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The First Annual Thomas W. Henderson Lecture in Legal Ethics at Duquesne University School of Law *presents* William H. Simon: Thinking Like a Lawyer — About Ethics*

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* This is the edited text of a panel discussion held as part of the legal ethics curriculum at Duquesne University Law School on October 24, 1999. The speakers have had the opportunity to update and correct this text; therefore, this printed version may deviate slightly from what was presented.

1. Keynote speaker; the Kenneth and Harle Montgomery Professor of Public Interest Law at Stanford University.

2. Moderator; Thomas W. Henderson Distinguished Professor of Legal Ethics, Duquesne University Law School, B.S., M. Div., J.D.

3. Panelist; Professor of Law, Duquesne Law School, B.S.F.S., J.D.

4. Panelist; Associate Professor of Law, Duquesne Law School, A.B., M.L.S., J.D.

5. Panelist; Professor of Scripture and Chair of Theology, Duquesne University, M.A., S.T.L., L.S.S.

Dean Nicholas P. Cafardi[6]
Thomas W. Henderson, Esq.[7]
The Honorable Ronald W. Folino[8]

PROFESSOR TAYLOR: Thank you all for being here. It is my real pleasure this afternoon to officially open the first Thomas W. Henderson Lecture in Legal Ethics.

This lecture is one that is dedicated to bringing cutting-edge thinkers in legal ethics to this law school and the university. With the generous gift of money from attorney Tom Henderson, we at Duquesne University School of Law have been fashioning legal ethics and professional responsibility as a unified motif of our legal curriculum. First, we have increased the credit hour requirement towards professional responsibility. Second, this theme has been built into our first-year courses, our orientation program, and our legal research and writing courses. Third, we have an ongoing faculty study group, as well as a study group of alums and faculty, who are currently engaged in reading and discussing philosophical and ethical texts. Finally, we have been purchasing books and videotapes on professional ethical themes for use by professors and students.

Our ultimate desire, our wish list, so to speak, is to lay the foundation for a new discipline, a new discipline, namely, a discipline of comparative professional ethics under the theme of professional leadership for the new millennium. You can read about these and other matters in my regular column, in *Juris* [Duquesne Law School's award-winning newsmagazine], called *The Ethics Corner*, which will be appearing shortly.

Be this as it may, this academic year's high point commences this afternoon because it is our good fortune to have with us William H. Simon. You all know him as the author of the book that has been assigned reading, *The Practice of Justice, A Theory of Lawyers' Ethics*[9] published by Harvard University Press. This book has stimulated, prompted, caused, occasioned a vigorous discussion in the academic community and among practitioners, both the bench and the bar.

Bill has consulted widely on legal ethical matters and is active in various legal aid programs. He has been teaching law now at

6. Panelist; Dean and Professor of Law, Duquesne Law School, Ph.B., M.A., J.D., J.C.L.
7. Panelist; Distinguished Alumnus, Duquesne Law School, J.D.
8. Panelist; Judge, Court of Common Pleas, Allegheny County, Pennsylvania.
9. William H. Simon, The Practice of Justice, A Theory of Lawyers' Ethics (1998).

Stanford for approximately eighteen years, has been a visiting professor at Harvard Law School and the University of California, Berkeley School of Law. Prior to his career in teaching, he practiced for several years, first as a courtroom litigator, and later as a legal aid lawyer specializing in welfare matters.

Among his recent publications are *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, which appears in *Law and Social Inquiry*.[10] His most recent article has an intriguing oxymoronic title of *Virtuous Lying*, subtitled *A Critique in Quasi-Categorical Moralism*, which appears in the *Georgetown Journal of Legal Ethics*.[11]

In addition to various projects on professional responsibility, he is presently engaged in the study of lawyer participation in community economic development activities in low income communities.

And I would also at this time like to introduce our distinguished respondents, starting here with the Honorable Ronald Folino. He is with the Court of Common Pleas of Allegheny County. Next, we have Attorney Thomas W. Henderson himself, whose generosity has made this discussion possible; Dean Nicolas P. Cafardi, Dean of this law school; of course, Bill Simon, our speaker; Father Sean P. Kealy, who is Chair of the Department of Theology of Duquesne University; and Duquesne University School of Law Professors Margaret Krasik and Bruce Ledewitz.

It is now my pleasure to give you Professor Simon, who will address you on the theme of thinking like a lawyer—about ethics.

PROFESSOR SIMON: Thank you. It's a great honor to be here. I'm thrilled by your interest in my book. I'm thrilled even though I recognize that the interest is compulsory.

I want to thank Mr. Henderson for his support of this project, for making this possible. I'm very grateful to Dean Cafardi. I want to thank you for the wonderful hospitality that I've been shown, and to Bob Taylor for setting this up.

You are fortunate to have such an ambitious and stimulating ethics program. In fact, at Stanford, we are revisiting our ethics curriculum right now, and I'm going to take some of the ideas that I've gotten from my visit back with me and talk to some people

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10. William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 L. & Soc. Inquiry 243 (Spring 1998).

11. William H. Simon, *Virtuous Lying: A Critique of Quasi-Categorical Moralism*, 12 Geo. J. Legal Ethics 433 (1999).

about possibly adapting them to our circumstances.

Let me begin by asking you to imagine that you're walking down the street in your hometown, and an old high school acquaintance, who we'll call Clyde Barrow, approaches you. You remember Clyde as a loser; a poor student, often in trouble with the authorities, but an appealing guy with a friendly manner and a sense of humor. He tells you that he's here to rob a bank, but that the confederate who is supposed to drive the get-away car hasn't shown up. He asks you to step in and help out.

Now, before I proceed, let me allay your suspicions. I am not going to argue that lawyers are like bank robbers. This is not going to be an extended lawyer joke. I think lawyers are very different from bank robbers. I think they occupy an honorable social role. But I think it's important to think about the ways in which they are different from bank robbers and from other actors in this society, and to think about wherein their social honor lies. And my story is designed to remind us of those differences.

Of course, you're shocked at Clyde's suggestion, and you say no. Clyde is hurt at your glib response. "You're being selfish and insensitive," he says, "I'm on the spot. I need help. You're the only one I can turn to. I remember from high school that you're an excellent driver. You have a valuable skill that you can use to help others. And anyway, there's no one else here I know. This job has to be pulled off before they close the vaults at 5 o'clock."

You say to Clyde that, if he's really desperate, you'll lend him some money, but you think that robbing banks is wrong. He becomes indignant. "How can you be so paternalistic?" he says. "Who are you to impose your values on me? You're arrogating to yourself the power to decide the difference between right and wrong. You're playing God. How about some respect for my freedom as an individual?"

You answer that you do respect him as an individual, but you feel you owe some respect to the bank as well. "There you go again," he replies, "always siding with the big guys. Here I am, all by myself, facing the immense power of concentrated wealth, and you won't lend me a hand." "It's not fair to steal, even from the wealthy," you say. "Talk about fair?" he comes back. "Every day guys are getting away with jobs like this. The only difference between them and me is that they've got more reliable help. Is it my fault that my partner bailed on me? All I'm asking for is an equal chance."

So now, a little taken aback, you play your trump card: "Clyde,

it's illegal," you say. "Says who?" he asks. "Well," you reply, "Section 477 of the State Criminal Code makes it a crime to 'appropriate by force or fraud' funds from any bank within the state."

Clyde says, "Yeah, I've read that section, but I don't think it's applicable. I'm planning to go in with a toy gun, point it at the teller and ask him, real nice, to hand over the money. I figure as long as it's a toy gun, there's no force; and as long as I don't say it's real, there's no fraud."

You inform Clyde that this ploy has already been anticipated in the case of *State versus Parker*, where the state supreme court upheld a conviction under Section 477 of a defendant who used a toy gun.

"I read that case," Clyde says. "It's not on point. The guy there was using a toy semiautomatic. I'm going to use a toy handgun."

You tell him you don't think that's a relevant distinction. And he replies, "Who are you to say? You're not a judge. You're not a state official. This isn't one of those totalitarian societies where every private citizen is supposed to act like a lackey of the state." Then he adds, "Anyway, aren't I innocent until proven guilty?"

"Well, that doesn't mean we can deliberately commit a crime," you say. "But after we do it, we'll still be innocent until proven guilty, right?" he asks. "Yes," you answer. "And if they never prove us guilty, we'll always be innocent." "Well . . . " "So let's just do it and stay innocent."

Now, let's consider what distinguishes lawyers from people who drive get-away cars in bank robberies. It isn't that they help people in need. It isn't that they protect people's freedom. It's not that they stand against the power of the state and concentrated wealth on the side of the isolated individual. The difference lies in the fact that they protect our clients' rights. Rights are different from freedom, because rights are designed to allow a fair measure of freedom on the part of others.

Now, the term "right" connotes two fairly different types of judgment or analysis to the lawyer. On the one hand, "right" can be the conclusion of a fairly mundane, straightforward reading of a legal rule. If the rules say you can park twenty minutes where the curb is painted green, you have a right to park twenty minutes where the curb is painted green. On the other hand, "right" also connotes a more ambitious and difficult claim that implicates more basic values, the rights of due process or freedom of expression, for example, that call for complex judgments about important

issues of justice.

Sometimes we tend to identify the practical tasks of lawyering with the more mundane and simple types of judgment. For example, the legal theorist T.R. Powell once opined, "If you can think of a subject that is inter-related and inextricably combined with another subject without knowing anything or giving any consideration to the second subject, then you have a legal mind."[12] He didn't intend this as flattery, however.

More flattering and more directly relevant to our subject is Lord Brougham's famous description of the advocate's role. He pronounced it in the course of the Trial of Queen Caroline in 1820. "An advocate," he said, "knows but one person in the world: the client, and none other. He must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other."

Lawyers love to quote this speech and to note its stirring context. Brougham was defending Queen Caroline against charges of adultery brought by her husband, the King of England. He had in his possession documentary evidence, the King's will, of a prior secret marriage by the King, and he was giving notice that he was prepared to offer this evidence even though some feared it might bring down the monarchy.

Now, this conception of lawyer judgment as simple, single-minded judgment continues to exercise a powerful hold on the field of legal ethics. One of the most common objections to ethical arguments that impute responsibility to lawyers to protect the interests of non-clients, other than interests that are unambiguously protected by explicit specified rules, is that such responsibilities entail difficult judgments. People speak as if asking the lawyer to make such judgments would be an intolerable burden. Or alternatively, they note that there's often disagreement about such judgments, and they imply that they couldn't have a workable regime of professional regulation that depended on judgments about which people disagreed.

When the American Bar Association produced the *Model Rules of Professional Conduct* in 1983, they largely capitulated to objections of this kind. One of the main goals of the drafters of the rule was to produce a code that did not require difficult judgments. The rules provide a "black letter rule for every case," as one of its drafters boasted.[13] In many jurisdictions, as you know, legal ethics

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12. *Reprinted in* THURMAN ARNOLD, FAIR FIGHTS AND FOUL 20-21 (1965).

13. *See* Geoffrey Hazard, *Legal Ethics: Legal Rules and Professional Aspirations*, 30

is the only subject tested on the bar exclusively on a machine-graded, multiple choice basis. Instructors in bar review courses routinely warn their charges not to think too much about the questions on the Multistate Professional Responsibility Exam. "What's being tested is your memory, not your ability to think," they say.[14]

However, when we turn from the realm of professional ethics, we find a different picture of legal judgment, at least in some areas. In some areas, favorable portrayals of lawyering associate it with an ambitious style of judgment. So compare Powell's disparaging characterization of legal judgment mentioned above to Cardozo's proud credo, announced, of all places, in an opinion interpreting a tax statute: "Life in all its fullness must supply the answer."[15]

Or, closer to home, think of the law school curriculum, especially the first year. We don't introduce students to "thinking like a lawyer" with black letter rules. You can go for weeks without seeing any. Instead, we focus on case analysis, especially ones that involve complex circumstances and difficult issues. The lesson, more often than not, is that there are no categorical answers. Each case stands for a principle that has to be given meaning through an analysis of a particular constellation of facts. Think of *Hawkins v. McGee*,[16] the case of the "hairy hand," which many of us, including some of you, were introduced to in the first year of law school. You came in thinking that determining the damages for negligent hand injury would be a fairly mechanical matter. You're then made to recognize that the general principle was compatible with at least two broadly different understandings of damage: the expectation approach, the difference between the hand as warranted and the hand the plaintiff ended up with; and the reliance approach, the difference between the hand he started out with and the hand that he ended up with.

Neither of these rules will satisfactorily resolve all of the cases. Once we figure which one applies, we have to engage in a painstakingly contextual examination of the circumstances to apply

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Clev. St. L. Rev. 571, 574 (1982).

14. *See* Jamie Heller, *Letter to the Editor*, N.Y. TIMES, Dec. 16, 1994, at A38.

15. Welch v. Helvering, 290 U.S. 111 (1933) ("Here, indeed, as so often in other branches of the law, the decisive distinctions are those of degree and not of kind. One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle.").

16. 146 A. 641 (N.H. 1929).

it.

A few months later, you study the *Palsgraf* case,[17] in which you learn that causation is not just a fact that you observe mechanically, but a policy judgment that can only be effectively applied to an understanding of the particular circumstances.

Of course, we eventually do encounter a few rigid rules. For the most part, however, they're either for people we don't trust, the *Miranda*[18] rules for the police, or issues we don't care much about, like the "mailbox" rule for a contract problem that almost never arises.

For the people we trust and the issues we care about, we have norms of complex judgment, like due process, reliance, and reasonableness. We don't leave these norms in their unelaborated state. But instead of reducing them to black letter rules, we elaborate them through rebuttable presumptions and illustrative cases. A rebuttable presumption is a rule that we follow only after we've determined that there are no circumstances that make it inappropriate to do so in the case. An illustrative case is a norm that we follow only after we've determined that the present case is relevantly similar to it.

Or, again, think of malpractice adjudication. The standard of care applied there to the lawyer is not defined in terms of black letter rules. Lawyers can't defend against claims for negligence simply by showing that their actions were not prohibited by the rules. And plaintiffs can't establish liability simply by showing that the lawyer has violated a black letter rule. Violation is only evidence of negligence — a rebuttable presumption of negligence. The judgments that lawyers owe their clients under the negligence law is not rule-bound, but complex and contextual, a judgment that applies a wealth of partly tacit understanding to the full range of circumstances of the case.

Justice O'Connor recognized this in explaining in *Strickland v. Washington*[19] why the Supreme Court should not attempt to spell out in black letter the meaning of effective assistance of counsel for a criminal defendant:

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions

17. Palsgraf v. Long Island R. Co., 162 N.E. 99 (N.Y. App. Div. 1928).
18. Miranda v. Arizona, 384 U.S. 436 (1966).
19. 466 U.S. 668 (1984).

regarding how best to represent a criminal defendant.[20]

Even the ABA *Model Code of Professional Responsibility*[21] ("*Code*") — and here I'm talking about the first set of model norms that the ABA promulgated in 1970 — when it's not talking about the duties to third persons or to the public, speaks of lawyer judgment in this kind of term. Especially revealing is Ethical Consideration 3.5 on unauthorized practice.[22] Here, the *Code*, in explaining why lay people should not be allowed to practice law, stops to acknowledge that some lay people, real estate brokers and tax accountants, can, in fact, follow black letter rules in the areas in which they practice. But, the *Code* says, the distinctive talents of lawyers are called for in matters that require "professional judgment."[23] The *Code* then explains, "The essence of the professional judgment of a lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem."[24]

Now, my suggestion is that professional judgment, conceived precisely in this way, ought to play a larger role than it does in legal ethics doctrine. The fundamental injunction of this doctrine ought to be the one that the first ABA *Code*, again the *Model Code of Professional Responsibility*, reserves for government lawyers, *to seek justice*. And while this general norm should be fleshed out in terms of more specific ones, the specific ones should take the form not of black letter rules that obviate judgment, but of contextual standards that engage the lawyer's capacities for complex

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20. *Strickland*, 466 U.S. at 688-89.

21. Model Code of Professional Responsibility (1969).

22. Model Code of Professional Responsibility EC 3-5 (1980), which states in full as follows:

> It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, non-lawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.

Id.

23. *Id.*

24. *Id.*

reflection.

For example, instead of the *Code's* categorical confidentiality norm,[25] we should have a norm that mandates the lawyer to keep confidentiality except to the extent disclosure is necessary to avert substantial injustice. Justice, as I mean the term, is not an extra-legal concept. I follow the preambles of both of the ABA model codes in understanding justice as the most basic and inclusive of legal norms. The term, as I use it, is more or less synonymous with legal merit. This means that all the sources of authority, all the analytical methods that lawyers draw on for ambitious professional judgments and other contexts, are available in matters of legal ethics. The values of justice and legal merit can be made more concrete by courts and other law-making institutions promulgating norms for government and professional practice. The elaboration, however, should be in the manner of the common law rather than the manner of the regulations of, say, the Occupational Safety and Health Administration. The norms should take the form of rebuttable presumptions and illustrative cases rather than rigid rules.

Now, a legal ethic of complex judgment grounded ultimately in the value of justice is not incompatible with strong loyalty to the client. The loyalty, however, has to be to the client's rights, not just to her interests. Loyalty to the client's rights is, I submit, what is really being celebrated in the heroic portrayals of advocacy, such as the Trial of Queen Caroline, although Brougham's statement about knowing "only the client" and asserting her rights "at all costs" is usually taken as a rhetorical banner for the mainstream or dominant view of legal ethics. That was not what was going on in the Trial of Queen Caroline. Brougham's threat, the news of this devastating evidence, was based on a far more complex set of judgments than simply that it might serve his client's interests to disclose the King's will.

In the first place, Brougham believed that his client was factually innocent of the acts with which she was charged. In the second place, the secret marriage that was disclosed in the smoking gun document was relevant to an important substantive defense. If the King had been married previously, then his later marriage to Queen Caroline was invalid, and she was legally incapable of adultery. In

25. Model Code of Professional Responsibility DR 4-101(B) (1980), which states in pertinent part that "a lawyer shall not knowingly: (1) [r]eveal a confidence or secret of his client, (2) [u]se a confidence or secret of his client to the disadvantage of the client, [and] (3) [u]se a confidence or secret of his client for the [lawyer's] advantage." *Id.*

the third place, Brougham shared the popular view that even if the charges had been true, this extraordinary prosecution would have been inappropriate, given the King's abusive mistreatment of his wife throughout the marriage, including numerous infidelities on his part. Finally, Brougham's defense was part of the Whig parliamentary party's campaign to limit the authority of the monarch who was wildly unpopular for what most of us would today consider good reason.

Now, at least some of these additional factors figure strongly in the romantic connotations of Brougham's advocacy. Notwithstanding Brougham's description of his role, had his case been without merit, had the devastating evidence been irrelevant, had his defense been in the service of an ugly political cause, it would not serve its inspiring role. Yet, none of these additional factors are captured in Brougham's simplistic self-description, which, on its face, might just as well apply to a lawyer threatening to cross-examine a truthful rape complainant on her sexual history.

To say that a lawyer should seek justice is not the same thing as saying she should work to advance whatever outcome she unilaterally decides is just. Justice is procedural as well as substantive. This means, for one thing, that certain procedures should be regarded as rights in themselves and independently of their tendency to produce just outcomes. It also means that one of the best guarantees of a substantively just outcome is a fair procedure. Lawyers often do not need to make, or act on, judgments about what the right outcome is. They can rely on the process for that. But to the extent they do, they need reasons to believe that the process is generally fair and that their own conduct contributes to, rather than subverts, that fairness.

An ethic of complex judgment is also fully compatible with the adversary system. It simply requires that we treat that system as a set of principles to be given meaning according to the context, rather than a set of dogmatic injunctions to be applied without regard to their purposes or consequences. To vindicate the adversary system, the advocate needs a sense of its underlying principles, and she needs to shape her conduct to those principles. If her conception sees truth as the central goal of adversary advocacy, then she should forego types of conduct that are incompatible with that goal. Cross-examining the truthful witness, for example, is usually ruled out.

The advocate also needs an understanding of how the system functions as a whole. That understanding will involve a variety of

assumptions about how the conduct of the advocate interacts with the conduct of other role players in the system to serve the goals of the system. But in some particular situations, these assumptions may not apply. They may be wrong in the circumstances of the case. And when that happens, the advocate needs to consider whether she should adjust her conduct in order to serve the system's goals. For example, most understandings of adversary advocacy assume that the other side is adequately represented. In situations where that assumption doesn't apply, fidelity to the purposes of the system may require a more moderate style of advocacy. The advocate is going to serve the underlying principles of the adversary system. She may have to adjust her advocacy to take account of the contingency that the other side is inadequately represented and, hence, a standard adversary presentation on her part may result in a subversion of the purposes of the system. Now, to see such moderation as the betrayal of the adversary system is to treat that system with a set of incantations rather than a set of principles.

Take the problem of cross-examining the truthful witness. What does the idea of the adversary system say about this problem? The most plausible understanding of the adversary advocacy suggests that its aim in the area of factual determination is to discover the truth, and that it charges the advocates with the partisan presentation of their clients' cases as a means to accurate fact-finding. This understanding would rule out any general commitment to impeaching truthful witnesses. In the classic situation, the cross-examiner draws out information from the witness — say, her defective eyesight — in order to encourage the trier to draw an inference — say, that her identification of the defendant at the scene of the crime is mistaken — that the advocate knows is mistaken because of information she withholds from the trier — say, that her client has told her, credibly, that she was at the scene. The practice thus amounts to deliberate deception, and it's difficult to see how it can make any general contribution to accurate and factual determination.

On the other hand, there may be situations in which this practice, while misleading with respect to specific issues, encourages accurate determination of the ultimate issue — where, for example, the client was at the scene but is, in fact, factually innocent and the victim of misleading circumstantial evidence. Note, however, that no proponent of the adversary system, at least as I've described it, can believe that such situations occur routinely.

For the situation supposes that the lawyer can reliably determine that the client is innocent, but the trier cannot be relied upon to do so after an adversary presentation conducted without deliberate deception. Treating this situation as normal rejects the whole premise of the adversary system, that the trier is in the best position to determine the facts after partisan presentation of both sides.

Nevertheless, it's important to recognize that generalizations do have exceptions. Any theory of the adversary process will include some assumptions that will not apply in some cases. Perhaps one of the sides will be impaired in some way, or the trier will be biased or incompetent or intimidated. In such circumstances, it may be that a style of advocacy based on inapplicable generalizations will not serve the goals of the system. If the lawyer can reliably determine that there has been some breakdown and can craft a response to it, she may be warranted in varying her usual style. Impeaching a truthful witness might conceivably be an appropriate variation. But within the context of the commitment to the adversary system, it would be warranted only as an exceptional response to a deviant situation.

Now, I recognize that there are other conceptions of the adversary system other than the truth-focused one I've emphasized here. Although I don't find these conceptions plausible, my main purpose is not so much to defend this particular conception of the adversary system as to use it to illustrate the style of judgment that seems appropriate to ethical decision making; the style that — in the words the ABA *Code* uses once and then ignores – "relate[s] the general body and philosophy of the law to a specific legal problem."[26] This involves a duty to understand the practices of advocacy in the light of their underlying purposes and to reshape the practices to keep them consistent with those principles in the particular context in which the lawyer finds herself.

Now, what I'm recommending here is no more than what Ethical Consideration 3-5 calls "the essence of [a] professional judgment."[27] It's the type of judgment that lawyers routinely make in making strategic judgments on behalf of the client. A lawyer who makes strategic judgments routinely in the manner that the *Model Rules* contemplate for many central ethical judgments would frequently commit malpractice. Why should she make decisions about third

26. Model Code of Professional Responsibility EC 3-5 (1980).

27. *Id.*

party and public interests differently?

If the Dominant View, the mainstream view, as an example, has an answer to this question, it is the suggestion that the lawyer would have difficulty maintaining the trust of the client if she pursued an ethic requiring complex judgment. The lawyer needs the client's confidence to do her job. She needs trust especially to induce the client to disclose facts. There have to be some limits on what lawyers will do for their clients, but the mainstream view rejects limits that require complex professional judgment. Clients are more likely to be reassured by confidentiality norms, such as Model Rule 1.6,[28] that limit disclosure to narrowly specified situations, than by norms such as the one that would permit disclosure when necessary to avert a substantial injustice.

Even if lawyers could coherently implement such a norm, they couldn't explain it to clients, the mainstream view asserts. For we cannot impute the capacity of professional judgment to clients. Thus, the argument goes, lawyers need to use simple judgment because their clients do.

Now, the first thing to know about all arguments from confidentiality is that they're myths, which means not necessarily that they're false, but that they're based on faith rather than rational analysis and investigation. Of course, intuition alone is sufficient to tell us that there are some good effects from confidentiality. We can be fairly certain that there is some additional disclosure by clients *to* their lawyers because of confidentiality.

But intuition also tells us that there are some bad effects from confidentiality. We can be fairly certain on the basis of intuition

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28. Model Rules of Professional Conduct Rule 1.6 (1983), which states in full as follows:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes is necessary:
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> > (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Id.

alone that there is considerably less disclosure *by* lawyers because of confidentiality rules. And we have no basis other than faith for believing that the good effects of confidentiality outweigh the bad effects of confidentiality. Even in this age of interdisciplinary research, there is not a scrap of evidence to support the behavioral premises of the mainstream view on confidentiality. Although the American Bar Association supports an excellent research institute, the American Bar Foundation, to the tune of many million dollars a year, it has never initiated any research into the empirical analysis of its most central normative commitment.

Now, interestingly, a few adventurous academics have made some very tentative and informal forays into the empirical investigation of confidentiality and its behavior and consequences. On the issue of the net benefits from confidentiality, studies have nothing to say. But one theme that emerges, tentatively but consistently, is that the typical lay person has little understanding of the confidentiality law. Especially interesting is a set of responses obtained by Fred Zacharias of the University of San Diego that suggests that the lay understanding of confidentiality approximates my avert injustice standard more than it does the rules currently in force. Zacharias found that most lay people believe that lawyers would disclose, at least in extreme cases of injustice, such as the "Innocent Convict" scenario that I discussed in the book,[29] where breach of confidence is necessary to save a wrongly convicted person. These responses come from the general survey of lay people rather than clients — rather than people who have been clients of lawyers. But Zacharias also questioned lawyers — also raised the question as to whether represented people actually obtained a more sophisticated understanding of confidentiality from their lawyers. Nearly all the lawyers that he surveyed said that they did not attempt to explain confidentiality to their clients.[30]

And indeed, how could they? The bar's rule, Model Rule 1.6, is designed to be a relatively simple rule. But that rule is subject to a wealth of exceptions that are imposed by law outside the field of legal ethics: the crime-fraud exception to the attorney-client privilege, the duties imposed by the civil discovery rules, the successor doctrine in bankruptcy, and various laws that impose

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29. *See* Simon, *supra* note 9, at 4 (introducing the "Innocent Convict" hypothetical, which is then used throughout the book for illustrative purposes).

30. *See* Fred Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 377-96 (1989).

liability on lawyers for aiding and abetting a client's wrongdoing. There is usually no feasible way of explaining this universe of exceptions to the client. For example, how do you explain to a naïve client the distinction between holding confidential a client's communication and turning over information learned from it, which under the civil discovery rules a lawyer will often have to do?

Given the fact that clients tend not to understand the rules and lawyers tend not to make serious efforts to enlighten them, it's not at all clear that the non-radical revision of the scope of confidentiality and any amount of change in the form of the confidentiality rule would have a large impact on client disclosure practices, except perhaps among the most sophisticated clients. And for them, the reassurance of strong confidentiality guarantees seem least needed anyway. Even if we want to increase client understanding of the rules, the current regime is no easier to explain than would be a contextual confidentiality. Despite the deceptive simplicity of Rule 1.6, the current regime is, in fact, quite technical.

One of the attractive things about the idea of justice is that most lay people have some notion of what it means. It's not always the same notion of what it means. But this concept then will often be more accessible to them, easier to explain to them, an easier basis for a discussion with them, than the technical conditions to which the dominant rule depends. The contextual approach has the advantage of focusing discussion around a term — justice — that unfortunately plays a stronger role in lay ethical discussion than it does in lawyers'.

People who grant that lawyers are capable of complex judgment sometimes doubt, even so, that we can institutionalize such an effort in the form of a disciplinary regime. They wonder if courts and agencies can make coherent, consistent rulings under a contextual approach. They doubt whether there's any way under such an approach to give lawyers notice or guidance of what's expected of them. In fact, however, lawyers are already subject to a variety of rules that take the form of contextual standards requiring difficult judgment. If we leave aside lawyer duties to non-clients — if we leave lawyer duties to non-clients to relatively black letter rules, we continue to prescribe the most important duty to the clients, the duty of care, to contextual standards.

We've noted that the malpractice regime is a quintessentially contextual standard. Moreover, if you look beyond the *Model Rules* and the professional disciplinary regimes to the way recent

developments in other laws have impacted the law of lawyering, you see a different picture. The most important developments affecting the lawyer's duties to non-clients come from the courts, not in their role as promulgators of disciplinary rules, but rather in their roles as common law adjudicators, as promulgators of general procedural rules, and from administrative agencies like the Securities and Exchange Commission and the Office of Thrift Supervision.

Consider what may be the two most important recent developments of this sort. First, the Federal Rules of Civil Procedure: Rule 11 now requires that litigation tactics have a proper purpose and a reasonable basis, and Rule 26(a), as recently amended, requires that evidentiary material relevant to disputed issues be volunteered to the other side. These strengthened lawyer duties to non-clients do not take the form of bright-line rules, but require complex and contextual judgment.

Second, we have the efforts of the Securities and Exchange Commission and the Office of Thrift Supervision to subject lawyers to discipline for assisting client violations of the securities and the banking laws. These agencies are acting under statutes that basically incorporate variations on the common law of fraud and misrepresentation. These common law norms have been around for centuries. The securities and banking laws that incorporate them have been around for more than a half century. What's new is that these laws are being applied in ways that impinge on professional responsibility doctrine. Of course, the development is resistant with the traditional arguments against requiring norms of complex judgment in this field. But lawyers have been charging their clients quite a bit of money for many decades for advising them how to conform their conduct to these norms. So it doesn't seem that much to expect that they could, in fact, apply it to their own conduct.

How does a contextual regime fit with the practical pressures of the marketplace for legal services? We worry about the race to the bottom. Lawyers who recognize more than minimal duties to non-clients may have difficulty regularly attracting clients. Clients, the argument goes, will prefer the lawyer willing to push their interests most aggressively, and a lawyer who's identified with an ethic more responsive to non-clients will suffer competitively.

Now, this problem does not arise strictly from the contextual quality of ethical norms. It arises from the greater deference to non-client interests in an ethic focused around the value of justice

ultimately. If we assume, however, that a contextual ethic gives lawyers more room to make their judgments without fear of discipline, then it contributes to the race to the bottom problem, at least it was conceived in the mainstream argument. If lawyers have a range of discretion, the pressures of the marketplace will erode that discretion and put those most concerned about non-client interests at a disadvantage. That's the argument.

This argument deserves to be taken seriously to the extent that it's right, to the extent that its premises are correct. It's perfectly appropriate to demand that professional responsibility norms take account of the practical pressures that lawyers take, including the pressures to make a living. But the objection over-simplifies the economic situation.

If there are economic pressures to intensify pro-client zeal, there are also countervailing pressures that intensify commitments to the public and non-client. Pushing client interests aggressively against the competing interests of others is only one of the things that lawyers do. Few lawyers spend most of their time doing anything that fits this description. Another important function of lawyers is to induce third parties — state officials, potential deal partners — to rely on or collaborate with their clients. A lawyer who can convince such third parties that she is committed to respecting their rights should have an advantage in this task. A lawyer who subscribes to an ethic of justice or legal merit should have an advantage here. And if she has an advantage in inducing third parties to rely on or collaborate with her clients, she should have an advantage of attracting clients who would benefit from this kind of assistance. Economics is a constraint, but not as severe a one as people sometimes assume.

Another problem people worry about has to do with the role of established disciplinary regime. Even if we concede that the contextual approach could be incorporated with a disciplinary regime, if we could imagine, the prevailing regime is much different. Is the contextual approach of any use to a lawyer who has to practice within the constraints of the current regime? The prevailing regime does impose important restraints. Most notably, it forbids disclosure in a lot of situations in which many would say that justice requires disclosure. In an extreme case, say, in the Innocent Convict case, in which an innocent life may depend on the disclosure, many lawyers would disclose in violation of the rules, as Zacharias' study found. But lawyers will often feel constrained by the rules, both because the rules are backed by

sanctions and because they are promulgated by the courts, which have authority to regulate the bar.

But just as it's important not to overestimate the constraints of economics, we shouldn't overestimate the constraints of the existing disciplinary regime. That regime is based on very different principles from the contextual approach that I argue for. But a regime that left lawyers no ethical autonomy at all would be intolerable. So the *Model Rules* do leave vast areas unregulated. Perhaps the most important of these relatively unregulated areas is withdrawal. Under the *Model Rules*, lawyers can withdraw from a representation for almost any reason.[31] In many situations, this is a powerful lever; the threat of withdrawal will sometimes induce clients to acquiesce in tactical or disclosure decisions they might otherwise disfavor.

Curiously, the *Model Rules* provide almost no limits on the lawyer's ability to impose her will to this lever. If some of the rules, like the confidentiality rules, seem to constrain lawyer judgment too rigidly, the one on withdrawal doesn't constrain it enough. But this gap in the *Model Rules* gives an important measure of discretion to the ethically ambitious lawyer who would try to do better than the rules without violating them. She can use the discretion of the contextual — she can use the contextual approach to ethics to structure the discretion that the rules give her over the withdrawal, for example. Even when the rules would permit it, she ought not to withdraw or threaten withdrawal when that would be unjust to the client. But she should feel free to use this discretion to prevent the client from doing injustice to others.

So, here's what you should tell Clyde about the bank robbery. You won't help him because his project is unjust. You know this not because Section 477 spells this out unambiguously, but because

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31. *See* Model Rules of Professional Conduct Rule 1.16(b) (1983), which states in pertinent part as follows:

> [A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if: (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (2) the client has used the lawyer's services to perpetrate a crime or fraud; (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent; (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (6) other good cause for withdrawal exists.

Id.

you have determined that it would be inconsistent with the principles that underlie that section and a variety of other sources that you are aware of. The state's burden of proof beyond a reasonable doubt or the presumption of innocence is not a principle that's relevant to a decision of whether to engage in unjust conduct. Even easy cases like this one sometimes turn out to rest on relatively more complex judgments than what initially appears.

But conventional legal ethics generally discourages us from treating as complex the issues without the relatively obvious answers of the kind involved in the bank robbery. It encourages us to adopt more routine approaches to these problems.

So at worst, as in the Multistate Professional Responsibility Exam, we find a conception of "thinking like a lawyer" that doesn't involve any thinking at all. At best, as in the *Model Rules*, we find — or the more ambitious of the *Model Rules* — we find a conception that tries to make particular ethical judgments as simple and categorical as possible. Yet outside the sphere of legal ethics, most admiring and ambitious accounts of lawyering associate the profession with complex and contextual judgment, and portray this kind of judgment as a hallmark of the attractive roles of lawyering. I propose we try to connect the field of legal ethics to this tradition.

Thank you.

PROFESSOR TAYLOR: Thank you, Bill. Because I introduced the panel from that side, I'll ask that you respond in that order. And the respondents may feel free to go to the podium if they wish. I'll give you five minutes and I'll rattle this bell.

PROFESSOR LEDEWITZ: And I will ignore it. Professor Simon's book is a needed, challenging response to the *Model Rules of Professional Conduct*, but I am not going to waste my response time praising it. So simply take that into account.

Doing justice is the heart of this book. Professor Simon is trying to teach us how to practice justice as lawyers. The practice of justice is the ethical life for the lawyer. Professor Simon argues that justice requires contextual thinking rather than obedience to categorical rules. I do not think that he shows this convincingly in the book. After all, the confidentiality exception of Rule 1.6(b) that he referred to today is contextual now. It says the lawyer *may* reveal information under certain circumstances.

It would be better if this exception were categorically stated to

require disclosure in clear cases, as I'm sure he would agree. But the more fundamental problem with Professor Simon's commitment to contextual thinking is that it is not clear that contextual judgment, as he understands it, will lead to *ethical* judgment.

Chapter Six is where we learned how to make ethical judgments. The high point of this chapter for me is the difference explained between tax avoidance by the rich and welfare cheating, called maximization by the author, by the poor.[32] The ethical lawyer is to aid the poor person but not the rich one in the avoidance scheme.

But how could such a distinction between rich and poor be justified? Obviously one could consider the place of the poor in a capitalist society, but this is not done in the book. Doing that, taking account of the social, the economic, and the political conditions, is prohibited by the insistence at the beginning of Chapter Six that contextual thinking is "not ordinary morality." Indeed, it is not any sort of morality. Contextual thinking is presented as a type of reasoning from *legal* sources and norms. But looking only at such legal sources, there is nothing in the book, nor could there be, to justify treating the rich cheater any differently than the poor one.

Professor Simon writes that the lawyer might decide that the claimant's interest in a minimally adequate income is a value of exceptional *legal* importance. This is an example of the tendency in the book to couch conclusions in unassailable indeterminacy. Yes, a lawyer might reach such a conclusion, but it would be wholly unconvincing. There is in law as much support for paying as little taxes as possible as there is for providing a fair income for the poor. The interest of the poor in a decent income is compelling, but it is so in a *moral* sense, not a legal one. The point here is not a quibble about words. Professor Simon writes this way — putting morality at bay while emphasizing the legal in order to provide cover to idealistic students, lawyers, and professors who want to do good in the world but who are afraid of being accused of doing morality.

Professor Simon is haunted by the claim, which he endorses by his very fear of it, that moral claims are subjective and inferior to those of law. He knows that in making legal claims, he can avoid the issue of truth, and this explains his tendency to the indeterminacy of "may" and "might." Legal judgments do not claim

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32. *See* Simon, *supra* note 9, at 138, 142-49 (comparing two tax avoidance hypotheticals).

to be true, only to be plausible defenses of particular positions. What Professor Simon shows by his commitment to a poor client without reflection is that legal arguments of this sort serve pre-existing commitments, which are themselves never examined.

Professor Simon's other argument in the book is thought by him to be a kind of antidote to the first. He limits contextual judgment to law, but he says that law is a substantively moral order. Professor Simon says at the beginning of the book: "Justice, as I use the term, is not an extralegal concept."[33]

Professor Simon's commitment to the relation between law and morality is a very extreme one. He writes: "If we define law substantively, we erase the line between law and morals." This extreme claim of erasure goes against the nuanced reasoning of Lon Fuller, against the nuanced reasoning of Harry Jaffa, and that of the entire natural law tradition. But ironically, this extreme moral claim does not elevate moral reasoning in law. As Chapter Six demonstrates, this extreme position banishes moral reasoning from the critique of the legal realm. That is precisely the charge that H.L.A. Hart made against Lon Fuller and natural law.

According to Professor Simon, if I commit perjury to save my client from the death penalty, I am not violating legal ethics if I believe the death penalty to be unconstitutional. But, in fact, I do not commit this perjury because the death penalty is unconstitutional, but because the death penalty is morally wrong. I suppose there is a sense in which the pro-life demonstrator sitting-in at the abortion clinic is upholding the law, but it would require serious reflection to explain what that means.

Professor Simon subsumes all this under the rubric "creative aspects of interpretation" and then leaves the matter. There are issues here that are being assumed away. It is important to Professor Simon to be able to say that law is moral and, therefore, all moral decisions are legal ones. The effect is to avoid moral reflection — in the case of the protester: is the unborn child worthy of protection? — and to focus instead on a legal issue: was *Roe v. Wade*[34] rightly or wrongly decided?

Roberto Unger teaches us that the task of the lawyer is to find the fundamental issues in the debates of the professions and to bring these issues back, transformed, to the larger life of society.

What Professor Simon has done is the opposite. By subsuming

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33. *Id.* at 9.

34. 410 U.S. 113 (1973).

morality in law, he has unwittingly, and with the best of intention, done what lawyers have a tendency to do: He has taken important issues away from society into the arcane debates of the profession and has there hidden them.

PROFESSOR TAYLOR: Professor Krasik?

PROFESSOR KRASIK: I believe that Professor Simon's book accurately describes the kind of post modern angst that lawyers feel now in terms of their relationship to their profession. Zealous advocacy within the bounds of law has turned out to be a very unsatisfying version of what we do and of our view of professional responsibility. We're not persuaded that, in the long run, justice is done, and we engage in routine manipulation of legal rules as zealots in the service of clients. We cynically react to becoming economically entrapped in a professional and intellectual life that we find unsatisfying.

The other point that I think is important that is not necessarily brought out adequately in Professor Simon's book is the fact that the public, the citizenry themselves, are equally disenchanted and cynical about our profession. And a fundamental question we have to ask is this: Is the law in the service of the profession? Do we act as servants of the *law*, the *profession*, or the *citizenry* when we act as lawyers?

The public is not generally convinced of the social efficacy of what we do. The public is cynical and knows that "this is the way things operate," and "if I get involved in the legal system, I will have to hire a lawyer because that's what people do and that's how we work the system." But what we often hear after the verdict in a high profile trial, when TV reporters interview people who are interested or supporters of the litigants, is that the verdict winners, or supporters of verdict winners, always say, "Well, *this time* the system worked." Losers always say, "This time the system *didn't* work."

I think the public generally feels that *justice* in the long run is *not* being done. And so, the question that I have is how the approach that Professor Simon puts forth in this book responds to the need to involve the public, the citizenry, and make a connection with them in terms of defining what our professional responsibilities, what our legal ethics are.

In some way, we should explicitly connect to and involve the *public* and the needs of the community in what we do. But I do not have an adequate answer from Professor Simon's book as to how

this can be accomplished through the adoption of a contextual approach to ethics, or through the continuation of a system of professional responsibility that depends on professional regulation by a cadre of supposed experts, i.e., the lawyers.

So, with regard to these concerns, I would say that unless we can make some connection to the public, to the citizenry, who arguably are to be served by the law, all we are doing in articulating professional ethics is allowing us, the lawyers, to reconcile our ambitions with our anxieties. We're doing nothing to speak to the public's anxiety about our profession.

The contextual decision-making ideal in regard to ethical dilemmas proposes that the lawyer take into account all the individual circumstances of a particular case and act in such a manner as to promote justice, defined as involving the legal merits of the case. My understanding of the definition of "the legal merits of the case" tells me that this is so constricted a definition of justice that there is no possibility for fundamental change in the profession.

As I understand legal merits and a contextual approach to the legal merits, the lawyer can take a more independent and free-ranging look at all the interests and objectives behind the legal principles that are involved in the case in front of her. To a certain extent, she contextualizes or individualizes because she's committed to reweigh or reassess the weight to be given to the particular interest in a given case.

But at every turn, the potential range of interests has already been defined by entrenched legal rules. Thus working in, and fighting in, a closed system allows the lawyer herself to be empowered, but does not offer any possibility of change to the citizenry or to the people who are affected.

In essence, the approach of professional regulation of legal ethics within a Dominant View or a Contextual View is anti-democratic, because it really has resided the power to determine the professional responsibility of lawyers in a cadre of — let's call it a cadre of so-called experts who are not receptive or open to input from outside the profession. If clients in fact are not as concerned about confidentiality as much as the *Model Rules* propose that they are, why don't we know this? Why don't we know? Or do we have to depend on empirical research by the American Bar Foundation to let us know what clients value? And if we don't know these things, how can we know them? What fundamental changes can we make in the regulation of the profession to ensure that we reflect

the values and the ethics of the people that we serve?

Thank you.

PROFESSOR TAYLOR: Father Kealy?

FATHER KEALY: To be honest with you, the longer I'm listening, I'm not quite sure what I'm doing here. I got a letter from Bob [Taylor], and it started off: "As one Irishman to another." And then, as I began to think this morning, I presume what he meant was, he knows I come from a society where sheep stealing was always an honorable profession.

And he knows, I think very well, that I *don't* believe in justice of any shape or size, to be quite honest with you. I was full of affirmation as I struggled through this book. I always recommend students to read books that they find very difficult. But at the same time, I suspect I would totally disagree with it from beginning to end, particularly because of the absence of God in the book.

You may not realize this, but God, they say, is making a come-back in theology, believe it or not.

And I found there was a great scene there with Kafka's *The Trial*,[35] the parable of the door. And that has remained with me, and I thank you very much for that, and also for that extraordinary George Eliot, who translated one of the most notorious books of the 19th century in my business [referring to David Strauss' *Life of Christ*].[36]

But some time ago, a friend of mine, and I feel exactly the same, was asked to do a wedding for the chief justice's daughter. When he came out on the altar, and all the judiciary were there, he began by saying, "I just consulted my lawyer on the way in. And he said it's all right to say 'the Lord be with you,' provided you say it without prejudice!"

But I must admit I'm very prejudiced here.

Let me tell you my favorite law story just to give you my picture. It comes from New York, the former mayor, Fiorello La Guardia. He used to occasionally preside in court. And once during the Depression years, an unemployed man was brought before him for stealing bread for his family. La Guardia said, "Sir, I'm sorry, the law exempts no one; I sentence you to a $10 fine." Then Fiorello opened — this is the judge — he actually opened his own wallet,

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35. *See* Simon, *supra* note 9, at 115-18 (summarizing the Parable of the Doorkeeper from FRANZ KAFKA, THE TRIAL (Vintage ed. 1969)).

36. *See id.* at 121-25.

believe it or not, and he gave the man $10, remitted the fine, and levied a fine for the man on everybody in the courtroom, because, he said, "It's a disgrace that a man in this city has to steal to feed his family." In a sense, that's how I see law.

I was thinking very much, to be honest, as I went through this book, that once I chaired a debate on law in Nairobi in East Africa. There were three deans speaking. One was from Holland, the other was from Cambridge, England, and the third one was from America. He wasn't from Stanford, you'll be glad to know. But it was Nebraska or somewhere.

And they wanted me to summarize at the end, and I didn't know what to say, to be honest. But I concluded that really the Cambridge man would get the prize for the best speech, definitely. The eloquence was wonderful, that wonderful British genius for understatement, which gives you the impression he might be telling the truth.

The second man, the dean from Holland, really knew the law, and he explained it very clearly. There was no obfuscation; blunt and straight and to the point.

But I said, if I was in trouble, I definitely would want the Nebraskan, because he would confuse any jury or any judge, and he was the one to get you off, whatever the ethics of the case. But believe it or not, that's something I found myself thinking at this point and I hope that I at least made you laugh a little.

However, I often find myself talking on the law in church. It's very important to note that the first books of the Bible are called "the Law." You know, the Jewish people had 613 laws, that's what they counted. I used to think that was an enormous amount of law before I came home to Ireland and I saw the European Community has a book that thick [gesturing] of laws for the production of eggs. And then I came to America, and really, it's certainly the most legislated society ever. There are more laws in this country than all other countries I suspect in history put together. There are more of them here, just including those on taxes. The basic notion seems to be that one can legislate goodness.

The Jewish people had 365 negative laws out of the 613. One law for every day was their idea. And the second type of law that they had was 248 positive ones. These were for every part of the body. This was their idea of all-embracing law. It was all-embracing. And the question asked on many a Sunday is, which is the most important law? And this is what I was looking for in the book.

I should add that my other source of law, other than this very

profound book, is John Grisham. He's my favorite. I did note that, in all the references that you made, there was no reference to my friend John Grisham. Recently I read a study on him, and it did suggest that the reason we like John Grisham is that we all deep down have a desire for vengeance, to get even. And what I saw was that that's the kind of God that is at the basis of most of modern law. It's the old idea the eye for the eye, or to be fair to Jewish law, only an eye for an eye, and only a tooth for a tooth. That's the old law.

And so, as I looked into this, I thought to myself, what kind of God do you think is behind this law, this society? That would be my first question. And secondly, what is the greatest commandment of this law that you're proposing?

And as you know, the answer in the gospel was that it's like a door; law is like a door. You need two hinges for proper law to float or to fulfill its function. First one is the kind of God you believe. That's the heart of it. And it could be a very poor God, and I think it is, for most people in society.

And the second kind of law, which is the more peculiar one, it's from the book of the Bible, as you know, that's quoted on the Liberty Bell here in the United States, quoting from the book that gave us "love your neighbor as yourself."

So basically, it's the idea of *compassion* that should be at the heart of any good law book. That is the Biblical view, that the center of good law is compassion. That means — the Greek word is sympathia, and the Latin word is compassion. It means to suffer with people, to feel with people, to walk in their moccasins, as the Indians say.

And so I wonder how much compassion's got to do with this theory that's being advanced, with this view of God? These are the two questions that I would like to pose.

Thank you very much, Professor, for making me think. Thank you very much.

PROFESSOR TAYLOR: We're not going to ask Professor Simon to respond to himself. Dean Cafardi?

DEAN CAFARDI: Thank you, Father Kealy. I think you've shown that the British gift for understatement is matched only by the Irish gift for story telling.

Alcoholism, drug addiction, mental health problems are afflictions that affect a great number of professions, including lawyers and judges. Reports of the ABA now estimate that while

ten percent of the general population have problems with drug and alcohol abuse, that number is around eighteen percent for lawyers, almost double the national average.

Because many lawyers and judges are over-achievers who carry enormous workloads, the tendency to escape from the daily problems through the use of drugs and alcohol is regrettably present in our legal community, and also the daily pressures placed on these men and women can lead to enormous amounts of stress and mental illness. Recent studies suggested a majority of disciplinary problems involve either chemical dependency or emotional stress.

How has this happened to us? How has one out of five practitioners of our noble profession fallen so low, and what can we do to change it? I think the answer is in how we practice law and the ethics of lawyering. Not necessarily what the *Code* or the *Rules of Professional Responsibility* say, but in *how* we are lawyers. I'm intrigued by Professor Simon's book. There's a certain primeval appeal in the Dominant View: "all the lawyering the law will allow." There's something I like about that. The downside of that view: the lawyer is a morally neutral hired gun; which far exceeds, I think, the upside.

The Contextual View I think makes a lot more sense. But the part of Professor Simon's book that I really like the most was his idea in Chapter Five of meaningful work as a grounding for legal professionalism, as a source of lawyers' ethics. This approach to the ethics of lawyering has the potential to cure many of the ills that face our profession. Like any proposed cure, it will first require laboratory and clinical trials. But early indications are that this remedy has definite possibilities. And it's really quite simple, while it looks not so simple as to seem trite.

Simply put, this is the cure: If all we do is use our professional training, our law degrees, to advance ourselves, albeit using the causes of our clients do so, that model is so confining that it will be difficult if not impossible to find either contentment or happiness within it. I suspect that most if not all of our drug- and alcohol-addicted colleagues had their problems start here. In the final analysis, they were lawyers only for themselves.

On the other hand, if we use our law degrees truly to benefit others, if we take up their burdens, if we bear their troubles, if we solve their problems, the effectiveness on our practices and on our personalities will be remarkable. All of a sudden, things open up. Now, by focusing beyond ourselves, we find the happiest

professional grounding within ourselves. As Professor Simon quoted, "Life in all its fullest will provide the answers." It does sound simple, but in reality, this medicine is hard to take, because there will always be loans to pay off, mouths to feed, children to clothe and educate, elderly parents to take care of, and that will take money, and money comes from work. As encompassing as these demands might be, they do not and should not require *all* of our professional lives. This way of practicing law, by focusing on a public and on a purely private benefit, will also ground us. It will make ethics, doing the right thing without even thinking about it, second nature.

And I like to think there's a distinct Duquesne aspect to all of this, too. The practice of law to benefit not ourselves, but others, is what we do. The motto on our school's coat of arms is from Cicero, but it really states a very Catholic idea, *Salus Populi Suprema Lex*: "the people's welfare is the highest law." The purpose of law is not personal advancement or even necessarily the advancement of our clients, but rather the *Salus Populi*, the common good.

In his treatise on law, St. Thomas Aquinas defines this as the very purpose of law, an ordinance of reason promulgated by the proper authority to achieve the *common* good. It was no accident that the very first clinic that we started here at Duquesne Law School was the Economic and Community Development Law Clinic, whose sole purpose was to provide free legal services to the community-based public charities, at the same time providing real-life practice opportunities for our students. This is the kind of learning we want to encourage at Duquesne, to provide legal services, where the intention and only goal is to help others; to make people's lives better; to provide a public benefit; and certainly lawyering that seeks the *Salus Populi*, the common good, does that.

And as Professor Simon indicates in his book, this type of meaningful work can be a real grounding for legal professionals in all aspects of our practice. It is also, I think, a great cure for depression.

PROFESSOR TAYLOR: Attorney Henderson?

MR. HENDERSON: I guess I've been struck by a lot of things today. I suppose the first reaction that I had is that this is about as hard an edge of peer review as anybody's experienced, Professor Simon.

In that context, though, I was assured by Professor Taylor that

even though I may have been the sponsor of this, or the genesis of it, that I was in no way curbed by my high level of disagreement because of what I've read, thought through, and experienced; and I was assured by Professor Taylor, as was confirmed by the previous speakers, that the level of agreement may well be fleeting.

Nevertheless, I was impressed by the well thought out and well developed notions that Professor Simon has advanced. In fact, I'm delighted that all of us have been able to experience this opportunity and I am looking forward to more of the same in the future.

The first comment that I have — and I want to make sure, as others have done, that I speak clearly — is that although Professor Simon did mention it somewhat more in his oral presentation, I'm left with the thought of the absence of the *client* in the process of reading the book. And so I have this to offer — notwithstanding anything that Professor Simon suggests to the contrary, the role of the lawyer is the representation of the *client*, most significantly in the resolution of disputes.

As I read Professor Simon's book, and to a large extent this also applies to the symposium of the *Stanford Law Review*,[37] which I had the privilege of having gone through — thanks again to Professor Taylor — I was struck by the lack of any significant reference to the client. For example, what does the client think or feel about, or how the client might react to these notions by Professor Simon? And my conclusion, based upon my experience, was that the reaction of the client would be overwhelmingly negative.

The idea of trying to separate the client's *right* and the client's *interest* just seems to me to be unworkable, at least from the standpoint of the client, because those two notions are interwoven, intertwined and, in effect, one, as far as the client is concerned.

The second concept was that because of the lawyer's duties of loyalty and to provide what I call "single-minded unconflicted

37. In April of 1999, the *Stanford Law Review* published a Review Essay Symposium on *The Practice of Justice*. *See* Deborah L. Rhode, *Symposium Introduction: In Pursuit of Justice*, 51 Stan. L. Rev. 867 (1999); David Luban, *Reason and Passion in Legal Ethics*, 51 Stan. L. Rev. 873 (1999); Thomas L. Shaffer, *Should a Christian Lawyer Sign Up for Simon's Practice of Justice?*, 51 Stan. L. Rev. 903 (1999); Robert W. Gordon, *The Radical Conservatism of the Practice of Justice*, 51 Stan. L. Rev. 919 (1999); Anthony V. Alfieri, *(Er)Race-ing an Ethic of Justice*, 51 Stan. L. Rev. 935 (1999); Tanina Rostain, *Waking Up from Uneasy Dreams: Professional Context, Discretionary Judgment, and the Practice of Justice*, 51 Stan. L. Rev. 955 (1999); and Robin West, *The Zealous Advocacy of Justice in a Less than Ideal World*, 51 Stan. L. Rev. 973 (1999).

representation," it occurred to me that Professor Simon's notions were largely unworkable. And I reached that conclusion before I had read some of the criticisms or some of the comments by, particularly, Professor Gordon and Professor Rostain.[38]

Next, I suggest that we as lawyers — and this is in response to, I think, something that maybe Professor Krasik alluded to — have not failed because we, as Professor Simon puts it, constantly disappoint the aspirations that the law encourages, but rather we have not adequately established or defined appropriate expectations of the lawyer to the public. While the client has a clear appreciation of the lawyer's duties to the client, in the context of the adversary system, we've failed in not adequately informing the so-called public of the proper bounds of the lawyer-client relationship within the process in which it operates.

The last point is that difficult legal ethics problems do not typically center on revealing client confidences. My experience, even as a very young lawyer, when about to say some things about any particular un-named client, has been that I quickly feel uneasy. And that squeamish feeling that I had about nearly revealing the client's confidence is very recognizable; therefore, the very important ethical duty of confidentiality has not been a difficult issue of legal ethics for me.

We always have to be on the lookout for that squeamish feeling, but my experience has been that the truly difficult issues of legal ethics frequently come up in the area of unconflicted representation. One such example is the *Georgine*[39] case that I

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38. *See* Gordon, *supra* note 37; Rostain, *supra* note 37.

39. This case concerned the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class-action certification that was sought in order to achieve a global settlement of current and future asbestos-related claims. The proposed class would have included potentially millions of individuals who had either been occupationally exposed to asbestos attributable to the defendant, or who were a spouse or close family member of someone else so exposed. The proposed class settlement agreement would have precluded nearly all class members from litigating claims not previously filed against the defendants. The district court approved the settling parties' plan for giving notice to the class and certified the proposed class for settlement only. The Third Circuit ultimately vacated the district court's orders. *See* Georgine v. Amchem Products, Inc., 83 F.3d 610 (3rd Cir. 1996). The circuit court acknowledged that a class action may be certified for settlement only, but held that the certification requirements of Rule 23 must be met as if the case were going to be litigated, without taking the settlement into account, explaining that certification was inappropriate because the class failed to satisfy, among other provisions, Rule 23(b)(3)'s requirement that questions common to the class "predominate over" other questions, and Rule 23(a)(4)'s adequacy of representation requirement. *Georgine*, 83 F.3d 610. The court therefore ordered the class decertified. *Id.* The Supreme Court affirmed. *See* Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997).

alluded to in Professor Taylor's class last year, a case that I was involved in, which involved a very significant and very contentious ethics question, where we had Professors Cramton and Koniak on our side and Professor Hazard and an ethicist from South Carolina on the other, and how those were handled in the context of a fairness hearing before a District Judge in Philadelphia, and how later the Third Circuit and still later the Supreme Court handled these issues, were telling. And these require — these issues often require complex contextual judgment. And the lawyers' capacity to distinguish between reaching a proper versus an improper judgment seems to me to be clearly premised on the *Code of Professional Responsibility.*

And as we somehow move into an area that becomes even *less* clear and fuzzier and proceeding down this slippery slope of contextual judgment, I'm not sure how it will work ultimately; I'm fearful that it may bottom out so that the ethical judgments that we make become more problematic and create more turmoil than solutions.

Thank you.

PROFESSOR TAYLOR: Judge Folino?

JUDGE FOLINO: The one comment I have is that under the Contextual View that Professor Simon writes about, zealous advocacy within the bounds of the law is not something that lawyers should always do in an extreme way. And I can tell you that the best lawyers, even under the current Dominant View, don't always practice that way.

So, for example, a lawyer doesn't always raise an impediment to every discovery request. You don't look for every possible procedural obstacle to put up in front of your adversary. And I bring this up because I was recently at a seminar where lawyers told me about the dissatisfaction they had with the profession. I didn't get a chance to pursue it, but one of the things they said was it was that this sort of thing, and it was the *young* lawyers that made the profession not as much fun for them as it used to be. So I wish I could have pursued that further, but I think maybe that's what they were talking about, the raising up of all sorts of procedural obstacles and technical obstacles to the trial, instead of just getting to the merits of justice.

The second comment I have is that I'm a trial judge and I try cases just about every day. I'll try maybe forty cases a year in the civil division. And I've never seen injustice done by a jury yet

under the current scheme that we practice under now. So at least I'm happy for that. I'm sure there are some cases where injustice does occur, but I haven't seen it, and I'm happy for that.

Those are my two comments. Then I had a couple questions for the professor and I hope you'll be able to respond to them. One thing I was struck with was this: if a lawyer, in practicing law, can and should look out for the interests of others, the third parties, while he's representing the client, could he also represent both sides in a dispute? Because if you can look out for the interest of third parties, couldn't you look out for the interest of the *other* party? And in fact, isn't that what you're suggesting that lawyers do? One such example in the book — it would be unethical for the lawyer to raise the statute of limitations defense if your client had already told you that they really do owe the debt, even though it was a long time ago.[40] So there you're looking out for the other side, so maybe under the Contextual View, the lawyer can represent both sides to a dispute. I wondered how that would work out.

The other question I have is this: that if this view, the Contextual View, would make the lawyer's job more fulfilling, and that's part of the reason why you propose it, why is it that lawyers are resisting it so vigorously? In other words, I'm not suggesting that practicing under the Contextual View would *not* make a lawyer's job more fulfilling, but I'm curious as to why so many lawyers resist your ideas. I do want to know that.

PROFESSOR TAYLOR: Thank you very much. Bill, if you would respond?

PROFESSOR SIMON: Well, you know, my friend Johnny Iligous, a constitutional law scholar, once came back from a conference and he said he felt like he was the most disagreed with man in the building.

Which is, you know, better than not being taken seriously, believe me. And I'm not even sure, it might be better than being agreed with. It's certainly more interesting than being agreed with. But I'm certainly grateful to be taken seriously. It's really an honor to have so much attention, serious attention, thoughtful attention, paid by so many distinguished people to the book.

So let me just respond to one large point and then more briefly

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40. *See* Simon, *supra* note 9, at 29 (introducing the "Statute of Limitations" hypothetical, which is then used throughout the book for illustrative purposes).

to three or four other points. But I think the dominant theme of certainly the first three respondents — Professor Ledewitz and Professor Krasik and Father Kealy — is what I'm always going to think of as the Duquesne Critique, which is that I subsume the language of morality into the language of law. The critique is that I'm reluctant to use, and Bruce [Ledewitz] even said fearful and insecure with, the language of morality.

Now, I think that's a valid critique, although I think [Professor Ledewitz] has the motivation wrong. It's not that I'm fearful of it. It's not that I don't have any confidence about that language. It's that I'm envisioning another conversation, and it's in addition to the one, I think, that the Duquesne Critique focuses on. I'm envisioning a conversation that takes place across a broad range of the society; but, first of all, a broad range of the legal profession, and then of society itself. And the reason I want to frame it in legal terms, and understand I have a very expansive understanding of legal terms, but the reason I want to frame it in legal terms is that law is the public language of American society. It's not a language of the legal profession, but it's the public language of American society. And it seems to me it's the language that makes possible the most general discussion, the discussion across the greatest number of differences in the society.

Now, that doesn't mean that aren't a lot of other rich conversations that will go on in the language of morality or religion, for example, but it seems to me that the language of morality and religion limits the range of people that can participate in the conversation, potentially, more than the language of law. So I want to emphasize the possibility of a rich discussion even though it's not the *only* discussion that should take place, and maybe even not the most important discussion that should take place. I want to emphasize the possibility of legal rhetoric as, in fact, a basis, like a set of tools, a set of sources of authority, a set of loads of analyses, that make possible a broader conversation, potentially.

Now, you know, I don't think it's an accident that this critique is raised in a Catholic law school, and I think one of the reasons that I think people are quicker to raise it here than they are elsewhere, is that the moral and religious conversation that can be had by many people here is a much richer one than many other Americans can have, privately, in terms of moral and religious terms. That is, secular Americans can't have the religious conversation at all. The moral discourse, the tools of analysis, the rhetoric that is available for moral discussion, it seems to me, for a lot of people, is much

more impoverished than the rhetoric that's available for any discussions in terms of law and the public value.

So I don't want to displace in any way the moral conversations that can go on, but I just want to suggest that whatever value they have here, they have an even greater importance in places in which the resources for these other conversations are not as great as they are here.

Now, Father Kealy, you know, by the way, I actually have a paper about John Grisham's jurisprudence and its relation to legal ethics. And an argument as to why his novels *completely* support my approach.

But let me respond to — I relay the points that Father Kealy and Professor Krasik raised. Professor Krasik raised this issue about the — no, I'm thinking about Mr. Henderson — Professor Krasik talked about the public, and Mr. Henderson talked about the client's right. Professor Krasik said, "Where is the public in all of this?" And Mr. Henderson said that he didn't think that the presence of the client was as high profile as it should be.

I think both of those are correct. On the other hand, I don't think that there are real problems with my argument. I think there's incompleteness in my argument, but not a deficiency in the argument. If you think that the public should be active in the regulation of the profession, and by the way I agree in principle, then, it seems to me, that you should design institutions of professional regulation or you should involve your legislature, and request lots of public participation. But then it seems to me, the question is what form is the output of these institutions going to take? And that's where, it seems to me, I would argue, they should take the form of norms that encourage and mandate contextual judgment.

So I don't think that incompleteness in my argument is an obstacle to its validity. One thing that Professor Krasik said was that she interpreted my emphasis on legal rhetoric as an appeal to expertise. I think there is an issue there. On the other hand, it seems to me that the language of law is a much broader public language than many others, especially today. I mean, the example of John Grisham certainly shows that there is a popular legal discourse that's related to the moral professional.

So I don't interpret the law solely in terms of a narrow expertise. I think lay people can and should participate in these debates and in the activity of professional regulation, but they should participate in terms of the rhetoric that I am proposing.

Now, it seems to me that a very important part of the picture of lawyer ethical decision making is the lawyer's relation to the client. Mr. Henderson is completely right that I don't say anything about that. You know, at some point I should and will. Again, I think the type of rhetorical style that I'm recommending is perfectly compatible with one that has a lot of respect with the client's right to participate in these decisions. Let me note, however, this one qualification. One of the problems is that there has to be a set of assumptions about what the client's authority is, and the limits of what the client's entitled to ask you to do. Presumably that decision cannot be left up to the client. That may be a discussion that the client participates in, but one can't leave it up to the client to decide the limits of what you can do.

Now, one small but maybe important quibble with Professor Ledewitz. Professor Ledewitz characterized Rule 1.6, the permissive part of 1.6, as a contextual norm. Rule 1.6 says you *may not* reveal confidences — that's the categorical part — except where these exceptions apply, in which case you may reveal confidences. That's what Professor Ledewitz characterized as the contextual part. But that's not what I understand by contextual judgment. A "may" unaccompanied by any precepts, any rebuttable presumptions, any illustrative cases; a "may" that's just the delegation to the personal subjective concerns and literal concerns of the lawyer is *not* what I mean by a contextual norm. A contextual norm is not an unstructured or an individual decision. I think a contextual norm is just a decision that involves informal consideration, application of norms to the full range of considerations. But it's an intensely structured decision, and it's a decision that's grounded in norms, so it has some objectivity and some collective aspect to it.

Just let me respond briefly to Judge Folino's two interesting questions. A very interesting kind of pure exponential question: If a lawyer can, in fact, really be responsible to the interests and rights of people other than the client, could a lawyer just resolve the whole thing? A lot of people say, "You're asking the lawyer to act as a judge." And in some respects, I think that it's not an inappropriate way to put it.

You know, there is an increase in lawyer mediation, and in lawyers actually acquiring responsibilities to adverse parties. We are more tolerant of that role for lawyers. And, the *Model Rules* actually do incorporate some legitimization for that role. So I would say a qualified yes. On the other hand, I would also say that there are many situations where that's not the way to go. As I said

in the talk, I think the adversary system is perfectly compatible with my approach, and it's also a very good way to make decisions. In those situations, the idea of the contextual approach assumes that there are some situations where you can recognize that the lawyer is not in a position to decide what the outcome is. In that situation, partisan advocacy of each side is the best way to make the decision.

So I think all I'm saying is that lawyers can have a certain ability to identify those situations. Then when they put themselves in the partisan role, they should act as partisans in a way that contributes to the ability of the trier to make a *just* decision, by not deceiving the person, and by getting the evidence out in a coherent way.

And then maybe the hardest but certainly one of the most interesting questions, which was posed by Judge Folino: "Why do lawyers resist this?" Now, I actually thought that — help me out here — the first thing you said was that partially they don't resist it. In some practices, lawyers did embrace this type of lawyering. But why do they resist more? And I don't know what the answer is, but I do know it's not a unique phenomenon; people have been known to resist things that they know are good. So, for example, Dean Cafardi talks about substance abuse and alcohol abuse; the kind of self-control that is inhibited by alcohol abuse is something that we want, but yet not everybody can achieve that and they resist it in various ways.

It's not inconceivable that this is another one of those goods that is either kind of frightening and scary in some ways, or requires a certain level of self-discipline or imagination to achieve, such that it scares us off. Maybe we sense that, if we got there, we would be proud of ourselves and happier, but the road to get there may be a little daunting.

Let me stop there. Thanks very much.

PROFESSOR TAYLOR: I'll save my questions for dinner. I would at this time entertain some questions, for the panelists or Bill, from the floor.

SPEAKER FROM THE FLOOR: This is primarily for Professor Simon, but also for all the panelists. Where do you see the intersection between law, ethics, and morality?

PROFESSOR SIMON: Well, I don't know if I have an answer to that. I think it's an ambiguity in the legal culture. And the ambiguity has to do with what I call in the book the kind of ambiguity between a positive and a substantive understanding of legality.

If we understand law to be just the commands of the state, then law has only an indirect relationship to morality. On the other hand, if we want to define law in a way that gives it some sense of obligation or duty, then we tend to embrace much broader conceptions of legality that incorporate morality. And people like Robert Gordon, for example, a legal theorist, who wanted a broad — wanted to define law in a way that connotes that it's worthy of respect — tend to be driven to incorporate more and more morality into their understanding of law. Many of our institutions are designed to incorporate morality; the jury, for example, does not distinguish radically between positive law and moral law. The norms of negligence, for example, explicitly incorporate social norms.

So, because I want to promote this type of conversation that I have in mind that would develop norms in a common law process, I might have a more expansive definition of law that incorporates most of the publicly available moral realm, because I think then the conversation will be richer and the body of norms that will be felt will be much richer. On the other hand, I can't say that that is objectively or officially the conception of law that our system maintains, because I think there's an ambiguity in the system.

SPEAKER FROM THE FLOOR: Under the contextual theory of professional ethics, could a lawyer ever represent a criminal defendant who the lawyer believed was factually guilty?

PROFESSOR SIMON: Well, sure. Even guilty people have defenses, for example. I think the question is what can you do? You can certainly argue for any mitigating circumstances; you can certainly argue against excessively harsh punishment; or you can certainly argue for minimal punishment that was plausibly applicable.

Certainly, my own belief, and I know it's shared by a lot of you, is that a lot of punishment that's administered in the society today is unjust, that the sentences are insanely harsh. Many people believe capital punishment is always unjust. So I think that would often be a very good reason for defending a factually guilty person.

Now, I must say that I cannot give a very good account of the actual minimum that you would give a factually — a person who was both factually guilty and facing a just punishment — what would you give such a person? The system clearly prescribes that a person is entitled to some defense. The presumption of innocence and proof beyond a reasonable doubt clearly gives some rights to that. I can't give a good account for those rights in that situation,

but I don't think that criminal defense lawyers in general can give a very good account. So I don't have a very good sense of exactly what the limits are in that situation. I'm not denying that limits may exist, but I think that's simply an incompleteness in my doctrine. I just haven't figured out yet, if we assume not only factual guilt but otherwise just punishment, to what extent representation that would be designed to bring in a factual acquittal is justified. I find it hard to draw a line. I don't find the lines that criminal defense lawyers draw very plausible either. I don't think that's a problem distinctively for me. I think that that's a problem in the area generally.

SPEAKER FROM THE FLOOR: From an ethical perspective, where do you envision the legal profession to be in fifty years, or where do you think it should be?

PROFESSOR SIMON: Well, that's another question where the short answer is "I don't know." I will say that there are two developments that I want. I'm not saying these are the powerful trends that are going to dominate. I say that, to me, they're the most promising.

First of all, I like the fact that the inclusive bar associations, the ABA and the state bar associations, are being increasingly trumped by the administrative agencies, the courts, and other general law making bodies. For example, I think that things like what the Securities and Exchange Commission have done, and what the Federal Rules of Civil Procedure have done, are steps in the right direction.

And the other thing I like is that the *specialized* bar associations are beginning to promulgate their own ethics codes, and they're trying to race to the top, trying to provide institutional support for lawyers who want to cultivate the reputational benefits of commitment to a higher standard. So I just mention the American Academy of Matrimonial Lawyers, for example, as a group that's been out front. But there are, in fact, maybe a dozen of these relatively specialized bar associations that have been quite promising in developing their own ethics codes.

MR. HENDERSON: I wanted to pick up on the previous question regarding representation of a criminal defendant who the lawyer believes is factually guilty. There was a note in the *Stanford Law Review* symposium by Professor Robin West entitled *The Zealous Advocacy of Justice in a Less than Ideal Legal World*, and it's a

commentary of Professor West's on Professor Simon's book.[41] But she says, "Professor Simon is not the first to address the apparent amorality of lawyering with an argument that wasn't harmless so as to drastically restructure the lawyers' adversarial role rather than explain it to a doubtful public who obstinately fail to appreciate its social value."[42]

And we must start here, with law students understanding what that role is, and that the role of representing the client is, at least at this point, inviolate. And it has to include the ability of a defense lawyer to be able to adequately represent a client that a lawyer understands to be factually guilty, and to do *whatever* is necessary — to cross-examine the prosecution witnesses, to file appropriate motions, including motions to suppress evidence; specifically, to do everything the lawyer must do, within ethical bounds.

If we cannot understand that, we'll never be able to have the doubtful public understand it. The doubtful public understands it when one individual in the doubtful public is arrested for driving under the influence, because that person's interest and rights coalesce to a point that he or she wants whatever adequate representation that we can provide.

PROFESSOR TAYLOR: The last question, Professor.

SPEAKER FROM FLOOR: I'd like to go back to the teasing proposition that perhaps a lawyer is doing the wrong thing in raising a statute of limitations defense where the lawyer says the client has confided, "Yes, I really do," or should the word be *did*, "hold the money." To what extent is that different than asking whether the lawyer should file a motion to suppress evidence in a criminal charge where there was a failure to give a *Miranda* warning, an incriminating statement has been given, tending to reveal the truth of the matter? Aren't they *exactly* the same? And if they're not, how are we to tell which version of the truth is entitled to be raised up and which one must be put aside?

PROFESSOR SIMON: Well, you're assuming that I'm in favor of representing people on suppression motions, which is true. I think Mr. Henderson, I think, might have had some doubts on that.

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41. *See* West, *supra* note 37.
42. *Id.*

MR. HENDERSON: No. Me, no.

PROFESSOR SIMON: Okay, but that's right. Here's what I say about the statute of limitations: I'm not in favor — the statute of limitations issue, I don't have a clear position on the statute of limitations issue. The statute of limitations issue was designed to illustrate a claim that lawyers ought to look to the purposes and the underlying principles of the rules they involve on behalf of their clients.

So I say whether it's appropriate to plead the statute in that situation depends partly what the purpose of the statute is. And I distinguish between two possible purposes. If the purpose is to repose, if the purpose is that there's been a societal decision that after a fixed period of time you should not have to answer to claims that arise from the prior period, then it seems perfectly consistent with that policy, that principle, to plead the statute even though the client admits that the claim was valid.

On the other hand, another potential principle might be that the purpose is to avoid adjudication on unreliable evidence, and the concern that old evidence would be stale and, therefore, unreliable. And I say if that's the purpose, then it's inconsistent with the purpose to plead the statute, because there's no unreliability to the issue. It's very clear that the factual determination is clear to the lawyer. It may not be clear yet to the court. But it's clear to the lawyer, and the lawyer should have no concern that there will be an unreliable factual determination. And therefore, in that situation, it would be inconsistent with the purpose to plead the statute.

Now, I'm told — and I did a little research actually on the statute of limitations — and it's not my favorite kind of research — and people say that while it's ambiguous, the more *modern* basis for the statute is usually understood to be repose. In which case, I think it's consistent to plead the statute. The older basis is understood to be the stale evidence concept; in that case I think you should *not* plead the statute.

PROFESSOR TAYLOR: Well, we bring to a conclusion the topic *Thinking Like a Lawyer—About Ethics*. This topic is a good omnium-gatherum, the gathering up of all the "this's" and the "that's" and the fragments that the *Rules of Professional Conduct* impose upon us.

I grew up as a lawyer under the *Code of Professional Responsibility*. When I had to face teaching instead the *Rules of Professional Conduct*, I thought to myself, "My God, the

profession's micromanaging itself. The snake is now biting its own tail." And I'm still trying to recover from that shock. I would rather think about the question that Tom Henderson has suggested we think about: What does *representing* the client mean? To represent? Are we translators, translating from one realm to another? Are we intervenors when we represent? Are we guides? Are we instructors or interpreters? There are many issues concerned with this word "representation."

Thinking Like a Lawyer—About Ethics, thinking like a lawyer insofar as it is confined to the role of lawyering, may be a way for lawyers to hide behind role morality. And thinking like a particular role is *acting*; it is *not* thinking. It's acting according to script. I came to law experienced in a natural science, namely physics. Physicists wouldn't call what lawyers do vis-à-vis the *Rules of Professional Conduct* "thinking." They would call that politics or ideology. My response to the law school mantra, "think like a lawyer," has been that I've always wanted to raise my hand and say, "Professor, first tell me about thinking itself." We never probed thinking itself in law school. We never took it to "ground," so to speak. Now, thinking about ethics, like a lawyer about ethics, sounds like arm's length bargaining to me. It's sort of bikini ethics. How little can we get away with as a lawyer and still be respectable? Or it's like asking the question how often can I kiss and not get mononucleosis? We lawyers seem to be afraid that ethics would require us to transform ourselves, and therefore, we try to keep real ethics at bay.

Let us first start thinking about thinking itself, and that means letting ethics speak for itself. The notions of outside the law/inside the law, extra-legal/inter-legal, are boundary notions that we should reject because we are whole human beings. We should be like Father Bernard Lonergan who told a friend of mine that he (Lonergan) wanted to rattle around in economics until he found God there. We in a Catholic law school should rattle around in professional responsibility until we likewise find God there.

Real thinking, and we're called here to do what the philosopher Heidegger said was the most thought provoking thing, the thing that matters most in our era, and that is to begin to think about thinking itself. For Heideggeran philosophy, thinking and thanking are related. In German, *dinken* (thinking) and *danken* (thanking) are related concepts. Professor Simon, I am thankful for your thoughtful displeasure at the *Model Rules* and their micromanagement of the practice of law. I am thankful for all the

respondents and the hard work they did in taking time from busy schedules to really read Bill's book in a very serious way. I think legal practitioners are already suffering enough under the ravages of post-modern late capitalism. Therefore, we need another mode of approach to lawyering that is more akin to ministerial and pastoral counseling, rather than prosecution and sanctioning under the *Rules*.

Thinking Like a Lawyer—About Ethics. I want to end by suggesting that ethics may mean thinking our way toward the essential and into the essential. For us at the end of this millennium, that's a most difficult task, because we have to ask ourselves: What is disposable? We have to travel light into the next millennium, and I think our speaker has shown us, and our panelists have shown us, how difficult it is for the legal profession or for any human being to come into what is essential.

Thank you all.