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Reforming Law Practice in the Pursuit of Justice: The Perils of Privileging "Public" Over Professional Values

Cover Page Footnote

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REFORMING LAW PRACTICE IN THE PURSUIT OF JUSTICE: THE PERILS OF PRIVILEGING “PUBLIC” OVER PROFESSIONAL VALUES

*Ted Schneyer**

I have no direct answer to the grand question the *Law Review* editors put to the Colloquium participants: “What does it mean to practice law ‘in the interests of justice’ in the twenty-first century?” Answering the question to my own satisfaction would require a definition of justice, which I am not prepared to offer and defend.¹ Indeed, with lawyers now working in a vast array of settings and specialty fields, and so many nonlawyers² competing or cooperating with lawyers to provide “professional services,” I would hesitate to venture a definition of *law practice*!

Deborah Rhode is braver than I. In her recent book, *In the Interests of Justice: Reforming the Legal Profession*,³ Professor Rhode has much to say about what is wrong with law practice in the United States, and what changes would move us in the right direction. But, although she says all this in the name of promoting justice, she does so without systematic attention to the meaning of the term. Her focus is intensely practical. Examining current conditions in private law practice,⁴ the lawyer’s role in the adversary system,⁵ the delivery of

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1. For an ambitious and illuminating effort to define justice for purposes of making that endlessly contested term a meaningful guide in law practice, see William H. Simon, *The Practice of Justice: A Theory of Lawyers’ Ethics* (1998).

2. For example, many lay advocates now represent clients in labor arbitrations and quasi-judicial proceedings before state and federal agencies. See Herbert M. Kritzer, *Legal Advocacy: Lawyers and Nonlawyers at Work* (1998) (comparing the effectiveness of lawyers and lay advocates in administrative proceedings).

3. Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* (2000).

4. *Id.* at 24-25. These include enormous stress, little job security, increasingly bureaucratized workplaces, an eroding commitment to public service, impersonal and unstable relationships with clients, and unprecedented billing pressures. See *id.* at 8-13, 23-38. Rhode attributes these conditions, in part, to fierce competition for clients. *Id.* at 9. Today’s competitive environment was fostered by judicial decisions in the 1970s and 1980s that struck down restrictions on solicitation, lawyer advertising, and below-minimum fees. Many observers at the time welcomed those decisions because they promised to encourage competition, which would drive down fees and make

legal services, the regulation of lawyers, and the structure of legal education, she detects a need for substantial change and identifies many potential reforms for the reader's consideration.

Echoing George Bernard Shaw's sentiment that professions are "conspiracies against the laity,"⁶ Professor Rhode's "central premise" is that reform is not only needed, but has been far too slow in coming because "the public's interest has played too little part in determining [lawyers'] professional responsibilities."⁷ Rhode believes that "[t]oo much regulation of lawyers has been designed by and for lawyers"⁸ and that the "self-regarding tendencies of [professional self-regulation] have been too long overlooked."⁹ Drawing attention to what she views as a sharp dichotomy, she aims to encourage "more searching analysis by both the profession and the public about the points at which their interests diverge."¹⁰ While the profession has not been oblivious to its dwindling public esteem, Rhode considers recent bar initiatives to "rekindle professionalism"¹¹ and restore lawyer

legal services more widely available, thereby enhancing access to justice.

5. Although her treatment of contemporary law practice is extensive, Professor Rhode gives surprisingly little attention to some important roles lawyers play outside of the adversary system—e.g., as negotiators in business transactions or as neutrals and client representatives in mediations.

6. 1 George Bernard Shaw, *The Doctor's Dilemma*, in Bernard Shaw: Complete Plays with Prefaces xv, 110 (1963).

7. Rhode, *supra* note 3, at 2.

8. *Id.*

9. *Id.* at 3. But certainly not overlooked by Professor Rhode, who has emphasized this theme in her scholarship for more than two decades. See, e.g., Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589, 643 (1985) [hereinafter Rhode, *Ethical Perspectives*] (insisting that lawyers stop "retreat[ing] into role" and begin to "assume personal moral responsibility for the consequences of their professional actions"); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 Tex. L. Rev. 689 (1981) (identifying lawyer self-interest as the motivation for drafting codes of legal ethics). Elaborating on her charge that "the public's interest plays too small a role" in defining or enforcing lawyers' responsibilities, Rhode rightly asserts that nonlawyers play only a token role in lawyer regulation—e.g., by sitting in small numbers on bar disciplinary committees. She does not consider the growing interest of the press in publicizing lawyer misconduct, monitoring the regulatory activities of the organized bar, and covering bar policy debates. See, e.g., Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 Law & Soc. Inquiry 677, 695-97, 723-24 (1989) [hereinafter Schneyer, *Professionalism as Bar Politics*] (discussing press coverage of ABA debate regarding proposed ethics rules).

10. Rhode, *supra* note 3, at 3. Though she criticizes the profession in many respects, Rhode does not always side with the public when she discerns a divergence between public and professional opinion. For example, she regrets the fact that much of the public, unlike the bar, opposes government-subsidized legal services for the poor. See *infra* note 21 and accompanying text. On a few occasions, moreover, she downplays apparent conflicts between public and professional interests by suggesting that changes beneficial to the public would really benefit lawyers as well. E.g., Rhode, *supra* note 3, at 45 (suggesting that many lawyers, unhappy with their careers, would benefit along with their clients from "plac[ing] greater emphasis on values other than profit").

11. Comm'n On Professionalism, ABA, "... In the Spirit of Public Service": A

civility a largely cosmetic response to serious problems.¹² Effective reform will require “fundamental changes in ethical rules, enforcement structures, and economic incentives”¹³—changes designed to align professional conduct with public values and “commonly accepted ethical principles” as Rhode understands them.

After commenting briefly on Professor Rhode’s treatment of the supply of legal services and the regulation of law practice, with which I am in considerable sympathy, I focus in this Essay on her critique of lawyers’ ethics in matters, including adversary proceedings, in which client interests may conflict with the interests of third parties or the public. My reaction to that critique is mixed. Rhode’s vivid accounts of lawyers’ adversarial excesses on behalf of clients in large-stakes civil litigation are beyond cavil.¹⁴ In my view, however, her critique does not point the way to any reconstruction of legal ethics that could command wide support inside or outside the profession. Instead, it illustrates the enormous difficulty of defining a shared conception of justice upon which to ground lawyers’ responsibilities in a nation as politically diverse and a legal culture as jurisprudentially conflicted as ours.

* * * *

Rhode fully appreciates the vagaries of public opinion as they bear on problems associated with the delivery of legal services in this country.¹⁵ Most Americans would agree with her that, in our highly legalistic society, access to those services is an important good.¹⁶ And

Blueprint for the Rekindling of Lawyer Professionalism (1986).

12. Rhode, *supra* note 3, at 17.

13. *Id.* at 82.

14. *Id.* at 82-98. I part company with Rhode, however, when, in an effort to undermine the argument that zealous advocacy in an adversary process promotes truth-finding, she suggests that, if the argument had much merit, then trial lawyers would hire competing investigators to collect evidence. This suggestion reflects a failure to distinguish between two kinds of disputes. In Type I disputes, a resolution exists that will uniformly enhance the outcomes for all interested parties, while other resolutions will reduce those outcomes. An example is a dispute between hunters about which path will lead them out of the woods. In Type II disputes, which are typical in litigation, the interests of the parties are opposed because any particular resolution is apt to enhance the outcome for one party at the expense of the other. Psychological research has suggested that in Type II disputes, adversarial presentation by the parties is apt to bring out important contextual factors that “are likely to be overlooked when information is developed from the narrower perspective” of the adjudicator, as it tends to be developed in non-adversarial systems. See John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 Cal. L. Rev. 541, 543-45, 550 (1978).

15. She is also discriminating in her support for measures that would increase the availability of legal services or reduce the need for them. She is skeptical, for example, about relying on no-fault compensation systems and alternative dispute resolution as alternatives to litigation. See Rhode, *supra* note 3, at 130 (stating that the former might reduce “deterrence and responsibility for wrongful conduct” while the latter might “offer insufficient procedural protections” for those who are unsophisticated or vulnerable to decisionmakers’ biases).

16. See *id.* at 53.

access could be improved if the public were mobilized to oppose the unnecessarily broad restrictions that Rhode rightly criticizes the bar and the courts for imposing on the provision of legal and law-related services.¹⁷ But mobilization is not in the cards, for reasons having less to do with professional resistance than with public attitudes. Public knowledge concerning the utilization and supply of legal services is abysmal, as Rhode illustrates by refuting the widely accepted claim that the United States is far more litigious and has more lawyers per capita than comparable nations.¹⁸ And Americans are "deeply divided" on access-to-justice issues.¹⁹ We may agree, Rhode writes, that everyone deserves "reasonable opportunities" for access to justice in order to satisfy "significant legal needs," but such terms mask a "host of complexities."²⁰ For example, many Americans are hostile to government-subsidized legal services for the poor, which the bar has long supported.²¹

* * * *

Professor Rhode finds serious weaknesses in the regulation of law practice, and she holds the courts largely responsible for having delegated too much authority to the bar, thereby spawning a cluster of "bar-controlled oversight structures" that inadequately protect societal interests and ineffectively respond to lawyer misconduct.²²

17. See *id.* at 135-41 (discussing overly restrictive bans on unauthorized practice of law).

18. *Id.* at 120-29.

19. *Id.* at 130.

20. *Id.* at 130-31.

21. *Id.* at 7 (quoting a legal aid lawyer's assessment that "[t]he only thing less popular than a poor person these days is a poor person with a lawyer," and noting that we spend far less per capita than other Western industrial societies on subsidized legal representation). Prior to 1970, the bar was at times hostile to public subsidies, just as the medical profession feared that "socialized medicine" would unduly constrain professional autonomy. Since the 1970s, the bar has supported funding for the Legal Services Corporation, most notably in the face of opposition by the Reagan administration. See Andrew L. Kaufman & Gerry Singen, *Legal Services in the 1980s*, in Andrew L. Kaufman, *Problems in Professional Responsibility* 547-50 (3d ed. 1989).

22. Rhode, *supra* note 3, at 19-20. Rhode presumably has in mind the ABA and traditional state and local bar associations, which formulate general standards for law practice, interpret them in ethics opinions, and enforce them in disciplinary proceedings. However, more specialized bar groups are gaining prominence and Rhode holds out some hope that they can influence practice for the better. She is heartened by the respect shown for the public interest, not just for lawyer and client interests, in practice guidelines that an ABA Tax Section committee and the American Academy of Matrimonial Lawyers have issued for lawyers in their fields—guidelines that could influence the standard of care to which lawyers are held in legal malpractice cases. *Id.* at 21. But she gives us no reason to expect specialty bars as a class to develop standards that are superior to the ethics codes designed for lawyers generally. Specialty groups may have a better grasp than general-purpose bar associations of the issues that confront lawyers in their fields, but it does not follow that they will produce standards more respectful of public as opposed to professional interests. The American College of Trial Lawyers and the American Trial Lawyers Association have formulated standards for trial practice, but Rhode criticizes both

These self-regulatory structures are not the only means of governing lawyers,²³ of course, but the bar takes pains to maintain their prominence in the regulatory mix.²⁴ They include the ethics codes the ABA formulates for judicial adoption and the bar-administered disciplinary process in which those codes are enforced.²⁵

Rhode's critique of the disciplinary process is forceful. She rightly decries the secrecy of the process, its reactive approach to enforcement, its reluctance to pursue grievances concerning a lawyer's fees or competence, its often inadequate funding, and its meager arsenal of sanctions.²⁶ Among those raising similar criticisms, some would go so far as to abandon the process.²⁷ Others call for reform, recognizing that the process does serve a distinctive need by governing lawyers' relations with unsophisticated clients²⁸ and

specialty groups for treating "undivided fidelity to each client's interests as the client perceives them" as the fundamental norm in trial practice. *Id.* at 15, 50 (internal quotations omitted).

23. Lawyers are also constrained by antitrust, malpractice, and fiduciary law, rules of judicial procedure, and rules issued by certain administrative agencies, in addition to market forces and reputational concerns. See Ted Schneyer, *Foreword: Legal Process Scholarship and the Regulation of Lawyers*, 65 *Fordham L. Rev.* 33, 35-36 (1996).

24. See, e.g., Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study*, 35 *Ariz. L. Rev.* 363, 363-64 & n.6 (1993) (referring to an ABA resolution urging that, in the interest of preserving an independent bar, lawyers be regulated through a judicially created bar disciplinary process and not by the other branches of government); see also Rhode, *supra* note 3, at 158 (referring to a survey of California lawyers, only twenty percent of whom thought the state bar was effectively administering the disciplinary system, but ninety percent of whom thought the bar should continue to administer it!).

25. For my evaluations of lawyers' self-regulatory institutions, see Ted Schneyer, *Professional Discipline for Law Firms?*, 77 *Cornell L. Rev.* 1 (1991) (calling for extension of disciplinary jurisdiction to law firms); Schneyer, *Professionalism as Bar Politics*, *supra* note 9 (reviewing ABA's process for formulating a new ethics code); Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 *UCLA L. Rev.* 67 (1981) (identifying weaknesses in ABA ethics opinions of the 1970s and in the procedures by which the opinions were developed).

26. Rhode, *supra* note 3, at 158-61. Professor Rhode also asserts that weaknesses in the disciplinary process have increased the number of civil suits and federal administrative proceedings against lawyers. *Id.* at 20. I doubt this. As she recognizes, malpractice suits are usually too expensive to pursue in order to remedy the low-level problems that typify disciplinary grievances. *Id.* at 159. And, in my opinion, federal agencies such as the Internal Revenue Service, Patent Trademark Office, and Securities Exchange Commission would seek some control over the lawyers (and the many nonlawyers) who practice in their fields, even if the traditional disciplinary process were more effective, just as judges seek direct control over trial lawyers by enforcing procedural rules and invoking their contempt power.

27. Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 *Tul. L. Rev.* 2583, 2591-99 (1996) (calling for dismantling the disciplinary process in favor of greater reliance on civil liability as a regulatory tool).

28. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 *Harv. L. Rev.* 799, 874 (1992) (stating that clients with complaints about "inattention, low-level negligence, overpayment, or conversion of trust funds will often be better served by the kind of

disbarring “bad apples.” Rhode is in the latter camp. She supports a number of sensible reforms to beef up enforcement and better inform the public about the process and the disciplinary records of individual lawyers.²⁹ To date, the bar has been able to block some of these reforms, but one cannot chalk this up to our traditional reliance on judicial as opposed to legislative oversight of the legal profession. As Rhode notes, “[l]egislatively created oversight agencies [for other professions] often suffer from the same problems of underfunding, delays, and capture by regulated groups.”³⁰

With respect to the ABA ethics codes, Rhode is particularly critical of rules governing the duty of confidentiality that lawyers owe to their clients.³¹ When her book was published in 2000, the Model Rules of Professional Conduct forbade lawyers to reveal confidential information in order to protect the public from being victimized by client wrongdoing except as necessary “to prevent the client from committing a criminal act that . . . is likely to result in imminent death or substantial bodily harm.”³² No disclosures were allowed in order to (1) prevent client crimes or frauds that would substantially harm third-party property or financial interests, (2) prevent death or substantial bodily harm that would otherwise result from non-criminal acts such as accidental spills of toxic waste, or (3) mitigate or rectify economic losses from client crimes or frauds in which the lawyer’s services were used.³³ Professor Rhode considers the protection that the Model Rules provide for client confidences far too absolute from a public perspective, though quite understandable from a professional perspective because it gives lawyers “maximum scope to protect their own interests and those of paying clients.”³⁴ I agree that further exceptions to the duty of confidentiality would be desirable.³⁵ But I do not put much stock in the public opinion survey data she offers in support of her position. Nor do I share her certitude that confidentiality rules written by laymen would require a broader range of disclosures for the protection of societal interests.

One rationale for requiring lawyers to keep client confidences is the assumption that clients would otherwise be less candid about their

flexible, informal, and relatively inexpensive procedures found in many disciplinary agencies than . . . by malpractice suits”).

29. Rhode, *supra* note 3, at 162-65.

30. *Id.* at 161.

31. *Id.* at 106-15.

32. Model Rules of Prof'l Conduct R. 1.6(b)(1) (1983).

33. Ethics rules promulgated by some state supreme courts contain broader exceptions to the duty of confidentiality than the Model Rules, but the exceptions “still are strikingly limited.” Rhode, *supra* note 3, at 110.

34. *Id.*; see also *id.* at 113 (calling further exceptions “steps in the right direction”).

35. I support exceptions permitting disclosure in the circumstances enumerated above; Rhode would go further and require lawyers to whistleblow on their clients in a number of circumstances in which the law does not currently permit or require disclosure. *Id.* at 114.

conduct and intentions, thereby affording lawyers fewer opportunities to counsel them against taking unlawful or unduly harmful courses of action. It is notoriously difficult to evaluate this assumption or, more precisely, to gauge the magnitude of the chilling effect on client communication that would result from recognizing broader exceptions to the duty of confidentiality. Rhode suggests the effect would be insignificant, but her discussion only illustrates the difficulty. As evidence that such exceptions would not significantly reduce client candor, she notes that “only about a third” of the clients surveyed in a study in upstate New York reported that they had given information to their lawyers that they would have withheld without a guarantee of confidentiality.³⁶ Yet one could interpret this finding differently: “Gee, as many as a third. And most of those respondents were probably not referring to information nearly as sensitive as an intention to commit a crime. Confidentiality must really be important!”³⁷

Professor Rhode considers the bar an unsatisfactory source of confidentiality rules where third-party interests are concerned because lawyers have a financial and ideological bias against making, or even contemplating, disclosures that their clients would regard as betrayals.³⁸ She thinks rulemakers more concerned “with the public interest undoubtedly would” permit and even require more disclosure.³⁹ But it is far from clear that lay rulemakers would be more concerned with “the public interest” as Rhode understands it.⁴⁰

Rhode suggests that the best confidentiality rules would emerge from a hypothetical process in which the rulemakers stood behind philosopher John Rawls’s “veil of ignorance”—i.e., acted without

36. *Id.* at 111; see also Fred C. Zacharias, *Rethinking Confidentiality*, 74 Iowa L. Rev. 351 (1989).

37. Lawyers and clients in the New York study were also given a hypothetical case in which the client, an airplane manufacturer, learns from a confidential investigation that one of the parts in its planes might explode at high altitudes. However, the part meets federal safety standards and the client decides that the data is too inconclusive to warrant public disclosure of the risk. Rhode finds it notable that only fifteen percent of the surveyed clients said that, if the law permitted the company’s lawyer to disclose the risk to the public, they would be less willing to use a lawyer’s services. Rhode, *supra* note 3, at 113. But, as the author of the study conceded, the other eighty-five percent “may well have assumed they would never be in a similar situation” or assumed that if they ever were in such a situation they could withhold the sensitive information from their lawyer. Zacharias, *supra* note 36, at 395 n.227.

38. Rhode, *supra* note 3, at 109-10.

39. See *id.* at 113 (identifying disclosure requirements recommended by ethics experts and bodies that have approached the issue from “a disinterested perspective”).

40. One reason why I presume that Rhode would favor a process for drafting confidentiality rules in which lawyers’ views were subordinated to lay views is that she embraces philosopher Sissela Bok’s position that the professions are “too insular and self-interested to make appropriate assessments” of their own confidentiality obligations. *Id.* at 112-13.

considering their positions in society and how the rules would affect them personally.⁴¹ But lay rulemakers might be no more able or willing than lawyers to stand behind the veil. And without the veil, they might very well act on their perceived interests as prospective clients with secrets to protect rather than as people who could be adversely affected by the unanticipated conduct of a lawyer's client.⁴² The American Trial Lawyers Foundation Code of Conduct, conceived as an alternative to the ABA's Model Rules, was produced by a committee that included several nonlawyers. Those nonlawyers were reportedly "shocked by the concept that a lawyer would reveal a client's secrets except in the most extreme circumstances."⁴³ They reminded the committee that it was producing "not just a Code of Conduct for lawyers, but a Bill of Rights for clients."⁴⁴ As one nonlawyer put it: "When I need a lawyer, I need him to be *my* lawyer. And if he isn't going to be *my* lawyer, I don't need him."⁴⁵

Conversely, there are signs that the bar, without discernible pressure from lay organizations, is coming to accept broader exceptions to the duty of confidentiality where vital third-party interests are at stake. The American Law Institute's new *Restatement of the Law Governing Lawyers* permits disclosure of confidential client information as necessary in order to prevent death or serious bodily harm (whether or not a crime would be involved),⁴⁶ to prevent clients from committing crimes or frauds that threaten substantial financial loss,⁴⁷ and to rectify or mitigate the losses sustained when such crimes or frauds occur and the lawyer's services were used to commit them.⁴⁸ An ABA commission recently proposed similar exceptions for the Model Rules,⁴⁹ though with mixed results.⁵⁰ Thus, even if lawyer self-interest shapes the bar's confidentiality rules, it is not inevitable that those rules will permit too little disclosure. Lawyers' perceptions of their interests sometimes *favor* disclosures

41. *Id.* at 113.

42. See Murray L. Schwartz, Comment, 37 *Stan. L. Rev.* 653, 655 (1985) (expressing doubt that the Model Rules would be very different if drafted by a team of nonlawyers).

43. Theodore I. Koskoff, *Introduction to The American Lawyer's Code of Conduct* (Roscoe Pound-American Trial Lawyers Foundation, Public Discussion Draft 1980), reprinted in *Trial*, Aug. 1980, at 44, 46, 47.

44. *Id.*

45. *Id.*

46. *Restatement (Third) of the Law Governing Lawyers* § 66 (2000).

47. *Id.* § 67(1).

48. *Id.* § 67(2).

49. Report of the Commission on the Evaluation of the Rules of Professional Conduct, ABA, Proposed R. 1.6(b), at 21 (Nov. 2000).

50. In February 2002, the ABA House of Delegates amended Model Rule 1.6 to permit disclosures to "prevent reasonably certain death or substantial bodily harm," but rejected proposals to permit disclosures to prevent or rectify client crimes or frauds that entail substantial financial loss. Compare *id.* with Ethics 2000-February 2002 Report 401, ABA, at http://www.abanet.org/cpr/e2k-202report_passed.html.

calculated to protect third parties from client wrongdoing. The willingness of the American Law Institute to recognize a right to blow the whistle on clients who are defrauding others, for example, reflects one influential lawyer's argument that lawyers must have discretion to disclose their clients' intended or ongoing frauds in order to protect their own reputations and avoid being sued for assisting in fraud.⁵¹

* * * *

Professor Rhode also relies on contestable contrasts between public and professional values or interests in developing her broader critique of professional ethics. That critique starts with the "guiding principle" that lawyers must "accept personal moral responsibility for the consequences of their professional acts."⁵² Lawyers all too often evade moral responsibility, according to Rhode, by "depend[ing] on a retreat into role that denies the need for reflection."⁵³ In other words, they blindly conform to what philosopher Richard Wasserstrom has called role-differentiated norms—i.e., rules and expectations that require lawyers by virtue of their role to "put to one side considerations . . . that would otherwise be relevant if not decisive."⁵⁴

The role morality that Rhode believes lawyers adhere to is, in her view, embodied in the traditional codes of legal ethics. If lawyers'

51. See Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get It*, 6 Geo. J. Legal Ethics 701, 720 (1993). Professor Hazard was Director of the American Law Institute while the *Restatement of the Law Governing Lawyers* was being developed. Institute members are all lawyers or judges.

52. Rhode, *supra* note 3, at 17. What it means to "accept moral responsibility for one's professional acts" is by no means clear. What Rhode seems to have in mind is a willingness to reflect consciously on the consequences of one's choices for all concerned, both before and after those choices are made, and to acknowledge the authority of nonlawyers to pass moral judgment on one's conduct on the basis of "commonly accepted ethical principles." On the various meanings that accepting moral responsibility or accountability can carry, see Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 J. Legal Educ. 11, 12-13 (1991) [hereinafter Schneyer, *Some Sympathy for the Hired Gun*].

53. Rhode, *supra* note 3, at 17.

54. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 Hum. Rts. 1, 3 (1975); see also Schneyer, *Some Sympathy for the Hired Gun*, *supra* note 52, at 12-13. Thus, insofar as rules of professional ethics encourage a lawyer to invoke the statute of frauds to help a client avoid a debt he really owes, but commonly accepted ethical principles (or the lawyer's own, off-the-job principles) require repayment, the lawyer's conduct, if it is to be justified at all, will have to be justified by reference to role-differentiated norms. Whether role-differentiated norms are a species of *moral* norms and, if so, whether they are the *only* species, are matters of some controversy among philosophers. Wasserstrom contrasts role-differentiated conduct with conduct based on "the moral point of view." Wasserstrom, *supra*, at 12, while Alasdair MacIntyre argues that rational moral evaluation *requires* seeing actors in social roles. Alasdair MacIntyre, *After Virtue* 169-209 (1981). Of medical ethics, MacIntyre writes that "[m]oral agency is embodied in roles such as that of the physician, the patient or the nurse," which are "mutually interdefined in terms of types of relationship." Alasdair MacIntyre, *What Has Ethics to Learn from Medical Ethics?*, 2 Phil. Exchange 37, 46 (1978).

energies are to be more effectively harnessed for the pursuit of justice, Rhode argues, then lawyers will have to “satisfy *commonly accepted ethical principles* [“CAEPs”], not just the minimal standards set forth in bar ethical codes.”⁵⁵ The codes may conflict with CAEPs for two reasons. First, code rules “reflect and reinforce” the principles of Neutrality and Partisanship, which exalt client loyalty above all else.⁵⁶ (Neutrality encourages lawyers to act without regard to the moral worthiness of a client or a client’s objectives; Partisanship encourages lawyers to pursue client objectives within, but all the way up to, the limits of the law.)⁵⁷ Second, code rules can be too categorical—i.e., insensitive to contextual factors. According to Rhode, it is itself a CAEP that “[e]thical obligations . . . *depend* on context,”⁵⁸ yet the lawyer’s role under the codes disregards or downplays moral considerations that laymen, at least, would consider highly relevant in particular lawyering situations.⁵⁹

55. Rhode, *supra* note 3, at 18 (emphasis added). It is common but often misleading to criticize standards in legal ethics codes for being “minimal.” Many rules of legal ethics represent trade-offs between such policy goals as promoting client candor by keeping confidences, on one hand, and protecting third parties from impending harm by disclosing confidences, on the other. One can sensibly argue that rules defining the lawyer’s duty of confidentiality give undue weight to one of these goals, but calling the rules “minimal” obscures the fact that they reflect a trade-off.

56. *Id.* at 51.

57. *Id.*; see also Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. Rev. 63, 82-83 (1980) (arguing that lawyers’ responsibilities are “entirely predetermined” by rules derived from these principles). For discussion of the role these principles have played in moral philosophers’ criticism of legal ethics, see Ted Schneyer, *Moral Philosophy’s Standard Misconception of Legal Ethics*, 1984 Wis. L. Rev. 1529, 1532-44; Schneyer, *Some Sympathy for the Hired Gun*, *supra* note 52.

Professor Rhode’s discussion of the Neutrality Principle is somewhat confusing. She wants lawyers to make judgments about the worthiness of the aims of prospective clients in deciding whom to represent. On the other hand, she thinks Neutrality is a useful value when cabined to encourage lawyers to represent clients who are so unpopular or detested that they find it difficult to obtain counsel. See Rhode, *supra* note 3, at 51-54. Contrasting the approach to Neutrality in American legal ethics codes, which caution that providing legal assistance should not be taken as an endorsement of the client’s views or activities but which permit lawyers to reject would-be clients, with the British “cab-rank” rule, which *requires* barristers to accept clients on a first-come, first-served basis, she praises the cab-rank rule as a “more demanding principle.” *Id.* at 60. So it is, but the rule also makes it easier for barristers to represent clients whom Rhode might regard as unworthy of representation, since barristers can always claim that they had no choice. In this respect, the rule may enable barristers to take *less* moral responsibility for their work than their American counterparts.

58. Rhode, *supra* note 3, at 51 (emphasis added); see also *id.* at 71 (stating that “[u]nder generally accepted ethical principles, context is critical”). This is news to me. The maxim “do not lie” is presumably a CAEP. Yet many people would reject the proposition that the morality of lying always or even usually depends on the context in which it occurs.

59. The ABA acknowledges that the Model Rules do not “exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.” Model Rules of Professional Conduct Scope para. 2 (2001). But neither the ABA, nor the courts that adopt those rules as law, regard

With this background, we can focus on the key elements in Rhode's critique of legal ethics as that field is understood within the mainstream of the bar: her hostility to role morality, her attraction to a "contextual view" of legal ethics, and her belief that lawyers' ethical choices should be guided by CAEPs and not by (or solely by) legal ethics codes.

It is not clear whether Professor Rhode means to attack role morality per se, or only a role for lawyers that is largely defined by the principles of Neutrality and Partisanship. She criticizes those principles for offering lawyers a "conveniently simplified moral universe"⁶⁰ when true moral responsibility requires a consideration of "all the societal interests at issue in particular practice contexts."⁶¹ Yet she indicates that fulfilling the "distinctive needs of lawyers' occupational role" is itself a societal interest.⁶²

In my view, role morality, narrowly and rigidly conceived, can be very unwholesome, but not all role morality is rigid and narrow. Moreover, role morality in professional practice has potential benefits that Rhode does not sufficiently credit. First, by limiting the considerations that actors must take into account, role morality can usefully coordinate the expectations of parties who find themselves in recurrent interactions, such as lawyers and clients, or lawyers and judges. Second, in fields such as law, where fateful choices must be made under serious time and information constraints, role morality may enable practitioners to act who would otherwise be paralyzed by a moral universe so complex as to constitute what William James called a "buzzing blooming confusion."⁶³ Third, role morality can foster accountability by identifying the parties—e.g., clients—to whom the practitioner's primary duties run.⁶⁴ Without identifying lawyers' primary obligees in advance, their actions might be virtually

them as so regularly in conflict with exogenous moral considerations that they should be treated as *rules of thumb*, which seems to be how Rhode would have lawyers and enforcers treat them. Cf. Simon, *supra* note 1, at 197-203 (supporting a "contextual view of legal ethics" and, thus, a disciplinary regime analogous to common law adjudication in legal malpractice cases, where norms "take the form of general standards, rebuttable presumptions, and illustrative cases"). Professor Rhode never expresses concern that treating ethics rules as rules of thumb in the interest of encouraging lawyers to think contextually could conflict with the practical goal of making lawyers legally accountable for their conduct by subjecting them *ex ante* to the governance of relatively unequivocal disciplinary rules.

60. Rhode, *supra* note 3, at 64.

61. *Id.* at 67.

62. *Id.*

63. William R. Bishin & Christopher D. Stone, *Law, Language and Ethics* 170 (1972) (quoting James).

64. See John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 *Cornell L. Rev.* 825, 841-42 (1992) (expressing concern that obscuring the legal distinctions between clients and nonclients in hopes of encouraging lawyers to take greater account of currently subordinate nonclient interests could enable lawyers more often to pursue their own interests with impunity).

unreviewable.⁶⁵ Finally, role morality guards against the risk that actors, biased by strong financial pressures or personal bonds and unconstrained by role, would *misapply* their own conceptions of justice or all-things-considered morality.⁶⁶ As Rhode herself notes, given the pressures of law practice, “attorneys may too often convince themselves that fundamental values [justify] noncompliance [with rules]. If the bar’s history is any guide, the clients most likely to benefit from such decision making would not be the poor and oppressed.”⁶⁷

The main problem with Rhode’s call for a more “contextual” view of legal ethics is the difficulty of clarifying how lawyers (or their regulators) should determine the import of contextual variables or how finely-grained their contextual analysis should be.⁶⁸ Rhode’s own intuitions about these matters do not suggest a methodology; they illustrate the problem. At several points, she draws a sharp contrast between advocacy in a criminal defense context and in civil litigation. She contends that the “justifications of neutral partisanship assume special force in criminal cases”⁶⁹ and rejects “[p]roposals to curtail advocacy for criminal defendants” (since strong pressures already work against effective representation),⁷⁰ while insisting that zealous partisanship is “not necessarily justifiable for civil litigation” because it can harm legitimate third-party interests.⁷¹ Elsewhere, however, she obscures the ethical significance of her civil-criminal contrast by contextualizing *within* the criminal defense field, as when she criticizes

65. There is an analogy here to the case against “corporate constituency statutes,” which permit or require corporate officers to take actions on behalf of their company that serve the interests of corporate “stakeholders” in addition to shareholders—e.g., bondholders, employees, or the local community. See Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 Tex. L. Rev. 579, 579-80 & n.2 (1992). Since these laws do not define or assign relative weights to the interests of the various constituencies, their effect in practice may be to make corporate decisions unreviewable on behalf of *any* constituency. See Thomas A. Smith, *The Efficient Norm for Corporate Law: A Neotraditional Interpretation of Fiduciary Duty*, 98 Mich. L. Rev. 214, 247 (1999) (noting that there is no consensus about how to define the legal duties that officers and directors owe to various corporate constituencies and calling the problem of defining those duties “difficult and perhaps intractable”).

66. In other words, “[t]he question of what values actual legal actors ought to hold in a world that is causally connected in particular ways must be seen as a complex question requiring positive as well as normative analysis.” Christopher T. Wonnell, *Problems in the Application of Political Philosophy to Law*, 86 Mich. L. Rev. 123, 155 (1987).

67. Rhode, *supra* note 3, at 78.

68. For a more sustained effort to identify contextual factors that should be considered relevant, see Simon, *supra* note 1, at 138-69.

69. Rhode, *supra* note 3, at 54.

70. *Id.* at 73.

71. *Id.* at 51. Rhode asserts, for example, that if a civil defendant has suffered no significant prejudice as a result of a plaintiff’s failure to file a substantively justifiable claim before the statute of limitations ran, the defendant’s lawyer should not invoke the statute to obtain a dismissal, despite the legal validity of that defense. *Id.* at 71.

lawyers who use “nuts and sluts” (i.e., blame-the-victim) defenses in rape cases.⁷²

Rhode also equivocates on the relevance of client poverty as a contextual factor. “Not all poor clients would be entitled to unqualified advocacy,” she writes, but “neither would factors *like* poverty be irrelevant *if* they affect the justice of a particular claim.”⁷³ Yet, she never identifies factors that in her view *are* like poverty, or the morally relevant characteristic such factors share with poverty, or the range of matters in which a client’s poverty would bear on the justness of a claim.⁷⁴ Instead, she concedes, as I think she must, that “in a profession as large and diverse as the American bar, different lawyers will make different judgments about what is in fact just.”⁷⁵ Since lawyers differ on this, one wonders why getting them to think contextually can be expected to promote justice—defined either objectively or by Rhode’s lights.⁷⁶

Professor Rhode does try to clarify how “general principles of moral responsibility [i.e., CAEPs] would apply in concrete legal settings.”⁷⁷ She does so by discussing several “hard cases.” One such case arises in representing welfare applicants. “Many impoverished clients,” she writes,

have compelling claims for assistance that the law fails to acknowledge. . . . To meet basic subsistence needs, indigent clients typically have no alternative but to supplement their governmental support with unreported income. . . . Lawyers who become aware of [these] awkward financial facts confront difficulties of their own.

One of my own first cases, as a law student working for a legal aid office, involved precisely this situation. It appeared obvious from our client’s circumstances that she had undisclosed income that would have made her technically ineligible for benefits. But without that support she would have lost the chance to finish an educational program that could help her escape poverty. . . . [S]he seemed to be precisely the kind of recipient whom the statutory scheme was designed to help. Our office had to decide whether to provide

72. *Id.* at 101.

73. *Id.* at 79 (emphasis added).

74. Professor Rhode does discuss one concrete situation in which she thinks a client’s poverty would be a morally relevant factor justifying the use of an “evasive strategy” by lawyers that would otherwise be improper. See *infra* note 78 and accompanying text.

75. Rhode, *supra* note 3, at 79.

76. In fairness, I must admit that Rhode offers no guarantees that a more contextualized approach to legal ethics will promote justice. She grants that “[t]he full effects of [the] approach are difficult to predict,” *id.*, and indicates that its advantage “is not that it promises bright-line answers but, rather, that it promotes ethically reflective analysis and commitments.” *Id.* at 71. Still, I take Professor Rhode to be interested in promoting justice, not reflection for reflection’s sake.

77. *Id.* at 71.

assistance that might help her maintain benefits to which she probably was not entitled.⁷⁸

Rhode never tells us for sure, but I infer that the office helped the client prepare and file sworn documents that materially misrepresented her income. Since it was "obvious" that the client had undisclosed, disqualifying income, the lawyers presumably knew they were assisting her in a crime or fraud,⁷⁹ at least as the term "knew" is used on the street. Rhode considers it morally justified and "most compatible" with her contextual ethical framework for lawyers to provide help in such cases "as long as they refrain from illegal conduct such as knowing presentation of perjury or preparation of fraudulent documents."⁸⁰ Two questions come quickly to mind: How does Rhode escape the conclusion that helping clients in such cases constitutes knowing assistance in fraud and thus is illegal? And what "commonly accepted ethical principle" would justify the lawyers' assistance?

On the first question, Rhode declines to rely on the sort of jurisprudential escape hatch that her colleague, William Simon, might offer. As she reports, Simon argues that lawyers have a duty to pursue "substantive justice" and that this duty can "authorize noncompliance with formal legal requirements," just as the pursuit of substantive justice can justify jury nullification of an out-of-date or unduly harsh penal statute.⁸¹ As she describes Simon's view, (1) lawyers should have "discretion to disregard legal rules that . . . compromise fundamental values," and (2) "rules that irrationally withhold minimal welfare support might justify such noncompliance."⁸² Simon is not claiming that lawyers should exalt their own *moral* values over their duty to obey the law, but rather that law itself is coterminous with substantive justice.⁸³ Because Simon

78. *Id.* at 76-77. Rhode presumably thinks the undisclosed income made the client only "technically" ineligible on the theory that (1) welfare programs exist to assist applicants who, like this one, will put their assistance to good use in an effort to escape poverty and (2) officials who set income limits so low as to disqualify such applicants are irrationally disserving that goal. But if the "technically ineligible" did not try to qualify for aid by hiding income, more aid might be freed up for others, with no income to hide, who would put the aid to equally good use—who, in other words, would be more than "technically" eligible.

79. If so, they might have committed a crime and would have violated ethical bans on knowingly assisting clients in crimes or frauds. See Model Rules of Prof'l Conduct R. 1.2(d) (1983); Model Code of Prof'l Responsibility, DR 7-102(A)(7) (1983).

80. Rhode, *supra* note 3, at 77.

81. *Id.* I am mystified by Simon's unqualified enthusiasm for giving lawyers discretion to disobey legal commands on the basis of an analogy to jury nullification, because he acknowledges that many disturbing instances of jury nullification have occurred, notably in the South in trials of white killers of blacks and civil rights activists. Simon, *supra* note 1, at 84.

82. Rhode, *supra* note 3, at 77.

83. Simon, *supra* note 1, at 79-108 (contrasting "positivist" theories of law with his own "substantive" conception of law and attempting to show that the latter plays a

takes the position that assistance for the poor is inscribed as a fundamental value *somewhere* in American law,⁸⁴ he might argue that it can override a lawyer's duty, inscribed in other law, to refrain from knowingly assisting in fraud, and that *on balance* the lawyers who helped Rhode's welfare client should not be deemed to have acted unlawfully.⁸⁵

Rhode expressly rejects Simon's "troubling" analogy to jury nullification as a way to justify lawyer noncompliance with formal legal requirements.⁸⁶ And she refuses to condone in any context "illegal conduct *such as* knowing presentation of perjury or preparation of fraudulent documents."⁸⁷ Her position is rather that, when it would serve commonly accepted ethical values, lawyers should be permitted, if not expected, to use "evasive strategies that [are] not *technically unlawful*" in order to pursue client objectives that are not "substantively justified,"⁸⁸ including the objective of obtaining welfare benefits for a "technically ineligible" client. "Selective ignorance"—avoiding "knowing" assistance in a crime or fraud by avoiding any information that would clearly reveal it—is such a strategy. Rhode suggests that, by resorting to that strategy, lawyers in the legal aid office were able to assist their client without "knowingly"

significant role in American legal culture); *id.* at 138 (stating that decisions about justice are neither "assertions of personal preferences" nor "applications of ordinary morality," but instead are "legal judgments," albeit judgments sensitive to the fact that law includes "many vaguely specified aspirational norms").

84. See *id.* at 148-49 (describing a right to basic assistance for those with incomes below the federal poverty line as one that has been recognized in "some contexts").

85. I presume that Simon would consider lawyers justified in assisting a welfare client under the circumstances Rhode describes. But given the open-endedness of his "substantive" theory of law, I cannot be certain. Even if it were contrary to a fundamental legal value for a state to deny welfare benefits to someone whose income was below the federal poverty line (but who, taking unreported income into account, was ineligible for benefits under state law), the pot of welfare funds is limited. It would not disserve the purpose of welfare and thus be irrational to withhold from that applicant benefits that would go instead to an otherwise similar applicant whose *total* income made her eligible. Moreover, Simon elsewhere argues that if lawyers have reason to think an agency will be unable to get the information needed to review the merits of a client's filing (e.g., a tax return), the lawyer should try to remedy agency ignorance by, for example, flagging the issue. *Id.* at 142-43. But "flagging" their client's undisclosed income would have been the last thing on the minds of the lawyers who assisted Rhode's welfare applicant, even though welfare agencies would seem to be in no better position than the IRS to discover unreported income.

86. "We can accept nullification," she writes, because it is "public and subject to some limited review" whereas lawyers' decisions to disobey the law "lack such accountability." Rhode, *supra* note 3, at 78. I do not grasp this distinction. The reasoning seems inapplicable to nullification by criminal juries. It is not always clear when a jury has engaged in nullification, nor is nullification by criminal juries subject to effective judicial review.

87. *Id.* at 77 (emphasis added). By using the words "such as" in the quoted phrase, Rhode obscures the range of illegalities she has in mind.

88. *Id.* at 77-78 (emphasis added). She describes this as the position "most compatible" with her "contextual ethical framework." *Id.* at 77.

assisting in the client's misrepresentations of her income to the agency.⁸⁹

Here, it is Rhode who puts the word "knowingly" in scare quotes, which is itself an evasive strategy. What it evades is a difficult legal issue—whether it was lawful for lawyers to assist the welfare client when it was "obvious" that she had undisclosed income, or was instead a violation of the ethics rules (and perhaps penal statutes) forbidding knowing assistance in fraud. Rhode cites nothing in support of the view that this was lawful. Although an important ABA ethics opinion has hinted that, for purposes of the ethics rules, lawyers should not be deemed to know of a client's intention to commit fraud unless the client acknowledges it,⁹⁰ Rhode has described that opinion elsewhere as "clear[ly]" recognizing that a lawyer can be deemed to know that a client intends to commit perjury (i.e., fraud on a tribunal) without the client admitting it.⁹¹ Because she never fleshes out an argument that the legal aid lawyers were indeed operating within the bounds of the law, Rhode's effort to distinguish her position from Simon's fails.

Moreover, her position countenances the kind of "it-depends-on-the-meaning-of-sex" equivocation by lawyers that the public deplores—and deplores, in my judgment, whether it is used to benefit the wealthy and powerful *or* the poor. The question becomes whether Rhode is nonetheless able to identify a *commonly* accepted ethical principle that justifies "selective ignorance" on behalf of a welfare client when, at least for Rhode, the same strategy would be indefensible in other contexts.

The answer is no. While noting that Congress has tried to bar government-funded poverty lawyers from lobbying and pursuing reform litigation for welfare clients,⁹² Rhode refuses to rely on that point. She claims that "conventional ethical principles [would] justify" selective ignorance on behalf of welfare clients even if reform

89. *Id.* at 78.

90. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 87-353 (1987) (stating that in the "unusual case where the lawyer does know, on the basis of the client's clearly stated intention, that the client will testify falsely at trial, . . . the lawyer cannot examine the client in the usual manner"). However, this statement comes in the context of discussing when a criminal defense lawyer should be deemed to know that her client intends to commit perjury. As noted earlier, Rhode argues that the justifications for zealous advocacy have "special force" in the criminal context. See *supra* notes 69-71 and accompanying text. And, without focusing on context, Rhode has chastised lawyers for trying to justify their conduct by "epistemological demurrer"—i.e., a "skeptic's claim to ignorance" about the merit or truth of a client's position. Rhode, *Ethical Perspectives*, *supra* note 9, at 618-19.

91. Deborah L. Rhode & David Luban, *Legal Ethics* 271 n.42 (3d ed. 2001).

92. Rhode, *supra* note 3, at 78. In 2001, the Supreme Court ruled that these restrictions violated the First Amendment, and thus struck them down. *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001).

prospects were better.⁹³ Unfortunately, the closest she comes to articulating such a principle is this: "An impoverished mother struggling to escape welfare stands on different ethical footing than a wealthy executive attempting to escape taxes."⁹⁴ The problem with this "principle," as Monroe Freedman points out, is that even political conservatives like Rush Limbaugh could embrace it, but their understanding, contrary to Rhode's, would be that the *executive* has the firmer footing!⁹⁵ In other words, the principle as Rhode intends it is not a principle the public holds in common; it is deeply contested. Given her treatment of this "hard case" one suspects that, although lawyers of various stripes might find a "contextual ethical framework" rhetorically useful in accounting for their own evasive strategies, the framework will rarely justify evasion for the sake of promoting justice in any sense on which there is public (or professional) consensus. Most legal ethicists will wish for firmer ground to support their views about how lawyers should behave.⁹⁶

Similar problems crop up in Rhode's treatment of the "hard cases" that often arose as late as the 1970s,⁹⁷ when, despite changing mores, some states continued to require petitioners to establish grounds such as adultery or cruelty in order to obtain a divorce. Rhode identifies an evasive strategy that lawyers used to obtain divorces for their clients where the law recognized physical cruelty as a ground but required proof of two physical assaults separated by a cooling-off period. "[I]nventive lawyers orchestrated compliance," she writes, by "witness[ing] one spouse gently slap the other twice, with a civilized lunch break in between."⁹⁸ Rhode thinks this was "not technically unlawful,"⁹⁹ but, again, its lawfulness is unclear—unless one regards whatever conduct enforcers tolerate as *ipso facto* lawful. The trouble is that gently slapping one's spouse with his or her consent is clearly not a legal assault. Relying on such slaps as the requisite assaults for filing divorce petitions may well have violated ethical¹⁰⁰ or procedural rules¹⁰¹ barring frivolous claims. One thing that can be said in favor of

93. *Id.* at 79.

94. *Id.* I presume that Rhode would place the impoverished mother on a higher plane of moral desert than the wealthy executive even if the latter, unlike the former, was not lying to the government about her income.

95. Monroe H. Freedman, *How Lawyers Act in the Interests of Justice*, 70 *Fordham L. Rev.* 1717, 1726 (2002).

96. See Ted Schneyer, *Some Sympathy for the Hired Gun*, *supra* note 52, at 19-20 (discussing the limitations inherent in theories of legal ethics that are clearly driven by the aim of enlisting the legal profession in the pursuit of one political perspective at the expense of other perspectives within mainstream American politics).

97. Rhode, *supra* note 3, at 78.

98. *Id.*

99. *Id.*

100. See, e.g., Model Code of Prof'l Responsibility DR 7-102(A)(2) (1983).

101. See, e.g., Fed. R. Civ. P. 11.

Simon's jurisprudence is that, unlike Rhode, he tries to grapple with such complexities.

I hasten to add that, personally, I am not scandalized by the divorce lawyers' strategy. And, although I am discomfited by Rhode's certitude that lawyers act lawfully when they assist a welfare applicant who "obviously" has unreported, disqualifying income, I cannot certify that I would behave differently in their shoes. Moreover, I firmly believe that my political values are much closer to Deborah Rhode's than to Rush Limbaugh's. But unlike Rhode, I would not present these "hard cases" to the public in order to clarify an "alternative vision" of how lawyers should pursue justice. My view is instead, the less said about them, the better. We do not appear to need a new vision of legal ethics in order to get lawyers to behave as they have in Rhode's hard cases. Besides, I would not wish to give Mr. Limbaugh any ammunition!