

2002

The Irony of Lawyers' Justice in America

Thomas L. Shaffer

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Thomas L. Shaffer, *The Irony of Lawyers' Justice in America*, 70 Fordham L. Rev. 1857 (2002).
Available at: <https://ir.lawnet.fordham.edu/flr/vol70/iss5/23>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

The Irony of Lawyers' Justice in America

Cover Page Footnote

Robert and Marion Short Professor of Law Emeritus, University of Notre Dame; Supervising Attorney, Notre Dame Legal Aid Clinic, South Bend, Indiana. I am grateful for the assistance of Linda Harrington, Teresa Phelps, John Robinson, Robert E. Rhodes, Jr., and Nancy Shaffer.

THE IRONY OF LAWYERS' JUSTICE IN AMERICA

*Thomas L. Shaffer**

Our pastor recently finished a pretty good sermon, on the Parable of the Good Samaritan,¹ with a story of his own about a dangerous curve on the highway into town:

The curve was so bad that drivers regularly miscalculated, ran off the road, injuring or killing themselves and their passengers. The people in the church, under their preacher's leadership, went out to the curve and tended to the dead and injured. It became a regular and devoted mitzvah by these good people, encouraged as they were by the scriptural example of the good Samaritan their preacher regularly reminded them of.

And then some of these good Samaritans suggested that it would be a good idea for the city council to petition the state department of transportation to straighten out the road, so that it would no longer have a dangerous curve. The no-curve highway plan ran into opposition from the mayor of the town, who owned the property through which a new, straight road would go. Some of the good Samaritans went to their preacher and asked him to use his influence to get the council to overrule the mayor and petition the department of transportation to straighten out the road into town. The preacher declined. He said he did not believe in mixing religion and politics. And so the curve remains. The good Samaritans continue to go out to the curve and tend to those who, in the biblical phrase, have fallen among thieves.

The Parable of the Dangerous Curve brought to my mind Deborah Rhode's thorough, thoughtful assessment of American lawyers in the twenty-first century, and Dean Kronman's eulogy for the lost lawyer. The good Samaritans who sought to straighten the dangerous road spoke of roadwork as Deborah Rhode speaks of what legislatures, judges, and bar associations should do about lawyers.² Maybe they

* Robert and Marion Short Professor of Law Emeritus, University of Notre Dame; Supervising Attorney, Notre Dame Legal Aid Clinic, South Bend, Indiana. I am grateful for the assistance of Linda Harrington, Teresa Phelps, John Robinson, Robert E. Rodes, Jr., and Nancy Shaffer.

1. *Luke* 10:29-37.

2. Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* 93 (2000) ("In the long run . . . major improvement in adversarial practices will

thought modern speed and paving had made it dangerous—yearning, as Dean Kronman does, in his *The Lost Lawyer*,³ for a past that never was. The parable also brought to mind a critique of these sorts of idealistic assessments (my pastor's and Rhode's and Kronman's) in a series of lectures by Reinhold Niebuhr, published half a century ago under the title *The Irony of American History*.⁴

I. IRONY

Irony, Niebuhr said, “depends upon an observer who is not so hostile to the victim of irony as to deny the element of virtue which must constitute a part of the ironic situation; nor yet so sympathetic as to discount the weakness, the vanity and pretension which constitute another element.”⁵ The *element of virtue* in my pastor's parable was, of course, the preacher's urging his people to practice mercy and love of neighbor. The *weakness, vanity, and pretension* lay not in the preacher's consciousness but in the observer's perception that the preacher seemed to prefer the dangerous curve to a safe road—so that his followers would have an opportunity to be Christians. The *irony* is the product of detached observation. It is not about what the preacher in the story thought, but about what our pastor thought as he told the story last summer. Sermons such as his are a form of advocacy. They are detached, but they are not disinterested.⁶ Our pastor could have made his point about religion and politics through reflection on the advice the Lord gave through the Prophet Jeremiah, to Judah in captivity in Babylon: “Seek the welfare of any city to which I have carried you off . . . on its welfare your welfare will depend.”⁷ But he chose irony. My present suggestion is that irony might work for discussion of recent books about lawyers in America.

require major changes in bar ethical codes, enforcement patterns, and incentive structures.”). Professor Rhode applies the same judgment in other contexts. *See id.* at 161-65, 178-83, 207-13. She speaks broadly of a desire to “reconnect the ideals and institutions.” *Id.* at 213. I read “institutions” here to imply coercive regulation of lawyers.

3. Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 168-69, 240-64 (1993).

4. *See* Reinhold Niebuhr, *The Irony of American History* (1952).

5. *Id.* at 153. “There is no chance in a life that seeks to learn to grow,” Karyn Kedar writes. Karyn D. Kedar, *God Whispers: Stories of the Soul, Lessons of the Heart* 51 (1999). “Poets see all juxtapositions as poetry, all contrast as ironic commentary.” *Id.*

6. My colleague and friend Professor Teresa G. Phelps notes, in reference to a draft of this paper and to F. Scott Fitzgerald's story “The Crackup,” that irony involves holding on to two ideas at once. “[T]he test of a first-rate intelligence,” Fitzgerald said, “is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function.” F. Scott Fitzgerald, *The Crack-Up*, in *The Crack-Up* 69 (Edmund Wilson ed., 1956). Irony, Professor Phelps wrote me, involves both distance and affection.

7. *Jeremiah* 29:8.

Irony is what you might entertain if you saw two young lovers standing in a downpour and saying it's a lovely day. It is Atticus Finch telling the repulsive Mrs. Dubose that she looked like a picture. You who see the lovers standing in the rain notice that they seem not to know what is going on. (You would, I hope, make your observation with affection and attention to the element of virtue involved.) Atticus's daughter Scout noticed that Mrs. Dubose was complimented, as Atticus intended her to be, and reported the incident by way of an ironic observation on the practices of Southern gentlemen. ("I never heard Atticus say like a picture of what."⁸) Scout knew what was going on. She also loved her father.

The situation that provokes the ironic observation is seen to be humorous and meaningful. That, I am suggesting, is one way to look at the Rhode and Kronman books. The situation (these books) "must elicit not merely laughter but a knowing smile."⁹ Niebuhr said, "[c]omic incongruity is transmuted into irony, when one element in the contrast is found to be the source of the other."¹⁰ Love of neighbor preserved the dangerous curve. The situation among modern American lawyers that Professor Rhode and Dean Kronman perceive is the transmutation of our ancient claim that we serve our clients, as Rhode puts it, in the interests of justice. Or in Kronman's claim that it is not that our ideals are wanting, but that we neglect our ideals, especially those ideals we inherited from our gentleman-lawyer past.¹¹ Irony fastens on the perception that it is raining on the lovely day; that Mrs. Dubose looks terrible; that lawyers in this country have never sought to serve justice as much as their apologists claimed; that American lawyers have always announced ideals and then neglected them.

II. IRONY RATHER THAN TRAGEDY OR PATHOS

The advantage in seeing the persistence of the dangerous curve as ironic—if only as a sort of thought experiment—is that it gives the observer a way to avoid tragedy and pathos, neither of which support sequential thought and discussion as well as irony does. Tragedy in the Greek-Promethian sense seems to me not useful as to either of Rhode's or Kronman's books about American lawyers. Classical tragedy turns on a certain perception of fate,¹² one that is at best peripheral in American culture, and both of these authors speak from

8. Harper Lee, *To Kill a Mockingbird* 109 (1960).

9. Niebuhr, *supra* note 4, at 154.

10. *Id.* at 155.

11. Kronman, *supra* note 3.

12. Niebuhr, *supra* note 4, at 166-67; see also OED Online (1993 additions) (defining "dramatic or tragic irony" as "the incongruity created when the (tragic) significance of a character's speech or actions is revealed to the audience but unknown to the character concerned"), at <http://dictionary.oed.com>.

American culture, as Niebuhr did: Neither the preacher's political theology, nor Rhode's belief that we are in decline, nor Kronman's assessment of neglect seems to be a matter of fate. Neither our pastor nor either writer invokes fate, although Kronman is remarkably pessimistic and Rhode depends on misty conventional "societal values" that seem to me not to be there.¹³ (The absence of them might be a sort of tragedy, but that proposition is not useful either.) She wants to whip lawyers into shape with steady and coercive dependence on conventional American morals¹⁴ (the imposition of which would be, in my view, tragic, if any are available). In any event, to us and our pastor as believers, and to Rhode and Kronman as cultural Americans, fate could not in the end be triumphant. Believers depend on the Eschaton; cultural Americans depend on things turning out right.

The meaning of a classical tragedy is nobility in the face of impossible odds—fate. The observer's reaction is a combination of pity and admiration—not available as to the Parable of the Dangerous Curve because, if eliminating the curve is seen to be impolitic, it is because of the bad theology of the preacher and his obedient people. Nor does the observer react with a combination of pity and admiration to the past and to those Kronman calls lost lawyer-statesmen: Kronman's "lawyer-statesman" is a noble figure, and Kronman's nostalgia for associations of lawyers prior to 1969 is nostalgia for a noble fraternity.¹⁵ But both are illusions. In fact, as Jefferson Powell's recent book on the American constitutional priesthood¹⁶ and Michael Schudson's study of the late-nineteenth-century Bar demonstrate,¹⁷ priorities among American lawyers have been power and wealth more than a patriot's determination to make

13. Rhode, *supra* note 2, at 67 ("consistent, disinterested, and generalizable principles"); *id.* at 92 ("broader concerns [than] . . . bar disciplinary rules"); *id.* at 112 ("If the rationale for broad confidentiality obligations is that society as a whole benefits, then society should decide whether the gains outweigh the losses."). See generally, as to the futility of locating such universal moral guidelines, freed of the solipsism and self-regard of particular cultural morals, Alasdair MacIntyre, *Whose Justice? Which Rationality?* (1988).

14. These would, presumably, militate against the practices of "major law firms, where partners' salaries are over ten times those of the average American worker," and would require the imposition, one way or another, of "some modest short-term financial sacrifice that will promote more satisfying professional lives." Rhode, *supra* note 2, at 48.

15. Kronman, *supra* note 3; see Thomas L. Shaffer, Book Review, 41 *Loy. L. Rev.* 387 (1995) (reviewing Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993)).

16. H. Jefferson Powell, *The Moral Tradition of American Constitutionalism: A Theological Interpretation* (1993); see Shaffer, *supra* note 15, at 394-96; Thomas L. Shaffer & John H. Robinson, *H. Jefferson Powell on the American Constitutional Tradition: A Conversation*, 72 *Notre Dame L. Rev.* 11 (1996).

17. Michael Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 *Am. J. Legal Hist.* 191 (1977).

America work. More specifically, lawyers have sought power and wealth more by making America work the way they and their clients want it to work than by seeking the common good in a just social order. Irony toward the lawyer-statesman seems to me to hold more truth about lawyers as they are (that is, less than statesmen) than tragedy does.

Pathos is not available either, because in pathos the actor is merely a victim, a prisoner, a character in a Thomas Hardy novel. The observer's reaction to a victim or a prisoner is pity. There is no nobility to admire.¹⁸ No irony either: The knowing smile is not available. Whatever American lawyers have been or are, they were not and are not victims or prisoners.

III. PROFESSORIAL DETACHMENT

We law teachers come to think and write as Kronman and Rhode do, and as I am doing, because we do not make a living in the practice of law. We can claim detachment from what Kronman calls the "routine and uninspiring" substance of law practice,¹⁹ and then we are able—whether we take advantage of the detachment or not—to see (i) the pretension in the grand claims made by bar associations and judges who give speeches on Law Day; (ii) the neglect these academic authors describe; and (iii) the moral successes lawyers have despite the pretension and the neglect, almost despite themselves. All of us who make a living out of legal ethics notice these things; not all of us are often enough detached to do it with a knowing smile at ourselves.

The audience claimed by irony, according to H.W. Fowler, is an "inner circle."²⁰ (And at Fordham here we are!) That describes those of us who write about legal ethics. My thought experiment at present is to claim a detachment from the detachment, to use the word *irony* for what I am doing,²¹ and then, perhaps, to suggest that professors who make sweeping judgments on practicing lawyers might try a knowing smile. In making the suggestion, I attempt a knowing smile of my own. Maybe it will work out to be like what Yogi Berra said

18. Niebuhr sees pathos as naturalistic and primitive. Niebuhr, *supra* note 4, at 166-67. The actor in pathos is merely a victim, whereas the actor in irony is in some way both cause and victim. Because the actor in pathos is merely a victim, a prisoner, the observer's reaction is pity. *Id.*

19. Kronman, *supra* note 3, at 379.

20. H.W. Fowler, *A Dictionary of Modern English Usage* 305-06 (2nd ed. rev. by Sir Ernest Gowers 1965).

21. In a similar sense perhaps, Pat Truly, a book reviewer for Knight Ridder Newspapers, quotes an anonymous writer referring to Senator Barry Goldwater as "the favorite son of a state of mind." Pat Truly, *Book a Close Reading of Goldwater, Conservatism*, South Bend Trib., July 29, 2001, at F7 (reviewing Rick Perlstein, *Before the Storm: Barry Goldwater and the Unmaking of the American Consensus* (2001)).

about little-league baseball. It's "a good thing," he said, "cause it keeps the parents off the streets . . ." ²²

My object here, as I follow Niebuhr to seek a sense of the ambivalence of our history and try to think about the plausible models for law practice, would be to make an opening for newness that I do not find in either Kronman's condemnation nor Rhode's call for coercive regulation. I think of what Walter Brueggemann said of the biblical prophets, who announced new possibilities and an alternative reality.²³ Prophetic newness—prophetic imagination—is not available in pessimistic assessments (Kronman's). Nor is newness or imagination evident in assessments of pathos such as Rhode's. Our guild, Rhode says, is in a state of permanent decline.²⁴ "[D]espering people do not anticipate or receive newness," Brueggemann said.²⁵

More to the present point, and not to deny that old (and present) neglect really is neglect, our failure, past and present, contains the possibility of renewal. Assessments such as these colleagues provide, for all of their insight, seem not to be open to the renewal that is available to be uncovered in failure. (Finally, of course, Niebuhr was a theologian. His faith in God, not his faith in America, was what kept him from being merely a pessimist, what kept him hoping for prophetic newness and for the renewal that is hidden in failure.²⁶)

IV. RENEWAL

"[T]he great evils of history," Niebuhr said, "are caused by human pretensions which are not inherent in the gift of freedom."²⁷ This was in the 1950s, relatively late in his career as a pastor, preacher, and teacher. He was in the process of talking himself out of his early devotion to Marxism. He looked at Stalin's Soviet Union and despaired. Because Russia had suppressed freedom, it had suppressed what Communists there might have regarded as failure, and, with that, the possibility of renewal from failure.

But Niebuhr was not in despair over what America had failed at. Because of freedom (Niebuhr always the liberal), America had unwittingly accomplished something:²⁸ America had claimed to be

22. Yogi Berra, *The Yogi Book: "I Really Didn't Say Everything I Said!"* 116 (1998).

23. Walter Brueggemann, *The Prophetic Imagination* 60-61 (2d ed. 2001).

24. See Rhode, *supra* note 2, at 1.

25. Brueggemann, *supra* note 23, at 60.

26. One author called this "the open-handed, foolish, measureless, boundless embrace of the unembraceable" in a Lenten reflection last March. Joan Chittister, *Go Ahead! Throw the First Stone!*, *Nat'l Catholic Rep.*, Mar. 23, 2001, at 13.

27. Niebuhr, *supra* note 4, at 158; see also Harlan Beckley, *Passion for Justice* 291 (1992) ("Our efforts to achieve justice will prove most successful if we are sufficiently humble about our own righteousness and capacities to manage history that we permit human vitalities that do not conform precisely to our conception of a just order.").

28. Beckley, *supra* note 27, at 291 ("[T]he ironies of history may produce a more

God's new Israel,²⁹ but had become, only, as Lincoln put it, the "almost chosen people."³⁰ But American freedom permitted unauthorized, chaotic possibility, and the possibility issued in something useful, something you could see and describe, once you dug through the grand claims. Niebuhr might today notice a parallel in recent, sweeping, professorial assessments of the American legal profession. And perhaps the Midwestern, small-city, county-seat lawyers I practice with understand chaotic possibility³¹ more quickly than they understand themselves as administrators of justice, and with more hope than they hear from law teachers who write books about them.

An example of small gain salvaged from pretension and noticed with irony is Rhode's discussion of the Illinois rape case.³² The defendant had been convicted of rape but was allowed to remain out on bond while the social workers compiled sentence recommendations for the judge. Because of a "clerical oversight," no report was submitted and no sentencing hearing was set. The defendant stayed out of jail. His lawyer advised his client to keep his head down—and he kept his own head down, too. This worked for ten years. When the story came out, and the lawyer had to account for what he had done, his rather lame and sexist response was that his client did not seem like "the kind of guy [who] would [rape] on a regular basis."³³

That remark is nonsense, but what Sir Alaric of Dr. Seuss's *The 500 Hats of Bartholomew Cubbins* would call "very serious nonsense."³⁴ Most of the lawyers I know down at the courthouse in South Bend would say they would have done the same thing. I am pretty sure I would have. Perhaps we even see, as advocates, a small circumstantial gain there: This man had been convicted of rape. Nobody else in town was looking out for his interests. (It might help if this client was,

tolerable justice than our tragic choices. . . . One of the limitations that history places on justice is that we cannot approximate it by aiming to achieve any one of the ideals it incorporates.").

29. See Martin E. Marty, *Righteous Empire: The Protestant Experience in America* 24 (1970).

30. *Id.* at 243 (quoting Paul Tillich perhaps quoting Lincoln) (emphasis added).

31. Perhaps they might recognize themselves in Roger Ebert's description of Woody Allen's comic genius: "Allen's characters depend on self-deprecating double-reverse wit for their appeal. . . ." Roger Ebert, "Curse of Jade Scorpion" Gives Comic Twist to Film Noir, *South Bend Trib.*, Aug. 24, 2001, at C6. Or in the somewhat arcane opinion among some scholars that Machiavelli's ruthless *The Prince* was "an ironic and satiric thrust at the dangers of tyranny." Robert Blackey, Letter to the Editor, *Not a Machiavellian*, *N.Y. Times*, Oct. 1, 2000, § 7 (Book Review), at 4.

32. See Rhode, *supra* note 2, at 106.

33. *Id.* at 108 (quoting an unidentified lawyer quoted in Tom Coakley, *N.M. Rapists Free 10 Years in Court Foul-Up*, *Denver Post*, Mar. 23, 1983, at 12A).

34. Dr. Seuss, *The 500 Hats of Bartholomew Cubbins* (1938) (pages unnumbered), quoted and discussed in Patrick Henry, *The Ironic Christian's Companion: Finding the Marks of God's Grace in the World* 208-22 (1999).

in his lawyer's biased perception, not likely to rape again—but that judgment is very serious nonsense, as well as open to irony.) And, I suspect, no small number of the lawyers I practice with would see the situation both as ironic—on Reinhold Niebuhr's criteria—and as a not-so-bad way to cope with what Rhode describes as a citizen's responsibility to protect women from rapists and at the same time be the only person in town who is expected to be irresponsible in favor of one particular rapist. There is an element of virtue in the preference.³⁵ And there is weakness, vanity, and pretension in the guild's way of accounting for its adversary ethic, which implies but rarely admits the peril this case illustrates, and which has been, as often as not, announced as General Motors' right to a lawyer.³⁶

It's not that the lawyers down at the courthouse don't respect what professors say about confidentiality. They do not boast, but somehow they think they know more about client secrets and rapists than professors do. Still, they respect what professors have learned and what they write about what they have learned. They see professorial wisdom the way Lowell saw Dante's knowledge of the scriptures: "They do even a scholar no harm."³⁷

Another of Rhode's list of confidentiality cases involves the in-house corporate lawyer whose employer and client was marketing defective dialysis machinery. The lawyer blew the whistle. The company fired him. The Illinois Supreme Court, reviewing the lawyer's claim that this was a retaliatory discharge, said getting fired was the chance the lawyer took. The company won the discharge case, but it had to quit marketing dangerous dialysis machinery.³⁸ In the common ironic phrase, judges and bar associations who seek whistle-blower protection win the battle, but lose the war.³⁹

35. Think of Jesus and the woman taken in adultery, see *John* 7-8; Abraham pleading for Sodom and Gomorrah, see *Genesis* 18; or Moses, an advocate for rebellious Israel, arguing with God, see *Exodus* 32.

36. Justice Abe Fortas, praising his sometime law partner Thurman Arnold, included both sides of the argument: "Lawyers are agents, not principals; and they should neither criticize nor tolerate criticism based upon the character of the client whom they represent . . . Rapists, murderers, child-abusers, General Motors, Dow Chemical—and even cigarette manufacturers and stream-polluters—are entitled to a lawyer . . ." Abe Fortas, *Thurman Arnold and the Theatre of the Law*, 79 *Yale L.J.* 988, 1002 (1970).

37. VIII *The Oxford English Dictionary* 87 (2d ed. 1989) (defining "irony;" quoting John Weiss, Wit, Humor, and Shakespeare: Twelve Essays (Norwood ed. 1976) (1876)).

38. Rhode, *supra* note 2, at 106-07 (discussing *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991)).

39. My wife Nancy says I have this sentence backwards. Perhaps it is an example of irony, in that it will, on my reading, work either way. I assume the object of whistle-blower protectors is to get "society" warned of the bad things clients have in mind, as Professor Stephen Gillers wrote last summer: "[E]thical behavior would seem to require that lawyers act to protect the innocent victims, not the unscrupulous client." Stephen Gillers, *A Duty to Warn*, *N.Y. Times*, July 26, 2001, at A25. Perhaps

V. THE CAUSES OF EFFECTS AND THE EFFECTS OF CAUSE

The question would be whether this use of irony has any value for present purposes. I am suggesting that it may, and I am suggesting this from a position of double detachment: First, law teachers who write books about American lawyers, past (Kronman) and present (Kronman and Rhode), are and admit that they are detached from the lives of lawyers.⁴⁰ And then I, for present purposes, modestly claiming only an experiment (in retirement, aging, and a volunteer legal-aid lawyer), claim detachment from the detachment.

My friend and teacher Robert E. Rodes, Jr., drawing on Herbert Butterfield's critique of what Butterfield called the Whig interpretation of history,⁴¹ speaks, I think, to the sort of reforms Rhode proposes when she talks of practicing law in the interests of justice; in the process Rodes talks, too, of the small, useful gains from chaos that Niebuhr spoke about:

To try to impose a general order on society . . . is to try to control history, something that the best philosophical reflection tells us cannot be done. . . . [W]e cannot isolate in history the causes of a single effect or the effects of a single cause. It follows that we can neither predict nor control the results of any given intervention in a historical process.⁴²

I think of Rhode's discussion of lawyer-client confidentiality, and of the parade of horrors she provides as argument (a couple of which I have discussed). She surveys the array of state-level ethics rules that issued from the Kutak Commission's endless discussion of the subject, and describes the present situation, which a friend of mine in Virginia (another legal ethics teacher) once called the balkanization of legal ethics.⁴³ She might more clearly have noticed that trust between lawyer and client comes (this is my perception) close to being the most important of all dogmas among practicing lawyers—a product not of administration but of experience. That on-the-street priority, considering Rodes, and considering what Niebuhr called “pretension,” has caused me to conclude that whatever the propounders of “professionalism,” the leaders of the bar, and the states' highest courts do will not affect very much the way lawyers protect their clients' secrets.

The Commonwealth of Virginia, when I taught there, adopted the most extreme form of whistle-blower rule, announcing along the way

such lawyers are entitled to a warning from us professors; maybe we need to remind them that the moral life is not possible without pain.

40. Kronman, *supra* note 3, at 353.

41. Robert E. Rodes, Jr., *Pilgrim Law* 17, 181 (1998) (discussing Herbert Butterfield's *The Whig Interpretation of History*).

42. *Id.* at 17.

43. *Cf.* Rhode, *supra* note 2, at 106-15 (describing some of these balkan subdivisions).

the lawyer's duty to report a client's stated intention to commit a crime.⁴⁴ The Virginia rule is mandatory, a duty to report the intention to commit a crime, any crime: If your client says he will be in your office in half an hour, and he lives forty miles away, he has announced an intention to commit a crime. The new rule contained no exceptions. And the new rule has also, as far as I know, made no difference. When I talked informally to the Virginia lawyers I was commissioned to explain the new rule to, several told me they would never tell on a client, no matter what the Supreme Court said.

Of course these lawyers did not mean what they said. I have no doubt that none of them would protect a client's secret if the result would be that an innocent person would be put to death by the state (something they do a lot of in Virginia and another of Rhode's examples⁴⁵). The means of preventing that would probably be as various as all of the other creative things lawyers do. (Narrative examples that come to mind include a couple of plausible stories from the old "L.A. Law.")

Consider what we tell our student-lawyers in the Clinic at Notre Dame about child abuse: We have an unelaborated policy in our Clinic, we say. We will not leave untended a situation in which one of our child-custody clients exposes her or his children to abuse. We say we are clever enough to figure out how to intervene to protect children and at the same time keep our tickets to practice law. And so far we have done both. We represent our clients zealously. And we try, as Rodes puts it, "to enhance whatever good and resist whatever evil the process brings about."⁴⁶ We set out, of course, both to obey our professional rules and keep our clients' trust. But we know, as Rodes says, that "[u]ntended results will always be inextricably entangled with intended ones."⁴⁷

The advantages I see in an application of Rodes's theory of history, or Niebuhr's take on irony, is that it takes some of the weight out of academic assessments of the situation of lawyers in America. It suggests a cautious assessment of Rhode's and Kronman's persistent

44. Va. Code of Prof'l Responsibility DR 4-101(D); see Robert F. Cochran, Jr. & Teresa S. Collette, *Cases and Materials on the Rules of the Legal Profession* 83-85 (1996). Although Virginia has since adopted a revised code of legal ethics based on the Model Rules of Professional Conduct, see Charles H. Oates & Marie Summerlin Hamm, *A New Twist for an Olde Code: Examining Virginia's New Rules of Professional Conduct*, 13 Regent U. L. Rev. 65, 65 (2000-01), it retained this disclosure requirement. See Va. Rules of Prof'l Conduct R. 1.6 cmt. (2001) ("The Committee added language to this Rule from DR 4-101 to make the disclosure provisions more consistent with current Virginia policy. The Committee specifically concluded that the provisions of DR 4-101(D) of the Virginia Code . . . should be added as paragraph (c)."); see also Oates & Hamm, *supra*, at 79 (comparing Rule 1.6 and DR 4-101).

45. Rhode, *supra* note 2, at 106.

46. Rodes, *supra* note 41, at 18.

47. *Id.*

dependence on administrative domination of the profession—a dependence on the state that, when I reviewed Kronman's book a few years ago, moved me to accuse him of idolatry.⁴⁸ Rodes and Niebuhr suggest to me more rather than less professorial detachment—even detachment from our detachment—a lighter hand, and more trust in the circumstantial prudence of lawyers, when it comes to dealing with the evils Kronman and Rhode rightly—and no doubt accurately—describe. Less weight, I tell myself as I try with usual success to monitor my arrogance, might now and then find a knowing smile to be useful.

CONCLUSION: CONSIDER POOH

Irony is a discipline. Irony is what educated Catholics call ascetic, moral weight lifting to keep affection alive and disgust in check. Like a low-salt diet or giving up chocolate for Lent. It says to us professors, when we are tempted to be only sarcastic or cynical about our former students: Think of Christopher Robin, who considered with clarity and a cool eye the stubborn selfishness of his old friend and said, "Silly old bear." Reinhold Niebuhr would want us to try that on such things as the facts that

- The best our thinkers and drafters have been able to do about the racism and sexism of our white male forebears is to reject the ethics of the gentleman-lawyer that Dean Kronman and I admire and substitute the hype of professionalism.⁴⁹ They replaced Aristotle with a bureaucrat.

- The best our thinkers and drafters have been able to do about the hypocrisy in so much lawyer talk about justice and so much lawyer profit from serving injustice has been to appeal for voluntary "pro bono" time—which you don't have to provide and, one way or another, you can buy your way out of.⁵⁰ I think of an old Hoosier maxim: Whenever anybody says to me, "It's not the money, it's the principle of the thing"—it's the money.

- The best our thinkers and drafters have been able to do about the analytical difficulties disciplinary committees have with the governmental apparatus Kronman and Rhode want to tighten has been to remove the language of ethics, to call our flabby moral consensus "professional responsibility," and to pare our rules down to

48. Shaffer, *supra* note 15, at 395-96.

49. The literature, as it then existed, is cited and discussed in my lecture, *Inaugural Howard Lichtenstein Lecture in Legal Ethics: Lawyer Professionalism as a Moral Argument*, 26 *Gonz. L. Rev.* 393 (1990-91).

50. Professor Rhode extensively discusses pro-bono work throughout her current book, see Rhode, *supra* note 2, at 265-66, and also two of her recent essays, see Deborah Rhode, *Access to Justice*, 69 *Fordham L. Rev.* 1785 (2001); Deborah Rhode, *The Pro Bono Responsibilities of Lawyers and Law Students*, 27 *Wm. Mitchell L. Rev.* 1201 (2000).

quasi-criminal law. And then, when they beheld how morally barren their achievement was, they urged lawyers to become *civil*—as if that idea had been invented by bar-association committees and groups of judges, as if that idea were not inherent in what they had pared away.

“You’ve got to be careful if you don’t know where you’re going,” Yogi said, “‘cause you might not get there!”⁵¹

51. Berra, *supra* note 22, at 102.