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Fred Zacharias and a Lawyer's Attempt To Be Guided by Justice: Flying with Harry Potter and Understanding How Lawyers Can Prosecute the People They Represent

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Fred Zacharias and a Lawyer’s Attempt To Be Guided by Justice: Flying with Harry Potter and Understanding How Lawyers Can Prosecute the People They Represent

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I. INTRODUCTION

Fred Zacharias took being a lawyer very seriously. To Professor Zacharias, being a lawyer was not a “job” in the ordinary sense; it was an honor and a responsibility. Being a lawyer was a commitment to

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ensuring that situations and lives were better after you were done working with them than they had been before. Professor Zacharias believed that a lawyer's life was not simply about the lawyer, nor was it about uncompromisingly facilitating a client. A lawyer's life, especially a government lawyer's life, was about pursuing something called justice.

Professor Zacharias realized that people—both clients and lawyers—could make mistakes, could see things incorrectly, and therefore, he believed that justice could not be achieved unless people transcended their own passions and prejudices. Consequently, Professor Zacharias also believed that a lawyer should not rely exclusively on his client's or his own conscience in the pursuit of justice. A lawyer needed to rely on something Professor Zacharias called a professional conscience.

Professor Zacharias did not presume to be an expert on justice. In fact, he found justice in its current form to be an elusive concept, but not so elusive that lawyers could not come together to figure out what it looked like and what it demanded of them. Thus, Professor Zacharias called upon lawyers to do just that. Professor Zacharias insisted that unless lawyers agreed upon the meaning of justice and its practical requirements in a concrete way, the pursuit of justice could not impact their day-to-day behavior as lawyers.

This Article seeks to embrace Professor Zacharias's call for lawyers to consider more deeply what it means for a lawyer—and here particularly a government lawyer—to do justice. In so doing, it recognizes two parameters that Professor Zacharias wisely established for this task: first, that lawyers need direction that is concrete in how to behave as lawyers; and second, that lawyers can understand “justice,” “fairness,” and “truth” to be amorphous concepts and that lawyers may even attempt to define those terms with equally amorphous words. This Article also recognizes, however, that although justice, fairness, and truth can be reduced to abstraction, those words can also take on concrete meanings, and in their concrete form they can help lawyers to guide their attitudes and, thus, their behaviors.

The first part of this Article reviews Professor Zacharias's understanding of justice and professional conscience, and then considers his views on the need for and the difficulty in using these concepts to guide one's behavior. The second part of the Article suggests a concrete notion of justice that is consistent with our understanding of the government lawyer as the representative of the people. In this notion, justice is not simply societal revenge but, instead, seeks to help all who encounter it to “a future full of hope”¹ within their community. Finally, the Article

1. *Jeremiah 29:11* (New American).

discusses how this notion of justice has manifested itself in the everyday behavior of lawyers.

II. FRED ZACHARIAS ON A LAWYER'S PROFESSIONAL CONSCIENCE AND THE GOVERNMENT LAWYER'S DUTY TO PURSUE JUSTICE

Professor Fred Zacharias and his friend and frequent coauthor Bruce Green once traced the modern regulation of the legal profession to “a nineteenth-century debate about the proper conduct of advocates,” a debate frequently thought to have “only two sides.”² One of those sides insists that a lawyer is called to be a “hired gun” for a client while the other insists that a lawyer must follow his personal conscience.³ Professors Zacharias and Green, however, demonstrated through a careful consideration of the history of legal ethics that the loyalty paradigm for lawyers generally, and government lawyers in particular, has never been and should not be simply a choice between being loyal to one's client or being true to one's self.⁴ Instead, Professors Zacharias and Green insisted that lawyers need to rely on their ““professional conscience”” to guide their professional behavior.⁵

Professors Zacharias and Green attributed the concept of a professional conscience to the opinion of Pennsylvania Supreme Court Chief Justice John Bannister Gibson in the classic legal ethics case of *Rush v. Cavanaugh*.⁶ In addition, the two defined the lawyer's role when it is accountable to this professional conscience as “one in which lawyers' duties of zealous advocacy are limited by duties to the court that are implicit in the lawyer's professional role, capable of being articulated, and, in some cases, judicially enforced.”⁷ The two professors noted that Chief Justice Gibson himself had grounded this duty to professional conscience in the lawyer's ““official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client.””⁸ They further noted that given the nature of that oath, the concept of

2. Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 2 (2005).

3. *Id.* at 2–3.

4. *See id.* at 2–21.

5. *Id.* at 30–32.

6. 2 Pa. 187 (1845).

7. Zacharias & Green, *supra* note 2, at 6.

8. *Id.* at 8 (quoting *Rush*, 2 Pa. at 189).

professional conscience “embodies professional norms that derive loosely from the lawyer’s professional relationship to the court, which is itself committed to promoting justice.”⁹ Professors Zacharias and Green pointed out that these “norms have not necessarily been expressed in the law” but, instead, may be “transmitted through professional socialization.”¹⁰ Under this view, lawyers come to know “through training and experience what is expected of them professionally,” and then to recognize the need “to comport with the professional expectations even in the face of conflicting client demands.”¹¹ The two professors did acknowledge, however, that some elements of professional conscience do take the form of explicitly articulated legal standards. Chief Justice Gibson provided two such elements in *Rush* when he wrote that a lawyer violates his professional conscience ““when he consciously presses for an unjust judgment”” and ““when he presses for the conviction of an innocent man.””¹²

According to Professor Zacharias, loyalty to personal conscience failed as a sufficient check on a lawyer’s unrestrained loyalty to the client because the lawyer was just as apt as the client to be distracted in decisionmaking by prejudices, personal interests, and blind spots.¹³ In his work, Professor Zacharias demonstrated that even government lawyers who claim to have justice as their client have incentives that can make their own judgments less than just. For example, in the context of pursuing justice for postconviction defendants, Professor Zacharias pointed out that a prosecutor’s personal interests often would militate against reopening a case even when it was likely the convicted individual was actually innocent:

[P]rosecutors’ incentives at the postconviction stage militate against taking action that benefits convicted defendants. Such action may involve confronting a prosecutor’s own error or undermining the reputation of a colleague who erred. It means undertaking additional work that ordinarily is not required by legal requirements or the demands of supervisors. Conversely, the overwhelming workloads of

9. *Id.* at 32. The Preamble of the American Bar Association’s *Model Rules of Professional Conduct* mirrors this duty in describing a lawyer as “an officer of the legal system and a public citizen having special responsibility for the quality of justice.” MODEL RULES OF PROF’L CONDUCT pmbl. para. 1 (2010).

10. Zacharias & Green, *supra* note 2, at 32.

11. *Id.*

12. *Id.* at 8 (quoting *Rush*, 2 Pa. at 189).

13. See Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 174 (2005); see also Zacharias & Green, *supra* note 2, at 30–31 (asking rhetorically, “Could [Chief] Justice Gibson really have meant to authorize lawyers to overrule their clients based on *any* personal notion of ‘justice,’ however idiosyncratic? And does this authority to exercise personal conscience and subordinate client interests apply in all aspects of advocacy and client representation?” (footnote omitted)).

prosecutors and the presumption of guilt that attaches to convicted defendants can justify inaction. As a policy matter, the reopening of a closed case invites public distrust of the accuracy of the criminal justice system.¹⁴

Yet, even as Professor Zacharias argued that lawyers need to be guided by a professional conscience rather than simply their personal one, he acknowledged that the notion of a professional conscience has problems of its own. In fact, Professor Zacharias recognized that “perhaps the most important reason why prosecutors have difficulty addressing their postconviction ethical obligations, is the complexity of identifying what it means to serve justice.”¹⁵ Although it is one thing to agree that prosecutors should strive to be fair, just, and neutral, Professor Zacharias argued it is quite another to come to grips with what such amorphous concepts mean in day-to-day practice. Although we might all agree, for example, that neutrality requires that a prosecutor embrace “nonbiased decision-making,” “[a]void[] [i]mpermissible [c]onsiderations” and “[s]elf-[i]nterest,” “[e]xclud[e] [p]ersonal [b]eliefs,” and “[a]void[] [p]arty [p]olitics,”¹⁶ we might find it very difficult to reach a consensus on where the lines are to be drawn that distinguish wisdom from bias, judgment from personal beliefs, or discretion from party politics. As Professors Zacharias and Green together put it:

But our analysis of the concept of “prosecutorial neutrality” demonstrates that there are no settled understandings, except perhaps at the most general and abstract level. All might agree that prosecutors should be “neutral,” just as they might agree that prosecutors should be “fair” or that they should “seek justice.” But none of these terms has a fixed meaning. They are proxies for a constellation of other, sometimes equally vague, normative expectations about how prosecutors should make decisions.¹⁷

Professor Zacharias pointed out that so long as prosecutors are guided by a set of abstract concepts rather than “a coherent workable set of decision-making criteria,” they “cannot possibly act in uniformly principled fashion.”¹⁸

Professor Zacharias offered that this problem with the professional conscience might be remedied if “there were well-established normative

14. Zacharias, *supra* note 13, at 174.

15. *Id.* at 174–75.

16. Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 853–59.

17. *Id.* at 903.

18. *Id.* at 904.

standards governing prosecutors' discretionary decision-making,"¹⁹ and these standards "command[ed] broad societal acceptance."²⁰ If such standards were available, "the public could elect people of integrity to serve as prosecutors, or higher officials could appoint them, and then trust them faithfully to apply accepted criteria."²¹ Professor Zacharias acknowledged, however, that "prosecutors have never, either individually or collectively, undertaken the task of identifying workable norms for the array of discretionary decisions that their offices make each day."²² Under these circumstances, Professor Zacharias was not content to offer the promulgation of such standards as an imminent solution to the problem.²³ Instead, he saw his work as "set[ting] the stage for deeper consideration of a problem that previously has gone unnoticed" and an invitation to "commentators, legislators, ethics code drafters, and other regulators to develop appropriate responses."²⁴ It is this invitation to a deeper consideration of what a lawyer's professional conscience demands of him that this Article now turns.

III. WHEN HARRY MET FRED: TWO VISIONS OF THE MEANING OF JUSTICE

Fred Zacharias was known to be a pretty fair basketball player,²⁵ and Harry Potter was known to be a pretty fair Quidditch player.²⁶ Both games involve challenging our standard notions of gravity. Perhaps it is this mutual ability to transcend the clouds that makes it seem reasonable to begin a response to Professor Zacharias's call for a deeper consideration of the demands of a lawyer's professional conscience with a discussion of the meanings of justice in the wizarding world of Harry Potter.

19. *Id.* at 903.

20. *Id.* at 840.

21. *Id.* at 903.

22. *Id.* at 840.

23. The ABA's *Model Rules of Professional Conduct* have called lawyers generally to "help the bar regulate itself in the public interest," MODEL RULES OF PROF'L CONDUCT pmbl. para. 6 (2010), and "to assure that [the bar's] regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar," *id.* at para. 12. For one view on the relative successes of this undertaking by the bar, see Randy Lee, *The State of Self-Regulation of the Legal Profession: Have We Locked the Fox in the Chicken Coop?*, 11 WIDENER J. PUB. L. 69 (2002).

24. Zacharias, *supra* note 13, at 239.

25. See *A Tribute to Fred Zacharias 1953–2009*, AALS PROF. RESP. NEWSL., Fall 2009, at 23, 26 (comments of Dean Kevin Cole, Univ. of San Diego Sch. of Law), available at <http://www.aals.org/documents/sections/proresponse/Fall2009.pdf>.

26. Quidditch is a game played in the wizarding world by teams of seven flying on broomsticks. For a more complete discussion of the game, see J.K. ROWLING, *HARRY POTTER AND THE SORCERER'S STONE* 166–70 (Scholastic Press 1998) (1997).

In fact, in the final two books of the Harry Potter series, readers are confronted with the aims of two concrete systems of justice. The first of these to be discussed can be found in *Harry Potter and the Deathly Hallows*.²⁷ In that book, Harry is called upon to judge his friend Ron Weasley by a forest pond. Ron has just returned to Harry and their mutual friend Hermione Granger after Ron abandoned his two friends in the midst of a desperate mission all three shared.²⁸ Left alone without Ron's help, Harry and Hermione were almost killed.²⁹ Now, confronted with this task of judging Ron, Harry creates a justice system that allows for Ron's redemption and facilitates a way for him to be restored to his friendships with Harry and Hermione.

In Harry's system of justice, this redemption involves, not surprisingly, forgiveness but a forgiveness that asks of Ron an act of penance—Ron's destruction of a Horcrux.³⁰ As Harry ultimately observes, Ron can only succeed in this act of penance if he brings to the act a spirit of contrition—a desire to conquer the temptations and personal demons that led Ron to abandon Harry and Hermione in the first place—rather than bringing to it a willingness to give in to these same demons again. As Ron attempts to destroy the Horcrux, the Horcrux tempts Ron to abandon this penitential act and, instead, to judge or blame Harry and Hermione according to Ron's own fears and misconceptions.³¹ By transcending these temptations, destroying the Horcrux, and succeeding in his act of penance, Ron is able to make all things new in his relationship with Harry.³²

The second system of justice is one created by the evil dark Lord Voldemort, also by a body of water, in *Harry Potter and the Half-Blood Prince*.³³ For his system of justice, Voldemort has prepared, on an island in a cave, a place where one must drink a potion that confronts its

27. J.K. ROWLING, *HARRY POTTER AND THE DEATHLY HALLOWS* (Arthur A. Levine Books 2007).

28. *See id.* at 310, 370–71.

29. *See id.* at 340–46.

30. *See id.* at 373. In *Harry Potter*, a Horcrux is an object in which the villain Lord Voldemort hides part of his soul, effectively allowing him to achieve immortality unless every Horcrux containing a portion of his soul is destroyed. *See Horcrux*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Horcrux> (last updated Jan. 2, 2011, 6:53 PM).

31. *See id.* at 375–77.

32. *See id.* at 378–79. Hermione also ultimately forgives Ron but not before she extracts her own expressions of repentance from him. *See id.* at 379–87.

33. J.K. ROWLING, *HARRY POTTER AND THE HALF-BLOOD PRINCE* (Arthur A. Levine Books 2005).

consumer with that person's greatest regret, his largest failure.³⁴ As one drinks in the memory of this sin, he necessarily must thirst for forgiveness, but Voldemort has set up his justice system so that one cannot drink from the water that surrounds him there.³⁵ Thus, Voldemort has literally created a justice system where having been confronted by our sins, we thirst for forgiveness, but we cannot drink the water. It is a justice system that cares only about who one was rather than who one is or what one may become, and it is a cruel system. Unlike Harry's system of justice, in the dark Lord's system, justice is a place from which there is no way home.

Although these two systems of justice share both a proximity to water and an understanding that we are all tormented most and most effectively by our own personal demons, they differ radically in the purpose each was designed to serve. In the hands of Lord Voldemort the purpose of justice is to yield "the satisfaction of revenge,"³⁶ but for Harry the aim of justice is to redeem, restore, and renew, to "get people . . . to a present from which a better future can be obtained,"³⁷ and "to restore a shared narrative of their lives."³⁸ In Harry's realm, justice offers those who encounter it a way home, though not necessarily a free ticket there. In the realm of Lord Voldemort, however, those who encounter justice must be forever tormented by justice's consequences and forever segregated from their community.

If a community cannot agree on what justice is, then it has no chance of agreeing on how best to pursue justice in everyday behaviors.³⁹ Thus, the contradiction in the two systems of justice from Harry Potter's world highlights the need for those who administer justice in our world to answer a very basic question before trying to develop "well-established normative standards" to guide professional consciences.⁴⁰ That question

34. See *id.* at 570–74; ROWLING, *supra* note 27, at 567.

35. See ROWLING, *supra* note 33, at 567, 574–76.

36. ROWLING, *supra* note 27, at 640.

37. Randy Lee, *Bruce Springsteen's Hope and the Lawyer as Poet Advocate*, 14 WIDENER L.J. 867, 872 (2005).

38. RICHARD P. CHURCH, *FIRST BE RECONCILED: CHALLENGING CHRISTIANS IN THE COURTS* 114 (2008); see also Robert J. Araujo, *The Lawyer's Duty To Promote the Common Good: The Virtuous Law Student and Teacher*, 40 S. TEX. L. REV. 83, 110 (1999) ("First, the individual is simply not just an autonomous being but is also a member of a community . . . [L]awyers are concerned about individuals who live in the community, not individuals who live in isolation from one another.").

39. See CHURCH, *supra* note 38, at 19 ("Legal ethics is written for all lawyers, regardless of the particularity of the traditions, practices, and places that shape them. The cost of making legal ethics applicable to all lawyers is that the shared moral content sustaining them is razor thin." (footnote omitted)).

40. Green & Zacharias, *supra* note 16, at 903; see *supra* text accompanying note 19.

is what do we want from justice. Is the point of justice to help those who encounter it to live a better future within their community, or is the point of justice societal revenge? Are lawsuits to be a “striving after self” and an attempt to get all we can, or are they to be a mechanism for redemption and an attempt to resolve our disputes in the manner our friends and neighbors deem most appropriate?⁴¹ As Professor Zacharias’s work suggests, determining what we as a community want from justice may be hard, but this is not because justice is always complex or amorphous. Rather defining justice can be hard because it requires one “to face, at the center of law and legal thought, the largest questions about human life and human purpose.”⁴² As Dr. Robert Coles has put it, it demands that we consider “[h]ow to live a life[, h]ow to live an honorable, a caring, and a decent life,” and it makes us ask ourselves, “Where do we come from, what are we, and where are we going?”⁴³

Fortunately, those legal practitioners whom Professor Zacharias called upon to undertake this task need not approach it with a blank slate. Instead, a concrete and specific definition of justice can be drawn from a synonym for seeker of justice that the legal profession has assigned to government lawyers. As Professor Abbe Smith has pointed out, prosecutors, and most other government lawyers as well, insist that not only do they seek justice, but they also insist that they represent “the people”: “Prosecutors represent the people, the state, the government. This is very noble, important, and heady stuff. Prosecutors seek truth, justice, and the American way. They are the ones who stand up for the victims and would-be victims, the bullied and battered and burgled. They protect *all of us*.”⁴⁴

41. Such questions have challenged those who would pursue justice for centuries. In fact, William Shakespeare placed them at the heart of his play *The Merchant of Venice*. In that play, Shakespeare invites readers to consider whether justice would “be a place where everyone got what they wanted,” “would it be a place where everyone got what they deserved”—or, at least, that to which the law entitled them—or would it be a place where souls are redeemed, relationships healed, and lives made better? Randy Lee, *Who's Afraid of William Shakespeare?: Confronting Our Concepts of Justice and Mercy in The Merchant of Venice*, 32 U. DAYTON L. REV. 1, 3 (2006).

42. H. Jefferson Powell on the American Constitutional Tradition: A Conversation, 72 NOTRE DAME L. REV. 11, 15 (1996) (quoting Joseph Vining, Hutchins Professor of Law, Univ. of Mich.).

43. Robert Coles, *Bruce Springsteen and Staying on the Jersey Side: An Interview with Robert Coles on Human Connection and the Law*, 14 WIDENER L.J. 953, 977 (2005).

44. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 356 (2001) (footnotes omitted).

In fact government lawyers often take great pride in those moments when they publicly announce that they represent and “protect all of us.” Robert DeSousa, former Assistant United States Attorney and Inspector General of the Commonwealth of Pennsylvania, describes those moments in his career this way:

And I can tell you that there was never a time when I stood in a United States District Court and said that it was “My pleasure to represent the United States of America.” In fact, a chill would go down my spine, because it was not only a pleasure but a great honor to represent the United States of America.⁴⁵

Yet, if government lawyers represent and protect “all of us,” then necessarily government lawyers represent the people whom they prosecute, the people whose licenses or other rights they seek to limit, and any other people these lawyers sue on behalf of “the people.” In addition, if judges really do work for “the people,” then the people for whom they work must include the people whom they ultimately condemn. If justice is, as it was for Lord Voldemort, societal revenge or a tool for individuals to get what they want, however, then these representations and relationships are either profound conflicts of interest, or they are lies.⁴⁶ This is so because a lawyer cannot be representing someone when the lawyer’s objective in the representation is to do that person harm.⁴⁷ Thus, if one were to claim that she was prosecuting her client, she would either be enmeshed in a conflict, or she would be telling a lie about the person’s status as a client.

On the other hand, if justice means what it meant in the hands of Harry Potter—if justice, even when it uses force, seeks only to get all people who encounter it to a place from which they can obtain a future filled with hope—then justice would always seek to act in the best interests of those it touches. In that case, the lawyer could be representing someone whom he was prosecuting or deciding against in the name of justice. Thus, if we are to take seriously the claim that government lawyers represent the people and all the people, then justice must mean what it meant to Harry Potter rather than what it meant to Lord Voldemort.

Harry Potter is not alone in his view of justice. This same view surrounds the life of Saint Ives, the patron saint of lawyers in the

45. Robert J. DeSousa, Opening Remarks, *Legal Ethics for Government Lawyers: Straight Talk for Tough Times*, 9 WIDENER J. PUB. L. 207, 209–10 (2000).

46. I would like to thank Robert Armour, board prosecutor for the Pennsylvania Department of State’s Bureau of Professional and Occupational Affairs, for sharing this observation with me.

47. See MODEL RULES OF PROF’L CONDUCT R. 1.7 (2010). In a similar vein, one might add that a judge cannot adjudicate the rights of someone for whom the judge works. See MODEL CODE OF JUDICIAL CONDUCT Canon 3(E) (2004).

Catholic Church. During his legal career, Saint Ives, a Franciscan, resisted unjust taxation by the king. Yet, after his death and at his canonization, it was observed that the greater reason Saint Ives was “[a] marvelous thing to the people”⁴⁸ was because “under him ‘the people of the land became twice as good as they had been before.’”⁴⁹ Thus, the most profound fruits of this life, which sought perfectly after justice, were people made better in their own lives.

Perhaps justice is complicated not so much because of how amorphously it may be discussed but because of how much it actually may demand of those who act in its name. Justice was not served in the life of Saint Ives merely because someone’s tax payments were respected, as important as that was. Similarly today justice is not served merely because someone who was robbed has been made whole, someone’s rights have been respected, someone’s matter has been disposed of “promptly, efficiently and fairly,”⁵⁰ or someone has gotten answers she could not have gotten on her own. As important as all of that is, today justice yearns for more than that. Beyond all that, justice yearns for that moment when someone who has been charged with a crime comes to know that society charges that person not because we only care about our own futures nor because we do not care about the accused’s future, but precisely because we do care about the futures of those whom we charge.

Given the legal system’s insistence that it is built on truth⁵¹ and the hundreds of thousands of cases that continue to be decided with the caption *People v.*, it seems too late in the game to claim that government lawyers do not represent the people. Many would say, however, that one can read too much into the way government lawyers introduce themselves and how they caption their cases. After all, the argument might go, just because lawyers say they represent “the people” does not mean that they represent the people in the literal sense. There are those who would insist, for example, that when prosecutors say, “I represent the people,” they do not mean “the people” to include the person they

48. *Ivo of Kermartin*, WIKIPEDIA, http://en.wikipedia.org/wiki/Ivo_of_Kermartin (last modified Nov. 13, 2010, 10:36 PM).

49. *Id.* Some have more cynically suggested that Saint Ives was to be marveled at because he was “[a] lawyer and not a thief.” *Id.*

50. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(8) (2004).

51. *See, e.g., Nix v. Whiteside*, 475 U.S. 157, 166 (1986) (emphasizing that “the very nature of a trial [is] a search for truth”).

are prosecuting. They only mean that they represent the good people, and once the state has presumed a person to be bad, that person ceases to be part of the “good people.” Given such a view, justice could be exactly what Lord Voldemort claims—societal revenge—and prosecutors could seek to harm those they prosecute in the name of justice without fear of conflict.

Others might claim that representing the people is really just representing an abstraction, like the Commonwealth or Truth, or a personification, like Uncle Sam or Lady Liberty, which shares nothing necessarily in common with those people it personifies. Of course, there is nothing inherently wrong with representing an abstraction⁵² or an abstract personification even if doing so is a lot like representing nothing at all. Such a view, however, would not explain the chill that ran down the spine of Robert DeSousa every time he announced that he “represent[ed] the United States of America.”⁵³ A person could understandably feel chills when she recognized that she represented her neighbors and friends who have entrusted her with that greatest of responsibilities—the responsibility of doing what is right⁵⁴—but the representation of abstractions cannot carry the same effect.

Clever lawyers could offer other explanations for the absence of a conflict as well. For example, representing all the people is simply being impartial. Thus, in essence, representing all the people is to represent none of the people. In addition, despite its striking circularity, one also could insist that representing all the people is simply representing justice and, correspondingly, representing justice is simply representing all the people. Alternatively, one might concede that representing all the people actually does mean representing all the people but then insist that because there are so many people in “all the people,” a conflict with any one of them only creates a tiny conflict. However, although the *Model Rules of Professional Conduct* arguably have been recently amended to allow for screening in response to such a view,⁵⁵ those rules continue to insist that the measure of a conflict is the impact on a client’s interests rather than the expense of a lawyer’s client base.⁵⁶ One might even insist that government agencies are the creation

52. *But see* ALDOUS HUXLEY, *Words and Behavior*, in *COLLECTED ESSAYS* 245, 252–54 (1958) (arguing that the personification of states is a self-deception, which can allow one to “find relief from the constraints of ordinary social decency”).

53. DeSousa, *supra* note 45, at 210; *see supra* text accompanying note 45.

54. *See* HARPER LEE, *TO KILL A MOCKINGBIRD* 215 (Warner Books 1982) (1960) (“‘We’re the safest folks in the world,’ said Miss Maudie. ‘We’re so rarely called on to be Christians, but when we are, we’ve got men like Atticus to go for us.’”).

55. *See* MODEL RULES OF PROF’L CONDUCT R. 1.10(b) (2010) (allowing screening for vicarious conflicts created by individual lawyers).

56. *See id.* R. 1.7.

of and speak for the people, or that what is good in the eyes of a government agency is necessarily good for all the people. Thus, the argument would go, when one represents an agency or agency head, one is effectively representing the people. Yet, after one has been told by more than one agency head or agency lawyer that the laws of the nation and the Constitution do not apply to the agency, it becomes hard to accept that the good of the people and the good of a government agency are always synonymous.

Private lawyers may well insist that whatever government lawyers may have to say about whom government lawyers represent or what they seek, private lawyers represent particular people or entities, and justice for these clients is represented by pursuing for them all that they may want or can get. Of course, as the current *Model Rules of Professional Conduct* make clear, what a client wants does not necessarily define what the lawyer must deliver.⁵⁷ In addition, just as Professor Zacharias has insisted that justice requires a lawyer to transcend his personal conscience and be guided by a professional conscience, perhaps justice also asks of our clients, on occasion, to transcend their personal interests.⁵⁸ Perhaps the price of asking our friends and neighbors to resolve our disputes is to yield to their vision of the greatest good.

In a story of justice shared in the Mennonite tradition, a misunderstanding arose between two farmers, John and David, about the boundary between their farms.⁵⁹ After much time and discussion, John and David agreed that they could not agree on their own, and “rather than allow any ill-feeling among themselves,” they decided to take their dispute to court.⁶⁰ As David traveled down the road on the day of their hearing, however, he found his neighbor John in his fields “hilling his potatoes.”⁶¹ David called to John to come with him to court, but John could only apologize and continue working. John shared with David that his potatoes would “suffer if they are not hilled today,” and then added, “You go to the court and tell the story. You know all about our

57. See *id.* R. 1.2(d) (limiting the scope of a lawyer’s representation of a client to matters that are not known by the lawyer to be “criminal or fraudulent”).

58. See Zacharias & Green, *supra* note 2, at 32.

59. See CHURCH, *supra* note 38, at 92–93 (quoting Paul Erb, *Nonresistance and Litigation*, 13 MENNONITE Q. REV. 75, 80 (1939)).

60. *Id.* at 93 (quoting Erb, *supra* note 59, at 80) (internal quotation marks omitted).

61. *Id.* (quoting Erb, *supra* note 59, at 80) (internal quotation marks omitted).

differences and can tell them as well as I. First put your side before the court, and then mine. Stop on your way home and tell me the verdict.”⁶²

This, in fact, is what David did, and, then, on his way home that night, as John came “to meet him halfway,” David told his neighbor, “[B]rother . . . I went to court and put both sides before them, and the court decided in your favor.”⁶³ And then, so the story goes, “David continued on his way humming a little folk melody—Mary Graybill.”⁶⁴

Of course, not every lawyer experiences the good fortune of representing clients like John and David. On the other hand, perhaps more of our clients aspire to be like John and David than we think. Maybe they just need an instrument of justice to inspire them. Thus, the next Part of this Article will seek to show that such instruments do exist within our legal system, and what they look like in their everyday work.

IV. RESPONDING TO PROFESSOR ZACHARIAS’S CALL FOR NORMATIVE STANDARDS FOR JUSTICE: PRISONERS IN THE WIND TUNNEL, PARENTS ON THE BRINK

Professor Zacharias and his coauthor Professor Green acknowledged that “norms [for the professional conscience] have not necessarily been expressed in the law,” but they insisted that a professional conscience still might be “transmitted through professional socialization.”⁶⁵ In other words, the example of attorneys who consistently transcend their own interests and manage to work for justice can instruct and inspire other lawyers in their behavior. This Part, then, seeks to articulate some “requirements” of a professional conscience by looking at the way lawyers who seek justice practice law.

Two examples of lawyers who seek justice as it has been defined here can be drawn from former students of mine who went on to become prosecutors. The first went home to work as an assistant district attorney in her hometown. While she was working there, she found out that one of her childhood friends, who was only twenty-three years old, had already managed to accumulate three DUIs but still had not lost his license. For various reasons, well-meaning judges and prosecutors had, up until then, kept finding reasons to let him off. As the friend faced yet another violation, my former student—who was now insistent and furious—went to her boss. As she put it:

62. *Id.* (quoting Erb, *supra* note 59, at 80–81) (internal quotation marks omitted).

63. *Id.* (quoting Erb, *supra* note 59, at 81) (internal quotation marks omitted).

64. *Id.* (quoting Erb, *supra* note 59, at 81) (internal quotation marks omitted).

65. Zacharias & Green, *supra* note 2, at 32; *see supra* text accompanying note 19.

I wanted him to lose his license, and I wanted him to be punished in some way that would make him realize that this had to stop. If that had to be jail time, then it had to be jail time. If that wasn't enough, then he needed to be punished in some other way.

He was my friend. I went to high school with him. I wanted him alive, and I didn't want him to have to live with killing someone.

There is both an irony and a clarity in my former student's response to her friend's behavior. In the context of a justice that seeks to avenge society or harm the wicked, my student's desire to bring consequences to bear on a friend seems ironic. After all, how could one want harm to come to her friend? Yet, in the context of a justice that seeks to bring people to a better life, my former student's response seems mandatory. In fact, as the advertising campaign so long insisted, "Friends Don't Let Friends Drive Drunk."⁶⁶

The second former student who became an assistant district attorney was known to pray for the defendants he prosecuted. During the winter months, the court administrator for my former student's county had a practice of lining defendants up in a hallway where they would stand waiting for trials or hearings without coats and the wind would rip across them every time a door opened. My former student made the administrator change that practice and move the men to someplace where the administrator would ask any other group of people to wait. After all, they were part of "the people."

My former student made friends with the homeless men who resided around the courthouse and, after work, would throw a basketball into the back of his car and drive around the neighborhoods looking for kids to shoot hoops with, hoping that if he made friends or played ball with people now, maybe he would not have to prosecute them later.⁶⁷

Of course, the pursuit of justice can be seen in the actions of judges as much as it can be seen in those of prosecutors. Judge Roger Stuart, for example, adjudicates juvenile and family law cases in Oklahoma City, Oklahoma, and he understands that each person brought before him is part of the people.⁶⁸ These people brought before him are his clients,

66. *Drunk Driving Prevention (1983–Present)*, AD COUNCIL, <http://www.adcouncil.org/default.aspx?id=137> (last visited Jan. 3, 2011).

67. Randy Lee, *Dorothy Day and Innovative Social Justice: A View from Inside the Box*, 12 WM. & MARY J. WOMEN & L. 187, 203 (2005).

68. See Randy Lee, *Judaism and John Paul II: Coming To Grips with What Law Means in the Hands of God*, 45 J. CATHOLIC LEGAL STUD. 415, 451 (2006).

and these clients are given no choice but to trust Judge Stuart not only with their procedural rights but more profoundly with their lives.

Judge Stuart takes his responsibilities to these clients seriously. He agonizes over every child and every parent who comes through his courtroom. He struggles to determine “what they need; what he can do; what he should say; who he can involve; what services and resources he should access; what punishments he should administer.”⁶⁹ Judge Stuart struggles so much with each case because he believes that he owes his clients justice: the opportunity to be redeemed, restored, and renewed.⁷⁰

If one knows where to look, one may be fortunate enough to see not only such efforts but even their fruits. A few years ago, I was invited to speak about justice at a church near Oklahoma City, and because I planned to talk about Judge Stuart and his work in my talk, I asked him if he would attend. Judge Stuart informed me that he had other engagements that evening but that he would try to make my talk, and we left it at that.

After the talk, my hosts ushered the attendees through a receiving line of which I found myself a part. One of the people who came through the line was Judge Stuart. He introduced himself to me, as I knew him only by reputation, and we spoke briefly before he indicated that he did not want to hold up the rest of the line. He said that perhaps we could talk more later and then stepped graciously out of line.

Shortly thereafter, a woman came through the line. She took my hand and thanked me for mentioning Judge Stuart in my talk. She said that several years ago her life had been a mess and the State of Oklahoma had wanted to take away her children. She had become a regular in Judge Stuart’s courtroom during this period, and at her hearings, Judge Stuart quite frequently had said to her things she did not want to hear and had insisted on her making changes she had not wanted to make.

“I wasn’t always happy with him at the time,” she told me, “but thanks to Judge Stuart, my life got better. I can’t tell you that I’m perfect now or my life’s always easy,” she continued, “but I was able to keep my kids, and I’m on the right track, and we’re really a family.”

The woman paused for a moment, and then added:

I work down by the courthouse, and sometimes, when I’m walking by, I think I should go in and thank Judge Stuart for what he did for me and for my children, but then I remember how busy he is and how he wouldn’t really have time to talk with someone like me, and I just keep walking, but someday, I would like to thank Judge Stuart for what he did for us.

69. *Id.*

70. *See id.*

It was at that moment that I interrupted the woman and asked her if she was serious about wanting to thank Judge Stuart. She looked at me curiously and then indicated that she was, at which point I said, "Well if you really want to thank Judge Stuart, he's standing right behind you."

The woman turned and gasped, and then threw her arms around the neck of the Honorable Roger Stuart and hugged him. Her life and her hug were fruits of justice, fruits that should tell all of us that, however complex and amorphous justice may be, we ought to be able to recognize it when we see it.

V. CONCLUSION

Several years ago, I was trying to get my son across town from his job to his dentist appointment. It was a twenty-minute trip, but consistent with the way life and family schedules tend to work, we had thirteen minutes in which to make it. Even factoring in the five minutes the dentist allowed one to be late before he gave away one's appointment, our journey could not be accomplished within the ordinary laws of nature. As a husband and father, however, I was committed to trying anyway.

Through a series of inspired route choices and perhaps some equally inspired driving, I found myself within striking distance of the five minute grace period with only a traffic light and a pair of turns between us and our appointment. Unfortunately, as we approached the traffic light from a distance, it had the appearance of a stale green, a light hungering to transform itself into amber and then to red, and we had to make that light. I felt my foot press down on the accelerator as my eyes fixed on the light.

All matter around me dissolved as my world became only me and that light, and my son and I made it through the intersection before the light could turn red. I reassured myself that we now would make the dental appointment, breathed a sigh of relief, and made the first of my final two turns. It was at that moment that I noticed the flashing light in my rearview mirror.

The officer who pulled me over assured me that he had no interest in raising my insurance rates or making money for the township. He had, however, been awestruck at the speed at which I had traveled through the intersection and was concerned because there had already been two fatal automobile accidents on that stretch of road that year. He said he only wanted just to make sure my son, I, and others who traveled that

road stayed safe. All the time that the officer was talking, I was hoping that—as I had never before had so much as a parking ticket—he would give me a warning and let me go. Instead, he gave me a ticket and told me to slow down.

The officer was very polite and respectful through all of this. I was angry and frustrated. As I sat there in my car, my thoughts were probably very much like those of the woman when she had been called into Judge Stuart's courtroom and like those of so many people prosecuted each year by government lawyers. This police officer, this guy, did not understand my life, my circumstances, or what I needed to be doing at that moment. I didn't need his rules, I didn't need his driving tips, and I certainly didn't need his justice. I just needed my own way.

Five years later, however, I am still alive, my son's still alive, and no one else has died on that strip of road. I continue to be conscious of the need to approach driving differently than I did on that day, and I have received no more tickets. My son has since gotten his own license and remains infraction free as well. Perhaps that is all because that policeman did justice. Perhaps it is because he saw me as his client and did as his professional conscience required. In any event, I suspect that this is how Professor Zacharias thought justice and law should work.

When my kids were growing up and they asked me what I did for a living, I often wished for a better answer than that I was a lawyer. If only I could have told them that I was a cowboy, or a fireman, or a ship's captain, something that they could have gotten their heads around or something they, themselves, aspired to be.

I think, however, that if lawyers commit themselves to doing what Professor Zacharias called them to do—to develop appropriate responses to what justice requires of them and to seek to listen to a conscience bigger than their own interests—a day will come when a generation of lawyers will have an answer to that question from their children that their children can embrace. I think one day children will ask their lawyer mothers and lawyer fathers, "What did you do at work today," and their parents will respond, "Do you remember that story in *Harry Potter*, the one where Harry saves Ron, and restores their relationship, and makes the world a better place. That's what I did today as well." When that day does come, we will thank Fred Zacharias for helping us all to bring it here.