

LEGAL ETHICS AND THE CONSTITUTION

*Alan Dershowitz**

Thank you for inviting me to this wonderful conference. I learn so much from these conferences. And I enjoy meeting the leaders in the field of legal ethics.

The one person I miss greatly, of course, is Sam Dash. We used to love to exchange stories. We actually believed for a while we were related to each other because a number of people in my family changed their name from Dershowitz to Dash. And I would get phone calls from him when he agreed with something I did: "Alan, we're related." And then, two weeks later I would do something he disagreed with: "Alan, we're not even distantly related." I had always hoped we were, because he was such a mensch.

And being at a conference sponsored in honor of Monroe Freedman is a thrill for me. Monroe was my role model. He was the first lawyer I ever heard argue an appeal. It was in the D.C. circuit. It was a very difficult, complex case and I remember David Bazelon called me. He never, ever said, come down to the court. He always wanted me to work. But he said, Monroe Freedman is arguing. You've got to come and listen.

And I went and I listened and I said to myself, that's what I want to be when I grow up. I will never be as good, but at least I'm going to try. And so I have been following in Monroe's footsteps for so many years.

Yesterday, I was at my daughter's high school parents day. And they announced that they were now going to teach a course on ethics. And they didn't want to actually hire an ethics teacher, so one day it would be taught by a math teacher, another day by the college guidance counselor, a third day by a minister and a fourth day perhaps by the history professor. And don't worry, they said, the issues are very simple. It's a pure question of right and wrong.

And it put me in mind of how ethics were taught at law school when I was a student. It was generally taught by the dean. At Harvard Law School it was Erwin Griswold. And he would get up and speak for fifteen minutes to the first year students and with a kind of perennial harrumph in his voice, he would say, do not commingle your funds with your client's funds. And nobody understood what commingle was; nobody had any notion of funds, but yet we were taught not to do that. Basically, legal ethics was, do not commit perjury and honor your father and your

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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 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.

We have heard the story before. He started by focusing on the perjury trilemma. Lawyers must learn the facts. Lawyers must keep what they learn confidential. And lawyers have an obligation to be candid with the Court. To which I would add a fourth factor: clients are often motivated to lie; and a fifth, and this is controversial: clients sometimes benefit from telling lies. And perhaps a sixth: some lies and some failures to disclose are worse than others, because they endanger innocent third parties.

I'm certain that there are more. We've heard that Monroe was criticized, even threatened with discipline for expressing the opinion that these were hard questions and for proposing some counter-chapel answers. Interestingly enough, answers that, significantly, priests who live in the chapel, were giving routinely on a day-to-day basis in the context of the priest-penitent privilege.

But nonetheless, Monroe Freedman was regarded as a dissident. I regard him as the Holmes and Brandeis of legal ethics. Over the years his dissenting opinions have, if not always become the majority opinion, certainly have become the center point around which the debate occurs.

Freedman changed many things, among them the following: He turned legal ethics from an amateurish decanal enterprise about simplistic notions of good and evil into a professional discipline about gray area conflicts and complications with hard questions, many which have still not been resolved, some of which may never be resolved.

He placed legal ethics squarely at the center of the uniquely American adversarial process where they belong. And he insisted that many ethical duties have their source in constitutional rights. And that's what I want to speak about today, the constitutional basis for legal ethics in an adversary system.

I learned about the adversary system from my mother, because I was always a really bad student, as was mentioned by the dean. And I always had my defense lawyer at my side. No matter what I was accused of, my mother was there defending me. And that's how I learned how to defend guilty clients. Because although my mother would assert my innocence—I think she genuinely believed in it sometimes—there was usually no plausible claim of innocence that could be made on my

behalf.

I think Dean Twerski mentioned that everybody in this room has always disagreed with me at least once—except my mother. She finds it hard to disagree with me, although she will sometimes quietly and gently tell me maybe I overstated something. But I want to thank her again publicly for all she has done for me over these many, many years.

I want to start out my discussion with what I call “role morality.” The rightness or wrongness of a particular action is often a function of the legitimate role that one is performing. A simple example will illustrate this.

If a good person is told by a bad person that the bad person has been beating his wife, the general obligation of the good person is to report the bad person to the proper authorities. But that general obligation may change if the good person is a priest, a journalist, a psychologist, a lawyer, and if he has been told the information in confidence.

A priest will try to dissuade the bad person, but he can never tell on him. A journalist will write a story without disclosing his name. The psychologist is obligated to report it if she perceives a likely future danger. The lawyer’s obligation varies from jurisdiction to jurisdiction, provided the client has not told him that he is planning to beat his wife again.

Each professional is being moral. Each is being a good person, but their roles require different ethical rules. Is this moral relativism? Perhaps so. But when is the last time you heard a priest accused of moral relativism—a dirty word within the context of the Catholic and many other churches—for fulfilling his priestly obligations?

No class at a seminary about the sanctity of the confessional would ever be properly taught without addressing the broad role of the priest in the church system, his role in assuring eternal salvation, in accepting confession of sins, in forgiving. If you don’t understand the system of religion and system of the church, it just doesn’t sound right to withhold information that would be so important in helping the poor woman who was being beaten.

Freedman quotes a colleague as saying that there is almost no one today who specializes in lawyers’ ethics who also has a working familiarity with constitutional law or criminal procedure. And he uses this observation to explain why none of those who have proposed radical changes in the adversary system ever have troubled, this is his quote, “to reconcile their views with the Bill of Rights.” That’s, I think, our job today and our job in general.

Now, whether or not Monroe’s observations would be accepted by

all, and I know that Sam Levine among others might dissent, he teaches both constitutional law and criminal procedure and legal ethics. But I think that is relatively a new trend. It certainly is clear that under the supremacy clause all state-imposed legal ethics rules must be reconciled with the Constitution. Even as distinguished a constitutionalist as Justice Scalia sometimes forgets that, as when he responded to the First Amendment argument offered by Monroe Freedman about lawyer advertising. Prior to the Supreme Court's decision in the *Bates* case, Scalia reportedly quipped, quote, "I wish Dean Freedman would forget about the First Amendment and stick to the merits." As if somehow you can separate out the merits from the First Amendment.

No one can ever forget about the First Amendment when the issue is being decided within the American legal system. That is an important and indeed an often dispositive part of the merits of any discussion of lawyer advertising, just as the Fifth Amendment is an important part of the merits of any discussion of what a lawyer may, must, or should do, when his criminal client wants to commit perjury. Several Constitutional developments have recently occurred that I think are worth at least mentioning in order to have a fuller understanding of how complex and difficult this perjury trilemma—or sextema—really is.

For example, the Supreme Court last year decided the *Chavez*¹ case which announced really a dramatic new approach to the privilege against self-incrimination. It had been hinting around this issue, but in an opinion by Justice Thomas it basically declared that the Fifth Amendment has no relevance, none whatsoever, at the point of compulsion or solicitation of an incriminating statement. The only point of impact of the Fifth Amendment is at the point of admission in a criminal case against the criminal defendant.

In other words, there is no right to remain silent. There is only a right not to have involuntarily obtained evidence admitted against you in a criminal trial. The privilege against self incrimination is, under this view, *only* an exclusionary rule. I think the Framers would be turning over in their graves. And it's ironic that neither of the famous originalists on the Supreme Court bothered to pause for even a moment to ask the question: What was the original understanding of the Fifth Amendment? Would the Framers have actually said it's okay under the Fifth Amendment to beat a confession out of somebody, put that confession in the newspaper, as long as it's not admitted against that person in a criminal case?

I think the Framers might have had a different view than that

1. *Chavez v. Martinez*, 538 U.S. 760 (2003).

expressed by Justice Thomas. But Thomas's view is now the law. And that current view has implications both ways. Monroe Freedman argues very persuasively that the immunity cases like *Portash*² inform us about how the perjury trilemma should have been decided. But today I think there is a real question about whether immunity is even required under the Constitution. I'm not sure it is. I think you can make the following argument. The state may compel you in a civil case, in a grand jury appearance, in *any* context, the state may compel you to answer every question. You have no right to refuse to answer that question.

They can even put you in jail for refusing to answer the question. However, if they do, and they do compel you to answer the question, the answer can't be used in a criminal case against you. That's all the Fifth Amendment means today, shocking as that may sound. That's all, folks. There is no first Fifth Amendment right, at least under the self-incrimination clause, to refuse to answer a compelled question put to you by legal authority.

We may disagree with that—I suspect there are many in this room who do—but one has to think about the implications. And it cuts both ways. It may be that because we are focusing now on the admission point of contact, that maybe the case that Monroe Freedman makes is even more powerful, even though the analogy to immunity has become, if anything, somewhat less powerful.

Another point that I think is very important is there are developments going on in double jeopardy law which legal ethicists may not be as familiar with as proceduralists and constitutionalists. For example, it has now been held by the Seventh Circuit,³ and it seems like a dominant trend in lower courts, that double jeopardy does not preclude a second trial, if the first trial was tainted by bribery, the bribery of the judge or the bribery of a juror. It is possible therefore that double jeopardy would not preclude a second trial if the first trial were tainted by the perjury of the defendant.

If that were to become the law, it would strengthen Monroe Freedman's argument that the courts indeed have, in another context, recognized a major difference between bribery, killing witnesses on the one hand and perjury on the other. In the double jeopardy context it makes all the difference in the world. And you would think it would make all the difference in the world in the trilemma context as well. These are the kinds of issues that we have to think about in tandem, constitutional procedure and legal ethics.

2. *New Jersey v. Portash*, 440 U.S. 450 (1979).

3. *See, e.g., Aleman v. Hon. Judges of Cook County*, 138 F.3d 302, 308-09 (7th Cir. 1998).

The developing right to testify in one's own defense, which fifty years ago was not a right at all, and is still not a right in many parts of the world, may also be relevant. I was asked for advice by the Israeli government after the *Demjanjuk* case.⁴ John Demjanjuk, the man who was suspected of being Ivan the Terrible, won his appeal on the ground that there was evidence suggesting he had been in a different concentration camp, rather than the one that he was convicted of being at, even though he denied under oath that he was at any of the camps.

So when I was asked by the Israeli government what to do, I said, "Well, it's so obvious. You just take his testimony, you lay it down beside his new affidavit, and it shows 100% certainty of perjury." Charge him with perjury. The attorney general laughed. "What are you talking about?" I said, "Perjury prosecution." Again, a laugh. They'd never heard of any such thing. You don't bring perjury prosecutions against defendants who lie in their own defense. Defendants are *supposed* to lie in their own defense. Everybody expects that. That's why they weren't allowed to testify under oath for so many centuries, because nobody wanted to damn them to hell. That was the trilemma then. The trilemma included eternal damnation. That's why you could testify, but not under oath, just say what you wanted, lie through your teeth, nobody is going to believe it anyway. But we now have a right to testify under oath, in one's own defense. And that surely has relevance in the debate over the trilemma.

Empirical information is relevant to the debate. Has perjury, in fact, been reduced as a result of this finger-shaking attitude reflected in *Nix v. Whiteside*,⁵ in which lawyers are warned against in any way becoming complicit in a client's perjury? Marvin Frankel didn't think so. He said that there is no evidence suggesting that there has been a notable increase in truth telling in the courthouse. And one of the reasons that there has been no notable increase is that the focus on the controversial nature of Monroe Freedman's suggestion distorted the focus away from where perjury really occurs.

There is a hierarchy in perjury that any practicing lawyer will tell you about. Much, much, much—and I can use up the rest my time by adding muches—much, much more perjury is committed in civil trials than is committed by criminal defendants in criminal trials. Not that civil litigants are less honest or that criminal defendants are more honest. Believe me, in my experience many are not. It's just that all civil litigants have to testify. There is no Fifth Amendment privilege, so they

4. 367 F.3d 623 (6th Cir. 2004).

5. 475 U.S. 157 (1986).

virtually testify in every case. And the more testimony you have by a particular genre of people, the more perjury there is going to be. It's as simple as that.

The second highest level of perjury doesn't occur among criminal defense defendants, but rather among prosecution witnesses. Why? Because every prosecution case has many prosecution witnesses, and many defense cases have no defense witnesses. And we know how prevalent lying is: lying by the policeman about the circumstances of a search or a seizure or about evidence which they believe doesn't go directly to guilt or innocence.

And indeed, lowest on the hierarchy of perjury is perjury committed by criminal defendants. Why? Because criminal defendants usually don't testify. And yet *that's* the one area that has been the focus of the most attention and the most criticism of criminal defense lawyers. And yet that's the only context where there is a Sixth Amendment Right. There is no Sixth Amendment issue in civil cases and there is no Sixth Amendment relationship between a prosecutor and a policeman or prosecutor and any witness. So it's precisely in the context where there is the *least amount of perjury* and *the most constitutional protection* that we have *the most criticism of lawyers*.

And there is some anecdotal evidence to suggest that there is one context in which lawyers blow the whistle on clients. And it's not in the context of paid retained representation. It's in the context of pro bono representation, or representation appointed by the Court. Is it possible that lawyers are more ethical when they are not being paid than when they are being paid? That's an interesting question to ponder.

Is the implication that people who can't afford lawyers are treated to a higher level of ethics but a lower level of advocacy? Would that surprise anyone to learn that the higher your pay and the more likely you want to continue in the relationship, the more likely you are to turn sharp corners ethically, or that you are more likely to stand up as a hero to ethics when you're not being paid at all? Wouldn't that be an interesting revelation if it could be documented and proved.

I think there is another point in the news today that's worthy of consideration, and it relates to the Scooter Libby indictment, which I have in front of me and which I have read very, very carefully. And the question that really arises is, is it true or are we just imagining that more and more crimes are being committed by clients with their lawyers at their sides. Bill Clinton, his alleged crimes were committed with some of the best lawyers in the world standing right at his side. The same with Martha Stewart and Scooter Libby.

Just a parenthetical, I cannot understand how a good lawyer—

Scooter Libby presumably had a good lawyer—could permit his client to testify in front of a grand jury in conflict with his client’s own notes and with the testimony of so many other witnesses who he hasn’t debriefed and checked what the content of their testimony is going to be. This is particularly shocking with regard to the Tim Russert episode. It seemed to me a simple phone call to Tim Russert by the lawyer before the grand jury saying, “my client is about to testify, he recalls the following conversation with you, do you recall that conversation?” Three possible answers: No, it didn’t happen; yes, it did happen; or my lawyer tells me I can’t talk to you. Any of those answers is quite valuable.

Even if he gets that third answer, then Libby goes in front of the grand jury and says, “Look, I have tried my best to confirm my recollection, I have had my lawyer check. The witness won’t talk to me so I’m going to be a little bit more modest in my recollection. It’s my recollection but it may not be true because I can’t confirm it.”

The same thing seems to have occurred with Martha Stewart. Letters were written to the various investigative agencies, apparently without checking to see whether there was a stop order or anything from Merrill Lynch. Is it possible that some of this grows out of the way the Supreme Court resolved the trilemma issue? Is it possible that particularly sophisticated clients now know that they risk too much by telling their lawyers the whole truth? That they constrain their lawyers’ action by telling the lawyers everything and so they’re holding back? And as a result of their holding back from their own lawyers, their lawyers are not able to give them the best possible advice. And they may be walking themselves into perjury charges.

You may say they are getting what they deserve, and at some level maybe they are. But when you are talking about the quantity of perjury, it may very well be increasing and I’m not sure the quality of the perjury is getting any better either, as evidenced by the fact that so many of these people get caught.

Of course, there is the great myth that cover-up never works, that they always get you in the cover-up. That is a real myth; let me tell you why. We only know about the cases where they get you in the cover-up. What we don’t know is how many cover-ups work. And I suspect many, many, many cover-ups work. And I suspect many of the cover-uppers who were caught have successfully covered up many times in the past and they are shocked when *this* cover-up didn’t work.

So that newspaper myth of a cover-up—they always get you in the cover-up: the cover-up never works—I suspect they work tragically more often than one would hope.

And that, Professor Gillers, to anticipate your talk tomorrow, is

why we are still talking about this issue and we will keep talking about this issue for a long time. And why we have to talk about other constitutional issues as well.

The Fourth Amendment also presents some of the hardest issues that lawyers must consider. And you hardly can find a good answer to these Fourth Amendment questions in any legal ethics textbook because the cases that raise it change every day. For example, what does a lawyer do in the context of the Fourth Amendment when he is advising a client and the client says to him, "I think there is going to be a search warrant of my house tomorrow. And I think they are going after my computers. And my computers have ninety-five percent personal information, records about business, and five percent that might be relevant to the criminal case."

Is the lawyer entitled to say, "I will take the computer to my office. Let them subpoena the computer. Then we can respond to the subpoena and ask the court to limit its subpoena to the relevant parts of the record and not include the other parts of the record"? Is that an obstruction of justice? Is it legally or ethically questionable for a lawyer to take control, not to try to destroy anything, but to take control so that a subpoena rather than a search warrant becomes the mechanism under the Fourth Amendment for the search?

What if a client calls you and says, "There is a search about to be conducted in my home and I've got that little stash of marijuana"—not that a client would do that—"in my drawer." But let me tell you about a case that somebody told me about not so long ago. A client in California called him and said, "I think there is going to be a search conducted of my house. I have a license to carry a gun in Nevada. And I was driving home a few years ago, I think I took my gun with me and I put it in the drawer in California and it's now in the drawer in California. I have a license for it in Nevada, but I don't have a license for it California."

What is the lawyer supposed to advise at that point? To do nothing? Well, that's a past crime, a present crime, and a continuing crime. To destroy it? How do you destroy a gun? To move it to Nevada? Who does the moving? Telling a client to pick up a gun in California and move it may be a crime. Trying to seek amnesty from the police, they may not give it to you or they may say "it depends on who your client is and what he has done."

These are complex issues under the Fourth Amendment. Now, there is a change in the Fourth Amendment just this last year. The Supreme Court, in a decision by Justice Stevens, a moderate justice, said the Fourth Amendment does not create a reasonable expectation of privacy

in contraband.⁶ So that the reason that dog sniffs are now constitutional is that the dog has been trained to sniff only contraband. And if it's only contraband that's being alerted to, there is no reasonable expectation of privacy.

Again, I think the Framers would have some real difficulties with that limited construction of the Fourth Amendment. But you can't consider these ethical issues outside of the context of changing rules about reasonable expectation of privacy.

Consider the Sixth Amendment, especially in the context of ineffective assistance of counsel. How many of you have read carefully the Supreme Court's remarkable decision in *Nixon v. Florida*?⁷ It was a capital case, in which a white lawyer represented a black client who was accused of killing a white victim, in front of an all white jury and all white judge. The client has been excluded from the courtroom because he is having psychological problems and is acting out. The white lawyer tells the jury and the judge, without his client's permission, that his client is guilty. The lawyer starts out his argument by saying, essentially, "Ladies and gentlemen of the jury you won't hear me claim my client is factually innocent. Why? Because he is guilty, he did it." All without a waiver from the client.

And the Supreme Court says that's okay. That's not ineffective assistance of counsel because it may have been in the best interest of the client. Talk about a conflict between the interests of the client as perceived by the expert lawyer and the autonomy of the client, the autonomy of the average client. You can't plead a client guilty without his consent but you can, in effect, plead him guilty by acknowledging that he did it.

And I can't believe that Justice Ginsburg, who is supposed to have some experience about these matters, writes an opinion in which she says that there is an enormous difference between a plea of guilty and just saying your client did it. Because if you say your client did it and he is convicted, you can appeal. Has she never heard of the harmless error rule? Is anything not harmless error when you have conceded your client's guilt in front of a jury and the judge?

And yet, these decisions are going by like ships in the night. We are studying ethics and they are making constitutional decisions that are totally undercutting assumptions involving the ethics. The two have to come together. The ethical considerations have to conform to the constitutional analysis; the constitutional analysis has to conform to the

6. *Illinois v. Caballes*, 543 U.S. 405 (2005).

7. 543 U.S. 175 (2004).

ethical considerations.

We heard a little bit today about the presumption of innocence. There is no presumption of innocence anymore except in the court on the day the trial begins. The Supreme Court has ruled the presumption of innocence does not cloak any of us in this room. We are not presumed innocent. The only people who have the benefit of the presumption of innocence are people who are indicted and people are in trial.

It's a rule of evidence, that's all it is. It doesn't say that there is a presumption you should be bailed. That involves an analysis of another part of the Constitution.

Obviously, the Sixth Amendment and the First Amendments have enormous implications on the duty of a defense lawyer to defend his client in the court of public opinion. I have, for all prosecutors I get involved with, a standard letter: "Dear prosecutor, I don't want this case tried in the press." Why? Very self-serving. My client would rather never be mentioned in the press. My client would rather be under the Chinese system: you never find out. They don't want anything in the press. They don't want anything about them to be made public.

But I offer a deal to the prosecutors. Sometimes they accept it, sometimes they don't. If you don't prosecute my client in the press, I won't defend him in the press. But wither thou goest, I will go. If you go to the courthouse steps, I will be there. If you go to Larry King, I will go too. If you go to the New York Times, I will be there. If you leak, I will leak. Anything you will do, I will do better. That's the rule of criminal defense lawyers.

I did a capital murder case some years ago, a double capital murder case in Arizona. I made a deal with the prosecutor; he agreed. I never once spoke to the press, even when we won. I didn't do the victory lap. I was called by all the newspapers. I made a deal. It was not in my client's interest to gloat. It was not in my client's interest to respond. It never got tried in the press. But if it gets prosecuted in the press, you have an obligation to try it in the press, both under the First Amendment and the Sixth Amendment.

Ineffective assistance of counsel, we have heard a lot about that today already. Professor Ogletree will be talking here tomorrow. He and I had a case a few years ago; we were not lawyers, we were just expert witnesses. A man was about to be executed in Virginia and his lawyer sent us the brief. We couldn't read it. It was simply an incomprehensible word salad. It cited no case less than ten years old. And then we were able to find that the table of contents of cases was copied from a previous brief. All the arguments were canned arguments, simply copied from previous briefs. Some of them bore no relation to the facts of the

case.

We wrote an affidavit saying this was the worst brief any of us had ever seen and we had been judging moot court briefs by first year students for a long time. And they executed him on the basis—*Chichester*⁸ was the name of the case—on the basis of that horrible brief. Both lawyers who wrote the brief were ultimately disbarred, but not for this case, for other things that were pending at the time.

I had a case here in Long Island a couple of years ago where a lawyer was offered a deal for a client in a tax case and didn't disclose the deal to his client because he himself had just pleaded guilty to an IRS charge, and he owed the government \$125,000 in back taxes. And he estimated that the fee for the trial would be \$125,000, but the fee for accepting a plea would only be \$15,000, and he just needed the extra money.

And that was what a lawyer did to earn the money to pay the government without telling his client he was under indictment in front of the same judge, by the same U.S. attorney. The judge knew about it. The U.S. attorney knew about it. The defense lawyer knew about it. And the defendant did not know about it. Talk about lack of legal ethics.

So we need to do more to develop context—a context of ineffective assistance of counsel outside of the constitutional standard. Because the constitutional standard today is, as Deborah Rhode said, “how long can you sleep?” Or we call it the breathing on the mirror test. If you can hold the mirror up to the lawyer and breath forms on it, it's not ineffective assistance of counsel. It's only if he is clinically dead. And there has to be a better standard than that for judging the effectiveness of the lawyer within the context of our Constitution.

So much remains to be done. And no one will ever replace Monroe Freedman as The Dean. I don't mean only of the Hofstra Law School—he can and has been replaced several times as Dean of the Hofstra Law School—but as Dean of the legal ethics bar, he will never be replaced. But we need more multidimensional legal ethics scholars. We have some in this room.

I often think of the story that a student once asked about Justice Cardozo when he was sitting on the New York Court of Appeals. The student observed that Cardozo was a lucky man, because he got assigned all the interesting cases. And you can make the same quip about Monroe Freedman. How come there are so many more legal ethics problems post-Freedman than there were pre-Freedman? Is Freedman causing an increase in unethical conduct on the part of lawyers or has he just raised

8. *Chichester v. Virginia*, 448 S.E.2d 638 (Va. 1994).

the bar of sensitivity to a much higher point?

Dean Twerski quoted his father as saying, “Did you ask a good question?” It’s interesting that just a few miles from where Dean Twerski lives another great intellect named Richard Fineman, the great Nobel Prize winning physicist, who I was honored to know at the end of his life, grew up in Brooklyn. And in his book he says his father asked him the same question. The very secular father of Richard Fineman asked the very same question as the very religious father of Dean Twerski asked: “Have you asked a good question today?” And good questions are half the answers, as the Dean told us. And may Monroe Freedman continue to ask great questions until at least 120.

Thank you very much.

QUESTION & ANSWER

PROFESSOR SIMON: I have a feeling there are a few questions. We will welcome questions. We have plenty of time for questions.

PROFESSOR DERSHOWITZ: And they can be rebuttals, they don’t have to be questions. They can be comments, as far as I’m concerned.

MS. RINGLER: Robyn Ringler. What do you do when it becomes such common practice that it’s actually sort of a standard practice in the community for people to act unethically, as you are saying, and the judge knows what’s going on, and the defense lawyer knows what’s going on, and everyone knows what’s going on except the client. And yet it seems to be an accepted part of your community’s law practice. How do you fight something like that?

PROFESSOR DERSHOWITZ: Boy, it’s really a hard question. And it’s more a question of enforcement, and we have so little enforcement today. I wasn’t aware when Deborah Rhode said that there was a study, I knew it was true but I didn’t know there was a study documenting it, of 200 cases involving prosecutors who engaged in prosecutorial misconduct. I knew about the famous *Reck v. Pate*⁹ case and a few others where there were. And there was one in Massachusetts a little while ago.

Unethical behavior in many ways is almost expected—it used to be at least—almost expected of prosecutors after *Mapp v. Ohio*.¹⁰ You know that the District Attorney of New York, I think it was, I’m not positive, but I think it was, filed an amicus brief, there was at least one amicus brief saying, please don’t impose the exclusionary rule, it will

9. 367 U.S. 433 (1961).

10. 367 U.S. 643 (1961).

only lead to police perjury. What a comment. Of course it's true. And you couldn't get police perjury as rampant as it is today without at least some knowledge by prosecutors and probably some level of encouragement. Now, the encouragement, of course, is inexcusable. The knowledge raises the question of whether of the same level of knowledge should be required, for example, of defense attorneys or of prosecutors. I think it's a very different situation. I think prosecutors, who don't have a Sixth Amendment relationship with their witnesses and where there is no constitutional basis or limitation, should be required to decline to put on a witness if they have any reasonable doubt about the truth of their witness. It should be a very low threshold before a prosecutor refuses to put a witness on. And it should be a very high threshold for a defense attorney putting on his own client. Because the considerations are so, so different. Yet I have not seen any consideration of that.

The big issue is that we are the only country in the world that I know of—I think there may be one other recently—that elects prosecutors and elects judges. It's unheard of in other parts of the world. And even when we elect the judges and prosecutors, until really the 1960s we hadn't politicized justice to the point where it becomes a major issue in campaigns. The proof of it is very simple. All of my liberal friends who were most active in the anti-capital punishment campaign, when we were in college and law school together, every one of them who is in politics now is a strong supporter of the death penalty. Hillary Clinton to Eliot Spitzer know they have to support the death penalty, otherwise they just have no chance of being elected.

So the politization of the criminal justice system has created, I think, also a pervasive sense of corruption and then result-oriented judges. Whether it's because they are seeking election or seeking promotion or because there are litmus tests. When I was arguing in the First Circuit and my friend, Justice Breyer, was sitting, I dreaded getting him. I wanted some seventy-five year-old, right wing Republican judge who had no ambition. Because I know that liberal judges who want to become justices want to be liberal on issues where there are constituents, such as women's rights, gay rights, and separation of church and state. But on criminal justice there is no constituency. So you show your centrist leanings by being totally result-oriented in criminal cases. And that was true of Ruth Bader Ginsburg, who was one of the most pro prosecution judges in the D.C., Circuit. Her voting record was indistinguishable from Scalia's and Thomas's on criminal cases. And I think Breyer's was probably indistinguishable as well. And you get that kind of result-oriented justice in criminal cases where you just know

how the case is going to come out, where harmless error pervades everything that's done.

Let me end my answer with the three-word anthem for dishonesty in the judiciary, *Bush versus Gore*.¹¹ How could you teach students any longer about judicial integrity? They're smart enough to see through it. And when a guy like Cass Sunstein pronounces on the day after *Bush v. Gore*, that no law professor should challenge the integrity of the justices who rendered their decision, that we should limit ourselves to only questioning the arguments that they have offered, that would be as if we couldn't question the integrity of Judge Manton who sat on the Second Circuit—he also wrote good opinions. He only took bribes in cases where he knew it would come out a certain way. In fact, when the Second Circuit reviewed every one of his decisions while he was sitting in the penitentiary for having accepted bribes, they reversed not a single one of them. He had written very good decisions. And I think law professors have an obligation to look behind opinions and talk about corruption.

Consider the lionization of Justice O'Connor, who I think is one of the most political judges ever to serve on the United States Supreme Court. Let me give you three facts about Justice O'Connor and maybe it will help shape your view of this paragon of virtue. When she first got on the Supreme Court—she was there only a couple of years—she was a very well-known politician, of course, from Arizona. She got a letter from the head of the Republican Party in Arizona saying that we are beginning to make gains among some of the Democrats in some of the rural regions of Arizona. And the way to really cement our gains is to persuade them that our party is the party of Christianity. So we have adopted as our doctrine that America is a Christian country. What we would like from you is a letter on the letterhead of the Supreme Court confirming for us that under the Supreme Court doctrine America is a Christian country. We want to send that out as part of our campaign to get more Democrats to become Republicans. She did it.

And then a couple of months later, she agreed to have a meeting in her chambers of Republican givers who gave more than \$25,000 to the Republican National Committee to give them a secret private briefing about how the Supreme Court works. Well, the *Washington Post* caught her on that one and she had to change her mind. And then on Thanksgiving Day in the year 2000, there was a dinner in Arizona with one of the heads of the Republican Party, and somebody I know was at that dinner because their child was married to the child of that

11. 531 U.S. 98 (2000).

Republican. And halfway through the dinner, the leader, the Republican guy, the father of the other child, got up to take a phone call, and came back with his hands up in a victory sign saying, “That was Sandy. She just called and she said they figured out a way to do it.”

And this is after the party on the night of the election saying in outrage when Fox acknowledged initially that Gore had won Florida, she said, “This is terrible.” And her husband explained what she meant; it would be terrible for Gore to win because she wanted to retire and she would only retire if there were a Republican in office. Then she lied to the *New York Times*. When she was asked about that she said, “‘Oh, this is terrible,’ meant it’s terrible that they are revealing the outcome of the election before the polls were closed in Western Florida.” I mean, if a lawyer told a lie like that to a judge, he would be disbarred. But a judge can tell a lie like that to a journalist and the public.

So for all of you who want to see another Sandra Day O’Connor, don’t count me as part of that list. I would rather an honest conservative with integrity than a politician on the court who is simply doing political justice. [Applause]

PROFESSOR APPLEMAN: You started out by saying that you see three areas, legal ethics, constitutional law, and criminal procedure. And you are concerned that not enough legal ethics practitioners and also professors are really melding the three. And I wonder if part of the problem you have discussed maybe should be laid on all of our shoulders as part of the academy, in that teaching legal ethics can often be something that’s so focused on rules and it’s, in a sense—students sometimes see it as, okay, legal ethics, it’s this course and it doesn’t actually pervade any of the other courses. So maybe it’s not just legal ethics professors’ fault.

PROFESSOR DERSHOWITZ: I agree.

PROFESSOR APPLEMAN: If you are a constitutional law professor—I mean, I teach criminal law so as much as I can, I try to bring that in. I think in a sense legal ethics has been marginalized—not to say that you want the sort of pervasive way of, let’s say, Yale Law School, which at least when I was there, didn’t teach it as all. That’s how pervasive it was. They never mentioned legal ethics and they assumed they would get it in. But maybe it’s time for some of us to rethink how it’s taught.

PROFESSOR DERSHOWITZ: I completely agree with that. It’s a very, very helpful analysis. I do it in two ways. First, I start my criminal law class, the first year law class, I start with two weeks on a case, starting with a newspaper story, the killing, lawyer getting appointed, the pretrial hearings, the trial, the appeal, federal habeas corpus, and the

Supreme Court decision, and the transcript of the Supreme Court argument. It's *Nix v. Whiteside*.¹² It's a perfect case to start with. It immediately integrates legal ethics in the criminal procedure and criminal law class. It's a case that has all four things, legal ethics, criminal procedure, constitutional law and substantive criminal law. And I try to use it as an introduction. Everybody at Harvard is required to take an ethics class but they are all very different. For example, David Wilkins, who is our Dean of Ethics at Harvard Law School, teaches a course mostly on the legal profession, the structure of the profession, the integration of minorities into the profession. Brilliant, terrific course, students love it.

Mine is different. It's called Tactics and Ethics in Criminal Litigation. And it deals with a dozen or so problems in which the ethics point one way and the tactics point another way. It's a choice of evils. Or as I wrote Deborah Rode a note when she said what I had done was a little sleazy and I wrote back saying, "Yes, it was a little sleazy, but if I had failed to do it, it would have been a lot sleazy."

So often criminal lawyers are faced with choices of sleaze. You have no non-sleazy options. And she said, "Don't take the case." Well, it was pro bono appointed case. That's not an option either. And I think, you know, teaching students to think about choices of evils. Choices of evils is sometimes even easier than choice of marginalized ethics. Because we are always getting close to that line. And the question is: which is the lesser of the evils and the lesser of the sleaze? But I think another way of integrating material is, if you don't think that you know a lot about legal ethics, to invite an ethics professor to come and join you for a couple of sessions in the class. When you are dealing with the Fourth Amendment, you deal with some of these ethical issues and what do you do if somebody comes into your office as a lawyer and he has the gun or he has the money or he has the drugs. What do you do in the Fifth Amendment context?

I think integrating experts in legal ethics into the classes themselves would be very good, inviting constitutional experts to come into the ethics class to talk about the constitutional implications. The point is that we have to just integrate those subjects and other subjects. I'm not an expert in corporation law, but hearing the wonderful previous talk, clearly I want a legal ethics expert in the corporate context as well and many other contexts. So it's a great idea.

MR. ARONSON: I would like to say that I disagree with your assessment of Justice O'Connor and, you know, need of a full

12. 475 U.S. 157 (1986).

disclosure. You said—

PROFESSOR DERSHOWITZ: I have to tell you, if I were a member of the Federalist Society, I would even be angrier than I am at Justice O'Connor. Because I like the Federalist Society and I think they stand for integrity and honesty. That's why I'm so mad at her.

MR. ARONSON: I'm mad at O'Connor because she is not pro-life. You said a couple of things, I didn't want to say, but some of your statements were extremely outrageous. What you said about Monroe Freedman, his assessment of lawyers in the criminal law context—what about privacy interest, privacy law which prevented us from pursuing the terrorists on our territory, because we are so worried about political correctness and not offending certain groups?

If you provide certain protections that the liberal Court interpreted during the '60s and '70s, you're creating a vacuum of power. And you basically enable the terrorists to attack us. You also said about *Bush v. Gore*, which we all know there were numerous recounts. And in accordance with the recount, Bush won the state—

PROFESSOR DERSHOWITZ: I don't care who won the election. The election you can do four years later. I only care about the Supreme Court decision.

MR. ARONSON: I do have the same outrageous reaction about fraud in state court, which were all appointees of the Democratic governors and even the chief justice of the Supreme Court said that he was ashamed of the bench he was serving upon. It's the same outrage about that. Also, a couple of other points that you made in terms of the death penalty: Why should I feel anything for the person who, let's say, raped a child? Why should I care about his rights? Not only would I support the death penalty in this case, but I would let the relatives push the plug. If you don't believe that, the person who is a human scum somehow becomes champion of the law and entitled to all the protection. Where was he when he was killing people?

PROFESSOR DERSHOWITZ: Remember too that the murderer and rapists killed and raped without due process. Would you then allow the murderer and the rapists to be killed without due process? Clearly, we are not going to bring ourselves down to that level.

MR. ARONSON: Not kill, just retribution.

PROFESSOR DERSHOWITZ: We need to have a process—

MR. AARONSON: If you have a child molester, people don't believe that they can reform. But they're allowed by liberal judges to go into the—to elect people—

PROFESSOR DERSHOWITZ: Let's speak to that. First of all, the best judge on the Supreme Court in child molesting cases, the most pro-

defendant judge on the Supreme Court, is Antonin Scalia. He is the one who has written opinion after opinion about how the Confrontation Clause requires that there be personal confrontation; that—he has taken the most pro-procedure ACLU view on videotaped testimony in the courtroom. On the issue of terrorism, Justice Scalia has written very interestingly and very, very pro-defense in the recent series of cases. He called Justice O'Connor Mr. Fix-it, saying that she is just trying to make things easier for the government. But he argued principle.

So I don't want to get into an argument about liberalism and conservatism. Reasonable people in America have a right to disagree about that, and that's what elections are about. What I want to talk about is the principle. And I wrote a book on the Supreme Court election in which I said I thought Bush would probably have won by almost any series of recounts.¹³ But the justices didn't know that when they stopped the count—the five justices, all of whom routinely voted to stop this recount. I don't know if you know that about this case, probably it wouldn't bother you too much, but there was a case in which four justices voted for certiorari in a capital case. Four justices said this was a case worthy of being heard. But you need five for a stay. And the fifth justice wouldn't vote for a stay. And they executed a man whose case was actually pending in front of the United States Supreme Court before the argument could be heard, even though four justices had voted to grant argument and even though there is a statutory obligation to hear a case. And by executing him they mooted the case.

All of the justices who voted to grant the stay in *Bush v. Gore*,¹⁴ voted against the stay in that capital case. Talk about irremedial harm. Taking a man's life is irremedial. Stopping a vote or continuing a vote is not irremedial. I was—

MR. ARONSON: Two wrongs don't make a right.

PROFESSOR SIMON: We have other people who want to ask questions.

PROFESSOR CHARNOV: Bruce Charnov of Hofstra University. You speak eloquently, as you did at the inauguration of Monroe Freedman, which I remember. You have raised the issue that there is likely to be greater perjury in civil cases and I want to focus on a specific circumstance and ask your comment.

PROFESSOR DERSHOWITZ: Sure.

PROFESSOR CHARNOV: In the matrimonial area one needs to prove grounds. Often you find the circumstance that all the financial

13. ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000* (2001).

14. 531 U.S. 98 (2000).

details are worked out and then virtually everyone involved agrees to a conspiracy of perjury. The bench, the lawyers on either side. Someone agrees that they are going to take the divorce. You get a sworn testimony where everybody knows that everybody is lying, with the countenance of the Court, in the interest of moving the case through. In fact, the system probably could not survive as currently constituted if perjury weren't an accepted doctrine, however wink, wink, under the table. How do we deal with that?

PROFESSOR DERSHOWITZ: It is very interesting that—it certainly used to be the case where adultery was the only ground for divorce in many jurisdictions. You get people, instead of saying, “I wish I had committed adultery,” saying, “I had committed adultery,” in order to be able to get over that threshold. I suspect—I’m not a matrimonial lawyer—that’s happening less frequently with more permissive grounds for divorce. But there is no accepting that. I had a case a few years ago in New York where my client had shot a corpse. Some of you may remember this from my book. My client had shot somebody thinking maybe he was alive, but he was dead at the time when he shot him. It was a fascinating case. So we won the appeal and it came back for a retrial. And nobody wanted to retry that, not the prosecution, not me. So we pleaded him guilty to attempted manslaughter. Now manslaughter requires that it be an accident and attempted requires that there be specific intent. And the judge was very good. The judge said look, nobody is going to commit perjury in this courtroom. Nobody is going to swear to anything that didn't happen. I'm going to take the blame. He said, I want the defendant to state on the record to exactly what he did, factually and accurately. And then I will say that I find that constitutes the elements of attempted manslaughter. And since both of you have agreed not to appeal, that's probably the last we will hear of it. And then he turned to me and said, “So are you going to use it in your classroom, are you going to make a fool of me in your classroom?” I said, “No, I will use it in the classroom but only after full disclosure that this is something we all agreed upon as the responsible plea bargain.”

I think you can't allow perjury in a plea bargain. And it happens, it must happen in matrimonial cases. It happens in criminal cases a lot, when you get a client being willing to—my son was a legal aid lawyer some years ago and he absolutely believed the client was innocent. And the prosecutor—he had been in six months—said, we are willing to give you time served if you're willing to admit that he did it. But if not, the trial will take another three months and he will probably get time served, but it will be three more months. And my son had to decide whether he was prepared to allow his client to agree. He did many things like it, and

that's why he was such a good defendant, but he didn't do that particular one, at least my son thought so. You can't do that. You can't countenance perjury of that kind even as letting the system work. But the point is so interesting, that the system is so hawkish on lawyers suborning perjury. But we have so much criticism of that and yet you're so right, some other benign perjury, what my mother used to call a white lie, gets told in the court when there is nothing white about it at all. It's a lie; a lie is a lie.

MS. MILLER: Esther Miller. What do you think about the defense to perjury that my client wasn't lying, he was just really too busy and involved in other things to really remember the truth of what happened.

PROFESSOR DERSHOWITZ: Well, you know memory is a very strange thing. I don't know anything about the Libby case, but when I read the indictment, I said to myself, "He just isn't that stupid to take on Tim Russert about a conversation that just never occurred." And when I read it I said, "I bet you he really thought something like that had happened. Or maybe he had the conversation with somebody else and he got confused." I have to start my class every year in criminal law for the last three years saying, in 1964—some of you may have been my students—I could within two weeks know the name of every student in my class. There were 150 of them. Now there are only seventy, and I don't remember anyone's name. I'm sixty-seven years old and memories are very difficult. I still remember the students in my '64 class because those are old memories, but new memories are very, very difficult. I'm not suggesting that's a defense, but I am suggesting a little bit of humility sometimes about what people do remember. And there is also wishful thinking.

Again, reading the Scooter Libby indictment, it seems likely to me something like this happened. That Scooter Libby and the Vice-President came up with a cover story. And they were going to tell the cover story to the journalists, which is not a crime. He didn't want to source it to the Vice-President, obviously, or source it to the CIA, so they came up with a cover story. Then he is asked to testify and many of the counts of the indictment are just like the Clinton counts: it depends what "is" is, whether it's present tense or past tense.

You have Libby saying, "I told him that I learned it from other journalists." Well, that's literally true. But when you repeat it in front of the grand jury, is he now saying, "And I'm saying to you that it's true," or is he just repeating a falsehood that he told previously? The Miller and the Cooper ones seem to fit within that category. The Russert one does not, because Russert says there was simply never any conversation whatsoever about the matter.

So it's intriguing to me and it's perplexing how this could have happened, but I'm prepared to at least consider the possibility that people do either honestly forget or, at some level of wishful thinking, remember better than it happened. Alice in Wonderland said, "I remember things even better before they happen than after they happen." That's an element of wishful thinking. Last one.

PROFESSOR GILLERS: Stephen Gillers. *Nixon v. Florida*:¹⁵ it's a wonderful case to teach. But let me present it as a question for you. Experienced Florida criminal defense lawyer in capital case, this is his life.

PROFESSOR DERSHOWITZ: Absolutely.

PROFESSOR GILLERS: Really understands the rhythm of capital cases. He is assigned to represent Nixon. Nixon is very spacey, wouldn't talk to him—this is true. He told Nixon about the strategy of admitting the crime and thereby perhaps winning mercy from the jury on the sentence. Nixon is all over the place, ultimately refuses to talk to him. He's got to sum up.

PROFESSOR DERSHOWITZ: You left out one fact. He tries to fire him. He says, "I want a black lawyer, not a white lawyer."

PROFESSOR GILLERS: This is my hypothetical. You can do your hypothetical. So Nixon is then told by the judge, "You're in this case, I'm not letting you out, you have to sum up." Nixon honestly—rather, the lawyer honestly believes that the best way to save Nixon's life, given the overwhelming evidence of guilt, confession, real evidence, witnesses, et cetera, is to not tease the jury with arguments of innocence. But he calls you up. He calls you up. What do you tell him?

PROFESSOR DERSHOWITZ: Here's what I tell him. I tell him, "You know, I'm sure you had the same issue before trial and I'm sure you said to yourself, 'Boy, if I can only get this guy to accept a guilty plea, to offer a guilty plea.'" I am even more experienced than that. I know giving a guilty plea prior to trial increases dramatically the chances of getting no death sentence. The second best thing is going to trial and say to the jury, "my client did it."

So I really would like to do the best of all: plead him guilty. So I go to my client and say, "give me permission to plead you guilty." Same spacey stuff. You cannot walk into that court and say, "Your Honor, I'm an experienced lawyer, I have done this for a hundred years, I know what's best for my client, I am pleading him guilty." You can't do that.

So it seems to me at least you have to ask the question, why can you then do the same thing functionally at trial? So I would reluctantly

15. 543 U.S. 175 (2004).

say to him, "You're a great lawyer. You were right, it is better for him, but waiver requires a sense of the autonomy of the person who's going to die. And although we don't want anybody to be able to use the legal system as judicial suicide, none of us want to be Dr. Kevorkian. Your hands are tied. You can't do it." Now the call comes post *Nixon* and you can do it. You can't do it pretrial, but you can do it post trial. So the harder question is, what do you tell him now? And I guess I tell him now, "Do it." Now, I would say you have the imprimatur, eight to nothing. Rehnquist wasn't sitting; it would have been nine to nothing. And then I say, "I've got to call Monroe and find out whether or not what is constitutionally permissible, what is tactically permissible, is also ethically permissible. And by the way, I can't find the answer to that in the ethics books. So I don't know what the ethical answer is. I now know what the constitutional answer is. I think it's a wrong answer, but I think it's an answer. And I know what the tactical answer is. And I know that better than Justice Ginsburg knows it, because we are experienced criminal lawyers and she is not. But I don't know what the ethical answer is. Do you?"

PROFESSOR GILLERS: I think also in *Nixon*, the Florida Supreme Court reversed, per se, as ineffective assistance of counsel, and I think Ginsburg's opinion remanded for a *Strickland* analysis.

PROFESSOR DERSHOWITZ: But we know what the result of a *Strickland* analysis would be. You know, another answer, and we can't do this but you think it, you say to the guy, "Be ineffective. Then, he at least has another shot. Maybe that's the best thing you can do, fall on your sword." But we are not allowed to do that either. This is so complicated and I have pity for the poor lawyer in *Nixon* because he didn't have any guidance. He couldn't turn to any books. And to me it's so remarkable that with all the collective wisdom in this room and everything that has come out of the legal ethics, for the vast majority of questions that the average criminal defense lawyer confronts almost on a weekly basis, there is almost no guidance. And you've got to just go by the seat of your pants or by your ethical instincts or by analogy. And I find myself often just calling the bar. And they always say, "Well, you know, there are considerations on this side and the other side." And you've got to make the wise judgment. But at least you have a written record that you have tried. You've called the bar.

So this is a work in progress. And, you know, there are different, clearly different orientations. When you hear Deborah Rhode you hear one orientation. My orientation is somewhat different. Monroe's, yours, we all have somewhat different orientations. And I would never want to live in a world where we were dominated by a single philosophy,

whether it be Kantian or a Benthamite philosophy or a Rawlsian. I think it's wonderful that philosophies serve as checks and balances on each other in a heterogeneous society. And I think in the world of legal ethics it's wonderful that we have heterogeneous philosophies, because we are never going to get to the answers, but at least we see a process at work. And it's a fascinating process and you all make it even more fascinating. So thank you. [Applause]