

3-1-2016

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### Recommended Citation

Wendel, W. Bradley (2016) "Monroe Freedman: The Ethicist of the Non-Ideal," *Hofstra Law Review*. Vol. 44 : Iss. 3 , Article 7.

Available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol44/iss3/7>

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## MONROE FREEDMAN: THE ETHICIST OF THE NON-IDEAL

*W. Bradley Wendel\**

Monroe Freedman was a severe critic of “philosophizing” about legal ethics,<sup>1</sup> yet he was one of the most influential theorists in the development of theoretical legal ethics as an academic discipline in the late twentieth century. No philosopher can ignore Monroe’s arguments, many of which are as vital today as when he first articulated them. It is not just the arguments themselves that remain influential, however, but also a style of reasoning that is characteristic of legal argument at its best. Philosophers not steeped in the ethical world of practicing lawyers have a tendency to assume away many of the hard problems. For example, a dilemma may be presented on the assumption that a lawyer “knows” some fact—that the client is lying and will lie on the stand, that the adversary’s inexperienced lawyer has made a mistake, that a defendant was wrongfully convicted, and so on. One of the great virtues of Monroe’s work is its lawyer-like insistence on the centrality of facts and the difficulty of knowing what they actually are. It is easy to say that a lawyer should provide competent assistance and should keep a client’s confidences, but also a lawyer should not assist in presenting perjured testimony.<sup>2</sup> Using one of his vivid examples, however, Monroe reminded us that a lawyer will not know the facts needed to provide competent representation without first giving the client an ironclad guarantee of confidentiality, which limits the lawyer’s options in

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\* Professor of Law, Cornell Law School. I am grateful to Alice Woolley for ongoing discussions about Monroe’s life and work. The author gratefully acknowledges the research funding provided by the Judge Albert Conway Memorial Fund for Legal Research, established by the William C. and Joyce C. O’Neil Charitable Trust to the honor the memory of Judge Conway, Chief Judge of the New York State Court of Appeals from 1954 to 1959 and his son, Hewitt A. Conway, a member of the Cornell Law School Class of 1949.

1. See generally Monroe H. Freedman, *A Critique of Philosophizing About Lawyers’ Ethics*, 25 GEO. J. LEGAL ETHICS 91 (2012).

2. This is the famous “trilemma” from his best-known article. See Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1469-70, 1175-80 (1966).

responding to the client's subsequent decision to testify falsely.<sup>3</sup> Imagine that a woman is accused of stabbing her husband to death with a kitchen knife. The client insisted that she had not committed the crime, despite overwhelming physical evidence of guilt. Only after the lawyer pressed the client, and reassured her that nothing she told him would ever be disclosed or used against her, did the client reveal that her husband was a mean drunk who had abused her many times in the past. On the occasion of the death, he came home drunk and violent, attacked her again, and as she backed away from him she felt the kitchen knife and stabbed him in self-defense. Of course, this is a complete defense to the murder charge and, armed with this information, the lawyer could easily persuade the prosecutor to dismiss the charges.

It is hard to imagine a philosopher disagreeing with the value of zealous representation in the self-defense case, but Monroe's point was that a lawyer engaged in ethical deliberation about the same case would see connections a philosopher might miss.<sup>4</sup> The relationship between confidentiality and competence is fairly easy to perceive. A defense lawyer would not be able to learn valuable information if it were first necessary to give a *Miranda* warning,<sup>5</sup> so to speak, cautioning the client that any information disclosed by the client might have to be shared with law enforcement. The deeper relationship, however, is between confidentiality and the ethical demand that lawyers not participate in presenting false testimony at trial.<sup>6</sup> A defense lawyer who needs to know all the facts in order to represent a client competently may subsequently find herself in a real jam if the client insists on testifying to a version of events that is at odds with the story the client told the lawyer. To avoid getting into this predicament, the lawyer may begin the representation with a commitment to avoid learning all the relevant, potentially incriminating facts. That way, whichever story the client chooses to tell on the stand (assuming the client invokes the constitutional right to testify),<sup>7</sup> the lawyer can plausibly claim that she did not *know* it was false.<sup>8</sup> *Voilà*, the lawyer is off the hook for discipline, but the client will

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3. See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS § 6.02, at 152-53 (4th ed. 2010).

4. See generally Freedman, *supra* note 1.

5. *Miranda v. Arizona*, 384 U.S. 426, 467-73 (1966).

6. See MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(2) (AM. BAR ASS'N 2014).

7. *Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987).

8. The *Model Rules of Professional Conduct* ("Model Rules") requires the lawyer to take remedial action only when the lawyer subsequently comes to know that evidence offered or testimony by a witness called by the lawyer is false. See MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(3). Knowledge is defined in the *Model Rules* as actual (that is, subjective) knowledge. *Id.* r. 1.0(f).

be less well served. Inventive defense lawyers have come up with all manners of clever work-arounds to avoid acquiring the kind of knowledge that will limit their freedom of action. Famed Texas defense lawyer Richard “Racehorse” Haynes, for instance, has said he “never [asks] the client what it is that he contends are the facts from his point of view . . . in order to avoid being ‘compromised’ in deciding whether to put him on the witness stand.”<sup>9</sup> Instead, Haynes asks “what [the client] suspects the other side might claim.”<sup>10</sup> Sophisticated clients have no trouble figuring out what they are supposed to say, and, thus, do not lose any of the benefits of effective advocacy, but Monroe rightly questioned whether such an obvious ruse is really an ethical solution to the problem.<sup>11</sup> It would be better, he contended, to clearly and candidly give lexical priority to the values of loyalty, confidentiality, and competence in the attorney-client relationship over what should be seen as secondary duties to the tribunal and to the system of justice.<sup>12</sup> That means if the lawyer cannot successfully dissuade the client from testifying falsely, she should present the client’s testimony in the ordinary way, not relying on the “narrative” fiction to distance the lawyer’s questioning from the client’s perjury and not making any retrospective efforts at rectifying the record.<sup>13</sup>

This is the position that got Monroe in such hot water with professional elites when the lecture that became his “Three Hardest Questions” article was first publicized. Then-Eighth Circuit Court of Appeals Chief Judge, Warren Burger, along with two other federal judges, actually initiated disbarment proceedings against Monroe for having expressed opinions they believed to be in conflict with a lawyer’s ethical duties.<sup>14</sup> But, in fact, all Monroe’s position, from which he never wavered, boils down to is, *something has got to give—the only question is what*. There is no tidy solution to the perjury trilemma that avoids compromising either loyal client service or the duty to screen out false evidence and perjured testimony.<sup>15</sup> In the years following the publication of the article and the ensuing controversy, Monroe never tired of pointing out the contortions that courts and disciplinary agencies went

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9. Stuart Taylor, Jr., *Reporter’s Notebook: Defending Guilty*, N.Y. TIMES, Aug. 1, 1981, at 16.

10. LEO KATZ, ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW 44 (1996).

11. FREEDMAN & SMITH, *supra* note 3, § 6.08, at 162.

12. *Id.* § 6.03, at 154.

13. Freedman, *supra* note 2, at 1477-78.

14. See Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 GEO. J. LEGAL ETHICS 133, 133-34, 133 n.1, 136-38 (2008) (recounting this history).

15. See FREEDMAN & SMITH, *supra* note 3, § 6.03, at 153-54.

through to avoid facing up to this problem. Consider the knowledge requirement. In the ABA *Model Rules of Professional Conduct*, and in many civil perjury cases, a fact finder can infer from circumstantial evidence the conclusion that a lawyer had subjective knowledge of falsity.<sup>16</sup> Numerous cases involving criminal defense lawyers, however, hold that it is almost impossible to satisfy the knowledge requirement to trigger a defense lawyer's remedial obligations.<sup>17</sup> The Wisconsin Supreme Court went as far as to say: "Absent the most extraordinary circumstances, such knowledge must be based on the client's expressed admission of intent to testify untruthfully."<sup>18</sup> Since it is only the thickest-headed client who will frankly admit to an intention to testify falsely, this interpretation of the knowledge requirement aligns state courts in Wisconsin exactly with the position that Monroe advocated almost fifty years ago.

Many other courts have taken the same position,<sup>19</sup> leaving the substance of the law as Monroe said it should be, only buried beneath pious denunciations of perjury. To return to Monroe's criticism of the strategy of willful ignorance, is this really an *ethical* solution? I believe the answer is yes, but on a conception of ethics that is more familiar to lawyers than to philosophers. Over and over again, Monroe insisted on the importance of context to ethical decision-making. Speaking of the critics of his "Three Hardest Questions" article, he ascribed their objections to a style of reasoning that could not break free of rigid, categorical rules or principles:

Their system of professional responsibility appears to rest upon rigidly legalistic adherence to norms, regardless of the context in which the lawyer may be acting, his motives, and the consequences of his act . . . . The system of professional responsibility that I have been advancing in these articles, on the other hand, has been one that

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16. MODEL RULES OF PROF'L CONDUCT r. 1.0(f) (AM. BAR ASS'N 2014); see *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 459 (4th Cir. 1993); see also MODEL RULES OF PROF'L CONDUCT r. 4.2, cmt. 8 (warning, in the context of the anti-contact rule, that avoiding a knowing violation of the rule cannot be evaded by the lawyer "closing eyes to the obvious").

17. See, e.g., *United States v. Midgett*, 342 F.3d 321, 326 (4th Cir. 2003); *Shade v. Great Lakes Dredge & Dock Co.*, 72 F. Supp. 2d 518, 524 (E.D. Pa. 1999).

18. *State v. McDowell*, 681 N.W.2d 500, 513 (Wis. 2004).

19. See, e.g., *Midgett*, 342 F.3d at 326 (noting "defense counsel's responsibility to his client was not dependent on whether he personally believed [defendant]" and holding that defense counsel's "mere belief" was not sufficient to refuse defendant's need for assistance in testifying); *United States v. Long*, 857 F.2d 436, 445 (8th Cir. 1988) (stating that a clear intent to commit perjury is necessary for an attorney to break confidence).

attempts to deal with ethical problems in context, giving full consideration both to motive and consequences.<sup>20</sup>

Much later, he returned to the same theme, criticizing the formalistic, rule-bound style of reasoning that lawyers and judges sometimes employ when dealing with the rules of professional conduct: “I would like, therefore, to venture beyond the words of the ethical rules themselves, into the larger legal context of the lawyers’ role, into understanding inconsistent ethical rules in the light of reason, into the purposes of legal representation in criminal cases, and into moral philosophy.”<sup>21</sup> The answer to an ethical question often depends on contextual factors not easily captured by general rules. For example, suppose a judge says to a defense lawyer, “Let’s speed this up—tell me, did your client do it?”<sup>22</sup> If the lawyer answers truthfully, she betrays a client confidence, but if she equivocates or refuses to answer, the judge will take that response to be a tacit admission of the client’s guilt. Given that the judge had no right to ask the question in the first place, and has placed the lawyer in an untenable position, Monroe said the “right” answer is for the lawyer to respond, “Your Honor, I have no doubt that the defendant is not guilty.”<sup>23</sup>

The emphasis on a holistic, purposivist style of interpretation over a rigid, categorical, and formalist approach in legal ethics is not unique to Monroe. It also characterizes the work of one of the frequent targets of his criticism, Bill Simon.<sup>24</sup> What very strongly distinguished Monroe’s approach, however, was his resistance to the idea that there might be tidy solutions to difficult conflicts among ethical values.<sup>25</sup> Lawyers know and philosophers sometimes forget, hard ethical questions do not always have answers so clearly justified that the agent feels no sense of conflict or regret with respect to the unchosen option. We would like it to be the case that the resolution of an apparent dilemma is either “do *X*” or “do not do *X*,” and in either case to feel no sense of loss with respect to the alternative. But consider the analysis of the perjury trilemma and the improper question by the judge. Telling lawyers either to flat-out lie to a judge or to knowingly introduce perjured testimony is the kind of

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20. Monroe H. Freedman, *Postscript: The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030, 1046-47 (1967).

21. Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771, 774 (2006).

22. *See id.* at 773.

23. *Id.*

24. *See generally* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

25. *See supra* text accompanying notes 19-20.

uncompromising stance that riled up Monroe's critics. The alternatives, on the other side, would be just as troubling—a fact that critics often prefer to gloss over. Robust duties to screen out perjury necessarily result in lawyers betraying client confidences or engaging in some kind of strategy of willful ignorance. Either way, when thinking about the perjury trilemma and the problem of the impertinent questions by judges, it is difficult to avoid a sense that the unchosen alternative also had a great deal to be said in its favor. Presenting the testimony of a defendant who will almost certainly be lying may be the least-worst outcome of a difficult situation, but it is not straightforwardly the right result. Dilemmas in political life, of which (I contend) the practice of law is a part, are sometimes incapable of resolution without a sense that there is something disagreeable, even wrongful, about the resolution, even though the conclusion may be justified.<sup>26</sup> There may be no “innocent” resolution in which an agent takes all the relevant considerations into account, engages in the right process of weighing and balancing, and leaves no residue or remainder of value unacknowledged.<sup>27</sup> Thus, a lawyer ought to reason to the best resolution of the competing values at stake—for instance, loyalty to the client, but also obligations to the tribunal—and act on that resolution, but should also be aware of the remainder or residue of the competing values. A lawyer should be aware that her work sometimes involves getting her hands dirty, as it is sometimes called. It may be impossible to do the right thing without, at the same time, engaging in moral wrongdoing.

Many philosophers find this position deeply confused, and even incoherent.<sup>28</sup> Moral reasoning should yield a conclusion regarding what should be done, all things considered. The competing considerations weighing in favor of alternative courses of action are taken into account in deliberation, but once a conclusion is reached, they cease to have any significance for the agent. A decision may be difficult, depend on contextual factors, call for the exercise of judgment, and not simply be given straightforwardly by abstract principles; still however, there is, in principle, only one right answer. The unchosen options do not linger and create “moral remainders.”<sup>29</sup> An agent may experience sentiments of

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26. See, e.g., BERNARD WILLIAMS, *Politics and Moral Character*, in MORAL LUCK 64 (1981); Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160, 165-66 (1973).

27. CHRISTOPHER W. GOWANS, INNOCENCE LOST: AN EXAMINATION OF INESCAPABLE MORAL WRONGDOING 90-91 (1994).

28. See C.A.J. Coady, *The Problem of Dirty Hands*, STAN. ENCYCLOPEDIA PHIL. (Apr. 29, 2009), <http://plato.stanford.edu/archives/spr2014/entries/dirty-hands> (reviewing criticism of the dirty hands thesis).

29. See GOWANS, *supra* note 27, at 90-91 (defending the view that moral values have some

remorse or regret, but the presence of these emotions does not indicate wrongdoing. I disagree with this view, mainstream though it may be, because I believe moral remainders may point to residual wrongdoing even though the action taken was justified.<sup>30</sup> The purpose of this brief Tribute, however, is not to re-argue an issue within moral and political philosophy, but to suggest an explanation for the staying power and continuing significance of Monroe's scholarship on the lawyer's role. One of the themes that animated so much of Monroe's work is that the role of the lawyer necessarily touches on values that are always in tension and sometimes in outright conflict. Lawyers represent individuals within a system of justice, and as such, they are subject to the demands of both individual and political morality. The demands of loyalty to one's client are not always congruent with the demands of justice, nor can they be, because sometimes the realization of social justice would require the betrayal of one's client's confidences and, on the other hand (as every lawyer knows), there are cases in which doing the best job for one's client results in an unjust outcome. This is not a particularly original observation, but the power of Monroe's decades-long engagement with legal ethics comes from his refusal to abstract away from the particulars of real cases, in which there seem that every alternative involves the compromise of some core value. In other words, to borrow from the title of Stuart Hampshire's magnificent book, Monroe's voice is that of experience, not innocence:

[T]hose who incur the responsibility of political power . . . should at all times be prepared for the occurrence of an uncontrolled conflict of duties in situations which seem to exclude the possibility of a decent outcome, and in which all lines of action seem dishonourable or blameworthy. This is the point at which the contrast between innocence and experience becomes indispensable in ethics. The idea of experience is the idea of guilty knowledge, of the expectation of unavoidable squalor and imperfection, of necessary disappointments and mixed results, of half success and half failure.<sup>31</sup>

When considering some of the hardest cases lawyers must deal with in practice, the perspective of innocence has less to offer than the standpoint of experience. In particular, it better acknowledges the inevitability of wrongdoing. In the much-debated example of cross-

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independence from deliberative conclusions and defining a "moral remainder" as "something that remains of a moral conflict after the process of moral deliberation and that thereby explains the presence of wrongdoing even when the correct conclusion of deliberation has been followed").

30. See W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 171-73 (2010).

31. STUART HAMPSHIRE, *INNOCENCE AND EXPERIENCE* 170 (1989).



examining the alleged victim in a rape case,<sup>32</sup> the conflict between the possibility that an innocent defendant may be sent to jail for most of the remainder of his life and the humiliation and anguish inflicted on the complaining witness is incapable of resolution without moral remainders. There is little to hope for in such a case beyond “the expectation of unavoidable squalor and imperfection,”<sup>33</sup> but an ethical theory should nevertheless be prepared to provide guidance in these circumstances.

It would be one thing to theorize about an area of social life in which almost everyone accepts principles of justice, complies with them, and helps support just institutions. When individuals and institutions fail to live up to the demands of justice, however, ideal theories have little to contribute. If judges never asked questions they should not, if witnesses never lied or were mistaken, if police officers did not commit perjury, if all defendants had access to competent and dedicated defense lawyers, and if prosecutors complied with their constitutional obligations to turn over exculpatory evidence, then we could make do with an ideal theory of the defense lawyer’s role. Where other actors partially or completely fail to comply with principles of justice, however, a different theoretical approach is required—a non-ideal theory. I am using this term slightly differently from the way it is normally used by Rawls and others,<sup>34</sup> but the underlying idea is the same. We can distinguish a theory that assumes our institutions and practices are the best for which we can realistically hope from one that takes institutional injustice as given and seeks to derive principles for actors within the system in light of this injustice. What is the required (or permitted) response from defense lawyers to prosecutorial misconduct? What about the response of all lawyers to unjust laws? Importantly, the answer to any question along these lines, within non-ideal theory, is given by the content of ideal theory.<sup>35</sup> That sounds confusing, but it means that the moral permissibility of a policy, rule of conduct, or action is judged as a step toward the achievement of an integrated ideal of justice. Non-ideal theory is a *transitional* perspective, not the passive acceptance of a

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32. See FREEDMAN & SMITH, *supra* note 3, § 7.12, at 207-08; *id.* § 7.14, at 212. Monroe’s co-author, Professor Abbe Smith, has separately addressed the case of a New York City police officer accused of having violently assaulted Haitian immigrant Abner Louima in a police stationhouse, in which the defense lawyer suggested that Louima’s horrific injuries at the hands of the cop could have resulted from consensual homosexual activities. See Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 925, 930-31 (2000).

33. HAMPSHIRE, *supra* note 31, at 170.

34. See A. John Simmons, *Ideal and Nonideal Theory*, 38 PHIL. & PUB. AFF. 5, 7 (2010).

35. *Id.* at 18.

second-best outcome.<sup>36</sup> As Adam Swift explains: “[A]s long as philosophers can tell us *why* the ideal would be ideal, and not simply *that* it is, much of what they actually do when they do ‘ideal theory’ is likely to help with the evaluation of options within the feasible set.”<sup>37</sup>

This leads to a concluding observation about an aspect of Monroe’s ethical theory that has come under criticism—his uncompromising defense of the adversary system on constitutional grounds, which carries with it a strong obligation of zealous advocacy for attorneys.<sup>38</sup> He imagines an idealized system, in which clients are represented by loyal, competent, and dedicated lawyers who single-mindedly advocate for their clients’ best interests.<sup>39</sup> Of course, the legal system also aims at social values such as truth and justice, but these will be produced by the adversary system, as long as all the parties’ lawyers fulfill their role of zealously advocating for their clients.<sup>40</sup> A rosy description of the American adversarial system is an inviting target for critics, who argue that ethical norms for lawyers cannot be defended with reference to such a flawed system.<sup>41</sup> Perhaps a different way to understand Monroe’s reliance on the adversary system is as a regulative ideal that operates within a fundamentally non-ideal ethical theory. The values that inform ethical lawyering in the real world are those that can be understood by starting with a “realistic utopia.”<sup>42</sup> It may be utopian to imagine that all citizens really do have an equal opportunity to have their rights, humanity, and dignity respected by the legal system, and to have a loyal, dedicated, competent lawyer serving them as their “champion against a hostile world.”<sup>43</sup> If there ever were to be anything approaching a realistic utopia, however, we are only going to get there if lawyers act on the values of equality and dignity, which are at the heart of Monroe’s conception of the adversary system.<sup>44</sup> We are more likely to end up in an ideal world by keeping the individual rights of our clients at the center of our ethical vision than by subordinating the humanity and dignity of our clients to social ends such as truth and justice.

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36. *Id.* at 22-25.

37. Adam Swift, *The Value of Philosophy in Nonideal Circumstances*, 34 *SOC. THEORY & PRAC.* 363, 365 (2008).

38. *See, e.g.*, Freedman, *supra* note 21, at 772; FREEDMAN & SMITH, *supra* note 3, § 2.04, at 21.

39. *See generally* Freedman, *supra* note 21.

40. FREEDMAN & SMITH, *supra* note 3, § 2.10, at 33-35.

41. *See, e.g.*, DAVID LUBAN, *The Adversary System Excuse*, in *LEGAL ETHICS AND HUMAN DIGNITY* 21 (2007) (arguing that a lawyer’s accountability for unethical actions does not depend on the adversary system, and the adversary system is not a sufficient basis for unaccountability).

42. Simmons, *supra* note 34, at 7.

43. FREEDMAN & SMITH, *supra* note 3, § 2.03, at 20.

44. *Id.* § 2.04, at 20-21.

If he could read this, Monroe might object to my redirection from his lawyerly arguments, based on the American Constitution and adversarial system, toward an analysis drawn from political philosophy. He and others rightly ask how much philosophers have to teach lawyers about their own ethical duties, particularly since philosophers tend to work with fantastical thought experiments, do not pay sufficient attention to empirical facts, and seek truths that are necessary and do not depend on factual contingencies.<sup>45</sup> Many factors explain the lasting value of Monroe's scholarship, not the least of which is its insistence on taking the full complexity of the real world of legal practice into account when seeking to prescribe ethical norms for lawyers. At the same time, however, his work is philosophical in the best sense. It articulates and defends a vision of ethical lawyering that has stood the test of time. Plenty of scholars (myself included) have criticized the zealous advocacy conception of lawyering, but in so doing, have always felt constrained to hold onto the values of humanity and dignity that animate all of Monroe's work. Philosophers and lawyers alike will continue to debate these issues, largely in terms set by Monroe in the 1970s, as long as there is a field of legal ethics.

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45. See, e.g., M.B.E. Smith, *Should Lawyers Listen to Philosophers About Legal Ethics?*, 9 L. & PHIL. 67, 71-79 (1990).