

LITIGATORS' ETHICS

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I'm going to talk about litigators' ethics from the standpoint of a litigator who works primarily in the criminal courts. No doubt some of you came here thinking that litigators' ethics is an oxymoron, like "defense budget" or "military intelligence." I don't think that's true, and maybe I'll convince you of it. I will tell you to begin with that I am going to honor William James's statement that some people say they are thinking when they are simply rearranging their prejudices. I'm going to rearrange some of my prejudices for you today and talk from experience.

I was provoked to consider my subject by some recent events. Nineteen ninety-eight was a banner year in Texas and a banner year for legal ethics. It was a year in which the state bar of Texas proceeded at a cost of several million dollars against a plaintiff's lawyer for allegedly unlawfully soliciting clients in the wake of an air crash—a U.S. Airways plane that crashed in South Carolina. They were unsuccessful. That is to say, the jury found that John O'Quinn hadn't done anything wrong, and no discipline was imposed. And yet, as I say, the bar literally spent millions of dollars to bring this case—to hold this plaintiff's lawyer up as an example of everything you shouldn't do. That is, you shouldn't go to the scene of an accident, where insurance investigators are already thick on the ground, and offer people legal representation. But also in 1998, the state bar did nothing—zero—about the representation provided in capital cases that the Texas Court of Criminal Appeals managed to affirm, even though the court-appointed lawyers for these defendants had slept during much of the trials in which their clients were found guilty and sentenced to death. That is, I think, an unfortunately all-too-typical look at the exercise of discretion by the bar in legal ethics cases.

I'm not going to say much about the technicalities of this world of legal ethics. Of course, you must learn all of those rules, but there are some times when a hand held before your eye can obscure the vision of distant mountains. And it's important, I think, to raise our sights a little bit and to look at where we ought to be as members of a learned profession. And so I begin, but only by way of introduction, with the ordinary rules of professional responsibility, what you learn about in the required law school courses—the Model Rules. Some of these rules reflect, of course, deep-seated values of the profession. Some have historical antecedents which we can identify; because they are so

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deeply rooted, we can't realistically urge that we simply wipe the books clean and start over. Some—perhaps many—perform useful functions.

I think the ethical standards about the litigation process protect at least three kinds of interests. The first thing they do is protect the profession's monopoly on the provision of legal services. That's not all to the good. We understand the process by which the common-law lawyers—the lawyers in England who were members of the common-law bar—achieved a position that was central to the operation of English society. After all, the English Revolution in the 1640s saw the abolition of prerogative courts—courts created by royal fiat—and a tremendous shift of power in the direction of the common-law courts and, therefore, to common-law lawyers. This process had already begun in the 1500s and early 1600s as these lawyers became responsible for all the conveyancing under the drastically revised Tudor land law. The common-law lawyers and courts also became responsible for English contract law. The 1602 decision in *Slade's Case*¹ customarily marks this shift in business away from merchant courts and to common-law courts in commercial contract cases.

So we understand where the profession's monopoly comes from. Unfortunately, that monopoly is all too often enforced to deny legal services to people who need them. The early history of the *Selective Service Law Reporter* provides an example. In 1967, as a result of congressional legislation and our increasing involvement in Vietnam, tens of thousands of young men faced induction into military service based on the decisions of local draft board members, who were not lawyers. The body of regulatory law administered by those draft boards was complex, difficult, and largely inaccessible, and so we published this law reporter to make that law visible. We had to threaten to sue to get some of the regulatory material out in public—the Selective Service system claimed for a time that its own regulations were secret.

Most lawyers in America were not equipped to advise young men about their rights and options under the draft laws. They had no experience in the technical regulations governing such things as becoming a conscientious objector, understanding what it meant to get a student deferment, or satisfying the requirements for the ministerial exemption. Yet, these legal questions lay at the heart of young men's personal dilemmas about the war and raised serious constitutional issues.

There simply weren't lawyers who were doing this kind of law. So we turned to nonlawyer draft counselors. Some of these folks, who became quite adept at understanding the regulations, were in church organizations that advised young men about conscientious objection. Some were affiliated with colleges. In response, conservative elements in the bar attempted to shut down these operations on the grounds that they were engaged in the unauthorized practice of law. However, this attempt was simply the

1. 76 Eng. Rep. 1072 (1602).

manipulation of a legal rule that denied young men any access whatever to the sorts of information that they needed in order to help them through this difficult time in their lives. This example is but one instance among many of bar groups' seeking to enforce the profession's monopoly in ways that deny ordinary people access to information about their rights.

The second task of the rules of professional responsibility is to protect the client. It used to be, and around the turn of the century it was, that the rules expressly stated that the lawyer's obligation to the client in litigation was to represent the client with warm zeal. Now, in the latest incarnation of the rules, the words "warm zeal" are dropped out. Instead, Model Rule 3.1 says (in essence) "we really mean warm zeal, but we talk about professionalism and competence and so on because we are afraid that if we say warm zeal, people will think that means you need to be a zealot on behalf of your client, and nobody likes zealots." So in the name of softening up the rules and softening up the image of the profession, the warm zeals are a threatened species. They are clubbing the warm zeals to death to make coats for rich people. I think that's what's happening.

Whether it's that or some other thing, warm zeal has become endangered. It is almost embarrassing now to speak these words—that we will represent our clients with warm zeal, which at times means that we as lawyers must rebuke judges who want to override what our clients are doing. And so a rule designed to protect clients has, in the hands of the people who make these rules for our profession, been watered down to a degree. I see young lawyers out there who are hesitant to confront judges, who are hesitant to confront their opposition in the way that they need to in order to defend their clients.

Yet whom do we celebrate in the profession when we look to our history? We celebrate those advocates who have the courage to speak truth to power. We celebrate Erskine, who stood up to his former tutor Justice Buller. In a celebrated seditious libel case, the jury found the defendant "guilty of publishing only."² The word "only" meant that the verdict could not be construed as finding the defendant guilty. So Erskine demanded that the "word 'only' be recorded."³ Justice Buller ordered Erskine, "[S]it down, or I shall be obliged to interpose in some other way."⁴ To that threat Erskine replied, "I stand here as advocate for a brother citizen, and I demand that the word 'only' be recorded. Your lordship may interpose in any manner you think fit. I know my duty as well as your lordship knows his."⁵

We also celebrate John Philpot Curran, the great Irish advocate of the nineteenth century, when English judges presided in Ireland over trials of Irish dissidents. After some colloquy back and forth, the English judge finally leaned over and purportedly said, "Mr. Curran, if you persist in that, sir, I

2. 1 J.F. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 330 (1883).

3. *Id.*

4. *Id.* at 331.

5. *Id.* at 331 n.3.

shall be compelled to commit you for contempt.” And Curran rocked back and adjusted his wig and said, “Ah, then your lordship and I will both have the satisfaction of knowing it won’t be the worst thing your lordship has ever committed.”

So, whether it is with a hint of humor or with a stance of confrontation, warm zeal is a part of the tradition of our profession, and the rules are supposed to protect it. And in these times when critics hammer vigorous advocacy, we must resist all such moves to hold back our duty to speak truth to power.

The third thing the rules of professional responsibility are designed to protect is the tribunal—the process. That is to say, we owe candor to the tribunal. This obligation is enforced by the rules. Now, I certainly do not quarrel with our duty of candor. Indeed, even when I take an attitude of skepticism towards one or more of the formal rules, I recognize that we must all obey them. With respect to this particular rule, I am impressed by the mounting evidence that prosecutors in high profile cases routinely lie and conceal exculpatory evidence, and that little is done about it. It is not the rule that is at fault, but the uneven application of it.

That said, we should understand that many of these rules often have their origin in the desire to protect only one part of the profession and only one part of American society and to prevent lawyers from serving as advocates for other parts. One example is the early hostility to and outright forbidding of contingent fees. These arrangements were opposed by the organized bar even though study after study after study had shown that the contingent fee was the only way that talented lawyers could be drawn into the marketplace to represent people who have been injured by defective products or by other corporate or governmental activity. Moreover, a Justice Department study in 1972 reflected that the highest level of satisfaction among consumers of legal services was found in areas where the contingent fee brought out lawyer talent. And yet politicians and segments of the bar still rail against it.

Similarly, under the bar rules, there are restrictions on the solicitation of clients. We know from studying the history of the civil rights movement that all over the South the NAACP’s efforts during its early days to attract clients to bring test cases were shut down by state bar associations. These bar associations and the state agencies that supported their aims sued the NAACP and its lawyers and threatened them with disbarment. Why? Because they were “soliciting” clients. They were informing people about some alternative to the injustice under which they lived. It took courageous lawyers to stand up to that sort of threat and to keep the struggle going until the Supreme Court finally ruled in their favor.⁶

The fault did not lie only with the bar groups in the South. In 1912, the American Bar Association discovered to its horror that three African-Americans had become members. I guess you didn’t have to send in a picture

6. See *NAACP v. Button*, 371 U.S. 415 (1963).

with your application and your dues. The ABA wrote these lawyers a letter telling them to get out of the organization. It wasn't until the 1940s that the American Bar Association received African-American lawyers into its ranks. These are examples of how far behind the curve the organized bar has been.

And so I will insist throughout this talk that while these rules of professional responsibility must guide our conduct in the sense that we must obey them at our peril, they certainly do not provide for us a full understanding or a full expression of what we, as lawyers with moral compasses, must do when making the decisions we must make about where to take our professional lives. These rules were made by, and in many cases in the interest of, a small and powerful group in the profession with an agenda that is not at all congenial to the interest of the broad mass of people.

Susan Carle, my colleague at Washington College of Law, has written about the way in which some high profile lawyers in the years between 1900 and 1930 were willing to risk professional discipline in order to move the profession.⁷ But these were lawyers who, despite their eminence and prominence, were willing to say, "We know the rule prohibits solicitation, but let's see if we can do it anyway and stretch the meaning of the rules." Some of the lawyers were willing, quite frankly, to ignore the rules. Early leaders of the NAACP—that is to say, prominent white lawyers in the North—thought that they were relatively immune from being proceeded against under these bar rules, so they went out and acted in ways that might very well have subjected lawyers in another part of town to punishment.

Let me give you another example of the milieu in which people operated. As late as the 1930s, the ABA Ethics Committee said that lawyers could not represent an organization of farmers because the representation of the organization was essentially equivalent to soliciting the business of the group's members by encouraging them to bring lawsuits about their particular problems.⁸ So, you couldn't be the lawyer for the Grange—an organization of farmers hit hard by the depression. And yet in that same year, the Ethics Committee opined that a trade association could retain lawyers to bring lawsuits against the New Deal legislation because somehow that was different.⁹ The Committee essentially took the position that these "businessmen" simply wouldn't know how else to challenge the Wagner Act in order to keep unions off their property and that they were ignorant of their rights and had no affordable access to legal counsel other than through the association.

To continue a little bit on this theme—that even rules with which we agree get enforced in the oddest way—please forgive me a story. Dominic Gentile is a lawyer in Las Vegas, Nevada. He has an excellent reputation. He

7. Susan Carle, *From Buchanan to Button: Race, Class and Legal Ethics in the Early NAACP* (unpublished manuscript, on file with the author).

8. ABA Comm. on Professional Ethics and Grievances, Formal Op. 169 (1937).

9. ABA Comm. on Professional Ethics and Grievances, Formal Op. 168 (1937).

taught at the National College of Criminal Defense Lawyers. He is a good lawyer. He had a client in Las Vegas named Grady Sanders who owned one of these places where you can store your stuff. The Las Vegas police used a storage locker there to store narcotics and money that they were using in a sting operation. The narcotics and money went missing, and for a year the police and prosecutors issued press statements and arranged leaks to the press saying that Grady Sanders stole the money and the drugs and that he was the guilty party.

After a year, of course, the inevitable happened, and Sanders was formally charged with having stolen the money and drugs. The night before the arraignment, Dominic read all the cases on lawyer speech. He went to court and obtained a trial date six months into the future. He went back to his office and held one and only one press conference. At that conference, he said, in so many words, "I will tell you what I believe the evidence will show. The evidence will show that a Las Vegas police officer took the money and put the dope up his nose."¹⁰ Six months later the case was tried. No juror remembered that press conference, so it could not have had an effect on the process. The jury acquitted Grady Sanders because, indeed, there is evidence that the police officer put the dope up his nose.

One week later, Dominic Gentile got a letter from the state bar, initiating disciplinary proceedings for having held his press conference.¹¹ Now, Dominic's a courageous man. He went through the process, and he got a private reprimand letter. He could have forgotten about it, but he said, "I'm not taking it." He called on me and my former partner Sam Buffone, and we said, "All right, we'll represent you for free. Let's petition for certiorari." We got certiorari. We did research, and we could not find a single case in which a prosecutor had been disciplined by a bar for holding a press conference—except one. We found a case in which a former assistant district attorney in a New Jersey county spoke with the press following the reversal of a murder conviction in a case he had tried.¹² He told a newspaper that the case shouldn't be retried because there wasn't anything to be gained by it. For this, the District Attorney referred him to the bar, which disciplined him.¹³

That was the only case we could find. As to the merits on the question of lawyer speech, you can read *Gentile v. State Bar of Nevada*. As I was arguing before the Supreme Court, Justice O'Connor leaned over and in a typically probing question said (and I'm paraphrasing here), "Mr. Tigar, don't all the state bars have rules that are identical to this one?"¹⁴ I said, "Yes, they do.

10. See *Gentile v. State of Nevada*, 501 U.S. 1030, 1049 n.2 (1991).

11. *Id.* at 1033.

12. *Matter of Rachmiel*, 449 A.2d 505 (N.J. 1982).

13. *Id.* at 509.

14. Oral Argument of Michael Tigar on Behalf of the Petitioner at *7, *Gentile v. State of Nevada*, 501 U.S. 1030 (1991) (No. 89-1836), available in 1991 WL 636296.

It's one of the Model Rules."¹⁵ She said, "Well, what about that?"¹⁶ I said, "Well, Justice O'Connor, one of these days—I hope it's today—the state bars will learn that the First Amendment does not stop short of their door."¹⁷ And five justices agreed that that rule was invalid, although a different majority of five imposed certain restrictions on lawyers' speech in connection with pending cases.¹⁸

The point is not to reargue the *Gentile* case. It's to point out that these rules have a chilling effect on certain kinds of lawyer activity and that they are enforced in a discriminatory way—despite the fact that lawyers, in addition to being lawyers, are, after all, public citizens. You learned in Criminal Procedure, I hope, about writs of assistance—those terrible things that the British troops used to break down the doors of colonial merchants—and how in 1761 James Otis, the great Boston lawyer, stood in the Boston Common and made a speech against such things.¹⁹ Of that speech, John Adams later wrote, "Then and there the child Independence was born." Also referring to that speech and others like it, John Adams wrote home to Abigail from Philadelphia on July 3, 1776, saying in so many words, "You know, my dear wife, tomorrow Tom Jefferson and I and some of the other boys"—they were all boys, we understand that—"are going to do something here in Philadelphia, and it's going to make some news. But it takes me back to the time when we had that 1761 deal, and I was leaking stuff to the press."²⁰ John Adams himself, second President of the United States, was a lawyer, and somebody in his office leaked stuff to the press about the bad tactics of the British. And why? Because he understood that, as I said to the Supreme Court, the public's business can be done in more than one forum at once. And who is better qualified to comment on the implication of things that are happening in the courthouse than the lawyers who are deeply involved in it?

15. *Id.*

16. *Id.* at *8.

17. *Id.*

18. *Id.* at 1082.

19. Otis argued that such writs were illegal in the context of a case variously styled the "Writs of Assistance Case," "Paxton's Case," or "Petition of Lechmere" (after the names of the customs officials involved). John Adams reported Otis's argument. See *Petition of Lechmere*, in 2 LEGAL PAPERS OF JOHN ADAMS 123-34 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) [hereinafter LEGAL PAPERS OF JOHN ADAMS].

20. See Letter from John Adams to Abigail Adams (July 3, 1776), in THE BOOK OF ABIGAIL AND JOHN 138-40 (L.H. Butterfield et al. eds., 1975); LEGAL PAPERS OF JOHN ADAMS, *supra* note 19, at 123-34. When John Adams was retained to represent John Hancock in a forfeiture proceeding, his contentions and, later, a text of his undelivered argument were thoroughly aired in the press of the time along with running commentaries on the legal issues. LEGAL PAPERS OF JOHN ADAMS, *supra* note 19, at 123-34. These court cases were "the Commencement of the Controversy, between Great Britain and America," according to an Adams letter of July 3, 1776. *Id.* at 107 n.2. Adams's undelivered argument and his contentions could only have reached the press from himself or from lawyers in his office.

To silence that voice is to silence an important participant in the debate.

Against this backdrop, we can see how these rules of professional responsibility may legitimately be said to guide our conduct. They do so in the sense that Oliver Wendell Holmes, the great legal realist, spoke of the "bad man" theory of the law.²¹ That is, the law of ethics in its narrow sense dictates only what a bad person would be required to do in order to avoid punishment. This is the function of the formal rules. And once we put the rules of professional responsibility into that context, we can begin to ask ourselves the really important question: What should and must I do in order to live an ethical life, personally and professionally?

I've established that the rules tell us how we must act. I've established that I think that the rules are sometimes silly and sometimes enforced in a bad way. But I haven't addressed how we choose our cases and how we choose our tactics within those cases. In preparing for this talk, I started reading the literature (and there's a lot of it lately) written by people—good-hearted people—who want to attack the sort of thing that I like to do—that is, defending people accused of crime. These critics raised some of the old questions, such as, "How can you represent people you know or think are guilty and be a party to turning them loose?" And others go on to ask, "How could you possibly cross-examine a witness effectively, even brutally, when you really know that that witness is, or might be, telling the truth?"

Of course, the traditional answer has to do with the role of lawyers in the adversary system. I've seen a lot of this literature, and so I wanted to talk a little bit about it because I'm sure that in your day-to-day activity working in the clinic or thinking about working on cases you wonder sometimes, "What role am I suppose to be playing here?" Well, I'll give you a little hint of where this is headed. I think that it is right and good to represent people accused of crime. I want to talk about the way in which we choose our cases and the way we should represent our clients. I am going to reject out of hand the counsel of those such as Charles Fried, who wrote an article on "The Lawyer as Friend."²² Fried was Ronald Reagan's Solicitor General. He taught, I think, at Harvard, and then he must have taught in England. His tenure as Solicitor General represented the intense politicization of what had theretofore been an office noted for its political independence. I was sorry for that. A few weeks ago, Fried was at a conference, one of my colleagues reported, at which he once again defended the idea that some lawyers will see the wisdom of being in the middle of those great decisions by which society is moved—by which he means lawyers in white-shoe law firms on Wall Street. And some lawyers, he is reported to have said, will be like those who fix toasters.

I'm going to speak to you as a toaster fixer. I think the idea that a

21. See THE ESSENTIAL HOLMES 161-63 (Richard Posner ed.) (1992).

22. See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

satisfying legal career can be carved out by being a friend to the powerful is not one that I personally go for, although you may wish to. I would warn you this—that when Fried describes the practice of the big law firms and their partners of becoming friends of the powerful, he's not really talking about friends. He's talking about becoming a flatterer of the powerful. And a flatterer is not your friend, as James Boyd White has pointed out.²³ He's your enemy because he tells you how you can do what you would like to do with no thought to the consequences of doing it and, therefore, with no warning about what might befall you if you don't think as well about what you ought to do.

I confess another part of my bias. Maybe it's suggested by what I said about judging a case. I represented a man named John Demjanjuk who was charged with being Ivan the Terrible of Treblinka in a lawsuit filed by the government in 1977. He was denaturalized. He was deported. He was extradited to Israel where he stood trial for being Ivan the Terrible and was sentenced to death. He spent seven and one half years in a death cell in Israel before, during, and after his trial. It was discovered that, in fact, he was not Ivan the Terrible of Treblinka and, moreover, that the government had known—had had evidence in its hands—that he was not, but had deliberately kept that evidence from its adversary and from the court. And so a panel of the Sixth Circuit, in an opinion by Judge Lively joined by Judges Merritt and Keith, held that the Justice Department had defrauded the courts of the United States, and by inference, the courts of Israel.²⁴

After all of that litigation, not one Justice Department lawyer was disciplined. Not one unfavorable word went on their records, even though they had put Mr. Demjanjuk at the risk of death. Now these prosecutors are starting all over again, saying that if he wasn't Ivan the Terrible he was certainly Ivan the Very Annoying. They will attempt once again to revoke his citizenship and put him through all that business after twenty-two years in litigation.

We all know from reading United States Supreme Court decisions such as *McCleskey v. Kemp*²⁵ that, although the system of prosecutorial discretion that chooses the candidates for the death penalty is shot through with racism in county after county across the American South and the North, there is almost nothing you can do to litigate that issue when representing someone in a capital case. That's what the Supreme Court said. As Justice Brennan said in dissent, "That would be too much justice."²⁶

We also know that in the *Wayte* case²⁷ the Supreme Court essentially said,

23. See James Boyd White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849, 875 (1983).

24. 10 F.3d 338 (1993).

25. 481 U.S. 279 (1987).

26. *Id.* at 339 (Brennan, J. dissenting).

27. *Wayte v. United States*, 470 U.S. 598 (1985).

“Well, we don’t really get in the way of prosecutorial discretion based on the exercise of First Amendment activity.” Now, think about that for a minute. You know from your Criminal Law course that only a small percentage of criminal activity is ever prosecuted and that of the cases that are prosecuted, ninety percent result in guilty pleas based on plea bargains. Why are only a small percentage of cases prosecuted in the first place? Because prosecutors must exercise discretion. In a lot of cases, prosecutors believe that pre-trial diversion, a warning, or a civil sanction will suffice. Other justifications are that prosecutors’ offices don’t have adequate resources or that they have other priorities in their offices. These seem to be benign kinds of discretion. But nobody apologizes for the fact that prosecutors have this enormous and largely unreviewable power to decide who’s in jail, who’s not, under what conditions, and charged with what. And yet we are reading in the work of very good law professors, and even clinical teachers, that those of us on the defense side must engage in a rigorous self-examination and be subject somehow to public criticism based on our exercise of discretion concerning who we represent and the kinds of tactics that we use. My answer to that is, of course, that this Supreme Court line of cases, which insulates prosecutorial discretion from review, is wrong.

Maybe we will achieve some understanding of the limits of discretion in the wake of Kenneth Starr’s activity. The Supreme Court decided in *Morrison v. Olson*²⁸ that the special prosecutor system did not violate the separation of powers, even though special prosecutors are subject to none of the institutional constraints—such as they are—to which Justice Department prosecutors are subject. We know that the Justice Department doesn’t discipline many people, but at least you know they have their people over there that look at cases and say, “Maybe we should stop now.” I don’t think there are very many of those people. Maybe they’re an endangered species, but they provide some constraints and controls. And although judges are involved in selecting cases and supervising grand juries, *Morrison v. Olson* gives judges the kind of power that, arguably, judges shouldn’t have. As I say, in the wake of the Starr business, which I don’t propose to debate here, there may very well be another look at prosecutorial discretion. But it doesn’t look likely that something like that is going to happen, or that it’s going to result in some thorough-going change in the process.

Maybe we could forgive it of the prosecutors, saying as Chesterton said of the English judges, “They’re not cruel, they just get used to things.”²⁹ I don’t know. But surely we defense lawyers, facing these attacks and this unchecked prosecutorial discretion, need to ask ourselves: what is it we’re doing and why do we do it?

Now some of this questioning we can do based on what David Luban has

28. 487 U.S. 654 (1988).

29. See STEPHEN, *supra* note 4.

called "role-based morality."³⁰ I would not call it role-based morality, I would call it role-based activity. When I was representing John Demjanjuk, Alan Dershowitz and Monroe Freedman wrote essays asking me why I was doing it. "He's not worth your time," they said.³¹ "He's a terrible person. He's a Nazi. He's a criminal. He might have killed all these people, and so he shouldn't have a lawyer. At least he shouldn't have you as his lawyer." In response, I could have invoked the time-honored canons of ethics—the rules of professional responsibility. And, of course, I did so because they're important in that respect. Every person charged with a crime has not just some abstract right but a constitutional right to counsel. Lawyers, under Rule 6.2, have the obligation to accept court appointments. So, if I'm appointed by the court to represent someone charged with a serious crime, I really don't have any problem now do I?

And, of course, I can read the rules like 3.1 and say that I can still do that with warm zeal. So I'm permitted to say to anyone who wants to criticize what I do, "Excuse me, I am immune from any official sanction for being a lawyer." And when you think about it and think about the role of lawyers in the justice system, my role-based activity as a lawyer should be immune from public criticism. And I do say that. But you know, I don't think it's enough.

We can read all we want about the great lawyers of this century who have defended that principle—and it's an important principle to defend. But that really doesn't answer how we choose our cases and how we choose our tactics within those cases. It doesn't tell us anything about how to behave. I debated this with Monroe Freedman, and I said that there are two aspects to this. First, don't tell me that I need to make a public justification for representing someone in a criminal case, particularly an appointed case. Don't tell me that, because once we start down that road, we set in motion the criticism of lawyers for taking on these cases. We make the lawyer the focus, and there is already too much of that. The kind of attack we endured during the *Nichols* case from the press in Oklahoma is, for example, plenty proof of that.³² No, Monroe, we need to defend that line. But at the same time I do acknowledge a responsibility to myself and to my profession to have a reason for acting as I do. It's simply that you shouldn't be telling me that I'm obliged to make that into a kind of public defense because when you impose that obligation, you weaken that shield that we need in order to do our job.

Now does that make you uncomfortable—that you're going to have some dialogue within yourself and maybe with your colleagues, and you're not

30. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988).

31. See generally Monroe Freedman, *Must You Be a Devil's Advocate?*, *LEGAL TIMES*, Aug. 23, 1994, at 19; Alan M. Dershowitz, *On Demjanjuk, Unprecedented Lawlessness*, *WALL ST. J.*, Aug. 5, 1993, at A12.

32. The author represented Terry Nichols during his trial for the bombing of the federal building in Oklahoma City. See *United States v. Nichols*, 169 F.3d 1255 (10th Cir. 1999), cert. denied, 120 S. Ct. 336 (1999).

going to have to justify yourself publicly? It doesn't make me particularly uncomfortable. Prosecutors do it all the time. It's an accepted fact of life that prosecutors exercise this enormous discretion having to do with people's lives and liberty, and the formal rules say that they are not accountable for it. And yet I hope that no one would suggest for a minute that if you choose to be a prosecutor you can act as though you're kind of an amoral being, and the consequences of the terrible decisions you make aren't really anybody's responsibility because you were just doing your job. "I was just following orders. I was just doing my job." That sort of stuff went out at Nuremberg.

So I do have a means of choosing cases. I do have a means of choosing tactics within cases, and I was thinking about how could I express this—how could I talk about it. After all, there are people like Professor Alfieri, who says (in so many words), "Look, you shouldn't cross-examine someone if doing so reinforces certain social stereotypes about people. You have to be a sensitive cross-examiner. It doesn't matter that you're doing it to try to get the jury convinced to come around to your side. You've really got to think about all these other things."³³

And then there's an article by my good friend, Stephen Lubet.³⁴ It's an article that asks the question, suppose Atticus Finch's client was guilty. We all remember—I hope we do—the story of *To Kill A Mockingbird*. It's often performed as a play. It's a great novel. It was a movie with Gregory Peck. Here is Atticus Finch—the lawyer in a little town who is appointed to represent an African-American charged with the rape of a white woman. And in the end the client is convicted, commits suicide—maybe killed by the deputies, we don't know. But there is the community in that little southern town at a time before *Coker v. Georgia*,³⁵ when to be convicted of rape in the South carried the death penalty.

Lubet wants us to imagine—suppose the defendant really did it. Would we then applaud his vigorous cross-examination of the complaining witness? Would we then applaud Atticus's summation in which he suggested to the jury that the social circumstances in which she found herself had brought her to lie under oath? Would we applaud the African-American looking on the court proceedings, in a segregated courtroom to be sure, who says to Scout, "Stand up, your father's passin'"? Would we do that? And I say, "Hell, yes." Walk with me. Let's look at that. Let's ask ourselves. Let's put ourselves in it.

First, I will tell you that if you brought me a rape case today, I probably wouldn't defend it if I had a choice. An appointed case would be different. Why? Because if I could go all through my life without having to cross-examine the victim of a rape, I would feel better for it. I do other kinds of

33. See Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293 (1998).

34. See Steven Lubet, *Reconstructing Atticus Finch*, 97 MICH. L. REV. 1339 (1999).

35. 433 U.S. 584 (1977) (holding that the imposition of a death sentence upon conviction of the crime of rape violates the Eighth Amendment).

cases. I don't know why this particular distinction gets to me. I would also find it difficult to represent someone charged with major league heroin distribution. Other people will do it. There's plenty of money in it. There's nothing wrong with it, but those are just preferences that I have. You can attack me for my asserted inconsistency, but there it is.

What about Atticus Finch? Well, he's in a southern town. He's taken a case that, one would imagine, would not get a fair hearing—an African-American confronting the justice system in a southern town with an all white jury. And yet the need to have that kind of dialogue, to have that kind of confrontation is very great. How are we going to change the South? By talking to people? No, it's easier to act yourself into right thinking than to think yourself into right acting. Also, we remember in the words of the old prayer, "God give me the serenity to accept the things I cannot change, the courage to change the things I can." So, I'm a lawyer. I'm Atticus Finch. I'm in this town. I understand that racism is pandemic. I see it everyday as I walk. I see it in people's attitudes. I see it in the way they refer to each other. I see it in the segregation of the courthouse. And I also know (and this, by the way, would be enough for me) that in the law of the South there are many, many cases—and you can read them—developing the law of attempt relating to the selection of defendants. Let's take law of attempt first.

There are so many cases in which African-Americans are convicted and sent away for attempted rape, for loitering, and for looking at white women. The law of criminal attempt in the South suffered so much from that strained definition of what constituted an attempt. Hell, they were well ahead of the Model Penal Code in relaxing the limit, saying that mere preparation would be enough. We also know that in the South, although a lot of forcible or nonconsensual sex went on, alleged nonconsensual sex involving an African-American male and a white woman was far more likely to be proceeded against than any other kind, especially alleged nonconsensual sex between a white man and an African-American woman. We also know that, since it's pre-*Coker v. Georgia*, if you're convicted of nonconsensual sex with a white woman and you're an African-American, you are sentenced to death and executed, unless they pull you out of the jail and lynch you first.

And so I'll start by saying that if I'm Atticus Finch in that town, and I recognize that this is where it is, and I believe the things that he has been represented as believing, I would try that lawsuit, if only to try to save that young man's life. If only for that, I would do it. I would try it also because I think it's necessary at times to confront a system. I would try it to have the opportunity to give that summation—to try to lead those jurors from the place where they were to a place where they could see a different vision of a just society. That's what we do as lawyers. You know, to take a minute or two and just talk about things.

A lot of times in cases, we're forced to go to a jury and talk to them about things that are counterintuitive to them—things that they really don't want to believe—and then ask them to do things that they really might not want or be

inclined to do. And so in the *Nichols* case,³⁶ for example, I talked about needing a place to stand. Here we are in the penalty phase. I said, "You know, I really want to talk to you because there are different places you can stand to look at this. I'd like to help us get to a place where you could see that with the centuries of the world and the decades of our liberty piled so high, there could be a different way to do things than to respond to all the cries for vengeance that have filled this room these three days past." I told them the story of Joseph—cast into a pit by his brothers, left there to die, sold into slavery, becoming great in Pharaoh's house—who meets his brothers again a couple of chapters later. I won't go through the whole thing. You know the scene. He sends everyone out of the room and concludes by saying, "for I am Joseph, your brother," and sees to it that they have food even though they had left him for dead. I said, "That's why in the other part of the case I stood behind Terry Nichols and said, 'This is my brother.'" I hoped the jurors didn't resent it. I wanted them to keep in mind that there is another place to stand other than vengeance.

And so, yes, in the Atticus Finch case, that's the decision I would make. And now I get rebuked. Someone will say to me, "Aren't you just playing God? Aren't you just making up your own mind how it should be?" Well, I reject the playing God idea. That's just sophistry. What I think I'm saying is that we all have the obligation to make decisions as moral individuals. That's just a value judgment. Well, it is a value judgment, but it's not just a value judgment.

One of the terrible things about law school, I think, is that very little that happens in most law schools prepares you to listen or to care. As our dean jokingly says, "Eighty percent of the people who come to this law school say they want to become lawyers because they're interested in social justice. We get that down to about twenty percent by the time they get through here. We beat that out of them." Well, that's not true, but a lot of what happens in traditional legal education in the first year asks you to focus on legal rules. Can you ever remember raising your hand and saying, "Wait a minute. That's just not fair"? And then the professor goes into the Socratic dance and goes round and round, and you learn the value of the rule and the perils of indulging exceptions—forgetting, I think, in the process that the structure of the law has got so many open spaces and so much discretion that the discretionary area in which officialdom and the lawyers for people operate is just so much greater than the paradigm suggests. So the answer is, you will be compelled to act in ways that affect people and to do so without any formal rules that require you to act in one way or another.

I've already shown you that as a prosecutor, you'll process case after case and make your decisions. As a defense lawyer, you will decide to cross-examine this witness or not to cross-examine, or to be harsh or to be gentle,

36. See *United States v. Nichols*, 169 F.3d 1255 (10th Cir.), cert. denied, 120 S. Ct. 336 (1999); see also Michael E. Tigar, *Defending: An Essay*, 74 TEX. L. REV. 101 (1995)

or to say this or to say that, or to counsel this client about what he ought to do as opposed to what he's able to do (as Sir Thomas More put it in his talk with his successor as Lord Chancellor). And very little in legal education (except, by the way, clinic education) prepares you to make those kinds of decisions—to exercise that kind of judgment. And yet, I tell you as surely as we're sitting here that it will be what you will do every day of your professional life. And so the time is now to say, not that this is just a value judgment, but to ask yourself, "how will I make those value judgments? How did I make it in the case of Atticus Finch? Whether you agree or disagree with me or not, how did I make it?"

To begin, a lawyer stands in a certain point in history. So our first requirement is that we understand history—that we understand where we stand. A lawyer understands the social system of which he or she is a part. A lawyer understands certain kinds of claims for justice made by a client. An opportunity to stand at the center by which all things are moved is given us only because some poor soul needs justice. And based on our understanding of those things—that is to say, historically validated norms and ideas about how justice is, can be, and must be—we can make decisions about what our priorities are in particular cases. We live in a world in which the self-conscious formulation of norms about justice has proceeded at a pace that would amaze those of two or three generations ago.

Can I prove it? On September 21, 1976, on the streets of Washington, D.C., a bomb planted on the orders of President Pinochet of Chile killed Salvador Allende's foreign minister, Orlando Letelier—the former ambassador to the United States—and his associate, Ronni Karpen Moffitt. My partner Sam Buffone and I sued the Chilean junta. We got a judgment for four million dollars. Eventually we collected. But—and we knew this—the Pinochet regime in Chile from 1973 to 1990 had been responsible for more than four thousand disappearances and innumerable tortures. That's a part of reinforcing what that regime did. It was refreshing to see that there have been developed in the last generation international norms that say that that sort of conduct not only is wrong, but can be punished. That is, we are not without guidance in thinking about what you need for a just society. There's been a universal declaration of human rights, there are conventions on torture, conventions on the rights of the child. These are the historical moments in which we stand. We can make decisions about what role we want to play in formulating claims for justice and we can do something about it.

And then last October Pinochet gets arrested. Remember that? In England. And people said, "Ah, some crazy Spanish private prosecutor has gone and seen to the arrest of a former head of state." So with my wife and law students from Washington College of Law, I helped the British barristers who were supporting extradition. We went to London and worked on the briefs for four days. The next thing you know the House of Lords says, "Oh, he's not immune from a lot of that." And then a couple of weeks ago, Sam Buffone and I went to London. There was a Magistrate Court hearing on Pinochet, and even Mrs. Thatcher was making public speeches against

extradition. Against the expectations of many, a relatively conservative magistrate wrote a short opinion upholding extradition and affirming that the developing norms of human rights increasingly point towards one law, one rule of justice, for one world.³⁷

So, how hard can it be to go and find our own moral compass and to point ourselves in a direction? Recognizing that, with some humility—a commodity that lawyers are kind of short on (we're litigators: we tend to be a massive blob of ego suspended over a chasm of insecurity, and that makes it bad for us)—we can make these decisions. These decisions are insulated from public criticism largely because we have these formal rules of which I speak that enhance our responsibility to talk amongst ourselves and make sure that they are right. It's simply that we have to keep in touch with the real world in which our clients live. A lawyer who never goes to court is never put to sea. We have to make sure that we are not, by virtue of doing these same things over and over again, falling into some kind of routine—that we keep alert to these things. I personally like the words of Yeats, "Too long a sacrifice can make a stone of the heart." That, of course, is something about which we need to worry and be concerned, but I am here today simply to invite you to join with those people in our profession who I've mentioned, who I've already met here, who I know from among your faculty, in the process of defining our roles. Our role is as the people—the only people—our clients can look to. And therefore, because we're the guardians of the doors to that place where our clients can claim to participate with justice, we have to understand what ethics really means.

37. The magistrate ruled that Pinochet should be held until the Secretary of State determined whether he should be extradited to Spain. *Regina v. Secretary of State for the Home Department, ex parte the Kingdom of Belgium*, No. CO 236/2000, 2000 WL 486 (Q.B. Div'1 Ct. Feb. 15, 2000). The Secretary of State has since allowed Pinochet to return to Chile, where he may face prosecution. Attorney General Janet Reno has authorized an American grand jury inquiry into Pinochet's possible role in the Letelier-Moffitt murders.