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# Lawyers, Loyalty, and the Question of Citizenship: Perspectives from the Classroom and from Catholic Social Thought

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**Lawyers, Loyalty, and the Question of Citizenship: Perspectives from the Classroom and  
from Catholic Social Thought**

Bruce P. Frohnen

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This article relates the response of two law professors to a problem highlighted in the Carnegie Foundation for the Advancement of Teaching's 2007 report titled *Educating Lawyers* (the "Carnegie Report").<sup>1</sup> That report noted the failure of American law schools to prepare lawyers to act as good citizens of our democratic society. We begin by pointing out the importance of this overlooked and undervalued element of legal education. We proceed to report on two classes, one taught by each of us, attempting to address the question of lawyerly citizenship on the basis of somewhat divergent theoretical and pedagogical inclinations and concerns. We then relate a crucial element to the teaching of citizenship provided by Catholic Social Thought: a full, proper understanding of the nature and purpose of the state. Because the state orders the associations of society and the loyalties of citizens, it in important ways defines citizenship in theory and practice. Thus, a perspective informed by Catholic Social Thought on the service function of the state provides an essential framework for ordering the duties and loyalties of the ethical attorney.

**The Problem**

Both of us have sought to respond to the Carnegie Report by developing a course focusing on lawyers' duties as citizens. In doing so we sought in particular to come to grips (and help students come to grips) with what we saw as a significant source of confusion among those lawyers who take seriously their ethical duties: the vague and conflicting claims on their

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<sup>1</sup>WILLIAM M. SULLIVAN, ANN COLBY, JUDITH WELCH WEGNER, LLOYD BOND, & LEE S. SHULMAN, *EDUCATING LAWYERS* (Jossey-Bass 2007).

loyalties posited by authoritative texts, most prominently the Model Rules of Professional Conduct.<sup>2</sup> The MRPC mentions three roles or loci of loyalty for the lawyer—service to clients, membership in the legal profession, and “public citizen.”<sup>3</sup> We at least know in general terms what the first two of these are, but the third, “public citizen,” is critical, undefined, and intrinsically incoherent.<sup>4</sup> It is critical because the duties of a citizen may define and/or limit those of a servant to clients and/or a member of a profession. It is undefined in the text beyond a vague reference to “the quality of justice.”<sup>5</sup> It is incoherent because one cannot be a citizen of “the public” as an inchoate mass; one must be a citizen of some actual, concrete community. We must reexamine what we mean by citizenship and of what we are citizens so that we can achieve a workable understanding of the various duties owed by the lawyer to his or her various communities.<sup>6</sup>

In her recent book, *The Majesty of Law*,<sup>7</sup> Justice Sandra Day O’Connor addresses the relationship between citizenship and the professional identity of the lawyer:

One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership in a profession entails an ethical obligation to temper one’s selfish pursuit of economic success [even though that obligation cannot] be enforced either by legal fiat or through the discipline of the market. . . . Both the special privileges incident to membership in the profession and the advantage those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. *That goal is public service.*<sup>8</sup>

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<sup>2</sup>See MODEL RULES OF PROF’L CONDUCT (1983).

<sup>3</sup>The Preamble of the ABA’s Model Code of Professional Conduct states, “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” MODEL RULES OF PROF’L CONDUCT Preamble 1 (1983).

<sup>4</sup>MODEL RULES OF PROF’L CONDUCT Preamble 1 (1983).

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>See SANDRA DAY O’CONNOR, *THE MAJESTY OF THE LAW* (Craig Joyce, ed., Random House Pub. Group 2004).

<sup>8</sup>O’CONNOR, *supra* note 7, at 229; *Shapero v. Kentucky Bar Assn.*, 486 US. 466, 488-89 (O’Connor, J., dissenting).

The American adversarial system of justice presents substantial challenges to the moral life of the lawyer/citizen.<sup>9</sup> As Daniel Markovits argues in his recent book, *A Modern Legal Ethics*,<sup>10</sup> lawyers often are confronted with professional expectations—particularly those brought about by the requirement of zealous advocacy (which Markovits calls “fidelity” to the client), to undertake acts that would be immoral for a non-lawyer.<sup>11</sup> Such acts include making misleading statements or encouraging misunderstanding and concealing material information—actions that to the layperson might appear to be lying and cheating.<sup>12</sup>

Nonetheless, lawyers have an ethical interest in living a coherent moral life—what Markovits refers to as having moral “integrity”—which gives lawyers a desire to resist being characterized as immoral for being zealous advocates for their clients.<sup>13</sup> Markovitz concludes that any legal ethics capable of meeting the complexity of lawyers' lived experience must be able to respond to this tension, but that the dominant approaches to legal ethics cannot.<sup>14</sup> Hortatory pleas for “community involvement,” pro bono work, and greater professionalism are common encouragements for law students, but there is little consideration given in legal education to the complex issues that relate citizenship in a liberal democracy to the role of the legal professional as a public actor in the political system.<sup>15</sup>

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<sup>9</sup> SULLIVAN, *supra* note 1, at 142-47.

<sup>10</sup> See DANIEL MARKOVITS, *A MODERN LEGAL ETHICS* (Princeton Univ. Press 2008).

<sup>11</sup> *Id.* at X.

<sup>12</sup> *See id.* at X.

<sup>13</sup> *Id.* at X.

<sup>14</sup> *See id.* at X.

<sup>15</sup> SULLIVAN, *supra* note 1, at 138-39, 184.

Although the Carnegie Report found several dimensions of legal education to be poorly served in the United States, it quickly became identified as calling for greater emphasis on clinical education.<sup>16</sup> Less influential has been the Carnegie Report's call for greater emphasis on doctrinal classes specifically directed toward professional formation.<sup>17</sup> The problem that the Carnegie Report identifies is that greater attention needs to be given in law school curricula to promoting an understanding of what constitutes good citizenship for lawyers in the American democracy.<sup>18</sup> While this is clearly an important pedagogical goal, it seems that little attention has been given in recent years to understanding what constitutes good citizenship for the lawyer and how it might be achieved in practice.<sup>19</sup>

The Carnegie Report cites the Preamble to the Model Rules of Professional Conduct (MRPC), which describes the scope of the lawyer's work as follows: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and *a public citizen having special responsibility for the quality of justice.*"<sup>20</sup> The Carnegie Report concludes that "[law] schools need to attend more systematically to the pedagogical practices that foster the formation of integrated, responsible lawyers."<sup>21</sup>

<sup>16</sup> *Id.*

<sup>17</sup> The authors of the Carnegie Report criticize the current overly technical approach to teaching doctrinal classes, commenting that a "more effective way to teach is to keep the analytical and the moral, the procedural and the substantive in dialogue through the process of learning the law. This approach is not new to legal education. It is just too infrequently practiced." Sullivan, *supra* note 1, at 142.

<sup>18</sup> *Id.* at 12, 34-38.

<sup>19</sup> The Carnegie Report states that its primary concern is both curricular (how to use the second and third years of law school in a more effective manner) and pedagogical (how to bring the teaching and learning of legal doctrine into a more fruitful conversation with the pedagogies of legal practice). *Id.* at 12.

<sup>20</sup> SULLIVAN, *supra* note 1, at 126 (emphasis added). In explaining this aspect of the lawyer's identity, the MRPC states in relevant part:

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education.

MODEL RULES OF PROF'L CONDUCT Preamble 1. We note that there is no guidance provided in the MRPC as to how legal education is to be strengthened—either in what way or to what end.

<sup>21</sup> SULLIVAN, *supra* note 1, at 126.

One problem noted by the report is a tension between multiple conceptions of the role of the lawyer.<sup>22</sup> In popular imagination, for example, the lawyer's identity is typically portrayed as that of a heroic crusader, who exemplifies what William Simon calls the "dominant view," that "the only ethical duty distinctive to the lawyer's role is loyalty to the client."<sup>23</sup> But this sensationalized view of the lawyer's work denies the roles of counselor and court officer.<sup>24</sup> Citing Mary Ann Glendon, the report notes that the "peace-making and problem-solving lawyers are the legal profession's equivalent to doctors who practice preventative medicine. Their efforts are generally overshadowed by the heroics of surgeons and litigators."<sup>25</sup> The skills of negotiation and drafting durable contractual agreements often are given a subordinate place to the drama of courtroom oratory.<sup>26</sup> But, as the report notes, careers in the less glamorous venues "may well provide the best opportunity for students to contribute to the well-being of their fellow citizens, as well as to achieve career satisfaction."<sup>27</sup>

Nor is the Carnegie Report the only source of complaint regarding this aspect of legal education. The report should be considered alongside several recent calls for renewing the tradition which considered citizenship within both political and moral discourse. Anthony Kronman, for example, has argued that, under the influence of modern social science, colleges and universities have expelled questions about human meaning from their classrooms, judging them unfit for organized study.<sup>28</sup> Kronman calls for the restoration of life's most important

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 131.

<sup>24</sup> *Id.*

<sup>25</sup> SULLIVAN, *supra* note 1, at 127.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> ANTHONY T. KRONMAN, *EDUCATION'S END X* (Yale Univ. Press 2007); *see also* KRONMAN, *THE LOST LAWYER, FAILING IDEALS OF THE LEGAL PROFESSION X* (Harvard Univ. Press 1993).

questions to an honored place in higher education.<sup>29</sup> He urges a revival of the humanities' lost tradition of studying the meaning of life through the careful but critical reading of great works of literary imagination and philosophical enquiry.<sup>30</sup>

Similarly, Martha Nussbaum has argued for a return to education in literature and the classics, notably Seneca and Cicero, for teaching lawyers about cosmopolitan obligations.<sup>31</sup> These examples evidence a growing concern to understand the citizen as a political agent within society and as a moral agent with both individual and communal moral commitments.<sup>32</sup> Kronman's work, in particular, suggests a desire to understand the relationship between citizenship and philosophical (and theological) discourse on the one hand, and citizenship and moral and intellectual integrity on the other.<sup>33</sup> By seeking to recover humanistic studies, Kronman's work asks what relationship exists between a meaningful human life and democratic politics.<sup>34</sup> This question can be explored by considering the concept of citizenship through questioning how a good citizen lives a meaningful life.<sup>35</sup> What Kronman seeks is a return to the traditional notion of a University as it developed in Catholic thought, in which questions of meaning and existence can be explored through humanistic engagement with literature relevant to the question.<sup>36</sup> What is needed is a re-integration of questions of professional conduct with larger questions of politics and even metaphysics.

### Teaching Citizenship: Two Approaches

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<sup>29</sup> *See id.* at X.

<sup>30</sup> *See id.* at X.

<sup>31</sup> *See* MARTHA C. NUSSBAUM, *CULTIVATING HUMANITY X* (Harvard Univ. Press 1997).

<sup>32</sup> *See* KRONMAN, *supra* note 28, at X; *see also* NUSSBAUM, *supra* note 31, at X.

<sup>33</sup> KRONMAN, *supra* note 28, at X.

<sup>34</sup> *See id.* at X.

<sup>35</sup> *See id.* at X.

<sup>36</sup> *See id.* at X.

Taken together, the Carnegie Report, Kronman, and Nussbaum make a strong case for the recognition of a need to focus on better understanding the lawyer's role as public citizen.<sup>37</sup> In the Anglo/European political tradition of which the American democracy is a part, the question of citizenship has been considered in both political and moral discourse.<sup>38</sup> Theorists from both areas have sought to understand the citizen's dual role as political and moral agent, with both individual and communal commitments.<sup>39</sup> As a result, theorists have attempted to understand the relationship between citizenship and philosophical (and theological) discourse on the one hand, and citizenship and moral and intellectual integrity on the other.<sup>40</sup>

While educating a lawyer for "public service" in the American democracy turns on knowing how these issues have been treated in the Western intellectual tradition, this is not to suggest that law schools should teach an ideology of public service.<sup>41</sup> It is, rather, to suggest that legal education should be concerned with understanding how the public acts of lawyers fit into the pluralistic democracy at the center of American public life.<sup>42</sup> More precisely, legal education should investigate how lawyers contribute to democracy, both as servants of the public good and as individuals with personal moral beliefs and commitments that at least sometimes differ from that expressed by the common will.<sup>43</sup>

Thinking about the relationship between good citizenship and living a meaningful life has a substantial history in Western thought and Catholic thought in particular.<sup>44</sup> Here we report on

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<sup>37</sup> SULLIVAN, *supra* note 1, at 1.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 30-31.

<sup>40</sup> See SULLIVAN, *supra* note 1, at X; MARKOVITZ, *supra* note 10, at X; KRONMAN, *supra* note 28, at X; NUSSBAUM, *supra* note 31, at X.

<sup>41</sup> SULLIVAN, *supra* note 1, at 18-19.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 185-86.

<sup>44</sup> See Zachary R. Calo, *Catholic Social Thought, Political Liberalism, and the Idea of Human Rights*, available at: [http://www.samford.edu/lillyhumanrights/papers/Calo\\_Catholic.pdf](http://www.samford.edu/lillyhumanrights/papers/Calo_Catholic.pdf) (last visited Nov. 20, 2008).



two different attempts to “teach citizenship” to lawyers. The first, undertaken by Professor Lee in a seminar held during fall semester 2008 at the Campbell University Law School, was concerned primarily with how lawyers can come to know their proper role in society, and fulfill that role so as to enlighten that society and its members. The other, undertaken by Professor Frohnen in a seminar offered fall semester 2008 at Ohio Northern University College of Law, focused on normative models of lawyers’ conduct rooted in differing conceptions of their primary loyalty—be it to client, legal system, or the public. Both courses were intended to explore the potential for lawyers to integrate their professional roles with political and metaphysical values so as to provide public service in the American democracy.

Both courses point to the need for greater understanding among students and lawyers of Catholic Social Thought regarding the nature and proper end of the state to help order and integrate attorney duties. A central problem underlying the incoherence of the MRPC itself is its failure to consider and make clear the implications of citizenship.<sup>45</sup> This failure is rooted in a

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<sup>45</sup>MODEL RULES OF PROF’L CONDUCT R. 1.7 states:

“(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

MODEL RULES OF PROF’L CONDUCT, *supra* note 2, at X.

The first comment to Rule 1.7 indicates, “Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client. Concurrent conflicts of interest can arise from the lawyer’s responsibilities to another client, a former client or a third person or from the lawyer’s own interests.” *Id.* at Rule 1.7. This first comment on Rule 1.7 is just one example that establishes that the confusion and ambiguity in the language of the ABA’s rules (specifically here, what actually constitutes a conflict of interest) that make it difficult for a lawyer to know when he or she is being loyal to the client while simultaneously acting in an ethical manner. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT’S GUIDE 280-81 (The American Bar Association 2006).

refusal to consider the nature of the community of which we are citizens.<sup>46</sup> Rejection of a natural law understanding of the nature and purpose of the state has led to an incapacity to understand the common good to which lawyers, like all citizens, owe loyalty and, consequently, an incapacity to integrate and rationalize the lawyer's duties to clients and the profession as well as the state.<sup>47</sup>

### Lee: A Socratic Course of Study

Much of the literature that developed in the West which explores the issues put forward by Kronman and relevant to the search for professional identity as "public citizens," is Catholic in origin.<sup>48</sup> This means that Christian and especially Catholic institutions have a particularly relevant role to play in satisfying the call in the Carnegie Report for a refined pedagogy that examines the lawyer's professional identity as citizen.<sup>49</sup> Lee, however, chose not to begin with specifically Christian writings. Instead, he chose to engage historical interpretations of the Socratic model of citizenship in Athenian democracy, because this allows for an engagement with a central tension in the moral life of the lawyer.<sup>50</sup>

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<sup>46</sup> See KRONMAN, *supra* note 28; SULLIVAN, *supra* note 1 ("The calling of legal education is a high one: to prepare future professionals [students] with enough understanding, skill, and judgment to support the vast and complicated system of the law needed to sustain the United States as a free society worthy of its citizens' loyalty...to uphold the vital values of freedom with equity and extend these values into situations as yet unknown but continuous with the best aspirations of our past.").

<sup>47</sup> See KRONMAN, *supra* note 28.

<sup>48</sup> *See id.*

<sup>49</sup> The Carnegie Report's call for a refined pedagogy, examining the lawyer's role as a citizen is described in the Report through the proposal of a framework that provides a structure for legal education that can be responsive to modern needs while simultaneously trying to mediate between the claims of legal theory and practice in order to promote professional responsibility. SULLIVAN, *supra* note 3, at 12.

<sup>50</sup> SULLIVAN, *supra* note 1, at 142-47; *see also* HEINRICH A. ROMMEN, *THE NATURAL LAW X* (Thomas R. Hanley, trans., Indianapolis: Liberty Fund 1998) ("Socratic Citizenship begins with the contention that Socrates should be the model for citizenship in contemporary liberal pluralist regimes. The Socrates of the Apology and the Gorgias, rather than the system builder of the Republic, is the right model because he maintains a critical distance from the common sense and shared understandings of his fellow citizens. Furthermore, this Socrates refuses to do an injustice in the name of community even if it means punishment or death."); DANA VILLA *SOCRATIC CITIZENSHIP* 191 (Princeton Univ. Press 2001).

Thus, Lee's course turned to the ideal of citizenship associated with the Socrates of Plato's "Apology"<sup>51</sup> as this foundational text has been received in various historical periods of Western thought.<sup>52</sup> Why the "Apology"?<sup>53</sup> There are several reasons for focusing on this text: First, Socrates' problem is our problem—he seeks to find his own philosophical and moral integrity among the different public opinions of his democratic Athens.<sup>54</sup> And in doing so he offers a rebuke and revision of the vision of democracy set out by Pericles during the so-called Golden Age of Athenian democracy.<sup>55</sup> For Pericles, opinions (*doxa*) are purified through public debate and the Periclean citizen is most happy or fulfilled (*eudiamonia*) when acting on beliefs tempered in the fires of public debate.<sup>56</sup> There is a moral virtue, in other words, to public life.<sup>57</sup> This leader of the great Athenian democracy saw no inherent conflict between being a good citizen and being a good person—one can have moral integrity through public life.<sup>58</sup> This is the version of democracy that Markovits finds difficult to achieve for the lawyer as public citizen.<sup>59</sup>

Socrates lived through the Peloponnesian War, perhaps fighting in it, witnessing the death of Pericles to illness and the corruption of the democratic ideal of Athens.<sup>60</sup> Through his words and deeds, he counters the Periclean ideal of citizenship by claiming that while moral and intellectual integrity go hand in hand, this sort of integrity can conflict with values such as patriotism, political participation, piety, and obedience to authority.<sup>61</sup> Like Markovits, he views

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<sup>51</sup> See PLATO, *The Apology*, in [THE TRIAL AND DEATH OF SOCRATES: EUTHYPHRO, APOLOGY, CRITO, DEATH SCENE FROM PHAEDO](#) (John M. Cooper, ed., G.M. Grube, trans., Hackett Pub. Co. 2001).

<sup>52</sup> *See id.*

<sup>53</sup> *See id.*

<sup>54</sup> *See id.*

<sup>55</sup> *See id.*

<sup>56</sup> THUCYDIDES, *THE HISTORY OF THE PELOPONNESIAN WAR 75-76* (Rex Warren trans., 1972).

<sup>57</sup> *Id.*

<sup>58</sup> *id.*

<sup>59</sup> *See* MARKOVITS, *supra* note 10, at X.

<sup>60</sup> *See* THUCYDIDES, *supra* note 56,

<sup>61</sup> *Id.*

the public citizen as possessing duties to the state that conflict with the fulfilled human life and with moral integrity.<sup>62</sup> In focusing on Socrates and his reception by succeeding generations of political thinkers, he offers an opportunity to explore the rich complexities of the tension that Markovits identifies as being at the core of legal ethics.<sup>63</sup> What follows is a discussion of the readings assigned in Lee's seminar on "Lawyers as Citizens."

Differing interpretations and valuations of Socrates are pregnant with critical issues for class discussion that are sharply relevant to pressing issues for the lawyer's identity as a citizen today.<sup>64</sup> One interesting contrast can be seen in the writings of Nicholas of Cusa (Cusanus) (1400-1464) and Erasmus (1466-1536).<sup>65</sup> These thinkers are particularly illuminating, since both developed humanist readings of Socrates that in some ways pre-figure later readings by, for example, John Stuart Mill.<sup>66</sup> For Cusanus, Socrates represents a model of the "Learned Ignorance" which makes the way possible for an apprehension of God's nature.<sup>67</sup> He seeks a return to the Socratic mode of inquiry; Socrates began his investigations from the premise, "'[a]ll I know is that I know nothing,' and likewise, Cusanus argues that the human mind never obtains a precise portrait of the world since it knows all things by relation."<sup>68</sup> Viewed in this light, the ideal of Socratic citizenship would seem to require a commitment to humility and to humbling the overreaching claims of public opinion.<sup>69</sup> A lawyer following this model of citizenship might

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<sup>62</sup> See MARKOVITS, *supra* note 10, at X; THUCYDIDES, *supra* note 56, at X.

<sup>63</sup> See *id.* at X.

<sup>64</sup> Compare VILLA, *supra* note 50, with SULLIVAN, *supra* note 1, and Calo, *supra* note 44.

<sup>65</sup> H. LAWRENCE BOND, NICHOLAS OF CUSA: SELECTED SPIRITUAL WRITINGS 88 (Paulist Press 1988).

<sup>66</sup> See BOND, *supra* note 65. John Stuart Mill was a prominent writer of philosophy and British political discourse during the nineteenth century. Among his most well-known and significant works are *A System of Logic, Principles of Political Economy, On Liberty, Utilitarianism, The Subjection of Women, Three Essays on Religion*, and his autobiography, *John Stuart Mill*, THE INTERNET ENCYCLOPEDIA OF PHILOSOPHY, available at: <http://www.iep.utm.edu/m/milljs.htm> (last visited Nov. 20, 2008).

<sup>67</sup> BOND, *supra* note 65, at 88.

<sup>68</sup> *Id.*

<sup>69</sup> DESIDERIUS ERASMUS, COLLECTED WORKS OF ERASMUS 194 (Univ. of Toronto Press 1989).

be called upon to reject totalizing claims of authority, whether resting on scientific principles or religious dogma.<sup>70</sup>

Lee contrasted selections from Cusanus with writings taken from the work of the prominent early modern humanist and friend of Thomas More, Erasmus. Erasmus holds Socrates to be a relentless pursuer of wisdom and truth.<sup>71</sup> He most admired the Socratic method of investigating a problem through posing questions, which was akin to the Academic skepticism that Erasmus used as a guide in his debate with Martin Luther over free will.<sup>72</sup> In his colloquy “The Godly Feast” (1522), while discussing virtuous pagans who seem to surpass most Christians in piety and moral righteousness, one of Erasmus’ characters exclaims that such holiness in a man who did not know Christ makes him hardly able to refrain from exclaiming, “Saint Socrates, pray for us.”<sup>73</sup> Erasmus’ Socrates is presented as someone much closer to Pericles’ model of Athenian citizen than to Cusanus’ because he sought public debate to find clarity of thought so that public opinion might be brought into accord with knowledge for the common good.<sup>74</sup>

The contrast between Cusanus and Erasmus contextualizes important readings of Socrates that would come later by those who viewed Socrates as a precursor to modern political theorists.<sup>75</sup> The class next read examples from John Stuart Mill, who viewed Socrates as engaged in a struggle to achieve autonomy in thought, freed from the traditions and dogmas of public opinion. Mill endorsed Socrates’ claim that most citizens rest in a moral slumber of unquestioned opinion. Mill’s reading of Socrates, however, allows for a professionalized politics

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> See THUCYDIDES, *supra* note 56, at X.

<sup>75</sup> See JOHN STUART MILL, *ON LIBERTY* X (Dover Pub. 2002) (1869); BOND, *supra* note 65, at X; ERASMUS, *supra* note 69, at X.

that Socrates would have denied. Mill accepts a more Platonic notion of politics providing for representative government by those of “skilled employment” in the science of politics and administration which would minimize the negativity of the Socrates of Cusanus or the faith of the Socrates of Erasmus.<sup>76</sup> While Mill celebrated a variety of public opinions, for him the plurality of *doxoi* should be replaced where necessary by specialists who, like the Delphic Oracle, reveal to the masses *episteme* that take the form of scientific facts.<sup>77</sup> This vision of politics has been used to promote conceptions of the lawyer as a bureaucrat who deploys a legal science, such as that imagined by legal formalism, to provide scientific legal answers to the social problems that become the subjects of legal dispute.<sup>78</sup>

Succeeding readings were chosen to show how the totalitarianism of the early twentieth century has cast doubt on such totalizing programs. In post-World War II political theory, two readings of Socrates have been particularly influential, that of Leo Strauss and that of Hannah Arendt.<sup>79</sup> For Strauss, Socrates represents the original political philosopher—a pursuer of the truth about politics.<sup>80</sup> In “What is Political Philosophy?”<sup>81</sup> Strauss describes the task of the political philosopher as that of “truly know[ing] the nature of political things, and the right or good, political order.”<sup>82</sup> For Strauss, through the authoritative work of the philosopher, the plurality of *doxoi* can be reduced to a uniform public opinion.<sup>83</sup> Decrying the relativism of recent Western thought, his response is to dogmatically assert the metaphysical realism of Plato and

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<sup>76</sup> MILL, *supra* note 75, at X.

<sup>77</sup> *See id.* at X.

<sup>78</sup> *See id.* at X.

<sup>79</sup> Leo Strauss, *What is Political Philosophy*, in *WHAT IS POLITICAL PHILOSOPHY, AND OTHER STUDIES* 9-38 (The University of Chicago Press 1988); *See* HANNAH ARENDT, *THE HUMAN CONDITION* X (The University of Chicago Press 1998).

<sup>80</sup> Strauss, *supra* note 79, at 9-37.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 16.

<sup>83</sup> *See id.* at X.

Aristotle (in this regard, Rorty and Derrida are foreshadowed for Strauss by Weber and Heidegger).<sup>84</sup>

In contrast to Strauss, Arendt's Socrates is heroic in his effort to purge *doxa* in order to open a space for independent moral judgment. Socrates calls on the citizen to question the "foundational" claims of societal belief and purge them of the *doxa* borne of political slogans and public philosophies.<sup>85</sup> Against Strauss' view of political philosophy, Arendt argues, "the philosopher left behind him the claim of being 'wise' and knowing eternal standards for the perishable affairs of the City of Man,' a claim that had force so long as the philosopher was understood to dwell 'in the proximity of the Absolute.'"<sup>86</sup> The philosopher has lost the claim to knowing ultimate truth for Arendt because the received metaphysical claims that Strauss seeks to re-assert have been invalidated in modern thought, and the project of modernity itself has been undermined by the horrific experience of what such totalizing philosophical systems can bring in the form of death camps and killing fields.<sup>87</sup>

At this point students were asked to read selections from contemporary Catholic writers. The Catholic citizen scholar approaching the debate between Strauss and Arendt cannot help but be drawn into it.<sup>88</sup> In important ways, Strauss and Arendt replay the debates in the Church that began shortly after the Second World War about the proper understanding of the relation of nature and grace.<sup>89</sup> The desire for moral absolutes led to efforts that seek, like Strauss', to reassert classical metaphysical doctrines (in the case of the Neo-Scholastics Aristotelian

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<sup>84</sup> See *id.* at X.

<sup>85</sup> See ARENDT, *supra* note 79, at X.

<sup>86</sup> VILLA, *supra* note 50, at 284.

<sup>87</sup> VILLA, *supra* note 50, at 284; ARENDT, *supra* note 79, at X; STRAUSS, *supra* note 79, at X.

<sup>88</sup> See TRACEY ROWLAND, *CULTURE AND THE THOMIST TRADITION: AFTER VATICAN II* X (Routledge 2003).

<sup>89</sup> See *id.* at X.

hylomorphism) in order to ground some standards of truth for confronting the deplorable modern skepticism of what passes for contemporary politics.<sup>90</sup>

Neo-Scholastic attempts to recover Thomism were criticized by the *nouvelle theologies*, which included the founders of today's *Communio* movement—theologians like Balthasar, Wojtyla, and Ratzinger who were influential during the Second Vatican Council.<sup>91</sup> Balthasar, in particular, argued against the Neo-Scholastics in part on the grounds that, by their assertion of the priority of nature over grace, they had displaced the divine initiative in human understanding. This also would seem to argue against the Straussian desire to re-assert pagan metaphysics in contemporary political philosophy.<sup>92</sup>

Arendt, in Augustinian fashion, points out that the totalizing claims of the pagan philosophers deny the role of the unfathomable in human knowing.<sup>93</sup> For her, Strauss' political philosopher reduces God to a being among beings (as with Aristotle's Unmoved Mover) and rejects the mystery and ineffable aspects of knowledge in favor of a system of natural reason.<sup>94</sup> This is abhorrent because it portends the totalizing philosophical systems that led to the horrors of the totalitarianisms of all too recent experience.<sup>95</sup> For her, as for Balthasar, recognition of the limitations of natural reason open "new possibilities" for thinking about how truth is made manifest in human consciousness.<sup>96</sup>

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<sup>90</sup> See VILLA, *supra* note 50, at 284; ARDENT, *supra* note 79, at X; Straus, *supra* note 79, at X; ROWLAND, *supra* note 88, at X.

<sup>91</sup> See AIDAN NICHOLS, *CATHOLIC THOUGHT SINCE THE ENLIGHTENMENT X* (Gracewing Pub. 1998).

<sup>92</sup> See *id.* at X.

<sup>93</sup> See ARDENT, *supra* note 79, at X.

<sup>94</sup> See ARDENT, *supra* note 79, at X; STRAUSS, *supra* note 79, at X.

<sup>95</sup> See *id.* at X.

<sup>96</sup> See ANGELO SCOLA, *HANS URS VON BALTHASAR: A THEOLOGICAL STYLE X* (Eardmans, William B. Pub. 1996).



The course came to no conclusions about the significance of all of this for thinking about citizenship among lawyers.<sup>97</sup> The intent was not a full exposition of any of these positions, but only to simulate some ecumenical interest in them.<sup>98</sup> Clearly, understanding the relationship between nature and grace is important for thinking about what kinds of public arguments will succeed in a pluralistic society.<sup>99</sup> Take, for example, the hope of persuading a non-Christian of the intrinsic value of human life: What are the limits of natural reason in making the claim, and at what point must one rely solely on Catechesis and prayer? When to speak? When to sting like the Socratic gadfly? When to retreat to the Churches and wait with MacIntyre for the next St. Benedict?<sup>100</sup> These are questions that can be asked by thinking through the Socratic model of citizenship.<sup>101</sup>

The course was useful for two reasons: first, students benefit wherever they begin, by being exposed to a great slice of the Western intellectual tradition through studying such works.<sup>102</sup> Students gain an opportunity to see what is at stake in this long debate, and to make its questions their questions—to enter the debate on their own behalf.<sup>103</sup> And, second, it is only by working through this material in the classroom and in the study that we as scholars can come to some better understanding of it and its significance for the American democracy.<sup>104</sup> Students in the class, however, had trouble grasping the nature of the political context within which Socratic struggle takes place. Primary questions regarding the nature and purpose of the state, the ends which laws and the government (as opposed to society as a whole) naturally should seek,

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<sup>97</sup> See Calo, *supra* note 44, at X.

<sup>98</sup> See Calo, *supra* note 44, at X; see also SULLIVAN, *supra* note 1, at X.

<sup>99</sup> See SULLIVAN, *supra* note 1, at X.

<sup>100</sup> See ALASTAIR MACINTYRE, *AFTER VIRTUE X* (Notre Dame Press 1984).

<sup>101</sup> See *id.* at X.

<sup>102</sup> See SULLIVAN, *supra* note 1, at X.

<sup>103</sup> See *id.* at X.

<sup>104</sup> See *id.* at X.

remained difficult for students to engage. The contemporary liberal insistence on the segregation of public from private in particular seems to leave students with an all or nothing choice between laws directing moral conduct and neutrality as to the morality of such conduct. No class can address all the major issues relevant to citizenship, and this class could afford no further readings, but more would have been accomplished had students come to the class with an understanding of the state's role in supporting other institutions in promoting virtue.

### Frohnren: A Tradition of Conflicts of Loyalty

Frohnren's seminar on "Law, Lawyers, and Citizenship," focused on the problems inherent in the MRPC's approach and the nature of the questions underlying the various forms of loyalty required of an ethical attorney.<sup>105</sup> Because the course was overtly one on citizenship, Frohnren began the readings with an ancient treatment of conflict between the demands of the state and those of more primordial loyalties to family and the divine. *Antigone*,<sup>106</sup> Sophocles' tragedy of a woman put to death for burying her dead brother in defiance of the law of her uncle/king, dramatizes the limits of our duty of loyalty to the state.<sup>107</sup> Taking place in ancient Thebes, *Antigone* addresses a form of citizenship that is thick and powerful.<sup>108</sup> The ancient Greek person was essentially constituted by his or her membership in the polis.<sup>109</sup> One was, before most if not all else, a Theban, or a Spartan, or an Athenian.<sup>110</sup> Antigone, however, is also a sister.<sup>111</sup> While her brother may have died leading an army against her city, the gods, in her

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<sup>105</sup> See *id.* at X.

<sup>106</sup> See SOPHOCLES, *ANTIGONE* X (Ian Johnson trans., Richer Resources Pub. 2007).

<sup>107</sup> See *id.* at X.

<sup>108</sup> See *id.* at X.

<sup>109</sup> See SOPHOCLES, *supra* note 106 at X; ROMMEN, *The Natural Law*, *supra* note 50, at 7,14.

<sup>110</sup> See SOPHOCLES, *supra* note 106, at X.

<sup>111</sup> *Id.* at 3-5.

view, demand that he be buried, rather than left to be eaten by dogs, if he is to be received properly in the afterlife.<sup>112</sup>

Creon, Antigone's uncle, decrees (and thereby enacts a binding law) that the treasonous brother be left unburied, promising death to anyone who disobeys.<sup>113</sup> When Antigone is found to have disobeyed, we are made witness to conflicting visions of justice (punishment for treason vs. the demands of the gods), loyalty (to the polis vs. to one's brother), and power (the king vs. the gods) and their tragic results.<sup>114</sup> Antigone is killed and Creon's son (Antigone's fiancé) and wife kill themselves, leaving Creon shattered.<sup>115</sup>

Like all great tragedies, *Antigone* leaves us with questions rather than answers, and it does so in grand, cosmic fashion.<sup>116</sup> Is justice the will of those with power (be they kings who can execute the disobedient, or gods who can do even worse)?<sup>117</sup> Must justice give way to love, and if so must the lover be willing to pay the ultimate price?<sup>118</sup> Should these considerations be allowed to interfere with one's unstinting service to the good of the polis?<sup>119</sup> And who should determine the good of the polis, and how?<sup>120</sup>

Students next were asked to read materials relating the development and institutionalization of the "two swords"<sup>121</sup> theory and to consider the implications of the

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<sup>112</sup> *Id.* 1

<sup>113</sup> *Id.* at 3. 1

<sup>114</sup> *Id.* at 46-50. 1

<sup>115</sup> SOPHOCLES, *supra* note 106, at 46-50.<sup>1</sup>

<sup>116</sup> *Id.* 1

<sup>117</sup> *Id.* 1

<sup>118</sup> *Id.* 1

<sup>119</sup> *Id.* 1

<sup>120</sup> SOPHOCLES, *supra* note 106, at 46-50.<sup>1</sup>

<sup>121</sup> See, e.g., OLIVER O'DONOVAN & JOAN LOCKWOOD O'DONOVAN, FROM IRENAEUS TO GROTIUS 258-59, 431 (Grand Rapids: Eerdmans 1999) "Bernard expressed the spiritual-temporal duality of the papal plenitudo by elaborating the allegory of the 'two swords' drawn from Christ's exchanges with his disciples during his arrest. According to Bernard, both swords, of spiritual and temporal judgment, belong to the church; the latter belong to her only in the sense of being at her disposal to command rather than for her direct use. Thus, Peter is entrusted to sheathe the

separation of religious from political loyalty on the role of conscience in public life and, in particular, the development of law and legal professionalism.<sup>122</sup> Next, they read materials relating to the rise of constitutional government through the efforts of lawyers such as Sir Edward Coke.<sup>123</sup> The purpose was to get them thinking about the implications of the collapse of the ecclesiastical jurisdiction—the law of the Church which had for some 1,000 years subjected kings to the demands of natural justice and necessarily split the loyalties of citizens between secular and sacred authorities.<sup>124</sup> Had conscience and faith in the law taken the place of the ecclesiastical jurisdiction, allowing lawyers to serve in a semi-priestly capacity as checks on royal power, which is now bound up with a view of the state as embodying the good of the people? <sup>125</sup> Or, was law now a mere battleground of powerful forces seeking to impose their will?<sup>126</sup>

This last theme was picked up in a section of readings devoted to asking whether there is a moral duty to obey the law, divorced from the question of its justness. In readings taken from Anthony D’Amato, J.L. Mackie, and W. Bradley Wendel, students examined the limits of contractual arguments for the obligation to obey the law, as well as the distinction between moral and legal obligations, and the variety of practical considerations (e.g. the danger of bad

sword with which he cut off the ear of the slave of the high priest. While Bernard’s primary intention was to dissuade Pope Eugenius III from dealing with Roman civil revolt by force of arms, readers of his *On Consideration*, and particularly the Decretists and Decretalists who glossed and disputed the “two swords doctrine,” were occupied with resolving conflicting accounts of imperial and papal authority on terms generally satisfactory to Rome.” *Id.* The “Two swords theory” is more generally defined as, “the medieval belief that the Pope is not only the authority of spiritual realm but also of the temporal.” THE HARPER COLLINS ENCYCLOPEDIA OF CATHOLICISM 1274 (Richard P. McBriend, ed., Harper Collins 1995). It found its highest expression Boniface VIII’s papal bull, *unam Sanctam* (1302), which held that “there are two swords, the spiritual and the temporal in the control of the Church. One is used by the hand of the Kings and Knights at the command and with the permission of the priest.” *Id.* Therefore, “for every human creature to be submissive to the Roman pontiff is absolutely necessary for salvation.” *Id.*

<sup>122</sup> See O’Donovan, *supra* note 121, at X.

<sup>123</sup> See Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, X (1994); Sir Edward Coke, *Prohibitions Del Roy*, reprinted in 1 *The Struggle for Sovereignty: Seventeenth-Century English Political Tracts* X (Joyce Lee Malcolm ed., Indianapolis: Liberty Fund 1999) (1658).

<sup>124</sup> Berman, *supra* note 123, at 1673-74.

<sup>125</sup> *Id.* at 1684-88.

<sup>126</sup> *Id.* at 1694.

examples) weighing for and against an obligation to obey the law.<sup>127</sup> The section ended with discussion of Wendel's argument that lawyers should exercise custodianship for the law in relation to a conviction that it is a worthy endeavor for law to guide conduct through rules.<sup>128</sup>

The central problem with these readings, and one major reason for assigning them, is their lack of any coherent conception of that creature which is instituting/declaring/enacting the law that may or may not obligate us.<sup>129</sup> Moreover, while the justness of laws was seen as an important factor in determining whether obedience is obligatory, the criteria by which to judge laws just or unjust was left unclear to say the least.<sup>130</sup> The theoretical assumptions were those of skeptical individualism, allowing no coherent view of any common good. Perhaps this characteristic of the readings was best exemplified by D'Amato's condemnation of Socrates for allowing the state to take over some of his judgment as to the justness of the law. This lack of discussion regarding the nature of the law maker rendered it difficult even to discuss the various reasons why one might be obliged to obey its laws.<sup>131</sup>

As exemplified by these readings, contemporary discussions of law tend to focus on the obligation (or lack of it) of individuals acting as sovereign selves rather than of communities acting together.<sup>132</sup> Following up on this prejudice in the literature, the course next turned to various models of lawyerly conduct deemed ethical. David Hoffman's well known, perhaps infamous, resolutions on deportment from the nineteenth century provide a somewhat aristocratic

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See Anthony D'Amato, *Obligation to Obey the Law: A Study of the Death of Socrates*, 49 S. CAL. L. REV. 1079, X (1976); J.L. Mackie, *Obligations to Obey the Law*, 67 VA. L. REV. 143, X (1981); W. Bradley Wendel, *Lawyers, Citizens, and the Internal Point of View*, 75 FORDHAM L. REV. 1473, X (2006).

<sup>128</sup> Wendel, *supra* note 127, at 1476, 1492-99.

<sup>129</sup> See D'Amato, *supra* note 127, at X; Mackie, *supra* note 127, at X; Wendel, *supra* note 127, at X.

<sup>130</sup> See *id.* at X.

<sup>131</sup> D'Amato, *supra* note 127, at 1084, 1088-89, 1096-98, 1107-08.

<sup>132</sup> See D'Amato, *supra* note 127, at X; Mackie, *supra* note 127, at X; Wendel, *supra* note 127, at X.

model of conduct focusing on the duty of the lawyer to his or her profession.<sup>133</sup> Client interests are seen as important, but by nature subject to the judgment of the lawyer in regard to their propriety and how they ought to be served—invariably within the limits of the law, of lawyerly honor, and of views of propriety focusing on the justness of the underlying cause as well as the tactics.<sup>134</sup>

Selections from the work of Monroe Freedman were read next and discussed in terms of Freedman’s emphasis on the paramount nature of the duty of loyalty to the client.<sup>135</sup> Looking in particular at Freedman’s recommendation of lying and other “overzealous” conduct, the class discussed whether the long-term interests of clients are in fact served by attorneys who behave in this way.<sup>136</sup> The interest of the profession and of the nation in conditions of trust among potential litigants points back to Wendel’s valuation of custodianship of the law.<sup>137</sup> Moreover, Freedman’s own commitment to various causes might lead one to believe that he himself is as committed to a specific conception of citizenship, or at any rate what the state ought to look like and do, as to a specific, overriding loyalty to the interests of just any client.<sup>138</sup>

The next model of lawyerly conduct the class examined was that of Judge John Noonan of the Ninth Circuit Court.<sup>139</sup> Judge Noonan has made a point throughout his career of arguing

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<sup>133</sup> See David Hoffman, *Resolutions in Regard to Professional Deportment*, in *A Course of Legal Study: Respectfully Addressed to Students of Law in the United States* X (Baltimore: Coale and Maxwell 1817).

<sup>134</sup> See *id.* at X.

<sup>135</sup> See Monroe H. Freedman, *Henry Lord Brougham, Written by Himself*, 19 *GEO. J. LEGAL ETHICS* 1213, X (2006); Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 *HOFSTRA L. REV.* 771, X (2006); Monroe H. Freedman, *Kaye Scholer—Overzealous or Overblown?*, 35 *S. TEX. L. REV.* 577, X (1994); Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 *CHAP. L. REV.* 57, X (1998); Monroe H. Freedman, *The Corporate Watchdogs that Can’t Bark: How the New ABA Ethical Rules Protect Corporate Fraud*, 8 *U. D.C. L. REV.* 225, X (2005).

<sup>136</sup> Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, *supra* note 135, at 771-72, 778-82.

<sup>137</sup> See Wendel, *supra* note 127, at X.

<sup>138</sup> See Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, *supra* note 135, at X.

<sup>139</sup> Steve Albert, *A Lecture from O’Connor: Habeas Limits Stir Up Acrimony on 9<sup>th</sup> Circuit*, *LEGAL TIMES* 8, June 14, 1993; John T. Noonan, *The Religion of the Justice: Does it Affect Constitutional Decision Making?*, 42 *TULSA L.*

that his (Catholic) religious beliefs do not influence his decision making, and that Catholic faith has not, historically, been an important influence on judicial decision making in the United States.<sup>140</sup> Noonan has good reason to make his argument, fearing as he does the formation of a religious test excluding Catholics from serving as judges.<sup>141</sup> But Noonan acknowledges that the conscience of the judge may at times influence his or her decision in a given case.<sup>142</sup> Moreover, examination of the arguments (including Noonan's) in the well known case of Robert Alton Harris would seem to indicate that conscience, and perhaps specifically religious belief, has something to do with various decisions in regard to the death penalty. Harris was a convicted murderer, sentenced to death, who gained hearing for over a dozen habeas corpus appeals and on the night of whose execution only a direct order from the Supreme Court put an end to a succession of emergency stays.<sup>143</sup> Class discussions centered on questions including the distinction (or lack of distinction) between personal conscience and religious doctrine in analyzing such cases.

The final substantive readings of the course centered on the question of civil disobedience and its interaction with law, specifically in the context of the civil rights movement in the United States.<sup>144</sup> Beginning with the Rev. Martin Luther King, Jr.'s "Letter from

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REV. 761, X (2007); *Harris v. Vasquez*, 949 F.2d 1497, X (9th Cir. 1990); *Gomez v. U.S. Dist. Court for Northern Dist. of Cal.*, No. 92-70237, 1992 WL 155238 (9th Cir. Apr. 20, 1992); *Feminist Women's Health Ctr. v. Codispoti*, 69 F.3d 388, X (9th Cir. 1995).

<sup>140</sup> See Noonan, *supra* note 139, at X; *Feminist Women's Health*, 69 F.3d at X..

<sup>141</sup> See Noonan, *supra* note 139.

<sup>142</sup> Noonan, *supra* note 139, at 769 ("Every person, I venture to affirm, has a conscience. A judge is no exception. Whether the conscience is formed by formal religion or parental exhortation or the lessons of life, or all such influences, the judge will respond to persons before him guided by this inner guide. To act against it, as a judge is capable of doing, is to make oneself an unhappy person. The better that it is integrated with the judge's beliefs the surer and finer will be his judgment.").

<sup>143</sup> *Harris*, 949 F.2d at X.

<sup>144</sup> See *Legal Sanctions to Enforce Desegregation in the Public Schools: the Contempt Power and the Civil Rights Acts*, 65 YALE L.J. 630, X (1956) THERE IS NO AUTHOR LISTED ON THE JOURNAL; Martin Luther King, Jr., *Letter from Birmingham Jail*, reprinted in WHY WE CAN'T WAIT X (New York: Harper Collins 1964) (1963); STEPHEN L. WASBY, THE USE OF LITIGATION X (VA Univ. Press 1995); Jack B. Weinstein, *Every Day is a Good Day for a Judge to Lay Down His Professional Life for Justice*, 32 FORDHAM URB. L.J. 131, X (2004).

Birmingham Jail,” students were confronted with the question of how to address conflicts between established law and justice.<sup>145</sup> They also were confronted with the question of what role lawyers could play, as lawyers, in furthering the cause of justice. Particularly important, on this point, is an article from Judge Jack B. Weinstein discussing judicial methods intended to undermine unjust laws and a reading that questions the intrinsic value of civil rights litigation (as opposed to other forms of political activism) in producing fundamental change.<sup>146</sup>

Over the course of the semester the class developed at least three paradigms of citizenship that seem relevant to the practice of law. The first Hoffman-esque paradigm emphasized the lawyer’s role as members of a profession, seeking to uphold standards of civility as well as basic moral practices like honesty and fair dealing on the view that such conduct is good in itself and necessary to the functioning of a legal system essential to the proper service of clients and the maintenance of a free society.<sup>147</sup> The second paradigm, developed out of readings from and related to themes in Monroe Freedman, posited the autonomous individual as the proper object of concern from society as a whole as well as the legal profession.<sup>148</sup> The common good, on this view, consists of the maximization of individual choice and self-mastery and is served best by lawyers pursuing the self-chosen interests of their clients.<sup>149</sup> The final view, brought out primarily in negative form through critiques by individualists, was of a managerial citizenship in which the needs and goals of various bureaucratic agencies, justified as serving the good of the nation, are held more important than the rights of individuals, and more important than the adversarial role of lawyers and their courts.<sup>150</sup>

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<sup>145</sup> See King, *supra* note 144, at X.

<sup>146</sup> See Weinstein, *supra* note 144, at X.

<sup>147</sup> See Hoffman, *supra* note 133, at X.

<sup>148</sup> See Nancy Amoury Combs, *Understanding Kaye Scholar: The Autonomous Citizen, the Managed Subject and the Role of the Lawyer*, 82 CAL. L. REV. 663, X (1994); Freedman, *supra* note 135, at X.

<sup>149</sup> *Id.*

<sup>150</sup> See Combs, *supra* note 148.



None of these paradigms seemed satisfying, however, in terms of acceptability on ethical grounds or in its ability to help integrate potentially conflicting lawyerly duties of loyalty. Hoffman's vision was rejected as too aristocratic and, in any event, lacking in relevance in an age of big firm practice and the attendant reduction in the freedom to decline business on ethical grounds.<sup>151</sup> The managerial model was rejected as too pro-government, lacking in the capacity to help lawyers help clients and maintain traditional liberties.<sup>152</sup> The individualistic model, by far the most prevalent in the literature and appealing to students, nonetheless utterly failed as a means of helping integrate potentially conflicting loyalties.<sup>153</sup> Indeed, this model lacked any integrated vision of lawyers' duties as citizens as well as lawyers; a failure rooted in a lack of concern with the nature of political community itself, or rather a denial of the existence of substantive political community in favor of a vision of the state as useful only to protect individuals in their individual pursuits.<sup>154</sup>

### Toward a Coherent View of Citizenship and the State

To regain a workable understanding of citizenship it is helpful to look at the development and decline of the idea and reality through time. The ancient view of citizenship portrayed in *Antigone* certainly was full-bodied; it conceived of the person as essentially a member of a specific political community.<sup>155</sup> This view has many positive aspects—it leads to a deep concern

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<sup>151</sup> See Hoffman, *supra* note 135.

<sup>152</sup> See Combs, *supra* note 148; see also Freedman, *Kaye Scholer-Overzealous or Overblown?*, *supra* note 135.

<sup>153</sup> See Freedman, *Kaye Scholer-Overzealous or Overblown?*, *supra* note 135.

<sup>154</sup> See *id.*

<sup>155</sup> See SOPHOCLES, *supra* note 106 at X; ROMMEN, *The Natural Law*, *supra* note 50, at 7,14.

with virtuous conduct and character. But this view also tends to limit the person to membership in the polis.<sup>156</sup> The lack of a transcendent standard by which to judge the polis in practice allowed for severe injustices including slavery and human sacrifice.<sup>157</sup>

The “thick” view of citizenship, so central to the growth of civilization in the ancient world, was spread thin by the Romans, who used it as a means of pacifying certain upper classes of its subject peoples, reducing citizenship’s importance from one of essential identification with the polis to discrete and limited duties and obligations.<sup>158</sup> The thinner, later Roman model of citizenship is key to the modern understanding, which originally was seen in republican terms, as in contradistinction to the person being “subject” to a monarch.<sup>159</sup> As characterized by the Catholic legal thinker, Heinrich Rommen, the rebirth of republican virtue and concerns with citizenship in the modern world had both a bright and a dark side—roughly represented by the American and French revolutions, producing, respectively, orderly constitutionalism and the Terror.<sup>160</sup>

Despite tragic experiences with totalitarianism, the general trend over the course of the nineteenth and twentieth centuries was toward greater individualism.<sup>161</sup> This in many ways is to be welcomed as an affirmation and help for human dignity.<sup>162</sup> But among lawyers in particular, there has been an unfortunate turn toward atomism that has undermined any coherent view of the

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<sup>156</sup> ROMMEN, *The Natural Law*, *supra* note 50, at 7,14.

<sup>157</sup> *Id.* at 17-18, 19-26.

<sup>158</sup> ROMMEN, *supra* note 50, at 15; RUSSEL HITTINGER, *THE FIRST GRACE: REDISCOVERING THE NATURAL LAW IN A POST CHRISTIAN WORLD* 307-08 (Delaware ISI Books 2003).

<sup>159</sup> ROMMEN, *The Natural Law*, *supra* note 50, at 25, 113; ROMMEN, *THE STATE IN CATHOLIC THOUGHT: A TREATISE IN POLITICAL PHILOSOPHY* 382-85 (Herder 1945).

<sup>160</sup> ROMMEN, *The Natural Law*, *supra* note 50, at 95.

<sup>161</sup> KENNETH SCHMITZ, *THE ONTOLOGY OF RIGHTS*, *in* *RETHINKING RIGHTS* 135 (Bruce P. Frohnen & Kenneth L. Grasso, eds., University of Missouri Press 2009).

<sup>162</sup> ROMMEN, *The Natural Law*, *supra* note 50, at 75.

state, the duties of the citizen to that state, and the appropriate role of the lawyer as public citizen.<sup>163</sup>

Contemporary legal theorists, including Joseph Raz and Anthony D'Amato, for example, have treated the person's obligation to obey the law as an issue to be analyzed in terms of agreements, benefits, and moral judgments chosen by individuals in relation to the state.<sup>164</sup> Such calculations assume, as D'Amato puts it, that a "state is merely a collection of individuals living in a certain geographic area."<sup>165</sup> This atomistic view is radically opposite, even hostile to Catholic Social Thought, according to which human life is possible only in the framework of the state.<sup>166</sup> As Rommen argues, on the modern view individuals are the only reality, fully autonomous and self sufficient. They agree to live in a political community only because and to the extent that their individual purposes are served thereby; "the common good is only a name for the sum of the private particular goods of all the individuals."<sup>167</sup>

Lacking from the modern individualist view is an understanding of the individual as a social person. A self sufficient individual is not a full person because he or she is not social; he or she does not participate in the relations that form human nature and so is either a god (not likely) or a beast. It is recognition of the reality of the common good that allows for the treatment of individuals as full persons. For the common good "turns the external amorphous mass, the mere conglomeration of individuals, into a solidarist body of mutual help and interest, into the organically united nation."<sup>168</sup> In addition, nominalism simply can not adequately account for or explain the fact that communities develop over time; we must recognize the philosophical

<sup>163</sup> ROMMEN, *THE STATE IN CATHOLIC THOUGHT*, *supra* note 159, at 232, 341.

<sup>164</sup> See JOSEPH RAZ, *Authority and Justification in AUTHORITY* (Joseph Raz, ed., NYU Press 1990); D'Amato, *supra* note 29, at 1091.

<sup>165</sup> D'Amato, *supra* note 127, at 1091.

<sup>166</sup> ROMMEN, *THE STATE IN CATHOLIC THOUGHT*, *supra* note 159, at 307.

<sup>167</sup> *Id.* at 314.

<sup>168</sup> *Id.* at 311.

reality of human communities, with their own histories, goals, and intrinsic natures, if we are to properly value and evaluate the intrinsic purposes and changing characteristics of these communities, as well as the people who form them.<sup>169</sup> Only in recognizing the reality of the state can we recognize the full potential of each person:

The state does not exist outside or over and above its citizens. . . . It exists only in its citizens, by them, and with them. The sum of the individuals is the “matter” of . . . the state, whereas the form is the moral end, expressed in its laws, customs, and political constitutional organization. It is the common purpose, usually stated in the preamble of modern constitutions, that unifies, that forms and organizes the individuals into a distinct political community.<sup>170</sup>

Our communities, including our political community, are formed by our relationships with one another. Our common activities forge common purposes and manners of procuring them. Our way of life—expressions of what we value and who we are—forges the state, not vice versa.

Therefore, while Catholic Social Thought rejects modern atomism, it simultaneously refuses to seek a return to the ancient Greek view of the state; it rejects the Greek notion that human nature and the person find their perfection in citizenship.<sup>171</sup> Rather, “the ultimate end and highest perfection” of the person is “citizenship in the city of God.”<sup>172</sup> This means that the state, like the common good it is to pursue, is inherently limited. The purpose of the state is not, as for the Greeks, *felicitas* simply, but rather *felicitas externa* or *politica*. The common good of the state is itself a state of affairs in “which men live in an order of peace and justice with a sufficiency of goods that are related to the conservation and the development of the material life with that probity of morals which is necessary for the preservation of external peace and felicity of the body politic and the continuous conservation of human nature.”<sup>173</sup> The state’s purpose is

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<sup>169</sup> See HAROLD J. BERMAN, *LAW AND REVOLUTION X* (Harvard Univ. Press 1983).

<sup>170</sup> ROMMEN, *THE STATE IN CATHOLIC THOUGHT*, *supra* note 159, at 308.

<sup>171</sup> *Id.* at 309.

<sup>172</sup> *Id.* at 310.

<sup>173</sup> *Id.*

real and important—maintenance of peace and protection of individual persons in their pursuit of the material goods of life, in a manner consistent with the maintenance of peace and good order. But the common good, the very reason for the state’s existence and justification of its actions, is immanent; its felicity belongs to this world only and so its morality and claims of right are limited. The person, who is not limited to the immanent, has an existence, dignity, and purpose on the totality of which the state can lay no proper claim.<sup>174</sup>

The dignity of the person, defined by his or her ultimate end in the city of God, is primary. Thus, Aquinas argued that laws demanding that the person violate the natural law do not bind the conscience.<sup>175</sup> Therefore, in “a genuine conflict between natural law and the positive law of the state, the natural law prevails. In a genuine conflict between the salvation of man’s soul and a positive demand of the state, the salvation of the soul prevails.” This valuation of the interest of the person over that of the state extends even to the waging of war; ; even a just war “may not be continued, if it would mean the destruction of” the bulk of the male population because justice has meaning only in human relations, which can not exist if the people involved are destroyed.<sup>176</sup> Moreover,

A common good, a concrete order, that would destroy fundamental rights or infringe on them would be disorder, a mutilated common good. If, therefore, on account of the failure of the concrete order a whole group of the members should suffer injustices and intrusions into their personal sphere, offenses against human dignity, then the order is disturbed. Not only do those suffer who are immediately concerned, but the whole suffers, too, because the common good is not realized.<sup>177</sup>

In this passage Rommen asserts the duty of the state to prevent oppression of the person. This extends to interpersonal relations as well. “[A]ny grave violation of the private good of an individual by another is a violation of the common good with the reaction of punishment on the

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<sup>174</sup> *Id.*

<sup>175</sup> ROMMEN, *THE STATE IN CATHOLIC THOUGHT*, *supra* note 159, at 208.

<sup>176</sup> *Id.* at 309.

<sup>177</sup> *Id.* at 308.

part of authority, the aim of which is the protection of the common good.”<sup>178</sup> It is crucial to note, however, that persons can suffer injustices as groups as well as individuals. Social justice is a necessary ground for commutative justice and the state has an obligation “to bring about such a social order and such economic conditions that the individual member in the community is enabled to fulfill the demands of commutative justice, e.g., pay a family wage.”<sup>179</sup>

Clearly, then, the state’s pursuit of the common good involves both defense of individual persons against undue interference with their activities and an ordering of society such that the relations among individual persons and groups can be just. This is no call for governmental control over people’s lives. Rather, it is a recognition that the state must order relations among individual persons and groups if political felicity is to be possible.<sup>180</sup> Catholic Social Thought focuses on the very area of life ruled out by individualism’s insistence on defining political relations solely in terms of individuals and the state: that of social groups. These groups, like the state itself, have their own integrity, purpose, and common good—which the state cannot properly usurp or ignore. A good society “will have self-governing autonomous groups to regulate and deal with their own problems in a spirit of cooperation, motivated by their respective partial common good.”<sup>181</sup>

Catholic Social Thought grows from a full understanding of the social nature of the person and that person’s inevitable, constitutive membership in a variety of communities.<sup>182</sup>

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<sup>178</sup> *Id.* at 327.

<sup>179</sup> *Id.* at 321.

<sup>180</sup> ROMMEN, *THE STATE IN CATHOLIC THOUGHT*, *supra* note 159, at 320. (“The common good is to be conceived like the health and vitality of the organism, which are different from the members but are of benefit to each of them as something animating them, connecting them so that each participates in it, and still no member has it wholly and separately.”).

<sup>181</sup> *Id.* at 344.

<sup>182</sup> *Id.* at 135-37, 329, 356-57; JOHANNES MESSNER, *SOCIAL ETHICS* 140 (St. Louis: B. Herder Book Co. 1949) (“A society therefore is not simply a collection of individuals united and structured by the authority of the state. Rather, it is a community of communities, a unity composed of member communities relatively independent, or autonomous, since they have their own social ends, their own common good, and consequently their own functions.”).

Kenneth Schmitz, for example, has pointed out how even the rights valued in a liberal society are rooted in an understanding of the person and his or her rights as relational in their very essence.<sup>183</sup> Each of us is constituted in significant measure by our communities, as are the rights and duties through which we interact in those communities.<sup>184</sup>

The person, as a social being with dignity and free will created in the image and likeness of God, is at the center of Catholic Social Thought. He or she can develop fully his or her humanity only in society. We must avoid, however, the mistake of identifying society completely with the dictates, even legal dictates, of the government. The state instantiates order, but,

the concept of order is broader than that of law. Along with justice, according to the great doctors, the end of the state includes tranquility, security, and peace. Thus the political and social order is more than the system of positive norms as compiled in statute books or court decisions. The law is merely one form of that order, though the most important because on its function immediately rest tranquility, security, and peace.<sup>185</sup>

We must avoid the error of totalitarianism (seeing the state as all of life) as well as the error of atomism. We must understand the state itself as a servant of the person and the communities within which that person grows.

The state is a community of communities; it encompasses within itself a plurality of communities with limited authority over their members, rooted in their limited but very real common goods.<sup>186</sup> According to Rommen, the purpose of the state is to protect the security of these communities, “their peaceful functioning, the furthering of their self-initiative by the

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<sup>183</sup> SCHMITZ, *supra* note 161, at 137-38.

<sup>184</sup> *Id.*

<sup>185</sup> ROMMEN, THE STATE IN CATHOLIC THOUGHT, *supra* note 159, at 334.

<sup>186</sup> *Id.* at 308-11, 329-33; Kenneth L. Grasso, *An Unfinished Argument; John Courtney Murraray, Dignitatis Humane and the Catholic Theory of the State*, THE FAITH AND REASON INSTITUTE, available at <http://www.frinstitute.org/grasso.html> (last visited Nov. 12, 2008) (“Man's social nature is not exhausted in the state because human nature, as Rommen observes, gives rise ‘to a plurality of social forms and . . . cooperative spheres that . . . serve independent ends in the order of the common good.’ The state, therefore, ‘does not create’ these ‘social forms.’”).

creation of legal institutions and public offices as a help and assistance (but not as their substitute), and the assurance of their peaceful development by protection against internal disorder and external disturbance.”<sup>187</sup> The state, then, is not of independent, primary value—it can not properly subordinate individuals and their communities to its own ends. Neither, however, is the state properly a servant to individuals taken simply as independent, asocial beings.<sup>188</sup> Rather, the state’s function is an enabling one.<sup>189</sup> The state is not simply responsible for suppressing violence or establishing a minimal, neutral framework of order allowing for the existence of groups created by the will of particular persons.<sup>190</sup> Nor does the state possess a generalized responsibility for perfecting the individuals and groups who compose society.<sup>191</sup> Rather, the state is responsible for creating an order within which these groups can flourish. This order would safeguard what Pope John Paul II called the “human ecology;” it also would assure groups access to the resources they need for their own flourishing and to perfect themselves and “make their distinctive contributions to the integral development of the human person.”<sup>192</sup>

The state, properly conceived, takes people as they are, “as social beings inasmuch as they already live in families and other free organizations for religious, cultural, and social welfare and for economic purposes.”<sup>193</sup> This state does not seek to mold persons to its own ends. Nor does it seek to pretend that individuals are self-sufficient, treating them as if their social relations and communities are not central to their being. Rather, the state pursues the common good of good order among social beings and their communities.

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<sup>187</sup> Grasso, *supra* note 186, at 25.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Grasso, *supra* note 186, at 25-26.

<sup>193</sup> ROMMEN, THE STATE IN CATHOLIC THOUGHT, *supra* note 159, at 317.



The form of conduct appropriate to the state is, then, that of creating a system of public law that recognizes and protects the rights and duties of each person and community, as well as serving the common good by adjudicating conflicts of rights and duties as they arise between persons and communities.<sup>194</sup> As Rommen puts it, “[the] state, as distinguished from the whole of the individual citizens and their families, is a servant. Its end, the common good, can be realized only by enabling the citizens to fulfill their ultimate and transcendent end, the salvation of their souls, in pursuing their secular task in peace and security and in mutual help.”<sup>195</sup>

### Implications for the Lawyer as Public Citizen

It now remains to relate this understanding of the state—its proper end being the common good, defined as a proper ordering of persons and communities maintaining political felicity—to the proper role of the lawyer. Here, Justice O’Connor’s statement of the duties owed by professionals arising from benefits received on account of their position in society again become relevant. To them may be added a deeper understanding of the relationship between professionals and the state provided by Rommen, who points out that the professions, including medicine, the military, and law “in regard to their immediate ends, are nearer to the common good and its order than is, for instance, the work of the cobbler or the mason. These ends. . . are more essential to the functioning of the order of the common good, as are law and the forcible protection of law, health, and life.”<sup>196</sup> Law is a crucial element of the order of the state, aimed at

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<sup>194</sup> Grasso, *supra* note 186, at 25 (“The state, “in short “enables other communities to realize their ends” by creating “a framework” of public law “recognizing and protecting the various rights and duties pertaining to each and, in the interests of the common good, by adjudicating between them when conflicts of rights or duties arise.” Thus, in the economic realm, for example, the state fosters “favorable economic conditions not primarily by functioning itself as an economic agent (producing, consuming and so on) but by establishing a framework of public law” enabling the economic sector to make its distinctive contribution to human flourishing.”)

<sup>195</sup> ROMMEN, *THE STATE IN CATHOLIC THOUGHT*, *supra* note 159, at 308.

<sup>196</sup> *Id.* at 325.

justice but also, and in some ways more fundamentally, aimed at peace. A bad tax law, for example, contradicting the principles of justice and proportionality is indeed unjust, but members of the legal profession have a duty to uphold it because “the preservation even of the imperfect order is preferable to resistance to an unjust law of this kind.” The right thing is to change the law, but until that is accomplished, the law must be obeyed.<sup>197</sup>

This is not to say that justice is unimportant. Judges, for example, have a duty to measure laws against the constitution, and the constitution itself, if necessary, against the natural law. If the natural rights of persons and/or groups are being violated, even through a properly constituted statute approved by the majority, the judge is obliged to vindicate the rights; in a contest between legality and moral legitimacy, moral legitimacy has the higher claim.<sup>198</sup> But perfect justice, like perfect virtue, is not to be found in this life. The state, and with it the laws and those whose profession revolves around the law, must accept that the good they serve is partial only, and should act accordingly—that is, with tolerance and humility and in pursuit of a peaceful ordering of persons and communities.<sup>199</sup>

In this context, we may return to the multiple loyalties incumbent on lawyers as recognized in the Model Rules to see how citizenship, properly understood, structures the variety of duties owed by lawyers. The duty to the client is real, rooted in both contract and the dignity of the client as a person.<sup>200</sup> The duty to the profession of the law also is real, because the

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<sup>197</sup> *Id.* at 208.

<sup>198</sup> *Id.* at 212-13.

<sup>199</sup> *Id.* at 330 (“The end of the state is not virtuous life as such, but only inasmuch as the exercise of certain virtues is necessary for the existence of the state and the preservation of the public order and the common good. Thus the activity and the jurisdiction of the state in moral matters are restricted to public morality, to those virtues that immediately concern the common good. Personal individual morality and education to that end are not directly the concern of the state. Thus the virtue of justice in its general form and in its particular forms as legal, distributive, and commutative justice, is directly the concern of the state, but other virtues only so far as they are actually related to the common good and to justice.”).

<sup>200</sup> John M. Breen, *The Catholic Lawyer: “Faith in Three Parts*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 431,438-439 (2006) (“[Faith] provides a Catholic lawyer with an opportunity to exercise his or her freedom in the service of the faith. It allows [the lawyer] to fill up the emptiness with the values of the Gospel[.]...[b]y practicing law in a

profession itself is a community (often indeed itself a collection of smaller communities defined by geography and/or practice area) with its own end—justice, rooted in maintenance of a system upholding human dignity and the vindication of the reasonable expectations of litigants—and duties related to the achievement of that end.<sup>201</sup> And the duty to the state, of which we are citizens, is real and bound up with service to the common good of the society which is intimately related to the pursuit of justice.<sup>202</sup> Finally, all of these duties are limited by the transcendent duty

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way that recognizes the transcendent value of every human person, you will bear witness to the truth, the “faith” as it were, that every legal system must embody in order to be law.”).

The Preamble of the ABA’s Rule of Professional Conduct touch upon the duty of loyalty. Section 2 states, “[a]s a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client’s legal affairs and reporting about them to the client or to others.” Section 4 states, “[i]n all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.” MODEL RULES, *supra* note 2, at Preamble 1-2, 4.

<sup>201</sup> Bruce P. Frohnen, *The Bases of Professional Responsibility; Pluralism and Community in Early America*, 63 GEO. WASH. L. REV. 931, 953-54 (YEAR). Justice as vindicating reasonable expectations of litigants can be summarized as placing faith and value in the legal profession because God’s laws demand that lawyers act as interpreters and enforcers of the law. *Id.* In terms of the ABA’s Model Rules, “[a]s a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education[.]” MODEL RULES, *supra* note 2, at Preamble 5-6 (1983). Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest. *Id.*

<sup>202</sup> ROMMEN, *supra* note 50, at 60. According to Rommen the “Pursuit of Justice” can best be viewed in terms of communitative, legal, and distributive justice. *Id.* Rommen states, “Justice is the virtue which has right for its object. It is essentially directed to one’s fellow man. As communitative justice it has to do with those who are upon equal footing in the social complex; as legal justice it concerns the rights of authorities or superiors; as distributive justice it obliges according to function and merit in the ordered whole.” *Id.* Thus the norms that have to do with the life in common of men and groups (their social units, arrangements, and social functions) are the object of justice. *Id.*

Section 8 of the Preamble describes “Justice” as, “A lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. MODEL RULES, *supra* note 2, at Preamble 8. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. Additionally, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private. MODEL RULES. *Id.*

to God, which requires that we be willing to question all our other loyalties when they will result in violation of the dignity of persons and/or the undermining of the common good.<sup>203</sup>

Only the full, transcendent good is objective and complete; the goods of the state and of other social groups are immanent and partial. This means that duties to the state, themselves limited by the duty to God, also limit duties to lesser groups. Citizenship, then, defined by one's duties to the state and its intrinsic end (the common good of society) demands of the lawyer an understanding of one's duties to the legal profession as inherently limited.<sup>204</sup> One who identifies solely and completely with the legal profession will not be a good citizen because he or she will pursue an overblown and misshapen conception of that profession's good, for example by seeking partial legislation gaining special favors (be they economic, political or social) that take necessary resources away from society as a whole or subordinate other sectors or interests (e.g. law enforcement or poor tort victims) to the narrow interest of the legal profession.<sup>205</sup> There will, of course, be much room for disagreement over where such lines are or ought to be drawn.<sup>206</sup> No perspective can eliminate the need for virtue, including the virtue of prudence. Moreover, the claims of the state itself are limited by its immanent nature. The point is that duties to the profession are limited by its proper place within a larger community of communities.<sup>207</sup>

Likewise, the lawyer's duties toward his or her client are shaped by duties to the profession and its intrinsic ends.<sup>208</sup> This is, for example, the justification for rules limiting

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<sup>203</sup> Grasso, *supra* note 186, at 10.

<sup>204</sup> Schmitz, *supra* note 161, at 145 ("The inculcation and observance of these values [civil peace, love, dignity, patience, fraternity, and justice] among the citizenry of a society requires an appropriate balance between individual interest and the common good, a balance not easily attained or maintained, yet engrained in the optimum condition for both person and community."); *see also* Grasso, *supra* note 186, at 10; Rommen, *supra* note 50, at X.

<sup>205</sup> *See* Grasso, *supra* note 186, at X; Rommen, *supra* note 50, at X; Schmitz, *supra* note 161, at X.

<sup>206</sup> Grasso, *supra* note 186, at 25.

<sup>207</sup> *Id.*

<sup>208</sup> *See* Freedman, *In Praise of Overzealous Representation-Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, *supra* note 135, at X; *see also, generally*, MODEL RULES, *supra* note 2.

zealous advocacy by forbidding lying to tribunals and third parties.<sup>209</sup> Moreover, because people are by nature social, the lawyer has a duty to treat them as social beings, enmeshed in a variety of communities and relationships—some memorialized in contracts and some not—that must be respected, and which the lawyer should point out to the client and seek to uphold.

In a sense this analysis of the duties of the lawyer may be seen as merely restating in Catholic terms the generally understood conflicts of loyalty experienced by the lawyer today.<sup>210</sup> What makes such an approach more fruitful in practice is its explication of human characteristics through which one may integrate these duties in a coherent and meaningful way.<sup>211</sup> Citizenship is not a mere fiction or a term used to capture certain benefits, such as peace; we must enjoy in common if at all.<sup>212</sup> Neither is it social coordination only. Citizenship is a set of natural relations requiring a conception of our own interest as in important ways identical with that of the state—the political community that orders relations among persons and communities.<sup>213</sup>

As Aristotle understood, our relations- including our political relations- rest on a form of friendship through which trust is established, and without which we cannot function in a manner that is properly human.<sup>214</sup> Our mutual relations all require this trust, and the law is particularly

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<sup>209</sup> See Freedman, *In Praise of Overzealous Representation-Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, *supra* note 135, at X. The ABA Model Rules of Professional Conduct states, “*Advocate*. Rule 3.3 Candor Toward The Tribunal(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; Rule 4.1 Truthfulness In Statements To Others In the course of representing a client a lawyer shall not knowingly:(a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6. MODEL RULES, *supra* note 2, R. 3-4

<sup>210</sup> Grasso, *supra* note 186, at X.

<sup>211</sup> Schmitz, *supra* note 161, at 138 (“As already indicated, it seems to me fruitful to redefine the terms of the relation and to distinguish the individual from the person, and the collective from the community. That is, it would seem more fruitful to set the terms of the relation as between person and community rather than between individual and collective.”).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> ARISTOTLE, *NICOMACHEAN ETHICS* 220-25 (Terence Irwin trans., 1985).

important to the maintenance of trust.<sup>215</sup> Thus, even from a perspective emphasizing the duty of loyalty to the client, Freedman is wrong to say that lawyers should lie for their clients, even in seemingly private, amoral conditions such as those of negotiations.<sup>216</sup> Such practices will lead to the habit of lying and undermine lawyers' trust in one another as well as non lawyers' trust in lawyers, the legal system, and the law.<sup>217</sup> A lawyer who understands the nature of the state will better understand those of the profession and of the client-as-person. This lawyer will recognize his or her duty to maintain the norms central to trust in the law and legal processes, as well as the trust among family members, business associates and even simple contracting parties necessary for the functioning of society and the attainment of the client's own ends.

By seeing the goods of our communities in such terms, we can integrate them so that we may serve the dignity of our client, the stability and justice of the profession and the legal system it serves, and the common good of society in our everyday professional lives.<sup>218</sup> This integration is central to Catholic social thought.<sup>219</sup> Further, it is central to any fully coherent and defensible view of ourselves as lawyers and citizens.<sup>220</sup>

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<sup>215</sup> *Id.*

<sup>216</sup> See Freedman, *In Praise of Overzealous Representation-Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, *supra* note 135, at X.

<sup>217</sup> See Freedman, *In Praise of Overzealous Representation-Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, *supra* note 135, at X; see also Hoffman, *supra* note 133, at X.

<sup>218</sup> ARISTOTLE, *supra* note 215, at 220-25; see also Grasso, *supra* note 186, at X.

<sup>219</sup> See Grasso, *supra* note 186, at X.

<sup>220</sup> See *id.*