

1998

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Recommended Citation

Simon, William H. (1998) ""Thinking Like a Lawyer" About Ethical Questions," *Hofstra Law Review*. Vol. 27 : Iss. 1 , Article 1.

Available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol27/iss1/1>

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HOFSTRA LAW REVIEW

Volume 27, No. 1

Fall 1998

"THINKING LIKE A LAWYER" ABOUT ETHICAL QUESTIONS

*William H. Simon**

Suppose you had to pick the two most influential events in the recent emergence of ethics as a subject of serious reflection by the bar. Most likely, you would name the Watergate affair of 1974 and the appearance a few years earlier of an article by Monroe Freedman. The article was a discussion of what Freedman called the "Three Hardest Questions" surrounding the responsibilities of criminal defense lawyers.¹

Of the two events, Watergate is the most famous but, for our purposes, the least important. It raised no challenging issues of professional responsibility. The lawyer conduct in Watergate that shocked the nation—burglary and obstruction of justice—was indefensible and, for the most part, undefended. The problem, as it emerged in Watergate, was compliance—how to induce people to obey a set of ostensibly uncontroversial norms. The principal responses have been the rote learning of disciplinary rules and moralistic exhortation to obey them. Neither response invokes a lawyer's capacities for judgment; indeed both often seem inimical to judgment. In many jurisdictions, legal ethics is the only subject tested on the bar examination exclusively on a machine-graded, multiple choice basis. In addition, bar review instructors rou-

* Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford University. An earlier version of this Essay was given as the Howard Lichtenstein lecture at Hofstra University School of Law in November, 1997. I am grateful to Dean Stuart Rabinowitz, Professor Monroe H. Freedman, and the Hofstra community for their hospitality and for a stimulating discussion.

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

tinely advise their charges not to “think too much” about the questions on the Multistate Professional Responsibility Exam. “What’s being tested is your memory, not your ability to think,” they say.²

However, if we turn to the second of these two seminal events—Monroe Freedman’s article—we see a different influence. I know I was invited here to *disagree* with Freedman, and I do not intend to disappoint you. However, honesty compels me to begin by expressing my admiration. Freedman focused attention on intensely contestable issues, the “hardest questions” as he put it—whether to cross-examine a truthful witness,³ counsel a client in a manner that might tempt her to perjury,⁴ or present perjury by a criminal defendant.⁵ Moreover, Freedman challenged some of the comforting responses often invoked as excuses for evading such questions. For example, Freedman swept away the claim that lawyers need not be concerned about deceptive tactics because they can “never know the real truth” of the matter.⁶ Lawyers often do know the truth, he insisted with the authority of his great practical experience, and partisanship often requires lawyers to work against the truth.

But—and here I move into my anticipated role as a critic of Freedman—if he was insistent on confronting hard questions, he also was emphatic in affirming simple answers. To any question about whether a lawyer should do X for the client, Freedman has usually answered with a vehement “Yes” as long as X was in the client’s interest and not plainly legally prohibited. He has been emphatic in his defense of a lawyer ethic of categorical client loyalty bounded only by the minimal duty of respect for clearly promulgated law required of any citizen.

Thus, while Freedman was pleased to point out that the client’s interest would often coincide with substantive justice, he declined to build his ethic on any direct commitment to values more complex than the client’s interest on the one hand, and the clear commands of the positive law on the other. For example, Freedman’s article hypothesizes a case in which cross-examining the truthful witness might save an innocent defendant.⁷ The witness, despite the demonstrable defects in her eye-

2. Cf. Jamie Heller, Editorial, *For the Bar Exam, Thinking Gets You Nowhere*, N.Y. TIMES, Dec. 16, 1994, at A38 (describing advice given at a bar review course).

3. See Freedman, *supra* note 1, at 1469.

4. See *id.*

5. See *id.*

6. See *id.* at 1472-74.

7. See *id.* at 1474.

sight, is accurate in testifying that the client was at the scene of the crime, but the client nevertheless did not commit the crime, and the witness's testimony, together with misleading circumstantial evidence, may wrongly convict him.⁸ Now my response to this heartening example is that the lawyer should limit his use of deceptive cross-examination to cases like this in which it seems necessary to avert probable injustice (or at least is not likely to contribute to injustice). Freedman's rule, however, requires that the lawyer invariably engage in such cross-examination so long as it is in the interest of the client.

Although Freedman's view is less compromising than the one reflected in the bar's ethics codes, the codes share its predilection for client-focused and categorical norms in all matters that pit client interests against third-party and public interests. The confidentiality rule, to take the most notable example, mandates client loyalty in all but a few narrowly defined circumstances.⁹ Outside them, the weightiest competing stakes—which might potentially involve life-or-death for an innocent person—do not warrant disclosure.¹⁰ Because of this affinity between Freedman's view and the ABA Codes, I am going to lump them together and call them the "Mainstream View," though I recognize that this is likely a source of pain to Freedman, since it ignores both the distinctive features of his version and the embattled posture in which he has sometimes found himself.

I want to suggest that the most important and problematical feature of the Mainstream View is its reliance on relatively simple or single-minded judgment. In doing so, I am differing from critics who are most troubled by what they see as the extreme individualism of this ethic—its insistence on the autonomy of the client even at great expense to other interests. Also, I mean to distinguish my critique from those whose disagreement focuses on the supposed utilitarianism of the ethic—its ostensible premise that we should be willing to accept some very bad short term results in the interests of a larger long term good. I have no strong objection to individualism or utilitarianism. It does not even bother me that the Mainstream View seems to embrace both, even though they are often thought incompatible. What I object to is that the

8. *See id.*

9. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998).

10. An example often used to illustrate the strictness of the rule is the case, unfortunately not entirely hypothetical, in which the client gives the lawyer information exculpating a wrongly convicted person and refuses to permit disclosure. The rules mandate respect for the client's wishes. *See* Symposium Problem, *The Wrong Man Is About to Be Executed for a Crime He Did Not Commit*, 29 LOY. L.A. L. REV. 1543, 1543-46 (1996).

Mainstream View makes ethical decision-making a matter of crude, or at least simple, judgment. I think this conception is foreign to our most plausibly ambitious conceptions of what it means to “think like a lawyer.”

There are some conceptions of lawyering that associate it with simple judgment. For example, the jurist, Thomas Reed Powell opined, “[i]f you can think of a subject that is interrelated and inextricably combined with another subject, without knowing anything about or giving any consideration to the second subject, then you have a legal mind.”¹¹ He did not, however, mean this as flattery. More flattering and more directly relevant to our subject is Lord Brougham’s famous description of the advocate’s role in the course of the trial of Queen Caroline in 1820. An advocate, he said, “knows . . . one person in the world, *that client and none other*. . . . [H]e must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other.”¹² Lawyers love to quote this speech and to note its stirring context. Brougham was defending Queen Caroline against charges of adultery brought by her husband, the King of England.¹³ He had in his possession documentary evidence—the King’s will—of a prior secret marriage by the King, and he was giving notice that he was prepared to offer it, even though many feared it would bring down the monarchy.¹⁴

However, outside the realm of legal ethics, most favorable portrayals of lawyering associate it with a relatively complex kind of judgment. Compare Powell’s disparaging characterization of legal judgment with Cardozo’s proud credo, announced of all places in the course of interpreting a tax statute: “Life in all its fullness must supply the answer”¹⁵

Or, closer to home, consider the law school curriculum, especially the first year. We do not introduce students to “thinking like a lawyer” with black letter rules. In fact, one can go for weeks without seeing any. Instead we focus on case analysis, especially ones that involve complex circumstances and difficult issues. The lesson more often than not—especially vivid in classics like *Hawkins v. McGee*¹⁶ or *Palsgraf v. Long*

11. THURMAN ARNOLD, *FAIR FIGHTS AND FOUL: A DISSENTING LAWYER’S LIFE* 20-21 (1965).

12. 2 HENRY LORD BROUGHAM, *THE LIFE AND TIMES OF HENRY LORD BROUGHAM* 309 n.* (1871).

13. *See id.* at 285-86.

14. *See id.* at 308-09.

15. *Welch v. Helvering*, 290 U.S. 111, 115 (1933).

16. 146 A. 641, 644 (N.H. 1929).

*Island Railroad Co.*¹⁷—is that there are no categorical answers. Each case stands for a principle that has to be given meaning through an analysis of particular facts. Of course, we do eventually encounter a few rigid rules, but they are usually designed either for people we do not trust—for example, *Miranda* rules for the police¹⁸—or for issues we do not much care about—for example, the “mailbox” rule for a contract problem that hardly ever arises.¹⁹ For the people we trust and the things we care about, we have norms of complex judgment like due process, reliance, and reasonableness. We do not leave these norms in their conclusory, unelaborated state. However, instead of reducing them to black letter rules, we elaborate them through rebuttable presumptions and illustrative cases. A rebuttable presumption is a norm that we follow only after we have determined that there are no indications in the situation that make it inappropriate to do so. An illustrative case is a norm that we follow only after we have determined that the present case is relevantly similar to it.

Or, again, think of malpractice adjudication. The standard of care applied to the lawyer is not defined in terms of black letter rules. Lawyers cannot defend against claims for negligence simply by showing that their actions were not prohibited by specific rules. Furthermore, plaintiffs cannot establish liability simply by showing that the lawyer has violated a black letter rule; a violation is only “evidence” of negligence. The judgment that lawyers owe their clients under the negligence law is not rule-bound, but complex and contextual. It is a judgment that applies a wealth of partly tacit understanding to the full range of circumstances of the particular case.²⁰

Even the ABA Code, when it is not talking about duties to third parties and the public, speaks of lawyer judgment in such terms. Especially revealing is the Ethical Consideration on unauthorized practice. Here, the Code, in explaining why lay people should not practice law, acknowledges that certain individuals, such as real estate brokers or tax accountants, are able to follow black letter rules in their areas of practice.²¹ But, says the Code, the distinctive talents of lawyers are called for in matters that require “professional judgment.”²² The Code also explains that “[t]he essence of the professional judgment of the lawyer is

17. 162 N.E. 99, 99-101 (N.Y. 1928).

18. See *Miranda v. Arizona*, 384 U.S. 436, 467-71 (1966).

19. See, e.g., *Morrison v. Thoeke*, 155 So. 2d 889, 905 (Fla. Dist. Ct. App. 1963).

20. For example, see RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1965).

21. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5 (1986).

22. *Id.*

his educated ability to relate the general body and philosophy of law to a specific legal problem.”²³

My argument is that professional judgment—conceived in precisely this way—ought to play a larger role than it does in professional responsibility doctrine. The fundamental injunction of this doctrine ought to be the one the ABA Code reserves for government lawyers—to “seek justice.” And while this general norm should be fleshed out in terms of more specific ones, the specific ones should take the form, not of black letter rules that obviate judgment, but of contextual standards that engage the lawyer’s capacities for complex reflection. For example, instead of the Code’s categorical confidentiality norm, we should have a norm that mandates that the lawyer keep confidentiality “except to the extent disclosure is necessary to avert substantial injustice.”

“Justice,” as I mean the term, is not a subjective or extra-legal concept. I follow the Preambles of both ABA codes in understanding “justice” as the most inclusive and basic legal norm. The term, as I use it, is more or less synonymous with “legal merit.” This means that all the analytical methods and sources of authority that lawyers draw on for ambitious professional judgments in other contexts are available in matters of legal ethics. The values of “justice” or “legal merit” can be made more concrete by courts and other law-making institutions. The elaboration, however, should occur in the manner of the common law, rather than in the manner of the regulations of the Occupational Safety and Health Administration. The norms should take the form of rebuttable presumptions and illustrative cases rather than rigid rules.

A lawyer ethic founded on professional judgment, grounded ultimately in the value of justice, is not incompatible with strong loyalty to the client. The loyalty, however, has to be the client’s *rights*, not simply her *interests*. Loyalty to the client’s rights is, I submit, what is really being celebrated in the heroic portrayals of advocacy such as the Trial of Queen Caroline.²⁴ Although Brougham’s statement about knowing “only the client” and asserting her rights “at all costs” is usually taken as a rhetorical banner for the Mainstream View, that was not what was going on in the Trial of Queen Caroline. Brougham’s threat was based on a far more complex set of judgments than simply that the Queen’s interests would be served by producing King George’s will. In the first place, Brougham believed that his client was factually innocent of the

23. *Id.*

24. For a complete discussion of the trial, see BROUGHAM, *supra* note 12, at 269-316.

acts with which she was charged.²⁵ In the second place, the secret marriage was centrally relevant to an important substantive defense: if George had been married previously, then his later marriage to Caroline was invalid, and she was legally incapable of adultery. In the third place, Brougham shared the popular view that, even if the charges had been true, this extraordinary prosecution would have been inappropriate given the King's outrageous mistreatment of his wife from the beginning of their marriage.²⁶ Finally, Brougham's defense was part of the Whig parliamentary party's campaign to limit the authority of a monarch who was wildly unpopular for what most of us would consider good reasons.

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

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

The advocate also needs an understanding of how the system functions as a whole. That understanding will involve a variety of assumptions about how the conduct of the advocate interacts with those of other role players to serve the goals of the system. But in some particular

25. Or so he asserted emphatically in his autobiography. *See id.* at 291. While insisting that she was innocent of the charges, Brougham did concede that she had committed other "great indiscretions." *Id.* at 291. However, Flora Fraser questions the plausibility of any belief in Caroline's innocence and also reports accusations that Brougham was disloyal to the Queen in various ways prior to the trial. *See* FLORA FRASER, *THE UNRULY QUEEN: THE LIFE OF QUEEN CAROLINE* 322-24 (1996).

26. *See* FRASER, *supra* note 25, at 41, 77 (explaining how Queen Caroline was confined like a prisoner to the King's residence while he would often go to parties with his mistress).

situations, these general assumptions may not apply, and when that happens, the advocate needs to consider whether she should adjust her conduct to further the system's goals. For example, most understandings of the adversary system assume that the other side is adequately represented. In situations where that assumption does not apply, fidelity to the purposes of the system may require a more moderate style of advocacy. To see such moderation as a betrayal of the adversary system is to treat that system as a set of incantations rather than of principles.

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

On the other hand, there may be, as Freedman suggests, situations in which the practice, while misleading with respect to specific issues, encourages accurate determination of the ultimate issue—where, for example, the client was at the scene, but is in fact factually innocent and is the victim of misleading circumstantial evidence. Note, however, no proponent of the adversary system (at least as I have described it) can believe that such situations occur routinely. For the situation supposes that the lawyer is reliably able to determine that his client is innocent, but that the trier cannot be relied on to reach this conclusion after an adversary hearing conducted without deliberate deception. Treating this situation as normal rejects the whole premise of the adversary system—that the trier is in the best position to determine the facts after partisan presentation of both sides.

Nevertheless, it is important to recognize that generalizations have exceptions. Any theory of the adversary process will include premises that will not apply in some circumstances. Perhaps one of the sides will be impaired in some way, or the trier will be biased, incompetent, or intimidated. In such circumstances, it may be that a style of advocacy

based on inapplicable generalizations will not serve the goals of the system. If the lawyer can reliably determine that there has been some breakdown and can craft a response to it, she might be warranted in varying her usual style. Impeaching a truthful witness might be an appropriate variation. However, within the context of a commitment to the adversary system, it would be warranted only as an exceptional response to a deviant situation.

I recognize that there are other conceptions of the adversary system than the truth-focused one I have suggested. Although I do not find these other conceptions plausible, my main purpose is not so much to defend my conception as to use it to illustrate the style of judgment that seems appropriate to ethical decision-making, the style that, in the words the ABA Code uses once, but otherwise ignores, "relate[s] the general body and philosophy of law to a specific legal problem."²⁷ This involves a duty to understand the practices of advocacy in the light of their underlying principles and to re-shape the practices to keep them consistent with these principles in the particular contexts in which the lawyer finds herself.

What I am recommending here is no more than what EC 3-5 calls the "essence of . . . professional judgment."²⁸ It is the type of judgment we expect lawyers to make in reaching strategic decisions on behalf of their client. A lawyer who makes strategic decisions in the rigid categorical manner that the Mainstream View prescribes for ethical considerations would routinely commit malpractice. Why should he make decisions about third party and public interests differently?

If the Mainstream View has an answer, it is that the lawyer could not maintain the trust of the client if she pursued an ethic requiring complex judgment. The lawyer needs the client's confidence in order to do her job. She needs trust especially to induce the client to disclose facts truthfully. There has to be some limits on what lawyers will do for their clients, but the Mainstream View rejects limits that require complex professional judgment. Clients are more likely to be reassured by confidentiality norms, such as Model Rule 1.6, which limit disclosure to narrowly specified situations²⁹ than by norms such as the one that would permit disclosure "when necessary to avert substantial injustice." Even if lawyers could coherently implement such a norm, the Mainstream View asserts, they could not explain it to clients. For we cannot impute

27. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5 (1986).

28. *Id.*

29. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1998).

the capacity for professional judgment to clients. Thus, lawyers need to use simple judgment because their clients do.

One of the first things to note about all mainstream arguments about confidentiality is that they are myths, which means, not that they are necessarily false, but that they are grounded in faith rather than rational analysis and investigation. Of course, intuition alone is sufficient to convince us that confidentiality has some good effects. We can be fairly sure that it leads to *some* increased disclosure *to* lawyers. But intuition also tells us that there are bad effects; we can be equally sure it leads to some reduced disclosure *by* lawyers. Furthermore, we have no basis other than faith for believing that the good effects outweigh the bad effects. Even in this age of inter-disciplinary research, there is not a scrap of evidence to support the behavioral premises of the Mainstream View on confidentiality. Although the bar currently supports an excellent research institution—the American Bar Foundation—to the tune of several million dollars a year, it has never initiated any research into the premises of its most central normative commitment.

A few adventurous academics have made some forays into the empirical investigation of confidentiality. On the issue of the net benefits or costs of confidentiality, these studies have little to say. One theme that emerges tentatively but consistently, however, is that the typical lay person has little understanding of the confidentiality rule. Especially interesting is a set of responses obtained by Fred Zacharias, which suggests that the lay person's understanding of confidentiality approximates my proposed "avert injustice" standard more than it does the rules currently in force.³⁰ Zacharias found that most lay people believe that lawyers would disclose confidential information, at least in extreme cases of injustice such as the "Innocent Convict" scenario, where breach of confidence is necessary to save a wrongly convicted person.³¹ These responses came from a general survey of lay people rather than clients of lawyers; however, Zacharias also questioned whether represented people gained a better understanding of confidentiality from their lawyers. Nearly all the lawyers Zacharias surveyed said that they did not attempt to explain confidentiality to their clients.³²

And indeed how could they? The bar's rule is itself relatively simple, but that rule is subject to a variety of exceptions imposed by laws outside the rules that are individually and collectively complex—the

30. See Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 377-79 (1989).

31. See *id.* at 390, 392.

32. See *id.* at 382-83.

crime-fraud exception of the attorney-client privilege, the duties imposed by the civil discovery rules, the successor doctrine in bankruptcy, and various laws that impose liability for aiding-and-abetting client wrongdoing. There is usually no feasible way of explaining all this to a naive client.

Given the fact that clients tend not to understand the rules and lawyers tend not to make serious efforts to enlighten them, it is not at all clear that non-radical differences in the scope of the rules and any differences in the form of the rules would have a large impact on client disclosure practices, except among the most sophisticated clients for whom the reassurance of strong confidentiality guarantees seem least needed anyway. However, even if we want to increase client understanding of the rules, it is not at all clear that the current regime is easier to explain than would be the "avert injustice" standard. Despite the deceptive simplicity of Rule 1.6, the current regime is in fact quite technical. There's no reason to think that a lawyer can more effectively explain this hodge-podge of doctrines to the client than he can explain what he understands by "substantial injustice."

So the conception of lawyer judgment we find in conventional legal ethics is peculiarly deviant. At worst, as in the Multistate Professional Responsibility Exam, we find a conception that takes "thinking like a lawyer" to mean not thinking at all. At best, we find a conception that tries to make particular ethical judgments as simple and categorical as possible. Yet, outside the sphere of legal ethics, most admiring and ambitious accounts have long portrayed the hallmark of lawyering as complex and contextual judgment. I propose we try to connect the field of legal ethics to this tradition.³³

33. I will pursue these ideas in greater detail in a new book, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998).

