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LAWYERS AND CONSCIENCE

by Thomas H. Morawetz*

I. THE NEED FOR MORAL REFLECTION AND JUSTIFICATION

It would be perverse to say that lawyers, unlike the rest of humanity, should not take responsibility for their actions or be held responsible for their choices. Some philosophers would maintain that moral categories, and the practice of using standards to judge conduct, are spontaneous aspects of language and thought.¹ To abstain from holding certain persons morally responsible is to exclude them from the general run of humanity.² From such a perspective, to say that lawyers either should or should not be held responsible for their conduct is to say something peculiar, for the commitment to regarding them as responsible is not a matter of choice.³

The suggestion that lawyers are not to be held responsible for their actions is not, therefore, simply an argument for their exemption from moral judgment. It is rather an argument that an overriding or super-vening moral judgment must be taken into account when lawyers are judged, a judgment about the character of the institutions and procedures that define the lawyer's role.⁴ For example, the defense of the adversary model provided by Dean Monroe Freedman and Charles

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1. Historically important discussions of the spontaneity of moral judgment are to be found in D. HUME, *AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS* (1751), and I. KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* (1785). For a modern treatment of the subject, see P. NOWELL-SMITH, *ETHICS*, ch. 1 (1954).

2. Of course, we exempt young children, persons who are retarded or brain-damaged, or persons from very primitive and alien cultures from at least some moral judgments. Lawyers would probably not wish to claim an analogous disability.

3. The place of the concepts of freedom, resentment, and moral responsibility in the general attitudes of persons to other persons is explored perceptively in Strawson, *Freedom and Resentment*, 48 *PROC. OF THE BRIT. ACAD.* 186 (1962).

4. Such an approach to the issue is taken, for example, in Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 *MICH. L. REV.* 1469 (1966), and Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060 (1976).

Fried⁵ is anything but amoral. Freedman and Fried argue that the adversary process is an especially effective vehicle for fair, just, and equitable disposition of legal disputes. The process works optimally, however, only if the lawyer uses the resources of the legal process single-mindedly to secure the interests of clients.⁶ According to proponents of the adversary model, the process and the law in general rectify imbalances in power and skill, and transpose any dispute to an even playing field.⁷

This way of thinking has much to do with the way we think of games. In games, the morality of acting in accord with the rules and of being an adversary is taken for granted. Similarly, the lawyer may no more second-guess the fairness and justice of the rules of combat (by tempering zealous representation in light of the possible consequences for other players or for society in general) than she may question, while in the middle of playing chess or baseball, whether the rules are fair and just and attempt to alter strategy in the interest of fairness to the opposition or to third parties. The pitcher who pitches with an eye toward serving interests other than his team's interest in winning is not quite playing baseball.⁸ A moral judgment about fairness is more appropriately made when the rules of combat are formulated, not when the rules are being applied in mid-game.⁹

There are many problems with this comparison between lawyering and games. The rules of combat in the adversary system remain unclear and controversial. What one lawyer regards as fair and exemplary in questioning adverse witnesses or in shielding a client from the consequences of ongoing criminal activity, another may see as unfair and harmful to the interests of third parties. By contrast, the rules of baseball or chess are more or less closed. Moral dilemmas do not infect every single choice of strategy, rendering each choice potentially controversial. In games, the rules are fixed, and the players, in making their discrete moves, are expected to put to one side the overall moral-

5. See *supra* note 4.

6. Freedman, *supra* note 4, at 1473-74.

7. Fried, *supra* note 4, at 1082-86.

8. I discuss the implications of the comparison between the rules of law and the rules of games in Morawetz, *The Rules of Law and the Point of Law*, 121 U. PA. L. REV. 859 (1973); see also Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

9. Such a theory resembles the "rule-utilitarian" model of moral reasoning, whereby systems of rules (for example, the rules of a game or the rules of a practice), rather than individual acts, are evaluated so as to determine whether they optimize achievement of the goal (e.g., utility). See D. LYONS, *FORMS AND LIMITS OF UTILITARIANISM* (1965); D. REGAN, *UTILITARIANISM AND COOPERATION* (1980).

ity of the game itself.¹⁰

In legal contests, the lawyer who *assumes* that the adversary system is fair exposes herself to the accusation that she is willfully naive about the context in which such contests proceed. Her failing is not that she has neglected altogether to provide a moral justification; rather it is that her justification is not grounded in reality. The reality, in the view of many observers,¹¹ is that neither the fairness of the adversary system nor the equal worth of each client can be taken for granted. The objectives of some clients will further the public interest and the objectives of others will frustrate it. Lawyers, having limited resources of time and energy, will often have the incentive to serve the wealthiest and most powerful clients, whatever the morality of the clients' objectives. A client's resources may affect both the lawyer's initial decision to choose the client and her choice of strategies in legal representation.

Thus, the potential for unfairness and inequality is built into the adversary system at several levels. Such inequity manifests itself in our uncertainty about what strategies are permissible, in our recognition that the interests of clients are not equally conducive to the general welfare, and in our awareness that the resources of the system are imperfect and limited.¹²

II. THE ROLE OF CODES AND COURSES

If lawyers cannot evade moral judgment and cannot pass the buck to the system itself, two questions are inescapable. The first question is how one can distinguish an ethical lawyer from an unethical one; the second is how to make lawyers more ethical. Daniel Kleinberger¹³ concludes that neither codes of ethics nor courses on professional responsibility do much to make lawyers ethically responsible. Such a conclusion is based on several assumptions, some sound and others unsound.

Several ways of distinguishing ethical lawyers from unethical lawyers are obviously flawed. Reputation is an uncertain guide. Perhaps the ethical lawyer will be more widely respected. Nonetheless, the judgment of lay persons may rest on a false conception of the lawyering

10. See *supra* notes 8 & 9.

11. See, e.g., J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976); M. FRANKEL, *PARTISAN JUSTICE* (1980).

12. See Fried, *supra* note 4.

13. Kleinberger, *Wanted: An Ethos of Personal Responsibility—Why Codes of Ethics and Schools of Law Don't Make for Ethical Lawyers*, 21 *CONN. L. REV.* 365 (1989).

process or of the reasons lawyers act as they do,¹⁴ and the judgment of other professionals may be distorted by the need to protect the reputation of the profession from all criticism, justified or not.

If reputation is at best an unreliable criterion, one must look instead to a lawyer's actions and attitudes. While actions may speak louder than words, they are corrupted by ambiguity just as words are. Two lawyers whose reputations are tarnished by their zealous representation of unpopular clients may have very different reasons for acting. The first may act out of a deep faith in the adversary system, the second out of concern only for personal gain. Thus, the crucial factor distinguishing the ethical lawyer from the amoral lawyer must lie not in actions pure and simple but in the attitude that underlies those actions.

In what way can codes of ethics or legal training affect a lawyer's attitudes? Kleinberger largely dismisses the question, which nonetheless deserves careful attention.¹⁵ One preliminary consideration is that it is dangerous to generalize about lawyers' moral dispositions. Some lawyers will be more conscientious than others, more attentive to admonitions of conscience. Some lawyers will be more malleable than others, more easily moved by good arguments or by bad ones. Of course, codes and courses cannot transform the most callous and self-interested operators into lawyers of conscience. At best, codes and training can activate preexisting inclinations. Moreover, many aspects of legal education do foster skepticism about moral values, simple-minded relativism, and a chameleon-like disposition to identify with and defend all positions.¹⁶ The image of the lawyer as "gun-for-hire" is as old as the profession itself.

Nonetheless, it is hard to see why one should take a dismissive position toward codes of ethics. The effect of codes is not necessarily exhausted by the process of disciplinary enforcement and the rules are not necessarily moral minima.¹⁷ At least for some lawyers, codes will

14. For a general discussion of the complexities involved in assessing role morality in general, and the morality of legal professionals in particular, see D. LUBAN, *THE GOOD LAWYER* 1-24 (1984) and D. LUBAN, *LAWYERS AND JUSTICE* (1988).

15. See Kleinberger, *supra* note 13, at 367.

16. See Kennedy, *How the Law School Fails: A Polemic*, 1 *YALE REV. L. & SOC. ACTION* 71 (1970); Luban, *Against Autarky*, 34 *J. LEGAL EDUC.* 176 (1984); Wasserstrom, *Legal Education and the Good Lawyer*, 34 *J. LEGAL EDUC.* 155 (1984).

17. The 1969 Code of Professional Responsibility makes this point clear by distinguishing disciplinary rules from ethical considerations. The distinction is, as one might expect, not always easy to maintain. Some disciplinary rules do not seem to represent what is minimally permissible, and some ethical considerations do not seem to express ethical aspirations or ideals. See Frankel, *Book Review*, 43 *U. CHI. L. REV.* 874 (1976) (reviewing Code of Professional Responsibility

affect attitudes, and therefore behavior, by defining a standard of conscientiousness and exhorting lawyers to follow it. Codes will elucidate the shared expectations of the bar and the common center of gravity of the practice.

For example, a confidentiality provision that advises attorneys to intervene and to breach confidentiality when their clients' actions affect third parties in seriously harmful ways will shape conduct differently than would a stricter prohibition on disclosure.¹⁸ Of course, such a provision may be difficult to enforce. Of course, some lawyers will scorn it and evade it cheerfully. And of course, such provisions may be regarded cynically as mere examples of the bar paying lip service to public opinion. Nevertheless, such a change may go a long way in shaping the attitudes and practices of some lawyers. To think otherwise is to see lawyers as beyond change and beyond redemption, to see the members of the profession as self-selected for moral unresponsiveness. Under such an assumption, there is no reason to urge reform or to admonish lawyers to heed morality since lawyers are assumed to be incapable of doing so.¹⁹

Similarly, courses in professional responsibility can awaken dormant unease rather than indoctrinate students in the techniques of moral evasion. Law teachers, like law students, come in many shapes and flavors. Some will connive with their most cynical students to subvert whatever moral reservations other students may have and to counsel the efficient evasion of even minimal constraints. Others will try in vain to lead students to frame moral limitations for themselves. Still others, however, will succeed in influencing students to attend to personal and cultural convictions that coexist with training in legal technique, and to have misgivings about some implications of the adversary model itself. One cannot assume that teachers who are committed to an amoral model and who teach evasion are the norm, nor can one assume that students normally lack misgivings or conscience.²⁰ To assume ei-

(1975)).

18. See Alschuler, *The Preservation of a Client's Confidences*, 52 U. COLO. L. REV. 349 (1981); Landesman, *Confidentiality and the Lawyer-Client Relationship*, in D. LUBAN, *THE GOOD LAWYER*, at 191; Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966).

19. It is important for commentators to be clear about their psychological assumptions about human nature and about lawyers. Do they assume law students are malleable and are able to respond to moral arguments, to arguments appealing to altruism and justice, or do they assume the opposite? Similarly, what assumptions of these kinds do they make about practicing attorneys and about bodies that draft and enforce legal rules?

20. Kleinberger's description sometimes comes close to embodying these assumptions. See

ther is to transpose cynicism to a different plane. To view the world of law teachers and students as composed of moral cynics is itself a form of cynicism.

Generalizing about codes and curricula is also a perilous enterprise. Some code provisions, for example those concerning conflict of interests or use of clients' funds, are necessarily expressed as prohibitions, as rules distinguishing what is acceptable from what is not. Other issues addressed in the code are natural vehicles for moral idealism. Provisions that describe the limits of confidentiality and those that touch on concern for third parties and for the public interest can have such moral significance.²¹ They may or may not be conceived as delineations of what is minimally acceptable; certainly there is no need to frame them in such a way.²²

Just as general codes and rules can be made to accommodate idealism, so too can legal education make room for moral responsiveness. Every substantive course in the curriculum can be made a vehicle for exploring the effects of legal doctrine and lawyers' actions upon the well-being of individuals and the community.²³ To be sure, the techniques of legal representation and argumentation are morally neutral. These techniques may, however, be supplemented by an independent examination of the consequences of actions. The mastery of a technique never preempts the possibility of taking consequences seriously. Kleinberger draws our attention to campaign managers as analogues of lawyers.²⁴ The tools of the campaign manager may be used by amoral managers for bad candidates, but there is nothing inherent in campaign techniques that stands in the way of choosing to use the techniques only for good candidates.

This last point needs amplification. Morality is implicated in legal strategies and techniques in two ways. The first involves the morality of clients' ends. I have been emphasizing that the lawyer, like the campaign manager, may limit her services to those whose interests she can

Kleinberger, *supra* note 13, at 367.

21. See, e.g., Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

22. One issue that complicates the drafting and application of such rules concerns whether rules should give lawyers wide discretion to take moral responsibility and to weigh the effects of their actions, or alternatively whether such rules should make protection of the public interest mandatory.

23. It is commonly suggested by curriculum reform committees that various courses should be given an explicit legal ethics component. Many law teachers already introduce such issues implicitly.

24. See Kleinberger, *supra* note 13, at 372.

approve. The second, however, involves the morality of the techniques themselves. Techniques such as discrediting witnesses whom one knows to be speaking the truth and using testimony that one suspects is perjured are not morally neutral.²⁵ Moreover, these techniques remain morally objectionable even when used to serve clients whose interests are meritorious.

Drafters of codes of professional responsibility must balance the objective of providing clear guidance on such moral matters and the need to show respect for the moral discretion and independence of individual lawyers. If the drafters conclude that the use of objectionable techniques is sometimes justified by the particular ends at issue, they may make the techniques discretionary rather than forbid them altogether. Such discretion presumes not only that the techniques may be used in exceptional circumstances, but also that lawyers may be trusted to decide for themselves which instances are exceptional, trusted, that is, not to abuse this discretion.²⁶

Both codes and courses are appropriate contexts for seeking to wake lawyers' awareness of moral considerations and to show that the responsibility for choosing strategies and ends must rest with the individual rather than the system. At the same time, it would be naive to underestimate the difficulties that stand in the way of changing lawyers' incentives. These difficulties are psychological rather than conceptual. Where legal services are highly rewarded, many of the most skilled lawyers will tend to serve the highest bidder. Viewed from this standpoint, conscience-raising through codes or courses is a weak weapon. This weakness is rooted in the economic and political structure of society, in the distribution of resources and the incentive structure that it creates.

Any analysis of the situation must be poised between hope and realism. To be sure, some lawyers will be guided by moral conscience. Training will effectively sensitize some (perhaps many) lawyers to the moral aspects of their actions. Existing (or new) organizations of lawyers or judges or laypersons may change the rules and incline the playing field toward morally justifiable consequences. Nonetheless, intractable social, economic, and psychological obstacles may well stand in the

25. See Fried, *supra* note 4, at 1064-65; Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 *Geo. J. Legal Ethics* 125 (1987).

26. It may be idealistic to believe that lawyers can moderate the use of such strategies by taking into account the pursuit of justice and the rights of third parties.

way of significant change in both practice and reputation.²⁷

III. MORAL RELATIVISM

Lawyers who are admonished to heed morality and to be conscientious will often respond with puzzlement. When land developers confront environmentalists, when landlords trying to protect investments confront aggrieved tenants, moral priorities are hardly self-evident. Lawyers may make a general point about the morality of representation, namely that in such cases there is no firm ground on which to justify one choice of values over another.

This argument needs clarification. Certainly the examples suggest that in many confrontations the positions of both sides have merit. At the same time, every conscientious lawyer will recognize that cases differ in weight and importance. For example, the set of confrontations between developers and environmentalists (or others)²⁸ may run the gamut from compelling cases for development to equally compelling cases for protection and preservation. Even if lawyers disagree in their final judgment about a case, they will often agree about what factors are relevant, about the relative weight to be assigned such factors, and about what cases are stronger (or weaker) than others. In a sense, these standards of relevance form the common language within which coherent disagreement is possible.²⁹ Such standards are both descriptive and normative. Put simply, the standards tell us, for example, what counts as economic loss, but also tell us that economic loss is, other things being equal, to be minimized.

In other words, the argument for moral uncertainty or relativism is necessarily incomplete. To say that every case involving development or foreclosure has *something* to be said in its favor is not to say that every case is equally meritorious. To say that lawyers will often disagree about the merits of particular cases is not to say that lawyers lack shared standards for judging some cases to be weaker than others.³⁰

27. It can be argued that a significant societal change would affect not only the willingness of lawyers to consider morality, but also more basic matters, such as society's need for lawyers and the distribution of demand for lawyers' services.

28. One can imagine different kinds of opponents: environmentalists, historical preservationists, the indigenous residents and users of the land in question, the population of the surrounding area, etc.

29. See generally L. WITTGENSTEIN, *ON CERTAINTY* (1969), and T. MORAWETZ, *WITTGENSTEIN AND KNOWLEDGE* 119-38 (1978) (discussion of the epistemological aspects of agreement and disagreement).

30. Cf. Gordon, *The Independence of Lawyers*, 68 B.U.L. REV. 1 (1988):

Nor is it to say that a lawyer who engages in predatory and harmful practices should be exempt from criticism for doing so.

Lawyers, in response, will say that such criticism is misguided because, apart from the merits of a particular position, each party has a right to be heard and to have a sound case presented on its behalf. The value of being able to present one's case should be distinguished from the value of the position itself. To agree, however, that a distinct value exists is not to say that the value is an overriding one. Because a lawyer's time and energies are limited, it is difficult to think of a sound moral argument *against* using such resources selectively for the most compelling interests.³¹

Moral relativism sometimes takes an "absolutist" form. Those who concede that there are shared standards for unconscionable interests may yet wish to refrain from judging actions and effects in moral terms *unless* it is possible to provide a decisive or absolute justification. "Who am I to judge?" expresses this response.

It is one thing to bear in mind, when representing a client, that one may not know all the facts or to acknowledge that opinions about a client's conduct and the effects of such conduct will differ. To engage in such thinking is to judge wisely. Yet, it is something entirely different to assume that *no* standards exist for judging conduct or that the standards we have—the only standards we *can have*—lack legitimacy.³² The admonition that one should generally refrain from making moral judgments impeaches much more than our moral judgments about lawyers' choices. It embodies a fallacious distinction between legitimate and illegitimate judging that impeaches basic ways of thinking and orienting oneself in the social world. Judging is an eradicable dimension of thinking. Our moral judgments do not hang in a linguistic vacuum; they are tied conceptually to notions of harm and destruction, well-being and health. Our criminal statutes, our medical practices, and our governmental policies all presuppose general agreement about which kinds of circumstances are desirable and which kinds are to be avoided.

It's easy to say lawyering is not a club for superhumans, and that especially in this century lawyers have been joined, and in many areas of political life displaced, by rival interpreters and articulators and mediators of social purposes. What's absurd is to argue that because of this lawyers are uniquely *disqualified* as citizens or moral and political actors—the one group of individuals in the world who should conscientiously attempt to reduce themselves to ciphers, pure media of transmission.

Id. at 75.

31. See Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985).

32. See *id.*

The justification of *all* such judgments is internal to a system of thought and not "absolute."³³ Everything hangs or falls together.

IV. SKEPTICISM AND FAIR DESCRIPTION

One thread running through my discussion has been a warning against "all or nothing" thinking, a kind of thinking that leads to the overly simplified and skeptical conclusions that codes express minimal expectations (and therefore cannot express moral ideals) and that law schools cannot affect moral conscience. Professor Kleinberger's essay contains several obstacles to clear discussion of these issues.

Paradoxically Kleinberger uses Thomas Hobbes' moral and political philosophy to illustrate the need for moral reflection.³⁴ Of all philosophers, Hobbes is the least congenial to these purposes. Hobbes' philosophy is grounded on the psychological assumption that persons can and will act only for their personal self-interest.³⁵ Hobbes theorized that people create and maintain political institutions only because, and only as long as, doing so benefits them more than existing in a state of nature.

This view of "the hearts and minds of the system's handmaidens"³⁶ and of human nature generally places persons beyond the reach of moral arguments. Appeals to altruism or conscience are, for Hobbes, inherently stillborn unless they are also grounded in appeals to self-interest.³⁷ Those who say, perhaps cynically, that one cannot expect lawyers to be other than "guns-for-hire" seem to share Hobbes' deterministic conception of human nature. It is odd that Kleinberger uses Hobbes for quite the opposite argument when less dogmatic and simplistic views of human motivation are available and persuasive.³⁸

It is also peculiar that Kleinberger uses the moral circumstances of

33. See P. STRAWSON, *SKEPTICISM AND NATURALISM: SOME VARIETIES* 41 (1985).

34. See Kleinberger, *supra* note 13, at 375.

35. T. HOBBS, *LEVIATHAN* chs. II and XIII (1st ed. 1651); see also C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (1962); Minogue, *Hobbes and the Just Man*, in *HOBBS AND ROUSSEAU: A COLLECTION OF CRITICAL ESSAYS* 66 (1972).

36. See Kleinberger, *supra* note 13, at 375.

37. See *supra* note 35. The ethical theory called "hedonistic egoism" is generally attributed to Hobbes.

38. Most ethical philosophers, both historical and modern, have advanced theories that are less deterministic and hedonistic than Hobbes. Aristotle and Kant are two of the most influential figures in the history of ethical thought, and both have accommodated altruism and moral action for its own sake.

the campaign adviser to illuminate the role of lawyers.³⁹ There are special justifications for the moral neutrality of campaign advisers which are not similarly applicable to lawyers. Choosing between candidates for office is a pure form of democratic participation. If democratic theory is to have a chance of working, candidates must possess the resources necessary to run for office. Thus, the argument that campaign directors should forestall prejudging candidates on moral grounds is particularly strong, while the act of withholding resources from candidates based upon moral preconceptions can be compared to a kind of censorship. If the adversary process, and other aspects of the legal process, were as formally democratic as the process of voting, a strong argument could be made for lawyers' neutrality. As matters stand, however, the processes and values are too dissimilar.⁴⁰

A deeper paradox is implicit in lawyers' discretion to choose among clients and interests. On the one hand, such discretion frees lawyers to attend to the moral implications of their choices. On the other hand, lawyers may channel their activity in whatever ways will most gratify self-interest. In other words, two ways of choosing clients can be morally criticized. First, a lawyer may act purely out of self-interest. Second, a lawyer may offer zealous representation to each client in turn, acting disinterestedly as "gun-for-hire."⁴¹ Both types of action are to be contrasted with acting out of a morally determined choice, with a sense that one is selecting among competing interests and demands after considering their respective merits.

The role of law schools in priming students to make such choices is also described inadequately in Kleinberger's essay. He contrasts two possible tasks for the law teacher. The first involves preaching about moral values, which as Kleinberger correctly observes is likely to be ineffective or, worse, counterproductive. The second task consists of teaching students "to operate rationally in a world of concepts and symbols."⁴² Kleinberger argues that instruction "can do little . . . to develop moral commitment" because "[c]haracter is a matter not of analysis but of faith."⁴³ Perhaps this is so. Nonetheless, the sources of

39. See Kleinberger, *supra* note 13, at 372.

40. To be sure, there are many ways to corrupt the process of voting just as there are many ways to corrupt the process of litigation. In both situations, the actor, as campaign manager or lawyer, must look to ends as well as means.

41. Such a distinction may collapse when the rationale for acting as "gun-for-hire" is used to justify acting out of self-interest.

42. See Kleinberger, *supra* note 13, at 379.

43. *Id.*

character and the issue of what it takes to change character are matters of deep controversy and cannot be settled casually. Certainly character and faith are distinct notions, linked in some ways and not others. It is certainly widely believed that one can be a person of character without being a person of faith in a traditional sense.

Rational and analytic thinking is not necessarily morally neutral, as Kleinberger assumes.⁴⁴ For example, analytic thinking can uncover the flaws in arguments used by lawyers to avoid responsibility for their actions, arguments such as the claim that the adversary system works itself pure. In this way analytic thinking can be used to demonstrate the need for and inevitability of personal responsibility. That is not to say that rational and analytic thinking can shape character or can make persons moral. Where the commitment to neutrality is intellectual, however, rational argumentation can be used to dispell it.

CONCLUSION

Any serious discussion of lawyers' ethics will rest on several premises.

(1) Lawyers, unlike doctors, are inevitably partisans in human conflicts. Doctors represent the uncontroversial ideal of health. Lawyers represent the ideals of order and justice in dispute resolution, but they also represent particular claimants with particular and often divisive interests.⁴⁵ The theme of legal representation is that of victory and defeat, rather than that of harmony and cooperation.⁴⁶ One commentator has observed that "[w]e use lawyers both to express our longing for a common good, and to express our distaste for collective discipline."⁴⁷

(2) Lawyers therefore present a "public and unavoidable embodiment of the tension we all experience between the desire for an embracing and common community and the urge toward individual independence and self-assertion; between the need for a stable, coherent, sincerely presented self and the fragmented and disassociated roles we are forced to play in the theater of modern life."⁴⁸ As a result, "the special hatred which popular culture holds for the lawyer can be an

44. *Id.* at 378-79.

45. See Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 12 (1975).

46. Harmonious dispute resolution, however, has drawn increasing attention from lawyers and law schools in recent years.

47. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CALIF L. REV. 379, 386 (1987).

48. *Id.* at 389.

illuminating resource for understanding cultural contradictions of the deepest and most profound kind.⁴⁹ The unpopularity of lawyers is endemic to the role they play, and the role is, in turn, endemic to organized society.

(3) At the same time, specific cultural, social, and economic conditions can aggravate or mitigate social disparities and shape the kinds of conflicts that will arise. The degree to which lawyers are a lightning rod for discontent will depend on the scope of such disparities and on the responsiveness of the legal system to problems that arise.

(4) Lawyers are human beings, and therefore some will be venal and others will be altruistic. All, however, will have complex motives and aims. In addition, in every society some ways of practicing law are better rewarded than others. When the practical rewards of representing private corporate interests far outweigh the rewards of representing the rights of the powerless, these social facts represent serious obstacles to the conscientious practice of law.

(5) Finally, there is nothing inherent in the lawyer's role that should exempt her from moral criticism. Personal responsibility is the common denominator of social conduct for all persons who are not specifically disabled.⁵⁰ The lawyer's choices cannot be reduced to simple rules nor is her role ever reducible to one of ethical neutrality. All of us are responsible for the consequences of our conduct. If we play a role in a larger system, we must be able to justify both the role and the system.

One may draw several conclusions from all this. The unpopularity of lawyers is only partly within their control. Some of the unpopularity may be attributed to the kind of role lawyers play and not to the way they play it. Moreover, social and economic conditions shape lawyers' incentives and opportunities. In some societies, the opportunity to act on altruistic motives will be available and visible, while in other societies this opportunity will be more elusive. These conditions are within some degree of social control, but they are certainly not within the control of individual attorneys.

At the same time, there is a narrower dimension within which a lawyer has choices. Notwithstanding the difficulties of enforcement and the necessary vagueness of its provisions, a code of professional ethics can do more than formulate rules for minimally acceptable conduct. A

49. *Id.*

50. *See supra* note 2.

code can also express aspirations. Similarly, legal training can do much more than merely arm lawyers with technical skills. Legal education can acquaint law students with moral reasoning, can show them that lawyers are not exempt from moral judgment, and can make them thoughtful about the consequences of their actions. If in fact legal training gives rise to amorality and moral cynicism, the problem is only partially remediable. Understanding and accepting the inevitable reasons why lawyers will be "hated"⁵¹ is the first step in acting to counter and discredit that hatred.

51. See *supra* note 47.