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Crisis in the Legal Profession: Don't Mourn, Organize!

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My claim is this: What passes for "legal ethics" today is misnamed, of ignoble birth, and in almost every important respect solipsistic. The sorry state of "legal ethics" mirrors that of the legal profession itself. I do not make these claims in order to cultivate cynicism. Lawyers, in the present crises of social organization, popular discontent, and looming environmental catastrophe, have a constructive role to play if they will take on the responsibility to play it. Those who do take on this responsibility can then develop ethical standards that deal appropriately with the profession's entitlements and its members' duties. After all, ethical notions are inevitably grounded in human experience—either to understand it or to reject its lessons. Our imagination about ethics, as about almost any aspect of life, is constrained by the historical, social, and cultural situation in which we find ourselves.

Given the powerful forces that have shaped the present rules by which the legal profession governs itself, it is easy to become cynical or dispirited. A quick look at the social upheavals that have occurred in the past two decades shows us that change is not only possible, but in many areas of human endeavor inevitable. Or, as the South African legal scholar and activist Albie Sachs said after Nelson Mandela was released from prison and the decades of apartheid were being swept away, "[a]ll revolutions are

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impossible until they happen; then they become inevitable."[1] Hence the second part of this paper's title, "Don't Mourn, Organize," is often said to have been the last words of union hero Joe Hill.[2]

I have been working at being and becoming a lawyer—if you count my pre-law school thinking and writing—for more than fifty years. I have represented lawyers. I have written about lawyers' duties and rights. I have taught in law schools in the Americas, Europe, Africa, and Asia, focusing on issues of lawyer responsibility.

In this essay, I will not repeat what I have written on this general subject of lawyers and society. I have put a list of my work in the footnote; the articles are all online, and the books are in many libraries.[3] This essay is not, however, an iteration. I try to describe a rather different path to some of the same conclusions about what lawyers ought to do and with specific reference to "ethics," which is a name that this conference calls itself.

I. PARADIGM #1: GENTILE AND THE HYPOCRISY OF PROCLAIMED ETHICS

I begin with a quotation from Chief Justice Rehnquist's truculent opinion in *Gentile v. State Bar of Nevada*,[4] a 1991 Supreme Court case that my partner Sam Buffone and I briefed and that I argued on behalf of a lawyer named Dominic Gentile. Chief Justice Rehnquist wrote some of this opinion for four Justices and some of it for five.[5] The issue was the constitutional limits on attorney pretrial speech.[6]

I discussed the background to the case in Fighting Injustice:

> Dominic was a successful defense lawyer, former faculty member of the National Criminal Defense College, and published author. His client was Grady Sanders, who owned a private storage

1. Albie Sachs, *Towards a Bill of Rights for a Democratic South Africa*, 12 HASTINGS INT'L & COM. L. REV. 289 (1988-89). Sachs was a banned person during the apartheid period in South Africa, which meant that when we had meetings in South Africa during that period, it was forbidden to mention his name. When Nelson Mandela was released from prison, and Albie came back from exile, he was appointed to the new Constitutional Court. *See generally* ALBIE SACHS, THE SOFT VENGEANCE OF A FREEDOM FIGHTER (2000).

2. Joe Hill, alias of Industrial Workers of the World organizer Joseph Hillstrom, was executed in Utah in 1915. "Don't Mourn, Organize" is a paraphrase from his last letter. *See generally* PHILIP S. FONER, THE CASE OF JOE HILL 96 (1965).

3. *See generally* MICHAEL E. TIGAR, FIGHTING INJUSTICE (2002). I have been writing about these issues for many years. *See, e.g.* my books: PERSUASION: THE LITIGATOR'S ART (1999), EXAMINING WITNESSES (2d ed. 2002), THINKING ABOUT TERRORISM: THE THREAT TO CIVIL LIBERTIES IN TIMES OF NATIONAL EMERGENCY (2007), NINE PRINCIPLES OF LITIGATION AND LIFE (2009), and for an overview of the role of lawyers in social change, LAW AND THE RISE OF CAPITALISM (2d ed. 2000).

4. 501 U.S. 1030 (1991).

5. *See id.*

6. *See id.*

company. The Las Vegas police rented lockboxes from Sanders' company, and used the boxes to store money and narcotics for use in a sting operation. The police neglected to tell Sanders what they were doing.

The money and narcotics disappeared, and the ensuing public outcry occupied the media for months. Eventually, the police having denied guilt, the district attorney indicted Sanders. Dom went to court and got a trial date six months in the future. The night before, he had carefully studied the rules of professional responsibility to see what press comment he could make about the case.

After the arraignment, Dom held a press conference, which he had the good sense to videotape. He kept within the bounds of proper comment as he saw them, and he said that the evidence showed that the Las Vegas police were probably the ones who had stolen the money and drugs. At the trial, no prospective juror remembered Dom's press conference, although some jurors recalled public statements by the police and the district attorney. Dom presented evidence to support his theory and the jury acquitted Sanders.

Shortly after the trial, the Nevada bar sent Dom a letter saying that his press conference violated the disciplinary rules and that he was subject to discipline. A justice of Nevada Supreme Court had initiated the complaint. Dom put on a thorough defense at the bar disciplinary hearing, including testimony on his own qualifications and the opinions of a media expert and a criminal defense lawyer.

The bar found him guilty and the Nevada Supreme Court affirmed. The punishment was a private reprimand, which would do no great harm to Dom's reputation, but he chose to challenge what the Nevada authorities had done. And so we filed a petition for certiorari, making three basic points. First, we said that lawyer speech should be protected unless it poses a clear and present danger to the administration of justice. Second, we argued that the rule under which Dom was punished, based on an ABA Model Rule, was unconstitutionally vague and broad–indeed, contradictory. Dom was found to have violated section 2(d) of Nevada Rule 177, which proscribes uttering "any opinion as to the guilt or innocence of a defendant or suspect in a criminal case." Section 3(a) of the same rule, however, states that, notwithstanding

> the prohibitions of sections 1 and 2, counsel "may state without elaboration: a. the general nature of the claim or defense." Third, we argued that on the facts Dom's press conference was not only harmless but also a public service.[7]

The Court's majority held that the then-prevalent ABA Model Rule, under which Dominic had been disciplined, was unconstitutionally void for vagueness.[8] That should have ended the case. We won. But a five-Justice majority, for whom Chief Justice Rehnquist wrote, went on to hold that lawyer speech could be disciplined even if it did not raise a clear and present danger of harm to a judicial proceeding.[9] As Justice Kennedy pointed out in his dissent from this conclusion, these five Justices ignored a long history of lawyer speech on public issues.[10] In the United States, social issues have been tried and today are being tried in the public forum of trials. Lawyers in such cases are best-equipped to know the facts and issues.

They are also, by training and in the history of the republic, public citizens with as much a duty as a right to comment on matters of public concern. Certainly it was a matter of public interest that the Las Vegas Police Department was the more likely suspect in the disappearance of narcotics and money. The jury apparently agreed.

On the way to his conclusion, Chief Justice Rehnquist wrote:

> More than a century ago, the first official code of legal ethics promulgated in this country, the Alabama Code of 1887, warned attorneys to "Avoid Newspaper Discussion of Legal Matters," and stated that "newspaper publications by an attorney as to the merits of pending or anticipated litigation . . . tend to prevent a fair trial in the courts, and otherwise prejudice the due administration of justice." H. Drinker, Legal Ethics 23, 356 (1953). In 1908, the American Bar Association promulgated its own code, entitled "Canons of Professional Ethics." Many States thereafter adopted the ABA Canons for their own jurisdictions. Canon 20 stated:
>
> "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of

7. TIGAR, FIGHTING INJUSTICE, *supra* note 3, at 265-266.
8. TIGAR, FIGHTING INJUSTICE, *supra* note 3, at 267.
9. *See Gentile*, 501 U.S. at 1038.
10. *See id*. at 1054-56.

> justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement."[11]

This citation of authority illustrates much of the concern I have expressed. Almost everything is wrong with it. First, the Court's task was to tell us how much truthful speech on matters of public interest lawyers should be allowed to give. The Chief Justice began to answer that question by asking what some lawyers thought about the issue in 1887.[12] Justice Kennedy's opinion, by contrast, began with the historical First Amendment tradition.[13] That tradition is truer to the Constitution's spirit than the disconnected bar rules on which the Chief Justice relied.[14]

It is true that the organized bar's view may at times be relevant to disposition of a constitutional issue involving lawyers. For example, an accused is entitled to the assistance of counsel, and this means "effective assistance."[15] A sensible view of what constitutes effective assistance should draw on the collective experience of lawyers. This is a practical question, based on the constitutional text and on the history of legal representation. Therefore, the Court has looked in capital cases to American Bar Association ("ABA") standards.[16] Interestingly, Justice Scalia, who joined the Rehnquist opinion, rejects reliance on the ABA standards.[17] Similarly, the question of how much process is due will often turn in part on the cost and effectiveness of a particular kind of remedy, and again the experience of lawyers and courts is a useful guide.[18] But the First Amendment does not invite this kind of inquiry, and no First Amendment case supports employing it.

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11. *Id*. at 1066.
12. *Id*.
13. *Id*. at 1034-35.
14. *See* Brief for Petitioner, Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) (No. 89-1836), 1991 WL 11007836 at *17- 19 (for a review of the relevant history).
15. *See* MODEL RULES OF PROF'L CONDUCT Preamble (2010).
16. *See, e.g*., Wiggins v. Smith, 539 U.S. 510, 524 (2003).
17. *Wiggins*, 539 U.S. at 542 (Scalia, J., dissenting) (deriding reliance on ABA Standards).
18. The leading case remains. *See* Mathews v. Eldridge, 424 U.S. 319, 348 (1976). What process is due will depend in great measure upon the risks of an unreliable determination. These risks are not always financial, for example, child custody may not involve a sum of money, but the process due should nonetheless be plentiful.

And then, upon what lawyers does the Chief Justice choose to rely? His choice illustrates so much that is wrong with what passes for legal ethics. Let us take it step by step. In Alabama at this time, there were a few African-American lawyers and some African-American laborer groups who sought to defend their rights.[19] However, Alabama society as a whole was white-dominated, and within two decades the Jim Crow system had become firmly established.[20] The professional responsibility rules to which Drinker referred, and on which Chief Justice Rehnquist relied, were drawn by white lawyers for a white-dominated society, and among the white lawyers by those who were in command of the profession.

Surely this is some hint that basing constitutional doctrine on the text of so-called ethics rules is a perilous undertaking. One must also recall that in 1887, when the Alabama rules were adopted,[21] the Fourteenth Amendment was only twenty years old. It had not been held to require the states to observe any of the rights enshrined in the first ten amendments. Thomas Goode Jones was the principal architect of the 1887 Code and he drew on the work of Pennsylvania jurist George Sharswood.[22] Jones was an unregenerate white supremacist. In Alabama politics, he was a consistent supporter of Jim Crow legislation and also had little use for the idea of gender equality.[23]

In 1908, a leading authority on ethics looked back at the Alabama code and regretted that its once asserted lofty principles had been eroded.[24] He looked back to a time "when Alabama 'was a homogenous community, where the law was an honorable profession, and not a trade, and where the practices of many races and of commercial craft had not destroyed notions of ethical standards.'"[25]

In 1908, the American Bar Associations "Canons" represented advice to the bars of all the states and territories about professional responsibility.[26] The ABA was all white and all male. The committee that drafted the

19. *See* J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844-1944, 271-75 (1993).

20. *Id*.

21. *See* Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471, 471 (1998).

22. *Id.* at 493.

23. *See* Marston, *supra* note 21, at 479-81.

24. *See* Samuel J. Levine, *Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism*, 47 AM. J. LEGAL HIST. 1, 5-6 (2005).

25. *Id*. (quoting Charles A. Boston, *A Code of Legal Ethics*, 20 GREEN BAG 224, 228 (1908)); *see also* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS §1.03 (3d ed. 2004) (for more discussion of the early history of ethics drafting).

26. FREEDMAN, supra note 25, at 2-3.

Canons recommended that Canon 13 say that "contingent fees . . . lead to many abuses," but the 1908 ABA delegates voted simply to insist that such fees be subject to judicial supervision.[27] The treatment of contingent fees is relevant because then, as now, the contingent fee is a mechanism that permits those without means to have access to the courts. The distrust of such fees was allied to restrictions on solicitation of business and the use of non-legal personnel to obtain legal business. As James Altman has shown in an insightful article, the 1908 drafters insisted that lawyers were to act as "gentlemen," moderating any duty of zealous representation by recognizing their status as "officers of the court."[28] The organized bar was ostensibly to resist the intrusion of market-based money-seeking values into the profession.[29] This professed ideal was, however, mostly a justification for erecting barriers to entry and a disciplinary system that upheld the "old-fashioned" values of the existing bar members.[30]

Now, a well-established lawyer might be a member of clubs and associations where he would mix and mingle with the sorts of people who could afford and might want his services. A lawyer who was not so well off would not have the same type of opportunity to get clients. The various prohibitions on stirring up litigation, and turning law into a mere business were in fact devices to keep the profession in the hands of those who served the well-to-do and white. This was, indeed, the motivating force of what the bar's leaders couched in terms of "professionalism."

The organized bar's decision to restrain zealous advocacy echoed a 19th century debate that usually focused on Lord Brougham's celebrated defense of the advocate's duty during his defense of Queen Caroline of England:

> An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of

27. Annual Report of the American Bar Association, ABA 61-62 (1908).

28. James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2401 (2003).

29. *Id*.

30. *See generally* Levine, *supra* note 24.

> consequences, though it should be his unhappy fate to involve his country in confusion.[31]

Henry Drinker, whose work Chief Justice Rehnquist cites, did not participate in the 1908 drafting, but came along soon enough afterwards to make sure its dominant principles held sway. He became the bar's leading ethics expert in the 1920s.[32] Jerold Auerbach has examined the social attitudes of the early 20th century bar leaders, and concluded that "[a]lthough lawyers spoke the language of professionalism, their vocabulary often masked hostility toward those who threatened the hegemony of Anglo-Saxon Protestant culture."[33] The mask often fell off. In 1929, Henry Drinker spoke at the American Bar Association's annual meeting and openly decried the "Russian Jew boys" and "other foreign Jews" who had joined the bar and seemingly lowered its ethical standards.[34] Walter George Smith, who was head of the ABA Section on Legal Education in 1911, openly regretted that the "mixed character of our population" and the influence of "members of the most ancient race" had lowered the standards of the profession.[35]

Of course, the ABA did not welcome African-Americans to membership until 1943, and its admission of a few women in 1918 was by accident and was repeated only fitfully until the 1930s.[36] ABA publications were forums for attacks on *Brown v. Board of Education*.[37] The organized bar of Southern states attacked civil rights lawyers under a variety of so-called ethical rules, resulting in the Supreme Court's opinion in *NACCP v.*

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31. This is one of the most-often quoted statements of that great English advocate Henry Brougham. Monroe H. Freedman, *Henry Lord Brougham: Advocating at the Edge for Human Rights*, 36 HOFSTRA L. REV. 311, 312 n.4 (2007) (provides a view of Brougham's life, work and ethics).

32. Levine, *supra* note 24, at 8.

33. Levine, *supra* note 24, at 3 (quoting JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 99 (1976)).

34. Levine, *supra* note 24, at 8-9.

35. Levine, *supra* note 24, at 6-7 (quoting *Joint Meeting of Bar Examiners and the Section on Legal Education of the ABA*, 4 AM. L. SCH. REV. 31, 32 (1915)).

36. *See* Selma Moidel Smith, *A New Discovery: The First Women Members of the ABA*, ABA SENIOR LAWYER'S DIVISION 1 (1999), *available at* http://wlh.law.stanford.edu/wp-content/uploads/2011/01/smith-a_new_discovery.pdf; *Ololade Olakanmi*, Segregation Within National Professional Associations, *AMERICAN MEDICAL ASSOCIATION* 6, *available at* www.ama-assn.org/resources/doc/ethics/segregation.pdf.

37. 347 U.S. 483; *see also* Eugene Cook & William I. Potter, *The School Segregation Cases: Opposing the Opinion of the Supreme Court*, 42 A.B.A. J. 313 (1956) (a notable example). The authors, one a public official and the other a prominent lawyer, decry "the commingling of the white and colored races" and view with horror the effect of the decisions on "the hearts and minds of white children and their parents." To be sure, the official publication of the bar might have noted opposition to *Brown* among lawyers. But this loaded language, typical of the tone of the entire piece, reflects ill on an organization itself taking only the tiniest of steps to free itself from the vestiges of its own racist and sexist history.

Button.[38] The Court expanded upon these principles of right to representation by striking down limits on injured worker access to counsel in *Brotherhood of Railroad Trainmen v. Virginia*.[39] The issues in these cases involved lay intermediaries recruiting clients and making known that legal services were available to right wrongs.

I recall the late 1960s, when draft calls mounted for the escalating war in Vietnam. Young men needed guidance about the complex selective service regulations, and the arbitrary practices of local draft boards. On top of all this, the director of Selective Service, General Lewis Hershey, decided that summarily ordering young men to report for induction was an ideal antidote to militant protests against the war and the draft. Very few lawyers had the experience, expertise, or even interest to provide competent legal advice to draft-age men. So, in a tradition that began with faith-based organizations and quickly spread to campuses and community groups, trained draft counselors took up the challenge. The organized bar's response in many cases was to label such efforts the unauthorized practice of law, and seek to forbid or enjoin it. The law was not only a learned profession, but had an effective monopoly on letting people know their rights.

When civil rights demonstrations spread across the South in the wake of the sit-in movement that began in 1960 (although there had been earlier examples), local lawyers often refused their services to arrested demonstrators. And when lawyers from the North showed up to volunteer, the local bar and judges tried to prevent them from acting on behalf of the protestors.[40]

In short, the concept of lawyer ethics with which Chief Justice Rehnquist began his analysis is the relic of a discredited and discreditable process.[41]

There is, in Chief Justice Rehnquist's version of lawyer ethical codes, an implicit view of lawyering, as professional activity by and for the social class that brought these codes into being. Viewing the legal profession as a whole, Rehnquist has a point. But in the Gentile case, we were not talking about the main stream of lawyers. The case had nothing to do with lawyers seeking media attention to peddle their skills, or stir up litigation. It had nothing to do with reaching out to intermediaries to rake in clients.

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38. NAACP v. Button, 371 U.S. 415, 423-26 (1963).

39. Bhd. of R.R. Trainmen v. Virginia, 377 U.S. 1, 7 (1964).

40. *See, e.g.*, Lefton v. City of Hattiesburg, 333 F.2d 280, 285-86 (5th Cir. 1964) (holding that local court rules may not be used to bar out-of-state attorneys from defending civil rights of litigants).

41. *See Gentile*, 501 U.S. at 1066-68.

Dominic Gentile had held a press conference about a pending case, to provide truthful speech on a matter of deep public concern.[42] He had done so only after government agents had consistently portrayed his client as a criminal.[43] Gentile's one press conference was held months before a trial, and no juror recalled hearing it.[44] Gentile had stayed up the night before to study the professional responsibility limits on what he could and could not say.[45] He was therefore in a tradition of speech by lawyers acting as public citizens, daring to speak out against perceived injustice, and in a context in which their professional knowledge provided useful information to the public. And, perhaps accidentally, he was not hewn from white Anglo-Saxon stone—he was an Italian-American from Chicago, relocated to Las Vegas. His was not the polished drawing room rhetorical style of those who had brought the professional responsibility rules into being.

The Court decided Gentile in 1991.[46] In reading the opinions of the bar officials and judges as the case wound its way from Nevada to Washington, one might think that criminal defense lawyers were mouthing off with such frequency and effect that fair adjudication of criminal cases was routinely endangered. There was little if any evidence of this. Those of us involved in high-stakes, high-profile litigation saw that prosecutors and police were the most effective and dangerous users of media attention in major cases.[47] The FBI was very good at corralling reporters and giving out tantalizing details of cases. After all, the crime beat and judicial beat reporters hung out in buildings where the same cast of prosecutorial and law enforcement characters were likely to be. The uproar over Dominic Gentile's press conference was misdirected and spurious. In short, Chief Justice Rehnquist's professed concern was both one-sided and ahistorical.

II. PARADIGM #2: THE LAWYER AS HUCKSTER

Dominic Gentile announced his name, and that he was an advocate for his client.[48] Listeners could evaluate his message in terms of his admittedly partisan position. They could do an independent investigation of his claims, ask public officials to confirm or deny, or simply wait until the client was

42. *See id*. at 1033-34.
43. *See id*. at 1034.
44. TIGAR, FIGHTING INJUSTICE, *supra* note 3, at 265.
45. TIGAR, FIGHTING INJUSTICE, *supra* note 3, at 265.
46. *Gentile*, 501 U.S. at 1030.
47. TIGAR, FIGHTING INJUSTICE, *supra* note 3, at 265.
48. *Gentile*, 501 U.S. at 1033.

tried and discover that Gentile's statements were backed by evidence that convinced the jury.[49]

At the same time that the Supreme Court was wrestling with Gentile's truthful and open speech, there was a lawyer-sponsored movement afoot to influence thousands of lawsuits, as well as legislative activity. This movement was financed by corporations that manufacture lethal products such as cigarettes, and that provide products and services that sometimes injure consumers and the public generally. The organizations involved in this activity were mostly financed by corporate sponsors. Yet, they took names suggesting they were grass-roots community groups and masked their message as citizen concern.

Nobody doubts that these organizations and their sponsors have a First Amendment right to present their views. The issue here is: What were lawyers doing organizing and directing these activities as part of their provision of professional legal services? In 2010, documentary filmmaker Michael Moore posted an article on his website, discussing an outfit called APCO:

> When someone talks about pushing you off a cliff, it's just human nature to be curious about them. Who are these people, you wonder, and why would they want to do such a thing?
>
> That's what I was thinking when corporate whistleblower Wendell Potter revealed that, when "Sicko" was being released in 2007, the health insurance industry's PR firm, APCO Worldwide, discussed their Plan B: "Pushing Michael Moore off a cliff."
>
> But after looking into it, it turns out it's nothing personal! APCO wants to push *everyone* off a cliff.
>
> APCO was hatched in 1984 as a subsidiary of the Washington, D.C. law firm Arnold & Porter -- best known for its years of representing the giant tobacco conglomerate Philip Morris. APCO set up fake "grassroots" organizations around the country to do the bidding of Big Tobacco. All of a sudden, "normal, everyday, in-no-way-employed-by-Philip Morris Americans" were popping up everywhere. And it turned out they were outraged -- outraged! -- by exactly the things APCO's clients hated (such as, the government

49. *See id.*

> telling tobacco companies what to do). In particular, they were "furious" that regular people had the right to sue big corporations . . . you know, like Philip Morris . . .
>
> Right about now you may be wondering: how many Americans get pushed off a cliff by Big Tobacco every year? The answer is 443,000 Americans die every year due to smoking. That's a big cliff.
>
> With this success under their belts, APCO created "The Advancement of Sound Science Coalition." TASSC, funded partly by Exxon, had a leading role in a planned campaign by the fossil fuel industry to create doubt about global warming. The problem for Big Oil speaking out against global warming, according to the campaign's own leaked documents, was that the public could see the "vested interest" that oil companies had in opposing environmental laws. APCO's job was to help conceal those oil company interests.[50]

Yes, APCO was founded by Arnold & Porter. Here is a description of it by its general counsel:

> APCO itself is a multidisciplinary practice, a firm that combines the skills of many professional disciplines – including lawyers – to assist its clients in addressing public affairs, government relations, and strategic communications issues wherever they arise throughout the world. APCO today has some 250 professionals operating in governmental capitals and commercial centers throughout the Americas, Europe, and Asia. We are successful at what we do precisely because we are good at "thinking outside the box," at fashioning innovative strategies and creative solutions for our clients' problems. Our ability to do that results directly from the quality and multidisciplinary skills of our professional staff. The MDP concept is at the heart of what APCO is – and it always has been.
>
> APCO was created in 1984 as a wholly owned subsidiary of Arnold & Porter. It was intended to complement several existing practice

50. Michael Moore, *How Corporate America Is Pushing Us All Off a Cliff*, MICHAELMOORE.COM (Nov. 19, 2010 PM), *available at* http://www.michaelmoore.com/words/mike-friends-blog/how-corporate-america-pushing-us-all.

> areas within the law firm by bringing to bear the talents and expertise of a number of non-lawyer professionals, particularly in legislative and related public policy fields. APCO was conceived as a vehicle for broadening the scope of services offered by Arnold & Porter to its clients and as a means for offering services in a more efficient and cost-effective manner. It grew out of the conviction that – at least for certain types of matters – an interdisciplinary approach combining the skills of lawyers and non-lawyer professionals could lead to better and more creative solutions for client problems. The clients evidently agreed since APCO's business grew and the company expanded. In 1991, when APCO was sold by Arnold & Porter to Grey Advertising (APCO's current parent company), the firm had increased to some 35 persons serving numerous clients on a wide variety of issues.[51]

Beginning in 1986, APCO was a major player with the American Tort Reform Association ("ATRA") and with the growing number of Citizens Against Lawsuit Abuse ("CALA") entities that began to appear in various parts of the country.[52] ATRA and the CALAs were mostly funded and directed by corporate and insurance interests, but they presented themselves to the public as grass-roots entities directed and financed by "ordinary" citizens.[53] ATRA and CALA achieved great success in state legislatures.[54] For example, in Texas they helped secure passage of legislation that virtually barred lawsuits based on consumption of "natural" products, which expressly included tobacco. This state legislation prevented Texas Attorney General Dan Morales from suing Big Tobacco in state court. He therefore hired private lawyers who brought a RICO-based federal lawsuit that Texas settled on the eve of trial for at least $17.5 billion dollars. The private lawyers had invested about $50 million of their own money in the lawsuit. Even after their success, Governor George Bush and Morales's Republican successor as Attorney General, John Cornyn, did everything they could to see that these lawyers did not receive a just fee for their otherwise uncompensated work.[55]

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51. *Statement of James W. Jones*, AMERICAN BAR ASSOCIATION, *available at* http://www.abanet.org/cpr/mdp/johnson2.html./ (last visited June 23, 2011).

52. *See* Carl Deal & Joanne Doroshow, *The CALA Files: The Secret Campaign by Big Tobacco and Other Major Industries to Take Away Your Rights*, CTR. FOR JUSTICE & DEMOCRACY 9 (2000), *available at* www.centerjd.org/archives/studies/CALAFiles.pdf.

53. *Id*. at 14.

54. *Id*. at 42-43.

55. This account is based on my personal experience as counsel for the private lawyers.

In addition to legislative success, these factitious grass-roots campaigns had success with potential jurors. Civil trial judges report that jurors in civil cases today are much more likely to come to court with the attitude that plaintiffs are trying to rip off insurance companies.[56] Reactionary judges demonstrate hostility to plaintiffs by setting aside jury verdicts and preaching the gospel of summary judgment to terminate cases.

APCO's founders understood that there were professional responsibility issues inherent in putting lawyer and non-lawyer services under the same roof.[57] They took steps to address what they understood these to be, but the steps they took related almost entirely to policing the relationships among the law firm, its clients and the subsidiary non-lawyer entities.[58] That is, clients would not be pressured to use APCO's services, and APCO would disclose its relationship to Arnold & Porter in all its dealings with clients and potential clients.

In 1991, largely under the influence of its 60,000 member Section of Litigation, the ABA adopted a ban on law firm ancillary services, which today parade under the name Multi-Disciplinary Practice (or "MDP").[59] That ban was effective for one year and was reversed in 1992.[60]

In 1999, an ABA Commission reported on MDP's and issued proposals that let the MDP drive forward.[61] Professor Schneyer described the Commission's work in terms that agree with my view that the "let lawyers be lawyers" theory amounts to abandonment of a search for principle:

> The Commission regards loyalty, competence, confidentiality, and independent professional judgment as the legal profession's "core values." One can hardly disagree. But core values and useful regulatory concepts are two different things. The bar and the courts have spent decades giving legal meaning and regulatory significance to three of these values but not the fourth. Conflict-of-interest rules and disqualification decisions have defined the lawyer's duty of loyal and spelled out its implications. Malpractice decisions have fleshed out the duty of competence. Ethics opinions and case law have elaborated on the duty of confidentiality. By contrast, the regulatory history of "independent judgment" is so thin

56. Based on conversations with trial judges at judicial conferences.

57. *See Statement of James W. Jones*, *supra* note 51.

58. *See Statement of James W. Jones*, *supra* note 51.

59. Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study*, 35 ARIZ. L. REV. 363, 364 (1993).

60. *Id.*

61. Ted Schneyer, *Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 MINN. L. REV. 1469, 1469-71 (2000).

> that the value is dismissed in some quarters as a professional "shibboleth." The sorts of interference lawyers must resist or be shielded from to play their proper role remain particularly unclear. In academic parlance, "independent judgment" and "interference" are under-theorized legal concepts.[62]

Today, the activities of MDPs such as APCO are regulated by Model Rule 5.7, which reads:

> Rule 5.7 Responsibilities Regarding Law-Related Services
> (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:
>
> (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
>
> (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.
>
> (b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer.[63]

Rule 5.7 was adopted after an ABA Commission studied MDP. Its report says:

> The legal profession should adopt and maintain rules of professional conduct that protect its core values, independence of professional judgment, protection of confidential client information, and loyalty to the client through avoidance of conflicts of interest, but should not permit existing rules to unnecessarily inhibit the

62. *Id.*
63. MODEL RULES OF PROF'L RESPONSIBILITY R. 5.7 (2002).

> development of new structures for the more effective delivery of services and better public access to the legal system.[64]

Neither Rule 5.7, nor any related provision, addressed the concern that outfits like APCO were in the business of influencing litigation and legislation without disclosing to legislators, the public, or potential jurors the nature and source of their financing and organization. Indeed, they actively concealed and falsified their sponsorship. At the risk of repetition, I iterate that this sort of participation in the processes of government is probably protected by the First Amendment. Our issue is the relationship between APCO and similar entities and a sensible view of the legal profession.

The issue may be illustrated with a simple example: Ms. Wilson has been injured by a defective product. She sues the manufacturer, who is represented by counsel provided by the insurance company. Ms. Wilson's lawyer, Ms. Smith, holds a press conference to announce the lawsuit and to make a plea that anyone else injured by this product should come forward to provide relevant information. Ms. Smith may be subject to professional discipline under Model Rule 3.6, as amended in the wake of *Gentile*.[65] Her comments might be found to raise a risk of impact on the Wilson case.

The defendant manufacturer and its insurance company are both contributors to ATRA and the local CALA. Billboards, newspaper advertisements, and radio and TV spots have appeared for the past several years denouncing "lawsuit abuse." The ad campaigns have been fashioned by a legal team working with ATRA and the CALA group. That legal team is organized along the same lines as APCO. There is no rule of professional responsibility that could apply to the defendant's or insurance company's conduct. It is almost beyond the reach of judicial control. It is not considered "lawyer speech," and therefore is not subject to the diluted speech standard that *Gentile* reserves for lawyers. The only remedy that Ms. Smith might have is to seek in discovery her opponents' activity, and to ask that jurors be told of this activity and ask whether any of them have been subjected to it. This would be the same sort of inquiry one would make in a high-profile case, asking jurors whether they had read or heard anything relevant to their decisional process.

Ms. Smith's and her opponents' media contacts are symmetrical in the sense that in both instances there is speech about a matter of public concern.

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64. James W. Jones, *Redefining Lawyers' Work: Multidisciplinary Practice Focusing the MDP Debate: Historical and Practical Perspectives*, 72 TEMP. L. REV. 989, 999 (1999).

65. *See generally Gentile*, 501 U.S. 1030; MODEL RULES OF PROF'L RESPONSIBILITY R. 3.6 (2002).

They are not symmetrical to the extent that her opponents are putting up a false front about the organization and financing of their efforts and are spreading false and misleading material about the issues—as the energy and tobacco companies cited by Michael Moore were doing.[66]

I am not the first to notice this asymmetry. In articles in the Georgetown Journal of Legal Ethics, Professor Beardslee suggested modifying Rule 3.6 to regulate lawyer speech and lawyer-controlled speech. His proposed changes to the current rule are underlined:

> RULE 3.6: Publicity <u>About Legal Matters</u>
> (a) A lawyer who is participating or has participated in the investigation, litigation, or <u>analysis</u> of a legal matter shall not make an extrajudicial statement <u>or substantially assist his client in making an extrajudicial statement</u> that the lawyer knows or reasonably should know will be disseminated by means of public communication and
>
> (1) knows or reasonably should know <u>*would*</u> have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter <u>regardless of whether an adjudicative proceeding currently is or will be pending</u>, <u>OR</u>
>
> (2) <u>knows or reasonably should know is groundless or would mislead or deceive others about the legal controversy</u>.[67]

Neither Professor Beardslee nor anybody else imagines that this rule will be adopted. Nor, given the Supreme Court's campaign finance decisions—essentially holding that spending anonymous corporate money is a form of protected "speech" under the First Amendment—can one be sure that such a rule would survive the current fashion in constitutional analysis. Moreover, the rule does not address the problem of anonymous or mislabeled speech.

Returning to the ABA Commission explanation, what are the "core values"? Are they only the ones of confidentiality, loyalty, and conflict-free representation? One hopes not, or at least one would hope not if the goal is to create a system of "ethics" that is worthy of the name. The obliquity of those who have argued for so paltry a list of limits on MDP illustrates the problem. Professor Robert Gordon has cast the debate in terms of

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66. *See* Moore, *supra* note 50.

67. Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment Two: How Far Should Corporate Attorneys Go?*, 23 GEO. J. LEGAL ETHICS 1119, 1178 (2010).

"constraints" and "temptations" that may "compromise the exercise of a lawyer's independent judgment."[68] That is, MDP proponents, who have pretty much carried the day, succeeded by seeing the issues and dangers as related only to client service. And in today's world, clients with money are the predominant and favored consumers of legal services. The format of law firm MDP efforts has overwhelmingly been in the service of those clients who can and do pay.[69] Hence, the issues that Michael Moore and the studies of ATRA and CALAs have raised and studied.

The MDP controversy has been resolved, at least for the time being, along the lines advocated by Professor Robert Gordon and the leading lights of APCO. Their justifications for MDP reveal as much about the supposed role of legal ethics rules as about the specific issues in the MDP debate. Hence, they help us see the paradigm of the lawyer as huckster. Professor Gordon's case for the MDP was:

> The point is simply that lawyers already experience many forms of pressure and constraint on their independent judgment. The case against multi-disciplinary practice would have to be that it would impose additional pressures and constraints, quantitatively and qualitatively more severe in kind and degree, to those that already exist.[70]

Professor Gordon also cites the pressures on in-house counsel to toe the corporate line, and the inducements of insurance company lawyers to serve the company rather than the insured.[71] If the system can handle these problems without special and stringent regulation, the argument goes, there is no need for MDP restraints of the kind that the ABA had for a year and then abandoned.

James Jones, APCO's vice-president and general counsel, was more direct. Leave the MDPs alone, he said:

> [T]he only effective line of defense for preserving the professional independence of lawyers is the integrity of the individual lawyer himself. If the bar is truly concerned about such issues – and I would certainly hope it would be – it should focus on making certain that individual lawyers have the training and the procedures

68. *Letter from Robert W. Gordon*, AMERICAN BAR ASSOCIATION, *available at* http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/gordon.html (last visited June 23, 2011).

69. *Id*.

70. Jones, *supra* note 64, at 997.

71. Jones, *supra* note 64, at 997-98.

> for making principled decisions when called upon in particular situations.[72]

The MDP debate is now muted.

Gordon's and Jones's positions reveal the bankruptcy of the current debate about professional responsibility, or ethics, or whatever name one wishes to use. Jones's argument is simply a version of the deregulation mantra: Leave the lawyers alone in their pursuit of profit and professional satisfaction.[73] The law schools and inspirational bar meetings will instill good values and we need not worry.

Professor Gordon's view is certainly ahistorical and almost surely uninformed. The pressures on lawyers to behave in unprofessional ways are already present, have increased in the past thirty years, and are largely unregulated by existing rules and rule-enforcement structures. The creation, growth and activity of MDPs have simply exacerbated tendencies that were already at work. I examine this assertion in the following sections of this essay.

As for Mr. Jones of APCO, the "let lawyers be lawyers" strophe is a cop-out. The discussion of ethics or professional responsibility rules assumes that there is such a thing as a "legal profession" to which all lawyers belong and that commands respect for certain norms. Mr. Jones does not expressly describe that imagined profession, although his reference to "the individual lawyer" revealingly adds "himself," so that one may assume that in his world-view, all the lawyers have a certain chromosomal consistency.[74] With or without gender specificity, if Jones's assumption is correct, as a starting place for discussing rules, then Mr. Jones's recommendation is out of order. He also adopts, without justification, a marketeer-entrepreneur model of lawyer behavior without an examination for doing so and without addressing the consequences of such a choice.

III. PARADIGM #3: *MALLARD V. UNITED STATES DISTRICT COURT*[75]– THE BAR DUCKS

The Federal District Court in Iowa had a practice of requiring lawyers to accept appointment to represent indigent civil litigants.[76] It based its appointment authority on 28 U.S.C. § 1915(d), which authorizes courts to

72. *See* Jones, *supra* note 64, at 998.
73. *See* Jones, *supra* note 64, at 999.
74. *See* Jones, *supra* note 64, at 998.
75. Mallard v. United States District Court, 490 U.S. 296 (1989).
76. *Id*. at 298.

"request" lawyers to provide such service.[77] Mallard was a lawyer, appointed to represent prisoners in their civil rights suit, who challenged the court's authority to require him to serve.[78] The Supreme Court held, in a 5-4 decision, that "request" means only "ask" and that it gives no power to compel.[79] The Court did not decide whether there might be an inherent judicial power to compel.[80] It also said that a request confronts the lawyer with "an important ethical decision," though the Court did not cite any ethical rules that would guide or dictate such a decision.[81] Justice Brennan wrote for the majority, and it is difficult to see where in his view of the law and lawyers his analysis fits.[82] Justices Stevens, Marshall, Blackmun and O'Connor dissented.[83] Justice Kennedy wrote a concurrence expressing the hope that lawyers would voluntarily take on indigent cases.[84]

The case attracted several amicus briefs. The Association of the Bar of the City of New York, in a brief authored by, among others, Ogden Lewis and John Koeltl, argued that "request" was simply a polite form of "compel," and that the statute codified an inherent judicial power to require lawyers to assist indigent people.[85] The brief was eloquent, and Justice Stevens's dissenting opinion reflected many of its arguments.[86] The Association wrote:

> As an officer of the court, a member of the bar enjoys certain powers that others do not possess. For example, admission to the bar creates a license not only to advise and counsel clients, but also to appear in court, try cases, and cause persons to become witnesses in court and for depositions. Such benefits, however, come with corresponding burdens, one of which is that a lawyer, as an officer

77. *Id*. (quoting 28 U.S.C. § 1915(d)).
78. *Id*. at 299-301.
79. *Id.* at 301-302.
80. *See Mallard*, 490 U.S. at 301-310.
81. *Id*. at 308.
82. *See id.* at 298-310. I remember having lunch with Justice Brennan around this time, and asking about his views. He waved the question away.
83. *Id.* at 311-18.
84. *Id*. at 310-11. Some time after *Mallard*, which was decided in 1989, I began regularly plying the Atlantic Intracoastal Waterway, which is crossed by dozens of drawbridges. Some of these have fixed opening times. Others open when a boat approaches and signals. I remember hearing on the radio one novice captain hailing the bridge and saying "do you open on demand?" The bridge tender responded, "no. We open on request." "On demand" is in fact the language in the official maritime documents, but regardless of the word, the bridge opens when the captain asks.
85. Brief of the Association of the Bar of the City of New York as Amicus Curiae, Mallard v. United States District Court, 490 U.S. 296 (1989) (No. 87-1490), 1988 U.S. S. Ct. Briefs LEXIS 679, at *5-6, *9.
86. *See Mallard*, 490 U.S. at 311 (Stevens, J., dissenting).

> of the court, is obligated to represent indigents for no compensation upon court order.

As the Court of Appeals for the Third Circuit recently stated:

> There is a symbiotic relationship between the court and the attorneys who are members of its bar. The court's responsibility for the administration of justice would be frustrated were it unable to enlist or require the services of those who have by virtue of their license, a monopoly on the provision of such services.[87]

True, the Association found it difficult to find a rule of professional responsibility that unambiguously compels pro bono service.[88] It resorted instead to tradition, "ethical considerations" attached to the mandatory rules, and the inherent power of courts.[89] As of 2010, the New York Rule of Professional Conduct 6.1 provided only that attorneys should "aspire" to perform twenty hours of pro bono legal services to poor persons per year, but added that this rule "is not intended to be enforced through the disciplinary process."[90] Rather, the rule speaks of "aspirational goals . . . without legal consequences."[91]

The State Bar of California, in a brief signed by Morrison & Foerster, argued not only that the statute does not authorize judicial compulsion, but that it would violate the Fifth Amendment Takings Clause if it did.[92] It costs money to maintain a law practice, the California Bar argued, and litigation has become so complicated and expensive that lawyers should not have to shoulder the burden of helping people without money to engage in it.[93] The signers of this brief made this argument without a hint of irony. These lawyers, bluntly put, decline to take any responsibility for the fact that this complexity and costliness freezes out lawyer-deprived citizens from meaningful access to justice.[94] The bar encourages lawyers to provide pro bono services, but it argues that costs of any widespread access to justice should be borne as part of publicly-funded legal services programs.[95] This argument, replete with financial data about the expense of law practice,

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87. Brief for the Association of the Bar of the City of New York, *supra* note 85, at *20-21.
88. Brief for the Association of the Bar of the City of New York, *supra* note 85, at *31-32.
89. *See generally* Brief for the Association of the Bar of the City of New York, *supra* note 85.
90. RULES OF PROFESSIONAL CONDUCT R. 6.1 (New York 2009).
91. *Id.*
92. Brief of the State Bar of California as Amicus Curiae, Mallard v. United States District Court, 490 U.S. 296 (1989) (No. 87-1490), 1988 U.S. S. Ct. Briefs LEXIS 677, at *7.
93. *Id*. at *10-13.
94. *See id*. at *8-9.
95. *Id*. at *24-25.

was written after the Reagan-era limitations on legal services programs had already been enacted and enforced, and after such successful programs as California Rural Legal Services had experienced significant funding cutbacks. That is, the bar was writing at a time when it was obvious to anyone that public funding of adequate legal services was unlikely to happen. The bar's argument that financially-strapped lawyers would not be able to provide fully adequate legal services took no account whatever of the caseloads routinely borne by public defenders and legal services lawyers. No representation, the argument seems to be, is better than representation by lawyers who must labor under financial pressure.[96] Needless to say, the bar's argument did not contain a vision of the lawyer's role as champion of justice.

The Fifth Amendment argument was a remarkable exegesis on laissez-faire economic ideology.[97] Of course, citizens are sometimes called upon to provide service to their government at less than market rates. Conscription is an example. Nominally private property may be used by the public for all sorts of things, including leafleting and union-organizing activity. And surely the bar's virtual monopoly on access to justice should not be guaranteed without lawyers paying some price for the privilege.

The bar's position in 1989 was the position it had taken in 1970-71 in a case in which I was involved.[98] In 1970, Rosalio Muñoz was indicted in the United States District Court for the Central District of California for refusing to submit to induction into the armed forces.[99] He had applied for conscientious objector status, but the Selective Service System had denied his claim. Muñoz had been student body president at UCLA, at whose law school I was then teaching. He asked me to represent him pro bono and I agreed. By that time, I had written a book on representing draft registrants and had litigated a number of such cases. I went to his arraignment. I was not a member of the California bar. The local rule said that a lawyer who was not a member of the California bar could appear *pro hac vice*, provided that he did not "'maintain an office in this District for the practice of law.'"[100] The arraignment judge interpreted the rule as barring me from appearing, even with local counsel. I noted that my law professor office at UCLA was not "for the practice of law," so I was not competing with local

96. *See id*. at *22-23.

97. *See* Brief of the State Bar of California as Amicus Curiae, Mallard v. United States District Court, 490 U.S. 296 (1989) (No. 87-1490), 1988 U.S. S. Ct. Briefs LEXIS 677, at *31.

98. Munoz v. Hauk, 439 F.2d 1176 (9th Cir. 1971), *cert. denied sub nom.* Curtis v. Munoz, 404 U.S. 1059 (1972). I have given details of the dispute in, FIGHTING INJUSTICE, *supra* note 3, at 134-41.

99. *Id*. at 1177.

100. *Id.* at 1178 (quoting RULES OF THE DIST. CT. FOR THE CENTRAL DIST. OF CALI. R. 1(d)).

lawyers. Moreover, there was already some authority for the proposition that membership in the state bar where a federal court sat was not required for someone who was representing someone in a federal matter, particularly a criminal case, and particularly pro bono. The cases in which northern lawyers had come South to defend civil rights activists were particularly relevant.[101]

No matter, said the judge, and his ruling was upheld by the judge to whom the case was assigned for trial. Muñoz and I sought mandamus.[102] Not only did all but two of the local judges resist the application, the California Bar designated three of its distinguished members to defend the local rule.[103] Not only did they do so—all the way to the United States Supreme Court—they also argued that the combination of radical Muñoz and his radical lawyer created (unstated) risks to the justice system.

The court of appeals upheld Muñoz's and my position. The Supreme Court denied review. On remand, we moved to disqualify all the judges who had opposed my admission, and the case was tried before a judge who granted a judgment of acquittal. This same judge also admitted me *pro hac vice* in a case involving national security wiretapping, which on the merits was the first decision holding that dispensing with a warrant in such cases was impermissible.[104]

IV. PARADIGM #4 – AN OUTBREAK OF HONESTY

Law firms hire and fire associates, and expel partners, for many reasons. The limits on their power to do so have been litigated in courts and before bar associations.[105] There is extensive literature on such cases, and the economic troubles of recent years have focused attention on the issues. But suppose a law firm partner detects that others in the firm are violating rules of professional responsibility? Suppose the partner finds that her colleagues are committing fraud on a client?

Such a case—well-chronicled and therefore not requiring extensive treatment here—is that of Colette Bohatch.[106] She was a partner in the Washington office of Butler & Binion, a Texas-based law firm.[107] She believed that one of her partners was over-billing one of the firm's major

101. *See e.g*., *Lefton*, *supra* note 40.
102. *Munoz*, 439 F.2d at 1178.
103. *See id.* at 1179.
104. United States v. Smith, 321 F. Supp. 424 (Cent. Dist. Cal. 1971). My admission *pro hac vice* is noted in *Munoz*, 439 F.2d. at 1178-79 and accompanying footnote.
105. *See generally* Douglas R. Richmond, *Expelling Law Firm Partners*, 57 CLEV. ST. L. REV. 93, 104-22 (2009).
106. *Id*. at 117; *see also* Bohatch v. Butler & Binion, 977 S.W.2d 543 (Tex. 1998).
107. *Bohatch*, 977 S.W.2d at 544.

clients.[108] She did the right thing with her concerns, by reporting them to her partners and to the firm's management committee.[109] Under Model Rule 8.3(a), she had the option and almost certainly the duty to report her well-founded suspicions "to the appropriate professional authority," probably the bar itself.[110]

The firm's guiding powers concluded that there had been no over-billing, and the client pronounced itself satisfied.[111] This inquiry bore signs more of circling the wagons rather than seriously confronting the issue. The law firm expelled Ms. Bohatch from the partnership.[112]

The Texas Supreme Court, with two dissents, upheld the expulsion.[113] It did so by two analytical devices. First, it held that a partnership is a creature of contractual volition.[114] But Butler & Binion's partnership agreement did not impose limits on the reasons why a partner could be expelled[115], and so presumptively none existed.

The second device was to turn to what the court regarded as the basic idea of a partnership.[116] As Judge Cardozo long ago reminded us, partners have duties of disclosure and honor towards one another that are far greater than mere contractual ties.[117] If the sense of mutual trust is broken, a partnership may expel one of its members. This theory of partnership mutual agency has a sound footing in legal history, certainly as applied to ordinary business partnerships that are engaged in the sale of goods and services. But as the dissenters pointed out, the theory assumes that the partnership and its members have no duties to the outside world greater than those that may be imposed by the laws of contract, tort, property and public law.[118] That is, if the bar disciplinary authorities, or the client, want to create public scandal by charging the firm with impropriety, that would be acceptable. But if a member of the firm raises an issue of professional conduct, and seeks to steer the firm towards a proper view of its obligation to clients or the public, the partnership may expel the member for that conduct.

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108. *Id*.
109. *Id*.
110. Richmond, *supra* note 105, at 117 (quoting MODEL RULES OF PROF'L CONDUCT R. 8.3(a)).
111. *Bohatch*, 977 S.W.2d at 544.
112. *Id*. at 544-45.
113. *See generally id*.
114. *Id*. at 545-46.
115. *Id*. at 546.
116. *Bohatch*, 977 S.W.2d at 545-47.
117. *See* Jacob A. Stein, *A Note About Such Things as Fiduciary, UPA, and RUPA*, DC BAR (Apr. 2011), *available at* http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/april_2011/spectator.cfm.
118. *See Bohatch*, 977 S.W.2d at 558-562.

To put the matter as Henry Drinker might, perhaps, have done, the law firm need have no sense of obligation to the rules of professional conduct than "merely following the methods their fathers had been using in selling shoe strings and other merchandise[.]"[119]

V. SO WHY ARE THEY CALLED—OR FORMERLY CALLED—LEGAL ETHICS?

These four paradigmatic events in the law—*Gentile*, the MDP debate, *Mallard* and *Bohatch*[120]—show us the bar, not as it wishes to be seen, but in action. It is quick to defend its monopoly. But one should note that rules such as that in the California federal court will fall by the wayside under the pressure of economic events. The California rule was designed to keep all the "foreign" lawyers from competing with locals.[121] Such rules began to crumble with the spread of multistate bar examinations and reciprocal admissions. With the growth of multi-city law firms, with their hundreds and even thousands of lawyers, "multi-jurisdictional practice," (or "MJP") is a new mantra. There is a fierce debate within the bar as to how far these "artificial" restraints on provision of legal services should give way to permitting any lawyer admitted anywhere to practice federal and international law. California and Florida continue, however, to enforce relatively strict rules against out-of-state lawyers coming in to practice, due no doubt to the popularity of these states as places to live. The migration urge seems to hit particularly hard among older lawyers who would like to live in a "sunshine state," but they will continue to find the barriers higher than in other places.

There is a progressive aspect to the liberalizing MJP rules, as they make more lawyers available for civil rights cases in places where the local bar is not responsive. But the change has been driven by the economic interest of the large firms.

The debate over MJP rule changes lays bare a central conflict over the purpose and meaning of "ethics," "professional responsibility," and "professional conduct." Until forty years ago, the American bar was dominated by local and state associations. The power in the ABA was drawn from the leadership of those associations. Then, the "sections" of the ABA, led by Litigation and Torts/Insurance Practice, began to assert themselves. They brought a more "national" view, and struggled to increase their power over ABA activities and positions. I observed these

119. Levine, *supra* note 24, at 8.
120. *See* discussion *infra* Parts I, II, III, and IV.
121. *See* RULES OF THE DIST. CT. FOR THE CENTRAL DIST. OF CALI. R. 1(d)).

developments in the 1970s through 1990s, in various leadership positions in the Section of Litigation, during which time I was Chair, became the ABA's largest section. Because the sections focused on particular practice areas, they were much more in touch with the day-to-day concerns of their members than was the "national" ABA establishment. Thus, there has been a struggle between the ABA which is considered a collection of independent fiefdoms, and an ABA that looks beyond state and local boundaries.

Despite the section's increasing clout, the local and state bars continue to insist on their power to exclude "outsiders" from activity in their arenas. Thus, "unauthorized practice" covers not only the activity of those who are not lawyers, but also of those admitted in other jurisdictions who want to advise clients and litigate in local courts. But increasingly these interests give way to the economic interests of those who envision a "national" bar with relatively few limits on what a lawyer from one jurisdiction may do in another. Resistance to MJP rules retreats to a focus on keeping control of state and local law concerns by limiting the kinds of practice that outsiders may engage in. The outsiders, in their turn, have tended to adapt to these limits by opening satellite offices, fueling the movement towards multi-city mega-firms.

The MDP debate reveals some of the same stresses. The lawyer in solo or small firm practice is relatively unlikely to want a satellite public relations or lobbying operation. It is the large firms that have led the drive to legitimize such things. And when a solo lawyer like Dominic Gentile[122] raises his voice in the public forum to defend his pilloried client, he is directly in the sights of the lawyer comment rules that have been framed in ways that, as we have seen, have no impact on the MDP firms.

When I talk about advocacy, I usually mention that we use words to persuade jurors: witnesses testify, lawyers argue, and the judge instructs. There may be objects, documents, and pictures as well, but these come to court attached to and supported by the sponsoring words of a testifier. As advocates we must take care that the words we and the witnesses use conjure the very image that we have in mind and not some other. To illustrate this point, I say to the audience, "Close your eyes. I am going to say a word. When I do, check the image in your mind. OK, 'pediatrician.' How many of you have in mind a male pediatrician? How many a female pediatrician?" And so it would go with any number of words: truck, motel, and so on.[123]

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122. *See generally Gentile*, 501 U.S. at 1038.

123. On the power of signs and symbols, *see generally* MICHAEL E. TIGAR, THE POWER OF MYTH: JUSTICE, SIGNS & SYMBOLS IN CRIMINAL TRIALS, LITIGATION 25 (1999).

The word "lawyer" calls to mind any of a hundred mental images, depending on the listener, and on his or her social, cultural, ethnic, and religious milieu. In this sense, Gordon and Jones are right to suggest that there is no single image of lawyer.[124] However, the anecdotal evidence that I have been seeing for the past fifty years suggests that all the lawyers, in whatever context they work, have been and are subject to the same sorts of pressures to bring their conduct within the dominant rules imposed by the holders of political and economic power.

Who are these "individual lawyer[s]?"[125] Let me trace the basis for my descriptions and the ensuing analysis. I have represented lawyers in many practice settings. I have worked closely with corporations and their general counsels. I have worked with legal services and public defender lawyers. I have negotiated with prosecutors and even joined a prosecution team or two. I was Chair of the 60,000 member ABA Section of Litigation during some of the fights over revising professional responsibility rules. And I have testified as an expert witness on professional responsibility issues. So let us begin with a brief survey of practice settings:

- The partner in a large multi-city law firm, whose share may be more than one million dollars per year, or whose firm may have so aggressively courted the economic fallacies of the past twenty years that it may join some other large firms on the brink of extinction.

- The lawyer who defends civil cases on referral from insurance companies and corporations. Many of these lawyers are in organizations such as the Defense Research Institute. I have spoken to groups of them. They increasingly find that their work is controlled by bean-counting executives who sharply limit the way the lawyer is to approach the case. This may be very well when the lawyer is directly retained by the client. But there is plenty of anecdotal evidence that when the insurance carrier retains and controls counsel, decisions are being made that often do not put the insured's interest first. The insurance company retained lawyer comes to court with strict and often unrealistic limits on settlement authority, banking on stringing things out so that plaintiff's counsel will have to accept. After all, actually going to trial these days is expensive. These lawyers are uncomfortable with the restrictions but often do not know how to push back.

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124. *See* discussion *infra* Part II.
125. *See* Jones, *supra* note 64, at 998.

- The Legal Services lawyer, paid by state or federal government but carrying a huge caseload and operating under restrictions that forbid resort to such things as class actions. The Supreme Court has held that some restrictions on client services are unconstitutional, but nobody imagines that those who need these lawyers will find that the resources available to protect their rights are anywhere near those available to those who have infringed those rights.

- The honorable lawyers who understand that a law license requires honest and ardent client service and a healthy dose of pro bono activity.

- The in-house lawyers for corporations. Many of these lawyers toil in an honorable tradition. They spot potential difficulties and alert management to them. They manage litigation with in-house and outside lawyers with attention to professional standards. However, I have found that in-house legal departments are being reorganized to promote efficiency at the expense of professional standards.

- The prosecutor, under pressure from the police (federal, state, and local) to bring charges and get convictions. Capital cases provide us with the most dramatic illustration of the pressures under which these lawyers labor and how they feel compelled to respond. However, the pressures are the same, though different in degree, throughout the system that calls itself criminal justice. Capital crimes are by nature disturbing to the community. The police apparatus wants to reassure the citizenry that all is well, the perpetrators are caught and that something called justice will soon and visibly be done. Haste and a natural tendency to overlook suspect rights in this quest produce the errors that we have seen and prosecutors go along with the wrongdoing.

- The court-appointed lawyer, whose contract is with the state entity that pays the agreed fee, and not by the defendant being represented. The "agreement" to represent the client is a fake bargain, in which the client, as the person most concerned, has almost no control over the terms of service, and the lawyer operates within a fairly narrow range of possible choices. I have written about these issues here now and will not repeat that analysis.

One could recite dozens of other examples, showing the variety of practice settings and the corresponding pressures on lawyer conduct and motivations. There is no such thing as "the individual lawyer himself" or even "herself." He or she is a fiction created on a particular occasion for a particular purpose. He is "the man on the Clapham omnibus" which an English judge envisioned as arbiter of sexual mores.[126] He is the "reasonable man" of negligence law, whose vaunted prudence led A.P. Herbert to say that "[a]ll solid virtues are his, save only that peculiar quality by which the affection of other men is won."[127]

Put another way, the idea of an unguided "individual" decision ignores the fact that decisions are not truly individual. How we decide what to do is a product of our social, historical, and cultural circumstance. We need not wade into the nature-nurture controversy to see at least this much. Only a little experience with real life clients will teach the same lesson. Our decisions are also influenced by what we perceive as principles of conduct, whether derived from some internal moral compass or perceived as binding because imposed by recognized authority.

It is legitimate to ask, therefore, what is to guide lawyer decisions about how to behave, and from what legitimate source would such principles spring. The history of "ethics" codes, and their shaping over the past 150 years, leads to one conclusion. Those codes have nothing to do with ethics, properly so-called. The codes originated in the desire of lawyers to define their monopoly on access to the machinery of justice. They came to fruition in an effort to keep the practice of law, so far as possible, in the hands of those representing the rich and powerful. Reluctantly, the bar was forced to accept changes in its rules that opened the gates to justice a little bit, and belatedly invited in lawyers who were not white and male. Yet the driving force of change in the past three decades has been the economic interest of lawyers serving the interests of an increasingly centralized and monopolistic economy. As the entities in that economy have become larger, they have become multi-state and multi-national, defying the power of localized governments to control them. The organization of big-time law practice has followed this example. "Ethics" codes proscribe financial irregularity,[128]

126. The phrase has been widely used to describe the middle of the road, allegedly "ordinary" man. In a mid-20th Century incarnation, the tastes of such a person were sometimes used as a test of what is or is not obscene. *See generally* MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 134 (2004).

127. From one of Herbert's celebrated satirical essays, which one can find in, A.P. HERBERT, UNCOMMON LAW (1935). The saying is also *available at* http://alittlebitofjake.wordpress.com/2006/10/04/the-myth-of-the-reasonable-man-the-case-of-fardell-v-potts-a-p-herbert/.

128. MODEL RULES OF PROF'L RESPONSIBILITY R. 1.5 (2010).

lawyer inattention,[129] and conflicted representation,[130] and provide penalties for disobedience.[131] Notions of justice and public service are merely aspirational. They are like column fillers and the weasel words in which they are couched are gestures of surrender rather than declarations of principle. They have become archeological evidence of moral obliquity.

If you are led by the high-minded language of professional responsibility prefaces to believe that this is a system worthy of being termed ethics, consider Samuel Butler's trenchant and analogous commentary upon the Victorian-era church-goers of the English countryside: "They would have been equally horrified at hearing the Christian religion doubted, and at seeing it practised."[132]

V. WHAT ARE ETHICS?

Professor Barrows Dunham, in his exciting book, Ethics Dead and Alive, tells us:

> Ethical theory differs from moral codes. The codes are lists of admonitions, with little or no account of why they are binding. But ethical theory undertakes to explain in some detail the principle of right decision, of how one ought to make up one's mind. Throughout this enterprise moves an effort to escape bias. Mathematics and other sciences assert, or try to assert, what is the case, regardless of what anyone wishes were the case. Similarly, ethical theory asserts, or tries to assert, what ought to be chosen and done, regardless of what anyone wishes were chosen and done. For, just as the darkling flow of appetite and apprehension can dim awareness of the world we act in, so also it can dim awareness of what and how to decide. To pierce the shell of the self is, in ethics or the sciences, a primary task, so that the self, emerging, may know the world and what to do about it.
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> There are rules for all of this, and since they are still debated, I suppose we must regard them as tinged with doubt. But the odd fact is that there is less doubt about the rules than there is doubt about our recognizing when the rules have been successfully applied.[133]

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129. MODEL RULES OF PROF'L RESPONSIBILITY R. 1.1 (2010).
130. MODEL RULES OF PROF'L RESPONSIBILITY R. 1.7, 1.8 (2010).
131. MODEL RULES OF PROF'L RESPONSIBILITY R. 8.1, 8.5 (2010).
132. SAMUEL BUTLER, THE WAY OF ALL FLESH 43 (1903), *available at* http://www.gutenberg.org/files/2084/2084-h/2084-h.htm.
133. BARROWS DUNHAM, ETHICS DEAD AND ALIVE 10-11 (1971).

The study of ethics is about moving outside of self, to regard the "other" as an end and not a means to be employed in the heedless service of self. If Dunham's formulation makes sense, then these codes of professional conduct are not ethics. They define a certain kind of agency relationship, derived from ideas of contract and tinged with equitable notions of fiduciary duty. The lawyer-agent performs agreed services. The duties of candor, undivided loyalty, and not exploiting the lawyer's superior knowledge and skill are all aspects of any fiduciary relationship. The very idea of such relationships rests in turn on the equity jurisprudence that took shape in England under the chancellors. Equity borrowed heavily from canon and Roman law sources, as the chancellors were until Thomas More clerics, and More defined himself as a devout as much as a common lawyer—and in the end, even more.

When Shakespeare's character suggests to "kill all the lawyers," he goes on to note that it was a lawyer-drawn parchment that bound him to the land and work.[134] The life, work, and ideology of lawyers, viewed as a profession rather than focusing on individual cases, had to do with operating within the set of agency rules in the service of power. Sometimes that power held sway over the state. Sometimes groups of lawyers would enlist in the service of power-in-waiting, power yet to be. Thus the English common lawyers recast the law of royal prerogative, real property and contract as part of the English Revolution. In the American colonies, lawyers for influential merchants proclaimed indefeasible principles of independence, not as free-standing ideals, but as instruments of liberation from the colonial yoke. And when the dust of these conflicts had settled, it was back to business as usual for the bar.

One could not expect more or better from the bar than what we have. The lawyers make their own rules, and proclaim self-regulation as a core value. They have a financial interest in organizing law practice in certain ways. They deny having any enforceable compulsion to share legal services with those who cannot afford them. And when the state intervenes to create such a compulsion, bar associations come forward to deny that the state has any such power. If, as Professor Dunham tell us, avoiding bias and self-centeredness is central to developing a sense and structure of ethics, the bar's regulatory codes are not about ethics at all.[135]

If you care about justice, are concerned about legal ethics properly so-called, and wish to live a life that respects such values, what ought you to do?

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134. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2.
135. DUNHAM, *supra* note 133, at 10-11.

VI. INSIDE PASSAGE AND OUTSIDE PASSAGE

The rules of professional responsibility, and of contract and partnership that govern jobs in the law, are there to be understood and observed. Some of these rules are based on somebody's idea about the good society, but taken as a whole they possess no more inherently moral content than the speed limit. We can accept Holmes's "bad man" theory[136] about them, or we can justify some or all of them on some deeper basis, but they do not provide any ethical direction for our lives.

We are left, I think, to accept Mr. Jones's advice that it is up to "the integrity of the individual lawyer."[137] That would be you, the reader. I do not mean that we must abandon the quest for standards to govern lawyer greed, lust, sloth, and other various deadly sins. Rather, we must acknowledge that we must each take responsibility for finding and following a path that fulfills a vision of justice.

When we look at younger lawyers today, we see waves of professional and personal discontent as well as economic insecurity. Again, I have written on this subject and will not repeat. If you are a lawyer or law student facing such uncertainties, you have a personal decision to make. In making it, you can look around and ask: Who are the lawyers whose lives we justly celebrate and who seem to have had both success and personal satisfaction? Professor Gerald Uelmen wrote a thoughtful article searching for "lawyer of the century," that is the twentieth century.[138] His first, and perhaps most important, criterion was professional reputation—the opinion of the lawyer's peers.[139] That is a wise way of looking at the issue. If you ask lawyers as a group to put limits on their own self-interest, you see what we get in terms of codes of conduct. But Uelmen's question seems to call for lawyers to identify praiseworthy qualities that rise above the pursuit of selfish goals.[140] And indeed, the polls of lawyers bear out this prediction. Lawyers admire those of their peers who pursue justice for clients despite public condemnation and personal sacrifice. They value qualities of advocacy that enforce counter-majoritarian principles of justice. To put matters cynically, lawyers laud selflessness so long as they are not themselves required to practice it.

So in your quest, you could ask what lawyers say one ought to do, and not what they, in their collective discussions, decide they are able to do.

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136. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

137. Jones, *supra* note 64, at 998.

138. Gerald Uelmen, *Who is the Lawyer of the Century?*, 30 INTL. SOC'Y BARRISTERS Q. 407 (2001).

139. *Id*. at 408.

140. *See id*. at 409.

This mode of reasoning one may call the inside passage. It speaks of a personal quest informed by the judgments of those engaged in a similar quest. It is to that extent self-referential. If you look around, you see dozens of organizations devoted to causes that their organizers identify with justice. On issues such as abortion, affirmative action, political campaign finance, and criminal law, you can identify with any side of the issue. Since 2001, lawyers have stepped up to represent those subject to torture and unlawful detention at Guantanamo and elsewhere. Finally, some large law firms have taken up these cases. I have much experience with these issues, and even with military law. Yet the Chief Judge of the United States Court of Appeals for the Second Circuit, Dennis Jacobs, recently gave a speech attacking those lawyers, and deriding their claim to be truly interested in pursuit of justice—prefacing his remark by noting "I know little of military law."[141] He then quotes F. Lee Bailey's praise of fairness in court martial proceedings, without noting that Guantanamo detainees do not have the rights of a military court martial defendant, nor that Bailey's reputation is hardly one on which to base a sweeping conclusion.[142] In short, the examples of those who claim to be serving some ideal of justice do not teach a consistent lesson. The trumpets are many, and make an uncertain sound.

Nor, I think, is one aided by most of what is called Critical Legal Studies. This movement, which flourishes less now than formerly, seemed to me principally occupied in promoting a kind of anomie in the face of social conflict. The arguments of lawyers engaged in representing people in trouble are labeled "rights rhetoric," which in turn is regarded as "unstable, indeterminate, reifying, and of no utility."[143] This is not the place to debate the strands of CLS thought. Professor Brian Leiter has recently provided some helpful guidance.[144] My point is that the lawyer looking for something other than an exit strategy finds little help there.

At best—and it is no inconsiderable gift—the inside passage is a starting point. The example of lawyers who struggle for some idea of justice gives us a clue about where to look for guidance. Let us look back at Barrows Dunham's formulation: ethical theory moves us outside our self,

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141. Dennis Jacobs, Chief Justice, U.S. Ct. of Appeals, Address at the 10th Annual Barbara K. Olson Memorial Lecture: Lawyers at War (Jan. 7, 2011) (transcript available at http://www.fed-soc.org/publications/detail/lawyers-at-war).

142. *See id.*

143. Michael E. Tigar, *Crime Talk, Rights Talk, and Double-Talk: Thoughts on Reading Encyclopedia of Crime and Justice*, 65 TEX. L. REV. 101, 119 (1986-87).

144. *See, e.g.*, Brian Leiter, *The Radicalism of Legal Positivism*, 66 NAT'L LAW GUILD REV. 165 (2009) (for Leiter's delightful take-down).

and even outside the collective "self" of a self-interested profession.[145] It asks us to see where we are and what we are, in the most expansive possible terms. The great majority of lawyers earn their livings by supporting and defending things as they are and the people who own and control things as they are. We have before us the examples of lawyers complicit in horrendous conduct.

Where should we look? Not so hard, it seems to me. Human experience defines claims for justice. We can see what kinds of norms are properly labeled as progressive, at least in some discernible outline. Camus wrote to a German friend at the close of World War II: "Qu'est-ce sauver l'homme? Mais je vous le crie de tout moi-même, c'est de ne pas le mutiler et c'est donner ses chances à la justice, qu'il est le seul à concevoir."[146] That is, "what will save Man? I cry out to you with all my self, it is that one not mutilate him and to give him a chance for justice, which he is the sole being to have conceived."[147] Interesting idea, that humans have this characteristic of generalizing norms from experience. In a celebrated dialogue with Robert Thurman, Deepak Chopra recalled the thoughts of the Persian poet Rumi.[148] Rumi tells of a man sitting in his study and hearing an incessant knocking at his door.[149] Finally, he goes to the door, only to find that the knocking has come from the inside.[150]

A second observation is based on the writings of Professor Martha Nussbaum, which I summarized back in 1995.[151] I have provided this summary below.

When I speak of a prosaic and down-to-earth idea of justice, I mean simply that one can deduce principles of right from human needs in the present time. That is, I reject the cynical, or Stoic, or no-ought-from-an-is idea that one set of rules is just as good as another. I reject the notion, as Professor Martha Nussbaum has characterized it, "that to every argument some argument to a contradictory conclusion can be opposed; that arguments are in any case merely tools of influence, without any better sort of claim to our allegiance[.]"[152] Rather, again borrowing from Professor

145. DUNHAM, *supra* note 133, at 10-11.

146. CHRISTINE MARGERRISON, ET AL., ALBERT CAMUS IN THE 21ST CENTURY: A REASSESSMENT OF HIS THINKING AT THE DAWN OF THE NEW MILLENIUM 232 (2008).

147. *Id*.

148. DEEPAK CHOPRA & ROBERT THURMAN, *God and Buddha: A Dialogue* (Mystic Fire Video released Nov. 11, 2003).

149. *See id*.

150. *See id*.

151. Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714 (1994).

152. *Id*. at 716.

Nussbaum, my notions of justice "include a commitment, open-ended and revisable because grounded upon dialectical arguments that have their roots in experience, to a definite view of human flourishing and good human functioning."[153] One element of such views is that "human beings have needs for things in the world: for political rights, for money and food and shelter, for respect and self-respect," and so on.[154]

Professor Tomiko Brown-Nagin has just published a book entitled COURAGE TO DISSENT, which chronicles the decisions and struggles of civil rights litigants.[155] The concept is refreshing. If we study how lawyers and the system that calls itself justice affects the lives of people, we can have some guidance as to how we might in today's situation organize our lives. The choice of path depends on an understanding of the social, cultural and historical context in which we are acting and the likely impact of our work on those who depend upon us.

Lawyering on the edge puts adrenalin into one's system, and the intensity that one feels leads to temptation. The temptation is to forget that "it is not about me." When we remember who "it" is really "about," and the likely consequences for them, we are on the path towards seeing a system of ethics, properly so-called.

There is an international movement to recognize, restate, and advance an ideal of human rights. Your job is to read deeply about the history of this movement and to see that lawyers must define their tasks outside themselves and outside the view of codes of professional conduct. One must define the task in terms of peoples' demands for justice. To guide you, there are stories of lawyers who have broken the mirror in which law is accustomed to look at itself, and have trod a path towards justice. I commend those stories to you. John R. Vile, in his GREAT AMERICAN LAWYERS: AN ENCYCLOPEDIA, profiles 110 lawyers whose career choices and paths may provide examples.[156] Professor Gerald Uelmen's article, *Who Is the Lawyer of the Century?*, tells some stories of lawyers who you may find worthy of emulation.[157] In my essay, *The City Upon the Hill*, in the book RAISE THE BAR: REAL WORLD SOLUTIONS FOR A TROUBLED

153. *Id*. at 718.

154. *Id*.

155. TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT (2011).

156. JOHN R. VILE, GREAT AMERICAN LAWYERS: AN ENCYCLOPEDIA (2001).

157. Gerald F. Uelmen, *Who Is the Lawyer of the Century?*, 33 LOY. L.A. L. REV. 613 (2000); s*ee also* CALIFORNIA LAWYER MAGAZINE, February 2000, at 15 (reporting on California Attorneys for Criminal Justice poll).

PROFESSION,[158] I discuss young lawyer dissatisfaction and some thoughts on organizing one's way out of that state of mind. And in another essay, *Narratives of Oppression*,[159] I have discussed the challenge of representing those whom society has cast out or marginalized. These works provide you with just the beginnings. I will not go farther. Conclusions that you reach yourself will belong to you more than those dictated by others. Conclusions based on your own study of the historical, cultural, and social events and movements that show where lawyers can make a difference will be more likely to give you the satisfaction you seek. You must, in short, figure out whose aspirations move you to employ your talents.[160] You are not searching for a point of view, but for a philosophical system.

I am suggesting a method of study, and not a conclusion. To know the experiences of those seeking justice, you must be with them. You will not find the answers in lofty sentiment, or from the towers of professional responsibility lore. As G.K. Chesterton has Father Brown say, "One sees great things from the valley; only small things from the peak."[161]

If you agree that these are difficult times, in a society riven with social and economic divisions, you have a decision to make. In the 1930s, as the power of fascism grew across the continent of Europe, talented intellectuals faced the decision to engage or to retreat. Their dilemma, which is also yours, was captured by Federico Garcia Lorca's poem, written shortly before fascists murdered him:[162]

I have shut my balcony
For I do not wish to hear the weeping
But from beyond the grey walls
Nothing else is heard but the weeping
He cerrado mi balcón
por que no quiero oír el llanto

158. Michael E. Tigar, *The City Upon the Hill*, *in* RAISE THE BAR: REAL WORLD SOLUTIONS FOR A TROUBLED PROFESSION 273 (Lawrence Fox ed., 2007).

159. Michael E. Tigar, *Narratives of Oppression*, 17 HUM. RIGHTS BRIEF 34 (2009).

160. In this quest, I suggest looking at John Berger's first novel, A Painter of Our Time. First published in 1958, and then suppressed by its publisher for seven years. It reads today as chillingly modern. Berger wrote an afterword to it in the 1988 paperback edition. The painter of the book, Janos Lavin, understands that artists survive only from money from those who can afford to buy their work, including state subsidies at times. There are parallels to the lives and choices of lawyers in this telling.

161. G.K. CHESTERTON, *The Hammer of God*, *in* THE INNOCENCE OF FATHER BROWN, 118 (2008), *available at* http://www.gutenberg.org/cache/epub/204/pg204.txt.

162. FEDERICO GARCIA LORCA, CASIDA DEL LLANTO, *available at* http://elpensador.info/pensamiento/MTc1Mw/. The translation is mine. *See also* MICHAEL ROSSMAN, WINDS OF THE PEOPLE 3-4 (1986). This book is the text of a radio program commemorating the Spanish Civil War. Rossman's translation is a little different from my own, but the differences arise from my own sense of the meter of Lorca's original.

pero por detrás de los grises muros
no se oye otra cosa que el llanto.[163]

163. *See id*.