2016

Monroe Freedman and the Morality of Dishonesty: Multidimensional Legal Ethics as a Cold War Imperative

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I. INTRODUCTION

Well before the turn of the last century, Monroe Henry Freedman's place in the history of legal ethics had been established. Often, he would be introduced by reference to professional honors. Audiences would be told, for instance, that he had received the American Bar Association ("ABA") Michael Franck Award for distinguished contributions to professional ethics, the New York University Martin Luther King, Jr. Humanitarian Award for decades of work to advance human dignity and

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The author alone is responsible for errors and the views herein, but he expresses special thanks for sharing varied perspectives and other assistance to Alex Aleinikoff, Jerome Barron, Maurice Emond, Susan Fortney, Eric M. Freedman, Leon Friedman, Eugene Freedman, Doris Gilbert, Robert Gilbert, Jennifer Gundlach, Daniel Greenwood, Rebeca Izquierdo, Rhoda Karpatkin, Lawrence Kessler, James C. MacDonald, Ronald Meister, Roger Newman, Alan Resnick, James Sample, Pasia Schonberg, Nancy Silber, Ronald Silverman, Roy Simon, Abbe Smith, and Ellen Yaroshefsky. The author is indebted to the Director of the Hofstra Law Library, Courtney Selby, and Monroe Freedman's family for allowing early public electronic access to a selection of Monroe's files in advance of their more complete organization; librarian Toni Aiello; Ronald O'Leary, Maurice A. Deane School of Law at Hofstra University J.D. Candidate 2018; and the Board of Editors of Volume 44 of the *Hofstra Law Review* for their editorial and research assistance.

The title contains an allusion to Mary Dudziak's thought-provoking exploration of the impact of foreign policy objectives on civil rights litigation in *Desegregation as a Cold War Imperative*, which was published in the *Stanford Law Review*.

This Article does not purport to consider intensively many facets of Monroe's career or personal life. His family, his anti-war activities, his connection to Judaism, his teaching, his professional mentoring, his deanship of the then-Hofstra Law School, and of course, the evolution of his detailed positions in professional ethics, including law reform activities, lawyer advertising and commercial law—these merit further study and have received some consideration elsewhere, including in this Volume of the *Hofstra Law Review*.

social justice, and the New York State Bar Association Sanford Levy Award for extraordinary contribution to the field of professional ethics through a body of work spanning four decades.[1] There was no shortage of awards to choose from: ones that recognized his contributions to legal ethics, inspirational teaching, bold stands on civil rights and civil liberties issues, deep religious values, and unyielding defense of unpopular clients and egalitarian causes.[2]

Speaking more personally, Monroe would say that although these honors were welcome, he took more delight in a description of himself that he found in a Federal Bureau of Investigation ("FBI" or "Bureau") report he had forced the government to disclose.[3] An analyst, whose name was redacted, wrote the report in 1967.[4] The analyst portrayed him

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1. Monroe H. Freedman, *Curriculum Vitae*, MAURICE A. DEANE SCH. L. HOFSTRA U., http://law.hofstra.edu/directory/faculty/fulltime/freedmanm/cv/cv.pdf (last visited July 24, 2016).

2. A list of honors and awards is contained in his curriculum vita. *Id.*

3. He mentioned this observation on several occasions. *See* Nabeal Twereet, *Influential Ethics Professor Monroe H. Freedman Discussed GM's Internal Investigation*, LAW CROSSING, http://www.lawcrossing.com/article/900022652/Influential-Ethics-Professor-Monroe-H-Freedman-Rflects-on-a-Long-and-Rewarding-Career-at-Maurice-A-Deane-School-of-Law (last visited July 24, 2016) (quoting Monroe as stating that "[t]he quotation that I most prize is an evaluative report by the FBI on December 14, 1967 (obtained through the Freedom of Information Act): 'Freedman has been a member of the National Association for the Advancement of Colored People and of the American Civil Liberties Union. He has been extremely outspoken, and his irresponsible mouthings have received an inordinate amount of publicity'"). The memorandum is in the Freedman-FBI electronic folder, compiled and maintained by the Hofstra Law Library. Memorandum from FBI on Monroe H. Freedman (Dec. 14, 1967) (on file with the Hofstra Law Library in the Freedman-FBI electronic folder); *see* Bart Jones, *Hofstra's Monroe Freedman Dies; Eminent Legal Scholar Was 86*, NEWSDAY (Feb. 27, 2015), http://www.newsday.com/long-island/nassau/monroe-h-freedman-eminent-legal-scholar-dies-at-86-1.9987406.

4. In 1975, then-Hofstra Law School Dean, Monroe requested his files from the FBI. *See* Letter from Monroe H. Freedman, Dean, Hofstra Univ. Sch. of Law, to Fed. Bureau of Invesitgation, (Mar. 18, 1975) (on file with the Hofstra Law Library in the Freedman CIA-FBI electronic folder). He was represented by his colleague Leon Friedman. Their successful effort involved persistence, publicity, and the promise to litigate if necessary, eventually winning him access to what appeared to be all of Monroe's declassified and redacted FBI and CIA dossier. *See* Letter from Monroe H. Freedman, Dean, Hofstra Univ. Sch. of Law, to Clarence N. Kelley, Dir., FBI (Sept. 8, 1975) (on file with the Hofstra Law Library in the Freedman CIA-FBI electronic folder); Letter from Clarence N. Kelley, Dir., Fed. Buerau of Invesstigation, to Monroe H. Freedman, Dean, Hofstra Univ. Sch. Of Law (Sept. 22, 1975) (on file with the Hofstra Law Library in the Freedman CIA-FBI electronic folder); Letter from Leon Friedman, Professor, Hofstra Univ. Sch. of Law, to Edward Levi, Att'y Gen., U.S. (Oct. 13, 1975) (on file with the Hofstra Law Library in the Freedman CIA-FBI electronic folder); Letter from Richard M. Rogers, Deputy Chief, Freedom of Info. & Privacy Unit, Office of the Deputy Att'y Gen., U.S., to Leon Friedman, Professor, Hofstra Univ. Sch. of Law (Nov. 17, 1975) (on file with the Hofstra Law Library in the Freedman CIA-FBI electronic folder); Letter from Harold R. Tyler, Deputy Att'y Gen., U.S, to Leon Friedman, Professor, Hofstra Univ. Sch. of Law (Aug. 30, 1976) (on file with the Hofstra Law Library in the Freedman CIA-FBI electronic folder); Letter from Clarence N. Kelley, Dir., FBI, to Monroe H. Freedman, Dean, Hofstra Univ. Sch. of Law (Oct. 8, 1976) (on file with the Hofstra Law Library in the Freedman CIA-FBI electronic folder); *see also* Richard Galant, *Monroe Freedman's*

as "extremely outspoken" and "a member of the National Association for the Advancement of Colored People and the Washington affiliate of the American Civil Liberties Union" whose "irresponsible mouthings" had been receiving "an inordinate amount of publicity."[5] Monroe was delighted—he might as well have been given an FBI award for "significant radical provocation."[6] It was hardly praise he repeated to courts or in law reviews, but it was unintentional acknowledgement that, despite what had been done to try to deprive him of a professional livelihood and to quiet his voice, he had followed the dictates of his conscience and moved the world a bit in his direction.

This Article reaches into Monroe's personal history to advance an explanation for his advocacy and his signal contributions to legal ethics—particularly his landmark article of 1966, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, where he inquired into situations in which candor might not be either moral or professional.[7] It suggests his outspoken defense of lying as sometimes necessary and even moral behavior in the adversary system should be understood as an outgrowth of his early perspective about the nature of moral obligations, as well as a response to excesses of the Cold War that touched him personally.[8] It argues that Monroe's confidence in the fundamental fairness of government rules, processes, and punishments—and that of hundreds of other young lawyers—was undermined by experience with inquisitions and surveillance during the 1950s.[9] Understanding the history does at least as much to explain his attitude about ethics in an adversary system as his better-known encounters with the problems of criminal defense lawyers in more immediate contexts. Focusing on earlier events offers insight not just into Monroe and the genesis of his position in that article, but the modern development of multidimensional professional ethics.

Secret Life, NEWSDAY, Aug. 26, 1976, at 3; Pete Bowles, *Hofstra Dean Sues for His FBI File* (on file with the Hofstra Law Library in the Freedman CIA-FBI electronic folder); *Hofstra Law School Dean Sues FBI for Data in File on Him*, (on file with the Hofstra Law Library in the Freedman CIA-FBI electronic folder);. *Hofstra Law Dean Sues to Get FBI File*, L.I. PRESS, June, 10 1976. Monroe's wife Audrey also was politically engaged and applied to receive her FBI file around the same time, but the file was unavailable to be reviewed for this article.

5. Memorandum from FBI on Monroe H. Freedman, *supra* note 3.

6. *See* Twereet, *supra* note 3.

7. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); *see infra* Part V.

8. *See infra* Part VIII; *see also* Alice Woolley, *Hard Questions and Innocent Clients: The Normative Framework of* The Three Hardest Questions*, and the Plea Bargaining Problem*, 44 HOFSTRA L. REV. 1179, 1190 (2016) ("Freedman rejected rule-based approaches to moral decision-making. He noted his embrace of civil disobedience where appropriate . . . .).

9. *See infra* Part V.

II. HIGHER EDUCATION AND HIGHER LAWS

Born on April 8, 1928, and raised in a middle class secular Jewish family in Mount Vernon, New York, Monroe served in the U.S. Navy as a seaman.[10] He entered Harvard College in 1948 and not long afterward fell in love with, and proposed to, Audrey Willock, a Wellesley student from a well-to-do Protestant Pittsburgh family.[11] According to accounts, Audrey's parents were anti-Semitic, and to keep Audrey away from him, they pulled her from school and confined her at home.[12] Monroe and his friends drove to Pennsylvania, where, using a subterfuge, they "broke her out" and engineered an elopement.[13] Audrey became estranged from her parents, converted to Judaism, and became more religiously observant than her husband.[14] Their passionate marriage lasted half a century, until her death in 1998.[15]

At Harvard College, Monroe became deeply interested in the connection between religious and political thought.[16] He wrote an inspired honors thesis contending that early Jewish thought was largely "political" and the Jewish prophets were ignored by conventional textbook surveys, which incorrectly asserted that the first contemplation of political obligation and relationships began with the Greeks.[17]

Significantly, for present purposes, Monroe identified early Judaic prophets with the development of ideas about "higher" laws and explored a fissure between the devotion to the prophetic moral traditions of early Judaism, on the one hand, and the dominant attachment to legalism and God's Covenant with Abraham, after 621 A.C.E., on the

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10. Monroe's family raised him secularly; he did not become a bar-mitzvah until his thirties. Interview with Eugene Freedman (Feb. 18, 2016); Telephone Interview with Jerold Barron (Feb 16, 2016).

11. *Id.*

12. The story of their romance and elopement was told by Bob Gilbert, a participant in the elopement; this version of events, according to Monroe's granddaughter, Rebeca Izquierdo, was also substantially repeated by Monroe and Audrey to his children and grandchildren. Telephone Interview with Rebeca Izquierdo (Mar. 14, 2016); Telephone Interview with Bob Gilbert & Doris Gilbert (Mar. 20, 2016).

13. *Id.*

14. *Id.*

15. *See* Edwin McDowell, *Audrey Freedman Dies at 68; Specialized in Labor Issues*, N.Y. TIMES, Apr. 16, 1998, at D23.

16. Monroe H. Freedman, A Consideration of the Political Thought of the Early Jews (Apr. 11, 1951) (unpublished A.B. honors thesis, Harvard University) (on file with the Pusey Library, Harvard University). His honors thesis acknowledged the contributions of his tutor Samuel Mantel, Jr., then a doctoral student studying the politics of education; Theodore S. Baer, an instructor in government and general education; and Professor Maurice Zigmond, an ethnographer who was the Rabbi at the Harvard-Radcliffe Hillel House. *Id.*

17. *Id.* at 2.

other hand.[18] In the earlier years, he observed, despite the fact that ordinary citizens of the pre-covenant Jewish state were not entitled to question "the validity of a law of the land or an act of a king," it was nevertheless possible "for a prophet, with an intuitive knowledge of the Law of God, to distinguish between that which was the Law and that which was not."[19] Obedience to higher law was imperative, and "man-made law as was not part of the Law of God, simply was not law."[20] He linked prophetic messages such as those of Isaiah to the expression of similar ideas many centuries later by the legal philosopher Grotius.[21] In the rebellion of the prophets, Monroe found "*Jus Naturale*—a Law above the laws of men."[22] He would invoke higher natural law throughout his later life to justify his actions and explain ethical responsibilities.[23]

Graduating with honors in 1951, Monroe went on to Harvard Law School where, during his third year, he worked as a faculty assistant with the school's Dean Erwin N. Griswold.[24] Griswold was then deeply involved in the problems of Harvard students and faculty who were being investigated for their support of the Communist Party and were facing ineligibility for admission to the bar or disbarment as a result.[25] Griswold's perspective on responding to the investigations evolved into robust support for civil liberties. He spent considerable time lecturing and writing about overreaching by government committees and cautioning against inappropriate inferences of guilt based on the unwillingness of targets of inquiries to cooperate.[26]

Initially derisive of students who stood on their rights and refused to cooperate, Griswold changed his position during the period that Monroe was his faculty assistant. He came to describe the Fifth Amendment as "an expression of the moral striving of the community"

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18. *Id.* at 28-29, 47-48, 55-56, 61, 64.

19. *Id.* at 52-53.

20. *Id.* at 52.

21. *Id.* at 52-57.

22. *Id.* at 64.

23. *See, e.g.*, Timothy W. Floyd, *Monroe Freedman: Prophet of Biblical Justice*, 44 HOFSTRA L. REV. 1087, 1089 (2016) ("[I]t is clear to [Floyd] that Monroe stands squarely in the tradition of the ancient Hebrew prophets . . . . Monroe believed passionately and advocated zealously on behalf of justice. And, the justice he pursued is the justice of the Hebrew Bible . . . embodied most obviously in the prophets."); *Morality Put Above Law by War Foe*, WASH. POST, Dec. 11, 1967 (arguing for a duty to avoid the draft); *see infra* text accompanying note 195.

24. *See* Jones, *supra* note 3; Harvard Univ., *Faculty and Staff*, OFFICIAL REG. HARV. U., Mar. 1954, at 5, 8.

25. *Sears, State Bar Chairman, Asks Griswold Fire Lubells*, CRIMSON (Apr. 7, 1953), http://www.thecrimson.com/article/1953/4/7/sears-state-bar-chairman-asks-griswold.

26. *See* Erwin N. Griswold, *The Fifth Amendment Today*, 39 MARQ. L. REV. 191, 195-96 (1956).

and "a reflection of our common conscience, a symbol of the America which stirs our hearts."[27] The right not to testify against one's self is quite clear, he asserted:

> [I]t is our law and is our practice that there is no right on the part of the public to have every man's evidence. . . . [T]he privilege between the attorney and client[, for example,] is well established and would, I am sure, be honored by virtually every lawyer even against an order of the court where the lawyer felt that that order was clearly unjustified.[28]

The Dean denounced the stigma being attached, in the political climate of the day, to a claim of a Fifth Amendment privilege. It was often asserted, he observed, that those who claimed the privilege were either criminals or liars:

> Either he committed the crime, in which case if he claims the privilege, he is a criminal and he is simply avoiding having to confess it and out of the kindness of our heart we don't make him confess it; or else he didn't commit the crime, and then when he claims the privilege and says that he will be incriminated if he answers, he is a liar; and therefore, it's obvious that he is either a criminal or a liar.[29]

Griswold assured his audiences that inferences about lying or criminality were not always warranted. He was virtually certain, for instance, that Harvard Law students and graduates he knew had invoked their Fifth Amendment privileges not because they were Communists, but because they had other values, were stubborn, "knew a little law," or did not like to be pushed around.[30] Griswold blasted decisions such as one by a Florida court that disbarred lawyers because they invoked their privilege in response to a question about membership in the Communist Party.[31] Working with Griswold, Monroe became familiar with the problems of professional ethics and gatekeeping, government

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27. ERWIN N. GRISWOLD, THE FIFTH AMENDMENT TODAY 73 (1955), *quoted in* Malloy v. Hogan, 378 U.S. 1, 9 n.7 (1964); *see* Alexander Cockburn, *The Lawyer's Tale: Harvard Law School's Hour of Shame*, COUNTERPUNCH, (Feb. 20, 2009), http://www.counterpunch.org/2009/02/20/the-lawyer-s-tale-harvard-law-school-s-hour-of-shame. Two brothers who attended law school with Monroe, Jonathan and David Lubell, were denied positions on the *Harvard Law Review* and subjected to student ostracism because they had invoked their First and Fifth Amendment privileges. Cockburn, *supra* (describing Griswold's reversal in his position regarding invocation of rights).

28. Griswold, *supra* note 26, at 192.

29. *Id.* at 195-96.

30. *Id.* at 198-99.

31. *Id.* at 202-03 (citing Sheiner v. State, 6 Fla. Supp. 127 (Fla. Cir. Ct. 1954), *rev'd en banc*, 82 So. 2d 657 (Fla. 1955)).

investigations into Communism, and the importance of the privilege against self-incrimination.[32]

III. BLACKLISTED

Obtaining his law degree from Harvard Law School in 1954, Monroe aspired to work as a worker-side labor lawyer but could not find employment.[33] He continued at Harvard to pursue a two-year Master of Laws Degree on an invited faculty teaching and administrative fellowship,[34] and near the completion of his studies he applied for a position in the Office of the Solicitor General ("OSG") of the United States.[35] Then, as now, opportunities with the OSG were both few and highly coveted. Based on his record at Harvard and his references, however, Monroe had reason to be hopeful. He had the support of Griswold, who was an OSG alumnus.[36] Further, the OSG was filled with Harvard graduates.[37]

Surprisingly, Monroe heard nothing at all about his application for a position at the OSG—neither an invitation to interview nor a rejection.[38] He traveled to Washington to follow up, but when he arrived, nobody would give him the time of day. That changed when, according to Monroe, he was beckoned to Assistant Solicitor General Philip Elman's office. Elman, who was in charge of the Civil Rights Division,[39] let the twenty-eight-year-old know that despite outstanding academic credentials and references,[40] Monroe's extracurricular activities ruined his prospects.[41] In particular, Elman said the Solicitor General was aware that Monroe subscribed to the *Lawyers Guild Review* and belonged to

32. Harvard Univ., *supra* note 24, at 8.

33. *See* Freedman, *supra* note 1.

34. *Id.* The Harvard Law School catalogs list him as a member of the faculty between 1954 and 1956, as an assistant in charge of the Ames Competition. Harvard Univ., *Faculty and Staff*, OFFICIAL REG. HARV. U., Apr. 1955, at 5, 9; Harvard Univ., *supra* note 24, at 8.

35. Memorandum from FBI on Monroe H. Freedman, *supra* note 3.

36. *See* Dennis Hevesi, *Erwin Griswold of Harvard, Ex-Solicitor General, 90*, N.Y. TIMES, Nov. 20, 1994, at 58.

37. Griswold took on Senator McCarthy in the midst of the Red Scare in speeches and in a book, and he would go on to become the Solicitor General during the Johnson administration. *See id.* Griswold not only took an outspoken position in support of the right against self-incrimination but rejected a demand by the Massachusetts Bar to disband the Harvard unit of the National Lawyers Guild. *See id.*

38. Freedman, *supra* note 1 (showing that Monroe never worked in the OSG); *see* NORMAN I. SILBER, WITH ALL DELIBERATE SPEED: THE LIFE OF PHILIP ELMAN: AN ORAL HISTORY MEMOIR 158, 162, 164 (2004).

39. *See generally*, SILBER, *supra* note 38, at 158, 162, 164.

40. Monroe told the author the story of his application to the OSG and conversation with Elman while he was reading SILBER, *supra* note 38.

41. Memorandum from FBI on Monroe H. Freedman, *supra* note 3.

the National Lawyers Guild ("Guild").[42] In the prevailing political climate, these facts sufficed to suggest that he might be a subversive. The Guild was a known Communist front organization,[43] Elman reminded him, and this meant that Monroe would not find work anywhere in the U.S. Department of Justice.[44] Elman explained that the damage could not be repaired immediately and there was nothing to be done.

Monroe was disheartened.[45] Like many thousands of others, he had been victimized by the Cold War, despite the fact that the only adverse information in the Bureau's intelligence file on him in those years consisted of information about his receipt of Guild publications and a record of his Guild membership.[46] This dossier plagued him, and over the next several years, the FBI discouraged his prospective employers.[47] The Bureau responded with conclusions or intimations of patriotic unreliability, such as its response to one employer who had initially assumed he was unobjectionable:

> [Redaction: the Bureau returned a call to a certain Employer] concerning Dr. Freedman whom he was considering employing [redaction: presumably the employer was told] on a confidential basis of the fact that an individual of the same name . . . had received the National Lawyers Guild quarterly publication "The Lawyers Guild Review" in 1953. Freedman was recommended [redaction: presumably to the employer] by a trusted individual [perhaps Griswold] and [the

42. *Id.*

43. During the Second World War and afterward, chapters of the Guild attracted non-Communist liberal lawyers to work for important social causes, including labor rights, civil rights, and women's rights. *Our History*, NAT'L LAW. GUILD, www.nlg.org/our-history (last visited July 24, 2016).

44. Elman found the policies and procedures being used to vet current and prospective employees extremely troubling. Inside the Justice Department during these years he was critical of the loyalty-security program, opposed the use of anonymous informants, and had some difficulties establishing his own loyalty. *See* SILBER, *supra* note 38, at 160-61.

45. So disheartened was Monroe that he recounted the story to the author years afterward saying he was later grateful Elman had the decency to let him know about his situation.

46. *See, e.g.*, ELLEN SCHRECKER, THE AGE OF MCCARTHYISM 86-97 (2d ed. 2002) (finding that a comprehensive study from Professor Ralph Brown of the Yale Law School concluded that over 10,000 people lost their jobs as a result of the Cold War); *see* RALPH S. BROWN, JR., LOYALTY AND SECURITY: EMPLOYMENT TESTS IN THE UNITED STATES 181-82 (1958).

47. During the mid-1970s, Monroe saw the 1954 FBI memorandum that torpedoed him. The Bureau had gathered nothing about his actual activities other than that his name appeared on the subscription list for the *Lawyers Guild Review* in October 1953 and he was listed as a member of the Guild in 1954. FBI, N.Y. Office Reports (Oct. 1, 1953) (on file with the Hofstra Law Library in the Freedman-FBI electronic folder); FBI, N.Y. Office Reports (July 13, 1956) (on file with the Hofstra Law Library in the Freedman-FBI electronic folder).

> employer] advised [the FBI] that in view of this recommendation he originally assumed that Freedman was all right.[48]

It is uncertain whether Monroe changed his career plans because he could not gain government employment, because of family or financial considerations, or because a preference for commercial law practice entered into his calculations. Whichever the reason, he quit the Guild,[49] gave up on government employment, and joined a very successful, moderately large, and conventional Philadelphia law firm.[50] He worked there for the next two years developing many skills of a commercial real estate lawyer and a practical understanding of contract law.[51]

In 1958, Monroe tried to find an academic position and applied to join the faculty at George Washington University ("G.W.") Law School.[52] Someone contacted the FBI regarding his loyalty and was provided the same information as it had to the other inquirers about his Guild involvement.[53] This time, however, the Bureau described its information about the Guild as "not pertinent,"[54] a less hostile stance that

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48. Memorandum from FBI on Phone Calls by Prospective Employers of Monroe Freedman (Jan. 7, 1959) (on file with the Hofstra Law Library in the Freedman-FBI electronic folder).

49. Efforts to locate his resignation letter, if it exists, were unsuccessful. The National Lawyers Guild Papers are located at the Tamiment Collection at New York University, and such a letter does not appear in folders devoted to letters of resignation. Many terminations were oral; many resignations were in fact lapses; and the records themselves are incomplete.

It is possible—though unlikely—that Monroe never quit the Guild, notwithstanding his representation to the government that he renounced his membership, or that he quit in 1956 and later rejoined. If this had been the case, however, the subsequent FBI file would be expected to refer to that fact, and yet the extensive reports on his activities do not contain any reference to Guild membership or activities for the period from 1956-1975.

Georgetown University Professor Abbe Smith, his decades-long friend and collaborator, expressed surprise that he declared that he had quit: "It has always been my understanding," she wrote, "that Monroe was a longstanding member of the Guild; I know nothing about him ever not being a member or renouncing membership—during the Red Scare or even over Israel in recent years, when the Guild took positions that would have tested him. He regularly [told] students that the NLG had black members when the ABA refused. So I was surprised by what you wrote." Professor Smith continued that "I wouldn't put it past Monroe to lie to the FBI. The "truth" has never been the most important value to him—not in comparison to other values. Nor to me." E-mail from Abbe Smith, Professor, Georgetown Univ., to Norman I. Silber, Professor, Maurice A. Deane Sch. of Law, Hofstra (Jan. 18, 2016) (on file with author).

50. Wolf, Block, Schorr and Solis-Cohen was for several decades "the firm of choice for Jewish businessmen in the city and an incubator for Jewish legal talent," with "one of the city's premier real estate law departments." Bob Fernandez, *Glorious Past, But Without a Plan, Era's End: Wolf Block Was Once at the Hearth of Political Power*, PHILLY.COM (Mar. 24, 2009), http://articles.philly.com/2009-03-24/business/25278693_1_firm-wolf-block-premier. In 2009, the firm disbanded. *See id.*

51. *See* Freedman, *supra* note 1.

52. *Id.*

53. *See* Memorandum from FBI on Phone Calls by Prospective Employers of Monroe Freedman, *supra* note 48.

54. *Id.*

could be attributable to the sheer passage of time, the diminished public tolerance for "witch-hunting" after the televised Army-McCarthy hearings, the Guild's success in avoiding placement on the U.S. Attorney General's list, or the two years spent in an ordinary commercial law practice.[55] It also may be that employment at a private law school afforded the faculty independence to dismiss information about the Guild and the late timing of the inquiry by G.W. Law School saved him from disqualification. Clearly, the loyalty issue was minimized by the Bureau at this time, permitting him to find a good academic position.[56]

IV. CLEARANCE CHALLENGE

Academics in Washington receive opportunities to consult, and Monroe desired to help the U.S. Senate work on labor issues related to the Landrum-Griffin Act, addressed to corruption in labor unions.[57] Soon afterward, in February 1960, he was invited to work with the U.S. Civil Rights Commission in regard to fair housing matters.[58] However, there was a significant hurdle. The position required a security clearance, for which he needed to submit a form to the FBI entitled "security information data for a sensitive position."[59]

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55. John H. Fenton, *Brownell Attacks the Lawyers Guild: Acts to List It as 'Subversive'—He Outlines Wide Program to Fight Organized Crime*, N.Y. TIMES, Aug. 28, 1953, at 1; Ellen Schrecker, *Political Tests for Professors: Academic Freedom During the McCarthy Years*, U.C. BERKELEY HIST. PROJECT (Oct 7, 1999), http://www.lib.berkeley.edu/uchistory/archives_exhibits/loyaltyoath/symposium/schrecker.html.

56. *See* Freedman, *supra* note 1.

57. Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519, 519 (codified as amended in scattered sections of 29 U.S.C.). The Landrum-Griffin Act, drafted by the Senate Select Committee on Improper Activities in Labor and Management ("McClellan Committee"), imposed more stringent financial and accounting standards on labor organizations. DAVID SCOTT WITWER, CORRUPTION AND REFORM IN THE TEAMSTERS UNION 205 (2003). The McClellan Committee investigated labor racketeering, especially in the Teamsters Union. *Id.* at 157-58, 201-03; Jacobs, Paul Jacobs, *Extracurricular Activities of the McClellan Committee*, 51 CALIF. L. REV. 296, 296-98 (1963). Senator McClellan was a Democratic Senator from Arkansas and an opponent of desegregation. *See* WITWER, supra, at 207; Theo Lippman Jr., *Flaws Kept Arkansas Sen. J. William Fulbright . . .*, BALT. SUN (Feb. 16, 1995), http://articles.baltimoresun.com/1995-02-16/news/1995047036_1_orval-faubus-fulbright-state-senators.
No security information data form with respect to consulting work for the McClellan Committee is in the Hofstra Law Library file on Monroe Freedman. The security inquiry concerning his appointment may be at Memorandum from FBI on Phone Calls by Prospective Employers of Monroe Freedman, *supra* note 48.

58. Section 1 of the Civil Rights Act of 1957 created the U.S. Commission on Civil Rights. Pursuant to a report by the Commission, President Kennedy issued an Executive Order on Equal Opportunity in Housing in 1962. *See* Martin E. Sloane & Monroe H. Freedman, *Executive Order on Housing: The Constitutional Basis for What It Fails to Do*, 9 HOW. L.J. 1, 3 (1963).

59. FBI, Security Investigation Data for a Sensitive Position (Feb. 23, 1960) (on file with the Hofstra Law Library in the Freedman-FBI electronic folder) (containing Monroe's answers, as he submitted this form for a position with the U.S. Civil Rights Commission).

The form required extensive personal information and answers to many questions, including the notorious one: "HAVE YOU EVER BEEN A MEMBER OF THE COMMUNIST PARTY U. S. A. OR ANY COMMUNIST OR FASCIST ORGANIZATION?" He answered the question "No."[60] It further asked: "HAVE YOU EVER BEEN A MEMBER OF ANY . . . GROUP . . . WHICH IS TOTALITARIAN, FASCIST, COMMUNIST, OR SUBVERSIVE . . . ?" He answered that question "No" as well.[61] The government also required the names of all organizations of which Monroe was at any time a member. He listed the American Civil Liberties Union ("ACLU") (1948-now); NAACP (1948-now); National Lawyers Guild (1954-1956).

The initial waves of domestic anti-Communist activity had crested by 1960, but Cold War anxieties persisted. Concern about espionage and subversion still remained.[62] Those who had been members of the Communist Party and groups identified as heavily influenced by it continued to be excluded from government employment. When an individual's membership in a front organization such as the Guild was self-disclosed, careful elaboration was needed to appease the security apparatus.[63] To satisfy the authorities, it was best to confess error and convey contrition,[64] and because of the earlier difficulties resulting from his Guild membership, Monroe provided an additional narrative to elaborate on his membership and explain his involvement.[65] His narrative is revealing.

Monroe did not exhibit contrition. He did not profess regret about having been part of the Guild or deny knowing there were Communist members or that he knew others alleged the Guild was an organization controlled by Communists.[66] He did confess error, however. Without

60. *Id.*

61. *Id.*

62. Tension between the Soviet Union and the United States, and fears of subversion, increased significantly in 1960 when Fidel Castro allied himself the Soviet Union. *See* ARTHUR SCHLESINGER, JR., A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE 216-23 (1965). Gallup poll results in 1960 indicated that as a nation, Americans believed that the "Soviet Challenge" was "the greatest problem facing the country" at that time. BRUCE BUCHANAN, THE POLICY PARTNERSHIP: PRESIDENTIAL ELECTIONS AND AMERICAN DEMOCRACY 21 (2004).

63. *See supra* Part III.

64. *See* VICTOR NAVASKY, NAMING NAMES 204 (Hill & Wang, 3d ed. 2003) (1980); *supra* Part III.

65. FBI, *supra* note 59.

66. At the time Monroe subscribed and joined, the Guild was fighting proceedings to formally list it as a "subversive organization[]." NAT'L LAWYERS GUILD, AN APPEAL TO REASON 1 (1953). The Attorney General had described it as such, and a congressional committee had concluded it was subversive. By the time of his response in 1960, however, the Guild had avoided formal inclusion on the list. Having tried unsuccessfully to challenge directly the constitutionality of the list, Nat'l Lawyers Guild v. Brownell, 225 F.2d 552, 553-55, 558 (D.C. Cir. 1955), the Guild, in *National*

addressing whether he ever thought of the Guild as "subversive,"[67] he wrote he had been duped into subscribing and joining a Communist "dominated" organization: "Upon graduation from law school, I joined the National Lawyers Guild. I had heard allegations at the time that the Guild was Communist dominated, but I did not believe these allegations were true."[68]

Monroe wrote that he disbelieved allegations of domination because he had observed at least one of the Guild's policy positions was incongruent with the Communist party line: "I based my conclusion in part on several things that I had read in the *Lawyers Guild Review*, including, as I recall, a resolution in the *Review* condemning the North Korean invasion of the Korean Republic."[69] He then addressed the second-level problem: If he knew there were Communists in the organization and was aware there were allegations of domination, why was he not more interested in determining whether he had a well-founded *disbelief* in its excessive influence? Monroe answered by stating that he was not active enough to care: "I did not find time to participate actively as a member of the Guild, so I was not able to judge the Guild on the basis of personal experience."[70] This addressed his lack of diligence and emphasized the insignificance of his membership.

Finally, Monroe wrote that he had been set straight by a reliable source, whom he did not name: "However, in 1956 I received information, from a source that I considered reliable, that the Guild is Communist dominated, and immediately terminated my membership."[71] It might have been a reliable source other than Elman, but Elman was the person who, in 1956, told Monroe about the negative information in his file. Beneath Monroe's elaborate answer, an analyst inserted:

Lawyers Guild v. Rogers, Civil Action No. 1738-58 (D.D.C. July 2, 1958), waged an effort to resist interrogatories the government had demanded in the course of the long administrative process. The Attorney General rescinded his proposal to designate the Guild as subversive, explaining the fight had gone on so long that key witnesses had died or were unavailable and "the evidence that would now be available at a hearing on the merits of the proposed designation fails to meet the strict standards of proof which guide the determination of proceedings of this character." Dombrowski v. Pfister, 380 U.S. 479, 495 n.12 (1965) Nevertheless state anti-subversive legislation in some states required organizations that had been "officially cited or identified by the Attorney General of the United States, the Subversive Activities Control Board of the United States or any Committee or Subcommittee of the United States Congress as a . . . communist front organization" to register as presumptive front organizations. *Id.* at 494 n.11. Not until 1965 was the presumption ruled unconstitutional. *Id.* at 481-83, 496-98 (finding the standards procedurally deficient).

67. FBI, *supra* note 59.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

> It is noted that. . . Freedman admitted membership in the Lawyers' Guild from 1954-1956. No additional pertinent information is contained in FBI files and no investigation under Executive 10450 [security requirements for government employment] is contemplated. This is not a clearance or disapproval of this individual by the FBI for federal employment. . . [redacted: presumably an additional warning and/or conclusion is stated].[72]

It cannot be ruled out that his two uneventful years at a private law firm and his answers to the questions on the security form did the trick. The factors accounting for the FBI's "not pertinent" responses to private employers also may have accounted for its "not pertinent" response on this occasion.[73] Whatever the reason, the FBI did not block his government employment.[74] This was not an endorsement, but the barrier to his government consulting had been lifted. He went on to consult for the Human Rights Commission and a few other government bodies.[75]

V. EVASIONS AND CONCEALMENTS

It is possible that Monroe's answers about his Guild membership were entirely truthful when he completed the security information data form in 1960.[76] The greater likelihood is that he evaded, concealed, and lied—that he answered in result-oriented ways to implement a careful decision to distort and conceal the truth. His assertions deserve to be examined in greater depth: assertions about his modest knowledge as to the Guild's nature, about his naïve reasons for remaining a member, and about his actual reasons for quitting.[77] Examining them can reveal whether his early-life ideas and experiences in balancing candor against other ethical virtues were reflected in, and further confirmed by, his personal encounter with government expectations of self-incrimination.

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72. *Id.*

73. Memorandum from FBI on Phone Calls by Prospective Employers of Monroe Freedman, *supra* note 48; FBI, *supra* note 59.

74. It may also be the pure passage of time, or other factors, including a file that contained no adverse information since 1956, that accounted for the FBI's changed position.

75. He went on to serve as a government consultant or employee on other occasions, including as Executive Director of the U.S. Holocaust Memorial Council, as an expert on legal ethics for the U.S. Department of Justice, as a member of the Governing Board of the District of Columbia Bar, and as Chairman of the Committee on Professional Disciplinary Standards and Procedures. Freedman, *supra* note 1.

76. *See* FBI, *supra* note 59.

77. *See id.*

A. Knowledge of the Guild's Nature

The security information data form he completed in 1960 did not ask whether he knew he had joined a group dominated by Communists. Instead, it asked whether he had been a member of a group that was "communist" or "subversive."[78] Monroe ignored those questions and addressed domination as the only issue, professing his disbelief.[79] Accepting his narrowing of the question, the historical record reveals the probability of his untruthfulness. There were credible and widely public allegations of Communist domination before, during, and after his initial subscription to the *Lawyers Guild Review* in 1953.[80]

Allegations of domination were made by conservatives and liberals alike inside the Guild.[81] Many New Deal liberals left the Guild in the late 1930s—well before the fiercest anti-Communist responses of the 1950s—because they believed Communists were unfairly manipulating its goals and policy positions.[82] Many other non-Communist liberals left during the early post-war period for the same reason.[83]

From its creation in 1937, the Guild contained progressives with many different ideologies but adopted Communist policy positions up and down the line.[84] The Guild took pacifist positions when the Soviets made a pact with the Nazis and then reversed itself to take a pro-war position when the Nazis broke the pact and invaded Russia.[85] It took no positions against Stalinist show-trials or atrocities. It urged recognition of the Chinese Communists and took positions in support of Communist "revolutionary anti-colonialist" uprisings around the globe.[86]

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78. *Id.*

79. *See id.*

80. *See* Nat'l Lawyers Guild v. Brownell, 225 F.2d 552, 553-55, 558 (D.C. Cir. 1955); Thomas I. Emerson, *The National Lawyers Guild in 1950-1951*, 33 NAT'L LAW. GUILD PRAC. 61, 63-65 (1976).

81. *Id.* at 63-65.

82. VICTOR RABINOWITZ, UNREPENTANT LEFTIST: A LAWYER'S MEMOIR 168-70 (1996).

83. *Id.*

84. *Id.*

85. H.R. REP. NO. 81-3123, at 10-11 (1950).

86. In hindsight, it is apparent that although the Guild maintained it was "not a Communist Organization, nor a Communist Front Organization, nor dominated by Communists," and insisted it was instead "a bar association dedicated among other things to the defense of the constitutional rights of all people," it was the product of an effort by the Communist Party to create a "front organization," and for decades was steered by it. In 1935, Joseph Stalin announced that Communists around the globe should ally with liberals and non-Communist leftists in a broad anti-fascist coalition—and the Guild, created through a "call" in 1937, was a part of an initiative to forge such a coalition. This was not conceded by the Guild at the time of its difficulties, of course, and over the years, accounts by leaders of the Guild mentioned Communist involvement but minimized the influence of the Communist Party of the United States ("CPUSA") and the Communist International ("Comintern"). *See* RABINOWITZ, *supra* note 82, at 80, 169 (acknowledging clandestine or quasi-

In 1950, the House Un-American Activities Committee ("HUAC") released an extensive report with a blunt statement of its conclusion in the title: *Report on the National Lawyers Guild: Bulwark of the Communist Party*.[87] Then, in August, 1953, Attorney General Herbert Brownell announced in a widely reported address to the ABA that the Guild was "a Communist dominated and controlled organization," and he would list it as a "subversive" organization.[88] Before the HUAC report appeared, the Guild had a reputation for embracing Communist positions which, even then, discouraged many liberals from remaining involved. Once the Guild was identified by both a congressional report and the Attorney General as Communist dominated, however, lawyers fled in droves.[89] Thomas I. Emerson, Yale law professor and Guild president from 1950-1951, wrote decades later that membership dropped from a peak of roughly 5000 (hundreds of whom were government employees, including judges, cabinet members, and elected officials) to about 2600 (hundreds of whom were not paying their dues) soon after the HUAC report in 1950.[90] The decline continued at a fast pace after Brownell's announcement.[91]

The Guild made strenuous efforts to defend itself by asserting its constitutional freedom to associate.[92] It also opposed efforts to force Communists to identify themselves through mandated oath provisions.[93]

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clandestine Party membership and stating that among those who started the Guild, "[s]ome of this group were members of or close to the Communist party, and some represented the new and militant trade union movement," while others were civil libertarians); Ann Fagan Ginger, *The Third Annual Convention: 1939 in Chicago*, *in* THE NATIONAL LAWYERS GUILD: FROM ROOSEVELT THROUGH REAGAN 31 (Ann Fagan Ginger & Eugene M. Tobin eds., 1988). After the fall of the Soviet Union and in other venues, however, Victor Rabinowitz—one of the founders and long-time leaders of the Guild—described to the author the party's involvement in initiating the call that went out to left-leaning progressives at the behest of clandestine members of the Communist party and known Communists, several of whom for many years thereafter played an important role in guiding its affairs. *See* VICTOR RABINOWITZ & LENORE B. HOGAN, REMINISCENCES OF VICTOR RABINOWITZ: ORAL HISTORY (1979) (on file with the Columbia Center for Oral History); *see also* Victor Rabinowitz, *The National Lawyers Guild: Thomas Emerson and the Struggle for Survival*, 38 CASE W. RES. L. REV. 608, 610-11 (1988) (missing a close discussion of the creation of the Guild but including a description of the conflict with New Dealers who believed that the Communist Party was directing its affairs).

87. *See* H.R. REP. NO. 81-3123. This fifty-page report, together with Brownell's proposed addition of the Guild to a list of subversive organizations, did the most damage. Crushed during the first part of the 1950s by anti-Communist sentiment, the Guild re-emerged to become a significant actor in many important struggles for civil rights justice and anti-Vietnam War protest during the 1960s.

88. *See* NAT'L LAWYERS GUILD, *supra* note 66, at 1; Fenton, *supra* note 55.

89. *See* RABINOWITZ, *supra* note 82, at 168-70; Emerson, *supra* note 80, at 63-67.

90. Emerson, *supra* note 80, at 62.

91. *See* Fenton, *supra* note 55.

92. *See* NAT'L LAWYERS GUILD, *supra* note 66, at 9, 16-19; Fenton, *supra* note 55.

93. NAT'L LAWYERS GUILD, *supra* note 66, at 8. In 1951, the Guild took a policy position in

Nevertheless, more than half the original chapters folded. Not a single government lawyer was on the rolls in Washington three years later.[94]

Monroe first entered his subscription to the *Lawyers Guild Review* in 1953, after these developments, when there were probably fewer than 700 members. In 1956, when he resigned his membership, there were 512 dues-paying members. There were only 489 members remaining in 1957. Moreover, those who remained included at least some informers and undercover agents.[95]

Monroe's recollection of a distinction between the Guild's position on North Korea and the Communist Party's position echoed part of the Guild's own defense,[96] but it formed a thin basis for concluding that the organization was not dominated by Communists. Professor Emerson wrote, years later during the 1970s, that the development of a policy about the Korean War was difficult for the Guild because many members "felt that South Korea had begun hostilities against North Korea."[97] At a stormy session in Chicago, in 1950, it is true that a resolution was adopted "supporting the 'action of the United Nations in resisting the aggression of North Korea,'" but it also "attacked the cold

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defense of the Fifth Amendment: "[A]bsent a vital privilege against self-incrimination, the witness who, under compulsory process, is hostilely questioned about his political views or associations, is confronted with the unenviable alternative of being prosecuted for contempt, perjury, or sedition." NAT'L LAWYERS GUILD, RESOLUTION ON PRIVILEGE AGAINST SELF INCRIMINATION (1951). Lawyers for the Guild, Emergency Civil Liberties Committee, and ACLU adopted divergent views on whether to advise clients to invoke their Fifth Amendment privilege at HUAC and other anti-communist proceedings. Persons caught in lies were charged with perjury and faced the loss of their livelihoods. *See* NAVASKY, *supra* note 64, at 341-42. The Resolution on Privilege Against Self-Incrimination was passed at the 1951 Annual Convention of the National Lawyers Guild in Chicago as a response to the use of immunity statutes to undermine the "privilege." *Resume of Preambles and Other Resolutions Adopted*, 11 LAW. GUILD REV. 180, 182 (1951) (citing NAT'L LAWYERS GUILD, *supra*).

94. *See* Emerson, *supra* note 80, at 69.

95. JULIUS COHEN, NAT'L LAWYERS GUILD, TREASURER'S REPORT (1959) (on file with the Tamiment Library & Robert F. Wagner Labor Archives). The Freedman-FBI electronic folder maintained by the Hofstra Law Library contains copies from the Guild files, and the redactions appear to indicate that undercover anti-Communists penetrated the Guild.

96. In its response to the HUAC Report, the Guild pointed to the divergence between its positions on Finland and the Korean conflict: "As far back as 1939 the Guild passed a resolution denouncing the attack of the Soviet Union on Finland. As recently as September 9 of this year, the National Executive Board adopted a resolution supporting "the action of the United Nations in opposing the aggression of North Korea against South Korea." Thomas I. Emerson, *The National Lawyers Guild: Legal Bulwark of Democracy (A Reply to the Report of the Committee on Un-American Activities)*, 10 LAW. GUILD REV. 93, 95 (1950). In 1946, the Guild Committee on International Law took the view that American foreign policy stood in opposition to "the national aspirations of the Korean people." Comm. on Int'l Law and Relations, Nat'l Lawyers Guild, *The State of American Foreign Policy*, 6 LAW. GUILD REV. 412, 414 (1946).

97. Emerson, *supra* note 80, at 70 (quoting *Report on Guild Activities*, 11 LAW. GUILD REV. 42, 43 (1951)).

war policy of the U.S. Government and added specifically: '. . . we do not approve the action of the United States in ordering military intervention in Korea unilaterally before the United Nations acted.'"[98] To put Monroe's reliance on the Korea resolution in context, the Guild at the same time urged the United States to recognize Mao's government in China and to abandon the Nationalists.[99]

B. Reasons for Joining and Remaining

Monroe subscribed to the *Lawyers Guild Review* in 1953, three years after the HUAC report.[100] Notwithstanding, and in spite of Attorney General Brownell's statement of belief that the Guild was dominated by Communists, he became a member of the Guild in the following year.[101] Those who joined at that time understood it was beleaguered by accusations of Communist domination. They knew that the Communist Guild members believed—at least as a matter of theory—in a revolution by violence if necessary.[102] None of this deterred him from subscribing in 1953 and later joining.

Why? He surely acted in solidarity with an organization that Griswold treated with respect while it was under fierce attack. Maybe Monroe joined because the Communists he knew personally were admirable, nonviolent people of high ideals and action. And, even if toeing the international Communist line was objectionable to him, such behavior was probably secondary to features of the Guild's laudable domestic work.[103]

During those years, non-Communist progressives (often referred to as "fellow travelers"), many of whom shared Monroe's general background, were drawn by the Guild's active and frequently unique engagement in great struggles for social justice and equality of that day.[104] Unlike other bar associations, the Guild's constitution from the

98. *Id.*

99. The Guild's resolution on the China policy urged that "to promote the effective operation of the U.N.," the government should support the representation of the Chinese People's Republic in the United Nations [and] accord recognition to the Chinese People's Republic, [and] terminate aid to the remnants of the Nationalist regime." *Resolutions*, 10 LAW. GUILD REV. 38, 43 (1950).

100. Memorandum from FBI on Monroe H. Freedman's Nat'l Lawyers Guild Membership and Subscribership (Dec. 14, 1967) (on file with the Hofstra Law Library in the Freedman-FBI electronic folder).

101. *Id.*

102. Jerold Simmons, *The American Civil Liberties Union and the Dies Committee, 1938-1940*, 17 HARV. C.R.-C.L. L. REV. 183, 186 (1982).

103. *See* RABINOWITZ, *supra* note 82, at 80-81, 170; *see also* RABINOWITZ & HOGAN, *supra* note 86; Victor Rabinowitz, Freedom of Information Act (FOIA) File (FBI) (on file with the Tamiment Library & Robert F. Wagner Labor Archives).

104. H.R. REP. NO. 81-3123, at 15-16 (1950); NAT'L LAWYERS GUILD, *supra* note 66, at 3-5;

outset admitted lawyers "without regard to sex, race, color, or religious or political belief or affiliation."[105] It encouraged law students and faculty to use their legal talents for justice. Its members, for example, worked against Jim Crow laws in the south.[106] The Guild opened storefront offices for low income clients and took strong policy positions in support of organized labor.[107] During World War II, the Guild opposed American concentration camps and favored expanding the franchise to soldiers.[108] After the War, Guild members helped draft the Universal Declaration on Human Rights, opposed fingerprint identification cards, endorsed national healthcare, fought efforts to drive radicals from Unions, supported the "Hollywood Ten," and opposed the HUAC aggressively.[109]

Non-Communist progressives inside the Guild often believed that the causes they championed were quintessentially about civil rights, civil liberties, a more equal America, and a more democratic world—and that nothing they did evinced disloyalty or support for the overthrow of the government.[110] To the extent they were aware of participation, management, and even domination by Communists, it was generally considered a positive factor in the Guild's operational competence.

C. Reasons for Quitting

Monroe stated that he quit the Guild because in 1956 he learned it was Communist dominated, but it seems closer to the truth to state that he quit—as did so many others—because otherwise he would have been unemployable by the government.[111] If he had resigned earlier, the implication that he quit when he was disabused of a subterfuge would be

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see CONST. OF THE NAT'L LAWYERS GUILD art. 2.1 (1937) (amended 2012).

105. CONST. OF THE NAT'L LAWYERS GUILD art. 2.1; NAT'L LAWYERS GUILD, *supra* note 66, at 5.

106. *See* Leandra Zarnow, *Braving Jim Crow to Save Willie McGee: Bella Abzug, the Legal Left, and Civil Rights Innovation, 1948-1951*, 33 L. & SOC. INQUIRY 1003, 1012-18 (2008).

107. H.R. REP. NO. 81-3123, at 2-3, 12; *Our History*, *supra* note 43.

108. H.R. REP. NO. 81-3123, at 23.

109. H.R. REP. NO. 81-3123, at 24, 28, 32; *Our History*, *supra* note 43.

110. *See, e.g.*, DAVID STEBENNE, ARTHUR J. GOLDBERG: NEW DEAL LIBERAL 14 (1996). There is a distinction to be drawn between what progressives believed they were doing and whether the Communist party believed liberals were furthering Soviet objectives and assisting in espionage activities. On the latter issue, see, for example, John Earl Haynes, *The Cold War Debate Continues: A Traditionalist View of Historical Writing on Domestic Communism and Anti-Communism*, J. COLD WAR STUD., Winter 2000, at 76, 94-115 (concluding that recent evidence and scholarship confirms that major financial investments were made in front organizations and in espionage endeavors; and that the Comintern exerted hierarchical authority over CPUSA, and front organizations).

111. FBI, *supra* note 59.

easier to accept. Earlier resignations more frequently registered surprise or revulsion than later ones. In the wake of the 1950 HUAC report, for example, Alan S. Maremont wrote from Kelly Air Force Base in Texas that he had no use for Communists and that while he recognized a need for a liberal lawyers association, he was "unable to satisfy [himself] that the Guild fits this definition."[112] Following Attorney General Brownell's statement and actions in 1953, Israel Colvisser resigned with a note stating that if he had "at any time felt that the Guild was a subversive organization [he] should not have become or remained a member."[113]

Even then, however, others resigned with a sense of remorse or capitulation out of concern for their livelihood.[114] Milton Pinsker wrote that he was quitting "in great reluctance in view of the glorious stand of the Guild in these dark days of intolerance and oppression," but his employment was at risk.[115] In 1954, Rabbi Emanuel Rackman explained that his reserve commission with the Air Force prevented affiliation with groups "under fire," but he recognized that the issue was complicated:

> By the same token I am not at all convinced that the Guild has ever been subversive but that on the other hand it has a wonderful record for civil liberties. Certainly it should have the fullest opportunity to [establish] this in the courts. Yet if the members withdraw because of the statement of the Attorney General there will be no organization left to maintain the suit. This is therefore a very ticklish matter of conscience for me and for the time being [the way] for me to resolve it is not to pay my dues but to pay you the same sum as a contribution.[116]

By 1956, the year he quit, the Guild resignation file reveals fewer expressions of surprise and more of perceived necessity. Seymour Booth, of Booth, Lipton & Lipton, wrote: "Gentlemen:—I herewith resign as a member of the Board of Directors and as a member of the Guild. I shall continue to observe the activities of the Guild with great interest."[117] Executive secretary of the Guild in 1956, Royal W. France responded to another member who resigned that he sympathized with his situation and encouraged him to come to an upcoming meeting since "as

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112. Letter from Alan S. Maremont to Nat'l Lawyers Guild (Apr. 12, 1952).

113. Letter from Israel Colvisser to Nat'l Lawyers Guild (Nov. 12, 1953) (on file with the National Lawyers Guild).

114. FBI, *supra* note 59.

115. Letter from Milton Pinsker to Nat'l Lawyers Guild (Oct. 28, 1950).

116. Letter from Rabbi Emanuel Rackman to Nat'l Lawyers Guild (Jan. 21, 1954).

117. Letter from Seymour N. Booth to Nat'l Lawyers Guild (Jan. 8, 1955) (on file with the Tamiment Library & Robert F. Wagner Labor Archives); *see* Letter from Paul Kellner to Nat'l Lawyers Guild (Aug. 10, 1955) (on file with the Tamiment Library & Robert F. Wagner Labor Archives) (resignation letter); Letter from Francis A. Smith, Jr. to Nat'l Lawyers Guild (Nov. 23, 1956) (on file with the Tamiment Library & Robert F. Wagner Labor Archives) (resignation letter).

you know, no attendance record is kept of non-Guild members."[118] For most who left at this time, formal resignation was a matter of professional necessity, notwithstanding affection for the organization.

VI. ETHICAL CONFLICT

Above, the history indicates it would have been more consistent with Monroe's political and social values—and his intelligence—if in 1960 he explained his subscription to the *Lawyers Guild Review* more forthrightly.[119] Would it not have been more genuine for him to state that despite its Communist orientation and many positions with which he disagreed, he joined the Guild in solidarity with the organization in a time of crisis because it was devoted to equality and social justice? To state that he was ever more inclined to join and stay as the government tried to suppress the Guild, giving it and not the government the benefit of his moral support? And, to state that he quit for the ability to work for the government? This view also emerges after considering Monroe's membership over decades in other organizations (some of which he subsequently left) that he joined or defended despite disapproving their governance or identifying with only some of their positions.[120]

In context, it seems that if he answered more truthfully, he would have acknowledged his awareness of the large influence of Communists in the Guild and explained his involvement in terms of the good work that the Guild was doing.[121] He had no way to know that the FBI might have characterized his history of Guild involvement "not pertinent" and, in the historical moment, answering more truthfully or completely than he did would have risked self-destruction.[122] The government might well have continued to interfere with his life plans.[123]

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118. Letter from Royal W. France, Exec. Sec'y, Nat'l Lawyers Guild, to Louis L. Redding (June 25, 1956) (on file with the Tamiment Library & Robert F. Wagner Labor Archives); *see* Letter from Royal W. France, Exec. Sec'y, Nat'l Lawyers Guild, to Al Martin Curtis (June 1, 1956) (on file with the Tamiment Library & Robert F. Wagner Labor Archives) (replying to Curtis's resignation letter); Letter from Royal W. France, Exec. Sec'y, Nat'l Lawyers Guild, to Melvin C. Friendly (Oct. 17, 1957) (on file with the Tamiment Library & Robert F. Wagner Labor Archives) (replying to Friendly's resignation letter); Letter from Royal W. France, Exec. Sec'y, Nat'l Lawyers Guild, to Samuel H. Landy (Jan. 28, 1957) (on file with the Tamiment Library & Robert F. Wagner Labor Archives) (replying to Landy's resignation letter).

119. *See supra* Part V.A–B.

120. Freedman, *supra* note 1.

121. *See* Interview with Rebeca Izquierdo, *supra* note 12; Interview with Bob Gilbert & Doris Gilbert *supra* note 12.

122. *See supra* notes 52-56 and accompanying text.

123. Monroe's brother, and at least some of his longtime friends, believe that despite his efforts to separate himself from his Guild past, it not only caused him to be blacklisted in early years but detrimentally affected his career over his lifetime. *See* Telephone Interview with Rebeca Izquierdo,

In a figurative sense and a literal sense, he kept his own counsel when he completed his security form.[124] Weighed against his legal obligation to supply truthful information purportedly designed to "root out subversives" was his right against self-incrimination and the injustice of a witch-hunt against an organization that did good work. And yes, there was his personal interest in working for the U.S. Civil Rights Commission, an undeniably good cause.[125] Monroe's adoption of the prophetic Jewish tradition and his antipathy for Cold War inquisitions, sharpened by his own personal employment difficulties, crystalized his thinking about his higher ethical obligations and his entitlement to evade and to lie.

He is not alive to reconstruct for us his internal justification for the answers he gave more than a half-century ago. Based on his subsequent writing and speaking on morality and candor, however, it is possible to speculate.[126] He may have believed that he had no ethical duty to be forthright in response to questions into which the government had no ethical or lawful right to inquire; that, although the government had a right to question citizens to enhance domestic security, he retained a constitutional right against self-incrimination that could be effectively exercised only by providing misleading, evasive, or false answers, because explicit invocation of the privilege would undermine the object of the privilege itself;[127] that the good to be done by his future public service justified some falseness and incompleteness in his answers; that a wholly candid explanation about joining, staying, and quitting—however innocent—would surely be misinterpreted, at his and the U.S. Civil Rights Commission's loss, justifying a simplified and self-serving response;[128] that the ostensible premise for the question—that it was

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supra note 12; Telephone Interview with Bob Gilbert & Doris Gilbert *supra* note 12.

124. While it is possible, it does not appear that Monroe consulted other attorneys, Griswold, a Rabbi, or his wife when he completed his government employment forms. The bulk of Monroe's papers were inaccessible as of the date this Article was published. The Hofstra Law Library endeavors toward a more complete organization of Monroe's papers, which will eventually be made available to the public electronically.

125. His work for the U.S. Commission on Human Rights would focus on affordable housing for minorities and the poor. *See* Monroe H. Freedman, *The Executive Order on Housing: The Constitutional Basis for What It Fails to Do*, 9 HOW. L.J. 1, 3 (1963).

126. *See* Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U L. REV. 191, 193-96 (1978); *infra* notes 200-07.

127. *See supra* Part II (discussing Griswold's stance on lawyer confidentiality and self-incrimination). In 1951, in fact, the Guild took a position favoring a robust and "vital" right to avoid self-incrimination in light of the power of the State to compel testimonial appearances. *See supra* note 96.

128. *See* Alison Kornet, *The Truth About Lying*, PSYCHOL. TODAY (May 1, 1997), https://www.psychologytoday.com/articles/199704/the-truth-about-lying (discussing in the context of lie detectors, and noting that "a true statement by an innocent individual could be misinterpreted

possible to ferret out subversives by asking if they *were* subversives—was preposterous and itself a subterfuge and so unworthy of a truthful answer; that responding evasively was a form of civil disobedience comparable to engaging in a refusal to cooperate; or that in balancing competing values, the imperatives of social justice deserved greater weight than the state's demands for honesty.[129]

Likely, these justifications shared in common the conviction—emanating from the Jewish prophetic tradition and also from lessons he drew from the persecution of Jews[130]—that there are moral imperatives for self-preservation and to pursue justice that may override demands made by a powerful state likely to inflict unwarranted punishment.[131] And, of course, Monroe may have been convinced at the time that he provided truthful and complete answers to the questions he was asked. As a lawyer, he surely understood the significance of submissions to the government certifying that his statements were "true, complete and correct" to the best of his knowledge. The form stated explicitly that false statements were punishable by law.[132]

VII. FALLOUT

Once Monroe found a position as a professor of law at G.W. Law School, he led a busy personal and professional life. He published not in legal ethics but in areas dear to the social concerns of the day. He wrote an erudite article about the tort law pertaining to nuclear reactors[133] and a piece about affordable housing regulation.[134] Monroe also developed an outside advocacy-related practice, taking on consulting work and pro bono activities related to his view of social justice as a labor expert,[135] civil liberties lawyer,[136] housing rights lawyer,[137] defender of the

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if the person is sufficiently afraid of the examination circumstances").

129. Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939, 1946-49 (1988); Kornet, *supra* note 128.

130. *See* JOACHIM PRINZ, THE SECRET JEWS 65-75 (1973) (explaining Marranism and Jewish tenacity); Monroe H. Freedman, *Legal Ethics from a Jewish Perspective*, 27 TEX. TECH L. REV. 1131, 1136-37 (1996).

131. *See* Freedman, *supra* note 130, at 1136-37.

132. FBI, *supra* note 59.

133. Monroe H. Freedman, *Nuisance, Ultrahazardous Activities, and the Atomic Reactor*, 30 TEMP. L.Q. 77 (1957).

134. Sloane & Freedman, *supra* note 58.

135. R. ALTON LEE, EISENHOWER & LANDRUM-GRIFFIN: A STUDY IN LABOR-MANAGEMENT POLITICS 112 (1990).

136. Freedman, *supra* note 1.

137. Letters from Monroe Freedman (on file with author) (concerning Monroe's representation of Florence Wagman Roisman in grievance committee proceedings related to *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970)).

separation between church and state,[138] critic of educational testing,[139] vehement opponent of expanded government surveillance powers,[140] and founding director of a community law firm.[141] He opposed the war build-up in Vietnam.[142] At G.W. Law School, Monroe was a pioneer in expanding opportunities for women at law schools.[143] He represented the Mattachine Society, one of the earliest homophile organizations in the United States, in public testimony and private litigation.[144] He advocated resistance to the draft.[145]

Monroe did not turn explicitly to the study of professional ethics until 1966, several years down his academic path.[146] When he eventually expressed his views about the ABA *Canons of Professional of Ethics* and the ethics of criminal defense lawyering, he faced blistering attacks. That episode in his career is well known within the field of legal ethics, a story he later would tell in *Getting Honest About Client Perjury*.[147]

After the Supreme Court's 1963 decision in *Gideon v. Wainwright* guaranteeing indigent criminal defendants a right to counsel,[148] Monroe obtained a grant to establish a criminal trial institute to train lawyers inexperienced in criminal law how to represent criminal defendants.[149] He became part of a small community of criminal defense lawyers who talked among themselves about troubling aspects of their representation:

> One day, a member of the group said, with considerable embarrassment, "My client is going to testify tomorrow, and he's going to lie, and I don't know what I'm supposed to do about it." To our surprise, we found that we all shared what we each considered to

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138. *See* Wallace Terry, *Reticence of Negro Leaders in Civil Liberties Cases Scored*, WASH. POST, Mar. 18, 1963, at B1.

139. Monroe H. Freedman, *Testing for Analytic Ability in the Law School Admission Test*, 11 J. LEGAL EDUC. 24, 28-32 (1958).

140. He chaired the ACLU Privacy Committee in 1966-1967.

141. Carol Honsa, *New D.C. Law Firm Plans to Push Public Interest*, WASH. POST, May 15, 1970, at B1.

142. Monroe's FBI file of reports about his anti-war and anti-draft activities is extensive. *See, e.g.*, Memorandum from FBI on Monroe H. Freedman's Anti-War & Anti-Draft Activities (Feb. 13, 1968) (on file with the Hofstra Law Library in the Freedman-FBI electronic folder).

143. Interview with Jerome Barron (Feb. 16, 2016).

144. *See* DEBORA L. RHODE & GEOFFREY HAZARD, JR., PROFESSIONAL RESPONSIBILITY AND REGULATION 112-13 (2d ed. 2007) (negotiating use of hotel); William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy,* Nomos*, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 824-25 (1997) (representing ACLU).

145. *See, e.g.*, *Morality Put Above Law by War Foe*, *supra* note 23.

146. Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 GEO. J. LEGAL ETHICS 133, 133-39 (2008).

147. *Id.* at 136-39.

148. *Id.* at 137.

149. *Id.*

> be a personal guilty secret. That is, each of us believed that he or she was unique in facing that and other serious ethical problems, and each assumed that he or she must have been doing something wrong or it would not have been happening. Certainly, such issues had never been recognized, much less discussed, either in our law school classes or in any professional conferences.[150]

In January 1966, Monroe lectured to attorneys who were about to enter the practice of criminal law, and he pointed out to them a key contradiction in the ABA *Canons of Professional Ethics*.[151] Lawyers were bound by the rules to keep everything they learned from their clients confidential, and yet, if a client wanted to give false testimony, the *Canons of Professional Ethics* required revelation of the falsehoods.[152] He posed three "tricky" questions to his class: (1) Is it proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth?[153] (2) Is it proper to put a witness on the stand when you know he will commit perjury?[154] (3) Is it proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury?[155] Monroe took the position that in certain cases the behavior he described was not improper.[156]

A Washington Post reporter was in the classroom at the time, which led to a story in the newspaper.[157] Among those who read about Monroe's views were three local judges, including Warren Burger—a staunch Republican, who at that time was a judge on the U.S. Court of Appeals for the District of Columbia and would later become Chief Justice of the U.S. Supreme Court.[158] Outraged at this young faculty member who already had a profile as a civil rights, civil liberties, and anti-war activist, the three judges urged the D.C. Committee on Admissions and Grievances ("Grievances Committee") of the federal bar to consider disbarment proceedings.[159] Just two days after Monroe's lecture, the Grievance Committee informed him that his heretical views—not any actions as a defense attorney—were responsible for

150. *Id.*
151. *Id.* at 137-39.
152. *Id.* at 137.
153. Freedman, *supra* note 7, at 1469.
154. *Id.*
155. *Id.*
156. Freedman, *supra* note 146, at 138.
157. *Id.*
158. *Id.* at 133-36.
159. *Id.* at 138.

initiating a proceeding to determine whether to disbar him.[160] The case became a "cause *célèbre* across the country."[161]

Charges against Monroe were dismissed by an eight-to-one vote, but not without chastisement.[162] He could legally express his viewpoint as an academic, according to the Committee, but "any lawyer carrying such views into practice would be guilty of professional misconduct."[163] The successful defense against disbarment notwithstanding, he faced continuing challenges and some slights at his law school.[164] Judge Burger tried to convince the dean to fire him, but Monroe had already been promoted to tenure and had the support of most of the faculty.[165]

Segments of the legal academy came to his defense.[166] Probably at the suggestion of constitutional and criminal law professor Yale Kamisar, the *Michigan Law Review* organized a symposium where David Bress, a Washington prosecutor, argued against Monroe's view, while John Noonan, then-professor of law at Notre Dame, took an intermediate position.[167] Monroe elaborated on the views he had originally discussed in *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*,[168] the article that

160. *Id.*

161. *The Law*, TIME, May 13, 1966, at 81, 81.

162. Norman W. Spaulding, *The Artifice of Advocacy: Perjury and Participation in the American Adversary System*, *in* LAW AND LIES: DECEPTION AND TRUTH-TELLING IN THE AMERICAN LEGAL SYSTEM 81, 97-98 (Austin Sarat ed., 2015).

163. *Id.* at 98.

164. Jerome Barron, a colleague of Monroe's at the time, remembers Burger later wrote to G.W. Law School's Dean, Robert Kramer, as the Chief Justice, letting Kramer know that in his view Monroe should not be teaching on that or any faculty. Kramer, who defended Monroe, gave him the letter. Monroe framed it and gave it a prominent place on his office wall and would show it to visitors. Interview with Jerome Barron, *supra* note 143. Monroe decided to leave G.W. Law School and become the second dean of the then-Hofstra Law School in 1973. He told Hofstra colleague Professor Eric M. Freedman that he received an invitation from the law school to apply but had thrown it away, only to retrieve it after his wife Audrey received an offer to work as a labor economist in Manhattan. Interview with Eric M. Freedman, Professor, Maurice A. Deane Sch. of Law at Hofstra Univ. (Jan. 18, 2016).

165. Spaulding, *supra* note 162, at 98-99. Burger placed his condemnation of Monroe's views in print, which did not hurt Burger's chances for nomination to the nation's highest court. Warren E. Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11, 15 (1966). Burger was confirmed as Chief Justice in June, 1969. *Warren E. Burger*, OYEZ, http://www.oyez.org/justices/warren_e_burger (last visited July 24, 2016).

166. Spaulding, *supra* note 162, at 99-101.

167. Symposium, *Symposium of Professional* Ethics, 64 MICH. L. REV. 1469 (1966). Professor Kamisar recounted encouraging the *Michigan Law Review* to sponsor the symposium in the mid-1990s. He immediately excerpted *The Three Hardest Questions* in the leading casebook, LIVINGSTON HALL & YALE KAMISAR, MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS (Erwin N. Griswold ed., 2d ed. 1966).

168. *See* Freedman, *supra* note 7.

stimulated the most important academic discussion of professional responsibility in the last half-century.[169]

Monroe began by claiming it is the duty of a lawyer to refrain from mentioning damaging information overlooked by a court or adversary.[170] He related with approval a story told by the great Samuel Williston who, finding a very damaging fact, chose not to mention it to the judge.[171] Williston stated that he was convinced it was a barrister's duty to subordinate the court's expectation of professional honesty to his client's interest in success.[172]

With respect to a client's decision to perjure himself, Monroe argued that in an adversary system it is wrong for the lawyer to exclude a client's choice to lie:

> Assume . . . that the witness in question is the accused himself, and that he has admitted to you . . . that he is guilty. However, he insists upon taking the stand to protest his innocence. . . [T]he attorney who prevents his client from testifying . . . is violating that confidence by acting upon the information in a way that will seriously prejudice his client's interests.[173]

The third question asked whether it is "proper to give your client legal advice when you have reason to believe that the knowledge you

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169. Publication of *The Three Hardest Questions* is generally considered as the watershed moment at which the definition of ethical professional behavior no longer could be addressed by reference to honest behavior. In 2006, Professor Alan Dershowitz generalized that when he was a law student at Yale (1959-1962), legal ethics was usually taught by the dean, and at Harvard, where Dershowitz subsequently taught, it was Griswold, who would make quick work of the subject:

> [H]e would get up and speak for fifteen minutes to the first year students and with a kind of perennial harrumph in his voice [and state, essentially, that] legal ethics was, do not commit perjury and honor your father and your mother. It was the Ten Commandments. There were no hard questions. It was chapel.
>
> And then along came this devil of a man, named Monroe Freedman, who [beginning with *The Three Hardest Questions*] complicated this simple good-and-bad notion beyond any possibility of remedy. For Monroe Freedman there were no simple answers to ethical questions in the legal context. They were all hard because they are so multidimensional.

Alan Dershowitz, *Legal Ethics and the Constitution*, 34 HOFSTRA L. REV. 747, 748 (2006); *see* Peter A. Joy, *Monroe Freedman's Influence on Legal Education*, 44 HOFSTRA L. REV. 649 (2016) (considering the importance of Freedman's article and subsequent scholarship on law school curricula). A panel in honor of the fiftieth anniversary of *The Three Hardest Questions* was held at the Association of American Law Schools ("AALS") 2016 Annual Conference organized by Professor Susan Fortney. ASS'N OF AM. LAW SCH., FROM CHALLENGE TO INNOVATION: AMERICAN LEGAL EDUCATION IN 2016 (2016), https://www.aals.org/wp-content/uploads/2015/12/AM2016_finalprogram.pdf 63 (last visited July 24, 2016).

170. Freedman *supra* note 7, at 1470-71.

171. *Id.*

172. *Id.*

173. *Id.* at 1475.

give him will tempt him to commit perjury."[174] He raised the *Anatomy of a Murder* situation,[175] where the lawyer says to the defendant as follows:

> If the facts are as you have stated them so far, you have no defense, and you will probably be electrocuted. On the other hand, if you acted in a blind rage, there is a possibility of saving your life. Think it over, and we will talk about it tomorrow.[176]

Perhaps Monroe was thinking of his own security data form when he pointed out there are instances in which the lawyer may be the accused:

> As in the tax case [where a tax lawyer shows a client a loophole], and as in the case of a plea of guilty to a lesser offense, the lawyer has given his client a legal opinion that might induce the client to lie. This is information which the lawyer himself would have, without advice, were he in the client's position. It is submitted that the client is entitled to have this information about the law and to make his own decision as to whether to act upon it.[177]

In the eyes of his critics, Monroe committed two cardinal sins in his discussion. First, he exposed the fundamental incoherence of the ABA *Canons of Professional Ethics*—the "self-contradictory" requirements to keep client confidentiality and to be candid to the Court.[178] Extended discussion of this conflict by itself would have been moderately provocative. Second, and much worse, he had the "poor" moral character to elevate the constitutional right to the assistance of counsel above the duty of candor as a professional and a moral imperative.[179] Monroe concluded a lawyer has a duty to conceal a client's perjury in limited situations.[180]

The public brush with professional banishment and the publication of *The Three Hardest Questions* raised Monroe to prominence as a brilliant and daring legal ethicist, scholar, and civil liberties advocate. It is also fair to say that he became a lightning rod for opposition inside and outside the law. Reading the article, a senior partner at Paul, Weiss, Rifkind, Wharton & Garrison expressed hope that the day would "not come when we hire a graduate of [his] law school."[181] For decades, some

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174. *Id.* at 1478.

175. ROBERT TRAVER, ANATOMY OF A MURDER (1958).

176. Freedman *supra* note 7, at 1481.

177. *Id.*; FBI, *supra* note 59.

178. Freedman, *supra* note 7, at 1469.

179. *Id.* at 1477-88.

180. *Id.* at 1478. The story of Monroe's encounter with the Grievance Committee is presented more fully in Spaulding, *supra* note 162, at 81, 97-98.

181. E-mail from Ronald Meister, Esq., to Norman I. Silber, Professor, Maurice A. Deane Sch. of Law at Hofstra Univ. (Feb. 18, 2016) (referring to partner Simon Rifkind, who was most

judges refused to attend conferences at which he was speaking.[182] Monroe's book entitled *Lawyers' Ethics in an Adversary System* angered practitioners who believed it was laced with pernicious assertions about the obligation of criminal defense lawyers to represent clients even at the cost of candor to the government and exoneration of the guilty.[183] He offended a number of prosecutors who believed, rightly or wrongly, that his work maligned them for their customary standards of conduct and made their job harder than it should have been.[184]

In later years, Monroe also received derision from conservative media outlets including the *New York Daily News* and Fox Broadcasting Network, whose reporters and pundits sometimes painted him as un-American. He irritated readers across the country who were disturbed to the point of vitriol by the aim he took at some of the cultural shibboleths they revered, including the character of Atticus Finch in *To Kill a Mockingbird*.[185] Most of this notoriety did not displease him. Rather, Monroe believed that drawing fire either from other scholars or from uncritical or uncompassionate people just brought others to join him to defend his own point of view. He typically regarded his detractors as misinformed and their responses as invitations to further correction.[186]

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probably unaware that a graduate of the school was among the employees to whom he was speaking).

182. *See* Spaulding, *supra* note 162, at 96-99.

183. MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975); *see, e.g.*, William R. Meagher, *A Critique of* Lawyers' Ethics in an Adversary System, 4 FORDHAM URB. L.J. 289, 292-95, 301 (1975) ("[T]he author's peculiarly lax ethical standards accessible to the general public, who are not likely to appraise them with a critical eye . . . will hardly be elevated by [Prof. Freedman's] heterodoxy which approves as permissible and indeed mandatory, practices traditionally and rightfully condemned as unethical.").

184. *See, e.g.*, Paul W. Valentine, *Lawyer Freedman Accuses Bress of Condoning Misconduct by Police*, WASH. POST, May 3, 1966, at A1.

185. *See, e.g.*, Monroe H. Freedman, *Atticus Finch—Right and Wrong*, 45 ALA. L. REV. 473, 474-77 (1994); *see* Bennett L. Gershman, *In Memory of Monroe Freedman: The Hardest Question for a Prosecutor*, 44 HOFSTRA L. REV. 1093, 1100 (2016) ("[T]here are many cases in which prosecutors, even in the face of compelling evidence of innocence, not only fail to question the defendant's guilt but also make outlandish arguments to convict.").

186. *See, e.g.*, Alice Woolley, *Rigorous, Relevant, and Right: The Scholarship of Monroe Freedman*, PROF. LAW., 2015, at 2, 3-5; Lawrence J. Fox & Susan R. Martyn, *Monroe Freedman's Contributions to Lawyers: Engagement, Energy, and Ethics*, 44 HOFSTRA L. REV. 635, 635 (2016) ("[H]e did not hesitate, even when he was threatened, to join issue with the forces of darkness. But he did so with consummate good will, good humor, and an unruffled sense of confidence in the power of his advocacy . . . ."); Michael Tigar, *The Essential Monroe Freedman, In Four Works*, 44 HOFSTRA L. REV. 659, 660 (2016) ("What we wrote and said was impassioned, though I think with mutual respect."); David Margolick, *At the Bar; The Demjanjuk Episode, Two Old Friends and a Debate from Long Ago*, N.Y. TIMES, Oct. 15, 1993 (Monroe "pummeled" from all sides); Stephen.Gillers, Comment to *The Criminal Lawyer's Trilemma*, LEGAL ETHICS F. (October 11, 2009), http://www.legalethicsforum.com/blog/2009/10/the-criminal-defense-lawyers-trilemma.html (providing discourse between Steven Gillers and Monroe Freedman, with Gillers commenting, "we

VIII. IMPERATIVES

Efforts to drive Monroe out of the profession after the publication of *The Three Hardest Questions* are well known. Less well-known are the earlier struggles and experiences and their relationship to later activities.[187] Deeply committed to social justice and steeped in a Jewish tradition of the morality of self-regarding acts,[188] his personal experiences and values surely convinced him that his own decision to respond to government inquiries without incriminating himself was ethically correct and that it ought to be professionally acceptable.[189] He was primed by them to respond antagonistically to the proposition that candor to an imperfect judicial institution was a value greater than protecting a defendant who deserved fully committed representation; they disposed him to challenge laws and practices coercing self-incrimination and abetting "witch-hunting."[190]

There are direct connections between the Cold War wounds and Monroe's later activities as an advocate and as a scholar. On a pro bono-basis, he challenged the constitutionality of listing "subversive" organizations, for example.[191] In 1966, Monroe represented the W.E.B. DuBois Clubs of America, opposing the Attorney General and the Subversive Activities Control Board's efforts to punish the organization for failing to register as a subversive organization.[192] A year later, he volunteered to work for the Washington Area Committee for the Abolition of the House Un-American Activities Committee.[193] He joined

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had quite a little dialogue"). An indication of Monroe's ability to move the law through by creating controversy is his success, in 1977, in persuading a reluctant ABA that legal ethics and professional responsibility should be recognized as an acceptable "field of law." *See* Monroe H. Freedman, *Crusading for Legal Ethics*, LEGAL TIMES, July 10, 1995, at 25.

187. *See supra* Parts II, V.

188. Freedman, *supra* note 16; Freedman, *supra* note 130, at 1131 n.2 (quoting *Miranda v. Arizona*, 394 U.S. 436, 458 n. 27 (1966) (citing Freedman, *supra* note 16) (proposing that the Bill of Rights and, in particular, the privilege against self-incrimination had Judeo-Christian roots).

189. FBI, *supra* note 59.

190. *See* Spaulding, *supra* note 162, at 96-101; *supra* Part IV.

191. W. E. B. DuBois Clubs of Am. v. Clark, 389 U.S. 309, 309-13 (1967).

192. *See id.* (William M. Kunstler, Arthur Kinoy, Melvin L. Wulf, David Rein, Monroe H. Freedman, and Floyd McKissick for appellants); W. E. B. Du Bois Clubs of Am. v. Katzenbach, 277 F. Supp. 971, 971-72 (1967) (for appellant, with David Rein). The case reached the U.S. Supreme Court, which did not reach the constitutional claims, and ruled—over dissents by Justices Black and Douglas—that the Attorney General was required to make a finding that the organization was a Communist-front organization prior to requiring a registration, and that the W.E.B. DuBois Clubs of America needed to exhaust administrative remedies prior to a consideration of constitutional objections. *See W. E. B. DuBois Clubs of Am.*, 389 U.S. at 309-13.

193. *See* Memorandum from FBI on Monroe H. Freedman's Anti-War & Anti-Draft Activities, *supra* note 142.

and became the chair of the ACLU's Privacy Committee, where he fought against government and corporate surveillance.[194]

In resisting the draft, Monroe embraced the distinction between higher moral law and immoral promulgations that should be disobeyed, which he had identified decades earlier in the context of early Jewish though and the prophets.[195] His encouragement of civil disobedience by draft inductees led the *Washington Examiner* to observe as paradoxical that "a man of the law" should become "one of the most insistent voices on civil disobedience."[196] Monroe responded with deep conviction:

> I was a free man with moral responsibility before I ever was a lawyer. I don't see any inherent inconsistency between the two roles. But if there is, I would say that it is far better for a lawyer on rare occasions to break the law than for a man in all instances to put the law above his conscience, his religious beliefs, or his moral convictions.[197]

The FBI continued to monitor him, and his file fattened with reports.[198] In 1970, an informant reported Monroe had acted as master of ceremonies for an anti-war demonstration at L'Enfant Square, where he stated: "I urge you. I incite you to resist the draft. I will aid you, abet you, and conspire with you to resist the draft."[199] The informant appears to have been disappointed when the Assistant U.S. Attorney to whom he passed the report for possible action determined that "Freedman's words alone do not constitute a violation of the SSA (Selective Service Act)" and "that someone must act upon these words for a violation to have been committed."[200] However "irresponsible" his "mouthings," he remained within the bounds of First Amendment protection.[201]

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194. *See, e.g.*, Willard Clopton, *Personality X-Rays or Peeping Toms?* WASH. POST, July 4, 1965, at F2; *see* Freedman, *supra* note 1; Memorandum from FBI on Monroe H. Freedman's Anti-War & Anti-Draft Activities, *supra* note 142.

195. Freedman, *supra* note 130, at 1135-38.

196. *Monroe Freedman: 'An Illegal and Unjust War,'* WASH. EXAMINER, Feb. 5, 1968, at 8.

197. *Id.*

198. *See, e.g.*, Memorandum from FBI on Monroe H. Freedman's Anti-War & Anti-Draft Activities, *supra* note 142; Memorandum from FBI on Monroe H. Freedman, *supra* note 3.

199. Memorandum from FBI on Monroe H. Freedman's Statements at Anti-War Demonstration (May 19, 1970) (on file with the Hofstra Law Library in the Freedman-FBI electronic folder). Monroe was doubtless doing his best to bring his words within the ambit of the incitement test of *Brandenburg v. Ohio*. 395 U.S. 444, 447 (1969) ("[T]hat the constitutional guarantees of free speech . . . do not permit a State to forbid . . . advocacy of . . . law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

200. Memorandum from FBI on Monroe H. Freedman's Statements at Anti-War Demonstration, *supra* note 199 (mentioning Assistant U.S. Attorney, Robert A. Shuker). The informant was sufficiently disappointed by Assistant U.S. Attorney Shuker's conclusion to make a notation indicating that he was seeking a second opinion. *Id.*

201. *See supra* notes 3, 5 and accompanying text.

The connection between Monroe's experiences in the Cold War and his legal ethics scholarship—beginning with his 1966 article—is also striking.[202] Although *The Three Hardest Questions* does not mention Cold War events and instead concentrates on the duties of confidentiality owed by criminal lawyers to their clients, the questions it raises ultimately revolve around asking whether and when it is moral to conceal knowledge of the truth from persons sitting in judgment.[203] This is a problem that, as we have seen, many thousands of lawyers on the American Left faced during the Cold War.

In the decades following *The Three Hardest Questions*, Monroe often revisited the telling of lies.[204] He distinguished lies from evasions, mental reservations, and justifiable equivocations, which he argued were ethically acceptable in certain situations.[205] He dissected permissible lying in contract negotiations,[206] considered the acceptability of pleading clients innocent when a lawyer believes them to be guilty and the epistemological difficulties with describing beliefs as lies,[207] asserted constitutional arguments against breaching confidences,[208] defended lying as permissible zealousness,[209] and evaluated ethically acceptable and unacceptable perjury and lying in many other contexts.[210] Monroe

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202. Freedman, *supra* note 7.

203. *Id.* at 1469, 1471-72.

204. Monroe H. Freedman, *The Cooperating Witness Who Lies—A Challenge to Defense Lawyers, Prosecutors, and Judges*, 7 OHIO ST. J. CRIM. L. 739, 740-43 (2010) (evaluating a hypothetical based on perjury and a lawyer's actual knowledge of perjury); Monroe H. Freedman, *Ethical Ends and Ethical Means*, 41 J. LEGAL EDUC. 55, 58-63 (1991) (discussing legal ethics as it relates to witness perjury and fraud); Monroe H. Freedman, Forward, *Ethics, Truth, and Justice in Criminal Litigation*, 68 FORDHAM L. REV. 1371, 1372-74 (2000) (discussing the effects on litigation of false testimony); Freedman, *supra* note 146, at 136-52 (discussing the development of and issues with the approaches to resolving the client perjury controversy); Monroe H. Freedman, *Lawyer-Client Confidences Under the A.B.A. Model Rules: Ethical Rules Without Ethical Reason*, CRIM. JUST. ETHICS, Winter/Spring 1984, at 3, 5-7 (discussing the issues of client fraud on the court and client perjury); Monroe H. Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030, 1036-38, 1043-47 (1967) (discussing the issue of perjury as it relates to the prosecution's case); Monroe H. Freedman, Professor, *Whatever Happened to the Search for Truth?*, 60 MERCER L. REV. 851, 855-56 (2009) (discussing the often accepted practice of lying while trying to obtain evidence).

205. *See, e.g.*, Andrew Perlman, *Freedman on Zacharias on Lawyer Lying,* LEGAL ETHICS F. (July 23, 2008, 1:05 PM), http://www.legalethicsforum.com/blog/2008/07/freedman-on-zac.html.

206. *See, e.g.*, Monroe H. Freedman & Abbe Smith, *Misunderstanding Lawyers' Ethics*, 108 MICH. L. REV. 925, 930 (2010) (book review).

207. MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 51-57 (1975).

208. Monroe H. Freedman, *Lawyer-Client Confidences and the Constitution*, 90 YALE L.J. 1486, 1492-93 (1981) (book review).

209. Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771, 771-72, 777 (2006).

210. Freedman, *supra* note 146, at 136-52. For an in-depth discussion on lawyers' duty of candor to the court in criminal cases and questions that, in Monroe fashion, "present a tension

never condoned all lying but contextualized ethically justifiable and professionally necessary lying.[211] His corpus finds reflection in countless secondary sources[212] and in many cases that evaluate his positions.[213]

A literature about the philosophical foundations for Monroe's views emerged with disparate perspectives of their nature[214] and consequences.[215] Some held him emblematic of, or even partly responsible for, the absence of a strong norm against dishonesty in the legal profession—and by extension, held him partly responsible for popular disdain for the honesty of lawyers.[216] Others considered him the

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between competing principles in the criminal justice process," see Bruce A. Green, *Candor in Criminal Advocacy*, 44 HOFSTRA L. REV. 1105, 1106 (2016).

211. FREEDMAN, *supra* note 207, at 53-54.

212. The Lexis Advance database is exhausted after finding more than 10,000 secondary references to the search ("Monroe H. Freedman" and perjury).

213. *See, e.g.*, *In re* Friedman, 392 N.E.2d 1333, 1336-37, 1339 (Ill. 1979) (Underwood, J., concurring) (adopting view of candor recommended by Freedman).

214. *See infra* notes 215-16. Monroe's commitments appear, at times, as principally Kantian (because he privileges the lawyer's expression of personal morality in choosing his clients); principally anti-Kantian (because he condones some lies and rejects utilitarian calculus of rule efficiencies); quintessentially pragmatic (because he places such weight on the real effect of following a professional rule such as withdrawal on a client's likelihood of success); or quintessentially post-modern (because he responds situationally or consequentially to the morality of lying). *See infra* notes 214-15. He is identified as a role moralist (who would have moral choice depend on an assigned role rather than an underlying definition of what is right) or as an idealist (based on his egalitarian views of the purpose of a legal system). *See infra* notes 214-15.

215. SISELA BOK, LYING: MORAL CHOICE IN PRIVATE AND PUBLIC LIFE 158-59 (1978); Paul Butler, *An Ethos of Lying*, 8 U.D.C.L. REV. 269, 270 (2004) ("It would overstate Freedman and Smith's ambition to term their analysis of lying an 'ethos.' Their defense of lying is a minor part of their book, but it is consistent with the whole in that it approaches, in a careful, nuanced way, the problems that lawyers face in the real world. I admire the authors' application of principle to practice. They demand the best from lawyers, and they suggest that this will require lawyers to break promises to clients in rare cases."); Fred Zacharias, *Fitting Lying to the Court into the Central Moral Tradition of Lawyering*, 58 CASE W. RES. L. REV. 491, 492-503, 506-11 (2008); *see* Thomas Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319, 322-23 (treating Freedman as an exponent of Immanuel Kant). Not opposed to philosophizing, Monroe invoked a Kantian imperative to uphold promises and explored "ordinary" morality and "personal" morality in the course of criticizing William Simon, *Role Differentiation and Lawyers' Ethics*: *A Critique of Some Academic Perspectives*, 23 GEO. J. LEGAL ETHICS 987 (2010). Monroe H. Freedman, *A Critique of Philosophizing About Lawyers' Ethics*, 25 GEO. J. LEGAL ETHICS 91, 99-100, 103 (2012). He observed that "[w]hen moral philosophers ignore . . . practical concerns, they produce articles and books that have no significance in the world of real lawyers and real clients." *Id.* at 103; *see* W. Bradley Wendel, *Monroe Freedman: The Ethicist of the Non-Ideal*, 44 HOFSTRA L. REV. 671, 680 (2016) (stating that despite being immersed in real-world lawyering, "his work is philosophical in the best sense").

216. *See, e.g.*, Bruce P. Frohnen & Brian D. Eck, *Whom Do You Trust? Lying, Truth Telling, and the Question of Enforcement*, 27 QUINNIPIAC. L. REV. 425, 426 n.6, 447-50 (2009) (focusing on Monroe's influence and observing that according to Gallup polls, only eighteen percent of people surveyed rated lawyers' honesty and ethical standards as "high" or "very high"); Michael Asimow, When the Lawyer Knows the Client Is Guilty: Legal Ethics, and Popular Culture 3 (Mar. 2006) (unpublished manuscript), http://www.lsuc.on.ca/media/sith_colloquium_asimow_michael.pdf.

"primary creative force in legal ethics"[217] and "the conscience of the [legal] profession,"[218] whose views reminded the bar that commitment to honesty as the "meta-norm" for the legal system should not be reflexive.[219] His commitment to "client-centered" lawyering and the importance of the lawyer's ethical responsibility to foster autonomous choice arose from long-held moral convictions and thinking about the plight of persons such as himself and his friends.[220]

IX. IRONIES

In 1978, Monroe argued that a lawyer who enters a contractual obligation with a client is morally bound to heed the wishes of that client—at times, even when it will establish wrongful guilt. He used as his hypothetical the iconic moral contest between Whittaker Chambers and Alger Hiss, former U.S. Department of State official who Chambers accused of being a Communist and a spy for the Soviet Union[221]:

> At one time I had the notion, based on fantasy, that Alger Hiss had no involvement with Whittaker Chambers' nefarious activities, but that Hiss' wife did. Assuming such a case, imagine Mr. Hiss' lawyer advising him that the only way to defend himself would be to tell the truth about his wife's involvement, and Hiss replying that, in no way, directly or indirectly was his wife to be brought into the case, even if it meant an erroneous conviction for himself. In those circumstances, I find it hard to believe that even Clement Haynsworth or Thurmond Arnold would insist upon conducting the case in such a way as to implicate the client's wife.[222]

("[Freedman's] *strong adversarial* approach . . . is rejected by most ethicists and by all ethical codes. Criminal defense lawyers we've spoken to are uncomfortable with it. . . . [I]t would inject more perjury into criminal trials and push the criminal justice system further in the direction of finding falsehood rather than truth. . . . [I]t would be soundly rejected by public opinion and would worsen the already lamentable image of criminal defense lawyers."). Notwithstanding, in the decades since *The Three Hardest Questions*, many states have moved partially in Monroe's direction and no longer impose an unqualified duty to disclose to a tribunal testimony the lawyer knows is perjurious. *See, e.g.*, CAL. RULES OF PROF'L CONDUCT r. 5-200 (CAL. SUP. CT. 2015).

217. Ralph Temple, *Monroe Freedman and Legal Ethics: A Prophet in His Own Time*, 13 J. LEGAL PROF. 233, 234 (1988).

218. Freedman, *supra* note 1 (quoting an email written by Lawrence J. Fox).

219. *See* Freedman *supra* note 215, at 97-99.

220. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS § 3.08, at 62 (3d ed. 2004) (noting client-centered lawyering involves maximizing client autonomy, especially by not preempting client decision-making); *see* Monroe H. Freedman, *Client-Centered Lawyering—What It Isn't*, 40 HOFSTRA L. REV. 349, 351-53 (2011) (rejecting caricatures of client-centeredness).

221. The accusation eventually resulted in the trial and conviction of Hiss for his perjury related to espionage in the Cold War. CHRISTINA SHELTON, ALGER HISS: WHY HE CHOSE TREASON 192-93 (2012); ALLAN WEINSTEIN, PERJURY: THE HISS-CHAMBERS CASE 5 (1978).

222. Freedman, *supra* note 126, at 193, 201 (referring to the position that the lawyer should

The Cold War hypothetical, like Griswold's example of students who were stubborn about violating their loyalties and ethical principles, emphasized the right of clients to determine their own course of action, including the right to behave dishonestly either in the interest of their exoneration or their guilt. In 1988, Monroe would directly raise the key question animating his personal dilemma: "The real issue is whether the search for truth sometimes must be subordinated to other values, such as the privilege against self-incrimination."[223]

Whether Monroe would have reached the positions he did without his Cold War encounters is impossible to know. Some may argue that his moral character already had been formed by then. Or, conversely, that his education in the Cold War was too removed, temporally and substantively, from his academic answers to questions about the professional rules of lawyers during the 1960s. His work with criminal defense lawyers after the *Gideon* case surely raised the immediate problems that led him to address ethical questions about the candor requirement. The fact that Monroe identified ethical dilemmas in criminal defense, however, did not ordain his unconventional approaches to resolving them. Previously, sustained attention had not been paid to either his practical answers or their moral basis.[224]

It is ironic that during the Cold War the adversary system and its importance in protecting the Bill of Rights played a significant part in the government's promotion of American values at home and abroad. And yet, the very same government intruded on the rights of citizens who exercised those rights.[225] It is also ironic that Monroe, whose rights had been intruded upon and who narrowly avoided exclusion from his chosen career path, faced exclusion a second time—for arguing, from experience, that sometimes dishonesty should be preferred to truth to bend law toward justice.

Many lawyers of his generation came to accept this point of view, thereby changing the way professional obligations would be discussed and defined over the half-century that followed.

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hold "the whip hand" in decisions about the honorable representation of a client (quoting Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1123 (1970))).

223. Freedman, *supra* note 129, at 1951.

224. *See* Stephen Gillers, *Monroe Freedman's Solution to the Criminal Defense Lawyer's Trilemma Is Wrong as a Matter of Policy and Constitutional Law*, 34 HOFSTRA L. REV. 821, 839 (2006) ("At a time when legal ethics was a remote and largely unexamined backwater in legal scholarship and in the minds of lawyers and judges, Professor Freedman was one of a very few scholars to identify serious issues in the field and to subject them to critical inquiry.").

225. *See* Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 102-03 (1988).