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[This is a very rough draft, with some original handwritten line edits, of a speech that was hastily typed on a laptop computer prior to delivery. I do not have a final, clean version of this speech.]

YALE LAW SCHOOL PREISKEL/SILVERMAN SPEECH  
NOVEMBER 12, 1993

Doing What's Right: Ethical Questions for Private Practitioners  
Who Have Done or Will Do Public Service.

I was delighted to be invited to speak to you today. I have very fond memories of my time at Yale and returning is a pleasure, particularly when I am given an opportunity to discuss a topic for which I have a passion: public service, and which, I am gratified to see, the Law School has grown to appreciate. My years here were the transition years away from the social and political upheavals of the Vietman and the post Kennedy civil rights years. As a result, although at that time there was a core group of students involved in public service projects with Legal Aid and capital punishment cases, the clinical programs were very limited and the core group very small. I myself was more involved in purely academic pursuits with law journals than in public service concerns. As I have interviewed law clerks this past year, however, I have been delighted with the expansion in the variety of clinical programs at the law school -- the Mental Disability, Immigration, Greenhaven, Prisoner Rights, Homeless Advocacy, and Housing programs (I'm sure I've missed some and apologize) and I have also been impressed with the leadership role Yale has taken in work like the Haitian Refugee project.

Certainly, Yale's faculty has always and does provide intellectual challenges for its students. For some of us, the abstract study of law itself is fascinating. Nevertheless, it is exciting to combine intellectual engagement with social good and I

appreciate that the culture at the Law School must be much more stimulating on social issues than it was when I was here. It is always nice to see change for the better.

In very recent years the law school's leadership role in supplying our nation with public servants has been particularly noticeable. Yale has always done so. In my time, we had people like Cyrus Vance as Secretary of State. Now, however, the Law School has filled some very visible public positions like the Presidency of the United States, back-to-back, and the Supreme Court with its alumni. I am sure the publicity has not harmed Dean Calabresi's fund raising efforts or diminished the attractiveness of the law school to potential applicants. It is this very type of symbiotic relationship between public service and private benefit that aroused my interest in the topic I have chosen today.

The presence of our alumni in public positions underscores the fact that individuals with strong intellectual and income producing capabilities are often drawn to public work and service. Clearly, there is a drive and need in many such people to "do good" for others and it is a drive that motivates people to forego money -- for the ill-paying scale of public work is legendary -- and to endure the often disheartening frustrations occasioned by the limited resources generally available to government legal agencies and public interest law firms to do their work.

Recognizing the onerous burdens that choosing public service imposes, I hesitated in raising my topic -- Doing What's

Right: Ethical Questions for Private Practitioners Who Have Done or Will Do Public Service." My topic suggests that I am advocating an additional burdens to an already disadvantaged option and attempting to undermine one of its very few but very potent attractions -- the creation of contacts and knowledge which can later assist in private practice. I certainly do not want to discourage public work. Nevertheless, newspaper accounts are almost daily reporting on incidents that not only call into question the ethicacy of how private industry uses former public employees to lobby public entities but how public service lawyers exploit their former public positions or anticipated future positions to earn money in their private practice.

The Secretary of Commence Ron Brown's actions have starkly illustrated my point. Mr. Brown before leaving his very prestigious Washington law firm to join the Clinton administration, wrote to his clients to bid them adeau, In the process he reminded them of his new appointment and of the competence of his partners to serve their needs, He also invited them to stay in touch with him and visit him. Mr Brown has also chosen not to recused himself as Secretary from involvment in issues that effect companies who retain his former law firm. As an aside, I might mention that Mr. Brown's son has been hired by a lobbying firm with a clientele similar to that for which Mr. Brown had worked. Mr. Brown's actions in protecting his income-producing potential after he leaves the government has been very direct and well publicized. I do not address here any potentially illegal actions like the recent

Justice Department's investigation of Mr. Brown about an allegation that he has accepted payment in return for attempting to influence US policy on Vietnam. That type of conduct is clearly controlled by legal standards. My focus is not what is already within the law, although I will allude to it in order to mark our starting point, but my question is where should we place the ethical line at which self-promotion for future benefit should be placed.

We should be careful in judging Ron Brown because he may simply be unapologetic about a reality that is an integral part of public service. In fact when questioned about his lobbying during his confirmation hearings, he off handedly retorted that it only proved he was an effective advocate. The major elect of New York City, Rudy Giuliani, a former US Attorney was hired by three law firms after his initially failed run for major four years ago. The three law firms paid him and an assistant about half a million dollars a year to join them. At none of the firms did he generate that much in client billing and this <sup>MAX</sup> accounts for his leaving two of those firms. However, it was an interesting investment for the law firms that are not lobbyist in the Washington sense and also unquestionably a very generous perk of public service for Mr. Rudy Giuliani when he had to make a living in the private sector. Similar to the major-elects story, when Robert Abram attorney general of NYs decided to leave public service after more than two decades, he was hired by one of the premiere law firms of NYC to develop business with the former Soviet Union countries. Now, Bob Abrams for the last eight years has run a state office and prepared  
...  
a failed campaign for the Senate. I'm impressed that he had the time to develop skills and contacts with the former eastern bloc.

These are very direct examples of how public service is exploited in private practice. Some of you may want to argue that

these examples are titilating but that they should not drive the discussion of ethical rules because this level of benefit from former public service is limited to just a few, elite public officers. To the extent that common <sup>people</sup> folks can exploit their former positions, well, there generally are laws which control those situations. For example, President Clinton has passed an executive order that <sup>no</sup> executive aides must commit to not lobbying before government agencies which they supervised for five years. Similarly, most government agencies in most cities and states bars, <sup>for</sup> lawyers from working before the agency that had employed them, ~~for~~ <sup>at least two years!</sup> ~~at least two year~~. However, these rules simply address the more blatant forms of exploitation of public service. They do not address the more subtle forms.

For those of you who may not realize it, government agencies like Legal Aid societies, United States Attorneys Offices and District Attorneys offices ~~often~~ forge personal relationships that exist for lifetimes and those relationships influence appointments to other government jobs as well as the swapping of business in private practice. This is contact building at its best and most subtle because it doesn't implicate lobbying but it does <sup>involve</sup> ~~implicate~~ private gain.

I draw on a personal example to illustrate my point and to underscore that this subtle exploitation of past public service is not <sup>as</sup> ~~a~~ question without <sup>quite</sup> ~~significant~~ importance <sup>both</sup> to the individual involved <sup>and</sup> ~~but~~ to our society, in general. ~~The consequences are~~ important. As you know, I started my legal career with Robert

Morgenthau office, Manhattan's District Attorney's office. When I left there I went into private practice. I did not practice criminal law <sup>at my firm</sup> so I did not have the opportunity there to exploit the knowledge of criminal law and the criminal justice system <sup>that I had argued.</sup> Nevertheless, my <sup>prior</sup> association with Mr. Morgenthau did assist in my appointment while in private practice to serve on a number of public committees -- the NYC Campaign Board, the New York State Mortgage Agency Committee, the Governor's task force of race and cultural relations, and on PRDLEF, The work for the DA's office in combination <sup>with</sup> of the prestige of my partnership in a firm that specialized in international business law made me an attractive candidate for public service on boards <sup>and</sup> of directors. <sup>of these types of organizations</sup> I took personal pride that I never attempted to draw on my work for these <sup>organization</sup> projects to generate work for my firm. I never accepted appointment to a committee involved in any of my firm's specialities and I did not have my partners try to develop new business in the public service areas in which I was involved. Needless to say, some of my partners felt that my decisions <sup>as</sup> were a bit counterintuitive <sup>productive</sup> for them and somewhat burdensome. ~~for the firm.~~ My contributions of time to public service was obviously at the expense of my firm. <sup>f</sup> Despite a standard that most lawyers do not adhere to, I am not pristine and do not intend for you to conclude so. When Senator Moynihan's committee reviewed my qualifications for the federal bench, they spoke to all of the people I served <sup>with</sup> on these various boards ~~with~~. Equally significant, all these people -- participants in the public service arena -- in turn were friends

with the people who sat on the Senator's committee--those people too were public interest veterans. Who knows, ~~who~~, who knows who? Now, there is nothing <sup>inherently</sup> wrong in people who know you giving recommendations. I suspect almost everyone would agree. However, remember that in private practice this process resulted in my being able, for a very personal gain, to exploit my public service to get a very attractive job, <sup>as federal judgeship</sup>. The process of patronage appointments in government is well known as is the ills it occasions. But, is the subtle benefit of having people know you who are influential any less dangerous than direct patronage? Is the most qualified person the one who knows the <sup>friends of or the themselves</sup> decision makers and has impressed them for whatever reason? How does the really smart lawyer with extraordinary legal skill equalize the field and get selected on merit? Now, like with all these issues, the question gets fudged and lost in the quagmire of how do you define "qualified." Some would say that an individual whose talent hasn't come to the attention of others may not have all the necessary skills for a public position. But this type of answer begs the <sup>issue</sup> question and doesn't address how one could <sup>or should</sup> minimize influence. <sup>Assuming</sup> Obviously, however, that one has accepted the proposition that the influence of who you know is an ill, how do you control it? <sup>Should we combat it?</sup>

<sup>as noted</sup> For many years, most governments and good government groups have centered their attention on controlling the contributions of special interest groups, generally businesses and corporations, to political campaigns and in limiting the lobbying efforts of former public employees immediately after they leave

office. For example, we have the Federal Elections Law and many states, and cities, including New York City have passed comprehensive laws not just limiting contributions to campaigns but imposing extensive reporting requirements about both expenditures and contributions. We have federal laws on lobbyist reporting their work and contributions and on elected officials accepting payments or benefits from lobbyist. All the complicated and extensive ethics and conflict laws and regulations, however, are generally not enough fully to address the subtle forms of public service exploitation in private practice.

I will be drawing many examples brought to my attention on this issue by my prior service on NY City's Campaign Finance Board. I was a founding member of that Board and participated in formulating NYC's comprehensive regulations on campaigns. I served on the Board with pride until my appointed to the bench. NYC's campaign rules have been praised and touted as exemplary by many good government groups. My experience on this Board taught me some very important lessons. No matter how stringent and detailed your rules might be, those intent on evading them will manage to find a way and those intent on breaking them will. For example, NYC's campaign law limits not just contributions to but expenditures by campaigns. Exempted from the campaign expenditure limit are those expenses related to complying with the law. In this last election in New York City, Mayor Dinkin's campaign was investigated because they attributed to this exemption a very high percentage of the salaries of some of their most costly campaign

workers, like the Campaign Manager. Now I was not a member of the Board during this investigation and am only relating what I have read in the papers, but the Board disallowed these deductions and fined the Dinkins campaign over a quarter of million dollars for false reporting. This is not an insignificant amount when your limit for the entire campaign cycle is only about, if I recall correctly, 4mil, and you are in the last week of a close race. The Board has announced that it is now thinking of passing a rule that would limit the campaign law compliance exemption to 15% of total expenditures. Again, I do not suggest that the Dinkins campaign <sup>intentionally</sup> broke the law, I simply point out that for every ethics rule some one will seek a way around it.

Ethical rules by their very nature are generally self-regulating. Few organizations or agencies have the resources to investigate fully the panoply of ethical violations that arise. The rather limited success of bar associations in monitoring our profession is a testament to this failure. Just last year, New York State's insurance reimbursement to victims of legal malpractice totalled over, I believe, 10 million dollars.

~~Those bent to break ethical guidelines are rarely caught.~~

Now, influence peddling is rarely committed to writing or visible. While on the City's Campaign Board, I was disappointed to learn that a partner in a major City law firm had arranged to have a number of his partners give contributions to a campaign and then had the firm reimburse the partners for their outlay. Our Board's <sup>own</sup> law limited the contributions a partnership or a corporation could

make, therefore, by having the individual partners write checks, the firm's contributions limits were ignored. The law firm was investigated by the NY City District Attorney's office and ultimately reached an agreement where it was not prosecuted in exchange for paying a fine of over 100, 000. Now, at moments I wasn't sure whether I was disappointed because members of our bar were implicated in a charge of intentionally seeking to violate laws or whether I was disappointed that they were so ignorant in how they went about their actions. Issuing their partners back-to-back checks for contributions given to the campaigns seemed rather unsophisticated. The episode, however, made me realized that it would have taken very little for the firm to evade the law, it simply could have waited until the end of year and silently incorporated contributions into its compensation calculations for its partners

Well do these limitations in <sup>policing</sup> ethical rules <sup>mean</sup> suggest that we shouldn't have them? Absolutely not, despite the burdens imposed by such rules and even in the face of their non-enforcement history, ethical rules set the parameters of what we as a society find acceptable. In all human pursuits, we have to rely on the good will of the participants in our endeavors. No one has the resources to enforce all laws. By having rules, <sup>however,</sup> we stimulate discussion and we stretch ourselves to improve our commitments to our goals. Accordingly, I excuse my selection of my topic today by pointing out that the rules I ask you to think about are not intended to scare you away from public service. Neither do I

believe the rules should be thought of as burdens on public service. Instead, I encourage you to accept the consideration of them to inform your conduct as you make choices in the future of what limits you will set upon yourselves when you leave public service and begin earning a living.

Among the campaign promises that President Clinton has had difficulty in achieving, has been in honoring his commitment to pass ethical rules for his administration which would be the most exacting of their kind. Now, the President has passed rules which are much more comprehensive than his predecessors. Nevertheless, with many private business candidates indicating they could not accept a place in his administration if the broad rules he originally proposed were passed, President Clinton had to reduce the scope of his rules. SO, from an original proposal that would have barred an administration employee from lobbying for five years before any federal agency, the new executive order he passed bars lobbying only from those agencies an individual supervised. The rule, however, does not prohibit the aide from working for an organization that does lobby in this way, but only limits his or her personal lobbying efforts. The way around this rule is self-evident. As the NY times observed "remote control" lobbying is almost impossible to detect and can be done without violating the letter of the rule, although it might violate its spirit. For example, the rule does not appear to prohibit a former agency employee from explaining to a colleague how the public aspects of his former agency operate.

Not just lobbying is controlled by regulation for a period of time but other typical rules bar lawyers from arguing cases or handling cases before agencies they have worked with for a period of time. However, just like remote control lobbying, this rule does not control the influence and benefit of not who you know but what you know about government regulations and rules. Although Most government rules bar appearance before an agency for a period of time, the rule doesn't bar the attorney from giving clients legal opinions or from exploiting the special knowledge imparted by working in any area of the law while in public service. This may account for why so many lawyers who practice tax law were IRS agents. Recognizing that particularly for lawyers their is an *great* advantage solely in specialized knowledge, should we be limiting their ability not just to practice before an agency but to practice in an area at all for a period of time? How long is enough? Should time measure it or if not, what circumstances. Do we consider evening the playing field by keeping a player out all together. Now, there is the argument that a public service employee was disadvantaged by poor pay for a period of time, and should not be kept from making a living for a longer period. However, the presumptions of that argument may be changing in our society. With the recession, for example, many mayor law firms have reduced their staffs. With that reduction has come a very talented pool of individuals to the public world. But there as well, jobs are limited and can one, in a recessive economy, really say that anyone who has had a job at all is "disadvantaged" because pay is low? I

doubt the unemployed lawyers out their would agree.

Well, what is wrong with special knowledge about a field? In a vacuum, nothing, but where does the possession of that knowledge unfairly disadvantage an opponent and isn't the public weal harmed when those who have served it, denigrate it by manipulating it. I venture no opinion on right or wrong here, I simply raise the question and ask whether recognizing the question, the bars in private praction should be broader than they now are. Should you bar lawyers from practicing in their specialty? Should that bar be total for the government entity with which an attorney worked so that the lawyer shouldn't work for a firm that does practice before that agency? How far the bar?

And, what do we do about sublte influence. There are many government entities, for example, who now put out their legal work for bidding. Yet, lawyering is a service which has very little objective criteria for measurement, You can ask a law firm how many cases have you handled in this area of the law but the inquiry has limited value because it tells you nothing about the complexity or quality of the cases handled. I can assure you that multimillion claims are often less complex than the habeas cases that come before me. Thus, bidding has its disadvantages for the public weal and in any event, it is not a fool proof way of controlling influence. Who gets invited to bid sometimes depends on who know who and knowledge imparted between friends on how to attractively structure a bid is valuable information. Finally, in close bids, a former agency employee whose talent is known, still

has an advantage. Is there something wrong in giving or selecting a friend whose work we know to be good something bad? Why do we usually say no. Most lawyers send work to law school friends and for sure, lawyers often send work to people they worked with in public service. Do we control that -- how? Should we bar it? Should we have rules requiring that people on selection committees for granting jobs or appointments never review the application of friends. Should you require selection committees <sup>to set forth</sup> their prior experience with an applicant who they are proposing.

Should you require selection committee members <sup>to remove themselves altogether</sup> from involving themselves at all in a process in which they know a lead contender? How do or do you want to make up for personal knowledge gained through public service. When and where? <sup>if you do, how do you define know or level of friendship</sup>

I started my saying that I was a proponent of public service. Doing good for people is generally the highest reward of public service. It would be naive and disingenuous for anyone to argue that all use of the knowledge and contacts developed in public service should be outlawed. Use of public service in private practice is not and should not be a "dirty" thing. As I explained earlier, while at Yale, I went through a fairly traditional career - I did journal, I worked for a big law firm, I was interviewing till almost the end exclusively with firms. Fortuitously, one evening I was leaving the library when I smelt food in a conference and I walked in. A panel on public service job alternatives was going on and Robert Morgenthau, the DA of Manhattan and former US ATTorney of the Southern District of New York was speaking. He was

describing the work of his office, and at the end of his speech in which he had touted the importance of the work, its challenge, etc, he said to the group that he could promise anyone that came to work for him the greatest amount of responsibility and the power to exercise it in cases at an earliest point of our careers. He predicted that it would be years before anyone who left his office would be given as much responsibility and no other lawyers out of school would be given comparable experience. Having just spent a summer working in a big and famous law firm, and having watched a seventh year associate worked almost 72 hours straight on a temporary restraining order and then seeing the partner briefed for an hour argue the case, Mr. Morgenthau convinced me I was on the wrong track. I spoke to him that night, interviewed with him the next day and he invited me to NY. I went and at the end of the day, he offered me a job, I <sup>took</sup> thought it and have never regretted the decision. <sup>days he explained</sup> The path he gave me has <sup>led</sup> led to my <sup>having</sup> doing the best job any lawyer could ever have--being a judge, and particularly a federal judge. What Bob Morgenthau didn't tell me was that the alumni from his employment populated all levels of government, that my co-workers over time would rise to high levels of government and that the friendships I formed in my work in his office and by my association with him would be important the rest of my life. This is important for you to know and what is equally important to appreciate is that the process has great value. Part of that process, however, is recognizing that we should not abuse it and should, as part of our commitment to our ideals, strengthen by

thought and discussion the close questions. I hope you are not disappointed by <sup>my</sup>not presenting a detailed ethics proposal. I did not do so because groups like Common Cause spend their time developing those proposals and they are a better source for specific ideas. My intent was to stimulate your thought about these issues and to invite you to give them thought as you choose among your career options now and later in your lives. Thank you for having me.

I need only point to the heart breaking example of Elizabeth Holtzman, the former Congresswoman who rose to stardom during the Watergate Congressional investigation and who is soon to be former Comptroller of the City of New York. Ms. Holtzman's political career of twenty-five years has been halted by the taking of a political contribution from a bank whose affiliate was actively seeking and subsequently was granted by Holtzman's office a significant part of the city bond business. There are many questions concerning the Holtzman situation and I do not mean to imply that she violated any laws or even any ethical rules, but I use her example only to suggest that the fine line between public service and private interest is always a close one.