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# Personal Responsibility for Professional Actions

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# PERSONAL RESPONSIBILITY FOR PROFESSIONAL ACTIONS

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In present American society, a "professional"[1] seems to operate under a dual moral system. He has a general moral framework governing his actions in his personal life and a distinct professional "ethical code" governing his professional actions. Each day the professional must frequently shuttle between his private moral world and a different professional world—a world of clients, corporations, and patients. When faced with a situation in his professional world he may respond to it in an infinitely different manner than his private moral system might dictate.

The fundamental question that arises is whether the professional needs such separate ethical norms to guide his professional conduct and actions, or whether the person's general moral framework is adequate to guide both his professional and private lives. The issue is significant in view of the possible consequences of the choice made. A person uses his moral framework to justify his action: if he chooses to follow a separate ethical system for his professional life, then he will use that framework to justify his professional actions. The most troubling consequence of this last choice is that it has a significant tendency to absolve the professional from moral responsibility for his professional actions, thus making him an amoral, neutral technician.

The response of the legal profession, as well as other organized professions, has been the codification of rules which are morally neutral.[2] Members of these professions commonly and conveniently view these codes as setting the boundaries of permissible legal and moral conduct. In

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[1] For the characteristics distinguishing a learned profession from other careers, see Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 1 n.1 (1975).

[2] *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter MODEL CODE]; MODEL RULES OF PROFESSIONAL CONDUCT (1983).

doing so they leave behind their common moral framework and enclose themselves in a world which is at best amoral. This attitude of the professional leads to behavior marked by strong role differentiation.[3] For lawyers, the primary justification for this behavior is that it is necessitated by our adversary system of justice.[4]

This paper will examine the sources and justifications given for the choice of separate ethical frameworks and suggest that personal moral responsibility is essential to any ethical system. Further, it will be argued that a professional needs both his general moral framework and the given profession's unique principles to guide his actions. Since each individual is a morally autonomous person and acts by choice in both his private and professional worlds, he must accept moral responsibility for his actions and feel personally accountable for their consequences.

## THE GENERAL MORAL FRAMEWORK

A person grows up forming a personal moral character. He acquires and develops principles through which he distinguishes right from wrong, good from evil, and the permissible from the impermissible. After making these distinctions he decides on a set of values with which he feels comfortable. Not all the morally autonomous members of a given society adhere to the same principles. For example, abortion is evil to some but not to others. Nevertheless, a society is bound by some commonly accepted moral precepts. Thus, every member accepts that murder or theft is evil, and that the perpetrator should be punished. An individual adopts the moral precepts common to society and supplements them with his personal ethical principles to form his general moral framework within which he functions. He uses this framework ultimately to justify his actions.

The issue is whether this general moral framework is adequate to guide a person in his professional life without impeding his proper functioning. Moral philosophers generally do not see any socially or morally overwhelming reasons to justify two distinct moral systems. The idea that a person can have a different response to a particular situation depending on whether he is acting in a personal or a professional context is repugnant to a moralist. This response violates an essential principle of moral theory, that of "universalizability," which holds that if a person considers something to be morally wrong, he should accept it as impermissible whether done in a private or professional context. According to Professor Gustafson, an influential contemporary moral theologian, "[t]he laudable purpose of much moral philosophy is to find a common basis for morality

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[3] *See infra* notes 9-16 and accompanying text.

[4] *See infra* notes 17-29 and accompanying text.

to which all persons from all historical communities might adhere."[5]

Some legal scholars also have adopted this principle, advocating a general moral framework. Professor Wasserstrom suggests the "deprofessionalization" of legal services as a way to return to the general moral framework and the responsibility it entails.[6] The lawyers who have adopted this position are alarmed by the actual and potential consequences of moral abdication inherent in the "separate morality" principle.[7]

Abolishing the distinct professional code is not an adequate solution. A professional frequently faces unique situations in his practice for which his general moral framework does not provide the desired guidance. A professional code can assist him in resolving these problems. The ethical precepts of such a code, however, should be commonly accepted and morally "universalizable" principles—at least within the professional's universe. The problem with the current professional codes, however, is twofold. On the one hand, the morally neutral codified rules are viewed as a moral framework. On the other hand, they are observed as a separate and distinct ethical system by the profession.

The private and professional aspects of a person's life are not distinct and separate. They constantly permeate each other and together make up the whole person. It is practically impossible to keep the two aspects of life completely apart. As long as a person preserves his moral autonomy he is one person and has one life, no matter how multi-faceted it may be. His professional life is an integral part of his private life at all times, and vice-versa. There is a constant flow of influencing factors between the various aspects of a person's life. Similarly, the moral principles guiding a person's professional life should be an integral part of his general moral framework and consistent with it. Otherwise, as one philosopher has re-

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[5] J. GUSTAFSON, ETHICS FROM A THEOCENTRIC PERSPECTIVE 76 (1981); *see* Veatch, *Medical Ethics: Professional or Universal?*, 65 HARV. THEOLOGICAL REV. 531, 541-43 (1971).

Morality has been commonly viewed as either identical with or at least based on religious beliefs. Religiously based morality also seeks universal principles to justify its beliefs, and thus, the multiplicity of religious and cultural traditions is not an impediment to having a "universalizable" moral framework. Professor Gustafson, whose ethics are rooted in the Christian tradition, writes that:

> With the more radical secularization of Western culture in recent centuries, and with the growing knowledge of cultural pluralism and various vital religious traditions, it has not been unreasonable to seek a basis for morality that transcends [particular] religious beliefs, one that can be held to by persons holding different religious beliefs and that would appeal to all "rational" and "autonomous" agents.

J. GUSTAFSON, *supra*, at 76.

[6] Wasserstrom, *supra* note 1, at 12.

[7] *See, e.g.*, Noonan, *Other Peoples' Morals: The Lawyer's Conscience*, 48 TENN. L. REV. 227, 230 (1981); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30, 131; Wasserstrom, *supra* note 1, at 3.

marked, "when professional action is estranged from ordinary moral experience, the lawyer's sensitivity to the moral costs in both ordinary and [professional] situations tends to atrophy."[8]

## ROLE-DIFFERENTIATED ETHICS

Role-differentiated behavior comes into play when a person breaks life into separate and distinct units. The person lives and acts in his personal life according to his general moral framework. In his professional life, he is playing a "role" according to a general script provided by his profession.[9] It is analogous to actors performing on stage. Since he is "role playing," the actor does not see himself as morally responsible for the acts of the character he plays, nor does he expect others to hold him responsible. This analogy overlooks one critical difference between a stage role and a professional role; while an audience knows actors are role-playing on stage, people in the real world consult responsible identifiable professionals for specialized services.

The legal profession has a long tradition of codifying rules of conduct for its members. The American Bar Association's Model Code of Professional Responsibility (the "Code") or its successor the Model Rules of Professional Conduct (the "Model Rules") is currently in effect in every state. The Code, with which we are primarily concerned here, has some "aspirational" ethical considerations, but the mandatory disciplinary rules[10] are essentially morally indifferent. This incongruity has led one commentator to remark that:

> [a]t the very least, there is something odd about a code of professional behavior which admonishes lawyers to attempt to prevent their clients from engaging in "unjust" conduct (impliedly conceding that this is an identifiable genus), and yet permits them to go forward without fear of reproach if the client is adamant.[11]

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[8] Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 79 (1980).

[9] For a comprehensive discussion of the psychological reasons and consequences of the role as a mask, see T. SHAFFER & J. ELKINS, LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL (1987).

[10] *See* MODEL CODE, *supra* note 2, at Preliminary Statement. "Ethical Considerations are aspirational in character. . . . The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum conduct below which no lawyer can fall without being subject to disciplinary action." *Id.*

[11] Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 691 (1978).

This Code's odd nature and its consideration as a distinct framework for ethical conduct lead to behavior by lawyers that is strongly role differentiated.

This kind of behavior is not a creature of the organized american bar. The concept that professional and private lives have different rules seems to have its roots in antiquity.[12] This type of vicarious detachment from the self in order to serve clients has its model in classical Stoicism, which permitted adopting a client's problem while staying detached from the self.[13] A strong medieval expression of this concept is found in Montaigne, who believed in complete separation of his private and public lives. Montaigne stated his position unequivocally: "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."[14]

This dichotomy was not always part of American legal ethics. The few writings on the subject that precede the formation of the American Bar Association do not reflect such a division.[15] The doctrine of a separate morality for a lawyer's professional life—what the profession calls the "adversary ethic"—has been the central concept of American legal ethics only for about the last century. Professor Shaffer attributes its rise to prominence to the American Industrial Revolution. He writes that "[t]he adversary ethic appeared in the legal profession's collective morality at about the time lawyers . . . began acting for the robber barons of the American industrial revolution. Or, more accurately, it appeared when lawyers began to defend themselves for acting for the robber barons."[16] The bar's response, however, is that this ethic is necessary to enable the lawyer to carry out his functions in an adversary system of justice.

*The Adversary System*

The adversary system is commonly described as an American legal theory which holds that truth is best discovered and justice done when the two opposing parties present their cases before an impartial judge and

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[12] *See* T. SHAFFER, FAITH AND THE PROFESSIONS 79 (1987).

[13] *See* Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 19-20 (1951).

[14] *Id.* at 20 (quoting IV *Essais de Montaigne* 152-53 (Charpentier, Variorum ed. 1876)). The benefits of this separation are, to say the least, dubious. As St. Thomas More stated: "I believe, when statesmen forsake their private conscience for the sake of their public duties . . . they lead their country by a short route to chaos." Quoted in T. SHAFFER, AMERICAN LEGAL ETHICS 170 (1985).

[15] *See* T. SHAFFER, *supra* note 12, at 59. For example, Judge Jones' 1887 ALABAMA CODE FOR LAWYERS states: "[t]he attorney's office does not destroy man's accountability to the Creator . . . and the obligation to his neighbor." *Id.*

[16] T. SHAFFER, *supra* note 12, at 85.

jury.[17] The Code recognizes this system as the law of the land, and asserts that a lawyer has certain duties to maintain the system's integrity.[18] The Code clearly states that "[t]he 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."[19] The norm required to carry out this duty is advocacy, whereby the lawyer advocates his client's position and fights on his behalf. This kind of advocacy, notwithstanding statements in the Code to the contrary, inevitably implies adoption and identification of the lawyer with the client and/or the client's position. Since the lawyer-as-person may not desire to be so identified, he ascribes his actions to his "role" in the system. While some lawyers may be able to keep a moral and psychological distance from that "role," indications are that there is still a high degree of identification.[20] However, as the Code also recognizes, the practice of law not only entails advocacy but also involves counseling and other types of technical assistance to clients.[21] The adversary system, thus, cannot be the sole culprit for this behavior. As Professor Wasserstrom has observed, "much, if not most, of what lawyers do has nothing directly to do with the adversary system or even with the settlement of disputes."[22]

Under this role-differentiated model a lawyer may do for a client what he would not do for himself because of his general ethical frame-

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[17] The term "adversary system" is used to distinguish the American system from the "inquisitorial" or "interrogative" system most common in Civil Law countries in which the judge conducts the actual investigation. The adversary system is not without its critics. Dean Roscoe Pound challenged the belief of the system's fairness as early as 1906. *See* 29 A.B.A. REPS. 395 (1917). One of the most vocal and persuasive contemporary critics is Judge Marvin Frankel. *See* M. FRANKEL, PARTISAN JUSTICE *passim* (1980); Frankel, *The Search For Truth—An Umpireal View*, 123 U. PA. L. REV. 1031, 1032-40 (1975). *See generally* Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 *passim* (1985) (arguing non-adversarial judicial investigation is superior to adversarial).

One flaw of the adversary system is its assumption that the parties are equally represented. However, it is fair to state that "[h]ow frequently those presuppositions hold is open to question in a social order that tolerates vast disparities in wealth, renders most litigation enormously expensive, and allocates civil legal assistance almost entirely through market mechanism. Under these circumstances, one would expect that the 'haves' generally come out ahead." Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985), *reprinted in* G. HAZARD & D. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY & REGULATION 170, 171 (1988).

[18] MODEL CODE, *supra* note 2, at EC 7-19 to 7-39.

[19] *Id.* at EC 7-19.

[20] *See* Postema, *supra* note 8, at 76.

[21] *See, e.g.*, MODEL CODE, *supra* note 2, at EC 3-3 & 7-5.

[22] Wasserstrom, *Moral Considerations in Professional Responsibility*, in P. KEENAN, TEACHING PROFESSIONAL RESPONSIBILITY 859, 862 (1979); *see also* Shaffer, *Christian Theories of Professional Responsibility*, 48 S. CAL. L. REV. 721, 727 (1975) (discussing substantial effect of decisions made within attorney's office).

work. For example, although he personally opposes asserting the defense of the statute of limitations to avoid a just personal debt, he may, and upon the client's insistence he must, assert it to help the client avoid paying a just debt. Commenting on this acting-for-the-client, Professor Noonan, a critic of the system, writes:

> While I understand the attractiveness and even the inescapability of the catch phrase, "I'm doing it for my client," I also see the phrase functioning as a kind of carapace. The phrase functions as a defense against various moral claims, a defense against empathy with someone else's feelings, a defense against responsibility. If a lawyer can utter this incantation and can take it seriously enough, responsibility and the feelings accompanying it are shifted to the client.[23]

This shifting of the responsibility makes the lawyer comfortable in his "role." This "portrait of the lawyer as merely a technical adviser and spokesperson is false. The fact is that the modern legal adviser is an actor in the situations in which he gives advice. And as such he is accountable."[24]

As a corollary to the adversary system, the Bar has also developed the myth that the legal profession is a social "institution" and hence above each individual member. This myth finds its lofty expression in the Code's statement that: "[l]awyers as guardians of the law, play a vital role in the preservation of society."[25] The existence of such an institutional entity, if indeed true, could very well have justified role-differentiated behavior. It would even have connoted a sacrifice of personal principles in order to achieve the goals of the institution's higher social and moral order. However, the comments of one lawyer on the behavior of the profession in response to problematic situations seem more apt than the idealistic statement of the Code. He writes:

> [t]he lawyer's response takes the form of a dialectic of cynicism and naivete. On one hand, he sees his more degrading activities as licensed by a fundamental amorality lying beneath conventional morality. On the other hand, he sees his move heartening ones as serving an instituitonal justice higher than conventional morality[26]

The fact, of course, is that lawyers are not an "institution" serving a function as a corporate body; they are merely skilled individuals serving other members of society within a legal system.

From a sociological perspective, justification for role-differentiated behavior requires a showing that the behavior is *essential* or *necessary* to

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[23] Noonan, *supra* note 7, at 230.

[24] G. HAZARD, ETHICS IN THE PRACTICE OF LAW 151 (1978).

[25] MODEL CODE, *supra* note 2, at Preamble.

[26] Simon, *supra* note 7, at 30.

fulfill an institution's function. Furthermore, as one sociologist has written, "the institution in question must serve a vital moral function in society. . . . It [must] be shown that some central institutional value will fail to be realized . . . and that the realization of this value is worth the moral price paid for strong role-differentiation."[27] The application of this standard clearly demonstrates that legal practitioners' role-differentiated behavior is not justified. The only group of lawyers who may qualify under this standard would be the judiciary, which can justifiably be considered an institution. As judges, they may sometimes be required to apply the law in a manner contrary to their personal ethics.[28] To illustrate, if a litigant asserts a valid statute of limitations defense to a just debt, the judge must uphold the defense. Judges have a vital institutional social function and the value gained for this moral price is stability, consistency, and the equal application of the law. Occasional injustice to an individual is a price worth paying for the preservation of the essential social moral values involved.[29]

*Zealous Advocacy*

Canon 7 of the Code states that "[a] lawyer should represent a client zealously within the bounds of the law."[30] This is the "axiomatic norm"[31] expected of the lawyer. One cannot help but notice the glaring absence of any reference to ethical or moral bounds. Thus, the lawyer zealously advocates his client's position so long as the client's demands are "within the bounds of the law," without inquiring into any other motives or possible consequences. Despite all the supposed safeguards in the Code this type of "zealous advocacy" can often lead to overstepping the bounds of the law. The observation of Professor Hazard, a cautious supporter of the adversary system, describes this path quite succinctly. He writes that in zealous advocacy "[l]egitimate and illegitimate techniques shade into each other—vigorous maneuver into harassment, careful preparation of witnesses into subornation of perjury, non-disclosure into destruction of evidence. At some point in deterioration of rules of form, an expert in rough and tumble becomes simply a thug."[32]

This requirement of zealous advocacy within an adversary proceeding leads to behavior with a high level of role-differentiation. Even though

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[27] A. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 7 (1980). For a generally critical review of Goldman's book by a lawyer, see Kaufman, Book Review, 94 HARV. L. REV. 1504 (1981).

[28] *See* A. GOLDMAN, *supra* note 27, at 39.

[29] *See id.* at 38-49.

[30] MODEL CODE, *supra* note 2, Canon 7.

[31] *Id.* at Preliminary Statement.

[32] G. HAZARD, *supra* note 24, at 132-33.

the Code states that zealous advocacy "implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client,"[33] for all practical purposes the attorney makes that adoption, and the public views it as such. A telling example of how far this zeal can go is the position taken by former Justice Fortas of the United States Supreme Court:

> If the interest of the client required the lawyer to advocate a position or seek a result which he personally disliked or even which he considered contrary to society's welfare, it was the lawyer's duty to do so with all his mind and heart, subject only to the restrictions and proprieties which the rules and conventions impose.[34]

Ethical Consideration 7-1 of the Code makes it abundantly clear that a lawyer owes a duty of loyalty and zeal to the client who seeks "any *lawful* objective through *legally* permissible means."[35] It was perhaps this kind of emphasis on using the bounds of the law alone as the standard along with its total absence of ethical considerations that led the exiled Russian writer Solzhenitsyn to criticize our present society and make a bleak forecast for its future. In addressing a graduating class of a decade ago he said:

> [e]verybody operates at the extreme limit of those legal frames. . . . A society which is based on the letter of the law and never reaches any higher is taking very scarce advantage of the high level of human possibilities. . . . Whenever the tissue of life is woven of legalistic relations, there is an atmosphere of moral mediocrity, paralyzing man's noblest impulses.[36]

In practice, the zealous advocacy model has changed the purpose of the legal system from an exercise in the search for truth and justice to a duel to prevail over the opponent at any cost. One lawyer was not far off the mark when he commented that "[a]pocryphal defense lawyers have been known to assert: 'My clients don't want justice, they want to get off.' . . . [A]ttorneys are in effect selling their services to clients to help them defeat the public interest in truth-seeking."[37] This concept of justice is advanced to justify role-differentiated behavior and its accordant comfort of "immunity from responsibility."[38] This type of advocacy rewards a lawyer for being "competitive rather than cooperative; aggressive rather than

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[33] MODEL CODE, *supra* note 2, at EC 7-17.

[34] Fortas, *Thurman Arnold and the Theater of the Law*, 79 YALE L.J. 988, 996 (1970). It is noteworthy that the words used parallel the Biblical words used to describe the person's devotion to God. *See Deuteronomy* 6:5; *Matthew* 22:37.

[35] MODEL CODE, *supra* note 2, at EC 7-1 (emphasis added).

[36] Address by Aleksandr Solzhenitsyn, Harvard University Commencement Address (June 8, 1978). For reference to this speech, see N.Y. Times, June 9, 1978, at A8, col. 3.

[37] Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 737 (1977).

[38] G. HAZARD, *supra* note 24, at 151.

accommodating; ruthless rather than compassionate; and pragmatic rather than principled."[39]

Shedding this "role" and becoming personally accountable will not necessarily dampen the zeal needed for proper representation. A lawyer who feels morally responsible for his conduct and its consequences will represent a client conscientiously because he will feel accountable for any injury he may cause his client. When the lawyer feels morally responsible for his actions he will give serious effect to the token statements of the Code which suggest that lawyers may take actions which are both legal and morally just. One of the Code's "aspirations" states that "[i]n assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible."[40] And when the client insists on a course of action which is in his best interest but contrary to the lawyer's conscience, the lawyer "may ask his client for permission to forego such action,"[41] or refuse to aid him in the realization of an immoral project. The obvious tonal difference between the above isolated "aspirational" comments and the strong unequivocal statements on the duty of zealous representation clearly indicates the bar's approval of role-differentiated behavior.

*Making Legal Services Available to All*

Lawyers are expected to make their expert services available to all who may need them. One of the Code's aspirations is that "persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services."[42] Nevertheless, the Code does not require a lawyer to take on every client that comes along and also allows withdrawal from representation for a variety of reasons.[43] The aspiration to make services available to everybody, the argument runs, requires that a lawyer put aside his personal preference or moral principles—otherwise the unpopular clients and causes will not find legal representation. It would appear, however, that the imposition of moral responsibility on lawyers will enhance legal representation by making lawyers more directly accountable for their professional conduct without significantly restricting the availability of legal services. For the responsible lawyer, the issue would not be the character of the client or the cause; he simply would be making a conscious decision during the representation not to violate his own

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[39] Wasserstrom, *supra* note 1, at 13.
[40] MODEL CODE, *supra* note 2, at EC 7-8.
[41] *Id.* at EC 7-9.
[42] *Id.* at EC 2-16.
[43] *See, e.g., id.* at EC 2-20, 7-4, 7-6, DR 2-109, 1-102(A).

moral principles while acting on behalf of his client. "Unpopular" causes and clients would still find representation. First, considering the diversity of the moral framework of individuals, such causes and clients may not be unpopular for many lawyers. Second, representing a cause of client should not denote identification with that client or that cause, nor necessarily sympathy with it. The lawyer is not responsible for what his client did; he is merely responsible and accountable for his own actions. In making moral decisions for himself, the lawyer is not coercing the client to act in a manner consistent with the lawyer's moral standards; he merely decides to aid or to refuse aid to the client. In either case he is personally responsible and morally accountable for his choice.

*Client Autonomy*

The Code makes it abundantly clear that the client has the final say. While the Code allows the lawyer to give his moral opinion, it clearly states that "[i]n the final analysis . . . the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself."[44] The Code further states that "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer."[45]

Some argue that the lawyer's raising of moral considerations in his representation would impinge on the client's autonomy. This emphasis on the client's autonomy fails to recognize the parallel autonomy of the lawyer. It makes him a skilled technician acting at the bidding of his client. In a sense, he is no different from a sophisticated computer responding to the instructions of the programmer. If this seems to have a dehumanizing effect on the lawyer, it has, as we shall see, an equally dehumanizing effect on the client.

The attorney-client relationship is a human interaction. At its best, it is an enabling relationship rather than one intended for exploitation.[46] As the enabler, the professional is an active contributor toward the realization of the client's objectives, and shares in the responsibility for them. When the client is interested in using the expert skills of the lawyer to exploit the system, or somebody else, and the lawyer willingly participates, he should be equally responsible for the misdeed and its consequences. In actual practice the relationship is not one between equals. Clearly the lawyer dominates, and thus should be held even more

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[44] *Id.* at EC 7-8.
[45] *Id.* at EC 7-7.
[46] *See* D. REECK, ETHICS FOR THE PROFESSIONS—A CHRISTIAN PERSPECTIVE 39 (1982).

accountable.[47]

When the lawyer raises moral issues he is not acting in a paternalistic or an elitist manner. "Lawyers, like anybody else in the world, can know that there are some things that it's wrong to do."[48] Indeed when the lawyer fails to raise ethical concerns he is abdicating his moral duty. Moreover, in raising moral issues the lawyer implies that he considers the client not as another "thing", "case", or "problem" but as another autonomous person who at that moment happens to be in need of the lawyer's specialized skills. The lawyer who raises moral issues follows the Kantian principle of treating the person as an end in himself, rather than as a means to something. For theologians, this is the "human dignity of the professional relationships."[49] Non-lawyers seem to be better equipped to see the dehumanizing dimensions of the lawyer-client relationship. The amoral stand adopted by the lawyer has a similar effect on the client's outlook because "[t]he client may in fact lose his own sense of moral responsibility when he sees his most partisan interests warmly embraced and given institutional respectability by his lawyer."[50]

The lawyer-client relationship is primarily an economic one. The lawyer sells his skills and gives preferential treatment to his client in order to accomplish the client's objective. There is nothing morally flawed about making an honest living from providing such needed services. The Bar, however, attempts to describe the relationship in non-economic terms, perhaps because it feels that the economic basis of the relationship is degrading to the profession.

An example of the desire to describe the relationship in terms that do not embrace the reality is Professor Fried's "friendship" analogy.[51] He describes the lawyer as a "limited purpose friend" or "legal friend" of the client. The author, using what he calls a classic definition of the word, writes that a "lawyer is a friend in regard to the legal system. . . . That means that like a friend he acts in your interest, not his own; or rather he adopts your interest as his own."[52] A person would naturally prefer his friend over a stranger, but this analogy is not required to justify a lawyer's preferential treatment of his client. Further, Professor Fried makes this a one-way "friendship" where the client makes the decisions and the lawyer adopts them, and this makes the lawyer a good person.[53] In a nor-

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[47] *See* Wasserstrom, *supra* note 1, at 19.

[48] Wasserstrom, *supra* note 22, at 863.

[49] D. REECK, *supra* note 46, at 51.

[50] A. GOLDMAN, *supra* note 27, at 126.

[51] Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060-89 (1976).

[52] *Id.* at 1071.

[53] *Id.* at 1083-84.

mal friendship, however, there is constant interaction and mutual influence. In response to Fried's article, Professors Dauer and Leff wrote that "the lawyer achieves his 'goodness' by being—professionally—no rottener [sic] than the generality of people acting, so to speak, as amateurs."[54]

Another view is that of looking at the lawyer as the alter ego of the client. Here the "*principal* duty of the lawyer is to exercise his 'professional judgment' for the client. . . . The lawyer becomes the client's 'legal judgment,' but should exercise this faculty exactly the way the client would if he had it himself."[55] The obvious implication of this view is that the lawyer has to take the actions which are most advantageous to the client, regardless of their morality. This suggestion unfairly imputes to clients a lack of moral framework. Not every client would want to choose a legally permissible course of action that is unjust or morally objectionable.

In an ethical system where the lawyer is personally accountable, the autonomy of the client is preserved and even enhanced along with that of the lawyer himself. Preferring the interests of the client over those of non-clients is not inherently wrong. As long as the lawyer can attend to those interests in a morally acceptable way, and be rewarded for it, he is involved in a healthy human relationship involving two morally autonomous persons.

## PERSONAL MORAL RESPONSIBILITY

A framework of ethical principles provides the ultimate justifying reasons for an action taken. The framework recognizes the moral autonomy of the person and his freedom to choose one course of action over another. This in turn means assuming responsibility for the consequences of that action. The Code does not constitute a moral framework in this sense. Professor Shaffer rightfully laments that "what [the profession] calls ethics are traffic regulations that make professional intercourse efficient and keep professional practice at least (and often at most) within the boundaries set by the criminal law."[56]

The Code suggests that the lawyer has no obligation to respect the moral rights of others when they conflict with his client's legal rights. This notion "effectively absolve[s] the lawyer of moral responsibility."[57] The Code develops a professional world which is a "simplified moral world; often it is an amoral one; and more than occasionally, perhaps, an

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[54] Dauer & Leff, *The Lawyer as Friend*, 86 YALE L.J. 573, 582 (1977).

[55] *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1254 (1981) (footnotes omitted).

[56] T. SHAFFER, *supra* note 12, at 131.

[57] A. GOLDMAN, *supra* note 27, at 95.

overtly immoral one."[58] Like most simplified things, this world becomes a very comfortable one in which to reside. It also seems to be a favored place because there seems to be no moral personal accountability there.

The organized bar expects high ethical standards only as an ideal.[59] For the bar, the ultimate incentive for a lawyer to meet these aspirational moral standards is "the desire for the respect and confidence of the members of his profession and of the society which he serves."[60] If the respect and confidence of the public provide any indication, this incentive has not worked very well.[61]

The picture of this simplified moral world of non-accountability is a refuge for self-deception. To illustrate this point, Professor Shaffer cites the example of prominent Nazis who did not consider it their duty to consider the moral aspects of their involvement, and adds: "vicarious morality leads to excuses for monumental horrors. . . . Schizophrenia is not only a disease; it is also a metaphor for bad reasoning and bad consequences."[62]

The person deceives himself in an attempt to justify the unjustifiable. Referring to this kind of self-deception, the existentialist philosopher Sartre remarked that man is not what "he conceives himself to be, but he is what he wills . . . [and] is responsible for what he is."[63] While Sartre, true to his existentialist principles, would not pass an external judgment of the person's choice, he would not hesitate to call that person a "self-deceiver" and a "coward."[64] The metaphor of the coward is particularly appropriate. It denotes the lack of courage to do right, to resist wrong, and, especially, to accept moral responsibility for one's choices.

Scholars troubled with the status quo have suggested alternative systems for professional conduct. Goldman, a sociologist, suggests that lawyers should aid their clients to get "only that to which they have moral rights."[65] Thus sometimes lawyers may have to forego their clients' legal rights, but at other times may have to exceed legal bounds to get that to

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[58] Wasserstrom, *supra* note 1, at 2.

[59] *See* MODEL CODE, *supra* note 2, at Preamble. The ABA promulgated the Model Rules of Professional Conduct in 1983 as a substitute for the Code. As far as moral and ethical precepts are concerned there are no substantive differences between the two.

[60] *Id.*

[61] The public distrust and dislike of lawyers is clear from public opinion polls. *See, e.g.*, B. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 227-58 (1977); Burger, *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility*, 29 CLEV. ST. L. REV. 377, 379 (1980). For some lawyer horror stories, on the subject *see* J. AUERBACH, UNEQUAL JUSTICE—LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976); M. BLOOM, THE TROUBLE WITH LAWYERS (1968).

[62] T. SHAFFER, *supra* note 12, at 97.

[63] J. SARTRE, EXISTENTIALISM AND HUMANISM 28-29 (Tr. P. Mairet trans. 1977).

[64] *Id.* at 51-52.

[65] A. GOLDMAN, *supra* note 27, at 138.

which the client has a moral right. This alternative does not take into consideration the incentives to frequently exceed the legal boundaries and the consequences of those actions. More importantly, however, from a moral point of view, it is the client's moral rights alone that determine the lawyer's course of action. In this system the lawyer can again avoid moral responsibility for his actions if they were moral from the client's perspective.

The suggestions of "deprofessionalization" and adequacy of the person's general moral framework[66] do not adequately take into consideration the unique situations a lawyer may face. While under such a theory the lawyer would be accountable for his actions, he would not have adequate principles to guide him. Others would like to see a further classification of the profession. In this system advocate-lawyers and all criminal law practitioners would be absolved from moral responsibility, whereas the non-advocate lawyers would be held accountable.[67] Besides the introduction of a double standard within the profession, this suggestion seems to imply that it is necessary or acceptable to behave immorally in an advocacy situation. This would also require the impractical task of clear delineation between advocacy and non-advocacy practice. Professor Hazard has offered to introduce the tort concept of "the reasonable person" standard to determine when a lawyer should be held accountable and when not.[68] This may sound attractive, but it introduces an alien, largely objective element into the subjective area of morality.

Since moral autonomy necessarily implies accountability, any ethical system must include that element in it. For the lawyer, the moral framework problem can be resolved first, by rejecting the principle of separate morality which violates the holistic nature of the person; and second, by recognizing an expanded moral framework covering all the aspects of the person's life. This unification would also permit the "cross-fertilization of moral experience necessary for personal and professional growth."[69] This moral framework would not make life easier. To the contrary, since it abolishes the simplified morality of the professional world, the framework would make it more difficult to make decisions. The reward for the difficulty would be the comfort of being able to justify those decisions on moral grounds and the courage of assuming responsibility for their consequences.

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[66] *See* Simon, *supra* note 7, at 131; Wasserstrom, *supra* note 1, at 19.

[67] *See* Schwartz, *supra* note 11, at 673, 695.

[68] G. HAZARD, *supra* note 24, at 152.

[69] Postema, *supra* note 8, at 64.

THE FAILURE OF LEGAL EDUCATION

The basic premise of legal education seems to be to teach students "to think like a lawyer." Law school curricula are generally highly structured and systematized. Despite this organization, the teaching of ethics in law schools is "mismanaged and chaotic" and in dire need of reform.[70] The current teaching of ethics consists mainly of a course in "Professional Responsibility" which is simply an exposition of the Code or Model Rules. This instruction in "negative ethics," essentially trains students how to avoid getting into trouble.[71]

Some alternative forms of ethical instruction are currently used. These methods include: teaching ethics by using stories from inside and outside of the profession,[72] having outside practitioners teach the course so they may bring a concrete perspective to the problems,[73] and using the clinical method.[74] There has also been a very useful suggestion of utilizing non-lawyer specialists in teaching ethics.[75]

It is true that by the time a person starts law school he has already formed a character that aides him "in doing the right things and [gives him] courage in resisting the wrong."[76] Nevertheless, it is not too late to teach ethical responsibility. A former Chief Justice of the United States considered the teaching of ethics to law students equal in importance to, if not more important than, teaching substantive and procedural law, and emphasized that law schools have a duty to inculcate moral principles.[77] As long as law schools fail in this duty, they prepare, at best, "amoral technicians" instead of morally autonomous skilled persons. This perhaps justifies the remark of a law student that "law school teaches students to deal with every conceivable loss, that of an arm, a leg, five dollars, a wife—every one, that is, but the most important, the loss of one's self."[78]

The amoral (perhaps even immoral) legal technician, who loses his self and his moral autonomy, and abdicates moral responsibility, becomes a perfect tool for exploitation. This is not the ideal toward which the professional aspires. In former Chief Justice Burger's words:

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[70] Gee, *Legal Ethics Education and the Dynamics of Reform*, 31 CATH. LAW. 203, 203 (1987).

[71] Bresnahan, *Ethics and the Study and Practice of Law: The Problem of Being Professional in a Fuller Sense*, 28 J. LEGAL EDUC. 189, 189 (1976).

[72] *See* T. SHAFFER, *supra* note 12, at 14.

[73] *See* Joiner, *Teaching Professional Responsibility*, 64 A.B.A. J. 551, 553 (1978).

[74] *See* Leleiko, *Love, Professional Responsibility, the Rule of Law, and Clinical Legal Education*, 29 CLEV. ST. L. REV. 641, 641-61 (1980).

[75] Bresnahan, *supra* note 71, at 198.

[76] D. REECK, *supra* note 46, at 47.

[77] Burger, *supra* note 61, at 377.

[78] Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444, 502 (1970).

> [lawyers] must be more than skilled legal technicians. We should be that, but in a larger sense, we must be legal architects, engineers, builders, and from time to time, inventors as well. We have served, and must continue to see our role, as problem-solvers, harmonizers, and peacemakers, the healers—not the promoters—of conflict.[79]

Legal education has succeeded superbly in training students "to think like lawyers," if that phrase means producing skilled legal technicians. In order to succeed completely, however, legal education must expand its objectives by also inculcating a sense of moral responsibility in the students. The motto used in greeting entering law students should be: *"We will teach you how to think like a lawyer and how to act responsibly as one."*

## CONCLUSION

The moral framework in which we function is the ultimate justification for our actions. The concept of dual morality for professionals suggests a false dichotomy in the life of a person. The lawyer does not need a "role" to fulfill his essential social functions. He can carry out his duties to their full extent by being a morally autonomous and responsible person. The idea of the role involves both self-deception and abdication from responsibility and invites immoral conduct. This artificial dichotomy of the person has a dehumanizing effect on both the lawyer and his client. The lawyer becomes a mere legal technician, while the client becomes a "thing," and both lose their personality. The inevitable result of the dominance which the principle of separate ethics holds over the legal profession is pervasive moral failure. And, as Professor Shaffer writes, "[w]hat seems to bind together these instances of [moral failure] . . . is that they did what everyone else was doing. In every instance the plea in defense is *vitia temporis* (everybody's doing it)."[80]

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[79] Burger, *supra* note 61, at 378.

[80] Shaffer, *supra* note 22, at 757.