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MACKINNON'S ENGAGED SCHOLARSHIP

José E. Alvarez*

When I agreed to do this commentary, many of my colleagues wondered why. What does my field, international law, have to do with women? Before MacKinnon, the answer was not much — at least there was not much international law *explicitly* about women. MacKinnon made us see that this was in fact a problem. Her scholarship in action taught us the meaning of international law's silences. We owe her an enormous debt. Her classics *Feminism Unmodified* and *Toward a Feminist Theory of the State* showed us that the interstate system, like all systems of law, is gendered; that international law — like the states that make its rules — do plenty to women, often by sheer omission.¹ MacKinnon's signature ideas — the power that lies behind seemingly "neutral" rules, the role of male privilege in the construction of hierarchal rules and dominant law-making actors, the invisibility of those subordinated by the normative public/private divide, the flaws in Aristotle's restricted notions of equality — came relatively late to us, filtered through the work of some of our own, especially Christine Chinkin and Hilary Charlesworth, who took MacKinnon's work seriously enough to present the first feminist critique of the field in 1991.² But when these ideas arrived, they proved as transformative to us as they have been elsewhere. They challenged our sources of law, our state centrality, the interplay between power and law, how our international institutions worked (or failed to), and the ways others (and not just states) could be made accountable. International lawyers have been feminist late-bloomers but many of us, myself included, have become enthusiastic acolytes of MacKinnon's brand of theory built from practice.

Over little more than a decade, MacKinnon launched a critique of international law to rival those built on law and economics, McDougal/Lasswell's Yale School of international law, and Abe Chayes' international legal process. Today, feminist critiques of international law, along with other critical perspectives, provide the most vibrant new insights in the field.³ It is important to recall just how stinging MacKinnon's rebukes to hoary international legal concepts have been, since they help to explain both her impact as well as the vehemence of some of her detractors. A few of her bon mots suggest the

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1. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

2. Hilary Charlesworth, Christine Chinkin, & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991). See also HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW* (2000).

3. For one collection of some of the leading voices in the field, see, e.g., *RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW* (Dorinda G. Dallmeyer ed., 1993).

bracing nature of her pen.⁴

On international human rights:

“Human rights principles are not based on the experience of women. . . . When things happen to women that also happen to men, like being beaten and disappeared and tortured to death, the fact that they happened to women is not noted in the record books of human suffering.”

“What happens to women is either too particular to be universal or too universal to be particular, meaning either too human to be female or too female to be human.”

“What most often happens to women escapes the human rights net. Something — jurisdictional, evidentiary, substantive, customary, or habitual — is always wrong with it.”

“Women’s absence shapes human rights in substance and in form, effectively defining what a human and a right are. . . . Half of humanity is effectively defined as nonhuman, subhuman, properly rightsless creatures, beings whose reality of violation, to the extent it is somehow female, floats beneath international legal space.”

“Male reality has become human rights principle. . . . [W]hen men use their liberties socially to deprive women of theirs, it does not look like a human rights violation. When men are deprived of theirs by governments, it does.”

On the international rules governing the conduct of war:

“[M]en do in war what they do in peace. When it comes to women as civilian casualties, the complacency that surrounds peacetime extends to war, however the laws read. . . . The more a conflict can be framed as within a state, as a civil war, as social, as domestic. . . . [t]he closer a fight comes to home, the more feminized the rights and the victims (no matter what their sex) become.”

On sovereignty:

“[N]o state effectively guarantees women’s human rights within its borders. So, internationally, men’s states protect each other from women’s rights the way men protect each other from women’s rights

4. All quotations are drawn from CATHARINE A. MACKINNON, *ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES* (2006).

within states. Sovereignty is the name of the principle in the name of which men respect this.”

“When men begin behaving to some other men and women the way they have been behaving to “their own” women all along, it is not called male dominance, it is called nationalism.”

“[S]overeignty [is] an element of male ideology. . . . [T]he notion of sovereign dominion structures legal recourse in the form of doctrines of jurisdiction at every level of procedure, from the domestic through the international. It begins at home, “a man’s . . . castle.” . . . Historically, women have had to leave home to get justice within it. . . . Overcoming a systemic reluctance to intervene in what are called domestic conflicts in the private sphere . . . women got local regulations, state or provincial laws . . . as close to home as possible. . . . [These] [l]aws against rape and domestic violence . . . continue to be interpreted and implemented through a familiarity exemption, meaning the closer the man is to the woman, the more he can violate her.”

Describing Bosnia-Herzegovina and Croatia in the mid 1990s:

“This is how states are made. . . . [T]his is one way communities are destroyed and states are created: by whom you can rape. . . . [T]he process we are witnessing is a part of a process through which nation-states have often been created.”

On sovereign immunity:

“Sovereign immunity protects [state actors within states] in the law of nations. This is patriarchy writ large.”

On international comity:

“[T]he balance of terror between men through which some men respect other men’s license to abuse women at home underlies the notion of ‘comity’ in [international law], as well as effective exemptions from international prohibitions on misogynistic cultural practices.”

Most recently, at my law school, MacKinnon delivered a public lecture that was the perfect embodiment of her method: reality-based theory intended to create fresh understanding and affect change.⁵ Her talk, entitled “Women’s September 11th,” dared to compare the “war” on terrorism to the demonstrable non-war on violence against

5. *Id.* at 259. See also Catharine A. MacKinnon, *Comment: Theory is not a Luxury*, in *RECONCEIVING REALITY*, *supra* note 3, at 83-92.

women, which is responsible, like 9/11 itself, for some 3,000 victims every year in the United States alone.⁶ MacKinnon noted the numerous international legal innovations now afoot in the wake of 9/11: the redefinition of non-state actions as constituting an “armed attack” under the U.N. Charter,⁷ the extension of responsibility to states that harbor such non-state actors,⁸ and the willingness to permit defensive actions to the continuing threat of terrorist acts.⁹ She compared these unprecedented legal innovations to the continued unwillingness to deal seriously with other non-state actors who commit or threaten to commit violence against other civilians — mostly female and within the home — and are equally “harbored” by the action/inaction of states.¹⁰ One could hardly have planned a talk more suited to giving offense to all sides of the political spectrum. Those on the right were offended by equating a “real” war to what, in their eyes, could only be a “rhetorical” one while the liberal pacifists were disturbed by the suggestion that any “war,” whether against terrorists or wife abusers, could ever be justified. Of course, provocative engagement bears a price: Professor MacKinnon’s talk has so far not been published by any law review.¹¹

Engaged scholarship — particularly the kind that casts doubt on virtually every supposed verity (however untrue) of a field — including the premise that international rules are an objective *alternative* to politics — does not win you friends. These days, engaged scholarship even seems a bit old fashioned. Judge Harry Edwards’s 1992 plea in the Michigan Law Review that scholars be relevant to judges and other practitioners now seems . . . so yesterday.¹² There is such exciting post-modern jargon to play with if we stop spending precious time with tedious real world facts or, better still, can just *talk* about doing empirical work without actually doing it. Engaged scholarship of the activist sort may even be a trifle dangerous these days, especially if it is so critical that it appears unpatriotic — or at least can be made to appear so. And if being engaged means that you fail to chase the latest post-modern fad, it may not even get you tenure or those valuable post-tenure lateral offers, especially if some of your work looks suspiciously like the work of those tied to the third rail of legal academe, namely clinicians. Practitioners of engaged scholarship definitely pay some costs *in the academy*.

MacKinnon’s achievements suggest some of the rewards of engagement *in the real world*. Because her scholarship results from and addresses actual problems, MacKinnon’s wide-ranging rebuke of international law’s inadequacies is (slowly) reforming the practices of governments (including some constitutional courts) and leading to gender mainstreaming in institutions as distinct as the World Bank and the U.N. It is slowly transforming, despite considerable reluctance, international criminal law, including international criminal courts. Her ground-up theory of sexual harassment as sex discrimination has influenced regional human rights courts as well as national

6. See MACKINNON, *supra* note 4, at 259-61.

7. *Id.* at 264.

8. *Id.* at 268.

9. *Id.* at 272-73.

10. See *id.* at 260-63, 268-69.

11. It is included in MACKINNON, *supra* note 4, at 259.

12. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34-41 (1992).

laws around the world. As is documented by MacKinnon's casebook on *Sex Equality*, the normative ripples of MacKinnon's ideas have extended to national and international rules concerning the family, criminal law, lesbian and gay rights, reproductive control, trafficking, affirmative action, and free speech.¹³ MacKinnon's (re)conception of equality is a global concept worthy of a globalized world.

Because of MacKinnon's brand of engaged scholarship/advocacy, the United States Court of Appeals for the Second Circuit established the civil component to Nuremberg in the famous *Karadzic* case - now essential reading in all basic international law courses - thereby permitting numerous victims of "ethnic cleansing" to tell their stories and have a judge and jury declare rape to constitute genocide, along with an award of \$745 million in damages.¹⁴ Because in substantial part of MacKinnon's scholarship and unrelenting pressure from her and other feminist advocates, international tribunals - from the ad hoc war crimes tribunals for the former Yugoslavia and Rwanda to the new International Criminal Court - now recognize that harms done to women as women can constitute international crimes and these institutions are more willing, which Nuremberg never was, to prosecute rape and other forms of gender violence as war crimes. We have MacKinnon's work in part to thank for the increased sensitivity to reporting gender-based violence by human rights NGOs, for the greater attention to the needs of all victims in the procedural and evidentiary rules of modern international criminal tribunals, including through rape shield rules, and for refreshing emphasis on including female judges and prosecutors in these tribunals. Her work with atrocity's victims also helped inspire the powerful NGO coalition that pushed for provisions granting victim rights to monetary compensation and to representation in the statute of the International Criminal Court.

Because MacKinnon's brand of concrete, engaged scholarship has thrown a harsh light on how more than half the world's population are actually treated, international bureaucrats, some governments, and NGOs have been shamed enough to begin to address the realities of discrimination against women. They are beginning to suggest that violations of equality may occur as a result of social or cultural as well as legal practices, through actions at home as well as in the public sphere, whether resulting from indirect or direct state action, and whether systemic and inadvertent or intentional. It is appropriate and predictable that MacKinnon's own international women's rights organization, Equality Now, has filed the first complaint under the optional protocol of a treaty that, at least formally, recognizes these realities, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), that her organization is even now seeking to convince the committee charged with that treaty's interpretation to establish concrete benchmarks for determining whether states are in fact taking "all appropriate action" to address women's inequality, and that this organization has also filed the first complaints filed before the U.N. Commission on the Status of Women targeting 40 countries' explicitly discriminatory laws..

13. CATHARINE A. MACKINNON & ELIZABETH A. LONG, *SEX EQUALITY* v, v-vi (2001).

14. *Kadic v. Karadzic*, 70 F.3d 232, 236-37, 242 (2d Cir. 1995); Plamenko Cvitik, *Judicial Triumph for Victims of War: "Karadzic Owes Me U.S. \$35 Million*, NACIONAL DNEVNO ONLINE IZDANJE (July 29, 2008), <http://www.nacional.hr/en/clanak/47722/karadzic-owes-me-us-35-million>.

MacKinnon's activist scholarship is threatening to many precisely because it is so concrete; because it rises from how women are treated and takes women's real world experiences as the basis for theory. It is capable of generating real world reaction because it is not position-less; because it exposes, based on demonstrable evidence, that ostensibly "objective" or disengaged theory relies on unchallenged, unacknowledged assertions of male (and increasingly hegemonic) power.

MacKinnon's work has led to prominent detractors within the academy — particularly those who, in an avowedly "postmodern" vein, argue that we need to "take a break" from feminism¹⁵ because it portrays women as victims, focuses on women as women (and is therefore "essentialist" or insufficiently "culturally sensitive") — as if women throughout the world have ceased being all too often victims, as if recognizing this fact is the problem, or as if recognizing common needs to respect human dignity is necessarily inconsistent with recognizing cultural and other particularities. However, I will leave critiques of the feminist critics to others.¹⁶ More to the point is the counter offered by people like Stanley Fish. In his parting shot to the academy on his retirement, published in the *New York Times* last May, Fish argued that scholars should remain scholarly and not engage in "partisan advocacy."¹⁷ Fish says that our job is to interpret the world, not save it. We have enough to do if we focus on our job, which he identifies as the search for and dissemination of "truth," maintaining standards in our curriculum, correcting how our schools are run, and making sure that we teach well. We should leave to others the larger tasks of forming character, fashioning citizens, or combating the world's evils. As a subsequent letter to the *Times* pointed out, Fish's position seems odd for someone who has himself written lengthy articles far afield from his own academic specialty, including on feminism, presidential elections, affirmative action, church and state, and the media, but never mind . . .¹⁸ The rest of my remarks will address why Fish is wrong when it comes to legal academics and especially for those who write about and teach international law.

At least since Watergate if not before, law professors have been mandated to teach professional responsibility — and hopefully not only in a two credit required course on "professional responsibility" but throughout the curriculum including in subjects not required for the bar, like international law. We are required at least to try to form lawyers with character, responsible practitioners able to distinguish the moral from the immoral use of the law. Given the ever expanding role of law and lawyers in our society, it seems inconceivable to distinguish our task as ABA-accredited fashioners of lawyers from the task of fashioning responsible citizens whose own responsibilities include abiding by national (and international) law.

In my basic course on international law next semester, I plan to assign at least one of the infamous Bush Administration "torture" memos precisely in order to raise questions concerning the professional responsibilities of the international lawyer.

15. See, e.g., Janet Halley, *Take a Break from Feminism?*, in *GENDER AND HUMAN RIGHTS* 57 (Karen Knop ed. 2004).

16. Including MacKinnon herself. See, e.g., MacKinnon, *Postmodernism and Human Rights*, in *MACKINNON*, *supra* note 4, at 44.

17. Stanley Fish, Op-Ed., *Why We Built the Ivory Tower*, *N.Y. TIMES*, May 21, 2004, at A23.

18. John Allen Paulos, Letter to the Editor, *Academics and Politics*, *N.Y. TIMES*, May 28, 2004, at A20.

These torture memos, such as the *Working Group Report on Detainee Interrogations in the Global War on Terrorism* dated March 6, 2003, are an excellent example of legal work that is, *on its face*, disengaged.¹⁹ The March 2003 memo, for example, purports to address merely “the requirements of international law, as it pertains to the Armed Forces of the United States, as interpreted by the United States.”²⁰ These memoranda do not *purport* to be partisan; they are the very embodiment of dry, disembodied, apolitical (even a little boring) legal analysis. As written, these memoranda are the lawyers’ equivalent of “just the facts,” unencumbered by partisan agenda. Perhaps Stanley Fish would like them, but I doubt it. As we know, the conclusions reached in these memos — that prohibited torture requires a specific intent to inflict grievous bodily harm for its own sake and not to secure information or to save the nation, that torture consists of only the most extreme methods of coercive interrogation, that U.S. laws on torture do not extend to Guantánamo, and that in any case the Commander in Chief can disregard any statutory or treaty based bans on torture in conducting the “war” on terror — proved so controversial that they have since been (apparently) disavowed by the Administration — but only when the memos were made public. We might regard the torture memoranda as merely poorly executed attempts to engage in “objective” legal analysis: after all, what can one say in defense of a brief on Presidential powers that fails to mention Youngstown Steel?²¹ But I would argue that much of the problem with these memos — why they are useful counter-examples for someone interested in teaching professional responsibility — is precisely that they were, consciously, so disengaged from the real world. These are memos that strike at the heart of the rule of law; that justify barbarous acts that are the very antithesis of rule by law and civilization itself and yet that scarcely mention — much less consider seriously — the shocking departure from established rules that they are misrepresenting as banal legal analysis

As Richard Bilder and Detlev Vagts have recently pointed out, these memos fail to consider the “moral, economic, social and political factors, that may be relevant to the client’s situation” as is expected by Rule 2.1 of the Model Rules of Professional Legal Ethics.²² Except for an aside that blithely mentions that “other nations and international bodies may take a more restrictive view,”²³ the March 2003 memo fails to consider why other nations and international bodies might take a more restrictive view of the permissibility of torture — because of their own historical recollections, their citizens’ commitments to principles of common decency, their own recollection of what the *Torture Convention* was intended to prevent, perhaps? It fails to consider whether the

19. DRAFT MEMORANDUM FROM WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS (March 6, 2003), available at George Washington University’s National Security Archive, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.03.06.pdf>. Other memorandum discussed here are also available at <http://www.gwu.edu>. They are discussed in Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 98 AM. J. INT’L L. 820 (2004).

20. DRAFT MEMORANDUM FROM WORKING GROUP, *supra* note 19, at 4.

21. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

22. Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT’L L. 689, 692 n.23 (2004). See also MODEL RULES OF PROF’L CONDUCT R. 2.1 (2003).

23. DRAFT MEMORANDUM FROM WORKING GROUP, *supra* note 19, at 4.

legal analysis given would in fact credibly further the war on terror given the unreliability of information received under torture or the consequences on other nations' cooperative efforts. It does not address the predictable political consequences should these memoranda come to reflect policy and become publicly known as such: that is, Abu Ghraib and emerging questions about U.S. detainees, known and unknown, dead or merely gravely injured while in U.S. custody elsewhere. It fails to consider whether those who follow the advice in these memos — as well as the lawyers who are providing the advice — might be guilty of conspiracy to commit torture either as a matter of national or international law. It says nothing about the likely impact on other nations' behavior — including towards U.S. nationals in foreign custody or about the profound consequences on the United States as a credible purveyor of human rights, as in Iraq.²⁴ These memoranda are shoddy legal products, in short, because they try so hard to be disengaged, because they give the client what the lawyer believed that he wanted to hear without regard to the real world.

And yet the torture memos are only one recent public example of the kind of legal advice our government is getting. Recently the New York Times reported on another draft legal memorandum, also produced by Administration lawyers.²⁵ This one re-interpreted Article 49 of the Fourth Geneva Convention to permit the transfer of individuals from occupied territory, such as Iraq, “to facilitate interrogation.”²⁶ The memo concluded, not entirely implausibly, that the rules on occupying powers do not prevent the transfer of aliens found within occupied territory or the temporary transfer of even nationals of occupied territory (such as Iraqis), so long as these have not been charged with a crime. Like the better known torture memos, this memo lacked context. It did not address why such an interpretation is necessary. We are left to speculate why busy Administration lawyers were asked to provide a lengthy legal justification for such a policy. Having previously committed itself to abiding by the Geneva Conventions at least with respect to its actions in Iraq, is this an attempt by the Administration to evade the injunctions of Geneva by permitting coercive interrogations outside Iraq in secret locations that would be exposed to less critical scrutiny? Does the interpretation provided in this memo discourage charging suspects with a crime precisely in order to prevent Geneva rights from kicking in? Is it consistent with the object and purpose of the Geneva Conventions to permit the secret transfers of individuals from occupied territory? Is this memo yet another lawyerly tool in a conspiracy to commit torture and to evade that “radical” organization, the International Red Cross, which is entitled to information about such “ghost detainees” under international humanitarian law? And what of the consequences to international humanitarian law generally should interpretations that defy the spirit, if not the letter, of the law become the norm? One could go with the many

24. For a more eloquent and detailed enumeration of many of these arguments, see Bilder & Vagts, *supra* note 22.

25. Douglas Jehl, *U.S. Action Bars Right of Some Captured in Iraq*, N.Y. TIMES, Oct. 26, 2004, available at http://www.nytimes.com/2004/10/26/politics/26detain.html?_r=1&scp=1&sq=article%2049%20of%20fourth%20geneva%20convention&st=cse.

26. U.S. DEPARTMENT OF JUSTICE, OFFICE OF LEGAL COUNSEL, DRAFT MEMORANDUM TO WILLIAM H. TAFT, WILLIAM J. HAYNES, JOHN BELLINGER, AND SCOTT MULLER FROM JACK GOLDSMITH, (Mar. 19, 2004) (indicating that the opinion concerning the meaning of Article 49 was requested by Judge Alberto Gonzales), *discussed in* Jehl, *supra* note 25.

questions left unaddressed by this equally dispassionate memo, which has so far not been renounced by the Administration and apparently reflects current policy.

From the perspective of an international lawyer, such memoranda are disengaged only in their failure to address evident facts that desperately need addressing but such memos are not *in fact* disengaged from the world. As MacKinnon points out in her own remarks, what international lawyers do is necessarily engaged, whether they admit it or not. As all international lawyers know, much international regulation remains the product of the practice of states when that practice is undertaken under the conception that it is compelled by the law. The United States as a leading state influences, perhaps more than most, customary international law. What it does — even in violation of existing custom — may provide the seed for a new rule, particularly if it is emulated by others influenced by timeless concepts of reciprocity. The writers of the torture memos had the potential (and presumably the intent) to influence what the most powerful nation in the world did with respect to the customary and treaty-based prohibitions on torture. But given the fragile hold human rights has in the practice of states and the self-interest all governments have in torturing political opponents, there is some doubt about how long the legal ban on torture would last if the leading democracy in the world embraces its practice. What the authors of the torture memos argued had the potential to affect the future state of the law.

These memos, as MacKinnon has argued in another context, do not own, as they purport to do, accuracy and fairness. They embody and assert “a specific form of power, one that had been invisible to politics and theory but, by feminism, lay exposed as underlying them.”²⁷ For these reasons, as well as all the others that apply to all lawyers, Administration lawyers had a responsibility to make their client understand the potential global consequences of their legal reasoning. Even assuming that their authors sincerely believed that torture was sometimes legally permitted, they needed to say that what they were arguing could loosen the customary strictures on governments throughout the world, both within their own territory or in their overseas bases, to the detriment not only of their own citizens but U.S. nationals; that their interpretation of existing law could free leaders everywhere — and not just our commander in chief — from the strictures of treaty, with dire consequences for the prospects of treaty based norms generally. (Presumably this is not what the Administration means when it claims that “freedom is on the march.”) They had a responsibility to become explicitly what they were covertly: engaged lawyers.

And what of international legal scholars not under the employ of the U.S. government or indeed any client? Do they have an equal responsibility to be engaged? Undoubtedly. The sources of international law — custom, treaty, and general principles — are evinced through, among other things, judicial opinions and the opinions of scholars. Indeed, the Statute of the International Court of Justice specifically authorizes its judges to look to the views of scholars as evidence of what the law is. Time and again, determinations of international law — including by our own courts — have been influenced by views from the academy. Because it is impractical as well as impossible to

27. MACKINNON, *supra* note 4, at 47.

secure the views of all 190 plus nations of the world when it comes to discovering rules of custom, general principles, or even the interpretation of treaties, judges and diplomats often make do with understandable shortcuts — such as certain General Assembly resolutions, actions by prominent states (especially when others acquiesce in them), and the opinions of scholars who distill the practices of states, find common general principles through the comparative analysis of foreign law, or provide persuasive interpretations of obscure treaty provisions. For these reasons, international law scholars, even those that purport to be disengaged, are, like it or not, as engaged in the making of international law as were the authors of the notorious torture memos. International law scholars, no less than the nations in which they find themselves, necessarily *practice* international law when they set pen to paper. They, no less than the authors of the torture memos, have a responsibility to consider the “moral, economic, social and political”²⁸ dimensions of what they say the law is or should be. When they do so, they have a responsibility to consider — as MacKinnon has done throughout her remarkable career — the effects of what they say on the sex that all too often (especially in the rest of the world) is not part of the legal academy at all.

28. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2003).