidently exercising the right to keep still.<sup>20</sup> Consider whether our vaunted system of ideal trial procedures might be related to the facts that (1) we have the most severe sentencing ranges of almost any country in the world, and (2) we alone in the West have, and are increasingly using, capital punishment. Is our trial system fine beyond needs for serious reform when one of our greatest judges, Learned Hand, found it appropriate to express his famous dread?<sup>21</sup> Or when, blessed with that perfect system, 90% of defendants choose plea bargains over the right to be tried?<sup>22</sup> Is it possible, with the sentencing guidelines and other causes of en-

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17 MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(4) & (5) (1981).

18 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(1) & (4) (1997).

19 Cf. Marvin E. Frankel, *Clients' Perjury and Lawyers' Options*, 1 J. INST. FOR THE STUDY OF LEGAL ETHICS 25 (1996).

20 See FRANKEL, *supra* note 3, at 95-99.

21 "I must say that, as a litigant, I should dread a lawsuit beyond anything else short of sickness and death." Quoted in JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 40 (1949).

22 See BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEPT OF JUSTICE, *COMPENDIUM OF FEDERAL JUSTICE STATISTICS*, 1996, at 1 (1998) (noting that 91% of federal felony convictions in 1996 were through plea bargains).

hanced prosecutorial power, that the *ex parte* decision to indict has become the main event, and the classic trial largely a vestigial appendix?

I do not propose to answer these rhetorical questions here. I pose them merely to note that Professor Freedman's simplistic view of the adversary system, if it ever could have been significant, is at best an irrelevant anachronism.

The short of this subject is, I think, that orations about the system, and whether it should be replaced by another system, are beside the point. The system we have will remain in place for the long future, changing only at a glacial pace, the way that systems in a democracy generally change. Taken all in all, it is by no means a bad system. Nevertheless, a key office for scholars includes the perception and understanding of defects, followed by the formulation of remedies. The office is not well served by distorting the problems and conquering windmills.