

## THOUGHTS ABOUT LEGAL ETHICS AND CRIMINAL DEFENSE\*

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### *Introduction*

I am honored that you have invited me to speak. I am honored, first, because you have allowed me to speak of these important issues in the context of shared concern with human rights and human flourishing. I am also honored to be part of a gathering devoted to studying the work of my friend, colleague and mentor Monroe Freedman. Monroe and I met and became friends in 1967, in Washington, D.C. We sometimes debated with one another, but we always maintained a deep friendship.

Our topic is criminal procedure and its relation to legal ethics. When I think of this topic, I focus first of all upon the rights of those charged with crime, rather than on the state's asserted need to find and punish wrongdoers. The state has plenty of power to fashion and enforce its will. We as lawyers are simply trying to see that it exercises its power in a responsible way. Our commitment to that task is the most important determinant of legal ethics as they apply to the criminal law.

Although I have known many Japanese lawyers, and have represented Japanese persons and entities, I am certainly not an expert on Japanese law and legal culture. I speak only of the legal system in which I have worked, perhaps with an occasional idea drawn from my work on the history of the Western legal tradition.

Before I discuss the four specific questions<sup>1</sup> that have been posed by the conference

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The symposium was designed by the organizer in memory of late Monroe H. Freedman who passed away on February 26, 2015. Monroe H. Freedman, the former dean of Hofstra Law School, was recognized as one of the most highly regarded constitutional lawyers and "a lawyer's lawyer" in the field of Legal Ethics.

His 1966 *Michigan Law Review* article on criminal defense ethics, "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions" has still been controversial and unresolved. He received the ABA's highest award for professionalism in recognition of "a lifetime of original and influential scholarship in the field of lawyers' ethics." (Comments by Professor Keiichi Muraoka, the organizer of the symposium)

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<sup>1</sup> The questions are as follows:

#### Question 1

You tried to persuade the defendant not to take the stand, but he decides to do so anyway of his own free will. You believe the defendant will commit perjury. In these circumstances, is it ethical to let him go on the stand?

organizers, I want to set out three basic ideas.

FIRST:

The bar's nominal independence means nothing unless

- the bar proclaims and enforces the right of people to have access to justice
- the bar upholds the right and obligation of its members to defend unpopular clients and causes;
- the bar supports meaningful access to justice by approving law practice settings that advance that goal;
- the bar is open on the basis of equality, and in its rules and administration upholds the ideals of diversity.

The bar in my country has often failed to grasp these principles.

SECOND:

It is self-serving and solipsistic to discuss rules of professional responsibility without first centering oneself in an ethical or spiritual tradition, from which basic rules of human conduct, obligation and flourishing may be derived.

Professor Muraoka has invoked the name of Monroe Freedman. He presents us a magnificent example of a lawyer and ethics scholar for whom true commitment to an ethical framework always preceded any discussion of specific rules and principles.

THIRD:

We, criminal defense lawyers, occupy a uniquely important place in society.

We mediate between what the law says and what it actually does to people. We mediate between the law's promises of justice and the real world in which punishments are dispensed. That is, we mediate between what is given and what is desired. You might say that all lawyers do these things, but we do them against a backdrop of state power, and in situations where the state can inflict loss of liberty or even life. We know that the legitimate functions of the criminal law can be and have too often been abused. The criminal law, which includes the means used to investigate those who may be charged with crime, provides a measure of how state power is exercised in the society as a whole.

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Question 2

You received secret information that the police would be going to search the client's house. The source of the information was legitimate, such as from a reporter. In these circumstances, is it ethical to reveal the secret information to the client?

Question 3

See the Alton Logan Case. 26-Year Secret Kept Innocent Man in Prison, "60 Minutes" CBS News, March 6, 2008. <http://www.cbsnews.com/news/26-year-secret-kept-innocent-man-in-prison/2/>

What do you think about the attitude of the two lawyers who kept the secret for 26 years on account of client confidentiality despite knowing that Alton Logan was innocent?

Question 4

In Japan, a kind of "plea bargaining" will be introduced in the near future. The Diet has passed a law under which the accused will be entitled to enter into a contract with the prosecutor to obtain a more lenient disposition of the case in return for providing vital testimony against a third party whom the prosecutor wishes to indict. The Government has explained that defense counsel would ensure the legality and legitimacy of the contract between the accused and the prosecutor. What do you think about the introduction of this Japanese plea bargaining system as compared with the practices in your country?

We understand more than other members of our profession these basic ideas: First, the law is not what it says but what it does. We must always ask ourselves what effect the rules will have in their actual operation on the lives of human beings. The law may proclaim equality and transparency, but those claims are often fictitious. I will return to this theme.

Second, legal rules — including ethics rules — are the product of specific social, historical and cultural contexts. They are not neutral principles. They were devised for specific purposes. We must lay bare those historical circumstances in order to answer particular questions.

Third, we fail at our task if we simply accept the criminal law's overriding desire to fit our clients into the often-artificial categories created by the Penal Code. We must empower our client, and seek to end his or her alienation from the forces that seek to punish him or her.

I am arguing that rules of professional responsibility must be seen in a cultural, historical and social context, and that we must fashion and interpret them to promote our client's essential humanity. The rules must be both an inspiration and a warning.

Let me take up these themes.

### I. *The Bar's Responsibility*

In *Gentile v. State Bar of Nevada*<sup>2</sup>, a leading United States Supreme Court case, Chief Justice Rehnquist traced modern professional responsibility rules to the state of Alabama in 1887, and said that this was “the first official code of legal ethics promulgated in this country.” Seriously? Alabama?

A later commentator praised the Alabama code because it was written by “gentlemen” at a time when Alabama was supposedly a “homogeneous community.” He meant, of course, that the rules were written by a white supremacist politician who thought that only white men should be lawyers and that only white people should have rights.

In 1908, the American Bar Association published its first Canons of Ethics. The rules were hostile to contingent fee representation of plaintiffs. In practice, the organized bar sought to deter and marginalize the groups that were forming to advance the rights of working people, farmers and racial minorities.

The American Bar Association itself stood apart from the struggles against injustice that were part of American society in the first half of the 20th Century. Women were agitating for the right to vote, and eventually took direct action in the streets to advance their cause. The American Bar Association grudgingly admitted a few women lawyers in 1918 under pressure from the government, but did not fully open its membership to women until the 1930s. The ABA did not admit African-Americans until 1943. However, in 1954, after the Supreme Court had decided the iconic school desegregation case of *Brown v. Board of Education*<sup>3</sup>, the ABA Journal was a forum for attacks on that decision as “communistic.”

It is true that the American Bar Association is a voluntary association of lawyers. Women and African-Americans could be and were admitted to the state bars, which are the licensing authorities for law practice. And it is true that in the midst of the Civil War, in 1865, an African-American was admitted to the Supreme Court bar.

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<sup>2</sup> *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991)

<sup>3</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954)

But the ABA has from its inception claimed a leading role in the American legal profession, and sought to be the profession's voice. Until about thirty years ago, that voice was white, male, Anglo-Saxon, and hostile to change. I am proud to have taken some role in trying to change the ABA, along with other bar leaders such as Benjamin Civiletti, John Curtin and Dennis Archer.

One of the defining characteristics of the ABA until the 1940s was anti-Semitism. In 1929, leading legal ethics expert Henry Drinker told that ABA that one of his most important jobs was keeping "Russian Jew boys" out of the legal profession.

In the 1960s, African-Americans sought and needed legal counsel for the rising tide of lawsuits against racial discrimination, and then to defend those who were arrested during non-violent protests. The organized bar in the Southern states was largely deficient in assisting those seeking justice. And it sought to enforce its rules in a way that would deny access to counsel. Bar associations also tried to restrict access to lawyers by injured workers, who depended on their labor unions to get help in finding a lawyer and seeking redress. The United States Supreme Court finally resolved most of these issues in favor of a broad right to legal representation.

Even recently, as it has reformed to address issues of racial discrimination, equality within the profession, and access to legal services, the ABA leadership has reflected the interests of lawyers who represent the wealthy and powerful.

Here is a recent example. The Chinese government has arrested dozens of human rights lawyers and is starting to prosecute some of them for their activities in defense of human rights. The ABA's criticism of these outrageous actions has been mild and tepid. A strong statement of condemnation was voted down in the ABA because such a statement might harm the interests of major American law firms that practice in China.

The ABA has sponsored new rules of professional responsibility. Let me cite a few examples. The law firm of Arnold & Porter, which was founded in Washington, D.C., is today an international law firm with offices in many US cities and abroad. In 1984, using newly written professional responsibility rules, it formed a non-lawyer subsidiary called APCO. APCO brought non-lawyer professionals, mostly public relations experts, into the law firm.

What did APCO do? It was a public relations and advertising firm. Its non-lawyers helped political groups advocating such things as restricting plaintiff rights to sue by lobbying and conduct publicity campaigns.

How does this work out in legal ethics terms? Under the Supreme Court's decision in *Gentile v. State Bar*, if I represent a criminal defendant, I am permitted to speak in public about the case. However, I must avoid saying things that pose a strong likelihood of influencing the jurors who will eventually hear the case. Similarly, if I represent a big corporation that has committed serious environmental pollution — something that happens in the United States and in Japan — and the corporation is sued for its conduct, I must respect the legal ethics rules and limit my public comment on the case.

But under ABA Model Rule 5.7<sup>4</sup>, if I represent that big corporation, I have a different

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<sup>4</sup> Rule 5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

path. My firm can set up something like APCO, as a subsidiary, and APCO can do advertising and lobbying against plaintiff lawsuits with no control at all.

In short, lawyer speech about pending cases is subject to differential controls based on whether the client and the law firm have the financial means to evade the ordinary rules.

For many years, the organized bar had campaigned against the combination of lawyers and non-lawyers in the same practice setting. But when their large corporate clients provided a financial opportunity for law firms to establish subsidiaries such as APCO, the bar adjusted its rules to permit that activity.

Chief Justice Rehnquist, writing in the *Gentile* case, did not bother to address this sort of inconsistency. In that same case, however, Justice Kennedy wrote for five Justices and did reaffirm the grand tradition of lawyer speech about public issues, including criminal cases. You know from your own experience in Japan of the secret and hidden ways that criminal defendants and suspects are treated by the police and prosecutors. Public revelation of these things has been indispensable to any effort to correct these injustices, and indeed the Japan Federation of Bar Associations did its courageous documentary about coerced confessions<sup>5</sup>.

In the *Gentile* case, a criminal defense lawyer held a press conference to combat the press campaign that had been orchestrated by the prosecution and the police. He sought to shape the social context in which his client would be judged, and to empower his client to resist the unjust accusations made against him. The client was acquitted, but lawyer Gentile was attacked by the bar for failing to be simply an organ of the state and instead being a hired gun in the sense that Professor Muraoka has discussed. Gentile won, but only after a long battle, and only 5 to 4.

By contrast, the corporate clients of Arnold & Porter freely seek to reshape the architecture of the law in their own interest, and the ethics rules are not used to block their way.

Here is another example. For many years, the organized bar in the United States insisted that self-regulation meant that each state — as a licensing jurisdiction — had plenary power over the members of its bar. Also, if a lawyer from another state wanted to practice, he or she would have to associate a “local” lawyer in that activity. A law firm could not have members of the bar of other jurisdictions as partners. These restrictions were in many instances counter-productive. As I have noted, when the civil rights protests began in the 1960s, the Southern state bars tried to prevent lawyers from the Northern states coming down to provide the legal services to civil rights leaders that the local bar would not.

That has changed. As you know in Japan, foreign law firms have been able to have a limited presence here. Thus, you have Morrison & Foerster in Tokyo, an old-line San Francisco law firm. There is nothing wrong with this, but it is curious to see that the barriers to multi-jurisdictional practice came down when the large law firms who represent

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(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist

(b) The term “law-related services” denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

<sup>5</sup> DVD “Presumed Guilty: Creating False Confession”, Japan Federation of Bar Associations (2008), Japanese Title, “Tsukurareta-Jihaku: Shibushi no Higeiki”

multinational corporations saw that this would make their practices more efficient and lucrative.

This historical sketch is of course incomplete and partial. I provide these few examples in order to address one of my themes. The concern that unites all these examples is this: we must ask who and in whose interest legal ethics rules are drafted. If, as in Alabama in 1887, the draft is done by a wealthy white racist, it is easy to predict whose interests the rules will protect. If modern ethics rules are drafted by a legal profession intent on preserving its existence as an elite that predominantly serves wealthy persons who can afford to hire lawyers, that choice will be reflected in the rules.

There must be a *quid pro quo*: the State gives lawyers a near-monopoly on access to legal advice and to the courts. What will the lawyers give in return? I would have thought that answer is easy. Lawyers must devise rules that maximize access to justice, and use their influence to see that such access is supported by the organs of the state.

Yet, as I noted in an article<sup>6</sup> a few years ago, not all lawyers see the inherent justice of that essential bargain. In *Mallard v. United States District Court*<sup>7</sup>, a federal judge appointed a lawyer to represent a civil rights plaintiff in a civil suit. The lawyer would not be compensated, except perhaps if the suit was eventually successful. The Association of the Bar of the City of New York filed an amicus brief, saying essentially what I have advocated. Lawyers must be expected to provide *pro bono* legal services from time to time. But the State Bar of California — the nation's largest, with about 135,000 members — hired the law firm of Morrison & Foerster to file a brief saying that making lawyers do *pro bono* work is unconstitutional, because it is like taking their property without compensation.

Every United States jurisdiction has an ethics rule that lawyers should do *pro bono* work, but none of those rules provides that if a lawyer does not do such work, that there are any adverse consequences.

To sum up, the legal ethics rules that now exist in the United States have their origins in the idea of the legal profession as a bastion of privilege. The pretense that the profession would be independent of merely commercial motivation is belied by its embrace of new rules that permit it to combine commercial advertising with litigation advocacy. And all the while, the commercial theme is reinforced by rules that tell potential clients that if they don't have money, they are subject to the purely discretionary decision of lawyers to provide or not to provide access to justice for those who cannot pay.

So that is my first point: We need a different stance towards legal ethics rules. They should be drafted with concern for the public interest and in frank recognition that a virtual monopoly comes at a price. The rules should encourage diversity and inclusiveness within the profession — diversity of gender, ethnicity and social class. As the profession becomes more diverse, it will naturally tend to turn towards actions and rules that serve a broader community. That has been the case in my country.

Here in Japan, you have many fewer lawyers as a percentage of the population than we do in the United States. Yet, your bar is growing — from 24,000 members in 2005 to more than 35,000 in 2014. This growth can provide an opportunity for careful consideration of ethics rules. It can also allow you to consider the views and aspirations of younger lawyers. As of 2014, only 18% of Japanese lawyers were women — 6326 of 35031. If your experience is

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<sup>6</sup> Michael E. Tigar, "Crisis in the Legal Profession: Don't Mourn, Organize!", 37 *Ohio N.U.L.Rev.* 539 (2011)

<sup>7</sup> *Mallard v. United States District Court*, 490 U.S. 296 (1989)

anything like ours, the presence of increasing numbers of women in the profession gives an opportunity to rethink issues of inclusion and diversity.

And so I ask: Why and how did we get the ethics rules — or more accurately rules of professional responsibility, because the drafters have abandoned any claim that “ethics” are at the root of their work — that we now have? In the United States, as in many other countries, the bar has achieved “self-regulation.” That is, the bar is relatively independent of governmental control, and it makes and enforces the rules concerning qualifications of lawyers, admission to practice and rules of lawyer conduct. In the United States, and in other countries as well, the bar also “accredits” law schools, thus making its control of the profession nearly complete.

The bar then congratulates itself for this independence, and professes to uphold certain fundamental values of honesty and public service. The iron laws of economic behavior in capitalist societies make these claims difficult to accept. Any monopoly over goods or services in any branch of endeavor inevitably leads to monopoly pricing, exclusion of alternatives to the good or service that the monopolist provides, controls on market entry, and organization of the market in order to further those goals. These dangers of monopoly power are plain to all of us from the first moment in law school when we studied the origin and function of antitrust laws.

These economic truths help us to understand why we must join the struggle for more inclusive and public-spirited rules.

The rules should go further, however. Yes, we do give awards and recognition to the lawyers who stand up to power, and who give their time and energy to those who are marginalized by society. When we think of lawyers who set an example for those entering the profession in my country, we think of Andrew Hamilton, who represented the colonial newspaper editor John Peter Zenger. We think of the lawyers who resisted British impositions on the colonies. We think of Clarence Darrow, who devoted his life to representing those charged with crime. We celebrate the lawyers who took on the civil rights cases of the 1940s, 1950s and 1960s. That is, we celebrate the lawyers who understood that our basic job is not to “accept the things we cannot change,” but to “change the things we cannot accept.” That is, we build a bridge between a given injustice and a more just result.

This sort of work is not easy. I am reminded of what William James said in 1887, dedicating a monument to Robert Gould Shaw. Shaw served in the Civil War, bravely. But James celebrated him because Shaw chose to command a regiment of African-American soldiers. Military valor, in that time as in this one, was widely celebrated. As William James said:

That lonely kind of courage ... is the kind of valor to which the monuments of nations should most of all be reared, for the survival of the fittest has not bred it into the bone of human beings as it has bred military valor; and of five hundred of us who could storm a battery side by side with others, perhaps not one would be found ready to risk his worldly fortunes all alone in resisting an enthroned abuse.

There is professional satisfaction in not accepting things as they are. As I traveled around the country, I met a lawyer named James Robertson in the state of Mississippi. He was a leading litigator for the business community in his region. Then he accepted an appointment to represent an African-American charged with a capital crime. As he told the story, he said “I discovered that there was no greater pleasure in law practice than to cheat the hangman.” I

would tell that story to bar groups, and experienced lawyers who had done similar work would come up and say the same sort of thing. Indeed, remembering today's theme, Monroe Freedman was above all a joyful person, taking pleasure in the struggles he had decided to undertake.

## II. *Ethics and Professional Responsibility*

My second point is that a deep and studied sense of ethics must precede any effort to draft rules of professional responsibility. In the 19th and early 20th Century, the American bar called its rules "canons of ethics." In a burst of unaccustomed candor and humility, it has renamed them "rules of professional responsibility." The collected rules begin with high-sounding words about justice and the legal profession, none of which impose any duties on lawyers. The rules themselves are simply an adaptation of the law of contract and the law of agency. As I have noted, they fail to address the legal issues facing those without the means to hire a lawyer and those such as indigent criminal defendants who do not bargain about legal services but simply have a lawyer assigned to them.

As other speakers will tell you in more detail, Monroe Freedman's views about professional responsibility were rooted in a deep sense of ethical and moral obligation<sup>8</sup>. In our profession, we go to work every day and think about what is just and unjust for our clients. We are the only profession engaged in that kind of work in a practical way.

In my book *Fighting Injustice*<sup>9</sup>, I began by writing: "Were there no injustice, men would never have known the name of justice." The Greek poet and philosopher Heraclitus wrote this some 2,500 years ago.

We may not know what "justice" means, as an abstract concept. Indeed, there is a danger in thinking or saying that we have discovered a true and complete idea of what ought to be. From such visions, much tyranny has arisen.

Some months after my book was published, I got a letter from Gore Vidal, addressing this idea. He wrote: "I like your take on an idea I find it impossible to shorthand — the negative 'injustice' that arouses you to action is easier to deal with than the potentially soaring 'justice' for which we good guys fight." He then added a rather chilling reminder: "I thought a somewhat overwrought sense of justice overwhelmed McVeigh<sup>10</sup>."

In an essay<sup>11</sup> about my being appointed as counsel to Terry Nichols in the Oklahoma bombing case, I wrote on this same theme:

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

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<sup>8</sup> Jane B. Tigar, "The Influence of Judaism on Monroe Freedman's Understanding and Study of Ethics" (2016)

<sup>9</sup> Michael E. Tigar, *Fighting Injustice*, (ABA,2002)

<sup>10</sup> Timothy James McVeigh, an American Terrorist convicted and executed as principal culprit of the Oklahoma City bombing.

<sup>11</sup> Michael E. Tigar, "Defending", 74 *Tex.L.Rev.* 101 (1995)



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

The modern rules of professional responsibility have lost connection with ethics as that term is properly used. They have largely become simply rules about contracts and agency. And when the rules are untethered from moral obligation, it becomes easy to argue that the lawyer’s obligation to the community is pleasant to discuss, but not something to be insisted upon.

In the criminal law in the United States, about 80% of felony defendants are indigent and therefore have appointed counsel or a public defender. The systems for appointment and defense are not adequately funded and staffed. The accused does not “retain” counsel, or have a freely bargained contract. Given this harsh reality, we must see the lawyer-client relationship in moral and ethical terms, not contractually. And when it comes to plea “bargains,” we must use the term bargain with care, for the disparity in bargaining power between the state and the accused is evident.

I am not suggesting that our legal ethics must arise from any particular religious faith. That approach to legal ethics can lead to narrow and exclusionary sets of rules. We may follow different religious paths. Our spiritual practices may differ. What Martha Nussbaum was saying, in the passages I quoted, is that basic ethical principles can be deduced from study and understanding of the human condition. Our religious faiths and spiritual practices will differ, but we meet on the common ground of the human condition. As Jacques Derrida wrote in his wonderful book *Specters of Marx*, we are learning how to live.

After all, the identification of injustice and the search for means to combat it has led — in the years since World War II, to a remarkable consensus about what we now call human rights. This is the consensus for which Albert Camus hoped when he wrote after the war to a German friend: “What will save mankind?” Camus wrote. “Simply not to mutilate him, and to give him a chance for justice, which he is the only creature to have conceived.”

### III. *The Role of Criminal Defense Lawyers*

The role of ethics is to make sure that professional responsibility has a moral center. The criminal defense lawyer’s practice uses these rules to put the client at the center. Client-centered advocacy.

The criminal defense bars of the United States and Japan share a problem and a duty. In the United States, we are seeing coerced confessions, torture by police officials, secret detentions, executions carried out in ways that are inhumane by any standards — and this is only to speak of civilian police departments. The detention center at Guantanamo Bay, and the CIA renditions and tortures pose a related and more difficult set of issues. I reflected on the way that prison inmates in California were being held in solitary confinement for years at a time, and how recently a lawsuit that addressed that issue was being resolved favorably to the

inmate's concerns<sup>12</sup>.

As I prepared for this talk, I assumed that in Japan — a country to which my wife and I feel a special attachment — might not have these problems. Then I began to read, I read of the Shibushi cases, of the criminal case about which the Japan Federation of Bar Associations made its documentary<sup>13</sup>. In the December 5, 2015 issue of the venerable British publication *The Economist*, there are stories about coerced confessions and about the treatment of inmates in Japanese prisons. So, I said to myself, “Well, my Japanese colleagues and I have some common problems to address.”

We, the criminal lawyers, are the only true friend that the accused or suspected person will have. Those who have arrested him have the goal of “closing the case.” Even the most fair-minded judge presides over dozens, even hundreds of cases, and cannot be expected to investigate every issue in every case. No, it is our job. It has always been our job.

We may advocate reform in the system as a whole, and we should do that. But case by case, one client at a time — that is historically the way that change has come. When we expose police, prosecutor and prison misconduct, and when (as has now happened) the press and public become aware of the abuses, then change might happen. As the result of our work, the problems are no longer abstract, they are real and they have a human face.

I have been defense counsel in dozens of cases involving inculpatory statements made either by the accused or by a witness who has bargained for leniency in exchange for testimony. Next Monday, I will share some experiences with plea bargaining at a meeting of the JFBA. There, I will pursue these issues in greater detail<sup>14</sup>. For now, I raise some points about defense counsel's ethical obligation.

When I hear of a case in which a confession was coerced, or in which a confessing informer has testified against an accused person in exchange for leniency, the first question I ask is “Did defense counsel provide effective and competent representation?” Did defense counsel zealously and tirelessly seek the records of detention and interrogation? Did defense counsel seek out all the potential witnesses and have them interviewed? Did defense counsel use the subpoena power to obtain relevant information? If these requests are denied, did defense counsel make proper and repeated objections in order to preserve the issue for appeal? Did defense counsel begin by accepting the client's needs and understanding?

As I prepared for this talk, I discussed some of the issues with my son. He is a United States District Judge in San Francisco. He said, “I believe that a person charged with a crime should have the chance to obtain leniency by providing truthful information about other people's criminal conduct.” But he quickly agreed that there are risks that a person in that position has a powerful motive to minimize his or her own culpability in order to fix blame on somebody else. The remedy, we agreed, is that this sort of bargaining must take place in the clear light of day. And who will shine that light on it? The lawyer for the accused person against whom the testimony will be used.

You may tell me that judges in your country are harder to convince than in my country. People say that to me when I litigate away from my home state. “You know, that is not the

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<sup>12</sup> A federal class action, *Ashker v. Governor of California*, was settled on September 1, 2015.

<sup>13</sup> DVD “Presumed Guilty: Creating False Confession”, Japan Federation of Bar Associations (2008)

<sup>14</sup> Michael E. Tigar, “Plea Bargaining for Leniency”, (Lecture at Japan Federation of Bar Associations), Japanese Translation is available at 10 *Hakuoh Law Review* 253 (2017)

way judges do things here.” Yes, judges’ attitudes differ. But the ethical obligation of the lawyer is the same.

And don’t be so sure about the judges.

People ask me why Judge Richard Matsch was, on the whole, a fair and impartial trial judge in the Oklahoma City bombing trial of Terry Nichols. In a recent book about the McVeigh and Nichols trials, spectators are quoted as remarking that Judge Matsch’s rulings in the Nichols trial seemed to favor the defense more than his rulings in the McVeigh trial. It is true that the trials were different. The major difference was that our team — the Nichols team — filed motion after motion to challenge the government and the government’s preferences about trial procedures. And another major difference was this, I think. Judge Matsch was very concerned about his reputation. He wanted these trials to be seen as models of judicial temperament. And so, while he would not bend the law, he would be sure to listen to defense requests with an eye on the way history would see him. I think one of our jobs is to remind judges of the special position they have, and the way in which their conduct shapes the public image of justice. And I believe that is true in other countries than my own.

So often in our work as lawyers, and especially in the defense of criminal cases, we confront the word “justice.” The condemnation of our clients to prison or death is called “the administration of justice.” The system of police and prosecutors and trials is called “the justice system.” When France had the death penalty, the guillotine would descend and as the severed head of the defendant tumbled into the basket, the executioner would intone “*au nom de peuple français, Justice est faite.*” “In the name of the French people, Justice is done.” Given all we now know about unjust convictions, and about the way the death penalty was administered in France, we understand this phrase simply gave a name to a process that was in fact unjust.

The French writer Roland Barthes, in a brilliant essay entitled “*Domenici, or the Triumph of Literature,*” evoked the same idea, when he spoke of “Justice” [with a capital “J”], always ready to lend you a spare brain, in order to condemn you without remorse or to paint you, in the manner of Corneille, not as you are but as you must be.”

Our responsibility as lawyers — our professional responsibility — is to *see* injustice. Others of course may see injustice, but we have this special obligation. The obligation arises because we have learned how to analyze what we see in light of rules about substance and procedure, in order to address and perhaps change what we have seen.

Let me take a brief detour to reflect on what Barthes has written. The Penal Codes of Japan and in the United States are based on the idea of free will. The accused is said to have “intended” to commit a wrongful act, or to have “known” that his act was wrongful, or to have “known” of the circumstances that made the conduct wrongful. This is an image of human behavior that is based on philosophical speculation and not on what we know about how human beings actually conduct themselves. As Anatole France remarked, the law in its majestic equality forbids the rich and the poor to sleep under bridges, to beg in the street and to steal loaves of bread.

Our clients come to us from social, economic, emotional, and ethnic circumstances that shape their lives and their decisions. We cannot simply operate as machines that help to fit them into the rigid categories established by the Penal Code. We must take long hours to understand them and to use all the tools of factual investigation, legal knowledge and social science to seek a just result. We must be client-centered and justice-centered, not law-centered.

Of course, some defendants really do plan and intend and know in the sense that the Penal Code defines. That is certainly true of white collar defendants. But in the main, I agree with those such as Lady Barbara Wootton who have a deep suspicion of the Penal Code mental element categories. (See my “crime talk” essay<sup>15</sup>, which I have provided to Professor Muraoka.)

There is another aspect to this client-centered approach. The accused feels alienated from this strange, hostile and forbidding system that calls itself justice. We must work to empower our client to participate in his or her defense. When the clients who were forced to make false confessions told their lawyers about what happened to them, did the lawyers believe the clients and set to work to investigate? Or, did they tend to accept the official version of events?

In the United States, the constitutional obligation of counsel is to keep the client informed at all stages and to obtain the client’s informed consent to all major decisions about the case and the conduct of the defense. There are number of Supreme Court decisions on this point. Indeed, this idea can be derived from the law of agency itself. This principle of informed consent is not simply a legal rule. It expresses a fundamental idea about our clients as human beings entitled to respect and consideration.

Some people carelessly say that our job is to “humanize” our client. That is wrong. Our client is already human enough, very human, essentially human. Our job is to understand the client so deeply that we can portray his humanity to those who will decide his fate.

Of course, being tireless in challenging the “official version,” and questioning the candor and diligence of the prosecutor and police can be risky. Especially for a younger lawyer, there are no doubt risks of professional censure. Yet, as Monroe Freedman reminded us, those are the risks we agreed to take when we became lawyers. One of Monroe’s favorite quotations was from Henry Lord Brougham. In 1820, King George IV of England wanted to divorce his wife, Queen Caroline. To achieve this goal, he charged her with adultery. The issue was tried in the House of Lords. Brougham represented the Queen. He did his task with such vigor and zeal that he was warned that his conduct might endanger the English monarchy itself.

In 2007, Monroe convened a conference at Hofstra to consider “lawyering at the edge.” He called his own contribution “Henry Lord Brougham — Advocating at the Edge for Human Rights.”<sup>16</sup> Monroe quoted Brougham’s response to the expressed concern:

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

Monroe loved that statement. He quoted it many times, and defended his view of Brougham from critics who claimed that Brougham himself had later in life softened his vision

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<sup>15</sup> Michael E. Tigar, “Crime Talk, Rights Talk, and Double-Talk: Thoughts on Reading Encyclopedia of Crime and Justice”, 65 *Tex. L. Rev.* 101 (1986)

<sup>16</sup> Monroe H. Freedman, “Henry Lord Brougham —Advocating at the Edge for Human Rights”, 36 *Hofstra L. Rev.* 311 (2007)

of the advocate's duty of zeal.

Of course, zeal is not enough. Our undivided loyalty to our clients requires us to deploy skill, learning, persistence, diligence and courage.

The police and prosecutors — and the judges — are doing their jobs. They are part of the machinery that grinds on and validates the system of prosecution and punishment. Our job is to stand outside that system, as the client's only friend and ally, and to make the "adversary system" work. In doing this, we are not disloyal citizens. We are the sunshine that prevents the pool of justice from becoming stagnant and impure. If the system that calls itself justice is virtuous, its virtue will survive the challenge and emerge stronger.

As the English poet John Milton said, "I cannot praise a fugitive and cloistered virtue, that never sallies out and sees her adversary."<sup>17</sup>

Let me give another example: Albert Camus' novel, *L'Étranger* — in English, *The Stranger* — is one of the world's best-known works of literature. It has been translated into many languages, including Japanese, under the title *Ihoin*. (I hope I have pronounced that correctly.) In the novel, the hero Meursault is condemned to death and executed. The death sentence is imposed because the tribunal did not believe that he was capable of compassion. Yet, when one reads the novel, there is much evidence of his compassionate nature, beginning with the very first sentence, in which he tells that his mother died.

And if there was evidence — even the tiniest scrap of evidence —, who had the responsibility to bring that evidence to light and to argue its significance as persuasively as possible? Meursault's counsel, of course. Meursault stood charged with a crime, in a culture where the tribunal knows that most people who are charged are in fact guilty of something. The lawyer's job was to mediate between that skepticism and hostility on the one hand and the possibility of redemption on the other. If you read the novel — to revisit it or for the first time — try to see events in this way.

I believe — to repeat what I said a while ago — the four questions posed to us cannot be answered without considering the historical, cultural and social position of defense counsel, including the role that courageous defenders have played in significant struggles to defend and extend human rights.

It is ironic that defense counsel are sometimes derided for their vigorous defense of their clients. And, at the same time, in the pantheon of great lawyers whose lives and work we celebrate, defense counsel take a prominent position. In the legal culture from which I come, these lawyers have included Andrew Hamilton, John Adams, Lord Erskine, David Paul Brown, and Clarence Darrow. I will say a few words about each of them in a few minutes.

But for now, I reflect that our job is to expose and resist the unlawful exercise of state power. Our clients are often, if not usually, marginalized. Often, they are poor, despised, members of ethnic, racial and religious minorities. Yes, the conduct with which they are charged is sometimes, perhaps one would say often, worthy of punishment.

We know from recent history that prosecutorial and police misconduct, unreliable forensic evidence and the ineffective assistance of defense counsel has resulted in many wrongful convictions. Dozens of people have been convicted and sentenced to death, and later found to have been innocent. Any consideration of legal ethics that ignores these plain facts is incomplete and misleading. There will always be risks occasioned by the carelessness,

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<sup>17</sup> John Milton, *AREOPAGITICA* (1644)

incompetence and sometimes dishonesty of the state apparatus. There may be little we can do about this larger problem.

Monroe Freedman saw and taught that there is something we can and must do, and that is to take seriously our obligation to provide zealous and effective legal representation. A moment ago, I used the words “the conduct with which they are charged.” These words carry within them the message of our responsibility.

The client’s isolation is greatest in a criminal case. The client is charged with a homicide. Forensic and physical evidence must be examined. Witnesses will inevitably have different versions of events. The police will have done a good or a bad job of collecting and analyzing evidence. The prosecution team will or will not reveal exculpatory evidence.

And even if the defendant is proved to have caused a death, that is only the beginning of the law’s inquiry.

Then we must consider that many of the actors in the drama of trial are articulate and well-spoken, while the accused may not be able to express clearly his recollected conduct. Jurors and trial judges are drawn from a part of the community that may be distant from the social milieu from which the client comes.

I have written about these issues, and a list of some of these works is available. I give this brief sketch to suggest that our work as defense counsel presents the greatest challenges. I suggest also that any consideration of legal ethics or professional responsibility must give heavy weight to the fundamental values that we as defense counsel uphold. The state is powerful. Its agents often overlook or excuse crimes for various reasons. If a decision about legal ethics means that an occasional guilty person goes free, that is hardly a tragedy.

The state is not only powerful, it is a perennial recidivist. If its agents get away with unlawful tactics, they will repeat that activity.

Those who exercise state power certainly know how important a criminal case can be, and how their interest will require them to manipulate the process. I have written about one dramatic example. In January 1933, in Germany, the Nazi party needed some device by which to seize and consolidate its power. As soon as Hitler was appointed Chancellor, in January 1933, he and Goering enrolled 50,000 special police to begin rounding up dissenters. Goering’s people staged an arson fire in the Reichstag building as an excuse for further repression, and sought to manipulate the criminal law system to ensure convictions of those falsely accused. I have described this process in detail in an article<sup>18</sup> that is available to you. My view of these events may be controversial, and I can only refer you to the historical record that I have researched and about which I have written.

In 18th Century England, the newly powerful Whig party enacted laws that made more than 100 offenses punishable by death, in order to stamp out peasant resistance to enclosures and urbanization. And this was at a time when the accused had no right to counsel in cases of felony.

In the American South, exclusion of African-Americans from voting and from jury service helped to create a system that called itself “justice” but was not worthy of the name.

Yes, history teaches us that the criminal law and its processes have traditionally been used by those holding state power to beat back, suppress, deter and even obliterate those who are or

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<sup>18</sup> Michael E. Tigar & John Mage, “The Reichstag Fire Trial, 1933-2008: The Production of Law and History”, *Monthly Review* Vol. 60 No. 10. p24 (2009)

may be opposed to them. Historian E.P. Thomson has chronicled this process in 18th Century England. I have written of it in my book *Law and the Rise of Capitalism*. Clarence Darrow's career gives us many examples. The post-World War I suppression of radicals, chronicled by Professor Zechariah Chaffee, gives another example. I cite these historians for those who may wish to explore the topic. And of course, Monroe Freedman's work remains a valuable resource

You may say to yourself, "my practice does not concern itself with major issues such as those you are discussing." I was speaking at a small law school in Ohio, and the dean reminded me that the graduates of that school would practice law in small towns and cities. Oh, I said, "you mean like Atticus Finch<sup>19</sup>, or Clarence Darrow before he moved to Chicago." Or, to repeat, like my friend James Robertson in Mississippi.

My point for today's discussion is that you can never know when you may be called upon to act out the ethical principles that are the foundation of our work. Every case that comes into your office may contain a significant issue, one that will add to the public outcry for reform in the system that calls itself justice. But you will not know which case or cases that is, unless in every case you are prepared to be the kind of lawyer that Monroe Freedman told us we must be.

#### IV. *The Four Conference Questions*

First, Monroe Freedman's discussion of the client who intends to take the witness stand and tell a story that the lawyer believes to be false;

Second, what is the lawyer's obligation when she receives secret information that affects her client's interest — specifically in this case information about a proposed search of the client's premises;

Third, if a lawyer gains information that a person convicted of murder is in fact innocent, but that information comes from a lawyer-client privileged communication, what should the lawyer do?

Fourth, and more generally, what are the risks of plea bargaining?

I will answer the first question by asking you two questions. One: Who says that the client "intends" to "commit perjury?" Second, what must the lawyer do before making the decision that the question presents?

Several years ago, a federal judge called me. He said that a criminal defense lawyer was in his chambers and had said that the client intended to commit perjury. I asked, "what do you mean?" The judge said "well, the client is going to tell a different story than the story he told his counsel in the first interview."

I reminded the judge that witnesses change their remembered version of events all the time. It is a daily occurrence in our trial preparation and in our trials. (And as we know, it certainly happens in police stations. When it happens in a police station, we also know that sometimes the earlier version is true, and sometimes the later version is true.) Testimony is recollected experience. What we experience — what we see, hear and feel — is based our

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<sup>19</sup> Atticus Finch, a fictional character in Harper Lee's Pulitzer Prize-winning novel and the Academy Award-winning film, "To Kill a Mockingbird."

point of view and ability to perceive. What we remember experiencing is based on our own biases. As the writer Anais Nin put it: “We do not see things as they are. We see them as we are.”

And once we have seen an event, even one in which we have ourselves participated, our memory of it may change over time. I once represented a well-known political figure who was convinced that a crucial meeting had taken place at a certain time. There was no question that the meeting happened, but the timing was important. He had reviewed his records and remembered things one way. Then, more records became available and suddenly he said, “Oh my God, I got it wrong. The meeting actually happened in the morning not the evening.”

We add to that the natural human desire to portray things in the light favorable to ourselves. Doing that may not be deliberate falsehood, but simply the way that memory and perception operate in human beings.

Therefore, our first task is to work with our client to see how this change in the client’s story came to be. We treat the client with respect, and we make every effort to rationalize the competing versions of events. How many times in daily life have we said?, “I thought it happened this way, but then I looked back at the situation and I saw that I was mistaken.”

When you have diligently worked through the issue in this way, suppose you are convinced that the client indeed intends to lie. At that point, you must instruct the client in how the adversary system operates. What happens to witnesses who tell a false tale? They are cross-examined. They are confronted with the illogic of their testimony. They are shown evidence of the physical facts that cast doubt on their version. A criminal defendant will already suffer from the perception that he or she might be lying in order to escape punishment.

Indeed, I hesitate to counsel a client to testify even when I am convinced that his or her version is accurate, because cross-examination inevitably tarnishes his or her image. Better I have found to let the objective evidence, and the attack on the government’s version, do the job.

So here is my answer: In fifty years of law practice, I have never actually confronted this issue in the form presented by the question. I have found through diligent work that the competing versions can be explained or reconciled. When that fails, my client has seen the wisdom of staying away from the witness stand.

How would I answer the question if it arose? I agree with Monroe Freedman.

Question Two, concerning information about a search of the client’s premises. It is interesting that you ask this question. I have confronted this exact situation, not as the lawyer for the client who was going to be searched, but as an expert witness called in later litigation about the search. I testified that the client’s lawyer had violated his ethical obligation.

The facts were these: A lawyer received a telephone call from a client who had been arrested for allegedly participating in a massive fraud involving millions of dollars. The lawyer found out that there was an existing judicial order sequestering money in the client’s actual or constructive possession. Through the day, the lawyer attempted to get at this money, in order to take some of it as a fee. The lawyer found that the client’s bank accounts had been blocked. The client then told the lawyer about a secret stash of money that the searchers had not yet found, but that they would surely find within a day or so. The money was at the client’s home, but hidden there. The lawyer arranged for the client’s friends to go get the money — six million dollars in canvas bags. The lawyer kept a million dollars as a fee. The client and the client’s friends apparently caused most of the rest of the money to disappear. I will not tell you the lawyer’s name, but you can Google the information I have provided and find that out.



The client went to prison. The victims of his fraud sued him and the lawyer. I gave my expert opinion that the lawyer was liable.

So where was the ethical violation? It was permissible for the lawyer to tell the client of the impending search. The lawyer's highest duty is to the client. I would never accept information from any source while promising not to reveal it to my client. I would challenge, and have challenged, judicial orders that sought to impose such a condition, and there is good precedent on my side.

However, the lawyer must not interfere in any way with the search, and must strive to ensure that the client does not interfere in any way with the search. This obligation can and does present factual difficulties in actual cases, but the rules are clear. My expert testimony is under seal in the case file, but I am providing a citation to a news report of the case settlement. <http://articles.latimes.com/2006/aug/09/local/me-shapiro9>.

The third question is more troubling. You have read, or will read, about the actual case<sup>20</sup> on which it is based. The basic issue is one that we debated at length in the early 1980s, during the ABA discussions of the revised rules of professional responsibility.

The basic principle is this: the lawyer-client confidential relationship cannot be used as a shield that permits substantial harm to be done to a third party. There will always be a dispute about what is a substantial harm and what degree of likelihood must exist before the question arises.

Let me begin with a non-confidential relationship. You are hosting a party at your home. One of your guests who is a good friend and colleague drinks too much and becomes very intoxicated. He plans to get in his car and drive home. Do you have a legal obligation to take his automobile keys away from him and make sure he does not drive? In United States tort law, the trend of the law is to say that there is such an obligation, and if the intoxicated person does drive and causes an accident, the social host may be liable along with the intoxicated driver.

Then there is the famous California case of *Tarasoff v. Board of Regents*<sup>21</sup>. A psychiatrist at the University of California was treating a student. The student announced that he planned to kill someone. The psychiatrist did not reveal this to anyone. The student carried out the threat. The court held that the psychiatrist and the university were liable, and that the psychiatrist should not have relied on the confidential relationship with the patient.

This issue will be litigated in Colorado. James Holmes, the man who shot and killed 16 people at a movie theater in Aurora, Colorado, and who has been sentenced to life in prison, told the mental health doctors at his university that he was planning to commit violent acts. They did not inform anyone of this threat, and compounded the problem by prescribing a medication that made Holmes more dangerous.

In the hypothetical situation, I would begin by counseling the client. Many times, the "real perpetrator" will decide willingly to come forward and confess. I can cite cases in which that happened. Failing that, it is a balancing test. If the falsely convicted person faces a severe punishment, it is more likely that the lawyer should regard that as a basis to override confidentiality.

The fourth question deals with plea bargaining. In an article in *Hastings Law Review*,

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<sup>20</sup> Alton Logan Case. 26-Year Secret Kept Innocent Man in Prison, "60 Minutes" CBS News, March 6, 2008.

<sup>21</sup> *Tarasoff v. Board of Regents of University of California*, 17 Cal. 3d 425 (1976)

United States Court of Appeals judge Steven Trott has discussed the dangers of plea bargaining. The title of his article is “*Words of Warning for Prosecutors Using Criminals As Witnesses.*”<sup>22</sup> Judge Trott was an Assistant Attorney General of the United States and a well-known California prosecutor before being appointed to the bench. He writes:

Criminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law. This willingness to do anything includes not only truthfully spilling the beans on friends and relatives, but also lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and double-crossing anyone with whom they come into contact, including — and especially — the prosecutor. A drug addict can sell out his mother to get a deal, and burglars, robbers, murderers and thieves are not far behind. Criminals are remarkably manipulative and skillfully devious. Many are outright conscienceless sociopaths to whom “truth” is a wholly meaningless concept. To some, “conning” people is a way of life. Others are just basically unstable people. A “reliable informer” one day may turn into a consummate prevaricator the next.

There is little to add to this account. The use of informers during the infamous McCarthy period of anti-Communist hysteria has been told by Lillian Hellman in her memoir *Scoundrel Time*, and by Victor Navasky in his book *Naming Names*.

In my country and years, we have seen the abuses committed by police and prosecutors in obtaining confessions. It is much easier to get a criminal to confess if he is offered the chance for a lighter sentence by blaming somebody else for the most serious parts of the criminal activity.

Prosecutors often target a particular individual and then diligently search for witnesses who are willing to give testimony in exchange for leniency. I was counsel in one such case. John Connally had been governor of Texas. He was riding in the same automobile as President Kennedy the day of the assassination, and suffered gunshot wounds. He was later Secretary of the Treasury in the cabinet of President Nixon. The Watergate prosecutor decided that Connally had accepted a bribe from representatives of the dairy industry in exchange for influencing policy favorably to that group. They had evidence that Connally’s long-time friend Jake Jacobsen had obtained \$10,000 from the industry group, and had told that group he would use the money to bribe Connally. In fact, Jacobsen was having financial problems and he probably used the money for his own purposes.

Jacobsen was already under indictment for having swindled Texas banks out of hundreds of thousands of dollars.

So, the prosecutors made a plea bargain. Jacobsen would plead guilty to a minor misdemeanor, would not serve any jail time, and would be able to continue practicing law. All the bank fraud charges would be dismissed.

The federal judge before whom the bank fraud case was pending refused to dismiss the charges, but the court of appeals held that prosecutors have the unreviewable discretion to make bargains that give impunity to criminals. This is one of the dangers of bargaining — the shift of power to the unlimited discretion of prosecutors. Plea bargaining shifts an important part of the criminal process out of the light. It is our job as lawyers to shine the light on it.

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<sup>22</sup> Steven S. Trott, “Words of Warning for Prosecutors Using Criminals as Witnesses”, 47 *Hastings L. J.* 1381 (1996)

Connally was indicted. Jacobsen's bargained story fell apart under cross-examination. Connally was acquitted, but the stain of the prosecution affected him for the rest of his life. The Justice Department promised to review the way that informers are recruited but nothing came of that.

In United States law, the courts have taken account of the unreliability of informers and of plea bargained testimony. The Supreme Court has set aside convictions when the prosecutor has failed to disclose the inducements that were provided to an informer, and the inconsistent statements that the informer has made during the investigation.

The diligent defense lawyer must demand copies of all prior statements, and records of the way that the witness was interrogated. The witness's bargain, and all its terms, must be disclosed to the defense. In short, we, members of the criminal defense bar, may not have political influence to limit or end plea bargaining, but our obligations to our clients are clear. Judges and jurors tend to accept the idea that one criminal can testify against another criminal. But they also understand that testimony that it purchased in the bargaining process must be received with caution and suspicion.

I have provided Professor Muraoka with copies of articles and other materials about bargained testimony, and an annotated version of my cross-examination of an informer in the Oklahoma City bombing case.

I hope that this overview of the issues that confront those of in Japan and in the United States has been helpful to you. But my principal hope is that this conference will help us all to see that human rights are indivisible, and that the struggle to defend them is transnational.

### *Conclusion*

In conclusion, I want to stress that in every modern nation-state, the principle of separation of powers is considered an essential element of democratic government. One element of that principle is an independent judiciary, to which citizens can present claims against the lawless exercise of executive power. In those legal challenges, the claimants are represented by lawyers who — by definition — necessarily act as independent agents of those seeking justice.

One must consider that the exercise of state power in criminal cases is fraught with greater consequences for individual life and liberty than in any other context. Moreover, the state's image as protector of rights and of social order depends on the perceived fairness of the criminal process. This image is important in the world community as well as inside Japan. It should follow, therefore, as a matter of principle and of logic, that the rights to independent, zealous, effective and courageous counsel is even more important than it is in civil suits that seek to defend human rights. Indeed, in most legal systems, the right to counsel in criminal cases is more fully guarded than in civil cases.

I have heard it argued that respecting the right to zealous and independent counsel may threaten the state's interest in punishing guilty people. More than 60 years ago, Judge Learned Hand answered that contention in a case involving national security:

"All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the

accused, and unpurged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism.”<sup>23</sup>

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<sup>23</sup> United States v. Coplon, 185 F.2d 629, 638 (2d Cir. 1950).