

Client Centered Counseling and Moral Accountability for Lawyers

By Robert M. Bastress*

Many lawyers view their role in the attorney-client relationship as that of a paternalistic captain charting and asserting his solution to the client's problems. The attorney is clearly in charge and dominates the relationship. At the same time, most lawyers advocate on behalf of clients without ever confronting the moral or social propriety of clients' claims. The Code of Professional Responsibility and our adversarial system have relieved attorneys of moral accountability for what they advocate in their professional role.

Recently, both of these approaches to lawyering have met much criticism. Building on the humanist schools of psychotherapy and philosophy,¹ a number of commentators have espoused some form of a "client-centered" approach to lawyering.² That approach

* Associate Professor of Law, West Virginia University.

1. See, e.g., M. BUBER, *BETWEEN MAN AND MAN* (1947); A. MASLOW, *TOWARD A PSYCHOLOGY OF BEING* (1968); C. ROGERS, *CLIENT-CENTERED THERAPY* (1951); C. ROGERS, *ON BECOMING A PERSON* (1961). See also authorities cited in nn. 65-68, *infra*.

2. E.g., R. BASTRESS & J. HARBAUGH, *INTERPERSONAL SKILLS FOR LAWYERS* (manuscript); G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY*, 124-272, 966-1112 (1978); D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING* (1977); T. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING* (1976); T. SHAFFER & R. REDMOUNT, *LEGAL INTERVIEWING AND COUNSELING* (1980); Goodpaster, *The Human Arts of Lawyering: Interviewing and Counseling*, 27 J. LEG. ED. 5 (1973); Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049 (1984); Sacks, *Human Relations Training for Law Students and Lawyers*, 11 J. LEG. ED. 316 (1959). In addition, see a more complete citation of authorities in Bastress & Harbaugh, *Examining Lawyers' Skills*, in *CLINICAL LEGAL EDUCATION, REPORT OF THE AALS-ABA COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION*, 223, 223-26 nn. 1-12 (1980). These commentators, and others writing on the subject, have modified to some extent the client-centered approach when transferring it from psychotherapy to legal counseling. The modification is dictated by somewhat different goals (or at least different primary goals); psychotherapists are most concerned with personality growth and development while lawyer-counselors are most concerned with working through particular problems

puts the attorney in the role of an open, accepting helper and leaves both priority-setting and decision-making to the client. The lawyer helps the client determine what is best for him in light of his own priorities.

Another set of commentators has focused on the bar's amorality and has urged a duty for lawyers to judge for themselves the moral and societal implications of their clients' causes.³ Some in that group have criticized the client-centered set for reinforcing the long-standing moral neutrality of the bar.⁴

This article advocates both client-centered counseling and moral accountability for lawyers. Although the two models may at first glance seem inconsistent, the discussion will show that they are necessarily interdependent. The article will primarily focus on the development of a duty for lawyers to independently assess the consequences of their advocacy.

These goals are accomplished in several steps. Part I sketches an overview of the client-centered approach. Part II and III summarize two views of the attorney's moral responsibility. Part II discusses the "traditional" conception—that the lawyer is simply an advocate and has little or no accountability for what he advocates. Part III capsulizes the alternative—that the lawyer should exercise independent moral judgment. The limitations and advantages of that approach are noted. Part IV then explains the relationship between the client-centered and morally independent models. Finally, Part V describes how moral accountability for lawyers can be implemented. The section offers examples, both famous and com-

that have a "legal" setting. In addition, legal education cannot realistically be expected to train lawyers to handle the more advanced and more complex psychological issues regularly treated by psychotherapists.

3. E.g., Flynn, *Professional Ethics and the Lawyer's Duty to Self*, 1976 WASH. U.L.Q. 429; Noonan, *Other People's Morals: The Lawyer's Conscience*, 48 TENN. L. REV. 227 (1981); Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT. 181 (1981); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29; Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487 (1980); Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975). See also, Abramson, *Attorneys, Clients, "Ethics"*, 52 NOTRE DAME LAWYER 797 (1977); Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEG. HIST. 191 (1977); Shaffer, *The Legal Ethics of Two Kingdoms*, 17 VAL. U.L. REV. 3 (1983).

4. Simon, *Homo Psychologicus*, *supra* n. 3. On a more general, non-legal level, see Lasch, Book Review, THE NEW REPUBLIC 30-31 (March 31, 1979).

monplace, to illustrate how the proposed duty can operate in practice. The discussion concludes by suggesting steps that can be taken to accomplish and enforce moral responsibility and by proposing standards to guide lawyers in meeting their responsibility.

I. A MODEL FOR THE LAWYER-CLIENT RELATIONSHIP

Recent texts and articles have developed comprehensive theories for conducting lawyer-client relations.⁵ This section aims only to sketch a client-centered model⁶ to provide a basis for dealing with the perplexing issues of moral responsibility that will be discussed below.

In this model, the lawyer strives to build a "helping relationship," one in which the lawyer is demonstrably sincere, empathic, nonjudgmental, and honest. It focuses on the client—on his problem, his goals, and his feelings. The lawyer and client work together as partners. The lawyer supplies his expertise and skills—legal, practical, and interpersonal—and the client sets the priorities and decides the major issues.

This lawyer-client partnership accomplishes several purposes. The reflective, empathic listening essential to client-centered relationships encourages a free flow of information. The client responds and openly discusses all the facts in the case, including his feelings about the subject at hand. Obviously, a lawyer wants all the traditional "legal" facts, but the client's feelings are also important facts. Law office decision-making—that forum in which law operates most pervasively—often concerns issues whose resolution will turn as much on how a client *feels* about certain individuals and actions as on any fact relating to the legal merits. (E.g., who should the client include in a will and to what extent? Should he enter into a particular contract? Or sue his employer?) By demonstrating empathy and acceptance, the lawyer establishes a non-threatening atmosphere so the client feels at ease in describing sensitive emotions and topics.

The client-centered approach builds rapport and mutual trust, which are essential for the lawyer and client to work together to reach solutions or to deal with the results in cases without solutions. When the client knows his lawyer accepts, cares about, and

5. Note 2, *supra*, lists a sampling of such authorities.

6. The model sketched here is thoroughly developed in R. BASTRESS, & J. HARBAUGH, INTERPERSONAL SKILLS FOR LAWYERS (manuscript).

respects him as a person, the client will be more inclined to trust in the lawyer. The two can thus feel secure in confronting issues together and can better work as partners. Such partnerships are more efficient ("two heads are better than one") and more satisfying for both the client and the attorney.

By adopting a client-centered model, the lawyer enhances the intrinsic value of his relationship with his client. The model facilitates meaningful human relations for both its participants. When individuals experience an open, nonthreatening environment, they are better able to recognize their feelings, better able to accept themselves, and consequently, to grow as persons. That is not to say such a lawyer-client relationship profoundly affects a participant's personality (though that is possible), but mutuality of trust and candor in a lawyer-client partnership can contribute to and facilitate personal development for both partners. That bestows on the relationship an intrinsic value and thus should be one of the lawyer's goals with every client he represents. Unfortunately, it is one goal that has often been lost among the more utilitarian justifications for client-centered lawyering.

The client-centered approach recognizes and enhances the importance of the individual *qua* individual. The client does not perceive himself as, and is not, an instrument to be manipulated by the lawyer. Rather, the client directs his own destiny, relying on the lawyer as a helper and as a guide through the legal labyrinths. Thus, the client-centered approach emphasizes autonomy and individual growth.⁷

Finally, a lawyer-client relationship founded on mutual trust and candor increases the likelihood that the relationship will render a just and fair result, from both the client's and society's perspective. There is empirical evidence showing that the "helping" lawyer achieves more favorable settlements for his clients,⁸ presumably because he is more aware of his own needs and be-

7. *E.g.*, C. ROGERS, ON BECOMING A PERSON 166-81 (1961) (client-centered counseling facilitates, and depends on, individual autonomy, self-direction, and self-fulfillment). *See also id.* at 26-27 ("persons have a basically positive direction" when given autonomy); nn. 65-87 & accompanying text, *infra*.

Oddly enough, one commentator has criticized the client-centered advocates for imposing conformity and stifling individuality. Simon, *Homo Psychologicus*, *supra* n. 3, at 528-29. Such criticism is baffling; an approach that calls for the counselor to be empathic and accepting hardly seems to embrace conformity.

8. D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE (1974).

cause he operates with fuller information. Thus the client is more likely to be satisfied. In addition, if the relationship has acquired mutual trust and candor, then the lawyer and client will be able to discuss freely what are the social and moral ramifications of a particular course of action or settlement. This, too, has not been a widely recognized goal of the lawyer, but, as will be developed below, the lawyer has a professional and moral responsibility to see that justice is sought.⁹ Correspondingly, the chances of justice prevailing are enhanced.

These goals—free flow of information, rapport and mutual trust, a meaningful relationship, and a result that is (if possible) agreeable to the client and just—and the character of the client-centered approach—open, candid, trusting—are accomplished through a variety of techniques and skills. The lawyer, first of all, must be a good listener; she must hear what the client says and must note what the client does not say. The listening, too, must be “active”; that is, the lawyer must communicate back to the client that she hears him and understands what he has said and feels. The lawyer essentially acts as a mirror for the client. This reflection, when accurate, communicates *empathy*—that the lawyer has placed herself in the client’s shoes and understands the client’s feelings.¹⁰

The lawyer should be accepting, supportive, and nonjudgmental (except as qualified below). She should offer an understanding that will convince the client he remains a human being worth caring about regardless of the facts or desires he reveals. Such an attitude helps the client to be open and to acquire greater self-awareness.

The lawyer, too, must be conscious of his own needs. A lawyer is subject to competing drives and pulls within his own personality that can seriously affect his professional relations and performance.¹¹ He may have a strong need for power or achievement (both

9. Part III, *infra*. See Abramson, *supra* n. 3.

10. See, e.g., A. BENJAMIN, *THE HELPING INTERVIEW* 46-50 (2nd ed. 1974); W. CORMIER, *INTERVIEWING STRATEGIES FOR HELPERS* 61-76 (1979); R. GORDEN, *INTERVIEWING: STRATEGY, TECHNIQUES, AND TACTICS* 41-44 (2nd Ed. 1975). See generally R. CARKHUFF & B. BERENSON, *BEYOND COUNSELING AND THERAPY* (1967); G. EGAN, *THE SKILLED HELPER* (1975).

11. R. BASTRESS & J. HARBAUGH, *supra* n.6, ch. 13. See also A. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS* 75-100 (1976); Leete, Francia & Strawser, *A Look at Lawyer's Need Satisfaction*, 57 A.B.A.J. 1193

are common among lawyers). He may be materialistically acquisitive or have a strong need to be accepted and liked. He may be subject to feelings of countertransference.¹² Some motivating forces push every attorney. What those forces may be in a given case is not critical to the present discussion; the important point is the lawyer must recognize and deal with them. Introspection, mutual trust and candor with the client, and discussions with partners and intimates are the means by which attorneys can gain the needed self-awareness.

The lawyer helps the client in meaningful ways to choose the most appropriate course of action in light of the client's priorities. Naturally, the lawyer must contribute her legal expertise and counsel, but the client-centered attorney does much more. She structures agenda and the issues to clarify the clients' choices; she explains; she identifies the consequences of each alternative. She reflects back to clients not only what they have verbalized but also emotions that might lie below the surface of their awareness. The attorney confronts clients with inconsistencies and self-discloses to provide support and relevant information. That is, the client-centered lawyer does not see her counseling role as merely laying the alternatives on the table for the client to pick one; rather, she feels the responsibility to use the above skills to help the client determine and assess his evaluative criteria and then apply them to his alternatives.¹³ Obviously, a lawyer with that perception of her responsibility must do considerable preparation for her interpersonal sessions with clients. Research must be done and analyzed before counseling. Counseling sessions that must produce, or at least discuss, some law office decision must be planned, not to the point of inflexibility but enough to enable the lawyer to think through alternative solutions and identify topics that must be probed.

To repeat, this section merely sketches a model for the lawyer-counselor. The sketch should, however, serve to describe a perception of lawyering that allows for maximum satisfaction of client needs while meeting institutional needs (through effective representation of clients). The model looks to the client for decisions and to the lawyer as an advisor, legal analyst, and helper. The

(1971).

12. A. WATSON *supra* n. 11, at 41, 44, 75-79; A. WATSON, *PSYCHIATRY FOR LAWYERS* 6, 31 (2nd ed. 1978).

13. R. BASTRESS & J. HARBAUGH, *supra* n.6, ch. 12.

above description leaves open, however, what the lawyer's moral responsibility should be in his relations with and representation of clients. The remainder of this article is directed toward that subject.

II. TRADITIONAL PERCEPTION OF THE LAWYER'S MORAL OBLIGATION

Extending back to the English legal system and persisting through today, the generally prevailing conception of the lawyer's social and moral roles has left him a moral eunuch. Tradition and the Code of Professional Responsibility hold that the lawyer must zealously represent his client, limited only by the bounds of the law.¹⁴ Whom he represents and what he advocates carries no responsibility—he is not held accountable for the causes he advocates. The system's truth-finding (or at least decision-making) process depends upon the competing sides in a dispute presenting their cases to a neutral judge or jury. The litigants, to have their positions adequately and fairly adduced, are entitled to be represented by skilled, trained advocates, schooled in the procedures and quirks of the system. Indeed, traditionalists contend that the process can *only* work if each side is technically proficient and "blindly zealous."¹⁵ Thus, to assure that each party will receive a

14. ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 7. See also *id.* EC 7-19 quoted in n. 15, *infra*; text at n. 50, *infra* (discussing provisions of CPR and the proposed MODEL RULES OF PROFESSIONAL CONDUCT that relate to the lawyer's duty to accept, reject, continue on, or resign from cases with which he has moral or social reservations.)

15. *E.g.*, ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-19:

"Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary, and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law."

See also, *e.g.*, M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975); Fortas, *Thurman Arnold and the Theatre of the Law*, 79 *YALE L.J.* 988, 1002 (1970); Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060 (1976); Landsman, *The Decline of the Adversary System and the Changing role of the Advocate in that System*, 18 *SAN DIEGO L. REV.* 251 (1981).

fair hearing, the lawyer is insulated from accountability for the position he advocates, even though his client's position is ultimately found to be unlawful or unjust.

This perception of the lawyer's moral responsibility projects him as operating in two moral spheres: his personal and his professional. The dichotomy finds support in the notion, proceeding from St. Paul through Martin Luther and into the twentieth century,¹⁶ that each sphere has special characteristics calling for different moral treatment. Limitations prevail in the "public" realm that preclude a morality as rigid as that which should control the personal realm. At times, the argument goes, one can do no better than a "relative morality" when confronting means-ends conflicts in the public sphere. Government leaders, for example, must decide whether preserving peace or rescuing a strategic ally justifies a timely deceit. In international and political relations, which are dependent upon the good will and cooperation of their participants with few measures to enforce principles, decision-makers frequently act in a moral vacuum. The political pragmatist manipulates and pressures to achieve positive goals when the rigid moralist might be ineffective. Thus, Lord Cromwell preserved peace in England when a Thomas More could not have,¹⁷ and Lyndon Johnson cajoled civil rights and anti-poverty legislation out of Congress when others might have failed. Montaigne endorsed this compartmentalized morality when he said, "I have been able to concern myself with public affairs without moving the length of my nail from myself. . . . The mayor and Montaigne have always been two people, clearly separated."¹⁸

In their professional lives, lawyers, too, must function in settings that do not always permit them to adhere strictly to their ideals. "There's no reason why a lawyer . . . should not recognize the knavery that is part of his vocation," Montaigne insisted. "An honest man is not responsible for the vices or the stupidity of his calling."¹⁹ At times, the lawyer must sacrifice his personal feelings for the good of the system or his client. Thomas Shaffer (though not endorsing it) has summarized this view:

16. Shaffer, *supra* n.3.

17. *Id.* at 8-11.

18. Quoted in Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 64, (1980).

19. *Id.* at 63. See also Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 20 (1951).

The best you can hope for in exercising power in the world, as a judge does and as lawyers do, is "the relative good"; you can't follow the law of love in public and professional life; you do the best you can and that is always to some extent evil. If the morality of public and professional life is not exactly a *separate* morality, it is inevitably a *compromised* morality.²⁰

In a related—yet ironically different—argument, Charles Fried has defended the lawyer's dual morality by analogizing the lawyer-client relationship between friends and between close relatives.²¹ For example, our society might endorse some level of distributive justice yet still approve of a person's decision to provide his family with housing, food, and education to the exclusion of aiding the starving masses in Northern Africa.²² Fried also sees the lawyer's total discretion in deciding to represent a client as a function of basic liberty and justice:

Just as the principle of liberty leaves one morally free to choose a profession according to inclination, so within the profession it leaves one free to organize his life according to inclination. The lawyer's liberty—moral liberty—to take up what kind of practice he chooses and to take up or decline what clients he will represent is an aspect of the moral liberty of itself to enter into personal relations freely.²³

.....
If the lawyer is really to be impressed to serve. . . social needs, then his independence and discretion disappear, and he does indeed become a public resource cut up and disposed of by the public's needs. There would be no justice to such a conception.²⁴

Such apologies have been used to justify auction of lawyers to the highest bidder and permitted those hires to advocate with impunity.²⁵ The lawyer's response to critics, and to himself, can invariably rest on the assertion that he is simply a professional doing his job, lending an essential element to our legal system. This con-

20. *Id.* at 13.

21. Fried, *supra* n. 15.

22. *Id.* at 1065-76.

23. *Id.* at 1078.

24. *Id.* at 1079.

25. See J. AUERBACH, UNEQUAL JUSTICE 153-54. Schudson, *supra*, n. 3; Simon, *The Ideology of Advocacy*, *supra* note 3, at 36.

ception of the lawyer's role has a venerable history. The classic description was made by Lord Brougham in 1820:

An advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, THAT CLIENT AND NONE OTHER. To save that client by all expedient means, to protect that client at all hazards and costs to all others, and among others to himself, is the highest and most unquestioned of his duties: and he must not regard the alarm, the suffering, the torment, the destruction which he may bring on any other. Nay, separating even the duties of a patriot from those of an advocate, and casting them, if need be, to the wind, he must go on reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his client's sake.²⁶

Later in that century, this view was acted out in America by David Dudley Field in a series of notorious actions taken on behalf of a pair of shyster railroad magnates.²⁷ Field, the tireless reformer of procedural codes, used loopholes in New York's civil procedure laws (which he drafted) to secure questionable injunctions to facilitate the speculative and greedy undertakings of his clients. He then represented them as they executed a series of clearly immoral, probably illegal, and possibly homicidal maneuvers. Field defended his role in the litigation through a highly publicized correspondence with the noted editor of the Springfield Republican, Samuel Bowles. Field's participation in these events and in the exchange of letters, says one commentator, reflected "a kind of 'amoral morality'"—a belief that lawyers "served justice best by refusing, themselves, to judge their clients" or their clients' causes.²⁸ The story of David Dudley Field is just one example from a century that saw the adversarial model increasingly proffered as the appropriate one for lawyers.²⁹

26. Quoted in Schudson, *supra* n. 3, at 205-06. See also Goldberger, *The "Right to Counsel" in Political Cases: The Bar's Failure*, 43 L. & C.P. 321, 324 (1979), which notes that "the obligation of the English barrister to undertake any case tendered to him was acknowledged in Scotland as early as the sixteenth century." Goldberger, though, is concerned with protecting lawyers who represent unpopular clients. As noted in the text accompanying nn. 54-55 & 110-11, *infra*, the unpopularity of a lawyer's advocacy should not be confused with its morality.

27. Schudson, *supra* n. 3.

28. *Id.* at 192.

29. See O. W. HOLMES, *THE COMMON LAW* (1881); Schudson, *supra* n. 3, at

By the turn of the century, the adversarial approach was the clearly prevailing view. Elihu Root, a prominent lawyer and a president of the American Bar Association, commented in 1906 that the "pure lawyer seldom concerns himself about the broad aspects of public policy."³⁰ One of that era's most respected and successful American attorneys, John W. Davis, spent a professional lifetime working under this belief and on behalf of moneyed, voracious interests. According to his biographer, Davis's philosophy held that

the lawyer's duty was to represent his client's interests to the limit of the law, not to moralize on the social and economic implications of the client's lawful actions.³¹

Early in Davis' career, for example, Davis represented railroads and coal companies in West Virginia, a state whose laws were then highly protective of those industries. He rationalized the inequities occasioned by the laws' harshness: "It was my duty," he said, "to find out what the law was, and tell my client what rule of life to follow. That was my job. If the rule changes, well and good."³² So he represented a railroad as it built a railroad line through the farm of one of Davis's old friends and six feet from the farmhouse door. A short while later, a coal company client insisted that Davis force the sale of a widow's property under the terms of an earlier, unfavorable contract. Davis reflected, "The lawyer must steel himself like the surgeon to think only of the subject before him and not of the pain his knife can cause. . . . He spends his life making enemies in other people's quarrels."³³

192-93; Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT. L. REV. 181, 214 n.79 (1981). According to Schudson, the influential Holmes book

"argued that the law made progress by focusing on technical—and hence resolvable—issues, rather than on moral—and hence indeterminate—considerations. Lawyers in their day-to-day practice could make the corresponding claim that their expertise had nothing directly to do with morals but was simply a technical instrument applicable to any situation. *Justice* inhered in the legal system not in its constituent acts just as, in the market the optimal distributing of wealth was expected to be the systemic outcome of a multitude of self-interested choices." *Id.* (emphasis in original).

30. W. HARBAUGH, *LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS* 22 (1973). See also J. AUERBACH, *supra* n. 25, at 130-57 (1976).

31. W. HARBAUGH, *supra* n. 30, at 264.

32. *Id.* at 46.

33. *Id.* See also *id.* at 23, 45, 264, 267.

The traditional view prevails today. Chief Justice Burger, for example, has written that "in the highest tradition of the law, . . . the advocate is not to be invidiously identified with his client."³⁴ Similarly, Justice Abe Fortas expressed his view in a eulogy of his former law partner and friend, Thurman Arnold:

Lawyers are agents, not principals; and they should neither criticize nor tolerate criticism based upon the character of the client whom they represent or the cause they prosecute or defend. They cannot and should not accept responsibility for the client's practices. Rapists, murderers, child-abusers, General Motors, Dow Chemical—and even cigarette manufacturers and stream-polluters—are entitled to a lawyer; and any lawyer who undertakes their representation must be immune from criticism for doing so.³⁵

The practicing bar generally endorses that view.³⁶ The bar's principle self-image is that lawyers are professionals who, like doctors or dentists, work and do their best for clients regardless of the clients' identities or causes.³⁷ For example, one of the country's successful trial lawyers, Roy Cohn, has said in an interview, "[M]y personal ethics are to win. Total devotion to employment and to win, to go for the jugular, to fight as rough and as tough as I can within the bounds of legality."³⁸ Later in the same interview, Cohn elaborated, "It is not the lawyer's responsibility to believe or not to

34. *Gertz v. Welch*, 418 U.S. 323, 355 (1974) (dissenting opinion). It should be noted, though, that the Chief Justice was writing in the context of a lawyer's representation of unpopular—not immoral—clients. See n. 26, *supra*, & text accompanying nn. 54-55, 110-11, *infra*. Thus, it is not clear that the Chief Justice would necessarily apply his statement to all contexts.

35. Fortas, *Thurman Arnold and the Theatre of the Law*, 79 *YALE L.J.* 988, 1002 (1970).

36. See nn. 14-15 & accompanying text, *supra*, and nn. 45-50 & accompanying text, *infra*.

37. See Maute, *supra* n. 2, which divides lawyers into two camps: "instrumentalists," who view themselves as technicians doing their clients' bidding within the bounds of the law, and "paternalists," who preempt client decision-making. While the present article has much in common with the Maute piece, and conceding the instrumentalist-paternalist distinction has substance, in practice many lawyers cross lines between camps. Those lawyers interfere in client decision-making and then justify their ensuing conduct by characterizing themselves as mere technicians executing a client's desires.

38. *Reflections on a Life of Controversy: Roy Cohn . . . on Roy Cohn*, *THE NATIONAL LAW JOURNAL* 13, 46 (Dec. 1, 1980).

believe—the lawyer is a mere technician.”³⁹ And, “every person has a right to a lawyer of his own choice. . . . Now, there is never a need for a lawyer to apologize for whom he represents.”⁴⁰ The academic literature also continues to yield support for the insulation of lawyers’ advocacy from moral scrutiny.⁴¹

The entrenchment and pervasiveness of the adversarial model in legal education and the profession has provoked Richard Wasserstrom (among others) to speculate it is responsible for the nefarious deeds committed by Watergate lawyers.⁴² The Nixon administration lawyers perceived the President as their client, and could thus rationalize their shenanigans—“lying to the public; dissembling; stonewalling; tape-recording conversations; playing dirty tricks”⁴³—executed on his behalf. While not all those activities were illegal, they certainly evidenced an amorality and a confusion of means and ends. These young lawyers were unable to shed their professional training, which had taught them to blindly advance the client’s interest without serious consideration of means and consequences. According to Professor Wasserstrom,

39. *Id.* See also Noonan, *Other People’s Morals: The Lawyer’s Conscience*, 48 TENN. L. REV. 227, 228-30 (1981), which recounts the involvement of Hoyt Moore, “a highly respectable New York lawyer, a rather righteous Yankee from Maine,” in an attempt to financially influence a federal judge on behalf of Bethlehem Steel. Moore’s conduct was clearly improper, of course, but the point of the story lay in his firm’s rationalization that he did it for his client. Moore’s partner later wrote—without mentioning the bribe attempt—that “[n]o lawyer ever unreservedly gave more of himself to a client than Hoyt Moore has given to Bethlehem.” R. SWAINE, 2 THE CRAVATH FIRM AND ITS PREDECESSORS 144 (1948).

40. *Id.* at 47. Cohn did, however, equivocate and he tempered the statements quoted in the text. He also said, “I take advantage of my special practice to be personally selective, meaning I won’t take a case unless I believe in it.” *Id.* He stated further:

I have to have a motivating factor in order to represent somebody. That is my personal ethic. I have to believe that person is being selectively prosecuted, picked on, legally wronged, or if not legally wronged, morally wronged, otherwise I am not comfortable with the case. *Id.*

Thus, if there is a consistency in Mr. Cohn’s position, it is apparently that while he personally follows the moral principles advocated in this article, he would not apply them to lawyers generally.

41. *E.g.*, M. FREEDMAN, *supra* n. 13; Fried, *supra* n. 13; Landsman, *supra* n. 15. See nn. 15-24 & accompanying text, *supra*.

42. Wasserstrom, *supra* n. 3.

43. *Id.* 5 HUMAN RIGHTS at 11.

[T]he behavior of the lawyers involved in Watergate was simply another less happy illustration of lawyers playing their accustomed institutional role. If we are to approve on institutional grounds of the lawyer's zealous defense of the apparently guilty client and the lawyer's effective assistance of the immoral cheat; does it not follow that we must also approve of the Watergate's zealous defense of the interests of Richard Nixon?⁴⁴

As previously noted, the Bar's professional codes have formally institutionalized the adversarial, amoral model. "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available," directs Canon 2. Although that does not require the lawyer to represent "every person who wishes to become his client," Ethical Consideration 2-26 admonishes that "a lawyer should not lightly decline proffered employment. The fulfillment of [Canon 2's] objective requires acceptance by a lawyer of his share of tendered employment which may be unattractive both to him and the bar generally." Rejection of employment is warranted only if "the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client."⁴⁵ Canon 5 holds, "A lawyer should exercise independent professional judgment on behalf of a client." The Canon presumes "the lawyer acts on behalf of or for rather than to or with the client."⁴⁶ Ethical Consideration 5-21 makes clear that the Canon 5 obligation requires the lawyer to act "solely on behalf of his client" and to "disregard the desires of others that might impair his free judgment." According to Robert Redmount, "Canon 5 locks the lawyer into an advocacy and adversarial role. His judgment of the situation, regardless of what it is, is distorted by his obligation to his client, directly contradicting the idea that he is able to exercise independent judgment."⁴⁷

Canon 7 provides the creed for the lawyer in our adversarial system: "A lawyer should represent a client zealously within the bounds of the law." Ethical Consideration 7-3 amplifies the Canon's general edict by directing the lawyer to "resolve in favor of his client doubts as to the bounds of the law."

44. EC 2-30.

45. Redmount, *Client Counseling and the Regulation of Professional Conduct*, 26 St. Louis U.L.J. 829, 842 (1982) (emphasis in original).

46. *Id.* at 843.

47. See Maute, *supra* n. 2; Redmount, *supra* n. 45.

Additional provisions of the Code reinforce the perception of the lawyer as a professional detached from moral and societal responsibilities beyond those owed to clients and prevailing law. Ethical Consideration 7-8 suggests "it is often desirable" to indicate moral concerns to the client, but resolution of the issues must ultimately rest with the client. The lawyer may withdraw from representation in nonadjudicatory matters if the client persists in conduct that is contrary to the lawyer's judgment and advice.⁴⁸ Nowhere, however, does the Code compel—or even suggest—withdrawal if the lawyer objects to the client's goals on moral, social, or political grounds, so long as the goals are legal. Finally, EC 7-17 informs lawyers their obligation of loyalty to a client applies only to their discharge of professional duties and does not extend to personal viewpoints or positions on public issues.⁴⁹

The final draft of the American Bar Association's Model Rules of Professional Conduct does project a more enlightened perception of the lawyer in counseling and nonadversarial roles,⁵⁰ but is, at best, ambivalent on moral independence for lawyers. The rules are more liberal in permitting assertion of moral principles by lawyers, but do not endorse or impose it. On one hand, the comment to Rule 1.15 states, "A lawyer has a qualified freedom of association and ordinarily is not obliged to assist a client whose character or cause the lawyer regards as repugnant." In addition, Rule 1.16(b)(2) permits an attorney to withdraw (assuming he is not ordered by a court to continue) whenever "the client persists in a course of conduct that is illegal or unjust." On the other hand, Rule 1.15(a) holds "A lawyer's representation of a client, . . . does not constitute an endorsement of the client's political, economic, social, or moral views or activities." The comment to that Rule adds, "A potential client need persuade a lawyer only that the client's cause has legal merit and not that it also is compatible with the lawyer's political, social, or moral views." Obviously, the Rules' drafters are concerned about representation of unpopular clients. But, as pointed out below, representing unpopular causes is not equivalent to advocating immoral causes.

The examples provided earlier in this section of lawyers in action expose the amorality of the adversarial model.⁵¹ As is

48. EC 7-8.

49. See also EC 7-19, quoted in n. 15, *supra*.

50. Maute, *supra* n. 2; Redmount, *supra* n. 45, at 854.

51. See nn. 27-40 and accompanying text, *supra*. See also Part V-A, *infra*.

implicit in those cases, the model carries real costs to society and to lawyers (individually and collectively). Watergate was just one glaring manifestation of the costs. Other costs, though, run deeper and are more persistent.

By permitting, even requiring, lawyers to leave their morality outside their adversarial role, we deprive society of an important means for efficient yet sensitive disposition of legal problems. By relieving lawyers of any moral responsibility for results, the adversarial model reduces the chances for achieving just results. Because wealthy and established interests have a corner on the lawyer market, the model tends to produce lawyers satisfied with the status quo and having little incentive to seek just changes in the law. Finally, the model forces the lawyer to wear a professional mask, to be dishonest with himself, thus causing serious damage to the lawyer's personality and building an impediment to his own self-fulfillment.

These costs of the adversarial model will be further developed in the following sections offering an alternative model and developing its advantages.

III. A PROPOSAL—A DUTY FOR LAWYERS TO EXERCISE INDEPENDENT MORAL JUDGMENT

The amoral adversarial model should be replaced by one that requires a lawyer to exercise independent judgment. This section proposes such an alternative model and explains its basic features, difficulties, and advantages.

A. Overview

The alternative model calls for the lawyer to gain an understanding of the client's facts, following the approach advanced in Part I, above. That is, the lawyer should be open and accepting, and gathering the "facts" should include an awareness of the client's feelings and motives. The lawyer should then independently assess the case to determine if she has any moral or social objections, both in terms of the consequences to the immediate parties and of the effects on broader policy implications. If so, then she should carefully prepare for a most sensitive counseling session and proceed to fully discuss the issue with the client. The client may satisfy the lawyer's reservations and the representation can then continue. If, however, the client cannot meet the lawyer's objections, then the lawyer should explore possible alternatives with the client. If that fails, then the lawyer should again exercise her

independent judgment and, if the concern persists and is serious, should refuse to proceed with the case. The judgment should be based on the lawyer's personal sense of right and justice and not, as presently exists under the adversarial standard, focused on the client's interest in being adequately represented.

If the lawyer does decide to represent a client—either after putting aside his concerns or after deciding that there is nothing objectionable—then he must be held accountable for his adversarial position. This accountability is a key feature to this model; it represents symbolically and in practice the demolition of the protective wall of adversarial amorality. "Accountability" here does not mean subjection to civil liability or disciplinary action. Rather, it means the lawyer must be placed in an identity with his client's cause. Thus the lawyer can be taken to task for the position he advances and scrutinized by both peers and by the public. He cannot be allowed the luxury of a professional veil to hide behind.

Furthermore, the lawyer should judge (against moral and social standards) not only the position he advocates, but also the means he adopts in representing the client. Thus "zealous representation" should be circumscribed not only by the bounds of the law but also by the lawyer's judgment of the propriety and fairness of his actions. To reach that judgment, the lawyer should consider, *inter alia*, the impact that the questioned action will have on the truth-finding process and on affected individuals, the availability of alternative means, the client's input, the action's perceived unfairness, and the effects on client confidentiality.⁵²

Scrutiny of the lawyer's moral judgments should focus on what he advocates and how, not on whom he represents. The distinction has practical significance for the lawyer; it means the lawyer should not judge the client's morality in matters unrelated to the position advocated. Thus, for example, an attorney may find adultery immoral, but can nevertheless non-judgmentally and unequivocally counsel an adulterer-divorce client. The lawyer has no business morally judging clients on personal or other matters when they are not essential to the result sought; in the divorce case, the attorney need assert only that the marriage is irretrievably broken and need not argue that adultery should be condoned.

This distinction is further illustrated, if unintentionally, by Monroe Freedman in his major defense of the adversarial system.

52. See Part V, *infra*.

Freedman assailed an Anthony Lewis column that criticized James St. Clair for "dangerous arrogance" and arguments that were "surely wrong" in his defense of Richard Nixon.⁵³ To Freedman, St. Clair was just zealously representing his client—within legal bounds—and was therefore insulated from attack for his participation in the case. Indeed, St. Clair should not be criticized simply because he represented Richard Nixon; Nixon was entitled to a lawyer and St. Clair was entitled to represent him. St. Clair, however, should be held responsible for positions he advocated that would have seriously disrupted the sensitive checks and balances among our governmental branches. (That was the thrust of Mr. Lewis's criticism.) Mr. Lewis was participating in a public dialogue, a moral discourse, that properly forced his readers and Mr. St. Clair to focus on the substance of the attorney's advocacy and its societal implications. When St. Clair went to court, he should have been prepared to defend his position not only to the justices, but also to himself and to the public. As a citizen and as a prominent commentator, Lewis thus acted responsibly by questioning the consequences and the propriety of St. Clair's arguments and professional conduct.

The "moral" or other standards that will ultimately be applied, however, must necessarily be the lawyer's own. The relevant "morality" is a personal, subjective one, not objective or externally imposed. Were it otherwise, bar associations could develop censorship powers, casting a conformity of thought, politics, and culture on their subjects. Politically or socially dissenting attorneys could be too easily targeted and lawyers would be even more reluctant than at present to represent unpopular, nonconforming clients.⁵⁴ The developments of the fifties and their lingering effects are proof enough of the real threat posed by overzealous bar committees.⁵⁵ Moreover, few moral issues are reducible to simple black and white answers.

The subjective standard, then, means the Bar will not play a traditional role in "enforcing" this professional duty. Practically speaking, an organization cannot force an individual to follow his

53. M. FREEDMAN, *supra* n. 15, at 10-11. The Lewis column appeared in the *New York Times*, March 18, 1974, at 29, col. 1.

54. See Goldberger, *supra* n. 26.

55. See, e.g., *Konigsberg v. Board of Bar Examiners*, 366 U.S. 36 (1961); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Pushinsky v. Board of Law Examiners*, 244 S.E.2d 666 (W. Va. 1980).

own conscience. The Bar can, however, take several steps to meaningfully implement the duty. Section V-B, *infra*, describes those steps, as well as other means for developing a model of moral independence for lawyers.

The model has limitations. For one, moral independence with a subjective standard may simply cause lawyers to change rationales. Instead of explaining that the advocate's role imposes no moral obligation, the lawyer could convince himself that the position he advocates is morally and socially proper. The only apparent change, then, would be the different rationalization.

That change, however, is a meaningful one. Hopefully, not all attorneys would be so effective in their self-argument that they would become moral chameleons changing colors to suit their surroundings. Attorneys would, at least, be more likely to follow their conscience, and they would not be able to deflect criticism and discussion of important issues by raising their advocacy shield. Attention could thus focus on the *relevant* moral and societal considerations. (That alone would be a major improvement.)

The criminal process requires a special reference. Most criminal defense work can be completed without threatening the lawyer's moral independence. A lawyer representing a criminal defendant normally advocates only that his client is not guilty of the charges. Certainly in defending a murderer, counsel does not advocate, nor should he be perceived as advocating, murder. When he believes his clients should not be convicted, when his tactics are proper, and when his advocacy does not include policy questions counter to his beliefs, the lawyer will not face a moral issue in justifying the goal of acquittal.⁵⁶ This point applies as well in the civil

56. Criminal lawyers, of course, may also view their advocacy in terms of defending a client's constitutional rights, especially under the fifth and sixth amendments. *Some lawyer must represent every criminal defendant.* *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963). There is, moreover, a difference in what is at stake—a man's liberty and the stigma of a criminal conviction is balanced against the entire weight of the state's machinery geared toward obtaining a conviction. That is a considerably different circumstance than in a civil dispute where the judicial system does not perceive one side or the other as rating special protection. *See, e.g., Rosenbloom v. Metromedia*, 403 U.S. 29, 58 (1971); *In re Winship*, 397 U.S. 358, 371 (1970). The different burdens of proof (reasonable doubt vs. preponderance) provide one instance in which our system compensates the criminal defendant for the high risk he confronts and the imbalance of the process. *See also Wasserstrom, supra* n. 3, at 12:

Because a deprivation of liberty is so serious, because the

process. For example, a lawyer may believe in strict enforcement of environmental laws, yet still sincerely represent a company civilly sued for pollution—if he believes that the company has not violated pollution standards *and* that relieving it of liability will not set an undesirable precedent.

Finally, there are problems generated by certain realities of law practice. A lawyer's insistence on asserting his independent moral judgment may result in severed relationships with paying clients. For some lawyers, money is the driving force in the practice of law⁵⁷ and turning away income is not easy for them. Other lawyers may be operating on a slim profit margin and feel they cannot afford to turn away any client who holds forth the prospects of a fee. For the attorney in the former class, our profession should have no compassion, although we can appreciate the dilemma faced by the latter. Another, much larger, class of lawyers could also face difficulties abiding by an independent moral code. Junior partners and associates working in firms and in corporate counsel offices will not likely feel they have the discretion or the position to raise moral and social questions with a client and then follow a course of action based on his own (the lawyer's) perceptions of those issues. Too often in a law firm, important moral and social issues get lost in the firm's hierarchy. An attorney in the lower eschelons of that hierarchy will understandably be reluctant to antagonize any of the firm's regular and well-paying clients. He will be equally reluctant to jeopardize his position and advancement in the firm by appeals to senior partner.

Such problems, while real, do not preclude adoption of a duty by lawyers to adhere to their own, independent moral standards. The problems are not unsolvable; Part V, for example, suggests several means for handling them. Even if those suggestions do not entirely resolve the problems, advantages to the new standard would still outweigh any drawbacks.⁵⁸

prosecutorial resources of the state are so vast, and because, perhaps, of a serious skepticism about the rightness of punishment even where wrong-doing has occurred, it is easy to accept the view that it makes sense to charge the defense counsel with the job of making the best possible case for the accused—without regard, so to speak, for the merits.

57. See D. ROSENTHAL, *supra* n. 7.

58. As David Hoffman put it, "What is wrong is not the less so for being common." H. DRINKER, LEGAL ETHICS APPENDIX E at 346 (1953), quoting Hoff-

B. Advantages

The advantages of moral independence and accountability for each lawyer are manifold and weighty. The benefits will further the needs of the legal system, of society generally, of the organized bar, and of individual lawyers as well.

One of the approach's major benefits should be a fairer and more just legal system. After all, lawyers and their clients are continuously making "legal" decisions in law offices and board rooms.⁵⁹ Imposing a duty on lawyers to assert themselves morally would help assure full consideration of societal implications. Thus, when a cereal company decides whether to fight a federal ruling on sugar-coated cereals, when a steel company (or steelworkers' union) looks for loopholes in fair employment laws, when a solvent debtor seeks to invoke a statute of limitations to avoid repayment of a loan,⁶⁰ or when a bank fires an employee for insisting on compliance with credit reporting statutes,⁶¹ the lawyers representing these clients should confront them about the moral and socio-economic consequences of their conduct. Such confrontations should occur as soon as the lawyer has the facts. (Ideally, that would be before the conduct is initiated, but unfortunately clients do not always consult their attorney before acting.) In any event, this fuller, more balanced process will produce better decisions.

The legal system should also be fairer in the sense that its truth-finding process should function more accurately. For example, an attorney should consider whether his withholding of certain evidence or his impeachment of an admittedly honest witness is compatible with the search for a just solution. With lawyers thus

man's *Fifty Resolutions in Regard to Professional Department*, Resolution XXX-III. (Drinker quotes the entire text of Hoffman's *Resolutions*.)

In 1835, Hoffman authored the first attempt in this country to codify rules on lawyers' ethics. Although Hoffman was definitely not client centered, his perception of the lawyer's moral responsibility was consistent with that advocated in this article. Maute, *supra* n. 2, at 1053-54. Hoffman's view was attacked in 1854 when the jurist and law professor, George Sharswood, argued that the lawyer was not morally responsible for his client's causes. Sharswood's position eventually prevailed as states began to adopt formal Codes of Ethics. *Id.*

59. See T. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING* 1-2 (1976); Sacks, *supra* n. 2, at 316-19.

60. See *Zabella v. Pakel*, 242 F.2d 452 (7th Cir. 1957); nn. 104-06 & accompanying text, *infra*.

61. See *Harless v. First Nat'l Bank in Fairmont*, ___ W. Va. ___, 246 S.E.2d 270 (1978).

scrutinizing the effects of their tactics and of their conduct of cases, the system should be more effective.⁶²

The system's efficiency will be improved by the lawyer's more searching review of his clients' cases. A client must be able to convince his lawyer that his claim is worth while, not simply that he will be able to pay a fee. Client awareness of that will deter even the effort to file frivolous or harrassing civil actions. Elimination of silly and bad faith cases would relieve court dockets for more deserving litigation. Although we presently have rules of professional responsibility that supposedly regulate the filing of harassing and frivolous law suits,⁶³ the rationalizations provided by the advocacy model render them largely ineffective.

The organized legal profession will also gain by imposing on its members a duty to assert independent judgment. The Bar would acquire a much-improved image in the public eye. The profession has long been lampooned for its amoral pose.⁶⁴ Although public perception may at first glance seem a superficial advantage, a new image could produce real gains. Lay respect for the fairness of the legal system can have a positive effect on society's willingness to properly use and to abide by the system. If the public lacks that respect, then law is perceived as a sham and its effectiveness is diminished. Greater respect also makes the lawyer's job easier in individual cases.

Finally, and perhaps most significantly, this model of the morally independent lawyer makes for happier, healthier, more productive lawyers and lawyer-client relationships. Attorneys who believe in their advocacy and in their clients enjoy their work, while those who toil in conflict with their beliefs can experience inner turmoil, self-doubt, and constant struggles with rationalization. A person who works against his beliefs, or who delegates to others (such as clients) his moral choices, is unable to achieve self-actualization. That is, he cannot develop his full potential as a person, and he flounders in frustration. The lawyer's contradiction of values and work also damages relationships with those clients whose

62. Abramson, *supra* n. 3. *But see* Fried, *supra* n. 15.

63. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-4 & DR 7-102.

64. *E.g.*, Sandburg, *The Lawyers Know Too Much*, in C. SANDBURG, SMOKE AND STEEL 85 (1920); Gawalt, *Sources of Anti-Lawyer Sentiment in Massachusetts, 1740-1840*, 14 AM. J. LEGAL HIST. 283 (1970); Peters, *The Screwing of the Average Man—How Your Lawyer Does It*, WASH. MONTHLY 33 (Feb. 1974); Waltz, *The Unpopularity of Lawyers in America*, 25 CLEV. ST. L. REV. 143 (1976).

cases occasion the conflict. The lawyer's deception of self and others inhibits communication and deprives the relationship of the genuineness it needs to be fully effective. In contrast, a lawyer who acts consistently with his values and uses the model of the lawyer-counselor sketched in Part I, above, clears the way to fully develop both himself and his relationships with clients. That theme pervades the following two sections as they explain the seeming paradox of how an accepting, client-centered lawyer not only *can* be morally independent in his work, but *must* be.

IV. RELATIONSHIP OF MORAL ACCOUNTABILITY FOR LAWYERS TO CLIENT-CENTERED COUNSELING

How can a lawyer/counselor be open and accepting with clients while still insisting on his own moral code? The response is that a counselor cannot be open and accepting unless he is honest with himself and with his client. A counseling relationship based on falsehoods is doomed to failure. An "open and accepting" approach requires *respect* for the client and a willingness to listen; it does not mean that the counselor surrenders all his social, political, and moral commitments to each client. The relationship can best be described as a partnership between equals who share both common goals and responsibility. Thus, as this section explains, client-centered and morally independent counseling are interdependent and both demand "honest" counselors.

The concept of the lawyer as a morally independent counselor follows naturally from the philosophical, psychological, and psychotherapeutic premises of client-centered lawyering. These premises can be traced to humanist, existential, Taoist, and Judeo-Christian thinkers, such as Abraham Maslow, Soren Kierkegaard, Martin Buber, and Carl Rogers.⁶⁵

Humanistic psychology as formulated by Abraham Maslow supplies client-centered helping with many of its essential notions about human nature and personality. Maslow described personality development in terms of a "hierarchy of needs," in which the individual is preoccupied with satisfaction of a progression of basic

65. *E.g.*, authorities cited in nn. 1-2, *supra* and nn. 66, 73-74, *infra*; J. SARTRE, *THE EMOTIONS: OUTLINE OF A THEORY* (B. Frechtman, trans.) (1948). *See generally*, *e.g.*, R. CORSINI, *CURRENT PSYCHOTHERAPIES* 189-94 (2d ed. 1979); A. VAN KAAM, *EXISTENTIAL FOUNDATIONS OF PSYCHOLOGY* (1966).

needs.⁶⁶ He strives to sate—in order—his physiological, safety and love needs. Once those are largely filled, then he can move on to deal with a new discontent and restlessness—the need to do the best at what he is suited for. Maslow termed this the need for self-actualization. “This tendency might be phrased as the desire to become more and more what one is, to become everything that one is capable of becoming.”⁶⁷ The aspirations can find expression in any field—music, art, athletics, teaching, carpentry, and so on. Those who experience a high need for self-actualization, which means that their lower needs are largely satisfied, are the most psychologically healthy people. They are growth-motivated, not deficiency-motivated, as are those dominated by the lower needs of physiology, safety, and love. Unfortunately, only a small percentage of people presently experience the self-actualizing need to a substantial degree.

Self-actualized persons are accepting of themselves, of others, and of nature. They accept their own frailties and their discrepancies from the ideal without disruptive concern.⁶⁸ That is not to say they are self-satisfied; rather, they acknowledge the inevitability of weakness and human frailty without undue fret or psychological disturbance. They accept the imperfections of nature and humans. The psychologically healthy lack defensiveness and labor posturing and artificiality.

Self-actualizing persons focus more on external problems than on themselves. That is, they perceive “some mission in life, some task to fulfill, some problem outside themselves which enlists much of their energies.”⁶⁹ They are typically concerned about the basic and persistent issues of philosophy and ethics. They rarely get so close to the trees that they fail to see the forest. They lack pettiness and generally look past the trivial. Yet, while maintaining an external focus, the self-actualizing also make use of solitude and privacy to a much greater degree than the average person. Such comfort with solitude follows, perhaps, from their contemplative nature, their knowledge and acceptance of self, and their independence.

66. *E.g.*, A. MASLOW, *MOTIVATION AND PERSONALITY* (1954). *See also* A. MASLOW, *THE FARTHER REACHES OF HUMAN NATURE* (1971); A. MASLOW, *supra* n. 1.

67. A. MASLOW, *MOTIVATION AND PERSONALITY* 92 (1954).

68. A. MASLOW, *THE FARTHER REACHES OF HUMAN NATURE* 112-13 (1971).

69. A. MASLOW, *supra* n. 67, at 211.

That independence or autonomy crosscuts through much of the self-actualized's make-up. "Since they are propelled by growth motivation rather than by deficiency motivation, self-actualizing people are not dependent for their main satisfactions on the real world, or other people or culture or means to ends or, in general, on extrinsic satisfactions. Rather, they are dependent for their own development and continued growth on their own potentialities and latent resources."⁷⁰

At the same time—and this is crucial to client-centered helping—the interpersonal relations of the self-actualizing are marked by deep feelings of identification, sympathy, empathy, and affection for fellow human beings. Self-actualizing persons accept and respect the autonomy of others, although they can also be impatient with, and disgusted by, stupidity. They generally maintain deeper and more profound interpersonal relations than do other adults. The interpersonal relations of the self-actualizing also reveal a true democratic character; they are open-minded, egalitarian, and free of stereotypical thinking. Thus, in the most profound implication of this attribute, the growth-motivated "give a certain quantum of respect to *any* human being just because he is a human individual."⁷¹ Self-actualizing individuals also value and effect honesty and genuineness in their relations with others.

Finally, self-actualizing individuals are distinctly aware of the value dimension in their life. They have an acute awareness of what values they, in fact, hold; "these individuals are strongly ethical, they have definite moral standards, . . ."⁷² They independently arrive at their views of right and wrong, which follows naturally from their autonomy and independence of thought. Thus, the self-actualizing do not accept without scrutiny the moral edicts of religion, law, or other individuals.

Maslow's progression to self-actualization corresponds to the theories of Lawrence Kohlberg on developmental moral psychology. Building on the theories of Jean Piaget,⁷³ Kohlberg has identified three levels of moral development that individuals experience in six stages from childhood into adulthood.⁷⁴ The levels comprise

70. *Id.* at 213-14.

71. *Id.* at 220 (emphasis in original).

72. *Id.* at 221.

73. *E.g.*, J. PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (1932); J. PIAGET, *SIX PSYCHOLOGICAL STUDIES* (1968); J. PIAGET, *STRUCTURALISM* (1970).

74. *See generally* L. KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT*

the premoral (or preconventional), conventional role conformity (conventional), and self-accepted moral principles (postconventional). Each of the levels has two stages.

The premoral level is that of the child and premised on consequences rather than intent. "I can fudge, or even cheat, on my income taxes because the chances of the I.R.S. discovering me are very small." Thus, good and bad depend on the probability of punishment, and "moral" decisions are reached without considering others.

The second level reveals a quantum leap forward in moral development as morality shifts away from egocentrism to societal expectation. Right and wrong are defined by peer group or external authority. Loyalty, duty, and obedience surface as the key virtues.⁷⁵ This conventional morality is exemplified by strict adherence to law (i.e., legalism), religious dogma (e.g., the Bible or the Koran), or politico-social doctrine (e.g., *Das Kapital*, the Sayings of Chairman Mao). Most lawyers function at this level, an unsurprising consequence of legal education's methods and substance⁷⁶ and the adversarial system's ethics. Lawyers measure their "ethics" by adherence to the Code of Professional Responsibility, even though that Code is as much concerned with business regulation as morality and even though the code encourages the lawyer to assign most of his moral decisions to his clients.⁷⁷ Clients and their views, then, supplement the Code and, in practical effect, constitute lawyers' most common "external authority." This system of "vicarious re-

(1981). The structure described in the text reflects the Piaget-Kohlberg principle that moral development should be assessed in terms of the reasons given by individuals at various ages for distinguishing right and wrong and acting on those distinctions. See Richards, *Moral Theory, The Developmental Psychology of Ethical Autonomy and Professionalism*, 31 J. LEG. ED. 359 (1981).

75. E. STEVENS, BUSINESS ETHICS 16 (1979).

76. See generally Richards, *supra* n. 74; Wasserstrom, *supra* n. 3. See also nn. 112-17, *infra*. The "team play" ethics prevalent among the Nixon administration's lawyers enmeshed in Watergate starkly illustrates a level II morality. See Wasserstrom, *supra*. For example, former Attorney General John Mitchell responded, when asked if he thought he had done anything wrong, "I put my trust in the role of the President." Hall, *Values: Education and Consciousness: The State of the Art, Challenge in Our Times*, in M. SMITH, VALUES CLARIFICATION 193 (19___), What was "right" for Mitchell and the other Watergate lawyers was what the President, or the "Team"—the external authority—said was right.

77. See nn. 14-15, 44-47 & accompanying text, *supra*.

sponsibility"⁷⁸ in moral decision-making is particularly troublesome because clients—unlike most other external authorities—do not prescribe moral choices according to some world view that takes into account competing values. The problem is compounded when lawyers do not at least confront clients with moral and social considerations relevant to client's alternatives.

In the third level of Kohlberg's structure, representing another quantum leap in moral development, the person's own conscience emerges as the moral arbiter:

The moral focus shifts again, this time away from group expectations and back to the self. But this is not return to the selfishness of level one. Not egotism but autonomy is the rule—the self as autonomous. I'm less concerned about how others see me, and more concerned about how I see myself. Ethical decision-making at this level submits even laws and moral convictions to the test of universal moral principle to which the autonomous self is committed. Ethical principles appeal to comprehensiveness and logical consistency.⁷⁹

Thus, Level III individuals may look to an external authority for moral guidance, but they will adhere to the authority only if, after evaluation and thought, it satisfies the individual's perception of right.⁸⁰ Unfortunately, most persons never reach this third level.

78. Noonan, *supra* n. 3.

79. Stevens, *supra* n. 75, at 17.

80. David A. J. Richards has synthesized Kohlberg's six stages in the following outline:

Level I. Premoral:

Stage 1. Punishment and obedience orientation.

Stage 2. Naive instrumental hedonism.

Level II. Morality of conventional role conformity.

Stage 3. Good-boy morality of maintaining good relations, approval by others.

Stage 4. Authority maintaining morality (legalism).

level III. Morality of self-accepted moral principles.

Stage 5. Morality of contract of individual rights and of democratically accepted law.

Stage 6. Morality of individual principles of conscience.

Each of these six general stages of moral development is marked by the different kinds of moral reasons offered for certain courses of conduct. For example, when asked why to obey rules, the answers divide as follows:

Stage 1. Obey rules to avoid punishment.

Stage 2. Conform to obtain rewards, have favors returned, etc.

The descriptions here of Maslow and Kohlberg should reveal a great deal of similarity between the characteristics of Maslow's self-actualizing people and Kohlberg's sixth stage persons. While Maslow was primarily concerned with personality growth, moral development plays an integral role in his theories about psychological health. Indeed, Maslow referred to his need hierarchy as encompassing a value order.⁸¹ And Kohlberg, although concentrating on moral development, nevertheless recognized the interrelationship of values and personality. The Maslow and Kohlberg theories thus share certain basic assumptions and the characteristics rendered by the advanced categories of both Maslow and Kohlberg overlap in many critical ways. Those shared assumptions and characteristics create a distinct model for the functioning and growth of lawyer-counselor.

Maslow and Kohlberg constructed their theories on the keystone of individual autonomy. That autonomy embraces both the individual's own independence—in thought, self-determination, and responsibility—and his sincere and abiding respect for the independence of others. For Kohlberg's sixth stage, respect for the

- Stage 3. Conform to avoid disapproval, dislike by others.
 - Stage 4. Conform to avoid censure by legitimate authorities and resultant guilt.
 - Stage 5. Conform to maintain the respect of the impartial spectator judging in terms of community welfare.
 - Stage 6. Conform to avoid self-condemnation.
- Or, when asked to explain the value of human life:
- Stage 1. The value of human life is confused with the value of physical objects and is based on the social status of physical attributes of its possessor.
 - Stage 2. The value of a human life is seen as instrumental to the satisfaction of the needs of its possessor or of other persons.
 - Stage 3. The value of a human life is based on the empathy and affection of family members and others toward its possessor.
 - Stage 4. Life is conceived as sacred in terms of its place in a categorical moral or religious order of rights and duties.
 - Stage 5. Life is valued both in its relation to community welfare and as a universal human right.
 - Stage 6. Life is valued as sacred and as representing a universal human value of respect for the individual.

Richards, *supra* n. 74, at 367-68.

81. See A. MASLOW, *NEW KNOWLEDGE IN HUMAN VALUES* (1959); Smith, *supra* n. 76, at 234.

individual is the universal value, and Maslow's self-actualizing persons reserve that "certain quantum of respect [for] *any* human being just because he is a human individual."⁸² The respect extends to a genuine regard and acceptance of others. Through that regard and acceptance, relations with others achieve their highest level of honesty and clarity, and therefore, mutual benefit. That regard for others also forms the moral foundation for the mature person. Because the morality of decisions is based on their impact on others, the advanced individual therefore has the capacity to understand the needs of others, to put himself in their shoes, to empathize. That true understanding of others, though, can be achieved only if the individual first knows himself. Accurate self-knowledge provides him with a ready source of information for understanding human nature (after all, the mature individual is himself a human) and permits him to more easily empathize. Self-awareness also enables the individual to separate out his own needs and ego involvement from his moral decisions and his relations with others.

The client-centered psychotherapeutic theories of Carl Rogers also emphasize self-awareness; knowledge of self and a corresponding honesty with clients combine to provide a cornerstone for effective counseling.⁸³ The self-understanding allows the counselor—including the lawyer-counselor—to experience personal growth while his frankness fosters healthier relations with his clients and facilitates resolution of moral issues that arise during the relationship. The results reflect what the philosopher Martin Buber called "I-Thou" relationships; they are based on felt experiences between persons who bring their whole, genuine selves into the relationship.⁸⁴ (These contrast with "I-It" relationships, which would portray the lawyer as a distant professional dealing with the client in a depersonalized manner.)

Rogers sees self-awareness, self-acceptance, and genuineness

82. A. MASLOW, *supra* n. 67, at 220 (emphasis in original).

83. C. ROGERS, *ON BECOMING A PERSON* 61 (1961). See generally authorities cited in nn. 1, 2, & 10, *supra*. See also Elkins, *The Legal Persona: An Essay on the Professional Mask*, 64 VA. L. REV. 735, 754-61 (1978).

84. M. BUBER, *BETWEEN MAN AND MAN* (1947); M. BUBER, *I AND THOU* (1923). Buber, like Maslow and Kohlberg, emphasizes respect for each individual as a person. A lawyer's approach using Buber's "I-Thou" structure would "reflect openness, candor, and clarity with the client, fostering mutual understanding and feeling. In the process of counseling, the lawyer will encourage the client to reciprocate with openness and sharing." Redmount, *supra* n. 45, at 834.

as the ingredients of "congruence." The congruent counselor operates "without front or facade, openly being the feelings and attributes which at that moment are flowing in him."⁸⁵ He is "able to live these feelings, be them, and able to communicate them if appropriate."⁸⁶ For Rogers, genuineness in the counseling relationship is crucial:

I have found that the more that I can be genuine in the relationship, the more helpful it will be. This means that I need to be aware of my own feelings in so far as possible, rather than presenting an outward facade of one attitude, while actually holding another attitude at a deeper or unconscious level. Being genuine also involves the willingness to be and to express, in my words, and my behavior, the various feelings and attitudes which exist in me. It is only in this way that the relationship can have reality, and reality seems deeply important as a first condition. It is only by providing the genuine reality which is in me, that the other person can successfully seek for the reality in him.⁸⁷

These varied client-centered sources reveal recurring themes of large importance to the lawyer-counselor. They first recognize an individual cannot reach his full potential unless he is honest with himself and acts consistently with his values. A failure to look inward and follow conscience prevents psychological healthiness and stunts personal development. Second, the mature, actualized person reaches his own moral conclusions base upon a set of self-developed and thoughtful values. Third, a relationship between two (or more) persons cannot reach its potential unless those persons consider each other as equals and are honest with each other. So in counseling, the individual respect a counselor must maintain for the client demands the counselor be forthright.

Lawyers have no claim to an exception from these fundamental precepts. The lawyer must communicate to, and discuss with, his clients the moral issues. He must resolve for himself the moral conflicts by applying and following his own moral standards. The lawyer's personal and professional development and the effectiveness of his relationships with clients depend on adherence to that code of conduct. Thus, by being honest with himself and with his

85. C. ROGERS, *supra* n. 7.

86. *Id.*

87. *Id.* at 33.

client, the lawyer experiences personal maturity and solidifies his relationship with his client. If he merely cedes the moral decisions to his clients, then his relationships with clients are deprived of mutuality; the lawyer is no longer an equal and his very identity is threatened.

The technical and adversarial nature of the legal process, however, can easily interfere with lawyers' candor in client relations. The process tempts lawyers to don a "professional mask"⁸⁸ to conceal (from their clients and themselves) their feelings, insecurities, and reservations. That is, lawyers will often use the law and its jargon to maintain a distance from their clients and to erect security barriers between themselves and their clients. Further, the traditional adversarial model provides lawyers with an easy excuse for role-playing and for suppressing their convictions; they hide behind their adversarial mask to legitimate stifling their own feelings and mores. When a lawyer submits to these temptations, the lawyer's psyche becomes confused; he loses touch with his moral standards; he increasingly loses his ability to remove his "mask" when leaving the adversarial setting.⁸⁹ The professional mask chills the lawyer-client relationship. The lawyer acts out a role and cordons himself off from his and the client's feelings.

Self-awareness and self-honesty help the lawyer to overcome these difficulties. He does not deceive himself or his client. When he achieves congruence, the lawyer is more at ease with himself and with others; he loses his need for the professional mask. He avoids the inner-conflict that results from the clash between his professional model and his feelings as a human being.

For example, recall the previously described⁹⁰ representation by John W. Davis of railroads and coal companies as they callously dealt with old Davis friends and old widows. Davis, at least early in his career, suffered great anguish from such cases, but, according to his biographer, his work for the railroads and coal companies so favored by West Virginia courts and law "slowly forced him to in-

88. *Id.* at 108-11; Elkins, *supra* n. 83.

89. This is especially difficult for trial lawyers, who in litigation are literally actors creating impressions and emotions in juries and judges. A litigator will often find it increasingly difficult to turn off his self-imposed intensity and leave his advocate's cloak in the courtroom. *See id.* at 742-44; *cf.* Himmelstein, *Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U.L. REV. 514, 531-33 (1978).

90. Notes 31-33 & accompanying text, *supra*.

ure himself to the injustices wrought against individuals."⁹¹ If, however, Davis had asserted his moral independence, he could have avoided the anguish of his early professional years and the desensitizing of his feelings. Both Davis and society would have benefited.

The gains from self-awareness and candor carry over to the lawyer's relationship with his clients. When he expresses himself honestly with acceptance and respect for the client, he fosters similar responses from the client. Mutual respect and candor result. The lawyer thus disserves himself and his clients when he submerges matters he finds morally or socially significant.

Thus, while the lawyer should express to his clients his support and positive regard for them, he must also be open enough to discuss with them the moral and social implications of their cases. The discussion should be full, frank, and nonconfronting. A client may or may not satisfy the attorney's concerns. Only through frank discussion, however, can the lawyer reconcile his roles as counselor and as an independent citizen, and only in that way can the advocate maintain touch with his own identity and keep his cases in perspective.

If the lawyer becomes convinced that serious moral or social problems are raised, and the client fails to resolve the doubts, then the honesty and integrity of the lawyer require him to sever the relationship (or at least his work on that case). The lawyer should not advocate that which he believes to be morally or socially wrong. If he does, he loses his identity and self-respect.

When the lawyer assumes an adversarial role, he is espousing his client's cause; he is not a counselor attempting to help a client mature and reach contentment. Though some might conclude that, therefore, the client-centered model breaks down at this point, the discussion in this section shows that the model requires the lawyer to be honest and independent at all times—for independent thought is a key to self-actualization. The counselor who advocates a cause contrary to his values serves neither his client nor himself.

91. W. HARBAUGH, *supra* n. 30, at 46. See also the statement by Davis quoted in the text at n. 33.

V. IMPLEMENTATION

A. Illustrations

This subsection illustrates the practical operation of moral independence for lawyers by sketching several examples of lawyers facing conflicts of conscience. (A following subsection, V-B, will offer more generic standards and suggestions.) The selections range from the celebrated to the mundane, from John W. Davis and this century's most famous judicial decision to a simple tort action.

Prior discussion⁹² has described John W. Davis's schizophrenia; during Davis's formative years as a lawyer in West Virginia his conscience often sided with friends and widows who were mistreated by his client, the railroads and coal companies, but he still felt dutybound to defend the latter to the legal limits. Davis's most notorious representation, though, was his defense of South Carolina's segregated schools policy in two of the cases decided under *Brown v. Board of Education*.⁹³ In that instance, however, Davis believed in what he argued; he was convinced South Carolina was right.⁹⁴ Indeed, he even refused to accept a retainer for his work on the case.⁹⁵

Thus, Davis passed the first prong of moral independence—he believed in the cause he advocated.

Nevertheless, Davis flunked the second prong, at least in my view. Neither his thoughtful consideration of the moral issues nor his commitment to the cause were enough. I would take him to task for the substance of his advocacy. Segregation is immoral. “[O]fficial humiliation of innocent, law-abiding citizens is psychologically injurious and morally evil.”⁹⁶ The elder Justice Harlan recognized that fact in *Plessy v. Ferguson*⁹⁷ and so have “many other Americans with responsive consciences” before, during, and after the rise of “separate but equal.”⁹⁸ Davis, having advocated an immoral and socially reprehensible position, should have been

92. Notes 31-33 & 90-91 & accompanying text, *supra*.

93. 347 U.S. 483 (1954). Davis represented the segregated school systems in *Briggs v. Elliott* (South Carolina) and *Davis v. County School Board of Prince Edward County* (Virginia).

94. W. HARBAUGH, *supra* n. 30, at 484.

95. *Id.* at 483.

96. *Id.* at 499, quoting Edmund Cahn.

97. 163 U.S. 537, 554-64 (1896) (dissenting opinion).

98. W. HARBAUGH, *supra* n. 30, at 499.

“held accountable” for the turpitude of his clients cause.⁹⁹

Other notables offer more positive illustrations. Despite misgivings, Clarence Darrow accepted the job as counsel for the Chicago and North Western Railway.¹⁰⁰ His sympathies and principles, though, lay with the individual, and not with big corporations. He conducted his business for the railroad accordingly; he diligently attempted to reach fair settlements for injured workmen and passengers. He justified the additional dollars spent in those cases by pointing to the good will earned by the company and the money saved in avoiding litigation.¹⁰¹ He thus reconciled his personal beliefs with his employer's concern for profits. When the railroad's position during the Pullan Strike of 1894 became abhorrent to him, he quit.¹⁰² Thus Darrow, at least in those circumstances, conducted his advocacy according to his principle.

Similarly, Louis Brandeis had a thriving corporate practice in Boston before ascending to his position on the Supreme Court. Despite his representation of large corporate interests, Brandeis believed in and publicly advocated fair and effective antitrust and securities laws. Much to the dismay of the Bar, Brandeis refused to represent positions that were inconsistent with his beliefs about needed law reform and socio-economic policy. He had his principles and he adhered to them.¹⁰³ A wealthy clientele did not require compromise.

Two other, more mundane, examples further illustrate the need for independent moral scrutiny by lawyers. In *Zabella v.*

99. Of course, in 1954 Davis would have had considerable public support on the moral correctness of segregation. That should not, however, diminish the need for a public dialogue on the morality of his—or any other lawyer's—advocacy. Indeed, the now generally perceived moral bankruptcy of segregation should reinforce the principle of accountability. Had lawyers accepted responsibility for the positions they advocated on behalf of the southern school boards, we may have been able to avoid much of the protracted resistance to *Brown's* decree for desegregation “with all deliberate speed.”

100. I. STONE, *CLARENCE DARROW FOR THE DEFENSE* 2 (1941).

101. *Id.* at 2-3.

102. *Id.* at 3-5.

103. See J. AUERBACH, *supra* n. 25, at 65-66-71-72; L. BRANDEIS, *The Opportunity in the Law* in *BUSINESS-A PROFESSION* 329 (1933); M. UROFSKY, *A MIND OF ONE PIECE: BRANDEIS AND AMERICAN REFORM* 37-38 (1971); Frank, *The Legal Ethics of Louis D. Brandeis*, 17 *STAN. L. REV.* 683 (1965); Schudson, *supra* n. 3 at 210-11; Simon, *Homo Psychologicus*, *supra* n. 3, at 496-97.

Pakel,¹⁰⁴ a carpenter sought to recover a debt for a loan he had made to his former employer. At the time of the loan, the employer was a financially troubled contractor. Subsequently, he left the construction business, regained solvency, and prospered. He eventually rose to the presidency of a Chicago savings and loan company. When the carpenter finally pressed his claim, however, the statute of limitations had run. Although there was no question the defendant had not repaid the borrowed money, he still asserted and prevailed on the statutory bar.

Zabella is not an easy case for defense counsel. He certainly could not ignore the statute of limitations defense. If he did, he would be liable for malpractice and *he* would end up paying the debt. Thus, under duties imposed by the Code of Professional Responsibility and tort law, the lawyer would have to indicate the availability of the limitations defense. The morally independent lawyer, however, also has a duty to discuss with his client the inequity of asserting that defense. If liability is clear and the client has not suffered from the delay (indeed, *Pakel* likely profited from it), why shouldn't he repay the debt? At least that question should form the basis for discussion. If the client persists, then the lawyer should refuse to continue on the case if the result would offend his sense of justice.¹⁰⁵

One criticism of this approach holds that the lawyer who is reluctant to assert the statute of limitations defense contradicts a legislative judgment and contributes to the creation of an "oligarchy of lawyers."¹⁰⁶ The client, of course, decides the matter in the final analysis, not the lawyer. The lawyer's only decision is whether asserting the defense would offend his morals and require his withdrawal from the case. Even aside from that point, however, the criticism still lacks merit. The legislature has determined that certain actions should be brought within a fixed time and legitimate

104. 242 F.2d 452 (7th Cir. 1957).

105. David Hoffman's seminal Resolutions (*see* n. 58, *supra*), curiously enough, maintained that the ethical lawyer does not raise a statute of limitations defense to a valid claim. Resolution XII stated:

I will never plead the Statute of Limitations when based on the mere efflux of time; for if my client is conscious he owes the debt, and has no other defense than the legal bar, he shall never make me a partner in his knowery.

Quoted in Maute, *supra* n. 2, at 1053, n. 9.

106. *See* Wasserstrom, *supra* n. 3, at 10-11.

policies lay behind that determination. That is all quite true, but it is not dispositive. Lawyers are constantly qualifying legislative and judicial decisions through law office functions. Lawyers interpret law in their research (often with varying conclusions); they negotiate out-of-court settlements; they advise clients. Each of these functions can easily produce a result different from that which a given court might produce. Moreover, legislatures make laws for application in the typical fact situations; it is up to lawyer (as well as courts) to achieve justice under atypical facts.

The final example concerns a tort action filed as a counterclaim by a lumber company against the Sierra Club and several environmentalists. The company alleged the environmentalists had tortiously interfered with its business relationships by communicating with federal agencies, asserting administrative appeals, and filing a law suit. Each of those efforts by the environmentalists sought to accomplish a particular application of federal statutes and regulations. The federal district court dismissed the lumber company's counterclaim because the environmentalists' activities were protected by the first amendment's right to petition.¹⁰⁷ Although the court's opinion does not develop the factual background, the case at least raises the question whether the company's real and enduring purpose in pursuing the counterclaim was to chill the efforts of the plaintiffs (and others) from registering complaints with federal regulatory agencies and from securing enforcement of the relevant statutes.

Given those circumstances, the company's lawyers had a moral duty to discuss with their client the substance and motivation behind the counterclaim. That discussion should have occurred as soon as the issue surfaced. If the company's attorneys were aware of an intent to chill the environmentalists' activities and yet persisted in the counterclaim, or if they ignored the repercussions of a groundless assault on environmentalists' statutory and constitutional rights, then those attorneys should be roundly condemned. The perpetration of such a counterclaim is immoral if it uses the judicial process solely to prevent individuals from fully exercising certain rights.¹⁰⁸ We should not concede to that company's attorneys

107. *Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Calif. 1972).

108. The moral issues in *Sierra Club* are much the same as those faced by the lawyers who represented Alabama state officials who filed multiple and sizeable libel claims against the New York Times for its references to the civil rights

the traditional rationalization that they were simply following the client's orders. They must exercise independent moral judgment.

B. Means for Achieving Moral Accountability

Once the desirability of moral independence for lawyers is recognized, the difficult task still remains of determining the means for imposing accountability. Certainly, reliance on traditional disciplinary actions, such as suspensions and disbarment, is unrealistic.¹⁰⁹ Those procedures would require bar associations to become roving censor-boards, reviewing the morality of lawyers' representation in thousands of cases. That is both unworkable and undesirable; it could lead to bar associations chilling lawyers' willingness to represent unpopular client or causes. "Unpopularity" should not be deemed synonymous with injustice or immorality.¹¹⁰ Moreover, as noted above,¹¹¹ the final moral and policy decisions must be made by the lawyer according to his (or her) own principle. Therefore, there must be nontraditional, less formal means for giving effect to moral accountability for lawyers.

Implementation of this new ethic can be achieved through several methods. First, the duty to morally assess each case must be taught at the beginning of each attorney's professional career. That is, law schools have an obligation to instruct students on moral accountability and teach them how to adhere to it. Second, the Bar must take formal actions, including (among other things) inserting into the Code of Professional Responsibility an explicit statement of the lawyer's moral obligation and standards to guide its application. Third, the bar should make every effort to educate the public

campaigns in that state during the late fifties and early sixties. *New York Times v. Sullivan*, 376 U.S. 254, 278 n. 18 (1964) (5 libel suits were filed against the Times in Alabama seeking a total of \$3,000,000 in damages). The Supreme Court, of course, thwarted the officials' efforts in *Sullivan* when it established the "actual malice" defense to libel actions brought by public office-holders, *Sullivan* and its analogs were stark examples of an attempt to use the judicial process—where the lawyers could feel immunized by their adversarial role—to choke the exercise by others of their constitutional rights.

109. There is, however, some use to be made of the traditional enforcement measures in reviewing lawyers' tactics, or means, in the representation of clients. See, e.g., Thurman, *Limits to the Adversary System: Interests that Outweigh Confidentiality*, 5 J. OF THE LEG. PROF. 5 (1980) (dealing with ABA Discussion Draft of Model Rules of Professional Conduct).

110. See Goldberger, *supra* n. 26.

111. Part III-A.

about this new perception of the lawyer's role and invite public dialogue on positions advocated by lawyers.

Legal education bears much of the responsibility for lawyers' attitudes.¹¹² Professional school is, after all, a formative stage in any career. In fact, several commentators have attributed the amorality of lawyers to the methods and messages of law school.¹¹³ Generally, students are not taught to consider the moral or social consequences of undertaking a case. Law is, for the most part, learned as an academic exercise without examination of human elements,¹¹⁴ and lawyers are seen as fungible advocates for parties on either side of an issue.¹¹⁵

There has, however, been some effort to address these problems. Law school clinics have put law in a realistic setting, have forced students to analyze what they are about, and have given them the means for self-analysis.¹¹⁶ In addition, several law professors have recognized the moral issues raised here, thus evidencing that some academicians have exposed students to the problems.¹¹⁷

More is needed, though. Law school textbooks must build in moral and social issues. Professors should develop those issues in substantive courses, not just in skills training and professional responsibility study. Courses in interpersonal skills must instruct

112. *E.g.*, Elkins, *Moral Discourse and Legalism in Legal Education*, 32 J. LEG. ED. 11 (1982); Himmelstein, *supra* n. 89.

113. *E.g.*, J. AUERBACH, *supra*, n. 25, at 74-101; Elkins, *supra* n. 112; Wasserstrom, *supra* n. 3.

114. Elkins, *A Humanistic Perspective in Legal Education*, 62 NEB. L. REV. 494 (1983); Himmelstein, *supra* n. 89, at 533-39.

115. For example, law school moot court programs routinely have students switch sides in their oral arguments, and teachers using Socratic dialogue often have students articulate one side of the case and then the other. While there may be pedagogical utility to these techniques—good lawyers do need to understand opposing arguments—legal education rarely, if ever, stops to examine whether the student has personal or moral objections to the position he or she is forced to advocate. Indeed, these techniques are commonly defended with explicit rationalizations that the lawyer does not choose his clients, but takes them as they come. At any rate, the resulting message perceived by students after three years of exposure to such techniques is clear: lawyers do not have a moral responsibility for the causes they advocate on behalf of clients.

116. *E.g.*, Goodpaster, *supra* n. 2; Meltsner & Schrag, *Scenes From a Clinic*, 127 U. PA. L. REV. 1 (1978).

117. *See, e.g.*, the articles by Professors Abramson, Flynn, Noonan, Shaffer, & Wasserstrom, *supra* n. 3.

students in how to counsel clients on matters that present dilemmas of conscience for the lawyer.

Bar associations must also shoulder the burden for developing morally independent lawyers. The Bar should, as an institution, commit its members to exercise greater self-scrutiny in their representation of clients. This commitment should be met both formally, by adopting rules of professional responsibility, and informally, by educating the public on the lawyer's obligations.

On the formal level, the Bar should develop ethical canons that explicitly obligate lawyers to independently assess the consequences of each of their undertakings. The canons should incorporate standards to help lawyers make that assessment. Those standards should address both the means and ends of client representation. For example, in deciding whether to adopt a particular litigation or negotiation tactic, the lawyer should consider:

- the extent to which the tactic will disguise the truth or prevent the fact-finder from determining the truth;
- the fairness to opposing parties of using the tactic;
- the existence of alternative means that may accomplish the lawyer's purpose in a manner less disruptive of the truth-finding process.¹¹⁸

And in determining to advocate a particular result sought by a client, the lawyer should weigh:

- the extent to which the result will cause an injustice to the opposing party;
- the potential that the result will set a precedent that will be morally, socially, or economically unjust;
- the extent to which pursuit of the result will chill other individuals from exercising important rights;
- the extent to which any possible injustices are offset by the client's own particular needs or circumstances;
- the availability of alternatives that would satisfy the client's

118. The ABA's Model Rules of Professional Conduct incorporate these concerns to a much greater degree than the current CPR. Most notably, the MRPC have adjusted the traditional adversarial role by requiring disclosure of a client confidence "to prevent death or serious bodily harm to another person" (Rule 1.7(b)); by requiring candor of the lawyer in his representations to a court (Rule 3.1); by stating that the lawyer shall not "make a knowing misrepresentation of fact" (Rule 3.1(a)(2)); and by requiring lawyers in both civil and criminal cases to reveal a client's perjury, even when the revelation would disclose a lawyer-client communication (Rules 3.1(a)(3) & 3.1(b)). See generally Thurman, *supra* n. 109.

concerns without risking undesirable precedents, chilling effects, or other injustices.¹¹⁹

The Bar can enhance the effectiveness of these standards by sanctioning law firms that retaliate against a partner or associate who has acted on his (her) conscience.¹²⁰ In addition, legislation should protect lawyers who work for corporations or other entities outside the Bar's regulatory control.

The Bar should also act on an informal level to implement accountability for lawyers. Primarily, such action should focus on education. Obviously, the Bar should inform its members of their professional responsibilities. Through its own CLE programs and law journals, the Bar has the means available to teach moral accountability for lawyers. In addition, the Bar should fully inform the public of this new perception of professional ethics.

Educating the public is important for several reasons. Public awareness acts as a check on lawyers; the public will expect moral self-scrutiny and lawyers, to maintain their practice, must respond. That expectancy also makes it easier for lawyers to assert their principles. Clients will understand that their lawyers will have limitations on their capacity to accept and to conduct cases. Clients' greater understanding of that will allow lawyers to more easily raise and discuss their personal reservations. Moreover, the public perception of a morally committed bar will enhance the bar's standing in the community and that, in turn, aids lawyers in their ability to perform efficiently and serve the public. Finally, public awareness would encourage a constructive dialogue from the public. Editorials and letters to the editor, for example, can provide a

119. Notes 14-15, 44-50 & accompanying text, *supra*, discuss the current ABA rules. See also Maute, *supra* n. 2; Redmount, *supra* n. 45.

120. Recent common law developments qualifying the at-will employment doctrine may at least arguably, already provide associates with such protection. Several states now hold that employers may not discharge employees for reasons that violate public policy. *E.g.*, *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3rd Cir. 1983) (applying Pa. law); *Harless v. First Nat'l Bank in Fairmont*, ___ W. Va. ___, 246 S.E.2d 270 (1978); *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 561 (1983). See generally, *e.g.*, Pierce, Mann, & Roberts, *Employee Termination at Will: A Principled Approach*, 28 VILL. L. REV. 1 (1982); Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L. REV. 153 (1981). Certainly, if the Bar did have as an ethical rule that lawyers must assert their moral independence, then a lawyer discharged for asserting his values would have a very strong claim that an identifiable "public policy" has been violated.

forum for airing views about the propriety of litigation activities. Commentators will be encouraged to raise issues about the social and moral consequences of legal actions. Such exchanges should be helpful to attorneys in asserting their own and their colleagues' actions.

CONCLUSION

The traditional role of lawyers as amoral advocates with no responsibility for the positions they assume on behalf of clients must now be rejected. The role damages the effectiveness of the judicial process. It demeans and psychologically harms lawyers by prompting them to undertake causes inconsistent with their personal values. Thus, society and lawyers will both benefit from the imposition of a duty upon lawyers to independently assess the moral and social implications of their undertakings. When a lawyer's assessment concludes that the case is inconsistent with his values or beliefs, then he has a further duty to discontinue his representation.

While lawyers should assert their principles, they should also follow a "client-centered" approach to their professional relations. That requires lawyers to accept and respect clients, to empathize with them, and to help them reach resolutions identified by the client's own priorities.

Although these two perceptions of the lawyer's role are seemingly in conflict, they are actually interdependent. Effective counseling requires the lawyer to be honest with both himself and with the client. Thus, he must constantly analyze his own motives and perceptions. If his self-analysis indicates that he has serious moral or social reservation about the client's goals, then the lawyer must discuss those concerns with the client. If the attorney does not raise and discuss his reservations with the client, then the lawyer will be forced to either stifle his convictions or subtly manipulate the client. Either way, the lawyer is not being honest, the mutual respect will inevitably evaporate, and the strength of the professional relationship will be broken. If the lawyer suppresses his true feelings, he may come to resent the client and may develop self-contempt for his own moral duplicity. If the lawyer tries to manipulate the client, then the client will house resentment. Thus honesty is the solution.

The Bar and legal education must take steps to implement a professional ethic that requires lawyers to independently assess the

moral and social implications of their professional undertaking. Law Schools need to incorporate instruction on the issue in both substantive courses and in the teaching of professional responsibility. Skills training must equip students with the means of self-analysis and the tools to counsel with the client on such sensitive matters as moral issues.

Bar associations need to formally articulate the lawyer's duty to assert his principles and accept "responsibility" for what he advocates. Standards need to be developed to guide the lawyer in assessing his case. The Bar must also adopt measures to protect from employer retaliation those law firm-lawyers who do assert their principles. Finally, the Bar should educate its members and the public about the lawyer's moral and societal duties.

These measures would facilitate better lawyer-client relations and would permit lawyers to maintain their principles and their self-respect. Lawyers would thereby find a corresponding enhancement of their professional status and society would gain a more effective legal system.